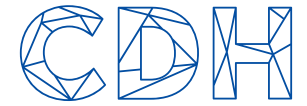


# Dispute Resolution

ALERT | 14 January 2025



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## Setting aside a public procurement decision on the grounds that the award exceeded the available budget

On 27 December 2024, the Supreme Court of Appeal (SCA) delivered a judgment in *Zeal Health Innovations (Pty) Ltd v Minister of Defence and Military Veterans and Another* [2024] ZASCA 183, that adds to the body of public procurement law jurisprudence. This particular judgment is of interest due to the grounds of review that were raised and, to a lesser extent, the court's treatment of the services rendered by the service provider.

### **The facts**

Being a public procurement matter, the relevant core facts start with the issuing of a tender by the Department of Defence and Military Defence (Department) for a healthcare and wellness service provider. In response to the tender, bids were submitted by bidders which were then considered by the Department. A decision was taken

to award the tender to Zeal Health Innovations (Pty) Ltd (Zeal Health), after which the Department entered into a three-year contract with Zeal Health (commencing on 1 June 2015) as well as a memorandum of understanding which set out the fundamental terms of the agreement. A Government Order (the official written order for the supply of the services) was issued by the Acting Director-General for an amount of R60 million. On 1 June 2015, Zeal Health started to render services and invoiced the Department accordingly. However, the Department failed to pay for the services rendered. As a consequence, in September 2015, Zeal Health approached the High Court on an urgent basis, seeking an order to compel the Department to make payment for the services rendered. The Department instituted a counterapplication in its answering affidavit for the judicial review of its decision to award the contract. Zeal Health's application was struck from the urgent roll, after which the Department proceeded to file a record and supplementary affidavit in respect of its counterapplication (i.e. the judicial review application). At the end of the judicial review process, the High Court granted the relief sought by the Department. As a consequence, the decision to appoint Zeal Health was declared unlawful and set aside. As a corollary consequence, the High Court further declared the contract between the Department and Zeal Health to have been unlawful, unconstitutional, and invalid from the outset. The High Court also declined to preserve Zeal Health's right to payment for the services it rendered. Zeal Health appealed the decision by the High Court and persisted with its argument that it was entitled to payment for services rendered from 1 June 2015.



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### Findings

In the High Court, the Department raised three broad grounds of review. The SCA dealt with one of those grounds: the fact that the contract which was awarded far exceeded the Department's available budget for healthcare and wellness services. Specifically, the available budget at the time of awarding the contract was approximately R34,2 million, whereas the contract amount for the first year was either R70,1 million or R52,4 million (there appeared to be a quantification dispute which, according to the judgment, is the subject of other legal proceedings between the parties). According to the provisions of section 38(2) of the Public Finance Management Act 1 of 1999 (PFMA) an accounting officer for a department may not commit the department to any liability for which money has not been appropriated. This is to ensure that departments do not exceed their allocated budgets. In light of section 38(2) of the PFMA, the High Court held that the Acting Director-General (as the accounting officer for the Department) did not have the power to commit the Department to a liability for which money had not been appropriated. The SCA confirmed the High Court's decision. As a result, the SCA dismissed Zeal Health's appeal and ordered that the decision to award the tender, the contract entered into, and all consequential decisions flowing from the award and the contract be declared constitutionally invalid and set aside.

### Discussion

The PFMA already provides for a mechanism to discipline an accounting officer who wilfully fails to comply with section 38 (or is grossly negligent in complying with section 38), with the result being that the accounting officer in question could be liable on conviction to a fine or imprisonment of up to five years. However, the PFMA does not provide for a specific remedy in respect of the liability or the commitment to incur the liability itself. This judgment is useful in that it interprets section 38(2) in a manner that now provides departments with a judicial review remedy to have a liability declared unconstitutional and void.

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However, where the liability or commitment to incur the liability occurs as a result of a public procurement process, the situation is somewhat nuanced because third-party bidders may, in all likelihood, not be aware of the procuring department's budgetary restrictions. The question then is whether the procuring department should disclose the available budget for the goods or services being sought as part of the tender documents in order for bidders to be aware of what the procuring department can actually – legally – afford as this will allow bidders to determine whether it is commercially viable for them to provide the services within the available budget and to tender appropriately.

Prevailing jurisprudence on transparency, competitiveness and cost-effectiveness (as per the requirements of section 217 of the Constitution) seems to suggest that procuring departments ought to disclose this information. Either way, this case highlights the importance of pre-planning by organs of state, in particular when it comes to approaching the market for goods and services to ensure that prior to issuing a tender there is budget available for the proposed contract. Whether that information starts to find its way into tender documents may depend on various considerations, such as whether this particular ground of review finds prominence in other matters.

### **Innocent parties**

The treatment of the contract or services rendered by a service provider is worthy of discussion because, unlike the High Court, the SCA was sympathetic to Zeal Health as an innocent party and followed the recent approach of the Constitutional Court in *Greater Tzaneen Municipality v Bravospan 252 CC [2024] ZACC 20* where the Constitutional Court frowned upon the use of legality reviews by organs of state to escape liability for making payments to "innocent contractors". As a result, the SCA preserved Zeal Health's right to pursue payment for the services it provided to the Department in terms of the contract due to it being an "innocent party". The SCA did this by crafting a just and equitable remedy in terms of the powers available to it under section 172(1)(b) of the Constitution. Although the section 172(1)(b) remedy is determined on a case-by-case basis by our courts, it seems apparent from recent jurisprudence that our courts are willing to declare that an organ of state must pay for goods or services delivered by an "innocent contractor" even in instances where the agreement between the parties has been declared unlawful and has been set aside.



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This type of remedy is not uncommon in public procurement reviews but it does raise an interesting question where, if the available budget is disclosed as part of the tender documents and a bidder chooses to exceed that amount and is somehow awarded the tender, but the tender is then reviewed and set aside on the grounds that it exceeded the available budget, would that bidder be entitled to payment for services rendered under circumstances where it would have been aware that the department did not have the available funds to pay it for the services rendered? An answer to this question may also depend on whether budget availability starts to find its way into tender documents, which only time will tell.

However, it does seem plausible from the approach by the SCA and the Constitutional Court that in circumstances where a procuring department discloses its available budget to the market and a bidder nonetheless bids at a higher price and is subsequently awarded the contract, which is then set aside, the successful bidder may find it difficult to argue for payment where it was at all times aware of the budget availability of the organ of state and still quoted a higher price. As a result, it will be difficult for it to prove that it is in fact an “innocent contractor” to the court. With this in mind, disclosing the available budget may add an upfront extra layer of protection for organs of state.

**Imraan Abdullah, Charles Green and Tshephang Kekana**

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