



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 06/25

In the matter between:

MINISTER OF DEFENCE AND MILITARY VETERANS

First Applicant

**ACTING DIRECTOR-GENERAL, DEPARTMENT
OF MILITARY VETERANS**

Second Applicant

and

ZEAL HEALTH INNOVATIONS (PTY) LIMITED

Respondent

Neutral citation: *Minister of Defence and Military Veterans and Another v Zeal Health Innovations (Pty) Ltd* [2026] ZACC 21

Coram: Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Nicholls AJ, Rogers J, Savage J and Tshiqi J

Judgment: Mathopo J (majority): [1] to [100]
Kollapen J (dissenting): [101] to [136]

Heard on: 6 November 2025

Decided on: 27 May 2026

Summary: Section 172(1)(b) of the Constitution — just and equitable remedy — true discretion — grounds for appellate interference established

No profit, no loss principle — narrow application to suspension orders — not a general exclusionary rule — benefit from unlawful contract subject to scrutiny, not automatic exclusion and is fact-dependent

ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld in part.
3. Paragraph 2 of the order of the Supreme Court of Appeal dated 27 December 2024 is amended by replacing the quoted paragraph 2 (that is, paragraph 2 of the substituted order which the High Court of South Africa, Gauteng Division, Pretoria should have granted) with the following:

“2. (a) The order of constitutional invalidity in paragraph 1 above does not have the effect of divesting Zeal Health Innovations (Pty) Limited of any rights to which it would have been entitled under the contract referred to in paragraph 1 above in respect of the period from 1 June 2015 to 12 August 2015.

(b) In respect of the period 1 to 12 August 2015, the right contemplated in (a) above shall be a right to a pro-rated portion of the amount to which Zeal Health Innovations (Pty) Limited would have been entitled had it rendered service for the whole of that month, such pro-rated portion being based on the fraction 12/31.

(c) For the period 13 August 2015 to May 2018, Zeal Health Innovations (Pty) Limited may claim compensation for actual out-of-pocket expenses incurred (if any) in maintaining its capacity to provide services or in providing emergency services to military veterans, such claim to be

determined in separate proceedings or by agreement between the parties.”

4. Paragraph 3 of the order of the Supreme Court of Appeal, and the words “with costs” in paragraph 1 of that order, are set aside.
5. Each party is to bear its own costs in the Supreme Court of Appeal and in this Court.

JUDGMENT

MATHOPO J (Mlambo DCJ, Majiedt J, Mhlantla J, Musi AJ, Nicholls AJ, Rogers J, Savage J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against part of an order of the Supreme Court of Appeal.¹ That Court upheld a High Court of South Africa, Gauteng Division, Pretoria (High Court) judgment² declaring invalid a contract for the provision of healthcare services to military veterans but, in the exercise of its remedial discretion under section 172(1)(b) of the Constitution, made an order preserving the contractual rights of the respondent, Zeal Health Innovations (Pty) Limited (ZHI), notwithstanding the invalidity. The order was framed on the basis that the declaration of constitutional invalidity did not divest ZHI of any rights to which it would have been entitled under the contract, but for the declaration of invalidity.

[2] The application is brought by the applicants, being the Minister of Defence and Military Veterans (Minister) and the Acting Director-General of the Department of

¹ *Zeal Health Innovations (Pty) Limited v Minister of Defence and Military Veterans* [2024] ZASCA 183 (Zeal Health SCA).

² *Zeal Health Innovations (Pty) Limited v Minister of Defence and Military Veterans*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 77188/2015 (7 October 2022).

Military Veterans (collectively the Department). It concerns the remedial discretion that a court enjoys under section 172(1)(b) of the Constitution, once that court has declared the award of a tender invalid pursuant to its duty to do so in terms of section 172(1)(a). The Department submits that the Supreme Court of Appeal incorrectly granted the order preserving ZHI's contractual rights. It contends that the Supreme Court of Appeal failed to exercise its remedial discretion under section 172(1)(b) judiciously; that the order is ambiguous and capable of entitling ZHI to substantial contractual damages for services never rendered; and that ZHI should be limited to recovery of its out-of-pocket expenses without any profit.

[3] ZHI opposes the application. It contends that the Department's complaint misconstrues the authorities, and that an order preserving its accrued contractual rights was appropriate in the circumstances. ZHI submits that it is an entirely innocent party that rendered services for which it has never been paid. It argues that innocent contractors should not suffer loss as a result of an organ of state's failure to comply with its constitutional and statutory obligations, particularly where the contractor is blameless in the irregularity that led to the contracts being declared invalid. ZHI further submits that the so-called "no profit, no loss" principle upon which the Department relies has been rejected as a general rule, and that each case must be assessed on its own facts in the exercise of the court's remedial discretion under section 172(1)(b).

[4] The question that then arises for this Court's determination is this: does the absence of a right to benefit from an unlawful contract amount to an exclusion of such benefit from the exercise by a court of its just and equitable discretion under section 172(1)(b)? Expressed differently, may a court, in fashioning a just and equitable remedy, permit an innocent contractor to retain a benefit, including a profit margin, for services actually rendered under a contract subsequently declared invalid?

Factual background

[5] The salient facts are as follows. In January 2015, the Department advertised a tender for the provision of healthcare and wellness services to approximately 16 000

military veterans over a three-year period. The tender was made pursuant to the Department's obligations under the Military Veterans Act,³ which provides for benefits to which military veterans are entitled and establishes the institutional mechanisms to give effect to those benefits.

[6] According to the Department, the approved budget for the three-year period was R31 625 492.31. ZHI disputes this figure, contending that the budget was R122 million over three years. What is common cause is that three pricing models were presented to the Department during the tender evaluation: a fee-for-service model, a capitation model and a hybrid model combining both approaches. The Department selected the capitation model. On 21 May 2015, ZHI was awarded the tender. The contract value was R198 159 360 over three years, calculated on a capitated fee basis. Under this model, ZHI would receive R365.48 per registered veteran per month in the first year, and R333.30 per veteran per month in the second and third years. The fee was payable regardless of whether each veteran actually sought treatment; that was the essence of the risk allocation inherent in a capitation model.

[7] On 27 May 2015, the contract was signed by Dr Malik Vazi, ZHI's Chief Executive Officer, and Mr Tsepe Motumi, the erstwhile Director-General of the Department.⁴ The contract was to commence on 1 June 2015 and run until 31 May 2018. The actual database of veterans numbered 14 346 rather than the estimated 16 000. ZHI commenced providing services in terms of the contract on 1 June 2015, having done so on an interim basis during April and May 2015. It established a managed healthcare network comprising general practitioners, specialists, pharmacies and other healthcare providers. During June 2015, according to ZHI's health reports, 1 155 veterans accessed primary healthcare services. Similar numbers were recorded for July and August 2015. ZHI submitted its first invoice on 6 July 2015,

³ 18 of 2011.

⁴ The contract form (SBD 7.2) was signed by ZHI on more than one occasion. ZHI signed versions dated 21 May 2015, 27 May 2015 and 31 July 2015, with the last being backdated to 27 May 2015. This forms part of the procedural irregularities identified by the Department, though the parties proceeded on the basis that the operative contract date was 27 May 2015.

claiming R5 243 176.08 for services rendered in June 2015. This amount was calculated by multiplying 14 346 veterans by the capitated fee of R365.48.

[8] The invoice gave rise to concerns within the Department. On 27 July 2015, the Acting Chief Financial Officer wrote to ZHI requesting a copy of the signed contract and a detailed breakdown of services provided. Unfortunately, ZHI did not respond to this request. On 31 July 2015, Mr Motumi, still the Director-General, approved a memorandum recommending payment of ZHI's first invoice. However, this instruction was never carried out. On 1 August 2015, Mr Motumi's term of office expired. He was replaced by Mr Lifeni Maake as Acting Director-General.

[9] The evidence suggests that the Acting Director-General took a different view of the contract. An email dated 1 June 2015 from Mr Maake to Mr Motumi, which only emerged later in the proceedings, revealed that the Deputy Minister had instructed that the tender should be withdrawn because it should have included provision for veterans' dependants. Mr Maake expressed indignation that Mr Motumi had proceeded "in defiance of the Deputy Minister's instruction". The Minister subsequently informed Parliament that she had instructed that ZHI not be paid because the contract was too expensive.

[10] ZHI submitted its second invoice on 31 July 2015, for services rendered in July 2015, in the amount of R5 261 084.61. Earlier that same day, faced with the Department's failure to pay its first invoice, ZHI had forwarded a memorandum to its service provider network informing it that, due to the Department's failure to pay for services provided in May, June and July, the providers should, as of 1 August 2015, require military veterans to pay cash for consultations. On 11 August 2015, the Department informed ZHI that it intended to seek judicial review of the procurement process. The following day, ZHI formally suspended all healthcare and wellness services to military veterans, instructing its provider network to provide only emergency services (as legally required of healthcare professionals) and to require cash payment for non-urgent cases, with an undertaking that veterans would be refunded once ZHI

was paid. ZHI submitted a third invoice on 31 August 2015 for the month of August, also in the amount of R5 261 084.61, though by this time services had been substantially curtailed. None of these invoices were paid.

[11] The three invoices totalled R15 765 345.30. ZHI has never been paid for the services it rendered during June, July and August 2015. Once ZHI suspended the full suite of services in mid-August 2015, the Department resorted to alternative arrangements for the provision of healthcare services to military veterans. It activated a memorandum of understanding (MOU) with the Department of Defence that had been concluded earlier, on 16 March 2015, in anticipation of a possible need for supplementary healthcare provision. This MOU allowed military veterans to access military healthcare facilities throughout the Republic operated by the South African Military Health Service (SAMHS), with the Department undertaking to reimburse the Department of Defence for services rendered according to an agreed reimbursement model.

[12] The evidence indicates that these alternative arrangements proved more expensive than the contract with ZHI would have been. The Department spent R67 265 000 on the Health and Wellness sub-programme during the 2015/16 financial year. This represented approximately 73% overspending against the original budget. By contrast, the contract with ZHI would have cost R52.4 million for the remaining 10 months of that financial year. Moreover, the SAMHS facilities were not always conveniently located for veterans, many of whom lived far from military bases.

Litigation history

High Court

[13] On 28 September 2015, ZHI launched an urgent application in the High Court seeking payment of R10 504 260.69, being the first two invoices plus interest (payment of the third invoice was not yet due). On 19 October 2015, the Department filed a counter-application seeking judicial review of the procurement decisions and the

contract. The urgent application was struck from the roll on 23 October 2015 for lack of urgency. The matter then proceeded in the normal course. ZHI opposed the review on each ground raised by the Department. ZHI also amended its notice of motion to include payment of the third invoice, bringing the total capital amount claimed to R15 765 345.30. On 4 April 2018, shortly before the contract's expiry date of 30 May 2018, ZHI cancelled the contract on the ground that the Department had repudiated the contract. On 30 March 2021, ZHI issued a combined summons claiming damages in the amount of R73 233 228, representing loss of profit from 1 September 2015 to 30 May 2018. Those proceedings were stayed pending resolution of the review application and subsequent appeals.

[14] For reasons that are unexplained in the record, the application for specific performance and the counter-application for review were only heard some six years later, in February 2021. On 7 October 2022, the High Court delivered its judgment, dismissing ZHI's application for specific performance and granting the Department's counter-application in full.

[15] The Court reviewed and set aside all procurement decisions relating to both the interim contract⁵ (which had preceded the main contract) and the main contract. It declared these contracts unconstitutional, unlawful and void *ab initio* (from the beginning). The Court found that the contract price of R198 million far exceeded the available budget, thereby violating section 38(2) of the Public Finance Management Act⁶ (PFMA), which prohibits an accounting officer from committing to a liability for which money has not been appropriated. The High Court observed that, although there was no evidence that ZHI was complicit in any irregularities, it would not be prudent or in the public interest to uphold the contracts. However, having declared the contracts invalid, the High Court made no remedial order under section 172(1)(b) of the

⁵ The interim contract, concluded on 1 April 2015, provided for ZHI to render basic healthcare services to 1 300 military veterans for a three-month period on a fee-for-service basis pending award of the main tender. In the event, the interim contract was superseded after two months by the three-year contract. ZHI's entitlement to payment in respect of the interim contract is no longer in dispute.

⁶ 1 of 1999.

Constitution. It did not consider what remedy, if any, would be just and equitable to compensate ZHI for the services it rendered or to protect its position as an innocent contractor. The order simply declared the contracts unconstitutional, unlawful and void *ab initio*, and set aside the contracts.

Supreme Court of Appeal

[16] With the leave of the High Court, ZHI appealed to the Supreme Court of Appeal against the whole judgment and order of the High Court. Its primary ground of appeal was that the review should have been dismissed. In the alternative, ZHI sought an order under section 172(1)(b) preserving its contractual rights notwithstanding the declaration of invalidity. ZHI relied on the approach adopted by this Court in *Gijima*.⁷ The Department opposed the appeal on the merits.

[17] The submissions in this Court reflect a disagreement as to what the Department's position was on remedy in the Supreme Court of Appeal:

- (a) According to the Department, its contention was that the appropriate order would be one limiting ZHI to the recovery of its out-of-pocket expenses, without any profit margin. The Department states that it relied on what it characterised as the “no profit, no loss” principle articulated in this Court's decision in *AllPay*.⁸ The Department also urged the Supreme Court of Appeal to consider making an order similar to that made by it in *Bravospan SCA*,⁹ namely an order entitling ZHI to compensation for services rendered rather than preservation of contractual rights.
- (b) According to ZHI, the Department made a bare submission that the contract should not be preserved, advancing no further argument on a just and equitable remedy. The Department did not mention *Bravospan*. The

⁷ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).

⁸ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC).

⁹ *Greater Tzaneen Municipality v Bravospan 252 CC* [2022] ZASCA 155.

Department did not even say that ZHI should be allowed its out-of-pocket expenses. According to ZHI, the Department's unwavering stance, until the application in this Court, was that ZHI was entitled to no payment at all.

[18] On 27 December 2024, the Supreme Court of Appeal dismissed ZHI's appeal against the declaration of invalidity but granted a *Gijima*-type order.¹⁰ The Court's reasoning on remedy appears at paragraphs 23 to 25 of its judgment. It will suffice to provide a recapitulation of only its salient features. The Supreme Court of Appeal rightly understood section 172(1)(b) to confer a true discretion which must be exercised judiciously on a case-by-case basis. The Court observed that, although the contract was invalid, ZHI had rendered services under it, was not involved in perpetuating irregularities and was found by the High Court to be an innocent party. The Supreme Court of Appeal framed its reasoning thus: "[u]nder those circumstances, it should be entitled to payment of any amount it is able to establish". It concluded:

"In all the circumstances, the appeal must be upheld in part. Although the appeal against the counter-application is dismissed, [ZHI] was successful in so far as it seeks the preservation of its rights to pursue payment for services provided, as a just and equitable remedy."¹¹

[19] The operative part of the Supreme Court of Appeal's order, at paragraph 2(2), reads:

"The order of constitutional invalidity in paragraph 1 above does not have the effect of divesting [ZHI] of any rights to which it would have been entitled under the contract referred to in paragraph 1 above, but for the declaration of invalidity."

¹⁰ This type of order safeguards the contractor's interests, in that such an order of constitutional invalidity does not have the effect of divesting the contractor's rights to which it would have been entitled under the constitutionally invalid contract but for the declaration of invalidity. See *Gijima* above n 7 at para 54.

¹¹ *Zeal Health SCA* above n 1 at para 25.

[20] The central question that thus arises in this appeal is whether the Supreme Court of Appeal's exercise of its remedial discretion under section 172(1)(b) of the Constitution was vitiated by any error of law or material misdirection, and if so, what remedy would be just and equitable in the circumstances of this case.

In this Court

Department's submissions

[21] The Department submits that this Court's jurisdiction is engaged on two bases. First, it contends that the case concerns the interpretation and application of section 172(1)(b) of the Constitution, making it a constitutional matter in terms of section 167(3)(b)(i). The Department submits that the proper approach to just and equitable remedies under section 172(1)(b), particularly in protecting the position of innocent contractors when public contracts are declared invalid, raises questions of constitutional interpretation and application that require authoritative determination by this Court.

[22] Second, the Department submits that this Court has jurisdiction under section 167(3)(b)(ii) on the basis of an alleged conflict between decisions of the Supreme Court of Appeal. The Department points to what it characterises as conflicting decisions: on the one hand are *Gijima* and *Buffalo City*,¹² which preserved contractors' accrued contractual rights; and on the other hand, there is *Bravospan*, which, according to the Department, supports limiting contractors to out-of-pocket expenses, and *Phomella*,¹³ which, so the Department contends, wrongly rejected the "no profit, no loss" principle. The Department cites *CEF*¹⁴ as correctly adopting the "no profit, no loss" principle.

¹² *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC).

¹³ *Special Investigating Unit v Phomella Property Investments (Pty) Ltd* [2023] ZASCA 45; 2023 (5) SA 601 (SCA).

¹⁴ *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* [2022] ZASCA 54; 2022 (5) SA 56 (SCA).

[23] On the merits, the Department advances several grounds for impugning the Supreme Court of Appeal order. First, it contends that the Supreme Court of Appeal failed to exercise its discretion judiciously. The Supreme Court of Appeal's reasoning, the Department says, was sparse and bereft of analysis. The judgment made no reference to *AllPay* and no attempt to distinguish this case from *Gijima* or *Buffalo City*. Most importantly, the Supreme Court of Appeal failed to grapple with the limited duration of ZHI's performance, only two and a half months, and the implications of this regarding an appropriate remedy.

[24] Second, the Department submits that the Supreme Court of Appeal's order is ambiguous. It is not clear whether the order only preserves ZHI's right to the three invoices for June to August 2015 or whether it preserves ZHI's right to claim damages for the entire three-year contract period, including lost profits. The Department's understanding, shared by ZHI, is that the order bears the broader interpretation. But if that is correct, the Department argues, the order would entitle ZHI to recover not merely compensation for services rendered but substantial damages for services never provided over a 33-month period. That, it argues, cannot be just and equitable.

[25] Third, the Department relies on the "no profit, no loss" principle which it contends flows from *AllPay*. The principle means that where a contract is declared invalid, an innocent contractor should not be out of pocket but equally should not profit from an unlawful arrangement. The Department acknowledges that *AllPay* involved a forward-looking suspension of invalidity, whereas this case is backward-looking. But the underlying principle, so the Department submits, should apply with equal force: innocent contractors should be compensated for their actual costs, but should not be enriched at public expense through contracts that violate constitutional and statutory norms.

[26] Fourth, the Department points to several factual circumstances which, it says, the Supreme Court of Appeal failed to consider. ZHI voluntarily suspended services on 12 August 2015. The Department acted promptly, within less than three months, to

launch its self-review. ZHI vehemently opposed all grounds of review, claiming that there were only minor and immaterial mistakes in the procurement process. The contract term expired in May 2018. ZHI cancelled the contract in April 2018 to pursue a damages claim for lost profits. The Department had to make alternative arrangements through the MOU with the Department of Defence and has thus already paid for the self-same services in respect of which ZHI claims damages for lost profits. All these factors, the Department submits, should have informed the Supreme Court of Appeal's remedial discretion.

[27] Fifth, the Department submits that there is a material distinction between this case and *Gijima* or *Buffalo City*. In the latter cases, the contractors continued to render services throughout the contract period or a substantial part of it. The state allowed the contractors to perform and derived the benefit of that performance over an extended period. Only much later did the state seek to review the contracts. Here, by contrast, services were rendered for only two and a half months, and the Department acted relatively promptly to challenge the contract.

[28] The Department proposes that the appropriate remedy would be an order limiting ZHI to recovery of its out-of-pocket expenses for the period from 1 June to 12 August 2015. If ZHI can establish that it incurred additional out-of-pocket expenses after 12 August 2015 in maintaining capacity or providing emergency services, those too should be recoverable. But ZHI should not be entitled to any profit margin, and certainly should not be entitled to lost profits for services never rendered.

ZHI's submissions

[29] ZHI submits that the Department has failed to identify any true conflict in the jurisprudence. ZHI points out that *Bravospan SCA* involved an unjust enrichment claim brought in separate action proceedings, not a contractual claim of the kind advanced here. Moreover, when this Court dismissed the application for leave to appeal in

Bravospan CC,¹⁵ it did so on the basis that it was not in the interests of justice to grant leave, not because the order in *Bravospan SCA* was correct. The two cases are thus distinguishable on their facts, and there is no conflict requiring resolution.

[30] ZHI accepts that our constitutional jurisdiction is engaged. The proper interpretation and application of section 172(1)(b) are indeed constitutional matters. However, ZHI contends that it is not in the interests of justice to grant leave to appeal. The Supreme Court of Appeal exercised a true discretion, and the Department has not established that the discretion was exercised in a manner that was not judicious, or was influenced by wrong principles or was based on a misdirection of fact. The Department's complaint, properly understood, is that the Supreme Court of Appeal should have weighed the relevant factors differently, but that is not a basis for appellate interference with a discretionary decision.

[31] ZHI emphasises that this is a case where an innocent contractor rendered services for which it was never paid, despite the Department having approved payment. The Department then engaged in what ZHI characterises as an unconscionable and cynical attempt to justify its refusal to pay by searching for grounds of review. The Department's conduct, ZHI submits, makes this an inappropriate case for limiting the contractor to out-of-pocket expenses.

[32] On the merits, ZHI submits that the Supreme Court of Appeal's order should be upheld. It argues that while the reasoning could have been more elaborate, it is sufficient to show that the Supreme Court of Appeal exercised its discretion judiciously. ZHI disputes that the order is ambiguous. ZHI submits that, properly read, the order preserves its accrued contractual rights, notwithstanding the declaration of invalidity of the contract.

¹⁵ *Greater Tzaneen Municipality v Bravospan 252 CC* [2024] ZACC 20; 2025 (1) BCLR 1 (CC); 2025 (1) SA 557 (CC).

[33] ZHI contests the Department's reliance on the "no profit, no loss" principle. That principle, ZHI submits, has been comprehensively analysed and rejected as a general principle by the Supreme Court Appeal in *Phomella*, which overruled its earlier judgment in *CEF*. *AllPay* did not establish a rule that innocent contractors may never profit from services rendered. Rather, *AllPay* held that there is no *right* to benefit from an unlawful contract, but the absence of such a right does not mean that a court, in the exercise of its remedial discretion, may not *permit* a party to profit. Each case must be assessed on its own facts.

[34] ZHI emphasises what it characterises as the Department's unconscionable and unconstitutional conduct. The contract was signed by the Director-General, Mr Motumi, on 27 May 2015. On 31 July 2015, his last day in office, Mr Motumi approved a memorandum recommending payment of ZHI's first invoice. However, this instruction was never carried out. On the following day, 1 August 2015, Mr Maake assumed office as the Acting Director-General. ZHI contends that the change in leadership precipitated a reversal in the Department's approach, driven by political considerations rather than genuine concerns about procurement irregularities.

[35] ZHI points to several pieces of evidence in support of this contention. First, an email dated 1 June 2015 from Mr Maake (the then Deputy Director-General) to Mr Motumi revealed that the Deputy Minister had instructed that the tender should not proceed because it should have included provisions for veterans' dependants, and expressed indignation that Mr Motumi had proceeded "in defiance of the [Deputy Minister's] instruction". Second, the then-Minister subsequently informed Parliament that she had given an instruction that ZHI should not be paid because she considered the contract too expensive. Third, when the Department's Acting Chief Financial Officer was asked why payment had not been approved, he provided a demonstrably false explanation, namely that ZHI was already contracted under the interim services agreement, when in fact the complete approval document (which only came to light when provided to ZHI by an anonymous third party) showed that payment had been recommended and supported by the relevant officials.

[36] ZHI submits that this evidence reveals a self-serving and cynical attempt by the Department to justify the Minister's political decision not to pay by retrospectively searching for grounds of review. ZHI characterises the Department's counter-application as a post-hoc (ex post facto) rationalisation designed to give legal cover to what was in truth a repudiation of the contract for reasons of political expediency. Throughout the litigation, the Department maintained that it was not obliged to pay ZHI anything for services rendered under an invalid contract, despite ZHI having performed in good faith and incurring substantial costs in doing so.

[37] ZHI submits that the capitation model was the Department's choice. Three pricing models were presented. The Department selected the capitation model because it provided certainty and predictability. Under that model, ZHI bore the risk that more veterans would seek treatment than anticipated and that the necessary healthcare services would exceed those anticipated. Conversely, it stood to benefit if fewer veterans sought treatment or if the necessary healthcare services were less extensive than anticipated. The fact that only a fraction of the veterans actually accessed services between June to August 2015 does not undermine ZHI's entitlement to the capitated fee. That was the bargain struck. The Department never challenged the invoices during the litigation on the basis that the capitation model was inappropriate or the rates excessive.

[38] ZHI points out that the Department incurred greater expenditures through the alternative arrangements with SAMHS than it would have under the contract with ZHI. The Department spent R67.2 million in the 2015/16 financial year, compared to R52.4 million that ZHI would have cost. Moreover, the location of SAMHS facilities did not adequately meet veterans' needs. This, ZHI submits, undermines any suggestion that compensating ZHI at the contractual rate would be unjust or inequitable.

[39] Finally, ZHI relies on this Court's recent judgment in *Bravospan CC*. In that case, this Court emphasised that organs of state must pay for services provided to them

by innocent contractors.¹⁶ The Court spoke of “a broader phenomenon of organs of state seeking to rely on their own unlawful conduct to avoid compensating innocent contractors” and stated that “conduct of this sort will not be tolerated”.¹⁷ ZHI submits that the present case is a textbook example of such conduct and that the Supreme Court of Appeal’s order should be upheld as a just and equitable remedy.

Discussion

Jurisdiction and leave to appeal

[40] The Department invokes our constitutional jurisdiction on the basis that this case concerns the interpretation and application of section 172(1)(b) of the Constitution. It also submits that this matter raises an arguable point of law of general public importance arising from an alleged conflict between decisions of the Supreme Court of Appeal.

[41] The proposed appeal is said to be a constitutional matter on the following basis. Section 172(1)(b) of the Constitution confers upon a court that has declared conduct or legislation to be invalid a discretion to make any order that is just and equitable. The proper interpretation and application of this provision, particularly in the context of contracts declared invalid where one party is entirely innocent, raise questions of constitutional interpretation. Moreover, the Department submits that this case concerns the interaction between section 172(1)(b) and the protection of constitutional rights and access to courts. ZHI, as an innocent contractor that rendered services and incurred costs, has constitutionally-protected interests that must be balanced against the public interest in not rewarding parties to invalid contracts.

[42] I am satisfied that our constitutional jurisdiction is engaged. The question whether a court may, in the exercise of its remedial discretion under section 172(1)(b), permit an innocent contractor to retain a benefit, including a profit margin, for services actually rendered under a contract subsequently declared invalid is undoubtedly a matter

¹⁶ *Bravospan CC* above n 15 at para 60.

¹⁷ *Id.*

of constitutional interpretation and application. Although the legal principles governing the exercise of remedial discretion under section 172(1)(b) are well-established, their application to cases of the present kind, and the proper approach to protecting innocent contractors, raise questions that fall squarely within this Court's constitutional jurisdiction.

[43] Whether our general jurisdiction is engaged on this basis is, in my view, doubtful. The invocation of an alleged conflict between the Supreme Court of Appeal's decisions is not well-founded. *Bravospan SCA* involved an unjust enrichment claim brought in separate action proceedings after a contract had been set aside on review, not a section 172(1)(b) remedy fashioned contemporaneously with the declaration of invalidity. The Court in *Bravospan SCA* granted an order entitling the contractor to compensation for services rendered; language which does not, on its face, preclude the inclusion of a profit margin as part of such compensation. *Phomella*, for its part, is express in rejecting any blanket "no profit, no loss" principle and emphasises that the exercise of remedial discretion under section 172(1)(b) must be undertaken on a case-by-case basis, having regard to the particular circumstances of each matter. The factual matrices of *Gijima*, *Buffalo City*, *Bravospan SCA* and *Phomella* differ materially, and it is not immediately apparent that they establish conflicting legal principles that rise to the level of being an arguable point of law that would ground our general jurisdiction.

[44] There might even be some tension between *Gijima* and *AllPay* in that regard, since *Gijima* permitted the innocent contractor to recover its contractual remuneration (including profit) for services actually rendered, whereas *AllPay* spoke of ensuring that the innocent contractor suffers no loss but also derives no gain. But as will become apparent from my analysis of the recent decision of the Supreme Court of Appeal in *Mafoko*,¹⁸ the apparent tension dissolves upon a proper understanding of *AllPay*. Accordingly, to a greater or lesser extent, I entertain some doubt that this Court has

¹⁸ *Mafoko Security Patrols (Pty) Ltd v Mjayeli Security (Pty) Ltd* [2025] ZASCA 179. See also *Caledon River Properties (Pty) Ltd t/a Magwa Construction v Special Investigating Unit* [2026] ZASCA 5 (*Caledon River*) at para 18.

general jurisdiction on the basis of the alleged conflict between decisions of the Supreme Court of Appeal. The question presented by this case is not one that requires us to choose between conflicting lines of authority in the Supreme Court of Appeal. Rather, it requires us to interpret and apply section 172(1)(b) of the Constitution in circumstances where an innocent contractor rendered services under a contract that was subsequently declared invalid. This is quintessentially a matter of constitutional interpretation.

[45] It is, however, unnecessary to resolve the question of general jurisdiction given the existence of constitutional jurisdiction. Accordingly, I proceed on the basis that this Court has jurisdiction to entertain the application for leave to appeal. However, the fact that the matter engages our jurisdiction does not mean, without more, that it is in the interests of justice to grant leave to appeal.¹⁹

[46] The interests of justice must warrant the granting of leave to appeal, and several considerations point in favour of granting leave to appeal in this matter. First, the amount at stake is substantial. The three invoices that remain unpaid total R15 765 345.30. Beyond that, ZHI has issued a summons claiming R73 233 228 in lost profits for the remainder of the contract period. Those proceedings have been stayed pending resolution of the present appeal. The remedial order made by the Supreme Court of Appeal has significant financial implications for both parties and, given the involvement of public funds, for the fiscus.

[47] Second, the question of how to protect the position of innocent contractors when public contracts are declared invalid is one that arises with considerable frequency in our law. Organs of state enter into numerous contracts for goods and services. Where such contracts are subsequently declared invalid, whether on grounds of non-compliance with procurement legislation, budgetary constraints or other constitutional or statutory requirements, courts are routinely called upon to fashion just

¹⁹ *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at para 35.

and equitable remedies. Clarity as to the relevant considerations and approach would serve the public interest.

[48] Third, the principles governing remedial discretion under section 172(1)(b) have application across a wide range of circumstances where state action is declared invalid. This judgment may thus have utility beyond the specific context of procurement contracts.

[49] Lastly, as I shall explain in due course, there are grounds for concluding that the Supreme Court of Appeal did not exercise its remedial discretion judiciously. The reasoning provided by the Supreme Court of Appeal was sparse. The judgment does not address the material distinction between the limited period during which ZHI actually rendered services and the much longer period for which the Supreme Court of Appeal's order appears to preserve contractual rights. Nor does it consider the Department's conduct, the promptness with which the review was launched or the factual differences between this case and *Gijima* or *Buffalo City*. If these concerns are well-founded, appellate intervention would be warranted.

[50] The question whether it would be in the interests of justice to grant leave to appeal turns substantially on the applicant's prospects of success. For reasons on which I shall elaborate, I am satisfied that the Department has reasonable prospects of success on appeal, at least in part. It is accordingly in the interests of justice to grant leave to appeal.

The standard for appellate interference with a true discretion

[51] Before addressing the merits, it is necessary to consider the standard that applies when this Court is asked to review the exercise of remedial powers under section 172(1)(b). It is now well established that the determination of a just and

equitable remedy involves the exercise of a true discretion. In *Ekapa*,²⁰ this Court recently confirmed that the discretion exercised in terms of section 172(1)(b) is a true discretion, to be exercised on a case-by-case basis, and may only be interfered with on appeal if the court of appeal is satisfied that the discretion was not exercised judiciously, was influenced by wrong principles or was based on a misdirection of fact.²¹

[52] The rationale underpinning appellate restraint in such circumstances is sound. It preserves judicial comity, fosters certainty and favours finality. However, appellate restraint does not mean appellate abdication. Where a court has failed to exercise its discretion judiciously, that is, where it has not brought its unbiased judgment to bear upon all relevant circumstances, or has been influenced by wrong principles, or has made material errors of fact, an appellate court is entitled, indeed required, to intervene.

[53] A court exercises discretion judiciously when it considers all relevant circumstances and makes an order it considers fair and just on substantial reasons, not capriciously. Where a court's reasoning is so sparse that one cannot discern what factors were considered, or why a particular option was chosen over others, this may indicate that the discretion was not exercised judiciously. The question is not whether the court cited every authority or distinguished every potentially relevant case. Section 172(1)(b) contemplates a flexible, fact-sensitive approach. But the exercise of discretion does require consideration of material circumstances and an explanation, however succinct, of why the chosen remedy is just and equitable in the particular case.

Application of the standard

[54] With the above principles in mind, I turn to consider whether the Supreme Court of Appeal exercised its remedial discretion judiciously. The Supreme Court of Appeal's reasoning on remedy appears at paragraphs 23 to 25 of its judgment. At paragraph 23, the Court correctly noted that section 172(1)(b) confers a true discretion which must be

²⁰ *Ekapa Minerals (Pty) Ltd v Sol Plaatje Local Municipality* [2025] ZACC 1; 2025 (5) BCLR 505 (CC); 2025 (6) SA 1 (CC).

²¹ *Id* at para 57.

exercised judiciously on a case-by-case basis. It then observed that, although the contract was invalid, ZHI had rendered services under it, was not involved in perpetuating irregularities and was found by the High Court to be an innocent party. The Supreme Court of Appeal stated that “[u]nder those circumstances, it should be entitled to payment of any amount it is able to establish”. The Court concluded that although the appeal against the review order is dismissed, “ZHI was successful in so far as it seeks the preservation of its rights to pursue payment for services provided, as a just and equitable remedy”. This reasoning, whilst not as elaborate as might be desirable, does identify certain salient considerations: ZHI’s innocence, the fact that services were rendered and that some form of payment was appropriate. The order itself follows the formulation adopted by this Court in *Gijima and Buffalo City*.

[55] However, the Supreme Court of Appeal’s reasoning does not grapple with several material considerations that distinguish this case from *Gijima and Buffalo City*. Most significantly, the Supreme Court of Appeal does not address the critical question of the duration of ZHI’s performance. When did performance cease, and why? The judgment refers to ZHI having “rendered services under the contract” but does not distinguish between services actually rendered and services that were never provided. There is no consideration of whether the remedy should vary as between the period during which ZHI performed (June to mid-August 2015) and the remainder of the three-year contract period.

[56] This matters, because the practical effect of the Supreme Court of Appeal order is ambiguous. Does the order preserve only ZHI’s right to payment for the period during which it actually performed? Or does it preserve ZHI’s right to claim the full contract price, including damages for breach in respect of the entire three-year period? On one reading, the order preserves ZHI’s “accrued contractual rights” – rights that accrued during the period of performance. On another reading, the order preserves all rights “to which [ZHI] would have been entitled under the contract”, which would include its right to sue for lost profits in respect of the full contract period.

[57] Both parties understand the Supreme Court of Appeal's order as bearing the broader interpretation with the effect of preserving ZHI's rights for the full three-year contract period, and not merely for the two-and-a-half-month performance period. The Department expressed concern that the order would leave it with no defence to ZHI's claim for lost profits in respect of the balance of the three-year period, a period of slightly more than 33 months. ZHI, for its part, has instituted separate action proceedings claiming approximately R73 million in lost profits for the period from September 2015 to May 2018. Those proceedings have been stayed pending the outcome of this appeal. The present appeal would likely not have been pursued had the Supreme Court of Appeal's order been limited to the three invoices for June to August 2015.

[58] The Supreme Court of Appeal's judgment does not consider several factual circumstances that are material to the determination of a just and equitable remedy. These include: the Department's conduct in approving and then reversing payment; the change in leadership that precipitated the reversal; the evidence of political considerations influencing non-payment; the absence of any challenge to the quantum of ZHI's invoices during the litigation; and the comparative costs of the alternative arrangements. Nor does the judgment distinguish between the period during which ZHI performed and the much longer period during which it did not.

[59] To be clear, a court exercising its remedial discretion under section 172(1)(b) need not address every factual nuance or cite every potentially relevant authority. But it ought to identify the key considerations that have influenced its choice of remedy and explain why that remedy is just and equitable in the particular circumstances. The Supreme Court of Appeal's reasoning, whilst not incorrect in what it says, is too sparse to demonstrate that the discretion was exercised judiciously with proper regard to material circumstances.

[60] I am fortified in this conclusion by the ambiguity of the order itself, coupled with the disjuncture between the order and the reasoning that underlies it. If the

Supreme Court of Appeal had intended to confine ZHI to payment for services actually rendered during June to August 2015, it would have expressed itself explicitly. If, conversely, it intended to preserve ZHI's full contractual rights, including its claim for lost profits for the entire contract period, one would have expected reasoning as to why that would be just and equitable, given that services were rendered for only a small fraction of that period. The absence of such clarity suggests a failure to grapple with the essential question: what rights are being preserved, and why is that remedy just and equitable in these particular circumstances?

[61] I conclude, therefore, that grounds exist for this Court to interfere with the Supreme Court of Appeal's exercise of its remedial discretion. That said, we are at large to reconsider what remedy is just and equitable in the circumstances of this case.

The appropriate remedy

First period (1 June to 12 August 2015)

[62] I turn then to consider what remedy is appropriate. It is necessary, in my view, to distinguish between two periods: first, the period from 1 June to 12 August 2015, during which ZHI rendered services; and second, the period thereafter, being 13 August 2015 to May 2018. For the period during which ZHI actually rendered services, I consider that a remedy preserving ZHI's contractual rights is just and equitable. Several considerations weigh in favour of this conclusion.

[63] First, ZHI was an entirely innocent party. The High Court found that there was no evidence of complicity in any irregularities, and the Department did not challenge that finding on appeal. This is an important starting point. The law rightly draws a clear distinction between parties who are complicit in maladministration and those who are not. Where a contractor has done no wrong, it should not be required to suffer loss as a result of an organ of state's failure to comply with its own constitutional obligations.

[64] Second, ZHI rendered actual services pursuant to the contract. It established and managed a healthcare network. It provided primary healthcare, chronic disease management and psychological counselling services to military veterans as contemplated by the contract. These services assisted the Department in complying with its statutory obligations under the Military Veterans Act. The Department obtained the benefit of those services.

[65] Third, ZHI incurred costs in setting up and operating this network. It had to pay healthcare providers for the services they rendered to veterans. The invoices submitted by ZHI for June, July and August 2015 totalled approximately R15.7 million. While the Department expressed concern about the quantum of these invoices, it never challenged them on the basis that the services were not provided or that the invoicing was fraudulent.

[66] Fourth, the Department's conduct was not exemplary. The contract was signed by the Director-General on 27 May 2015. On 31 July 2015, the same Director-General approved a memorandum authorising payment of ZHI's first invoice. But this instruction was never carried out. The evidence suggests that there was a change of leadership at the Department, with an Acting Director-General taking office on 1 August 2015. The Minister apparently instructed that ZHI should not be paid because she considered the contract too expensive. Only then did the Department embark upon the process of self-review.

[67] Fifth, although the Department submits that it acted promptly, it did so only after ZHI had already begun performance and incurred substantial costs. The contract commenced on 1 June 2015. The Department did not notify ZHI of its intention to seek judicial review until 11 August 2015, by which time more than two months had elapsed. During this period, the Department allowed ZHI to continue performing, creating a reasonable expectation that it would be paid.

[68] Sixth, once ZHI stopped providing the full suite of services in mid-August 2015, the Department had to find alternative arrangements. It resorted to an MOU with the Department of Defence, under which military veterans could access military healthcare facilities. The evidence before this Court indicates that this proved more expensive than the contract with ZHI would have been and that the alternative arrangements were less satisfactory in meeting veterans' needs, particularly for those living far from military installations.

[69] In these circumstances, I consider it just and equitable that ZHI should be entitled to recover payment at the contractual rate for the period during which it actually rendered services. This means that ZHI should be compensated in accordance with the contract for June, July and the portion of August 2015 during which it provided the full suite of services.

The “no profit, no loss” principle

[70] I do not accept the Department's submission that ZHI should be limited to out-of-pocket expenses without any profit margin. The Department relies on the “no profit, no loss” principle, which it contends was articulated in *AllPay*. This requires careful consideration. In *AllPay*, this Court was confronted with the problem that if its declaration of invalidity was not suspended, Cash Paymaster Services (CPS) could simply cease operations, leaving welfare recipients without a means of securing social grant payments until a lawful tender process had been concluded. This Court found that CPS continued to bear constitutional obligations to ensure a payment system remained in place. In that context, this Court said:

“It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to [CPS]. 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.”²²

²² *AllPay* above n 8 at para 67.

[71] The “no profit, no loss” principle put forward by this Court in *AllPay* has narrow application. Properly understood, the principle, as this Court explained in *Shabangu*,²³ was developed in the specific context where this Court suspended the declaration of invalidity so as to require CPS to continue rendering services for an extended period despite the constitutional invalidity of the contract. The principle was designed to regulate the forward-looking suspension of an invalid contract where the contractor was required to continue performing in the public interest.

[72] Very recently, the Supreme Court of Appeal, in *Mafoko*,²⁴ clarified the proper interpretation of *AllPay*. Unterhalter JA, delivering the judgment of that Court, explained that the *dictum* (pronouncement) in *AllPay* does not establish a principle that innocent tenderers cannot profit from services rendered pursuant to invalid contracts.²⁵ Rather, what *AllPay* holds is that there is no *right* to benefit from an unlawful contract. But the absence of such a right does not mean that a court, in the exercise of its just and equitable discretion, may not permit a party to enjoy the benefit of a contract, including the profits that may have already accrued. As the Supreme Court of Appeal observed, any benefit derived from an unlawful contract “should not be beyond public scrutiny”.²⁶ This means that such benefit falls to be scrutinised in determining how the court should exercise its remedial discretion. It does not mean that the benefit is excluded from remedial consideration.

[73] The reasoning in *Mafoko* accords with the earlier decision of the Supreme Court of Appeal in *Phomella*. The position is clear: there is no rigid rule that innocent contractors may never profit from services rendered pursuant to invalid contracts. Whether such profit should be allowed depends upon all the circumstances of the case,

²³ *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42; 2020 (1) BCLR 110; 2020 (1) SA 305 (CC).

²⁴ *Mafoko* above n 18. That decision has been reaffirmed in *Caledon River* above n 18 at para 18.

²⁵ *Mafoko* id at para 11.

²⁶ Id.

properly considered in the exercise of the court's remedial discretion under section 172(1)(b).

[74] This case differs materially from *AllPay*. The contract was declared invalid by the High Court in 2022, and that declaration was upheld by the Supreme Court of Appeal. The contract is not being suspended; it has been cancelled and would in any event have expired. What this Court is concerned with here is not the forward-looking continuation of an invalid arrangement but the backward-looking question of how to compensate an innocent contractor for services already rendered by the contractor and accepted by the organ of state. In the circumstances prevailing in *Gijima* and *Buffalo City*, this Court considered that the innocent contractor which had rendered services pursuant to the invalid contract should be entitled to benefit through a preservation of accrued contractual rights.²⁷ There is no good reason to depart from that approach here, at least for the period during which services were actually rendered. Indeed, the reasoning in *Mafoko* strongly supports this conclusion. In that case, the Supreme Court of Appeal noted that where a firm is entirely blameless and has been required to render services over an extended period, profit should not automatically be excluded from consideration. The Court explained that lawful public procurement is secured by the state at a competitive price, which includes a return for the provider.²⁸ Where a provider is blameless, the imposition of a duty to provide public services should be influenced by this normative benchmark – that is, compensation at a competitive price that includes a reasonable return.

[75] If the contractual rights are preserved for the period from June to mid-August 2015, ZHI will be entitled to the contractual rate. That rate, in the nature of things, includes a profit margin. The preservation of “accrued contractual rights” does not mean putting the contractor in the position it would have occupied had the entire contract been performed. Rather, it means compensating the contractor, at the

²⁷ *Gijima* above n 7 at para 54.

²⁸ *Mafoko* above n 19 at para 19.

contractual rate, for services actually rendered during the period of performance. It is backward-looking in that it concerns what has been done, not what might have been done had the contract continued.

[76] This is materially different from an expectation interest in future performance. If a three-year contract is entered into but only two months of services are rendered before the contract is challenged and set aside, the contractor – but for the order of invalidity – would have accrued rights in respect of those two months. It would not have accrued rights in respect of the remaining 34 months, because no performance would have occurred during that period. At most, it may have a claim for damages for breach or repudiation, but that is a different matter. The distinction matters because it determines the scope of the remedial order under section 172(1)(b).

[77] The correct approach is therefore to distinguish between the period of actual performance and the period of non-performance. For the former, it will often be appropriate to allow the contractor's rights to be preserved at the contractual rate, particularly where the review does not attack the contractual rate as such. That rate, in the nature of things includes a profit margin. No tenderer submits a bid without factoring in some profit. If a contractor performs efficiently, the contractual rate will cover its costs and yield a profit. If it performs inefficiently, the profit margin will be eroded. But the contractor takes that risk when it enters into the contract. The point of preserving accrued contractual rights is to honour the contractual bargain for the period of actual performance, not to rewrite it. This puts the contractor in the position it would have occupied had the contract been valid for the period during which the contractor performed. For the period after performance ceased, the contractor has not accrued contractual rights through performance, and preservation of such rights would amount to a windfall. All of this flows solely from the exercise of a court's just and equitable discretion under section 172(1)(b) of the Constitution.

[78] I am mindful of the disparity between the number of veterans who actually sought treatment (approximately 1 113 in June 2015) and the number for whom ZHI

invoiced (14 346). However, as already noted, the capitation model was the Department's choice. ZHI assumed the risk that more veterans would seek services than anticipated, driving up costs. Conversely, it stood to benefit if fewer veterans sought services. That was the agreed bargain.

[79] It would be unjust to deny ZHI the benefit of that bargain for the period during which it performed, particularly when the Department never challenged the invoices during the litigation on the basis that the capitation model was inappropriate or that ZHI had overcharged. The Department's review application was premised primarily on the budget shortfall and various procurement irregularities, not on any contention that the pricing model itself was unlawful or that the rates were excessive. Indeed, when the Department initially received ZHI's first invoice, its concern was to verify the existence of a signed contract and to request a breakdown – it did not suggest that the invoiced amount was inflated or unreasonable given the capitation model that had been agreed.

[80] Moreover, to confine ZHI to out-of-pocket expenses would raise difficult practical questions. What exactly would constitute out-of-pocket expenses? Would it include only the amounts paid to service providers, or also the costs of establishing and maintaining the network, the call centres and the administrative systems? What profit margin, if any, would be allowed? How would one distinguish between reasonable costs and excessive costs ZHI incurred in setting up? These are questions that could lead to protracted and costly litigation. We should not condemn the parties to such litigation in respect of a period of only two and a half months, when the contractual rate provides a clear, lawful and fair basis for compensation.

[81] It is significant that the Department did not, during the course of the litigation, mount any sustained attack on the reasonableness of the tender award price. The contract was the product of a competitive tender process. ZHI was the successful bidder. Absent fraud or corruption, and there is no suggestion of either, there is generally no basis for a court to substitute a different rate for the rate that emerged from

the competitive process. The Department's complaint was that the contract exceeded its budget, not that the pricing was inherently excessive or unreasonable.

[82] There are broader considerations that support this conclusion. The incentive effects of remedies must be considered. If organs of state could avoid paying for services rendered merely by establishing procedural irregularities, even where the contractor is entirely innocent, they would have little incentive to ensure sound procurement practices at the outset, and every incentive to search for grounds of review when a contract proves inconvenient or politically expensive. Depriving innocent contractors of profits earned through legitimate performance might also send an undesirable message to the business community. I conclude, therefore, that for the period from 1 June to 12 August 2015, ZHI is entitled to compensation at the contractual rate.

Second period (post-12 August 2015) and concerns relating to the second judgment

[83] The position is very different for the period after 12 August 2015. From that point, ZHI did not render the full suite of services contemplated by the contract. On 12 August 2015, it instructed its provider network to suspend non-emergency services and to require cash payment for consultations. The August invoice, for R5 261 084.61, covered the period 1 to 31 August, by which time services had been substantially curtailed from 12 August 2015 to May 2018. I recognise that this creates a temporal anomaly: the third invoice covers a month during which full services were provided for only 12 days. Neither party has suggested that the third invoice should be pro-rated or challenged on this basis. Be that as it may, this Court can *mero motu* (of its own accord) consider the issue of pro-rating the August 2015 invoice. This would allow ZHI to be compensated for services rendered. Since ZHI rendered services from 1 to 12 August 2015, there is no reason why it should be compensated for the entire month of August 2015. I therefore conclude that ZHI is entitled to pro-rated compensation for the 12 days of August 2015.

[84] For the period from 13 August 2015 to May 2018, the position is very different. There is limited evidence in the record as to what services, if any, ZHI continued to provide. The Department's evidence is that once ZHI suspended services, the Department immediately resorted to the MOU with the Department of Defence to ensure continuity of healthcare provision to military veterans. ZHI's evidence suggests that it maintained some limited capacity to respond to emergency cases and incurred ongoing costs in doing so during August, September and October 2015.

[85] In these circumstances, I do not consider it just and equitable to preserve ZHI's contractual rights for the remainder of the three-year contract period. Several considerations point to this conclusion. First, and most fundamentally, ZHI did not render the contracted services after August 2015. The contract contemplated a comprehensive managed healthcare programme providing primary healthcare, chronic disease management, psychological counselling and medical assessments for compensation claims to all registered military veterans on an ongoing basis. That programme operated from 1 June to mid-August 2015. Thereafter, at best, ZHI maintained limited emergency capacity for a brief transitional period. ZHI was no doubt willing to render the services for the full contract period if the Department were willing to accept the services and pay for them, but as a fact, practically no services were rendered for the balance of the contract period.

[86] Second, to preserve ZHI's contractual rights for the full three-year period would potentially entitle ZHI to claim lost profits in respect of 33 months of non-performance. ZHI's separate action, instituted in March 2021, claims approximately R73 million in lost profits for the period from September 2015 to May 2018. This accounts for services that were never rendered, in circumstances where the Department had notified ZHI of its intention to review the contract and had made clear that it would not be calling on ZHI to continue performing.

[87] To do so would potentially entitle ZHI to claim the full contract price of approximately R198 million, or at least substantial lost profits in respect of the

33-month period from September 2015 to May 2018, despite having rendered the contracted services for only two and a half months. That would be a windfall, not compensation. During oral argument, counsel for ZHI submitted that ZHI remained willing and able to perform throughout this period, and that as a matter of private contract law, it would be entitled to claim damages for the Department's repudiation. There is force in this submission from the perspective of ordinary contract law. But as a matter of constitutional law, the remedy must be just and equitable, having regard to all the circumstances.

[88] This case is materially distinguishable from *Gijima, Buffalo City* and similar cases where courts have preserved contractors' accrued rights for extended periods. In those cases, the contractors continued to render services throughout the contract period, or a substantial part thereof. The State allowed, and indeed required, the contractors to perform and derived the benefit of that performance over extended periods, in some cases, for years. The State's delay in challenging the contracts, coupled with its continued acceptance of performance, created strong equitable considerations in favour of preserving contractual rights. Here, by contrast, the Department notified ZHI of its intention to seek judicial review within less than three months of the contract commencing, and instituted formal review proceedings in October 2015. ZHI did not continue performing thereafter, save possibly for limited emergency services. The factual foundation for preserving contractual rights for the full contract period is thus simply absent.

[89] Whilst one might debate whether the Department's conduct was as prompt and proper as it should have been, it cannot be said that the Department engaged in the kind of extended delay seen in cases like *Gijima*. The Director-General who signed the contract left office on 31 July 2015. The Acting Director-General took a different view of the contract. Whether that view was driven by legitimate budgetary concerns or improper political considerations is a question I need not resolve for present purposes. What matters is that by mid-August 2015, less than 11 weeks after the contract

commenced, the Department had made clear that it disputed the validity of the contract and would be seeking to set it aside.

[90] However, I emphasise that limiting the preservation of contractual rights to the first period does not mean that ZHI should receive nothing for the post-August 2015 period if it can establish that it incurred costs. If ZHI did maintain some capacity to provide emergency services during September and October 2015, and if it can establish the quantum of genuine out-of-pocket expenses incurred in doing so, those expenses should be recoverable. This would not include any profit margin, but would encompass actual costs reasonably incurred in maintaining transitional capacity or responding to emergency cases.

[91] The difficulty is that there is insufficient evidence before this Court to determine the nature, extent or quantum of any such post-August 2015 services or expenses. ZHI's primary claim throughout these proceedings has been for payment at the contractual rate (the three invoices) and for lost profits (the separate action). It has not advanced an alternative claim quantifying out-of-pocket expenses for the post-August 2015 period, nor has it led evidence establishing what those expenses might be. These matters will need to be resolved, if necessary, through the separate proceedings or by agreement between the parties.

[92] If ZHI did incur genuine out-of-pocket expenses in maintaining some transitional capacity to provide emergency services, or in responding to emergency cases presented by military veterans from 13 August 2015, those expenses should be recoverable. By out-of-pocket expenses I mean actual costs reasonably and necessarily incurred, for example, payments to healthcare providers for emergency services actually rendered, or unavoidable fixed costs of maintaining minimal capacity during a brief transitional period. This would not include any profit margin, nor would it include speculative or inflated claims for costs that were not genuinely incurred or were not reasonably necessary.

[93] I have had the pleasure of reading the judgment of my Brother Kollapen J (second judgment) and I briefly deal with the approach favoured by him. I disagree with the second judgment to the extent that it reads my judgment as having introduced into a just and equitable remedy the element of contractual autonomy and the need to honour an invalidated contract.²⁹ My judgment does not create a default position that an innocent contractor to an invalid contract has a right to benefit from such an invalid contract. The basis for the preservation of contractual rights for ZHI in the present matter is that it is just and equitable to do so, considering the particular facts and circumstances of this case. The mere fact that, but for the invalidity of a contract, certain contractual rights would have accrued does not automatically mean that those contractual rights should be preserved. Each case must depend on its own merits.

[94] The second judgment acknowledges that there are six considerations in my judgment which underpin the preservation of ZHI's contractual rights.³⁰ The six considerations set out earlier are fact-specific considerations which favour the preservation of ZHI's contractual rights in this case. The only point of difference with the second judgment is that it posits a remittal to the High Court for determination of what it describes as a failure by the High Court to conduct an enquiry into a just and equitable remedy. On the contrary, the six considerations alluded to above constitute a proper exercise of a just and equitable remedy.

[95] It is important to underscore that the precedent set by this Court in *Gijima* and *Buffalo City* points towards non-remittal. As a result of the disjuncture between the reasoning of the Supreme Court of Appeal and the order that it made, this Court is entitled to interfere and make a determination of a just and equitable remedial action under the circumstances. Therefore, my judgment is consistent with the principle of *AllPay* which held that there is no *right* to benefit from an unlawful contract, but the absence of such a right does not mean that a court, in the exercise of its remedial

²⁹ See the second judgment at [121].

³⁰ See the second judgment at [129].

discretion, may not *permit* a party to profit. In the present case, this Court in the exercise of its remedial discretion has permitted ZHI to benefit from the invalidated contract for the limited period during which it actually rendered full performance.

[96] The Department did not attack the tender award, nor did it make out any case that the contractual rate was extortionate. Additionally, it would be very difficult for this Court to define what a reasonable non-contractual compensation would be and what profit margin should flow from this non-contractual compensation. In the circumstances, the appropriate course in my view is to leave the question of any recoverable out-of-pocket expenses for the period as from 13 August 2015 to be determined, if necessary, in the separate proceedings or by agreement between the parties.

Costs

[97] Both parties have had partial success. The Department succeeds in limiting ZHI's remedy to the performance period. ZHI succeeds in retaining its entitlement to payment at the contractual rate for that period. In these circumstances, each party should bear its own costs in this Court.

[98] The High Court ordered the parties to pay their own costs. In the High Court, ZHI was the applicant, and it was claiming specific performance for the three invoices. The High Court dismissed that application, because ZHI was not entitled to payment of the three invoices as a matter of specific performance, which was the basis of its application. In relation to the Department's counter-application for review, the Department succeeded on the merits. The High Court should have preserved ZHI's accrued rights, but only in respect of the period June 2015 to 12 August 2015. So practically speaking, pursuant to section 172(1)(b), ZHI would get most of the payment it was claiming in its application,³¹ but nothing more. Therefore, an order for the parties to pay their own costs in the High Court is fair.

³¹ The full amounts for June and July 2015, and the fraction 12/31 for August 2015.

[99] As to the costs in the Supreme Court of Appeal, ZHI was entirely unsuccessful on the merits – the declaration of invalidity was upheld. Its success lay in obtaining a remedy preserving its contractual rights. However, we have now significantly restricted the scope of that remedy, confining it to the first two months and the pro-rated days of August 2015 rather than the full contract period. The three invoices for June 2015 to August 2015 total approximately R15.7 million. ZHI’s lost profits claim for the remainder of the contract period is approximately R73 million. ZHI thus loses a claim worth more than four times what it retains. This substantial diminution in success makes it inappropriate for ZHI to recover costs in the Supreme Court of Appeal. Each party should therefore bear its own costs in that Court.

Order

[100] I accordingly make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld in part.
3. Paragraph 2 of the order of the Supreme Court of Appeal dated 27 December 2024 is amended by replacing the quoted paragraph 2 (that is, paragraph 2 of the substituted order which the High Court of South Africa, Gauteng Division, Pretoria should have granted) with the following:
 - “2. (a) The order of constitutional invalidity in paragraph 1 above does not have the effect of divesting Zeal Health Innovations (Pty) Limited of any rights to which it would have been entitled under the contract referred to in paragraph 1 above in respect of the period from 1 June 2015 to 12 August 2015.
 - (b) In respect of the period 1 to 12 August 2015, the right contemplated in (a) above shall be a right to a pro-rated portion of the amount to which Zeal Health Innovations (Pty) Limited would have been entitled had it rendered

service for the whole of that month, such pro-rated portion being based on the fraction 12/31.

- (c) For the period 13 August 2015 to May 2018, Zeal Health Innovations (Pty) Limited may claim compensation for actual out-of-pocket expenses incurred (if any) in maintaining its capacity to provide services or in providing emergency services to military veterans, such claim to be determined in separate proceedings or by agreement between the parties.”
4. Paragraph 3 of the order of the Supreme Court of Appeal, and the words “with costs” in paragraph 1 of that order, are set aside.
 5. Each party is to bear its own costs in the Supreme Court of Appeal and in this Court.

KOLLAPEN J

Introduction

[101] I have read the comprehensive judgment of my Colleague Mathopo J (first judgment) in which he concludes that this Court is entitled to interfere with the order made by the Supreme Court of Appeal to the extent that the latter misdirected itself in exercising its true discretion in the determination of a just and equitable remedy.³² I agree with that conclusion and broadly with the reasoning underpinning it, although I would justify interference with the Supreme Court of Appeal’s order for different reasons which I will explore fully later on. The first judgment then in dealing *de novo* (afresh) with what would constitute a just and equitable remedy concludes that ZHI’s contractual rights in respect of the period during which it rendered services to the Department should be preserved, and in respect of the period beyond that, it should be

³² See the first judgment at [61].

entitled to its proven out-of-pocket expenses.³³ I disagree with that part of the order and the reasoning advanced in support of it.

[102] I associate myself with and endorse the background facts, litigation history and submissions of the parties which are comprehensively set out in the first judgment, and do not intend to traverse any of those matters except to the extent that it may be necessary in advancing my reasoning and conclusion.

[103] This is a matter of some significance as it deals with the complex issue of how a court approaches the determination of a just and equitable remedy following the invalidation of a contract and in circumstances where there has been performance (partial or full) on the part of an innocent contractor.

[104] In *AllPay*, this Court in speaking to the consequences that would generally flow from the invalidation of a contract said—

“[i]t is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to [CPS]. 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.”³⁴ (Footnote omitted.)

[105] There has been some debate whether *AllPay* is authority for the proposition that an innocent contractor may not benefit from a contract that has been invalidated but should, at best, only be entitled to its out-of-pocket expenses. To the extent that such uncertainty has existed, it has firmly and decisively been put to bed by the judgment of this Court in *Black Sash II*.³⁵

³³ Id at [62], [69] and [83].

³⁴ *AllPay* above n 8 at para 67.

³⁵ *Black Sash Trust v Minister of Social Development* [2026] ZACC 12 at paras 24-5.

[106] In *Black Sash II*, this Court in explaining the outer and inner perimeters of *AllPay* on the question of contractual benefits in the context of a just and equitable remedy quoted with approval the *dictum* of the Supreme Court of Appeal in *Mafoko* which said—

“[t]he 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.

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.”³⁶

[107] The first judgment adopts the same approach as in *AllPay*, and I extract two principles from that approach that find relevance in this matter. First, while there is no right to benefit from an invalid contract, there is similarly no basis to exclude from the consideration of a just and equitable remedy such a benefit. It falls to be considered but is not the default position, nor can the fact that the parties in an earlier contractual setting agreed on the benefits assume some dispositive or undue place in deciding what is just and equitable. What is required is a consideration of various factors in the determination of a just and equitable remedy and not simply the substitution of previously agreed contractual benefits as a just and equitable remedy. To do so would have the effect of

³⁶ *Mafoko* above n 18 at paras 14-15.

elevating the benefits of an invalid contract to a right – something that *AllPay* is clear in not supporting.

[108] Second is the need to exercise scrutiny in respect of the benefits that would form part of a just and equitable remedy. In a public law setting, the funds that may be paid come from the public purse and flow from a contract that is invalid and therefore the need for public scrutiny is crucial. After all, the underlying contract and the one whose invalidation triggers the need for a just and equitable remedy is one entered into for the public benefit. Courts are therefore enjoined to exercise a level of scrutiny befitting the proper use of public funds and the principles of contractual autonomy hold no sacred place in this process.

[109] In these proceedings, this Court can only interfere with the exercise of the Supreme Court of Appeal's discretion in making a just and equitable order if it is satisfied that either the discretion was not exercised judiciously or was influenced by wrong principles or a misdirection on the facts, or the lower court had reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.³⁷ In this regard, there is a disjuncture between the reasoning of the Supreme Court of Appeal and the order that it finally made. I turn to explain this disjuncture below.

[110] In its reasoning, the Supreme Court of Appeal took the view that because ZHI had rendered services in terms of the contract and was an innocent party, "it should be entitled to payment of any amount it is able to establish".³⁸ The Supreme Court of Appeal said further that the quantum of the services so rendered had not been determined, and that it was open to the parties to determine the further course to quantify the payment to be made to ZHI for the provision of the services it had provided. In the

³⁷ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 88 relying on *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) at para 11.

³⁸ *Zeal Health SCA* above n 1 at para 24.

order, however, the Supreme Court of Appeal directed that the order of constitutional invalidity “does not have the effect of divesting [ZHI] of any rights to which it would have been entitled under the contract . . . but for the declaration of invalidity”.³⁹ As such, what is contemplated in the reasoning is not carried through in the order and there is indeed no reasoning in the judgment to support the order made. At first sight this appears to have been an error or a misdirection on the part of the Supreme Court of Appeal in making the order that it did – one at variance with the reasoning and remedy it had proposed in the judgment. This would certainly be a basis for this Court to interfere with that order.

[111] Flowing from the finding that the Supreme Court of Appeal misdirected itself, this Court would then be in a position to consider a just and equitable remedy *de novo*.

[112] My disagreement with the first judgment is firstly at the level of principle. While it endorses *Black Sash II* in the proper approach to a just and equitable remedy, it impermissibly determines that the retention by ZHI of its full contractual benefits must follow because it would be unjust to deny ZHI the benefit of the bargain it had struck in the contract with the Department. It says:

“The point of preserving accrued contractual rights is to honour the contractual bargain for the period of actual performance, not to rewrite it. This puts the contractor in the position it would have occupied had the contract been valid for the period during which the contractor performed.”⁴⁰

[113] The effect of this holding is that a contractual benefit that has been agreed upon must be honoured and it would be unjust to deny an innocent party such a benefit because the contractor must be put “in the position it would have occupied had the contract been valid for the period during which the contractor performed”. This, with respect, is not what the law requires – the contractor has no right to such an entitlement.

³⁹ Id at para 27.

⁴⁰ See the first judgment at [77].

It is a proposition wholly inconsistent with this Court's holding in *AllPay*. It is also a stance that has the unintended consequence of revising the test this Court set out in *AllPay* for reasons I will set out hereunder.

[114] The first judgment says that where parties have struck an agreement then it would be unjust in determining a just and equitable remedy to deny an innocent party the benefit of the agreement. It goes further to say that even if that agreement results in a bargain for the innocent party, it would be unjust to deny such a party the benefit of such a bargain.⁴¹ Of course, a court may, after exercising public scrutiny, decide that a just and equitable remedy is the payment of the benefit the parties agreed to contractually. In that case it would be just and equitable not because that is the agreement reached between the parties but because the court is satisfied, after scrutinising the benefit, that it is indeed a just and equitable remedy. In *Steenkamp*,⁴² this Court characterised the difference between a public law and private law remedy when it said:

“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.”⁴³

[115] The first judgment effectively introduces and endorses a private law remedy agreed upon by the parties in a contractual setting, in place of a public law remedy a court is meant to arrive at after scrutiny and one which must be just and equitable. Such an approach would impose an inflexible rule on the courts' rich discretion in arriving at a just and equitable remedy. Speaking to a just and equitable remedy in terms of the Promotion of Administrative Justice Act,⁴⁴ this Court in *Bengwenyama*⁴⁵ cautioned

⁴¹ Id at [79].

⁴² *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

⁴³ Id at para 29.

⁴⁴ 3 of 2000.

⁴⁵ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (3) BCLR 229 (CC); 2011 (4) SA 113 (CC).

against adopting rules in the application of this discretion and presented a strong “*case-by-case*” centric approach to ordering such remedies. It stated as follows:

“I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.”⁴⁶ (Footnotes omitted.)

[116] Similarly, this Court in *Mhlope*⁴⁷ reinforced the view that a just and equitable remedy must only be guided by the principles of justice and equity in the context of each case. It stated as follows:

“Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy, even for exceptional, complex or apparently irresolvable situations. And the operative words in this section are ‘any order that is just and equitable’. This means that whatever considerations of justice and equity point to as the appropriate solution to a particular problem, it may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).”⁴⁸

[117] I have some difficulty in understanding how it can be unjust to deny the innocent party the benefit of the bargain in the absence of any scrutiny of the bargain. This scrutiny is what the first judgment acknowledges when it says that “any benefit derived from an unlawful contract ‘should not be beyond public scrutiny’. This means that such benefit falls to be scrutinised in determining how the court should exercise its remedial

⁴⁶ Id at para 85.

⁴⁷ *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC).

⁴⁸ Id at para 132.

discretion.”⁴⁹ A court in the exercise of scrutiny would be required to ask whether the terms of the bargain are just to both parties and, in the context of a public law remedy of the kind we are dealing with, whether it is also just to the public purse. If it is not, then it would be difficult to justify it as a just and equitable remedy. This is fortified by the decision taken by this Court in *AllPay*, wherein a just and equitable remedy in public procurement was decided upon, with priority given to “the public good”.⁵⁰ Thus, while the terms of the bargain may be ordinarily enforceable in a contract, its status in determining a just and equitable remedy is no higher than one of the many factors a court is required to consider.

[118] What the reasoning adopted in the first judgment suggests is that where performance has occurred, the invalidation of an agreement should not result in an innocent party losing the benefit it would have been entitled to under the invalid agreement. Such an approach is contrary to this Court’s approach in *AllPay*, since its effect would be that the right that an innocent party has to the benefit, which *AllPay* says comes to an end on invalidation, is *de facto* (in reality) restored by the court. Without more, the benefit is characterised as a just one because it was arrived at through consensus. While the first judgment goes on to suggest that it does not intend to establish a normative principle in this regard, it has framed the issues⁵¹ and considered the engagement of this Court’s general jurisdiction⁵² in broad terms, making the answers thereto necessarily normative law-making. It is these doctrinal implications on the just and equitable remedy principle in circumstances of invalid contract settings that are concerning.

[119] Such an approach prevents or avoids any scrutiny of the benefit as the object is to preserve the bargain secured under the invalid contract. The first judgment uses the term “bargain” to denote a windfall, but scrutiny of the benefit must follow whether or

⁴⁹ See the first judgment at [72].

⁵⁰ *AllPay* above n 8 at para 32.

⁵¹ See the first judgment at [4].

⁵² *Id* at [43] to [45].

not it may be described as a bargain. If proper scrutiny results in the conclusion that the preservation of the contractual benefit is just and equitable, then so it must be. But then it will be preserved as a benefit, not just because it was agreed to, but because proper scrutiny has led to the conclusion that it is indeed a just and equitable remedy. A court cannot substitute its duty of scrutiny by simply resorting to the terms of the contract. Such an approach will mean that the terms of an invalid contract will continue to endure and have dispositive consequences even after the contract has been invalidated.

[120] It is incumbent on this Court and justifiably expected of it, as the apex court, to provide clear and unambiguous guidance to the judicial system as a whole through its judgments. This advances certainty, predictability and consistency in a uniform legal system. There is the real risk that this may not occur if this Court blurs the lines between contractual autonomy and its outcomes, and the determination of a just and equitable remedy when that contract has been invalidated. The suggestion that a party is, without more, entitled to the bargain it has struck when the Court determines a just and equitable remedy effectively blurs the test set out in *AllPay*.

[121] As indicated, there is nothing in *AllPay* that supports the view that contractual bargains must be honoured when the contract is set aside. At best, *AllPay* would support the proposition that if, in the particular circumstances of a case and after scrutiny of the benefits, a court is of the view that it would be just and equitable to preserve the contractual benefits then it may do so. A bargain cannot be just and equitable simply because it was arrived at through consensus – this approach introduces into a just and equitable remedy the element of contractual autonomy and the need to honour that when a contract has been invalidated.

[122] My further disagreement with the first judgment is at the level at which it fails to apply the principle of public scrutiny, and in particular the question whether we are able to exercise such scrutiny on what is before us. Having endorsed the stance that

public scrutiny of the benefits that should follow is crucial, the first judgment fails to exercise any level of public scrutiny in respect of the benefits it orders.

[123] The role of scrutiny by a court in the exercise of its discretion in arriving at a just and equitable order is not confined to the conduct of the parties and the reasons for the invalidation. A party may be entirely blameless but that is not the end of the enquiry, and, when benefits are scrutinised, blameworthiness cannot be decisive as it is the benefits that must be scrutinised and that must ultimately meet the standard of being just and equitable. It must therefore follow that it cannot be unjust to deny a party their full contractual benefits when scrutiny of those benefits does not conclude that their payment would be just and equitable. This is the critical issue in this appeal and ultimately this Court must be satisfied that to allow ZHI to retain its benefits under the contract would be just and equitable.

[124] Its failure however, in fairness, is not of its own doing, but is occasioned by the absence of sufficient evidentiary material to enable this Court to meaningfully exercise its duty of public scrutiny. Let me explain.

[125] The Department in its counter-application in the High Court sought the invalidation of the contract and that Court was obliged, but failed, to make an order that was just and equitable. The Supreme Court of Appeal on the other hand made an order that was ambiguous to some extent but one that in the main enabled ZHI to retain its full contractual benefits even if only in respect of the period when it delivered services. In its reasoning, however, the Supreme Court of Appeal took the view that ZHI would be entitled to payment of any amount it was able to establish. The parties largely took starkly opposing views on the question of remedy. ZHI's stance was that it was entitled to retain its full contractual benefits, while the Department's view was that ZHI was, at best, entitled to its out-of-pocket expenses. Neither of the parties meaningfully engaged on what would be a just and equitable remedy because of the respective stances they adopted (both of which were wrong). They thus failed to place any relevant material before the Supreme Court of Appeal to enable it to consider a just and equitable remedy.

[126] In the first judgment, various pertinent questions are raised which all point to the elements of and need for effective public scrutiny. Those questions are captured as follows in the first judgment:

“Moreover, to confine ZHI to out-of-pocket expenses would raise difficult practical questions. What exactly would constitute out-of-pocket expenses? Would it include only the amounts paid to service providers, or also the costs of establishing and maintaining the network, the call centres and the administrative systems? What profit margin, if any, would be allowed? How would one distinguish between reasonable costs and excessive costs ZHI incurred in setting up? These are questions that could lead to protracted and costly litigation. We should not condemn the parties to such litigation in respect of a period of only two and a half months, when the contractual rate provides a clear, lawful and fair basis for compensation.”⁵³

[127] This approach, at least in respect of the questions the first judgment poses, accords in large measure with the kind of enquiry the Supreme Court of Appeal in *Mafoko* said should be undertaken. That Court said:

“As I have indicated, to make an order that is just and equitable, in the circumstances of this case, requires the consideration of a number of matters. Was Mafoko entirely blameless for the unlawful award of the tender to it? Did its incumbency as a service provider burden it with constitutional duties to continue to provide the service? If so, what is the content of that duty and for how long should it have endured? What benefits and burdens accrued to the [South African Broadcasting Corporation] and Mafoko in the performance of the services rendered by Mafoko? What profit did Mafoko enjoy? How closely did any such profit conform to a normal return for a firm in a competitive market for security services? Was such a return necessary and deserved, given the period over which Mafoko rendered its services? I do not suggest that all of these questions must be answered to make a just and equitable order, nor that these questions are exhaustive of the issues that may be relevant. What these questions do demonstrate is that a just and equitable order is not a binary choice between Mafoko retaining all the profits it may have made or being required to disgorge its profits. Justice and equity

⁵³ Id at [80].

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. Such an order was not rendered by the high court, but, at the same time, an order that simply permits Mafoko to retain its profits would amount to an order made in advance of answering some central questions that need to be posed.”⁵⁴

[128] And so, while the first judgment asks the right questions, it then inexplicably concludes that the answer to such questions will result in further protracted litigation which should be avoided. This avoidance of public scrutiny in order to avoid further litigation has the consequence that the first judgment then accepts the retention of ZHI’s contractual benefits for the period when it delivered services as a just and equitable remedy. That cannot be correct in the absence of any scrutiny of such benefits and inadvertently has the effect of this Court substituting a public law remedy with a private law remedy. The first judgment says that interrogating the questions that it correctly poses should be avoided in the interest of preventing further and protracted litigation.⁵⁵ It is worth pointing out in this matter that the order for the retention of the contractual benefits for the period 1 June 2015 to mid-August 2015 amounts to some R15.7 million – a significant amount of money by any measure which, in my view, requires scrutiny and such scrutiny cannot be avoided in order to prevent protracted litigation when that very litigation will provide the opportunity for the necessary scrutiny so as to arrive at a just and equitable remedy.

[129] The first judgment lists six considerations in support of the just and equitable order it makes from the period 1 June 2015 to mid-August 2015. All but one of those reasons relate to the conduct of the parties and the provision of the services that occurred. Only one of those reasons addresses the costs and benefits that are implicated by the remedy ordered. This is what the first judgment says about that:

“Third, ZHI incurred costs in setting up and operating this network. It had to pay healthcare providers for the services they rendered to veterans. The invoices submitted

⁵⁴ *Mafoko* above n 18 at para 28.

⁵⁵ See the first judgment at [80].

by ZHI for June, July, and August 2015 totalled approximately R15.7 million. While the Department expressed concern about the quantum of these invoices, it never challenged them on the basis that the services were not provided or that the invoicing was fraudulent.”⁵⁶

[130] This is the highwater mark of any scrutiny of the sum of R15.7 million. We do not know what part of that amount represents expenses, including those that relate to the setting up and maintenance of the network of service providers, we do not know what part of that amount represents profit and we do not know how the profit margin compares to what generally prevails in the industry. In truth, we probably know too little of the figure of R15.7 million except for how it was arrived at. In fact, that is the only figure before us. It is not possible to exercise any meaningful scrutiny when all we know is that the parties contracted on a benefit. That can never be dispositive in exercising scrutiny. The Supreme Court of Appeal was also unable to reach a conclusion on the quantum of the services rendered by ZHI. Under these circumstances, meaningful scrutiny is simply not possible and the failure by the Department to challenge those invoices is of no moment. That failure does not bind this Court, but in any event, absent the invalidation of the contract, there would have been no basis to challenge the quantum of the invoices as they simply reflected the consensus arrived at between ZHI and the Department.

[131] Returning to the question of scrutiny, even on the sparse facts before us, the need for scrutiny becomes self-evident. On what we know:

- (a) The capitation model provided for the provision of healthcare services for some 14 346 military veterans while the services actually rendered reached about 1 113 military veterans. This suggests that about only 8% of military veterans had a need for such services during the period when services were delivered while the capitation model was based and costed on the basis that it would support 14 346 military veterans.

⁵⁶ Id at [65].

- (b) The business model that ZHI used with its network of service providers was that it would pay such service providers only for services actually rendered. Thus, ZHI was only required to pay for actual services rendered by its network of service providers while it, on the other hand, was entitled to invoice the Department for services not actually rendered but in respect of which it would be obliged to render, if so requested.
- (c) Prior to the conclusion of the contract, which was invalidated, ZHI entered into an interim contract with the Department for the provision of healthcare services to military veterans. That contract was based on an actual services model and not a capitation model. The amount the Department was required to pay ZHI was R198 754.26 for services provided in April 2015 and R276 230.37 for services provided in May 2015.

[132] The limited facts demonstrate that scrutiny serves an important purpose in matters such as these. It enables a court, in the determination of a just and equitable remedy, to interrogate the facts and the surrounding circumstances thoroughly so that it is indeed able to arrive at a just and equitable remedy. The first judgment does not, and cannot, do this in the absence of relevant factual material that the parties have simply not put up.

[133] Under those circumstances it must follow that this Court is unable to exercise its remedial discretion in ordering a just and equitable remedy. For such a remedy to be properly considered will require consideration of further facts of the kind referred to in *Mafoko*. The High Court is well-placed to deal with how that happens so that it can properly exercise its remedial discretion in fashioning a just and equitable remedy.

[134] For the reasons given, this Court is unable to exercise the scrutiny required and of the kind that *AllPay* says must happen. It must accordingly follow that a remittal of the matter to the High Court is ordered so that the High Court can require of the parties all necessary information to make a determination of what is just and equitable. While

what it may ultimately decide will vary in respect of the period during which ZHI delivered services and the period beyond that, there is no need for separate enquiries. The task the High Court will be required to undertake will of necessity consider as a relevant factor the difference in the kind of remedy that should follow when services were rendered and when they were not, and this Court should not be prescriptive in this regard but should allow the High Court to properly exercise the discretion it has in terms of section 172(1)(b).

Costs

[135] Each party would bear its own costs, given that the failure by the parties to be open with the Court and share relevant information with regard to the determination of a just and equitable remedy has largely resulted in the decision to remit the matter to the High Court.

Order

[136] I would make the following order:

1. Leave to appeal is granted.
2. The order of the Supreme Court of Appeal is set aside.
3. Each party must bear its own costs in the Supreme Court of Appeal and in this Court.
4. The matter is remitted to the High Court to determine the appropriate order in terms of section 172(1)(b) of the Constitution, after securing the production of such evidence from the parties as it considers warranted and inviting further submissions from the parties.

For the Applicants:

I Ellis SC instructed by the Office of the
State Attorney, Pretoria

For the Respondent:

I Currie instructed by Allan Levin and
Associates