

SOUTH AFRICA / JUDGMENT

Siyangena Technologies (Pty) Ltd v PRASA and Others (487/2021) [2022] ZASCA 149; [2023] 1 All SA 74 (SCA); 2023 (2) SA 51 (SCA) (1 November 2022) [2022] ZASCA 149

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Van der Merwe, Plasket, Chetty, Salie-
Hlope

CASE / FILE NUMBER

487/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 487/2021

In the matter between:

SIYANGENA TECHNOLOGIES (PTY) LTD

APPELLANT

and

PASSENGER RAIL AGENCY

OF SOUTH AFRICA

FIRST RESPONDENT

RETIRED JUSTICE EZRA GOLDSTEIN

SECOND RESPONDENT

RETIRED JUSTICE MEYER JOFFE

THIRD RESPONDENT

#UNITEBEHIND

AMICUS CURIAE

Neutral citation: Siyangena Technologies (Pty) Ltd v PRASA and Others (487/2021) [2022] ZASCA 149 (1 November 2022)

Coram:

PONNAN, VAN DER MERWE and PLASKET JJA and CHETTY and SALIE-HLOPE AJJA

Heard:

26 August 2022

Delivered: 1 November 2022

Summary:

Constitutional and administrative law – irregularities in procurement process by organ of state – legality review – self-review – delay – whether unreasonable and should be condoned – just and equitable remedy following declaration of unconstitutionality of contracts – factors relevant to assessment – misconduct by state officials – contracting parties not innocent – remedial discretion – independent engineer appointed to assess value of work – order may be interfered with on appeal only if discretion not exercised judicially – defective record – absence of core bundle – costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Lamont, Raulinga and Hughes JJ, sitting as court of first instance):

1 The appeal is dismissed with costs, including the costs of two counsel.

2 The appellant's attorneys shall not be entitled to recover any of the costs associated with the preparation, perusal or copying of the record.

Chetty AJA (Ponnan, Van der Merwe and Plasket JJA and Salie-Hlope AJA concurring):

Introduction

[1] This appeal is against the judgment of the Gauteng Division of the High Court, Pretoria (the high court), which set aside certain procurement contracts entered into between the appellant, Siyangena Technologies (Pty) Ltd (Siyangena) and the first respondent, the Passenger Rail Agency of South Africa (PRASA). Siyangena was appointed by PRASA to supply and maintain an integrated security access management system (ISAMS) at various train stations. The equipment – which included public address facilities, speed gates and electronic display boards – was intended to enhance the safety, access and efficiency of the public rail commuter system, which PRASA is under a statutory duty to provide and maintain.[1]

- [2] The high court found that in contracting for these goods and services with Siyangena, PRASA, as an organ of state, failed to act in a manner that is 'fair, equitable, transparent, competitive and cost effective' in accordance with the provisions of s 217 of the Constitution. The high court declared the award of the contracts to the value of approximately R5.5 billion invalid, and set them aside in terms of s 172(1)(a) of the Constitution. The high court further directed, as part of its remedial powers in terms of s 172(1)(b) of the Constitution, that an independent engineer be appointed in order to determine whether any of the payments made to Siyangena by PRASA should be set off against the value of the works done. It is principally this latter conclusion that occupies our attention in this appeal, which is with the leave of the court below.

Grounds of appeal

- [3] On appeal Siyangena appeared to accept that on the strength of *State Information Technology Agency SOC Ltd v Gijima*[2] (Gijima) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[3] (Buffalo City) the contracts fall to be declared constitutionally invalid. However, it takes issue with the remedial order. It contends that it is inconsistent with the Constitutional Court's approach to a just and equitable remedy because, so it claims, it was in the position of an innocent party. As a result, it ought not to be stripped of any rights it would have been entitled to under the contract, but for the declaration of invalidity.
- [4] Importantly, in its written argument before this Court, Siyangena conceded that it could not contest the high court's 'numerous findings that PRASA had failed to comply with the requirements of the procurement processes in respect of the three contracts at issue in these proceedings'. Rather, the position adopted by Siyangena is that at all times it had no knowledge of the internal workings of PRASA and was an 'innocent' contracting party; there was thus no basis to infer that it was complicit in the malfeasance.

Background facts

- [5] PRASA approached the high court in March 2018 to have its own decisions to conclude the procurement contracts with Siyangena reviewed and set aside.[4] The election by PRASA to set aside its own decisions was taken by the reconstituted Board of Control of PRASA (the Board), which was appointed in August 2014. Prior to this, the executive management committee fell under the control of the erstwhile Group Chief Executive Officer (GCEO), Mr Montana, who resigned under a cloud in July 2015 amidst mounting concern of mismanagement, as well as an ongoing investigation by the Public Protector into maladministration at PRASA.

- [6] The facts surrounding the irregularities, to the extent that they implicate PRASA's own officials, are extensively canvassed in the founding affidavit of Ms Ngoye, the Group Executive: Legal, Risk and Compliance at PRASA and corroborated by supporting documentation and affidavits. The high court made extensive reference to these facts in its

judgment,[5] and no purpose would be served in restating those here. The stance adopted by the appellant is that it does not challenge those findings, as it was not privy to the internal workings of PRASA.

Irregular contracts

- [7] In preparation for the 2010 FIFA World Cup, a decision was taken by PRASA to initiate a pilot project to upgrade certain stations. However, due to budgetary constraints, not every station was to be upgraded.
- [8] Mr van der Walt was the Head of Strategic Asset Development (SAD) at PRASA. Mr Gantsho was the general manager in the unit which was responsible for infrastructure development. Mr Gantsho, without the knowledge of Mr van der Walt, but after liaising with Mr Montana, authorised the extension of the pilot project to other '2010' stations, with Siyangena as the contracting party.
- [9] The haste with which this contract was concluded is evident from a proposal submitted by Mr Ferreira, the Chief Executive Officer (CEO) of Siyangena, on 17 March 2010 for the installation of Speedstile gates and closed circuit television (CCTV) surveillance cameras (forming part of an integrated security system) at seven sites for the amount of R90.9 million. Siyangena requested an appointment letter within two days from the date of its proposal. The proposal was met with some concern by Mr Sebola, the Senior

Manager: Projects, on the issue of the funding and ownership of the installations. His concerns were overlooked. Similar concerns were echoed by the Supply Chain Management department that the proposal be placed before the Board and that the issue of funding be resolved. These concerns were also brushed aside. On 30 April 2010, Siyangena was appointed as the contractor for an amount of R61.8 million, exclusive of VAT, in terms of a letter of appointment, although no formal contract could be located. It bears noting that the motivation submitted to the Chairman of the Board for approval of the contract deleted any reference to Mr Montana as being one of the persons who was instrumental in driving this project. Instead, the motivation referred to Mr Gantsho alone.

- [10] The high court recorded that this contract was concluded following private meetings held between Siyangena and officials of PRASA. A meeting took place between Mr Ferreira and Mr Kgaudi in November 2009 where they discussed the work to be carried out in respect of the 2010 FIFA World Cup stations. Mr Kgaudi was a consultant engineer acting on behalf of PRASA with regard to the supply and installation of the ISAMS. The identification of Siyangena as a suitable entity to take over the role as the service provider on

the ISAMS project appears, even on the version of Siyangena, to have been more than fortuitous. Both Mr Gantsho and Mr Montana were present at the meeting in January 2010 when Siyangena was mentioned to assist with the ISAMS roll-out. Mr Gantsho was then instructed to contact Siyangena, after which, as the high court found, at least two meetings were held between Mr Ferreira and Mr Montana, in private. There is no record of what was discussed at these meetings.

Ultimately, Mr Gantsho, in liaison with Mr Montana, and to the exclusion of Mr van der Walt and those in supply chain management, motivated for the appointment of Siyangena.

[11] The high court further noted that in Siyangena's answering affidavit it is recorded that Mr Montana met with Mr Ferreira on 17 March 2010 at the former's office, where discussions were held as to Siyangena's ability to meet the proposed deadline for delivery. There is no record of this meeting either. What is not disputed is that, on the same day, Mr Gantsho received the abovementioned proposal from Siyangena for an extension of the pilot project at a contract price of R90.9 million.

[12] The high court found that, despite the absence of a budget to fund the roll-out of the ISAMS programme, and without having carried out any procurement process or prior needs assessment as to whether the installation would be fit for purpose, PRASA proceeded to contract with Siyangena on the pretext that it would not be able to secure an alternative contractor to take over in time from Siemens (the previous contractor) before the commencement of the 2010 FIFA World Cup. It was found that internal documents were

manipulated in an attempt to justify and conceal a prior commitment, which had been made to Siyangena, to the exclusion of other

contractors.

[13] The high court proceeded to analyse the circumstances leading to the conclusion of 'Phase 1' of the impugned contracts, which entailed the roll-out of the ISAMS programme to sixty-two stations throughout the country. Siyangena was allowed to piggyback on its original contract with PRASA, and in this way, allowed to by-pass any vetting under the procurement system. The 2010 FIFA World Cup provided the impetus for stations designated as 'World Cup Stations' to be modernised, the intention being to reduce fare evasion and to cater for the anticipated volumes of commuters during the tournament. However, no needs analysis or

end-user assessment, planning or budgetary exercise was carried out before embarking on the next phase of the installations. This must be seen against the backdrop of a contract price of R1.9 billion, where the costs under the pilot project of R2.5 million per station ballooned under the extended roll-out to approximately R12.4 million per station, and then to R31.5 million.

Correspondence between Mr Gantsho and Siyangena suggests that the latter were left to design the specifications and the bill of quantities, so much so that the contract in Phase 1 resembles that of an unsolicited bid.

[14] Moreover, PRASA as an entity falling under the control of the Department of Transport and the responsible Minister, was bound by further regulatory policy. Provision for such a large expenditure (defined in the National Treasury Guidelines as a 'mega project'[6]) would have had to feature in the Medium Term Expenditure Framework (MTEF) for 2010/2011. No allocation was made for such expenditure. As the high court found, there was no authorisation from the Minister for a contract of such magnitude.

- [15] The high court found that the key protagonists in paying little or scant regard for PRASA's internal systems of checks and balances, and of the numerous committees created for the very purpose of ensuring efficiency and transparency in procurement, were Mr Montana, Mr Gantsho and Mr Mbatha, the Chief Procurement Officer (CPO). As the GCEO, Mr Montana simply ignored procedures, by-passed committees and manipulated documents to favour an outcome to the advantage of Siyangena. When the tender documents did find their way to the Board for approval, the minutes which served before the Board concealed irregularities and contained misrepresentations.
- [16] It is inconceivable that the Board could have approved a contract for approximately R1.3 billion in circumstances where its national budget for the installation of speed gates was R317 million. The Board members, who considered the approval of the contract, did not have the necessary expertise to evaluate the bid, but nonetheless awarded the contract to Siyangena on the basis that it 'met all our technical requirements'.
- [17] Even more startling is that Siyangena tendered for the contract at a price of R1.1 billion with the Board inexplicably approving the award of the contract at a price of R1.9 billion including VAT. This situation is exacerbated by an up-front payment by PRASA of R250 million as a 'deposit' to enable Siyangena to 'purchase equipment', without even knowing what equipment it intended to purchase.
- [18] The Joint Buildings Contract Committee (JBCC) agreement followed upon a process riddled with irregularities. The high court found that the works and quantities in the agreement had not been identified; the principal agent appointed had no skills to satisfy the requirements of the position. In short, the high court described the conclusion of the JBCC agreement as irrational and unreasonable. None of these shortcomings and irregularities are gainsaid by Siyangena.
- [19] A further example of Siyangena being the beneficiary of 'extensions' to existing contracts, without having to compete in an open and fair procurement process, is evident from a motivation addressed by Mr Mbatha to Mr Montana for approval of CCTV cameras at the cost of R97.7 million. The proposal was motivated on the basis of an urgent need to address spiralling theft and vandalism at the Wolmerton and Braamfontein staging yards. No formal needs analysis or budgetary considerations were evident in
- the request. A recurring theme used to justify the award of various contracts to Siyangena was on the basis of emergency situations or that an existing service provider was unable to meet the proposed deadline.
- [20] The implementation of 'Phase 2' of the roll-out of the ISAMS project was carried out in much the same manner as Phase

1. This phase encompassed 160 stations throughout the country and commenced with a proposal from Siyangena of R2.5 billion. Again, a competitive bidding process was jettisoned. The contract was considered in circumstances where the MTEF for 2013/14 only made

provision for R235 million for work of this nature, nor was there approval from the Department of Transport or National Treasury in respect of a 'mega project'.

- [21] PRASA attempted to give the process a veneer of compliance with the procurement guidelines. However, in June 2013, when a Request for Proposal was issued to various service providers, contrary to its SCM guidelines, PRASA specified the use of a specific brand of equipment in respect of access control, CCTV and speed gate installation. This was directed at favouring Siyangena over the other bids, as the brand of equipment specified was supplied almost exclusively by Siyangena.
- [22] Despite various concerns having been raised, Mr Montana ultimately recommended the approval of Siyangena as the successful bidder in circumstances where there was no approval by the Board. A letter of appointment was issued by Mr Mbatha on 17 June 2014 at a contract value of R2.5 billion. As in Phase 1, a JBCC agreement was concluded on 30 June 2014, which was plagued by the same shortcomings as its predecessor.
- [23] A further contract between PRASA and Siyangena was concluded in September 2014 for work to upgrade the equipment installed under Phase 1 and for the maintenance and warranty of equipment installed in Phase 2. The proposal for the work was initiated by Siyangena and it was the only entity considered, and thereafter engaged. As with other contracts between the parties, there was no adherence to any procurement protocols, no budget analysis, no Board approval and no consideration of the proposal by any of PRASA's committees, including the Corporate Tender Procurement Committee (CTPC). In this instance, the contract was steam-rolled by the Group Chief Procurement Officer, Mr Phungla, together with Mr Montana, at a price of R794 million.

Hearsay evidence and the exclusion of affidavits of 'intervening witnesses'

- [24] Siyangena contended that it was seriously hamstrung in demonstrating that it was innocent of the alleged malfeasance because the high court had wrongly decided to disregard affidavits made by certain witnesses. Those witnesses came to depose to affidavits in the following manner: The review application was set down by special allocation on 5-8 March 2019, the Judge President of the Division having decided to constitute a court of three judges to hear the matter (the first court) (which, save for one judge, was differently constituted to the one that eventually heard the matter).[7] Prior to the hearing, counsel were informed in chambers that the court had decided that the matter would not proceed, as the court was concerned that current and former employees of PRASA, who were implicated in alleged wrongdoing, had not been granted any opportunity to respond to the allegations made against them or to participate in the review proceedings as 'witnesses' or as parties. The first court consequently ordered that those specifically named employees or members of PRASA's

board were

entitled to intervene as witnesses and deliver affidavits in their defence of their alleged wrongdoing.

[25] This was done mero motu absent an application by any of the ‘intervening witnesses’ or the parties themselves. It is unclear where the court derived the power that it purported to exercise. There is certainly no provision in the Uniform Rules for Court for the intervention of a witness in an application. In any event, PRASA was not seeking relief against any of those identified as witnesses. The relief sought by PRASA was confined to the setting aside of the JBCC agreements, the contracts concluded with Siyangena and orders setting aside the arbitration agreements. None of those ‘intervening witnesses’ had any direct and substantial interest in the relief sought by PRASA.

[26] In my view, the order permitting witness affidavits to be filed ought not to have been granted in the first place. Support for this

conclusion is to be found in *National Director of Public Prosecutions v Zuma*,^[8] where this Court considered an application by the former President, Mr Mbeki, and the Government of South Africa to intervene in appeal proceedings concerning a decision by the high court which found the existence of a political conspiracy to prosecute the former Deputy President, Mr Zuma. To that end, the high court made several conclusions implicating Mr Mbeki, which reflected negatively on him and the Government. Mr Mbeki sought to intervene in this Court to ‘set the record straight’. The application was dismissed with Harms JA saying the following:^[9]

‘Nevertheless, to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal. The basic problem with the application is that the applicants have no interest in the order but only in the reasoning. They are in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. Such a person has no ready remedy, especially not by means of intervention. To be able to intervene in an appeal, which is by its nature directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal. The

applicants do not have such an interest.’ (My emphasis.)

[27] The high court ruled ‘the affidavits inadmissible as evidence in these proceedings’. Although the reasoning of the court in arriving at that conclusion can rightly be said to be open to criticism, the conclusion itself cannot be faulted. The order of the first court was open to reconsideration by the court seized with the review application. The order by the first court granting leave to witnesses to intervene is unprecedented. Unsurprisingly, there is no support for it in the rules of court or our substantive law. The first court lacked the power to issue such an order, which was to all intents and purposes a nullity.^[10] The court below was thus entitled to disregard the affidavits produced in terms of that order on the basis that they were inadmissible.

Delay

[28] The high court had careful regard to PRASA's explanation for the delay, viewed in the context of the widespread corruption that appeared to permeate those sections of PRASA concerned with the procurement of services related to the integrated access management

control system. The high court found that the previous management of PRASA, under the 'tyrannical' control of its erstwhile

GCEO, Mr Montana, placed obstacles in the path of the newly constituted Board to unearth the true state of affairs, by frustrating the flow of information. The new Board was constituted in August 2014. Mr Montana remained in his position until his resignation in July 2015, in which time steps were taken to conceal the irregular and unlawful conduct. These features too were echoed in *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa (Swifambo)*.
[11]

[29] In order to unearth the true extent of the mismanagement, the new Board appointed a team of forensic investigators. The investigators were required to trawl through countless emails and computer databases, amidst deliberate efforts to conceal the malfeasance within PRASA.

[30] It is in this context that PRASA contends that once the true reasons for the impugned decisions were known to the reconstituted Board, it acted without delay and within a reasonable time in bringing this application. To the extent that there was any delay (which the high court determined to be approximately 10 months), PRASA provided an explanation. In essence, as the high court held:

'The reconstituted board required time to . . . ascertain the nature and extent of the irregular activities and expenditure. What made the board's work even more difficult, is that, as a result of the victimization they suffered, certain members of the applicant's board resigned.'

[31] The high court, relying on *Buffalo City*, exercised its judicial discretion and granted condonation for the delay of 10 months, taking into account the nature of the impugned

decision; the conduct of PRASA; and prejudice to the public purse. It said that Siyangena's complaint of prejudice could be ameliorated in the form of an appropriate remedy.[12] It was not contended in this Court that the high court exercised its discretion on wrong principles or misdirected itself in any way.

[32] This Court in *Swifambo* condoned a delay of three years in circumstances similar to those in this matter, where the Board was kept ignorant of the full extent of the wrongdoing at PRASA.[13] *Swifambo* and the present matter relate to procurement during the tenure of Mr Montana, in the face of corrupt dealings with service providers.

Swifambo confirmed that the overriding consideration in condoning delay is the interests of justice, as well as the public interest. In this regard, the high court held that almost R5.5 billion of taxpayer's money had been spent on equipment which was not fit for purpose. As the Constitutional Court pointed out in *City of Cape Town v Aurecon South Africa (Pty) Ltd*:^[14]

‘ . . . If the irregularities raised in the report had unearthed manifestations of corruption, collusion or fraud in the tender process, this Court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention.’^[15]

[33] I can find no ground to interfere with the high court's decision to condone the delay of 10 months. This period of delay was not unreasonable in the circumstances. PRASA acted expeditiously once the true reasons for the impugned decisions came to light. In the context of a litany of breaches of the procurement system, condonation had to be granted in the interests of justice.

Corruption

[34] As this Court held in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others*,^[16] where there is evidence of corruption, an order declaring the contracts unconstitutional ought to follow. The factual findings by the high court, summarised above, display a concerted effort on behalf of officials within PRASA to debase almost all aspects of the procurement process, to the benefit of Siyangena. Their conduct spanned breaching the supply chain guidelines by not having the scope of work designed and evaluated by the Cross Functional Sourcing Committee (CFSC) and the introduction of brand specification into the Request for Proposals, in circumstances where Siyangena would have had ‘priority’ access or availability to such items by virtue of their proximity to the suppliers.

[35] It was also apparent that Siyangena was on occasion, without resort to a bidding process, introduced as the contractor that would be able to deliver on a particular project, based primarily on it being an existing contractor. The appointments were made without the necessary vetting process. In other instances, specifications were proposed by Siyangena rather than PRASA. When officials within the procurement structure raised concerns about source and price, their concerns were dismissed. The high court inferred an ‘existence of corruption . . . from the fact that a multitude of irregularities exist’ and the ‘absence of a candid explanation from the tenderer’.

[36] That remains the only plausible inference on a conspectus of all of uncontroverted evidence. I am satisfied that the high court was ineluctably driven to conclude that Siyangena was complicit, alternatively involved in the corruption in relation to the impugned

contracts.^[17] Nothing which has been placed before us warrants disturbing that finding. I therefore concur with the high court's inference of complicity in the corruption on the part of Siyangena.

Remedy

- [37] In the high court and in this Court, PRASA accepted that some of the work of Siyangena was of value to it. Thus, despite the view that Siyangena was not the innocent contractor it proclaimed to be, the high court devised a remedy it deemed to be fair to both parties, and directed that an independent engineer be appointed to value the works purportedly carried out by Siyangena at the various train stations and other facilities belonging to PRASA.
- [38] The high court further considered that the independent engineer would take into account amounts already paid under the contracts to Siyangena and in the event that it is determined that Siyangena has been underpaid, PRASA would be obliged to make good on the shortfall. Conversely, if it is determined that Siyangena has been overpaid in relation to the value of the work done, then it would be liable to recompense PRASA.
- [39] Gijima informs us that the powers of a court granting relief in terms of s 172(1)(b) of the Constitution are so wide that 'it is bounded only by considerations of justice and equity'.^[18] In this Court, counsel for Siyangena placed much emphasis on evidence that PRASA insisted that Siyangena continue to perform work in terms of the contracts, even at the time when the former was taking steps to review and set aside the contracts. Counsel for Siyangena contended that the company continued to provide its services as PRASA continued to demand performance. There is a dispute in this regard, as Siyangena itself obtained an interdict preventing PRASA from taking steps to bar it from various sites. That notwithstanding, it is not in dispute that PRASA ceased payment to Siyangena in May 2016 on the contracts in question.
- [40] It is in this context that the appellant submits that even if the high court was correct in declaring the impugned contracts to be invalid, it ought to have been treated in the same manner as that in Gijima, that is, be afforded just and equitable relief in the form of an order that the declaration of invalidity shall not have the effect of divesting it of its rights, which but for the declaration of invalidity it would have been entitled to.^[19] This would have included its right to pursue the pending arbitration before the second and third respondents and to contend for payment of services rendered at 'market related rates'.
- [41] #UniteBehind was admitted as an amicus curiae. It joined issue with PRASA in opposing any alteration to the relief granted by the high court. It submitted that Siyangena's attempt to alter the relief falters at the first hurdle, in that it has not been able to demonstrate any basis on which this Court should interfere with a true discretion exercised by the court below in respect of the relief granted under s 172(1)(b).
- [42] As observed in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another*:^[20]
- '[88] 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.”

[89] In Florence, Moseneke DCJ stated:

“Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial

decision-making.”’

[43] In my view, Siyangena did not show that the high court had failed to exercise its discretion judicially or, as this Court in *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others (Central Energy Fund)* stated:[21]

‘. . . It may be interfered with on appeal only if this Court is satisfied that it was not exercised judicially, or had been influenced by wrong principles or a misdirection of the facts, or if the court reached a decision which “could not reasonably have been made by a court properly directing itself to all the relevant facts and principles”. Put simply, the appellants must show that the high court’s remedial order is clearly at odds with the law.’

[44] In the present case, Siyangena was rightly found by the high court to have been ‘complicit to the corruption, impropriety and maladministration’. It is inconsistent with notions of justice and equity that it should be allowed to profit from the unlawful procurement contracts. Furthermore, even innocent counterparties are not generally entitled to benefit or profit from an unlawful contract.[22]

[45] Siyangena further contends that the order of the high court was imprecise and incapable of implementation, in that it failed to define how the independent engineer would attach a ‘value’ to the work which it has carried out. This argument has no merit. The order of the high court specifically provides that if the parties are unable to agree on the identity of the engineer or if there is disagreement in the valuation of the works, they are entitled to re-enrol the matter for the court to make a determination.

[46] There is precedent for an order, for instance, where an independent third party is appointed to assess the financials of the contracts to determine the appropriate accounting reconciliation.[23] Thus, the appointment of the independent engineer, particularly where parties are unable to agree on the value of the works, is not unusual. In this case, PRASA contends that the equipment was not fit for purpose, because it did not meet the need or

provide the latest technology and, in various respects, was implemented in a manner that was inadequate and incomplete. All of this points to the need for an independent, qualified third party to assess and determine the financial value of the works. This approach will ensure that Siyangena would not be benefitted unduly and that PRASA would not be paying for services not rendered. Fairness is achieved and justice is ensured for both parties.

[47] For all the reasons set out above, Siyangena's appeal must fail.

Record

[48] It remains to comment on the size of the court record and the failure of the appellant to produce a core bundle. SCA rule 8(7)(a) makes it plain that a core bundle is to be prepared as an adjunct to the appeal record if appropriate. This is particularly necessary

where the record is voluminous. PRASA's counsel alerted Siyangena to this at the time when it filed its heads of argument in November 2021, almost nine months before the hearing of the appeal. Correspondence was placed before us, which indicates that in August 2021 Siyangena's attorneys wrote to those acting for PRASA stating that since the appeal is directed at 'the whole of the judgment and order (including costs)', it would not serve any purpose or contribute to the convenience of the SCA to omit any portion of the record from the bundles.

[49] PRASA's attorneys responded expressing concern at the size of the record and invited their opponents to 'narrow the issues before the appeal court in a way that would facilitate only parts of the record being included'. This recommendation was unheeded, with the result that the record which was placed before us was made up of 41 volumes, comprising almost 8000 pages. According to Siyangena's practice note, approximately 1000 pages were relevant and necessary to read, excluding a further 2000 pages relevant to the 'intervening witnesses'. It beggars belief as to why the record comprised a further 7000 pages and why there was not at least a core bundle.

[50] Where appeal records contain unnecessary documentation or have not been properly prepared in other respects, this Court has on several

occasions limited the costs of preparation, perusal and copying that those responsible for preparing the record are

entitled to claim.[24] In *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality*, [25] in light of the practitioners not heeding previous warnings to prepare a core bundle, this Court sanctioned non-compliance with the rules by ordering that the errant attorneys would not be permitted to saddle their client with the costs of preparation of the record.

[51] It appears to me that in light of the blatant disregard by Siyangena's attorneys, who bear the primary obligation for the preparation of the record in accordance with the rules, and their misguided view that it would be necessary for this Court to trawl through approximately 8000 pages, a disallowance of costs for non-compliance with the rules should follow.[26]

Order

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

1 The appeal is dismissed with costs, including the costs of two counsel.

2 The appellant's attorneys shall not be entitled to recover any of the costs associated with the preparation, perusal or copying of the record.

M R CHETTY

ACTING JUDGE OF APPEAL

APPEARANCES

For the appellant: N G D Maritz SC

[Hheads of argument having been drafted by N G D Maritz SC and S Pudifin-Jones]

Instructed by:

Van der Merwe & Associates, Pretoria

Honey Attorneys, Bloemfontein

For the first respondent: Q G Leech SC (with H Shozi SC, M Kufa and J Chanza)

[Hheads of argument having been drafted by A Subel SC, Q G Leech SC, I Kutumela and O Makgotha]

Instructed by:

Ngeno and Mteto Incorporated, Pretoria

Mavuya Incorporated, Bloemfontein

For the amicus curiae: N Ferreira (with him M Mbikiwa)

Instructed by:

Webber Wentzel, Johannesburg

Symington De Kok, Bloemfontein

[1] PRASA was established in terms of s 22 of the Legal Succession to the South African Transport Services Act 9 of 1989. Its statutory

mandate is to provide, inter alia, commuter rail services in the public interest throughout the Republic and is funded by the

National Treasury through allocations made to the Department of Transport.

[2] State Information Technology Agency SOC Ltd v Gijima [2017] ZACC 40; 2018 (2) BCLR 240 (CC).

[3] Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd

[2019] ZACC 15; 2019 (6) BCLR 661 (CC).

[4] The legal challenge to the procurement contracts has a lengthy history more fully canvassed in the high court judgment. PRASA

launched an earlier review application on 2 February 2016 to set aside the contracts. On 3 May 2017, Sutherland J dismissed the

application on the basis that PRASA had not sought condonation for the delay in bringing the application in terms of s 9(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). An application for leave to appeal and subsequent application to the SCA were dismissed. Thereafter, the Constitutional Court handed down judgment in Gijima, paving the way for the present application as a legality review.

[5] See paras 43-104.

[6] National Treasury, Capital Planning Guidelines, June 2018 defines a ‘mega project’ as those estimated to cost more than R400 million per year for a minimum of three years, or a total project cost of at least R1 billion. Most mega projects will customarily require a pre-feasibility study and a comprehensive feasibility study for scrutiny by National Treasury.

[7] Per Mothle, Hughes and Van der Westhuizen JJ.

[8] National Director of Public Prosecutions v Zuma

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 84. See Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others

[2020] ZAWCHC 164, where Rogers J dismissed an application by an individual implicated in certain impugned transactions who sought to intervene in the proceedings to file an affidavit, presumably to exculpate himself. The Court reasoned: ‘To the extent that my findings reflect adversely on Gamede, they have been reached without regard to the evidence he wanted to adduce. If Gamede feels that a public statement setting out his side of the story is necessary to protect his reputation, my judgment will be no bar to his doing so.’

[8] National Director of Public Prosecutions v Zuma

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[9] Paragraph 85.

[10] Master of the High Court Northern Gauteng High Court, Pretoria v Motala N O and Others

[2011] ZASCA 238; 2012 (3) SA 325 (SCA).

[11] Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa [2018] ZASCA 167; 2020 (1) SA 76 (SCA) para 34.

[12] Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal

[2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) paras 53 and 56. See also Buffalo City para 54.

[13] Swifambo para 36.

[14] City of Cape Town v Aurecon South Africa (Pty) Ltd

[2017] ZACC 5; 2017 (6) BCLR 730 (CC).

[15] Aurecon para 50.

[16] Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others [2007] ZASCA 165; [2008] 2 All SA 145; 2008 (2) SA 481 (SCA) para 26: ‘There is no suggestion that the consortium was complicit in some way in bringing about the conclusion of the tender - had that been shown it would have been appropriate to set the decision aside for that reason alone - and it must be accepted that it is an innocent party’.

[17] In AllPay Consolidated Investment Holding (Pty) Ltd v Chief Executive Officer South African Social Security Agency (Corruption Watch and Centre for Child Law as Amici Curiae) [2013] ZACC 42; 2014 (1) SA 604 (CC) (AllPay), it was held at para 27: ‘... deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences’.

[18] Gijima para 53.

[19] Gijima para 54.

[20] Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 88-89.

- [21] Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others
- [2022] ZASCA 54; [2022] 2 All SA 626 (SCA) para 43.
- [22] AllPay 2 para 67.
- [23] See Black Sash Trust v Minister of Social Development and Others (Freedom under Law Intervening)
- [2018] ZACC 36; 2018 (12) BCLR 1472 (CC) (Black Sash I) paras 40 and 50; South African Social Security Agency and Another v Minister of Social Development and Others
- [2018] ZACC 26; 2018 (10) BCLR 1291 (CC) and Freedom Under Law NPC v Minister of Social Development (Corruption Watch (NPC) RF and South African Post Office SOC Ltd Amiens Curiae)
- [2021] ZACC 5; 2021 (6) BCLR 575 (CC).
- [24] See Bothma-Batho Transport (Pty) Limited and Another v Nedbank Limited
- [2015] ZASCA 31 (SCA) paras 20–21 (75 per cent of record superfluous); W T and Others v K T
- [2015] ZASCA 9; 2015 (3) SA 574 (SCA) paras 39–40 (record not cross-referenced); Bengwenyama-ya-Maswati Community and Others v Minister for Mineral Resources and Others
- [2014] ZASCA 139; [2014] 4 All SA 539 (SCA) para 65; and Bengwenyama-ya-Maswati Community and Others v Genorah Resources (Pty) Ltd and Others
- [2014] ZASCA 140; [2014] 4 All SA 673 (SCA) para 67 (appeal record more extensive than it ought to have been; 10 per cent reduction in costs of appeal ordered).
- [25] Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality
- [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 76.
- [26] City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others [2022] ZASCA 82 (SCA) paras 18-19.

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