THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1329/2021

In the matter between:

THE SPECIAL INVESTIGATING UNIT **APPELLANT**

and

PHOMELLA PROPERTY INVESTMENTS (PTY) LTD **FIRST RESPONDENT**

REBOSIS PROPERTY FUND LIMITED **SECOND RESPONDENT**

Neutral citation: *The Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* (Case no 1329/2021) [2023] ZASCA 45 (3 April 2023)

Coram: VAN DER MERWE, NICHOLLS, GORVEN, MATOJANE and MOLEFE JJA

Heard: 22 February 2023

Delivered: This Judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be on 10h00 on 3 April 2023.

Summary: Administrative law – lease declared unlawful – equitable relief under s 172(1)*(b)* of the Constitution – true discretion – test for interference on appeal – no misdirection on fact or law – no basis to interfere.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Rabie J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Gorven JA (Van der Merwe, Nicholls, Matojane and Molefe JJA concurring)

[1] This matter arises from a lease of the SALU building in Pretoria to accommodate the Department of Justice and Correctional Services (the DOJ). It was concluded between the Department of Public Works (the DPW) and the owner, Phomella Property Investments (Pty) Ltd, the first respondent (Phomella). The building and lease were subsequently transferred to the second appellant, Rebosis Property Fund Limited (Rebosis). Phomella and Rebosis were part of the same group of companies whose guiding mind was a certain Mr Ngebulana. The lease was concluded on 22 September 2009 for a period of 9 years and 11 months. It was concluded after utilising the procedure for a negotiated lease rather than an open bidding process. Authority to conclude the lease was subject to the condition that, prior to signature, an assessment of the space required by the DOJ was to be conducted. Despite this not having been done, the lease was signed.

[2] In February 2017, the Special Investigating Unit (the SIU), the appellant, launched an application in the Gauteng Division of the High Court, Pretoria (the high court). The initial relief sought was that the lease be reviewed and set aside as void *ab initio*. By the time the matter came before the high court, the lease had run its course. As a result, the SIU did not persist in that relief. It simply sought an order declaring the lease agreement to be unlawful. In addition, the SIU sought an order that Phomella and Rebosis should jointly and severally pay the Minister of Public Works the amount of R103 880 357.65. This was said to represent wasteful expenditure incurred during the lease. It was contended that an area greater than was needed by the DOJ had been leased. The figure represented the SIU's calculation of the rental which had been paid for that excess area.

[3] The declaration of unlawfulness was sought in terms of s 172(1)*(a)* of the Constitution. Two bases for this relief were relied on. First, that the DPW had failed to follow an open bidding process in concluding the lease. Secondly, and if it was found that a negotiated lease was competent, the prior requirement of a needs assessment of the space required by the DOJ had not been met. The prayer for payment of R103 880 357.65 was sought under the provisions of s 172(1)*(b)* of the Constitution.

[4] The high court, per Rabie J, declared the lease unlawful but dismissed the further relief sought by the SIU under s 172(1)*(b)* of the Constitution. There is no appeal against the declaration of unlawfulness which, accordingly, stands. The SIU sought leave to appeal against the refusal to make an order under s 172(1)*(b)* of the Constitution. That leave was granted by the high court. In essence, therefore, this appeal concerns whether the high court's application of the provisions of s 172(1)*(b)* of the Constitution warrant interference by this Court.

[5] It is important to note the basis on which the high court granted the declaration. Section 172(1)*(a)* of the Constitution reads:

'When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency . . .'

The lease had to comply with the provisions of the Supply Chain Management Policy of the DPW[1] which give effect to constitutional prescripts. In certain circumstances, it permits a negotiated process instead of an open bidding process. Of the two grounds advanced by the SIU, the high court found that there was insufficient evidence to conclude that a negotiated process had not been properly decided upon. Accordingly, the failure to follow an open bidding process and the utilisation of a negotiated process in concluding the lease could not be declared unlawful. The high court granted the declaration because the approval to contract was subject to a complete needs assessment being conducted prior to signature. As mentioned above, this was not complied with and the conduct in concluding the lease accordingly failed to comply with the Supply Chain Management Policy of the DPW. This implicated s 172(1)*(a)* of the Constitution. The high court was thus obliged to make the declaration of invalidity.[2]

[6] The peremptory requirement of s 172(1)*(a)* of the Constitution is to declare that 'law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. No less, no more. Accordingly, any order which goes beyond such a declaration is not one made under s 172(1)*(a)*. The SIU, however, called in

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[1] This is found in Notice 1665 of 2005 published in Government Gazette Number 278985 of September 2005 and is titled, 'Department of Public Works: Space Planning Norms and Standards for Office Accommodation used by Organs of State.'

[2] The high court declared the lease to be unlawful whereas s 172(1)*(a)* requires a declaration of invalidity. Nothing turns on the distinction.

aid the matter of *South African Broadcasting Corporation SOC Ltd and Another v Mott MacDonald SA (Pty) Ltd (Mott MacDonald)*, where Keightley J held:

'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 section 172(1)*(a)*, I am enjoined to set it aside and to declare it to be void *ab initio*.'[3]

[7] The dictum in *Mott MacDonald* conflated the two subsections of s 172(1) of the Constitution: a declaration of invalidity under s 172(1)*(a)* and a just and equitable order under s 172(1)*(b)*. The setting aside and the declaration of voidness are orders which fall under the latter section. The distinction between the two subsections was explained in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama)*:

'It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity.'[4]

[8] The declaration of unlawfulness by the high court brought into play the provisions of s 172(1)*(b)* of the Constitution. This reads:

'(1) When deciding a constitutional matter within its power, a court–

. . .

(b) may make any order that is just and equitable including–

(i) an order limiting the retrospective effect of the declaration of invalidity; and

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[3] *South African Broadcasting Corporation SOC Ltd and Another v Mott MacDonald SA (Pty) Ltd* [2020] ZAGPJHC 425 (GJ) (*Mott MacDonald)* para 87.

[4] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 *(Bengwenyama)* (CC) para 84.

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[9] In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (Gijima)*, the nature of the remedial power afforded to a court by s 172(1)*(b)* of the Constitution was described:

'…[U]nder s 172(1)*(b)* of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity.'[5]

An example of the exercise of that power would be if, after declaring the lease invalid, the high court had set it aside. It could, in addition, have declared it to have been void *ab initio*. It could have preserved the lease if it had a few months to run and there was insufficient time to conclude a new lease for the DOJ. These are but some examples of orders which might follow a declaration of invalidity. The only qualification is that any order made must be just and equitable in the particular circumstances of the matter.

[10] Such an order clearly involves the exercise of a discretion. The nature of two kinds of discretions has been decisively established:

'A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

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[5] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) *(Gijima)* para 53.

In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense —

"means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision".'[6]

[11] There are different tests for interference by an appeal court, depending on the nature of the discretion exercised by a lower court. As regards a loose discretion:

'. . . an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially.'[7]

The approach on appeal against the exercise of a true discretion, however, is very different:

'When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised — "judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles". [Footnote omitted.]

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.'[8]

[12] This Court has confirmed that the discretion exercised under s 172(1)*(b)* of the Constitution is a true one:

'The exercise of a remedial discretion under s 172(1)*(b)* of the Constitution…constitutes a discretion in the true sense. It may be interfered with on appeal only if [the appeal court] is satisfied

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[6] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) *(Trencon)* paras 85 and 86.
[7] Ibid para 87.
[8] Ibid para 88.

that it was not exercised judicially, or had been influenced by wrong principles or a misdirection of the facts, or if the court reached a decision which "could not reasonably have been made by a court properly directing itself to all the relevant facts and principles". Put simply, the appellants must show that the high court's remedial order is clearly at odds with the law.'[9]

[13] The high court, in the exercise of its true discretion, declined to make any order under s 172(1)*(b)*. Thus the question is whether the SIU has shown any of the aforementioned grounds for interference with the exercise of that discretion.

[14] The first ground relied on by the SIU was a submission that the high court was influenced by a wrong principle on the basis of another *dictum* in *Mott MacDonald*:
'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.'[10]
The SIU submitted that because the high court had failed to apply that principle, this Court was at large to reconsider the remedy claimed.

[15] The question is whether any such principle applies to the exercise of a discretion under s 172(1)*(b)*. In support of the *dictum* that 'even an innocent tenderer has no right to retain what it was paid under an invalid contract', Keightley J cited the full court judgment in *Special Investigating Unit and Another v Vision View Productions CC*.[11] In turn, that court cited as authority for the proposition *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer,*

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[9] *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2022] ZASCA 54; 2022 (5) SA 56 (SCA) (*Central Energy Fund*) para 43.
[10] *Mott MacDonald* para 91.
[11] *Special Investigating Unit and Another v Vision View Productions CC* [2020] ZAGPJHC 421 para 63.

South African Social Security Agency and Others (Allpay 2), where the Constitutional Court said:

'… It [Cash Paymaster] has no right to benefit from an unlawful contract. And any benefit it may derive should not be beyond public scrutiny.'[12]

[16] This requires careful evaluation. First, the *dictum* in *Allpay 2* stopped well short of what was held by Keightley J. She said, 'even an innocent tenderer has no right to retain what it was paid under an invalid contract'. But the full *dictum* in *Allpay 2* was:

'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract. And any benefit it may derive should not be beyond public scrutiny.'[13]

A contextual reading of this *dictum* in *Allpay 2* clarifies matters. The Constitutional Court did not require Cash Paymaster Services (Pty) Ltd (Cash Paymaster) to repay amounts paid to it under what was found to be an unlawful contract. In the exercise of its discretion, the Constitutional Court ordered that a new tender be issued but that:

'If the tender is not awarded, the declaration of invalidity of the contract in para 1 above will be further suspended until completion of the five-year period for which the contract was initially awarded'.[14]

When the tender had not been awarded within the five year period, in the follow-up matter of *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)*, the Constitutional Court granted an order further

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[12] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 *(Allpay 2)* para 67.
[13] Ibid para 67.
[14] Ibid para 4 of the order.

suspending the order of invalidity for a period of twelve months and requiring Cash Paymaster to continue its services for that period, explaining:

'…Our order below reflects that SASSA and [Cash Paymaster] should continue to fulfil their respective constitutional obligations in the payment of social grants for a period of 12 months *as an extension of the current contract*.'[15] (My emphasis.)

[17] To that extent, Cash Paymaster benefited despite the initial contract having been found to be unlawful. There was no order that the amounts paid and to be paid should exclude the profits it had factored into its price when tendering. On the contrary, in *Allpay 2*, the only order concerning those profits was that:

'Within 60 days of the completion of the five-year period for which the contract was initially awarded, Cash Paymaster must file with this court an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract.'[16]

Such an order was designed to give effect to that part of the dictum which held that, '… any benefit it may derive should not be beyond public scrutiny.'

[18] A careful and contextual reading of *Allpay 2* thus shows that the Constitutional Court did not hold that a party could derive no benefit from an unlawful contract. The approach in *Allpay 2* of allowing a party to retain payments, and thus to benefit, under an unlawful contract has been echoed in a number of matters.[17] One such example is found in *Buffalo City*, where the majority in the Constitutional Court held:

'…I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to [which] the respondent might have been entitled. It should be noted that

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[15] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) para 50.
[16] *Allpay 2*, paragraph 4.2 of the order.
[17] See eg *Gijima* para 54.

such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement.'[18]

There, too, the contractor had performed its obligations under the contract. The Constitutional Court held that the contractor was entitled to payment for the work which had been done.

[19] Therefore, it must be said that the 'principle' relied upon by the SIU as set out in *Mott MacDonald* is no principle at all. The same must be said of the following *dictum* in *Central Energy Fund*:

'The second guiding principle is the "no-profit-no-loss" principle which the Court articulated as follows:

"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."'[19]

Deriving as it does from the same *dictum* in *Allpay 2*, it is clearly wrong and should not be followed. Therefore, the failure of the high court to apply the 'principle' relied upon by the SIU does not afford a basis to interfere with the true discretion exercised by the high court in the present matter.

[20] Because there is a true discretion to be exercised under s 172(1)*(b)* of the Constitution, it is unwise to elevate *dicta* dealing with the facts in past matters to rules or principles. The discretion must be exercised on a case-by-case basis. This was clearly articulated in *Bengwenyama*, where the Constitutional Court held:

'I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law

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[18] *Buffalo City* para 105.
[19] *Central Energy Fund* para 41.

must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent.'[20]

This, of course, accords with the broad remedial powers with which courts are clothed under s 172(1)*(b)* of the Constitution.

[21] The second basis on which the SIU relied was its contention that the high court misdirected itself on fact. It submitted that paragraph 57 of the judgment of the high court was factually incorrect. That paragraph reads:

'During its investigation many years after the event, the applicant found minutes of meetings referring to the requirement of a needs assessment which had to be done prior to the signing of the lease agreement. I mentioned above that certain documents were found reflecting the needs of some of the sections of the DOJ but no comprehensive document as was required according to the applicant. The applicant then took it upon itself to compose such a needs assessment retrospectively and on the basis thereof submitted that the DOJ only required approximately 75% of the SALU building.'

The SIU objected to the last sentence in particular.

[22] The context of this paragraph is important. The high court had considered the contention that the lease was rendered unlawful because an open bidding process had not been followed. It had found that this case was not made out. It then turned its attention to the second basis on which the SIU contended that the lease was unlawful, namely, the fact that no needs assessment had been conducted prior to signature of the lease. This paragraph considers that issue.

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[20] *Bengwenyama* para 85.

[23] The high court did not find that the DOJ actually required more than the 75 percent spoken of. It found that no composite needs assessment had been performed prior to signature and held, on that basis, that the conclusion of the lease was unlawful. That paragraph was directed to the enquiry conducted under s 172(1)*(a)* of the Constitution. It is that finding which led to the peremptory declaration of unlawfulness under that section. I can find no such factual misdirection in that paragraph and, if there was any misdirection, it was certainly not material to the exercise of the discretion under s 172(1)*(b)* of the Constitution. Paragraph 57 of the high court judgment is thus no basis on which to interfere with the true discretion exercised by the high court.

[24] Our courts distinguish between third parties who are complicit in corruption or impropriety and those who are innocent parties.[21] The SIU submitted that both the extent of, and the manner in which, officials of the DPW committed breaches of requirements reflected malfeasance. It submitted that the high court misdirected itself in failing to find that the guiding mind behind Phomella and Rebosis, Mr Ngebulana, was complicit in this malfeasance and knew that the conduct of the officials in concluding the lease was unlawful. The primary thrust of this submission was that he was aware of the need for an open bidding process. Since there is no appeal against the finding that there was no evidence that such a process was required in the circumstances, that contention cannot found complicity on the part of Mr Ngebulana.

[25] The high court considered whether there was evidence that Phomella, Rebosis or persons associated with them, or Mr Ngebulana himself, were aware of the

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[21] *Central Energy Fund* para 42.

requirement for a needs assessment prior to signature of the lease. It held that there was no such evidence. That finding is manifestly correct. This was also no basis for the high court to have inferred complicity on the part of the respondents. Its finding in this regard cannot be faulted.

[26] The SIU also submitted that the high court ought to have found that there was complicity on the part of the respondents due to the restructuring of the property portfolio of Phomella and other entities under the control of Mr Ngebulana. The various entities under his control transferred properties into Rebosis so as to facilitate its listing on the Johannesburg Stock Exchange. As part of that exercise, Mr Ngebulana requested that the DPW transfer the lease over the SALU building to Rebosis. The various interlinking agreements which achieved the restructuring were made subject to the consent of Mr Ngebulana. Prior to the listing, the Amatola Family Trust (the Trust), of which Mr Ngebulana was the guiding mind, owned the Billion Group which in turn held all of the shares in Phomella. The Trust also owned 100 percent of the shares in Rebosis prior to the listing. I cannot see how this in any way leads to an inference of complicity. Businesses the world over restructure to their advantage without nefarious purpose or knowledge. There is no evidence that this restructuring exercise was any different.

[27] The refusal of the high court to exercise its discretion to order Rebosis to pay the almost R104 million requested by the SIU was based on the following findings and considerations. The respondents were unaware of any irregularities in the conclusion of the lease. The respondents were unaware of any contention that the DOJ required less than the entire SALU building. The DOJ in fact occupied the entire building for the duration of the lease. The rental charged was a market-related one. In order to prepare the building for occupation by the DOJ, Phomella had

cleared it of some 100 tenants. It had spent more than R81 million in refurbishing the building. It had been informed by the DPW that all of the requisite formalities for the conclusion of the lease had been complied with. No undue benefit was received under the lease by Phomella, Rebosis or Mr Ngebulana.

[28] None of the findings of the high court can be faulted. The consideration of those facts in the exercise of the high court's discretion cannot be faulted. It accordingly cannot be said the exercise of the high court's true discretion is subject to interference by an appeal court. For these reasons, there is no basis on which this court can uphold the appeal.

The appeal is dismissed with costs, including the costs of two counsel where so employed.

T R GORVEN
JUDGE OF APPEAL

Appearances

For the appellant:	R J Raath SC and J A Motepe SC
Instructed by:	The State Attorney, Pretoria The State Attorney, Bloemfontein
For the respondents:	J Babamia SC (heads also prepared by M Mbikiwa)
Instructed by:	Norton Rose Fulbright South Africa Incorporated, Johannesburg Webbers Attorneys, Bloemfontein.