No budget, no pay? No dice …

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LAW MATTERS

CAN the state Invoke a defence of "No Budget No Pay" to a service provider's claim? A recent Supreme Court of Appeal (SCA) decision addressed this question.

The Free State Department of Police, Roads and Transport ("Roads Department") decided to embark on a road infrastructure programme encompassing 23 roads located throughout the Free State province. The stated aim was to promote accessibility, mobility and safety, with an overarching objective of stimulating socio-economic growth.

One of the elements of the programme was the provision of engineering services including environmental services.

The Roads Department called for tenders for these services as it was obliged to do in terms of the law governing public procurement.

A joint venture was the successful tenderer and it was duly awarded the contract. It appointed a sub-consultant to render the environmental services.

The joint venture and the sub-consultant duly went about rendering the services called for in the programme. The contract progressed happily, and the Roads Department duly met its payment obligations to the joint venture which in turn enabled it to meet its payment obligations to its sub-consultant. However, funds dried up and the Roads Department simply stopped paying, despite both the joint venture and its sub-consultant continuing to render the services required of them.

The sub-consultant adopted a somewhat novel approach and instituted legal action directly against the Roads Department for payment of the amount due to it as opposed to pursuing a claim against the joint venture with whom it had contracted.

Predictably, the Roads Department raised the defence that the sub-consultant had no legal standing to sue it as there was no contract between them.

However, not content with that legal sidestep, the Roads Department went on to say that there was another reason why it was not obliged to pay and that was because it had in fact made no budgetary allocation for the road infrastructure programme. As such the Public Finance Management Act (PFMA) prevented it from making any payment.

Irregular

The Roads Department argued that any payment under the joint venture and sub-consultant contracts would be "irregular expenditure" and prohibited under the PFMA.

The SCA examined the evidence that had been put up by the Roads Department and concluded that the statement by the Roads Department that no budgetary allocation had been made for the road rehabilitation programme was disingenuous and factually wrong.

The SCA explained the difference between "irregular expenditure" and "unauthorised expenditure" in terms of the PFMA. "Irregular expenditure" is expenditure that is not in accordance with any applicable legislation and as such has not been legally and properly incurred.

"Unauthorised expenditure" on the other hand is expenditure in circumstances where a legal obligation has been properly incurred but the budgetary vote from which the expenditure is to be met has become exhausted.

In such circumstances either parliament or the relevant provincial legislature may appropriate additional funds to the relevant vote. Failing that, the expenditure must be met as a first charge against the funds allocated to the relevant vote in the next financial year.

The Court accordingly dismissed the Roads Department's "no budget no pay" defence.

The Court also took the unusual step of ordering the Roads Department to pay the sub-consultant despite there being no contract between them.

It said that the Roads Department was a state department which was required to be accountable and, because it had not raised any quibble with the performance of the sub-consultant's services, which it should in any event have paid for through the conduit of the joint venture, it should be made to pay.

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