REPUBLIC OF SOUTH AFRICA

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

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

10 October 2023

DATE SIGNATURE

CASE NUMBER: 47916/2017

In the matter between:

MJAYELI SECURITY (PTY) LTD First Applicant

SPECIAL INVESTIGATING UNIT Second Applicant

and

SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED ("SABC") First Respondent

MAFOKO SECURITY PATROLS (PTY) LTD Second Respondent

MAFOKO SECURITY SUPPLIES (PTY) LTD Third Respondent

MAFOKO SECURITY SERVICES Fourth Respondent

KHANYISILE KWEYAMA Fifth Respondent

MATHATHA TSEDU Sixth Respondent

FEBBE POTGIETER-GQUBULE Seventh Respondent

JOHN MATTISONN Eighth Respondent

PRESIDENT OF SOUTH AFRICA Ninth Respondent

JUDGMENT

DOSIO J:

Introduction

[1] This is a review application in terms of Uniform Rule 53 and/or s8 of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA'). The second applicant ('the SIU') seeks an order to review and set aside a decision of the first respondent ('the SABC'), dated 30 June 2017, to award a physical security tender to the second, third and fourth respondents ('Mafoko'). In the alternative, the first applicant ('Mjayeli') seeks the remittal of the SABC's decision back to the SABC for reconsideration, subject to such conditions the Court deems fit.

[2] In a subsequent amendment to the notice of motion the SIU seeks an order directing Mafoko to:

> '1.1. File with this court, within 30 days of the court order, an audited statement of the expenses incurred in the performance of its obligations in terms of the tender (contract), the income received and the net profit it would have earned at the expiry of the contract;
>
> 1.2. The first respondent ('SABC') must within 60 days thereafter obtain an independent audited verification of the details provided by Mafoko and file the audited verification with the above Honourable Court.
>
> 1.3. The court will thereafter determine the amount of profits to be paid back by Mafoko to the SABC or the SIU.'

[3] There was no opposition to the amendment.

[4] Condonation is granted to Mafoko for the late filing of the answering affidavit.

[5] The SABC filed a counter-application, seeking that a just and equitable order would be to:

(a) declare the award of the tender to Mafoko invalid *ab initio,* alternatively, to cancel the tender, rather than referring it back to the SABC for reconsideration and;

(b) authorizing Mafoko to continue to render the services until a new security service provider has been appointed. The SIU did not oppose the SABC's counter-application.

[6] The issues to be decided are the following:

(a) the validity of the tender itself and whether the fifth to eighth respondents ('interim board members') acted in violation of s2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000, ('PPPFA'), Regulation 11(2) of the PPPFA Regulations and s217 of the Constitution, in not awarding the tender to the highest scoring bidder;

(b) whether the SABC breached its own Supply Chain Management ('SCM') policy;

(c) whether the interim board considered irrelevant factors in awarding the tender to Mafoko;

(d) whether there is a reasonable suspicion of bias towards Mafoko;

(e) what would be a just and equitable remedy.

[7] The review application by the SIU is fully opposed by Mafoko and the interim board members.

Background

[8] On 20 January 2017 the SABC sent out an invitation to tender for the provision of security services at the SABC Auckland Park offices and TV outside broadcasts for a period of five years. The five-year period would expire on 31 July 2022.

[9] The closing date for the submission of tender bids was 10 February 2017. Forty-five bids were submitted by various bidders, which included Mjayeli and Mafoko.

[10] On 31 March 2017 the Bid Evaluation Committee ('the BEC') convened to evaluate the bids on functionality. The SCM policy states that only senior managers may form part of the

BEC. When the BEC reconvened its meeting on 6 and 7 April 2017 to conduct evaluations, it is common cause that the BEC was not properly constituted because only three members of the BEC were present, instead of five members. In addition, none of the three members, namely Bushy Khabisi, Sifiso Dube and Solomon Nkabinde were senior managers.

[11] In terms of the evaluations done by the BEC, three bidders met the minimum functionality score of 40 points. These bidders were Mafoko with 50 points, Mjayeli with 48 points and Mabotwane Security Services (Pty) Ltd with 47 points.

[12] On 7 April 2017, after site inspections and evaluations were conducted, all three qualifying bidders scored 100 points and were thus fully compliant to qualify to the next evaluation phase of price and BBBEE.

[13] The three bidders were evaluated on Price and BBBEE. Mjayeli scored the highest on price and BBBEE. The BEC recommended that the tender be awarded to Mjayeli.

[14] The Bid Adjudication Committee ('the BAC') convened a meeting on 23 May 2017 and also recommended Mjayeli. The BAC decided that the tender process should be audited by the internal Audit Department and once finalised, the recommendation to award the tender to Mjayeli could be made to the SABC Group Exco ('Group Exco') for recommendation to the Finance Investment Procurement and Technology Committee ('the FIPT committee') and Ultimately to the interim board for approval.

[15] On 20 June 2017, the Group Exco recommended that the contract be awarded to Mjayeli for a period of five years from 1 August 2017 to 31 July 2022, at a total cost of R183.218.470,18 (Inclusive of VAT).

[16] The FIPT committee of the interim Board of Directors convened a meeting on 22 June 2017 where the chairperson of the board, Ms Kweyama raised several concerns regarding the recommendation by the BEC, BAC and Group Exco to award the tender to Mjayeli. The concerns of Ms Kweyama were that Mafoko with a Level 1 BBBEE status had been overlooked in favour of Mjayeli with a Level 2 BBBEE status and further that Mafoko was already contracted to the SABC providing physical security. It was resolved that in order to approve the tender, feedback was required by 26 June 2017.

[17] On 22 June 2017, pursuant to the aforesaid resolution by the FIPT committee, Ms Ayanda Mkhize ('Ms Mkhize') requested the National Treasury to provide an opinion as to whether it is permissible in terms of the PPPFA to award a tender to the second highest scoring bidder, thus overlooking the highest scoring bidder. On the same day, the National Treasury responded stating that:

'My understanding is the bid did not have an objective criteria and all bidders that passed functionality were acceptable bids. It is for this reason that I would advise the highest scoring bidder is not passed over because it is not justifiable grounds for passing over. Furthermore, the bidders were already given a score for B-BBEE contribution level hence you cannot disadvantage the bidder.'

[18] On 30 June 2017, the interim board convened a meeting where it was resolved that the tender be awarded to Mafoko for a period of 5 years commencing 1 August 2017 at a total contract price of R185.519.425,61 which is R2.300.955,43 more than the contract price for Mjayeli. In July 2017, the tender was then awarded to Mafoko.

[19] The SIU alleges that at the meeting dated 30 June 2017, the interim board had regard to irrelevant considerations in awarding the tender to Mafoko and approved a tender that would cost it more in terms of contract price.

[20] During December 2017 Mjayeli believed that there might have been some irregularity in the process and due to the fact that its bid was lower than Mafoko's by over R2 million and because price formed a substantial part of the bid, it instructed its attorneys to seek reasons for its exclusion and ultimately instituted this application.

[21] Mjayeli's main ground of review was that the decision to award the tender to Mafoko, despite Mafoko's bid price being higher than its own, was contrary to the provisions of the PPPFA and the SABC's SCM policy. Mjayeli also attacked the evaluation of the SABC's BEC and BAC.

[22] Mjayeli contended that the SABC's decision constituted an administrative action which materially and adversely affected its rights and legitimate expectations and that the decision ought to have been procedurally fair, lawful, reasonable, fair, equitable, transparent, competitive and cost effective as provided for in PAJA, PPPFA and the Public Finance Management Act, Act 1 of 1999 ('PFMA'). Mjayeli accordingly sought an order, in terms of s8(1)(c) of PAJA, that the Court review and set aside the decision of the SABC to award the tender to Mafoko and substituting that decision of the SABC in terms of s8(1)(c)(ii)(aa) of PAJA, to award the tender

to Mjayeli. Alternatively, Mjayeli sought an order that the matter be remitted back to the SABC in terms of s8(1)(c)(i) of PAJA for reconsideration.

[23] On 6 July 2018, the President of the Republic of South Africa issued proclamation R19 of 2018 ('the proclamation'), in terms of which the SIU was appointed to investigate, amongst others, the procurement of goods, works or services by or on behalf of the SABC from Mafoko Security Patrols (Pty) Ltd and payments made in respect thereof. In terms of paragraph 2 of the schedule to the proclamation, the SIU was requested to investigate the maladministration in the affairs of the SABC or any losses or prejudice suffered by the SABC or the State as a result of such maladministration. It is clear that the schedule gave the SIU wide powers.

[24] The interim board of the SABC took a decision to refer the matter to the SIU to investigate the procurement of physical security services at the SABC and to prepare an investigation report.

[25] On 25 May 2018, the Court ordered that the matter be held in abeyance until the SIU had filed its report. Pending the finalization of the SIU report, Mafoko was authorised by the Court order to continue to render the security services to the SABC. In line with paragraph 4 of the Court order, Mafoko continued to perform in terms of the contract.

[26] On 30 June 2019, the SIU filed its report into the above investigations. In its report, the SIU supported Mjayeli's relief that the decision by the SABC to award the tender to Mafoko be reviewed and set aside. The SIU's reasons were that it had found that the conduct of the interim board members amounted to financial mismanagement which is an offence in terms of the PFMA. The SIU found that the interim board considered irrelevant facts and acted in contravention of s2(1)(f) of the PPPFA and regulation 11(2) of the PPPFA and s217 of the Constitution, in not awarding the tender to the highest scoring bidder and that there was a reasonable perception of bias on the part of the interim board.

[27] The SIU referred the matter to the National Prosecuting Authority in terms of s86(2) of the PFMA for criminal proceedings to be instituted against the former interim board members of the SABC. The SIU has also made a referral for a disciplinary hearing against the executive director, Ms TM Dlamini who was then still in the employ of the SABC and was also present when the interim board made a decision to appoint Mafoko as the preferred service provider.

[28] Despite the issuing of the SIU's report in June 2019 and the delivery of the SABC's Rule 53 record, Mjayeli abandoned ship and failed to file a supplementary affidavit or to participate further in these proceedings, post 2020. As a result, on 12 February 2019, the SIU applied to be joined as the second applicant in this matter. The SIU filed a notice of motion to have the decision of the SABC to award the tender to Mafoko, to be reviewed and set aside and that Mafoko be ordered to disgorge the profits it made from the above tender. On 31 January 2020, the former interim board directors of SABC, namely the fifth to eight respondents applied to intervene and were also joined.

Contentions of the SIU

[29] The SIU contends that the interim board of the SABC considered the following irrelevant factors in overlooking Mjayeli and wrongly awarded the tender to Mafoko, namely:

(a) That Mafoko had a better BBBEE level than Mjayeli and failed to follow the SABC's SCM;

(b) That a section in the PFMA and the National Treasury Regulations allowed the interim board to prefer Mafoko over Mjayeli, provided the price difference was within 11 percent and that the difference in price between Mjayeli and Mafoko was 1 percent. The SIU contended no reason was given why the board deviated from appointing Mjayeli which was the number one bidder;

(c) That Mafoko was on site rendering the same service to the SABC and a 'concern' that if the tender was awarded to Mjayeli, that Mjayeli would employ Mafoko's security officers;

(d) That the interim board had 'reasonable and satisfactory grounds' to deviate from awarding the tender to the highest scoring bidder.

[30] The SIU contended that the above facts considered by the interim board did not form part of the tender documents and were not stated as 'objective criteria' in the tender documents.

[31] With regard to a just and equitable order, the SIU contended that, notwithstanding the setting aside of the award of the tender, Mafoko should be allowed to continue to render services until the expiry of the contract in July 2022 but that it is not entitled to keep the profits earned from the unlawful contract.

[32] The SIU contended that the constitution of the BEC was invalid and as a result any decisions made were invalid. It was argued that the BEC had a duty to ensure compliance with the SCM policy and because they did not, they should have dissolved the BEC. It was argued that there was no good governance and that this is why the SIU recommended that an application in terms of s162 of the Companies Act of 2008 ('the Companies Act') be brought to declare the former directors of the interim SABC board as delinquent directors for failing to act in the best interests of the SABC.

[33] The SIU contended that the interim board disregarded the advice of Ms Mkhize who, according to the chairperson of the interim board, was a resident guide and expert on the PPPFA and who advised the interim board that according to the PPPFA there was no provision that allowed the interim board to award the contract to the second highest scoring tenderer if the difference in price was less than 11 percent. The SIU contended there is no such provision in the PPPFA or in the National Treasury Regulations. The SIU maintained that Ms Mkhize had reported at the meeting held on 30 June 2017 that in terms of price and BBBEE level, Mjayeli had been ranked number one with a total score of 99 points, with Mafoko ranked at number two with a total of 98.87 and Mabotwane ranked at number three with a total score of 98.14. The difference in the total score between Mjayeli and Mafoko was 0.13. It was argued that this 11 percent allowance cannot be viewed as an objective factor. The SIU contended that the interim board were warned that they may be challenged on that decision.

[34] The SIU contended that nobody on the interim board said that the tender submitted by Mjayeli was an unacceptable tender. The only consideration by the interim board, which according to the SIU was incorrect, was that the BBBEE level of Mjayeli was level two and Mafoko's was level one and that by implication Mafoko should be preferred. The interim board members also failed to accept the SCM's recommendation.

[35] It was contended that Mr Molaotsi who was the head of SCM had stated that based on the PPPFA regulations, when implementing or applying the BBBEE score as well as the price, the award should be made to the highest ranking bidder. Mr Molaotsi had added that in the event that the interim board digressed from that general practice, an objective reason that would be legally defendable would be required should the decision be challenged. The SIU contended that this was sound advice from Mr Molaotsi.

[36] Contrary to the advice of Mr Molaotsi, who advised that the interim board could only act in terms of the PPPFA regulations, Ms Kweyama, who was the chairperson of the interim

board, went against the advice of Mr Molaotsi and wrongly stated that there was a 11 percent differential that allowed the board to do what they wanted to do. It was contended that Mr Molaotsi was expressing and ensuring compliance with s217 of the Constitution which required that procurement by organs of state must be transparent and competitive. The SIU argued that what the interim board wanted to do was to go against the spirit of the constitution by favouring one entity.

[37] The SIU contended that the interim board wrongly considered that the difference in costs between Mafoko and Mjayeli was R2.301.000,00 which was equivalent to 0.1 percent and way below the permissible 11 percent. The SIU contended that Mr Vilakazi, who was head of Legal, had advised the interim board that being a public institution, whatever decision the board took would be an exercise of public power which could be subjected to a review, and that the test would be whether or not the board had applied itself and whether the decision was not tainted with illegality.

[38] It was contended that prior to the meeting of 30 June 2017, Egendri Nanakan ('Mr Nanakan'), who was the Director of SCM Governance, at the office of the Chief Procurement Officer-Treasury had sent an e-mail dated 22 June 2017 to Ms Mkhize advising her that:

'My understanding is the bid did not have an objective criteria and all bidders that passed functionality were acceptable bids. It is for this reason that I would advise that the highest scoring bidder is not passed over because it is not justifiable grounds for passing over. Furthermore, the bidders were already given a score for B-BBEE contributor level hence you cannot disadvantage the bidder.'

[39] It was contended that a few days after the advice of Mr Nanakan, the interim board went against this advice. The SIU contended that the arguments raised that the advice from Mr Nanakan was not formal advice and that it should be disregarded is without merit. The SIU contended that the advice from Mr Nanakan is the same advice Ms Mkhize provided to the FIPT committee in that she expressed her view that the interim board cannot pass over the highest scoring bidder. The SIU contended that the interim board was nonchalant about this advice and decided contrary to the recommendation, the financial consequences being that the difference between the price of Mafoko and Mjayeli was R2.300.955,43 which is significant for an ailing public broadcaster. As a result, the interim board members failed in their duty to ensure cost effectiveness in compliance with s217 of the constitution.

[40] The SIU further contended that the interim board at its meeting held on 30 June 2017, incorrectly decided that Mafoko appeared to be the qualifying company in all respects as

Mabotwane, passed the functionality test and was even cheaper in terms of price than Mjayeli and should have been considered as well.

[41] The SIU contended that the two objective factors raised by the interim board members are not valid grounds for the following reasons:

(a) The fact that Mafoko was a level 1 BBBEE company and that the bid price difference was approximately 1 percent which the interim board believed was below the 11 percent is nowhere to be found in law. On the contrary, the 1 percent amounted to a staggering R2.300.955,00 more than the contract price of Mjayeli.

(b) The concern that 75 percent of Mafoko's staff might be absorbed by Mjayeli should they have been awarded the tender, should not have been used to oust another bidder.

[42] The SIU maintained that if the interim board decided to give preference to Mafoko, who was already on site, then there should have been a pre-qualification in terms of the tender documents so that other service providers would know that they were competing with Mafoko who had an advantage over them.

Contentions of the SABC

[43] The SABC is *ad idem* that its decision dated 30 June 2017 must be reviewed and set aside, however, it contends that having regard to the fact that the contract was nearing its expiry, it was no longer feasible to refer the dispute to the SABC for reconsideration. By implication, the SABC agreed that in terms of the SABC's SCM Policy and the PPPFA, Mjayeli ought to have been awarded the contract unless objective criteria justified the award of a tender to a bidder with less points.

[44] The SABC agreed that there were irregularities pertaining to the BEC, namely:

(a) there were no senior managers or legal manager in the composition of the BEC, thereby violating the SABC's SCM policy.

(b) the SABC's internal audit committee discovered a number of irregularities ranging from the chairperson of the BEC not signing the declaration of interests and non-confidentiality agreement forms, incorrect scoring that could have resulted in incorrect disqualifications of other bidders, discrepancies in reasons for disqualifying other bidders, erratic individual scoring and missing or incomplete minutes of various meetings of the BEC.

[45] The SABC aligned itself with the submissions of the SIU that the interim board's interference and digression from the recommendation of the BEC, BAC, and the Group Exco amounted to impermissible double-dipping. The SABC agreed that the issue of double-dipping or avoidance of double-dipping was ignored by the interim board. The SABC did not participate in the SIU's applications against Mafoko and the members of the interim board in terms of s162 of the Companies Act and abided by the Court's decision in this regard.

[46] The SABC contended that although the interim board members noted the concerns raised by the FIPT committee it proceeded to sit and awarded the tender in the manner that it has awarded, which is contrary to the recommendations of the FIPT committee.

[47] The SABC pointed out that once a ground of review under PAJA had been established there was no room for shying away from it and s172(1)(a) of the Constitution required the decision to be declared unlawful. The SABC accordingly agreed that the fairness and lawfulness of the procurement process had to be assessed in terms of the provisions of PAJA.

[48] The SABC accordingly contended that these difficulties meant that the prayer sought by Mjayeli for the review and setting aside of the SABC's decision to award the tender to Mafoko, was well thought of and justifiable under the circumstances. The SABC contended that as a result, the SABC was under an obligation, in terms of the Legality principles of our law, to review its own decision to award the tender to Mafoko and have it set aside.

[49] The SABC contended that it failed in its mandate to award the tender to the highest point scorer and could not justify awarding the tender to a bidder other than the highest scorer as required by regulation 9 of the PPPFA and that it was the SABC's interest to self-correct the decision taken by the SABC and that they could not be prescriptive as to what must or must not happen to the interim board members.

[50] The SABC contended that given the practicalities of;

(i) the SABC being an NKP entity that required non-stop security services;

(ii) the tender contract being almost at an end; and

(iii) the SABC having already paid Mafoko over 98% of the contract price; that the SABC would seek, as just and equitable relief arising from the said declaration on invalidity, that Mafoko be permitted to continue rendering physical security services to the SABC until the lapse of the contract which would be 31 July 2022 and that it would not be feasible to award the tender to Mjayeli who had long abandoned this matter.

[51] The SABC indicated that it would abide by the application of the SIU for the disgorgement of profits and it would comply with the amended notice of motion insofar as the SABC would be directed to file a verification report or affidavit confirming what the independent auditors would have found in relation to profits gained by Mafoko in terms of the agreement.

[52] As regards costs, the SABC argued that because the SABC made common cause with the SIU and because Mjayeli abandoned this application, that it would be just and equitable or fair that each party pay its own costs.

Contentions of Mafoko

[53] Mafoko did not persist in opposing the order seeking the review and setting aside of the award of the tender and abided by the Court's decision in this regard. It only opposed the amended relief that the SIU sought in relation to the disgorgement of the profits, stating that it was brought very late, almost four years since the contract was awarded. It also contended that costs not be awarded against it in respect of the opposition of the review relief from the date that their heads of argument were filed.

[54] In respect to a just and equitable order pertaining to the profits, Mafoko submitted that it would not be a just and equitable order for Mafoko to repay the SABC or the SIU all profits earned under the awarded contract in that:

(a) It was an innocent tenderer and the SIU investigation found no wrongdoing of any kind on the part of Mafoko regarding the process and requirements of the contract with the SABC.

(b) In the contract concluded with the SABC, the SABC gave its assurance and confirmed to Mafoko that there had been compliance with all procurement processes and requirements. In addition, Mafoko had been awarded contracts before by the SABC and no issue of non-compliance had ever arisen previously. As a result, Mafoko was entitled to accept assurances by the SABC in the contract that it had complied with all procurement procedures and requirements.

(c) It performed and complied fully with its contractual obligations as was required by law and the Court order granted to the SABC pending the outcome of the SIU investigation.

(d) The Covid-19 pandemic had adversely affected the profitability of Mafoko. Thirty-four personnel were booked off with full remuneration and had to be replaced with thirty-

four NKP accredited casual officers which had a major financial impact on the business as none of the personnel were retrenched. These were also additional expenses not budgeted for when Mafoko took over the contract.

(e) Despite not having played any role in criminal or corrupt practice and having an unblemished record, it had been prejudiced by the innuendos and reputational damages since the allegations of corruption surfaced.

(f) The contract Mafoko had with the SABC was still on-going and that same should not be invalidated or retrospectively set side but should proceed to its end because Mafoko had performed substantially in terms of this tender/contract and the majority of the funds for this tender had already been paid over to Mafoko. Mafoko argued that the SABC would suffer irrecoverable loss should the Court order the contract to be retrospectively invalid in that the funds expended could be classified as wasteful expenditure even though the SABC had received the benefits of the tender.

[55] Mafoko argued that there were compelling reasons to deviate from the default position described in the matter of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*[1](‘*Allpay*’) that profits from an invalid contract must not be retained.

[56] Mafoko contended that what justice and equity demand in each case must depend on the facts and that it is not a blind or blunt instrument dictating that in each case where a tender award is declared invalid that the winning tenderer must disgorge all profits earned. Such an approach would not be justice but brute force.

[57] Mafoko contended that a just and equitable remedy on the facts of this case would be similar to that granted in the Constitutional Court decision of *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*[2] (‘*Gijima’),* where the Constitutional Court declined to establish a rigid guideline on the exercise of the court’s wide discretion in respect of a remedy and stated that:

‘…in the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled…’[3]

---

[1] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (17 April 2014).

[2] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC).

[3] Ibid para 54.

[58] It was argued that it is only the tenderer who is complicit in the irregularity who the law says may suffer losses, but not the ones that are not complicit. Reference was made to certain cases where conduct on the part of the winning tenderer contributed to the invalidity of the award of the tender and where the Court ordered profits to be forfeited or repaid, these cases are:

(a) *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd*,[4] ('*Mining Qualifications Authority*'), where misleading information by the winning tenderer contributed to the award of the tender.

(b) *Special Investigating Unit and another v Vision View Productions CC,*[5] ('*Vision View Productions*'), where a winning tenderer was content to commence a project where there was no contract in place.

(c) *Transnet SOC Limited v IGS Consulting Engineers CC and Others,*[6] where there was fraud, corruption and malfeasance.

[59] Mafoko argued it is an innocent tenderer and the fault in this matter lies squarely at the door of the SABC, its management executives and oversight structures. Accordingly, the invalidation of the award of the tender and the contract should not result in any loss to Mafoko or the loss of any other entitlement under the contract. It was contended that it is the individuals that allegedly acted unlawfully in awarding the tender to Mafoko, against whom the SIU should seek recourse, not an innocent tenderer, which has gone above and beyond to fulfil its obligations in terms of the contract.

[60] It was contended that this Court must consider the lengthy delay in bringing this application, as the SIU's founding affidavit in support of its review application was filed on 22 December 2020, over 1.5 years after the issuing of its final report, and approximately 3.5 years after the tender was awarded to Mafoko. Neither the SABC nor the SIU sought to interdict Mafoko's performance in terms of the contract. Instead, the SABC obtained an order compelling Mafoko to continue rendering the services pending the outcome of the SIU investigation. In addition, Mafoko was bound to perform in terms of the contract or face being held in breach of the contract. It was argued that it makes no financial sense for Mafoko, as a profit-making company, to have performed or continued to perform in terms of a contract in terms of which it

[4] *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd* (2016/44912) [2018] ZAGPJHC 455 (26 June 2018).
[5] *Special Investigating Unit and another v Vision View Productions CC*, Case No. 2019/20801 (18 June 2020).
[6] *Transnet SOC Limited v IGS Consulting Engineers CC and Others* (34688/2017) [2019] ZAGPJHC 527 (11 December 2019).

would not be entitled to its profits and/or run the real risk of its profits being forfeited in the long run. This would be grossly unfair.

[61] It was contended that the order the SIU sought is unjust and unfair in that it is punitive, in that requiring Mafoko to repay its profits would bankrupt Mafoko. It was contended it would be an almost impossible and hugely expensive task for Mafoko to raise funds to repay any profits which were used to sustain the business during the hard Covid 19 restrictions. It would need to raise a loan to repay any profits which would inevitably cripple its business.

[62] It was contended that during the Covid restrictions 34 personnel were booked off with full remuneration and had to be replaced with 34 NKP accredited casual officers which had a major financial impact on the business as none of the personnel were retrenched. These were all additional expenses not budgeted for when Mafoko took over the contract. As a result Mafoko argued that there were compelling reasons to deviate from the default position described in the matter of *Allpay*[7] that profits from an invalid contract must not be retained.

[63] It was argued that Mafoko will suffer severe prejudice if the proposed amended order is granted by the court, in favour of the SIU. Such remedy in the circumstances, would not be just and appropriate because even though in the answering affidavit Mafoko had indicated that it makes approximately R300.000,00 profit per month, there are further expenses that Mafoko has incurred, namely:

(a) A substantial amount of the profit realised from Mafoko has been reinvested into the business, to ensure that Mafoko retrenches as few members of staff as possible enabling it to offer its clients the most affordable competitive prices for its services, whilst still expanding the business.

(b) A large sum of R4.3 million had been paid to SARS in respect of income tax to date with an additional R17.4 Vat to be paid.

(c) Covid 19 resulted in the money initially intended to be reinvested in the business, being utilised to cover expenses that arose during the lockdown.

(d) Absa cancelled its loan facilities when Mafoko was accused of corruption and investigated by the SIU.

(e) The proposed amended order sought by the SIU would cause Mafoko to litigate, after the completion of the contract, because there would be unjustified enrichment on the part of the SABC.

[7] *Allpay* (note 1 above).

(f) The proposed amended order sought by the SIU, would bankrupt Mafoko.

[64] As a result, the prejudice Mafoko would suffer would far outweigh any prejudice the SIU or the SABC.

[65] With reference to clause 15.2 of the contract, it was contended that the SABC indemnified and held Mafoko harmless against direct loss, claim, action, direct damages or expenses suffered or sustained by Mafoko pursuant to or arising out of the breach by the SABC of its obligations, representations or warranties contained in the contract. It was contended that due to these warranties and due to other contracts being awarded to Mafoko, these facts distinguished the present case from the cases referred to by SIU.

[66] Reference was also made to the case of *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others*[8] where the Supreme Court of Appeal held that:

'The law draws a distinction between parties who are complicit in maladministration, impropriety, or corruption on the one hand, and those who are not, on the other. The category into which a party falls has a significant impact on the appropriate just and equitable remedy that a court may grant. Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be required to suffer losses. On the other hand, although innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss as a result of the invalidation of a contract.'[9]

[67] Counsel argued that there are exceptional circumstances and that the matter *in casu* is wholly distinguishable from the matter of *Vision View Productions*[10] in that the SABC has fully benefitted from the contract.

[68] Counsel argued that had the SABC brought their self-review immediately, this matter would have been decided probably two years earlier, and the prejudice to Mafoko would have been limited. It was argued that Mafoko should not carry the costs of the tardiness on the part of government, the SIU and the SABC. All are organs of state and the tardiness is inexcusable and that as per the *Gijima*[11] reasoning they must be denied the relief of disgorgement that they seek.

---

[8] *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* (119/2021) [2022] ZASCA 54 (13 April 2022).
[9] Ibid para 42.
[10] *Vision View Productions* (see note 5 above).
[11] *Gijima* (note 2 above).

[69] It was contended that it is the individuals that allegedly acted unlawfully and awarded a tender to Mafoko, against whom the SIU should seek recourse, not an innocent tenderer which has gone above and beyond to fulfil its obligations in terms of the contract.

[70] It was contended that if Mafoko is required to obtain loan funding, it would suffer losses in paying back any profits earned and that an order for the disgorgement of profits in the circumstances would be unjust and punitive. In addition, to get an auditor to audit its books to present to this Court an audited statement might dwarf the net profits that Mafoko will be ordered to ultimately pay.

Contentions of the interim board members

[71] The interim Board members argue that they were not bound by the recommendations of the BEC, BAC, Group Exco or National Treasury as they were entitled to apply their minds and discretion to evaluate the procurement in the best interest of the SABC and that they had an objective justification, other than BBBEE in awarding the tender to the second highest scoring bidder, namely Mafoko.

[72] It was contended that the opinion from the National Treasury was not a formal opinion and the board members were justified to disregard it. Furthermore, the reliance of the SIU on s2(1)(f) of the PFMA is misplaced.

[73] Counsel argued that when the interim board awarded the tender to Mafoko on 30 June 2017 it balanced all the interests of the three competing tenderers and complied with the five objectives set out in s217 of the Constitution. Their decision was taken after lengthy discussions, consultations and receipt of advice, ensuring compliance with the applicable statutes and prescripts, in order to ensure that their decision was lawful. The interim board members contended that the procedural steps adopted by the interim board are articulated in the minutes of the FIPT committee meeting held on 22 June 2017 as well as the minutes of the interim board meeting held on 30 June 2017, thereby negating any evidence of improper or irregular behaviour.

[74] As regards the compliance with s2(1)(f) of the PPPFA Act, which is the legislation giving effect to s217 of the Constitution, Counsel made two points:

(a) That a tender can be awarded to the second highest bidder if there are objective justifications for that outcome. These justifications are that Mafoko was performing

well, with a good track record, as compared to Mjayeli's potential involvement in irregularity.

(b) That the Constitutional Court decision of *Minister of Finance v Afribusiness NPC*,[12] ('*Afribusiness*') set aside the PPPFA regulations of 2017 on which the SIU's case rests, thereby putting an end to the SIU's submissions that because the tender document did not contain objective justifications other than BBBEE, that the award made by the interim board was irregular. As a result, there is no longer a requirement that objective criteria must be set out in the tender document and accordingly there were objective justifications for not awarding it to the highest scorer.

[75] It was argued that as regards the non-price elements of the contract, the procurement framework requires the advancement of an empowerment entity. This was achieved, because a level 1 contributor was appointed. With respect to the technical requirements, Mafoko had the necessary experience, expertise and the ability to perform the onerous tasks required to guard all National key points like the SABC.

[76] Counsel argued that on price competition the awarding of the tender to Mafoko, with a R2.3 million difference, still achieved the objectives under s217 of the Constitution and that the one percent difference is an immaterial price difference. As regards the alleged financial misconduct of the interim board members in terms of s83 of the PFMA, where the SIU alleges the interim board members committed irregular, fruitless and wasteful expenditure in excess of R2 million, the interim board members contended that:

(a) R2.3 million is immateriality when compared to the size of the contract.

(b) In terms of s83 of the PFMA, the SIU would have to show that there were elements of irregular, fruitless, wasteful expenditure on the part of the interim board members which would merit delinquency findings in terms of s162 of the Companies Act against the interim board. In addition, it would have to show that the interim board abused their duties and positions as directors, took personal advantage, inflicted harm on the SABC and acted negligently in failing to comply with the PFMA, contrary to the interests of the SABC, thereby permitting irregular or fruitless expenditure. Counsel argued that the SIU has not come close on anyone of the above, as they never did the work to analyse the evidence and failed to prove the interim board members actually had the necessary *mens rea* to engage in this conduct.

[12] *Minister of Finance v Afribusiness NPC* [2022] ZACC 4.

[77] It was argued that there was no reasonable perception of bias on the part of the interim board members. There is no factual evidential or legal basis to conclude that the tender was irregularly awarded through some misconduct or non-compliance with the applicable statutory framework. Furthermore, it was contended that the interim board is not constituted to merely 'rubber stamp' a decision taken by the BEC, BAC and the FIPT committee. The interim board is required to make the best decision for the SABC based on reasonable and satisfactory grounds.

[78] Counsel argued that the SIU can succeed in light of the SABC's concessions in having the tender declared irregular, unlawful and having it set aside, however, they ought to have tempered themselves as a responsible law enforcement agency in not insisting on scapegoating the interim board members.

[79] Counsel added that in respect to the improperly constituted BEC, it is important to note the following:

(a) that the interim board members were appointed after the BEC was constituted and already doing its work.

(b) Ms Kweyama should be commended as she received the whistle blower report about the irregularities relating to Mjayeli, conferred with her interim board colleagues, and referred the matter to the SIU. This conduct is entirely consistent with someone who, together with her colleagues was engaged in the diligent execution of their fiduciary duties.

(c) Counsel argued that the SIU was cherry picking from the minutes of 30 June 2017 and fixated only on whether there was double dipping on BBBEE. In contrast, the interim board had robust deliberations constantly challenging and testing various positions. The interim board also received inputs from the resident experts and guides on public procurement. There is never a point in the minutes of 30 June 2017 where the interim board is told, stop you cannot do this and such advice is ignored. In fact, they keep getting told there are objective justifications and tram lines in which you can proceed.

[80] Counsel for the interim board members argued that the SIU tried to embellish Ms Kweyama, whereas all she did was to inform the interim board that she would defend her decision to favour black entities that had more empowerment over others like Mafoko which was a level 1 BBBEE company as compared to Mjayeli that was a level 2 BBBEE company. The board had asked Mr Mulaudzi and he came back and stated if the board wanted to appoint someone else, then it needed objective reasons for doing so. Mr Mulaudzi had also confirmed

that as far as SCM was concerned, there had been no report suggesting or demonstrating a dissatisfaction with the service received by Mafoko, however, from SCM's position Mafoko would not have an advantage by virtue of them being on site. Counsel argued the message from Mulaudzi was ambiguous and downright confusing, because he says in one breath, it may well be that it was what the board might want to consider as a justifiable reason to digress, but from SCM's position they would not have been advantaged by virtue of being on site.

[81] Counsel contended that the interim board did not consider irrelevant facts and did not act in contravention of the PPPFA in awarding the tender to Mafoko.

[82] It was contended that the interim board was authorised to deviate from the SCM recommendation. This power is found in section 2(1)(f) of the PPPFA as well as clauses 17.1 and 17.5 of the tender document itself. The said paragraphs specifically state as follows: '17.1 Bidders are hereby advised that the SABC is not committed to any course of action as a result of its issuance of this BID and/or its receipt of a bid in response to it. In particular, please note that the SABC may: … 17.5 not necessarily accept the lowest priced bid.'

[83] Furthermore, it was contended that the interim board members took into account the following objective factors, namely:

(a) that Mafoko was a level 1 BBBEE company and the difference of the bid price between Mjayeli and Mafoko was approximately one percent which fell within the scope of deviation by the board in terms of the PPPFA.

(b) Mafoko already had the necessary security force in place at Auckland Park and 75 percent of its personnel would be used by Mjayeli.

[84] Counsel argued it is in respect of all the above-mentioned factors that the impugned decision was lawful procedurally and substantively. As a result, the interim board members opposed this application by the SIU and asked this Court to dismiss it with costs. Counsel argued that if this Court were to find that it was because of the SABC's concessions on merits that the tender must be set aside, then it would not be appropriate to insist on any costs against the interim board members.

Evaluation

BEC not properly constituted

[85] Clause 5.6 of the SABC supply chain procedures manual of 2016 provides that:

'The composition of the Bid Evaluation Committee will vary depending on the nature and complexity of the specific project but should at all times have a minimum of three (3) individuals. For more complex projects, strategic projects or projects of a value above R10 million, the members of the BEC must be senior managers in the employ of the SABC. The Bid Evaluation Committee should always include a representative from SCM and the Business unit concerned. A representative from Legal must be included for high value and strategic bids.' [my emphasis]

[86] In the matter of *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality and Another*,[13] the Court held that:

'[70] The accounting officer's decision to award the particular bids to IMS was therefore based upon recommendations made by a bid adjudication committee which had not been properly constituted. Its decisions and recommendations could not have been valid, not only because of the way that it was itself constituted, but also because of the fact that its decisions were based upon the decisions and recommendations of a bid evaluation committee which had also not been properly constituted[14] [my emphasis]

And further;

'On this ground alone the decisions fall to be set aside on the basis that "mandatory and material" empowering provisions were not complied with (s 6(2)(b) of the PAJA).'[15]

[87] It is clear that as regards the composition of the BEC there were no declarations of interest forms signed by the members of the BEC. Due to this tender being worth R185 million, members of the BEC had to disclose their interests. Where the legislation prescribes certain procedure to be followed, it must be strictly followed by public functionaries. Public functionaries are not immune from complying with the rule of law, they must comply with the SCM of the SABC. The SABC SCM document is very important as it advances the principles set out s217 of the Constitution.

[88] It was argued on behalf of the interim board members that the interim board members were appointed after the BEC was constituted and already doing its work and that no blame can be attached to the interim board members. This Court disagrees. Only once the interim board had considered compliance with the SCM, could they then consider the content of the document before them. It was the interim board's duty to ensure compliance.

---

[13] *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality and Another* (1357/2007) [2008] ZANCHC 73 (12 December 2008).
[14] Ibid para 70.
[15] Ibid para 71.

[89] The King Report on corporate governance was established to recommended standards of conduct for boards and directors of listed companies, banks and certain state-owned enterprises. Four reports were issued. As regards ethical leadership, a board should provide effective and responsible leadership which is categorised by ethical values such as accountability, fairness and transparency. As regards being responsible, the board should be guided by the Constitution and the bill of rights. As regards boards and directors the first principle as per the King report is that a board should act as the focal point as custodian of good governance. At all times the board must understand and appreciate that risk, performance and sustainability are inseparable. In addition, the board should provide ethical leadership based on an ethical foundation. In the matter *in casu*, the interim board members should have ensured that the SABC's ethics were managed effectively and should have acted in the best interests of the SABC.

[90] The interim board did not establish whether the members of the BEC had disclosed their interests and neither did they ensure that senior people were on the BEC. This is negligence on the part of the interim board. As a result, there can be no dispute that there was no compliance with the SABC's internal policies. Accordingly, the decisions and recommendations of the improperly constituted BEC are invalid and on this ground alone are set aside in terms of s6(2)(b) of PAJA for failure to comply with 'mandatory and material' empowering provisions set out in the SCM of the SABC.

[91] Irrespective of this conclusion, this Court has considered the issues pertaining to the PPPFA regulations.

PPPFA regulations

[92] As regards the argument by the interim board members that the PPPFA regulations were no longer in force at the time the decision was taken by the board members in June 2017, this Court finds as follows;

(a) these regulations were the law and the board members had no choice but to comply with this law.

(b) the regulations were only challenged later, in the matter of *Afribusiness*[16] which was heard on 25 May 2021. The order in the matter of *Afribusiness*[17] was handed down in February 2022. This Court finds that the judgement of *Afribusiness*[18] is not applicable

[16] *Afribusiness* (note 12 above).
[17] Ibid.

to the matter *in casu*, as the PPPFA regulations were the law at the time the interim board members made their decision.

[93] In the matter of *Head, Department of Education, Free State Province vs Welkom High School and Another*,[19] (‘*Department of Education’*), the Supreme Court of Appeal followed the decision of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*,[20] where the Supreme Court of Appeal stated that until an unlawful and invalid administrative decision is set aside ‘by a court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked’[21]

[94] The interim board had been duly advised by Ms Mkhize, Mr Mulaudzi, Mr Vilakazi and Mr Nanakan to comply with the law. Although the matter in the *Department of Education* [22] dealt with decisions of governing bodies that stand until set aside by a court, a reading of that judgment would suggest that the declaration of invalidity of the PPPFA regulations in the matter of *Afribusiness,[23]* is not retrospective.

[95] In the matter of *De Kock and Others v Van Rooyen*,[24] the Supreme Court of Appeal held that:

‘an order of invalidity should have no effect on cases which have been finalised prior to the date of the order'.

[96] This Court has considered the argument raised on behalf of the interim board members that it is not about retrospectivity, it is as if the regulations never existed as of the date of this judgment on 16 February 2022. The fact remains the decision of the interim board in 2017 was taken whilst the regulations were still the law and as a result, the interim board members had to adhere to the law. No regulation was referred to by the interim board members that gave them the power to ignore the decision of the BEC, even if the interim board members believed the BEC was properly constituted.

---

[18] Ibid.
[19] *Head, Department of Education, Free State Province vs Welkom High School and Another* 2012 (6) SA 525 SCA.
[20] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).
[21] Ibid paea 26.
[22] *Department of Education* (note 19 above).
[23] *Afribusiness* (note 12 above).
[24] *De Kock and Others v Van Rooyen* 2005 (1) SA 1 (SCA).

[97] If the Court is wrong in this regard, although the regulations were declared invalid, the PFMA itself is still valid and was the law and the interim board were obliged in terms of the PFMA to comply with the PPPFA.

Objective factors

[98] Section 2(1)(f) of the PPPFA provides that a tender must be awarded to a tenderer, who scored the highest points, unless objective criteria justify that it be awarded to another tenderer. It is not fair to overlook somebody who is deserving. The submissions made by the interim board members that there were objective justifications which entitled them to take the decision it took, must be objective factors in the context of everyone looking at them, not just the interim board. The objective criteria referred to in section 2(1)(f) must be additional criteria, in other words there must be criteria over and above those which have already received consideration as specific goals in terms of s2(1)(d) and (e) of the PPPFA.

[99] In the matter of *Schoonbee and 17 Others v The MEC For Education In The Mpumalanga Province and Another*[25] ('Schoonbee'), the Court held that:

'…it is quite settled law that the official who takes the administrative action should not be persuaded by matters other than those which are relevant for purposes of the decision before it; he or she should not have regard to or be persuaded or moved by some ulterior purpose or motive or make considerations which are irrelevant. He or she must act honestly, he or she cannot act arbitrarily, or capriciously. He or she must act rationally.' [my emphasis]

[100] In the matter of *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape & Others*,[26] the Court held that the applicable legislative provisions ought to be strictly followed as they are designed to ensure that competing bidders should be evaluated by utilizing objective criteria in a fair, reasonable, applicable and transparent manner and in terms whereof the personal discretion of the functionary awarding the tender be restricted as far as possible, and to provide a means of measuring the rationale behind the award of a tender.[27] [my emphasis]

[25] *Schoonbee and 17 Others v The MEC For Education In The Mpumalanga Province and Another* 2002 JDR 0460 (T).
[26] *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape & Others* (769102) [2003] ZAECHC23 (18 March 2003).
[27] Ibid para 25.

[101] In the matter of *Tshwane City V Link Africa And Others*,[28] the Constitutional Court stated that:

'Administrative action that is tainted with bias is void and falls to be set aside on review… The common-law rule against bias is part of the principles of natural justice. The other principle is the *audi* rule which requires that a person to be affected by an administrative decision must be afforded a fair hearing before the decision is taken. Both these principles have now been codified in PAJA as grounds of review. Section 6(2) of PAJA permits a court to review and set aside administrative action that is procedurally unfair or if the decision-maker who undertook it was biased or was reasonably suspected of bias. The rule against bias is underpinned by the principle that administrative justice must not only be done but must also be seen to be done. The purpose of the rule is to establish and maintain public confidence in administrative justice.'[29]

[102] The interim board members stated that two experts gave them the go-ahead. This is merely a diversion. The interim board needed to account as the decision is theirs. The e-mail from Ms Nanakan from the national treasury was clear, in that it stated that the higher scoring bidder must not be passed over as there were no justifiable grounds for passing over.

[103] From the advice of Mr Molaotsi at the meeting of 30 June 2017 three things appear, namely:

(a) The interim board could not overlook the highest scoring bidder unless they had lawful reasons to do so.

(b) The interim board could not double dip.

(c) If the interim board went against Mr Molaotsi's advise there would be consequences in that their decision may be taken on review.

[104] Irrespective of the advice from Mr Moloatsi, the chairperson accepted that even if there was double dipping she would defend the board's decision. This is a clear contravention of s2(1)(f) of the PPPFA

[105] Ms Mkhize was a resident guide and expert on PPPFA according to the chairperson and warned the interim board that as far as she knew, there is no provision in the PPPFA that allows the interim board to award the contract to the second highest scoring tenderer if the difference in price is less that 11 percent. In fact, there is no such provision in the PPPFA.

---

[28] *Tshwane City V Link Africa And Others* 2015 (6) SA 440 (CC).

[29] Ibid para 73.

[106] Irrespective of the provisions of s51(1)(h) of the PFMA, as well as the sound advice from Ms Mkhize, Mr Molaotsi and the National treasury, which advice was shared with the interim board members, seven days before the meeting of 30 June 2017, the interim board disregarded all such advice. The interim Board disregarded sound advice that considering the BBBEE status when points had already been allocated in this regard would amount to 'double dipping'.

[107] It is clear that the interim board was unfairly slanted towards Mafoko as there was nothing considered by the interim board that indicated that Mjayeli was not a suitable tenderer to be appointed. The fact that the chairperson raised the alarm that there may have been irregularities on the side of Mjayeli, remains unconfirmed to date.

[108] All the contemporaneous evidence, including the board members' own evidence shows that the interim board went out of its way to find reasons to appoint Mafoko and disregard Mjayeli.

[109] As regards the fact that Mafoko had to comply with the Court order dated 7 June 2018 and remain at the premises of the SABC, the fact is that Mafoko was not compelled, it agreed to that order. As a result, Mafoko knew already as far back as 2017 that its tender award might be set aside in the future and that this does not amount to exceptional circumstances.

[110] The criteria specified in the tender documentation created a legitimate expectation on the part of the tenderers, that nothing else but what was stated in the tender documents would be considered. It was impermissible for the interim board of the SABC to shift the goal posts. The fact that Mafoko was already on site and that 75 percent of its personnel would be employed by a new security company were irrelevant matters which had not been set out clearly as criteria in the tender documents. Technically, there would be nothing wrong with Mjayeli employing 75 percent of Mafoko's personnel, as this personnel would have retained their jobs, albeit under new management of Mjayeli.

[111] The objective criteria referred to by the board were not in the invitation to submit a tender. Section 2(1)(e) of the PPPFA is peremptory in that it prescribes that 'any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender'. [my emphasis]

[112] In the matter of *Airports Company South Africa Soc Ltd V Imperial Group Ltd And Others*[30] ('*ACSA*'), ACSA argued that it was permissible not to award the tender to the highest scoring bidder because clause 1.7 of the Request For Bids (RFB) provided that a bid might be awarded to a bidder other than the highest-scoring bidder 'where transformation imperatives allow'. The Supreme Court of Appeal rejected ACSA's contentions and held that:

'Section 2(1)(f) of the PP[PFA] Act provides that a tender must be awarded to a tenderer who scored the highest points unless objective criteria justify that it be awarded to another tenderer. Regulation 11(2) of the PP[PFA] regulations in turn provides that if an organ of state intends to apply objective criteria in terms of s 2(1)(f) of the PP Act, it 'must' stipulate the objective criteria in the tender documents. The requirement for objective criteria is in line with the transparency imperative that is espoused in s217(1) of the Constitution.'[31] [my emphasis]

[113] The Supreme Court of Appeal in *ACSA*[32] stated further:

'Bidders are entitled to know the applicable transformation imperatives at the time of bidding. Without ACSA's undertaking to amend a specific provision of the RFB, it is impossible to determine the impact or extent of any prejudice that bidders may suffer as a result of the envisaged amendment. It must be borne in mind that the RFB, by its nature, sets out the rules that govern the bid process. The *ex post facto* changing of applicable rules simply goes against the tenets of the principle of legality. In my view, the undue vagueness regarding ACSA's transformation imperatives rendered the procurement process unlawful.'[33] [my emphasis]

[114] In the matter of *WJ Building & Civil Engineering Contractors CC V Umhlathuze Municipality And Another*[34] ('*WJ Building*'), even though WJ was the highest scoring tenderer and had come in at the lowest price, the BEC awarded the tender to PC who was the second highest contender scorer due to the fact that WJ had recently benefited from two major projects and the municipality wanted to rotate service providers. The Court held that the municipality's rationale for not awarding the contract to the highest-scoring tenderer had to be based on objective, reasonable and justifiable criteria, however, the reasons given by the evaluation committee were arbitrary. They did not appear in the tender invitation advertisement, in the PPPFA or regulations, or from the municipality's preferential procurement policy. The Court held further that WJ might have benefited from previous projects but this was not of itself a ground for rejecting its bid. Even though the need to encourage the rotation of service providers might be a legitimate objective, it was nowhere expressed as a factor to be taken into account in

[30] *Airports Company South Africa Soc Ltd V Imperial Group Ltd And Others* 2020 (4) SA 17 (SCA).
[31] Ibid para 48.
[32] Ibid.
[33] Ibid para 50.
[34] *WJ Building & Civil Engineering Contractors CC V Umhlathuze Municipality And Another* 2013 (5) SA 461 (KZD).

determining the successful bidder and it should have been reflected in the invitation to bid, otherwise tenderers would not have been able to consider and deal with it.

[115] Similarly, in the matter *in casu*, the SABC's interim board's decision to consider the fact that Mafoko was already on site and providing security services to the SABC is arbitrary, as it was not expressed as a factor to be taken into account in determining a successful bidder and as a result it is unlawful.

[116] The interim board members used a discretion which they did not have. They went against all the sound legal principles set out in the matter of *Schoonbee*[35]. The interim board's decision stands to be set aside on this ground as well, due to the reasonable suspicion of bias.

[117] PAJA, as an Act of Parliament, owes its existence from s33 of the Constitution. Section 33 provides everyone the right to administrative action that is lawful, reasonable and procedurally fair. in terms of s1 of PAJA, 'administrative action' has been defined to mean

'any decision taken, or any failure to take a decision, by (a) an organ of state, when

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation…

which adversely affects the rights of any person and which has a direct and external legal effect.'

[118] The objective criteria considered by the interim board were irrelevant matters and should not have clouded or detracted the interim board from appointing Mjayeli instead of Mafoko. These irrelevant factors are grounds as set out in s6 of PAJA allowing this Court to review and set aside the award to Mafoko.

Non-compliance with the PFMA

[119] The argument raised by the interim board members that R2.3 million cannot be regarded as giving rise to fruitless and wasteful expenditure in nonsensical.

[120] Section 50 of the PFMA sets out the fiduciary duties of the accounting authority as follows:

'The accounting authority for a public entity must-

(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

[35] *Schoonbee* (note 25 above).

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

(c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and

(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.' [my emphasis]

[121] In terms of section 51(1)(a)(iii) of the PFMA the accounting authority must ensure that the public entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

[122] In terms of section 51(1)(b)(ii) of the PFMA, the accounting authority must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.

[123] In terms of section 51(1)(h) the accounting authority must comply and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.

[124] In the matter *of Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,[36] the Constitutional Court held that:

'…central to the conception of our constitutional order [is] that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'[37] [my emphasis]

[125] The interim board did not apply the provisions of ss51(1)(a)(ii), 51(1)(b)(ii) or 51(1)(h) of the PFMA. The SABC is a public functionary and it cannot simply disregard the law and make financial decisions just because, according to the interim board members an amount of R2.3 million may seem insignificant. The SABC is a public broadcaster and it does not issue only one tender at a time, it issues tenders in different spheres, not just security tenders as in the matter *in casu*. Should an interim board start making decisions in various tenders ignoring the law and saying a few million is insignificant, then soon such 'insignificant amounts' will

[36] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).
[37] Ibid para 58.

amount to millions. The amount of R2.3 million is not insignificant at all and the interim board members cannot be said to have acted in the best interests of the SABC when it overlooked the cheapest guy and chose the more expensive one. The interim board members did not do a cost effective decision by appointing a service provider whose bid was R2.3 million more than the number one rated bidder.

[126] This Court finds that the interim board members failed to comply with the SABC's SCM policy prescribed by s51(1)(b)(ii) of the PFMA, as well as s51(1)(h) of the PFMA which ensures compliance with the PPPFA. The only finding this Court can make is that the interim board members clearly wanted to benefit Mafoko.

[127] Section 83 of the PFMA provides that:

'(1) The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently-

(a) fails to comply with a requirement of section 50, 51, 52, 53, 54 or 55; or

(b) makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

(2) If the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority.'

[128] In terms of s86(2) of the PFMA an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.

[129] Failure to comply with a requirement of any of these sections makes the accounting authority liable for financial misconduct. It is on that basis that the SIU in its report made a finding that the interim board members breached their fiduciary duties and acted against the interest of the SABC. This is what informed the decision to make a recommendation that an application in terms of section 162 of the Companies Act be made against the interim board members.

The Constitution

[130] Section 217 of the Constitution states that:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.' [my emphasis]

[131] This Court should not be giving a licence to public functionaries to disregard the law, because once a Court sets a principle that it is permissible for public functionaries to disregard cost effective procurement, as prescribed by s217 of the Constitution, other parties will rely on this judgement to say it is justifiable. There is no jurisprudence that says public functionaries can disregard cost effective procurement, as prescribed by s217 of the Constitution.

[132] Section 217(3) of the Constitution provides that national legislation must prescribe a framework for the implementation of any preferential policy. The framework referred to in s217(3), is the PPPFA, which provides that organs of state must determine their preferential procurement policy based on a points system.

[133] The purpose of s2(1)(f) of the PPPFA is primarily to ensure that organs of state procure goods and services in a competitive and cost-effective manner as required by s217 of the Constitution. The question to be considered is whether when the first and second bidders are closely ranked as to price and there is a one percent difference, can it be said that the purpose of competitive and cost-effective procurement has been undermined.

[134] In the matter of *ACSA*,[38] the Supreme Court of Appeal stated that a purposive interpretation dictates that an act should be read in the context of the Constitution. It held that:
'This interpretation is consistent with various provisions of the PFMA, which enjoin the accounting authorities of organs of state to exercise sound management of revenue and expenditure; to efficiently manage, safeguard and maintain their assets and liabilities; and generally to ensure that the organs of state receive value for money.'[39] [my emphasis]

[135] Having regard to the aforesaid legislative provisions and the context in which the impugned decision was taken, it is clear that the conduct of the interim board not only violated section 2(1)(f) of the PPPFA, regulation 11(2) of the PPPFA Regulations and s217 of the Constitution but also amounted to financial misconduct in terms of s83 of the PFMA.

[38] *ACSA* (note 30 above).
[39] Ibid para 45.

[136] Accordingly, the decision of the interim board to appoint the second highest scoring bidder constitutes an act of financial misconduct in terms of s83 of the PFMA as the contract price for Mafoko was R2.300.955,43 more than the contract price for Mjayeli. The appointment of Mafoko is at odds with the peremptory obligation to ensure that procurement is cost-effective as prescribed by s217(1) of the Constitution. Accordingly, the interim board members failed to act in accordance with the law and to advance any lawful justification as to why they opted to appoint a tenderer who was the most expensive.

[137] The interim board in awarding the tender to Mafoko, acted outside the powers lawfully conferred to it by the Constitution, PFMA, the PPPFA and the SABC's SCM policy. The decision of the interim board qualifies as an irrational, arbitrary and capricious decision as contemplated in terms of PAJA. The decision to appoint Mafoko as the preferred winner of the tender was invalid and falls to be reviewed and set aside.

Just and equitable remedy

[138] Once a ground of review under PAJA has been established and the impugned decision is set aside, the consequences of the declaration of unlawfulness must then be dealt with in a just and equitable manner in terms of s172(1)(b).

[139] Section 8 of PAJA also gives detailed legislative content to the Constitution's 'just and equitable' remedy. The remedies provided by s8 are:

'The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—

(a) directing the administrator—

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and—

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases—

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.'

[140] The Court naturally has a judicial discretion to decide just and equitable relief post its declaration of invalidity of the SABC's decision to award the tender to Mafoko. The default position is that such an order has retrospective effect, in accordance with the doctrine of objective constitutional invalidity.[40]

[141] In the matter of *Steenkamp NO v Provincial Tender Board, Eastern Cape*,[41] the Constitutional Court held that in each case, the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in light of the facts, the implicated constitutional principles, if any, and the controlling law. The facts of the case will dictate the direction.[42]

[142] The facts of the matter *in casu* are unique in that the tender was issued in June 2017 and the application to have the impugned decision set aside commenced in 2018. Litigation ensued soon thereafter and the matter grew substantially when other parties were joined. This was whilst the SABC sought the Court's permission to continue receiving the necessary security services. This Court is aware that '(n)ot every slip in the administration of tenders is necessarily to be visited by judicial sanction" and "considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside an administrative act or not.'[43]

[143] The Constitutional Court in the matter of *Gijima*[44] held that:

'…under section 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…'[45] [my emphasis]

[144] In terms of the proclamations applicable to the matter *in casu*, the President of the Republic of South Africa gave the SIU wide powers to entrench the Rule of Law and to hold those who have broken the law accountable and to recover losses if there are any losses.

---

[40] See *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* 2015 (5) SA 370 (CC) paras 20 and 32; *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 27.

[41] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

[42] Ibid para 29.

[43] See *Chief Executive Officer, South African Social Security Agency, And Others v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) at para [29] page 225C. With Reference to *Moseme Road Construction CC And Others v King Civil Engineering Contractors (Pty) Ltd And Another* 2010 (4) SA 359 (SCA) at para [21], page 367C and *Oudekraal Estates (Pty) Ltd v City Of Cape Town And Others* 2004 (6) Sa 222 (SCA) at para [36].

[44] *Gijima* (note 2 above).

[45] Ibid para 53.

[145] The SIU does not seek that Mafoko must be taken out of pocket, the SIU requests that Mafoko must pay back the profits which have arisen out of the unlawful contract. Mafoko argues it is an innocent tenderer and as a result it should not be made to forego the profits made.

[146] The contract in this matter is not a negligible amount. It amounts to almost 185 million rands. The estimated profits by Mafoko are in the region of R18 million from the inception of the contract towards the end of the contract. The only way for the Court to know how much the estimated profits would be from the inception of the contract to the end of the contract, is to look into the affairs of Mafoko.

[147] In the matter of *Allpay*[46] the Constitutional Court held:

'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…'[47]

[148] The argument relating to innocent tenderers has failed on at least two occasions before this division.

[149] In the matter of *Mining Qualifications Authority,*[48] the question of forfeiture was controversial. The principle laid down in *Allpay*,[49] that an innocent tenderer should not benefit from the proceeds of an invalid contract, was applied by Sutherland J (as he then was). The Court held that:

'…taking the circumstances under which the respondent came to be awarded the tender, no factor is apparent why it should retain any profit made by its efforts. In my view it unnecessary that a clear case of complicity is proven; it is enough that the award is tainted by irregularity. Were it otherwise, the plea of an innocent tenderer would as 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.'[50] [my emphasis]

[46] *Allpay* (note 1 above).
[47] Ibid para 67.
[48] *Mining Qualifications Authority* (note 4 above).
[49] *Allpay* (note 1 above).
[50] *Mining Qualifications Authority* (note 4 above) para 41.

[150] The Court in *Mining Qualifications Authority*[51] ordered that the litigant that had unlawfully benefitted from a contract had to submit a statement and debatement of account in respect of the tender to determine the sum of profits, if any, derived by that litigant.

[151] The matter of *Mining Qualifications*[52] was followed by the full bench of this division in the matter of *Vision View Productions.*[53] In respect to the innocent tenderer argument, the Court stated:

'…The Court *a quo* found that the respondents could not plead ignorance as an excuse or a valid defence... It criticised the respondent for not appraising itself with tender regulations associated with procurement from an organ of state. However, although the Court *a quo* found that the irregularities were brazen, it found that the breach lay primarily at the door of the SABC, its management executive, and oversight structures. It found that there was no evidence that the respondent was corrupt or opportunistic and was, in effect, an innocent party.'[54] [my emphasis]

[152] The Court in *Vision View Productions*[55] ordered that the innocent tenderer only pay profits back. The Court held:

'In order to assess what is just and equitable, a Court should have regard to various factors involved in the award of the contract, the nature of the irregularity and the role of the respective parties. The just and equitable inquiry is multi-dimensional. A just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between.'[56]

And further:

'In the context of public-procurement matters, priority should be given to the public good. The primacy of the public interest must be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. Consequently, the inquiry is not one-dimensional, but has a broader range.'[57] [my emphasis]

[153] The Court in *Vision View Productions*[58] followed the decision in *All Pay*[59] and found that:

---

[51] Ibid.
[52] Ibid.
[53] *Vision View Productions* (note 5 above).
[54] Ibid para 50.
[55] Ibid.
[56] Ibid para 60.
[57] Ibid para 61.
[58] Ibid.
[59] *Allpay* (note 1 above).

'… In determining an appropriate order, the public interest must be paramount. Further, while a party in the position of the respondent should not suffer a loss, it should also not profit at the expense of the public purse.'[60] [my emphasis]

The Court went on further to state that:

'In our view, the public interest demands that the public purse should not be depleted.'[61]

'In our view, a remedial order that permits a full retention of profit should be the exception rather than the rule, and must be justifiable on the facts.'[62] [my emphasis]

[154] There are no exceptional circumstances in the matter *in casu*. Although Mafoko had contracted previously with the SABC, was an innocent party and had performed substantially at the time this matter was heard, this is still a matter where public procurement is involved. In instances of this nature the public interest must be paramount and must be taken into account. Mafoko's interests cannot outweigh the priority to be given to the public good. Although Mafoko should not suffer a loss, it should also not profit at the expense of the public purse.

[155] Applying the decision of *Allpay*[63] and *Vision View Productions*[64] to the matter *in casu* and due to the fact that this Court has made a finding that the contract is unlawful, this Court orders that Mafoko has no entitlement to keep the profits. To preserve Mafoko's full rights under the contract, this Court would be diverging from the established principles laid down in the Constitutional Court which have been applied in this division.

Costs

[156] It is trite law that a Court enjoys an unfettered discretion in making an order as to costs.

[157] Consideration should be given to the conduct of the parties in relation to the litigation in order to determine an appropriate order as to costs. A party must pay such costs as have been unnecessarily incurred through their failure to take proper steps or through taking unnecessary steps. Furthermore, it is an accepted legal principle that costs ordinarily follow the result.

---

[60] *Vision View Productions* (note 5 above) para 71.
[61] Ibid para 72.
[62] Ibid para 73.
[63] *Allpay* (note 1 above).
[64] *Vision View Productions* (note 5 above).

[158] Mjayeli was not malicious in launching these proceedings and highlighted the impugned decision of the SABC which has resulted in the decision of the SABC being reviewed and set aside, however, Mjayeli is not entitled to costs as it abandoned the review and failed to follow through with an undertaking to file supplementary affidavits or to prosecute this matter.

[159] The SABC did not bring an application for a self-review to set aside its own award. The SABC only filed an answering affidavit with a counter application for self-review on 23 June 2021, exactly two years after the SIU issued its report. The SABC offers no explanation of any kind for sitting around for two years after the SIU report was available. Organs of State must lead by example.

[160] Mafoko argued it pursued this application to protect and vindicate its constitutional entitlement to a just and equitable remedy and that even if the SIU succeeds on the merits of the review, it should not be made to pay the SIU's legal costs from the time when it filed its heads of argument and stating that it would abide by the decision of the court. This is late in the proceedings. Had it done so earlier, possibly Mafoko could have been excused from paying costs, however, to concede the merits on the day when the matter is being heard unfortunately attracts a cost order.

[161] As regards the interim board members, even though they were joined later in the proceedings, they were entitled to. Taking into consideration the matter of *Biowatch Trust v Registrar Genetic Resources and Others*,[65] this Court will not make a cost order against the interim board members.

Order

[162] In the premises the following order is made:

1. That the decision of the first respondent of 30 June 2017 to award a tender to the second respondent alternatively, and/or the third respondent further alternatively, and/or the third respondent is reviewed and set aside.
2. That the second respondent, alternatively the third respondent, further alternatively the fourth respondent be ordered to:

[65] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

2.1 File with this Court, within 30 days of the Court order, an audited statement of the expenses incurred in the performance of its obligations in terms of the tender (contract), the income received and the net profit it would have earned at the expiry of the contract.

2.2 The SABC must within 60 days thereafter obtain an independent audited verification with the above Honourable Court.

2.3 The Court will thereafter determine the amount of profits to be paid back by Mafoko to the SABC or the SIU.

3. That the time period provided for in Rule 6(5)(d) of the Uniform Rules of Court for which the second applicant requests the respondent's respective notices of intention to oppose and the answering affidavits be dispensed with.

4. In respect to the first, second, third and fourth respondents, costs will follow the result. In respect to the fifth to the eighth respondents no order will be made as to costs.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to Caselines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 10 October 2023

Appearances:

On behalf of the second applicant:	Adv. T Moretlwe
	Adv. Z. Matondo
Instructed by:	WERKSMANS ATTORNEYS
On behalf of the first respondent:	Adv. T.J Machaba SC
Instructed by:	Mncedisi Ndlovu Sedumedi Attorneys
On behalf of the second to fourth respondents:	Adv. H Maenetjie SC
	Adv. P.J Daniell
Instructed by:	Victor Nkhwashu Attorneys Inc
On behalf of the fifth, sixth, seventh and eighth respondents	Adv. M.M. Le Roux
Instructed by:	Malatji & Co Attorneys