IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

JUDGMENT

Reportable

Case No. **9526/2024**

In the matter between:

EZAGA HOLDINGS (PTY) LTD	**APPLICANT**

and

NATIONAL STUDENT FINANCIAL AID SCHEME	**FIRST RESPONDENT**
COINVEST AFRICA (PTY) LTD	**SECOND RESPONDENT**
NORACCO CORPORATION (PTY) LTD	**THIRD RESPONDENT**
TENET TECHNOLOGY (PTY) LTD	**FOURTH RESPONDENT**
MINISTER OF HIGHER EDUCATION, SCIENCE AND TECHNOLOGY	**FIFTH RESPONDENT**
SPECIAL INVESTIGATING UNIT	**SIXTH RESPONDENT**

CORAM : FORTUIN *et* CLOETE JJ et ADHIKARI AJ
Heard: 16-18 March 2026
Delivered electronically: 11 June 2026

ORDER

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1. The decision to appoint the applicant and the second to fourth respondents (collectively, 'the service providers') to provide direct payments of allowances to the students of the first respondent (NSFAS') pursuant to Bid Number: SCM022/2021 ('the tender') is declared to be unconstitutional, unlawful and invalid, and is reviewed and set aside;

2. The service level agreements concluded between NSFAS and the service providers pursuant to the award of the tender ('the service level agreements') are declared to be unconstitutional, unlawful and invalid, and are reviewed and set aside;

3. Subject to the process of determination set out in paragraphs 4 to 9.7 below, each of the service providers is entitled to just and equitable relief under s 172(1)(b) of the Constitution from NSFAS in the form of monetary compensation on the following terms:

    3.1. Compensation for all proven reasonable losses and necessary expenses actually and demonstrably incurred by each of the service providers respectively pursuant to, or in reasonable anticipation of, their respective service level agreements, and attributable to the service level agreements including, but not limited to, capital expenditure, operational costs, staff costs, the costs of terminating student accounts, and third-party contractual obligations; and

    3.2. Compensation for the proven reasonable profit that each service provider would have earned from their respective service level agreements as if the service level agreements had continued to the date of this Order, calculated as if the service level agreements had remained in full force and effect and had been implemented, up to the date of this Order;

4. The service providers shall present their statements of account to NSFAS' attorneys within 30 days of the date of this Order setting out their claimed expenditure, earnings and alleged loss of profits, with all supporting documentation ('**the accounting**');

5. NSFAS shall within three months from the date of the receipt of the accounting from the relevant service provider:

    5.1. consider the accounting, and debate the accounting with the service provider; and

5.2. advise the service provider of which claims NSFAS will agree to pay, in what amounts and on what terms, and provide reasons for the offer(s) made;

6. The service providers shall within a period of one month from the date of receipt of NSFAS' response as contemplated by paragraph 5 above, advise NSFAS' attorneys whether they accept or decline the amounts tendered by NSFAS;

7. In the event of NSFAS and any service provider failing to reach agreement as contemplated in paragraph 6 above, NSFAS and any service providers that have not reached agreement shall jointly appoint, within one month after the time period referred to in paragraph 6 above, a duly qualified and independent expert with appropriate experience, to assess and verify the reasonable losses and expenses incurred and reasonable profit claimed by each service provider to the extent that such claims arise from, or are directly attributable to, the relevant service level agreement, based on the evidence provided by each party;

8. Subject to the provisions of, and process set out, in paragraph 9 below, there shall be one expert only who may, if necessary, be substituted if they are unable or unwilling to act for any reason;

9. To give effect to the above:

9.1. Failing agreement about the identity of the expert within the time period provided for in paragraph 7 above within which an expert must be jointly appointed, the parties shall, within 20 days of such disagreement, approach the South African Institute of Chartered Accountants (**'SAICA'**) and request a list of names of three suitably qualified persons to act as an expert and from which list of names the parties shall agree, within five further days, a person to act as an expert;

9.2. Should the parties be unable to appoint an expert by agreement within such time, the parties shall request SAICA to determine which of the three experts should be appointed in accordance with SAICA's appointment guidelines and procedures within 10 days of such request;

9.3. The costs of the expert's appointment and services shall be borne equally between NSFAS, on the one hand, and the service providers, on the other, with the service providers being jointly and severally liable for their respective half portions;

9.4. The participating parties shall, prior to the commencement of the expert's services, pay such a reasonable estimate of such costs into trust with their respective attorneys, or into such other agreed trust account, to secure the payment of the expert's fees and disbursements;

9.5. The appointed expert shall determine the procedure to be followed to determine the amount of compensation payable by NSFAS to each service provider. In doing so, the expert shall be empowered to:

9.5.1. require the parties to deliver written submissions and supporting documentation within specified time periods;

9.5.2. conduct interviews or hearings as the expert deems necessary;

9.5.3. appoint specialist sub-experts or consultants, with the prior written consent of both NSFAS and the relevant service provider (such consent not to be unreasonably withheld); and

9.5.4. issue procedural directions to the parties;

9.6. The parties shall co-operate fully and comply promptly with all directions and requests of the expert with the view to completing the expert determination with all service providers within three months of the date of the expert's appointment;

9.7. If for any reason, additional time is required, any party or the expert, on notice to all other parties, may approach a Judge by way of a chamber book application for such additional time;

10. In the event of any of the parties accepting the settlement contemplated by paragraph 6 above, or the expert's assessment in respect of their compensation, they may approach the Court, which will decide whether to confirm such settlement or assessment;

11. In the event of any disagreement in respect of the expert's assessment the parties who are still in dispute are granted leave to approach the Judge President for the allocation of an expedited date(s) for hearing and determination of the disputed issues by way of oral evidence before one or three judges as directed by the Judge President;

12. In the event of any deadlock or inability to perform in accordance with this Order, the parties are permitted to approach this Court, on application and on notice to the other parties, for appropriate relief;

13. NSFAS shall pay each service provider the amount decided by the Court within 60 days of the Court's order on the amount of compensation payable to that service provider;

14. NSFAS and the service providers shall take the necessary steps to close students' accounts and secure regulatory compliance;

15. Subject to the provisions of paragraphs 11 and 12 above, each party shall bear its own costs; and

16. All references to days in this order are court days.

JUDGMENT

ADHIKARI, AJ (FORTUIN et CLOETE JJ concurring) :

INTRODUCTION AND RELIEF SOUGHT

[1] This application has its genesis in a decision of the first respondent, the National Student Financial Aid Scheme ('NSFAS') during or about October 2023 to terminate the service level agreements ('the SLAs') concluded with the applicant eZaga Holdings (Pty) Ltd ('eZaga'), the second respondent Coinvest Africa (Pty) Ltd ('Coinvest'), the third respondent Noracco Corporation (Pty) Ltd ('Noracco'), and the fourth respondent Tenet Technology (Pty) Ltd ('Tenetech')[1] pursuant to the award of Tender Number SCMN022 ('the tender') for direct payment of disbursement allowances to NSFAS-funded students at public universities and TVET colleges for a 5-year renewable period. For convenience and unless otherwise indicated, I will refer to the applicant and the second to fourth respondents collectively as the 'service providers' and to NSFAS and the service providers as 'the parties'.

[2] On 6 May 2024 eZaga instituted proceedings in this Court ('the main review application') seeking, *inter alia*:

[1] In the remainder of this judgment the second to fourth respondents are collectively referred to as '*the service providers'*.

[2.1] Orders reviewing and setting aside, and declaring invalid, unlawful and unconstitutional the following decisions taken by NSFAS ('the impugned decisions'):

[2.1.1] The decision taken on or about 18 October 2023 to terminate the SLA concluded with eZaga pursuant to the tender;

[2.1.2] The decision taken on or about 12 April 2024 to extend the payment of allowances to NSFAS funded students through universities as opposed to the direct payment solution provided by eZaga;

[2.1.3] The decision taken on or about 24 April 2024 to stop issuing payments instructions and making associated payments to eZaga for the direct disbursement of allowances into the bank accounts of NSFAS-funded students which eZaga had onboarded;

[2.1.4] The decision taken on or about 26 April 2024 to implement a payment mechanism with the assistance of NSFAS banker to distribute allowances directly to students' bank accounts; and

[2.2] An order condoning as far as necessary the late institution of the main review application.

[3] In addition, eZaga had sought certain interim interdictory relief.[2]

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[2] The application which came before this Court related to the review relief only.

[4] The sixth respondent, the Special Investigating Unit ('the SIU') applied to join the main review application and its application for joinder was unopposed.[3]

[5] On 6 May 2024 the SIU and NSFAS instructed their attorneys, Werksmans Inc Attorneys ('Werksmans') to institute proceedings in the Special Tribunal to review and set aside the award of the tender to the service providers and to interdict the implementation of the SLAs pending the outcome of the main review application.

[6] Those proceedings were instituted in the Special Tribunal on 24 May 2024 by the SIU in its own name and on behalf of NSFAS in which the following relief was sought:

[6.1] In Part A, the SIU and NSFAS sought an order interdicting and restraining the service providers from implementing the SLAs pending the determination of the relief sought in Part B;[4] and

[6.2] In Part B, the SIU and NSFAS sought orders declaring:

[6.2.1] the award of the tender to each of the service providers to be unlawful and invalid and setting the awards aside; and

[6.2.2] the SLAs to be unlawful and invalid and setting the agreements aside,

[7] When the interim interdictory relief sought by eZaga came before this Court on 12 June 2024 the explanatory affidavits delivered by the other service providers were struck out and the Part A relief was struck from the roll for lack

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[3] The SIU ultimately did not participate in the proceedings before this Court. The fifth respondent did not participate in these proceedings either.

[4] The Special Tribunal dismissed the Part A relief sought by the SIU and NSFAS.

of urgency. The interim interdictory relief was re-enrolled on the semi-urgent roll for hearing.

[8] This Court on 15 July 2024 granted an interim order interdicting NSFAS from taking any steps to implement the impugned decisions and directing NSFAS to implement the SLAs, pending the final determination of the main review application.[5]

[9] On 25 July 2024 NSFAS sought leave to appeal the interim order and leave to appeal was granted by this Court on 22 August 2024.

[10] NSFAS took the view that the interim order was suspended as a consequence of the delivery of the application for leave to appeal. eZaga took the view that the interim order was not suspended and consequently on 13 August 2024 eZaga launched contempt proceedings in respect of NSFAS' failure to implement the interim order. The contempt proceedings were struck from the roll for lack of urgency on 17 September 2024.

[11] The appeal against the interim order was subsequently withdrawn by agreement between the parties.

[12] On 25 May 2025 NSFAS instituted a counter application in this Court in the form of a self-review ('the counter application') in which it sought orders:

[12.1] Declaring the decision to appoint the service providers pursuant to the tender to be unconstitutional and invalid;

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[5] *Ezaga Holdings (Pty) Ltd v National Student Financial Aid Scheme Coinvest Africa (Pty) Ltd and Others* (9526/24) [2024] ZAWCHC 190 (15 July 2024).

[12.2] Reviewing and setting aside the aforementioned decision in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and s 1(c) of the Constitution;

[12.3] Declaring the SLAs to be unlawful and invalid in terms of s 172 of the Constitution and s 8 of PAJA;

[12.4] Divesting the service providers of all profit accrued to them as a result of the bid award;

[12.5] Directing that the service providers are entitled to retain from the payments advanced to them in terms of the SLAs only reasonable expenses incurred in the fulfilling of the SLAs; and

[12.6] Directing that:

[12.6.1] the service providers provide NSFAS with a detailed breakdown of the reasonable expenses incurred in fulfilling the SLAs together with supporting documents within 30 days to be verified by an expert;

[12.6.2] NSFAS, within 30 days after the service providers had complied with the above, appoint a duly qualified expert to assess the reasonableness of the service providers' expenses and debate the financial data provided by the services providers; and

[12.6.3] The service providers pay NSFAS the amounts found to be due by the expert within 60 days of demand by NSFAS.

[13] All of the service providers oppose the counter application and seek just and equitable relief in the event that the review relief sought in the counter application is granted.

[14] eZaga contends that in the event that the review relief in the counter application is granted, it would be entitled to compensation from NSFAS which

would cover eZaga's costs and expenses in implementing its SLA and the reasonable profits eZaga would have obtained in implementing the SLA. Given the dispute raised by NSFAS concerning the figures provided by eZaga, the latter seeks an order that an expert or referee be appointed to determine the losses and expenses incurred by eZaga in implementing the SLA, the reasonable profits eZaga would have obtained in implementing the SLA, and an order that NSFAS pay eZaga the compensation amount determined by the independent expert or referee.

[15] Coinvest contends that in the event that the review relief in the counter application is granted, the just and equitable remedy would be for the Court to suspend the order of invalidity either wholly or for a limited time period so as to preserve the service providers' rights to pursue a claim for damages, alternatively that the Court as part of these proceedings grant an order allowing for the determination of both their out-of-pocket expenses and fair profit.

[16] Norraco contends that in the event that the review relief in the counter application is granted, the just and equitable remedy would be for the Court to grant an order limiting the retrospective effect of the declaration of invalidity, and/or an order suspending the declaration of invalidity of the SLA for five years subject to such conditions as the Court may wish to impose, including the condition that in calculating the period of five years, the time period from April 2024 to the date of the final order not be taken into account, as well as, or in the alternative, an order that Norraco be compensated for any losses it suffered as a result.

[17] Norraco further contends that just and equitable relief must not equated with damages but that it would be just and equitable that it be compensated for the costs it has already incurred, its ongoing costs, and for the loss of a business opportunity to generate income over the period of the contract, as well as to pay the outstanding debt owed by NSFAS to Norraco which it contends amounts to R3 million.

[18] Tenetech contends in the first place that in the event that the counter application is dismissed, NSFAS be directed to immediately implement the SLA concluded with it. Tenetech is the only service provider that instituted a formal counter application for certain just and equitable relief in the event that the review relief in the counter application is granted. Tenetech seeks the following just and equitable relief:

[18.1] An order compensating Tenetech for all of the losses and expenses incurred pursuant to, or in anticipation of, the SLA including all product development costs and all expenses that Tenetech will incur to third parties as a result of termination of the SLA; and

[18.2] An order incorporating a reasonable profit for the services rendered including services tendered to be performed by Tenetech under the SLA, from the date of inception of the SLA to the date of the final setting aside of the SLA, including any appeals;

[18.3] That the parties are required to jointly appoint a duly qualified expert to assess and verify the expenses incurred and reasonable profits claimed together with all supporting documents and to determine:

[18.3.1] the reasonableness of all expenses incurred and claimed by Tenetech;

[18.3.2] the value of the compensation to which Tenetech is entitled for reasonable expenses;

[18.3.3] the amount or means of calculating the reasonable profit to which Tenetech is entitled;

[18.3.4] the amount and/or value of the reasonable profit to which Tenetech is entitled;

[18.3.5] the amount due to Tenetech as just and equitable relief; and

[18.4] Tenetech set out a proposed mechanism to give effect to the relief sought.

[19] By the time the matter came before this Court, the parties had agreed that the main issues in dispute related to the contentions raised in the counter application. The parties correctly accepted that if the counter application succeeds the main review application cannot succeed. The parties, prior to the hearing, delivered a joint practice note setting out the main issues for determination as follows:

[19.1] Whether NSFAS' decision to appoint the service providers for the provision of payment of allowances to NSFAS students was lawful and in accordance with the s 217 of the Constitution, the Public Finance Management Act 1 of 1999 (‘PFMA’), the Preferential Procurement Policy Framework Act 5 of 2000 (‘PPPFA’) and the Preferential Procurement Regulations, 2022

('the PPPFA Regulations'), the Treasury Regulations, and the 2021 National Student Financial Aid Scheme Supply Chain Management Policy ('2021 NSFAS SCM Policy');

[19.2] Whether the SLAs concluded between NSFAS and the service providers are valid, binding, and enforceable, or whether the SLAs are unlawful and invalid as a result of the material irregularities in the tender process;

[19.3] Whether the historical relationships between NSFAS officials and the directors of the appointed service providers, including prior irregular performance at the Safety and Security Sector Education and Training Authority ('SSETA'), created a reasonable apprehension of bias, gave rise to preferential treatment, or otherwise compromised the integrity and independence of the procurement process;

[19.4] Whether NSFAS suffered or is likely to suffer financial prejudice as a result of the irregular and unlawful procurement process, including the risk of irregular expenditure exceeding R49 billion, and whether the cumulative effect of the identified irregularities renders the entire procurement process constitutionally invalid;

[19.5] Whether any delay in instituting these proceedings has been adequately explained and should be condoned, having regard to the interests of justice, the seriousness of the alleged maladministration, the findings contained in the Werksmans Attorneys investigation report and the Special Investigating Unit ('the SIU') investigation report, the constitutional obligations resting on NSFAS, and the broader imperatives of good governance and the rule of law;

[19.6] In the event that invalidity is declared, the appropriate just and equitable remedy under s 172(1)(b) of the Constitution, including:

[19.6.1] whether the service providers are entitled to retain profit earned under the SLAs;

[19.6.2] whether the projected future income or expectation damages is cognisable in legality review proceedings; and

[19.6.3] whether, on the present record, this Court is in a position to determine complex financial and actuarial claims advanced for the first time in answering affidavits;

[19.7] Even if there is no basis for the Court to overlook any unreasonable delay, whether the Court should nevertheless be constitutionally compelled to declare the impugned NSFAS decisions unlawful;

[19.8] Whether the service providers are entitled to retain or be awarded compensation for their reasonable costs in implementing the SLAs;

[19.9] If this Court is not in a position to determine complex financial and actuarial claims advanced for the first time in answering affidavits, what just and equitable mechanism to impose to facilitate the calculation of what the service providers are entitled to retain or be awarded;

[19.10] Whether the service providers should be allowed to keep their profits;

[19.11] Whether such claims are, in substance, contractual expectation damages and are not cognisable within a legality review;

[19.12] Whether the appropriate remedy is corrective and restitutionary in character, permitting the recovery of proven and reasonable expenditure actually incurred, subject to independent verification, but not retention of profit derived from an unlawful award;

[19.13] Whether the appropriate remedy is for the Court to suspend the operation of the order of invalidity in toto, alternatively for a limited time to enable the service providers to recover both their out-of-pocket expenses and a fair profit;

[19.14] Whether service providers who are innocent of any wrongdoing and who have continued to render services under the SLAs should be entitled to payment of a reasonable profit for such services, in addition to all incurred costs in servicing the SLAs, and the appropriate means by which to determine such amounts.

RELEVANT BACKGROUND FACTS

[20] Pursuant to a review process, a decision was taken by NSFAS to advertise a tender for the direct payment of allowances to NSFAS student bank accounts for five years under bid number SCMN006/2020 ('the first tender'). The first tender was subsequently cancelled as it was deemed non-responsive. On 20 November 2020, NSFAS published a second tender under bid number SCMN01 4/2020 ('the second tender') for the provision of direct payments of allowances to NSFAS student bank accounts for 5 years. The second tender was also cancelled.

[21] On 25 January 2022, NSFAS advertised the tender for direct payment of disbursement allowances to NSFAS-funded students at public universities and TVET colleges for a 5-year renewable period. The service providers all submitted bids in response to the tender advertisement.

[22] On 15 June 2022 NSFAS advised the service providers that their respective bids were successful, subject to price negotiations. On 12 July 2022, NSFAS appointed the service providers in terms of the tender.

[23] On 15 August 2022 NSFAS concluded SLAs with each of the service providers pursuant to those awards.

[24] On 17 October 2023 the service providers were called to a meeting with NSFAS where they were informed that NSFAS had received an investigative report prepared by NSFAS' attorneys, Werksmans ('the Werksmans report'), which had advised NSFAS to terminate the SLAs with all four of the service providers and to cancel the award of the tender. It is not in dispute that at that meeting the NSFAS Chairman acknowledged that NSFAS was at fault for the

irregularities identified in the procurement processes and stated that the Werksmans report did not make adverse findings about the guilt of the service providers.

[25] The following day, 18 October 2023, NSFAS issued a media statement, in which it stated, *inter alia,* that upon reviewing the Werksmans Report, it would be 'cancelling' the SLAs concluded with the service providers. However for some time thereafter NSFAS continued to implement the SLAs with various service providers.

[26] By way of example, NSFAS continued implementing the SLA with eZaga by sending onboarding files, payment files, and making monthly payments to eZaga during the period November 2023 to March 2024, and between October 2023 and February 2024, Tenetech continued to receive payment instructions from NSFAS. On 31 January 2024, the NSFAS board passed a resolution requiring universities to maintain their collaboration with the service providers designated for their particular institutions. On 8 February 2024 NSFAS issued a notice confirming that the service providers remained enlisted by NSFAS to disburse funds to students.

[27] However, in February 2024 and March 2024, following student registration drives, NSFAS also distributed funds directly to universities for onward distribution to NSFAS funded students at universities, and directly to NSFAS funded students at TVET colleges, and did so for the months of February 2024 and March 2024, bypassing the service providers. At the time NSFAS stated that it had done so because of delays in the 2024 academic year caused by registration delays and that once the situation was corrected it would again honour the terms of the SLAs.

[28] On 12 April 2024 NSFAS wrote to university vice chancellors directing them to pay students allowances directly for the months of April 2024 to July 2024. On 24 April 2024, NSFAS failed to send eZaga and Coinvest onboarding or payment files or make payments to them for purposes of disbursing funds to students.

[29] On 26 April 2024 NSFAS issued a media statement announcing a new payment mechanism through First National Bank which had been an unsuccessful bidder in the tender process. The media statement advised that students were to open their own bank accounts into which NSFAS would be making payments directly and further recorded that there would be an offboarding process for students who had accounts through any one of the service providers.

[30] The decisions taken by NSFAS in April 2024 were the catalyst for the institution of the main review application. The essence of the dispute between the parties relates to the lawfulness of the procurement process and the consequences of any unlawfulness.

RELEVANT LEGAL PROVISIONS

[31] It is trite that the principle of legality governs the exercise of all public power. There is very little distinction between the grounds of review of administrative action under PAJA and the review of executive action under the principle of legality.[6]

[32] Decisions made by organs of State which are not challenged in the appropriate proceedings, by the right parties seeking the right remedy, at the right time, are treated as effective and binding, unless they are set aside by a court – even if the decisions may be vitiated by some irregularity.[7] As the Supreme Court of Appeal has observed '*until a court is appropriately approached*

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[6] *Minister of Home Affairs and Another v Public Protector* 2018 (3) SA 380 (SCA) ('*Minister of Home Affairs*'), para 38.

[7] *Oudekraal Estates (Pty) Ltd v City of cape Town* 2004 (6) SA 222 (SCA), paras 26 - 31; *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers* 2020 (4) SA 375 (CC), para 1.

and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence'. [8]

[33] Organs of State are not entitled to simply disregard administrative actions, even if they believe the decisions to be unlawful, unless and until those decisions are set aside by a competent court. To do otherwise, would be impermissible self-help, which is contrary to the rule of law.[9] Organs of State have a higher duty to respect the law, to fulfil procedural requirements, and to respect rights when doing so.

[34] It is not in dispute that NSFAS is a public entity listed in Schedule 3A of the PFMA and that it is an organ of State as contemplated by s 239 of the Constitution. Hence NSFAS seeks to review its decisions in terms of the principle of legality.[10] Moreover, it is well settled that organs of State are enjoined to uphold and protect the rule of law by, *inter alia*, seeking the redress of their unlawful decisions, and are in fact under a positive obligation to rectify any identified unlawfulness.[11]

[35] Section 217(1) of the Constitution requires that an organ of State like NSFAS must contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. This duty is given effect to in the case of NSFAS through, *inter alia*, the PFMA; the PPPFA; the PPPFA Regulations; the Treasury Regulations; and the 2021 NSFAS SCM Policy. These statutory and regulatory provisions form the procurement framework or system as contemplated by s 217(1). It is trite that the enquiry that a review

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[8] *Minister of Home Affairs,* para [38].
[9] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC), paras 89 and 103.
[10] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* ZACC 40; 2018 (2) 23 (CC) ('*Gijima*'), para 37 – 40.
[11] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* ZACC 15; 2019 (4) SA 331 (CC) ('*Buffalo City*'), para 61.

court is required to engage in is whether the procurement process that was followed complies with the applicable procurement framework.[12] Compliance with this constitutionally mandated framework is a necessary requirement for a valid procurement process[13] and the consequence of non-compliance is that any contract concluded in breach thereof is invalid.[14]

[36] The Constitutional Court in *AllPay I* explained the proper approach to be followed in matters where material irregularities were alleged in a tender award as follows – first it must be established, factually, whether an irregularity occurred, and thereafter (as the second step) the irregularity must be legally evaluated, taking into account the materiality of any deviance from legal requirements, to determine whether it amounts to a ground of review.[15] The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained and whether the purposes the tender requirements are intended to serve have been substantively achieved. [16] In a legality review the enquiry to be undertaken is whether the adopted procurement framework/system was complied with and whether the process followed was compliant with s 217 of the Constitution.[17]

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[12] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer South African Social Security Agency (Corruption Watch and Centre for Child Law as Amici Curiae)* ZACC 42; 2014 (1) SA 604 (CC), *('AllPay I'),* para 40.
[13] *AllPay I*, para 40.
[14] *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC,* [2009] ZASCA 66, 2010 (1) SA 356 (SCA), para 16; *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) , [2001] 4 All SA 273, paras 8 – 9.
[15] *AllPay I*, para 28.
[16] *AllPay I*, para 58.
[17] *Gijima*, para 40-41.

THE SCOPE OF THE SELF-REVIEW

[37] The decisions sought to be reviewed in the counter application are the decisions of NSFAS to award the tender to the service providers and the resultant conclusion of the SLAs pursuant to the tender awards.

[38] There can be no dispute that the decisions to award the tender constitute the exercise of a public power by NSFAS in terms of s 217(1) of the Constitution read with s 51(1)(a)(iii) of the PFMA. Given the averments in NSFAS' founding affidavit in support of the counter application that there were material irregularities in, *inter alia*, the bid specification committee ('BSC') processes, the bid evaluation committee ('BEC') processes, the bid adjudication committee ('BAC') processes, and the contract negotiation processes, it follows that a review of these decisions by NSFAS falls squarely within the scope of a review in terms of the principle of legality.

[39] Given the trite legal principle that a public procurement contract concluded in breach of legal provisions designed to ensure a transparent, cost-effective and competitive tendering process in the public interest is invalid and will not be enforced,[18] there can similarly be no question that the conclusion of the SLAs is part of and flows directly from the aforementioned public procurement process and thus properly forms part of the scope of a review in terms of the principle of legality.

[40] The crisp issue that this Court must determine for purposes of the counter application is whether the procurement process undertaken by NSFAS in the awarding of the tenders complied with the relevant statutory and regulatory framework. However, before dealing with whether NSFAS has made out a

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[18] *Ferrostaal GmbH and Another v Transnet SOC Ltd and Another* 2021 (5) SA 493 (SCA), para 31.

case for review, all of the service providers raise the issue of undue delay. In essence they all contend that NSFAS has delayed unreasonably in seeking to review the decisions that form the subject of the counter application and that the counter application should be dismissed for this reason.

DELAY

[41] The Constitutional Court has cautioned courts to be slow to allow procedural obstacles to prevent them from looking into a challenge to the lawfulness of an exercise of public power.[19] Ultimately, the overriding factor is whether it is in the interests of justice to grant condonation.[20] Unlike a review in terms of PAJA, a review under the principle of legality is not subject to a 180-day time bar. The guiding factor is whether the application has been brought within a reasonable time.[21]

[42] The Constitutional Court in *Khumalo*[22] in considering the delay rule in the context of the principle of legality, endorsed the test enunciated by the Supreme Court of Appeal in *Gqwetha* for assessing undue delay in bringing a legality review application.[23]

[43] The issue of delay is determined by using a two-stage process.[24]

[44] First, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to

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[19] *Khumalo and Another v Member of the Executive Council for Education: Kwa-Zulu Natal* 2014 (5) SA 579 (CC) ('*Khumalo*'), para 45.
[20] *Van Wyk v Unitas Hospital and another* 2008 (2) SA 472 (CC) at 477 A-B.
[21] *Buffalo City*, para 50.
[22] *Khumalo,* para 49.
[23] *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA), para 33.
[24] *Buffalo City*, para 43, 48, 52 -53.

the circumstances of the matter.[25] The court will consider the explanation provided for the delay and the explanation should cover the entire period of the delay. Where there is no explanation, the delay will necessarily be unreasonable.[26]

[45] Second, if the delay is unreasonable, the question becomes whether the court's discretion should nevertheless be exercised to overlook the delay to entertain the application.[27] There must be a good reason for the court to do so, based on objective facts.[28] The approach to overlooking delay is flexible, and entails a legal evaluation taking into account a variety of factors including:

[45.1] The potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision, and any prejudice that may be ameliorated by the court's power to grant just and equitable remedies.[29]

[45.2] The nature of the impugned decision. This requires a court to somewhat consider the merits of the challenge.[30]

[45.3] The conduct of the party bringing the review, in particular for State litigants seeking to review their own decisions as they are best placed to explain the delay.[31]

[46] In summary, the standard to be applied in assessing delay under the principle of legality remains whether the delay was unreasonable, and in assessing the delay the proverbial clock starts running from the date that the applicant

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[25] *Buffalo City*, para 48.
[26] *Buffalo City*, para 52.
[27] *Buffalo City,* para 48.
[28] *Gijima*, para 49.
[29] *Buffalo City,* para 54.
[30] *Buffalo City*, para 55.
[31] *Buffalo City,* para 59.

became aware or reasonably ought to have become aware of the action taken.[32]

[47] Certain of the service providers contend that the delay ought to be calculated from 12 July 2022 when NSFAS appointed the service providers in terms of the tender. NSFAS contends that it first became aware of certain irregularities on 15 October 2023 when it received the Werksmans report. NSFAS further avers that it had to await the outcome of the SIU investigation which was concluded on 23 April 2024. These averments are not meaningfully disputed by any of the service providers. NSFAS contends that the parties engaged in various litigious proceedings from May 2024 onwards as set out above and that in the circumstances its delay of some 19 months from October 2023 to May 2025 was reasonable, alternatively that the delay ought to be condoned as it is in the interests of justice to do so.

[48] I am in agreement with the service providers that the explanation for the delay provided by NSFAS is less than convincing. By its own account NSFAS became aware of at least some of the irregularities when it received the Werksmans report on 15 October 2023. NSFAS makes no effort to explain in its founding affidavit why it had to wait for the completion of the SIU investigation to approach the court. It bears emphasis that NSFAS does not state that the full nature and scope of the irregularities only came to light after it received the results of the SIU investigation. Even if the SIU investigation could be relied on, that only accounts for the delay up to April 2024. The contention that the remaining 13 month delay from April 2024 to May 2025 can be explained with reference to the other litigation in which the parties were involved is not convincing.

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[32] *Buffalo City,* para 48. *City of Cape Town v Aurecon South Africa (Pty) Limited* 2017 (4) SA 223 (CC), para 37 and 41.

[49] In the circumstances I am in agreement with the respondents that the delay is unreasonable. However, that is not the end of the enquiry as an unreasonable delay may still be condoned if it is in the interests of justice to do so.

[50] There can be no meaningful dispute that the decisions sought to be reviewed involve a procurement process of substantial financial scale. NSFAS contends that if the delay is not condoned it will incur some R49 billion in irregular expenditure, as this is the value of the tender. The prejudice asserted by the service providers is primarily commercial and operational in nature. The procurement decisions sought to be reviewed directly impact the livelihood, dignity, and academic survival of vulnerable students across the country. The appointment of the service providers directly affects the secure, timely, and efficient distribution of student allowances.

[51] Moreover, the approach to condonation in legality reviews requires that the Court consider the nature of the impugned decisions and in so doing to consider the merits to some degree. On a prima facie basis, the review grounds relied on by NSFAS are largely undisputed on the merits. Consequently, to refuse condonation would mean immunising a potentially fundamentally flawed procurement process that has sparked widespread public concern from judicial scrutiny.

[52] Furthermore, the impugned decisions carry profound implications for the national fiscus. NSFAS administers billions of rands in public funds. The procurement decisions involve the disbursement of public funds on a national scale and implicate the integrity of the procurement system adopted by NSFAS in compliance with s 217 of the Constitution. The irregularities alleged by NSFAS are substantive and go to the heart of the procurement process. The prejudice of refusing condonation would directly and adversely impact not only the public purse but also public trust. Conversely, the prejudice to the service providers who are commercial entities seeking to profit from what appears to be an irregular tender process is heavily outweighed by the public interest in ensuring fiscal accountability by deciding the merits of the counter application.

[53] I am satisfied that the interests of justice demand that the legality of the decisions sought to be reviewed in the counter application be decided for all these reasons.

THE GROUNDS OF SELF-REVIEW

[54] The irregularities identified in the founding affidavit in the counter application are not meaningfully disputed by the service providers.

[55] Paragraph 10.21.4 of the 2021 NSFAS SCM Policy requires NSFAS to obtain prior approval from the National Treasury before cancelling a tender for a second time. This requirement ensures independent oversight, to prevent arbitrary or unjustified cancellation of tenders, and to safeguard the integrity of the procurement process. The evidence demonstrates that the second tender was cancelled at the behest of Mr Nongogo, the former NSFAS CEO, without prior approval of the National Treasury, and consequently the cancellation of the second tender constituted a deviation from a mandatory procurement prescript.

[56] Tenetech's contention that failing to obtain National Treasury approval does not affect the validity of the tender (being the third tender advertised after the cancellation of the second tender), and that it only renders the second tender's cancellation reviewable, overlooks the NSFAS SCM Policy requirement for prior approval, which is undisputed and was not complied with. The cancellation of the second tender was therefore materially unlawful, and because it directly enabled the third tender, the unlawfulness taints the third tender process as well.

[57] The 2021 NSFAS SCM Policy required that bid specifications be compiled and deliberated upon by a properly constituted BSC in consultation with the end-user and in accordance with an agreed evaluation methodology. In this matter, however, the specifications for the third tender were drafted by the former CEO, Mr Nongogo, and submitted to the BSC for urgent approval via round robin, without a formal meeting, without disclosure of their origin, and without explanation for the urgency. These facts are undisputed. Although

Tenetech relies on an alleged ‘standard practice’ in which the BSC merely approves completed specifications, that practice cannot override mandatory procurement prescripts. The failure of the BSC to properly compile and deliberate on the specifications in accordance with the 2021 NSFAS SCM Policy constitutes non-compliance with the prescribed procurement framework, fundamentally undermining objectivity and the integrity of the process at the specification stage.

[58] The purpose, mandatory requirements and evaluation specifications of the tender deviated materially from the first and second tenders. The tender introduced material changes to both eligibility and evaluation. The requirement that bidders hold their own banking licence was relaxed. The evaluation framework was also significantly altered: a new presentation phase was added, the functional threshold was reduced from 80% to 70%, the preference point system shifted from 80/20 to 90/10, and mandatory requirements were reduced from 18 to 5. The changes to the mandatory requirements are not in dispute.

[59] The reconfiguration materially altered the competitive landscape by lowering eligibility thresholds and shifting from a bank-based framework to a fintech model, thereby enabling previously ineligible fintech entities to qualify. This occurred against the backdrop of Mr Nongogo’s prior professional relationships with entities linked to successful bidders, raising concerns about undisclosed connections. In such circumstances where safeguards were relaxed, strict compliance with due diligence and conflict-management obligations was essential. Taken cumulatively, the irregular compilation of specifications, reduction of mandatory requirements, altered evaluation criteria, and lack of proper due diligence constitute material non-compliance with s 217 of the Constitution and the 2021 NSFAS SCM Policy, undermining the fairness, transparency, and integrity of the procurement process.

[60] Paragraphs 1.7(e) and (i) of the 2021 NSFAS SCM Policy assigned to the end-user the responsibility to develop draft specifications in areas requiring technical skills and programme-specific needs; and provide technical input and presentations to the BSC and the BAC. Paragraph 2.2.2. of the 2021

NSFAS SCM Policy provides that the CEO appoints members of the BSC. The end-user is to be co-opted to provide technical input. The structure envisages distinct roles with internal checks and balances, contemplating that specifications originate from operational expertise and are subjected to independent scrutiny by the BSC. Where the executive drafts specifications and oversees their approval, that safeguard is substantially weakened.

[61] Mr Nongogo described himself as the end-user in response to questions posed by Werksmans and stated that his involvement in drafting specifications was in that capacity. There is no dispute that Mr Nongogo drafted or materially amended the bid specifications; that he exercised oversight over the BSC; and there was uncertainty within the bid committees regarding the identity of the end-user. Clearly the conflation of executive oversight and end-user input significantly compromised the integrity of the specification stage.

[62] The 2021 NSFAS SCM Policy required that a needs analysis be conducted to identify the goods and services required to achieve the outcomes envisaged in the NSFAS annual performance plan, which would then form the basis for specification development (paragraph 5.6.1 of the 2021 NSFAS SCM Policy) for each procurement process, thereby ensuring value for money and compliance with s 217 of the Constitution.

[63] Following the cancellation of the second tender on the basis that the services were no longer needed, no evidence exists that a fresh needs analysis was conducted before issuing the third tender. This is undisputed. Tenetech's reliance on an earlier needs analysis does not address the mandatory requirement that each procurement process, particularly one materially reconfigured, be supported by its own needs analysis. The third tender departed significantly from its predecessors, including a shift to a fintech model and altered requirements, which required justification through a compliant needs analysis. The absence of such an analysis constitutes a failure to comply with a foundational procurement requirement under the 2021 NSFAS SCM Policy, undermining the lawfulness of the process.

[64] Tenetech's contention that defects in the tender specifications are irrelevant because they are not separately challenged misconceives the nature of a self-review. The impugned decision is the award of the tender and the resulting contracts, and the specification stage forms an integral part of the process leading to that decision A legality review requires an assessment of the procurement process as a whole. Defects arising at the specification stage, such as in the formulation of requirements and evaluation criteria, are directly relevant where they materially affect the integrity of the process. It is therefore unnecessary to seek a discrete order setting aside the specifications in isolation. Tenetech's argument impermissibly fragments the procurement process.

[65] The 2021 NSFAS SCM Policy required each BEC member to independently evaluate and score every bid, sign score sheets, and justify discrepancies to ensure internal checks and comparability. However, the bids were divided among members of the BEC, with each member evaluating only two bids each, resulting in a single score sheet per bidder prepared by a single BEC member rather than independent scoring by all BEC members. These facts are undisputed.

[66] This process did not comply with paragraph 10.12.2(d) of the 2021 NSFAS SCM Policy, as it eliminated the safeguards inherent in independent scoring, namely the ability to detect discrepancies and ensure objective assessment. The recorded uncertainties in applying evaluation criteria further underscore the necessity of full independent evaluation. Accordingly, the adopted approach constituted a deviation from the prescribed evaluation methodology, undermined the comparability and integrity of the scoring process, and rendered the evaluation materially irregular and non-compliant with the procurement framework.

[67] Paragraph 10.11.3 of the 2021 NSFAS SCM Policy required a phased evaluation process, in terms of which only bids that met all mandatory requirements in Phases 1 and 2 could advance. Compliance with those requirements such as proof of a banking licence or equivalent sponsorship, PCI DSS certification, cyber-security documentation, professional indemnity cover of at least R20 million, and subcontracting obligations thus constituted a threshold qualification for further evaluation.

[68] Neither Tenetech nor eZaga demonstrated compliance with the mandatory professional indemnity insurance requirement at bid stage. Notwithstanding this non-compliance, both bidders were treated as compliant and permitted to proceed. The subsequent procurement of insurance does not cure this defect, as compliance falls to be assessed at the time of evaluation and not retrospectively. In permitting non-compliant bidders to proceed, while disqualifying another bidder on the basis of similar deficiencies, the evaluation process departed from the mandatory requirements of paragraph 10.11.3 of the 2021 NSFAS SCM Policy. This inconsistent application of threshold criteria constitutes material non-compliance with the 2021 NSFAS SCM Policy and undermines the fairness, transparency and legality of the procurement process under s 217 of the Constitution.

[69] The tender required that a minimum of 30% of the awarded contract be subcontracted to an EME or QSE that is at least 51% black-owned, with the subcontractor clearly identified and supported by valid B-BBEE credentials. This requirement was directed at securing genuine and independent participation by qualifying entities.

[70] At the time of the award, there were overlapping directorships between Tenetech and its subcontractor, Coralite. This gave rise to a substantive question as to whether the arrangement satisfied the purpose of promoting independent participation, as opposed to a merely formal compliance. In these circumstances, the BEC was required to interrogate both the formal compliance and the substantive integrity of the subcontracting arrangement. The proper enquiry is whether the arrangement fulfilled the underlying purpose of the requirement, namely meaningful participation by an independent EME

or QSE. The failure to properly interrogate compliance with a mandatory subcontracting requirement undermines the integrity of the evaluation process. Compliance with such requirements must be established at bid stage, in accordance with paragraph 10.11.3 of the 2021 NSFAS SCM Policy. Where this is not done, the process is rendered materially irregular and inconsistent with the prescribed procurement framework.

[71] Bidders who progressed to the presentation phase were required to present before the BEC. Although recorded as an ‘observer’, the former CEO, Mr Nongogo, attended these presentations, posed substantive questions to bidders, and made remarks indicative of a view on the appointment.

[72] Paragraph 2.6.5 of the 2021 NSFAS SCM Policy permits observers to attend proceedings but prohibits participation, save to advise if permitted. The record demonstrates that Mr Nongogo’s conduct exceeded that of a passive observer and instead formed part of the evaluative process. This must be considered in the context of the SCM Policy’s prescribed separation of roles between specification, evaluation, adjudication and approval. However the CEO, who ultimately exercises oversight over the award recommendation, participated in the evaluation phase after having been involved in the drafting of specifications.

[73] The CEO’s involvement in the evaluation phase had a material impact on the validity of the tender because it breached mandatory separation-of-functions requirements in the SCM Policy. Although characterised as an ‘observer’, the CEO actively participated by posing evaluative questions and engaging with bidders during presentations, conduct which went beyond the limited role permitted to observers. This occurred after his involvement in the drafting of specifications and before exercising oversight over the award recommendation.

[74] Such participation compromised the institutional safeguards designed to ensure independence, objectivity and impartiality in the evaluation process. The SCM framework requires a clear separation between specification, evaluation and adjudication functions; the CEO’s involvement collapsed those

safeguards. Under the principle of legality, compliance with these prescribed roles is mandatory, and the enquiry is not whether the outcome was actually influenced, but whether the procurement system as prescribed was adhered to.

[75] Accordingly, the CEO's involvement constituted a material irregularity that tainted the integrity of the evaluation process and, when assessed cumulatively with the other defects, undermined the lawfulness and validity of the tender award.

[76] The tender fell to be evaluated under the 90/10 preference point system, which requires that price operate as a decisive competitive differentiator, with 90 points allocated to cost in order to advance the constitutional objectives of competitiveness and cost-effectiveness under s 217. However, the pricing methodology adopted fundamentally undermined that framework. All qualifying bidders were awarded the full 90 points for price on the basis that they accepted NSFAS' pricing schedule. As a result, the BEC failed to meaningfully differentiate between bidders on the basis of price and did not utilise price as a ranking or elimination mechanism.

[77] This approach was compounded by the exclusion of material pricing components, most notably the charges to students, from the evaluation process. These components, despite varying significantly between bidders, were deferred to post-award negotiation and standardisation. The practical effect was that the core competitive components of pricing were removed from the evaluation stage altogether and only addressed after the award had already been made.

[78] A valid procurement process requires that adjudicators be presented with comparable offers capable of meaningful evaluation, so as to enable objective comparison between bidders. Where a pricing structure eliminates comparability, the competitive mechanism inherent in the tender process is neutralised. In these circumstances, the evaluation of price ceased to function as a substantive criterion and was reduced to a formal and mechanical exercise, with bidders effectively distinguished only by their B-BBEE scores.

This is inconsistent with the purpose and structure of the 90/10 system and fails to give effect to the constitutional imperatives of fairness, transparency, competitiveness and cost-effectiveness in public procurement.

[79] Crucially, the fact that this pricing model was contained in the tender documentation does not cure its unlawfulness. A procurement process that is itself structured in a manner that prevents any meaningful competition is inherently inconsistent with s 217, irrespective of formal compliance with its own terms. Accordingly, the pricing evaluation adopted in Phase 4 constituted a material irregularity. It undermined the integrity and competitiveness of the procurement process and contributed to the unlawfulness of the award decisions.

[80] The appointment and participation of Dr Chirwa in the BEC constituted a clear and material deviation from the 2021 NSFAS SCM Policy, rendering the evaluation process unlawful.

[81] Paragraph 2.2.3 of the 2021 NSFAS SCM Policy permits the inclusion of external experts only at the BSC level for advisory purposes. No equivalent provision authorises the appointment of an external expert to the BEC. The 2021 NSFAS SCM Policy instead limits participation in the BEC to its prescribed members, with only the end-user permitted to be co-opted for technical input.

[82] Dr Chirwa's appointment as an 'independent expert' to the BEC therefore lacked any lawful basis in the governing procurement framework. The subsequent amendment of the 2023 SCM Policy to expressly provide for such appointments underscores that no such authority existed at the relevant time. The evidence demonstrates that Dr Chirwa's appointment did not arise from any structured or authorised procurement decision. Rather, he was selected at the instance of the CEO, Mr Nongogo, without any recorded resolution, justification, or request from the end-user. This *ad hoc* appointment process is inconsistent with the requirements of the 2021 NSFAS SCM Policy.

[83] Although described as an advisor without voting rights, Dr Chirwa performed a substantive evaluative function. He was engaged to guide the BEC on how bids should be assessed, reviewed presentations and evaluation outcomes, provided input on pricing, and endorsed the scoring. His participation therefore went beyond passive advice and influenced the evaluation process itself. This is material. The 2021 NSFAS SCM Policy contemplates that evaluation be conducted by a properly constituted BEC, with built-in safeguards ensuring independence, accountability, and comparability of scoring. The introduction of an external participant exercising evaluative influence undermined those safeguards. The 2021 NSFAS SCM Policy establishes a structured separation between specification, evaluation, adjudication and approval. The unlawful inclusion of Dr Chirwa into the BEC blurred these delineations and altered the composition of the evaluation body. Compliance with prescribed committee composition is not a procedural formality; it is a substantive safeguard designed to ensure fairness, objectivity and institutional accountability in public procurement.

[84] Organs of State are required to act strictly within the bounds of their empowering framework. The enquiry is not whether the irregularity altered the outcome, but whether the procurement system, as prescribed, was complied with. A deviation in the composition and functioning of the BEC constitutes a failure to comply with binding procurement prescripts. As such, it renders the evaluation process defective and unlawful.

[85] The irregular appointment and substantive participation of Dr Chirwa must be assessed in conjunction with the broader defects in the procurement process. His involvement affected the manner in which bids were evaluated, the criteria applied, and the integrity of the decision-making process.

[86] The appointment of Dr Chirwa to the BEC, absent lawful authority and coupled with his substantive participation in the evaluation process, constituted a material irregularity. It undermined the prescribed procurement framework, compromised the integrity of the evaluation process, and contributed to the unlawfulness and invalidity of the tender award.

[87] Dr Chirwa expressly undertook to disclose any direct, indirect or potential interests and to recuse himself where his impartiality might reasonably be questioned. Notwithstanding this, he repeatedly declared that he had no interest in any bidder, while at the same time serving as a director of eZaga Remit, a subsidiary of one of the bidders, eZaga. This relationship constituted, at minimum, a potential and indirect interest falling squarely within the scope of his recusal undertaking. His failure to disclose that interest, and his continued participation in the evaluation process including reviewing presentations, advising the BEC, and endorsing scoring outcomes amounted to a breach of the prescribed conflict management safeguards. The undisputed facts demonstrate non-disclosure, non-recusal, and participation in evaluation despite a clear conflict of interest. Such conduct undermines the integrity of the evaluation process and the safeguards designed to ensure fairness, transparency and impartiality under s 217 of the Constitution. The resulting taint is material and vitiates the validity of the BEC process and, by extension, the tender award.

[88] Paragraph 10.11.1(e) of the 2021 NSFAS SCM Policy required the BEC, when considering bids for acceptance and before a formal contract is concluded, to conduct a due diligence process. That process must include: the use of a service provider to perform sufficient and appropriate background checks on the supplier and its directors; and the identification of any potential or actual conflict of interest between NSFAS bid committee members, SCM officials, and the supplier or its directors/shareholders.

[89] Paragraph 10.11.1(e) of the 2021 NSFAS SCM Policy imposed a mandatory obligation on the BEC to conduct due diligence, including background checks on bidders and the identification of any actual or potential conflicts of interest between committee members and bidders. There is no evidence that the prescribed due diligence process was conducted, including the use of a service provider to perform background checks. The available documentation such as eZaga's CSD records and the association between Dr Chirwa and entities linked to eZaga would, at a minimum, have triggered scrutiny under such a process. A basic background check would have revealed Dr Chirwa's directorship in eZaga Remit and his connection to Ubits Holdings which was

associated with a bidder. This information was directly relevant to the SCM Policy's conflict management requirements.

[90] The failure to conduct due diligence therefore constituted a deviation from a mandatory procurement prescript. When considered together with Dr Chirwa's undisclosed interest and participation in the evaluation process, this omission materially undermined the integrity, fairness and transparency of the BEC proceedings, and contributed to the unlawfulness of the tender award.

[91] Paragraph 2.4.1 of the 2021 NSFAS SCM Policy required the CEO to establish and appoint a BAC to serve for a period of one financial year. It further required that the BAC *'must consist of at least four senior/executive officials'.* Paragraph 2.4.1 of the 2021 NSFAS SCM Policy required that the BAC be properly constituted with at least four senior or executive officials. Although the BAC was formally reconstituted, it is common cause that, at the relevant time, key positions were vacant, leaving only three serving members. The BAC accordingly did not meet the minimum composition requirement and was not lawfully constituted. The quorum provisions of the SCM Policy do not cure this defect, as a quorum presupposes a properly constituted body. Compliance with the prescribed composition of procurement committees is a mandatory requirement, not a procedural formality.

[92] Notwithstanding its defective constitution, the BAC considered the BEC's recommendations and made determinations that formed a necessary step in the procurement chain leading to the awards. The BAC's defective composition therefore tainted its recommendations and the subsequent approval process, rendering the award decisions invalid.

[93] The BAC minutes of 8 June 2022 expressly recorded a recommendation that a risk assessment on the impact of student costs be conducted prior to the final award. However, this safeguard was omitted from the subsequent memorandum to the CEO and was not placed before the Board. The award was ultimately approved without this condition, and there is no evidence that any such risk assessment was conducted at any stage.

[94] This omission is material. The BAC itself identified the impact of student costs as requiring further scrutiny before the award decision could properly be taken. In circumstances where student charges varied significantly between bidders, pricing was to be standardised post-award, and those costs were excluded from the comparative evaluation. The failure to implement the recommended risk assessment meant that a recognised risk was neither interrogated nor mitigated. Where a procurement body recognises the need for a pre-award safeguard but the award proceeds without it, the rationality, integrity and lawfulness of the decision are undermined. The undisputed omission of the risk assessment recommendation from the decision-making chain accordingly forms part of the procedural defects that tainted the award.

[95] The BAC resolved on 8 June 2022 that all four recommended bidders would be engaged in joint price negotiations to ensure fairness, and the award of the tender proceeded subject to post-award negotiations to standardise pricing.

[96] Paragraph 2.5 of the 2021 NSFAS SCM Policy establishes a structured and sequential process: a negotiation committee conducts negotiations and makes recommendations; those recommendations are considered by the BAC; and only thereafter are they approved by the Executive Officer. This framework is designed to preserve a separation between negotiation, adjudication and approval functions. Notwithstanding this structure, Mr Nongogo acted as Chairperson of the negotiation committee, participated directly in formulating the negotiated outcomes, and subsequently exercised his authority as Chief Executive Officer to approve those outcomes. This collapsed the prescribed separation of functions and undermined the chain of accountability contemplated by the 2021 NSFAS SCM Policy.

[97] In terms of paragraph 2.5 of the 2021 NSFAS SCM Policy, the separation of roles is not merely procedural but constitutes a binding procurement prescript. Where a single functionary participates in both the formulation of negotiated terms and their ultimate approval, the integrity of the procurement system is fundamentally compromised.

[98] Mr Nongogo's involvement across specification, evaluation, negotiation and approval stages resulted in a concentration of decision-making authority inconsistent with the 2021 NSFAS SCM Policy's safeguards. This overlap materially undermined the fairness, transparency and independence of the process and contributed to the overall unlawfulness of the tender award.

[99] During the negotiation phase, the BAC had expressly identified the risk posed by student costs and recommended that a risk assessment be conducted prior to the final award. Notwithstanding this, NSFAS adopted a negotiation approach in which the four appointed service providers were invited to engage collectively on student pricing. The providers were presented with the cost structure together and afforded an opportunity to confer amongst themselves, following which they agreed on a uniform bundled fee that was accepted by NSFAS. This approach is impugned not only the basis of the resulting price, but the lawfulness of the process. A constitutionally compliant procurement framework requires that bidders compete against one another on price. It does not contemplate a post-award process in which successful bidders are permitted to eliminate competition by collectively agreeing on a consolidated price.

[100] The effect of permitting such collective engagement was to extinguish price competition and substitute competitive differentiation with consensus-based pricing. Price was thus no longer determined through rivalry, but through agreement between appointed bidders.

[101] The legality enquiry is whether the adopted negotiation structure complied with s 217 of the Constitution and the governing procurement framework. Properly understood, a process that permits competitors to agree on pricing after the award is inconsistent with the requirements of fairness, transparency, competitiveness and cost-effectiveness. This approach further compounded the earlier pricing irregularities at evaluation stage, where price had already failed to operate as a differentiator. The negotiation process entrenched uniform pricing through collective agreement, thereby reinforcing the absence of competition. Accordingly, the adopted negotiation methodology constituted

a material irregularity which undermined the integrity of the procurement process and contributed to the unlawfulness of the award decision.

[102] The tender process was thus materially non-compliant with the 2021 NSFAS SCM Policy and s 217 of the Constitution, in multiple interrelated respects.

[103] To sum up: the 2021 NSFAS SCM Policy prescribed a structured procurement system with distinct stages - specification, evaluation, adjudication, negotiation and approval—each performed by separate committees. This separation is a binding prescript designed to ensure fairness, transparency and accountability. The process departed from this framework in several respects, including the failure to conduct a mandatory needs analysis; the failure of the BSC to properly compile and deliberate upon specifications; the irregular assumption of end-user functions by the CEO; the CEO's participation in the evaluation phase; the unlawful appointment and participation of Dr Chirwa in the BEC; the defective constitution of the BAC; and. the CEO's overlapping roles in negotiation and final approval. These deviations collectively collapsed the separation of functions and completely undermined the integrity of the procurement system.

[104] The 2021 NSFAS SCM Policy imposed mandatory obligations to identify and manage conflicts of interest, supported by due diligence measures. These safeguards were not complied with. Dr Chirwa participated in the evaluation process while serving as a director of an entity associated with a bidder; he failed to disclose that interest, falsely declared no conflict, and did not recuse himself; and no due diligence was conducted to identify this relationship, despite it being readily discoverable. This amounted to a failure of both conflict management and due diligence mechanisms, undermining fairness and transparency.

[105] The tender was evaluated under the 90/10 preference point system, which requires meaningful price competition. The adopted pricing methodology, however, awarded all bidders full price points; excluded material pricing components (notably student costs); and deferred those components to post-award negotiation. As a result, price was not used as a competitive

differentiator, rendering the evaluation inconsistent with the PPPFA framework and s 217. The defects in price evaluation were compounded during the negotiation phase. Bidders were permitted to engage collectively and agree on a uniform price. This eliminated competition and replaced it with consensus-based pricing. A pre-award risk assessment, identified as necessary by the BAC, was not conducted. This approach entrenched the absence of competition and undermined the cost-effectiveness and competitiveness of the procurement. The cumulative effect of these irregularities demonstrates systemic non-compliance with the prescribed procurement framework. The process deviated from mandatory SCM requirements at every stage, undermining the constitutional principles of fairness, transparency, competitiveness and accountability.

[106] Accordingly, the award decisions are unlawful and fall to be set aside under the principle of legality.

THE JUST AND EQUITABLE REMEDY

[107] NSFAS contends that the just and equitable remedy in this matter would entail the unwinding of the financial consequences of invalid procurement by providing for the divesture of profit accrued as a result of the impugned bid award; and the retention of reasonable, proven expenditure actually incurred by the service providers subject to an independent verification of those expenses.

[108] NSFAS relies on *Allpay (II)*[33] and *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others*[34] for the contention that the invalidation

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[33] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No.2)* (‘*AllPay II*’) [2014] ZACC 12; 2014 (4) SA 179 (CC), para 67.

of an existing procurement contract should not result in loss to the contractor for value actually rendered, but that at the same time the contractor has no right to benefit from an unlawful contract, and any benefit that it may derive should not be beyond public scrutiny. NSFAS contends that these principles in effect permit the service providers only to recover proven, reasonable out of pocket expenditure but not to retain any profit.

[109] As the Supreme Court of Appeal has explained in *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others,*[35] the law draws a distinction between parties who are complicit in maladministration, impropriety, or corruption on the one hand, and those who are not, on the other. Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be required to suffer losses.[36] On the other hand, although innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss as a result of the invalidation of a contract.[37]

[110] Moreover, NSFAS' reliance on *Allpay (II)* for the contention that a contractor also no right to benefit from an unlawful contract is misplaced. In *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another*[38] the Supreme Court of Appeal held that a contextual reading of *Allpay (II)* shows that the Constitutional Court did not hold that a party could derive no benefit from an unlawful contract and that the approach in *Allpay (II)* was to allow a party to retain payments, and thus to benefit, under an unlawful contract.

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[34] *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others* (590/2024) [2025] ZASCA 179 (28 November 2025) ('*Mafoko*'), para 12.
[35] *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2022 (5) SA 56 (SCA) ('*Central Energy Fund*'), para 42.
[36] *Central Energy Fund,* para 42;
[37] *Central Energy Fund,* para 42;
[38] *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* 2023 (5) SA 601 (SCA) ('*Phomella*'), para 18.

[111] In *Allpay (II)* in the exercise of its discretion, the Constitutional Court ordered that a new tender be issued, but that *'(i)f the tender is not awarded, the declaration of invalidity of the contract in para 1 above will be further suspended until completion of the five-year period for which the contract was initially awarded'*.[39] When the tender was awarded within the five-year period, in the follow-up matter of *Black Sash Trust v Minister of Social Development and Others*[40] the Constitutional Court granted an order further suspending the order of invalidity for a period of 12 months and requiring the tenderer to continue its services for that period, and the Court explained that *'[the] order below reflects that Sassa and [the tenderer] should continue to fulfil their respective constitutional obligations in the payment of social grants for a period of 12 months as an extension of the current contract.'*[41] Clearly therefore the contractor in *Allpay (II)* benefited, despite the initial contract having been found to be unlawful, and there was no order that the amounts paid should exclude the profits it had factored into its price when tendering.[42] In fact the only order concerning profits was that *'[w]ithin 60 days of the completion of the five-year period for which the contract was initially awarded, Cash Paymaster must file with this court an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract'*.[43]

[112] Moreover, the approach of allowing a party to retain payments, and thus to benefit under an unlawful contract has been echoed in a number of matters, such as in *Buffalo City* where the contractor had performed its obligations

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[39] *Allpay (II)* Order para 4; *Phomella*, para 16.
[40] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* 2017 (3) SA 335 (CC) ('*Black Sash Trust*').
[41] *Black Sash Trust*, para 50; *Phomella*, para 16.
[42] *Phomella*, para 17.
[43] *Allpay (II)* Order para 4.2; *Phomella*, para 17.

under the contract and the Constitutional Court held that the contractor was entitled to payment for the work which had been done.[44]

[113] In *Mafoko* the Supreme Court of Appeal held that the interpretation of *Allpay II* as set out in *Phomella* is correct, and confirmed that the principle of no loss, but no gain, does not correctly reflect the position adopted in *Allpay II*, nor is it consistent with the remedial latitude the Constitutional Court has applied in other cases in which it has made a just and equitable order.[45] The principle in *Allpay II* is that the award of a tender found to be unlawful and declared invalid does not give rise to a right to benefit from an unlawful contract and there is thus no duty on a court exercising its just and equitable discretion to order that the benefit of the unlawful contract must be conferred, but the absence of such a right and its correlative duty does not mean that the court in the exercise of its discretion may not permit a party to enjoy the benefit of a contract, including the profits that may accrue.[46]

[114] The Supreme Court of Appeal has made it clear that there are circumstances in which a firm that secures the public good is entitled to accrue a private return and that the exercise of a court's just and equitable discretion is not repugnant to the enjoyment of profit in every circumstance where a tenderer has continued to render a service or provide goods.[47] The matters to be properly considered in the exercise of the court's discretion to make a just and equitable order include whether a tenderer is entirely blameless; whether the tenderer has enjoyed the considerable past benefits of incumbency; and what might be a reasonable return under the discipline of competitive rivalry.[48]

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[44] *Buffalo City,* para 105; See also *Gijima* para 54.
[45] *Mafoko,* para 13.
[46] *Mafoko,* para 14.
[47] *Mafoko,* para 19.
[48] *Mafoko,* para 19.

[115] In this matter NSFAS put up no evidence to demonstrate that the service providers were complicit in the unlawfulness.

[116] NSFAS accepts in its replying affidavit filed in response to eZaga's answering affidavit in the counter application that eZaga bears no culpability for the irregularities and in fact states in terms that NSFAS does not allege that eZaga procured the award through corruption.

[117] NSFAS does not dispute Coinvest's contention in its answering affidavit in the counter application that the Werksmans report contains no evidence of wrongdoing by Coinvest. The highwater mark of the allegations in relation to Coinvest are that Mr Nongogo had a prior relationship with a former director of Coinvest, who had been a director of a different entity that had also been unable to perform as required under a different tender. There is, however, no averment that this constitutes evidence of wrongdoing by Coinvest.

[118] NSFAS does not dispute Noracco's averment that although it is mentioned in the SIU Investigation Memorandum, the founding affidavits in the Special Tribunal, and the counter application, there are no adverse comments made regarding Noracco's conduct.

[119] NSFAS does not dispute Tenetech's contention in its answering affidavit in the counter application that there is no allegation that Tenetech was a wrongdoer in the irregular process, that it was in any way complicit in the unlawful procurement process, or that Tenetech knew about or had any untoward relationship with NSFAS or any representative of NSFAS that caused or participated in the irregularities.

[120] Given that there is no case made out on the papers that any of the service providers were complicit in the irregularities complained of in the counter application, there is no basis in NSFAS' pleaded case to deprive the service providers of all profits and to limit what they may recover to reasonable and necessary expenses incurred.

[121] However, I agree with NSFAS that this Court is not in a position to determine the quantum of the service providers' claims for compensation which include claims in respect of capital expenditure, operational costs, staff costs, the costs of terminating student accounts, and third-party contractual obligations. Such claims would require the leading of extensive evidence which is not before this Court.

[122] In light of the findings on the merits of the counter application, this Court must consider what would constitute just and equitable relief in circumstances where the procurement process was fundamentally flawed for a myriad of reasons, and as a consequence the awards made and contracts concluded pursuant thereto are set aside, but where the service providers have provided services in terms of those contracts in circumstances where there is no evidence that they are complicit in the irregularities, and it has been shown that the irregularities arise from NSFAS' internal processes.

[123] Given that this Court in deciding the counter application brought in terms of the principle of legality is considering a constitutional matter within its power, it is empowered to make any order that is just and equitable in terms of s 172(1)(b) of the Constitution. Section 172(1)(b) confers wide remedial powers on a court adjudicating a constitutional matter. The remedial power is not only available when a court makes an order of constitutional invalidity under s 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on the constitutional invalidity of legislation or conduct.[49]

[124] Section 172(1)(b) grants a Court exceptionally broad powers in order to ensure that just and equitable relief is granted. As the Constitutional Court in

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[49] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) (2010 (3) BCLR 177; [2009] ZACC 32), para 97; *Minister of Safety and Security v Van Der Merwe and Others* 2011 (5) SA 61 (CC), para 59.

Electoral Commission v Mhlope and Others[50] emphasised, *'when conduct is self-evidently inconsistent with a constitutional provision, s 2 of the Constitution, which reinforces its supremacy, declares in unequivocal terms that such conduct is invalid. A declaration of invalidity is thus a consequence of inconsistency of any conduct with our supreme law.'*

[125] The Constitutional Court explained the extent of the Court's remedial powers under s 172(1)(b) 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 irresoluble situations. And the operative words in this section are "an order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, 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).*[51]

[126] Similarly, in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*[52] the Constitutional Court stated as follows:

> *'However, this court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, s 172(1)(b) empowers courts to make any order that is just and equitable. … The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring*

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[50] *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) ('*Mhlope*'), para 129.
[51] *Mhlope* para 132.
[52] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC), para 210 – 211.

them to take steps aimed at making their conduct to be consistent with the Constitution'.

[127] In *Central Energy Fund,*[53] the Supreme Court of Appeal held that the power to grant an appropriate remedy applies in review proceedings, whether under the principle of legality or in terms of the provisions of PAJA.[54] The remedy must be fair to all those affected by it, and it must effectively vindicate the rights violated.[55] In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others,*[56] the Constitutional Court held that the discretionary power to grant just and equitable relief follows upon an order of invalidity in terms of PAJA or the principle of legality.[57]

[128] Section 172(1)(b) has been used by the Courts as a basis to grant just and equitable relief following the setting aside of a tender pursuant to a self-review.

[129] In *Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality*[58] a firm of attorneys was awarded a tender for the provision of debt collection services. It transpired that the firm had submitted a non-responsive bid. The municipality applied to self-review the decision, and in the answering affidavit, the firm counter-applied for the payment of outstanding invoices. The High Court set aside the tender but dismissed the counterclaim. The Supreme Court of Appeal upheld the appeal against the dismissal of the counterclaim and ordered the municipality to pay the firm an amount

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[53] *Central Energy Fund* para 36. *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No.2)* ('*AllPay II*') [2014] ZACC 12; 2014 (4) SA 179 (CC), para 71.

[54] *Central Energy Fund,* para 36; *AllPay II*, para 71.

[55] *Central Energy Fund,* para 36; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) ('*Steenkamp*'), para 29.

[56] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC), para 84.

[57] *Bravospan SCA* at para [17].

[58] *Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality* [2022] ZASCA 28 (18 March 2022) ('*Sekoko Mametja*').

equivalent to that which it would have been entitled under the void tender on the basis that the municipality had received the full benefit of the services, the firm had incurred expenses to enable it to render the services to the municipality and the municipality did not dispute its entitlement to be paid for services rendered.

[130] The Supreme Court of Appeal stated as follows:[59]

> '*… It is appropriate, however, that where no fault lies at the door of Sekoko Attorneys and it rendered services which redounded to the benefit of the municipality, an order is granted for payment. In those circumstances, it is just and equitable to order that the municipality pay to Sekoko Attorneys an amount equivalent to that to which it would have been entitled under the void tender. The municipality advanced no considerations against such an order. In the result, the counter application for payment should have been upheld by the high court on this basis*.'

[131] In reaching this conclusion, the Supreme Court of Appeal was clear that it could not enforce payment under a void tender, but that it could consider whether an amount should be paid on the basis that it was just and equitable to do so.

[132] Similar issues arose in *Greater Tzaneen Municipality v Bravospan 252 CC.*[60] In that matter the municipality and Bravospan had concluded a service level agreement pursuant to a competitive tender process which was subsequently extended, without a tender process. As a result of the extension the service level agreement became a long-term contract which needed to be advertised

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[59] *Sekoko Mametja*, para 15.
[60] *Greater Tzaneen Municipality v Bravospan 252 CC* [2022] ZASCA 155 (7 November 2022) (*'Bravospan SCA*').

for a period of not less than 30 days.[61] The municipality launched an application in which it sought an order that the extension be declared null and void, alternatively that the extension be reviewed and set aside. Bravospan launched a counter application for payment for the security services rendered in terms of the contract. Even after the municipality had commenced with litigation it requested Bravospan to continue rendering services and continued to accept and enjoyed the benefit of the services without any payment to Bravospan.[62]

[133] The Supreme Court of Appeal held that it would be manifestly unjust for Bravospan to be afforded no compensation for the services that it had rendered as Bravospan was not responsible for the unconstitutionality of the extension agreement and that on the contrary, the municipality had allayed its concerns and had the benefit of Bravospan's services for the full period. Consequently the Supreme Court of Appeal held that Bravospan should be afforded compensation for the services rendered as a just and equitable remedy under s 172(1)(b) of the Constitution and referred the matter back to the High Court to determine the quantum of the compensation.[63]

[134] The municipality sought leave to appeal from the Constitutional Court. The majority of the Constitutional Court refused leave to appeal on the basis that the judgment of the Supreme Court of Appeal would ensure that Bravospan would finally receive just and equitable compensation for the services that it had provided to the municipality, which was in the interests of justice, and that to grant leave to appeal would delay compensation further and be contrary to the interests of justice.[64] The majority judgment explained that the facts

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[61] *Bravospan* SCA, para 4.
[62] *Bravospan SCA*, para 5.
[63] *Bravospan SCA*, para 16, 22 and 23..
[64] *Greater Tzaneen Municipality v Bravospan 252 CC* 2025 (1) SA 557 (CC) (*'Bravospan CC*'), para 59.

showed that the municipality had behaved unconscionably; it had wrongly assured Bravospan that it could lawfully extend the contract without a new tender process; it had accepted services from Bravospan under the extended contract without paying for these services; it even induced Bravospan to continue providing services under the extended contract while the review application was pending; and it took the benefit of those services, but still failed to pay Bravospan for them and resisted Bravospan's action for compensation, and purely on the basis of technical defences.[65]

[135] Given that in this matter there is no evidence of complicity on the part of the service providers, and they have provided services in terms of the SLAs, it is just and equitable that they be entitled to compensation. There is no reason why the service providers should not be entitled to compensation for all proven reasonable losses and necessary expenses actually incurred and attributable to the SLAs including, but not limited to, capital expenditure, operational costs, staff costs, the costs of terminating student accounts, and third-party contractual obligations; and also compensation for the proven reasonable profit that they would have earned in terms of their respective SLAs.

[136] However, given that the decisions to appoint the service providers and thus the SLAs concluded pursuant thereto resulted from a manifestly flawed process which has had an enormous impact on public funds, it is not just and equitable for the service providers to be compensated for the entirety of the contractual period which is set to run to July 2027. In the circumstances, and bearing in mind the nature of the irregularities that led to the conclusion of the SLAs, in the exercise of my discretion I am of the view that it would be just and equitable for the service providers to be compensated as if the SLAs had continued and been implemented to the date of this Order. This is so because until the SLAs have been set aside they remain presumptively lawful.

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[65] *Bravospan CC*, para 55.

COSTS

[137] The *Biowatch* principle embodies 'a general rule', that in litigation between the State and private entities, if the State wins, each party should bear its own costs, subject to recognised exceptions which do not apply in the present case.[66] The reason for the general rule is to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights.[67] Given that NSFAS has been substantially successful in the counter application, there is no reason to depart from the general rule. For this reason each party should bear its own costs, subject to the order which follows.

[138] **In the result the following order is made:**

1. The decision to appoint the applicant and the second to fourth respondents (collectively, 'the service providers') to provide direct payments of allowances to the students of the first respondent ('NSFAS') pursuant to Bid Number: SCM022/2021 ('the tender') is declared to be unconstitutional, unlawful and invalid, and is reviewed and set aside;

2. The service level agreements concluded between NSFAS and the service providers pursuant to the award of the tender ('the service level agreements') are declared to be unconstitutional, unlawful and invalid, and are reviewed and set aside;

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[66] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), para 22.
[67] *Harrielall v University of KwaZulu-Natal* (CCT100/17) [2017] ZACC 38; 2018 (1) BCLR 12 (CC) (31 October 2017) para 11.

3. Subject to the process of determination set out in paragraphs 4 to 9.7 below, each of the service providers is entitled to just and equitable relief under s 172(1)(b) of the Constitution from NSFAS in the form of monetary compensation on the following terms:

    3.1. Compensation for all proven reasonable losses and necessary expenses actually and demonstrably incurred by each of the service providers respectively pursuant to, or in reasonable anticipation of, their respective service level agreements, and attributable to the service level agreements including, but not limited to, capital expenditure, operational costs, staff costs, the costs of terminating student accounts, and third-party contractual obligations; and

    3.2. Compensation for the proven reasonable profit that each service provider would have earned from their respective service level agreements as if the service level agreements had continued to the date of this Order, calculated as if the service level agreements had remained in full force and effect and had been implemented, up to the date of this Order;

4. The service providers shall present their statements of account to NSFAS' attorneys within 30 days of the date of this Order setting out their claimed expenditure, earnings and alleged loss of profits, with all supporting documentation ('**the accounting**');

5. NSFAS shall within three months from the date of the receipt of the accounting from the relevant service provider:

    5.1. consider the accounting, and debate the accounting with the service provider; and

5.2. advise the service provider of which claims NSFAS will agree to pay, in what amounts and on what terms, and provide reasons for the offer(s) made;

6. The service providers shall within a period of one month from the date of receipt of NSFAS' response as contemplated by paragraph 5 above, advise NSFAS' attorneys whether they accept or decline the amounts tendered by NSFAS;

7. In the event of NSFAS and any service provider failing to reach agreement as contemplated in paragraph 6 above, NSFAS and any service providers that have not reached agreement shall jointly appoint, within one month after the time period referred to in paragraph 6 above, a duly qualified and independent expert with appropriate experience, to assess and verify the reasonable losses and expenses incurred and reasonable profit claimed by each service provider to the extent that such claims arise from, or are directly attributable to, the relevant service level agreement, based on the evidence provided by each party;

8. Subject to the provisions of, and process set out, in paragraph 9 below, there shall be one expert only who may, if necessary, be substituted if they are unable or unwilling to act for any reason;

9. To give effect to the above:

9.1. Failing agreement about the identity of the expert within the time period provided for in paragraph 7 above within which an expert must be jointly appointed, the parties shall, within 20 days of such disagreement, approach the South African Institute of Chartered Accountants (**'SAICA'**) and request a list of names of three suitably qualified persons to act as an expert and from which list of names the parties shall agree, within five further days, a person to act as an expert;

9.2. Should the parties be unable to appoint an expert by agreement within such time, the parties shall request SAICA to determine which of the three experts should be appointed in accordance with SAICA's appointment guidelines and procedures within 10 days of such request;

9.3. The costs of the expert's appointment and services shall be borne equally between NSFAS, on the one hand, and the service providers, on the other, with the service providers being jointly and severally liable for their respective half portions;

9.4. The participating parties shall, prior to the commencement of the expert's services, pay such a reasonable estimate of such costs into trust with their respective attorneys, or into such other agreed trust account, to secure the payment of the expert's fees and disbursements;

9.5. The appointed expert shall determine the procedure to be followed to determine the amount of compensation payable by NSFAS to each service provider. In doing so, the expert shall be empowered to:

9.5.1. require the parties to deliver written submissions and supporting documentation within specified time periods;

9.5.2. conduct interviews or hearings as the expert deems necessary;

9.5.3. appoint specialist sub-experts or consultants, with the prior written consent of both NSFAS and the relevant service provider (such consent not to be unreasonably withheld); and

9.5.4. issue procedural directions to the parties;

9.6. The parties shall co-operate fully and comply promptly with all directions and requests of the expert with the view to completing the expert determination with all service providers within three months of the date of the expert's appointment;

9.7. If for any reason, additional time is required, any party or the expert, on notice to all other parties, may approach a Judge by way of a chamber book application for such additional time;

10. In the event of any of the parties accepting the settlement contemplated by paragraph 6 above, or the expert's assessment in respect of their compensation, they may approach the Court, which will decide whether to confirm such settlement or assessment;

11. In the event of any disagreement in respect of the expert's assessment the parties who are still in dispute are granted leave to approach the Judge President for the allocation of an expedited date(s) for hearing and determination of the disputed issues by way of oral evidence before one or three judges as directed by the Judge President;

12. In the event of any deadlock or inability to perform in accordance with this Order, the parties are permitted to approach this Court, on application and on notice to the other parties, for appropriate relief;

13. NSFAS shall pay each service provider the amount decided by the Court within 60 days of the Court's order on the amount of compensation payable to that service provider;

14. NSFAS and the service providers shall take the necessary steps to close students' accounts and secure regulatory compliance;

15. Subject to the provisions of paragraphs 11 and 12 above, each party shall bear its own costs; and

16. All references to days in this order are court days.

M ADHIKARI

ACTING JUDGE OF THE HIGH COURT

I agree and so ordered.

C FORTUIN
JUDGE OF THE HIGH COURT

I agree

JI CLOETE
JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	A Botha SC
	D Sive
Instructed by:	Shaheed Dollie Inc.
For First Respondent:	LJ Morison SC
	T Ngcukaitobi SC (heads of argument)
	N Chesi-Buthelezi
	N Qwabe
Instructed by:	Werksmans Attorneys
For Second Respondent:	G Hulley SC
	R Röthlisberger

Instructed by:	Zwane Sambo Attorneys
For Third Respondent:	J Moorcroft
Instructed by:	Bennett McNaughton Attorneys
For Fourth Respondent:	J Pammenter SC
	T Palmer
Instructed by:	Cox Yeats