



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY

Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality (Case no 1104/2019) [2020] ZASCA 122

From: The Registrar, Supreme Court of Appeal

Date: 6 October 2020

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of the Supreme Court of Appeal

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against an order of the Gauteng Division of the High Court, Pretoria (Baqwa J, sitting as court of first instance). The matter concerned so-called self-review of administrative action, whereby an organ of state seeks to have its own administrative decision undone through the process of judicial review. In this case it was the respondent, the City of Tshwane Metropolitan Municipality (the City), that sought to have its decision to award a tender to the first appellant, Altech Radio Holdings (Pty) Ltd (Altech), and the conclusion of certain contracts flowing from that decision, reviewed and set aside. The reviewable irregularities included noncompliance with its own rules, the misinterpretation of certain statutory prescripts, and maladministration in the tender process, so the City asserted.

The City intended developing a ‘smart’ city. On 15 September 2014 and after identifying its existing communications network infrastructure as inadequate for this purpose, The City published a Request for Proposal (RFP) and an invitation to bidders in respect of a municipal broadband network project (the project). Eight bids were received in response to the tender invitation and, after consideration, the City’s Bid Evaluation Committee (BEC) resolved to

recommend Altech as the successful bidder. On 9 June 2015 the City awarded the tender to Altech. The agreement was to be executed through a special purpose vehicle (SPV) for the successful funding of the project, which would be the second appellant, Thobela Telecoms (RF) (Pty) Ltd (Thobela).

Upon the award of the tender the third appellant, ABSA Bank Limited (ABSA), together with the Development Bank of Southern Africa (the DBSA), committed to providing Thobela with financing for the project. Subsequent to negotiations on a draft agreement between ABSA, Thobela and the City's attorney, Kunene Ramapala Inc (KR Inc), the Council of the City (the Council) duly resolved to approve the conclusion of a Build Operate and Transfer (BOT) agreement with Thobela, in terms of which Thobela was required to build, operate and maintain a 1500 km network of fibre-optic cable known as the Tshwane broadband network (the network) for a period of 18 years, split into a 3-year build phase and a 15-year maintenance phase, and to fund the capital cost of doing so.

Simultaneous negotiations were underway on a so-called Tripartite agreement, which was then concluded between ABSA, Thobela and the City on 4 August 2016, wherein ABSA (with the support of the DBSA) agreed to grant loans and make funds available to enable Thobela to meet its obligations owed to the City under the BOT agreement. The total funding of the project was R1.335 billion.

There were two key aspects to the project's commercial viability. One was that the City had committed to being the 'anchor customer' of the network. To this end, it agreed to pay to Thobela an annual service fee of R244 million once all 400 of the City's designated service sites (CPEs) had been installed. Second was the potential for the future commercialisation of the network's surplus capacity.

However, municipal elections held one day prior to the conclusion of the Tripartite agreement saw the African National Congress (ANC) lose control of three metropolitan municipalities, one being the City. The Democratic Alliance (the DA) became the head of a coalition government of the City's municipality, with Mr Solly Msimanga sworn in as its Executive Mayor. After gaining control of the City, the DA targeted a number of procurement contracts for 'review and possible cancellation', including the BOT agreement. On 22 August 2017 that agreement became the subject of a review application in the Gauteng Division of the

High Court, Pretoria. The City sought, firstly, to urgently interdict the implementation of the agreements and, secondly, to review certain decisions taken by its own officials over the period between April 2014 and September 2016 – essentially the tender process and the subsequent contracts concluded by the City, including the BOT and Tripartite agreements.

The urgent application (Part A) was in due course struck from the roll for want of urgency and the City was ordered to pay punitive costs on the scale as between attorney and client. The review application (Part B) was heard by Baqwa J and ultimately succeeded: The City's decisions to (i) award the tender to Altech; (ii) approve and conclude the BOT agreement; and (iii) amend the BOT agreement to extend the period provided for the fulfilment of the suspensive conditions were reviewed and set aside. So, too, were the BOT and Tripartite agreements – concluded pursuant to the tender award – invalidated and set aside. Altech, Thobela and ABSA took issue with this decision and appealed to the SCA.

The SCA noted that the City had launched the legality review application more than two years after the decision to award the tender to Altech, some 16 months after the Council had approved the BOT agreement, and one year after the Tripartite agreement was concluded. The principle issue on appeal was thus whether this delay was unreasonable or undue; and, if so, whether the court's discretion was nevertheless to be exercised by overlooking the delay and entertaining the application.

The SCA noted that the delay rule is a principle flowing directly from the rule of law and its requirement for certainty, in which there is a strong public interest. It was incumbent on the City to provide a full explanation covering the entire period of the delay. The SCA found the explanation to be superficial and unconvincing.

The City contended that the delay was justified because the DA had only won control of the City in August 2016 and thereafter required time to investigate the alleged irregularities perpetrated under the previous ANC-controlled administration. The SCA rejected this line of reasoning in law and in fact. It held that a change in political control of an organ of state such as the City was irrelevant, for it was a single juristic entity and the change in political administration did not change that. And, as a matter of fact, much of the evidence that was relied on was known or ought to have been known to the DA before it assumed control of the City. By November 2016 the City was already possessed of the information underlying all of

the grounds of review it ultimately relied on in the review application, yet chose to continue with the project nonetheless.

The City had evidently changed its attitude towards upsetting the contract on a few occasions. It pointed to the end of April 2017 as the time when it decided to seek legal redress, but had agreed to an expedited performance schedule at the management and steering committee meetings of 6 and 7 July 2017. In addition, before ABSA and the DBSA gave Thobela access to the funds, they sought confirmation of the lawfulness of the agreements from the City's attorney. KR Inc in turn confirmed that the agreements were valid and legally binding on the City and that the City had complied with all of the relevant legislation – not least its protection framework and policies – in connection with the tender. On the strength of this, ABSA and the DBSA signed the financing agreements and the first cash drawdown in order for Thobela to fulfil part of its BOT obligations to City. The SCA concluded that there was no acceptable explanation for the City's excessive delay, nor its inconsistent and vacillating conduct.

The SCA proceeded to the second enquiry, *viz.* whether the prospects of success on the merits meant that the unreasonable delay was nevertheless to be condoned. As to certain irregularities in the tender process, it was noted that public contracts did not fall to be invalidated on the basis of immaterial or inconsequential flaws. The City's submissions relating to its non-compliance with s 33 of the Constitution and also the Municipal Finance Management Act 56 of 2003 were quickly disposed of.

The SCA held that the high court had erred in finding that the City ought to have followed the procedures for a public-private partnership (PPP) because the project did not involve the performance of a municipal function or the provision of a municipal service, nor did it involve the use of municipal property. It further held that the high court had erred in its assessment of the consequences of setting aside the BOT and Tripartite agreements. It found that the high court was too receptive to the City's case and, as a result, lost sight of the multi-factor and context-sensitive enquiry with which it was engaged.

In the result, the appeal was upheld with costs, including those attendant upon the employment of two counsel.
