THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

24 November 2011

STATUS: Immediate

CHAIRMAN OF THE STATE TENDER BOARD V DIGITAL VOICE PROCESSING (PTY) LTD AND CHAIRMAN OF THE STATE TENDER BOARD V SNELLER DIGITAL (PTY) LTD & OTHERS (764/2010)

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

The Supreme Court of Appeal (the SCA) today dismissed both of the above appeals with costs.

Both appeals were against decisions of the North Gauteng High Court, Pretoria (Prinsloo J) that reviewed and set aside the blacklisting of the respondents from doing business with the government for a period of ten years.

The DVP Appeal

The court below found that the State Tender Board's (the STB) decision to blacklist DVP was invalid because, being an administrative action as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), it had been taken without DVP having been afforded a hearing.

The issue to be decided before the SCA was whether the decision to blacklist DVP was reviewable even though it had not been communicated to DVP by the STB. (DVP had only discovered that it had been blacklisted when the STB gave Sneller Digital the record of its decision to blacklist Sneller Digital. The resolution it had taken had also blacklisted DVP.) The argument advanced by the appellant was that the fact that DVP had not been informed by the STB of its blacklisting rendered the application for the review of the decision premature. In other words the issue was

one of ripeness. The SCA stated that while finality is usually achieved when an administrative decision has been made known, notification is not necessarily the proper indication that a decision is ripe for challenge. Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision, or even on whether the decision is a preliminary one or the ultimate decision in a layered process. Whether a decision is ripe for challenge is a question of fact. It was conceded, on behalf of the STB, that the decision had an effect on DVP. There was also no suggestion on the part of the STB that the decision was not final or that it had not been implemented. The adverse impact of the decision was that DVP could tender for as many contracts with the government as it wished and it would never be successful – and it would not know why. In these circumstances the SCA found that it was clear that the decision was ripe for challenge even if it had not been communicated to DVP by the STB itself.

The Sneller Digital Appeal

Sneller digital had tendered successfully for a government contract. It had performed in terms of the contract and some time after the contract had run its course, the STB blacklisted it and its directors. Three issues arose before the SCA in this matter. The first was whether the STB exercised a private, contractual power to blacklist the respondents or whether the power was a public, statutory power the exercise of which was an administrative action as defined in the PAJA and was reviewable in terms of s 6(1). If the decision was indeed administrative action, the second issue was whether the decision was tainted by irregularity and thereby liable to be set aside. The third issue related only to the second to sixth respondents. The point was taken by the appellant that their application for review was premature because, while the decision to blacklist Sneller Digital was communicated to it by the STB, it never communicated the decision to blacklist the individual directors to them.

The appellant asserted that the STB blacklisted the respondents in terms of clause 47 of the General Conditions and Procedures (ST36) published in the State Tender Bulletin 1421 of 17 May 1991 which, along with the State Tender Board regulations, made in terms of s 13 of the State Tender Board Act 86 of 1968, were incorporated into the contract between it and Sneller Digital that resulted from the tender submitted by Sneller Digital on 28 January 2000. This power, the argument proceeded, was a private power and was therefore not subject to the constraints imposed by the rules of public law. The SCA stated that by the time the power to blacklist was exercised the contract had run its course. Furthermore, the contract could not be the basis for the blacklisting of the directors of Sneller Digital because they were not parties to it. The only remaining source of the STB's power to blacklist was reg 3(5)(*a)* of the regulations made in terms of s 13 of the State Tender Board Act. The SCA held that the decision to blacklist the respondents was an administrative action in terms of PAJA with the result that it was, in terms of s 6(1), susceptible to review if any of the grounds of review specified in s 6(2) were found to be present.

The SCA stated that it is now well established in South Africa that a material error of fact is a ground of review. This is so even though it is not one of the grounds listed specifically in s 6(2). The decision to blacklist Sneller Digital and its directors fell to

be set aside because it was taken on the basis of a factual error: whereas the STB believed that the directors had not been appointed as such at the time Sneller Digital's tender had been submitted, and that they had accordingly fraudulently misrepresented that they were directors, the true position was that they had been appointed before the tender had been submitted. In addition, the SCA found that the decision was irrational as it was not 'based on accurate findings of fact and a correct application of the law'.

As to the final argument raised by the appellant, the SCA stated that it would be artificial and absurd to suggest that the decision to blacklist Sneller Digital, having been communicated directly by the STB to Sneller Digital's attorney and thence to its directors, is final but the remainder of the decision – blacklisting the directors – is not.

In the result the SCA ordered that both appeals be dismissed with costs.

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