



CONSTITUTIONAL COURT OF SOUTH AFRICA

Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another

CCT 198/14

Date of hearing: 5 March 2015

Date of judgment: 26 June 2015

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down a judgment in an application concerning when it is appropriate for a court to substitute a tender award with its own decision, after setting aside the original tender award.

In May 2012, the Industrial Development Corporation Limited (IDC) issued a public invitation to building contractors to submit proposals for a contract to upgrade its head office. The contractors' profiles were screened and a shortlisting process was conducted. Of the seven contractors shortlisted, only four submitted bids, which were then evaluated on the basis of price and broad-based black economic empowerment points. The evaluation was carried out by the IDC's Procurement Committee, Procurement Department and Bid Evaluation Committee. The IDC also engaged an independent firm of experts and a group of quantity surveyors to assist the evaluators. Trencon was the highest points earner and all of the evaluators recommended that the tender be awarded to Trencon. Despite this, the IDC's Executive Management Committee awarded the tender to the second respondent, Basil Read. Trencon's bid had been declared to be non-responsive (i.e. found not to conform to all the terms, conditions and specifications of the tender document), and was disqualified by the IDC.

Trencon approached the North Gauteng High Court, Pretoria which reviewed and set aside the IDC's decision. It found that the decision to declare Trencon's bid non-responsive was based on a material error of law. In considering a remedy, it found that there were exceptional circumstances justifying a substitution order in terms of the

Promotion of Administrative Justice Act (PAJA). As a result, the High Court substituted its own decision for that of the IDC and awarded the tender to Trencon.

The IDC appealed to the Supreme Court of Appeal on the issue of the substitution order only. The Supreme Court of Appeal found that there were no exceptional circumstances justifying a substitution order. It reasoned that the High Court had not considered the doctrine of separation of powers; that the award of the tender to Trencon was not a foregone conclusion; and that the substitution order would not cater for supervening circumstances like price increases resulting from the time that had lapsed since the beginning of the tender process. As a result, it set aside the substitution order and remitted the matter to the IDC for decision.

In a unanimous judgment written by Khampepe J, this Court held that there were exceptional circumstances to justify the substitution order. Given that the tender evaluation process was in its final stages and the IDC had already exercised its expertise over the bids, this Court found that it was in as good a position as the IDC to award the tender and that awarding the tender to Trencon was a foregone conclusion. Trencon had earned the highest points and there were no objective criteria or justifiable reasons to award the tender to another bidder or to cancel the tender. This Court found that the separation of powers was sufficiently catered for by the fact that PAJA allows for substitution remedies in “exceptional circumstances”. The tender conditions agreed to by the parties could address any concerns around changed circumstances arising from the delay occasioned by the appeal process. Further, it was held that the Supreme Court of Appeal should not have interfered in the exercise of the High Court’s broad discretionary powers. Consequently, this Court set aside the Supreme Court of Appeal’s decision and reinstated the High Court’s order.