THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 590/2024

In the matter between:

MAFOKO SECURITY PATROLS (PTY) LTD	**FIRST APPELLANT**
MAFOKO SECURITY SUPPLIES (PTY) LTD	**SECOND APPELLANT**
MAFOKO SECURITY SERVICES (PTY) LTD	**THIRD APPELLANT**

and

MJAYELI SECURITY (PTY) LTD	**FIRST RESPONDENT**
SPECIAL INVESTIGATION UNIT	**SECOND RESPONDENT**
THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	**THIRD RESPONDENT**
KHANYISILE KWEYAMA	**FOURTH RESPONDENT**
MATHATHA TSEDU	**FIFTH RESPONDENT**
FEBBE POTGIETER-GQUBULE	**SIXTH RESPONDENT**
JOHAN MATISSON	**SEVENTH RESPONDENT**
PRESIDENT OF SOUTH AFRICA	**EIGHTH RESPONDENT**

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

Coram: ZONDI DP and SMITH and UNTERHALTER JJA and BASSON and KUBUSHI AJJA

Heard: 7 November 2025

Delivered: 28 November 2025

Summary: Tender – invalidity – remedy – s 172(1)*(a)* and *(b)* of the Constitution – just and equitable remedy – unlawful award – tenderer continues to provide the service – application of the no profit no benefit principle.

ORDER

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

1 The appeal is upheld.

2 The order of the high court is set aside.

3 The second respondent is ordered to pay the costs of the appeal, including the costs of two counsel, where so employed.

4 The matter is remitted to the high court for the high court to determine the orders it should make in terms of s 172(1)*(a)* and *(b)* of the Constitution, after securing such production of evidence from the parties as the high court considers warranted and inviting further submissions from the parties.

5 The costs of the proceedings before the high court, save in respect of the order made concerning the fifth to the eighth respondents, are reserved for determination by the high court when it renders its judgment on remedy.

JUDGMENT

Unterhalter JA (Zondi DP and Smith JA and Basson and Kubushi AJJA concurring):

Introduction

[1] The first appellant, Mafoko Security Patrols (Pty) Ltd (Mafoko), was on 30 June 2017 awarded a tender by the third respondent, the South African Broadcasting Corporation Soc Ltd (the SABC), to provide security services. The award was made by the interim board of the SABC. It took this decision, even though the Bid Adjudication Committee and the Group Executive Committee of the SABC had recommended that the tender should be awarded to the first respondent, Mjayeli Security (Pty) Ltd (Mjayeli). This recommendation followed the evaluation of Mjayeli as the qualifying bidder that scored highest on price and empowerment.

[2] On 7 December 2017, Mjayeli brought an application to review and set aside the award of the tender to Mafoko. On 1 March 2018, the SABC requested the second respondent, the Special Investigation Unit (SIU), to investigate the award of the tender. The SABC then brought an application on 19 March 2018 to suspend Mjayeli's review pending the outcome of the SIU investigation. In that application, the SABC also sought an order that Mafoko would continue to render the security services that were contemplated in the award of the tender. Neither Mjayeli nor Mafoko opposed the application.

[3] On 7 May 2018, the Gauteng Division of the High Court, Johannesburg (the high court) granted the orders sought by the SABC. Of importance, the high court ordered, in relevant part, that Mafoko 'will continue to carry out the services

contemplated in the tender, relating to providing security services . . . pending the finalisation of the SIU's investigation or the setting aside of the award . . .'. I shall refer to this order as the continuation order.

[4] Under Presidential proclamation, the SIU was appointed to investigate the award of the tender to Mafoko. It did so and rendered a report on 30 June 2019. The SIU found that the decision of the interim board of the SABC to award the tender amounted to financial mismanagement and referred the matter to the National Prosecuting Authority. The SIU also supported the relief sought by Mjayeli in its review, which remained pending before the high court. Mjayeli did not take steps to pursue its review. The SIU, after some considerable time, then applied to intervene in the review as an applicant. The high court granted this order on 14 July 2020.

[5] On 19 December 2020, the SIU filed its founding affidavit, seeking to set aside the award of the tender, but resisting Mjayeli's proposed relief of substitution. In its answering affidavit, Mafoko averred that it was an innocent tenderer; that the SABC had received value for money; and that it had performed the services required of it. All this in support of its contention that the award of the tender should not be set aside. In its replying affidavit, the SIU sought to amend its notice of motion. In addition to the relief already sought (to review and set aside the award of the tender), the SIU sought an order that: (i) Mafoko file an audited statement of the expenses incurred by it in the performance of its obligations under the contract, the income received, and its net profits; (ii) that the SABC obtain and file an independent audited verification of Mofoko's statement; and (iii) that the high court then determine the amount of profit to be paid back by Mafoko to the SABC or the SIU. I will refer to this relief as the SIU disgorgement relief.

[6] The application, that was opposed by Mafoko and the members of the interim board of the SABC, was heard by the high court. The high court found that the interim board of the SABC had acted unlawfully and that this amounted to financial misconduct in terms of s 83 of the Public Finance Management Act 1 of 1999 (PFMA). There was no basis to have awarded the tender to Mafoko, as the incumbent provider, in preference to Mjayeli which had the higher score, and offered a lower price, the difference being some R2 300 955,43. The high court then proceeded to consider the question of remedy. It recognised that apart from the required declaration of unlawfulness, the high court enjoyed a discretion to fashion a just and equitable remedy. The high court considered the learning of our courts as to the nature of this discretion. It concluded that Mafoko was an innocent party and had performed the work with which it was charged. The private interests of Mafoko, however, could not outweigh the public good. As a result, although Mafoko should not suffer loss, '. . . it should also not profit at the expense of the public purse'. The high court made the following order: it set aside the decision of the SABC to award the tender to Mafoko; it granted the SIU disgorgement relief; and ordered Mafoko to pay the costs.

[7] With the leave of the high court, Mafoko now appeals to this Court. Mafoko does not appeal the finding of the high court that the award of the tender was unlawful. Its appeal is confined to the question of remedy. Mafoko contends that the high court erred in making the orders it did to set aside the award of the tender and grant the SIU disgorgement order. The high court, Mafoko submitted, misconceived the basis of the just and equitable discretion enjoyed by it, and should simply have declared the award of the tender unlawful, dismissed the SIU disgorgement order, and ordered the SIU to pay Mofoko's costs.

[8] I should indicate that neither the SABC, nor its interim board members, nor Mjayeli, took part in this appeal. And although two Mafoko companies remained

nominal appellants (second and third appellants), it was made plain in the answering affidavit of Mafoko that it alone was awarded the tender and engages in the litigation that has ensued.

The test for appellate intervention

[9] The parties were in agreement that the standard that must be met for an appellate court to interfere with the exercise by the high court of its discretion to fashion a just and equitable remedy in judicial review proceedings is the standard affirmed in *Trencon*.[1] Mafoko's appeal rests upon the proposition that the high court's remedial order is predicated upon an error of law. If that complaint can be made out, then, following *Trencon*, that would provide a basis for this Court's intervention. The central question that thus arises in this appeal is whether the high court's appreciation of its just and equitable remedial discretion was vitiated by any error of law.

Did the high court make an error of law?

[10] There can be little doubt that the high court, citing the Constitutional Court decisions in *Steenkamp NO*[2] and *Gijima*,[3] understood its discretion to be wide. The high court framed the discretion thus: 'The remedy must be fair to those affected by it and yet vindicate effectively the right violated'. I can find no fault with this general formulation.

[11] The high court, rightly, then sought to engage the important *dicta* in *Allpay II*[4] that engaged the question as to the remedial discretion that a court enjoys under

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[1] *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) para 88.
[2] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) para 29.
[3] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) para 53.
[4] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC).

s 172(1)(*b)* of the Constitution, once the court has declared the award of a tender to be invalid pursuant to its duty to do so in terms of s 172(1)*(a)*. In *Allpay II*, the Constitutional Court had to grapple with the problem that if its declaration of invalidity was not suspended, the company awarded the contract pursuant to the invalid tender (Cash Paymaster) could simply walk away, leaving welfare recipients without a means of securing payment, until a lawful tender process had been concluded. The Constitutional Court found that Cash Paymaster continued to bear constitutional obligations to ensure a payment system remained in place until a new provider was lawfully appointed and had become operational.[5] In the context of this exposition, the Constitutional Court said this: 'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract. And any benefit that it may derive should not be beyond public scrutiny'[6]. I shall, for convenience, call this the two-truths dictum.

[12] The two-truths dictum has given rise to a body of judicial interpretation. This learning has been set out in the decision of this Court in *Phomella*,[7] and need not be repeated here. Put at its most stark, these cases understand the two-truths dictum to enunciate a principle that even an innocent tenderer should not benefit from the proceeds of an invalid contract. Thus, while an innocent tenderer cannot be required to suffer a loss, if it is required to continue to perform under a contract that has been found invalid, such a tenderer cannot profit thereby. Simply put, the principle is this: no loss, but no gain.

[13] In *Phomella*, this Court explained that the principle of no loss, but no gain, does not correctly reflect the position adopted in *Allpay II*, nor is it consistent with

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[5] Ibid para 66.
[6] Ibid para 67.
[7] *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* [2023] ZASCA 45; 2023 (5) SA 601 (SCA) paras 14-16.

the remedial latitude the Constitutional Court has applied in other cases in which it has made a just and equitable order. Regrettably, *Phomella* was not cited before the high court. *Phomella's* interpretation of *Allpay II* is correct. *Allpay II* held that the award of a tender found to be unlawful and declared invalid does not give rise to a *right* to benefit from an unlawful contract. What this means is simply this: without a right, there is no duty resting upon a court exercising its just and equitable discretion to order that the benefit of the unlawful contract must be conferred. But the absence of such a right and its correlative duty does not mean that the court in the exercise of its discretion *may* not permit a party to enjoy the benefit of a contract, including the profits that may accrue.

[14] The mistake made by certain courts that have sought to understand *Allpay II* is to equate the absence of a right to benefit from an unlawful contract with the exclusion of such benefit from the exercise by the court of its just and equitable discretion. *Allpay II* does not say this. Indeed, it simply holds that any benefit derived 'should not be beyond public scrutiny'. This means that any benefit derived from an unlawful contract falls to be scrutinised in order to determine how the court should exercise its just and equitable discretion. It does not mean that the benefit of an unlawful contract is excluded from remedial consideration, for then the benefit would indeed be beyond public scrutiny because it would fall outside the very exercise the court undertakes to weigh relevant considerations so as to arrive at a just and equitable order.

[15] The exclusion of benefit, and more particularly profit, from remedial consideration could also have perverse and undesirable consequences. The conduct of a person awarded a tender that is found to be unlawful falls within a spectrum of culpability. Such a person may be complicit in the unlawful conduct or innocent of it, with degrees of turpitude or blamelessness between these polarities.

[16] The position of Mafoko raises these very issues. Neither the SIU nor the high court found there to be any culpability on the part of Mafoko in the award of the tender. Mafoko was the incumbent security provider and continued to provide this service to the SABC after the award of the tender. No criticism is offered of its performance. No party sought to interdict Mafoko from continuing to render services to the SABC. On the contrary, the SABC sought and secured the continuation order requiring Mafoko to continue providing security services.

[17] Without making a finding on this issue, it seems plain that Mafoko is positioned on the blameless end of the spectrum. Given this, there is no issue of principle that excludes consideration of whether it should be permitted to profit from the service it has rendered. While the award of the tender was found by the high court to have been unlawful, the litigation that ensued was engaged over such a lengthy period, that, by the time the high court rendered its judgment, in October 2023, the contract period secured by the tender had long since come to an end.

[18] Mafoko thus rendered its services over a lengthy period of time, and under compulsion of the continuation order. Whether that order was justified in virtue of a constitutional duty owed by Mafoko did not need to be determined by the court that gave the order. It may be that Mafoko, as the incumbent service provider, owed a constitutional duty to continue to provide its services to the SABC. The content and duration of that duty require careful consideration. For how long and under what conditions should a service provider be required to render service? These are among the important matters that need to be considered in the exercise by a court of its power to fashion a just and equitable remedy.

[19] Where a firm is awarded a tender that is found to be unlawful, it may be necessary, as the case law demonstrates, for this firm to continue to render services until a lawful tender process yields a new award. The rendering of that service is a

public service, as *Allpay II* has made plain. But at what cost? Lawful public procurement is secured by the state at a competitive price, which includes a return (or profit) for the provider. That is the normative benchmark. Indeed, without a return for the provider, the state would not be able to engage in public procurement. Does the rendering of public goods or services occasioned by an unlawful award oust a blameless provider, saddled with the duty to provide these goods or services, from enjoying any profit? I think not, because in circumstances where a provider is entirely blameless for the unlawful award, the imposition of a duty to provide public goods or services (and hence contribute to the public good) should be influenced by the normative benchmark of application to the award of a lawful tender. That is to say, at a competitive price. Of course, whether a tenderer is entirely blameless; whether the tenderer has enjoyed the considerable past benefits of incumbency; and what might be a reasonable return under the discipline of competitive rivalry are all matters to be properly considered in the exercise of the court's discretion to make a just and equitable order. The salient point is that the exercise of that discretion cannot be understood to be repugnant to the enjoyment of profit in every circumstance where a tenderer has continued to render a service or provide goods. There are circumstances in which a firm that secures the public good is entitled to accrue a private return. Nothing in *Allpay II* precludes such consideration in an appropriate case.

[20] It was submitted by counsel for the SIU that even though strict adherence to the principle of no loss, but no gain may not be warranted, it should nevertheless be the presumptive principle governing the exercise of the court's remedial discretion. This submission was predicated upon the observation that the corruption that pervades our system of public procurement may not always be evident, and hence it would be prudent to proceed on the premise that a tenderer should gain no profit from a contract declared unlawful. Such a presumption may then be rebutted by the tenderer seeking to secure a profit by way of judicial remedial discretion.

This presumptive construction of the discretion has some merit, given the dismal parade of corrupted tenders that come before the courts. But I consider the just and equitable discretion is better conceived as the Constitution intended, without preconception as to depravity that has befallen its promise. This said, once there is evidence that a tenderer is not blameless, or worse, actively complicit in the illegality that has rendered the award of the tender invalid, then courts will be astute to apply the age-old maxim that such a tenderer cannot profit from its own wrongdoing.

[21] I turn next, in the light of this exposition of the law, to consider whether the high court exercised its discretion to determine a just and equitable remedy under a misapprehension of law. The high court's understanding of *Allpay II* was plainly influenced by the series of decisions that adhered to the no loss, but no gain principle. The high court considered these decisions to be correctly decided. They were not, as *Phomella* decided, and I affirm.

[22] That this error of law was an operative error is made manifest in the manner by which the high court exercised its discretion. It considered the public good to be something opposed to the private interests of Mafoko, and that the public good enjoys such paramountcy that 'Mafoko's interests cannot outweigh the priority to be given to the public good'. The high court ultimately decided that '[a]lthough Mafoko should not suffer a loss, it should also not profit at the expense of the public purse'. And concluded as follows: 'Applying the decision of *Allpay* [*II*] and *Vision View Productions*[8] 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'. For these reasons the high court ultimately made an order requiring Mafoko to disgorge any profits it might have made.

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[8] *Special Investigating Unit and Another v Vision View Productions CC* [2020] ZAGPJHC 421; [2020] JOL 53649 (GJ).

[23] The high court laboured under an error of law derived from its adherence to the principle of no loss, but no gain. This adherence pervades 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.

[24] For these reasons, I find that the high court made an error of law that vitiated the exercise of its discretion to decide upon a just and equitable remedy. That conclusion, under the holding in *Trencon*, permits this Court to interfere with the orders made by high court as to remedy.

Remedy

[25] The high court gave the following order:

'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:

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 of the fifth to the eighth respondents no order will be made as to costs.'

[26] This order cannot stand. First, there was no reason to set aside the award of the tender. The tender had run its course and the SABC had received the services rendered by Mafoko. The delay that occurred in bringing this matter to finality before the high court, without even engaging upon the question of culpability, is a matter that must be taken into account as to what remedy is of practical value. The only question that remained, given the passage of time, was what of the remuneration enjoyed by Mofoko, should Mafoko be permitted to retain (the retention issue). The high court should, firstly, have made an order in terms of s 172(1)*(a)* of the Constitution declaring the award of the tender to be invalid, and then considered what remedy is appropriate to the determination of the retention issue. Second, the order is predicated upon a determination that once the audited statements of expenses and nett profit have been provided and verified, Mafoko is required to pay back its profits. That order follows from the high court's faulty understanding of the law. What is required is an exercise of the court's discretion that will result in a just and equitable order. Such an order cannot proceed from the *a priori* position that what is just and equitable excludes the retention of any profit by Mafoko.

[27] Mafoko submitted that setting aside the award of the tender and the repayment of the profits by Mafoko is neither just nor equitable. It contended that Mafoko was an innocent tenderer, and it should be permitted to enjoy the benefit of the contract it had fully performed. Hence, the high court should simply have

declared the award of the tender unlawful. Counsel for Mafoko invited us to set aside the high court order and to make such an order.

[28] I do not consider that to be the correct order that the high court should have made. As I have indicated, to make an order that is just and equitable, in the circumstances of this case, requires the consideration of a number of matters. Was Mafoko entirely blameless for the unlawful award of the tender to it? Did its incumbency as a service provider burden it with constitutional duties to continue to provide the service? If so, what is the content of that duty and for how long should it have endured? What benefits and burdens accrued to the SABC and Mafoko in the performance of the services rendered by Mafoko? What profit did Mafoko enjoy? How closely did any such profit conform to a normal return for a firm in a competitive market for security services? Was such a return necessary and deserved, given the period over which Mafoko rendered its services? I do not suggest that all of these questions must be answered to make a just and equitable order, nor that these questions are exhaustive of the issues that may be relevant. What these questions do demonstrate is that a just and equitable order is not a binary choice between Mafoko retaining all the profits it may have made or being required to disgorge its profits. Justice and equity are capacious concepts. Its boundaries may be uncertain, but it is designed to render a nuanced judgment as to what order will be just and equitable. Such an order was not rendered by the high court, but, at the same time, an order that simply permits Mafoko to retain its profits would amount to an order made in advance of answering some central questions that need to be posed.

[29] This court cannot, on the record before it, determine a just and equitable order. The matter must accordingly be remitted to the high court so that it can reengage the parties to determine a just and equitable order, properly informed by relevant evidence and argument which the court may need to secure. As to the costs

of this appeal, these must follow the success of Mafoko in overturning the remedial order of the high court.

[30] In the result, the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside.

3 The second respondent is ordered to pay the costs of the appeal, including the costs of two counsel, where so employed.

4 The matter is remitted to the high court for the high court to determine the orders it should make in terms of s 172(1)*(a)* and *(b)* of the Constitution, after securing such production of evidence from the parties as the high court considers warranted and inviting further submissions from the parties.

5 The costs of the proceedings before the high court, save in respect of the order made concerning the fifth to the eighth respondents, are reserved for determination by the high court when it renders its judgment on remedy.

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D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For the appellants:	A B Bishop
Instructed by:	Victor Nkhwashu Attorneys Inc., Johannesburg
	Symington De Kok Attorneys, Bloemfontein
For the second respondent:	J A Motepe SC (with him T Moretlwe)
Instructed by:	Werksmans Attorneys, Johannesburg
	Lovius Block Attorneys, Bloemfontein.