**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, JOHANNESBURG)**

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

[redacted]

**30 APRIL 2026** **FHD VAN OOSTEN**

**CASE NO: A2024/027144**

In the matter between

**AMAHLO CONSULTING SERVICES CC** **APPELLANT**

and

**GAUTENG ECONOMIC PROPELLER** **RESPONDENT**

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**J U D G M E N T**

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**VAN OOSTEN J:**

**Introduction**

[1] This appeal arises from a successful application by the respondent, Gauteng Economic Propeller (GEP), a provincial public entity established in terms of s 2 of the Gauteng Enterprise Propeller Act, 5 of 2005, with the main objective, to provide financial support and business development services to small, micro and medium businesses and co-operatives, for a self-review and setting aside of three decisions relating to the appointment, without a tender process, of the appellant, Amahlo Consulting Services CC (Amahlo), as the co-ordinator of Project Vuthela (the project), a job creation initiative launched by GEP in 2016, and the conclusion of an agreement relating thereto and the amendment thereof.

[2] The court a quo found that the impugned decisions were unlawful and therefore unconstitutional, which in terms of s 172(1)(a) of the Constitution, the court was enjoined to declare invalid. In regard to consequential just and equitable relief under s 172(1)(b), Amahlo was ordered to pay back to GEP the amount of R52 343 964.00, representing, as dealt with in the judgment, the amount of R59 762 578.46 paid to Amahlo by GEP, less an (estimated) allowance for payments made by Amahlo in respect of stipends of R1 500.00 per month for 142 students, in the total sum of R7 418 614.46.

[3] The court a quo in the judgment on leave to appeal, remarked that Amahlo had sought leave to appeal only as far as the calculation of the amount it was ordered to pay back to GEP is concerned. On the premise that there may have been an error in the calculation of the amount, the learned Judge a quo granted leave to appeal to this court, 'only on the issue of the calculation of the amount'.

[4] As a preliminary to the appeal, there is before this court an application for re-instatement of the appeal and condonation regarding Amahlo's non-compliance with certain rules and directives applicable to the prosecution of appeals.

**The basic facts**

[5] The illegality of the decisions was clear and indisputable. The background facts are fully set out in the judgment of the court a quo, and I accordingly do not consider it necessary to traverse those again. The illegality of the decisions was not challenged either in the court a quo, or before us. For the sake of clarity and context, I propose to briefly refer to the basic facts relating thereto, which are not in dispute.

[6] The impugned decisions were, first, GEP's decision to appoint Amahlo, as the project co-ordinator, in respect of which an upfront payment to Amahlo of R2 400 000, for a pilot project, and in addition thereto R65 963 817, were approved, for creation of approximately 75 000 job opportunities for the youth in Gauteng over a period of three years, second, the conclusion of the resultant memorandum of agreement (the MoA) between GEP, without its representative having the required authorisation, and Amahlo to implement the project, and, third, the conclusion of an

addendum to the agreement, in terms of which the number of job opportunities were reduced to 5 000, without a corresponding adjustment of the grant.

[7] In 2020 complaints of non-payment of stipends by students involved in the project, were received which prompted GEP to commission a forensic investigation relating to the project, in respect of which a report was delivered in January 2022. The report, in sum, contains a description of the nature and extent of the investigation, the factual findings relating to allegations of irregularities and wasteful expenditure, and recommendations.

***Re-instatement and condonation***

[8] The history of this matter, from the date of granting leave to appeal, sets the scene for what led Amahlo to launch an application for reinstatement of the appeal and condonation.

[9] Amahlo failed to comply with a number of the Uniform Rules of Court and the provisions of this Court's Practice Manual and the Revised Consolidated Practice Directive, in that the notice of appeal was filed late, the submission of the date application form and delivery of the record, likewise, were well out of time, resulting in the appeal *ex lege* deemed to have lapsed in terms of Uniform Rule 49(7)(d).

[10] Amahlo further failed to file the required heads of argument and a practice note simultaneously with the application for a hearing date and delivery of the record, which prompted GEP to launch an application for a declarator that the appeal had lapsed, alternatively, an order compelling Amahlo to file its heads of argument and a practice note. A notice of substitution of attorneys of record on behalf of Amahlo, and Amahlo's intention to oppose the application, signed by Amahlo's present attorneys of record, was filed one day before this application was to be heard. At the hearing of the application, counsel instructed by Amahlo's present attorney, appeared, and the matter was removed from the roll.

[11] Amahlo thereafter brought the application for re-instatement of the appeal 'insofar as the appeal has lapsed', and condonation, to which I have already referred. The application was opposed by GEP and a full set of affidavits was filed. An affidavit

deposed to by Amahlo's former attorney of record, in which the reasons for the delays before termination of her mandate, was obtained, and annexed to the founding papers. Regarding the period thereafter, the affidavit of Amahlo's present attorney of record, Ms Lomax, as well as a supporting affidavit deposed to by the sole member of Amahlo, form part of the founding papers, to which GEP has replied.

[12] In essence, the blame for the delays is put squarely on the shoulders of Amahlo's erstwhile legal team, in particular the conduct of counsel instructed by the former attorneys of record. Regarding prospects of success, the submission was advanced that the remedy ordered by the court a quo, in requiring Amahlo to repay all amounts paid to it, save for deductions of estimated stipends, is 'plainly not just and equitable', that this court on appeal has the power to set aside the remedy and in substitution thereof, not grant any remedy in terms of s 172(1)(b) of the Constitution.

[13] The standard for considering an application for condonation is the interests of justice, which the Constitutional Court in *Maleka v Boyce N.O. and Others* (CCT 175/23) [2026] ZACC 7 (24 February 2026), re-stated as follows (para [45] – [46]):

'This Court has previously stated that the standard for considering an application for condonation is the interests of justice. This would of course depend on the facts and circumstances of each case. There are a host of factors that are relevant to this enquiry including, but not limited to, the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. Indeed, what is required of a court when considering an application for condonation is a balancing act of these various factors depending on the facts before the court. The scale will, however, often tip against the granting of condonation upon consideration of the explanation furnished for the delay and the prospects of success. As such, an applicant seeking condonation must give a full explanation for the delay. The explanation must not only account for the entire period of delay but it must also be reasonable. The applicant must also enjoy reasonable prospects of success on consideration of the merits. This accords with what this Court said in *Grootboom* ([2013] ZACC 37; 2014 (1) BCLR 65 (CC); 2014 (2) SA 68 (CC) paras 20-4) that condonation is not for the mere asking.'

[14] Applied to the facts of this case, two considerations are decisive. First, GEP's delay in launching this application six years after the project was completed and in respect of which the court a quo granted condonation, and juxtaposed thereto, the delay caused by Amahlo's non-compliance with the rules, of some six months. The merits of the appeal and consequent re-consideration by this court whether the order of the court a quo complies with the Constitutional imperative of a just and equitable remedy under s 172(1)(b) of the Constitution, to which I shall revert, in my view, decisively tips the scale in favour of this court granting condonation and an order for re-instatement of the appeal.

[15] Against this background I now turn to a consideration of the merits of the appeal.

**Merits of the appeal: the litigation in the court a quo**

***Pre-hearing***

[16] The issues in the appeal are considerably wider than what the eye meets upon a reading and consideration of the affidavits filed in the main application, and notably changed significantly as the matter progressed. This was primarily caused by Amahlo changing the goalposts from the time of opposing the matter in its initial stages, until as late as at the hearing of the appeal before this court.

[17] In its answering affidavit in the main application, Amahlo does not challenge the unlawfulness of the impugned decisions, but adds that it was not involved or aware of GEP's internal decision making processes that were followed. Except for challenging the lateness of GEP bringing the application six years after the project was launched, and the admissibility of the forensic report on the ground of it containing hearsay evidence, it is stated that Amahlo has complied with all its obligations in terms of the agreement to create job opportunities, and that all funds received from GEP, totalling R62 162 578.56, were authorised by GEP and utilised for the intended purpose. Monthly feedback reports were submitted to GEP as to the progress made, and the project terminated in March 2019, resulting in the agreement having been duly fulfilled. In the concluding paragraph of the answering affidavit, an order for the dismissal of the application with a punitive costs order against GEP is sought.

[18] After service of the answering affidavit, GEP filed a notice in terms of Uniform rule 35(12), requiring Amahlo to produce the documents referred to in Amahlo's answering affidavit, and more fully described in 29 numbered paragraphs. In response Amahlo indicated that it was no longer in possession of the documents referred to in 8 of the paragraphs of the Rule 35(12) notice, and regarding the remaining documents requested, attached a plethora of documents to the reply, thereby contributing the bulk of the papers to the appeal record before this court.

[19] In GEP's replying affidavit Amahlo is accused of complicity in the wrongdoing of GEP regarding the impugned decisions and the execution thereof. Reference is made to the agreed reduction of job opportunities from 75 000 to 5 000 without any concomitant reduction of the contract price, Amahlo's submission of invoices for payment prior to the conclusion of the agreement, its failure to submit all required monthly reports and the inability to show that jobs were in fact created. Amahlo's financial statements, attached to the answering affidavit, are moreover criticised for a number of inconsistencies and irregularities, which it is alleged, disentitles Amahlo from retaining any monies received or profits made.

[20] I should indicate that the replying affidavit does not refer to, or deal with the rule 35(12) documents: although the rule 35(12) notice was served on Amahlo prior to the filing of the replying affidavit, the record does not indicate the date upon which the reply thereto with the attached documents, was delivered to GEP.

***The hearing***

[21] At the hearing of the application in the court a quo, counsel then appearing for Amahlo, in accordance with the earlier heads of argument, addressed GEP's delay in bringing the application without seeking condonation, which prompted counsel to submit that the delay was unreasonable and that the application on that ground alone, should be dismissed. Regarding GEP's prayer that Amahlo be ordered to refund all monies received, counsel submitted that Amahlo has demonstrated in the answering affidavit and the rule 35(12) reply 'that various expenses were paid by the respondent'. Counsel made no further reference to those documents, and proposed that the agreement not be set aside, in order to preserve Amahlo's rights, and that no order be

made for the repayment of any amount. The issues concerning ordering a just and equitable remedy in the event of setting aside the impugned decisions, and the calculation of the amount to be repaid, were raised by the learned Judge *a quo* with counsel for GEP in reply, who without more ado, persisted with the submission that all monies were to be repaid by Amahlo.

**Leave to appeal**

[22] The ambit of the leave to appeal granted by the court a quo was hotly debated before this court. The opposing contentions are, on the one hand, counsel for GEP contending that leave to appeal was granted on the limited issue relating to the arithmetical calculation, in order to arrive at the amount reflected in paragraph 2 of the order, and on the other, counsel for Amahlo, premised on the remark of the learned Judge a quo, I shall presently deal with, that a second bite of the cherry was afforded to Amahlo, submitted thereby opening the proverbial door for extending the scope of the leave to appeal, warranting the inference that this court has jurisdiction to entertain the appeal on all aspects relating to the order that was made, including the arguments raised in counsels' heads of argument.

[23] The order reads as follows:

'1. Leave to appeal is granted on the issue of the calculation of the amount in paragraph 2 of the order in the main judgment, to the Full Bench of this Division.

2. Costs are costs in the cause.'

[24] In the judgment on leave to appeal, the learned Judge in the opening sentence states:

'The applicant seeks leave to appeal my order in this matter only as far as the calculation of the amount it was ordered to pay back to the respondent is concerned'.

and continues:

'While there is an element in this application for leave of the respondent now having a second bite of the cherry, in that it declined to engage with the amount in great detail in the matter before me, I am satisfied that there may be an error in calculation and that another court may come to a different conclusion as far as the calculation of the amount to be paid back is concerned'.

### ***Analysis: Jurisdiction of this court on appeal***

[25] The determination of this issue requires as a starting point, an interpretation of the order of the court a quo. In *HLB International (South Africa) (Pty) Ltd v MWRK Accountants (Pty) Ltd* 2022 (5) SA 373 (SCA) para 24-26, the SCA dealt with the significant developments in the law relating to interpretation of documents, since the milestone judgment in *Firestone v Genticuro* 1977 (4) SA 298 (A), and with reference to the modern approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494 (SCA) para 12, and *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) para 13, concluded as follows (para 27):

'The manifest purpose of the judgment is to be determined by also having regard to relevant background facts which culminated in it being made. For as was said in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* (2009 (4) SA 399 (SCA) 409), 'context is everything.'

[26] The context in which the order must be considered, comprise a consideration of the grounds relied upon in Amalo's application for leave to appeal, the heads of argument submitted by the parties in the application for leave to appeal, the judgment and order of the court a quo, and lastly, Amahlo's notice of appeal.

[27] In the notice of application for leave to appeal, and relevant for present purposes, the primary ground in support of the application, is directed at the court a quo's 'finding' that Amahlo was to repay the sum of R52 343 96.00 to GEP, 'in circumstances where the undisputed evidence shows, that Amahlo had concluded various agreements with service providers, proof of such invoices were submitted by [Amahlo] and can be seen from annexures 'G1' to 'G33', so annexed to [Amahlo's] reply to [GEP's] notice in terms of rule 35(12)', and, 'that 'various payments to service providers of [Amahlo], which were necessary costs pursuant to the contract so being concluded between [Amahlo] and [GEP]'. A further ground relied on is simply directed at the court a quo's calculation

of the stipends 'so paid by [Amahlo] to be the sum of R7 418 624.40', without any further clarification on the nature of the alleged error.

[28] In the heads of argument in the application for leave to appeal, counsel for Amahlo extensively dealt with the amount of the order and the reasons for challenging the correctness thereof. In particular, the court a quo's calculation of the stipend deduction, with reference to the underlying figures, is dealt with, culminating in the submission that the correct amount should have been R7 668 000.00 and not R7 418 614.40. In addition hereto, arguments are raised that the court a quo failed to consider Amahlo's financial statements, and the rule 35(12) documents.

[29] Upon a consideration of the totality of the notice of application for leave to appeal, it must have been abundantly clear to all concerned that Amahlo's grounds of appeal were directed at the full amount that was ordered, and not only the amount of the stipend calculation. At the hearing of the application for leave to appeal, counsel for Amahlo, in response to a question directed by the learned Judge a quo, indicated that the appeal is directed against prayer 2, 'and that is the monetary amount Amahlo, is ordered to pay back' to GEP, being R52 343 964. The exchange between the learned Judge and counsel then proceeded as follows:

'<u>COURT:</u> Yes. Okay, and it is only the amount?

<u>MR KLOEK:</u> That is correct, M'Lady.

<u>COURT:</u> So, it is not the principle of the payback, it is the calculation?

<u>MR KLOEK:</u> Calculation, M'Lady.

<u>COURT:</u> Alright, Well, I am inclined to grant that. So let me hear Ms Haskins first.'

[30] Counsel for GEP then proceeded to address the calculation of the surplus, which came to R52.3m, less the stipend that was paid. In reply, counsel for Amahlo referred to a 'factual error' in the calculation the learned Judge had made regarding the stipend of R1 500 per month, that was paid to 142 students over that particular time period, which counsel submitted was more than the amount of R7 418 624.40 referred to in the judgment in respect of stipends, to which counsel added:

'Secondly, all the expenses demonstrated… [intervenes]

COURT: But the expenses are not justified. We do not know what the expenses are and I said I am not taking the expenses into account.

MR KLOEK: Yes. But only on the calculation, the difference between the R7 668 000 and the amount that was subtracted, there is an error, a factual error.

COURT: Yes. There is a difference of like R200 000 or something.

MR KLOEK: Be that as it may, there was no Rule 42 application brought to correct the amount, M'Lady and whether it is R200 000 or R100 000 that is not the test. The test is simply if there is prospect of success on appeal and we submit there are.'

[31] I consider a few comments appropriate. It is difficult to understand what the learned Judge referred to in using the words 'the principle of the payback'. The principle the learned judge was alive to, is the requirement of just and equitable as to the remedy. Counsel was informed in no uncertain terms, of learned Judge's firm stance that the expenses were not justified and that she had already made it clear that expenses would not be taken into account. This prompted counsel to deal with the stipend error in the learned Judge's calculation. The exchange between counsel and the bench in any event, occurred during argument and although counsel emphasised certain aspects of the argument, there was not at any stage an abandonment of the any of the grounds set out in the application for leave to appeal. The learned Judge's remark that Amahlo 'declined to engage with the amount in great detail in the matter before me', can only be considered as a reference to the full amount and not only the stipend amount, which as it apparent from the exchange quoted above, was fully explained to the court.

[32] This brings me to the reasoning of the learned Judge which I have alluded to. The 'error in calculation' referred to by the learned Judge is clearly to the stipend calculation error which counsel once again had addressed in argument, which significantly was not challenged by counsel for GEP. Had it been the intention of the learned Judge to limit the leave to appeal she proposed to order, to only the stipend calculation, she obviously would have mentioned exactly that, and nothing else, in particular as it was clearly circumscribed and unchallenged. But, she goes further and finds that another

court may come to a different conclusion as far as the calculation *of the amount to be paid back* is concerned. In making the finding, the learned Judge extended the scope of the order she proposed to make, to the whole amount to be paid back, and not limited to the stipend calculation error, which it seems, eventually persuaded the learned Judge to grant leave to appeal. The learned Judge, moreover was acutely acquainted with the difference, on the facts of this matter, between the amount to be paid back and the amount of the stipend deduction. Within this context the learned Judge's reference to a second bite of the cherry, for the reason that it that declined to engage with *that* amount in great detail, is not capable of any interpretation other than that a second opportunity was afforded to Amahlo to challenge the full amount to be paid back on appeal to the full court.

[33] I am moreover, in agreement with counsel for Amahlo's submission, which decisively seals the interpretation, that the calculation is the quantification limb of the just and equitable remedy: the court cannot determine the just and equitable requirement of the quantified amount without determining the remedial basis on which the amount is to be quantified. Once this is applied, the conclusion is inevitable: the leave to appeal granted on the calculation of the amount in prayer 2, includes the remedy of just and equitable relief, on which it is based.

[34] The order made by the learned judge is in all respects consonant with the interpretation above. Once again, the reference is made to the calculation of 'the amount' in paragraph 2 of the order. Had it been the intention of the learned Judge to limit the leave granted to the stipend calculation, one would have expected specific words to that effect in the order, of which there are none.

[35] In conclusion, Amahlo's notice of appeal is directed against the whole amount of prayer 2 of the order, and a substitution of the order with an order that Amahlo is not ordered to pay back to GEP any amount is sought.

[36] Amahlo's initial heads of argument in this appeal, challenge first, the 'default basis' on which the court a quo exercised its discretion in terms of s 172(1)(b) of the Constitution, being that an innocent party may not benefit from the unlawful contract and that this must be corrected by an order for re-payment, second, that the learned

judge should have applied the *Plascon-Evans*-rule in the determination of the issues, and, third, that the learned judge failed to consider the inadmissible hearsay allegations contained in the ENS report as well as the limitations under which it was compiled. In conclusion, it was submitted that the court a quo should have declined to grant any remedy in terms of s 172(1)(b). In the heads of argument of counsel for GEP, the point is taken that the arguments raised on behalf of Amahlo impermissibly seek to expand the ambit of the appeal if regard is had to the order that was granted in the application for leave to appeal. The refusal of leave to appeal in respect of those issues, it is further submitted, confines Amahlo to the issue pertaining to the calculation of the stipend amount. For the reasons I have mentioned, I do not agree with the argument.

[37] In conclusion on this issue, I agree with counsel for Amahlo that the order, properly interpreted, was granted on the whole amount referred to in the order.

**The judgment of the court a quo**

[38] In its consideration of a just and equitable remedy, the court a quo, with reference to *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2022 (5) SA 56 (SCA) at [42], and *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC) (*Allpay* 2), proceeded on the premise that 'If Amahlo is an innocent party, it still may not benefit from the unlawful contract'.

[39] The dictum in *Allpay 2* relied upon by the court a quo, reads as follows (para [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. And any benefit that it may derive should not be beyond public scrutiny'

In *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others* (590/2024) [2025] ZASCA 179 (28 November 2025), Unterhalter JA, writing for the court, coined the *Allpay 2* dictum as the two-truths dictum, which simply put, encompasses the principle: no loss, but no gain, the correctness of which, in re-affirming the SCA judgment in *Special Investigating Unit v Phomella Property*

*Investments (Pty) Ltd and Another* [2023] ZASCA 45; 2023 (5) SA 601 (SCA) paras 14-16, was rejected, as not correctly reflecting the position adopted in *Allpay 2*, and being inconsistent with the remedial latitude the Constitutional Court has applied to other cases in which it has made a just and equitable order. The judgment continues (paras 26):

'*Allpay II* held that the award of a tender found to be unlawful and declared invalid does not give rise to a right to benefit from an unlawful contract. What this means is simply this: without a right, there is no duty resting upon a court exercising its just and equitable discretion to order that the benefit of the unlawful contract must be conferred. But the absence of such a right and its correlative duty does not mean that the court in the exercise of its discretion may not permit a party to enjoy the benefit of a contract, including the profits that may accrue.

The mistake made by certain courts that have sought to understand Allpay II is to equate the absence of a right to benefit from an unlawful contract with the exclusion of such benefit from the exercise by the court of its just and equitable discretion. Allpay II does not say this. Indeed, it simply holds that any benefit derived 'should not be beyond public scrutiny'. This means that any benefit derived from an unlawful contract falls to be scrutinised in order to determine how the court should exercise its just and equitable discretion. It does not mean that the benefit of an unlawful contract is excluded from remedial consideration, for then the benefit would indeed be beyond public scrutiny because it would fall outside the very exercise the court undertakes to weigh relevant considerations so as to arrive at a just and equitable order.

What is required is an exercise of the court's discretion that will result in a just and equitable order. Such an order cannot proceed from the a priori position that what is just and equitable excludes the retention of any profit by Mafoko.'

(See also, *Caledon River Properties (Pty) Ltd t/a Magwa Construction and Another v The Special Investigation Unit and Another* (025&024/2024) [2026] ZASCA 05 (16 January 2026) para [18]).

[40] Applied to the facts of this case, the court a quo's adherence to its mistaken interpretation of *Allpay 2*, excluded from the exercise of its discretion, Amahlo's right to benefit from the unlawful contracts, even if Amahlo is an innocent party.

[41] The learned Judge reasoned that Amahlo has not shown any reason why the repayment in full should not be granted, that it has not taken the court into its

confidence regarding profits that were made or, absent any factual support, what it actually expended and to whom. The learned Judge finally concluded that there was 'no reason' to make an order other than Amahlo to repay the money it had received, less the stipends paid. No reasons are given for singling out the stipends for deduction or such principle as there may be, in regard thereto. The calculation 'in Amahlo's favour', she held, is that this was paid every month to 142 students, and that is the basis on which the amount will be determined'.

[42] It is necessary to consider the amounts that were used by the learned Judge a quo, in arriving at the final amount reflected in the order. The learned Judge, based on the ENS report, accepted that the total amount of R59 762 578.46 was paid by GEP to Amahlo in respect of the project, which corresponds with the amount in prayer 2 of the notice of motion in respect of which an order for pay back is sought. The ENS report indeed reflects that this amount was paid to Amahlo, pursuant to 29 invoices for payment presented by Amahlo to GEP, from 30 September 2016 to 29 March 2019. But, so the ENS report also reflects, the initial grant of R2 400 000, in respect of the pilot project to raise 52 job opportunities in Eldorado Park, was paid to Amahlo on 31 March 2016, thus apparently falling outside the period mentioned. It accordingly seems that this amount was not included in the total amount of R59 762 578.46.

[43] The stipend deduction factored in by the learned Judge, is likewise incorrect. I have already alluded to the erroneous calculation of the stipend, which was not challenged in this court. The alleged discrepancy, if factored into the equation, results in an amount of R249 376 less than the amount ordered to be repaid, which brings the total amount to R52 094 578.46.

[44] At the hearing in this court, counsel for Amahlo, took a completely different stance, in seeking an order in essence for the remittal of this matter to the high court for determination of the just and equitable remedy, limited to the qualification/calculation of the amount to be repaid by Amahlo. This occurred in response to my note sent to counsel shortly before the hearing of the appeal, alerting them to the recent judgment of the Supreme Court of Appeal in *Caledon.* In support of the alternative relief sought, reliance was placed on the SCA's approval of the Full Court's detailed analysis of the

pleadings, witness statements and expert evidence, for the purpose of exercising a discretion conferred by s 172(1)(b) of the Constitution. The SCA accordingly held:

'The debatement of accounts strikes an appropriate balance: it prevents unjust enrichment of the State by ensuring reimbursement of proven costs, while upholding the rule of law by denying profit derived from an unconstitutional interference'.

[45] Central to the alternative relief now sought by Amahlo, are the rule 35(12) documents. The draft order proposed by Amahlo is based on a statement and debatement of the rule 35(12) documents, in accordance with the following procedure: the documents must be provided to the auditor, for compiling a report, then debatement thereof by the parties, and finally, acceptance by the court eventually adjudicating the matter. The documents received scant attention in the court a quo: they were not referred to in the answering affidavit, they were requested by GEP, in the rule 35(12) notice I have alluded to, and once the documents were delivered as attachments to Amahlo's reply to the rule 35(12) notice, no further steps were taken by Amahlo to elevate them into evidence, or to explain the documents, or put them into context.

[46] Notably, the documents were referred to, albeit sporadically, but no objection as to admissibility was raised. The parties referred to the documents in the heads of argument as well as in argument before the court a quo. The court a quo further criticised certain aspects relating to the financial statements attached to Amahlo's answering affidavit, as if the documents had properly been admitted into evidence. On examination of the financial statements, the learned Judge commented as follows:

'20. An examination of the financial statement for the year ending February 2018 shows that on the income statement, income from 'sales' for 2018 is listed as almost R25 million, while 'cost of sales' is over R5 million. Gross profit is listed as over R19 million For the year ending February 2017 listed on the income statement as a comparator, 'sales' is over R48 million, while 'costs of sales' is just over R23 million. Gross profit is listed as over R25 million. The biggest expenditure in each of those years is 'salaries and wages'. However the names of employees and what they were paid is not disclosed.

21. The financial statements for 2018 and 2019 show similar patterns. Prima facie Amahlo has retained far more than it has expended, even taking into account that it may have received

money from more sources than GEP. It certainly does not show that it has expended the amounts it ought to have done in pursuance of Project Vuthela, had it properly carried it out'.

The results of the learned Judge's examination of the financial statements referred to in the judgment are analogous to results usually obtained following a statement and debatement. The appropriateness thereof, without having heard evidence or submissions of the parties thereto, in my view, cannot be endorsed. But, the results bring to the fore that expenses were made, in substantial amounts. Although *ex facie* the financial statements certain aspects may well justify discovering uncertainties, final views in making a s 172(1)(b) order can and should be reserved until a proper statement and debatement has been conducted.

[47] This brings me to the content of and weight to be attached to the ENS report. Amahlo contends, not without justification I should add, the report is primarily based on hearsay evidence concerning the vital aspects necessary to consider a just and equitable remedy, which prompted Amahlo in the answering affidavit already, to object to its admissibility. Amahlo, was not involved in providing any information for purposes of the report, for which it was and may well be criticised, but that does not add to its evidential weight. The report is moreover, in any event, premised on the self-declared limitations recorded therein, *inter alia*, the absence of financial documents and reliance on unsubstantiated information received in interviews with certain students and in brief telephone conversations held with a number of erstwhile students of Amahlo.

[48] Regarding the stipends that were paid by Amahlo to students, it is stated in the ENS report (paragraph 6.16.3):

'As part of the MOA (Memorandum of Agreement), Amahlo was allegedly contracted to place students into learnerships. If this was correct, Amahlo only paid the R1 500 stipends from the GEP's payments, which would have resulted in a massive surplus of funds.'

The reservation as to the correctness of the allegation impacts negatively on the conclusion. Statements, conclusions and views expressed in the report are often vague and unverified, for example, in paragraph 6.23 thereof: 'The allegation made by several EEC students was that they were unaware of the stipend and/or did not receive any payments', and in paragraph 6.24: 'It is also alleged that a number of EEC students did not receive the stipends for 6-12 months' (emphasis added). The report states that Amahlo's invoices show that 4 332 students were trained. The ineluctable inference to be drawn however', is that the training must have involved expenses. In argument before this court, counsel for Amahlo referred to an exercise performed by junior counsel, in calculating the expenses reflected in Amahlo's invoices forming part of the rule 35(12) documents, showing, *inter alia* payments made to students of more than R12 million and payment to service providers of some R2.5 million.

[49] The court a quo, on the papers before the court, in my view, was not in a position to properly consider a just and equitable remedy. The fact of other expenditures than payment of stipends was evidently overlooked. The learned Judge a quo criticised Amahlo for not providing any reason why the full amount should not be refunded, by inference casting an onus on Amahlo, which cannot be reconciled with the duty of the court, on the evidence before it, to fashion a just and equitable remedy. The question may well be asked what options were available to the court a quo, in the absence of duly admitted documents or, more importantly, not having heard oral evidence. Placing myself in the position of the court a quo, I would have referred the determination of the amount to be repaid by Amahlo, based on the dictum in *Caledon* and the order granted by the SCA in *Mafoko*, by way of statement and debatement of the amount, and the court's approval of the result thereof, for the purpose of ensuring that the remedy to be ordered, will be just and equitable.

**Culpability of Amahlo**

[50] In *Mafoko* the culpability of the tenderer was prominently dealt with by the SCA. In this regard, the court held [para 15 and [20]]:

'The exclusion of benefit, and more particularly profit, from remedial consideration could also have perverse and undesirable consequences. The conduct of a person awarded a tender that is found to be unlawful falls within a spectrum of culpability. Such a person may be complicit in the unlawful conduct or innocent of it, with degrees of turpitude or blamelessness between these polarities.

But I consider the just and equitable discretion is better conceived as the Constitution intended, without preconception as to depravity that has befallen its promise. This said, once there is evidence that a tenderer is not blameless, or worse, actively complicit in the illegality that has rendered the award of the tender invalid, then courts will be astute to apply the age-old maxim that such a tenderer cannot profit from its own wrongdoing.'

Although the SCA in *Mafoko* accepted, without finding, that Mafoko is positioned on the blameless end of the spectrum that was postulated, one of the matters requiring consideration to make an order that is just and equitable, in the circumstances of that case, is whether Mafoko was entirely blameless for the unlawful award of the tender to it.

[51] The culpability of Amahlo does arise in this matter. The court a quo in dealing with the facts underpinning the third impugned decision, *inter alia* refers to the MoA, which, as I have alluded to, initially provided for the creation of 75 000 job opportunities for which it would be paid R65m, which was by way of an addendum, was reduced to 5 000 job opportunities, whilst the contract price remained unchanged. Amahlo's representative who signed the addendum, and also deposed to the answering affidavit, explained that Amahlo was unable to perform in terms of the MoA, but the learned judge continued, no explanation was given 'of why being unable to perform already, two months into the contract period, Amahlo should be given such an advantageous amendment to the terms, particularly that the amount being paid by (sic) should remain the same'. I should add that Amahlo's representative in the answering affidavit, agrees that the number of job opportunities was reduced to 5 000 in the addendum, which he states, Amahlo complied with within three years. He further states that GEP 'should know' that the original target was beyond the reach of Amahlo. Although the third decision was reviewed and set aside, the learned Judge did not make any finding as to the culpability of Amahlo in regard thereto. While I am in agreement that the questions posed and reservations raised by the learned Judge a quo to which I have alluded, are relevant, they are in my view not decisive. The issue as to culpability is multifaceted: it cannot be determined superficially on inferences and uncorroborated evidence: once found to be present, the culpability must be positioned within a spectrum of culpability, having regard to degrees of turpitude or blamelessness between these polarities, in order to ensure a just and equitable order.

The court a quo was not sufficiently informed of all relevant evidence to determine culpability; it made no finding on culpability and this court is unable on the record before it, to properly do so.

**Conclusion**

[52] In *Caledon* the SCA expounded on the discretion to be exercised in terms of s 172(1)(b), as follows:

'That discretion is not mechanical, nor is it circumscribed by rigid rules. As explained in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* ([2015] ZACC 22, 2015 (5) SA 245 (CC)), it is a discretion in the true sense, requiring a value-laden judgment informed by all the relevant facts and by constitutional principle. The court is enjoined to fashion a remedy that is just and equitable in the particular circumstances, striking a careful balance between correcting constitutional invalidity, vindicating the rule of law, and avoiding outcomes that would themselves be unjust.'

It is my finding that the court a quo has not properly exercised its discretion in ordering the repayment in paragraph 2 of the order. 'Justice and equity are capacious concepts. Its boundaries may be uncertain, but it is designed to render a nuanced judgment as to what order will be just and equitable' (*Mafoko*, para [28]). Such an order was not rendered by the court a quo. The order cannot stand.

[53] The court is required to consider a number of matters, having been informed of the relevant evidence and arguments. The evidence, where appropriate, as in this matter, may consist of oral evidence as well as documentary evidence, as in an ordinary civil suit. The matter must accordingly, be remitted to the high court, before a differently constituted bench, for such determination and finalisation. The order I propose to make will make provision for the determination of culpability prior to and separately from the determination of a just and equitable order, for the reason that a finding on culpability may be dispositive of the remainder of the issues.

**Costs**

[54] Except for the costs of the condonation and re-instatement application which must be borne by Amahlo, in accordance with its tender to pay those costs, the remainder of the costs of the appeal will be reserved.

**Court Record on CaseLines**

[55] I am constrained to comment on the confusion caused by the record of this appeal, which regrettably was ineptly uploaded onto CaseLines. For some unknown reason, two records were uploaded, one the original and the other an updated record. Some documents only appear in the original record, which resulted in continuous shuttling between two records to search for and find the document required. The odd numbering of documents, likewise, was seemingly incorrect and the search function proved to be of no assistance. At the hearing before us, much time was wasted in searching and finding documents referred to by counsel necessitating third party on-screen directions to documents. Practitioners are once again reminded of the duty to verify the correctness of the record on CaseLines, prior to the hearing of matters, failing which, adverse orders may be expected.

**Order**

[56] In the result the following order is made:

1. The appellant's application for condonation and re-instatement of the appeal is granted.
2. The appellant shall pay the costs of the application to compel and the application for condonation and re-instatement of the appeal, on scale C.
3. The appeal is upheld.
4. The costs of the appeal are reserved for determination by the court making and final order in this matter.
5. The matter is remitted to the high court, before a differently constituted Bench, to determine the orders it should make in terms of section 172(1)(b) of the Constitution, after securing such production of evidence from the parties as the high court considers warranted and inviting further submissions from the parties.

6. The High Court may issue such further directions as may be considered necessary for a proper determination of the issues.
7. The High Court seized with the hearing of the matter, shall determine the issue of culpability, as set out in this judgment, separately before determination of a just and equitable remedy.

[redacted]

**FHD VAN OOSTEN**
**JUDGE OF THE HIGH COURT**

I agree.

[redacted]

**R STRYDOM**
**JUDGE OF THE HIGH COURT**

I agree.

[redacted]

**RMJ MOULTRIE**
**JUDGE OF THE HIGH COURT**

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| ***RESPONDENT'S ATTORNEYS*** | ***EDWARD NATHAN SONNENBERGS INC*** |
| ***DATE OF HEARING*** | ***25 FEBRUARY 2026*** |
| ***DATE OF JUDGMENT*** | ***30 APRIL 2026*** |