



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: 15 September 2023

Status: Immediate

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Kunene Rampala Inc. v North West Province Department of Education and Sport and Development (460/2022) [2023] ZASCA 120 (15 September 2023)

Today the SCA dismissed with costs, the appeal against the decision of the North West Division of the High Court of South Africa, Mahikeng. (The high court).

This appeal concerned a dispute arising from an addendum to a service level agreement duly concluded between the appellant, Kunene Rampala Inc. (KR Inc.), a firm of attorneys and the North West Province, Department of Education and Sport Development (the Department), the respondent.

The facts that gave rise to this appeal are the following: on 28 September 2015 the Department invited tenders to provide services to conduct evaluation, adjudication and supply chain management administrative services for the provision and delivery of Learner Teacher Support Material (LTSM), under closed tender EDU 04/15 NW. KR Inc. submitted a successful bid, and on 9 October 2015 the Department and KR Inc. concluded a Service Level Agreement (SLA) with the contracted price of R1 243 215. 60. On 12 October 2015, just three days after the SLA was concluded, and before KR Inc. conducted any work, the parties concluded an addendum to the SLA without further procurement processes being followed. Pertinently, the addendum spelt out the task to be undertaken as the provision and delivery of stationery to the distributors, bearing in mind that in terms of the SLA KR Inc. was tasked to evaluate, adjudicate and identify the service provider, to supply chain management services, and to conduct the provision and distribution function. The lifespan of the work under the addendum was for a period of 3 years. Whilst, the lifespan of the SLA was only 12 months. As a result of the addendum the scope of work to be conducted was increased. The net effect was that the fees due were also increased. KR Inc. performed and completed its duties in terms of the SLA and was duly paid therefore. On 23 December 2016, pursuant to the conclusion of the addendum, KR Inc. issued its invoice to the Department but never received any payment which resulted in KR Inc. giving notice of its intention to institute legal proceedings against the Department.

The matter was brought before the high court, and KR Inc. argued that the addendum was concluded in order to secure the proper and efficient distribution of LTSM throughout the province before the start of the 2016 school year. Further, that the services set out in the addendum flowed from the tender EDU 04/15 NW which had been awarded to KR Inc. In addition hereto, KR Inc. pleaded in the alternative that through the addendum, a single source procurement arose which dealt with additional work that could not be separated from the work assigned under the SLA without great inconvenience. This was necessitated by the emergency situation that the province found itself in, to deliver the LTSM to the schools before the commencement of the 2016 school year. The Department's case, on the contrary, was simply that the addendum was concluded without complying with the procurement prescripts and as such, it sought that the contract be declared unlawful and invalid. It specifically pleaded that the addendum was concluded in contravention of s 217 of the Constitution, Regulation 16A of the Treasury Regulations issued in terms of the Public Finance Management Act (PFMA) and the National Treasury Instruction Supply Chain Management Instruction Notes, in that, no bidding process was undertaken.

The high court, as per Peterson J, dismissed KR Inc.'s claim with costs. The high court found that the appointment of KR Inc. as the suitable service provider came about by way of a mere 'swoop of the pen' with a total disregard to fair, equitable and transparent processes as is envisaged by s 217 of the Constitution. In addition, it concluded that the addendum extended the SLA without an open tender process, was clearly contrary to the Treasury's Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management. The high court also found that on the evidence before it, the Department was entitled to challenge the validity and lawfulness of the addendum in its plea, without seeking to review and set it aside. It accordingly dismissed KR Inc.'s claim as the contract was concluded in breach of the applicable procedure prescripts and was thus invalid and unlawful.

With leave of the high court, KR Inc. brought the matter before this Court to determine whether the high court was correct in finding that the contract was invalid, unlawful and in breach of the applicable procedural prescripts, in the absence of a counter-application seeking a review and setting aside of the addendum.

The SCA agreed with the high court and found that the conclusion of the addendum did not comply with s 217 of the Constitution as the process applied to appoint KR Inc. was not fair, equitable, transparent, competitive and cost-effective as required by the section. The SCA further held that such non-compliance with s 217 was at variance with the principles of legality, since the Department had no authority to conclude the addendum in the first place. The Court also found that there was no evidence supporting KR Inc.'s contention that the addendum was valid as it was a single source procurement, which arose as a result of an emergency situation as the provision and delivery of the LTSM had to take place before the commencement of the 2016 school year. With regard to the issue of a collateral and reactive challenge, the SCA found that the court a quo was correct in entertaining the collateral challenge of the Department, and declaring the addendum invalid and unlawful, for non-compliance with the prescripts of the public procurement processes. This, according to the SCA was clearly contrary to what s 217 of the Constitution sought to prevent, in respect of organs of state, like the Department in this case. Therefore, the declaration of invalidity and unlawfulness of the addendum by the high court was warranted and justice required that the collateral challenge be entertained and thus, the appeal was dismissed with costs.

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