



## 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** 10 September 2015  
**STATUS** Immediate

***MEC v Terra Graphics (483/2013) [2015] ZASCA 116 (10 September 2015).***

*Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal*

Today the Supreme Court of Appeal (SCA) delivered a judgment dismissing the appeal by the MEC: Department of Police, Roads and Transport, Free State Provincial Government against an order by the Free State Division of the High Court, Bloemfontein, in terms of which it was ordered to pay an amount of R1 540 123.54 to the first respondent, Terra Graphics (Pty) Ltd t/a Terra Works, employed as an environmental subcontractor by a main contractor, the second respondent, SSI/Tshepega Joint Venture in furtherance of the Road Rehabilitation Programme of the Free State Provincial Government.

In short, after the Province had awarded a tender in relation to a road infrastructure programme and concluded a written agreement with the main contractor, the second respondent, to supply engineering services for a total remuneration package of R69 million and sanctioned the appointment of the first respondent as the subcontractor to provide environmental protection services for payment in an amount of R1 593 997.95 and after they had both completed the work and received some payment, the Province refused to pay the balance owing, on the spurious basis that the work had not been budgeted for. Notwithstanding that the Province had received the benefits of the labour of the two contractors, it contended that the failure to budget for the contemplated road works in the year in which the written agreement with the main contractor was concluded and in several budgetary periods thereafter amounted to contraventions of applicable regulatory statutory provisions and it was therefore entitled to refuse to be held to its obligations in terms of the concluded agreements. Ironically, it relied on the principle of legality to avoid honouring agreements that it had approved and benefitted from.

The court held that the documentation provided by the Province demonstrated that the Road Infrastructure Programme had indeed been budgeted for and that an Appropriation Act had in fact been passed by the Provincial Government and an amount of approximately R1,078 billion had been appropriated in respect of road infrastructure in the Province. Minutes of meeting also showed that budgetary concerns were being addressed by provincial officials. The court said the following about the aforesaid documents and the Appropriation Act:

‘[They] lend a lie to the highly improbable and clearly contrived explanation by the Province that the work had not been budgeted for.’

The court found it disturbing that on the version of the MEC the amounts already paid to the main contractor and the subcontractor would have constituted irregular expenditure in respect of which disciplinary steps ought to have been taken. There was no indication that that had occurred. At best for the Province, in the event that the budgeted amount was insufficient to pay the remainder of the amounts contractually due to the main contractor, the outstanding commitment would constitute unauthorised expenditure in terms of the Public Finance Management Act 1 of 1999 and would *ex lege* have constituted a first charge on the Provincial Treasury in the next financial cycle.

The court rejected the Province’s contention that it was not obliged to pay the first respondent because there was no contractual privity between them. It was submitted by the Province that the first respondent should look to the main contractor (the second respondent) for payment, notwithstanding that the Province had failed to pay the main contractor. The court had regard to contractual provisions from which it was evident that the Province knew that environmental services could only be provided by a subcontractor, of which it had approved. Furthermore, the Province had undertaken to pay the main contractor whatever was due to the subcontractor. The court held that all the affected parties had been joined, and the MEC had failed to raise any justification for its failure to pay the first respondent through the second respondent. The Province had also failed to heed the call by the then Minister of Finance to ensure that contractors it had employed were compensated.

In dismissing the appeal with costs the court stated that in relation to the transactions in question the provincial government had behaved unconscionably, without any integrity and had failed to be transparent and accountable as enjoined by our Constitution. The court emphasised that government should be a scrupulous role model. In the judgment the court stated that it hardly required any imagination to consider what members of the public would make of the manner in which it treated the two respondents. The also criticised the MEC for persisting in the appeal. It described the ongoing litigation as a waste of public money.