



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 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

Krohne (Pty) Ltd v Strategic Fuel Fund Association (Case no 476/2023) [2024] ZASCA 99
(14 June 2024)

Today the Supreme Court of Appeal (SCA) upheld an appeal, with costs, against the decision of the Gauteng Division of the High Court, Johannesburg (the high court). Paragraphs 1 to 4 of the order of the high court was set aside and replaced with an order that: 'The second point *in limine* raised by the respondent is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel, one of whom is senior counsel; The matter is remitted to the high court to be determined on the merits.'

Strategic Fuel Fund Association (the respondent), acquires, maintains, monitors and manages South Africa's strategic energy feedstocks and carries, in order to ensure security in the supply of energy. One of the crucial aspects of the respondent's functions was to measure accurately the precise volume of crude oil that is discharged into the tanks and subsequently exported out of the tanks of its facilities. Krohne (Pty) Ltd (the appellant) successfully tendered for the supply, installation and commissioning of the metering system at the Saldanha Terminal. In terms of the contract concluded between the appellant and the respondent, the appellant's services included the designing, calibration and installation of the metering cabinets, flow computers and master metering skids and all associated electrical reticulation, including necessary and associated equipment for the system (the KOG metering system).

It was a further term of the agreement that payment would be made in tranches, with the final 10% retained as a performance retention fee, payable upon completion and certification of the appellant's performance of the services. A dispute arose between the appellant and the respondent in regard to the accuracy of the KOG metering system. The appellant contended that it had completed its task as contracted and was entitled to payment of the 10% balance of the contract price. On demand of such payment, the respondent raised the query that the installed system did not operate within the specification agreed to in the contract. The parties agreed to refer the matter to arbitration, where a settlement agreement was entered into in terms of which the parties agreed to appoint an independent expert to determine the accuracy of the KOG metering system. The settlement agreement was endorsed by the arbitrator as an interim award.

The parties further agreed that upon the certification of the accuracy of the KOG metering system, the respondent would be liable for payment of the outstanding 10% performance retention fee to the appellant together with interest thereon. SGS Gulf Limited (SGS) was appointed by the parties, who

eventually provided a final report on the functioning of KOG metering systems. The appellant interpreted the final report to confirm that the metering systems operated within the specification agreed to by the parties. The appellant subsequently made a demand for payment in terms of the arbitration and upon failure of the respondent to pay, issued an application for the recovery of the agreed outstanding balance in the high court. The high court upheld the respondent's point *in limine* and dismissed the application on the basis that the appellant lacked a cause of action. The appeal is with leave of the high court.

The SCA held that the high court misdirected itself when it dealt with the validity or otherwise of the interim award. The issue to be dealt with by the high court was whether the SGS report concluded that the KOG metering system operated in accordance with the specifications agreed to by the parties. The SCA held further that the high court erred in law and fact by dismissing the appellant's claim on a point *in limine*. The parties agreed in the interim award that the final report of the independent expert would be binding on them and held further that the appellant's cause of action was founded on the report. The SCA accordingly upheld the appeal and remitted the matter back to the high court for determination on the merits.

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