

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA
REPORTABLE**

CASE NO: 451/98

In the matter between :

TECMED (PTY) LTD
Appellant

and

EASTERN CAPE PROVINCIAL TENDER BOARD 1st
Respondent

EASTERN CAPE PROVINCIAL GOVERNMENT 2nd
Respondent

**EASTERN CAPE PROVINCIAL DEPARTMENT OF
FINANCE**
3rd Respondent

S A PHILIPS (PROPRIETARY) LIMITED 4th
Respondent

Before: Smalberger, Vivier, Olivier, Scott JJA *et Mpati*
AJA

Heard: 14 September 2000

Delivered: 29 September 2000

JUDGMENT

OLIVIER JA

[1] I have read the judgment of my colleague Smalberger. On some issues we agree, on some not. The differences do lead, unfortunately, to divergent outcomes.

[2] The invitation issued by the Board required tenders to be submitted “... *on or before the closing date 10 October 1996 not later than 11:00*”. Tecmed did not comply with this requirement. The Board nevertheless considered its tender. Mr Ndlebe, the Board’s representative, erroneously and notwithstanding immediate objections by Philips, never informed the Board that Tecmed’s tender was late. The Board had a discretion to consider late tenders. Regulation 7(6)(d) reads as follows:

“(d) Any tender received after the closing hour shall be returned to the tenderer: Provided that --

- (i) ...*
- (ii) the secretariat may refer to the Board for its decision any late tender which has been delayed through no fault of the tenderer.”*

[3] Due to the misconception on the part of Ndlebe, the Board never exercised the said discretion. Philips was not at fault at any stage. The fact is that Tecmed failed to ensure that its tender would reach the Board timeously. Philips was entitled to have the award of the tender

to Tecmed set aside. Philips's main prayer was rightly granted by the Court *a quo*. Nevertheless, Tecmed pursued an appeal to this Court, and by far the largest part of the time spent on the hearing of this case was used by Tecmed's counsel in an endeavour to convince us that the main prayer should have been refused. He failed to do so.

[4] Having set the Board's award of the tender to Tecmed aside, the Court *a quo*, at the behest of Philips, made the following orders:

“(b) The matter is referred back to the First Respondent [the Board] to consider afresh tenders submitted in respect of the tender;

(c) The First Respondent [the Board] is interdicted and restrained from considering the tender purportedly submitted on behalf of the Fourth Respondent [Tecmed];

(d) ...

(e) Tecmed to pay the costs of the application occasioned by its opposition. These costs to include the costs of two counsel.”

[5] Philips was entitled to the relief sought in paras (b) and (e). In this Court counsel for Tecmed submitted that the correct order of the Court *a quo* should have been to refer the matter back to the Board to exercise its discretion whether to allow and consider Tecmed's late tender.

[6] I do not find any mention in the judgment of the Court *a quo* that Tecmed there also adopted its present attitude to the ancillary prayers.

[7] In its application to the Court *a quo* for leave to appeal to this Court, Tecmed mainly dealt with the main prayer. Its approach to the ancillary prayers is interesting. I quote from the relevant notice:

“13 The learned Judges, in concluding that the Tender Board would be precluded from considering late tenders if the matter was referred back to it for reconsideration, erred in

not giving effect to the provisions of Regulation 3(4)(c) and 7(7).”

14 The learned Judges failed to take cognisance of the fact that all the tenders had lapsed and that, accordingly, there was nothing that the Tender Board could reconsider.”

These two paragraphs were repeated as paragraphs 14 and 15 of the Notice of Appeal filed by Tecmed after this Court granted it leave to appeal.

[8] If the tenders had lapsed, as Tecmed said, there was in fact nothing that the Tender Board could consider again. But then it is impossible to understand why it now takes up the attitude that the matter should have been referred back to the Board in order to exercise its discretion to allow and consider its late tender. According to its own present view, Tecmed’s opposition to para (b) of the ancillary orders was misplaced. In any event, it never offered to abandon its opposition to the main prayer if Philips abandoned the ancillary orders. It persisted, to the very last, in opposing the main prayer.

[9] Philips, in my view, certainly achieved substantial success in its application and in its opposition to the appeal. Although it was not entitled to the relief sought in para (c) of the order that was of less importance and has by now become academic as completely new tenders will have to be invited.

[10] I would dismiss the appeal with costs.

P J J OLIVIER JA

**I CONCUR
VIVIER JA**