



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 472/2023

In the matters between:

TULLIS LAUNDRY SOLUTIONS AFRICA (PTY) LTD

APPELLANT

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, WESTERN CAPE

FIRST RESPONDENT

AMLAZI EQUIPMENT SERVICES (PTY) LTD

SECOND RESPONDENT

And

Case no: 634/2025

MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, WESTERN CAPE

APPELLANT

and

TULLIS LAUNDRY SOLUTIONS AFRICA (PTY) LTD

FIRST RESPONDENT

AMLAZI EQUIPMENT SERVICES (PTY) LTD

SECOND RESPONDENT

Neutral citation: *Tullis Laundry Solutions Africa (Pty) Ltd v MEC for Health, Western Cape and Another (472/2023); MEC for Health, Western Cape v Tullis Laundry Solutions Africa (Pty) Ltd and Another (634/2025) [2026] ZASCA 129 (29 September 2026)*

Coram: MAKGOKA, HUGHES and MEYER JJA and STEYN and MJALI AJJA

Heard: 4 May 2026

Delivered: 29 September 2026

Judgments: Makgoka and Meyer JJA (majority): [1] to [54]
Steyn AJA (dissent): [55] to [73]

Summary: Interpretation – court order – unlawfully awarded contract – suspension of invalidity to preserve delivery of essential service rather than a license to complete an unlawful contract.

Administrative law – review – just and equitable remedy under s 172(1)(b) of the Constitution

ORDER

On appeal from: Western Cape Division of the High Court (Ndita J, sitting as court of first instance):

In case number 472/2023:

1. The appeal is upheld to the extent set out below, with costs, including those of two counsel.
2. Paragraph 2 of the order of the high court is deleted, and paragraph 3 is renumbered paragraph 2.
3. The cross-appeal is dismissed with costs, including those of two counsel.

On appeal from: Western Cape Division of the High Court (Erasmus and Nziweni JJ, and Van den Berg AJ, sitting as court of appeal):

In case number 634/2025:

1. The appeal is upheld.
2. The appellant is to pay the first respondent's costs, including those of two counsel.
3. The order of the full court is set aside and replaced with the following:
 - '1. The appeal is upheld to the extent set out below, with the appellant to pay the first respondent's costs, including those of two counsel.'
 2. Paragraphs 3, 4 and 5 of the order of the high court is deleted, and replaced with the following paragraph 3:

'The order of invalidity in paragraphs 1 and 2 above does not have the effect of divesting the second respondent of any rights to which it would have been entitled under the contract referred to in paragraph 2 above.'
 3. Paragraph 6 is renumbered paragraph 4.'

JUDGMENT

Makgoka and Meyer JJA (Hughes JA and Mjali AJA concurring):

Introduction

[1] These are two appeals and a cross-appeal arising from the same procurement process initiated by the Western Cape Department of Health (the Department) in July 2020. In the first appeal, Tullis Laundry Solutions Africa (Pty) Limited (Tullis), is the appellant, and the Member of the Executive Council for Health, Western Cape (MEC), the cross-appellant. It is directed against different parts of the order of the Western Cape Division of the High Court (the High Court). In the second appeal, the MEC challenges the order of the full court of that division (the full court), which dismissed an appeal against an order of a single judge granting an application for judicial review. The second respondent in each appeal, Amlazi Equipment Services (Pty) Limited (Amlazi), was the successful bidder to whom the Department awarded the tender. Amlazi did not participate in any of the proceedings in the High Court, nor does it participate in these appeals.

Factual background

[2] On 16 July 2020, the Department issued an invitation to tender for essential laundry services under Bid Number WCGHGC0232/2020. The tender aimed to modernise the Tygerberg Central Laundry at Tygerberg Hospital, the country's second-largest hospital, over a three-year period. It included the supply, delivery, installation, testing, and commissioning of new laundry equipment, along with an initial one-year maintenance and guarantee period, followed by a further five-year warranty and maintenance plan. The tender was crucial for replacing most of the outdated laundry equipment nearing the end of its lifespan with advanced technology, as maintenance costs are the primary concern for ageing machines. The tender was vital to the operation of the Tygerberg Central Laundry, which processes laundry for 38 health institutions.

[3] The preamble to the tender advised prospective bidders that:

'This bid will be evaluated based on the bidder's proven ability to provide the service [which includes] infrastructure, technical and operational capacity, as well as the 90/10 Preference Procurement Points System outlined in the bid documents.'

Several companies, including Tullis and Amlazi, submitted bids to the Department. Notably, Amlazi's bid was approximately R27 million higher than Tullis'. Both Amlazi and Tullis held the same B-BBEE status: Level 2. On 15 February 2021, the Department informed Tullis that its bid had been unsuccessful and that Amlazi was successful, despite Amlazi's bid being significantly more expensive.

[4] In response, Tullis sent a letter to the Department the same day, requesting reasons for awarding the tender to Amlazi. It invoked public interest, Tullis' own interests, the right to administrative justice, and s 217(1) of the Constitution. The letter objected to the result, contested the award of the tender, reserved Tullis' entitlement to have it reviewed, and preserved its other remedies. The letter concluded by requesting an urgent response. However, Tullis received no response from the Department.

[5] On 23 February 2021, Tullis' attorneys sent a letter to the Department. The letter reiterated Tullis' intention to institute review proceedings, subject to the availability of internal remedies. It specifically requested the Department to urgently inform Tullis of any objection or appeal procedures or other internal remedies available to Tullis, noting the Department's failure to identify any such recourse in its notice of award. The letter concluded by requesting the Department to provide an undertaking by 24 February 2021 that the award will not be implemented pending Tullis' intended review.

[6] On 24 February 2021, the Department responded with a three-line email stating that the requested documents could be obtained by application under the Promotion of Access to Information Act 2 of 2000. The communication provided no reasons, identified no internal remedy, and offered no undertaking.

Litigation history

In the high court

[7] On 23 March 2021, Tullis initiated a semi-urgent application for judicial review under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). On 12 April 2021, the MEC delivered the record of decision in terms of rule 53 of the Uniform Rules of Court. Tullis filed its supplementary founding affidavit and amended notice of motion on 21 April 2021, and the MEC filed her answering affidavit on 7 June 2021. As mentioned, Amlazi did not oppose the application. This was despite being placed on notice by Tullis' attorneys.

[8] On 5 October 2021, the high court (per Nuku J) delivered judgment in favour of Tullis. This was just under eight months after the Department first communicated its decision to Tullis. The high court held that the evaluation of the competing bids was procedurally flawed because functionality was used in the evaluation without complying with Regulation 5 of the Preferential Procurement Regulations and without clear criteria for measuring it. Accordingly, the high court concluded that the MEC's decision to award the tender to Amlazi offended s 217 of the Constitution and was thus invalid. Regarding a just and equitable remedy, the court noted that the extent to which Amlazi had implemented the contract with the MEC had not been placed before it. The high court considered that the bid concerned an essential service that should not be disrupted, lest dire consequences follow for the public. In the circumstances, the high court deemed it appropriate to suspend the order of invalidity until the conclusion of a fresh procurement.

[9] The high court accordingly made an order: (a) reviewing and setting aside the MEC's decision to award the bid to Amlazi (the invalidity order); (b) remitting the procurement process to the MEC to commence afresh 'and to be concluded without unreasonable delay' (the recommencement order); (c) for the MEC to comply with Regulation 5 of the Preferential Procurement Regulations if the procurement process was to be evaluated on the basis of functionality (the functionality order); (d) suspending the declaration of the contract's invalidity until the final conclusion of the fresh procurement process, to ensure the continuous provision of service (the suspension of invalidity order).

[10] On 21 October 2021, Tullis learned through its own investigations that the MEC, despite Nuku J's order, was accelerating the installation of equipment procured from Amlazi under the tender, even though the tender had been declared invalid. Thereafter, on 25 October 2021, the MEC filed an application for leave to appeal against that order. That application automatically suspended Nuku J's order by operation of s 18(1) of the Superior Courts Act.¹

[11] Having failed to secure an undertaking from the MEC not to permit further installation of equipment, Tullis launched a further application. In it, it sought among other relief, that pending the final determination of the MEC's application for leave to appeal against the high court's order, the MEC be: (a) directed to remove the new equipment which Amlazi installed at the Tygerberg Central Laundry for the purposes of the tender, subsequent to the court's decision dated 5 October 2021; (b) interdicted from: (i) permitting the further removal of existing equipment and the installation of new equipment that is the subject of the tender; and (ii) from procuring or permitting the installation of any of the remaining equipment that is the subject of the tender. Tullis' application was heard together with the MEC's application for leave to appeal. On 14 March 2022, Nuku J dismissed both applications. The high court concluded that the MEC did not act maliciously in permitting Amlazi to replace the old equipment with the new equipment.

[12] By May 2022, six months since the high court's order and approximately eight weeks since the dismissal of the MEC's application for leave to appeal, the MEC had not commenced afresh the procurement process as ordered by the high court. On 9 May 2022, Tullis' attorneys wrote a letter to the State Attorney calling upon the MEC to commence the process afresh. In response, the State Attorney stated that the MEC understood that the court did not require the Department to advertise the first and second washing lines, only the third. The MEC indicated she aimed to have the tender for the third washing line advertised on 24 June 2022.

¹ Superior Courts Act 10 of 2013. Section 18(1) reads as follows:

'Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or an appeal, is suspended pending the decision of the application or appeal.'

Contempt proceedings

[13] Tullis launched an application to hold the MEC in contempt of court, alternatively, seeking declaratory relief regarding the interpretation of Nuku J's order. The application came before Ndita J who dismissed the application. She, however, declared that the earlier order concerns the entire scope of works provided for in the bid, and added the following rider to the declarator:

'Due to the fact that implementing the Order as set out in 49.1 will have no practical effect as the first and second washing lines have already been installed, the first respondent is directed to commence afresh with the procurement process in respect of the third washing line within 15 days.'

[14] Ndita J subsequently granted: (a) Tullis leave to appeal against the above order, and (b) the MEC leave to cross-appeal against the declarator that the main order concerns the entire scope of works provided for in the bid. Both the leave and the cross-appeal were granted to the full court. Subsequently, this Court also granted the MEC leave to appeal against the main order, to the full court.

In the full court

[15] Before the full court, additional evidence was tendered by agreement, the essence of which was that Amlazi has successfully installed all three laundry lines. In its judgment, the full court held that there was no need to replace the three lines for approximately 15 to 20 years. It also declined to consider Tullis' request that compensation for its loss be considered, as the issue was not canvassed on the papers. The full court accordingly dismissed the MEC's appeal with costs.

In this Court

[16] On 24 April 2025, this Court granted the MEC special leave to appeal against the full court's order. The order granting special leave to this Court limited the appeal to:

'Paragraph 1 of the order of the Full Court dated 21 January 2025 but only insofar as it confirmed PARAGRAPHS 3, 4, 5 and 6 of the order of Nuku J dated 05 OCTOBER 2021, and PARAGRAPH 2 of the order of the Full Court.'

Tullis' appeal and the MEC's cross-appeal against Ndita J's order

[17] Tullis' appeal is against paragraph 2 of Ndita J's order, which limited the fresh procurement process to the third washing line because the first and second washing lines had already been installed. Tullis and the MEC agree that neither party sought the relief and that Ndita J was not competent to grant the revised order *mero motu*. The MEC, correctly in our view, did not oppose Tullis' appeal against the revised order. Furthermore, Tullis did not persist with its appeal in respect of the dismissal of the application for contempt of court.

[18] In this Court, the MEC now acknowledged that the procurement process and its outcome were unlawful. However, she argues that, properly interpreted, the suspension of the declaration of invalidity of the contract permitted her to continue implementing the contract lawfully. She therefore cross-appeals the interpretation set out in paragraph 1 of Ndita J's order. Tullis, on the other hand, argues that the suspension permitted the MEC, on a temporary basis and only as an interim measure, to provide clean linen services using the laundry equipment that was operational at that stage until the re-run procurement process was completed. It did not authorise her to fully implement the invalidated procurement process as she did. The cross-appeal, therefore, concerns the proper interpretation of Nuku J's order, which reads as follows:

- '1. The decision to award the bid to Amlazi is declared unlawful and is reviewed and set aside;
2. The contract concluded between the MEC and Amlazi pursuant to the award of the bid is declared invalid;
3. The matter is remitted to the MEC for the procurement process to commence afresh and to be concluded without unreasonable delay;
4. The procurement process, if it is to be evaluated on the basis of functionality, must comply with the provisions of Regulation 5 of the Preferential Procurement Regulations;
5. In order to ensure the continuous provision of service, the declaration of invalidity of the contract referred to in subparagraph [2] is suspended until the final conclusion procurement process referred to in subparagraph [3] above as well as the implementation of a contract arising therefrom;
6. The MEC is ordered to pay the costs, such costs to include the costs of two counsel.'

[19] In *HLB International (South Africa) v MWRK Accountants and Consultants*,² this Court restated the correct approach to interpreting court orders,³ as follows:

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order the court’s intention is to be ascertained primarily from the language of the order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.” The manifest purpose of the order is to be determined by also having regard to the relevant background facts which culminated in it being made.’ (Citations omitted.)

[20] The language of Nuku J’s order is clear and unambiguous. Reading paragraphs 3, 4 and 5 of the order, in context with the reasons underpinning it, leaves no doubt about their manifest purpose. The high court sought to ensure continuity of an essential public service while simultaneously vindicating the lawfulness of the procurement process going forward. Thus, the order’s key objective was to preserve delivery of an essential service, not to allow Amlazi to fully implement the unlawful contract. The order, therefore, set out a two-track mechanism: the unlawful contract could continue temporarily to prevent disruption of essential hospital laundry services, but in the meantime a fresh, lawful tender process had to be pursued ‘without unreasonable delay’ to replace the contract between the Department and Amlazi.

[21] The suspension of invalidity was expressly conditional. It was a means to an end; the implementation of a new contract arising from a proper and valid procurement process. In contrast, the recommencement order, read with the functionality condition, was the core corrective remedy. It was the route by which administrative justice and the rule of law would be restored. Properly construed, the suspension order did not stand alone as a license to continue implementing an unlawful contract until discharged; it was

² *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* [2022] ZASCA 52; 2022 (5) SA 373 (SCA) paras 26 – 27, quoting from *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 13 as endorsed by the Constitutional Court in *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) para 29.

³ Also see *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) para 29 and *Lutchman NO and Others v African Global Holdings (Pty) Ltd and Others* [2022] ZASCA 66; 2022 (4) SA 529 (SCA); [2022] 3 All SA 35 (SCA) para 44.

tethered to, and indeed premised on, the expeditious fulfilment of the recommencement order. In other words, the suspension of invalidity cannot be severed from the context and purpose manifest by the recommencement order. The former allowed ongoing performance pending the outcome of the latter, not in lieu of it.

[22] The MEC's argument isolates paragraph 5 and misconstrues it, thereby nullifying the very remedy Nuku J intended. Under the MEC's reading, once the new washing equipment was fully installed under the Amlazi contract, it would be futile and wasteful to restart the procurement for the same equipment. Hence, the MEC, in effect, contends that the order must implicitly have allowed for that scenario, or else Nuku J's remedy would be ineffectual.

[23] Nuku J explicitly noted that the court had not been presented with evidence of the extent of Amlazi's implementation of the contract. Consequently, he was not informed of the progress when he formulated the remedy. However, the evidence before him showed that the invitation to bid required the supply, delivery, installation, testing, commissioning, and training of the laundry equipment over a three-year period commencing in 2020 and ending in 2023. Without his knowledge, the purchase orders had been placed on 21 July 2021; the first washing line was installed on 22 November 2021; and the second was scheduled for installation in December 2021. The suspension order did not envisage or permit the MEC to accelerate the implementation of an unlawful contract. The phrases 'the procurement process to commence afresh' and 'to be concluded without unreasonable delay' used in the order compel this interpretation.

[24] Properly interpreted, the suspension of invalidity preserved continuity pending the expeditious ('without delay') fulfilment of the fresh procurement process; it did not empower the MEC to render the invalidity order nugatory by completing implementation and then asserting futility. To conclude: the suspension order was a conditional, temporary measure to preserve an essential service rather than a license to complete an unlawful contract. The MEC's cross-appeal must therefore be dismissed.

MEC's appeal against the full court order

[25] In the alternative to her primary claim, the MEC asks this Court to fashion a new remedy markedly different from the just and equitable remedy granted by Nuku J based on the further evidence presented to the full court on appeal. She seeks an order compelling her to initiate a maintenance-only tender rather than full procurement of all three lines. She thus seeks a deviation from the default corrective principle to correct or reverse the consequences of illegality when they can no longer be prevented, and to avoid entrenching an unlawfully obtained incumbency.⁴ The full court declined to interfere with the high court's discretion in granting just and equitable relief.

Discussion

[26] When a high court reviews and sets aside a public tender based on unlawfulness, it acts pursuant to s 172(1)(a) of the Constitution and s 8 of PAJA. Section 172(1)(a) mandates that a court *must* declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency. Once a declaration of invalidity is made, the court shifts to its remedial jurisdiction under s 172(1)(b) of the Constitution, which empowers it to make any order that is 'just and equitable', including an order limiting the retrospective effect of the declaration of invalidity; or suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. The discretion to grant a just and equitable remedy under s 172(1)(b) is one in the true or narrow sense. A true discretion exists where the lower court has a choice between a range of permissible options. Consequently, a court of appeal cannot alter the remedy merely because it would have exercised the discretion differently or chosen an alternative formulation.⁵

[27] The Constitutional Court in *Allpay v Chief Executive Officer of the South African Social Security Agency (No 2)* (*AllPay 2*)⁶ emphasised that a 'just and equitable' remedy in public procurement must balance the public interest, the preservation of essential

⁴ *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) (*Allpay 2*) para 30.

⁵ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) paras 82-90.

⁶ *Allpay 2* para 32.

services, and the vindication of the principle of legality. In this case, the high court correctly assessed the facts, properly weighed the essential nature of the Tygerberg Central Laundry services and the need to provide a continuous essential service without disruption against the R27 million financial discrepancy and the need to vindicate the unlawfulness of the procurement process and its consequences, and judiciously structured the suspension.

[28] Consequently, the full court's reasoning cannot be faulted. But that is not the end of the enquiry, and it is here that we part ways with the second judgment written by Steyn AJA, which is premised on two grounds. The first is that an appeal should be determined on the facts as they stood when the order appealed against was made (the original facts principle). The second is that this Court can depart from the high court's order and leave the unlawful contract intact only in exceptional circumstances (the exceptional circumstances threshold). We consider each in turn.

[29] The original facts principle is uncontroversial. However, it yields to the court's power to consider a just and equitable remedy in terms of s 172(1)(b) of the Constitution, particularly where the factual position has changed since the order of the court of first instance. This is often the case in procurement cases. As this Court pointed out in *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another (Moseme)*,⁷ although supervening events cannot affect the answer to the question of whether the order granted by the court of first instance was correct at the time it was issued, they might conceivably affect enforceability on the ground of supervening impossibility.⁸

[30] Very recently, the Constitutional Court reinforced this approach in *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy; Natural Justice v Minister of Mineral Resources and Energy (Wild Coast)*.⁹ The case concerned a multinational oil

⁷ *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* [2010] ZASCA 13; 2010 (4) SA 359 (SCA); [2010] 3 All SA 549 (SCA).

⁸ *Ibid* para 17.

⁹ *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others; Natural Justice and Another v Minister of Mineral Resources and Energy and Others* [2026] ZACC 33; 2026 (10) BCLR 1049 (CC) paras 99 and 128.

and gas company's intention to commence a seismic survey along the Wild Coast under the exploration right to seek oil and gas reserves. Environmental rights groups opposed this on various grounds, including a lack of consultation and environmental, spiritual, and cultural concerns. On an application to appeal against the just and equitable remedy fashioned by this Court, the Constitutional Court restated and applied settled principles regarding a court's power under s 172(1)(b) of the Constitution. The Court reiterated that among the factors relevant to the enquiry are 'the passage of time between the original decision and the decision to be made on remittal' and 'practical considerations such as the feasibility of the remedy in light of changed circumstances.'

[31] As to the 'exceptional circumstances' threshold, the second judgment holds that for this Court to deviate from the order of the full court and leave the unlawful contract extant, there must be 'exceptional circumstances'. The second judgment seeks to rely on *Electoral Commission v Mhlope (Mhlope)*¹⁰ and *Black Sash Trust and Another v Minister of Social Developments and Others (Black Sash Trust)*¹¹ to support this proposition. This requires clarification.

[32] *Mhlope* concerned the August 2016 local government elections. The core issue was the Electoral Commission's failure to record physical addresses for millions of registered voters, which violated s 16(3) of the Electoral Act 73 of 1998 (the Electoral Act) and the Constitution. To ensure the elections were held on time, the Court suspended the Electoral Commission's duty under s 16(3) of the Electoral Act to record all available voter addresses on the national common voters' roll for the August 2016 local government elections. This effectively overrode the Electoral Act's strict operation. The Court considered that enforcing the literal text of the Electoral Act would have made it impossible to hold the August 2016 local government elections on time. Thus, in the context of that case, the Constitutional Court held that a court's power to depart from a statutory scheme should be exercised sparingly and only in exceptional circumstances. As Mogoeng CJ emphasised, this was an extraordinary case requiring an extraordinary

¹⁰ *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC).

¹¹ *Black Sash Trust and Another v Minister of Social Developments and Others (Black Sash)* 2026 JDR 2584 (CC).

solution to prevent a constitutional crisis arising from millions of registered voters being unable to exercise their right to vote.¹²

[33] In *Black Sash Trust*, the Constitutional Court had earlier declared the contract between the South African Social Security Agency (SASSA) and Cash Paymaster Services (CPS) for the distribution of social grants invalid. However, SASSA failed to establish a legal alternative before the invalid contract expired on 31 March 2017. If the contract had ended without an alternative service provider in place, millions of vulnerable South Africans would have suddenly lost access to social grants, triggering a humanitarian and constitutional crisis. In exercising its power to grant a just and equitable remedy under s 172(1)(b) of the Constitution, the Constitutional Court extended the lifespan of an already invalid contract to protect the fundamental rights of grant beneficiaries. The Court emphasised that it was compelled to do so under exceptional circumstances arising from the state's failure.

[34] In both cases, the Constitutional Court faced exceptional circumstances that required it to exercise its remedial power in an extraordinary manner to prevent a systemic collapse or a constitutional crisis. However, this does not mean that, in all other cases, exceptional circumstances must be present before a court exercises its remedial power under s 172(1)(b). As the Constitutional Court emphasised in *Wild Coast*, 'courts enjoy a generous discretion to make orders that are just and equitable; this power is bounded only by considerations of justice and equity.'¹³

[35] To be clear, the default position is that, when a court exercises its remedial power under s 172(1)(b), it is unbound and need not find exceptional circumstances. The 'exceptional circumstances' threshold is a distinct sub-category of the remedial power under s 172(1)(b) and applies only where the court is required to prevent a systemic or constitutional crisis, as in both *Mhlope* and *Black Sash*. In all other cases, the elastic and flexible just and equitable balancing test remains the standard. This explains why in *Wild Coast*, and many other cases before it, the Constitutional Court exercised its s 172(1)(b)

¹² Ibid para 137.

¹³ *Wild Coast* para 97.

power without seeking to find ‘exceptional circumstances’. The present case falls within the latter category.

[36] Thus, where an unlawful contract has been fully executed prior to the hearing of an appeal, a court of appeal is empowered to intervene – not to correct a judicial error by the high court – but to formulate a substituted order under s 172(1)(b) that addresses the practical reality of a completed contract. Ordinarily, appeal courts are reluctant to order a retrospective undoing of the works. Reversing completed physical works or services (such as the completed three laundry lines in this instance) is practically impossible and economically wasteful.¹⁴ Consequently, a court of appeal might conclude that varying the remedy to order a fresh tender is practically futile because there is no longer a live contract to tender for. That has nothing to do with the correctness or otherwise of the order of the court of first instance, but rather with, among other considerations, whether it was practical to order a re-evaluation of the tender. For this purpose, the full court admitted additional evidence to assess how far Amlazi had implemented the contract. As mentioned, that evidence revealed that it had successfully installed all three laundry lines.

[37] As this Court observed in *Chairperson: Standing Tender Committee and Others v J’S’SFE Sapela Electronics (Pty) Ltd and Others (Sapela)*,¹⁵ ‘[i]n appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act.’ This Court emphasised that there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.¹⁶ This, the Court said, involves considerations of ‘pragmatism and practicality.’¹⁷

[38] In *Sapela*, the high court had set aside an invalid procurement process. On appeal, because the engineering works were already fully performed, this Court varied the relief to decline setting aside the contract, granting a bare declaration of invalidity instead. In doing so, it held:

¹⁴ See, for example, *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) paras 52-54.

¹⁵ *Chairperson: Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA); [2005] 4 All SA 487 (SCA).

¹⁶ *Ibid* para 28.

¹⁷ *Ibid*.

'In my view the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand. While the court a quo correctly found that the award of each of the three tenders was invalid when made, it appears not to have appreciated that it had a discretion to decline to set aside those awards. It follows that in my view the court a quo erred in making the order it did and this court is free to set aside that order.'¹⁸

[39] Considerations of 'pragmatism and practicality' alluded to in *Sapela* are evident in the Constitutional Court's jurisprudence in *Allpay v South African Social Security Agency (All Pay1)*¹⁹ and in related cases concerning the unlawful award of the national social grants payment tender, which had been declared invalid.²⁰ In *AllPay 2*,²¹ the Constitutional Court recognised that, in exercising its remedial discretion under section 172(1)(b), a court may allow an invalid contract to stand and permit an innocent tenderer to profit from services rendered pursuant to invalid contracts. This was clarified by this Court in *Special Investigating Unit v Phomella Property Investments (Pty) Ltd (Phomella)*²² and in *Mafoke Security Patrols (Pty) Ltd v Mjayeli Security (Pty) Ltd (Mafoke)*,²³ after some decisions had interpreted *Allpay 1* as establishing a principle that innocent tenderers cannot profit from services rendered pursuant to invalid contracts.

[40] Recently, the Constitutional Court had occasion in *Minister of Defence and Military Veterans and Another v Zeal Health Innovations (Pty) Ltd (Zealth Health)*²⁴ to

¹⁸ *Sapela* para 29.

¹⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

²⁰ See *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2015] ZACC 7; 2015 (6) BCLR 653 (CC); *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC); *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC); *South African Social Security Agency v Minister of Social Development* [2018] ZACC 26; 2018 (10) BCLR 1291 (CC); *Black Sash Trust v Minister of Social Development* [2018] ZACC 36; 2018 (12) BCLR 1472 (CC); *Freedom Under Law v Minister of Social Development* [2021] ZACC 5; 2021 (6) BCLR 575 (CC); *RAiN Chartered Accountants Incorporated v South African Social Security Agency* [2021] ZACC 27; 2021 (11) BCLR 1225 (CC); and *Cash Paymaster Services (Pty) Limited v Freedom Under Law NPC* [2022] ZACC 2; 2022 (6) BCLR 661 (CC).

²¹ Footnote 3.

²² *Special Investigating Unit v Phomella Property Investments (Pty) Ltd* [2023] ZASCA 45; 2023 (5) SA 601 (SCA).

²³ *Mafoke Security Patrols (Pty) Ltd v Mjayeli Security (Pty) Ltd* [2025] ZASCA 179.

²⁴ *Minister of Defence and Military Veterans and Another v Zeal Health Innovations (Pty) Ltd*

clarify the exercise of a court's power under s 172(1)(b) of the Constitution in the context of an unlawful contract under procurement law. There, the Department of Defence and Military Veterans (the Defence Department) awarded a tender to Zeal Health Innovations (Pty) Limited (ZHI) in 2015 to provide healthcare services to military veterans under a 'capitation model' (flat monthly payments per registered veteran, regardless of actual usage). Shortly after ZHI began performance, the Defence Department refused to pay ZHI's initial invoices and sought judicial review to declare the procurement process invalid on the basis of budgetary constraints and administrative irregularities. After only two and a half months of performance, ZHI suspended its full suite of services on 12 August 2015. It subsequently sued for outstanding invoices and approximately R73 million in lost profits for the remainder of the contract term.

[41] Referring with approval to this Court's judgments *Phomella*²⁵ and *Mafoko*,²⁶ the Constitutional Court affirmed that the so-called 'no profit, no loss' principle (no benefit from an unlawful contract) is not a general exclusionary rule, but that the benefit from an unlawful contract is subject to judicial scrutiny and fact-dependent. In other words, there is no rigid rule that innocent contractors may never profit from services rendered under invalid contracts. Whether such profit should be allowed depends upon all the circumstances of the case properly considered in the exercise of the court's remedial discretion under section 172(1)(b).²⁷

[42] In the present case, the MEC permitted Amlazi to fully execute the contract under the *bona fide* but mistaken belief that the suspension of invalidity allowed for full implementation.²⁸ This highlights a common administrative misconception: a suspension of invalidity is intended as a temporary buffer to preserve services *while* a fresh, lawful process is expedited; it is not a judicial license to fully exhaust the impugned contract and bypass the remedial order of a fresh procurement process. By allowing Amlazi to fully perform the entire contract, the state effectively rendered the high court's ordered remedy

²⁵ *Special Investigating Unit v Phomella Property Investments (Pty) Ltd* [2023] ZASCA 45; 2023 (5) SA 601 (SCA).

²⁶ *Mafoko Security Patrols (Pty) Ltd v Mjayeli Security (Pty) Ltd* [2025] ZASCA 179.

²⁷ *Zeal Health* above paras 72-73.

²⁸ *AllPay 1*, paras 38-40 and 50-55.

(the fresh procurement process) nugatory. In *Allpay 1*, the Constitutional Court outlined the rationale behind suspending a declaration of invalidity. Such a suspension serves strictly as an interim safeguard to guarantee the uninterrupted delivery of vital public services - such as social grant disbursements in that instance - while a compliant procurement process is expedited. As the Court emphasised, preserving the invalid contract is intended exclusively to prevent public detriment, rather than to accord the non-compliant contractor an entitlement to complete performance or retain unscrutinised profits.

[43] Subsequent judicial findings support the MEC's position: in dismissing Tullis' application for an interdict, Nuku J noted that the MEC's actions were driven solely by the need to ensure continuous laundry services rather than malice or ulterior motives. Furthermore, in dismissing a subsequent contempt application, Ndita J ruled that the MEC's conduct was neither wilful nor *mala fide*.

[44] Similarly, there is no evidence that Amlazi acted in bad faith or improperly expedited the execution of the contract, as suggested in the second judgment. Amlazi acted in good faith in submitting its bid for the contract. It must be borne in mind that there was no fraud or corruption in awarding the contract. The invalidity arose from a flawed consideration of the bids, in which Amlazi was not a party, nor did it induce the error. It performed in terms of the contract and delivered the required equipment, from which the State has obtained value for money. It cannot be suggested, on any tenable basis, that Amlazi was *mala fide* in its full implementation of the contract. Thus, the inescapable conclusion is that Amlazi was an entirely innocent party. As the Constitutional Court emphasised in *Zeal Health*:

'The law rightly draws a clear distinction between parties who are complicit in maladministration and those who are not. Where a contractor has done nothing wrong, it should not be required to suffer loss as a result of an organ of state's failure to comply with its own constitutional obligations.'²⁹

²⁹ *Zeal Health* para 63.

[45] This contract was executed against a backdrop of critical operational urgency. By 2020, the Tygerberg Central Laundry was experiencing severe disruptions because ageing equipment installed in the 1980s had reached the end of its lifespan. Because a functioning laundry service is vital for infection control and preventing the spread of diseases, the Department advertised the tender on 19 June 2021. The urgency was exacerbated by the COVID-19 pandemic, as Tygerberg Hospital and 38 other facilities – including Karl Bremer and Somerset West Hospitals – provided essential frontline responses. Anticipating a fourth wave in December 2021, the MEC emphasised that the increased demand would inevitably cause the remaining legacy equipment to fail, threatening continuous healthcare operations. To mitigate this risk, the Department issued purchase orders to Amlazi, which subsequently imported the necessary machinery from Germany and installed it at the Tygerberg Central Laundry. Amlazi, therefore, rendered actual services and incurred expenses pursuant to the contract.

[46] In its judgment on appeal, the full court observed:

‘In light of the further evidence presented to the Court on appeal that was admitted by agreement between the parties, it has become common cause that Amlazi has successfully installed all three lines. The MEC’s submission regarding the irreparable financial prejudice and, more importantly, the more than likely disruption of the province’s public healthcare system, carries more weight than Tullis’ rights. *It would serve no purpose to commence the procurement process afresh. The three washing lines are installed, and there is no need to replace them in approximately the next 15 to 20 years.*’ (Emphasis added.)

[47] These are trenchant observations. Given that the factual matrix fundamentally shifted between Nuku J’s order and this appeal, we are of the view that this Court cannot simply enforce the high court’s order of a ‘fresh procurement process’ because the contract value is spent and the service delivered. All three washing lines have been installed at a total cost of R124 million. The original order is now practically impossible to execute without the Department incurring wasteful expenditure. Having correctly held that the contract had been fully implemented, and that it would serve no purpose to commence the procurement process afresh, the full court was enjoined to give serious consideration as to how, in light of the full implementation of the contract, that order is to be enforced.

[48] A court granting a just and equitable order must consider the practical implementation of its order. In light of the full installation of the three washing lines, leaving Nuku's order extant would leave it inchoate, as it gives no direction on how to implement it in light of the changed factual matrix. What is to happen to the three washing lines? Should they be dismantled? Because it is not suggested that Amlazi should not be paid for the work it has completed, what about the wasted expenses that the Department would incur in reappointing another service provider for the same works? The full court's failure to give direction in this regard means that it did not properly exercise its discretion to consider a just and equitable remedy. The full court gave no consideration to these practical issues. It thus erred in not varying the just and equitable relief granted by the court of first instance. The second judgment falls into the same error. This Court, therefore, needs to order a remedy that reflects the reality that the contract has been fully executed, by declining to set aside the completed performance.

[49] The setting aside of the completed contract at this stage has a number of consequences: Amlazi may not be able to claim under the revoked contract and be left with an enrichment claim despite the fact that it was not complicit in the irregularity; the Department as the employer may not have a claim for defective workmanship; Tullis may even have a claim for damages against the Department in respect of loss of profit on the executed contract even though it may not have been the successful bidder in a re-run of the tender process. Furthermore, as the full court observed, replacing the new state-of-the-art equipment and machinery at the Tygerberg Central Laundry would cause irreparable financial prejudice to the Department. More importantly, the more than likely disruption of the province's public healthcare system carries more weight than Tullis' rights. Declining to set aside the completed performance, in our view, is not only pragmatic, but sensible.

[50] The second judgment suggests that declining to order re-evaluation of the tender bid is not just and equitable, because Amlazi did not participate in the appeal or present evidence of the costs of replacing the installed lines or the financial hardship it would face if Nuku J's remedy were implemented. It is unclear how any of these factors would affect

the consideration of a just and equitable remedy. If the washing lines have to be replaced, the Department would have to pay whatever the amount is. Because Amlazi is an innocent party, the Department must pay Amlazi for the installation of the washing lines and the profits it has made from its performance. Thus, Amlazi's financial hardship does not arise. In any of these scenarios, if Nuku J's remedy were enforced, the only party that would suffer any financial hardship would be the Department, and by extension, the public purse. The second judgment gives no consideration to this fact.

[51] Compelling the MEC to initiate a maintenance-only tender process as she suggests would be futile. Tullis alleges that Amlazi is the sole supplier in South Africa of the Kannegiesser machinery that it installed at the Tygerberg Central Laundry. That has not been refuted. It is, therefore, a foregone conclusion that the tender would be awarded to Amlazi. Its right to the ensuing maintenance contract is accordingly entrenched.

[52] In all the circumstances, we consider it just and equitable that Amlazi retains the contractual payments it is entitled to under the unlawful contract.

Costs

[53] In *Sapela*, this Court found special circumstances to order the victorious party to pay the unsuccessful appellant's costs. We are of the view that in this case too, special circumstances exist to justify ordering the Department to pay Tullis' costs in the full court and in this Court. Tullis was entitled to participate in a procurement process that was fair, equitable, transparent, competitive and cost-effective. It launched the review application expeditiously, and no blame can be attributed to it for the full execution of the unlawful contract.

Order

[54] In the result, the following orders are made:

In case number 472/2023:

1. The appeal is upheld to the extent set out below, with costs, including those of two counsel.

2. Paragraph 2 of the order of the high court is deleted, and paragraph 3 is renumbered paragraph 2.
3. The cross-appeal is dismissed with costs, including those of two counsel.

In case number 634/2025:

1. The appeal is upheld.
2. The appellant is to pay the first respondent's costs, including those of two counsel.
3. The order of the full court is set aside and replaced with the following:
 - '1. The appeal is upheld to the extent set out below, with the appellant to pay the first respondent's costs, including those of two counsel.'
 2. Paragraphs 3, 4 and 5 of the order of the high court is deleted, and replaced with the following paragraph 3:
'The order of invalidity in paragraphs 1 and 2 above does not have the effect of divesting the second respondent of any rights to which it would have been entitled under the contract referred to in paragraph 2 above.'
 3. Paragraph 6 is renumbered paragraph 4.'

T MAKGOKA
JUDGE OF APPEAL

P A MEYER
JUDGE OF APPEAL

Steyn AJA:

[55] I have read the first judgment. I agree with the conclusions and the orders in relation to the first appeal as well as the cross-appeal. I, however, do not agree with the order of the second appeal (Case no: 634/2025) setting aside the order of the full court. The facts are succinctly summarised in the first judgment. For purposes of this judgment, I intend to emphasise some of the facts that underpin and support the order of Nuku J. The first judgment finds that this Court needs to substitute the initial relief granted by Nuku J, since 'the contract value is spent and the service delivered'. Importantly, the first judgment finds that the full court erred in not varying the relief granted by Nuku J.

[56] The first judgment does so in response to the alternative prayer sought by the MEC. What she sought is for this Court to craft a new remedy that deviates from the just and equitable remedy granted by Nuku J. This relief is sought on the additional evidence presented to the full court when the appeal was heard. Essentially, the MEC sought an order compelling her to initiate a maintenance-only tender rather than a full procurement of all three lines, which had already been installed, and a limitation on the retrospective effect of the unlawful contract, so that neither she nor Amlazi suffer any consequences from implementing the unlawful contract. The full court refused to interfere since a case was not made out for any interference with Nuku J's order. The proposed relief of 'no retrospectivity' is problematic, since this Court is required to separate the unlawful contract from the consequences that had emerged from it.

[57] The aforesaid relief is sought in circumstances where the MEC does not expressly contend before this Court that either the full court or Nuku J were materially misdirected. In my view, this is a hurdle that the MEC must overcome to warrant an interference by this Court. As found earlier in the first judgment, the MEC misinterpreted Nuku J's order, and should not receive any benefit, in my view, by her own post-order conduct. The general rule applicable to appeals is that an appeal court decides whether the judgment appealed from is right or wrong, and it will do so in accordance with the facts in existence at the time and not in accordance with facts which came into existence afterwards. The rule is, however, not inflexible, and additional evidence may be permitted in cases affecting children and in exceptional cases that 'cry out for the reception of post-

judgments facts’.³⁰ This is not one of those cases. I will elaborate on the applicable jurisprudence later in this judgment

[58] The challenge that is presented by invalid administrative acts, as observed by this Court in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*³¹ is that they are often acted upon by the time they are brought under review. So, the additional facts presented by the MEC are no different from the circumstances of most review matters. When Nuku J heard the review application, only two of the three washing lines were installed.

[59] The first judgment regards Nuku J’s original order as a ‘practical impossibility’ and finds that this Court needs to substitute the remedial remedy that was originally granted. Part of the reasoning underpinning the order is based on the fact that the original remedy no longer matches the ‘fully executed reality’. The first judgment holds the view that this Court is ‘empowered to intervene – not to correct a judicial error by the high court – but to formulate a substituted order under s 172(1)(b)’. In theory, the first judgment is correct that such an order may be granted.

[60] The difficulty facing the MEC is whether the additional evidence before the full court constitutes exceptional circumstances that require interference by this Court. It becomes more challenging in that the relief sought by the MEC indirectly results in granting remedial relief on factual information that was not placed before Nuku J when the contract was reviewed. It is common cause that at the time the review was heard, Nuku J was not informed of the extent to which the Amlazi had implemented the contract. In my view, Nuku J granted a corrective remedy aimed at restoring administrative justice and the rule of law, without disrupting the cleaning services at the Tygerberg Central Laundry.

³⁰ *Van Eeden v Van Eeden* 1999 (2) SA 448 (C) at 453A.

³¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA); [2004] 3 All SA 1 (SCA) para 46.

[61] The order by Nuku J on 5 October 2021 had to be assessed by the full court to determine whether Nuku J was misdirected on either the law or the facts.³² This Court in *Phomella*³³ held:

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

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

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

“When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised — “judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. [Footnote omitted]” ‘An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.’ (Emphasis added, footnote omitted)

[62] The evidence before Nuku J established that the invitation to bid not only required the supply, delivery, installation, testing, commissioning, and training relating to the washing lines over a three-year period from 2020 until 2023 but also the maintenance of it. Information that was not placed before the reviewing court was that purchase orders had been issued and that the first washing line had been installed on 22 November 2021, there was also a schedule in place for the second washing line that related to work in December 2021. What was never authorised nor foreseen is that the MEC would accelerate the implementation of the contract by moving forward with the installation process with equipment procured from Amlazi. All of this was done despite the order of invalidity issued by Nuku J. On 25 October 2021, the MEC filed an application for leave to appeal against Nuku J’s order.

[63] The MEC persisted in her contention that despite the suspension of invalidity of the contract between her Department and Amlazi, as per para 5 of Nuku J’s order, she

³² See para 17 above for the full order.

³³ *Phomella* fn 23 para 11.

was permitted to continue with the implementation of the contract. The interpretation of the order is dealt with in the first judgment, when the cross-appeal was considered. We are all agreed that the suspension order was a ‘conditional, temporary measure to preserve service delivery rather than a license to complete an unlawful contract’.³⁴ To vary the relief granted by Nuku J would in my view defeat the very condition upon which the suspension depended.

[64] The Constitutional Court in *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening) (Black Sash)*³⁵ emphasised ‘just and equitable’ remedial powers as follows:

‘...The need to intervene under these and similar circumstances was aptly captured by Mogoeng CJ in *Mhlope* in these terms:

“It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique and extraordinary remedy we have crafted...”.’ (Footnote omitted.)

The Court cautioned that remedial power is not limitless, when it stated:

‘It is necessary to be frank about the exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in *exceptional circumstances*.’³⁶(Emphasis added.)

[65] More recently the Constitutional Court in *Black Sash Trust and Another v Minister of Social Developments and Others (Black Sash Trust)*³⁷ endorsed the findings of this Court in *Phomella and Mafoko*³⁸ and made it clear that nothing precludes an innocent

³⁴ See para 23 above.

³⁵ *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening) (Black Sash)* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 para 43.

³⁶ *Ibid* para 51.

³⁷ *Black Sash Trust and Another v Minister of Social Developments and Others (Black Sash Trust)* 2026 JDR 2584 (CC).

³⁸ *Ibid* paras 21-25. See also *Caledon River Properties (Pty) Ltd t/a Magwa Construction and Another v Special Investigating Unit and Another* [2026] ZASCA 05 where this Court held:

‘[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

private contractor from claiming profits where it has rendered services in terms of an invalid contract. What must, however, be placed before the court is adequate information to decide on a just and equitable order. In my view, insufficient facts were placed before the full court.³⁹

[66] A consideration of what is just and equitable requires that all relevant factors be considered. The rationale is that there ought to be a balancing exercise of the interests of all the parties, including the rights of Tullis, the state and the general public.⁴⁰ This Court in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*⁴¹ confirmed the balancing exercise of rights which sometimes entails the balancing of the interests of the claimant against those of the respondent and, in many instances, may involve conflicting and competing interests.

[67] The full court engaged with ‘just and equitable relief’ and considered the following: *‘In the exercise of the Court’s remedial discretion, the nature of the irregularity and the extent to which circumstances have changed during the intervening period are determining factors. If the irregularity taints the entire tender process, due to, for example, the tender criteria being vague, a fresh tender process should be run. Should the irregularity relate to the manner in which the decision was taken, there would normally be no reason why the existing tenders cannot simply be reconsidered, unless circumstances have changed, and it is no longer appropriate to award the contract based on the original tender process.*

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.’ (Emphasis added.)

³⁹ *Black Sash Trust* para 40.

⁴⁰ *Residents of 5 Davies Street, New Doornfontein, Johannesburg, Industry House v Minister of Police and Others* 2023 (3) SA 329 (CC); [2021] ZACC 37; 2023 (1) SACR 14 (CC); 2022 (1) BCLR 46 (CC) para 114.

⁴¹ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA); 2008 (5) BCLR 508 (CC) paras 22–29.

It does not follow in all cases that, in deciding on a just and equitable remedy despite the declaration of invalidity, the Court should set aside the contracts concluded pursuant thereto. This is, however, a case-to-case-based inquiry. In deciding if the order is just and equitable, it should be considered if it resulted in fairness to all implicated parties and must account for all the relevant facts and circumstances. In most instances, the Court will not be in as good a position as the administrator to substitute its own decision for that which forms the subject of the review. A further factor to be considered in this regard is delay. The Constitutional Court, in *Trencon Construction*, held that "*delay can cut both ways*". The inappropriateness of especially a substitution order may become evident with the passing of time. However, delay occasioned by the litigation process should not easily cloud a Court's decision in reaching a just and equitable remedy. *The Appeal Court should further ordinarily base its decision on the facts that existed when the original decision was made.*⁴² (Emphasis added, footnotes omitted.)

[68] When the full court heard the appeal, it permitted the parties to present additional evidence, by agreement. The full court, however, after considering the *ex post facto* information, still concluded that it did not demonstrate that Nuku J was misdirected in exercising his discretion. The full court's finding that no case has been made out to interfere with the remedy granted and that the appeal stands to be decided on the facts known to Nuku J at the time of the order, in my view, cannot be faulted. Especially in circumstances in which the MEC failed to show that the full court materially misdirected itself in exercising appellate interference.⁴³

[69] The full court did not err, it was mindful of the rule that an appeal is not a re-trial on new facts and that it had to concern itself with the existing factual matrix.⁴⁴ This approach is in accordance with trite jurisprudential principles. The Constitutional Court has emphasised that an appeal is ordinarily concerned with the existing facts at the time when the order was given and that it will consider the judgment appealed against according to the facts in existence at the time it was given '*and not according to new*

⁴² See full court judgment paras 62-63.

⁴³ *Caledon* fn 38 para 21.

⁴⁴ It is not an inflexible rule, but the rule serves the interests of finality and discourages the withholding of material evidence.

*circumstances which came into existence afterwards.*⁴⁵ The full court assessed the facts placed before Nuku J. It held that the relief could only be interfered with, if exceptional circumstances existed to warrant a newly crafted remedy, since the MEC asked that the relief be ‘updated or clarified’. The additional evidence, as admitted by the full court remained insufficient to craft a variation of the remedial remedy granted by Nuku J. On a factual basis, the post-judgment developments were the product of the MEC’s own conduct and decisions taken. Seen in this context, the MEC took a calculated risk to proceed with the implementation of the bulk of the contractual work during a time when the contract was under review.

[70] In my view, the relief granted by the majority does not give full effect to the finding of invalidity, or that the evidence placed before us is not sufficiently adequate to substitute the remedial relief. No evidence was placed before us on the quantification of the operational costs flowing from this contract. Moreover, I am not persuaded that there are exceptional circumstances to grant the remedial relief sought by the MEC. Any remedial interference by this Court should be well grounded on facts and not on speculative scenarios proposed. This is in line with *Mhlope*⁴⁶ where the Constitutional Court affirmed that an appropriate remedial remedy requires a factual basis.

[71] The MEC’s proposed ‘no retrospectivity’ relief is also problematic on another level. It results in a separation of the unlawful contract and the consequences that emerged from the unlawful contract. In *AllPay* 2⁴⁷ the Constitutional Court held that a ‘fresh tender’ is a normal consequence of an unlawful tender as alluded to earlier in my judgment. If Amlazi was an innocent tenderer, it might still retain some payments, if justice and public interests so require. Amlazi, however, elected not to participate in the proceedings and did not present any evidence that would impact on the practicality of the order issued by Nuku J. It did not tender evidence supporting the costs involved in replacing the lines

⁴⁵ *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* [2010] ZACC 3; 2010 (5) BCLR 422 (CC); (2010) 31 ILJ 273 (CC); [2010] 5 BLLR 465 (CC) para 36. Also see *Bechan and Another v SARS Customs Investigations Unit and Others* 2024 (5) SA 1 (SCA) where this Court held at para 22:

‘It is a well-established general principle that this court decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given, and not according to new circumstances that came into existence afterwards.’

⁴⁶ *Mhlope* fn 11 para 83.

⁴⁷ *AllPay* 2 fn 3.

installed or the kind of financial hardship it would face if the remedy ordered by Nuku J is carried out. In my view, Amlazi's innocence, or not, is dependent on its factual awareness of Nuku J's order. More facts were required as to why it proceeded with the work, irrespective of Nuku J's order. I find it difficult to conclude that Amlazi was an innocent tenderer, in the absence of adequate information before this Court. As stated in *Black Sash Trust* the enquiry is fact-specific.⁴⁸

[72] Finally, remedial discretion exercised in terms of s 172(1)(b) of the Constitution remains a true discretion. This Court will therefore only interfere with the exercise of the discretion in instances of a misdirection.⁴⁹ As stated earlier, the MEC had failed to demonstrate any misdirection committed by either the court of first instance (Nuku J) or the full court. In *AllPay 2*⁵⁰ the Constitutional Court held that the default remedial impulse is to correct or reverse the consequences of illegality so as to avoid entrenching an unlawfully obtained incumbency. The relief sought by the MEC is not to reverse or correct anything; it is to obtain relief that everything that was done under the unlawful contract stands, and that she, who was recalcitrant, is absolved from accountability to the invalid contract. The relief granted in the first judgment, in my view goes too far.

[73] For these reasons, had I commanded the majority, I would have ordered that the appeal in case no 634/2025 be dismissed with costs, including those of two counsel.

E STEYN
ACTING JUDGE OF APPEAL

⁴⁸ *Black Sash Trust* fn 22 para 40.

⁴⁹ *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC); [2022] ZACC 41; 2023 (2) BCLR 149 (CC) para 48.

⁵⁰ *AllPay 2* fn 3 paras 40-45.

Appearances:

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the respondent in 634/2025

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Instructed by: Smit Sewgoolam Inc., Johannesburg
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For: Appellant in 472/2023, and in 634/2025

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