THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 440/2017

In the matter between:

WAYMARK INFOTECH (PTY) LIMITED **APPELLANT**

and

ROAD TRAFFIC MANAGEMENT CORPORATION **RESPONDENT**

Neutral citation: *Waymark Infotech v Road Traffic Management Corporation* (440/2017) [2018] ZASCA 11(6 March 2018)

Coram: Lewis, Seriti and Mathopo JJA and Davis and Plasket AJJA

Heard: 19 February 2018

Delivered: 6 March 2018

Summary: Interpretation of ss 66 and 68 of the Public Finance Management Act 1 of 1999: contract for the procurement of professional services did not constitute a future financial commitment.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ranchod J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and in its place is substituted:

'The counterclaim is dismissed with costs.'

JUDGMENT

Lewis JA (Seriti and Mathopo JJA and Davis and Plasket AJJA concurring)

[1] The interpretation of two provisions of the Public Finance Management Act 1 of 1999 is at the centre of this appeal. These are s 66, which deals with the restrictions on borrowing, guarantees and other financial commitments by government, an organ of state or a public entity listed in Schedule 3 to the Act; and s 68, which governs the consequences of unauthorized transactions.

[2] The appellant, Waymark Infotech (Pty) (Ltd) (Waymark), was the successful bidder in a public tender process administered by the respondent, the Road Traffic Management Corporation (RTMC), for the provision of professional services – to develop and install an 'Enterprise Resource Planning System'. The RTMC is an entity listed in Schedule 3 of the Act and is thus bound by the provisions of the Act.

[3] A contract between the parties was concluded on 31 March 2009. It made provision for various services to be rendered over a three-year period, and included a schedule for the payment of remuneration, the full contract sum being some R33.7 million.

[4] Waymark commenced rendering the services in 2009, but in February 2010 the RTMC advised it that some of its services were suspended. Litigation followed and a court found that the contract had not been terminated. That finding does not concern us. Waymark tendered its services and when the RTMC failed to perform its obligations, despite demand, Waymark considered that the contract had been repudiated. It instituted an action for damages (in the Gauteng Division of the High Court, Pretoria) in an amount exceeding R6.7 million in May 2014.

[5] The RTMC raised various defences, including that the claim had prescribed. Waymark replicated to the plea of prescription. Some two years after action was instituted by Waymark, the RTMC delivered a counterclaim for an order declaring that the contract was not binding on it, since it did not comply with the provisions of s 66(3)*(c)* of the Act, in that it had not been authorized by the Minister of Finance and was accordingly void in terms of s 68 of the Act. The question whether there had to be compliance with s 66(3)*(c)* was dealt with separately by the trial court, Ranchod J ordering a separation of issues in terms of rule 33(4) of the Uniform Rules of Court.

[6] That court found that an ordinary contract for the procurement of services by a public entity was valid only if the Minister of Finance had authorized it in terms of s 66(3). And since it was common cause that the Minister's authority had not been sought, let alone granted, the court concluded that the contract pursuant to the tender process was invalid. The appeal before us lies with the leave of Ranchod J.

[7] The only question that arises on appeal is whether the Minister's authority was needed in order for the contract to be enforceable. The answer depends on the interpretation of ss 66 and 68 in the context of the Act and having regard to what the legislation was designed to achieve. And the Act must of course also be construed having regard to ss 216 and 217 of the Constitution, to which the Act gives effect.

[8] Section 216 of the Constitution, headed 'Treasury control', requires that national legislation must establish a national treasury and prescribe measures 'to ensure both transparency and expenditure control in each sphere of government by introducing' a variety of measures and practices, and enforcing compliance with them. Section 217 deals with 'Procurement'. Section 217(1) provides that 'when an

organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.

[9] Section 51(1)*(a)*(iii) of the Act deals with the procurement of goods and services. The section echoes s 217 of the Constitution in imposing liability on an accounting officer for a public entity to ensure that he or she has and maintains 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective'. Tender processes must thus meet these standards and, since the promulgation of the Act, cases dealing with procurement tenders and awards have been based four-square on the section. The provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) give courts the power to review the award of tenders on a variety of grounds, and it is clear that it is the PAJA that in general provides the review procedures and grounds for the setting aside of a tender process and award if it does not meet the criteria in s 51(1)*(a)*(iii) or fails to meet the requirements of the PAJA and of the common law.

[10] The RTMC has not, however, questioned the validity of the contract on administrative law grounds. It contends that the contract concluded pursuant to the tender is in breach of s 66(3)*(c)* and thus invalid in terms of s 68, which provides that if a person contravenes s 66 of the Act, the transaction that ensues is not binding. Ranchod J found that the contract concluded between the parties was in contravention of s 66(3)*(c)* and was therefore unenforceable.

[11] Waymark has raised numerous grounds of appeal, based essentially on the premise that the conclusion of the contract amounted to administrative action, and was reviewable under the PAJA, the requirements of which had not been met by the RTMC procedurally. No review proceedings had been launched, it argued, and it was too late to do so at the stage when the counterclaim was issued. I shall not deal with these grounds since the challenge to the contract was not that it amounted to administrative action (the tender process and award were not challenged by the RTMC), but that the contract had been concluded in contravention of s 66(3) of the

Act. I shall consider only the fourth ground of appeal – that the contract did not fall within the purview of s 66 at all.

[12] Section 66, in Chapter 8 of the Act (headed 'Loans, Guarantees and other Commitments'), governs restrictions on borrowing, guarantees and other commitments. It will be recalled that the contract was for the provision of professional services – a standard procurement contract. The RTMC argues, however, and Ranchod J found, that it amounted to a future financial commitment and was thus struck by the section. Section 66(1) provides that an institution to which the Act applies 'may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction' is authorized in terms of the Act. Section 66(3)*(c)* determines the authority required for the transactions entered into by public entities. These transactions must be authorized by the Minister of Finance and, in the case of 'the issue of a guarantee, indemnity or security, the Cabinet member who is the executive authority responsible for that public entity, acting with the concurrence' of the Minister of Finance.

[13] The RTMC accepts that the contract did not amount to a guarantee, indemnity or security, but contends that as it provided for future financial commitments, it required the authorization of the Minister of Finance. It submits that a 'future financial commitment' includes any transaction that extends beyond the period for which the public entity has budgeted. Since only the financial year in which the contract was concluded (2008/2009) had a specified budget allocation, any undertaking to pay for services in a later year amounted to a future financial commitment. The RTMC relies in this regard on *Putco Ltd v Gauteng MEC for Roads and Transport* 2016 JDR 0756 (GP), in which the court endorsed the view of arbitrators that if a transaction is concluded in one financial year, but only comes into effect in a subsequent financial year, it is a future financial commitment. The internal memorandum of RTMC recommending that the award be made to Waymark anticipated that the project would be implemented over the 2009/2010 and 2010/2011 financial years as well.

[14] In my view, the reliance on *Putco* is misplaced. The court (para 51) approved the arbitrators' opinion that it is only if the transaction is not currently in force that a future financial commitment requires ministerial consent: if a contract is to run over more than one year and financial commitments are thus anticipated for further years, as long as the contract is in force when the commitment is made, it is current. In any event, *Putco* was not dealing with procurement. And in this matter the contract was concluded in the financial year it came into operation, and for which there had been a budget allocated.

[15] It would be very odd indeed if different sections of the Act, in different chapters, were to deal with contracts of procurement. As I have indicated, s 217 of the Constitution is echoed in s 51(1)*(a)*(iii) of the Act, and s 216 of the Constitution is echoed in s 66. Section 66 ensures that government does not commit itself to expenditure that is unplanned for. As Waymark argues, it would be absurd if s 66 were to apply to every contract for the procurement of goods or services concluded by government or public entities. Government would grind to a halt. The RTMC argues, on the other hand that it does not assist to look to absurd examples, such as the purchase of 1 000 pencils for a government department that would have to be authorized by the Minister of Finance. But it does not suggest a clear way of distinguishing between those contracts of procurement that do require ministerial authority and those that do not. It was faintly suggested at the hearing that procurement contracts that do not extend beyond the financial year in which they are concluded might not require ministerial authority. In my view there is no legislative basis for that.

[16] In interpreting ss 66 and 68 of the Act this court should consider what each section is designed to achieve – purposively, having regard to the scheme of the Act: *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 14; 2014 (4) SA 474 (CC) para 28. Looked at together, and with s 51, within the framework of the Act itself, each section serves a different purpose. Section 51 regulates procurement by public entities. It states who bears responsibility for effective, efficient and transparent financial systems of financial and risk management, and how this must be achieved. It does not deal with loans, guarantees and future financial commitments. Section 66 does that and s 68 prescribes the consequences of failing to comply with s 66.

It does not deal with the consequences of procurement decisions that are not made properly under the PAJA. This approach does not require the words of the sections to be stretched or words to be read in.

[17] As I see it, Ranchod J in the court a quo did not need to read s 66 to mean 'an undertaking to commit expenditure in the future for which a budget has not yet been approved'. Nor is there any need to read s 66 to exclude those transactions that are not fiscally exceptional, as Waymark has suggested. The sections require no embroidery or unpicking. If one looks to their design and purpose, as we must, it is plain that s 66 does not apply to procurement contracts that follow upon a proper process, and that do not embody loans, guarantees or the giving of security, even though they extend beyond one fiscal year. The contract in question did not amount to 'any transaction that binds or may bind that institution . . . to a future financial commitment': it was a present commitment to pay for professional services as they were rendered, albeit over a three-year period.

[18] In the circumstances the appeal must be upheld, and the order of the court a quo must be set aside. Accordingly:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and in its place is substituted:

'The counterclaim is dismissed with costs.'

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C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	K Tsatsawane Instructed by: Gildenhuys Malatji Inc., Pretoria Honey Attorneys, Bloemfontein
For Respondent:	N H Maenetje SC (with him N Rajab-Budlender) (Heads of Argument also prepared by D A Preis SC) Instructed by: Adams & Adams, Pretoria Phatshoane Henney Attorneys, Bloemfontein