

Restoring trust: Supreme Court raises accountability standards in tenders

By [Richard Hoal & Mohamed Mota](#), issued by [Cox Yeats](#)

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A study of Regiments Capital Tender for SA Diplomatic Office in New York



The Supreme Court of Appeal (SCA) delivered a judgment on 14 June 2023 in a case between the Minister of International Relations and Cooperation and Others v Simeka Group (Pty) Ltd and Others.

The case centres on the controversial tender for the development of office and residential accommodation for South African diplomatic missions in Manhattan, New York City.

The Department of International Relations and Cooperation (the Department) awarded the contract to a joint venture between Simeka Group (Pty) Ltd and Regiments Capital (Pty) Ltd. After the controversy erupted the Department asked the court to set aside the contract in what is often referred to as a “legality review”.

The crux of the case before the SCA was twofold: first, whether the tender awarded by the Department to the joint venture was constitutionally valid; and second, whether the Department’s delay in initiating the legality review was unjustified.

The brief background was that in March 2016, the Department issued a Request for Proposals (RFP) seeking the appointment of a development partner, with particular emphasis on a South African entity capable of financing, procuring, and maintaining accommodation for government.

The tender specifications required the successful bidder to secure land in Manhattan, design and develop the property to the Department’s requirements, and raise the necessary funding for the ambitious project.

Following an evaluation and recommendation by the Bid Evaluation Committee (BEC) and subsequent decision by the Bid Adjudication Committee (BAC), the Department awarded the contract to the joint venture in May 2016.

Another competing bidder was disqualified for failing to comply with the requirement to submit financial statements as required by the tender documents.

Subsequently, a Steering Committee was formed with representatives from the Ministry, the Joint Venture and the National Treasury to oversee the implementation of the project. The committee proposed a finance lease, which had to be approved by National Treasury.

While certain exemptions were granted, compliance with Treasury Approval III (TA III) remained essential, including the submission of various project-related documents.

As the committee progressed the project, it became evident that the Ministry intended to assume sole responsibility for the acquisition of the land, contrary to the explicit requirement of the tender, which placed this responsibility on the successful bidder. Concerns were also raised about the association of Regiments Capital, a member of the joint venture, with a family implicated in corrupt activities. Despite efforts to address these issues, the National Treasury refused to approve TA III.

Seeking a solution, the state parties approached the State Attorney, who wrote a letter to the respondents' attorneys in June 2018, highlighting irregularities in the tender award.

Following this, and in October 2018, the state parties initiated review proceedings before the High Court. However, the High Court dismissed the application primarily because of an unexplained and excessive delay by the Department in initiating the review.

On appeal, the SCA recognised the non-compliance with the RFPs and the constitutional and statutory failures of the BEC and BAC in the tender process. The Court concluded that the joint venture had failed to meet the Ministry's express requirements and that the resulting contract was constitutionally invalid and unlawful based on the irregularities found.

Regarding the Ministry's delay in initiating the review, the SCA found that the High Court had failed to exercise its discretion and had failed to give due consideration to the significance of the constitutional implications of the procurement process. The Supreme Court of Appeal held that the Department's delay was reasonable considering the constitutional and public interest considerations at stake.

This judgment is a reminder of the need to comply with the procurement framework and maintain transparency in government procurement processes. It highlights the obligation on state entities to undo its own transgressions using legality reviews and shows that the courts will do so even if there are delays where there are public interest factors at play. This is almost always the case since procurement inherently involves the use of public funds – ultimately effecting the interests of all South Africans.



Richard Hoal



Mohamed Mota

ABOUT THE AUTHOR

Richard Hoal
Cox Yeats
Direct Tel: 031 536 8511
Email: [[rhoal@coxyeats.co.za]]

Mohamed Mota
Cox Yeats
Direct Tel: 031 536 0295
Email: [[mmota@coxyeats.co.za]]

[[www.coxyeats.co.za]]

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