



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 73/18

In the matter between:

**ROAD TRAFFIC MANAGEMENT CORPORATION** Applicant

and

**WAYMARK INFOTECH (PTY) LIMITED** Respondent

**Neutral citation:** *Road Traffic Management Corporation v Waymark (Pty) Ltd*  
[2018] ZACC 12

**Coram:** Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ,  
Khampepe J, Mhlantla J, Petse AJ and Theron J

**Judgment:** Petse AJ (unanimous)

**Heard on:** 20 November 2018

**Decided on:** 2 April 2019

**Summary:** Public Finances Management Act 1 of 1999 — sections 66 and  
68 — future financial commitments — procurement contracts

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**ORDER**

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On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria), the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

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## JUDGMENT

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PETSE AJ (Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

### *Introduction*

[1] The facts in this case are deceptively straightforward, concealing the complexity and obscurity of the underlying legal issue which requires resolution. Central to the dispute is the proper interpretation of sections 66 and 68 of the Public Finance Management Act<sup>1</sup> (PFMA). At the heart of the dispute is the ambit of these sections and the interplay between them and some of the other sections in the PFMA.<sup>2</sup>

[2] This is an application for leave to appeal against a decision of the Supreme Court of Appeal. The Supreme Court of Appeal held that a service level agreement between the Road Traffic Management Corporation (RTMC)<sup>3</sup> and Waymark Infotech (Pty) Limited (Waymark),<sup>4</sup> entered pursuant to a proper procurement process, and with service and payment milestones extending beyond the financial year in which the agreement was concluded, did not require the prior approval of the Minister of Finance (Minister) under section 66 of the PFMA. Consequently,

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<sup>1</sup> 1 of 1999.

<sup>2</sup> More about these other sections later.

<sup>3</sup> The RTMC is an entity established in terms of section 3 of the Road Traffic Management Corporation Act 20 of 1999 (RTMC Act). It is also common cause that it is a National Public Entity as listed in Part A of Schedule 3 of the PFMA.

<sup>4</sup> Waymark is a private company with limited liability duly incorporated in terms of the company laws of the Republic of South Africa.

the RTMC was held to be bound by the agreement, even though the Minister had not approved it.

[3] The RTMC adopts the obdurate stance that it is not bound by the agreement because it is hit by the prohibition contained in section 68 of the PFMA. It applies for leave to appeal to this Court arguing that the agreement rightly falls within section 66's ambit. Thus, it contends that it is not bound by the agreement because, as section 68 of the PFMA decrees, an agreement of the kind in issue in this case is void if not approved by the Minister as required by section 66. Waymark, in opposition, argues that the agreement does not fall within section 66's ambit, so it does not matter that the Minister did not approve the agreement. Alternatively, it asserts that even if the agreement required ministerial approval, the RTMC is still bound by the agreement unless and until it succeeds in applying to a court for its decision to contract with Waymark to be reviewed and set aside (which it has not done). Waymark also contends, in any event, that it is not in the interests of justice for this Court to grant leave to appeal.

[4] Accordingly, the primary question is one of interpretation: What is the ambit and effect of sections 66 and 68 of the PFMA? More specifically:

- (a) Does the agreement between the RTMC and Waymark fall within the ambit of section 66 of the PFMA?
- (b) If so, because the agreement was not approved by the Minister, was it then incumbent upon the RTMC to bring review proceedings to have the agreement set aside?
- (c) If review proceedings were necessary, did the RTMC's counterclaim in substance amount to review proceedings, and, if so, can the delay in bringing those review proceedings be condoned?

[5] This judgment holds against the RTMC on the first question. Briefly, it concludes, as did the Supreme Court of Appeal, that the agreement does not fall within the ambit of section 66. For this reason, the appeal falls to be dismissed and this

conclusion renders it unnecessary to consider the effect of section 68. To conduce to clarity, this judgment is structured as follows by way of accounting for this conclusion. First, the relevant statutory context is canvassed. Second, the background of the matter is explained. Third, after finding jurisdiction and granting leave to appeal, the proper interpretation of section 66 is proffered. Finally, the order and costs are dealt with.

### *Statutory context*

[6] The PFMA was enacted to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.<sup>5</sup> The PFMA is the national legislation envisaged in section 216 of the Constitution,<sup>6</sup> and seeks to give effect to, amongst others, the values underpinning sections 217 and 195 of the Constitution.<sup>7</sup>

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<sup>5</sup> Long title of the PFMA.

<sup>6</sup> Section 216(1) provides:

“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) generally recognised accounting practice;
- (b) uniform expenditure classifications; and
- (c) uniform treasury norms and standards.”

<sup>7</sup> Section 217(1) provides:

“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.”

Section 195(1) provides:

“Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.

[7] Section 66 is located in Chapter 8 of the PFMA, which purports to regulate “[l]oans, guarantees and other commitments”. The relevant parts of section 66, which is headed “Restrictions on borrowing, guarantees and other commitments”, provide:

“(1) An institution to which this 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—

- (a) is authorised by this Act;
- (b) in the case of public entities, is also authorised by other legislation not in conflict with this Act; and

...

(3) Public entities may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that public entity to any future financial commitment:

- (a) A public entity listed in Schedule 2: The accounting authority for that Schedule 2 public entity.
- (b) A national government business enterprise listed in Schedule 3 and authorised by notice in the national *Government Gazette* by the Minister: The accounting authority for that government business enterprise, subject to any conditions the Minister may impose.
- (c) Any other national public entity: The Minister or, in the case of the issue of a guarantee, indemnity or security, the Cabinet member who

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- (f) Public administration must be accountable.
  - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
  - (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
  - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.”

is the executive authority responsible for that public entity, acting with the concurrence of the Minister in terms of section 70.”

[8] The most relevant part is section 66(3)(c). It provides that a national public entity (like the RTMC) may only “borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that public entity to any future financial commitment” through the Minister.

[9] Section 68 provides that if “any other transaction which purports to bind an institution to any future financial commitment” was entered into without the Minister’s authorisation as contemplated in section 66(3)(c), then that transaction does not bind the state institution concerned.<sup>8</sup>

#### *Factual background*

[10] In 2008, the RTMC invited bidders to tender for the development of an Integrated Enterprise Resource Planning System with Business Intelligence (ERP system). On 17 November 2008, Waymark presented a successful bid, and on 31 March 2009, the parties entered into a service level agreement with a ceiling price for rendering services of R33 737 062.03. The agreement was to endure for a period of three years. It is common cause that the Minister did not approve the agreement before it was entered into. And indeed no ministerial approval was sought by the RTMC.

[11] Although the contract seems to contemplate the contract’s conclusion within the 2008 / 2009 financial year,<sup>9</sup> an internal memorandum authored by a

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<sup>8</sup> The provision, which is headed “Consequences of unauthorised transactions”, reads:

“If a person, otherwise than in accordance with section 66, lends money to an institution to which this Act applies or purports to issue on behalf of such an institution a guarantee, indemnity or security, or enters into any other transaction which purports to bind such an institution to any future financial commitment, the state and that institution is not bound by the lending contract or the guarantee, indemnity, security or other transaction.”

<sup>9</sup> In its special plea in the High Court the RTMC pleaded: “It was not in the contemplation of the parties that delivery due dates could be extended for a period of five years”. And in the claim in reconvention, the RTMC based its assertions on the “future financial expenditure” on the basis of the 2009 timelines only.

representative of the bid evaluation committee on 11 March 2009, and addressed to the Chairperson, Finance and Risk Committee, noted:

“The project manager . . . confirmed that the project will be implemented in a phased in approach within the 2009/2010; 2010/2011 budget as provided for in the business plan of the [RTMC] for the 2008/2009 financial year.

An amount of R15 000 000.00 has been allocated in the business and financial plan for the budget of 2008/2009 of this project.”

[12] Following upon this, on 18 March 2009, the Chief Executive Officer of the RTMC wrote to Waymark advising that its “proposal dated 17 November 2008 . . . for the acquisition of an integrated enterprise resource planning system with business intelligence [had] been accepted, subject to all the terms and conditions embodied [in Bid RTMC 07/2008/09] with a ceiling price of R33 737 062.03 (VAT inclusive)”. Pursuant to this, and after the parties signed the agreement, Waymark commenced to render performance in 2009 in terms of the parties’ agreement.

[13] In a bizarre twist, on 23 February 2010, the RTMC communicated to Waymark that its Executive Committee had resolved to suspend the agreement “for about a week”. The RTMC further indicated that it would inform Waymark once the suspension was uplifted. But, for months, the RTMC did not uplift the suspension. On 1 June 2010, the parties met in an endeavour to resolve the impasse. This came to naught. In desperation, on 13 July 2010, Waymark instituted action proceedings against the RTMC in the High Court of South Africa, Gauteng Division, Pretoria (High Court), alleging that the suspension of services and deliverables for which the parties’ agreement provides amounted to an unlawful termination or, alternatively, repudiation of the agreement.

[14] On 18 October 2013, after a trial, the High Court (per Jansen van Nieuwenhuizen J) concluded that the service level agreement had not been terminated. It therefore granted absolution from the instance. Waymark then

addressed a letter to the RTMC on 29 October 2013, tendering its performance and calling upon the RTMC to agree to a timeline. Whether the RTMC responded to this letter and how is not apparent from the record. Nevertheless, on 14 February 2014, Waymark demanded of the RTMC to perform its side of the bargain in terms of the agreement. The RTMC refused to budge. In another letter dated 20 May 2014, Waymark considered this refusal a repudiation and cancelled the agreement.

[15] Undaunted, the following day Waymark instituted fresh action proceedings in the High Court against the RTMC for damages of R6 774 750 asserting that the RTMC had committed a material breach of the parties' agreement.

### *Litigation history*

#### *The High Court*

[16] Months after it had delivered its plea and after Waymark had replicated, the RTMC delivered a claim in reconvention against Waymark. It pleaded that the parties' agreement was unenforceable because it did not comply with section 66(3)(c) of the PFMA since it had not been authorised by the Minister. Consequently, it sought an order declaring the agreement void as contemplated in section 68 of the PFMA.

[17] The parties jointly invoked rule 33(4) and invited the High Court to determine the question whether compliance with section 66(3)(c) was a prerequisite for the validity of their agreement separately from the rest of the other issues. The High Court obliged.<sup>10</sup> The High Court (per Ranchod J) held that (a) the agreement fell within the ambit of section 66; and (b) because the Minister had not approved the contract, the contract did not bind the RTMC as contemplated in section 68.

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<sup>10</sup> *Waymark Infotech (Pty) Ltd v Road Traffic Management Corporation*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 36811/2014 (12 December 2016) (High Court judgment).

[18] With respect to (a), the High Court held that the words “any other transaction that binds or may bind that public entity to any future financial commitment” extended beyond loans or securities, and include any undertaking to commit expenditure in the future for which a budget had not yet been approved.<sup>11</sup> This interpretation, the High Court stated, was the necessary grammatical implication of the words “any” and “any other”.<sup>12</sup> In the view of the High Court, a narrow interpretation, which would limit “any other transaction” or “any future financial commitment” to the genus of loans or securities would be tantamount to reading the word “similar” impermissibly into section 66 and thus untenable.<sup>13</sup>

[19] Apropos (b), the High Court held that because the Minister had not approved the contract, the RTMC was not bound by it. This was notwithstanding the RTMC’s failure to launch a review application of their decision to contract with Waymark. Section 68, reasoned the High Court, makes plain that the RTMC is not bound by such a contract, and so a court does not have to declare that the RTMC is not bound by way of a review application.<sup>14</sup> In any event, concluded the High Court, the substance of the declaratory relief sought by the RTMC in its counterclaim was to all intents and purposes a review of its own decision.<sup>15</sup> Consequently, it upheld the RTMC’s counterclaim and granted a declaratory order that the RTMC was not bound by the agreement.

### *The Supreme Court of Appeal*

[20] Subsequently, the High Court granted Waymark leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal upheld the appeal.<sup>16</sup> It held that

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<sup>11</sup> Id at para 28.

<sup>12</sup> Id at para 27.

<sup>13</sup> Id.

<sup>14</sup> Id at para 32, relying on *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2015] ZASCA 70; 2016 (1) SA 202 (SCA) at para 22.

<sup>15</sup> High Court judgment id at para 33, relying on *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2011] ZASCA 243; [2012] 1 All SA 479 (SCA) at para 26.

<sup>16</sup> *Waymark Infotech (Pty) Ltd v Road Traffic Management Corporation* [2018] ZASCA 11; 2018 (3) SA 90 (SCA) (Supreme Court of Appeal judgment).

the agreement did not fall within the ambit of section 66.<sup>17</sup> Accordingly, the RTMC did not require the Minister's approval for the agreement to bind the RTMC.

[21] The Supreme Court of Appeal rejected the RTMC's reliance on *Putco*,<sup>18</sup> in which the High Court endorsed the view expressed in an arbitration award that if a transaction is concluded in one financial year, but only comes into effect in a subsequent financial year, then it is a future financial commitment. It held that reliance on *Putco* was misplaced as the Court there held that as long as the contract is in force when the commitment is made, then it is current and not a "future" financial commitment.<sup>19</sup>

[22] The Supreme Court of Appeal reasoned:

"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, section 217 of the Constitution is echoed in section 51(1)(a)(iii) of the Act, and section 216 of the Constitution is echoed in section 66. Section 66 ensures that government does not commit itself to expenditure that is unplanned for. As Waymark argues, it would be absurd if section 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 authorised by the Minister of Finance."<sup>20</sup>

[23] It continued:

"In interpreting sections 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

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<sup>17</sup> Id at para 17.

<sup>18</sup> *Putco Limited v Gauteng MEC for Roads and Transport* 2016 JDR 0756 (GP).

<sup>19</sup> Supreme Court of Appeal judgment above n 16 at para 14.

<sup>20</sup> Id at para 15.

. . . . Looked at together, and with section 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 section 68 prescribes the consequences of failing to comply with section 66. It does not deal with the consequences of procurement decisions that are not made properly under [the Promotion of Administrative Justice Act 3 of 2000]. This approach does not require the words of the sections to be stretched or words to be read in.”<sup>21</sup>

[24] In conclusion, the Supreme Court of Appeal held that the High Court was wrong to construe section 66 to mean “an undertaking to commit expenditure in the future for which a budget has not yet been approved”.<sup>22</sup> It said that the section required “no embroidery or unpicking”.<sup>23</sup> It considered that if one had regard to the design and purpose of section 66 it becomes patent that it finds no application to procurement contracts pursuant to a legitimate procurement process notwithstanding that those contracts embrace more than a single fiscal year. Thus, it rightly held that the agreement in issue in this case did not amount to “any transaction that binds or may bind the institution . . . to a future financial commitment”. Rather, “it was a present commitment to pay for professional services as they were rendered, albeit over a three-year period”.<sup>24</sup>

*In this Court*

[25] Broadly, the RTMC based its case against the decision of the Supreme Court of Appeal upon the contention that the agreement in issue constitutes a “future financial commitment” and is accordingly subject to the restrictions for which section 68 provides. It sought to explain the warrant for a wide reading of “future

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<sup>21</sup> Id at para 16.

<sup>22</sup> Id at para 17.

<sup>23</sup> Id.

<sup>24</sup> Id.

financial commitments” in the necessity for proper budgeting and budgetary approval. It is common cause between the parties that the first two of the three requirements, any one of which must be fulfilled before the application of section 66 is triggered, find no application. Thus, it is the third requirement with which this case is concerned.

[26] The words “enter into any other transaction that binds or may bind that institution . . . to any future financial commitment” are no doubt wide. Their interpretation cannot be limited by the words that precede them. They are self-standing. For this reason, counsel for the RTMC argued that these words cannot be restricted to exceptional transactions as the Supreme Court of Appeal found, for to do so would fail to give them their proper meaning. Thus, submitted counsel, the Supreme Court of Appeal approached the matter from the wrong standpoint. It lost sight of the fact that it was dealing with words that have an “expansive meaning”<sup>25</sup> the employment of which prima facie excludes limitation.<sup>26</sup>

### *Preliminary issues*

#### *Jurisdiction*

[27] It is common cause that the matter falls within this Court’s jurisdiction. It relates to the interpretation of the PMFA, which regulates the management of public finances in line with the purport of section 216 of the Constitution and whether additional checks apply to procurement agreements. It is thus an instance of constitutionally envisaged legislation whose interpretation falls squarely within this Court’s jurisdiction.<sup>27</sup> This matter also has implications for the review of the exercise of public power.<sup>28</sup> This is a constitutional issue as contemplated in

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<sup>25</sup> *Frank R Thorold (Pty) Ltd v Estate Late Sir Alfred Beit* [1996] ZASCA 79; 1996 (4) SA 705 (SCA) (*Thorold*) at para 35.

<sup>26</sup> *S v Wood* 1976 (1) SA 703 (A) (*Wood*) at 706.

<sup>27</sup> *Snyders v De Jager* [2016] ZACC 55; 2017 (5) BCLR 614 (CC); 2017 (3) SA 545 (CC) at para 28.

<sup>28</sup> It is trite that such a matter is constitutional in nature. See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 at para 33.

section 167(3)(b) of the Constitution.<sup>29</sup> Thus, this Court has the requisite jurisdiction.

*Leave to appeal*

[28] Is it in the interests of justice to grant leave to appeal? Among several factors to weigh up when deciding whether the interests of justice dictate that leave to appeal be granted is the importance of the issue,<sup>30</sup> and whether broader national interests are affected.<sup>31</sup> This question impacts on all institutions which may be subject to section 66. The interests of justice therefore impel this Court to consider this appeal. The discordant judgments of the High Court and the Supreme Court of Appeal, too, justify a hearing by this Court. Leave to appeal ought therefore to be granted.

*Analysis*

[29] The principles of statutory interpretation are by now well-settled. In *Endumeni*, the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation.<sup>32</sup> The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation.<sup>33</sup> This process, it emphasised, entails a simultaneous consideration of—

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<sup>29</sup> Section 167 provides:

“(3) The Constitutional Court—  
...  
(b) may decide—  
(i) constitutional matters.”

<sup>30</sup> *Mpofu v Minister for Justice and Constitutional Development* [2013] ZACC 15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at para 63.

<sup>31</sup> *Pretorius v Transport Pension Fund* [2018] ZACC 10; (2018) 39 ILJ 1937 (CC); 2018 (7) BCLR 838 (CC) at para 14.

<sup>32</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*).

<sup>33</sup> *Id* at para 18.

- (a) the language used in the light of the ordinary rules of grammar and syntax;
- (b) the context in which the provision appears; and
- (c) the apparent purpose to which it is directed.<sup>34</sup>

[30] What this Court said in *Cool Ideas* in the context of statutory interpretation is particularly apposite. It said:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).<sup>35</sup> (Footnotes omitted.)

[31] Where a provision is ambiguous, its possible meanings must be weighed against each other given these factors. For example, a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred.<sup>36</sup> Neither is one that unduly strains the ordinary, clear meaning of words.<sup>37</sup> That text, context and purpose must always be considered at the same

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<sup>34</sup> Id.

<sup>35</sup> *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28.

<sup>36</sup> *Endumeni* above n 32 at para 18.

<sup>37</sup> Id at para 25. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*).

time when interpreting legislation has been affirmed on various occasions by this Court.<sup>38</sup>

[32] Allied to these factors, courts must also interpret legislation to promote the spirit, purport and object of the Bill of Rights.<sup>39</sup> Again, courts should not unduly strain the reasonable meaning of words when doing so.<sup>40</sup> But this obligation entails understanding statutes to “lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa”.<sup>41</sup>

### *Plain meaning*

[33] Considering the textual or ordinary grammatical meaning of a provision is to give that provision a plain, natural and literal interpretation.<sup>42</sup> The RTMC correctly asserts that the use of the words “any” and “any other” in section 66 ordinarily imply that a broad, expansive meaning should be attributed to the unspecified financial transactions envisaged in the section.<sup>43</sup> But the authorities cited by the RTMC to support this submission contain a caveat. In *Hayne*, the Appellate Division said that “[i]n its natural and ordinary sense ‘any’ – *unless restricted by the context* – is an indefinite term which includes all of the things to

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<sup>38</sup> For examples see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90 (the judgment of Ngcobo J) quoted with approval in *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) at para 38; *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (*Bertie Van Zyl*) at para 21; *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) at para 129; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at paras 77-8.

<sup>39</sup> Section 39(2) of the Constitution.

<sup>40</sup> *Hyundai* above n 37 at paras 23-4.

<sup>41</sup> *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at para 19.

<sup>42</sup> See *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 321.

<sup>43</sup> The applicants cite *Hayne and Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 371 (*Hayne*); *R v Hugo* 1926 AD 271 (*Hugo*); *Wood* above n 26 at 706; *Commissioner for Inland Revenue v Ocean Manufacturing Ltd* [1990] ZASCA 66; 1990 (3) SA 610 (A) at 618H-I; *Thorold* above n 25 at 733A-C; “*Merak S*” (*Name of Ship*) *Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* [2002] ZASCA 18 at para 12.

which it relates”.<sup>44</sup> Yet again in *Hugo* it was held that “[a]ny’ is upon the face of it, a word of wide and unqualified generality. *It may be restricted by the subject matter* or the context, but prima facie it is unlimited”.<sup>45</sup> So while the general broad import of “any” supports the RTMC’s approach, the authorities are also clear that this is subject to an investigation into the context in which “any” is employed.

[34] Then the RTMC submits that the plain meaning of “future” financial commitment must mean payments that are due beyond a period that the organ of state has budgeted for. “Future” means “[a] period of time following the moment of speaking or writing” or “time regarded as still to come”.<sup>46</sup> A “future” financial commitment then ordinarily means a financial obligation that is due to be performed at a date beyond the date on which the obligation is undertaken. This could include, as envisaged in section 66, the instalments for the repayment of a loan in the future.

[35] To read “future” to extend beyond the budget of a public entity, and that payments due during a budgeted period are somehow “present”, seems fanciful. There is nothing in the word “future” that supports an interpretation that a “future financial commitment” would mean anything other than a financial commitment beyond the present moment. The RTMC argued that one reason for reading “future” in this way is to avoid the absurd situation where all transactions that entail some kind of future financial obligation fall within the scope of section 66 (and thus require ministerial approval). Another reason advanced by the RTMC is that requiring unbudgeted transactions to go through the Minister is an important, necessary check on fiscal expenditure.

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<sup>44</sup> *Hayne* id at 371.

<sup>45</sup> *Hugo* above n 43 at 271.

<sup>46</sup> Oxford Dictionary “Future” (2018, Oxford University Press) available at <https://en.oxforddictionaries.com/definition/future>.

[36] Quite clearly therefore, if section 66 can be reasonably construed to avoid this absurdity, then it should be.<sup>47</sup> The same is true of promoting financial discipline. But these reasons given by the RTMC do not invoke the ordinary usage of the word “future”. They invoke contextual and purposive concerns.

### *Context*

[37] In *AfriForum*, Mogoeng CJ held:

“[C]ontextual interpretation requires that regard be had to the setting of the word or provision to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. This exercise might even require that consideration be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located.”<sup>48</sup>

[38] Sections 66 and 68 are in Part 1 of Chapter 8 of the PFMA. The Chapter is headed “Loans, Guarantees and other Commitments”. Chapter 8 immediately follows upon three chapters that deal with the general accounting and fiscal duties of three kinds of state organs: Departments and Constitutional Institutions (Chapter 5), Public Entities (Chapter 6), and Executive Authorities (Chapter 7).<sup>49</sup> In broad strokes, each of these three chapters: (a) assigns the role of financial accountability to a functionary within the state organ concerned;<sup>50</sup> (b) fleshes out the powers and duties of such a functionary; and (c) enjoins all other officials within the state

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<sup>47</sup> *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 37.

<sup>48</sup> *AfriForum v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) at para 43.

<sup>49</sup> Chapters 2 and 3 regulate the national and provincial treasuries and revenue funds that give effect to sections 213, 216 and 226 of the Constitution. Chapter 4 regulates national and provincial budgets as mandated by section 215 of the Constitution.

<sup>50</sup> For department and constitutional institutions, this functionary is an accounting officer. See section 36(1). For public entities, the functionary is the board or chief executive officer. See section 49(2). For executive authorities, the executive functionary is obliged to ensure budgetary compliance, although the relevant accounting officer of the department concerned also plays a role in ensuring budgetary compliance. See sections 63(1) and 64(2).

organ to ensure financial regularity and discipline.<sup>51</sup> These three chapters seek to regulate the *general* expenditure of public funds by various organs of state.

[39] The generality of the regulation of financial affairs by these chapters is further borne out in the duties of the accounting officer of a public entity.<sup>52</sup> Section 50 delineates the fiduciary duties an accounting officer has, which include duties to: exercise the utmost care to ensure reasonable protection of the assets and records of the public entity; act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity; and seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.<sup>53</sup> Section 51 then sets out the general responsibilities of accounting authorities:

- “(1) An accounting authority for a public entity—
  - (a) must ensure that that public entity has and maintains—
    - (i) effective, efficient and transparent systems of financial and risk management and internal control;
    - (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and
    - (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
    - (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;
  - (b) must take effective and appropriate steps to—
    - (i) collect all revenue due to the public entity concerned; and

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<sup>51</sup> See sections 45 (for public entities and constitutional institutions), 57 (for public entities), and 63(1)(a) (for executive authorities).

<sup>52</sup> The duties discussed in this paragraph are substantially identical to the duties of accounting officers in departments and constitutional institutions. See sections 38 and 63.

<sup>53</sup> Section 50(1)(a), (b) and (c). Further fiduciary duties include disclosing information that influences the decisions of the relevant executive authority or legislature; not using the position of the accounting authority for personal gain or the benefit of another person; and withdrawing from decisions that the accounting official may have a direct or indirect interest in.

- (ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and
  - (iii) manage available working capital efficiently and economically;
- (c) is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;
- (d) must comply with any tax, levy, duty, pension and audit commitments as required by legislation;
- (e) must take effective and appropriate disciplinary steps against any employee of the public entity who—
  - (i) contravenes or fails to comply with a provision of this Act;
  - (ii) commits an act which undermines the financial management and internal control system of the public entity; or
  - (iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure;
- (f) is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;
- (g) must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and
- (h) must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.”

[40] Section 51 is quoted in full to emphasise the wide-ranging, general nature of an accounting official’s duty. The brunt of ensuring and maintaining financial discipline within a public entity mainly falls on accounting officers. They ensure oversight for all expenditure in general and for the day-to-day finances of the entity concerned. Of particular relevance is section 51(1)(a)(iii), which empowers

the accounting authority to regulate procurement processes. This section gives effect to section 217 of the Constitution, but through the accounting authority. Accounting authorities are also tasked, under section 55, with keeping and submitting the public entity's financial statements and audit reports. Section 54(1) further obliges the accounting authority to submit whatever information is required by legislation, a treasury or the Auditor-General to the entity requesting that information.

[41] The general rule is thus that the accounting authority approves and oversees finances – only exceptional contracts require executive approval. This is evidenced further by section 54(2), which provides:

“Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

- (a) establishment or participation in the establishment of a company;
- (b) participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;
- (c) acquisition or disposal of a significant shareholding in a company;
- (d) acquisition or disposal of a significant asset;
- (e) commencement or cessation of a significant business activity; and
- (f) a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement.”

[42] In effect, section 54(2) obliges the accounting authority to seek approval from the relevant executive authority for significant transactions, including the acquisition or disposal of a significant asset. But for the most part it is the accounting authority that is in charge of a public entity's general expenditure and finances.

[43] In contradistinction, Chapter 8 seeks to regulate certain kinds of transactions entered into by public entities. It has two parts. Part 1 is headed “General

Principles” and contains sections 66 and 68. The other general principles in Part 1 are:

- (a) the prohibition on provincial government from borrowing money or issuing a guarantee, indemnity or security or entering into any other transaction that binds itself to any future financial commitment, denominated in a foreign currency or concluded on a foreign financial market;<sup>54</sup>
- (b) the authority of the Minister to make regulations on “the borrowing of money by or for or on behalf of public entities referred to in section 66(3) (b), (c) and (d)”;<sup>55</sup> and
- (c) the requirement that Cabinet Ministers must have the written concurrence of the Minister when issuing a guarantee, indemnity or security that binds the National Revenue Fund or a public entity.<sup>56</sup>

[44] Part 2 of Chapter 8 then deals with loans by national government. That part provides for the purposes for which the Minister may borrow money under section 66(2)(a);<sup>57</sup> the Minister’s power to delegate his authority to sign loan agreements;<sup>58</sup> the costs of a loan by national government that are direct charges against the National Revenue Fund;<sup>59</sup> the repayment, conversion and consolidation of loans;<sup>60</sup> and government’s obligations in respect of liens.<sup>61</sup>

[45] A contextual reading of sections 66 and 68, given the chapter in which they are located, and the relation of that chapter to other chapters of the PFMA, lends itself

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<sup>54</sup> Section 67.

<sup>55</sup> Section 69.

<sup>56</sup> Section 70. To recall, a public entity, under section 66(3)(c) must issue guarantees, indemnities or securities through the cabinet member responsible for that public entity. See above [7].

<sup>57</sup> Section 71. Section 66(2)(a) provides for government borrowing money through the Minister that binds the National Revenue Fund.

<sup>58</sup> Section 72.

<sup>59</sup> Section 73.

<sup>60</sup> Section 74.

<sup>61</sup> Section 75.

to the interpretation that the phrase “any other transaction that binds or may bind that public entity to any future financial commitment” as referred to in section 66 must mean a transaction that is somehow similar to a credit or security agreement. This accords with and respects the generality of an accounting official’s duty for financial oversight. An overly broad interpretation of section 66 would detract from the accounting officer’s powers and place more of a burden on the Minister. This narrower reading, moreover, avoids requiring transactions that fall under section 54(2) also to need ministerial approval under section 66, thus, in effect, requiring two separate approvals. This double check, which is not spelt out in express or necessarily implicit terms, would be a significant administrative burden on public entities. Rather, the context and structure of the PFMA impels the view that “any other transactions” must be similar to loans and security, and distinct from most other transactions (especially those in section 54(2)).

[46] The RTMC baulks at such a contextual reading of section 66, contending that such a reading would amount to an improper invocation of the *eiusdem generis* rule. And that the *eiusdem generis* rule cannot be applied on these facts, because there is no clear genus discernible from section 66(3)(c).

[47] A reason given by the RTMC for why there is no discernible genus was because of section 66(3)(c). The RTMC contended that, while section 66(3)(a) envisages approval by the accounting authority for a Schedule 2 public entity, and likewise (subject to ministerial conditions) for a national government enterprise listed in Schedule 3,<sup>62</sup> in the case of “any other national public entity” (like the RTMC) section 66(3)(c) envisages something different. There, the Minister too must give approval – but “in the case of the issue of a guarantee, indemnity or security” approval rests with “the Cabinet member who is the executive authority responsible for that entity”. This, the RTMC urged, creates a legislative dichotomy between, on the one hand, guarantees, indemnities and securities, and, on the other hand, “any other transaction”. This is because section 66(3)(c) does

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<sup>62</sup> See section 66(3)(b).

not require the responsible cabinet member's approval for the future financial commitments of "other national public entities" so long as they are not guarantees, indemnities or securities.

[48] The *eiusdem generis* rule is an interpretive presumption to the effect that terms with a wide meaning may be restricted by terms with a narrower meaning with which they are connected.<sup>63</sup> It is true that the presumption cannot be applied unless the narrower words in a provision describe some kind of genus to which the broader word can be restricted.<sup>64</sup> Equally true is that it is difficult to place the transactions listed in section 66 (borrowing money, guarantees, indemnities, and securities) into a single genus. But the contextual reading above does not presuppose a genus or the application of *eiusdem generis*. Rather, the truncation of the scope of section 66 is borne out by other contextual factors listed above. Just because there is no discernible genus does not mean that the broad category of "any other transactions" as envisaged in section 66 cannot be limited by other clear contextual indications.

### *Purpose*

[49] The long title of the PFMA provides that it seeks to "ensure that all revenue, expenditure, assets and liabilities of those governments are managed *efficiently and effectively*". This is in accordance with section 216(1) of the Constitution, which envisages national legislation establishing a National Treasury and prescribing measures to ensure that both transparency and expenditure control in each sphere of government are attained.<sup>65</sup>

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<sup>63</sup> *Bertie Van Zyl* above n 38 at para 44; *Genesis Medical Scheme v Registrar of Medical Schemes* [2017] ZACC 16; 2017 (6) SA 1 (CC); 2017 (9) BCLR 1164 (CC) at para 47; *S v Du Plessis* 1981(3) SA 382 (A); [1981] 2 All SA 207 (A) at 404A.

<sup>64</sup> *First National Bank of Southern Africa Ltd v Rosenblum* [2001] ZASCA 77; [2001] 4 All SA 355 (A) at para 12; *Skotnes v South African Library* [1997] ZASCA 28; 1997 (2) SA 770 (SCA) at 775B-G; *Poovalingam v Rajbansi* 1992 (1) SA 283 (A); [1992] 1 All SA 230 (A) at 294A-C; *Wood* above n 26 at 707D-E.

<sup>65</sup> The National Treasury is established and the National Revenue Fund is regulated in terms of the PFMA. Similarly, provincial treasuries and provincial revenue funds are also established in terms of the provisions of the PFMA. See sections 5, 11, 17 and 21.

[50] The PFMA is not meant to place as many restrictions on government spending as possible. It seeks to balance financial discipline and oversight (on the one hand) with efficient government spending and resource allocation (on the other). Just because a provision can be read to impose harsher restrictions on government spending does not necessarily mean that that reading accords with the purpose of the PFMA. Rather, the reading must appropriately balance the functionality of public entities and fiscal accountability.

[51] The RTMC's mainstay for its interpretation of section 66 was that it promotes oversight of expenditure, which is the central theme of the PFMA, when that expenditure is not budgeted for. In other words, if a narrow interpretation is adopted, either: (a) public entities will not be able to commit to multi-year expenditure or (b) they will be able to commit to multi-year expenditure, but they will do so unsupervised. Either consequence, argues the RTMC, clearly undermines the purpose of the PFMA.

[52] The intractable terrain that the RTMC traverses to reinforce its argument in reaching this conclusion is section 53. Section 53(1) provides that the accounting authority of a public entity like the RTMC must submit a budget of estimated revenue and expenditure to the executive authority responsible for that public entity "for that financial year" for approval by the executive authority. Section 53(4) in turn provides that the accounting authority for such a public entity is responsible for ensuring that the expenditure of that public entity is in accordance with the approved budget. Because the approved budget can only be for a single financial year under section 53(1), the RTMC argues that accounting officials cannot commit the public entity concerned to financial obligations beyond a single, budgeted financial year. So these officials must use section 66 to undertake financial obligations extending beyond one fiscal year. Hence section 66 should be interpreted to apply to any transaction extending beyond a budgeted financial year. Otherwise accounting officials would lack the power to enter into multi-year transactions, or can do so unchecked.

[53] This argument ignores the other legislative provisions that empower accounting authorities of public entities to enter into multi-year transactions under executive oversight. First, section 53(5) of the PFMA provides that the National Treasury may regulate the application of section 53. To that end, the National Treasury has promulgated regulations,<sup>66</sup> which provide that public entities must have a strategic plan, covering a period of three years, and including multi-year projections of revenue and expenditure.<sup>67</sup> The strategic plan must be submitted to and approved by the executive authority – the relevant cabinet member – responsible for the public entity concerned.<sup>68</sup> Presumably, if an accounting authority does not ensure that the expenditure is in line with the strategic plan, then that authority commits an act of financial misconduct,<sup>69</sup> every member becomes individually and severally liable,<sup>70</sup> and such misconduct is a ground for dismissal, suspension or any other sanction.<sup>71</sup>

[54] Second, the RTMC Act has further checks and balances regulating the financial discipline of the RTMC. The Chief Executive Officer (CEO) of the RTMC,<sup>72</sup> in consultation with functional units within the RTMC,<sup>73</sup> must draft a business and financial plan spanning three financial years.<sup>74</sup> This plan sets out, amongst others,

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<sup>66</sup> Treasury Regulations for departments, trading entities, constitutional institutions and public entities GN R225 GG 27388, 15 March 2005 (Treasury Regulations).

<sup>67</sup> Id at regulation 30.1.

<sup>68</sup> Id at regulation 30.1.1.

<sup>69</sup> Section 83(1) of the PFMA reads:

“The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently—

(a) fails to comply with a requirement of section 50, 51, 52, 53, 54 or 55.”

<sup>70</sup> Id at section 83(2).

<sup>71</sup> Id at section 83(3).

<sup>72</sup> The CEO is appointed by the Shareholders Committee under sections 8(1)(a) and 15 of the RTMC Act.

<sup>73</sup> Functional units are established by the Shareholders Committee to ensure effective management of certain functional areas listed in section 18(1) of the RTMC Act.

<sup>74</sup> Section 14(2) and (3) of the RTMC Act.

the objectives of the RTMC,<sup>75</sup> the RTMC's scope of business and financial performance,<sup>76</sup> the principles, strategies, policies *and budgets* for achieving the objectives of the RTMC,<sup>77</sup> and the threshold above which the CEO is to obtain the approval of the Shareholders Committee before awarding a procurement contract.<sup>78</sup>

[55] The Shareholders Committee comprises the Minister of Transport, every member of the executive council who is responsible for matters connected with road traffic in that province, and two representatives nominated by the national organisation recognised in terms of section 2(1)(a) of the Organised Local Government Act.<sup>79</sup> The Shareholder's Committee must not only approve this business and finance plan at least two months before the start of every financial year,<sup>80</sup> but it must also agree beforehand with the board of the RTMC on the principles, policies, and structure of the business and financial plan.<sup>81</sup> The Minister of Transport and the MECs must cause "copies of the approved business and financial plan to be tabled in Parliament and every provincial legislature as the case may be within 14 days of receipt of that plan".<sup>82</sup> Significantly, once the budget is approved, the RTMC must act in accordance with such a plan.<sup>83</sup> The Shareholders Committee, along with the CEO, is responsible to ensure compliance with the business and financial plan.<sup>84</sup>

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<sup>75</sup> Section 14(6)(a).

<sup>76</sup> Section 14(6)(b).

<sup>77</sup> Section 14(6)(d).

<sup>78</sup> Section 14(6)(f).

<sup>79</sup> 52 of 1997. See section 6(2) of the RTMC Act.

<sup>80</sup> RTMC Act id at section 14(5).

<sup>81</sup> Id at section 9(1).

<sup>82</sup> Id at section 14(8).

<sup>83</sup> Id at section 27(b)(i).

<sup>84</sup> Id at section 39(1)(a) and section 39(2). See further section 28(1)(a).

[56] It bears mentioning that in terms of section 9(6) of the RTMC Act, the failure by the RTMC to comply with any provision of the business and financial plan does not affect the validity or enforceability of any agreement, right, obligation or liability entered into, acquired or incurred by the RTMC. It is therefore not without significance that in recommending the acceptance of Waymark's bid for R33 737 062.03 to the Bid Adjudication Committee on 11 March 2009, the Chairperson of the Bid Evaluation Committee explicitly mentioned that the project would be implemented in phases over the 2008 / 2009, 2009 / 2010 and 2010 / 2011 fiscal years in accordance with the budget provided for in the RTMC's approved business plan.

[57] Accordingly, there is no reason why interpreting section 66 to cover only transactions similar to credit or security arrangements frustrates the purpose of the PFMA. The procurement of significant assets still requires executive approval under section 54(2) of the PFMA and section 28(1)(d) of the RTMC Act.<sup>85</sup> Multi-year expenses must also be approved under regulation 30.1 of the Treasury Regulations and section 14(5) of the RTMC Act as part of strategic or business plans. And interpreting section 66 too broadly would result in an infinite number of transactions requiring ministerial approval, thereby frustrating the efficiency of the administration of public finances and stifling the operations of the RTMC.

[58] There is also no other persuasive interpretation of section 66 that does not frustrate the purpose of the PFMA. RTMC's interpretation of "future" is not free from inherent difficulty. It does not account for transactions that include severable obligations or transactions that contain indivisible obligations. If a contract contains severable obligations *x*, *y*, and *z*, and the payment for *x* was budgeted for, while the payment for *y* and *z* was not, it would mean that Ministerial approval would be necessary for *y* and *z*, but not *x*. Moreover, if Ministerial approval was not granted, and the contract in question was entered into, the public entity may be

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<sup>85</sup> Section 28(1)(d)(i) of the RTMC Act obliges the Shareholders Committee to approve procurement contracts whose value exceeds the threshold provided for in the RTMC's business and finance plan.

bound by *x*, but not by *y* and *z*. Yet it is quite clear from sections 66 and 68 that the *transaction* requires ministerial approval, and that the *transaction* is not binding if ministerial approval was not granted. All of these considerations underscore the implausibility of the contentions advanced by the RTMC.

[59] It is no answer to suggest, as the RTMC seeks to do, that an entire transaction is not binding without ministerial approval if at least one of its severable obligations extends beyond a budgeted year. This interpretation would result in the absurd, unbusinesslike result that the Minister would need to approve a transaction even if a single, severable obligation fell outside the budgeted year – notwithstanding the value or nature of that obligation. Such an interpretation would significantly hamper the administration of the public fiscus.

[60] Moreover, if a transaction contained a single, indivisible obligation that had financial implications spanning over a single budgetary year, it is a significant strain on the word “future” to regard that obligation as being a future financial commitment. This is because an indivisible obligation to perform, which is not subject to any kind of suspensive condition, would be enforceable from the time it is entered into. There is nothing future about it notwithstanding the fact that one, some or all of the obligations undertaken according to its terms will be due for performance 18 or 24 months hence.

[61] In sum, the RTMC’s contention was radical: it was that any contract hit by section 66 because it lacks ministerial approval is invalid without more, even within its first year for which express budgetary allocation has been made. The corollary of this argument is that section 68 operates automatically to exempt the state or any institution covered by section 66 from the consequences of an unauthorised contract. This seems grievously wrong and would have absurd and far-going effects.

### *Conclusion*

[62] In light of the foregoing I am persuaded that the Supreme Court of Appeal was correct. As it rightly noted, the agreement in question falls outside section 66's reach as it is essentially a procurement contract. Curiously, at no stage has the RTMC impugned the validity of the procurement process that culminated in the award of the tender to Waymark. On the contrary, the propriety of the procurement process is accepted without question. The Supreme Court of Appeal's conclusion therefore represents the best fit having regard to the text, context and purpose of the section. And that being the case, it is not necessary to deal with section 68 whose ultimate relevance was predicated on the applicability of section 66.

[63] Accordingly, whilst leave to appeal should be granted, given the importance of the constitutional issue raised, the appeal itself must fail.

### *Costs*

[64] There is no reason why costs should not follow the result. The disputants both engaged more than one counsel and each sought costs of two counsel if successful. In light of the conclusion reached in this judgment, the costs incurred in this Court will be for the account of the RTMC.

### *Order*

[65] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

For the Applicants:

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