



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 342/22

In the matter between:

GREATER TZANEEN MUNICIPALITY

Applicant

and

BRAVOSPAN 252 CC

Respondent

Neutral citation: *Greater Tzaneen Municipality v Bravospan 252 CC* [2024] ZACC 20

Coram: Bilchitz AJ, Chaskalson AJ, Dodson AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J

Judgments: Bilchitz AJ (concurring): [1] to [53]
Chaskalson AJ (majority): [54] to [63]
Dodson AJ (concurring): [64] to [68]

Heard on: 20 February 2024

Decided on: 2 October 2024

Summary: Compensation for services delivered pursuant to an unlawful tender process — court not placed in a position to decide substantive basis for compensation — in the interests of justice not to delay compensation — unacceptable conduct for organs of state to use own unlawful conduct to avoid compensating innocent contractors

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Limpopo Division, Polokwane):

1. Leave to appeal is refused.
2. The applicant is ordered to pay the respondent's costs in this Court, including the costs of two counsel.

JUDGMENT

BILCHITZ AJ (Mathopo J concurring):

Introduction

[1] The Constitution enjoins organs of state to maintain and promote a high standard of professional ethics.¹ Moreover, when contracting for goods and services, organs of state are mandated to do so in accordance with systems that are fair, equitable, transparent, competitive and cost-effective.² This case concerns a municipality, the Greater Tzaneen Municipality (Municipality), the applicant in this matter, that purported to extend an existing contract for the provision of security services, in the absence of a lawful tender process. Upon recognising the failure to conform to its own procurement processes, the Municipality applied to invalidate the extension of the contract. Notwithstanding the invalidity application, the Municipality requested the respondent, Bravospan 252 CC (Bravospan), to continue providing services but failed to pay for them.

¹ Section 195(1)(a) of the Constitution.

² Section 217(1) of the Constitution. See also *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (*Steenkamp*) at para 33.

[2] The contract was declared invalid in one set of legal proceedings but no order was made concerning compensation for the services that had already been delivered. Bravospan then brought separate proceedings to claim payment for the performance it had rendered. The High Court found in favour of Bravospan based on the common law of unjustified enrichment. The present application is against the Supreme Court of Appeal's order that Bravospan was entitled to claim compensation but on a different underlying legal foundation to the decision of the High Court – namely, through the exercise of a court's power to make any order that is just and equitable in terms of section 172(1)(b) of the Constitution.³

Background

[3] In 2013, the Municipality advertised a tender for the supply of security services. In the advertisement, the duration of the contract was not clearly stipulated. At a briefing session, the Municipality informed the potential bidders (including Bravospan) that the initial term of the contract would be for 12 months and could be subject to an extension, depending on price.

[4] Following a competitive bid process, Bravospan was awarded the tender to provide the Municipality with security services. On 20 November 2013, the parties entered into a written agreement, the terms of which required Bravospan to provide the following services:

³ Section 172(1) of the Constitution states:

“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 and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

“4.6.1 Installation and commissions of CCTV surveillance system at the following

Municipal areas:

- Civic Centre (main building) – CBD streets
- Tzaneen Library
- Tzaneen Testing Ground
- Municipal Stores
- Electrical Power Station
- Nkowankowa Testing Ground
- Mechanical Workshop

4.6.2 Maintenance, repairs and support of CCTV system

4.6.3 To provide staff to monitor the control room for 24 hours [seven] days a week.”

[5] The clause relating to the duration of the contract provided as follows:

“5.1 The value of this contract shall be R2 757 666.60 for a period of 12 months.

Should the Municipality wish to extend the service, written agreement must be negotiated and signed by the two parties especially on prices.”

[6] Pursuant to the conclusion of the agreement, Bravospan set up a fully equipped control room and installed monitoring equipment at the contractually specified sites. All invoices for these services were honoured and paid in full by the Municipality in terms of the agreement.

[7] Shortly before the termination of the contract, the parties entered into negotiations to extend the agreement for a further 24 months. During these negotiations, Bravospan specifically asked the Municipality about the validity of an extension agreement without an additional bid process. The Municipality, on the strength of a legal opinion it obtained, assured Bravospan that the agreement could be lawfully extended without the need for a further tender process.

[8] On 28 August 2014, the parties purported to extend the duration of the agreement for a further period of 24 months (extension agreement), without an additional tender process. The terms of the extension agreement included additional sites at which

Bravospan would provide security services. The agreed value of the contract was increased accordingly to R9 624 000.

[9] Despite the litigation discussed below, Bravospan continued to provide the services specified in the extension agreement to the Municipality until the end of the 24-month period (31 October 2016) and delivered monthly invoices to the Municipality. The Municipality failed to honour these invoices. A demand for the Municipality to compensate Bravospan for the services delivered in terms of the extension agreement resulted in litigation and the present application before this Court.

Litigation history

High Court – the invalidity application

[10] On 9 February 2015, the Municipality brought an application in the High Court of South Africa, Limpopo Division, Polokwane (High Court) seeking an order declaring the extension agreement null and void, or, in the alternative, reviewing and setting aside the agreement. Bravospan opposed the application and filed a counter-application for the payment of R2 005 000, that comprised the amount for services rendered in terms of the extension agreement, as at the date of the proceedings.

[11] The Municipality contended that the extension agreement was concluded without a tender process and, therefore, was not in compliance with section 217(1) of the Constitution,⁴ sections 111⁵ and 112(1)⁶ of the Local Government: Municipal

⁴ Section 217(1) states that “[w]hen an organ of state in the national, provincial or local sphere of government . . . contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-efficient.”

⁵ Section 111 provides that each municipality must have and implement a supply chain management policy that complies with the provisions of the Act.

⁶ Section 112(1) provides that a municipality’s supply chain management policy must comply with the requirements in section 217(1) of the Constitution and lists certain measures and processes that the policy must contain.

Finance Management Act⁷ and Circular 62⁸ issued by the National Treasury which contains guidelines and measures to improve accountability and transparency in municipal procurement processes.⁹ In its founding affidavit, the Municipality submitted that in terms of its own policy, based on Circular 62, competitive bids had to be invited when any goods or services were procured in excess of R200 000 (VAT inclusive) or for any contract that exceeded one year in duration. In addition, the policy required the preparation and publication of a bid specification inviting qualifying bids, which are evaluated by a Bid Evaluation Committee. The award of a preferred bidder is then decided by a Bid Adjudication Committee.

[12] In its opposing papers, Bravospan submitted that the Municipality had failed to adhere to clauses 14 and 15 of the extension agreement, which provided for the settlement of disputes by consultation and, if that fails, a referral of the dispute to arbitration. On the merits, Bravospan placed reliance on clause 5.1 of the agreement, which permitted the possibility of negotiating and agreeing upon an extension. It submitted that this clause was complied with and, therefore, the extension agreement was properly negotiated and valid. Further, it alleged that the defence of estoppel was available to it, given the express recordal that the Municipality was represented by the acting municipal manager who was duly authorised to enter into the contract by the municipal council. The Municipality provided Bravospan with no reason to suspect that its internal processes were not followed when the extension agreement was concluded.

[13] On 8 July 2015, the Municipality made a written offer of settlement to Bravospan and on 10 July 2015, it wrote to Bravospan requesting it to continue rendering services until a new service provider was appointed. On 13 July 2015, Bravospan appears to

⁷ 56 of 2003.

⁸ National Treasury MFMA Circular No. 62 *Supply Chain Management: Enhancing Compliance and Accountability* (July 2013).

⁹ *Id* at 1.

have accepted the offer of settlement but the negotiations did not proceed any further and the matter was argued before the High Court on 29 April 2016.

[14] On 19 August 2016, Mokgohloa DJP delivered judgment in favour of the Municipality and held that the extension agreement was invalid for want of compliance with the Municipality's legal obligations when conducting procurement processes. Bravospan's reliance on estoppel was rejected on the basis that to uphold the transaction would grant validity to a contract that was unlawful and *ultra vires* (beyond the Municipality's legal powers). Nothing was said about compensation for the services already delivered. As a result, the following order was granted:

- “1. The extension of a service level agreement concluded between the [Municipality] and [Bravospan] is declared null and void.
2. The counter-application is dismissed with costs.
3. [Bravospan] is ordered to pay the costs of the application on an attorney and client scale.”

[15] Aggrieved by this order, Bravospan brought an application for leave to appeal to the Full Court of the High Court, which was dismissed by Mokgohloa DJP on 9 November 2016. A subsequent application for leave to appeal to the Supreme Court of Appeal suffered the same fate on 27 February 2017.

High Court – the compensation application

[16] On 8 September 2017, Bravospan delivered a notice in terms of section 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act¹⁰ (Legal Proceedings Act) to the Municipality. That notice related to an intended damages claim against the Municipality.

[17] On 19 January 2018, Bravospan issued summons in the High Court and claimed from the Municipality an amount of R9 624 000, comprising the contractual amount

¹⁰ 40 of 2002.

specified in the extension agreement. In its particulars of claim, Bravospan relied on four alternative causes of action, namely, (a) delict; (b) fraudulent misrepresentation; (c) unjustified enrichment; and (d) constitutional damages. The Municipality opposed the action and raised four special pleas: (a) *res judicata* (the claim has already been adjudicated); (b) non-compliance with section 3(2) of the Legal Proceedings Act; (c) that constitutional damages did not constitute an appropriate remedy; and (d) prescription.

[18] In the pre-trial minute of 21 September 2020, the parties agreed to a separation of the question of liability from the determination of the quantum of compensation that might be found to be due. The only issue before the High Court was, therefore, to determine the question of liability. It was agreed by the parties that if the High Court found in favour of Bravospan, the issue of quantum would be referred to mediation.

[19] On 2 February 2021, the High Court, per Makgoba JP, delivered a judgment on the merits and found in favour of Bravospan on the basis of the unjustified enrichment cause of action. The Court held that it was unnecessary to consider the other three causes of action. It dismissed the Municipality's special pleas in relation to *res judicata*, non-compliance with the Legal Proceedings Act and prescription. The following order was granted:

- “41.1. [Bravospan] has made out a case against the defendant based on unjust enrichment.
- 41.2. The [Municipality] is ordered to pay [Bravospan] an amount determined under the disputed quantum.
- 41.3. The [Municipality] [is] to pay the costs of this action on [the] party and party scale.”

Supreme Court of Appeal – the compensation appeal

[20] With leave granted by Makgoba JP, the Municipality, on 29 April 2021, appealed to the Supreme Court of Appeal against Makgoba JP's judgment and order. The appeal was limited to the two special pleas that had been dismissed by the

High Court: first, that Bravospan had failed to comply with the provisions of section 3(2) of the Legal Proceedings Act and second, that a portion of Bravospan's claim had prescribed.

[21] During the hearing, the Supreme Court of Appeal, of its own accord, raised the possibility of granting compensation under section 172(1)(b) of the Constitution and ordered the parties to deliver supplementary heads of argument on that issue. The parties complied with this order.

[22] On 7 November 2022, the Supreme Court of Appeal found that no case had been made out on the two grounds of appeal. It went on to hold, however, that the High Court had incorrectly awarded compensation based on unjustified enrichment. South African law, it reasoned, had not yet recognised a general enrichment action and that made the finding of the High Court not “sustainable in law”.¹¹ It nevertheless reasoned that it would be “manifestly unjust for Bravospan to be afforded no compensation for the services that it had rendered to the [M]unicipality”.¹² In the Supreme Court of Appeal's view, there were exceptional circumstances warranting an order of compensation under an alternative legal foundation, namely, section 172(1)(b) of the Constitution.

[23] The Supreme Court of Appeal held that section 172(1)(b) confers a wide discretionary power upon courts to make any order that is just and equitable. That power, the Court held, would normally be triggered when a court declares a law or government conduct invalid. The Court found that this power enables a court to address circumstances that could lead to injustice where parties have materially changed their position on the assumption that the law or conduct relied upon was valid. It also found that there was no reason, in principle, why relief under subsections 172(1)(a) and (b) could not be claimed in separate proceedings. As a result, the Supreme Court of Appeal made the following order:

¹¹ *Greater Tzaneen Municipality v Bravospan* 252 CC [2022] ZASCA 155 (Supreme Court of Appeal judgment) at para 15.

¹² *Id* at para 15.

- “1 The appeal is upheld with no order as to costs.
- 2 The order of the High Court is set aside and replaced with the following:
- ‘(a) It is declared that [Bravospan] is entitled to compensation for the services rendered to the [Municipality] during the period from 1 November 2014 to 31 October 2016 as a just and equitable remedy under section 172(1)(b) of the Constitution;
- (b) Costs of the hearing on the merits are reserved.’
- 3 The matter is referred back to the High Court to determine the quantum of that compensation in accordance with the applicable law.”

[24] It is paragraphs 2 and 3 of this order against which the Municipality seeks leave to appeal in this Court and asks us to overturn.

In this Court

Applicant’s submissions

[25] On jurisdiction, the Municipality submits that its application for leave to appeal concerns the proper interpretation and application of section 172(1) of the Constitution, which is a constitutional matter. The key issue is whether a court other than the court making a declaration of invalidity can subsequently, on the basis of a fresh claim, grant compensation in terms of section 172(1)(b). The Municipality asserts that leave to appeal should be granted because the application has reasonable prospects of success on this point.

[26] On the merits, the Municipality submits that the Supreme Court of Appeal was not entitled to grant relief *mero motu* (of its own accord) on the basis of section 172(1)(b) when that matter was not squarely before it. The causes of action underlying the claim had not been formulated in terms of this section, nor was the awarding of compensation a “constitutional matter” as contemplated in section 172(1).

[27] Moreover, section 172(1)(b) cannot be invoked in separate court proceedings to those in which a declaration of invalidity in terms of section 172(1)(a) is made. The court considering invalidity is the only court competent to make a compensation order in terms of section 172(1)(b). Ordinarily, declarations of invalidity have retrospective effect and it is for the court making that order to decide whether to limit retrospectivity. The Municipality contends that section 172(1)(b) is not a self-standing provision upon which a damages claim can be founded.

Respondent's submissions

[28] Bravospan submits that leave to appeal ought to be denied. It avers that the Supreme Court of Appeal's judgment is in all material respects correct and there are no reasonable prospects of success.

[29] On the merits, Bravospan submits that it pleaded a cause of action rooted in the Constitution, namely, constitutional damages, before the High Court. In addition, it contends that evidence was led in support of all four causes of action and that it was the High Court that decided to make a finding on one cause of action and not the others. That, however, does not mean that the High Court had dismissed the other causes of action. The Supreme Court of Appeal, therefore, had not raised section 172(1)(b) *mero motu* and it was open to it to consider that section as an alternative basis for awarding compensation.

[30] Moreover, relying on this Court's decision in *Steenkamp*,¹³ the Supreme Court of Appeal had found correctly that the improper performance of an administrative function entitles the aggrieved party to appropriate relief. Section 172(1)(b) could also be invoked in separate proceedings to a declaration of invalidity where a basis for that relief was pleaded.

¹³ *Steenkamp* above n 2.

[31] Bravospan submits that it was an innocent contractor who had taken the additional precautionary step of enquiring into the legality of awarding such a contract without a bid. The Municipality led it to believe that the extension agreement was lawful. Even during the invalidity proceedings, it was the Municipality that had requested it to continue providing the security services. As a result, submits Bravospan, the Municipality acted in bad faith and its conduct was unfair. On the other hand, it contracted with the Municipality in good faith and in an honest manner. Despite the invalidity of the extension agreement, justice and equity dictate that it should be compensated for the services it provided to the Municipality. Thus, Bravospan submits that the Supreme Court of Appeal was entitled to make an order for compensation under section 172(1)(b).

Analysis

Jurisdiction

[32] In terms of section 167(3)(b)(i) of the Constitution, this Court has the power to decide constitutional matters. This case concerns a claim for compensation based on the delivery of services pursuant to the extension of an agreement between the Municipality and Bravospan that was later declared invalid.

[33] The issue raised in this application is not about the validity of the contract. That has already been decided. The question before us concerns whether the Supreme Court of Appeal was correct of its own accord to overturn the High Court's finding on unjustified enrichment and, instead, utilise section 172(1)(b) of the Constitution as the basis to found liability for compensation in separate proceedings from those in which the contract was declared invalid. That is a constitutional issue relating to the interpretation and application of a constitutional provision and, therefore, engages our jurisdiction.

Leave to appeal

[34] It is trite that this Court will only grant leave to appeal when it is in the interests of justice to do so.¹⁴ That enquiry is a broad test involving the balancing of several considerations including, but not limited to, the public interest in hearing the matter and the importance of the issues raised.¹⁵ This Court will also consider whether the issues before it have been properly identified, framed and ventilated, allowing for the rendering of an authoritative decision that takes account of all the relevant dimensions it must consider.¹⁶

[35] The central question that is the subject of this appeal relates to whether section 172(1)(b) can be a self-standing basis for awarding compensation *in separate proceedings* to those in which a contract was declared invalid in terms of section 172(1)(a) of the Constitution.¹⁷

[36] That question arises only as a result of the decision of the Supreme Court of Appeal to go beyond the two grounds of appeal which it dismissed. In this regard, the Supreme Court of Appeal briefly considered and rejected the finding of the High Court that compensation could be awarded on the basis of unjustified enrichment. Instead, the Supreme Court of Appeal, *mero motu*, developed an alternative basis to award compensation rooted in section 172(1)(b) of the Constitution. Prior precedent supports the right of a court to raise a legal issue *mero motu* where it considers an error of law to have been made.¹⁸

¹⁴ *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*) at para 12. See also *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) (*Afribusiness*) at para 20 and *Road Traffic Management Corporation v Waymark (Pty) Ltd* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) (*Waymark*) at para 28.

¹⁵ *Afribusiness* id; *Waymark* id; and *Steenkamp* above n 2.

¹⁶ *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* [2007] ZACC 2; 2007 (5) BCLR 453 (CC); 2008 (4) SA 16 (CC) at para 6. See also the cases referred to in n 38.

¹⁷ We are concerned in this case with a “self-review” by a municipality of its own conduct. This Court has held that such a review must be conducted in terms of the principle of legality and hence section 172 of the Constitution is applicable to relief in this regard: see *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) (*Gijima*).

¹⁸ This is an incident of the principle of legality: see, for instance, *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (1) BCLR 1 (CC); 2009 (2) SA 204 (CC) at para 68; and *Quartermark Investments (Pty) Ltd v*

[37] Nevertheless, as has been made clear by this Court, the Constitution envisages one system of law¹⁹ and does not seek to replace the entire edifice of the common law with separate constitutional actions.²⁰ Section 173 of the Constitution recognises the inherent power of superior courts to develop the common law. Moreover, in terms of section 39(2) of the Constitution, when developing the common law, courts are obligated to promote the spirit, purport and objects of the Bill of Rights.²¹ In *Carmichele*,²² this Court recognised that “under the Constitution there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts including this Court”.²³

[38] The Constitution recognises that the common law we inherited included elements of significant value whilst also needing to be thoroughly decolonised and adapted to a modern, diverse and democratic African society. That process is an ongoing one and, where relevant, requires a deep interpenetration of constitutional norms into the common law.²⁴ In transforming the common law, it is important to bear

Mkhwana [2013] ZASCA 150; [2014] 1 All SA 22 (SCA) at para 20. This approach was endorsed in *Sarrahwitz v Martiz N.O.* [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) at para 31 and more recently, *Miya v Matleko-Seifert* 2023 (1) SA 208 (GJ) at para 52. The supremacy of the Constitution also supports raising constitutional questions *mero motu* in certain circumstances. Parties must generally be presented with an opportunity to address the point raised by the court *mero motu*: see, for instance, *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) (*Director of Public Prosecutions*) at para 43 and *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) (*Matatiele*) at para 68.

¹⁹ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44.

²⁰ See the recent critique by Boonzaier “Common-Law Avoidance” (2024) 141 *South African Law Journal* 213 of a “trend” he identifies where the common law is replaced by constitutional law. See also Zitzke “Constitutional Heedlessness and Over-excitement in the Common Law of Delict’s Development” (2015) 7 *Constitutional Court Review* 259 who argues for a balance between what he terms “constitutional heedlessness” and “constitutional over-excitement”.

²¹ Where the Constitution applies directly to private parties, the common law may also be developed in terms of section 8(3) of the Constitution.

²² *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

²³ *Id* at paras 34 and 39.

²⁴ There has been a live academic debate on the success or otherwise of this project as well as its desirability: see, for instance, Woolman “The Amazing, Vanishing Bill of Rights” (2007) 124 *South African Law Journal* 762; Van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *Constitutional Court*

in mind the need to draw on values rooted in South Africa such as *ubuntu*.²⁵ What emerges from this Court’s jurisprudence²⁶ and philosophical writings,²⁷ is that *ubuntu* requires acting in ways that promote harmonious relationships and co-operation with others. That value is of importance not only in the context of public law but also private law, though there remains much work to be done to develop its implications in the latter area.²⁸

[39] The Supreme Court of Appeal did not engage with whether the common law should be developed to address the predicament of contractors such as Bravospan. Yet, on its face, this case has many of the hallmarks of an unjustified enrichment action.²⁹ Visser writes that “[a] large part of the law of enrichment has to do with reclaiming transfers made in terms of void contracts or transfers outside the four corners of a valid contract”.³⁰ Authors who have attempted to systematise enrichment liability in our law view it as essentially involving the enrichment of one party at the expense of another party who is impoverished in a manner that is unjustified or without legal cause.³¹

Review 77; and Klare and Davis “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *South African Journal on Human Rights* 403.

²⁵ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 305-7. See also Victor J’s judgment in *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (*Beadica*) at para 212.

²⁶ *Makwanyane* id at paras 263 and 307. See also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 38; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 71 and *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) (*Dikoko*) at para 68.

²⁷ Tutu *No Future Without Forgiveness* (Ebury Publishing, London 1999) at 31 and 35, explains “Ubuntu – [s]ocial harmony is for us the *summum bonum* – the greatest good. Anything that subverts or undermines this sought-after good is to be avoided like the plague.” See also Metz “Ubuntu as a Moral Theory and Human Rights in South Africa” (2011) 11 *African Human Rights Law Journal* at 537-541; Cornell and Muvangua *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (Fordham University Press, New York 2012) and Tamale *Decolonisation and Afro-Feminism* (Daraja Press, Ottawa 2020) at 229-230.

²⁸ See *Beadica* n 25 at paras 72-8 and 206-216. See also Bennett “An African Doctrine of Equity in South African Public Law” (2011) 57 *Loyola Law Review* 709 at 717 and 720.

²⁹ For a similar case where unjustified enrichment law was applied, see *Mangaung Metropolitan Municipality v Maluti Plant Hire* [2017] ZAFSHC 55.

³⁰ Visser *Unjustified Enrichment* (Juta & Co Ltd, Cape Town 2008) at 7. Indeed, the *condictio ob turpem vel iniustam causa* is an enrichment action that encompasses specifically transfers made pursuant to an illegal agreement (see Du Plessis *The South African Law of Unjustified Enrichment* (Juta & Co Ltd, Cape Town 2012) at 197-8).

³¹ Visser id at 8; Du Plessis id at 24; and Sonnekus *Unjustified Enrichment in South Africa Law* (LexisNexis, 2008) at 4.

[40] For a cause of action rooted in unjustified enrichment to be successful in a case such as the present, we would need to consider developing the common law and address a number of important legal questions on which there has been much academic discussion in recent years. These include, for instance, whether the applicable specific *condictiones* (enrichment actions) could be extended to apply in circumstances where services (and not money or goods) were delivered;³² and, potentially, whether it is desirable to develop the common law to recognise a general enrichment action, which was contemplated but not effected in *McCarthy*.³³ For present purposes, I merely point out that the common law of unjustified enrichment, either in its pre-constitutional form or duly developed in accordance with sections 39(2) and 173 of the Constitution,³⁴ may well be capable of accommodating an innocent contractor in the position of Bravospan. To adjudicate on this question, such an innocent contractor would have to bring a properly pleaded claim to be compensated for the amount by which its performance pursuant to an invalid contract has enriched the organ of state that received its services.

[41] Crucially, Bravospan, at no point, cross-appealed against the finding of the Supreme Court of Appeal relating to unjustified enrichment – and so that matter is not properly before us. As a result, no written argument was presented by counsel on the important questions raised above relating to the development of the common law of unjustified enrichment. We also lack the benefit of any in-depth reasoning both in the High Court and the Supreme Court of Appeal in this regard. Ordinarily, this Court has held that, when developing the common law, it should have the benefit of judgments from the High Court and the Supreme Court of Appeal.³⁵ For these reasons, it is not

³² Visser id at 222-5; Du Plessis id at 63-5; and Scott “Transforming the South African Law of Unjustified Enrichment” (2017) 25 *Restitution Law Review* 29 at 6.

³³ *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] ZASCA 14; [2001] 3 All SA 236 (A). There are a range of views from academics about the desirability or otherwise of such a development and how it should be effected: see, for instance, Visser id at 60; Du Plessis id at 6–10; Sonnekus above n 31 at 29-31; Evans-Jones and Fischer “Unjustified Enrichment’s Evolution in Mixed Legal Systems: Confronting McCarthy Retail Ltd” (2019) *Acta Juridica* 395 and Serfontein “What is Wrong with Modern Unjustified Enrichment Law in South Africa” (2015) 48 *De Jure* 388 at 394-401.

³⁴ See Scott above n 32 for some other ways in which the Constitution might impact on unjustified enrichment law.

³⁵ *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33; Carmichele above n 22 at para 41.

open to us to examine whether developing the common law could potentially offer the most appropriate avenue for an underlying cause of action in cases such as the present one (nor would it be desirable).

[42] Instead, we are being invited to ignore the potential relevance of the common law, and recognise a separate, direct constitutional cause of action rooted in section 172(1)(b) of the Constitution, in the manner developed by the Supreme Court of Appeal to address the injustice that would result from denying Bravospan a claim. In my view, we should not accept that invitation. Our courts have an obligation to develop the common law, and such an approach is particularly relevant to the realm of public procurement. When they enter into contracts, organs of state are bound by public law duties but also engage in relationships which exhibit features that are generally regulated by the domain of private law. As a result, public procurement law straddles the boundary between public and private law.³⁶ The Constitution enjoins us to harmonise these different domains and allow them mutually to enhance one another.³⁷

[43] The common law of unjustified enrichment may be capable of development in light of constitutional imperatives to cover cases such as the present. At the same time, the development of constitutional law in these circumstances may also benefit from an engagement with the accrued wisdom of the common law. Unfortunately, the way this case unfolded in the lower courts means that, if we grant leave to appeal, we are placed in the untenable position to make an authoritative pronouncement with far-reaching implications with only an incomplete and partial view of the legal possibilities available. It is, therefore, not in the interests of justice for us to grant leave to appeal.³⁸

³⁶ See *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42; 2020 (1) SA 305 (CC); 2020 (1) BCLR 110 (CC) at para 22. See also Quinot “Worse than Losing a Government Tender: Winning It” (2008) 19 *Stellenbosch Law Review* 101 at 119-120.

³⁷ Such an approach was suggested by Froneman J in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, of the South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at paras 29 and 67.

³⁸ This Court has on several occasions in the past refused leave to appeal on grounds that the issues have not been adequately framed or argued: see, for instance, *Sali v National Commissioner of the South African Police Service* [2014] ZACC 19; [2014] 9 BLLR 827 (CC); 2014 (9) BCLR 997 (CC) at para 96; *Radio Pretoria v Chairperson of Independent Authority of South Africa* [2004] ZACC 24; 2005 (3) BCLR 231 (CC); 2005 (4) SA 319 (CC) at

[44] The disagreement with my Colleague Chaskalson AJ (second judgment) is a narrow but important one. I cannot agree that the primary reason for refusing leave to appeal can be that the outcome achieved through doing so accords with a judge's sense of justice. This is particularly so where the reasoning in the lower courts for reaching that outcome is the very basis of the appeal. Indeed, that is precisely the situation in this case: the grounding for this appeal by the Municipality is a challenge to the reasoning of the Supreme Court of Appeal to award compensation to Bravospan on the basis of section 172(1)(b) of the Constitution. To affirm the outcome of the Supreme Court of Appeal judgment but not to engage with its reasoning – and the desirability or otherwise of this Court doing so – fails to grapple with the very basis of the leave to appeal application, which is that the result could not be reached in a legally justifiable way.³⁹

[45] I have grave reservations about interpreting the “interests of justice” test for leave to appeal to grant this Court a free-standing discretion to make ad-hoc decisions, on the basis that it approves of the outcome of refusing leave. The second judgment quotes the approach adopted in *Fraser*⁴⁰ as support for its approach. In my view, *Fraser* should only be applied in very limited circumstances, if at all – otherwise, it opens the door for judges to decide the substantive outcome of a case without adequate reasoning,

paras 21-3; *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (3) SA 559 (CC); 2004 (4) BCLR 333 (CC) at para 33.

³⁹ In the late 1990s, there was a well-known debate in academic journals about the virtues or vices of judicial minimalism: see Currie “Judicial Avoidance” (1999) 15 *South African Journal on Human Rights* 138 and Roederer “Judicious Engagement: Theory, Attitude and Community” (1999) 15 *South African Journal on Human Rights* 486. This debate drew heavily on the work of Sunstein “Foreword: Leaving Things Undecided” (1996) 110 *Harvard Law Review* 4, who launched a defense of decisional minimalism and described it as “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided”. Without re-opening this debate, I wish to indicate that even on the definition of minimalism provided by Sunstein, judges must provide the reasons that are necessarily required to reach a decision. Prof Stu Woolman, who sadly recently passed away, captures the strength of the case against judicial avoidance – and the harm it causes to the rule of law and the Constitution – in his seminal contribution, Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta, 2013) at 28-30. For the reasons given in the text, in my view, the fact that the judges approve of the outcome of the case is not a sufficient basis for refusing leave to appeal, particularly where the reasoning in the lower courts for reaching that outcome is the very basis of the appeal.

⁴⁰ *Fraser v Naude* [1998] ZACC 13; 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC).

representing a major widening of unguided judicial discretion at the leave to appeal stage. That would be inimical to the culture of justification – a central dimension of the rule of law – that courts in South Africa are tasked with defending and enacting through their own practices.⁴¹ Principled legal reasoning is a guard against decision-making based purely on judicial intuitions about outcomes which may lead to both just and unjust results. It is perhaps for this reason that the approach adopted in *Fraser* has not been applied since 1998. There is no need to resuscitate this troubling precedent to decide this matter given the settled principles that this Court has adopted in deciding leave to appeal applications.⁴²

[46] This case is also different to *Fraser* in several respects. *Fraser* was concerned with circumstances where the fundamental rights of a party not involved in the litigation – a vulnerable child – and their best interests would be seriously affected were a substantive finding to be made in favour of the father. In those circumstances, the Court was faced with balancing the interests of a litigant against a vulnerable third party when considering whether to grant leave to appeal.⁴³

[47] The circumstances in this case are entirely different. There are only two parties to this litigation and the issue does not concern fundamental rights but compensation pursuant to a declaration of invalidity. No vulnerable third party will be harmed. The Court is thus duty bound to provide adequate reasons – other than in relation primarily to achieving a desirable outcome – for why it grants or refuses leave to appeal. I have sought, in this judgment, to explain why granting leave, in the circumstances in which this case unfolded, would be undesirable given courts’ substantive duty to develop the common law, the lack of a cross-appeal and the lack of argument before this Court as

⁴¹ See Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *South African Journal on Human Rights* 10 at 32. See also Ackermann J’s comments about the constitutional state in *Makwanyane* n 25 at para 165.

⁴² Cohen “The Jurisdiction of the Constitutional Court” (2021) 11 *Constitutional Court Review* 1 helpfully summarises these principles at 42-3.

⁴³ It should be noted that *Fraser* had wide-ranging consequences both for the father and the child with a minimally reasoned judgment. It has been noted that this judgment created a manifest injustice to the father in this case: see Schäfer *The Law of Access to Children* (LexisNexis, Durban 2007) 80.

to how the law should optimally unfold in this sphere where several options exist. These are not merely supplementary reasons – as the second judgment holds – but the primary grounds on which the leave to appeal application must fail.

[48] This finding has an undesirable consequence – that this Court is not able to clarify the exact legal basis for awarding compensation to Bravospan. Nevertheless, it cannot be in the interests of justice to prolong this matter through sending it back to the High Court for further argument. After almost eight years since Bravospan ceased providing services to the Municipality, it still has not been paid for its work. No evidence on the record indicates that Bravospan was anything other than an innocent contractor. Despite challenging the validity of the contract, the Municipality requested that Bravospan continue providing the services – its refusal to pay for those services suggests that it sought to acquire the benefit of the services without paying for them. Indeed, during the hearing, it was pointed out that the same attorneys that launched the review application requested Bravospan to continue providing its services. Although they differed on the underlying legal principles, both the Supreme Court of Appeal and the High Court were agreed that, after close to a decade of waiting, Bravospan should receive compensation for the services that it provided to the Municipality. It cannot, therefore, be in the interests of justice to prolong this litigation and delay an award of compensation any longer.⁴⁴

[49] Unfortunately, the circumstances of this case are not unique.⁴⁵ As Navsa ADP stated in *Govan Mbeki*:

⁴⁴ This case is thus not like *Carmichele* above n 22 where this Court found that the lower courts had failed to consider the development of the law of delict and remitted the matter back to the High Court. In that case, both the legal basis and eventual outcome had to be decided. In this case, remitting the matter back to the High Court would simply delay the inevitable on which all courts that have considered the matter are *ad idem*: that Bravospan must be compensated.

⁴⁵ There are a series of recent cases where courts have ordered the payment of compensation to innocent contractors, who delivered services and were not paid, in the same proceedings in which those courts declared a contract (or administrative action) invalid: see, for instance, *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) at para 105; *Gijima* above n 17 at para 54; and *Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality* [2022] ZASCA 28; 2022 JDR 0488 (SCA) at para 15. Where a contractor comes to court and has been involved in corrupt practices or does not have clean hands, different considerations will apply. In some cases, the contractor can be non-suited to avoid the abuse of court processes: see *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GMBH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC); 2024 (1) SA 331 (CC) at paras 77-80 and 91 for

“This case is part of an ever growing, and frankly disturbing, long line of cases where municipalities and organs of state seek to have their own decisions, upon which contracts with service providers are predicated, reviewed and overturned, for want of legality, more often than not after the contracts have run their course and services have been rendered thereunder.”⁴⁶

[50] It is clear too that the conduct of municipalities who behave in the way described by Navsa ADP fails to meet the ethical standards that are expected from all government bodies exercising public power. Section 195(1) of the Constitution outlines the democratic values and principles that govern public administration. An important principle in the present context is that “[a] high standard of professional ethics must be promoted and maintained”.⁴⁷ As has been mentioned, a central value this Court has previously identified, with which public authorities must comply, is *ubuntu*. An ethic of *ubuntu* is inconsistent with taking advantage of others and requires conduct that involves treating everyone with whom one comes into contact, with the utmost respect in all interactions. This is particularly important in the relationship between the government and its citizens⁴⁸ – and, significantly, that includes the conduct of the government in relation to innocent contractors with whom it engages. Requesting a contractor to provide services and then refusing to pay them is a prime example of unethical conduct.

[51] For these reasons, I find that it is not in the interests of justice to grant leave to appeal. The practical effect of this finding is that the matter is remitted to the High Court for a determination of the quantum of compensation owed to Bravospan.

the general principles in this regard. In other circumstances, a balance will need to be struck that is fair to all parties, taking into account both the wrongdoing on the part of the contractor as well as the organ of state: see *Siyangena Technologies (Pty) Ltd v PRASA* [2022] ZASCA 149; [2023] 1 All SA 74 (SCA); 2023 (2) SA 51 (SCA) at paras 37-46. It is interesting to consider, again, the relationship between this rule of public law and the older *par delictum* (equal guilt) rule in private law and its relaxation in *Jajbhay v Cassim* 1939 AD 537.

⁴⁶ *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* [2021] ZASCA 34; [2021] 2 All SA 700 (SCA); 2021 (4) SA 436 (SCA) at para 1.

⁴⁷ Section 195(1)(a) of the Constitution.

⁴⁸ *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC).

Costs

[52] Bravospan has requested that, in the event of a result in its favour, this Court award it costs, including the costs of two counsel, both in the Supreme Court of Appeal and in this Court. The Municipality has not been granted leave to appeal and it also behaved in a disreputable manner in representing that the extension was lawful, requesting that services continue to be provided and failing to pay Bravospan. It is therefore appropriate to award costs against the Municipality. Bravospan is thus entitled to its costs, including the costs of two counsel, in this Court. Since leave to appeal was not granted and Bravospan did not cross-appeal, the costs order in the Supreme Court of Appeal cannot be interfered with.

Order

[53] The following order is made:

1. Leave to appeal is refused.
2. The applicant is ordered to pay the respondent's costs in this Court, including the costs of two counsel.

CHASKALSON AJ (Madlanga J, Majiedt J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

[54] I have had the pleasure of reading the judgment of my Colleague Bilchitz (first judgment). I agree that this application for leave to appeal must be dismissed because it is not in the interests of justice for leave to appeal to be granted. I reach this conclusion on grounds that are similar to those of my colleague. However, I prefer to emphasise different considerations.

Leave to appeal and the interests of justice

[55] The essential facts of this matter are set out in the first judgment. Those facts show that the Municipality has behaved unconscionably. The Municipality wrongly assured Bravospan that it could lawfully extend the contract without a new tender process. It accepted services from Bravospan under the extended contract without paying for these services. After it launched its review application, it induced Bravospan to continue providing services under the extended contract while the review application was pending. It took the benefit of those services. Yet, it still failed to pay Bravospan for the services. When the Municipality's review application was successful, it resisted Bravospan's action for compensation for the services that it had provided. It did so on the basis of technical defences and without calling a single witness at trial to answer Bravospan's case on the merits.

[56] It is now more than nine years since the Municipality stopped paying Bravospan for services from which it was benefiting and that Bravospan was providing at its repeated requests. It is certainly not in the interests of justice to allow the Municipality to continue to avoid paying Bravospan fairly for the services that it has taken from Bravospan. The effect of the judgment of the Supreme Court of Appeal is that Bravospan will finally receive just and equitable compensation for these services once the amount of such compensation has been determined in a hearing before the High Court. That outcome is plainly in the interests of justice. In my view, that should be the beginning and end of this application for leave to appeal.

Analysis

[57] This Court grants leave to appeal only when it is in the interests of justice to do so.⁴⁹ While reasonable prospects of success are a necessary requirement for an application for leave to appeal, they are not decisive.⁵⁰ More than 25 years ago, this

⁴⁹ Section 167(6) of the Constitution.

⁵⁰ *Phumelela Gaming & Leisure Limited v Gründlingh* [2006] ZACC 6; 2006 (8) BCLR 883 (CC); 2007 (6) SA 350 (CC) at para 24 and *Boesak* above n 14 at para 12.

Court explained in *Fraser*⁵¹ that substantive issues relevant to the interests of justice may sometimes require the refusal of leave to appeal even in cases where the appeal has reasonable prospects:

“The Constitution requires that provision be made for a litigant to appeal to this Court against the decision of any other court, ‘when it is in the interests of justice and with leave of (this) Court’. The prospects of success are obviously an important issue in deciding whether or not to grant leave to appeal. But they are not the only issue to be considered when the interests of justice are being weighed.

...

The matter must now be brought to an end. Accordingly, even if it could be shown that there were reasonable prospects of success in respect of the complicated procedural and jurisdictional issues that have been raised (and we express no opinion thereon), it is not in the interests of justice that a further appeal should be heard on them. In these circumstances no purpose would be served by setting down the application for leave to appeal and direct access to debate the issues that have been raised. The applications must therefore be refused.”⁵²

[58] *Fraser* was a case where the best interests of a minor child required an end to proceedings. So, the interests of justice precluded the grant of leave to appeal even if the applicant had reasonable prospects of success on the merits. The present case does not involve the best interests of a minor child. Nevertheless, the logic of *Fraser* applies to this application for leave to appeal.

[59] The judgment of the Supreme Court of Appeal will ensure that, after close to a decade of waiting, Bravospan will finally receive just and equitable compensation for the services that it has provided to the Municipality. That is plainly in the interests of justice. To grant leave to appeal would delay compensation further. That would be contrary to the interests of justice. Therefore, leave to appeal should be refused.

⁵¹ *Fraser* above n 40.

⁵² *Id* at paras 7-10 (footnotes omitted).

[60] There are additional reasons why the interests of justice support the dismissal of the application for leave to appeal on this narrow basis. First, such an approach will send a clear message to the Municipality and other organs of state that they must pay for services that are provided to them by an innocent contractor. This is not a case where there is any pleaded allegation, still less evidence, of corruption or other wrongdoing on the part of Bravospan that would justify the Municipality's refusal to pay it. Instead, the Municipality is opportunistically raising its own irregular conduct to avoid paying Bravospan. As is clear from [49] of the first judgment, the Municipality's unconscionable conduct in the present case is part of a broader phenomenon of organs of state seeking to rely on their own unlawful conduct to avoid compensating innocent contractors for services that those contractors have provided to them. This Court must make clear that conduct of this sort will not be tolerated.

[61] Second, there are good reasons of legal policy not to address the Municipality's prospects of success. In order to address prospects of success, it would be necessary to consider the relationship between section 172(1)(a) and (b) of the Constitution. That relationship raises complicated issues of constitutional law and legal policy. This Court should not express itself unnecessarily on these issues unless it is confident that it can do so without potentially causing problems for the disposition of different matters involving these issues in the future.⁵³ I have no such confidence.

[62] Moreover, the peculiarities of the pleading of the present case at trial and on leave to appeal to this Court make it a particularly unsuitable case for pronouncing on both the general relationship between section 172(1)(a) and (b) and the scope for

⁵³ In *Zantsi v Council of State, Ciskei* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) (*Zantsi*) at para 2, this Court quoted with approval the following injunction of the United States Supreme Court in *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* 113 US 33 (1885) at 39:

“(N)ever . . . anticipate a question of constitutional law in advance of the necessity of deciding it; . . . never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”

In the three decades since *Zantsi*, this Court has adopted a less cautious approach to constitutional adjudication. (See for example *Jordaan v Tshwane MM* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) at paras 6-8). However, it remains sound policy of constitutional adjudication for this Court not to determine new issues of constitutional law unnecessarily, unless it is confident that it can do so without creating unanticipated problems in future cases raising similar issues.

equitable relief to be granted under section 172(1)(b) in proceedings other than those in which a section 172(1)(a) order has been handed down. Before enshrining a section 172(1)(b) remedy of the sort created by the Supreme Court of Appeal judgment, this Court would have to consider whether the purpose served by such an individualised damages remedy could better be accommodated under a constitutionally developed common law enrichment action. As a result of Bravospan's pleading of its claim in the present matter and its failure to cross appeal against the order of the Supreme Court of Appeal, this issue was not canvassed in the proceedings before us.⁵⁴

Conclusion

[63] For the reasons set out above, this application for leave to appeal must be dismissed and I support the order proposed in the first judgment. Even if the Municipality were to have had reasonable prospects of success in relation to the complicated remedial issues that it raises regarding section 172 of the Constitution (and I express no views thereon), on the facts of this case, the interests of justice preclude the grant of leave to appeal.

DODSON AJ:

[64] I have had the benefit of reading the well-reasoned judgments of my Colleagues Bilchitz AJ (first judgment) and Chaskalson AJ (second judgment). I agree with the conclusion reached in both judgments that it is not in the interests of justice to grant the Municipality leave to appeal.⁵⁵ I agree with the order in the first judgment, including the order as to, and the reasons for, costs.⁵⁶ I adopt the setting out in the first judgment

⁵⁴ A similar point is made at [36] to [43] of the first judgment. I do not express any views as to the scope of a properly pleaded constitutionally developed common law enrichment action to accommodate contractors who find themselves in the position of Bravospan. I merely note that this is an issue that this Court would want to explore before deciding to enshrine a free standing section 172(1)(b) remedy.

⁵⁵ See the first judgment at [51] and the second judgment at [63].

⁵⁶ See the first judgment at [52] to [53].

of the background to the matter, the litigation history and the parties' submissions.⁵⁷ I agree with the finding that this Court has jurisdiction.⁵⁸

[65] As far as the reasoning on issues other than costs is concerned, I agree with each judgment in part and disagree in part. I agree with the reasons given in the first judgment for holding that it is not in the interests of justice to grant leave to appeal.⁵⁹ However, I do not associate myself with the questioning in the first judgment of the correctness of *Fraser*.⁶⁰ I would not venture down the *obiter* (in passing) path that the first judgment does in relation to the possible development of an enrichment action to provide for cases like the present one.⁶¹ Nor would I do so in relation to the possible development of a cause of action based on section 195 of the Constitution and the value of *ubuntu*, as the first judgment seems to foreshadow.⁶²

[66] The second judgment finds that it is in the interests of justice to refuse leave to appeal because doing so leaves in place a just outcome.⁶³ The first judgment criticises this understanding of the interests of justice on the grounds that this amounts to decision-making based on a judge's sense of justice, not a legal reasoning process.⁶⁴ I agree with this criticism.

[67] I agree with the "additional reasons" given in the second judgment for refusing leave to appeal, pertaining to the message it sends to municipalities and other organs of state to pay for services provided by an innocent contractor, and the inappropriateness

⁵⁷ See the first judgment at [1] to [31].

⁵⁸ See the first judgment at [33].

⁵⁹ See the first judgment at [34], [41] and [48].

⁶⁰ See the last sentence of para [45] of the first judgment and *Fraser* above n 40.

⁶¹ See the first judgment at [38] to [40] and [43].

⁶² See the first judgment at [50].

⁶³ See the second judgment at [56] to [59].

⁶⁴ See the first judgment at [44] to [45].

of a decision in this case on the relationship between section 172(1)(a) and (b) of the Constitution.⁶⁵

[68] It is on the above basis that I concur in the order to be granted.

⁶⁵ See the second judgment at [60] to [62].

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