

SOUTH AFRICA / JUDGMENT

Special Investigating Unit v Mlangeni Brothers and Another (GP07/2021)

[2022] ZAST 26 (14 November 2022)

[2022] ZAST 26

COURT
Special Tribunal

BEFORE
L.T. Modiba

CASE / FILE NUMBER
GP07/2021

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IN
THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE
SPECIAL INVESTIGATIONS UNIT AND
SPECIAL
TRIBUNALS ACT 74 OF 1996
(REPUBLIC
OF SOUTH AFRICA)
CASE
NUMBER: GP07/2021
In

the matter between:	SPECIAL INVESTIGATING UNIT Applicant and MLANGENI BROTHERS First Respondent MEMBER
OF THE EXECUTIVE COUNCIL:	GAUTENG DEPARTMENT OF HEALTH Second Respondent

JUDGMENT

Administrative Law – legality review – determination of just and equitable relief in terms of s 172(1)(b) of the Constitution – the burden of proof.

MODIBA J:

INTRODUCTION

- [1] The issues that remain for determination between the parties is just and equitable relief to be granted in terms of s 172(1)(b) of the Constitution, consequent upon the reviewing and setting aside of the tender the Gauteng Department of Health (GDOH) awarded the respondent, Mlangeni Brothers Events CC (Mlangeni Brothers) to supply it with Personal Protective Equipment (PPE) items in the wake of the Covid 19 pandemic in 2020, as well as the costs of the application.
- [2] In April 2020, the GDOH awarded Mlangeni Brothers a contract (the impugned contract) to supply it with 100,000 units or boxes (comprising 100 gloves each) of examination powder-free gloves (PPE items). Following widespread allegations of irregularities in the procurement of PPE's, the President of the Republic of South Africa issued proclamation R.23 of 2020[1], authorising the SIU to investigate maladministration and malfeasance in the awarding of tenders for the supply of PPEs across the public service.
- [3] The impugned contract is one of many contracts investigated by the SIU as authorised by Proclamation R.23 of 2020. On the basis of its findings, in March 2021, the SIU instituted proceedings in the Tribunal to review and set aside the impugned contract, citing various procurement irregularities (the review application). By agreement between the parties, on 7 February 2022, the Tribunal granted an order reviewing and setting aside the impugned contract, the commitment letter dated 20 April 2020 and purchase order number 4250901850 dated 07 May 2020 the GDOH issued to Mlangeni Brothers. The costs of the application were reserved for determination in these proceedings. The Tribunal's order also directed Mlangeni Brothers to file an Income and Expenditure Statement (IES) by 21 February 2022 to determine the profit it acquired from the impugned contract.
- [4] In the present proceedings, the applicants seek an order that it is just and equitable that Mlangeni Brothers is divested of the profit it stands to acquire from the tender and that it is only permitted to retain the reasonable expenses it incurred when it supplied the PPE items to the GDOH.

- [5] Mlangeni Brothers delayed by a period of four months to file the IES. It only filed it on 1 July 2022. It seeks condonation for the late filing of the IES. It also seeks an order that the GDOH pays to it an amount of R15, 523, 200, interest on this amount at the applicable rate, calculated from 22 September 2020 (the monetary judgment) as well as the costs of the review application. Essentially, Mlangeni Brothers seeks full payment of the amount it charged the GDOH,

inclusive of the profit it stands to earn from the impugned contract.

- [6] In their answering affidavit filed in response to Mlangeni Brothers' application for condonation and for monetary judgment, the applicants concede the condonation application and only seek the costs of the application. Notwithstanding that Mlangeni Brothers flagrantly disregarded the Tribunal's order regarding the filing of the IES, its request for condonation stands to be granted in the interest of justice. As will be apparent in this judgment, the basis for the condonation application bears relevance for the determination of the just and equitable relief.
- [7] Since by seeking condonation, Mlangeni Brothers seeks an indulgence, it is trite that it must bear the cost thereof. Therefore, Mlangeni Brothers falls to be ordered to pay the applicants' costs of the condonation application.
- [8] I first determine just and equitable relief. Then, I determine the costs of the review application.

JUST AND EQUITABLE RELIEF

- [9] In its answering affidavit, the SIU contends that a genuine dispute of fact irresolvable on the papers has arisen on the affidavits filed in respect of the determination of just and equitable relief. It sought a referral of the following issues to oral evidence:

9.1 the quantity of goods Mlangeni Brothers allegedly supplied to GDOH;

9.2 the veracity of the IES and whether the operating expenses set out in the IES constitute reasonable expenses Mlangeni Brothers incurred when supplying PPE items to the GDOH in terms of the impugned contract.

- [10] The Tribunal granted the SIU's request. The SIU led the oral evidence of the following witnesses:

10.1 Tania Mulligan (Ms Mulligan) – she is the sole owner of Kushesh Trading CC (Kushesh) based in Roodepoort, Gauteng.

10.2 Lizelle Van Rooyen (Ms Van Rooyen) – she is the co-owner of 3G Relocations and Transport CC (3G Relocations) based in Centurion, Gauteng.

10.3 Ismail Dawood Suleman Varachia (Mr Varachia) - he is employed by the SIU as a forensic accountant.

- [11] Mlangeni Brothers did not lead any oral evidence.
- [12] Both Ms Mulligan and Ms Van Rooyen testified that their respective companies were contracted by the GDOH to provide warehousing and transportation services to it. The services they provided GDOH include receiving, storing and dispatching goods on behalf of the GDOH. They provided these services in respect of the PPE items Mlangeni Brothers supplied to GDOH in terms of the impugned contract. Their evidence impugns Mlangeni Brothers' claim for secure warehousing and security costs.
- [13] Essentially, Mr Varachia's evidence is that the operating expenses are indirect costs Mlangeni Brothers incurred in the normal course of its business. Most of the operating expenses Mlangeni Brothers claims should be disallowed as they are not transaction costs. Meaning, Mlangeni Brothers did not incur these costs when supplying PPE items to GDOH.
- [14] I analyse the evidence of these witnesses below. However, before I do that, I deal with the applicable legal principles when determining just and equitable relief. I then determine the question of the onus of proof.

Applicable legal principles

- [15] The Constitution provides as follows:

"172 Powers of courts in constitutional matters

- (1) When deciding a constitutional matter within its power, a court-
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including-
- (i) an order limiting the retrospective effect of the declaration of invalidity; and
- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

- [16] In *Steenkamp NO v Provincial Tender Board of the Eastern Cape*[2] the Constitutional Court explained the basis for just and equitable relief as follows :

"[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the

aggrieved party to appropriate relief.²⁷ In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances, the remedy takes the form of an order to make or not to make a particular decision or

an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.”

[17] Concerning the purpose of just and equitable relief the Constitutional Court in *Bengwenyama*[3] stated that: “The apparent rigour of declaring conduct in conflict with the Constitution ... and unlawful is ameliorated ... by providing for a just and equitable remedy in its wake.”

[18] All Pay 1[4], the Constitutional Court held that:

“[67] 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.”

[19] This principle has become known as the no profit no loss principle. In All Pay 2[5], concerning this principle, the Constitutional Court said:

“[30] Logic, general legal principle, the Constitution, and the binding authority of this court all pointed to a default position requiring the consequences of invalidity to be corrected or reversed where they can no longer be prevented.

[20] By reference to the Constitutional Court authorities cited above, as well as several others, in *Mott MacDonalds*, the Court succinctly summarised the factors to be considered when determining just and equitable remedy. I quote the relevant extract below:

“88. The main principles that are relevant to this case may be briefly summarized as follows:

1. A court enjoys a wide discretion under s 172(1)(b) to grant the remedial relief. It is bound only by considerations of justice and equity. [44]
2. The remedy must be fair to those affected, but it must also vindicate the rights violated. It must be just and equitable in light

of the facts and the implicated constitutional principles. [45]

3. The default position is that the consequences of invalidity must be corrected, where this is still possible, or reversed, if prevention of invalidity is no longer possible. [46]
4. The guiding principle is that of legality, and courts should give full effect to the finding of invalidity in granting remedial relief. Relief that does not give full effect to the finding of invalidity must be justified in the particular circumstances of the case. [47]
5. The just and equitable inquiry is multi-dimensional, and involves a consideration of factors such as the nature of the irregularity and the role of the respective parties. [48]

6. In the context of public-procurement matters, the primacy of the public interest must be taken into account when the rights of other affected parties are assessed. [49]
7. Even an innocent contractor has no right to benefit from the proceeds of an invalid contract. This does not mean that it must suffer a loss, but any benefit it did derive should not be beyond public scrutiny. [50]

Onus

- [21] In Pillay,[6] Davis AJA stated the basic rules which regulate the incidence of the burden of proof as follows - he who asserts proves and not he who denies. A denial of a fact cannot naturally be proved provided that it is a fact that is denied and the denial is absolute. If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded in respect of that defence as being the claimant. For his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.
- [22] In the present case, it is unclear which party bears the overall burden of proof for the following reasons. The SIU is the applicant. In the notice of motion instituting the review application, it prayed for just and equitable relief, including an order that Mlangeni Brothers is divested of the profit it stands to acquire from the impugned contract. As the applicant, the SIU ordinarily bears the onus on a balance of probabilities to make out a case for the relief that it seeks.
- [23] On the basis of the no profit no loss principle dealt with above, Mlangeni Brothers has no legal right to profit from the impugned contract. However, it may also not suffer financial prejudice from it. Thus, it bears the evidentiary burden to prove the reasonable expenses it incurred when supplying PPE items to the GDOH, for which it is entitled to be compensated.
- [24] On the authority in Gijima and Buffalo City also dealt with above, Mlangeni Brothers may only retain the profit it stands to earn from the impugned contracts under exceptional circumstances.
- [25] Therefore, the parties bear the onus in the following respects:
- 25.1 the SIU must establish the number of boxes Mlangeni Brothers supplied to the GDOH;
- 25.2 in respect of the just and equitable relief sought by the SIU to divest Mlangeni Brothers of its profits:
- 25.2.1 Mlangeni Brothers ought to prove that the expenses it incurred to supply PPE items to the GDOH were reasonable and therefore, it must be allowed to recover them;
- 25.2.2 Mlangeni Brothers must also establish that there are exceptional circumstances for the Tribunal to exercise a discretion in its favour to allow it to benefit from the profit it stands to earn from the impugned contract;

25.3 In respect of its claim for monetary judgment, Mlangeni Brothers bears the onus to establish that is entitled to this relief. The SIU only bears an onus to the extent it establishes a special defence as referenced in 21 above.

The quantity of PPE items Mlangeni Brothers delivered to the GDOH

[26] Mlangeni Brothers alleges that it supplied 64, 680 boxes of PPE items to the GDOH. The SIU alleges that it only supplied 63,680 boxes. Under cross examination, Ms Van Rooyen clarified that there was an error in the manner in which she captured one of the delivery notes on a spreadsheet. Her evidence stands undisputed. It establishes the SIU's version on this point.

[27] I therefore find that the SIU has established that Mlangeni Brothers supplied 63,680 boxes of PPE items to the GDOH and not 64, 680 boxes.

Mlangeni's Brothers' Income and Expenditure Statement

[28] Mlangeni Brothers' IES appears below:

Mlangeni Brothers CC (Registration Number 2009/126180/23) Income and Expenditure Report R Sales/Revenue R15,523 200.00 Latela No. of Units Unit Price Total Mega 3D 3 210 R240,00 R770 400,00 GMT 6 010 R240,00 R1 442 400,00 55 460 R240,00 R13 310 400,00 64 680 R15 523 200.00 Less Cost of Sales R11 080 205,00 Gloves No. of Units Unit Cost R11 002 855,00 Latela 3 210 R155,00 R497 550,00 Mega 3D 6 010 R140,00 R841 400,00 GMT 55 460 R174,25 R9 663 905,00 64 680 Transportation & Delivery R77 350,00 Latela R4 100,00 Mega 3D R12 300,00 GMT R60 950,00 Gross Profit R4 442 995,00 After Payroll Adjustments Less Operating Expenses R3 347 280,87 R2 845 054,63 Difference Secure Storage & Warehousing R75 000,00 R75 000,00 Accounting and Audit fees R150 000,00 R150 000,00 Legal Fees R250 000,00 R250 000,00 Security Costs R114 000,00 R114 000,00 Financing Costs R898 280,87 R898 280,87 Transport cost R25 000,00 R25 000,00 Staff Salaries R390 000,00 R157 575,60 R232 424,40 Director salaries R500 000,00 R230 198,16 R269 801,84 Agents Commission R945 000,00 R945 000,00 R0,00 R0,00 Nett (Profit/Loss) before tax R1 095 714,13 R1 597 940,37 Estimated tax liability 28% R306 799,96 R447 423,30 Nett (Profit/Loss) after tax R788 914,17 R1 150 517,06 Earnings Summary Gross Profit Margin 28,62% 28,62% Net Profit Margin 7,06% 10,29% Sales/Revenue per unit R240,00 Total Cost per unit R223,06 COS p/u R171,31 Operating Costs p/u R51,75 Profit per Unit R16,94 Initial Invoiced Amount R15 523 200,00 Amount deducted from adjustments R502 226,24 Amount Invoiced after payroll adjustments R15 020 973,76

[29] As appears from the IES, Mlangeni Brothers alleges that it sourced 3,210 boxes of PPE items from Latela at R497, 500, 6,010 boxes from Mega 3D at R841,4000 and 55,460 boxes from Golden Miles Trading (Golden Miles) at R9,663,905. The total cost of the PPE items is R11,002,855. It claims cost of sales in respect of transportation and delivery costs in the amount of R77,350 and operating expenses in the amount of R3,347,280.87. It alleges that it would derive a profit of R1,095,714.13 from the impugned contract. These amounts account for the total amount of R15,523,200 it charged the GDOH in respect of the impugned contract.

[30] Several difficulties arise from the IES. I deal with them below.

The relationship between Mlangeni Brothers and SPA and the accounting fees

[31] The IES does not specify the period under review. As can be gleaned from the IES, it was prepared by Sync Professional Accountants (SPA) for Mlangeni Brothers. It purportedly presents the income accrued and expenditure incurred by Mlangeni Brothers in relation to the impugned contract. The IES is dated 14 March 2022.

[32] In Mlangeni Brothers' condonation application dated 1 July 2022, Mr Nkuna does not specify the date on which he approached SPA. From what he states there, by inference, he met Maanda Negovha (Mr Negovha) of the SPA during February or March

2022. Impliedly prior to this date, Mlangeni Brothers did not have any relationship with SPA. The representatives for the two entities Mr Nkuna and Mr Negovha had not met and Mlangeni Brothers had not retained SPA to prepare the IES. Yet, the invoice rendered by Sync Professional Accountants (SPA) who prepared the IES, is dated 15 March 2021. The invoice is in respect of Mlangeni Brothers' accounting fees for 2021. It does not reference the preparation of the IES in respect of the impugned contract.

[33] In the invoice SPA rendered to Mlangeni Brothers, it charged R150,000 in respect of accounting fees for 2021. This amount is reflected as an operating expense in the IES. Mlangeni Brothers seek a reckoning for this amount as an expenditure it incurred when supplying the PPE items to the GDOH. As already stated, Mlangeni Brothers could not have incurred this fee in 2021 when it only retained SPA in March 2022 to prepare the IES. Further, the IES was only prepared in relation to Mlangeni Brothers' income and expenditure in respect of the impugned contract and not in relation to Mlangeni Brothers' accounting statements for 2021. The statement is only 3 pages long. The supporting source documents only comprise of 30 pages. Even if this fee only relates to the preparation of the IES, given the limited scope of the SPA's mandate, this amount appears overstated. No details of the time spent preparing the IES are provided. Mlangeni Brothers has not filed its contract with SPA.

Secure storage warehousing and security costs

[34] Mlangeni Brothers alleges to have incurred R75,000 in respect of secure storage and warehousing costs and R114, 000 in respect of security costs. According to Mr Nkuna, Mlangeni Brothers stored the PPE items with Health Supplies (Pty) Ltd (Health Supplies) because it offered a secure storage. Health Supplies also packaged and labelled the PPE items in accordance with the GDOH requirements. It also secured the PPE items when transporting them to its destination. The destination is not specified.

[35] Mr Nkuna does not specify whether the storage costs and security charges relate to boxes supplied by Latela, Mega 3D or Golden Miles.

[36] In the answering affidavit, the SIU filed in response to Mlangeni Brothers' application for condonation and monetary judgement, it points out that on 30 May 2020, Golden Miles was approached by Mlangeni Brothers to supply PPE items to it. Between 4 June 2020 and 23 July 2020, Golden Miles supplied Mlangeni Brothers with 55, 460 boxes of PPE item in respect of the impugned contract. Golden Miles' Mr Van Vuuren confirmed this in a confirmatory affidavit. Golden Miles delivered the PPE items directly to Kushesh Express and 3G Warehouse, who according to Ms Mulligan and Ms Van Rooyen were

contracted by the GDOH to receive PPE items from its suppliers on its behalf, warehouse and dispatched it to the end user public health facilities. Therefore, the services rendered by Health Suppliers did not relate to the 55,460 boxes Golden Miles supplied to Mlangeni Brothers.

[37] During the cross examination of Mr Varachia, it emerged that the SIU only investigated this issue in relation to the PPE items supplied by Golden Miles and not those supplied by Latela and Mega 3D. During argument, counsel for Mlangeni Brothers argued that the services rendered by Health Suppliers only relate to the PPE items supplied by Latela and Mega 3D. I have difficulty with accepting this argument because it is not consistent with Mlangeni Brothers' case as set out in its founding affidavit. Its case is that it incurred secure storage and warehousing costs for all PPE items. It did not segregate these costs in respect of each supplier. On Mlangeni Brother's version, Latela and Mega 3D only supplied 3,210 and 6,010 boxes respectively. It cannot be that the amount of R189,000 which was purportedly charged for secure storage and security for PPE

items supplied by all three suppliers should now be considered only to relate to PPE items supplied by Latela and Mega 3D who supplied

the least PPE items to Mlangeni Brothers.

[38] When confronted with this difficulty, counsel for Mlangeni Brothers blamed the SIU for failing to properly investigate these expenses. This could well be but it is Mlangeni Brothers who bears the onus to establish its reasonable expenses.

[39] In their heads of argument filed after oral argument, counsel for Mlangeni Brothers tried to rescue Mlangeni Brothers' case in respect of these costs with reference to delivery notes. She submitted that various invoices were issued before 4 June 2020 when according to Mr Van Vuuren, Golden Miles started delivering PPE items Mlangeni Brothers sourced from it. There are delivery notes dating between 22 April 2020 and 20 May 2020 reflecting all deliveries made before 4 June 2020. Mlangeni Brothers should be allowed 15% of the storage costs and 15% of the security costs in respect of 16,400 boxes supplied by Latela and Mega 3D. These percentages are simply thumb-sucked as there is no shred of evidence that this cost was incurred.

- [40] Mlangeni Brothers did not reply to the SIU's answering affidavit to which Golden Miles' Mr Van Vuuren's affidavit is attached. Therefore, Mr Van Vuuren's version that Mlangeni Brothers first made contact with Golden Miles on 30 May 2020 and that the latter delivered all PPE items directly to the designated warehouses stands undisputed.
- [41] Mlangeni Brothers led no evidence to establish that the invoices and delivery notes referenced in its heads of argument relate to the PPE items supplied by Golden Miles. The delivery notes that are filed at 001-177 to 001-204 Caselines reflect that Mlangeni Brothers and Mega Speed Freight delivered PPE items to the GDOH in Centurion, Kushesh Express and to 3G Relocations. None of the delivery notes reflect that any PPE items were delivered on behalf of Mlangeni Brothers to Health Supplies.
- [42] Mlangeni Brothers has also not led any evidence that establishes that either it, any of its suppliers or any transport service provider retained by it delivered PPE items on its behalf to Health Supplies. For these reasons, I am unable to rely on Mlangeni Brothers' version that it incurred R189,000 in respect of secure storage and security services rendered to it by Health Supplies.
- [43] Therefore, the alleged cost in respect of secure storage and security stands to be disallowed.

Transportation and delivery costs

- [44] Mlangeni Brothers claims transportation costs in the amount of R77,350 comprising of R4,100 in respect PPE items supplied by Latela, R12,300 by Mega 3D and R60,950 by respect Golden Miles. According to Mr Van Vuuren, he did not levy a separate charge for delivery costs because the price of the PPE items Golden Miles supplied to Mlangeni Brothers included delivery costs. Therefore, the amount of R60,950 in respect of transportation and delivery stands to be disallowed.
- [45] The transportation and delivery costs in relation to the invoices that appear at 064-23 to 064-25 and 064-27 on Caselines stand to be disallowed. Mpangane Solutions billed these invoices directly to Golden Miles Trading. Mpangane Solutions only billed the invoice that appear on Caselines at 064-26 for R12,300 to Mlangeni Brothers for 3 deliveries. One delivery was made to Craighall Park and another to Edenvale. Neither 3G Relocations nor Kusheshe is based in these locations. By inference, only one of these deliveries to Centurion could relate to the PPE items delivered in terms of the impugned contracts where 3G Relocations is based. This invoice is for R4,100. Only this amount stands to be allowed in respect of transportation and delivery costs.

Provision for income tax

- [46] Mlangeni Brother alleges that it made provision for 28% income tax on the projected profit of R1,095,714,13. There is no justification for this amount. Income tax is not paid on profit earned from a single transaction but on an entities' whole turnover in a given tax year. It is important to state that this amount can possibly not relate to Value Added Tax because, in its invoice to the GDOH, Mlangeni Brothers did not charge VAT, notwithstanding that this transaction falls far beyond the applicable VAT threshold.
- [47] Further, as I find below that Mlangeni Brothers stands to forfeit the profit it stands to earn from the impugned contract, even on its legally untenable case that it is liable for income tax for this profit, this liability does not arise.
- [48] Therefore the tax expense stands to be disallowed.

Legal fees

- [49] Mlangeni Brothers alleges that it incurred R250,000 in respect of legal fees in this application, when preparing the affidavit it submitted to the SIU as well as when engaging with the Competition Commission to whom the SIU had referred the impugned contract for investigation. But it does not itemise the legal costs. It has not filed an invoice from its legal representatives. It is unclear what source documents SPA had regard to when it included this expense in the IES. It is also unclear how much was incurred in relation to the SIU investigation and this application and how much was incurred when engaging with the Competition Commission.
- [50] In any event, this expense stands to be disallowed as it was not incurred when performing in terms of the impugned contract. To the extent that this expense relates to the legal costs Mlangeni Brothers incurred to oppose the present application, the Tribunal will determine its entitlement to legal costs in accordance with the applicable trite legal principles.

Financing and Agents Commission Costs

- [51] Mlangeni Brothers purportedly concluded a capital raising agreement with Prester John (Pty) Ltd (Prester John) to raise the funds it required to finance the cost of sourcing PPE items it supplied to GDOH in terms of the impugned contract. In terms of the capital raising agreement, Mlangeni Brothers would pay Prester John R940,000 in respect of the agent's commission for the services rendered in terms of the capital raising agreement. The capital raising agreement is silent on how much Prester John would raise for Mlangeni Brothers.
- [52] The only evidence that Mlangeni Brother has presented that Prester John has performed in terms of the capital raising agreement is the inclusion of the agent's commission in the IES, as well as financing costs in the amount of R898,280.87. The latter amount purportedly represents interest charged on the capital Prester John raised from Mlangeni Brothers. A statement by Prester John to Mlangeni Brothers reflecting the amount Mlangeni Brothers owes and the interest charged on this amount is not attached. No other proof that Mlangeni Brothers received the funds Prester John raised for it is attached. Mlangeni Brothers is silent on exactly how much Prester John raised. Mlangeni Brothers largest supplier, Golden Miles

has not been paid. Mlangeni Brothers has also not paid Health Suppliers who is purportedly charging it interest. It is highly improbable that these suppliers would remain unpaid more than two years after supplying PPE items and allegedly providing secure storage and security costs to Mlangeni Brothers if it had received the funds Prester John raised for this specific purpose. Mlangeni Brothers has no reason to hold onto these funds when its suppliers continue to charge it interest on the amounts it owes them. The only reasonable inference to draw under these circumstances is that Prester Johan did not raise any capital on behalf of Mlangeni Brothers in terms of the capital raising agreement.

- [53] Mlangeni Brothers has failed to satisfy the Tribunal that it has incurred the agents commission and the financing costs. Even if it did satisfy the Tribunal, it would have serious difficulty to persuade the Tribunal that these costs are reasonable costs it incurred to supply PPE items to the GDOH. It has not pointed to a term of the impugned contract that it is entitled to pass on these expenses to the GDOH. At best for Mlangeni Brothers, had it satisfied the Tribunal that it incurred these costs, as testified by Mr Varachia, these costs are indirect operating expenses Mlangeni Brother purportedly incurred in the course of its business.

Director and Staff salaries

- [54] The IES reflects a director's salary in the amount of R500,000 and staff salaries in the amount of R390,000. Mlangeni Brothers have tendered to revise the sum total of its alleged salary costs by R502 226,24. For the reasons set out below, this concession is of no moment.
- [55] At best, the alleged salary costs are indirect business costs Mlangeni Brothers would incur in the course of running its business. It is not its case that it retained a director and staff specifically for the impugned contract. If it did, it would incur time costs in respect of these incumbents. But it has not specified precisely what they did in relation to the impugned contract. It has not tendered their employment contracts as evidence. On its version, the PPE items would have been handled by Health Suppliers who packaged and labelled them as required by the GDOH.
- [56] For these reasons, the full costs in relation to the director and staff salaries are also disallowed.

Conclusion

- [57] Mlangeni Brothers charged the GDOH an amount of R15,523,200, revised to R15 020 973,76, after the concession referenced in paragraph 54 above to supply PPE items to GDOH in terms of the impugned contract. In principle, in accordance with the no profit no loss principle enunciated in All Pay, Mlangeni Brothers is entitled to recover from the GDOH the reasonable expenses it incurred to supply PPE items to the GDOH, unless it establishes that there are exceptional circumstances that render it just and equitable to retain its profits. For the reasons stated above, Mlangeni Brothers overstated its operating expenses to retain as much of the amount it charged GDOH as possible in the event that the Tribunal finds that it

is just and equitable that it is divested of its profits.

[58] The IES concludes as follows:

“Conclusion

Based on our independent review work done, nothing has come to our attention that causes us to believe that the Income and Expenditure

report for the tender: Supply and Delivery of Examination Powder Free Gloves is in-accurate or do not represent fairly, in all material respects, the financial position/ performance of the tender based on the invoice issued to the Department of Health and the invoice issued by the supplier to Mlangeni Brothers Events CC including operations expenses incurred by the company in relation to the tender: Supply and Delivery of Examination Powder Free Gloves” (sic)

[59] Mlangeni Brothers and SPA have misrepresented basic information concerning their business relationship. This and the findings made above regarding the alleged operating expenses render the IES unreliable. I am also unable to rely on the SPA opinion expressed in the above quotation.

[60] From the R15,523,200 Mlangeni Brother charged the GDOH for the PPE items supplied in terms of the impugned contract. It incurred expenses in the amount of R11,002,855 to acquire the PPE items. From this amount, R147,500 stands to be disallowed in respect of the 1,000 boxes of PPE items Mlangeni Brothers did not deliver to the GDOH as found in paragraphs 26 and 27 above. This amount is determined using the average cost price per unit of the units supplied by Mega 3D and Latela since Mr Van Vuuren testified that he delivered all the PPE items he supplied to Mlangeni Brothers.

[61] For reasons set out above, only R4,100 stands to be allowed in respect of cost of sales. All the operating expenses stand to be disallowed as Mlangeni Brothers has failed to establish that they constitute reasonable expenses it incurred when supplying PPE items to the GDOH. I therefore find that Mlangeni Brothers incurred reasonable expenses in the amount of R10,859,455.00 to supply PPE items to the GDOH in terms of the impugned contract. As a result, Mlangeni Brothers stands to earn profit from the impugned contract in the amount of R4,663,745.00 if the Tribunal exercises its discretion in terms of s172(1)(b) in its favour.

Whether Mlangeni Brothers should be divested of its profits

[62] The legal principles set out in paragraph 14 to 19 above find application in the present case.

[63] Mlangeni Brothers has not established exceptional circumstances that render it just and equitable that it retains the profit it stands to earn from the impugned contract. The fact that it is an innocent party, it supplied the PPE items to the GDOH at the agreed price and that it incurred expenses to do so is not exceptional. These factors were present in All Pay, yet the Constitutional Court still divested All Pay of its profits. This approach is consistent with that followed in Vision View[7] and Mott MacDonalds.[8]

[64] Regrettably, in Sekoko[9], the SCA did not consider the no profit no loss principle, probably because the respondent municipality did not oppose the appeal. Be that as it may, it is unclear how allowing Sekoko to retain the profit it earned from the impugned contract corrects the breach by the respondent municipality of the Constitutional duty to procure goods and services in accordance with a system that is fair,

transparent, equitable and cost effective as required in terms of section 217 of the Constitution.

[65] Therefore, the Sekoko judgment on which Mlangeni Brother is at odds with the no profit and no loss principle. The authorities relied upon in Sekoko, some of which Mlangeni Brothers also seek to rely on are distinguishable on the facts.

[66] An exception to the no profit principle was allowed in Gijima[10] due to the peculiar facts of that case. There, the Constitutional Court ordered that despite a declaration of invalidity, to prevent an unjust outcome, Gijima should not be divested of the profits it would earn from the contract. The applicant organ of State in Gijima induced Gijima to agree to the termination of a valid contract in exchange for an invalid contract. The Constitutional Court allowed Gijima to retain profits earned from the latter contract to compensate it for the loss it stood to suffer as a result of the inducement.

[67] Similarly, in Buffalo City, Asla Construction was allowed to retain its profits due to exceptional circumstances. The Constitutional Court found that it is not just and equitable to divest it of its profits as doing so would allow the Buffalo City Municipality to benefit from its own delay in bringing the review application.

[68] In the present case, there are no exceptional circumstances that justify a departure from the no profit no loss principle.

[69] When the procurement process followed to conclude a contract breaches the values set out in s217 of the Constitution, the just and equitable relief to be awarded should correct the prejudice the parties stands to suffer as a result, provided that the public interest enjoys paramountcy. Here, the bidding process was not transparent, equitable, fair, competitive and cost effective. Here lies the greatest prejudice to the public interest. Whether, if the correct process was followed, Mlangeni Brothers would have been GDOH's successfully bidder and the GDOH would have entered into the impugned contract for the supply of the PPE items at the agreed price is only subject to speculation. Therefore, Divesting Mlangeni Brothers of its profit is the only just and equitable way of ensuring that any loss to the fiscus that would result from a procurement process that fails to meet the s 217 requirements is averted.

MONETARY

JUDGMENT

[70] On the authority in Steenkamp[11], Mlangeni Brothers is not entitled to private law relief. Therefore, for this reason as well as the reasons set out above, Mlangeni

Brothers' application for monetary judgment stands to be dismissed. It has not made out a proper case for the monetary

judgment.

[71] Mlangeni Brothers has also not made out a case that it is entitled to interest on the amount the GDOH stands to be ordered to pay to it. The amount Mlangeni Brothers charged the GDOH was not due on 20 September 2020 because the impugned contract was under investigation. Mlangeni Brothers has also not adduced any evidence that its suppliers are charging it interest on the reasonable expenses allowed in this judgment. Therefore, it has not established that it is entitled to interest from 20 September 2020.

COSTS

[71] The SIU initially alleged malfeasance on Mlangeni Brothers' part, only to change course in reply. Mlangeni Brothers contends that it would not have opposed the review relief if the SIU did not wrongly implicate it. On the other hand, Mlangeni Brothers has failed to make out a proper case, not only for the monetary judgment but to establish its entitlement to all but one operating expenses. Under these circumstances, it is just and equitable that each party pays its own legal costs.

[72] In the premises, the following order is made:

ORDER

1. Mlangeni Brothers' Events CC's (Mlangeni Brothers) application for condonation succeeds with costs.
2. The Gauteng Department of Health (GDOH) shall pay Mlangeni Brothers an amount of R10,859,455.00 including interest on the said amount at the prevailing rate calculated from the date of judgment to the date of payment.
3. Mlangeni Brothers is divested of the profit in the amount of R4,663,745.00 it would have earned from the impugned contract with the GDOH.
4. Mlangeni Brothers' claim for monetary judgment is dismissed.
5. Each party shall bear its own legal costs.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the applicants:

Adv. Oupa Modisa SC, assisted by Adv. Moja

Attorney the applicants:

Ms. S Zondi, Office of the State Attorney, Pretoria

Counsel for the respondent: Adv. A Van Den Heever, assisted by Adv. Douglas Kela

Attorney for the respondent: Mr T Hadebe, of Hadebe Attorneys

Date of hearing:

24-25 October 2022

Date of

judgment:

14 November 2022

Mode of delivery: this judgment was handed down electronically by transmission to the parties' legal representatives by email and uploading on Caselines and on Saflii. The time for handing down the judgment is deemed to be 10am.

[1] Published on 23 July 2020.

[2] 2007 (3) SA 121 (CC) at paragraph 29.

[3] Bengwenyama Minerals (Pty) Ltd and Others v General Resources (Pty) Ltd and Others (CCT 2011 (4) SA 113 (CC).

[4] Citation at fn4 above.

[5] AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others 2014 (4) SA 179 (CC).

[6] Pillay v Krishna 1946 AD 946 at 952 -953

[7] Special Investigating Unit and SABC v Vision View Productions CC

[2020] ZAGPJHC 19 June 2020.

[8] SABC SOC Ltd and Another v Mott MacDonalds SA (Pty) Ltd (29070 of 2018) [2020] ZAGPJHC 5 (08 December 2020) applied.

[9] Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality (Case No. 60/2021) [2022] ZASCA 28 (18 March 2022).

[10] State Information Technology SOC Ltd v Gijima Holdings (Pty) Ltd 2018

(2) SA (CC).

[11] See quotation in paragraph 15 above.

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