THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Siyangena Technologies (Pty) Ltd v PRASA and Others (487/2021) [2022] ZASCA 149 (1 November 2022)

The Supreme Court of Appeal (SCA) today dismissed an appeal with costs, including the costs of two counsel, against the judgment of the Gauteng Division of the High Court, Pretoria (the high court), which set aside certain procurement contracts entered into between the appellant, Siyangena Technologies (Pty) Ltd (Siyangena) and the first respondent, the Passenger Rail Agency of South Africa (PRASA).

Siyangena was appointed by PRASA to supply and maintain an integrated security access management system (ISAMS) at various train stations. This was pursuant to a decision that was taken by PRASA to initiate a pilot project to upgrade certain stations in preparation for the 2010 FIFA World Cup. The roll-out of the ISAMS programme was extended together with substantially increasing costs through an ostensibly irregular procurement process. PRASA approached the high court in March 2018 to have its own decisions to conclude the procurement contracts to the value of approximately R5.5 billion with Siyangena reviewed and set aside. The election by PRASA to set aside its own decisions was taken by the reconstituted Board of Control of PRASA (the Board), which was appointed in August 2014. Prior to this, the executive management committee fell under the control of the erstwhile Group Chief Executive Officer (GCEO), Mr Montana, who resigned under a cloud in July 2015 amidst mounting concern of mismanagement, as well as an ongoing investigation by the Public Protector into maladministration at PRASA.

The SCA, firstly, dealt with the finding of the high court (differently composed from that which eventually heard the matter – the 'first court') that affidavits of 'intervening witnesses' were inadmissible. Those affidavits arose from the first court's order that certain personnel from PRASA, who were implicated in alleged wrongdoing, were entitled to intervene as witnesses and deliver affidavits in their defence of their alleged wrongdoing. The SCA found that the order permitting witness affidavits to be filed ought not to have been granted in the first place. The SCA found further that the order by the first court granting leave to witnesses to intervene was unprecedented; that there was no support for it in the rules of court or our substantive law; and that the first court lacked the power to issue such an order, which was to all intents and purposes a nullity. The SCA thus held that the high court was entitled to disregard the affidavits produced in terms of that order on the basis that they were inadmissible.

In regard to whether there was a delay in instituting the legality review, and if so whether such delay was nevertheless reasonable and should be condoned, the SCA found that there was no ground to interfere with the high court's decision to condone the delay of 10 months. This was because the period of delay was not unreasonable in the circumstances, as PRASA had acted expeditiously once the true reasons for the impugned decisions had come to light. This was viewed in the context of the widespread corruption under the previous management of PRASA under Mr Montana, which placed obstacles in the path of the newly constituted Board to unearth the true state of affairs, by frustrating the flow of information. In order to unearth the true extent of the mismanagement, the new Board had appointed a team of forensic investigators. Furthermore, in the context of a litany of breaches of the procurement system, condonation had to be granted in the interests of justice.

In regard to the high court's inference of complicity in the corruption on the part of Siyangena, the SCA concurred with that finding. That remained the only plausible inference on a conspectus of all of uncontroverted evidence, which displayed a concerted effort on behalf of officials within PRASA to debase almost all aspects of the procurement process, to the benefit of Siyangena. The SCA was thus satisfied that the high court was ineluctably driven to conclude that Siyangena was complicit, alternatively involved in the corruption in relation to the impugned contracts. Consequently, the SCA held that where there was evidence of corruption, an order declaring the contracts unconstitutional had to follow.

In regard to remedy, the high court ordered that an independent engineer be appointed in order to determine whether any of the payments made to Siyangena by PRASA should be set off against the value of the works done. The SCA found that Siyangena had not been able to demonstrate any basis on which the SCA should have interfered with a true discretion exercised by the court below in respect of the relief granted. This was because Siyangena did not show that the high court had failed to exercise its discretion judicially.

The SCA held that Siyangena was rightly found by the high court to have been 'complicit to the corruption, impropriety and maladministration'. It was thus inconsistent with notions of justice and equity that it should have been allowed to profit from the unlawful procurement contracts. Additionally, the SCA rejected the argument that the high court order was imprecise and incapable of implementation, as the parties were entitled to re-enrol the matter for the court to make a determination if the parties were unable to agree on certain matters. Moreover, the SCA found that there was precedent for an order, for instance, where an independent third party was appointed to assess the financials of the contracts to determine the appropriate accounting reconciliation. Accordingly, the SCA held that there was the need for an independent, qualified third party to assess and determine the financial value of the works. That approach ensured that Siyangena would not be benefitted unduly and that PRASA would not be paying for services not rendered. Fairness was achieved and justice was ensured for both parties.

Lastly, the SCA, notably, commented on the size of the court record and the failure of the appellant to have produced a core bundle. This was particularly necessary where the record was voluminous; the record which was placed before the SCA was made up of 41 volumes, comprising almost 8000 pages. Notwithstanding, according to Siyangena's practice note, approximately 1000 pages were relevant and necessary to read, excluding a further 2000 pages relevant to the 'intervening witnesses'.

The SCA found that in light of the blatant disregard by Siyangena's attorneys, who bore the primary obligation for the preparation of the record in accordance with the rules, and their misguided view that it was necessary for the SCA to trawl through approximately 8000 pages, a disallowance of costs for non-compliance with the rules should have followed. The SCA thus held that the appellant's attorneys were not entitled to recover any of the costs associated with the preparation, perusal or copying of the record.

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