

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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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.

City of Tshwane v Nambiti Technologies (Pty) Ltd

The Supreme Court of Appeal (SCA) today upheld an appeal by the City of Tshwane against an order compelling it to evaluate a tender that it had cancelled, and award a contract in accordance with that evaluation. The SCA held that the decision to cancel the tender was not administrative action susceptible of judicial review in terms of Promotion of Administrative Justice Act 3 of 2000 (PAJA). It also held that there were no grounds for saying that the municipality acted unfairly in cancelling the tender.

The respondent in the appeal, Nambiti Technologies (Pty) Ltd, had held a contract for the provision of SAP support services to the Tshwane Municipality. That contract was due to expire on 31 December 2012. In October 2012 the municipality advertised a tender for the provision of SAP support services from 1 January 2013 for a period of three years. Nambiti, among others, submitted a tender.

Before the tender could be adjudicated, the City reviewed its needs in respect of information technology and SAP support services. It concluded that it did not

need such services on the basis or for the period set out in the advertised tender. It accordingly cancelled the tender and indicated that in due course it would publish a revised tender. In the meantime it appointed another contractor to provide SAP support services in terms of the applicable procurement regulations. Early in 2013 it advertised a fresh tender for the provision of SAP support services.

Nambiti Technologies contended that the cancellation of the original tender was unfair and the appointment of the new contractor was unlawful. It brought review proceedings in the Gauteng Division, Pretoria of the High Court to challenge these decisions. At the same time it obtained an interdict against the City preventing it from evaluating and adjudicating upon the fresh tender.

The review succeeded. The court declined to set aside the contract appointing the new contractor as, by the time of the hearing, it was about to expire. It held that the cancellation of the original tender was unfair. It set aside the cancellation of that tender. It ordered the City to afford the parties who had submitted tenders an opportunity to revise those tenders in order to take account of inflation, or to withdraw them. The City was ordered once that process was complete to adjudicate the tenders and award a contract pursuant to that adjudication.

The SCA held that the cancellation of the tender was not administrative action and accordingly could not be reviewed under PAJA. On the facts it held that there were no grounds for saying that the City's cancellation of the tender was unfair. Furthermore it pointed out that the effect of the court's order was to compel the municipality to acquire services on the terms of a tender, when it had decided that it no longer wanted those services on those terms. The procurement of services is fundamentally a matter for the decision of the organ of State concerned and not the court. For a court to order a municipality to

procure services that it has decided it does not want to procure, or does not want to procure on particular terms, infringes the municipality's constitutional powers and is contrary to the doctrine of separation of powers. The appeal was accordingly upheld and the order of the high court altered to one dismissing the application with costs.