



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

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The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others
(590/2024) [2025] ZASCA 179 (28 November 2025)

Today, the Supreme Court of Appeal (SCA) upheld an appeal against the judgment of the Gauteng Division of the High Court, Johannesburg (the high court).

In June 2017, the South African Broadcasting Corporation Soc Ltd's (the SABC's) interim board awarded a security services tender to the first appellant, Mafoko Security Patrols (Pty) Ltd (Mafoko), despite internal recommendations favouring the first respondent, Mjayeli Security (Pty) Ltd (Mjayeli) (which achieved a higher score). Mjayeli launched review proceedings in December 2017, and in May 2018, the high court ordered that Mafoko continue rendering services pending an investigation by the Special Investigation Unit (SIU).

The SIU, appointed by presidential proclamation, reported in 2019 that the tender was unlawful. The SIU then joined as a party to the review proceedings. It sought a 'disgorgement' of Mafoko's profits. The high court found the award of the tender invalid, set it aside, and ordered Mafoko to repay its profits, after making a principle disclosure, notwithstanding Mafoko's apparent blamelessness. Mafoko appealed against this remedial order.

The issue before the SCA was whether the high court erred in law by reason of its interpretation of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (*Allpay II*). The high court understood *Allpay II* to lay down a principle that an innocent tenderer may not retain a profit from the award of a tender found to be unlawful.

The SCA held that the high court had misunderstood *Allpay II*. It did not require adherence to a principle of 'no loss, but no gain' in fashioning a just and equitable remedy. The high court

thus made a material error of law in the exercise of its discretion to make a just and equitable order. The SCA, under the holding in *Trencon*, set aside the high court's remedy and did so.

The SCA found that the high court laboured under an error of law derived from its adherence to the principle of no loss, but no gain. This adherence pervaded the reasoning of the high court and resulted in the following errors. First, that the award of the tender is found to be unlawful does not oust from consideration whether a blameless tenderer that is required to continue to render a service to the state cannot enjoy any profit. Second, private gain is not, for all purposes, opposed to the public good. It may be a means to securing the public good in the context of public procurement. Third, and in consequence, the paramountcy of the public good does not exclude the possibility that the recognition of a profit may be warranted.

The record did not permit the SCA to determine a just equitable remedy. The matter was accordingly remitted for reconsideration.

The SCA set aside the high court's order and remitted the matter for determination of a just and equitable remedy under s 172(1)(a) and (b) of the Constitution, allowing evidence from the parties as the high court considers warranted and inviting further submissions from the parties. The SIU was ordered to pay the costs of the appeal, including costs of two counsel, where so employed, while the high court's costs were reserved for later determination.

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