



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 27 December 2024

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Zeal Health Innovations (Pty) Ltd v Minister of Defence and Military Veterans and Another (967/2023) [2024] ZASCA 183 (27 December 2024)

Today, the Supreme Court of Appeal (SCA) upheld in part, with costs, an appeal against a decision of the Gauteng Division of the High Court, Pretoria (the high court).

On 30 January 2015, the Department of Defence and Military Veterans (the Department) advertised tenders for service providers to assist in the provision of healthcare and wellness services (the services) to 16 000 military veterans. On 20 May 2015, the Department's Bid Adjudication Committee (BAC) convened and approved the award of the tender to Zeal Health Innovations (Pty) Ltd (Zeal Health). On 21 May 2015, the chairperson of the BAC, the Chief Director of the Department's supply chain management unit, informed Zeal Health that it was the successful bidder. On 27 May 2015, Zeal Health and the Department, represented by the Acting Director-General, concluded a three-year contract for the provision of the services. On 19 June 2015, the Department entered into a memorandum of understanding with Zeal Health represented by the Department's Deputy Director-General of Socio-Economic Support Services. On 31 July 2015, the Acting Director-General, issued a supplier's advice (Government Order), signed by him, to facilitate payment, by the Department to Zeal Health, of R60 million, for the provision of the services during the period between 1 June 2015 and 30 April 2016. Zeal Health began providing the services from 1 June 2015. The Department failed to pay for the services.

During September 2015, Zeal Health launched an urgent application, in the high court, for an order of specific performance, that the Department be compelled to pay it for the services rendered under the contract. The Department instituted a counter-application for the judicial review and setting aside of various decisions made by the Department's officials during the procurement process leading to the award of the tender to Zeal Health; the award of the tender to Zeal Health; the conclusion of the contract; the conclusion of the memorandum of understanding; and the issue of the Government Order. On 7 October 2022, the high court dismissed Zeal Health's application and granted the Department's counter-application. The appeal was with leave of the high court.

The principal issue in the appeal was whether the Acting Director-General of the Department validly appointed Zeal Health, as a service provider following a tender process. The ancillary issue was, if Zeal Health was not validly appointed, would it be entitled to any relief?

In answering the first question, the SCA held that what was of importance was whether the contract price fell within the budget when the tender was awarded and found that the evidence showed irrefutably that the Acting Director-General committed the Department to a liability, being the difference between

what was left in the budget (R34.2 million) and the portion of the contract price that was allocated to the 2015/2016 financial year (either R70.1 million or R52.4 million), when such difference had not been appropriated for services in respect of that financial year.

The SCA held further that the Acting Director-General was prohibited from committing the Department to a liability for which money had not been appropriated in terms of s 38(2) of the Public Finance Management Act 1 of 1999. The Acting Director-General had the responsibility of ensuring that the Department did not overspend its budget. He acted unlawfully when he breached the provisions of s 38(2). The awarding of the tender to Zeal Health, in circumstances where the provisions of s 38(2) were breached, was clearly unlawful and invalid.

The SCA held that the finding that the awarding of the tender was unlawful and invalid had consequences for everything that was done pursuant to the award of the tender to Zeal Health. That finding means that there was no lawful basis for the Department to conclude the contract with Zeal Health; the memorandum could not have lawfully been entered into with Zeal Health; and the Acting Director-General could not have lawfully issued the Government Order in Zeal Health's favour. The SCA accordingly found that the high court was correct in declaring the contract and issue of the Government Order by the Acting Director-General unconstitutional and unlawful. The high court was therefore also correct in reviewing and setting aside the decision to enter into the memorandum and the issue of the Government Order by the Acting Director-General. However, the high court did not consider a just and equitable remedy in the circumstances. In that regard, it erred.

Lastly, the SCA having found that the award of the tender to Zeal Health was unlawful and accordingly unconstitutional, it declared in terms of s 172(1)(a) of the Constitution, the Acting Director-General's conduct invalid. In view thereof, the SCA exercised its discretion in terms of s172(1)(b) of the Constitution and found that it was just and equitable that Zeal Health was entitled to payment of any amount it is able to establish.

As a result, the appeal was upheld in part.

~~~~ends~~~~