



in the tender process both before and after the conclusion of the original services agreement. It also attacked the validity of the renewed agreement on certain private law grounds. The Department referred to section 217(1) of the Constitution and section 38(1)(a)(i) of the Public Finance Management Act 1 of 1999, both of which require an organ of state, when contracting for goods and services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The Department argued that it had, after a due and proper tender process, given approval for a two year contract only. Thus any attempt to circumvent that approval by concluding a contract for a longer period was unlawful.

The SCA analysed the documents on which the Department relied and concluded that the services agreement reflected the understanding by the DAC and 3P that the initial contract period was two years, with a renewal for a further period of two years subject to such amendment the parties might agree to make. This meant that there was no failure by the Department to follow the constitutional and legislative provisions on which it relied and its attack on the validity of the services agreement had to fail. The SCA likewise rejected the Department's submission that the Chair of the DAC who signed the agreement on behalf of the Department had no authority to do so, a contention that had not been raised in the Department's answering affidavit.

As regards the validity of the renewal of the services agreement, the Department contended that the purported renewal for three years occurred without following a public bidding process and contrary to the constitutional and statutory provisions referred to above. The SCA rejected this contention, holding that the renewal of the services agreement did not give rise to a new services agreement, but simply extended the duration of the agreement for a period of three years. As there was no new services agreement, there was no new procurement of goods or services and it was thus not necessary for the Department to follow a competitive public bidding process.

The Department's reliance on certain private law grounds for the invalidity of the renewal of the services agreement also failed. With one exception, none of these grounds had been raised by the Department in its papers. Moreover, its contention that the renewal clause of the services agreement was either no more than an agreement to negotiate between the parties and thus unenforceable, or that this clause constituted an option to renew the services agreement and was not exercised timeously, was rejected by the SCA.

The Department's final submission was to the effect that, because the services agreement and any renewal thereof involved the rendering of consulting and personal services, the quality of the performance of which would be impossible to gauge or police, an order of specific performance was not an appropriate remedy. The SCA was not impressed with this submission. Not only was this contention conspicuously absent from the papers, but also there was nothing in the papers to suggest that the obligations of 3P were vague or imprecise and would give rise to lengthy disputes, as argued by the Department.

The Department's appeal was thus dismissed with costs, including the costs of two counsel.

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