



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another**

**Case No: CCT 34/10  
[2010] ZACC 21**

**Delivered on: 23 November 2010**

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#### **Media Summary**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Tuesday, 23 November 2010 the Constitutional Court delivered judgment concerning the nature and extent of an organ of state's duty to act when presented with evidence that an enterprise to which it had awarded a tender, taking into account its Black shareholding, had provided fraudulent information about the true nature of its Black shareholding.

The applicant (Viking) and the first respondent (Hidro-Tech) compete for tenders to supply and install equipment for water and sewerage treatment works from the City of Cape Town (the City). During 2006 and 2007, Viking was awarded more tenders than Hidro-Tech. Hidro-Tech discovered that this had happened because Black people held 70% of Viking's shares.

Hidro-Tech lodged a complaint with the City that the historically disadvantaged majority shareholders in Viking were mere tokens. Contrary to the spirit, purport and object of the Constitution, the Procurement Act and its regulations, they neither exercised control in Viking nor actively participated in its management to the degree commensurate with their shareholding and their positions as directors. They further alleged that Viking's profits were being routed to a sister company that is exclusively white-owned. Hidro-Tech asked the City to investigate these allegations of fronting.

The City commissioned a database managing firm to investigate. The firm simply confirmed that the shareholding reflected in Viking's tender documents was correct. The allegation of fronting was not investigated.

The applicable regulation required the City to "act" upon detecting any fraud in the procurement process. The High Court and the Supreme Court of Appeal held that the word "act" included the

power to investigate and that the word “detect” must be given a wide meaning. Both these Courts had ordered the City to act against Viking. Viking appealed to this Court.

The unanimous Court, per Mogoeng J, concluded that the reason for the enactment of the Procurement Act and its regulations was to ensure that organs of state do not remain passive when credible allegations of fronting or tender irregularities come to light. The organ of state responsible for the tender is, upon becoming aware of alleged irregularities, under an obligation to investigate the matter properly.

Mogoeng J also concluded that the City was duty-bound to act against Viking and the steps it took amounted to a failure to investigate the complaint properly.

Finally the Constitutional Court concluded that the order of the Supreme Court of Appeal was aimed at directing the City to investigate the allegations and that this was the proper order. The Court accordingly ordered the City to investigate the allegations and provisionally ordered it to pay the costs of both Viking and Hidro-Tech.