



THE SUPREME COURT OF APPEAL  
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE  
SUPREME COURT OF APPEAL

31 May 2019

STATUS: Immediate

**Intech Instruments v Transnet Limited T/A South African Port Operations  
(1165/18)**

*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 an appeal against a judgment and order of the KwaZulu Natal Division of the High Court, Durban (Koen J, sitting as court of first instance) (the high court). The matter concerned the refurbishment and upgrade of the manganese ore terminal at the Port Elizabeth port in terms of a tender issued by the respondent, Transnet Limited t/a South African Port Operations. The appellant, Intech Instruments, won the tender. Problems arose in the execution of the tender. These problems were mostly due to the parties' differing interpretations of the contract. Transnet interpreted the contract to require that Intech perform all work to achieve the outcomes stipulated in the tender. Intech, on the other hand, interpreted the contract to mean that it only had to do certain items of work. These problems were never resolved and Intech left the site at the end of May 2007. It purported to cancel the contract on 13 August 2007. Its only basis for cancellation was that Transnet had repudiated the contract by allegedly unlawfully issuing two 'stop works' orders in March 2007. In response, Transnet, citing several breaches on the part of Intech, including its purported cancellation, its refusal to perform work in terms of the contract, its failure to adhere to safety prescripts and its abandonment of the site, cancelled the contract on 14 August 2007.

Intech sued for various amounts based on its cancellation of the contract. These claims were based on Transnet's alleged repudiation on the basis set out above.

Transnet in turn counterclaimed on the basis of a final certificate, alternatively for damages and amounts paid to Intech in error. The final certificate, issued in terms of the contract, was computed on the basis of the amount it cost Transnet to complete Intech's work and to remedy Intech's defective work. Koen J dismissed Intech's claims with costs and granted judgment in favour of Transnet on its counterclaim. It granted leave to appeal to this court.

The SCA held that the contract was, as contended by Transnet, a performance specific contract, commonly referred to as 'a lump sum contract', in terms of which stipulated outcomes must be achieved by a contractor. Intech was therefore required to complete all work to achieve these stipulated outcomes as contained in the tender. The court held further that Transnet was entitled by law and on the facts to issue the two 'stop works' orders. Intech conceded in the evidence that it was in breach of the provisions of the Occupational Health and Safety Act (the Act). These provisions were peremptory and Intech could not seek to contract out of liability to comply with statutory requirements in the Act. Intech's purported cancellation of the contract on the basis of Transnet's alleged repudiation, based on the 'stop works' orders, was therefore unlawful. Transnet was, in the circumstances, entitled to regard this purported cancellation as repudiation and to cancel the contract. The SCA held that motive is irrelevant as far as repudiation is concerned and that the only relevant factor to be considered is the conduct of the parties. Intech's purported reliance on Transnet's ulterior motive and bad faith in issuing the 'stop works' orders were thus misconceived. For this reason, Intech's claims were thus correctly dismissed by the high court.

The SCA further held that Intech could not rely on interim payment certificates and the consequent interim payments as a basis of its claims. The court pointed out that where a contract has been lawfully cancelled by an employer such as Transnet, the interim certificates cease to be of force and effect. The interim certificates cannot sustain self-standing claims separate from the remainder of the contract. The SCA held that the high court was correct in granting the judgment in favour of Transnet for its reduced claim on the final certificate.

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