**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 29070/18**

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

SIGNATURE Weighley DATE 8/12/2020

In the matter between:

**SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED** Applicant

**SPECIAL INVESTIGATING UNIT** Second Applicant

And

**MOTT MACDONALD SA (PTY) LTD** Respondent

*This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 8 December 2020.*

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

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*Judicial review – Procurement contract - self review by SABC coupled with review by another organ of state (Special Investigating Unit) – whether SIU bound to apply for review under PAJA, or whether legality review competent – Constitutional Court judgment in State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd discussed and applied - Held: legality review, and not PAJA review, by SIU competent –- Delay in instituting review – whether reasonable – Held: not reasonable but appropriate in circumstances to overlook unreasonable delay – Contract concluded in breach of procurement requirements – no evidence of corruption – contractor delivered services - question of just and equitable remedy under s 172(1)(b) of Constitution – Held: contractor to retain only reasonable expenditure, not profit.*

**KEIGHTLEY, J:**

INTRODUCTION

1. Our courts are no strangers to litigation involving organs of state seeking to review their own previous decisions. This matter is another example of the phenomenon. The application was brought in a particular context. The state organ concerned is the South African Broadcasting Corporation SOC Limited (the SABC). It is common knowledge that it has had a troubled governance history, particularly in the era of the previous Chief Operations Officer, Mr. Motsoeneng. It applies to review and set aside one of a number of procurement contracts entered into in that era, and earmarked for investigation by the second applicant, the Special Investigating Unit (the SIU). The contract concerned was a consultancy contract awarded to the respondent, Mott MacDonald Africa (Pty) Ltd (Mott), in July 2015.

2. The consultancy contract is not tainted by any evidence of corruption or similar conduct. One of the questions that arises is that of a just and equitable remedy under s 172(1)(b) of the Constitution in circumstances where the contractor has delivered services, and has been paid for them, but faces the prospect of the original contract being reviewed and set aside. Another is the question of delay on the part of the applicants in instituting the review, and whether this should non-suit them. A third issue is on what basis the SIU ought to have instituted its application for review. It was granted leave to intervene in the proceedings and launched its own, albeit

joint, review application. Like the SABC, it based its review on the constitutional principle of legality, rather than on the Promotion of Administrative Justice Act[1] (PAJA). The question is whether it ought properly to have sought a review under that Act.

3. The SABC is a state-owned company. As a public entity under s 1 read with Schedule 2 of the Public Finance Management Act[2] (the PFMA) it is required to discharge its duties in terms of the applicable laws relating to the procurement of goods and services. In part, the PFMA gives effect to s 217 of the Constitution which requires that public entities must contract for goods and services in a manner that is fair, equitable, transparent, competitive and cost-effective. The hallmark of this constitutional imperative is the open-bidding process.

4. This review is sought on the basis that the SABC awarded the contract without following any of its prescribed procurement policy processes. It did not award the contract on an open-bidding basis. Instead, it treated Mott as a sole provider of services contrary to the regulatory rules of the procurement scheme. In so doing, the applicants say, the SABC's conduct, and the resulting consulting contract, fell foul of s 217 of the Constitution. As such, the contract must be reviewed, declared void *ab initio* and set aside. The applicants ask in addition that the court exercise its discretion under s 172(1)(b) of the Constitution and grant a remedial order which is just and equitable.

5. Section 172 prescribes what the powers of courts are in constitutional matters. It provides that:

> "(1) When deciding a constitutional matter within its power, a court-

[1] Act 3 of 2000
[2] Act 1 of 1999

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just an equitable, including-
(i) an order limiting the retrospective effect if the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period or on any conditions, to allow the competent authority to correct the defect." (emphasis added)

6. The essence of the application is that it is a self-review, brought by the SABC to set aside its own contract. The SIU joins the proceedings acting under its statutory mandate. In terms of s 4(1)(c) of the Special Investigating Unit and Special Tribunal Act[3] (the SIU Act) it has the power to institute civil proceedings on behalf of State institutions where justifiable civil disputes exist.[4] In this case, the SIU was given specific powers under Presidential Proclamation R29 of 2017, dated 1 September 2017, to investigate and take action in respect of contracts entered into by the SABC with various parties. The contract entered into between the SABC and Mott was one of those contracts referred to in the Proclamation. The SIU was further mandated in the Proclamation to recover "any losses suffered by the SABC or the State" in relation to the contracts in question.

7. The SABC instituted its review application on 7 August 2018. The SIU instituted an application to intervene as second respondent in May 2019. The application was granted, despite Mott's opposition, on 26 February 2020. As I have indicated, the

[3] Act 74 of 1996

[4] The section states:

The functions of a Special Investigating Unit are, pithing the framework of its terms of reference as set out in the proclamation referred to in seton 2(1)- …
(c) to institute and conduct civil proceedings in a Special Tribunal or any court of law for-
(i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution;
(ii) any relief relevant to any investigation; or …

SIU joins hands with the SABC in terms of the facts and averments relied upon to support the review, albeit that they seek a slightly different s172(1)(b) remedy.

8. Mott's stance is that the period of delay for both parties was unreasonable and that the court ought not to consider the application for that reasons alone. The applicants take a different view on the question of delay. It is one of the key issues of contention between the parties.

9. In contrast to the issue of delay, there is no real dispute between the parties on the question of whether the contract was irregularly awarded. Mott does not concede this point, but it does not contend otherwise. It says that it has no knowledge of the internal regulatory rules governing procurement within the SABC, and it offers no comment in this regard. It follows that while I must of course be satisfied that the applicants make out a case for the irregularity of the contract, this determination must be made on their version alone.

10. The final key issue of contention between the parties is that of a suitable remedy under s172 (1)(a) of the Constitution, in the event that I find that the contract was irregularly awarded. The applicants want the court to declare it invalid *ab initio*, to set it aside in total, and to fashion a remedy that will ensure that Mott must disgorge any profit it made under the contract. Mott, on the other hand, submits that justice and equity require that it ought not to be deprived of its rights under the contract as it was an innocent contractor, which delivered value under the contract even if the contract was irregularly awarded.

11. This is not the first case in which these key issues of contention have arisen for determination in the courts. In recent years, applications for self-review by organs of state have been dealt with in a number of cases and have resulted in judgments by higher courts, including judgments by the Constitutional Court. Indeed, earlier

this year, a Full Court of this Division handed down an appeal judgment involving an application by the SABC for self-review. The SABC was also joined there by the SIU as its co-applicant. In the resultant judgment, viz. *SIU & SABC v Vision View Productions CC*[5] (*Vision View*), the court had to consider some of the same issues that arise in this case. Thus, I am in the fortunate position that the relevant principles have been laid down in these earlier judgments. What remains, of course, will be to consider the application of those principles to the particular circumstances of the case before me.

12. I propose to undertake this exercise by considering the issues under the following heads:

12.1. The proper legal basis for the SIU's application.

12.2. The background to the awarding of the contract and the issue of irregularity.

12.3. The question of delay on the part of the applicants.

12.4. If the applicants are not non-suited on the basis of delay, the issue of review and an appropriate remedy under s 172(1)(a).

THE PROPER LEGAL BASIS FOR THE SIU'S APPLICATION

13. Both parties base their review on the principle of legality, rather than on PAJA. Insofar as the SABC is concerned, there can be no question that this is the correct basis of review. This was laid to rest by the Constitutional Court in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*[6] (*Gijima*) in which it was

[5] Unreported judgment of the Gauteng Local Division, Johannesburg, Case no. 20801/2019, dated 18 June 2020

[6] 2018 (2) SA 23 (CC)

held that an application for self-review by an organ of State must be brought under the constitutional principle of legality and not under PAJA.

14. As to the SIU, the respondent contends that as it is not seeking a review of its own decision, it is bound to proceed under PAJA, rather than on the basis of legality. Further, Mott says that the SIU did not institute its review within the 180-day time period prescribed under PAJA. As it has based its review on legality, the SIU did not apply for an extension of this period in its notice of motion, nor did it address the issue in its affidavits. Mott says that this is fatal to the SIU's case.

15. The SIU takes a different view, contending that it was bound to institute a legality review, rather than a PAJA review. Both parties rely on *Gijima* to support their opposing contentions. In addition, Mott relies on *Hunter v Financial Sector Conduct Authority and Others*,[7] in which the Constitutional Court, relying on its judgment in *Gijima* stated that:

> *"*As a general rule, PAJA must therefore apply unless the review is brought by a public functionary in respect of its own unlawful decision."[8]

16. It is on the basis of this dictum in particular that Mott says that as the SIU was not seeking a self-review of its own unlawful decision, under the general rule pronounced by the Constitutional Court, it was obliged to institute its review under PAJA.

17. I have reservations about Mott's reliance on the so-called general rule espoused in *Hunter*. In the first place, the facts in that case were materially different from those arising here. In *Hunter*, the applicant had <u>not</u> applied for a review of the impugned

[7] 2018 (6) SA 348 (CC)
[8] Para 49

decision by the FSCA. She wanted an order directing the FSCA to conduct further investigations into various issues, and for the court to supervise compliance with the order. It was in this context that the Court considered whether PAJA applied. It found that it did and that the applicant ought to have applied to review and set aside the decisions to which she had directed her complaints. In other words, in *Hunter*, the Court was not concerned with the question of which legal basis for review was applicable. It was concerned with the question of whether the applicant ought properly to have instituted review proceedings as her cause of action in the first place. The dictum relied on by Mott must be read in that context.

18. In the second place, in *Hunter* the applicant was a private person, and not a state entity. That PAJA ordinarily applies to a review in those circumstances is trite. The Court in Hunter was not concerned with a situation in which another state entity, albeit one who did not make the impugned decision, is seeking a review. It is this situation with which our case is concerned. The dictum in *Hunter* does not assist in this regard.

19. Finally, however, Mott's contentions are not based on a proper reading of *Gijima*. I know that *Gijima* was a case dealing only with self-review. The only party wanting to review the impugned decision was the decision-maker itself. In our case we have a hybrid situation: the decision-maker wishes to review its own decision, but so does another state entity. This is not entirely on all-fours with the situation pertaining in *Gijima*.

20. However, in making pronouncements on the general principles applicable, the Court in *Gijima* did not confine itself to cases of self-review. It commenced its inquiry on whether PAJA was applicable in cases of self-review by considering that Act's constitutional underpinnings. It situated PAJA within the context of s 33 of the

Constitution which guarantees that: "*Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*" The Court considered the following question and provided the following answer:

> "Is 'everyone' in this section so wide as to extend to the State? We think not. Section 33(3)(b) provides that national legislation, which - in terms of section 33(3) - has to give effect to the section 33 rights, must impose a duty on the state to give effect to the rights in section 33(1) and 33(2). It seems inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation the is intended to give effect to the right. This must, indeed, be an indication that only private persons enjoy rights under section 33."[9] (emphasis in the original)

21. The Court concluded that:

> "In the end, we are fortified in the conclusion that section 33 of the Constitution creates rights enjoyed only by private persons. And the bearer of obligations under the section is the State."[10] (emphasis added)

22. While the Court did not apply its mind specifically to the situation that presents itself in this case, it clearly stated that the right to review under section 33, and hence PAJA, is a right enjoyed by private persons and not state entities. Extrapolating from this fundamental principle, it seems to me that the logical end-point must be that PAJA is not an instrument of review open to be used by state entities. This must be so even if they are not seeking a review of their own decision.

23. As the Constitutional Court noted in its later decision in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[11] (*Buffalo City*), its approach in *Gijima* has been the subject of criticism. However, that approach and the dicta cited above have not yet been overruled by that Court, and it remains the applicable law. Thus,

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[9] Para 27

[10] Para 29

[11] 2019 (4) SA 331 (CC)

a proper reading of *Gijima* demonstrates that there is no merit in Mott's contention that the SIU ought to have instituted its review under PAJA.

24. There is another reason to reject Mott's submission. The SIU has the power under s 4(1)(c)(i) to institute civil proceedings in any court of law for any relief that the SABC (in this case) is entitled. The SIU submitted that what this means is that it has "*stepped into the shoes*" of the SABC in seeking a review. Consequently, because it is not seeking a review on its own behalf, but instead on behalf of, and in conjunction with, the SABC, it is bound to follow the same path of review as the SABC, viz. legality review.

25. In addition to the clear dicta in *Gijima* to the effect that state entities do not have a right of review under PAJA, where a state entity like the SIU acts under a statutory mandate to institute a review on behalf of another state entity, like the SABC, it seems to me to be logical that it should follow the same path of review.

26. For all of these reasons, I am satisfied that in this case the SIU acted properly in instituting its review based on legality, and not on PAJA.

THE AWARD OF THE CONTRACT AND THE ISSUE OF IRREGULARITY

27. The relevant background facts are largely common cause. In 2014 the SABC went through a tender process for the refurbishment of lifts and escalators at its Auckland Park offices, and for the instalment of an additional two lifts. The record of that tender process does not form part of the review record, however, it seems that on about 11 December the Technology Investment Committee endorsed a business case presented for additional budget for the project.

28. On the same day, the Group Exco of the SABC met. Mr Herold, a General Manager - Radio Broadcast Resources, made a presentation regarding the status of the lifts.

The Head of Procurement at that stage, Mr Shushu told the meeting that the Bid Evaluation Committee had recommended that Schindler be awarded the tender. This provoked concerns from Mr Motsoeneng, the Chief Operating Officer of the SABC and Mr Aguma, the Chief Financial Officer. They expressed the view that the procurement process should be open to all suppliers. Disquiet was sounded about Schindler's "*appalling service*". There were also allegations that the tender process in terms of which Schindler had been appointed had been flawed, as information allegedly had been leaked.

29. After these interventions by Mr Motsoeneng and Mr Aguma, the Group Exco resolved, among other things, that:

29.1. The existing tender in terms of which Schindler was recommended to be awarded the lifts tender was cancelled.

29.2. An independent Consulting Engineer be appointed to advise on "*the entire elevator matter*".

29.3. A forensic investigation into the existing elevator tender was to be instituted.

29.4. The Procurement Division was granted permission to issue a closed tender in respect of elevator maintenance and acquisition.

29.5. The closed tender process was to involve three companies, but Schindler was to be excluded.

30. At a later Group Exco meeting on 25 and 26 March 2014, the 11 December resolution was rescinded. Instead, the meeting resolved that the CFO, Mr Aguma, be "*required to undertake full accountability for the lift tender and maintenance matters*".

In this regard, he and the GE: Risk and Governance were required "*to ensure that the lift tender matter follows strict governance processes*".

31. On 15 April 2015 Mr Aguma wrote to one Ronald Athiyo, an engineer at Mott MacDonald, under cover of an email. The letter said:

> "SABC LIFTS
>
> The above subject refers.
>
> This letter serves to request a meeting with regard to SABC lifts. The SABC has approximately 36 lifts and 6 escalators that need replacement/refurbishment at both Auckland Park's Radio Park and TV Block buildings.
>
> I would therefore like to discuss the capabilities of your company in sourcing suppliers to offer services for this exercise. To that end, my office will like to set up a meeting with you at your earliest convenience.
>
> Please advise on your availability."

32. Mr Athiyo circulated the letter to some of his colleagues at Mott by way of an email saying:

> "Paulo/Ali
> Please see attached below. This has come through a contact of mine who used to wrk at DBSA. I am told SABC would like help with;
> • development of specs
> • tender documents
> • procurement process
> • supervision of works
> Anyone available to attend this meeting so that I can go back to them with a confirmation?"

33. The next event to occur was a meeting between Mr Aguma and Mr Monapathi, a Project Manager at Mott, to discuss what was required of Mott, its company profile and its capabilities. Thereafter, on 8 June 2015, Mott presented its proposal to Mr Aguma and some members of Exco. Mott contends that it was impressed upon its representatives at this meeting that the project was urgent, as the lift situation was unsafe. There is some dispute between the parties as to whether the project was

indeed urgent. In my view, nothing of substance turns on this and it is not necessary to engage in this debate. I record only my view that despite any utterances that may have been made by SABC personnel that the lift project was urgent, the project does not seem to have been so urgent as to warrant ignoring established procurement protocols.

34. The proposal outlined that the SABC wished to procure its professional services for rendering mechanical, electrical and structural services for purposes of designing and managing the implementation of a lift replacement project at Auckland Park. Mott's involvement would be to provide all services necessary to recommend and appoint a contractor to carry out the work. This would include the preparation of budget estimates, tender documentation, drawings, the recommendation of a contractor for the SABC to consider, site supervision, implementation, commissioning and handover. In other words, Mott's role would be to do all the work preparatory to identifying a contractor through a tender process to be run by Mott. The contractor would be identified for approval by the SABC. Mott would continue to play a role thereafter in overseeing the implementation of the lift contract, and it's close out.

35. On 12 June 2014 the Divisional Director of Mott, Mr Ramsarup, submitted a written proposal to Mr Aguma regarding the scope of work in detail (the written proposal). The written proposal recorded that it was presented in response to a Request for Proposal (RFP) from the SABC.[12] It identified the stages of the consulting services that Mott would provide. These included:

35.1. Stage 1 - Inception;

[12] There is no evidence that a formal Request for Proposal in terms of the SABC's Supply Chain Management policy was ever issued, contrary to this recordal.

35.2. Stage 2 - Concept and Viability;

35.3. Stage 3 - Design Development;

35.4. Stage 4 - Documentation and Procurement (including the preparation of procurement documentation; implementation of procurement procedures; and completion of tender evaluation and recommendation for appointment of contractor);

35.5. Stage 5 - Contract Administration and Inspection; and

35.6. Stage 6 - Close out.

36. The proposed cost was based on a percentage of the final lift replacement contract to be undertaken by the contractor identified by Mott. The estimated capital cost of the lift replacement project was R97 678 million. Mott proposed that its fee as consultant would be 7.2% of the capital cost, amounting to R7 033 464. 00 in total, broken down according to payments to be made at the conclusion of each stage.

37. Accompanying the written proposal was a covering letter which made provision for Mr Aguma to accept the written proposal by appending his signature. The covering letter indicated that the written proposal and Mott's standard terms and conditions (attached to the written proposal as Annexure B) would serve as the basis of the agreement on acceptance by Mr Aguma. Mr Aguma appended his signature to the covering letter, indicating the SABC's acceptance of the agreement on 6 July 2015.

38. It is common cause that Mott rendered services under the consulting contract to the SABC in respect of stages 1 to 4. However, after Mott had gone through the envisaged tender process, and had identified a recommended contractor to the

SABC, the SABC took the decision not to go forward with the lift replacement project. Thus, stages 5 and 6 fell by the wayside.

39. It is also common cause that various payments were made to Mott under the contract between 30 September 2015 to 19 August 2016. Mott says that it was paid some R4.9 million in total. The applicants do not dispute Mott's contention that the fees Mott charged were in line with gazetted fees for the consultancy work that it did.

40. Why do the applicants say that the contract was awarded irregularly and that it is unlawful? An initial, and important point to make, is that the applicants do not contend that Mott was involved in any form of corruption, or similar unethical practices in the awarding of the contract to it. There is no evidence of this, and the applicants make no such assertion. They accept that the blame for what went wrong falls primarily at the doorstep of Mr Aguma, in particular. However, for reasons that will become apparent later, the applicants also do not concede that Mott was a completely innocent contracting party. This is an issue that pertains particularly to the remedial portion of the case, and I will deal with it later.

41. The applicants' case regarding the irregularity and illegality of the contract is that it was awarded without any compliance whatsoever with the procurement obligations of the SABC. As such, in concluding the contract they say that the SABC breached its constitutional obligation under s217, and thus the legality principle.

42. Section 38(1)(a)(iii) of the PFMA requires the SABC, as a public entity, to implement an "*appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective*". The SABC is also subject to the provisions of the

Preferential Procurement Policy Framework Act[13] (the PPFA), and the Treasury Regulations for Departments, Trading Entities Constitutional Institutions and Public Entities[14] (the Treasury Regulations).

43. National Treasury Note 8 of 2007/2008 (the Treasury Note) regulates the threshold values within which public entities may procure goods or services through various means. It provides that for transactions above the value of R500 000. 00, invitations for competitive bids must be advertised.[15] A deviation from this requirement is permissible in certain circumstances:

> "Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (BAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process."[16]

44. In addition to these general legislative prescripts, the SABC is bound by its own Supply Chain Management Policy (the SCM policy). This policy permits a deviation from the competitive bidding process in limited circumstances. It provides, in relevant part:

> "13.19.1 The SABC shall use limited bidding only in the following exceptional circumstances, in case of urgency where unforeseen early delivery and urgent business continuity is of critical importance and the standard procurement process is impossible or impractical.
> 13.19.2 Urgent cases are cases where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical however does not include cases where planning was not done in time.

[13] Act 5 of 2000.

[14] Treasury Regulation issued in terms of the PFMA, GG 27388, 15 March 2005

[15] Paragraph 3.4.1 of the Treasury Note

[16] Paragraph 3.4.3 of the Treasury Note

…
13.19.5 Single source bidding where after a thorough analysis there is good and justifiable reason to restrict the process to only one bidder such as where you enter into a maintenance contract with only the bidder who supplied the product otherwise the product loses its guarantee (*sic*).
13.19.6 Sole source bidding where no competition exists and it is proven that only one bidder exists.
13.19.7 The deviations may only be approved by the appropriate authority as per the Delegation of Authority Framework ('DAF').
13.19.8 The BAC must sign off deviations from normal procurement processes depending not the threshold and recommend to the Group EXCO deviations that are above their level of authority as per DAF.

…."

45. The SCM policy provides further that an open-bidding process, initiated by a Request for Proposals (RFP), must be followed for all requirements above R2 million.[17]

46. Direct negotiations with potential suppliers is also regulated under the SCM policy. These are permitted: "*only … after approvals as per DAF and shall be conducted in such a manner that none of the suppliers is advantaged or prejudiced*".[18] The Group Chief Executive Officer or delegate: "*.. May negotiate the contract only with the preferred bidder identified by means of the competitive bidding process*".

47. Both the SABC and the SIU conducted forensic investigations into the various impugned contracts identified in the 2017 Proclamation, including the consulting contract with Mott. These investigations found that there was no competitive bidding process leading up to Mr Aguma entering into the contract with Mott. This finding is supported on the evidence before me. The evidence shows quite clearly that Mr Aguma approached Mott of his own accord by way of the letter emailed on 15 April 2015 to Mr Athiya. This led directly to the consultancy contract that was signed on

[17] Clause 13.18.1 of the SCM Policy
[18] Clause 13.10.1 of the SCM Policy

6 July 2015. No other service provider featured at all, and none was considered, alongside Mott, as a potential candidate to be awarded the consulting contract.

48. From at least 12 June 2015, when the written proposal was sent to Mr Aguma, he would have known that the proposed consultancy fees were above the R2 million limit requiring an open-bidding process before the services of Mott could be contracted for lawfully. He had been specifically required under the resolution adopted at the 11 December 2014 Group Exco meeting to take full accountability for the lift tender. Together with the General Executive (GE): Risk Governance, he was also required under the resolution "*to ensure that the lift tender follows strict governance processes*". While Mr Aguma proposed at the meeting that an independent, external company be engaged to undertake the procurement process for the lift tender, the meeting did not resolve that he be permitted to deviate from the SCM policy processes in order to secure those services.

49. The SABC internal report details that, at the request of the SABC Legal Services department, Ms Mbanjwa, a project manager in the SABC's Engineering Services department, requested Mr Aguma's office to provide her with the necessary deviation document signed by the relevant parties. She did not receive any documents in response to her request, and she was subsequently removed from the lift and escalators project. The Rule 53 record does not include any documents showing that Mr Aguma obtained the necessary authority under the SCM policy to deviate from the rule requiring an open-bidding process for the procurement of services over the value of R2 million.

50. In terms of the DAF, approvals for deviations from tender procedures had to follow a particular path. The relevant operational manager was the first official who had to recommend the deviation. The deviation should then also have been recommended

by the Bid Evaluation Committee and the Bid Adjudication Committee before being elevated to Exco. Until 25 June 2015, for deviations of up to R50 million, the Bid Adjudication Committee could give its approval. This was amended as from 25 June 2015. From that date, the Group CEO, the COO or the CFO could approve deviations for amounts of put to R10 million. However, other than this the process remained generally the same. The deviation first had to be recommended by the authorities referred to earlier, and, importantly, any request for a deviation had to be supported by a sound motivation.

51. Had Mr Aguma acted in accordance with the deviation process, it is unthinkable that the relevant documents would not have been filed for safe keeping. Thus, if they had ever existed, they should have been accessible for inclusion in the Rule 53 record. The Head of Procurement at the time, Mr Shushu, told the SIU in an affidavit that there was no audit trail for the Mott consultancy contract. He had not been involved in the process of appointing Mott, and to the best of his knowledge, none of the other officials who ought to have been involved had been so either. His view was that Mr Aguma had acted on his own in contracting with Mott.

52. In short, there is no simply no evidence at all that the deviation prescripts were followed before Mr Aguma appointed Mott. In all probability, this is because Mr Aguma did not follow the requisite procurement process. He did not comply with the open-bidding pre-requisite. Instead, he flew solo (albeit, it would seem, with the knowledge of at least some members of Group Exco) in approaching Mott to provide consulting services that effectively entailed the SABC contracting out to Mott the SABC's own procurement function. Mr Aguma did not follow the deviation process in doing so. He treated Mott as a sole supplier, contrary to the SCM policy. He also negotiated with Mott contrary to that policy.

53. The contract was concluded without the involvement of the Legal Department, as required by the SCM policy. It was not a standard contract, but was drawn up by Mott itself, on the basis of its standard terms and conditions. Mott proposed its own fees and payment schedule, which Mr Aguma simply accepted.

54. The appointment of Mott was not, as s 217 requires, fair, equitable, transparent, or competitive. Furthermore, the appointment was made in circumstances where the SABC had already run an open-tender process for the refurbishment and replacement of lifts and escalators, as well as a closed-tender process. Both of these processes were cancelled, and the tender process instead was handed over to Mott by Mr Aguma. It is difficult to understand how the appointment in these circumstances could be cost effective. Mr Aguma never explained why the tender process should start from scratch through an independent consultant. Nor did he, as required, set out reasons and motivate why a sole provider should be appointed to do so on the sole provider's terms, rather than on the SABC's own terms.

55. The conclusion of the contract was indeed grossly irregular and unlawful. It is significant that this contractual irregularity was not a once-off incident. Instead, as demonstrated by the 2017 Proclamation, and the involvement of the SIU as party in these proceedings, it was one of many incidents marking a systemic failure on the part of the SABC management at the time to follow proper procurement processes.

56. Whether or not I should consequently review and set aside the unlawful contract depends first on the question of whether the applicants ought to be non-suited for their delay in applying for that relief.

DELAY

57. It is trite that review proceedings must be instituted without undue delay. While reviews under PAJA must be instituted within 180 days (subject to a court extending this period), reviews under the constitutional principle of legality are not time-bound in the same way. However, they must be instituted within a reasonable period after the impugned decision.

58. It is common cause that the SABC instituted its review application just over three years after the consulting contract was concluded. The SIU instituted its intervention application on 3 May 2019, just short of four years after the contract was concluded. The applicants were obviously aware that the question of delay was likely to be an issue in their review applications and each of them deals with it in their respective founding affidavits. Mott contends that in both cases the explanations for the delays are unacceptable, and that consequently the delays were unreasonable and should not be overlooked.

59. Before considering the relevant facts pertaining to the delays, it is useful to start with the principles that have been established on this issue by our highest Court. Two judgments of the Constitutional Court are particularly instructive, viz. *Gijima*, and *Buffalo City*. These judgments in turn make reference to the earlier judgments in *Khumalo v Member of the Executive Council for Education: KwaZulu Natal*[19] (*Khumalo*) and *Department of Transport v Tasima (Pty) Ltd*[20] (*Tasima I*).

60. In cases, like this one, where an organ of state applies to review and set aside its own decision, it is bound to act diligently and without delay. This is a constitutional injunction[21] and, as such, gives rise to an obligation under the rule of law and

[19] 2014 (5) SA 279 (CC)
[20] 2017 (2) SA 622 (CC)
[21] In terms of s 237 of the Constitution, "*All constitutional obligations must be performed diligently and without delay*."

legality.[22] The rule against undue delay in self-review cases is thus not simply a procedural requirement. It is a feature of the rule of law that undue delay should not be tolerated, as it can cause prejudice to the respondent, weaken the ability of the court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative justice.[23]

61. In *Buffalo City* the Constitutional Court reaffirmed the test for assessing undue delay as set out in *Khumalo*:

61.1. The first stage of the inquiry involves determining whether the delay was unreasonableness. This is a factual inquiry upon which a value judgment must be made.[24] The clock starts running from the time that the applicant became aware or ought reasonably to have become aware of the impugned action.[25] An explanation for the delay must be given, and it must cover the entirety of the delay. If there is no explanation for the delay, it will necessarily be unreasonable.[26]

61.2. However, this is not the end of the matter. Even if the delay is unreasonable, the court retains a discretion to overlook it.[27] Thus, the second stage of the inquiry is to determine whether there is a justifiable basis for overlooking the delay and proceeding to consider the application for review. This basis must be gleaned from the facts made available or objectively available factors.[28]

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[22] *Khumalo* paras 46-8, cited in Gijima at para 43
[23] *Tasima I* para 160, cited in *Gijima* at para 48
[24] *Buffalo City* para 48
[25] *Buffalo City* para 49
[26] *Buffalo City* para 52
[27] *Buffalo City* para 53, citing *Khumalo* para 44
[28] *loc cit*

62. As to the second stage of the inquiry, courts may adopt a flexible approach in cases of legality review. A number of factors should be taken into account. One of these is the potential prejudice to affected parties, which may be ameliorated by the power of a court to grant just and equitable relief under s 172(1)(b) of the Constitution.[29] A second factor is the nature of the impugned decision. This requires the court to consider the merits of the legal challenge to the impugned decision. The extent and nature of the illegality in question may be a crucial factor.[30]

63. The third factor to consider is the conduct of the applicant. Organs of state are subject to a higher duty to respect the law.[31] Implicit in this, it would seem, is that they, in particular, ought to conduct themselves in such a way that there is no delay in the institution of review proceedings to rectify their own unlawful conduct. However, the Court recognised in *Buffalo City* that:

> *"*Even where a functionary has not acted as a model litigant or 'constitutional citizen', there may be a basis to overlook the delay if the functionary acted in good faith or with the intent to ensure clean governance."[32]

64. And it noted that in *Tasima I*, the Court had overlooked an unreasonable delay because the application was made in good faith, and although the applicant's behaviour had been muddled, it was not malicious. The review had been part of a conscious effort by the Department to break with its dilatory past.[33]

65. The majority judgment in *Buffalo City* referred to what it called "*the Gijima principle*":

> "Gijima dictates that where the unlawfulness of the impugned decision is clear and not disputed, then this Court must declare it as unlawful. This is notwithstanding an unreasonable delay in bringing the application for review for which there is no

[29] *Buffalo City* para 54
[30] *Buffalo City* para 55-58
[31] *Buffalo City* para 59-61
[32] Buffalo City para 62
[33] *Buffalo City* para 62

> basis for overlooking. Whether an impugned decision is so clearly and indisputably unlawful will depend on the circumstances of each case."[34] (emphasis added)

66. The *Gijima* principle creates a tension between two competing rule of law principles. On the one hand the law requires that state organs timeously seek review. If they delay, they must give an explanation that is reasonable, or there must be some other compelling reason for a court to overlook the delay. As I indicated earlier, the avoidance of delay principle has both procedural and substantive elements. On the other hand, s 172(1)(a) of the Constitution enjoins courts to declare invalid that which is inconsistent with the Constitution. This means, as the majority judgment in *Buffalo City* notes that the former rule sometimes has to yield to the latter.[35] It concluded in this regard that:

> "The *Gijima* principle should thus be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined. At the same time, this is not a matter in which the *Gijima* principle can be ignored and thus impliedly overruled. So the injunction it creates - to declare invalid that which is indisputably and clearly inconsistent with the Constitution - must be followed where applicable."[36]

67. The majority of the Court found that the applicant failed on both stages of the *Khumalo* test: it had unreasonably delayed in instituting the review and there was no basis upon which the delay could be overlooked. Nonetheless, the majority proceeded to apply the *Gijima* principle. It found that as the contract in question was clearly unlawful on the undisputed facts, the Court was enjoined to declare it invalid and to set it aside.[37]

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[34] *Buffalo City* para 66
[35] *Buffalo City* para 67
[36] *Buffalo City* para 71
[37] *Buffalo City* para 101

68. The minority judgment in *Buffalo City*[38] was critical of the manner in which the majority applied the *Gijima* principle. They proposed an alternative route:

> "This is that, in the absence of adequate explanation for unreasonable delay, courts should not intervene to inquire into a final and determinative holding into unlawfulness, unless the seriousness of the unlawfulness at issue warrants overlooking the manifest deficiencies in the state actor's case."[39]

69. Until the Constitutional Court itself revisits the *Gijima* principle definitively, it must be applied in accordance with the majority judgment. As I understand the governing principles in this regard, an unreasonable delay is not the end of the matter for an organ of state seeking to review its own decision. A court may overlook the unreasonable delay and nonetheless exercise its discretion, based on the factors at play, to proceed to review the impugned decision. Even if there is no justifiable basis on which to exercise its discretion in favour of the applicant, in cases where the illegality of the impugned decision or conduct is clear and undisputed, a court will be impelled to review it and set it aside.

70. These principles must be applied to the facts of this case.

71. If one starts the clock running from the time that the consulting contract was entered into the unavoidable conclusion is that there was considerable delay on the part of both applicants. The period of delay was three years in respect of the SABC and almost four years in respect of the SIU. The SABC explained in its founding affidavit that while it was still under the management of those responsible for the systemic undermining of its procurement processes, it could not realistically have been expected to have acted to rectify the situation by instituting review proceedings. The two primary wrongdoers in that process were Mr Motsoeneng and Mr Aguma. The

[38] Cameron J & Froneman J with Khampepe J concurring

[39] *Buffalo City* para 128

latter left the employ of the SABC in June 2017. He resigned while disciplinary proceedings were under way. Mr Motsoeneng did the same after June 2017.

72. The SIU records that it only came onto the scene after the 2017 Proclamation was promulgated, and it cannot reasonably have been expected to have considered taking action until it had carried out its investigative mandate.

73. The respondent does not seek to pin either of the applicants to the date from which the contract was entered into. This appears to me to be a reasonable approach, given the situation described above. However, Mott contends that even on the most charitable calculation of time, neither of the applicants has provided a sufficient explanation to warrant a finding that the delay was reasonable or, alternatively, to provide a basis for the court to overlook the unreasonable delay.

74. Mott points out that on its own version the SABC was free of the influence of Mr Aguma and Mr Motsoeneng from mid-2017. The interim Board of the SABC was appointed from March 2017. In May 2017 it resolved to commission the internal forensic report into five contracts, including the Mott consultancy contract. The internal report was completed in June 2017. At this stage, submits Mott, the SABC would have been in possession of all of the information it needed to institute review proceedings. However, says Mott, it gave no explanation in its founding affidavit for the delay of over 12 months before it instituting the proceedings in August 2018.

75. As far as the SIU is concerned, Mott points to the affidavits obtained as part of its investigation under the 2017 Proclamation and attached to its founding affidavit. These were commissioned between February 2018 and June 2018. Mott says that at least by June 2018, the SIU would have been in a position to take steps to launch its review. However, it only instituted its intervention application in May 2019. Once again, says Mott, there is no explanation for this period of delay of almost 12 months.

76. Both of the applicants say that one of the factors in their delay in launching review proceedings was that the Mott contract was not an isolated incident. The procurement irregularities at the SABC were a veritable can of worms that, when opened, released a string of dubious contracts that had to be investigated, first, and then, considered for possible legal action. I accept that this is a relevant factor in the delay inquiry. However, it is not enough to overcome the lack of an explanation for the period of 12 months on the part of both applicants between the time that they ought reasonably to have been in a position to take action but failed to do so. On the first leg of the *Khumalo* test, I find that both applicants delayed unreasonably in instituting the review proceedings.

77. But the inquiry does not end here. I must consider whether the delay ought to be overlooked. Here the applicants are on much firmer footing. Critical to this case is the nature and extent of the irregularity. It involved a flagrant disregard for well-established procurement process.

78. The constitutional imperative for fair, equitable, transparent, competitive and cost-effective procurement processes in the public sphere is an important bulwark against maladministration, the abuse of the public purse and possible corruption. Stamping out unlawful procurement practices is imperative for good governance, which is critical to the success of our democracy. This is why the Constitution itself requires state entities to follow proper procurement procedures.

79. In this case the irregularity involved the SABC, which is a critical organ of state. It is the public broadcaster. As such, it serves important constitutional purposes in facilitating access to information which is fundamental to the enjoyment of many other constitutional rights. It is also the recipient of significant public funding. Good governance is key to it serving its very important public purpose.

80. The Mott contract was entered into without any regard for, or compliance with, the SABC's procurement processes. This is undisputed on the evidence. And it was not an isolated incident. It formed part of a pattern of dubious procurement practices that were serious enough to warrant the President promulgating the 2017 Proclamation, directing the SIU to investigate a range of contracts that the SABC had entered into.

81. What is more, the systemic undermining of the procurement processes was but one part of a much broader pattern of governance failings by the SABC under the executive leadership of, among others, Mr Motsoeneng and Mr Aguma. So dire was the situation that the National Assembly resolved on 3 November 2016 to establish an *ad hoc* committee to inquire into the fitness of the SABC Board. In its final report, dated 24 February 2017, the Committee reported that:

> "1.3 There is prima facie evidence that the SABC's primary mandate as a national public broadcaster has been compromised by the lapse of governance and management within the SABC, which ultimately contributed to the Board's inability to discharge its fiduciary responsibilities.
>
> 1.4 The SABC has consequently deviated from is mandate as the public broadcaster, and from providing a platform and a voice to all South Africans to participate in the democratic dispensation of the Republic. …
>
> 1.5 Instead, there appears to have been a flouting of governance rules, laws, codes and conventions, including disregard for decisions of the courts and the Independent Communications Authority of Sough Africa … as well as the findings of the Public Protector of South Africa …. This collective conduct:
>
> - rendered the SABC potentially financially unsustainable due to mismanagement as a result of non-compliance with existing policies and irregular procurement …." (emphasis added)

82. Prior to this, in 2014 the Public Protector released her report, "*When Governance and Ethics Fail*".[40] The report followed investigations into allegations of maladministration, systemic corporate governance deficiencies, abuse of power

[40] Report No 23 of 2013/2014

and the irregular appointment of Mr Motsoeneng. The report found that the allegations were substantiated, and that the findings were: "*… symptomatic of pathological corporate governance deficiencies at the SABC…*". The fact that it took until 2017 to install an interim Board at the SABC, and for action to be taken to begin to rectify the situation demonstrates how deeply rooted and serious the problems were.

83. I am bound to give due weight to the objective context in which the consulting contract was concluded. The contract was one worm in a more extensive colony of worms that slowly but surely consumed the innards of this very important public institution. To permit the one worm to wriggle free because of a delay in the institution of these review proceedings would not serve the interests of justice or the rule of law.

84. It is important, too, that both the SABC and the SIU are *bona fide* in seeking to rectify the irregularity. As a responsible organ of state, the SABC is duty-bound to do so,[41] and the SIU must fulfil its mandate under the 2017 Proclamation. This court should be slow to permit the delay to impede them in carrying out their obligations. Unlike the context within which the review came before the Constitutional Court in *Gijima*, there is no reason in this case to conclude other than that the applicants genuinely seek the review in an effort to ensure clean governance.[42]

85. I need to consider also the prejudice to Mott if the delay is overlooked and the review proceeds. In this case, the relief the applicants seek is sufficient in my view to ameliorate the prejudice. They seek no more than that Mott ought to be mulcted in

[41] *Merafong City Local Municipality v Anglogold Ashanti Limited* 2017 (2) BCLR 182 (CC) at para 61, cited in *Buffalo City* at para 61

[42] *Buffalo City* para 62

its profits under the contract. The prejudice does not outweigh the broader interests of justice that will be served by proceeding with the review.

86. I find, then, that this is an appropriate case in which the court should overlook the applicants' unreasonable delay. Consequently, I do not need to go further and consider the issue that was debated in the Constitutional Court judgments in *Buffalo City*. In this case, there is a clear rule of law basis for overlooking the delay.

REVIEW AND REMEDY UNDER S 172(1)(b)

87. I have found that the awarding of the consulting contract was done irregularly in contravention of the SABC's regulatory procurement framework. As such, it undermines the principle of legality and is unlawful. Under s 172(1)(a), I am enjoined to set it aside and to declare it to be void *ab intio*.[43]

88. This leaves the question of a just and equitable remedy under the remedial powers established in s 172(1)(b), which gives courts wide remedial powers. The applicable principles in this regard were discussed recently in a Full Court of this Division in *Vision View*. It would serve no purpose to repeat in full the various dicta that give flesh to the principles. The main principles that are relevant to this case may be briefly summarised as follows:

88.1. 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]

[43]

[44] *Vision View* para 57 citing *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) (*Steenkamp*) para 29

88.2. 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]

88.3. 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]

88.4. 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]

88.5. 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]

88.6. 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]

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[45] *Vision View loc cit*

[46] *Vision View* para 58 citing *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (*No 2)* 2014 (4) SA 179 (CC) (*Allpay 2*) para 29

[47] *Vision View* para 59 citing *Bengwenyama Minerals (Pty) Ltd & Others v Genorah Resources (Pty) Ltd & Others* 2011 (4) SA 113 (CC) (*Bengwenyama*) para 84

[48] *Vision View* para 60 citing *Allpay* 2 para 38

[49] *Vision View* para 61 citing *Allpay* 2 paras 32-33

88.7. 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]

89. As to the latter principle, it is worth citing in full what Sutherland J said in *MQF,* and which was endorsed by the Court in *Vision View*:

> *"*… it is unnecessary that a clear case of complicity (against the contracting party) is proven; it is enough that the award was tainted by irregularity. Were it otherwise, the plea of an innocent tenderer would as a matter of course outweigh the public interest. The pendulum should usually swing the other way. What one has not obtained through a fair and transparent process ought not to vest any moral claim to retain the spoils.*" [51]*

90. The applicants seek a limited reversal of the consequences of the consulting contract. They do not ask Mott to pay back the full R4, 9 million it has been paid to date, but only the profit it made. This is in line with the order that was granted in favour of the SABC in *Vision View*.

91. Mott sought to persuade me that because it was what it called an innocent contractor, it should not be required to disgorge its profits. I have two difficulties with this submission. In the first place, as this Court found in *Vision View*, the principle is clear: even an innocent tenderer has no right to retain what it was paid under an invalid contract. In procurement matters, the public interest is paramount and the default position ought to be that payments made should be returned, unless there are circumstances that justify a deviation. There are no circumstances here that warrant a deviation permitting Mott to retain the profits it made under the consulting contract.

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[50] *Vision View* paras 61-3 citing *Allpay* 2 para 67 and *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd* (*MQA*) (2016/44912) [2018] ZAPHC 455 (26 June 2018)

[51] *Vision View* para 63

92. In the second place, I am not persuaded that Mott was indeed an innocent contracting party in the broader sense of that term. It is so that it was Mr Aguma who approached Mott and requested it to submit a proposal, and that there is no taint of corruption on the part of Mott. But that is as far as Mott's innocence goes. It is unthinkable that a multi-national firm of consulting engineers like Mott would have been unaware that the procurement of services by state entities is strictly regulated. In fact, in the proposal documents it submitted to Mr Aguma, Mott stated that it:

> "… seeks and establishes relationships with suppliers, subcontractors and other business partners based on mutual respect and good governance.
>
> We undertake appropriate due diligence in evaluating business partners to assess risk and avoid dealing with prospective partners where there is any indication of unethical behaviour.
>
> Ethics training is mandatory for all staff and forms a component of development programmes spanning the career of every employee within the company." (emphasis added)

93. Mott fails to explain how it missed the boat in not following its own commitment to good governance and due diligence in this case. It simply says, without explanation, that as it was dealing with the SABC's senior executives, it was reasonable for it to assume that the SABC had followed its own procurement processes. Such conduct on the part of Mott is not reasonable. It is a case of willful blindness, and deserves no exculpation. To accept this as an excuse would encourage contracting parties to avoid asking the hard questions necessary to achieve the objectives of s 217 of the Constitution. This would not be in the public interest.

94. As it is, the SABC and SIU are content to allow Mott to retain enough of the fees paid to it to cover its reasonable expenses. Although the SABC disputed in its founding affidavit that Mott had rendered services that were of benefit to it under the consulting contract, it ultimately did not dispute that Mott had rendered professional

services in respect of which there had never been any complaint. In the circumstances, I am satisfied that applicants' approach to remedial action is an appropriate way of balancing the competing interests in this case. The applicants also ask that a process be put in place under the order to ensure that the claim for reasonable expenses is transparent. I have sought to do so in my order.

95. Finally, in this regard, it is common cause that Mott has instituted proceedings to recover what it says are fees still outstanding under the consulting contract. In view of the fact that I have declared that contract to be void, I see no reason why Mott ought to be permitted nonetheless to pursue any further rights it has thereunder. Its rights are sufficiently catered for by permitting it to retain its reasonable costs for the services it has rendered and for which payment has already been made. It should not be entitled to recover anything further from the SABC.

COSTS

96. The applicants seek a costs order in their favour. Costs always lie at the discretion of the Court. In *Vision View*, the court of first instance ordered that each party pay its own costs even though it permitted the contractor to retain its profits under the invalid agreement. On appeal, the Court ordered the contractor to disgorge its profits, but left the costs order intact. It did so on the basis of the principle espoused in *Allpay 2* to the effect that in cases such as this: "*There are no real winners or losers in the ordinary litigation sense. If there is to be a winner, one hopes it will be the general public who will gain from adherence to the rule of law and greater transparency and accountability…*".

97. This case has a similar history to that in *Vision View*. In addition, I take into account the fact that Mott was entitled to answer the allegations that there was no proof that it had rendered services as against the payments it received for its fees. It was also

entitled to place on record that there had been no allegation of corruption or similar conduct on its part in the matter.

98. Finally, it is relevant to the question of costs that Mott played open cards with the applicants. It provided them with a full set of its audited financial statements in response to the relief set out in the SIU's Notice of Motion. It has also provided a full breakdown of its costs which, based on input from an expert, it says are reasonable. It did this of its own accord. That exercise will be of value to both parties when it comes to implementing my order. All of these factors are persuasive on the question of costs. It would not be just to order Mott to pay the applicants' costs. Justice requires that each party ought to pay its own costs.

ORDER

99. For all of these reasons, I make the following order:

1. The decision of the SABC in or about July 2015 to award a contract to the respondent for consulting services relating to the replacement of lifts (the consulting contract) is unlawful and invalid, and is reviewed and set aside.

2. The consulting contract concluded between the parties on 6 July 2015 consequent on that agreement is unlawful and invalid and is declared to be null and void *ab initio*.

3. Despite the invalidity of the consulting contract, the respondent is entitled to retain, from the payments already made to it, an amount reflecting its reasonable expenses under the contract, which amount shall be determined on the basis set out in paragraphs 4-7 below.

4. The respondent is to provide the SABC, within 30 days of this order, a detailed breakdown of its reasonable expenses, verified by a duly qualified expert.

5. The SABC shall, within 30 days thereafter, appoint a duly qualified expert to compile a report as to the reasonableness of the respondent's expenses.

6. A joint minute is to be prepared between the experts within 30 days thereafter.

7. The parties may elect to settle any remaining dispute as to the amount of the respondent's reasonable expenses by way of arbitration, mediation, or a further approach to the Court.

8. The respondent shall pay to the SABC the balance remaining after the deduction of its reasonable expenses from the total amount it received under the consulting contract.

9. There is no order as to costs.

**KEIGHTLEY J**
**JUDGE OF THEHIGH COURT**
**GAUTENG LOCAL DIVISION**

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| Date Heard (by videolink): | 13 NOVEMVER 2020 |
| Date of Judgment: | 8 DECEMBER 2020 |
| On behalf of the Applicant: | Adv. Jabu Motsepe SC |
| | Adv. Violet Magagane |

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| Instructed by: | WERKSMANS ATTORNEYS |
| | |
| On behalf of the First & Second Respondent: | Adv. Anban Govender |
| Instructed by: | MORTIMER GOVERNDER ATTORNEYS |