IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Full Court Appeal Case No: A19/2024

Court *a quo* Case No: 90545/18

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

[redacted]

18/02/2026

SIGNATURE DATE

In the Full Court Appeal of:

**SPECIAL INVESTIGATING UNIT** Appellant

and

**GEKKONOMICS PROPRIETARY LIMITED t/a INFONOMIX** First Respondent

**SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED** Second Respondent

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**JUDGMENT**

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**LABUSCHAGNE J**

This is an appeal against part of a judgment granted by Tlhapi J in the Court *a quo*. The appeal is with leave of the Court *a quo*.

[1] The appellant is the Special Investigating Unit (SIU) which was established in terms of the Special Investigating Units and Tribunals Act, 74 of 1996 ("the SIU Act"). Its purpose is to investigate malpractices and maladministration associated with state institutions. Its statutory powers include the following:

> "4(1) *(c)* to institute and conduct civil proceedings in a Special Tribunal or any court of law for-
>
> (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution;
>
> (ii) any relief relevant to any investigation; or
>
> (iii) any relief relevant to the interests of a Special Investigating Unit;"

[2] The SABC, the national broadcaster, is a public entity which was referred for investigation by the SIU under section 2(2). The authorisation of the investigation was published in Government Gazette No. 41086 of 1 September 2017 under Regulation Gazette No. 10754, Proclamation No. R29 of 2917.

[3] The SIU, through its investigations, obtained evidence that a tender awarded by the SABC to the first respondent ("Infonomix") was tainted by illegality in the procurement of its services.

[4] The SIU instituted review proceedings for the setting aside of the decision of the SABC to award the tender to the Infonomix and to declare the contract between the SABC and Infonomix concluded on 07 December 2016 void *ab initio*.

[5] The SIU also sought the following orders, which are relevant to this appeal:

> "3. Ordering the first respondent to repay all the payments made to the first respondent by the second respondent under the said contract.
>
> 4. In the alternative to prayer 3 above, that this Honourable Court orders:
>
> 4.1 The first respondent to render a full account of all payments it received under the impugned contract and its reasonable expenses, supported by necessary vouchers;
>
> 4.2 The debate of the said accounts;
>
> 4.3 Payment to the second respondent of whatever profits earned by the first respondent upon debate of the account."

**THE FACTS**

[6] Infonomics made a proposal, according to an affidavit of Mr T Mulaudzi, addressing the following:

> "1. The SABC was battling with a digital strategy and the first respondent undertook to develop a media proposition which would be commercialised. The first respondent identified seven websites that would be suitable for revenue creation.
>
> 2. The websites would be repurposed and changed from their current platforms to attract consumer interactivity to commercial platforms to create revenue generation. The first respondent would assist the SABC and commercialising the seven websites, transforming the websites into the SABC's immediate digital medial proposition.
>
> 3. The first respondent would implement Value Added Services on the seven websites."

[7] A financial partnership would ensue between the SABC and Infonomix on a 70/30 share of revenue derived from digital sales and value added services (i.e. 70% in favour of the SABC).

[8] However, the proposition required set up funding of R4,5 million for implementing of "a new responsive design of seven websites chosen by the SABC. The costs are for website skinning/platform development …", according to the Business Case presented for consideration.

[9] The business case document was signed by the author, Mr T Mulaudzi and officials of the SABC in mid-November 2016.

[10] The SIU's contention is that this was not sufficient to warrant a deviation for a single source service provider, as there may have been others with better products. The facts will demonstrate that the first respondent was not selected for its skills as it had no track record in the field or even a bank account at the time.

[11] The R4,5 million was paid by the SABC to Infonomix. Only one of the websites was developed.

[12] The SIU's contention was that there was no justification for the payment of R4,5 million. Infonomix did not indicate the nature of the services it rendered which justified the payment and it did not explain how the monies were utilised for set up costs within the premises of the SABC.

[13] There was no prior bidding process before the award and there was also no compliance with the pre-deviation processes required by the policies of the SABC.

[14] The Supply Chain Management Manual of the SABC provided for deviations from SCM procedures of inviting competitive bids where it is impractical to invite interested parties at short notice and where such procurement of goods or services needed immediate attention by the Executive Directors.

[15] The SIU contended that there was no basis to deviate in respect of Infonomix. It was only registered as a company in 2015, and it opened up a bank account for the first time on 12 November 2016, which was the first time it ever received payment from the SABC. It was therefore clearly not an established entity within that field.

[16] At the time of its appointment, Infonomix was not yet registered as a service provider of the SABC on the SABC database. It was only registered on 18 November 2016 on the SABC database and only on 12 December 2016 was it registered on the Central Supplier database.

[17] The SCM manual provided that the SABC could consider an unsolicited bid, only if the product or service offered is a unique or innovative concept that will be exceptionally beneficial to, or have exceptional cost advantages for the SABC; that the person who made the bid is the sole provider of the product and service; that the need for the product or service by the SABC has been established during its strategic planning and budgeting process; and the reasons for not going through the normal bidding processes are found to be sound by the Bid Adjudication Committee or a level as per the DAF.

[18] The Court *a quo* found that the SABC did not comply with its own manual. The Court found in para [67]:

"In as far as the SABC failed to comply with the law, such conduct was reviewable, and the award may consequently be set aside and the contract entered into declared void ab initio."

[19] The SABC did not provide evidence that the product was unique and innovative. That would have required prior strategic planning involving a needs analysis and an evaluation whether the need has been budgeted for. In exceptional cases it needed to be established whether there were costs advantages for the SABC warranting such deviation. Those reasons had to be provided to the Bid Evaluation Committee to explain why a normal bidding process was not followed.

[20] As none of the aforesaid took place, the Court granted prayers 1 and 2 of the notice of motion. It ordered that a decision of the SABC of 15 November 2016 to award the tender to Infonomix be reviewed and set aside. It also declared that the contract entered into between Infonomix and the SABC on 07 December 2016 is void *ab initio*.

**THE COURT *A QUO*'S FINDING ON A JUST AND EQUITABLE REMEDY**

[21] The Court *a quo* declined to grant prayers 3 and 4 of the notice of motion, quoted above, and it is against this part of the order that leave to appeal was sought and obtained.

[22] In dealing with prayers 3 and 4 of the notice of motion, the Court stated the following:

> "[82] In as far as prayers 3 and 4 are concerned, I am of the view that both Infonomix and the SABC flouted the SCM procedures, the SABC being the most guilty party by failing to follow a competitive bidding process as envisaged in section 217 of the Constitution and the PFMA

and, for engaging an unsolicited bid with an entity which did not qualify as a sole source provider.

[83] None of the employees involved in the malfeasance have been joined individually to this application which would probably have made them liable in their personal capacities for the loss the SIU wishes to recover. The prayers suggest there is probably more to the initial payment of R4,5 million which the SIU wishes to uncover, for example as suggested in the alternative prayer. The SABC has not opposed the application and in my view an order cannot be made in the circumstances of this case that only Infonomix repay the loss the SIU wishes to recover where the SIU has not shown that the SABC had not derived any benefit from the payment it made.

[84] While it is trite that Infonomix should not benefit out of a contract which is void ab initio, in this instance the SABC may have benefitted from whatever service it received from Infonomix before the contract was terminated and probably extending beyond that period. By declaring the agreement void ab initio Infonomix would be prevented from deriving further benefit from the SABC derived out of the contract.

[85] The SIU has not determined in its investigations what the value of such benefit might be and it has not made out a case why it should be determined that it is entitled to an order in the alternative, if in its investigations it did not go further in determining what gains or losses the SABC suffered as a result of the impugned decision or what profits

were earned. The SIU had full access to information of the SABC from which it could establish that more than the R4,5 million was paid out. The SIU has made no demand for repayment of the sum of R4,5 million and additional amounts it might have uncovered prior to the launch of this application. The SIU does not make out a case that the SABC itself was not playing open cards and was refusing to avail information from its books regarding its dealings with Infonomix justifying an order in the alternative against Infonomix only. Infonomix has not been approached by the SIU prior to the launch of this application to give an account of its services to the SABC and payment received or profits paid out and that Infonomix declined to give such information."

[23] In the judgment in respect of leave to appeal, the Court *a quo* reasoned that the aforesaid may demonstrate an error warranting the matter to proceed on appeal.

[24] The notice of appeal reflects that the appellant wishes to insert prayers 3 and 4 of the original notice of motion into the order of the Court *a quo*. This provides for a repayment of all amounts paid by the SABC to the first respondent, with an alternative for an accounting, and a debatement of all such payments and payment to the SABC of whatever profits were earned by Infonomix.

[25] In the grounds of appeal, the SIU contends in essence that Infonomix was not innocent, and as the agreement had been declared void, there was no legal

*causa* for payments to it to be retained. It was contended that the order of the Court *a quo* is at odds with the *"no profit, no loss"* principle that has developed in the jurisprudence pertaining to remedies that are just and equitable in review proceedings.

**CONTENTIONS ON APPEAL**

[26] The SIU contends that the Court *a quo* erred in failing to direct repayment of the amount of R4,5 million received by Infonomix. At the time when Infonomix's bid was considered and accepted, it was a company which had just been established, did not have a bank account, was not registered as a service provider on either of the SABC database or the Central Supplier database and the aforesaid payment was the first ever payment it received into its recently established bank account. The payment was pursuant to an approved request for set up costs for the implementation of a new responsive design of seven websites chosen by the SABC. However, only one website was ever designed by Infonomix.

[27] The SIU correctly points out that it must be accepted that the Court *a quo* correctly found the contract to be unlawful and void *ab initio*. There is no cross-appeal.

[28] Argument on behalf of the Infonomix on appeal did not contradict the correctness of the Court's finding that the contract was void *ab initio*. Argument for Infonomix suggested that it would be more appropriate to have a debatement after an accounting had taken place to determine what the aforesaid R4,5 million payment was expended on.

**WAS THERE A MISDIRECTION BY THE COURT *A QUO?***

[29] The exercise of the Court *a quo*'s remedial discretion under section 172(1)(b) of the Constitution constitutes a discretion in the true sense, which an Appeal Court would only interfere with if that discretion was not exercised judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision, which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles (see *Trencon Construction (Pty) Ltd v Industrial Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) at para [88]).

[30] Where a party is complicit in maladministration, impropriety or corruption, justice and equity dictates that such a party be precluded from profiting from an unlawful tender. A complicit party may also be required to suffer losses (see *PRASA v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at para [118], confirmed on appeal in *Swifambo v PRASA* 2020 (1) SA 76 (SCA)).

[31] The *"no profit, no loss"* principle was described by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC) at para [67] as follows:

> "[67] 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."

[32] The SIU correctly contends that Infonomix was complicit. It approached the SABC with its proposal. It knew it was dealing with an organ of state under constitutional strictures to act lawfully, following a procurement system that is fair, equitable, transparent, competitive and cost effective (sec 217 of the Constitution). It had no track record or special skills to justify making an unsolicited bid.

[33] The complicity within the SABC is evident. The internal request for a deviation from legal prescripts and the SABC Supply Chain Management Policy and Manual was approved on 11 November 2016. This was before the approval of the business case, which was required to motivate a deviation. That business plan was only approved on 15 November 2016. In the premises, the deviation was approved without justification.

[34] The Court *a quo* declined the request for an accounting or a debatement, contending that the SIU had not placed sufficient facts before the Court to demand a debatement. The Court effectively placed the SIU in the position of the SABC as though the complainant SIU had been the SABC.

[35] The SIU is a statutory organ with a statutory mandate to recover losses incurred by the State due to corruption and financial misconduct. Because it is removed from the ambit of those sharing privity of contract, the SIU cannot be treated as though it were one of the contracting parties when it comes to placing information relevant to remedy before the Review Court.

[36] This oversight on the part of the Court *a quo* in this regard constitutes a misdirection which leaves the Court of Appeal free to intervene.

[37] In *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) the Constitutional Court explained:

> "[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances, the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

[38] Usually, a remedy crafted in terms of sec 172(1)(b) of the Constitution must have at least the following qualities. It must vindicate the constitutional right wronged, i.e. the right of a party aggrieved by the unlawful exercise of public power. It must uphold the rule of law, and it be just and equitable to all parties.

This has been crystallised in the "no profit, no loss" approach in respect of innocent tenderers.

[39] As the SIU is a statutory recovery agent of the State for the return of ill-gotten gains, it is not in the position of an immediate party who was wronged. It recovers losses in terms of an empowering statute. A just and equitable remedy in such circumstances would focus on disgorgement of profits and recovery of unlawful payments.

[40] The R4,5 million paid to Infonomix is all the SIU seeks to recover. It is a single payment which it sought to be paid to the SABC in its Notice of Motion. However, as the SABC is complicit in the affair, it would not be just and equitable to direct Infonomix to repay this amount to the SABC. The first respondent has been in possession of the funds for almost ten years. Repayment to the SIU with interest is just and equitable in these circumstances.

[41] In the premises the following order is made:

1. The appeal succeeds with costs, such costs to include the costs of two counsel, where so employed, on Scale C.

2. The Court *a quo*'s decision declining an order in terms of prayer 3 of the Notice of Motion is set aside.

3. The following order is added to the order of the court a quo:

"The first respondent is directed to repay R4,5 million to the appellant, with interest at the prescribed mora rate from date of receipt to date of repayment."

[redacted]

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**LABUSCHAGNE J**

JUDGE OF THE HIGH COURT

I agree

[redacted]

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**POTTERILL J**

JUDGE OF THE HIGH COURT

I agree

[redacted]

**VAN DER WESTHUIZEN J**

JUDGE OF THE HIGH COURT