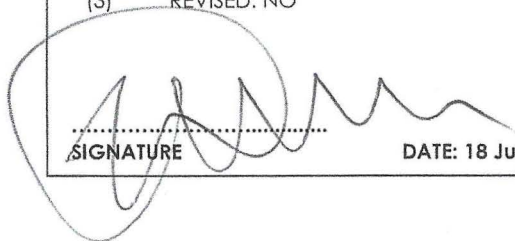


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/20801

|                                                                                    |                                                 |
|------------------------------------------------------------------------------------|-------------------------------------------------|
| (1)                                                                                | REPORTABLE: YES/ <del>NO</del>                  |
| (2)                                                                                | OF INTEREST TO OTHER JUDGES: YES/ <del>NO</del> |
| (3)                                                                                | REVISED. NO                                     |
|  |                                                 |
| SIGNATURE                                                                          | DATE: 18 June 2020                              |

In the matter between:

**SPECIAL INVESTIGATING UNIT**

First Appellant

**SOUTH AFRICAN BROADCASTING CORPORATION  
SOC LIMITED**

Second Appellant

and

**VISION VIEW PRODUCTIONS CC**

Respondent

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## JUDGMENT

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### THE COURT

#### Introduction

[1] This appeal concerns the remedy available in judicial review proceedings once a Court, in terms of s 172(1)(a) of the Constitution, declares a contract invalid due to procurement irregularities in its award and conclusion. Section 172(1) of the Constitution provides:

#### **'Powers of courts in constitutional matters**

- (1) When deciding a constitutional matter within its power, a court –
  - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just an equitable, including –
    - (i) an order limiting the retrospective effect if the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period or on any conditions, to allow the competent authority to correct the defect.'

[2] In this matter the respondent was appointed to render services for the second appellant (the SABC) regarding the construction of a multipurpose set and studio (the project) at an initial cost of R39 380 000.00 (excluding VAT). A written agreement (the contract) was concluded between the SABC and the respondent on 18 September 2015. However, it is common cause that the respondent was appointed to commence work under the contract prior to this date. The parties also signed an addendum to the contract in August 2016 the effect of which was to reschedule the payments due to the respondent, to extend the services to be provided. The contract price was also increased by some R14.5 million.

[3] The project was carried out over a period of time. According to the respondent, by 28 July 2017, it had delivered 80% of its performance. However, it is common cause that the SABC did not stick to the payment schedule agreed under the addendum. The respondent continued to perform under the contract. By the time the matter was heard by the Court a quo, it had performed between 90% and 98% of the services due by it under the contract.

[4] As we discuss in more detail below, on 1 September 2017, the President of the Republic of South Africa published a Proclamation (the 2017 Proclamation) under the Special Investigating Units and Special Tribunals Act,<sup>1</sup> referring various matters involving the affairs of the SABC for investigation and action by the Special Investigation Unit, the first appellant (the SIU). The contract with the respondent was one of the matters expressly referred to in the 2017 Proclamation.

[5] Following the SIU's investigations under the 2017 Proclamation it, together with the SABC, launched a review application in the Court a quo. They sought an order, inter alia, reviewing and setting aside the contract (including the addendum) on the basis that it was invalid by reason of the SABC's failure to comply with inter alia, s 217 of the Constitution,<sup>2</sup> and the statutory provisions and empowering prescripts regulating the procurement of goods and services by the SABC.<sup>3</sup> Following the Constitutional Court's

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<sup>1</sup> Special Investigating Units and Special Tribunals Act 74 of 1996.

<sup>2</sup> Section 217 of the Constitution, titled 'Procurement' provides as follows:

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
  - (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

<sup>3</sup> The SABC Memorandum of Incorporation; the Delegation of Authority Framework; the Group Supply Chain Management Policy and Preferential Procurement Policy; the Group Supply Chain Management Policy; the Group Executive Committee terms of reference.

decision in *Gijima*,<sup>4</sup> the review was based on the principle of legality. The review application was instituted on 23 April 2018.

[6] Although the respondent initially opposed the application before the Court a quo on the basis that the appellants had not provided evidence of the SABC's flouting of procurement procedures in awarding the contract, by the time the matter was heard by the Court a quo the respondent accepted that the contract was awarded irregularly and was invalid. In line with this, the Court a quo found that the conclusion of the impugned contract '*breached SABC's procurement policies, and the delegated authority framework, and was a deviation from the group executive committee's terms of reference, as well as other preferential procurement policies and relevant legislation.*'

[7] The court a quo granted the application, and made the following order:

- '1. The delay in launching the application, as well as the late filing of the applicant's affidavits (and) heads of argument is condoned.
2. The decision of 31 July 2015 to appoint the respondent is invalid and is accordingly set aside.
3. The contract entered on 18 September 2015, as well as the addendum thereof is invalid and is accordingly reviewed and set aside.
4. The order in paragraph 3 (reviewing and setting aside the contract) shall not divest the Respondent of its rights flowing from the due performance of the contract.
5. The order in paragraph 3 shall not apply to Clause 17 (the dispute resolution clause) of the contract and/or addendum.
6. The Applicants and the Respondent are to embark on or continue with the dispute resolution process to determine:
  - 6.1. the disputed performance;
  - 6.2. the payment due to the Respondent.'

[8] In declaring the contract invalid the Court a quo acted under s 172(1)(a) of the Constitution. The orders under paragraphs 4-6 (the remedial orders) were made by the

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<sup>4</sup> *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC); (CCT254/16) [2017] ZACC 40 (14 November 2017).

Court a quo in terms of its discretion under s 172(1)(b) of the Constitution to make any order that is just and equitable. There is no quarrel in this appeal with the Court a quo's declaration of invalidity of the respondent's appointment and the contract. The bone of contention between the parties lies in the Court a quo's exercise of its equitable discretion and thus with the remedial orders in paragraphs 4-6. The appellants invite this Court to set aside this relief, with the effect that the contract would be void *ab initio*, and the respondent would not be entitled to pursue any rights under it. They accept that the respondent performed under the impugned contract without being fully recompensed by the SABC. However, they submitted that the proper way to deal with this is via the respondent pursuing its common law remedies under unjustified enrichment, and not through what the appellants submit was the unlawful 'resurrection' of the contract by the Court a quo in the exercise of its discretion under s 172(1)(b).

[9] This, then, is the issue at the heart of this appeal. Before considering the issue, it is necessary first to deal with two preliminary matters. First, although the respondent did not cross-appeal the Court a quo's condonation of the delay in the appellants' institution of the review proceedings, it continued to make something of the fact that the contract had been entered into in 2015, and the review instituted only in April 2018. This matter need not detain us for long. Over and above the absence of a cross-appeal on this matter, the majority of the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*<sup>5</sup> laid down how cases of this nature should be dealt with. Even in circumstances where a public entity unreasonably delays in applying to review and set aside its own contract, and even in the absence of cogent reasons to overlook the delay, a Court is nonetheless obliged to declare invalid and to set aside a clearly and indisputably unlawful contract.<sup>6</sup> In the present case, it is undisputed that the contract was unlawfully concluded. Thus, even assuming that there was a delay of this nature, it would not provide grounds for interfering in the Court a quo's declaration of invalidity and setting aside of the contract. The delay was, in any event, not protracted. The 2017 proclamation was issued in September 2017; a myriad of interviews were undertaken by the SIU very

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<sup>5</sup> *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC);(CCT91/17) [2019] ZACC 15 (16 April 2019).

<sup>6</sup> *Ibid* para 101.

soon thereafter, and the review was launched in April 2018. In the circumstances of this case, such delay is not unreasonable.

[10] The second preliminary matter requires a little more discussion. It involves the nature of a Court's discretion under s 172(1)(b), and the powers of a court on appeal in this regard.

### **The nature of the Court a quo's discretion and the power of this Court on appeal**

[11] The respondent submitted that s 172(1)(b) of the Constitution vested in the Court a quo a discretion, in the strict sense, to determine a just and equitable remedy. As such, the respondent says that as a Court of appeal, we are limited in the extent to which we may interfere with the Court a quo's findings as regards a just and equitable remedy. It is only if we are satisfied that the Court a quo did not exercise its discretion judicially that we may interfere with the remedial measures imposed. The respondent contended that in the absence of such a finding, we are not permitted to substitute alternative remedial measures that we might consider to be to be just and equitable. It argued further that the appellant's grounds of appeal were not directed at whether the Court a quo exercised its discretion judicially, but rather at the incorrectness of the Court a quo's remedial measures. On this basis, the respondent invited us to dismiss the appeal at the outset.

[12] The word 'discretion' is capable of different meanings when applied to the powers of a Court.<sup>7</sup> In the wide sense, it may mean no more than "*the action or discerning or judging; judgment; discrimination*".<sup>8</sup> This type of discretion is sometimes also referred to as a "*discretion loosely so called*".<sup>9</sup> It means no more than a mandate to have regard to a number of disparate and incommensurable features in arriving at a conclusion. On the

<sup>7</sup> *Knox D'Arcy & Others v Jamieson & Others* 1996 (4) SA 348 (A) at 361H.

<sup>8</sup> *Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited ('Perskor')* 1992 (4) SA 791 (A) at 796H, citing *The Shorter Oxford Dictionary* 'discretion'.

<sup>9</sup> *MTN Service Provider (Pty) Ltd v Afro Call* 2007 (6) SA 620 (SCA) at para 10, citing *Media Workers Association* (note 8 above); see also *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & Another* 2015 (5) SA 245 (CC); (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC) (26 June 2015).

other hand, a discretion in the strict sense,<sup>10</sup> is one that involves a choice between different but equally admissible alternatives.<sup>11</sup> In other words, it gives the Court freedom to choose between a range of legal alternatives.<sup>12</sup> A discretion in the strict sense gives a Court an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.<sup>13</sup> This explains why the normal power of Courts on appeal does not apply to such a discretion.

[13] The Constitutional Court summarised the legal position as follows in *Giddy*:<sup>14</sup>

'The ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law....'

[14] The Constitutional Court added, in *Notyawa v Makana Municipality*, that:

'If none of these two grounds is established, it cannot be said that the exercise of the discretion was not judicial. In those circumstances, the claim for interference on appeal must fail.'<sup>15</sup>

[15] However, where the discretion is one in the broad or loose sense, the appeal Court's powers are not so circumscribed. In that case, there is no reason why the appellate Court should not exercise its own discretion by deciding the matter on its own view of the merits.<sup>16</sup>

[16] The Constitutional Court has recognised that there will be occasions where a decision made by another Court, which does not involve the exercise of a discretion in

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<sup>10</sup> This type of discretion is sometimes also referred to as a strong discretion, a discretion in the narrow sense, or a true discretion. See *Giddy NO v J C Barnard & Partners* 2007 (5) SA 525 (CC) at footnote 17; and *Trencon* (note 9 above).

<sup>11</sup> *MTN* (note 9 above).

<sup>12</sup> *Giddy* (note 10 above) para 19; *South African Broadcasting Corp Ltd v National Director of Public Prosecutions & Others* 2007 (1) SA 523 (CC) para 41.

<sup>13</sup> *Trencon* (note 9 above) para 85.

<sup>14</sup> *Giddy* (note 10 above) para 19.

<sup>15</sup> *Notyawa v Makana Municipality and Others* (CCT115/18) [2019] ZACC 43 (21 November 2019); (2020) 41 ILJ 1069 (CC) (21 November 2019) para 41.

<sup>16</sup> *MTN* (note 9 above) para 10, citing *Media Workers Association of South Africa* (note ... above).

the strict sense, will also only be interfered with in narrow circumstances on appeal. Thus, even if a court's discretionary power is not capable of a single characterisation for purposes of determining the correct approach on appeal, the appeal Court may, for other reasons, have cause to interfere in narrow circumstances with the Court a quo's decision.<sup>17</sup> An example is the inherent power of the Superior Courts under s 173 of the Constitution to protect and regulate their own process.<sup>18</sup>

[17] The Constitutional Court has recognised that a Court considering a constitutional matter has a wide remedial power under s 172(1)(b). The power is so wide that it is bounded only by considerations of justice and equity.<sup>19</sup> In relation to this statement of the legal position by the apex Court, Counsel for the respondent submitted that this was an indication that the discretion bestowed on a Court by the section is one in the strict sense, in that it permits a Court of first instance to consider a range of equally permissible legal alternatives as to what may be just and equitable in the case before it. This shows, submitted Counsel, that an appellate Court may only interfere in the exercise of the remedial power in narrow circumstances.

[18] There are indications in the jurisprudence of the Constitutional Court which lend support to the respondent's submission. The recent decision of *Notyawa*<sup>20</sup> involved a decision by a High Court to refuse to exercise its discretion in favour of condoning the applicant's delay in instituting review proceedings. In its judgment on an application for leave to appeal against this decision, the Constitutional Court stated that:

'...the scope of the present inquiry depends on the nature of the decision taken by the High Court. It will be recalled that the High Court has declined to condone Mr Notyawa's delay in instituting the review application and effectively refused to adjudicate the merits of his application. *In doing*

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<sup>17</sup> *SABC* (note 12 above) paras 40-41.

<sup>18</sup> See *SABC* (note 12 above) para 40. The case involved an appeal to the Constitutional Court against the decision by the SCA to disallow an application for television and radio broadcasts of proceedings before it in a criminal appeal. The Constitutional Court gave a range of reasons for finding that it should only interfere in the SCA's decision on narrow grounds.

<sup>19</sup> *Gijima Holdings* (note 4 above) para 53.

<sup>20</sup> *Notyawa* (note 15 above).

so the High Court was unquestionably exercising a narrow or strict discretion which may be interfered with on appeal only if specific grounds have been established....' (emphasis added).<sup>21</sup>

[19] It is significant that a Court's power to condone or overlook delays in the institution of review proceedings, and its remedial powers under s 172(1)(b) share a common denominator, viz. the interests of justice. Under s 9(2) of the Promotion of Administrative Justice Act (PAJA),<sup>22</sup> a Court may grant an application condoning a delay exceeding 180 days where '*the interests of justice so require*' (emphasis added). In the context of legality reviews, the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction* confirmed that a similar consideration applies to the Court's power to overlook an unreasonable delay.<sup>23</sup> It held in this regard that: '*... the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.*'<sup>24</sup> (Emphasis added).

[20] The judgment of the Constitutional Court in *Notyawa* does not go into the question of the nature of the discretion in any detail. The Court seems to have accepted as self-evident that a power to make an order in the interests of justice confers a discretion in the strict sense. A similar conclusion was reached by the Constitutional Court in its judgment in *Mwelase v Director-General for the Department of Rural Development and Land Reform*.<sup>25</sup> In that matter the Court was concerned with the powers of the Land Claims Court (LCC) under the Land Reform (Labour Tenants) Act.<sup>26</sup> The LCC had ordered the appointment of a special master. The Supreme Court of Appeal had set aside this part of its order on appeal. The LCC did not have express power to appoint a special master, but the Constitutional Court noted that the LCC enjoyed wide remedial powers under s 172(1)(b), as well as power to regulate its own process under s 173 of the Constitution. The Court found that:

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<sup>21</sup> Ibid para 33.

<sup>22</sup> Promotion of Administrative Justice Act 3 of 2000.

<sup>23</sup> *Buffalo City* (note 5 above).

<sup>24</sup> Ibid para 50.

<sup>25</sup> *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC); (CCT 232/18) [2019] ZACC 30 (20 August 2019).

<sup>26</sup> Land Reform (Labour Tenants) Act 3 of 1996.

'In voiding the appointment of the special master, the majority of the Supreme Court of Appeal gave no express consideration to the fact that the Land Claims Court was exercising not a weak power, but a powerful discretion. This is what this Court has recognised as "*a discretion in the true sense*". What is more, the discretion here was being exercised by a specialist court in relation to its assessment of its own capacity and expertise to ensure an effective remedy within a field the statute specially entrusts to it.'<sup>27</sup> (Emphasis added).

[21] In *Trencon*,<sup>28</sup> the Constitutional Court found that the power of a Court under s 8(1) of PAJA to award any order that is just and equitable, including, but not limited to the listed remedies, conferred a discretion in the strict or true sense, limiting the scope of an appellate Court's powers.<sup>29</sup>

[22] In *Gijima*, the Constitutional Court did not expressly consider the issue. It applied its own discretion in determining what would be a just and equitable remedy, and to the question of delay. In the circumstances of that case this approach was justified. The Courts below had applied PAJA to the review, and had non-suited the applicant by refusing to condone the delay in instituting review proceedings. The Court held that PAJA did not apply, and that the proper legal basis for the review was legality under the Constitution. It follows from the lower courts' incorrect application of a legal principle that the Constitutional Court on appeal was permitted to exercise its own discretion under s 172(1)(b). Neither the High Court nor the Supreme Court of Appeal considered the question of remedy under that section.

[23] In *Buffalo City*, the Constitutional Court adopted a similar approach on appeal. In this case, the High Court had upheld the review, and set aside the contract. The Constitutional Court departed from this by preserving the contract insofar as the respondent's accrued rights were concerned. However, in doing so, the Constitutional Court did not find that the High Court had failed to exercise its discretion judicially, as would have been required of it had the discretion been one in the strict sense. The Court

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<sup>27</sup> *Mwelase* (note 25 above) para 67.

<sup>28</sup> *Trencon* (note 9 above).

<sup>29</sup> *Ibid* para 90.

did not give consideration to the nature of the High Court's discretionary power, or expand on the reasons for its interference on appeal.

[24] Nonetheless, the weight of the authorities discussed above support the respondent's submission that in granting the remedial relief in its order, the High Court was exercising a discretion in the strict or true sense. Section 172(1)(b) is a wide power and clearly envisages that, in its exercise, courts will exercise a value judgment based on the facts before them. The question, then, is not whether we, as an appeal Court, would have exercised that discretion differently. We cannot simply impose on the parties remedies that we regard to be more appropriate. We may only grant alternative remedial remedies if we are satisfied that those ordered by the Court a quo are at odds with the law,<sup>30</sup> or were based on a wrong appreciation of the facts.

[25] The respondent took this issue further by submitting that as the appellant had based all of its grounds of review on the Court a quo having 'erred', the appellant had not laid a proper basis an appeal against the discretionary remedial orders granted. This further submission has no merit. We ought to be concerned with the substance of the appellants' complaints in the appeal, and not the language used.

[26] The appellants place the exercise of the discretion under s 172(1)(b) centre-stage in its appeal. Among other things, the appellant contends in its grounds of appeal that the Court a quo did not apply the default rule when it set aside the contract, but preserved the respondent's rights under it. It points out the conflict between the Court a quo's judgment and order and the Constitutional Court's orders in *Gijima*<sup>31</sup> and *Buffalo City*<sup>32</sup> and the judgment and order of Sutherland J in this Division in *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd*,<sup>33</sup> where Sutherland J declared the contract invalid, but referred the issue of the reasonable costs incurred in the project to arbitration, thus excluding any claim for profit, in accordance with the finding in *Gijima*. These are all

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<sup>30</sup> This terminology was used in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC); (CCT 127/13) [2014] ZACC 22 (26 August 2014) para 113.

<sup>31</sup> *Gijima* (note 4 above).

<sup>32</sup> Where the contract was declared invalid, but not set aside.

<sup>33</sup> *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd* (2016/44912) [2018] ZAGPJHC 455 (26 June 2018)

complaints that inherently involve the question of whether the Court a quo applied wrong principles of law, or acted on a wrong appreciation of the facts. It follows that we must proceed to consider the substance of the appeal, bearing in mind the limited bases upon which we may interfere with the Court a quo's orders.

### **The SABC and the 2017 Proclamation**

[27] The SABC is a state-owned company and the national broadcaster. It is a public entity in terms of s 1 read with Schedule 2 of the Public Finance Management Act 1 of 1999 (the PFMA), and is enjoined to discharge its duties in terms of the applicable laws relating to the procurement of goods and services. The PFMA was promulgated to give effect to the provisions of s 217 of the Constitution, which requires public entities, when contracting for goods or services, to do so in a manner that is fair, equitable, transparent, competitive and cost-effective. An open competitive bidding process is crucial to giving effect to the constitutional mandate set out in s 217 for the procurement of goods and services by public entities like the SABC. It is reliant on the 'public purse' for the procurement of goods and services and thus is bound to comply with all necessary processes when procuring same.

[28] As indicated earlier, the review application was brought not only by the SABC, but also by the first appellant, the SIU, which was established by the President of the Republic of South Africa in terms of Proclamation No. R118 of 31 July 2001.

[29] The SIU was mandated, in terms of the 2017 Proclamation to investigate certain allegations relating to the affairs of the SABC and to institute civil proceedings emanating from that investigation. The 2017 Proclamation empowered the SIU to investigate allegations regarding the financial losses that the SABC had suffered and which may be recovered. The SIU was mandated to recover *'any losses suffered by the SABC or the State, in relation to the ... matters in the Schedules'*.

[30] The Schedules provided for investigations into maladministration in the affairs of the SABC.<sup>34</sup> The SIU was empowered to investigate, inter alia:

- a. serious maladministration in connection with the affairs of SABC;
- b. improper or unlawful conduct by board members, officials or employees of the SABC;
- c. unlawful appropriation of expenditure or expenditure of public money or property;
- d. unlawful irregular or unapproved acquisitive transactions, measures or practices having a bearing on state property;
- e. intentional or negligent loss of public money or damage to public property;
- f. other offences referred to in the Prevention and Combating of Corrupt Activities Act 12 of 2004.
- g. unlawful or improper conduct by any person which may have caused serious harm to the interests of the public or any category thereof.

[31] Significantly for the present matter, the 2017 Proclamation provided for investigations relating to the procurement or contracting for goods or services on behalf of the SABC from a number of entities including, specifically, the respondent, and payments made in respect thereof, in a manner that was—

- (a) not fair, competitive, transparent, equitable, cost-effective;
- (b) contrary to applicable—
  - (i) legislation;
  - (ii) manuals, guidelines, practice notes, circulars or instructions issued by the National Treasury; or

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<sup>34</sup> No. 2 of the Schedule to the 2017 Proclamation.

(iii) manuals, policies, procedures, prescripts, instructions or practices of, or applicable to the SABC,

and any related unauthorised or irregular or fruitless and wasteful expenditure incurred by the SABC or the State.<sup>35</sup>

[32] Following its investigation under the 2017 Proclamation, the SIU, together with the SABC, instituted the review proceedings. They brought the application in their own interests, as well as in the public interest in terms of s 38 of the Constitution. In the founding affidavit the appellants submitted that the conclusion of the contract and the appointment of the respondent was irregular and unlawful in that it was effected in contravention of s 217 of the Constitution, read with the PFMA, Treasury Regulations, as well as several empowering prescripts regulating the governance of the SABC. The appellants sought an order reviewing and setting aside the appointment of the respondent and the contract.

[33] The SIU investigation established that the contract had been awarded in the circumstances set out below.

#### **The award of the contract**

[34] Prior to the involvement of the respondent in the project, on 13 June 2013, the Henley TV facilities, a business unit of the technology division of the SABC, submitted a business case requesting budget approval for the upgrade of the studio equipment in the Henley studios 1 and 2. As this was a capital expenditure (CapEx) project, approval was required from the Finance Investment Procurement and Technology Committee (FIPT), a subcommittee of the SABC Board. The Board resolved, on 26 July 2013, to approve the CapEx of R98 743 673.00 to migrate and upgrade Henley studios 1 and 2 from an analogue facility to a digital facility.

[35] The SABC then embarked upon a competitive bidding process for tenders to be submitted for the upgrades. Eleven preferred bidders were recommended. Despite this,

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<sup>35</sup> No. 1 of the Schedule to the 2017 Proclamation.

in December 2014, Mr Mfadi Mpuru (Mpuru), the founder and member of the respondent (who was not one of the bidders) was invited by Mr Hlaudi Motsoeneng (Motsoeneng), the Group Chief Executive Officer of the SABC at the time, via a telephone call from his professional assistant, to visit the SABC studios to assess the project. The purpose of the invitation was that Motsoeneng wanted a new studio set for the broadcast of the 2015 Rugby World Cup. On 4 February 2015, Mpuru attended at the SABC studios to take measurements and assess the studios for upgrades. The project manager for the upgrade project (who had dealt with the tender process) was informed that the upgrade project had been put on hold at the request of Motsoeneng and that the previous tender process was not approved by the Group Executive Committee (Exco).

[36] On 17 February 2015, the respondent submitted a quotation for the upgrade of all 11 studios of the SABC. On 4 March 2015, at a meeting of the Operations Committee (the OC), the respondent presented a business plan for the project. It was resolved that approval be granted for the SABC platforms to engage with the respondent to present the specific requirements for each platform of the project. The OC requested the respondent to provide a revised business plan and a breakdown of technical equipment that would be supplied.

[37] At a meeting of the OC on 5 May 2015, resolutions were taken that the Head of Sport was to coordinate the finalisation of the respondent's quotation for the project and table a business case which included the respondent's finalised quotation. The Committee was informed that the tender process was to be cancelled and the procurement division of the SABC was to effect the cancellation.

[38] On 20 July 2015, having presented the business case dated 13 July 2015, the Head Group Executive Sport, Ms Tawana, requested that the OC approve the deviation from the normal procurement process and contract with the respondent. It was resolved that it be recommended that the Exco approve the deviation. The Exco mandated Tawana to sign the contract on behalf of SABC with the respondent.

[39] A submission was compiled by Tawana for the Exco meeting scheduled for 29 July 2015, in terms of which Exco would be requested to grant approval for the finalisation of

the procurement process, and to contract with the respondent by deviation from the normal procurement processes. On 31 July 2015, Exco purportedly approved the request for deviation and approved the contract with the respondent. The approval was obtained by a round-robin resolution dated 31 July 2015. On 1 August 2015, the group secretary sent an email to the Exco members informing them that the round-robin approval was successful. The contract was signed on 25 September 2015.

### **The nature of the irregularities**

[40] It is not disputed by the respondent that the OC made the recommendation to Exco for the conclusion of the contract, in circumstances where it failed to inform Exco that it had, without the necessary delegation of authority, performed procurement functions of the SABC. What occurred was more than a direct negotiation, according to the appellants. This conduct is a transgression prohibited by clause 13.10 of the Supply Chain Management policy (SCM) of the SABC, which prohibits direct negotiations, without a bidding process and approval. In this case, the members of the OC facilitated, assisted, and supported the respondent with finalising its quotations in that it directly invited, negotiated with and accepted a quotation from the respondent without consideration of other competitive vendors. In addition, the OC:

- 40.1. did so without consideration of the fact that the respondent was not registered on the SABC vendor database;
- 40.2. engaged the services of the respondent before concluding a written contract setting out the terms of engagement with the respondent;
- 40.3. engaged the services of the respondent without a Tax Clearance Certificate.

[41] On the strength of the OC's recommendation, the SABC Board was induced by this misrepresentation to believe that on 31 July 2015 Exco had resolved that:

- 41.1. approval be given for the sports news divisions to deviate from the normal procurement processes to appoint the respondent for construction of the project at the amount of R39 380 000.00 (excluding VAT);

41.2. that the Head of Sport and GE for Technology were mandated to conclude and sign the contract documentation to give effect to the above on behalf of the SABC.

[42] As a result of this misrepresentation, the SABC:

42.1. appointed the respondent as the service provider for the project on 31 July 2015;

42.2. concluded the contract with the respondent on 18 September 2015, with a commencement date of 18 August 2015.

[43] During its investigations, the SIU found that only 6 of the 14 Exco members signed the round-robin resolution. This did not satisfy the threshold of a majority that is required to approve such a resolution. Thus, no valid resolution was obtained from Exco to obtain a deviation from the normal procurement processes. The approval of the deviation was thus irregular and unlawful. In addition, the reasons why a deviation was requested do not meet with the procurement policies and the SCM policies of the SABC; thus, the deviation was, in any event, irregular and could not have been approved.

[44] It was conceded by the respondent that the contract was vitiated by the numerous irregularities referred to. All procurement policies were flouted, and the contract was accordingly invalid.

### **The Court a quo**

[45] The Court a quo concluded, on the basis of these irregularities, that the contract was not validly awarded to the respondent. It found that it fell to be set aside. The Court then turned its attention to its discretion under s 172(1)(b), and the submissions made by the respondent in this regard. The respondent submitted that, notwithstanding the declaration of invalidity, it would not be just and equitable to divest it of its rights flowing from its performance under the contract. It therefore urged the Court a quo to exercise its discretion under s 172(1)(b) and to preserve its rights to secure payment from the SABC under the contract.

[46] The respondent's contention was that it was an innocent party in the awarding of the contract. It is not disputed that the respondent was approached by the SABC and requested to render the services – and that it did not solicit such approach. It therefore contended that it was an innocent tenderer and was entitled to full relief in respect of its claim. According to the respondent, it had no knowledge of the internal procurement requirements and policies of the SABC. The scope of its business was in the private sector. It had only tendered once for a public contract. It had previously done work for the SABC as a sub-contractor.

[47] The respondent pointed out further that the contract contained a warranty clause in terms of which the parties warranted, among other things, that they were duly authorised to enter into the contract, to represent the parties and to bind them to it. In addition, the respondent had performed substantially under the contract. The SABC was already enjoying use of the services rendered and goods received.

[48] The respondent also argued that as it was a 100% black owned entity, employing approximately 80 employees, it stood to be ruined if it did not recover its claim, in full, from the SABC. Thus, it was not in the interests of justice to have a viable empowered business, contributing to employment, economic development, transformation and the fiscus, destroyed due to no fault of its own. It stated that it had completed 98% of the services and that the SABC was using such equipment. This became an issue in an application for the introduction of new evidence on appeal. The new evidence that the respondent wished to introduce was that although the SABC had denied that it was using the equipment, it subsequently conceded that it was in fact doing so. The respondent contended that this is another issue which goes towards the just and equitable relief that it sought.

[49] The respondent prayed for either the dismissal of the application, alternatively that any declaration of invalidity be subject to the rider that it would not have the effect of divesting the respondent of rights which, but for the declaration of invalidity, it might have been entitled to under the contract.

[50] In determining a just and equitable remedy, the Court a quo took into account the nature of the irregularity, the role of the respective parties, and their conduct before and

after the irregularity was uncovered. The Court a quo found that the respondents could not plead ignorance as an excuse or a valid defence. It criticised the respondent for not appraising itself with tender regulations associated with procurement from an organ of state. However, although the Court a quo found that the irregularities were brazen, it found that the breach lay primarily at the door of the SABC, its management executive, and oversight structures. It found that there was no evidence that the respondent was corrupt or opportunistic and was, in effect, an innocent party.

[51] The Court a quo found further that the invalidity of the contract only arose after the respondent instituted arbitration proceedings in January 2018. In this regard, the Court a quo noted that in *Gijima*, the Constitutional Court found that the applicant in that matter ought not to benefit from its own undue delay. It found that the respondent had performed substantially under the contract.

[52] The court a quo referred to *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*,<sup>36</sup> where the court stated:

'To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.'

It took into account that the respondent was a 100 percent black owned company that employs 80 people.

[53] On these bases, the Court a quo was persuaded to grant the alternative relief sought by the respondent. Although it declared invalid and set aside the contract and the respondent's appointment, it granted a remedial order along the lines of the Constitutional Court's order in *Gijima*. In addition, the Court a quo directed the parties to continue with the arbitration process instituted by the respondent.

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<sup>36</sup> *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) para 23.

[54] In granting the remedial orders, the Court a quo dismissed the appellants' contention that even if the contract was set aside *ab initio*, the respondent retained remedies under the common law of unjustified enrichment to ensure that it would not be out of pocket. The Court found that the appellant's submission would lead to a multiplicity of actions. The Court a quo found support in the Constitutional Court's judgment in *Steenkamp NO v Provincial Tender Board, Eastern Cape*, in which the Court found that: '*It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies.*'<sup>37</sup>

[55] The Court a quo was similarly unpersuaded by the appellants' submission that the SABC was not in a financial position to pay the respondent in terms of the contract, in that one third of its available cash flow would have to be utilised to do so. It should be noted in this regard that it was common cause that the contract had not been required, planned for and that no budget had been allocated for it.

### **The applicable legal principles**

[56] The principles applicable to s 172(1) of the Constitution have been discussed in many judgments. It is trite that in terms of s 172(1)(a) of the Constitution, a declaration of invalidity is mandatory and accords with the doctrine of objective constitutional invalidity. A declaration that conduct is invalid pursuant to s 172(1)(a) of the Constitution confirms the invalidity from inception; that is the contract is void *ab initio*.<sup>38</sup>

[57] When it comes to a Court's remedial powers under s 172(1)(b), the Court has a wide discretion. Where it is just and equitable, it may limit the retrospectivity of its order or suspend it. The Constitutional Court in *Steenkamp* held that:

'In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. The court is bound only by

<sup>37</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); (CCT71/05) [2006] ZACC 16 (28 September 2006) para 29.

<sup>38</sup> See *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC) paras 27-28; *Premier, Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others* 2012 (4) SA 58 (CC) para 29.

considerations of justice and equity. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function.”<sup>39</sup>

[58] In *Allpay (2)*,<sup>40</sup> the Constitutional Court noted that the emphasis on correction and reversal was based on s 172(1)(b). Further, that remedial correction is also a logical consequence flowing from invalid and rescinded contracts and enrichment law generally. It went on to hold:

‘Logic, general principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.’<sup>41</sup> (Emphasis added)

[59] Similarly, in *Bengwenyama*,<sup>42</sup> the Court emphasised the importance of the principle of legality in determining a just and equitable remedy, and the need for Courts to justify a remedial order that does not give full effect to a declaration of invalidity:

‘It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follow upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the “desirability of certainty” needs to be justified against the fundamental importance of the principle of legality.’ (Emphasis added)

<sup>39</sup> *Steenkamp* (note 38 above) para 29.

<sup>40</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12 (17 April 2014); 2014 (4) SA 179 (CC) para 29.

<sup>41</sup> *Ibid* para 30

<sup>42</sup> *Bengwenyama Minerals (Pty) Ltd & Others v Genorah Resources (Pty) Ltd & Others* 2011 (4) SA 113 (CC); (CCT 39/10) [2010] ZACC 26 (20 November 2010) para 84.

[60] In order to assess what is just and equitable, a Court should have regard to various factors involved in the award of the contract, the nature of the irregularity and the role of the respective parties. The just and equitable inquiry is multi-dimensional. A just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between.<sup>43</sup>

[61] In the context of public-procurement matters, priority should be given to the public good. The primacy of the public interest must be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. Consequently, the inquiry is not one-dimensional, but has a broader range.<sup>44</sup>

[62] Significantly, in *Allpay (2)*, the Constitutional Court held that:

'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract. And any benefit it may derive should not be beyond public scrutiny.'<sup>45</sup> (Emphasis added)

[63] The principle laid down in *Allpay (2)*, that even an innocent tenderer should not benefit from the proceeds of an invalid contract, was applied by Sutherland J in this Division in *Mining Qualifications Authority*:<sup>46</sup>

'... taking the circumstances under which the respondent came to be awarded the tender, no factor is apparent why it should retain any profit made by its efforts. In my view it (is) unnecessary that a clear case of complicity is proven; it is enough that the award was tainted by irregularity. Were it otherwise, the plea of an innocent tenderer would as a matter of course outweigh the public interest. The pendulum should usually swing the other way. What one has not obtained through a fair and transparent process ought not to vest any moral claim to retain the spoils.'

### On appeal

<sup>43</sup> *Allpay (2)* (note 41 above) para 38.

<sup>44</sup> *Ibid* paras 32-33.

<sup>45</sup> *Ibid* para 67.

<sup>46</sup> *Mining Qualifications Authority* (note 33 above) para 41.

[64] Having regard to these principles, the appellants submit that this Court would be justified in interfering with the remedial measures ordered by the Court a quo. They contend that the Court a quo's discretion under s 172(1)(b), although extremely wide, must always be aligned to the purpose sought to be achieved. They submitted that the principal purpose of constitutional remedies is, inter alia, to vindicate the Constitution and to serve as a deterrent.<sup>47</sup> In particular, they say that the remedial orders granted by the Court a quo did not accord with what the Constitutional Court has found to be the default position in matters of this nature, viz. that the unlawful conduct must be corrected by setting it aside.

[65] The Court a quo did not limit or suspend its order; it set aside the impugned contract. The appellants contend that the Court then '*attempted to claw back (breathe life back into the impugned contract) from its section 172(1)(a) declaration.*' They submit that this was an impermissible exercise of the Court's remedial discretion. The appellants contended further that there were no compelling public interest considerations justifying the remedial orders made by the Court a quo. They thus argue that, unless there are exceptional and compelling public interest considerations at play, the Court cannot ameliorate the harshness of an order of a declaration of invalidity.

[66] The appellants argue that the Court a quo's remedial orders were not predicated on the applicable legal principles discussed above, but on the respondent's BEE status, its apparent innocence, substantial compliance, and the need to prevent a multiplicity of actions.

[67] Further, the appellants submit that the Court a quo did not limit what the respondents could claim; the claim would of course include a claim for profit which they contended is at odds with the Constitutional Court judgment in *Allpay (2)*, as well as being at odds with this Court's decision in *Mining Qualifications Authority*.

[68] The respondent, on the other hand, submitted that given the wide nature of the Court a quo's discretion, there is no justification for this Court on appeal to interfere with

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<sup>47</sup> See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 96.

the remedial orders granted. It says that the Court a quo took into account all relevant factors in preserving the respondent's rights to claim all amounts due to it for its performance under the contract. Even if this Court was to take a different view to that of the Court a quo in this regard, that is insufficient to warrant an interference with the orders on appeal. The respondent submitted that its innocence in the irregularities that had transpired presents a compelling circumstance, warranting a deviation from the default position described in *Allpay (2)*.

[69] We indicated earlier, that on appeal we may interfere with the Court a quo's remedial orders if we find that they were based on a wrong appreciation of facts or a wrong principle of law.

[70] Having regard to the facts in this case and the law in relation to the remedy applicable, we are of the view that the Court a quo applied the wrong principle in law, by preserving all of the respondent's rights under the contract. This would entitle the respondent to claim the full contract price (including its profit). In making an order of this nature, the Court a quo did not have regard to the legal position set out by the Constitutional Court in *Allpay (2)*.<sup>48</sup>

[71] The Court a quo approached the matter as if it had to carry out an all-or-nothing balancing exercise by either setting aside the contract in full, or preserving the respondent's rights under it in full. But this is not what is required of a Court in public-procurement matters of this nature. As the Constitutional Court has said, it may well be that something less than a complete setting aside or a complete preservation is required. In determining an appropriate order, the public interest must be paramount. Further, while a party in the position of the respondent should not suffer a loss, it should also not profit at the expense of the public purse. This is a fundamental aspect of the principle of legality, and of the need to correct plainly unconstitutional conduct. By preserving the respondent's full rights under the contract, the Court a quo diverged from the established legal principles as laid down in the Constitutional Court and as applied in this Division.

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<sup>48</sup> *Allpay (2)* (note 41 above).

[72] *Bengwenyama*<sup>49</sup> explains that although the discretion under s 172(1)(b) is wide, there must nonetheless be reasons to justify a departure from the default position by giving legal effect to an invalid act. There were no exceptional circumstances to warrant giving full effect to the contract in this case. On the contrary, the public interest clearly required that the respondent ought not to be permitted to recoup its profits from the SABC under the contract. The Court a quo failed to appreciate the fact that the review application flowed directly from the 2017 Proclamation in terms of which the SIU was mandated to recover any losses suffered by the SABC from the unlawful contract. Its remedial order, in permitting the respondent to recover its profits (and not only its costs) under the contract, undermined the purpose of the 2017 Proclamation, and thus the public interest it served. In our view, the public interest demands that the public purse should not be depleted. This is particularly so in circumstances where, as in this case, it was common cause that the project had not been planned or budgeted for, and that it would require a third of the SABC's available resources to pay the full contract price.

[73] The Court a quo did not deal with this issue in fashioning a remedy that allowed for the respondent to recover the full contract price. It did not appreciate that there is an important deterrent purpose in limiting what a party in the respondent's position may recover under an invalid procurement contract. The principle of legality would be completely undermined if, in the absence of evidence of collusion on its part, a contracting party could as a matter of course retain its profit. In our view, a remedial order that permits a full retention of profit should be the exception rather than the rule, and must be justifiable on the facts.

[74] In regard to the factual scenario, the Court a quo, in exercising its discretion, assigned negligible fault to the respondent, treating it, in effect, as a perhaps careless, but innocent contractor. While the Court a quo found that the respondent's ignorance of the law was not a defence, it nonetheless accorded the weight of blame to the SABC, and exercised its discretion accordingly. The Court a quo failed to take into consideration that the respondent did not give any explanation for its apparent ignorance of the SABC's

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<sup>49</sup> *Bengwenyama* (note 43 above).

procurement requirements, save to say that it usually worked in the private sphere. The answering affidavit was devoid of any helpful details as to how it was justified in taking the SABC at face value when the respondent was approached out of the blue and invited to submit a quotation for a substantial project.

[75] In stating that it was an innocent tenderer, the respondent went no further than simply stating that proposition. At no point did the deponent for the respondent, who is a well-seasoned businessman, enquire from the SABC whether the relevant procurement policies applicable to all state-owned entities had been complied with. The respondent contended that it had only once previously dealt with a state entity, and that it was unaware of the procurement policies required for contracting with the state. The respondent relies solely on the fact that the SABC warranted to it, in the contract, that it had been authorised to conclude the contract and that it was binding on it. This appears to be a standard clause which would appear in most contracts of this nature, and did not exempt the respondent from making further enquiries in this regard. What the respondent does not deal with is the basis upon which it believed that it could commence on a project valued at nearly R40 million, despite there being no contract in place until September 2015, without it being registered on the SABC's vendor list, and without submitting a Tax Clearance Certificate.

[76] The respondent relied on *Gijima*<sup>50</sup> to justify the remedial orders made by the Court a quo. Indeed, paragraph 4 of the order mimics the order made by the Constitutional Court in *Gijima*. However, the Court a quo failed to appreciate that there is a patent distinction between the two cases. The Constitutional Court dealt with *Gijima*'s conduct in the conclusion of the contract as follows:

'It was agreed that SITA would comply with all its internal procurement procedures in respect of these two agreements. Throughout, Gijima was concerned whether SITA had complied properly with its procurement processes. SITA assured Gijima that it had the authority to enter into the settlement agreement. It inserted the following term into the DoD services agreement (DoD agreement) at the insistence of Gijima:

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<sup>50</sup> *Gijima* (note 4 above).

"Sita unconditionally warrants, undertakes and guarantees that it has taken all steps necessary to ensure compliance to any relevant legislation governing the award of the Services to the Service Provider and specifically towards ensuring that this Agreement is entirely valid and enforceable, including but not limited to the Public Finance Management Act 1 of 1999. Indemnifies the Service Provider against any loss it may suffer should this warranty be infringed."<sup>51</sup>

[77] It is clear that the same situation does not pertain to the respondent in this case. On the contrary, the respondent adopted a supine approach to the procurement processes. It is inconceivable that any business person operating on the scale that the respondent operates would be ignorant of the basic tenets of public procurement process, viz. the need for a competitive, fair and transparent tender process. In our view, the Court a quo failed to appreciate these facts in being persuaded that the respondent was an innocent party whose interests under the contract outweighed the public interests involved.

[78] We are therefore satisfied that, both on the facts and the law, the appellant has laid a proper basis for this Court to interfere with the discretion exercised by the Court a quo.

[79] Having made such finding, we are of the view that the just and equitable remedy will be for the respondent to have a claim against the SABC, but only insofar as it is to be awarded its reasonable costs of the project. It cannot however benefit from the impugned contract by making a profit therefrom.

### **Costs**

[80] The Court a quo correctly ordered each a party to pay its own costs. In our view, although the appellants have been partially successful in the appeal, this Court considers the SABC's conduct to have been blatantly irregular. The respondent had performed

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<sup>51</sup> Ibid para 6.

substantially, and the irregularity was only sought to be corrected after a substantial period of time had lapsed. As was observed in *Allpay (2)*:

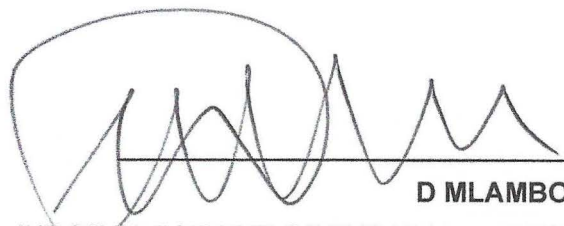
‘There are no real winners or losers in the ordinary litigation sense. If there is to be any winner, one hopes it will be the general public who will gain from adherence to the rule of law and greater transparency and accountability in relation to the payment of social grants. It is just to make no order as to costs. Each party will bear its own costs.’<sup>52</sup>

**ORDER:**

1. The appeal succeeds, in part.
2. Paragraphs 4, 5 and 6 of the Court a quo’s order are set aside and replaced with the following:
  - a. The respondent is to file with this court, within 30 days hereof, an audited statement of the expenses incurred, the income received and the net profit it would have earned under the completed contract;
  - b. The SABC must within 60 days thereafter obtain an independent audited verification of the details provided by the respondent under paragraph (a) above and file the audited verification with this Court;
  - c. The Court will thereafter determine the amount to be paid to the respondent.
  - d. There will be no order as to costs.
  - e. All documents are to be filed with the secretary of Judge President Mlambo and uploaded on CaseLines.

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<sup>52</sup> Ibid para 77.

**D MLAMBO**

JUDGE PRESIDENT OF THE HIGH COURT  
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

**S E WEINER**

JUDGE OF THE HIGH COURT  
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

**R KEIGHTLEY**

JUDGE OF THE HIGH COURT  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:

20 May 2020

Date of judgment:

19 June 2020

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**Appearances:**

Counsel for the Appellants:

Adv. JA Motepe SC;

Adv. T Motau SC; Adv. R Tshetlo

Instructing Attorneys:

Werksmans Attorneys

Counsel for the Respondents:

Adv. HP van Nieuwenhuizen; Adv. NS Nxumalo

Instructing Attorneys:

Tshabalala Attorneys