



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

22 April 2025

Date

K. La M Manamela

CASE NO: 64334/21

In the matter between:

SOUTH AFRICAN TOURISM BOARD

Applicant

and

LETSEMA CONSULTING AND ADVISORY (PTY) LTD

First Respondent

TOURISM BUSINESS COUNCIL OF SOUTH AFRICA

Second Respondent

DATE OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 22 April 2025.

**JUDGMENT
(APPLICATION FOR LEAVE TO APPEAL)**

Khashane Manamela, AJ

Introduction

[1] On 06 December 2024, I handed down a judgment in the legality review application ('the main application') substantially in favour of the South African Tourism Board ('SA Tourism') against Letsema Consulting and Advisory (Pty) Ltd ('Letsema') in the following terms ('the Judgment'):

[1.1] that, the decisions taken by SA Tourism in March and in August 2020 to appoint Letsema as a service provider are declared unlawful, constitutionally invalid and are reviewed and set aside;

[1.2] that, the appointments which came into existence pursuant to the decisions, envisaged in [1.1] above, are declared unlawful and constitutionally invalid and are set aside;

[1.3] that, subject to what is stated in [1.4] below, it is declared that payments made by SA Tourism to Letsema pursuant to the appointment are unlawful;

[1.4] that, as just and equitable remedy:

[1.4.1] it is declared that the payments made by SA Tourism to Letsema pursuant to the appointments in the amount of R10 130 269, 59 should not include monies representing profits on the payment received from the appointment;

[1.4.2] Letsema is directed to provide SA Tourism with a detailed breakdown of its reasonable expenses with supporting vouchers relating to the monies received by Letsema from SA Tourism pursuant to the appointment and file same with this Court within sixty (60) days from the date of the order, being 06 December 2024;

[1.4.3] SA Tourism shall, within thirty (30) days thereafter, verify the details provided by Letsema in terms of the order and file the verification with this Court;

[1.4.4] this Court will thereafter determine the amount to be paid by Letsema to SA Tourism.

[1.5] each party shall be responsible for its own costs, including costs occasioned by the joinder of the second respondent and postponement of the application on 21 November 2023.¹

[2] On 28 December 2024, Letsema launched this application for leave to appeal (‘Leave to Appeal’) against the Judgment or part of it, on the grounds set out below.² Essentially, Letsema is dissatisfied about the just and equitable remedy granted in terms of the Judgment.³ The Leave to Appeal is opposed by SA Tourism.

[3] The Leave to Appeal was heard virtually or remotely on 28 February 2025. As in the main application, Mr K Tsatsawane SC and Ms N Makhaye appeared for SA Tourism, and Mr G Budlender SC and Mr W van Aswegen appeared for Letsema. I reserved this judgment.

Letsema’s grounds of appeal

[4] The Leave to Appeal is sought to the Supreme Court of Appeal, alternatively a full court of this Division, against the orders in the Judgment concerning the just and equitable remedy and costs.

¹ *South African Tourism Board v Swift Thinking (Pty) Ltd and Another* (64333/21; 64334/21) [2024] ZAGPPHC 1311 (6 December 2024) par [122] which was a joint judgment of this and another related matter of *SA Tourism v Swift Thinking* under case number: 64333/21. In the latter matter, leave to appeal was sought in terms of notice dated 02 January 2025, but was subsequently withdrawn on 28 January 2025.

² Pars [4]-[6] below.

³ Par [1.4] above, for the terms of the just and equitable remedy in the Judgment.

[5] The grounds of appeal set out in the notice for the Leave to Appeal include the following:

Reasonable prospects that a Court on appeal would come to a different conclusion

1. ...
2. Letsema acted reasonably in relying on the assurances and representations by SA Tourism's Chief Executive Officer (Mr Ntshona) that the services would be contracted for and paid for by the Second Respondent, the Tourism Business Council of South Africa (TBCSA).
3. It was never SA Tourism's case that if Letsema was under the genuine belief that its appointment and payment were to originate from the Second Respondent, the TBCSA, it was nonetheless obliged to question whether a public procurement process was necessary.
4. Letsema was misled by the deliberate misrepresentation by Mr Ntshona that it was being appointed and would be paid by the TBCSA.
5. It was not unreasonable for Letsema to be deceived by this misrepresentation.
6. SA Tourism's own Executive Committee was similarly misled by Mr Ntshona's misrepresentation to it that Letsema's appointment was being made and would be funded by the TBCSA.
7. Letsema did not engage in any wrongdoing. It was SA Tourism, acting through Mr Ntshona, that initiated the transaction and breached the principle of legality in taking the impugned decisions and concluding the transactions that followed.
8. The deliberate misrepresentation by SA Tourism misled Letsema and induced the contract.
9. It could not be either just or equitable to permit SA Tourism, an organ of state, to make misrepresentations through its CEO, act unlawfully, and then, as a result of an order of court, benefit from that conduct by receiving the services in question at a reduced price.
10. The Court misdirected itself and erred by failing to find that a just and equitable remedy required that a declaration of invalidity would not have the effect of divesting Letsema of rights to which it would otherwise have been entitled, but for the declaration of invalidity.
11. SA Tourism's application for review was cynical and self-serving in that
 - 11.1. the review was initiated because Letsema required payment of the outstanding amount for the admittedly highly effective services which Letsema had provided; and
 - 11.2. SA Tourism attempted to profit from its own unlawful conduct by not only refusing to pay the outstanding amount, but by seeking an order that Letsema repay everything SA Tourism had paid it – in other

words, an order that SA Tourism should receive the services of Letsema for free.

...

14. As to the costs of the application: the Court with respect misdirected itself by failing to have regard or proper regard to the facts that:

- 14.1. Letsema achieved substantial success, as SA Tourism failed in its attempt to obtain an order that in effect would have required Letsema to render its services for free ...

Compelling reasons why the appeal should be heard

15. ...

16. This matter raises a significant question about the nature of just and equitable remedies under section 172(1)(b) of the Constitution in cases of unlawful state procurement, on which there has not been any authoritative pronouncement by the courts. The question is whether, and if so to what extent, a “no-profit” principle should apply in circumstances such as this, where the innocent party was deliberately misled by misrepresentations made by an organ of state ...⁴

[6] But when appearing at the virtual hearing of the Leave to Appeal, Mr G Budlender SC did not appear to be forceful about his client dissatisfaction with the costs order made. But, I will nevertheless consider all grounds in the Leave to Appeal, as appearing above.

Submissions on behalf of Letsema

[7] At the hearing of the Leave to Appeal the oral submissions by counsel for Letsema were naturally pivoted upon the grounds of appeal, referred to above. I refer to some of these submissions under this part.

[8] Letsema is dissatisfied with paragraphs 122(c) (i.e. the declaration of unlawfulness of the payments it received from SA Tourism)⁵ and 122(d) (i.e. just and equitable remedy) (‘the Orders’),⁶ as well as paragraph 122(e) (i.e. Cost Order)⁷. It is submitted on behalf of Letsema that there is a reasonable prospect that an appellate court will find that this Court misdirected itself, especially by adopting a wrong principle with regard to the just and equitable remedy

⁴ Leave to Appeal, CaseLines 0-2 to 0-5.

⁵ Par [1.3] above.

⁶ Par [1.4] above.

⁷ Par [1.5] above.

granted. Letsema finds the Orders for the remedy to be depriving it of profits for the work performed whilst SA Tourism benefits from its own unlawful conduct by only paying a reduced price for the services received. The Orders, according to Letsema, are based on an incorrect principle which is anything but just and equitable.

[9] Counsel for Letsema referred to instances where the courts have applied the just and equitable principle or remedy envisaged in section 172(1)(b) of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), where a procurement decision has been partly or fully implemented and, subsequently, it is established that the decision was invalid in terms of PAJA. Further, counsel cited the following *dicta* from *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* ('Allpay'):⁸

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 that it may derive should not be beyond public scrutiny.

[footnote omitted]

[10] Counsel, further, relied on a triad of judgments of the Constitutional Court which, it is submitted, demonstrate clearly that it is not impermissible for a successful tenderer to benefit from the implementation of the contract.⁹ What, actually, is meant is that a successful tenderer does not have the right to benefit from the unlawful contract, but it may still benefit. The inquiry in this regard concerns what is just and equitable and the contractor may still receive full payment for the work done, despite the invalidity of the contract. At the hearing for the Leave to Appeal and, perhaps, even the main application, counsel for Letsema referred to the incorrect

⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) ('Allpay') [67].

⁹ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) ('Gijima'); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ('Buffalo City'); *Greater Tzaneen Municipality v Bravospan* 252 CC 2025 (1) SA 557 (CC) ('Bravospan').

application of the views from *Allpay* to have resulted in the coinage of the so-called ‘no profit’ principle in this type of matters.

[11] The material part of the Orders, counsel’s submissions continued, were not just and equitable when consideration is given to the following circumstances in this matter: (a) who was primarily to blame for the fact that the award was invalid; (b) the assurances given and misrepresentations by Mr Ntshona, the then CEO of SA Tourism; (c) the fact that Letsema properly performed its obligations under the contract, and (d) whether it should be just and equitable for an organ of state, which was responsible for the invalid award, to benefit from its own unlawful conduct. The Orders effectively serve as punishment of Letsema and reward of SA Tourism as the full price for the services rendered will not be paid, contrary to the triad of Constitutional Court decisions, referred to above.¹⁰ This may also create an incentive for organs of state to enter into invalid contracts motivated by the fact that they will only be liable for a reduced price, which is contrary to public interest.

[12] Under the circumstances, the submissions conclude, leave to appeal ought to be granted, preferably to the Supreme Court of Appeal, due to the greater need for clarity and certainty, as well as authoritative pronouncement on the material issues of public importance.

Opposition to the Leave to Appeal (and submissions on behalf of SA Tourism)

[13] In its opposition of the Leave to Appeal, SA Tourism, predominantly disputes the appealability of the Orders, including the Cost Order, and points to the absence of reasonable prospect of success.

[14] It is submitted on behalf of SA Tourism that the just and equitable order in the Judgment is not final in effect, and it is not in the interests of justice to appeal against it at this stage. This is so, as this part of the Orders does not prescribe the amount which Letsema ought to repay to

¹⁰ *Ibid.*

SA Tourism, but only a procedure to be used by the Court to determine the *quantum* of the repayment.¹¹ Once the amount to be repaid is determined, which would constitute a final order, an appeal would be competent. For, this Court may still decide that nothing should be repaid by Letsema to SA Tourism.

[15] Counsel for SA Tourism cited authorities in support of their client's ground of opposition that an appeal is not competent at this stage. Counsel referred to the decision in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*¹² by the Constitutional Court that the correct approach to appealability is to have regard to the interests of justice.¹³ Appealability does not depend any longer 'largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application', as that 'is now subsumed under the constitutional interests of justice standard'.¹⁴ In determining appealability or whether to grant leave to appeal the interests of justice prevail over any impediments to the contrary which may arise from pre-Constitution common-law.¹⁵ But this does not suggest the jettisoning of the common law principles which should only yield to the interests of justice where the circumstances of a matter so dictate.¹⁶ This means that the durable principles in *Zweni v Minister of Law and Order* ('Zweni')¹⁷ remain applicable as they retain a gravitational pull on appealability of orders amidst 'the capacious remit of the interests of justice'.¹⁸ One of the principles or attributes in *Zweni* is that the high court seized with a matter ought to bring finality to the matter.¹⁹ The mischief guarded

¹¹ Paragraph [122](d) of the Judgment, paraphrased in par [1.4] above.

¹² *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) ('SCAW').

¹³ SCAW at [41].

¹⁴ *Tshwane City v Afriforum and another* 2016 (6) SA 279 (CC) [40].

¹⁵ *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) [41].

¹⁶ *Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV Smart and another* [2025] 1 All SA 60 (SCA); 2025 (1) SA 392 (SCA) ('Minmetals') [32].

¹⁷ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532-533.

¹⁸ *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* 2023 (5) SA 163 (SCA) ('TWK') [30]; *Minmetals* [32].

¹⁹ *Zweni* at 532-533.

against is appealing on a piecemeal basis to an appellate court, which is inherently not cost-effective and lead to the delay in the resolution of high court litigation.²⁰

[16] It is further argued by Mr K Tsatsawane SC for SA Tourism that the Orders are not final in nature and, thus, not appealable. The declaration of unlawfulness of the payments (in paragraph 122(c)) is ‘subject to’ the order in paragraph 122(d), thus, the issues in the latter have to be determined (in favour of SA Tourism, that is) for the declaration to come into effect. Otherwise, Letsema would not have to make any payment to SA Tourism, the argument concludes. Also, that Letsema has not established that it is in the interests of justice to grant leave to appeal against the Orders. This is borne by the fact that: (a) the Orders have not finally disposed of the important issues in dispute between the parties regarding the declaration of unlawfulness of the payments made to Letsema by SA Tourism, and the amount to be repaid by Letsema to SA Tourism, if any; (b) in the event of an appeal at the instance of Letsema being successful, following the granting of leave to appeal, the parties ought to return to this Court for the remainder of the just and equitable relief, which would delay the finalisation of the matter, and (c) an appellate court cannot concern itself with appeals against conditional orders, as in the Orders and, thus, this Court ought to wrap up the just and equitable remedy, before any appeal is competent.

[17] The opposition by SA Tourism is also on the basis that the intended appeal by Letsema has no reasonable prospect of success. On the one hand, the Orders are non-appealable in nature on the grounds already stated above. On the other hand, there is no misdirection on the part of this Court on the basis alleged by Letsema, as this Court – in recognition of the fact that Letsema may be entitled to keep the monies received from SA Tourism, deferred the issue for

²⁰ TWK [21]; *Minmetals* [33]; *Zweni* at 532-533.

later determination. Evidence subsequently gathered may reveal that nothing is repayable to SA Tourism by Letsema.

[18] Counsel for SA Tourism disputes that the triad of cases, relied upon by Letsema,²¹ serve as authority for a view that the private party to an impugned procurement ought to receive full payment in terms of the impugned contract. The cases, it is submitted, did not deal with divesting a private party to a contract of the monies received in terms of a just and equitable remedy granted by the Court in terms of section 172(1)(b) of the Constitution.²² In contrast the vexed question which faced this Court was whether Letsema should be divested of the monies paid to it as part of the just and equitable remedy. The Orders are consistent with section 172(1)(b) as they do not deprive Letsema from retention of monies it received, but only create a procedure in terms of which this Court is to determine just and equitable amount to be retained by Letsema or repaid to SA Tourism.

[19] In what resembles a contest of virtue (obviously of a million proportions, if it is) SA Tourism denies that Letsema is an innocent party in this matter. Counsel for SA Tourism argued that Letsema has always known that its appointment was not by Tourism Business Council of South Africa ('TBCSA'), the second respondent in the main application, and, in fact, Letsema did not have dealings with TBCSA. Letsema also knew that any appointment by SA Tourism could only be in terms of a public procurement exercise. Granted Mr Ntshona may have misled Letsema, but the latter knew that TBCSA was not involved. The latter issue is the very basis of the institution of the judicial review by SA Tourism, the submission concludes.

²¹ Par [10] above.

²² It is submitted on behalf of SA Tourism that in *Gijima* the Court declared the contract invalid, but did not set it aside and preserved the right of Gijima to sue, in an arbitration, which may be due to it under the invalid contract. The same was ordered in *Buffalo City*. In the recent case of *Bravospan* the Court invoked the interests of justice to prevent the Municipality from paying Bravospan 'fairly for the services that it has taken from Bravospan'. Counsel for SA Tourism argues that it is still to be determined what constitutes 'paying Bravospan fairly'.

[20] SA Tourism also criticises Letsema’s dissatisfaction with the Cost Order in the Judgment and for including same as a ground of appeal. The Cost Order made, it is submitted by counsel for SA Tourism, was correct as Letsema was not successful. Therefore, any intended appeal against the Cost Order has no factual and legal basis, as an appellate court would not interfere with the discretion of this Court in this regard. Such interference would be only appropriate in the event of: (a) the discretion not exercised judicially; (b) the exercise of the discretion influenced by wrong principles or constituting a misdirection on the facts, or (c) the decision not having been reasonably made by this Court properly directing itself to all the relevant facts and principles. Consequently, there is no basis for any interference in this matter.

Applicable legal principles for applications for leave to appeal

[21] I have referred to most of the legal principles cited on behalf of the parties in support of their respective cases, this or the other way. But the legal principles central to an application for leave to appeal are premised on the provisions of the Superior Courts Act 10 of 2013.

[22] Section 17(1) of the Superior Courts Act is pertinent in this regard and reads as follows in the material part:

- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
 - (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration ...

[23] In *Democratic Alliance v President of the Republic of South Africa and Others*,²³ a full court of this Division made the following observation regarding the test for leave to appeal:

- [4] The test as now set out in s 17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion... The fact that the Superior Courts Act now employs the word “would” as opposed to

²³ *Democratic Alliance v President of the Republic of South Africa and others* (21424/2020) [2020] ZAGPPHC 326 (29 July 2020) (coram: Mlambo JP, Davis JP and Molefe J).

“might” serves to emphasise this point. As the Supreme Court of Appeal said in *Smith v S* 2012 (1) SACR 567 (SCA) at para 7:

‘More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[5] ...

[6] The second basis upon which leave should be granted is that there is a compelling reason, that is apart from the existence of conflicting judgments on the matter under consideration which require clarification from a higher court. In essence the compelling reason is whether the case raises issues of significant public importance.

[24] The above legal principles do not profess to constitute a compendium of all legal principles currently finding application in respect of leave to appeal. But they – together with case law cited above, courtesy of counsel in this matter - will provide useful aids in the discussion to follow on the grounds of the intended appeal.

Grounds of appeal and submissions (for and against the granting of leave to appeal) - discussed

General

[25] Letsema has raised a number of grounds for its intended appeal against the Judgment. Equally, a number of issues have been raised on behalf of SA Tourism in opposition to Letsema’s case in the Leave to Appeal.

[26] Some of these grounds or issues deserve specific attention due to their impact on the disposition of this application. In some instances the issues or grounds are discussed jointly due to interlinkages which may be apparent from the subheadings. But, as I consider the Judgment comprehensive in nature and extent, I intend to strive for brevity in the discussion of these issues.

Letsema is innocent and reasonably relied on assurances and representations by Mr Ntshona

[27] Letsema’s primary point of contestation has been and remains that it acted reasonably in relying on the assurances and representations by Mr Ntshona, the then CEO of SA Tourism,

that TBCSA would contract for and pay for the services by Letsema. Letsema, similarly to the Executive Committee of SA Tourism, was misled by Mr Ntshona's deliberate misrepresentations, the assertion continues. According to Letsema it did not engage in any wrongdoing and, thus, it is an innocent party in this matter. This is disputed by SA Tourism.

[28] I did not directly rule on Letsema's self-proclaimed innocence in the Judgment. Such ruling or finding was unnecessary amidst my findings of Letsema's knowledge of the absence of the requisite competitive procurement process relating to its appointment.²⁴ I also rejected the so-called 'assurances' given by Mr Ntshona to Mr Harris of Letsema.²⁵ Reliance on such 'assurances' under the circumstances of this matter was always devoid of any reasonableness and inimical to Letsema's claim of innocence. Therefore, I search in vain for merit in this part of the grounds for the intended appeal.

Not just and equitable for SA Tourism to receive services at a reduced price

[29] It is further argued on behalf of Letsema that SA Tourism, as an organ of state, should not benefit – by receiving services in question at a reduced price – when its own CEO acted unlawfully by making the misrepresentations which led to the delivery of the material services.

[30] It is also submitted in this regard that this Court misdirected itself and erred by failing to find that a just and equitable remedy required that a declaration of invalidity would not have the effect of divesting Letsema of rights to which it would otherwise have been entitled, but for the declaration of invalidity. But I do not agree that this is an outcome cast in stone for this type of judicial reviews, otherwise the objective would be lost. Why should the organs of state and the courts go into the trouble of reviewing the unlawful procurement when the outcome is always certain: no interference with the private party's rights. The remedy imposed in the

²⁴ Pars [109]-[110] of the Judgment, CaseLines 00-38 to 00-39.

²⁵ Par [110] of the Judgment, CaseLines 00-39.

Judgment sought to balance the rights of both the organ of State, being SA Tourism, and Letsema, the private party. The Judgment does not interfere with payment made by SA Tourism for the services rendered by Letsema up to the reasonable cost of such services and nothing more or less.²⁶ I agree with counsel for SA Tourism that the case law relied upon by Letsema do not support the proposition advanced in this regard.

[31] Also, any anxieties regarding forensic accounting which would be required to give effect to the Orders cannot serve as a basis to appeal against the Orders or the Judgment. I did not see any other way of subjecting the unlawful payments made to Letsema to scrutiny without requiring Letsema to provide SA Tourism ‘with a detailed breakdown of its reasonable expenses with supporting vouchers relating to the monies received’.²⁷ Besides, it is not unreasonable to expect that any objective and competitive public procurement process of the same services would have required similar details to be set out in the bids, including by Letsema, for assessment by SA Tourism before awarding the tender. Competitive bids factor-in value relating to ‘intellectual capital, expertise, and intangible contributions’ in a manner ‘reasonably susceptible to quantification as profits’. They ought to, lest the figures or details provided would not comport with a ‘fair, equitable, transparent, competitive and cost-effective’ procurement, required for organs of state.²⁸ Therefore, there is nothing impractical and inequitable about this pending exercise in terms of the Orders.

[32] I agree that the just and equitable remedy proposed on the part relating to quantification exercise was not ventilated in the main application. But, I also agree with submissions on behalf of SA Tourism that the nature and extent of the possible repayment by Letsema is not yet

²⁶ Pars [115]-[116] of the Judgment, CaseLines 00-40 to 00-41.

²⁷ Par [122]d)ii) of the Judgment, CaseLines 00-44.

²⁸ Section 217(1) of the Constitution.

known and, therefore, Letsema's quest to embark on an appeal may be a fault start. The latter issue, actually, takes me to the next issue for discussion: is it not premature to appeal the Orders.

Is it not premature to appeal the Orders?

[33] SA Tourism says that the Orders, particularly the just and equitable relief granted, is not final in effect, and, therefore, it is not in the interests of justice to appeal against same at this stage. The Court is still to determine the amount repayable by Letsema to SA Tourism, if any. The latter would constitute a final order which would be competent of an appeal.

[34] I agree with counsel that the current position of the law is that appealability of an order or judgment of the Court is to be decided on the basis of the interests of justice.²⁹ And that the common law requirements of whether an order sought to be 'appealed against has final effect or is dispositive of a substantial portion of the relief claimed' are not irrelevant to the determination, but only subsumed by the constitutional standard of interests of justice.³⁰ Part of the focus of the Court in this regard is to guard against the pursuit of appeals on a piecemeal basis, which would be inherently not cost-effective and delay finalisation of litigation.³¹ The latter eventualities do not serve the interests of justice.

[35] Counsel for Letsema argued at the hearing of the Leave to Appeal that paragraph 122(d)(i) of the Judgment, declaring that the payments made by SA Tourism to Letsema pursuant to the unlawful appointments 'should not include monies representing profits on the payment received from the appointment',³² is final in effect and would not be dealt with in the subsequent process in terms of the Orders. I agree. Although, this part of the Orders - as

²⁹ SCAW at [41]. See par [15] above, for further discussion.

³⁰ SCAW at [56]; *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) [40]; *Eskom Holdings Soc Ltd and another v Sonae Arauco (Pty) Ltd* (1018/2023) [2024] ZASCA 177 (18 December 2024) [36]. See also *Government of the Republic of South Africa and Others v Von Abo* 2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA) [17] and par [15] above, for further discussion.

³¹ *TWK* [21]; *Minmetals* [33]; *Zweni* at 532-533; *Eskom Holdings v Sonae Arauco* [2024] ZASCA 177 [35]. See also *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA) [17].

³² Judgment par [122]d)i), CaseLines 00-44.

correctly pointed out by counsel for SA Tourism is still dependent in effect on the determination of the monies possibly repayable by Letsema to SA Tourism – paragraph 122(d)(i) of the Judgment by and of itself is final. The form or appellation of the order should yield to the effect of the order in this regard.³³ I also find that it would not be in the interests of justice to allow the remainder of the just and equitable remedy, envisaged in paragraph 122(d)(ii)-(iv), to unfold on the basis or trigger of paragraph 122(d)(i) when the latter part of the order is clearly operative and final.

Costs order unfair and appealable

[36] Letsema is also dissatisfied with the Costs Order that ‘each party shall be responsible for its own costs’.³⁴ Letsema contends that it was substantially successful in fending off SA Tourism’s ‘cynical and self-serving’ application for review. In the main, Letsema points to the fact that this Court did not accede to SA Tourism’s attempts to cause Letsema to be ordered to repay everything received from SA Tourism. Therefore, the Court misdirected itself by awarding costs on the basis done in the Judgment, the contention on behalf of Letsema concludes.

[37] Letsema’s contentions are disputed by SA Tourism including on the basis that the Cost Order is correct, as Letsema was not successful. And, that there is no factual and legal basis warranting interference by an appellate court with the exercise of discretion by this Court. I conclude on these and other issues above, next.

Conclusion and Costs

[38] Although I have sought to allow Letsema to retain part of the monies paid by SA Tourism representing vouched ‘reasonable expenses’,³⁵ it is clear from the rest of the Judgment

³³ SCAW at [53]; *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others* 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) [41].

³⁴ Judgment par [122]e), CaseLines 00-44.

³⁵ Judgment par [122]d)ii), CaseLines 00-44.

that I have denied Letsema anything suggestive of ‘profits’ from the monies received.³⁶ This represent the so-called ‘no profit principle’ whose origin now appears to be of legendary. Counsel for Letsema was emphatic in pointing out that the ‘no profit principle’ did not arise from *Allpay* although it may be from misapplication of the call in that case to subject benefit derived by a private party not beyond public scrutiny.³⁷ This seems probable.

[39] I am, therefore, convinced that the appeal intended by Letsema would have a reasonable prospect of success.³⁸ Further, current case law on the issue of the nature and extent of curtailment of the rights acquired by a private party in procurement declared unlawful by the Court is unclear. I have in mind the vexed question whether the private party may be stripped of all or part of what may represent profit from the services rendered or product delivered in terms of the procurement or appointment found unconstitutional and unlawful. This represents ‘some other compelling reason why the appeal should be heard’.³⁹

[40] But, I find myself unable to draw the same conclusion with regard to the intended appeal against the Cost Order. Nonetheless, as the Cost Order is intricate to (and natural consequence of) the Orders, the appellate court seized with the prospective appeal may consider it warranted to address all issues as part of the determination on the just and equitable remedy granted by this Court. Therefore, I will refrain from restraining the parameters of the appeal on any basis, including the Cost Order.

[41] Consequently, I would grant the Leave to Appeal. And due to the greater need for clarity and certainty, as well as authoritative pronouncement on the material issues of public

³⁶ Judgment pars [115]-[116], CaseLines 00-40 to 00-41.

³⁷ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) (‘*Allpay*’) [67].

³⁸ Section 17(1)(a)(i) of the Superior Courts Act. See pars [22]-[23] above.

³⁹ Section 17(1)(a)(ii) of the Superior Courts Act. See pars [22]-[23] above.

importance, I will grant Letsema leave to appeal to the Supreme Court of Appeal. The costs of this Leave to Appeal shall be costs in the appeal.

Order

[42] In the premises, I make the following order:

- a) leave to appeal to the Supreme Court of Appeal is granted, and
- b) costs of this application for leave to appeal is to be costs in the appeal.



Khashane La M. Manamela
Acting Judge of the High Court

Dates of Hearing : **28 February 2025**
Date of Judgment : **22 April 2025**

Appearances:

For Applicant (SA Tourism) : Mr K Tsatsawane SC (with Ms N Makhaye)
Instructed by : Diale Mogashoa Inc, Pretoria

For the First Respondent (Letsema) : Mr G Budlender SC (with W van Aswegen)
Instructed by : Phatshoane Henney Inc, Bloemfontein
c/o Tiaan Smuts Attorneys, Pretoria