



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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Minister of Transport v Prodiba (Pty) Ltd (20028/2014) [2015] ZASCA 38 (25 March 2015)

The Supreme Court of Appeal (SCA) today upheld an appeal against a decision of the Gauteng High Court Division, Pretoria in terms of which it upheld an application by the respondent, Prodiba (Pty) Ltd (Prodiba) to enforce an agreement concluded by an erstwhile Director-General of the Department of Transport, in terms of which Prodiba was granted the right to produce a new style drivers' licence for a period of five years, commencing on 1 March 2014, with costs implication for the State in excess of R1 billion. The high court also dismissed a counter application by the Department declaring the agreement void *ab initio*.

At the outset the SCA said the following:

'If Prodiba were to succeed [in the appeal] it would mean that following upon a single tender process during 1995-1997, a single contractor would have had an uncontested monopoly in the production of drivers' licences for a period of more than 20 years. Do our constitutional norms and values countenance such a situation? The short answer is no.'

The agreement in question had been signed in haste by an erstwhile Director-General shortly before his contract ended. The Department was emphatic that he had signed it without ministerial authorisation. The Department contended that the agreement was signed against constitutional values and statutory prescripts which required a competitive bidding process so as to ensure transparent and accountable governance. It was submitted on behalf of the Department that the migration to a new, technologically advanced, drivers' licence system was a policy decision that was within the province of the Executive and ought to have been approved by the Cabinet or, at the very least, by the Minister. The high court had held that the agreement was authorised.

The SCA agreed with the contentions on behalf of the Department and said the following:

'Perhaps even more fundamentally, the court below failed to pay sufficient attention to the procurement principles set out in the Constitution. Section 217 of the Constitution was designed to ensure transparency and accountability on the part of organs of state which we must all be intent on promoting.'

The SCA went on to state:

'[I]n describing Prodiba as an innocent party which would be prejudiced if the agreement was to be terminated, the court below ascribed to it a level of naivety that was unjustified. At the outset it succeeded a successful tenderer. In 2009 it was a bidder when a new tender was invited and ultimately not proceeded with. Prodiba knew that new technology and a new process was required and that the cost implications for the State were enormous. It must have been obvious that what was required was a competitive process which was circumvented by the agreement under discussion.'

The SCA dealt with the reasoning of the high court that the provisions of the Public Finance Management Act 1 of 1999 did not preclude the conclusion of the agreement in question. In that regard the SCA said the following:

'As indicated above, s 38(2) of the PFMA precludes an accounting officer from committing a department to any liability for which money has not been appropriated. The court below reasoned that the production of the cards would be self-funding in

that a driver to whom such a card has been issued would be required to pay for it. This was a complete misapprehension about budgetary processes in general and more specifically in relation to the State. It ignored the fact that what precipitated the litigation leading up to this appeal was that Prodiba had sought an advance payment. The money would only be recouped (if at all) at intervals in the future upon the issue of the drivers' licences. In any event, it is in the prerogative of the Department to allocate its earnings as it sees fit. A budget for a financial year yet to commence would take into account what amounts are required in respect of capital expenditure and operational expenses and would make a decision about how any potential future earnings would come into play. It was unchallenged that money was not appropriated to ensure compliance with the Department's obligations in relation to the agreement in question. That, in itself, was sufficient ground on which to invalidate the agreement.'

The SCA held that the high court had adopted an unjustifiably benign approach towards Prodiba. It made the following order.

- '1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the court below is set aside and substituted as follows:
 - “(a) The application is dismissed with costs, including the costs of two counsel.
 - (b) The third addendum agreement is declared void *ab initio* and set aside.
 - (c) The respondent in the counter-application is ordered to pay the costs of the counter application, including the costs of two counsel.”