



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: 14 June 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Minister of International Relations and Cooperation and Others v Simeka Group (Pty) Ltd and Others (610/2021) [2023] ZASCA 98 (14 June 2023)

Today the Supreme Court of Appeal (SCA) upheld the appellants' appeal with costs including costs of two counsel. It further set aside and replaced the order of the Gauteng Division of the High Court, Pretoria (the high court).

The appeal, involving the Minister of International Relations and Cooperation, the Director General: Department of International Relations and Cooperation and the Department of International Relations and Cooperation as the first to third appellants respectively (the government parties), and Simeka Group (Pty) Ltd (Simeka Group), Regiments Capital (Pty) Ltd (Regiments Capital), Lemascene (Pty) Ltd (Lemascene) and Serendipity Investments SA LLC (Serendipity) as the first to fourth respondents respectively, concerned a dispute which had its genesis in the award of a tender for the appointment of a development partner for the design, construction, operation, maintenance and financing of suitable and sustainable office and residential accommodation for South African diplomatic missions in Manhattan, New York City, New York in the United States of America. The tender was awarded on 17 May 2016 by the third appellant, the Department of International Relations and Cooperation (the Department), to a joint venture comprising the first and second respondent namely, Simeka Group and Regiments Capital (the Joint Venture).

The substantive question before the SCA entailed a legality review concerning whether the award of the tender to the Joint Venture, by the Department, was constitutionally valid and thus unimpeachable. In addition to the reviewing of the tender award, the anterior question to be determined by the SCA was whether there was an inordinate delay by the Department in instituting its legality review and, if so, whether such a delay was inexcusable.

On 4 March 2016, the Department issued a Request for Proposals (the RFPs) for the appointment of a development partner for the purposes indicated above. More specifically, the Department made it clear that it sought to enter into a 'long term lease' or, a 'lease to buy property' option with a South African incorporated entity that had 'presence or collaboration' in New York and 'able to finance, procure and maintain accommodation and act as landlord to the Government' of the Republic of South Africa. To achieve this objective, prospective bidders were explicitly requested to 'identify and secure land' in Manhattan, New York City and to 'design and develop or redevelop' such land in accordance with the Department's tender specifications. The RFPs further required that the successful tenderer 'raise the

required funding to finance both the capital and operational costs of acquiring and managing the facilities' for the beneficial use of the Department. On 17 May 2016, after evaluation and recommendation by the Bid Evaluation Committee (the BEC) and adjudication by the Bid Adjudication Committee (BAC), the tender was awarded by the Director General to the Joint Venture as the preferred bidder for the project as the other competing bidder, a consortium comprising Lephuthing Investment CC and Menzibali Construction CC, was disqualified on the basis that it had not submitted audited financial statements in compliance with the requirements of the RFPs.

Following the award of the tender to the Joint Venture, a Steering Committee (the Committee) comprising representatives of the Department, the Joint Venture and National Treasury, whose primary objective was to monitor the implementation of the project, was established. The Committee proposed that the envisaged lease agreement should constitute a finance lease which, according to legislation, requires the approval of National Treasury. Upon being approached to grant the requisite approvals, National Treasury granted exemptions in relation to Treasury Approval I – Treasury Approval IIB, stating that the exemptions were granted by virtue of 'the developments that have already taken place'. However, National Treasury insisted on due compliance with respect to Treasury Approval III (TA III) which required the Department to submit certain documentation namely, the final draft Public Private Partnership (PPP) agreement, the final draft nominee agreement, the final financial model, the PPP contract management plan and documents indicating the preferred bidder's capacity and track record in the financing, design and construction of buildings and facilities management.

At the Committee's first meeting held on 21 June 2016, it was agreed that an offer to purchase the land had been verbally accepted by the current owners and that a written agreement should be concluded by 30 June 2021; thereafter the transaction had metamorphosed into a finance lease and the Department was expected to contribute towards the purchase of the land; and Simeka Group would represent the Department as its agent in the acquisition of the land with the South African Government effectively becoming the purchaser of the land. At a subsequent meeting held on 19 January 2017, the members of the Committee agreed that the Government would pay a non-refundable deposit of US \$60 million towards the acquisition of land for the project in terms of a Project Preparation Agreement (PPA) that was at that stage envisaged. The Committee further agreed that the PPA should be submitted by 27 January 2017, the TA III application should be submitted to National Treasury by 31 March 2017 and the target date for the TA III approval was 30 April 2017. Subsequently, on 25 March 2017, the Government, represented by the Department on the one hand and Lemascene and Regiments Capital on the other, concluded the PPA.

The PPA explicitly provided, in clause 4.5 thereof, that Lemascene and Serendipity 'shall have no beneficial interest or rights nor assume any obligations in terms of or in the Land Purchase Agreement or the Chosen Site' meaning that the Department was going to be the sole party that would purchase the land and generally fund the project which was at variance with the explicit requirements of the RFPs that provided that the successful tenderer would solely bear such an obligation. Clause 7 of the PPA further provided that the Department shall make an advance payment of USD 9 000 000.00, which represented twenty per cent of the Project Sites' purchase price, to Lemascene for the execution of the Preparatory Work which is inclusive of the payment of a deposit of US \$5 million.

On 29 August 2017, and as explicitly provided for in the PPA, the Department, acting in collaboration with Lemascene, prepared a letter under the hand of the then Director General to National Treasury in terms of which an application was made for the TA III approval. The Department proposed to present the project to National Treasury on 11 September 2017. However, in the wake of allegations that a member of the Joint Venture, ie Regiments Capital, was associated with a well-known family perceived to have corruptly siphoned vast sums of money from the government, National Treasury expressed some misgivings about granting the required TA III approval. In reaction to this, Simeka Group wrote to the Department, proposing that Regiments Capital should withdraw from the Joint Venture so that Simeka Group could then proceed with the project on its own. This found favour with the Department and subsequently the Joint Venture concluded a termination agreement during December 2017 in terms

of which Regiments Capital terminated the Joint Venture. Regardless of this, National Treasury was still not convinced and, as a result, refused to grant TA III approval.

The Department consulted the State Attorney who, on 29 June 2018, wrote to the attorneys representing the respondents indicating, inter alia, that the award of the tender to the Joint Venture was fraught with irregularities. On 10 October 2018, the government parties instituted review proceedings in the high court. The review application failed before the high court and was dismissed solely on the basis of delay which the high court held was inordinate, unreasonable and not adequately explained. Consequently, the high court did not enter into the substantive merits of the review.

In addressing the first issue, the SCA pointed out that this case required the SCA to determine firstly, whether there was any non-compliance with the requirements of the RFPs and if so, whether non-compliance with the tender requirements as required by the law was material. The SCA then went on to state that in this case there was no dispute that the process preceding the award of the tender did not accord with the dictates of s 217 of the Constitution because both the BEC and the BAC that were central to the ultimate award of the tender failed at every turn in faithfully discharging their constitutional and statutory responsibilities. Additionally, the SCA reasoned that when it comes to procurement of goods and services by organs of state, the RFPs are designed to serve at least two crucial purposes, that being to inform the prospective bidders of what is required of them and also to foreshadow the terms of the contract that will be concluded between the organ of state and the successful bidder. In concluding on the first issue, the SCA held that Simeka Group was not able to provide what the Department desired and unambiguously required and that in having regard to the irregularities of which the government parties complain, a finding that such irregularities have been established must ineluctably lead to the conclusion that the ensuing contract concluded between the Department and Simeka Group during May 2016 falls to be declared constitutionally invalid and thus unlawful.

On the issue of the inordinate delay by the Department in instituting its legality review, the SCA held that there was no dispute that the government parties delayed in instituting the review proceedings, thus raising the critical question for determination as to whether the delay ought to be overlooked. The Court further held that in the context of the facts of this case, the high court failed to exercise its discretion judicially in that it exercised its discretion based on a wrong appreciation of the true facts or wrong principles of law. The SCA reasoned that although the high court considered the question whether the delay should be overlooked and some of the relevant factors that bear on that question, it did not consider the interests of justice as enjoined by judicial authority, having regard both to the requirements of the RFPs and the material deviations from what the RFPs had required. The interests of justice and the unexplained egregious material deviations from the tender requirements coupled with the onerous financial burden that the revision of the tender post its award to the Simeka Group were all relevant factors that, amongst others, were not sufficiently accorded due weight by the high court in determining whether the unreasonable delay should be overlooked. In conclusion, the SCA, on this point, held that the high court failed to properly exercise a judicial discretion as enjoined by judicial authority.

In the result, the SCA made an order upholding the appeal with costs including costs of two counsel and further setting aside and substituting the order of the high court, granting relief to the appellants as prayed in their notice of motion.

-----oOo-----