Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN SUPREME COURT OF APPEAL

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***MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd* (298/08) [2009] ZASCA 33 (31 March 2009)**

In a judgment delivered today, the Supreme Court of Appeal has held that government departments that involve private business entities in their procurement practices cannot change the processes without warning to the businesses.

In so holding, the SCA, by a majority of 4 to 1, dismissed an appeal from a judgment of the High Court in Kimberley, in which Molwantwa AJ (with whom Kgomo JP concurred) found in favour of a group of publishers which for some years before 2006 the department had closely involved in public schools' book procurement.

Those schools ordered learner teacher support materials (LTSMs) off a departmental catalogue the publishers at their own expense prepared for this purpose. The schools placed orders with bookshops in the province, which then ordered the books from the publishers.

But in June 2006, the department decided to shortcut the process by cutting past the schools and the bookshops. For 2007, it decided on 'central provisioning' for grades 8, 9 and 11 – instead of the schools and bookshops procuring LSTM, it would do so itself. Its objectives were good – mainly efficiency and cost savings. But the effect on the publishers was harsh. Not only did

they stand to lose their profits, but their considerable 2006 investment, in producing the catalogue, paying a participation deposit, producing and distributing promotional materials, and undertaking expensive marketing and publicity 'roadshows', would go to waste.

Worse was that the department made this decision without consulting them. It did not even inform them. They learnt of the proposed change, months after it was circulated, by accident rather than the department's design. This triggered an emergency meeting with the department. But when this failed to provide a remedy, the publishers successfully interdicted the department from changing the practice for 2007.

The majority of the SCA, in a judgment by Cameron JA (in which Mthiyane JA, Maya JA and Boruchowitz AJA concurred) found that the High Court had rightly assessed the facts and equities of the situation, and soundly applied the law to them. The publishers invoked the legal doctrine of legitimate expectation; but the majority found that it was elementary fairness that demanded their protection.

In a dissenting judgment, Jafta JA found that the doctrine of legitimate expectation could not apply because (a) the publishers had shown no benefit to themselves from the previous system; (b) in any event, that system did not constitute a settled practice and therefore could not give rise to any expectation; and (c) finally, that system imposed no duty on the department to consult the publishers.