



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

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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

Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd (216/2020) [2021] ZASCA 90 (25 June 2021)

The Supreme Court of Appeal (SCA) today dismissed an appeal brought by the Special Investigating Unit (the SIU) and another appellant against the decision of the Gauteng Division of the High Court, Pretoria (the high court) with costs, including costs occasioned by the employment of two counsel.

The appeal concerned a review application brought by the SIU and the Acting Commissioner of the National Department of Correctional Services, representing the Department of Correctional Services (the Department), against the respondent, Engineered Systems Solutions (Pty) Ltd (ESS). It concerned the validity of the decisions taken by the Department to award tenders to ESS and the subsequent service level agreement concluded between the Department and ESS. In the review application the SIU was the main applicant while the Department supported the application as the second applicant.

During 2011, a decision was taken by the Department to introduce, in phases, an Electronic Monitoring System (EMS) which would be used to monitor offenders who had been released on parole and/or remand detainees who had been placed under supervision. A procurement project in respect of the introduction of the EMS got underway in this regard. On 26 August 2011, the Department advertised a tender for the '[s]upply, delivery, installation, commissioning, training and maintenance of a National Pilot Project for an electronic monitoring solution for the Department of Correctional Services, over a one-year period' (the pilot tender). If the pilot project proved to be a success, a full-blown final project would be implemented. Bids were received from various entities, including ESS. In December 2011, the pilot tender was awarded to ESS followed by a contract concluded between the Department and ESS at a cost of R6 510 375. In February 2014, the Department advertised a further tender, after a previous one was aborted, for the 'supply delivery, installation, commissioning, training and maintenance of a National Electronic Monitoring Solution by way of lease for a period of five years for the Department of Correctional Services' (the final tender), which was awarded to ESS in April 2014. On 21 May 2014, a service level agreement (the SLA) was concluded between the Department and ESS in respect of the final

project to the value of R301 611 772. On 15 April 2016, the President of the Republic of South Africa issued a proclamation referring for investigation to the SIU, certain allegations in respect of the affairs of the Department, relating to irregularities in the procurement of the EMS and payments relating thereto. The SIU alleged that its investigation revealed a number of irregularities in the procurement processes relating to tenders awarded to ESS by the Department in relation to the EMS. These included non-compliance with the State Information Technology Agency Act 88 of 1998, and the Private Security Industry Regulation Act 56 of 2001, as well as B-BBEE fronting.

The review application, which was the subject of the appeal, was lodged on 28 March 2018. In the review application, the appellants sought condonation for the delay in bringing the application. The appellants also sought the review and setting aside of the SLA(s) and any other contracts entered into pursuant to the pilot and final tenders and/or projects; and orders declaring that the decisions to award the tenders, and the respective SLA(s) and other contracts, were unconstitutional, unlawful, invalid and void *ab initio*.

The SCA held that in light of the inordinate delay, which had not been fully explained and which had been found to be unreasonable; the egregious conduct of the Department (which had remained supine and failed to explain its conduct); the fact that the review application had no merit; and the prejudice that would have been suffered by other contracting parties; and having taken into account that the challenges to the procurement process were flimsy, the delay should not be overlooked. The SCA thus found that it was not necessary to consider whether the decisions to award the tenders and the SLA should nonetheless be set aside in terms of s 172(1)(a) of the Constitution, as no clear unlawfulness in the awarding of the tender and the contracts was shown on the facts. There was accordingly no reason to interfere with the order granted by the high court.

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