THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 198/2020

In the matter between:

IGS CONSULTING ENGINEERS CC **FIRST APPELLANT**

TURNMILL PROQUIP ENGINEERING (PTY) LTD **SECOND APPELLANT**

and

TRANSNET SOC LIMITED **RESPONDENT**

Neutral Citation: *IGS Consulting Engineers & Another v Transnet Soc Limited* (Case no 198/20) [2022] ZASCA 63 (29 April 2022)

Coram: DAMBUZA, SCHIPPERS and NICHOLLS JJA and TSOKA and MOLEFE AJJA

Heard: 18 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 14h00 on 29 April 2022.

Summary: Administrative law – non-compliance with s 217 of the Constitution - contracts set aside.

Civil procedure – s 16(2)(*a*) of Superior Courts Act 10 of 2013 – decision on appeal having no practical effect - no live issue other than costs – no exceptional circumstances justifying a hearing on costs.

ORDER

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

1 Paragraph 2 of the order of the high court is varied to read as follows:

'2. The contract concluded between the Applicant and the Third Respondent on 27 August 2015 (the second contract) is declared unlawful and is set aside; and

2.1 The First and Second Respondents are to serve and file with the Registrar of this Court an audited statement of the expenses incurred, the income received and the net profit earned under the second contract within 60 days of this order;

2.2 The Applicant is to obtain and file with the Registrar of this Court an independent audited verification of the details provided by the First and Second Respondents in terms of paragraph 2.1 within 30 (thirty) days of the receipt of the information, and the First and Second Respondents are to permit the auditors appointed by the Applicant to have unfettered access to the relevant financial information for this purpose;

2.3 The First Respondent is to pay to the Applicant its verified profit within thirty (30) days of service of the audit verification.

2.4 The Second Respondent is to pay to the Applicant its verified profit within thirty (30) days of service of the audit verification.'

2 The First and Second Appellants are to pay the costs of this appeal which costs are to include those occasioned by the appointment of two counsel.

JUDGMENT

Nicholls JA (Dambuza and Schippers JJA and Tsoka and Molefe AJJA concurring):

[1] 'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.' These are the words of s 217 of the Constitution. If there is non-compliance with this constitutional imperative a court must make a declaration of constitutional invalidity in respect of such conduct[1]. The only discretion it has is determining a just and equitable remedy.[2]

[2] This appeal concerns the ever-growing trend of organs of state, in this instance Transnet SOC Limited (Transnet), approaching courts on 'self-review' on discovering that their functionaries had concluded contracts which are an anathema to values set out in s 217. These reviews are brought on the basis of legality.[3] No party has a right to benefit from an unlawful contract.[4] Disgorgement of profits has been said to be an extraordinary remedy only to be used in exceptional circumstances.[5] Unfortunately, the extraordinary has become commonplace with the

---

[1] Section 172(1)(*a)* of the Constitution.
[2] Section 172(1)(*b*) of the Constitution.
[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 38; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 1; *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* [2021] ZASCA 34; 2021 (4) SA 436 (SCA) para 34.
[4]*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) para 67-70.
[5] *Atlantic Lottery Corp Inc. v Babstock*, 2020 SCC 19.

pillage of our state-owned enterprises. The loss to the public purse runs into billions of rand but the damage caused by the erosion of public trust is immeasurable.

[3] Transnet, who is the respondent in these proceedings, sought to set aside five contracts concluded between Transnet and IGS Consulting Engineers CC (IGS), the first appellant, during the period 2015 and 2016. The second appellant, Turnmill Proquip Engineering (Pty) Ltd (Turnmill) was cited on the basis that it had entered into joint venture agreements with IGS in respect of certain of the contracts.

[4] The Gauteng Division of the High Court, Johannesburg (the high court), per Vally J, granted the order to set aside the five contracts, the total value of which was in excess of R204 million, and ordered a disgorgement of the profits. The appeal is with the leave of the court a quo.

[5] On the morning of the appeal, counsel for IGS, the main protagonist, informed the Court that he had been instructed to withdraw the appeal and tender Transnet's costs. In consequence the ambit of the appeal was considerably circumscribed. Counsel for Transnet and Turnmill were invited to make submissions on whether there was any live issue for determination. Whereas Transnet agreed that nothing of practical effect remained, it was strenuously submitted on behalf of Turnmill that a decision on its liability, jointly and severally, with IGS for profits made by the IGS Joint Venture, would not be academic. This necessitated the hearing of the appeal.

[6] Very briefly, the facts are as follows. Five contracts were awarded by Transnet to IGS under its New Multi Product Project. This involved the maintenance of a 715 kilometre multi-product pipeline for high pressure

transportation of liquid petroleum gas from Durban to Gauteng. It was in respect of two of the five contracts that Turnmill was implicated. These contracts were referred to as the second contract and the fourth contract, which nomenclature will be adopted in this judgment.

[7] In summary the following orders were made by the high court in respect of the five contracts:

Each contract was declared unlawful and set aside.

(a) IGS, and Turnmill only in respect of the second contract, were to serve and file with the Registrar an audited statement of the expenses incurred, the income received and the net profit earned within sixty days of the order;
(b) Transnet was to file an independent audited verification of the above;
(c) IGS, and Turnmill only in respect of the second contract, were to permit the auditors appointed by Transnet to have unfettered access to their financial information for this purpose;
(d) IGS, and Turnmill only in respect of the second contract, were to pay Transnet the verified profit within thirty (30) days of service of the audited verification, jointly and severally the one paying the other to be absolved;
(e) IGS and Turnmill were to pay the costs of the entire application, jointly and severally the one paying the other to be absolved, which costs included those occasioned by the appointment of two counsel.

[8] The high court found firstly, that there was a corrupt relationship between Mr Sipho Sithole (Mr Sithole), the sole member of IGS and Mr Sipho Linyenga Herbert Msagala (Mr Msagala) who was the chief

executive of Transnet's specialised unit for capital projects, Transnet Group Capital. Secondly, there was non-compliance with the prescribed tender and procurement procedures, and applicable legislation. The high court concluded that fraud vitiated the award of the contracts which did not comply with the prescripts of s 217 of the Constitution.

[9] After the high court judgment, on 31 August 2021 the Special Tribunal[6] made damning findings in respect of the very same contracts that IGS had concluded with Transnet. The Tribunal ordered a disgorgement of the profits made by Mr Msagala and his family trust, as well as those made by Mr Sithole and IGS. This was in addition to the R26 423 028.77 that Mr Msagala was ordered to pay back to Transnet.[7] Undoubtedly, these findings contributed, in no small measure, to IGS' decision to withdraw its appeal.

[10] The relief sought against Turnmill was limited to the second and fourth contract, and premised on the fact that Transnet had awarded these contracts to a joint venture of which Turnmill and IGS were parties. Two joint venture agreements were concluded between IGS and Turnmill on 27 August 2015 and 7 July 2016, for the second contract and the fourth contract, respectively.

[11] The fourth contract was for the surcharging and demolition of accumulator tanks at Terminal 1, Durban. It was concluded on an emergency basis with the 'IGS Joint Venture' commencing on 25 January

[6] Special Tribunal set up in terms of section 2(1) of the Special Investigations Unit and Tribunals Act 74 of 1996.
[7] Special Investigating Unit case number GP05/2020. See also Special Investigating Unit GP03/2020 where the Tribunal made a final order forfeiting certain of Mr Msagala's moveable and immoveable property and interdicting the Transnet Pension Fund from paying out Mr Msagala's pension pending the outcome of the action before the Tribunal.

2016, although the NEC Engineering and Construction Contract was signed by Transnet and Mr Sithole, who represented that he was the managing director of the joint venture, on 6 June 2016. The work therefore started six months before the second joint venture agreement between IGS and Turnmill was signed. Turnmill denied any involvement whatsoever with the fourth contract. It was unaware that the fourth contract had been concluded when it signed the second joint venture agreement; it did not perform any work nor receive any payment in respect thereof; it has no documents pertaining to the fourth contract except those provided by Transnet during the discovery process.

[12] Turnmill's lack of involvement in the fourth contract was accepted by Transnet, and the high court. No more needs to be said about the fourth contract, save to state that even prior to the withdrawal of IGS' appeal, Turnmill was alive to the fact that the only live issue in respect of the fourth contract was the question of the costs awarded by the high court, in respect of the entire application.

[13] What remains is the second contract. This contract was for 'tightlining' at terminal 1 in Durban to ensure the delivery of fuel products from Durban to Heidelberg. This entailed an interim measure to bypass the need for the storage fuel tanks which were still under construction at the Durban terminal. The second contact was concluded pursuant to a site visit to Turnmill's premises on 5 July 2015 to assess its capacity to render services to Transnet. The contract was awarded to the joint venture on an emergency basis commencing on 13 July 2015, although the joint venture agreement itself was concluded more than a month later on 27 August 2015. The NEC3 Engineering Construction Contact was signed on

31 August 2015. The value of the contract was R50 485 630.20 of which R49 325 479.29 has been paid to IGS.

[14] The high court set aside the second contract and ordered that the profits be ascertained and verified, and then be disgorged, jointly and severally, by IGS and Turnmill. Turnmill alleges that it did all the work on the project and invoiced IGS for R23 004 608.67 for the services it rendered. However, it was underpaid by R7 302 608.76 and has demanded payment for the outstanding amount from IGS. To date it has not been paid. Thus, according to Turnmill, it has made no profit, and has, in fact, suffered a loss.

[15] Turnmill has at all times protested its innocence and distanced itself from IGS' fraudulent conduct. It argued that the two joint venture agreements were signed only in order to regularise relationships between itself and IGS. It insisted that Transnet was erroneously treating the relationship between itself and IGS as a partnership. Turnmill has been steadfast in its stance that it was a subcontractor to IGS and pointed to the subcontracting agreement between itself and IGS commencing 13 July 2015. This, it is contended, is also evidenced by the fact that Transnet at all times paid IGS, not the joint venture which did not have a bank account. Furthermore, the fact that IGS submitted an invoice to Transnet before the conclusion of the joint venture agreement is, so Turnmill contends, dispositive of the contention that Transnet contracted with the joint venture in respect of the second contract.

[16] There is no factual basis for these submissions. Turnmill was a signatory to the joint venture agreement and it is common cause that the second contract was awarded to the 'IGS Joint Venture'. IGS did not have

a Construction Industry Development Board (CIDB) grading which was a prerequisite for the award of the second contract. A CIDB grading is determined by financial capability and works capability. A construction company is allocated a ranking, ranging from level 1 which is the entry level to the highest - level 9, based on the value and experience of its past construction projects.[8] At the time Turnmill was in the process of acquiring its grade 8 CIDB, which was obtained in August 2015. A few days later the joint venture agreement was signed.

[17] The reason why IGS concluded the joint venture agreement is evident: IGS did not have the key determinants for a CIDB rating, namely track record and capital. For this it needed Turnmill. However, on the face of it there was no discernible advantage to Turnmill. This begs the question why Turnmill saw fit to enter in the written joint venture agreements. Mr Paul Pienaar, the managing director of Turnmill and the deponent to Turnmill's answering affidavit, stated that the joint venture agreements were merely subcontracting agreements which in retrospect were '. . .clearly devised by Sithole to prevent Turnmill from competing with IGS in contracts with Transnet . . . '. But this cannot be so - without a CIDB grading, IGS was unable to compete.

[18] The answer lies in the fact that without the joint venture it is unlikely that Turnmill would have received any work from Transnet. Mr Sithole was the one who had the connections with Transnet but lacked the expertise to perform in terms of the contracts. Without the necessary CIDB rating Transnet could not sign off on the project. Turnmill's version that its understanding of the joint venture 'merely confirmed to Transnet that Turnmill would be responsible for performing certain obligations for

[8] https://registers.cidb.org.za/PublicContractors/GradingDesignationCalc accessed on 01/04/2022.

which Turnmill required and had the requisite rating', cannot be correct. Transnet could never rely on the CIDB rating of a subcontractor. The joint venture was specifically concluded in respect of the tightlining project. In clause 3 it was specified that IGS had sourced the relevant contracts and Turnmill was to provide the relevant expertise. This is precisely why the joint venture was necessary to conclude the contract.

[19] In short, Turnmill had the skills and expertise to do the work whilst Mr Sithole of IGS had the connection to Mr Masagala which guaranteed the award of the contracts by Transnet. While it seems that Turnmill did not unduly profit from the contracts with Transnet, its professed innocence as to the signing of the joint venture agreement does not hold water. The only inference to be drawn is that Turnmill was well aware of the role it was to play. That its relationship with IGS soured at a later stage does not detract from the fact that Turnmill was a willing participant at the time that the joint venture agreements were signed. Irrespective of whether the joint venture agreements amounted to a partnership or not, the fact remains that the contracts that the joint venture concluded with Transnet were unlawful and fell to be set aside. This, it seems, is not disputed by Turnmill. Whatever the relationship created by the joint venture, it allowed IGS to represent to Transnet that Turnmill and IGS were working together on the second and fourth contracts.

[20] Notwithstanding the above, there is no evidence that Turnmill was involved in unlawful conduct or any wrongdoing. Nor was there any suggestion of corruption on the part of Turnmill. The high court's order that IGS and Turnmill jointly and severally pay any profits made in respect of the second contract, had the potential to expose Turnmill to a substantial claim for profits which it did not make, but which were made by IGS. These potential adverse consequences for Turnmill were the reason why

Turnmill was insistent on proceeding with the hearing once IGS had withdrawn its appeal. However, after IGS's withdrawal and once the proceedings had commenced, counsel for Transnet advised that Transnet was prepared to abandon the joint and several order in respect of the second contract. As a result, any concerns that Turnmill may have had that it was being penalised for what was essentially IGS's malfeasance, fell away.

[21] Turnmill's cardinal objection to the order was thus no longer a live dispute that required determination between the parties.[9] Nor could it be said that there were any remaining legal issues which would be of public importance or would affect matters in the future.[10]

[22] Our courts will not hear matters where there is no live issue or decide matters of academic interest which will have no practical effect on the parties or the public at large.[11] As a general rule our courts do not hear appeals where the only consideration is costs. These are longstanding rules of our common law, now buttressed by the Superior Courts Act (the Act).[12]

[23] Section 16(2)(*a*) of the Act provides that:

(i) 'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

---

[9] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC); *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 7; *Legal Aid South Africa v Magidiwana* [2014] ZASCA 141; 2015 (2) SA 568 (SCA); [2014] 4 All SA 570 (SCA) para18-20.

[10] *Centre for Child Law v Governing Body of Hoerskool Fochville* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 9-11.

[11] *Park 2000 Development 11 v Mouton and Others* [2021] ZASCA 140 para 22 and 23; *Director-General Department of Home Affairs and Another v Mukhamadiva* [2013] ZACC 47; 2014 (3) BCLR306 (CC) para 33.

[12] Section 16(2)(*a*) of the Superior Courts Act 10 of 2013.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

[24] The appeal was moot for all intents and purposes, as envisaged by s 16(2)(*a*)(*i*) of the Act. For this reason alone, it falls to be dismissed.[13]

[25] The only issue which would have any practical effect was that of costs. Counsel for Turnmill argued that the high court had incorrectly awarded costs against it in that it had been substantially successful in its opposition of both the second and fourth contract in the high court. This is not correct. In respect of the fourth contract Transnet sought, and was granted, the setting aside of the contract between the joint venture and Transnet. In respect of the second contract Turnmill was not successful in the high court.

[26] It is trite that an appeal court will rarely intervene where the court a quo has exercised a discretion as to the costs order that it considers to be appropriate. It can only do so if the court a quo did not act judicially; acted on wrong principles; misdirected itself on the facts; or reached a decision which could not reasonably have been made in light of the relevant facts and principles.[14] There is nothing to indicate that the learned judge did not

[13] *City of Cape Town v Khaya Projects (Pty) Ltd* [2016] ZASCA 107; 2016 (5) SA 579 (SCA); [2016] 4 All SA 1 (SCA) para 5; *City of Tswane Municipality and Others v Nambiti Technologies (Pty) Ltd* [2015] ZASCA 167; [2016] 1 All SA 332 (SCA); 2016 (2) SA 494 para 5; *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* [2016] ZASCA 163; [2017] 1 All SA 1 (SCA) para 15.

[14] *Minister of Rural Development and Land Reform and Another v Phillips* [2017] ZASCA 1; [2017] 2 All SA 33 (SCA) para 36; *Dobsa Services CC v Dlamini Advisory Services (Pty) Ltd and Another; Dlamini Advisory Services (Pty) Ltd and Another v Dobsa Services CC* [2016] ZASCA 131 para 14.

exercise his discretion judicially. There is thus no justification for interference by this Court on the question of costs.

[27] Most importantly, and as the parties were alerted at the commencement of the hearing, appeal courts will not easily entertain an appeal on costs alone. In terms of s 16(2)(*a*)(*ii*) a consideration of costs, where it is the only live issue, will only be heard in exceptional circumstances. Here there were no exceptional circumstances in the high court which warranted an argument on costs alone in terms of s 16(2)(*a*)(*ii*).[15]

[28] In this appeal Turnmill had limited success by virtue of the concessions made by Transnet at the commencement of this hearing. But this does not absolve it from paying the costs of the appeal. This Court in *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd* [16] cautioned that:

'. . . As a general rule, litigants and their legal representatives are under a duty, where an appeal or proposed appeal becomes moot during the pendency of appellate proceedings, to contribute to the efficient use of judicial resources by making sensible proposals so that the appellate court's intervention is not needed. If a reasonable proposal by one of the litigants is rejected by the other, this would play an important part in the appropriate costs order. . .'.

[29] This was an example of a sensible and reasonable proposal being rejected for no good reason. This Court's intervention was unnecessary

[15] See *Khumalo and Another v Twin City Developers* [2017] ZASCA 143, where the majority held that there were no exceptional circumstances which justified this Court only having consideration to costs as set out in s 16(2)(*a*)(*ii*) of the Act.
[16] *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) & another* [2018] ZASCA 12; 2018 (4) SA 433 (SCA) para 10.

after Transnet had agreed to abandon that portion of prayer 2.2 and 2.3 where joint and several liability was sought.

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

1 Paragraph 2 of the order of the high court is varied to read as follows:

‘2. The contract concluded between the Applicant and the Third Respondent on 27 August 2015 (the second contract) is declared to be unlawful and is set aside; and

2.1 The first and second respondents are to serve and file with the Registrar of this Court an audited statement of the expenses incurred, the income received and the net profit earned under the second contract within 60 days of this order;

2.2 The applicant is to obtain and file with the Registrar of this Court an independent audited verification of the details provided by the first and second respondents in terms of paragraph 2.1 within 30 (thirty) days of the receipt of the information, and the first and second respondents are to permit the auditors appointed by the applicant to have unfettered access to the relevant financial information for this purpose;

2.3 The first respondent is to pay to the applicant its verified profit within thirty (30) days of service of the audit verification.

2.4 The second respondent is to pay to the applicant its verified profit within thirty (30) days of service of the audit verification.’

2 The first and second appellants are to pay the costs of this appeal which costs are to include those occasioned by the appointment of two counsel.

C HEATON NICHOLLS
JUDGE OF APPEAL

APPEARANCES:

For first appellant:	I Hussain SC
Instructed by:	Essack Attorneys Inc., Johannesburg
	Phatshoane Henney Attorneys, Bloemfontein
For second appellant:	C van der Merwe
Instructed by:	De Souza Attorneys Inc., Sandton
	Lovius Block Attorneys, Bloemfontein
For respondent:	S Vivian SC and B Morris
Instructed by:	Mncedisi Ndlovu & Sedumedi Attorneys, Johannesburg
	Poswa Incorporated, Bloemfontein