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 21 May 2012

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Tecmed Africa v The Minister of Health
(495/11) [2012] ZASCA 64 (21 May 2012)
Media Statement

On 3 May 2012 the Supreme Court of Appeal (SCA) dismissed an appeal by Tecmed Africa (Pty) Ltd (Tecmed) in terms of s 21A(1) of the Supreme Court Act 59 of 1959 and ordered it to pay all costs in relation to the appeal incurred after 14 February 2012. Today the SCA handed down reasons for that order.

The facts and history of this matter can be summarised as follows: During 2005 Tecmed, an importer and distributor of medical equipment, imported a second hand Varian Clinac 2100 C linear accelerator into the country, which it then stored until 2007. In 2007 it refurbished the machine and consistent with the practice in the industry it brought about a change in the model number of the machine indicating that the machine had in fact been refurbished. Linear accelerators have been classified as a Group III hazardous substance by the Minister of Health which meant that no person was entitled to sell, let, use or operate such a machine or install such a machine unless such person had been issued with a licence. Cancare (Pty) Ltd (Cancare), which carries on business as the Durban Oncology Centre, purchased the machine from Tecmed and applied for a licence to install and operate the machine. In its licence application form the machine was incorrectly described as a new machine. On the strength of that description the licence was approved. When it subsequently emerged that the machine was in fact a refurbished one, The Deputy-Director in the Department of Health informed Cancare that a licence would not be issued as, so he asserted, Tecmed was only licensed to import new machines and as the machine in question had been imported illegally, the Department now required that the machine be exported or sold as scrap.

A new application was submitted on behalf of Cancare, which correctly described the machine. On the same day the Deputy-Director despatched a notice in terms of the Hazardous Substance Act 15 of 1973 to Tecmed, which placed an embargo on its licences to import varian linear accelerators. Tecmed lodged an appeal with the Minister against this decision primarily on the grounds that the Deputy-Director had acted ultra vires. The Minister dismissed the appeal. Tecmed then applied to the North Gauteng High Court seeking an order reviewing and setting aside the Minister's decision to dismiss the appeal (embargo application). And in a separate application it sought the review and setting aside of the DG's refusal to issue Cancare with a licence.

Claassen J, dealing with both embargo and licence applications, upheld Tecmed's contention that the DG was not in law entitled to issue the embargo. The application against the refusal to grant the licence also succeeded. The Minister obtained leave to appeal to the full court against this judgment, but in heads of argument filed on her behalf she abandoned the appeal against the judgment and order in the embargo application but persisted in the contention that the abandonment of that appeal did not affect the question of costs.

The full court, on this aspect, reasoned that as the Minister had persisted in the appeal, despite lifting the embargo and had caused Tecmed to go to unnecessary trouble and expense in preparing for the appeal, the Minister's conduct had to be characterised as vexatious. The Minister was ordered to pay the costs of the embargo appeal on the scale as between attorney and client. Regarding the licence appeal the full court held that the importation of the machine was illegal and upheld the appeal with Tecmed being ordered to pay one half of the Minister's costs on appeal.

On 14 February 2012 a notice was served and filed in which it was contended on behalf of the Minister that the appeal would have no practical effect or result. In an affidavit filed on behalf of the Minister in support of that contention the relevant assistant State Attorney stated that in summons that had been issued by Tecmed against the Minister the former had averred that it had secured a new machine for installation at the Durban Oncology Centre. The new machine replaced the machine which is a subject matter in this appeal.

Against that backdrop the primary question therefore before the SCA was whether the judgment sought in the appeal would have any practical effect or result. Counsel for Tecmed had to concede that securing a licence for the use of the machine had become academic, yet he still argued that the appeal should be entertained because if the full court's findings on the disputed facts were to stand, it could serve as an obstacle to the successful prosecution of its envisaged civil claim against the Minister. The SCA reiterated that appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Tecmed’s argument had to be tested against the principles governing the defence of res iudicata in general and issue estoppel in particular. Applying those principles, the SCA concluded that it does not appear that matter or questions likely to arise in the contemplated civil litigation had indeed been fully adjudicated upon by the full court. The SCA reiterated that it would not engage in speculation or conjecture nor give legal advice to a litigant. It accordingly dismissed the appeal in terms of s 21A(1) of the Supreme Court Act.

On the question of costs, the SCA referred to a letter despatched by Tecmed on 14 February 2012 in which it indicated that the machine in question had already been removed by it from the Durban Oncology Centre and will be sold as spares. As that was even before the matter had been argued before Claassen J, it ought to have rendered the licence application moot. As the effect of that letter appeared to have been lost on the parties as also both courts below and as both parties had willingly proceeded with the appeal, the SCA deemed it appropriate that each party should bear its own costs until 14 February 2012, the date on which the Minister filed a notice to the effect that the appeal would have no practical effect. The SCA accordingly ordered the Minister to pay Tecmed’s costs of appeal beyond that date.

--- ends ---