



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case No:375/2024 & 419/2024

In the matter between

**CALEDON RIVER PROPERTIES (PTY) LTD
T/A MAGWA CONSTRUCTION
PROFTEAM CC**

**FIRST APPLICANT
SECOND APPLICANT**

and

**THE SPECIAL INVESTIGATING UNIT
THE NATIONAL DEPARTMENT OF PUBLIC WORKS
AND INFRASTRUCTURE**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *Caledon River Properties (Pty) Ltd t/a Magwa Construction and Another v Special Investigating Unit and Another* (375 & 419/2024) [2026] ZASCA 05 (16 January 2026)

Coram: MATOJANE, MOLEFE and COPPIN JJA and BASSON and NORMAN AJJA

Heard: 21 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 11h00 on 16 January 2026.

Summary: Constitutional law – reconsideration application – s 17(2)(f) of the Superior Courts Act 10 of 2013 – refusal of leave to appeal – procurement irregularities – contract declared invalid – just and equitable remedy under s 172(1)(b) of the Constitution – nature of the discretion – whether contractors entitled to profit – appropriateness of remedy where contractors are not completely blameless.

ORDER

On application for reconsideration: referred in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013:

- 1 The application for reconsideration of the decision refusing special leave to appeal is dismissed.
- 2 The applicants are ordered to pay the first respondent's costs, including the costs of two counsel where so employed.

JUDGMENT

Matojane JA (Molefe and Coppin JJA, Basson and Norman AJJA concurring):

Introduction

[1] This application is brought in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act)¹ for the reconsideration of an order of two judges of this Court refusing a petition for special leave to appeal under s 17(2)(b). The petition was directed against a judgment of the Gauteng Division of the High Court, Pretoria, delivered by Van Nieuwenhuizen and Strijdom AJJ and Mudau J, sitting as a full court. That court dismissed an appeal against an order of the Special Tribunal declaring invalid certain contracts concluded during the COVID-19 national state of disaster and directing repayment of amounts paid in excess of actual expenditure.

[2] In reconsideration proceedings, this Court is required to place itself in the position of the judges who determined the petition and to decide afresh whether the statutory threshold for special leave to appeal has been met. While reasonable

¹ 'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

prospects of success are a necessary requirement, they are not, without more, sufficient. In the absence of special circumstances—such as the raising of a significant legal question or the risk of a grave failure of justice—the application cannot succeed².

[3] The proposed appeal concerns the remedial consequences flowing from a declaration of constitutional invalidity under s 172(1)(a) of the Constitution. The applicants contend that, notwithstanding the invalidity of the contracts, justice and equity require that they be permitted to retain the full contract price, including profit, for the construction of a 40 km border fence at the Beitbridge Border Post. Both the Tribunal and the full court held that the applicants were entitled only to reimbursement of proven and reasonable expenditure.

Factual Background

[4] The material facts are largely common cause. On 15 March 2020, the President declared a national state of disaster under the Disaster Management Act 57 of 2002 (the Disaster Management Act). The following day, the Minister of Public Works and Infrastructure issued a directive in terms of s 27(2)(l) of the Disaster Management Act authorising emergency procurement for border fencing, with priority given to the Beitbridge border post.

[5] On 17 March 2020, officials from the Department of Public Works and Infrastructure (the Department) met the applicants and other contractors on site. Specifications for the fencing were discussed. The applicants, Magwa Construction (Pty) (Magwa) and Profteam CC (Profteam), were selected on the basis that they were already on site performing work under a separate contract relating to the Beitbridge Border Post (the Beitbridge Border Post/RAMP contract). The fencing project was treated as a variation of the existing contract rather than as a new procurement process, with the consequence that no competitive bidding took place as required by section 217(1) of the Constitution.

[6] The applicants were appointed on 18 March 2020 and instructed to commence work immediately. Within days of the appointment, Magwa invoiced and received an

advance payment of R21 819 878.28 and Profteam an advance payment of R1 843 004.92—amounts representing approximately 60 per cent of the respective contract values. These payments were made before any substantial performance had taken place. The necessary deviations were not recorded in accordance with the applicable Treasury Regulations.

[7] Despite the declaration of a hard lockdown on 26 March 2020 and attendant operational difficulties, the applicants proceeded with the work and completed the fence by 20 April 2020. Certificates of practical completion were thereafter issued.

Proceedings in the courts below

[8] The Special Investigating Unit (SIU) instituted proceedings in the Tribunal,³ seeking to review and set aside the appointments of the applicants and recover irregular payments. The applicants ultimately conceded the merits, agreeing to an order in terms of s 172(1)(a) of the Constitution declaring the contracts invalid due to non-compliance with s 217 of the Constitution and the prescribed procurement procedures in terms of Treasury Regulations 16A.6.1 and 16A.6.4, and Regulation 11 of the Disaster Management Act regulations.

[9] In determining what relief was just and equitable, the Tribunal treated the matter as one of legal principle and did not engage with the extensive witness statements and expert reports filed by the applicants. It ordered that the applicants be divested of all profits derived from the unlawful contracts and limited their recovery to reasonable expenses, to be determined by way of a debatement of accounts.

[10] On appeal, the full court accepted that the Tribunal erred in failing to engage with the evidential material. It accordingly undertook a detailed analysis of the pleadings, witness statements and expert evidence. After doing so, it exercised the discretion conferred by s 172(1)(b) of the Constitution and reached the same substantive outcome: the applicants were not entitled to retain any profit, but were entitled to reimbursement of reasonable and proven expenditure.

³ A statutory body established in terms of s 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996 ('the SIU Act').

The nature of the discretion under Section 172(1)(b)

[11] The central question is whether the full court properly exercised the discretion vested in it by s 172(1)(b) of the Constitution. That discretion is not mechanical, nor is it circumscribed by rigid rules. As explained in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd (Trencon)*,⁴ it is a discretion in the true sense, requiring a value-laden judgment informed by all the relevant facts and by constitutional principle. The court is enjoined to fashion a remedy that is just and equitable in the particular circumstances, striking a careful balance between correcting constitutional invalidity, vindicating the rule of law, and avoiding outcomes that would themselves be unjust.

[12] The exercise of such a discretion necessarily admits of more than one permissible outcome. For that reason, appellate interference is tightly constrained. As reaffirmed in *Special Investigating Unit v Phomella Property Investments (Pty) Ltd*,⁵ an appellate court may not substitute its own view merely because it would have exercised the discretion differently. Interference is justified only where the discretion was not exercised judicially, was influenced by a material misdirection on the law or the facts, or produced a result that no reasonable court, properly directing itself, could have reached. This standard reflects respect for the institutional role of the court of first appeal and recognises that remedial choices under s 172(1)(b) are inherently context-specific.

No vesting right in invalid contracts

[13] The applicants submit that the fence was constructed in accordance with the agreed specifications, that the Department received what it required within the stipulated timeframe, and that no evidence was led to establish financial loss to the State. On that footing, they argue that it would be unjust and inequitable to deny them the full contract price, including profit, and place reliance on *State Information*

⁴ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22, 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

⁵ *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* [2023] ZASCA 45; 2023 (5) SA 601 (SCA) para 11 (*Phomella*).

*Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*⁶ to bolster their submission that the invalidity of a contract does not necessarily deprive a contractor of its profit.

[14] That reliance is misplaced. In *Gijima*, the contractor relinquished pre-existing and otherwise valid rights pursuant to a settlement agreement later declared invalid. Preserving those rights was necessary to avert manifest injustice. In the present matter, the applicants had no pre-existing entitlement to construct the border fence. The project arose from an unlawful procurement process that stood apart from any prior contractual relationship.

[15] The governing principle, restated by the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction*,⁷ is that no party should profit from unlawful conduct. While an innocent tenderer acting in good faith may, in appropriate circumstances, be permitted to retain some benefit, the “no profit, no loss” approach often represents the proper balance between compensating for actual expenditure and vindicating the constitutional requirements of legality and fiscal discipline.

[16] As explained in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency*,⁸ an invalid tender does not give rise to a right to benefit from an unlawful contract. The absence of such a right does not, however, compel a court to strip all benefits in every case. Section 172(1)(b) preserves a discretion to permit retention of benefits where justice and equity so require. Any such retention is not contractual in nature, but a remedial indulgence grounded in constitutional fairness.

[17] The respondents submit that even an innocent tenderer may not be permitted to profit from an unlawful contract and that the applicants should therefore be confined to the recovery of verified expenses. This reflects the so-called “no loss, no gain” principle.

⁶ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) para 54.

⁷ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC) paras 104-105.

⁸ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) para 67.

[18] In *Phomella* and, more recently, in *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others (Mafoko)*,⁹ it was emphasised that the dictum in *Allpay II* does not lay down a rigid rule that excludes the retention of profit.¹⁰ While an innocent tenderer has no accrued right to benefit from an unlawful contract, the Court enjoys a broad discretion to permit the retention of such benefits where justice and equity so demand. As held in *Mafoko*, the public good is not inherently opposed to private gain; indeed, legitimate public procurement relies on the normative benchmark of a competitive return for the service provider.

[19] The applicants cannot be characterised as innocent tenderers. While there is no finding of fraud or corruption, they were experienced participants in public procurement. Profteam acted as principal agent, a role carrying professional obligations to ensure regulatory compliance. The acceptance of advance payments amounting to approximately 60 per cent of the contract value, within days of appointment and before any meaningful performance, occurred in circumstances where the prohibitions contained in the PFMA and the Treasury Regulations were well known. The full court was entitled to regard this conduct as indicative of at least acquiescence in an irregular process. To accept such payment on the mere assurance of 'offices closing', when electronic banking remained functional during lockdowns, constitutes, at best, wilful blindness.

[20] This conduct conceivably places the applicants on the culpable end of the spectrum. Unlike a tenderer who is merely the passive recipient of an unlawful state decision, the applicants were active participants in a process that bypassed fundamental procurement safeguards. Consequently, the normative benchmark of a competitive commercial return, which protects the innocent tenderer, could reasonably be found not to apply here. Permitting the applicants to retain profits derived from a process that it helped distort could justifiably be considered to be contrary to the public interest and the principle of legality. Justice and equity in such instances require that the applicants be denied any benefits derived from the unlawful contract.

⁹ *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others* (590/2024) [2025] ZASCA 179 (28 November 2025).

¹⁰ *Ibid* para 11.

Advance payment and claimed innocence

[21] Counsel for the applicants argues that the full court erred in finding a 'lack of innocence' or equating them to 'ostriches with heads in the sand' without oral evidence. They contend that the advance payment was merely a 'practical solution' to the looming lockdown, not evidence of corruption. The full court was entitled to infer, from the objective and common cause facts—specifically, a multimillion-rand tender award in 24 hours without bidding, followed by a massive upfront payment for work not done that the applicants were participants in the irregularity. A 'practical solution' to a lockdown does not override statutory prohibitions on the use of public funds. To justify interference by this Court, the applicants had to show that the full court did not exercise its discretion judicially. They did not.

Expert evidence and urgency

[22] The criticism that the full court ignored expert evidence on pricing is unfounded. The relevance of that evidence depended on whether the applicants had demonstrated a misdirection in the exercise of discretion. They did not. Although the State of Disaster created operational urgency, it did not displace the procurement requirements applicable to government expenditure. The urgency of erecting a fence does not justify paying R21 819 878.28 upfront for work not yet done, without safeguards, for work not yet performed.

Conclusion

[23] The applicants have failed to demonstrate any basis for this Court to interfere with the order of the full court. The debatement of accounts strikes an appropriate balance: it prevents unjust enrichment of the State by ensuring reimbursement of proven costs, while upholding the rule of law by denying profit derived from an unconstitutional process. Merely because this Court disagrees with the permissible option chosen by the full court does not justify this Court's interference.¹¹

[24] The discretion under s 172(1)(b) was exercised judicially, on correct principle, and with proper regard to all relevant considerations. No grave failure of justice has

¹¹ *Phomella* para 11.

been shown, and there are no reasonable prospects that another court would reach a different conclusion.

Order

[25] The following order is made:

- 1 The application for reconsideration of the decision refusing special leave to appeal is dismissed.
- 2 The applicants are ordered to pay the first respondent's costs, including the costs of two counsel where so employed.

K E MATOJANE
JUDGE OF APPEAL

Appearances

For the first appellant:

GJ Scheepers SC and KK Maputla

Instructed by:

Louw le Roux Inc, Pretoria

Webbers Attorneys, Bloemfontein

For the second appellant:

EL Theron SC

Instructed by:

Alant Gell & Martin Inc, Pretoria

McIntyre Van Der Post Inc, Bloemfontein.

For the first and second respondent:

I Semanya SC and N Mayet SC

Instructed by:

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