



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: 29 April 2024

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

Eskom Holdings SOC Limited v Babcock Ntuthuko Engineering (137/2023, 156/2023 and 148/2023)
[2024] ZASCA 63 (29 April 2024)

Today, the Supreme Court of Appeal (SCA) upheld an appeal against a judgment of the Gauteng Division of the High Court, Pretoria (the high court), which amongst others, reviewed and set aside the decision taken by Eskom Holdings Soc Limited (Eskom) to award contracts for outage maintenance at 15 of its coal-fired power stations to Actom (Pty) Ltd (Actom) and Steinmüller Africa (Pty) Ltd (Steinmüller).

On 6 August 2018, Eskom published a Request for Proposals (RFP) inviting tenders for maintenance and outage repair services at 15 of its coal-fired power stations. The respondent, Babcock Ntuthuko Engineering (Pty) Ltd (Babcock), submitted its proposal by the extended deadline, namely 24 October 2018, but was disqualified because it failed to submit a current ISO 3834 certificate (the ISO certificate). That certificate verified that a company had the requisite resources, systems, and personnel to weld to a required quality and standard. The RFP listed 'Certification to ISO 3834' as a 'mandatory returnable for evaluation' and specified that failure to comply with that condition would result in disqualification at the tender evaluation stage. On 7 October 2021, Eskom awarded the tender jointly to Actom and Steinmüller. Actom was appointed to render maintenance and outage services at seven of the 15 power stations and Steinmüller at eight. Babcock challenged those awards in the high court, contending that the decisions to disqualify it at the evaluation stage and to split the tender award between Actom and Steinmüller were irrational, unlawful, and invalid.

On 17 November 2022, the high court (per Millar J) delivered its judgment upholding Babcock's contentions in respect of its disqualification. It found that Babcock's interpretation of the tender condition was to be preferred, namely that the condition did not require the submission of an ISO 3834 certificate but merely a statement by bidders that they had one. The high court found, additionally, that the requirement regarding the ISO 'Certification' was ambiguous and Eskom was thus obligated to allow disqualified bidders to comply by submitting the certificate after the deadline. Its failure to do so rendered Babcock's disqualification procedurally unfair in terms of s 6(2)(e) of the Promotion of

Administrative Justice Act 3 of 2000. The high court consequently reviewed and set aside the tender awards. It further declared the contracts concluded pursuant thereto unlawful and ordered Eskom to conduct a fresh tender process within stipulated time frames. The high court, however, suspended the order declaring the contracts entered into between Eskom, Actom and Steinmüller, invalid, subject to compliance with its directives regarding the finalisation of the fresh tender process. Eskom, Actom and Steinmüller appealed against the high court's judgment with the leave of that court.

The appeal before the SCA raised the following issues: (a) whether Babcock was properly disqualified from the evaluation stage of the tender; and (b) whether the decision to split the award between Actom and Steinmüller was lawful.

The SCA found that item 3.2 of the RFP was unambiguous and required bidders to submit an ISO 3834 certificate since at the tender clarification meeting bidders were informed that they were required to submit ISO 3834 certificates before the deadline and that failure to do so would result in disqualification from the evaluation phase. The Court further found that a mere statement that they had 'ISO 3834 Certification' did not constitute compliance with that condition. Babcock attended the meeting and could therefore not reasonably have been under the impression that a mere statement that it had ISO 3834 certification would constitute compliance with that mandatory requirement.

The SCA also dismissed Babcock's alternative argument, namely that having regard to the purpose of the requirement, Babcock's non-compliance was not material and Eskom should therefore have allowed it to submit the certificate after the tender closure date. The Court found that the purpose of the condition was to satisfy Eskom that a bidder had the necessary resources and skills to provide welding services to the required standard. The condition was thus crucial and material in the context of the services sought to be procured.

The SCA also found that Babcock's second review ground, namely that Eskom's decision to split the tender was irregular and inimical to the provisions of section 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA), was without merit. That section provided that a tender must be awarded to the highest scoring tenderer unless objective criteria justify the award to another tenderer. The Court found that Eskom had stated upfront that it intended to split the tender in order to minimise the risk of a service provider becoming incapacitated for some reason. Eskom had also stipulated objective criteria relating to safety, health and financial considerations and had evaluated and awarded the contracts to Actom and Steinmüller in terms of those criteria. The SCA found that the contracts were therefore properly awarded in compliance with the provisions of section 217 of the Constitution and the principles underpinning the PPPFA.

The SCA accordingly upheld the appeal with costs, including the costs of two counsel. It also set aside the order of the high court and substituted it with an order dismissing the application with costs.

~~~~ends~~~~