



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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**THE INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA
LIMITED v TRENCON CONSTRUCTION (PTY) LIMITED & ANOTHER
(642/13)[2014]**

The Supreme Court of Appeal (SCA) today partially upheld an appeal and set aside the order of the court below.

This appeal is against the judgment of the North Gauteng High Court, Pretoria which reviewed and set aside the decision of the appellant's Executive Committee to award a tender for the external upgrade of its head office in Sandton, Johannesburg, to the second respondent Basil Read (Pty) Limited (Basil Read) and substituted it with an order that the tender be awarded to the first respondent Trencon Construction (Pty) Limited (Trencon).

The Executive Committee declined to award the tender to Trencon, which had scored the most points in the evaluation process and was recommended by the tender evaluators, on the basis that its bid was non-responsive and invalid, because (a) it was not fixed and valid for 120 days; and (b) after the closing date Trencon amended its initial price and added an amount as a result of the postponement of the site handover date in breach of the tender conditions. It consequently awarded the tender to Basil Read. was influenced by a material error of law.

The court below overturned reviewed and set aside this decision on the grounds that (a) the Executive Committee committed an error of law in declaring Trencon's bid non-responsive because the latter was entitled to adjust its price in the circumstances; and (b) it had acted in a manner that was procedurally unfair, as contemplated in s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), by accepting, evaluating and

assessing Basil Read's bid which was filed late, in breach of its Procurement Policy. Having thus found, the court below held that IDC had shown no reason why the tender should not be awarded to Trencon when the decision was a foregone conclusion considering the recommendations which favoured Trencon. The court below concluded that it would be just and equitable to award the tender to Trencon itself as delaying the implementation of the project would prejudice not only Trencon but the appellant and National Treasury too in view of the substantial public funds involved.

On appeal before the SCA, IDC did not challenge the finding that Exco committed an error of law in declaring Trencon's bid non-responsive. It merely argued that the court below erred in finding that Basil Read's tender was disqualified because the degree of its submission's lateness was trifling, caused no prejudice and ought to have been condoned. It also contended that the court below wrongly granted the remedy of substitution on the facts of this case.

The SCA found that there were no apparent objective criteria or compelling reasons justifying the executive committee's decision that Trencon's bid was non-responsive. And once it was accepted that the executive committee erroneously excluded Trencon from the tender process and that its decision therefore constituted a reviewable error, as was conceded by IDC, it had to follow that the executive committee could not have lawfully awarded the tender to another bidder. Any attempt to do so would, of necessity, have resulted in another reviewable error. The question whether or not Basil Read's late proposal was responsive was wholly irrelevant. On this aspect the appeal failed. But the SCA then held that no exceptional circumstances existed to justify the order of substitution as required by s 8(1)(c)(ii)(aa) of PAJA and that this is a proper case to exercise judicial deference and refer back to the administrator for its reconsideration. The appeal was accordingly upheld in this respect.