



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

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Transnet SOC Ltd v Tipp-Con (Pty) Ltd and Others (797/2022) [2024] ZASCA 12 (31 January 2024)

Today, the Supreme Court of Appeal (SCA), by a majority of three judges against two, dismissed an appeal from the Gauteng Division of the High Court, Pretoria (high court). The appeal revolved around a tender for the manufacture, supply and installation of a high security fence at certain premises of the appellant. The respondent had been awarded the tender, but during installation of the fence, a dispute arose regarding the fence's specifications. This resulted in dispute resolution proceedings before an adjudicator, as stipulated in the agreement between the parties. The adjudicator found in favour of the respondent, namely that the fence was installed according to contractual specification and the respondent was entitled to payment under the contract.

The appellant was unsatisfied with the outcome of the adjudicator and barred the respondent from resuming with the fence's installation. The respondent turned to the court to make the adjudicator's award an order of court, after which the appellant sought to review the order in the high court, claiming, inter alia, that the contract entered into was unlawful because the respondent provided a non-compliant sample of the fence (the tender sample) during the tender evaluation process (it was not 'hot dip galvanized') and should therefore have been disqualified at the pre-qualification stage. As such, the contract ought to have been set aside. The high court dismissed the review application and held that the appellant had delayed in initiating the self-review and only brought the review application to 'escape its contractual obligations'. The appellant approached this Court, disputing the high court's decision.

The appellant appealed on two grounds. It held that, in relation to its tardiness, the high court erred when it did not apply the two-stage inquiry required to determine whether the delay in question was unreasonable, and secondly, that the award of the tender and the subsequent contract was a violation of procurement prescripts set out in s 217 of the Constitution and should have been set aside. With regards to the former, this Court held that the two-step approach entailed an assessment of whether the delay was unreasonable, and if it was, to initiate the second step by determining whether the delay could be overlooked. The high court complied with the first step but failed to determine whether the delay could have been overlooked.

This Court found that the nearly year-long delay by the appellant in initiating the review of the contract was not explained. In these circumstances the delay was unreasonable. Regarding whether the delay could be overlooked, this Court considered that the purpose of an organ of state's self-review should be to promote open, responsive, and accountable governance and that the appellant was required to promote these goals through its actions. Given the prejudice suffered by the respondent, the nature of the appellant's complaints, the fact that the irregularities were not egregious, and the unconscionable conduct of the appellant, the unreasonable delay cannot be overlooked.

In the result, the Court found that the appellant did not only delay the matter unreasonably, but it also acted unreasonably; it did not adhere to the constitutionally prescribed standard for state actors and did

not respect the rights of the respondent. It initially sought to enforce the very contract it later sought to annul and refused to recognize the outcome of an adjudicative process in which it had voluntarily participated. The appellant sought to circumvent the findings of the adjudicator by raising supposed tender irregularities, thereby hoping that the Court would disregard all its prior actions.

On the contrary, the minority judgment held that the facts overwhelmingly support a contrary finding. The irregularities Transnet complains of must be considered cumulatively rather than in discrete parts, to assess their overall effect on a fair and transparent tender process, in line with the approach in *Khumalo and Another v MEC for Education, KwaZulu-Natal*.

Transnet as the holding company assigned its divisions, Transnet Freight Rail (TFR), as 'its agent' to manage the tender evaluation process. TFR employees misrepresented the status of the sample submitted by Tipp-Con. It had submitted a 'non-responsive tender.' The review proceedings were brought by the Executive Manager: Legal of Transnet as the principal, and not by TFR. Transnet was alerted to the irregularities after the adjudication process, which prompted an investigation into the award. The 'proverbial clock' for computing the delay started 'ticking' from the date of the completion of the arbitration, on 7 August 2020. Transnet instituted the review application in October 2020. A belated investigation and discovery of tender irregularities is not uncommon and is analogous with *Swifambo Rail Leasing (Pty) Ltd v Prasa*. There was no delay, and if there was, it was not unreasonable and should be overlooked.

Besides the misrepresentation of the sample, Tipp-Con's Best Final Offer (BFO) of a 4 mm x 4mm wire diameter fence compared with the final terms of the NEC contract providing for a 3mm wire diameter, differed from the terms of the RFP and the BFO. After the award of the tender, Tipp-Con installed a fence between 3mm and 2.96mm. This was at variance from the terms of (a) the tender specification, (b) the BFO and (c) the final NEC contract. It was also at variance from the SANBS standard prescribed in the RFP. This raises questions about the grade and quality of the product offered and installed at the premises. The bulk of the irregularities occurred after the award of the tender. The deviations were not authorised by members of the bid evaluation structure. They fall within the proscription in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*¹ since they occurred outside of the tender process.

The arbitrator's finding was conducted on paper without hearing evidence cannot avail Tipp-Con in this case. Its central focus was the contract concluded after the award of the tender. The finding by the adjudicator that the variance was a '*deminimis deviation*' can only be supported if it was based on a proper consideration of *inter alia* the: (a) agreed contract price; (b) impact on the direct cost of the fence; (c) effect on the margin after the reduction of the bid contract price and (d) the incentive for Tipp-Con to cut its costs to improve its margin. Whether there was an incentive to cut costs and benefit Tipp-Con's margin or whether Transnet nevertheless obtained value for money, would have been necessary prior to concluding that it was a '*deminimis deviation*'.

Transnet was obliged to resist the irregular award which contravenes s 217 of the Constitution, and to set aside a resultant contract which was not in accordance with a lawful tender process. Transnet's functionary acted in good faith or with the intent to ensure clean governance. In these circumstances, the minority concluded that it would have upheld the appeal and grant consequential relief.

In the result, the SCA dismissed the appeal.

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<sup>1</sup> *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] 4 All SA 842 (SCA) para 21.