



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2
(1) OF THE SPECIAL INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1999
(REPUBLIC OF SOUTH AFRICA)**

HELD VIRTUALLY

CASE NO: GP/17/2020

In the matter between:

THE SPECIAL INVESTIGATING UNIT

First Applicant

NATIONAL DEPARTMENT OF PUBLIC WORKS

Second Applicant

AND INFRASTRUCTURE

and

CALEDON RIVER PROPERTIES (PTY) LTD

First Respondent

t/a MAGWA CONSTRUCTION

PROFTEAM CC

Second Respondent

JUDGMENT

***Mode of delivery:** this judgment was handed down electronically on 8 March 2022 by transmission to the parties' legal representatives by email and uploading on Caselines.*

The time for handing down the judgment is deemed to be 10am.

MODIBA J:

INTRODUCTION

- [1] The sole issue for formulation in the present proceedings is the just and equitable remedy the Tribunal ought to impose in terms of section 172(1)(b) of the Constitution.
- [2] The Special Investigating Unit (“SIU”) and the National Department of Public Works and Infrastructure (“Public Works”) as joint applicants, applied to review and set aside contract number H16/022 and HP14/075 concluded between Public Works and Caledon River Properties (Pty) Ltd (Caledon River Properties) and Profteam CC (Profteam), respectively (“the contracts”).
- [3] For convenience, I jointly refer to the SIU and Public Works as Plaintiffs and individually by their names. I refer to Caledon River Properties and Profteam as Defendants and individually by their names.
- [4] In terms of its contract with Public Works, Profteam would construct a 40km borderline fence along the Republic of South Africa and the Zimbabwe Beitbridge Border Post, to secure the border in the wake of the period of national disaster occasioned by the Covid19 pandemic. This project is colloquially known as the Beitbridge Border Fence Project. In terms of its contract with Public Works, Caledon River Properties would provide professional services related to the Beitbridge Border Fence Project.
- [5] Soon after the fence was constructed, it started to fell apart, prompting the SIU to investigate the awarding of the contracts. The SIU derived its authority to investigate

the awarding of the contracts from proclamation R23 of 2020, published by President Cyril Ramaphosa on 23 July 2020, acting in terms of section 2(1)(a)(ii) of the Special Investigating Units and Special Tribunals Act¹ (“the SIU Act”). The proclamation broadly authorises the SIU to investigate Covid19 related procurement.

- [6] The SIU found various irregularities in the awarding of the contracts. Its case in the review is premised on the contravention of the applicable constitutional, statutory and regulatory provisions.
- [7] Initially, the Defendants took issue with the Tribunal’s jurisdiction to set aside the contracts. They contended that the Tribunal is not a court of law. Thus, it lacks jurisdiction to review and pronounce on the constitutionality of the contracts in terms of section 172(1) of the Constitution. The issue was determined on the basis of the parties’ oral and legal submissions. In a judgment handed down on 26 February 2021, the Tribunal dismissed the point of law and found that the Tribunal is a court of law with the status of the High Court as envisaged in section 166(e) of the Constitution and, has jurisdiction to declare the contracts unconstitutional in terms of section 172(1).
- [8] This ruling led to the contracts being set aside by agreement between the parties. Without admitting any malfeasance on their part, the Defendants conceded the review. On 15 July 2021, the Tribunal granted the order below by agreement between the parties:

¹ Act 74 of 1996

“The contracts entered into between second applicant and the first and second respondents’ respectively is declared invalid in terms of Section 172(1)(a) of the Constitution due to non-compliance with Section 217 of the Constitution and in particular that the emergency deviation from the prescribed procurement process in terms of Treasury Regulation 16A 6.4; 16A. 6.1 and Regulation 11 of the Disaster Management Act 57 of 2002 did not comply with the procedural requirements that had to be followed by the second applicant”

- [9] The parties also agreed to have the remaining disputes subsequent to the finding of constitutional invalidity in terms of Section 172(1)(b) of the Constitution, *including* the remedial powers of just and equitable relief, referred to trial. The Tribunal granted directives for the conduct of the trial and enrolled it for hearing on 4 to 8 October 2021.
- [10] At the Judicial Case Management meeting held on 20 September 2021, the SIU through its counsel informed the Tribunal that it will not be filing an expert report and that it will argue its case on the basis of the Defendants’ expert report. Both parties assured the Tribunal that they were ready for trial.
- [11] In a surprising twist, on 1 October 2021, the SIU filed a postponement application. After hearing oral argument on 4 October 2021, I dismissed the application with reasons to follow.
- [12] Reasons for the dismissal of the postponement application are a sensible place to start tackling this judgment. Then, I elaborate on the parties’ respective cases as pleaded. Thereafter, with reference to the applicable legal principles and the relevant judicial authorities, I determine and formulate the just an equitable remedy. Then, I deal with the question of costs. Lastly, I set out the Tribunal’s order.

REASONS FOR THE DISMISSAL OF THE POSTPONEMENT APPLICATION

- [13] To determine the Plaintiffs' postponement application, I resorted to the trite principles set out below.
- [14] An application for a postponement must be made timeously as soon as the circumstances which might justify such an application become known to the applicant.² However, where, fairness and justice justifies a postponement, the Court may in an appropriate case allow an application for postponement, even if the application was not timeously made.³
- [15] The trial Judge has a discretion to grant or refuse an application for a postponement.⁴ The discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.⁵ Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the Court will be exercised.⁶ The Court should weigh the prejudice which will be caused to the Respondent if the postponement is granted against the prejudice which will be caused to the Applicant if it is not.
- [16] Various factors in the postponement application repelled the exercise of the Tribunal's discretion in the Plaintiff's favour.

² *Greyvenstein v Neethling* 1952 (1) SA 463 (C)

³ *Greyvenstein v Neethling* (supra at 467F)

⁴ *R v Zackey* 1945 AD 505

⁵ *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398–9; *Joshua v Joshua* 1961 (1) SA 455 (GW) at 457D)

⁶ *Nelson Mandela Metropolitan Municipality v Greyvenouw* CC 2004 (2) SA 81 (E) at 90–91

- [17] The application was brought unaccountably late. The reasons for the postponement are not satisfactorily explained. The Plaintiffs have also not established that they will suffer prejudice if the application is not granted.
- [18] The Plaintiffs sought a postponement of the trial in order to file an expert report. In the affidavit filed in support of the application for a postponement, their Attorney explained that she could not file the report by 21 September 2021 because the experts that the SIU procured to compile a technical report for the Beit Bridge Border Post Project were not willing to testify in the trial for fear of their lives. They also did not want to risk placing their corporate entity into disrepute.
- [19] These turn of events are regrettable because the SIU is heavily reliant on witnesses to fulfil its statutory mandate. Without the participation of witnesses, the State's efforts to recover monies lost to the fiscus due to procurement irregularities and other unlawful acquisitive acts are doomed.
- [20] At the 20 September Judicial Case Management meeting, the Plaintiffs undertook to rely on the reports filed by the Defendants expert. In the postponement application, the Plaintiffs have not explicitly explained how they intended conducting the trial on the basis of the Defendants' expert report and the reason why they changed the stance they adopted at the Judicial Case Management meeting. The Plaintiffs ought to have been more forthright about the evidence of the Defendants' expert they wished to place in dispute.

[21] There is no plausible reason why they could not meet this rudimentary requirement. On the Plaintiffs' own version, the technical report is already in their possession. Their attorney only experienced difficulty with obtaining the expert's personal details and credentials for the purpose of meeting the qualification requirements for the admission of the expert. However, the postponement application is silent on why the Plaintiffs' Attorney did not file the expert report before the due date and why it only sought the expert's details a week after the 13 September 2021 due date.

[22] Even more problematic for the Plaintiff is the fact that, consistent with the agreement reached between the parties, the Defendants are also not presenting expert evidence at this stage. They are approaching the determination of just and equitable remedy purely on written and oral submissions. Therefore, the Plaintiffs have not established that they will suffer any prejudice if the application for a postponement is refused as the Defendants are also yet to quantify the amounts they contend should form part of the just and equitable remedy in the event that the quantification becomes necessary.

[23] It is for these reasons that I dismissed the postponement application with costs.

[24] The Plaintiffs' also sought condonation for the late filing of their expert report. It is trite that the test for condonation is the interests of justice. It is in the interests of justice that the just and equitable remedy is properly quantified in order to ameliorate the loss the state stands to suffer as a result of the constitutional breach that led to the cancellation of the contracts.

[25] For these reasons, to the extent that the Plaintiffs require the expert report for the purpose of quantifying the amount that should form part of the just and equitable relief, it is in the interest of justice that condonation for its late filing is granted.

THE PARTIES RESPECTIVE CASES AS PLEADED

[26] Pursuant to the Tribunal's Directives, the SIU filed a declaration, praying for the repayment of the amounts of R21,819,878.28 and R1,843,004,92 Public Works pre-paid to Caledon River and Profteam CC four days after the contracts were concluded. These payments constitute partial payments in respect of the respective contract amounts of R37,176,843.50 and R3,259,071.48. The SIU alleges that it was irregular for Public Works to have made any payment before the Defendants performed in terms of the contracts. It seeks as just and equitable relief in terms of section 172(1)(b) of the Constitution, a restoration of the status *quo ante* to extinguish the parties unlawful conduct. Hence, it prayed for an order in terms of which the Defendants are directed to repay to Public Works the amounts it pre-paid them.

[27] In the alternative, the SIU seeks an order divesting the Defendants the profits they have derived from the contracts.

[28] The Defendants filed separate pleas and counter claims. In their respective counterclaims, they seek as a just and equitable remedy, an order in terms of which the rights vested in terms of the invalid contracts remain vested and Public Works is liable to make payment to the Defendants of the balance due in terms of the contracts.

- [29] Profteam also pleaded elaborately regarding the difficulties it encountered while implementing the contract under restricted lockdown conditions, the risks it was exposed to and the measures it resorted to ameliorate the risks.
- [30] In the alternative, Proteam pleads that due to the costs involved and the risk to which it was exposed, justifies, in addition to the amount already paid to it, an order that Public Works pays to it the amount the Tribunal finds to be just and equitable.
- [31] The Defendants admit that they received the pre-payments as alleged by the Plaintiffs. They have pleaded that the pre-payments were made at the behest of Public Works officials. The public officials imposed a strict deadline of 20 April 2020. They anticipated that due to the lockdown declared as part of the period of national disaster, the Public Works offices will be closed when payment is due in terms of the contracts. They also pleaded that throughout the contracting process, Public Works officials represented that the contracts were lawful, approved in terms of the prescribed processes and mandated by the Minister of Public Works Ms Patricia De Lille.
- [32] They further pleaded that subsequent to receiving legal advice, they admit that the procurement process constitutes a breach of section 217 of the Constitution and the applicable Treasury Regulations.
- [33] However, none of the parties led evidence to establish their respective cases as pleaded.

JUST AND EQUITABLE REMEDY

- [34] In their bid to fully recover the amounts Public Works paid the Defendants under the contracts, the Plaintiffs contend that the contracts are void *ab initio*, and, as a result, no legal consequences flow from them. As already stated, in the alternative, the Plaintiffs contend that the Tribunal should order just and equitable relief in terms of section 172(1)(b) of the Constitution as applied in *Vision View*⁷ and *Mott MacDonalds*⁸.
- [35] In their counterclaim, the Defendants also contend for just and equitable relief. However, on the authority in *Gijima*⁹ they contend that they should be allowed to retain their vested rights in the contracts. Profteam also contend for an alternative formulation as articulated in paragraph 30 above.
- [36] In respect of their main claim, the Plaintiffs either relied on pre-Constitution authority, authority that is distinguishable on the facts or inconsistent with Constitutional Court pronouncements on just and equitable relief in the context of a government procurement contract. The approach that the Plaintiffs are enticing the Tribunal to adopt to formulate just and equitable relief in respect of their main claim is inconsistent with the no profit no loss principle as applied in the context of government procurement contracts in *All Pay 2*.¹⁰ The no pay principle has become trite.

⁷ *Special Investigating Unit and SABC v Vision View Productions CC* [2020] ZAGPJHC 19 June 2020

⁸ *SABC SOC Ltd and Another v Mott MacDonalds SA (Pty) Ltd (29070 of 2018)* [2020] ZAGPJHC 5 (08 December 2020)

⁹ *State Information Technology SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA (CC)

¹⁰ The plaintiffs sought to rely on the following judgments: *City of Johannesburg and Another v Ad Outpost (Pty) Ltd* 2012 (4) SA 325 (SCA) para 20; *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9; *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) paras 13 – 14. All Pay 2 has become known as such as it is the sequel to the Constitutional

[37] In All Pay 1¹¹, the Constitutional Court described this principle as follows:

“[67] It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.”

[38] In All Pay 2, concerning this principle, the Constitutional Court said:

“[30] Logic, general legal principle, the Constitution, and the binding authority of this court all pointed to a default position requiring the consequences of invalidity to be corrected or reversed where they can no longer be prevented.

[39] In *Steenkamp NO v Provincial Tender Board of the Eastern Cape*¹² the Constitutional Court explained that :

“[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief.²⁷ In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.”

[40] Concerning the purpose of just and equitable relief the Constitutional Court in *Bengwenyama*¹³ stated that: *“The apparent rigour of declaring conduct in conflict with*

Court judgment in the merits judgment reported at 2014 (1) SA 604 (CC), which has become known as All Pay 1 of All Pay merits. All Pay 2 is reported at *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

¹¹ Citation at fn4 above.

¹² 2007 (3) SA 121 (CC) at paragraph 29.

¹³ *Bengwenyama Minerals (Pty) Ltd and Others v General Resources (Pty) Ltd and Others* (CCT 2011 (4) SA 113 (CC)

the Constitution ... and unlawful is ameliorated ... by providing for a just and equitable remedy in its wake.”

[41] The principle has also been applied in the two Full Court judgments relied on by the Plaintiffs. By reference to the Constitutional Court authorities cited above, as well as several others, in *Mott MacDonalds*, the Court succinctly summarised the factors to be considered when determining just and equitable remedy. I quote the relevant extract below:

“88. The main principles that are relevant to this case may be briefly summarized as follows:

- 1. A court enjoys a wide discretion under s 172(1)(b) to grant the remedial relief. It is bound only by considerations of justice and equity. [44]*
- 2. The remedy must be fair to those affected, but it must also vindicate the rights violated. It must be just and equitable in light of the facts and the implicated constitutional principles. [45]*
- 3. The default position is that the consequences of invalidity must be corrected, where this is still possible, or reversed, if prevention of invalidity is no longer possible. [46]*
- 4. The guiding principle is that of legality, and courts should give full effect to the finding of invalidity in granting remedial relief. Relief that does not give full effect to the finding of invalidity must be justified in the particular circumstances of the case. [47]*
- 5. The just and equitable inquiry is multi-dimensional, and involves a consideration of factors such as the nature of the irregularity and the role of the respective parties. [48]*
- 6. In the context of public-procurement matters, the primacy of the public interest must be taken into account when the rights of other affected parties are assessed. [49]*
- 7. Even an innocent contractor has no right to benefit from the proceeds of an invalid contract. This does not mean that it must suffer a loss, but any benefit it did derive should not be beyond public scrutiny. [50]*

[42] The above principles are equally relevant in the present case.

[43] It is important for each party to lay the factual basis for the Tribunal to exercise its discretionary remedial powers in their favour. Simply pleading the facts without leading

evidence as the parties have done here, is wholly inadequate. Since the review segment of the present proceedings was settled by agreement between the parties, I am constrained to formulate the just and equitable remedy on the basis of the parties' written and oral submissions, as I have not been afforded the relevant evidentiary material to judicially consider the above factors.

[44] As already stated, the Plaintiffs petition to order repayment of the pre-paid amounts is inconsistent with the applicable trite legal principle. They have also not established any factual basis on which the Tribunal should exercise its discretionary remedial powers to order repayment of the pre-paid amount or deny the recovery of the reasonable expenses the Defendants incurred to meet their respective obligations under the contracts.

[45] Profteam has not established on the facts, exceptional circumstances that justify a departure from the no profit principle. Therefore, it has not made out a case for the Tribunal to allow them to retain all their vested rights as was the case in *Gijima*.

[46] An exception to the no profit principle was applied in *Gijima* due to the peculiar facts of that case. There, the Constitutional Court ordered that despite a declaration of invalidity, to prevent an unjust outcome, *Gijima* should not be divested of the profits it would earn from the impugned contract. *Gijima* had been induced to agree to the termination of a valid contract in exchange for an invalid contract. The Constitutional Court allowed *Gijima* to retain profits earned from the latter contract to compensate it for the loss it would have suffered as a result of the inducement.

[47] Therefore, the Plaintiffs' main claim stands to be dismissed. Their alternative claim stands to be upheld. To the extent the Defendants' counterclaims are consistent with the Plaintiffs' alternative claim, they are nugatory. To the extent they are not, the Defendants' counterclaims stand to be dismissed for the reasons set out in paragraphs 45 and 46 above.

[48] It is just and equitable to apply the no profit and no loss principle as enunciated in *All Pay 1* and applied in *All Pay 2*, *Mott Mac Donald* and *Vision View*. In the present circumstances, this relief is fair to all the parties, vindicates the values of fairness, equity, transparency, competitiveness and cost effectiveness that were disturbed when the Defendants were awarded the contracts unlawfully. It also entrenches the rule of law by ensuring that while the Defendants are not left worse off as a result of the invalidation of the contracts, they also do not benefit from unlawful contracts.

[49] Regrettably, the biggest loser is the State and the public. They have been deprived of the variety of public, social and economic benefits that flow from a solid border track at the Beit Bridge border and are saddled with a deficient border fence.

[50] Further corrective measures lie in holding the officials who designed, approved and implemented the Beit Bridge Border Fence Project and its related procurement process and those who failed to take the appropriate steps to enhance the integrity of the fence. Such corrective measures are beyond the scope of the case presented before this Tribunal.

COSTS

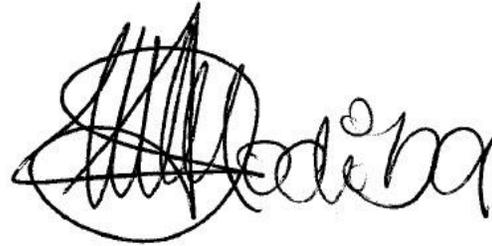
[51] No reasons were advanced as to why in respect of each claim considered in the present proceedings, costs should not follow the cause. The same applies were the Plaintiffs sought the Tribunal's indulgence.

ORDER

[52] In the premises, the following order is made:

1. The Plaintiffs' application for condonation for the late filing of their expert report is granted with costs against the Plaintiffs.
2. The Plaintiffs are also liable for the Defendants' cost of the postponement application.
3. The Plaintiffs' main claim is dismissed. Their alternative claim is upheld with costs.
4. The Defendants respective counterclaims are dismissed with costs.
5. The Defendants are divested of the profits earned from the contracts concluded under contract number H16/022 and HP14/075 between the Department of Public Works and Infrastructure (Public Works) and the first and second defendants respectively ("the contracts").

6. Within 30 days of this order, the Defendants shall deliver, by filing on Caselines, audited statements and debatement of account reflecting their respective income and expenditure in the contracts, supported by such expert report(s) as are necessary in the circumstances.
7. Within 30 days thereafter, the Plaintiffs shall appoint duly qualified expert(s) to compile a report as to the reasonableness of the Defendants' expenses and file it on Caselines.
8. Thereafter, the parties shall prepare a joint minute between their respective experts within 10 days and file it on Caselines.
9. After setting off from the pre-paid amounts the reasonable expenses the Defendants incurred to meet their respective obligations in terms of the contracts, they shall, within 30 days of the period referred to in paragraph 8 of this order, pay to Public Works the amount standing to their debit. If the Defendants' reasonable expenses exceed the pre-paid amounts, Public Works shall make payment to the defendants in respect of the amounts standing to their credit.
10. If a dispute arises from the implementation of this order, any party shall approach the Tribunal for an appropriate order on supplemented papers as necessitated by the circumstances.
11. The above cost orders are inclusive of the costs of two counsel where so employed.



JUDGE L. T. MODIBA

MEMBER OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the applicant: Adv. I. Semanya SC assisted by Adv. N. Mayet, instructed by the Office of the State Attorney, Pretoria

Counsel for the 1st respondent: Adv. G.J. Scheepers SC, instructed by Louw Le Roux Inc

Counsel for the 2nd respondent: Adv. E.L. Theron SC, instructed by Alant, Gell and Martin Inc

Date of hearing: 4 October 2021

Date of judgment: 8 March 2021