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: 8 June 2023

Status: Immediate

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PIC SOC Ltd and Another v Trencon Construction (Pty) Ltd and Another (365/2022) [2023] ZASCA 88 (8 June 2023)

Today, the Supreme Court of Appeal (SCA) struck a matter from the roll with each party to pay its own costs. The principal issue before the SCA was whether a live dispute or *lis* existed between the parties, upon which the SCA could, and therefore should, exercise its appellate jurisdiction. This, in circumstances where the first respondent, Trencon Construction (Pty) Ltd (Trencon), failed to obtain leave to appeal against the dismissal of a review application brought by it in the Gauteng Division of the High Court, Pretoria (the high court). The high court did however grant leave to appeal to the respondents in that application, being the first appellant, the Public Investment Corporation SOC Ltd (the PIC), and the second appellant, the Government Employees Pension Fund (the GEPF), against an order that it had issued after it had already finalised its judgment.

The facts of the matter were as follows. Trencon submitted a bid in response to an invitation advertised by the PIC on behalf of the GEPF in November 2019, to appoint a building contractor for a shopping centre in Pretoria (the tender). The tender was awarded to the second respondent, GVK-Siya Zama Building Contractors (Pty) Ltd (GVK). After losing the tender, Trencon launched an application in the high court seeking to review and set aside the PIC's decision to award the tender to GVK. It also sought a declaratory order that the GEPF was an organ of state in terms s 239*(b)*(ii) of the Constitution. On 2 November 2021, the high court dismissed Trencon's application. On 8 November 2021, Trencon filed a notice in terms of rule 42(1)*(b)* of the Uniform Rules of Court seeking an amendment to the high court's order. On 22 November 2021, the high court granted an amendment of its order, but not in the terms sought by Trencon. The amended order read as follows:

'1 for purposes of the present application, [the GEPF] is an organ of state in terms of section 239*(b)*(ii) of the Constitution.

2 save for the aforesaid order, the application is dismissed.'

The SCA found that since the high court had dismissed the application, that should have been the end of the matter. The SCA found that the high court did not deal with whether Trencon had brought itself within rule 42, and that it gave no consideration at all to the fact that having dismissed the application, it may have been *functus officio*.

The SCA found further that the question of whether the GEPF was an organ of state did not give rise to any self-standing relief. On the application papers as originally framed, the resolution of this question was a step in the determination of the review application. Having dismissed the review, the high court

had no power to revisit that order. The amended order was in effect a nullity because it was made without jurisdiction by the court making it.

The SCA found further that as the dismissal of the application by the high court was not open to correction on appeal, the final word had been spoken by that court. Logically, the SCA found, the dispute or *lis* between the parties no longer existed upon which the SCA could and should exercise its appellate jurisdiction.

The SCA found that the question of whether it nonetheless had a discretion to entertain the appeal therefore did not arise. Further, that, in any event, the amended order was limited in scope by the high court to the specific circumstances of the review application between the parties and did not extend to all tender processes outside its reach. This meant that any order of the SCA on appeal would have had no practical effect or result beyond the confines of the matter. The SCA accordingly found that there was also no reason for it to hear the appeal as contemplated in s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013.

The SCA thus held that, in the light of its findings, there was no need to consider any other remedy, other than to strike the matter from the roll. In regard to cost, the SCA found that neither party was blameless; the point held to be decisive was raised by the Court; and there was no justification in either party having persisted in the matter. Thus, it was appropriate to order each party to pay its own costs.

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