

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

APPEAL NO: A5066/2022

CASE NO: GP/17/2020

HEARD ON: 02 August 2023

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| (1) | <u>REPORTABLE: NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: NO</u> |
| (3) | <u>REVISED.</u> |

12 December 2023

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DATE

In the matter between:

**CALEDON RIVER PROPERTIES (PTY) LTD T/A
MAGWA CONSTRUCTION**

First Appellant

PROFTEAM CC

Second Appellant

and

THE SPECIAL INVESTIGATION UNIT

First Respondent

**NATIONAL DEPARTMENT OF PUBLIC WORKS
AND INFRASTRUCTURE**

Second Respondent

JUDGMENT

S VAN NIEUWENHUIZEN AJ (MUDAU J ET STRIJDOM AJ CONCURRING):

- [1] This is an appeal against the judgment of Modiba J, delivered on 7 September 2022, in the Special Tribunal (the Tribunal) established in terms of section 2(1) of the Special Investigating Unit and the Special Tribunals Act 74 of 1996 (the Tribunal Act).
- [2] The appeal concerns payment for the construction of PHASE 1 of a fence between the Republic of South Africa and Zimbabwe during the National Lockdown which commenced during March 2020. The appeal also concerns whether the appellants are entitled to any profits in respect of contract number H16/022 and contract number HP14/075 concluded in breach of the procurement laws and the Constitution of the Republic of South Africa, 1996 (Constitution). These contracts were set aside by agreement and the only issue arising on appeal is whether the first and second appellant are entitled to any profits derived from the contracts as opposed to a just and equitable remedy compensating them for their reasonable costs and time spent.
- [3] The first and second appellant will, for purposes of convenience, be referred to as the appellants or as “Magwa” and “Profteam” respectively depending on the context. The first and second respondents will be referred to as the respondents or as the SIU and DPW respectively or as the first and second plaintiff, depending on the context. The South African Defence Force will be referred to as DoD.
- [4] Given the fact that parties enjoy an automatic right of appeal to the Full Court of a Division of the High Court with jurisdiction as provided for in section 8(7) of the Tribunal Act, the Tribunal after concluding that an application for leave to appeal is not required, dismissed the appellants’ application for leave to appeal but held that the costs of the application should be costs in the appeal. The rationale was that the Tribunal

disposed of the applications for leave to appeal based on issues raised *mero motu* by the Tribunal.

[5] In dealing with the issue of leave to appeal, the Tribunal deemed it necessary to clarify the basis on which it approached the determination of just and equitable relief.

[6] It stated as follows —

“[20] ...During oral argument in the application for leave to appeal I put to the parties that, based on the submission by counsel for Caledon River Properties when he advanced argument in opposition to the plaintiffs’ application for a postponement, that the matter will not be disposed of in that hearing in any event because **the parties had to file expert reports for the determination of just and equitable relief, I approached the issue of just and equitable relief as a purely legal question. For that reason, I did not consider the defendants witness statements and expert reports.** Counsel for the parties could not agree on whether the defendants witness statements and expert reports had been properly placed before the Tribunal. Counsel for the defendants contended that the defendants’ evidence was properly before the Tribunal. Counsel for the plaintiffs contended that the defendants had to lead oral evidence and the plaintiffs had the right to cross examine the defendants’ witnesses.

[21] I requested the parties to file a transcribed record in order for me to determine precisely how the parties had formulated the issue before me. The parties agreed with me that it will be necessary for me to have regard to the record in order to determine the issues in the application for leave to appeal in a manner that would assist the court of appeal. Regrettably, it took the parties more than three months to file the record. I resorted to listening to the recording in order to dispose of the application for leave to appeal without further delay.

[22] **Having listened to the record, I am of the view that I misconstrued the question before me, that it was not an entirely**

legal question and that I ought to have had regard to the defendants' witness statements and expert reports when determining whether it is just and equitable for the defendants not to be divested of the profits accrued from the impugned contract, as well as the defendants' counterclaims. At the pre-trial conference held between the parties on 20 September 2021, the plaintiffs resolved to argue their case on the basis of the defendants' evidence. During the trial, the plaintiffs did not assert their right to cross examine the defendants' witnesses, notwithstanding that they had been lined up to testify. The additional expert reports to be filed as argued by counsel for Caledon River Properties are the defendants' financial statements for the purpose of determining their profits in the event that I found that the defendants ought to be divested of their accrued profits." (my emphasis)

- [7] The respective appellants' notices of appeal implicate the following parts of the order and judgment of the Tribunal —

"[33] However, none of the parties led evidence to establish their respective cases as pleaded."

... .

"[43] It is important for each party to lay the factual basis for the Tribunal to exercise its discretionary remedial powers in their favour. Simply pleading the facts without leading evidence as the parties have done here, is wholly inadequate. Since the review segment of the present proceedings was settled by agreement between the parties, I am constrained to formulate the just and equitable remedy on the basis of the parties' written and oral submissions, as I have not been afforded the relevant evidentiary material to judicially consider the above factors.

[44] As already stated, the Plaintiffs petition to order repayment of the pre-paid amounts is inconsistent with the applicable trite legal principle. They have also not established any factual basis on which the Tribunal should exercise its discretionary remedial powers to order repayment of the pre-paid amount or deny the recovery of the reasonable

expenses the Defendants incurred to meet their respective obligations under the contracts.

[45] Profteam has not established on the facts, exceptional circumstances that justify a departure from the no profit principle. Therefore, it has not made out a case for the Tribunal to allow them to retain all their vested rights as was the case in *Gijima*.

[46] An exception to the no profit principle was applied in *Gijima* 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 impugned contract. *Gijima* had been induced 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 would have suffered as a result of the inducement.

[47] Therefore, the Plaintiffs' main claim stands to be dismissed. Their alternative claim stands to be upheld. To the extent the Defendants' counterclaims are consistent with the Plaintiffs' alternative claim, they are nugatory. To the extent they are not, the Defendants' counterclaims stand to be dismissed for the reasons set out in paragraphs 45 and 46 above.

[48] It is just and equitable to apply the no profit and no loss principle as enunciated in *All Pay 1* and applied in *All Pay 2*, *Mott Mac Donald* and *Vision View*. In the present circumstances, this relief is fair to all the parties, vindicates the values of fairness, equity, transparency, competitiveness and cost effectiveness that were disturbed when the Defendants were awarded the contracts unlawfully. It also entrenches the rule of law by ensuring that while the Defendants are not left worse off as a result of the invalidation of the contracts, they also do not benefit from unlawful contracts.

[49] Regrettably, the biggest loser is the State and the public. They have been deprived of the variety of public, social and economic benefits that flow from a solid border track at the Beit Bridge border and are saddled with a deficient border fence.”

and the order ultimately made:

“3. The Plaintiffs’ main claim is dismissed. Their alternative claim is upheld with costs.

4. The Defendants respective counterclaims are dismissed with costs.

5. The Defendants are divested of the profits earned from the contracts concluded under contract number H16/022 and HP14/075 between the Department of Public Works and Infrastructure (Public Works) and the first and second defendants respectively (“the contracts”).

6. Within 30 days of this order, the Defendants shall deliver, by filing on Caselines, audited statements and debatement of account reflecting their respective income and expenditure in the contracts, supported by such expert report(s) as are necessary in the circumstances.

7. Within 30 days thereafter, the Plaintiffs shall appoint duly qualified expert(s) to compile a report as to the reasonableness of the Defendants’ expenses and file it on Caselines.

8 Thereafter, the parties shall prepare a joint minute between their respective experts within 10 days and file it on Caselines.

9. After setting off from the pre-paid amounts the reasonable expenses the Defendants incurred to meet their respective obligations in terms of the contracts, they shall, within 30 days of the period referred to in paragraph 8 of this order, pay to Public Works the amount standing to their debit. If the Defendants’ reasonable expenses exceed the pre-paid amounts, Public Works shall make payment to the defendants in respect of the amounts standing to their credit.

10. If a dispute arises from the implementation of this order, any party shall approach the Tribunal for an appropriate order on supplemented papers as necessitated by the circumstances.

11. The above cost orders are inclusive of the costs of two counsel where so employed.”

[8] The fact that the Tribunal did not consider the evidence available to it led to the ineluctable conclusion that the Tribunal arrived at in paragraph 22 quoted above, when it concluded that before arriving at its conclusions it

should have taken into account the undisputed facts placed before it by the appellants.

[9] Although the above is a true summary of the events in the Tribunal and, in my view, an accurate assessment of the impact of the notices of appeal files by the appellants; it is nevertheless preferable to refer to the detailed grounds of appeal as filed by the appellants.

[10] Magwa appeals on the grounds that the Tribunal erred in that it —

10.1 [11.1] As a factual basis and as a premise for its findings and subsequent order held that the appellants led no evidence, whilst both appellants filed factual and expert evidence as directed by the judge —

10.1.1 these statements were filed and in essence, constituted the appellants' evidence in chief in terms of the Tribunal's rules and as agreed between the parties;

10.1.2 the respondent advised the appellants at a pre-trial, held on 28 September 2021, that there is no controversy on the facts set out in the witness statements filed by the appellants; and

10.1.3 the first appellant in court tendered that its expert, Mr Veldman, delivers oral evidence but the court intimated that it was unnecessary as his witness statements had been filed.

10.2 Should in the light of the aforementioned and the concessions made by the respondents regarding the factual evidence, as well as the expert evidence and in the absence of any contradictory evidence to the version placed before the Tribunal by

the appellants, have accepted the facts on the versions of the appellants in the expert evidence regarding the costs and the evaluation thereof by the experts on behalf of the appellants.

10.3 Failed to consider, alternatively to properly consider, the undisputed facts and, in particular, the evidence on behalf of the first appellant's witnesses (on affidavit) and, in failing to do so, erred, in particular, by divesting the first appellant of any profits relating to the contract entered into between the second applicant and the second respondent under contract number HP14/076.

10.4 Did not find that a just and equitable remedy of retaining all rights that vested in terms of the aforementioned contract ought to remain vested, in particular having regard to the undisputed facts and evidence regarding the services rendered by the first appellant in terms of the contract.

10.5 Failed to consider that on the undisputed objective evidence of Mr Veldman (the expert witness), whose factual basis and opinions (save for what an equitable remedy would be) were conceded by the respondents at trial (and) that there was no fault on the part of the first appellant and that the costs so incurred were reasonable and fair.

10.6 Failed to consider the evidence under oath of Mr Bertram Pringle on behalf of the first appellant, corroborated, in all material terms, by the witnesses on behalf of the second appellant, that the first appellant performed in terms of the contract and delivered the fence as specified and prescribed by the second respondent within the prescribed period and within the budget provided as agreed to between the second respondent and the first appellant.

10.7 Was undisputed that the first appellant erected the fence for an amount less than that quoted, within the prescribed time of thirty (30) days and in accordance with the specifications provided and prescribed by the second respondent and its representatives.

10.8 Found that the fence started to fall apart, whilst the objective evidence, which was undisputed, clearly showed that the damage to the fence occurred as a result of the failure by the South African National Defence Force and of the Department of Public Works and/or the related government entities to take control of the fence, patrol it and take the necessary preventative and security measures, to secure and maintain the fence.

10.9 Failed to consider, alternatively to sufficiently consider, the circumstances under which the contract was entered into, including the undisputed fact that the contract was expedited at the behest of the Minister of the DPW, and senior officials during the period preceding the National State of Disaster, in order to protect the integrity of the border.

10.10 Found that despite the time, effort, and money as well as services that were rendered, which was undisputed and confirmed by two sets of expert witnesses, that no evidence was tendered to show circumstances to enable the first appellant payment in terms of the contract. This whilst the evidence was uncontested between the parties regarding the process that was allegedly followed by the second applicant, and the circumstances under which the terms of the contract were fully complied with by the first appellant.

10.11 Did not find that the affidavits (filed) as directed by the Tribunal during case management were uncontested and the evidence was not disputed in any way or manner. The evidence with the witness available to testify orally, which fact was disclosed

to the Tribunal, ought to have remained uncontested evidence in chief and, absent evidence to the contrary, ought to have been found as conclusive truth of the evidence under oath and as contained in the affidavit(s).

10.12 In particular, did not find that the first appellant was an innocent party that acted in terms of the representations made by senior officials of the second respondent, which facts were corroborated by the correspondence (not disputed at any time during the trial), that the Minister of the DPW was directly involved in describing the timeline and representing that the project was approved at presidential and executive level.

10.13 Failed, to consider, alternatively properly consider, that having regard to the Second Respondent's truncated time period, corroborated by the written representations by the Minister of Public Works, that there was no opportunity, nor any legal obligation, on the first appellant in the circumstances, to engage in an investigation akin to a due diligence process in order to verify the validity of the awarding of the contract tenders, specifically as a result of the circumstances and factually presented to it, as was undisputed before the Tribunal.

10.14 Made findings pertaining to condonation for the late filing of an expert report, whilst the objective evidence was that no expert report was filed by the first and/or second respondents, whether in time or late.

10.15 Found that the first appellant failed to present expert evidence. This finding is factually incorrect, and the expert report and affidavit filed as directed during case management dealt with all material issues including the costing and pricing as well as the reasons why the amount of the invoice of the first defendant was

reasonable. The evidence remained uncontested and was deposed to under oath by Mr Veldman, an expert witness whose expertise was uncontested. The availability of Mr Veldman to testify as an expert in addition to the affidavit and reports filed were raised with the Tribunal, having regard to the concessions made by the first and second respondents, but the Tribunal indicated that, having regard to the concessions, that there was no need for the evidence to be tendered orally.

10.16 In the judgment, the Tribunal, at paragraph 29, refers to second appellant's elaborate plea regarding the difficulties encountered whilst the project was performed. The first appellant also filed a comprehensive plea and counterclaim setting out the surrounding circumstances and facts as to why it would be just and equitable to grant it the remedy it sought, namely, payment in terms of the contract for its invoice amounts. This evidence and the facts in support of such a remedy were uncontested before the Tribunal.

10.17 In the judgment at paragraph 33, found that none of the parties led evidence to establish their respective cases as pleaded. It is submitted that the finding is not consistent with the objective and undisputed facts that were placed before the Tribunal. The expert evidence of both the first appellant and second appellant remains undisputed before the Tribunal regarding the processes that were followed and the manner in which the contract was awarded and executed. It was not only expert evidence but also the undisputed and uncontested evidence on affidavit by B Pringle, on behalf of the first appellant, setting out, in detail, what had occurred on site, problems in the supply chain, and the hardships that were faced by the first appellant to ensure compliance with the contractual obligations and erecting the fence as demanded by the second respondent.

10.18 Found that the first appellant did not lead evidence regarding its pleaded case, despite the fact that the affidavits and the evidence contained therein were uncontested before the Tribunal. The factual basis was conceded by the respondent and there was no dispute regarding the evidence so placed before the Tribunal.

10.19 In the judgment, the Tribunal, at paragraph 43, found that the Tribunal was not afforded the relevant evidentiary material to judicially consider. It is submitted that the Tribunal erred in making this finding for the reasons already set out above and the undisputed expert – and factual evidence – that was placed before the Tribunal as directed in affidavit.

10.20 As a result of the aforementioned, found that the necessary factual basis to enable the Tribunal to exercise its discretionary and remedial powers were inadequate.

10.21 Found that the case of the first appellant had to be dismissed as those claims were not supported by the evidence. The evidence supported the counterclaim by the first appellant and the Tribunal erred by dismissing the counterclaim of the first appellant.

10.22 Found that it would not be just and equitable, despite the evidence that was placed before the Tribunal, to entitle the first appellant to profit from the contract in terms of which it performed. The Tribunal erred by not considering the level of involvement by senior government officials and the Minister responsible for the second respondent, supported by the objective and undisputed evidence, caused the first appellant to participate in the process and to perform in terms of the contract to its detriment. The finding by the Tribunal ought to have been that it would be (a) just and

equitable remedy to allow the first defendant its profit for the first invoice amounts, as final completion had been achieved in terms of the contract (even if invalidated due to non-compliance by the second respondent).

10.23 Did not find that the first appellant's counterclaim for payment of the amount due in terms of the final invoice issued is payable as the just and equitable remedy afforded to it as an innocent party who performed in terms of the agreement.

10.24 Did not find that divesting the first appellant for profit, is inherently unjust and that the failure to comply with the Constitutional requirements by the second respondent, its responsible minister and the representations they made, ought not to lead to a loss for the innocent performing party, such as the first applicant, who had truncated time periods for the process to take place in conceded urgent circumstances and where performance of the demanded service and product was achieved.

[11] In the circumstances, the first appellant seeks an order from this court that the judgment and order of the Tribunal be set aside and replaced with the following —

- a. That it is ordered in terms of the provisions of section 172(1)(b) of the Constitution as part of the just and equitable remedy available to affected parties, that irrespective of the invalidity of the agreement between the first applicant and the second respondent, all rights remain vested and that the second respondent be ordered to pay the invoiced amount to the first plaintiff.
- b. Interest on the aforementioned amount at the prescribed amount of 7.25% plus 6% in terms of Regulation 260(2) of Government Gazette No 38822 of 29 May 2015 from 20 April 2020 up to date of final payment.

- c. Therefore, that the first and second respondents, jointly and severally, be ordered to pay the first appellant's costs of the application under case number GP12/2020, reserved on 16 October 2020 in order to be determined by the trial court.
- d. That the first and second respondents, jointly and severally, be ordered to pay the first appellant's costs in the Tribunal, including costs of senior counsel.
- e. That the first and second respondents, jointly and severally, be ordered to pay the first appellant's costs on appeal, including costs of senior counsel.

[12] The second appellant's grounds of appeal are as follows —

- a. The Tribunal erred fundamentally and, as anchoring basis for its findings found that the defendants led no evidence.
- b. The respondents filed factual and expert statements, which constituted the defendants' evidence-in-chief in terms of the Tribunal's rules and an agreement between the parties.
- c. The first defendant tendered that its expert delivers oral evidence, but the court intimated that it was unnecessary as the witness' statement had been filed.
- d. The plaintiff advised the defendants, at a pre-trial held on 28 September 2021, that there is no controversy on the facts (as) set out in the witness statements filed by the defendants.
- e. The Tribunal should, therefore, have accepted that —
 - i. the defendants were invited to a site meeting by the chief construction project manager (Mr Lukhele) of the second plaintiff;
 - ii. Mr Lukhele is a professional construction manager and the chief construction project manager of the second plaintiff;
 - iii. Mr Lukhele was responsible for the management of the build environment from conception to completion including the management of the second defendant;

- iv. two other contractors and their consulting engineers were also invited to the site meeting;
- v. Mr Lukhele told the defendants that the project was under direction of the Minister of the DPW, Ms Patricia de Lille, MP;
- vi. the ministerial direction was dated 16 March 2020 and directed that a contractor be appointed and commence work by 21 March 2020;
- vii. that the type and size of the fence was agreed at the site meeting between representatives of all the stakeholders;
- viii. that the specifications were agreed to at the meeting;
- ix. that the defendants' completed bid documentation and the bids were accepted, and the defendants appointed in appointment letters signed on behalf of the Director-General of the second plaintiff;
- x. that the second defendant produced master drawings for the fence, gates, river ways and that the master drawings contained the specifications for the build as well as detailed requirements in relation to workmanship and material;
- xi. that the second defendant accepted the master drawings;
- xii. that the second defendant reported, on a daily basis, to the second plaintiff;
- xiii. that the second plaintiff was made aware, on a daily basis, of attacks on the fence and resultant breaches;
- xiv. it was specifically recorded that the SANDF would look after the security of the fence once it was handed over to the second plaintiff;
- xv. that the maximum daily temperatures varied between 30°C and 38°C;
- xvi. that, on 4 May 2020, the second defendant transmitted a draft close out report to the second plaintiff, in which it was told that "the fence should be inspected daily, daily repairs, damages and vandalism should be attended to and noted.

- Should this not be done, then will the defence installation fail”;
- xvii. that a certificate of completion was signed on 28 April 2020 by representatives of the defendants, second plaintiff and the South African National Defence Force; and
 - xviii. that the defendants fully performed their obligations in terms of the agreement in the bona fide but mistaken belief that the agreements complied with section 217 of the Constitution and with the prescribed procurement process in terms of the Treasury Regulations and other regulations applicable.
- f. The facts set out above constitute the factual basis for the exercise of the remedial power.
 - g. The Tribunal erred in finding that the defendants were not entitled to their profits for the following reasons:
 - i. both the Supreme Court of Appeal and the Constitutional Court has allowed contractors to retain all payments made under agreements that have been performed, inclusive of profits made;
 - ii. they did so after the decision in “AllPay 2”¹;
 - iii. to hold that “AllPay 2” created an immutable rule that a contractor or a person rendering professional services will always be disentitled to the profits of their bargain is contrary to Buffalo City’s majority and minority judgments and to the judgment in Govan Mbeki;
 - iv. it is also contrary to section 172(1)(b) of the Constitution that says “any order”;
 - v. the Full Court’s finding that it is an immutable rule is² wrong and ignored Buffalo City and Govan Mbeki which were binding on it;

¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and Others* (2) 2014 (6) BCLR 641 (CC)

² *Special Investigations Unit and Another v Visionview Productions CC*

- vi. such an immutable principle would work particularly unfairly against professional services providers;
 - vii. they spend their commodity, which is time and knowledge, on a project. The State gets what it sought, which it could not have obtained but for the application of the time and knowledge of the service provider;³
 - viii. the State is enriched by this, but the service provider is left with nothing to show for its efforts⁴
 - ix. this iniquitous position is, to add insult to injury, achieved by the State's own breach of the Constitution;
 - x. the State in this matter got what they asked for when they wanted it and at a market-related price;
 - xi. it was neither just nor equitable nor does it satisfy justice and equity to deny the counterparties their bargain inclusive of profit in the circumstances of this case.
 - xii. The defendants in this case are in a similar position to the contractor in Buffalo City and the service providers in Govan Mbeki and Fetakgomo Tubatse.
- h. All the defendants' rights in terms of the agreements had already accrued, including their right to profit.⁵
 - i. The judgment in *Mining Qualifications Authority v IFU Trading Institute (Pty) Ltd*⁶ is distinguishable on its facts as the tenderer was not innocent at all.
 - j. The second defendant seeks an order that the judgment and order be set aside and replaced with the following —

“1. That it is ordered in terms of the provisions of section 172(1)(b) of the Constitution as part of the just and equitable remedy available to affected parties, that irrespective of the invalidity of the agreement between

³ *Sekoko Mametje Incorporated Attorneys v Fetakgomo Tubatse Local Municipality* [2022] ZASCA 28 (18 March 2022) para14

⁴ *Id* para 14-15

⁵ *Id* para 13 and15.

⁶ [2018] ZAGPJHC 455 (26 June 2018); See also *Sekoko Mametje Incorporated Attorneys v Fetakgomo Tubatse Local Municipality* [2022] ZASCA 28 (18 March 2022) para 13 and 15.

the second plaintiff and the second defendant all rights remain vested and that the second plaintiff be ordered to pay the amount of R1 277 401.19 to the second defendant;

2. Interest on the aforementioned amount at the prescribed rate of 7.25% plus 6% in terms of regulation 26D(2) of Government Gazette No 38822 of 29 May 2015 from 20 April 2020 until date of final payment.
3. The first and second plaintiffs, jointly and severally, be ordered to pay the second defendant's costs of the application under case number GP12/2020 reserved on 16 October 2020, and ordered to be determined by the trial court.
4. The first and second plaintiffs jointly and severally be ordered to pay the second defendant's costs in the court a quo."

11 I will now consider the law, pleadings, facts, and evidence that was before the Tribunal (but apparently not considered by it due to the misconstruction alluded to above).

The Law

[12] The Constitutional Court made it clear in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*⁷ that —

"It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. **This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity.** The discipline of this approach will enable courts to consider whether relief

⁷ 2011 (4) SA 113 (CC) at para 84-85.

which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then, the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality.

The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. **The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented — direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.**" (emphasis added)

[13] The aforesaid remains important for the present case and even more so where the invalidity of the underlying agreement is common cause.

[14] In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*⁸ (*Gijima*), the Constitutional Court held that Gijima could retain its profits notwithstanding the invalidity of the agreement entered into. Leaving aside the issue raised as to whether the state may use PAJA as opposed to a legality review should it desire to review its own invalid administrative actions, the facts, and legal principles the Court deemed relevant for purposes of the outcome were as follows:

⁸ 2018 (2) SA 23 (CC)

- a. The applicant, i.e. the State Information Technology Agency SOC Ltd (Sita), acts as provider of information technology services (“IT services”) to state departments. It does this by concluding agreements with private service providers which then do the actual work of providing IT services to state departments. In order to acquire IT services a department has to submit a business case and user requirements to Sita. Sita then prepares a procurement schedule for the execution of a request bid and a detailed costing for the proposed contract. Sita concludes a business agreement with the relevant department for IT services. Then a procurement process ensues after which Sita enters into an agreement with the successful private service provider for the provision of IT services to the relevant department. The respondent, Gijima is one of the private service providers whose services have in the past been enlisted by Sita.
- b. On 27 September 2006 Sita and Gijima concluded an agreement (“SAPS agreement”) in terms of which Gijima was required to provide IT services to the South African Police Service on behalf of Sita. Gijima performed in terms of that agreement. The agreement was extended several times. On 25 January 2012 Sita terminated it with effect from 31 January 2012.
- c. As a result of this, Gijima instituted an urgent application against Sita in the High Court of South Africa, Gauteng Division, Pretoria (High Court) on 1 February 2012. Sita and Gijima entered into a settlement agreement on 6 February 2012. This agreement was intended to compensate Gijima for the loss of approximately R20 million that it would have suffered as a result of Sita's termination of the SAPS agreement. The settlement agreement was not made an order of court. The urgent application was then removed from the court roll.
- d. In terms of the settlement agreement Gijima was appointed as the

DSS service provider for the KwaZulu-Natal Health Department from 1 March 2012 to 31 July 2012 and for the Department of Defence (DoD) from 1 April 2012 to 31 July 2012 on Sita's standard terms applicable to agreements of that nature. It was agreed that Sita would comply with all its internal procurement procedures in respect of these two agreements. **Throughout, Gijima was concerned whether Sita had complied properly with its procurement processes. Sita assured Gijima that it had the authority to enter into the settlement agreement. It inserted the following term into the DoD services agreement (DoD agreement) at the insistence of Gijima.** (my emphasis)

“Sita unconditionally warrants, undertakes and guarantees that it has taken all steps necessary to ensure compliance to any relevant legislation governing the award of the Services to the Service Provider and specifically towards ensuring that this Agreement is entirely valid and enforceable, including but not limited to the Public Finance Management Act 1 of 1999. Indemnifies the Service Provider against any loss it may suffer should this warranty be infringed.”

[15] After entering into the settlement agreement, protracted negotiations took place between the parties. At a meeting at which the DoD agreement was concluded, **Sita's former executive for supply chain management once more allayed Gijima's fears by giving the assurance that Sita's executive committee had the power to authorise agreements up to an amount of R50 million.**

[16] The DoD agreement was extended by addenda on several occasions, namely on 20 September 2012, 21 December 2012 and then, for the last time, on 8 April 2013. On 30 May 2013 Sita informed Gijima that it did not intend to renew the DoD agreement any further.

[17] A payment dispute arose. As at 30 May 2013 Sita allegedly owed Gijima an amount of R9 545 942,72. When the dispute could not be resolved, Gijima instituted arbitration proceedings in September 2013. Sita resisted the claim on the basis that the DoD agreement, as well as the three extending addenda that followed it, were invalid as there was non-compliance with the provisions of s 217 of the Constitution when the parties concluded the agreement. Sita was adopting this stance **for the first time as it had always assured Gijima that all relevant procurement processes** had been complied with. Sita also argued that Gijima had not performed in terms of the DoD agreement and the three addenda. On 20 March 2014 the arbitrator issued an award. He held that he did not have jurisdiction to adjudicate the question whether proper procurement processes had been followed.

[18] Sita then approached the High Court to set aside the DoD agreement and the three addenda. The High Court held that the decision to award and renew the DoD agreement qualified as administrative action in terms of the provisions of PAJA. It further held that the review had been brought way out of the 180-day period stipulated in s 7(1) of PAJA and that Sita had not sought an extension of this period. The Court could not find any basis for extending the period. It concluded that it would not be just and equitable to set aside the DoD agreement and the addenda. Consequently, the application was dismissed with costs.

[19] Sita turned to the Supreme Court of Appeal. Writing for the majority, Cachalia JA held that a decision by an organ of state to award an agreement for services constitutes administrative action in terms of PAJA. The majority also held that the wording in s 6(1) of PAJA, which allows *any person* to institute proceedings in a court or tribunal for the judicial review of an administrative action, is wide enough to include organs of state. It found that the conclusion of the settlement agreement had the capacity to affect Gijima's rights. This was because the effect of this agreement was that Gijima was to forego any damages claim that it

might have had as a result of the cancellation of the SAPS agreement. **The Court further held that Sita's repeated assurances that the DoD agreement had been validly concluded would have created a legitimate expectation that that contract would be honoured.** (my emphasis)

[20] After disposing of the PAJA debate and whether or not a legality review by Sita is permitted after a delay of 22 months the Constitutional Court granted the following relief:

“Relief

[52] We concluded earlier that, in awarding the DoD agreement, Sita acted contrary to the dictates of the Constitution. Section 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution. The award of the contract thus falls to be declared invalid.

[53] However, under s172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make 'any order that is just and equitable'. So wide is that power that it is bounded only by considerations of justice and equity. Here it must count for quite a lot that Sita has delayed for just under 22 months before seeking to have the decision reviewed. Also, from the outset, Gijima was concerned whether the award of the contract complied with legal prescripts. As a result, it raised the issue with Sita repeatedly. Sita assured it that a proper procurement process had been followed.

[54] Overall, **it seems to us that justice and equity dictate that, despite the invalidity** of the award of the DoD agreement, Sita must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while Sita sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, **a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which — but**

for the declaration of invalidity — it might have been entitled. Whether any such rights did accrue remains a contested issue in the arbitration, the merits of which were never determined because of the arbitrator's holding on jurisdiction.

Costs

[55] Sita achieves nominal success to the extent that there is a declaration of constitutional invalidity. Must this affect the question of costs? No. Substantially it is Gijima that succeeds. We say so because Sita's efforts were directed at avoiding the contract and Gijima, on the other hand, sought to hold on to the contract. To the extent that it is not to be divested of its entitlement under the contract, Gijima has managed to ward off Sita's efforts; that is the success we are referring to. Also counting against Sita on the question of costs is its repeated, but untruthful, assurances that proper procurement prescripts had been complied with in awarding the contract. Gijima is thus entitled to all its costs, including costs of two counsel.

Order

1. Leave to appeal is granted.
2. The appeal is upheld in part.
3. The order of the High Court of South Africa, Gauteng Division, Pretoria is set aside, and replaced with the following:

(a) The applicant's decision to appoint the respondent as a DSS service provider under a contract which was to be effective from 1 April 2012 to 31 July 2012 and all decisions in terms of which the contract was extended from time to time are declared constitutionally invalid.

(b) The order of constitutional invalidity in para 3(a) does not have the effect of divesting the respondent of any rights it would have been entitled to under the contract, but for the declaration of invalidity.

4. The applicant must pay the respondent's costs, including costs of two counsel, in the High Court, the Supreme Court of Appeal and in this court." (my emphasis)

[21] The exceptional circumstances which gave rise to Gijima not being divested of any rights it would have been entitled to under the contract

are self-evident.

[22] In what is often referred to as *Allpay2*⁹ the Constitutional Court dealt with the remedy that it regarded as just and equitable following upon a finding that the tender by the South African Social Security Agency (“SASSA”) awarded to Cash Paymaster Services (Pty) Ltd (“Cash Paymaster”) is constitutionally invalid. The declaration of invalidity was based on two grounds i.e., that SASSA failed to ensure that the empowerment credentials claimed by Cash Paymaster were objectively confirmed and that the bidders notice 2 did not specify with sufficient clarity what was required of bidders in relation to biometric verification, with the result that only one bidder was considered in the second stage of the process. This rendered the process uncompetitive and made any comparative consideration of cost-effectiveness impossible.¹⁰

[23] The order in *Allpay1*¹¹ suspended the declaration of invalidity pending the determination of a just and equitable remedy. *Allpay2* deals with the application of section 172(1)(b) of the Constitution that enjoins a court as follows after a declaration of constitutional invalidity i.e., it —

“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’.”

[24] In arriving at such a just and equitable remedy the court was confronted with an overriding concern in that the remedy it crafts should not disrupt

⁹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

¹⁰ *Id* at para 1.

¹¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC).

the payments of existing grants. In the case before me no such concern arises, and no element of an outstanding ongoing performance remains.

[25] The court first considered the evidence submitted by the parties and their submissions as to a just and equitable remedy and then applied its mind to a proper legal approach to a just and equitable approach in the procurement context.

[26] Due to the absence of an ongoing component of performance in the present case it serves no purpose to review the evidence the Constitutional court ultimately relied on for its findings. The proper legal approach a court should adopt to arrive at a just and equitable finding in the procurement context is, however, of paramount importance.

Proper Legal Approach to Remedy

[27] The Constitutional Court took its cue from a *dictum* of Moseneke DCJ in *Steenkamp NO v Provincial Tender Board, Eastern Cape*,¹² which reads as follows —

“It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. 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. ...Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled

¹² 2007 (3) SA 121 (CC) at para 29.

by constitutional precepts and at a broader level, to entrench the rule of law.' [Footnote omitted.]”¹³

12 The Constitutional Court then continues and states that¹⁴ —

“...The emphasis on correction and reversal of invalid administrative action is clearly grounded in s172(1)(b) of the Constitution, where it is stated that an order of suspension of a declaration of invalidity may be made ‘to allow the competent authority *to correct the defect*’ (own emphasis). Remedial correction is also a logical consequence flowing from invalid and rescinded contracts [and enrichment law generally.

Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.

[28] The references to the common law examples of remedial correction such as the consequences flowing from invalid and rescinded contracts and enrichment law in general are also important. In paragraph 67 the court elaborated on the latter. It concluded that —

“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.** ^[47]And any benefit that it may derive should not be beyond public scrutiny. So, the solution to this potential difficulty is relatively simple and lies in Cash Paymaster's hands. It can provide the financial information to show when the break-even point arrived, or will arrive, and at which point it started making a profit in terms of the unlawful contract. As noted earlier, the disclosure of this information does not require disclosure of information relating to Cash Paymaster's other private commercial interests. **But its assumption of**

¹³ *AllPay2* at para 29.

¹⁴ *Id.*

public power and functions in the execution of the contract means that, in respect of its gains and losses under that contract, Cash Paymaster ought to be publicly accountable”¹⁵ (my emphasis)

[29] The content of footnote 47 in the aforesaid passage should not be overlooked. It is in my view of some significance and casts light on the court’s approach to the remedy. It reads as follows —

“The dissolution of a contract creates reciprocal obligations seeking to ensure that neither contracting party unduly benefits from what has already been performed under a contract that no longer exists. This is evidenced in cases of rescission or cancellation of a contract where a party claiming restitution must usually tender the return of what she received during the contract's existence or, if return is not possible, explain the reasons for impossibility. See *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) ([1998] ZASCA 67) at 731D – 732D; and *Van der Merwe et al* above n14 at 116 – 18. It also underlies the enrichment claim available to a party in the case of an invalid or illegal contract where the other party seeks to retain benefits from a contract that no longer has legal justification. See *Visser* above n15 at 442. These diverse applications of restitutionary principles are not rigid or inflexible. See *Jajbhay v Cassim* 1939 AD 537 at 538 and, in particular, at 544 where the court held that 'public policy should properly take into account the doing of simple justice between man and man'. See further *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 420A – C, 421A and 427.”

[30] The Constitutional Court also makes it clear in paragraphs 32 and 33¹⁶ —

“This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the

¹⁵ *Id* at para 69.

¹⁶ *Id* at para 32 and 33.

more specific purposes of the Agency Act. Second, in the context of public-procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity — in this case the setting-aside of the contract between SASSA and Cash Paymaster — but also in relation to the effect of the order on future procurement and social-security matters.

The primacy of the public interest in procurement and social-security matters must also be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range.” (my emphasis)

[31] The take-home message is clear. The public interest reigns supreme. In the present matter both Magwa and Profteam’s conduct, and financial position should be subject to public scrutiny so as to establish a just and equitable remedy. The extent of the breach of the particular procurement legislation should thus also be considered in conjunction with all the other relevant facts that the Tribunal did not consider.

[32] In the very next paragraph, the court grappled with a submission from one of the *amici* to the effect that it should articulate a general formulation for when it would be just and equitable to deviate from the corrective principle. The court expressed the view that a general statement of this kind may not be desirable or even feasible once it is accepted that the application of the corrective principle is not uniform. The court justified this on the basis that the corrective principle may be capable of implementation at certain levels, but not others.¹⁷

[33] In paragraph 39 the court again points to the multi-dimensional features involved:¹⁸

¹⁷ *AllPay2* at para 34.

¹⁸ *Id* at para 39

“...I have alluded to the multi-dimensional aspects of the just and equitable enquiry. Factual disputes, at a practical level, add another dimension to be considered. **In these circumstances a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between, with competing aspects assessed differently.** The order made at the end of this judgment is of this kind.” (my emphasis).

- [34] In the matter of *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another*,¹⁹(Phomella) the Supreme Court of Appeal had to deal with the consequences arising from an expired lease of the SALU building in Pretoria which was entered into to accommodate the Department of Justice and Correctional Services (the DOJ). It was concluded between the Department of Public Works (the DPW) and the owner, Phomella Property Investments (Pty) Ltd, the first respondent (Phomella).
- [35] The building and lease were subsequently transferred to the second appellant, Rebosis Property Fund Ltd (Rebosis). Phomella and Rebosis were part of the same group of companies whose guiding mind was a certain Mr Ngebulana. The lease was concluded on 22 September 2009 for a period of 9 years and 11 months after utilising the procedure for a negotiated lease rather than an open bidding process. Authority to conclude the lease was subject to the condition that, prior to signature, an assessment of the space required by the DOJ was to be conducted. Despite the latter not having been done, the lease was signed.
- [36] The SIU, the appellant, launched an application in the Gauteng Division of the High Court, Pretoria (the High Court). The initial relief sought was that the lease be reviewed and set aside as void ab initio. By the time the matter came before the High Court, the lease had run its course. As a result, the SIU did not persist in that relief. It simply sought an order

¹⁹ 2023 (5) SA 601 (SCA)

declaring the lease agreement to be unlawful. In addition, the SIU sought an order that Phomella and Rebosis should jointly and severally pay the Minister of Public Works the amount of R103 880 357,65. This was said to represent wasteful expenditure incurred during the lease. It was contended that an area greater than was needed by the DOJ had been leased. The figure represented the SIU's calculation of the rental which had been paid for that excess area.

[37] The declaration of unlawfulness was sought in terms of s 172(1)(a) of the Constitution. Two bases for this relief were relied on. First, that the DPW had failed to follow an open bidding process in concluding the lease. Secondly, and if it was found that a negotiated lease was competent, the prior requirement of a needs assessment of the space required by the DOJ had not been met. The prayer for payment of R103 880 357,65 was sought under the provisions of section 172(1)(b) of the Constitution.

[38] The High Court declared the lease unlawful, but dismissed the further relief sought by the SIU under section 172(1)(b) of the Constitution. There is no appeal against the declaration of unlawfulness which, accordingly, stands. The SIU sought leave to appeal against the refusal to make an order under section 172(1)(b) of the Constitution. That leave was granted by the High Court. In essence, therefore, the appeal concerns whether the High Court's application of the provisions of s 172(1)(b) of the Constitution warrant interference by this court.

[39] The High Court ultimately granted the declaration because the approval to contract was subject to a complete needs assessment being conducted prior to signature. As mentioned above, this was not complied with and the conduct in concluding the lease accordingly failed to comply with the supply chain management policy of the DPW. Given that s 172(1)(a) of the Constitution was implicated the High Court made a declaration of invalidity.

[40] The SCA per Gorvan JA writing for the court held that —

“The peremptory requirement of s 172(1)(a) of the Constitution is to declare that 'law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. No less, no more. Accordingly, any order which goes beyond such a declaration is not one made under s 172(1)(a). The SIU, however, called in aid the matter of *South African Broadcasting Corporation SOC Ltd and Another v Mott MacDonald SA (Pty) Ltd (Mott MacDonald)*, where Keightley J held:

'I have found that the awarding of the consulting contract was done irregularly in contravention of the SABC's regulatory procurement framework. As such, it undermines the principle of legality and is unlawful. Under s 172(1)(a), I am enjoined to set it aside and to declare it to be void *ab initio*.'

The dictum in *Mott MacDonald* conflated the two subsections of s 172(1) of the Constitution: a declaration of invalidity under s 172(1)(a) and a just and equitable order under s 172(1)(b). The setting-aside and the declaration of voidness are orders which fall under the latter section. The distinction between the two subsections was explained in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama)*²⁰

[41] The SCA also made it clear with reference to *Gijima*²¹ that:

“An example of the exercise of that power would be if, after declaring the lease invalid, the High Court had set it aside. It could, in addition, have declared it to have been void *ab initio*. It could have preserved the lease if it had a few months to run and there was insufficient time to conclude a new lease for the DOJ. These are but some examples of orders which might follow a declaration of invalidity. The only qualification is that any order made must be just and equitable in the particular circumstances of the matter.”²²

²⁰ *Id* at para 6-7.

²¹ See footnote 14 above.

²² *Phomella* at para 9.

[42] The Court further held that²³:

“Such an order clearly involves the exercise of a discretion. The nature of two kinds of discretion has been decisively established:

'A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is true in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense —

“mean[s] no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision”.^[6]

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

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

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

'When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised —

²³ *Id* at para 10-20.

“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. ^[8]

This court has confirmed that the discretion exercised under s 172(1)(b) of the Constitution is a true one:

'The exercise of a remedial discretion under s 172(1)(b) of the Constitution . . . constitutes a discretion in the true sense. It may be interfered with on appeal only if [the appeal 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.'

The High Court, in the exercise of its true discretion, declined to make any order under s 172(1)(b). Thus, the question is whether the SIU has shown any of the aforementioned grounds for interference with the exercise of that discretion.

The first ground relied on by the SIU was a submission that the High Court was influenced by a wrong principle, on the basis of another dictum in *Mott MacDonald*:

'In the first place, as this Court found in *Vision View*, the principle is clear: even an innocent tenderer has no right to retain what it was paid under an invalid contract. In procurement matters, the public interest is paramount and the default position ought to be that payments made should be returned, unless there are circumstances that justify a deviation.'

The SIU submitted that, because the High Court had failed to apply that principle, this court was at large to reconsider the remedy claimed.

The question is whether any such principle applies to the exercise of a discretion under s 172(1)(b). In support of the dictum that 'even an innocent tenderer has no right to retain what it was paid under an invalid contract', Keightley J cited the full-court judgment in *Special Investigating Unit and Another v Vision View Productions CC*. In turn, that court cited as authority for the proposition *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (Allpay 2)*, where the Constitutional Court said:

'It [Cash Paymaster] has no right to benefit from an unlawful contract. And any benefit it may derive should not be beyond public scrutiny.'

This requires careful evaluation. First, the dictum in *Allpay 2* stopped well short of what was held by Keightley J. She said, 'even an innocent tenderer has no right to retain what it was paid under an invalid contract'. But the full dictum in *Allpay 2* was:

'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract. And any benefit it may derive should not be beyond public scrutiny.'

A contextual reading of this dictum in *Allpay 2* clarifies matters. The Constitutional Court did not require Cash Paymaster Services (Pty) Ltd (Cash Paymaster) to repay amounts paid to it under what was found to be an unlawful contract. In the exercise of its discretion, the Constitutional Court ordered that a new tender be issued, but that —

'(i)f the tender is not awarded, the declaration of invalidity of the contract in para 1 above will be further suspended until completion of the five-year period for which the contract was initially awarded'.

When the tender had not been awarded within the five-year period, in the follow-up matter of *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* the Constitutional Court granted an order further suspending the order of invalidity for a period of 12 months and requiring Cash Paymaster to continue its services for that period, explaining:

'Our order below reflects that Sassa and [Cash Paymaster] should continue to fulfil their respective constitutional obligations in the payment of social grants for a period of 12 months as *an extension of the current contract.*'^[15] [my emphasis.]

To that extent Cash Paymaster benefited, despite the initial contract having been found to be unlawful. There was no order that the amounts paid and to be paid should exclude the profits it had factored into its price when tendering. On the contrary, in *Allpay 2*, the only order concerning those profits was that:

'Within 60 days of the completion of the five-year period for which the contract was initially awarded, Cash Paymaster must file with this court an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract.'^[16]

Such an order was designed to give effect to that part of the dictum which held that 'any benefit it may derive should not be beyond public scrutiny'.

A careful and contextual reading of *Allpay 2* thus shows that the Constitutional Court did not hold that a party could derive no benefit from an unlawful contract. The approach in *Allpay 2* of allowing a party to retain payments, and thus to benefit, under an unlawful contract has been echoed in a number of matters. One such example is found in *Buffalo City*, where the majority in the Constitutional Court held:

'I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to [which] the respondent might have been entitled. It should be noted that such an award preserves rights which have already

accrued but does not permit a party to obtain further rights under the invalid agreement.'

There, too, the contractor had performed its obligations under the contract. The Constitutional Court held that the contractor was entitled to payment for the work which had been done.

Therefore, it must be said that **the 'principle' relied upon by the SIU as set out in *Mott MacDonald* is no principle at all.** The same must be said of the following dictum in *Central Energy Fund*:

'The second guiding principle is the "no-profit-no-loss" principle which the Court articulated as follows:

"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."

Deriving as it does from the same dictum in *Allpay 2*, it is clearly wrong and should not be followed. Therefore, the failure of the High Court to apply the 'principle' relied upon by the SIU does not afford a basis to interfere with the true discretion exercised by the High Court in the present matter.

Because there is a true discretion to be exercised under s 172(1)(b) of the Constitution, it is unwise to elevate dicta dealing with the facts in past matters to rules or principles. The discretion must be exercised on a case-by-case basis." (my emphasis)

[43] From the above it is clear that this Court may interfere with the Tribunal's findings given that it failed to take the common cause facts into account and that the concept of a "no -profit-no-loss" principle is false. This court is thus free to conclude depending on the facts of this case whether the appellants are entitled to their profits or not.

The Pleadings

[44] It is of some importance to understand in which way the procurement was illegal and a breach of the Constitution. The Plaintiff's alleged as follows in paragraph 6 – 15 of their pleadings:

- “6. The contract number H16/022 with the First Defendant relates to the construction of the border fence for a total amount of **R37 176 843.50**. A copy of contract number H16/022 including the General Conditions for the Construction Works, Second Edition, 2010 is attached marked **Annexure “A”**.
7. On 25 March 2020, four days after the conclusion of contract number H16/022, the Second Plaintiff approved and made advance payment of **R21 819 878.28** to the First Defendant which payment was irregular. A copy of the proof of payment is attached marked **Annexure “B”**.
8. The contract number HP14/074 with the Second Defendant relates to professional services and project management of the construction of the fence for a total amount of **R3 259 071.48**. A copy of contract number HP14/074 including the General Conditions for the Construction Works, Second Edition, 2010 is attached marked **Annexure “C”**
9. On 25 March 2020, four days after the conclusion of contract number HP14/074, the Second Plaintiff approved and made payment of **R1 843 004.92** to the Second Defendant. This payment too, was irregular. A copy of the proof of payment is attached marked **Annexure “D”**.
10. The parties agreed that the *Contracts* are declared invalid in terms of Section 172(1)(a) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) due to noncompliance with section 217 of the Constitution and with the prescribed procurement process in terms of Treasury Regulation 16A 6.4; 16A. 6.1 and Regulation 11 of the Disaster Management Act 57 of 2002.”

11. As a consequence of the invalidity of the *Contracts*, the payments to both the First and Second Defendants are irregular as the *Contracts* are *ab initio* unlawful. It is, within the meaning of section 172(1)(b) of the Constitution that the Plaintiffs are entitled to appropriate and just and equitable relief.
12. In the particular circumstances of the Plaintiffs' case, the appropriate and just and equitable relief is a remedy that extinguishes as far as possible the consequences of the Defendants' actions and re-establishes the *status quo ante* by ordering:
 - 12.1. the First Defendant to pay the amount of **R21 819 878.28** to the Second Plaintiff; and
 - 12.2. the Second Defendant to pay the amount of **R1 843 004.92** to the Second Plaintiff.
13. In support of the Plaintiffs claim that the aforementioned order would be appropriate and just and equitable relief, the Plaintiffs rely on the following facts:
 - 13.1. The First Plaintiff's investigations revealed that the design and construction of the border fence failed to meet the standards required for a border fence. The border fence did not comply with the drawings and specifications and First and Second Defendants conduct was in material breach of the conditions of the provisional site clearance certificate as:
 - 13.1.1. The design of the fence was defective;
 - 13.1.2. The construction of the fence was defective;
 - 13.2. As a result of the First and Second Defendants' defective design and construction, the border fence was compromised and ineffective *inter alia*:
 - 13.2.1. The border fence did not deter scaling and was easily breached and at 4-6 May 2020, at least 115 breaches were detected;

- 13.2.2. Numerous openings in the border fence clearly indicated that people could cross easily; and
 - 13.2.3. The defective border fence made the closing of the official border gates redundant.
14. The First and Second Defendants defective border fence undermined the National State of Disaster declared by the President of the Republic of South Africa and the spread of the Covid 19 virus as the Beitbridge border fence with Zimbabwe was not secured.
 15. Alternatively the repayment by the Defendants of the amounts of **R21 819 878.28** and **R1 843 004.92** respectively, is appropriate relief within the meaning of section 8(2)(b) of the SIU Act”

[45] Before dealing with the First Defendants plea hereto I should point out that it refers to itself as the “Second Defendant” in several paragraphs. I have assumed the relevant references to be typographical errors. The First Defendant pleaded as follows to the above extract of the Plaintiffs’ Declaration:

“6. AD PARAGRAPH 6 THEREOF

- 6.1 First Defendant admits that the contract with title: “**PHASE 1 : 40 KM BORDERLINE INFRASTRUCTURE AND INSTALLATION BETWEEN RSA I ZIMBABWE:** APPOINTMENT TROUGH EMERGENCY DELEGATION OF SECURING OF BORDERLINE FENCE was signed for amount of R37 176 843.45. It admits the signing of the agreement attached as annexure “A” to the declaration. (my emphasis)
- 6.2. First Defendant repeats the contents and background to the signing of the agreement as pleaded above.

7. AD PARAGRAPH 7 THEREOF

Second Defendant admits that it received payment of R 21 819 878.28 on 30 March 2020. Second Defendant pleads that the aforementioned payment was requested at the behest of the officials of the Second Plaintiff who indicated that its office was anticipated to be closed when payment was due to be made in terms of the contract. Based on the aforementioned instruction a payment request was prepared, certified by the Second Defendant and payment made by the Second Plaintiff in terms thereof. Second Defendant pleads that it was throughout represented that the payment and contract was lawful and approved in terms of the prescribed processes. It is admitted that the payment was received by the Second Defendant.

8. AD PARAGRAPHS 8 AND 9 THEREOF

The First Defendant takes note of the contents of the agreement attached as Annexure "C". Second Defendant cannot admit or deny the contents thereof.

9. AD PARAGRAPH 10 THEREOF

9.1. First Defendant admits that subsequent to it receiving legal advice and the relevant documentation being made available, that its appointment and the agreements relating thereto, failed to comply with the provisions of section 217 of the Constitution and with the prescribed procurement process in terms of Treasury Regulations 16A, 6.4, 16A 6.1 and regulation 1 1 of the Disaster Management Act.

9.2. Second Defendant (sic) specifically pleads that throughout the period preceding the agreement as well as at the time of the signing of the agreement and thereafter, the officials of the Second Plaintiff indicated and represented to the First Defendant that the process and the First Defendant's appointment was lawful and mandated by the Minister of Public Works, the Honourable Patricia da Lille, and the President of the Republic of South Africa.

9.3. First Defendant specifically pleads that the process followed was prescribed by the officials of the Department of Public Works and that the First Defendant complied with the process as instructed and prescribed by the officials of the Second Plaintiff and/or agents acting on its behalf.

10 AD PARAGRAPH 11 THEREOF

First Defendant admits as a matter of law that the contracts are *ab initio* unlawful and falls within the ambit of section 172(1)(b) of the Constitution. It pleads that the First Defendant is entitled to appropriate and just and equitable relief consequent to the declaration of invalidity.

11 AD PARAGRAPH 12 (INTRODUCTORY PORTION) THEREOF

The contents are denied as if specifically traversed and it is pleaded that the circumstances and the actions by the senior officials of the Second Plaintiff as well as the direct involvement of the Minister of Public Works and her advisors, constitutes sufficient facts and circumstances to grant a just and equitable remedy in the form of just and equitable relief to the First Defendant in the form of and order that all rights in terms of the contract remain vested irrespective of the invalidity of the agreement, and that First Defendant is entitled as its remedy to payment of all amounts due in terms thereof.

12 AD PARAGRAPH 12.1 THEREOF

The contents are denied as if specifically traversed.

13 AD PARAGRAPH 12.2 THEREOF

13.1 First Defendant is not in a position to plead to the aforementioned.

13.2. First Defendant specifically pleads that it performed in terms of the agreement entered into with the First Defendant and complied with its obligations in terms of the contract. As a result of the aforementioned, the First Defendant pleads that

it will be just and equitable that it is ordered that the rights that accrued in terms of the contract remains vested irrespective of the invalidity of the agreement and that the First Defendant is entitled to payment of the full contract price and in particular that it ought to be entitled to receive payment in the amount of R11,144,820-46 being the outstanding portion of the contract amount.

13.2.1. Final account delivered - R 34 699 682-88 (Vat Inclusive).

13.2.2. Less amount paid R 21 819 878-28 (VAT Inclusive)
Outstanding (inclusive of retention money now due R11 144 820-46)

14 AD PARAGRAPH 13.1 THEREOF

14.1. The contents are denied as if specifically traversed and the Plaintiffs are placed to the proof of each and every allegation.

14.2. In particular it is denied that the First Defendant was in any way involved with the design of the fence and First Defendant pleads that it complied with its obligations in terms of the contract.

15. AD PARAGRAPH 13.1.1 THEREOF

First Defendant denies that it was involved in the design or that it can be held accountable for any defective design in the fence.

16 AD PARAGRAPH 13.1.2 THEREOF

The contents are denied as if specifically traversed and the First Defendant specifically pleads that the Second Defendant as the appointed agent of the Second Plaintiff, together with the officials of the Second Plaintiff, signed off on the fence as erected and completed in compliance with the terms of the agreement.

17 AD PARAGRAPH 13.2 THEREOF

The contents are denied as if specifically traversed and the Plaintiffs are placed to the proof of each and every allegation.

18 AD PARAGRAPHS 13.2.1 TO 13.2.3 THEREOF

18.1 The First Defendant denies that it can be held accountable for any of the breaches that were detected and specifically pleads that at the time when the fence was handed over, there were no breaches.

18.2. First Defendant in particular pleads that, during its construction it advised the officials of the Second Plaintiff as well as officials of the South African National Defence Force ("SANDF") that there were attempted breaches of the fence and that the absence of patrols by the SANDF and/or SAPS rendered the fence vulnerable.

18.3. Irrespective of the aforementioned, the First Defendant took steps and procured sufficient security, at its own cost, to protect the fence until the time that it was handed over.

19. AD PARAGRAPH 14 THEREOF

19.1 The contents are denied as if specifically traversed and the Plaintiffs are placed to the proof of each and every allegation.

19.2. First Defendant specifically pleads that the fence that was erected as instructed, and that the construction thereof was approved as compliant to the terms thereof not only by the Second Defendant, but also by the Senior Officials of the Second Plaintiff.

20 AD PARAGRAPH 15 THEREOF

21. The contents are denied as if specifically traversed and it is denied that it would be just and equitable that any repayment of money be paid.

22. First Defendant specifically pleads that it ought to be entitled to be paid the full contract amount for the services rendered as will be set out at the counterclaim annexed hereto.

WHEREFORE the First Defendant prays that the relief as sought by the Plaintiffs be dismissed with costs.”

[46] Over and above the aforesaid First Defendant formulated a Counterclaim in the following terms:

“2

- 2.1 First Plaintiff repeats the facts pleaded in the plea and prays that it be incorporated herein as if specifically repeated.
- 2.2. First Plaintiff pleads that during the course of March of 2020 the Second Defendant was contacted by officials of the Department of Public Works to assist in the erection of an emergency fence that had to be erected as a matter of extreme urgency to assist in the control of movement between South Africa and Zimbabwe.
- 2.3. In particular the officials of the Second Plaintiff indicated that the project was in terms of presidential and/or ministerial directives and/or taking place at the specific insistence of the Minister of Public Works and Infrastructure, the Honourable Minister Patricia da Lille as reflected in annexure CRP “1” to the plea.

3.

- 3.1 At the meeting the attendants were informed that the contractor to be appointed has to be on site on the 20th of March 2020. An assessment would be performed by the Department at the conclusion of the meeting and the design and specifications would be communicated.

- 3.2. Mr Harry Van Meyeren on the 18th of March 2020 informed First Defendant that he was preparing a bill of quantities based on the first defendant's existing maintenance at the Beitbridge Border post. The prepared bill was forwarded by Van Meyeren on the 18th of March and forwarded to the First Defendant.
- 3.3. Pringle on behalf of the First Defendant indicated that the pricing of 2016 was insufficient and had to be adjusted with CPI to provide for increases. This CPI adjustment was calculated by the Second Defendant and amounted to some R4 000 000.00 in addition to the initially prepared bill of quantities.
- 3.4. On Wednesday the 18th of March 2020 First Defendant was notified by Second Defendant that First Defendant had been appointed as contractor and had to be present on site on the 19th of March 2020 to attend a site handover meeting, at which time the project would commence.
- 3.5. On Thursday the 19th of March 2020 First Defendant, represented by Mr Martin Lejaka, attended the site handover meeting, and received the appointment letter from officials of the Department of Public Works. A copy of the letter dated 18 March 2020 and signed by Mpho Rakau acting Director: Legal Services on behalf of the Director General, Adv S Vukhela, is annexed to the plea as annexure "CRP 2".
- 3.6. On Friday the 20th of March 2020 the Department demanded commencement of the project with immediate effect which demands persisted during the course of the weekend.
- 3.7. On Saturday the 21st of March 2020 Second Defendant's Van Meyeren arranged an urgent meeting at First Defendant's offices in Benoni on Sunday the 22nd of March 2020. It was to be attended by representatives of Second Plaintiff and First and Second Defendants.

- 3.8. On Sunday the meeting took place but was not attended by officials from the Department of Public Works. Van Meyeren handed the contract document to Pringle and instructed him to complete it, utilising the amended bill of quantities, sign it and have it delivered to Jabulile Mabaso at the offices of the Second Plaintiff.
 - 3.9 This was done, and Martin Lejaka personally handed the original contract document to Ms Mabaso at Public Works Offices in Pretoria. It accords with the document annexed as annexure A to the Plaintiffs' declaration.
 - 3.10 Profteam on behalf of the Second Plaintiff demanded the attendance on site and immediate commencement.
- 4 During the whole of the process, the First Defendant was not involved in selecting in the scope or procedures of the procurement process and acted on the representations and disclosures made to it. This was inter alia that the project was compliant with the relevant Legislation and procurement processes and was done as a matter of extreme urgency under a directive from the Minister of Public Works. The First Defendant specifically pleads that it acted bona fide in order to assist the government in an urgent and /or emergency project of National Importance, at Second Plaintiffs request.
 5. During the contract period and from 26 March 2020 the lockdown was announced and had additional and adverse operational impact and costing for the First Defendant.
 - 5.1 Accommodation and/or bathroom facilities compliant with Covid had to be provided and was enforced by the officials and/or agents of the Second Plaintiff;
 - 5.2. Access to the procurement of equipment was limited and special measures had to be introduced and permits obtained in order to have access to the materials needed for the project;
 - 5.3. Costs for securing the fence due to threatened breaches by illegal operators from Zimbabwe and South Africa to the

respective countries were incurred and breaches and crossings occurred on a regular basis;

- 5.4. Despite this problem being disclosed to the officials of the Second Plaintiff and representatives of the South African National Defence Force, no assistance was provided by the Second Plaintiff or the South African National Defence Force and or the SAPS;
- 5.5. The absence of the SANDF in patrolling the area exacerbated the situation;
- 5.6. First Defendant was throughout informed that it was of the utmost importance that the fence had to be completed by 20 April 2020 and faced contractual penalties in the event of failing to complete the fence in time;
- 5.7. First Defendant, its director and employees and contractors worked numerous hours of overtime, stayed in difficult conditions had to complete a project of significant magnitude in an unrealistic timeframe of 4 weeks.

6.

- 6.1 Despite the adverse circumstances the First Defendant proceeded to erect the fence in accordance with the specifications provided and allocated the necessary employees and/or contractors in order to ensure that the fence be erected in terms of the designs provided by Second Plaintiff and Second Defendant.
- 6.2 First Defendant incurred expenses in this regard and made its time available exclusively to the Second Plaintiff, exposed its representatives and/or employees to risk of contracting Covid -1 9, exposed itself to risk of attack at the unpatrolled border fence from smugglers and unlawful border crossers.

7.

- 7.1 On or about 25 March 2020 the First Defendant was informed that it was foreseen that payment could not be made in terms of the agreement as a result of the potential

closure of its office and access to payments as a result of the hard lockdown that was announced.

- 7.2. First Defendant was requested to prepare a “progress draw” on the work that was forecasted to be completed three weeks into the 4-week project.
 - 7.3. First Defendant proceeded under the guidance of the Second Defendant to prepare an invoice based on the instructions and information disclosed by the Second Plaintiff.
 - 7.4. An invoice was prepared based on 60 % completion and delivered to the Second Defendant.
 - 7.5. Second Defendant approved the payment, and First Defendant received payment into its bank account on 30 March 2020.
- 8.
- 8.1. First Defendant proceeded to complete the erection of the fence in terms of the agreement by 20 April 2020 and on 21 April 2020 the formal handover and inspections of the fence occurred, and practical completion was certified.
 - 8.2. The officials of the Second Plaintiff and role-players from the SANDF were involved in the inspection of the fence and the inspection was completed and save for limited snags that were disclosed, the fence was completed.
 - 8.3. Practical completion in terms of the agreement was reached and signed off not only by the Second Defendant but also by the officials appointed by the Second Plaintiff to oversee the project.
 - 8.4. The contract has since reached final completion.
 - 8.5. Irrespective of the handover, First Defendant was requested to have the private security that it had arranged in place until the 24th of April 2020 as SANDF to patrol the fence. First Defendant complied with this request and kept private security that it paid for in place until the evening of

the 24th of April 2020 at First Defendant's costs and which was not charged for.

- 9 In the premises it is submitted that the First Defendant complied with its contractual liability, and it was not the initiator or a participant in the formulation of the procurement process followed by the Second Plaintiff.
- 10 Having regard to the aforementioned as well as the costs and expenses incurred in the bona fide actions by the First Defendant, it is submitted that it would be just and equitable to order in these circumstances, that irrespective of the failure to correctly record the deviation from the procurement processes prescribed by the Treasury Regulations and the invalidity of the agreement, that it be ordered to be just and equitable that the rights in terms of the contract remains vested, irrespective of the invalidity of the agreement, and that the First Defendant is entitled to payment of the outstanding portion of the final account which was less than the contract amount.
- 11 As a result of the aforementioned it is submitted that the just and equitable relief subsequent to the setting aside of the agreements ought to be that the rights that vested in terms of the invalid agreement remains vested and that the Second Plaintiff is liable as a just and equitable remedy to make payment of the remaining portion of the contract in the amount R11 144 820.46 to the First Defendant.
- 12 In the alternative it is pleaded that the costs incurred and the risk to which the First Defendant was exposed, justifies that the Honourable Court as part of the enquiry into the just and equitable remedy orders Second Plaintiff to make payment, in addition to the amount already paid to the First Defendant, in the amount of R11,144,820.46 as the just and equitable remedy to the First Defendant.

WHEREFORE First Defendant prays for the following relief:

1. That it be ordered in terms of the provisions of section 172(1)(b) of the Constitution as part of the just and equitable remedy available to affected parties, that irrespective of the invalidity of

the agreement all rights remain vested and that the Second Plaintiff be ordered to pay the amount of R11,144, 820-46 to the Second Defendant;

2. Interest on the aforementioned amount at the prescribed rate of 7.25% plus 6 % in terms of regulation 26 D (2) of Government Gazette Number 38822 of 29 May 2015 from 20 April 2020 until date of final payment;
3. In the alternative to the aforementioned that the Honourable Court order as a just and equitable remedy that the Second Plaintiff pay to the First Defendant an amount of R11,144,820.46, alternatively such an amount that the Honourable Court finds to be just and equitable to the First Defendant;
4. Interest at the prescribed rate of 7.25 % per annum a tempora morae.
5. Costs of suit;
6. The First and Second Plaintiff jointly and severally be ordered to pay the first Defendants costs of the application under Case Number GP 12/2020, reserved on 16 October 2020 and ordered to be determined by the trial court.”

[47] The Second Defendant pleads as follows to paragraphs 6 - 15 of the plaintiff's declaration —

“3. AD PARAGRAPH 6

The allegations herein contained are admitted.

4. AD PARAGRAPH 7

Save to admit that the Second Plaintiff approved and made advance payment of R21,819,878.28 to the First Defendant, the remainder of the allegations herein contained are denied. The Second Defendant pleads specifically that the payments made to the First and Second Defendants were approved and made by

authorised representatives of the Second Plaintiff, alternatively ostensibly authorised representatives of the Second Plaintiff.

5. AD PARAGRAPH 8

The allegations herein contained are admitted.

6. AD PARAGRAPH 9

6.1 Save to admit that the Second Plaintiff approved and made advance payment of R21,819,878.28 to the First Defendant, the remainder of the allegations herein contained are denied.

6.2 The Second Defendant pleads specifically that the payments made to the First and Second Defendants were approved and made by authorised representatives of the Second Plaintiff, alternatively ostensibly authorised representatives of the Second Plaintiff.

7. AD PARAGRAPH 10

The agreement is admitted.

8. AD PARAGRAPH 11

8.1 The allegations herein contained are denied.

8.2 As a consequence of the parties' agreement, the tribunal is enjoined to declare the agreements invalid in terms of Section 172(1)(a) of the Constitution of the Republic of South Africa, 1969 (**sic**) (hereinafter "the Constitution").

8.3 As a result of the declaration of invalidity, the tribunal is vested with a discretion to make an order that is just and equitable which includes but is not limited to an order limiting the retrospective effect of the declaration of invalidity.

8.4 Section 171(b) (*sic*) of the Constitution which vests the tribunal with the aforesaid discretion envisages an order

that is just and equitable in all the circumstances and taking into consideration all the facts and factors leading to the conduct which is declared invalid and its consequences.

8.5 The Second Defendant pleads that a proper exercise of the discretion would be to afford the Defendants just and equitable relief having fully performed their obligations in terms of the agreements in the *bona fide* but mistaken belief that the agreements complied with Section 217 of the Constitution and with the prescribed procurement process in terms of the Treasury Regulations and other Regulations applicable.

9. AD PARAGRAPH 12

9.1 The allegations herein contained are denied.

9.2 The Second Defendant pleads that:

9.2.1 **the obligation to comply with the Treasury Regulations in general and specifically with Treasury Regulations 16A 6.4 and 16A 6.1 and Regulation 11 of the Disaster Management Act 57 of 2002 is on the accounting officer of the Second Plaintiff, alternatively on the Second Plaintiff; and**

9.2.2 the Second Defendant's bid was accepted by a duly authorised representative of the Second Plaintiff, Mr Welcome Mokoena on behalf of Sam Vukela, the Director General of the Second Plaintiff; and

9.2.3 Fulfilment of the contractual obligations were acknowledged by signature of a duly authorised representative that the practical completion certificate could be issued in accordance with the terms of the agreements; and

9.2.4 that representative of the Second Plaintiff represented to the Defendants that the project had ministerial and/or presidential approval. (my emphasis)

10. AD PARAGRAPH 13.1

10.1 The allegations herein contained are denied.

10.2 Without derogating from the generality of the foregoing denial, the Second Defendant pleads that:

10.2.1 **The design of the fence was dictated by the ministerial directive that the project would be a variation order of an existing contract with the Department.** (my emphasis)

10.2.2 The Defendants have an existing agreement with the Second Plaintiff WCS052500.

10.2.3 As a result, the material used for the design was limited to material available on the bill of quantities in relation to WCS052500.

10.2.4 The type and size of fence was agreed with representatives of the Second Plaintiff, the South African Police Service, the South African National Defence Force and other contractors and engineers invited to a site meeting on 17 March 2020 at the SAPS Barracks situated at Beit Bridge.

10.2.5 Design drawings based on the agreement at the site meeting was approved by the Second Defendant.

11. AD PARAGRAPH 13.2

11.1 The allegations herein contained are denied.

11.2 Without derogating from the generality of the foregoing denial, the Second Defendant pleads that the fence contracted for is not a border fence and only extends 20 kms on each side of the Beit Bridge border entry point.

11.3 The First and/or Second Defendant's representatives reported attempted breaches of the fence whilst it was being constructed to the South African National Defence Force.

11.4 Without sufficient patrols, any fence and specifically the fence erected in accordance with the agreed specifications would not withstand concerted efforts to breach it.

11.5 The fence was handed over to the Second Defendant's officials and they approved the practical completion certificate. A copy of the certificate is annexed hereunto as Annexure "SD1".

12. AD PARAGRAPH 14

12.1 The allegations herein contained are denied.

12.2 The Second Defendant pleads that a fence compliant with the specifications as agreed with the Second Defendant was handed over to it and that it approved a practical completion certificate for the fence duly represented by Jabulile Mabusu on 20 April 2020 and a certificate of completion on 28 April 2020.

13. AD PARAGRAPH 15

The allegations herein contained are denied.

WHEREFORE the Second Defendant prays for an order dismissing the Plaintiff's action with costs.",

[48] The Second Defendant also formulated a counterclaim in the following terms —

- “2. The Second Defendant repeats paragraphs 5 to 10 of the Plaintiffs’ declaration *mutatis mutandis*.
3. To avoid prolixity, Annexures “A” to “D” to the declaration are not annexed hereto.
4. Consequent upon the declaration of invalidity of the contracts by the tribunal, the Second Defendant pleads that it is entitled to equitable relief in terms of Section 172(1)(b) of the Constitution.
5. The Second Defendant pleads that it is entitled to the following just and equitable relief:
 - 5.1 Payment of the amount of R1,277,401.19;
 - 5.2 Interest on the aforesaid amount at the prescribed rate of 7.25% plus 6% in terms of Regulation 26D (2) of the Government Gazette No. 38822 of 29 May 2015 from 20 April 2020 until date of final payment.
6. The Second Defendant pleads that it is entitled to the aforesaid just and equitable relief in circumstances where:
 - 6.1 the Second Defendant and the First Defendant as the contractor entered into the agreements with the Second Plaintiff in the *bona fide* but mistaken belief that the Second Defendant, its accounting officer and representatives had complied with the prescripts of the Treasury Regulations and all other regulations or rules applicable to procurement;
 - 6.2 the Defendants proceeding from this *bona fide* belief, fully executed the terms of the contracts with the Second Plaintiff;
 - 6.3 the First Defendant handed over the fence to the Second Plaintiff and signed a practical completion certificate prepared by the Second Defendant;
 - 6.4 the practical completion certificate was signed by a duly authorised representative of the Second Defendant after a site inspection by representatives of *inter alia* the Second Plaintiff and the Defendants;

- 6.5 the Second Defendant, duly represented, accepted the design and specifications of the fence;
- 6.6 the minister responsible for the Second Defendant approved of and instructed that the project be initiated and completed in a specified timeframe and as a variation order.
- 6.7 Compliance with Treasury Regulations 16A 6.4 and 16A 6.1 as well as Regulation 11 of the Disaster Management Act 57 of 2002 rests upon the accounting officer of the Second Plaintiff.
- 6.8 The performance of the Defendants' obligations in terms of the agreements which are interlinked required an extraordinary effort having regard to the short timeframe for completion and the imposition of the Level 5 lockdown regulations.
- 6.9 The Second Defendant did not act in terms of any of the contractual provisions which would justify the refusal to pay the outstanding amounts which were due in terms of the agreements.
7. The Second Defendant pleads that the just and equitable relief subsequent to the setting aside of the agreements ought to be that the rights that vested in terms of the invalid agreements remain vested and that the Second Plaintiff is liable as a just and equitable remedy to make payment of the remaining portion of the contract in the amount of R1,277, 401.19 to the Second Defendant.
8. In the alternative it is pleaded that the costs incurred and risk to which the Defendants were exposed, justifies that the Honourable Court as part of the enquiry into the just and equitable remedy orders Second Plaintiff to make payment, in addition to the amount already paid to the Second Defendant, in the amount of R1,277,401.19 as the just and equitable remedy to the First Defendant.

WHEREFORE the Second Defendant prays for the following relief:

1. That it is ordered in terms of the provisions of Section 172(1)(b) of the Constitution as part of the just and equitable remedy available to affected parties, that irrespective of the invalidity of the agreement between the Second Plaintiff and the Second Defendant, all rights remain vested and that the Second Plaintiff be ordered to pay the amount of R1, 277, 401.19 to the Second Defendant;
2. Interest on the aforementioned amount at the prescribed rate of 7.25% plus 6% in terms of Regulation 26D (2) of Government Gazette No. 38822 of 29 May 2015 from 20 April 2020 until date of final payment;
3. In the alternative to the aforementioned that the Honourable Court order as a just and equitable remedy that the Second Plaintiff pay to the Second Defendant an amount of R1 277 401.19, alternatively such an amount that the Honourable Court finds to be just and equitable;
4. Interest at the prescribed rate of 7.25% per annum *a tempore morae*;
5. Costs of suit;
6. The First and Second Plaintiffs jointly and severally be ordered to pay the Second Defendant's costs of the application under case number GP12/2020, reserved on 16 October 2020 and ordered to be determined by the trial court."

[49] The Plaintiffs pleaded as follows to the Counterclaims of the Defendants —

"AD FIRST DEFENDANT'S COUNTERCLAIM

1. AD PARA GRAPHS 1 to 3
 - 1.1 For the purposes of these proceedings, the allegations contained in these paragraphs are admitted.

2. AD PARA GRAPHS 4 to 9

2.1 The allegations in these paragraphs are noted.

3. AD PARAGRAPHS 10 to 12

3.1 The allegations made in these paragraphs are denied.

Wherefore the Plaintiffs pray that the First Defendant's counterclaim be dismissed with costs.”

AD SECOND DEFENDANT'S COUNTERCLAIM

4. AD PARAGRAPHS 1 TO 3

4.1 The allegations made in these paragraphs are noted.

5. AD PARAGRAPH 4

5.1. The Plaintiffs aver that the Tribunal has the power to make a just and equitable order and the Tribunal a power that it deems appropriate to give effect to any ruling or decision made by it in terms of section 8(2)(b) of the SIU Act 74 of 1996.

6. AD PARAGRAPH 5

6.1. The allegations made in this paragraph are denied.

7. AD PARAGRAPH 6 to 8

7.1. The allegations made in these paragraphs are denied.

7.2. In particular, it is denied that the First Defendant is entitled to any payment.

Wherefore the Plaintiffs pray that the Second Defendant's counterclaim be dismissed with costs.”

[50] The Plaintiffs also replicated to the Defendants Pleas as follows —

“AD FIRST DEFENDANT'S PLEA

1. AD PARAGRAPHS 1-4

1.1. For purposes of these proceedings, the allegations made in these paragraphs are admitted.

2. AD PARAGRAPHS 5 (5.1-5.14)

- 2.1. For the purposes of these proceedings, the allegations made in these subparagraphs are admitted.
3. AD PARAGRAPHS 5.15
 - 3.1. It was known to all parties, given their past contractual agreements, that despite the state of national disaster, compliance with section 217 of the Constitution as well as Treasury Regulations 16A.6.4; 16A.6.1 and regulation 11 of the Disaster Management Act 57 of 2002 had to be met.
4. AD PARAGRAPHS 6 to 8
 - 4.1. The allegations made in this paragraph are noted.
5. AD PARAGRAPH 9.1
 - 5.1. The concession made in this subparagraph is consistent with the agreement between the parties and the order made by the Tribunal declaring the agreements invalid and setting such aside.
 - 5.2. As a consequence of the *ab initio* invalidity of the agreements, no rights vested to any party.
 - 5.3. As a result, a just and equitable order is to direct the *status quo ante* with the First Defendant paying back the monies paid to it in the amount of R21,819, 878.28 to the First Plaintiff, alternatively, that payment be made in terms of section 8(2)(b) of the SIU Act.
6. AD PARAGRAPH 9.2
 - 6.1. The allegations made in this paragraph are denied and, in particular that the Minister of Public Works or the President of the Republic mandated procurement that is inconsistent with the prescripts of the law.
7. AD PARAGRAPH 9.3
 - 7.1. The allegations made in this subparagraph is denied and the First Defendant is put to the proof thereof.
 - 7.2. In particular, it is denied that the officials of the Second Plaintiff can on their own prescribe processes in

procurement or give instructions that offend the legal precepts regarding procurement of goods and services by state and/or state bodies.

8. AD PARAGRAPH 11

8.1. The allegations made in this paragraph reflect correctly the law relating to the agreement being unlawful *ab initio*. Section 172(1)(b) of the Constitution reflects the power a court has, having declared any law or conduct to be inconsistent with the Constitution.

9. AD PARAGRAPH 12

9.1. The allegations made in this subparagraph is denied and the First Defendant is put to the proof thereof.

10. AD PARAGRAPH 13 to 16

10.1. The allegations made in this subparagraph is denied and the First Defendant is put to the proof thereof.

11. AD PARAGRAPH 17

11.1. The allegations contained in this paragraph is noted.

12. AD PARAGRAPH 18 and 19

12.1. The Plaintiffs' have no knowledge of the allegations in these paragraphs and the First Defendant is put to the proof thereof.

AD SECOND DEFENDANT'S PLEA

13. AD PARAGRAPH 4 to 6

13.1. The allegations in these paragraphs are noted.

13.2. No payments could in law, be payable in respect of agreements which were *ab initio* invalid.

14. AD PARAGRAPHS 8.1 to 8.5

14.1 The allegations made in these paragraphs are admitted to the extent they properly reflect the law.

14.2. It is denied that any right accrues in respect of agreements that are invalid *ab initio*.

15. AD PARAGRAPHS 9 (including all subparagraphs thereof)
 - 15.1. Notwithstanding the allegations made in these subparagraphs, the agreements were to comply with the prescripts of section 217 of the Constitution as well as Treasury Regulations 16A.6.4 and 16A.6.I and regulation 11 of the Disaster Management Act 57 of 2002.
16. AD PARAGRAPH 10 and 11 (including all subparagraphs thereof)
 - 16.1. Notwithstanding the allegations made herein being correct, the final construction of the border fence was defective and not fit for purpose.
17. AD PARAGRAPHS 12 (including all subparagraphs thereof)
 - 17.1. The allegations made in this paragraph are noted.

WHEREFORE Plaintiffs persists in their claims.”

The facts and evidence

[51] I intend dealing with the evidence of Magwa’s witnesses first and thereafter the evidence of Profteam’s witnesses. I approach all the evidence on the basis that same was uncontested in the proceedings in the SIU Tribunal.

Witnesses to Magwa

Mr Pringle’s (Pringle) Evidence

[52] His statement under oath should be deemed to be admitted as evidence as if he testified in chief. I should point out that the annexures to his affidavit appears before his affidavit in the Appeal Record and not after same as is the normal practice.

[53] He states that he was a director of Magwa from the outset and at all times involved as Project Manager in every contract performed by it. His curriculum vitae (CV) indicates that he obtained his National Diploma

Civil Diploma in Engineering from the Vaal Triangle Technikon in 1993. He over time worked himself up from junior technician to a Site Engineer at Concor whereafter he joined Menlo Construction Norh as a director and later became its manager director. He started Magwa Construction CC during 2005 as a founder member. The latter is now known as Caledon River Properties (Pty)Ltd a company of which he is a director and which trades under the name of Magwa Construction.

[54] It is apparent from his CV that he was involved in the tender for the Beitbridge Land Port of Entry (LPOE) and apart from his present involvement in the tenders for other LPOE's the lengthy list of other tenders with State Organs suggests that he is no newcomer to tendering processes involving State Organs.

[55] He was involved in every construction project ever awarded to Magwa/Magwa as Project Manager. He also annexed a spreadsheet listing numerous contracts he was involved in, several of which indicates that he is often involved in contracts with the DPW.

[56] On the 16 March 2020, he received an email from Goodwill Lukhele (Lukhele) from the DPW addressed to the Profteam and also copied to Jabulile Mabaso Wasnaar Hlabangwana, Bathe Mokhothu, Siphamandla Ngcobo and Siyabonga Xaba. The persons copied are also from the DPW.

[57] The email was apparently also directed to Hillside Trading, another contractor, who but for his presence at a meeting referred to below seems to play no further role in this matter.

[58] The e-mail reflects an invitation to attend a meeting to meet at the Beitbridge LPOE on 17 March 2020 at 11h00 in order to conduct a site visit and discuss the proposed scope of work and costs estimate for a borderline fence.

[59] In this email the DPW proposed to have the fence constructed as a part

of, or an extension of, the existing Repair and Maintenance Beit Bridge Project. As stated above Magwa was already contracted to the DPW in respect the aforesaid project, also known as RAMP Beitbridge.

[60] Lukhele is a Professional Construction Project Manager (PrCPM) and the chief construction project manager of the DPW. The RAMP contract was already awarded in 2016 pursuant to an open tender process and was extended on 7 August 2020 and only came to its final conclusion on 17 March 2021. According to Pringle, Magwa had a long and successful history of projects that it was contracted for by the DPW.

[61] Pringle attended the site meeting as requested by the DPW. The meeting was also attended by the South African National Defence Force (SANDF), other representatives of the DPW, the SAPS, Mr van Meyeren of Profteam, Hillside Trading, Asatico and Virtual Construction Engineers.

[62] The meeting was led by Lukhele who indicated that the purpose for the meeting was to discuss and determine the scope of works and to decide on the procurement strategy for an emergency project. He sketched the background to the meeting and stated that the project was at the direction of the Minister of the DPW, Ms Patricia de Lille, and with the full knowledge of the Cabinet. A copy of the direction is annexed to the witness' affidavit marked annexure "BP7" dated 16 March 2020 and it in its own terms directed that a contractor be appointed and should commence work by 20 March 2020.

[63] Lukhele indicated that the DPW had invited three repair and maintenance program contractors and the consulting engineers working on projects in the area. He also indicated that a rapid tender process would be implemented as a result of the directive and urgency of the project. Lukhele was unsure as to how they would implement the tender process.

- [64] Profteam's Bill of Quantities (BOQ) for the Beit Bridge LPOE had a security fence in the list of activities. The approved rates were set and accepted in 2016 through a competitive tender process. This contract also provided for escalation of the rates.
- [65] The DPW indicated that the RAMP project's BOQ had to be used to determine if a Variation Order (VO) could be issued as the rates are already available and were obtained in terms of an open tender process. Pringle also asserts that from the discussions at the meeting it appeared that the DoD and the DPW had met and decided on the specifications for the emergency fence to be constructed.
- [66] The issue of who would be responsible for maintenance and/or patrols were raised at the meeting. According to his recollection the DPW had to liaise with the DoD in that regard.
- [67] Pringle indicated that the pricing of 2016 was insufficient and had to be adjusted upwards with CPI to provide for increases in costs. The BOQ was then calculated in accordance thereof and amounted to some R4,000,000.00 in addition to the initially prepared bill of BOQ.
- [68] The total amount as recalculated amounted to R37,176, 843.50 inclusive of VAT.
- [69] On 18 March 2020, Magwa was notified by Profteam that it had been appointed as contractor and had to be present on site on 19 March 2020 to attend a site handover meeting, at which time the project would commence. This was instructed and demanded by the DPW, despite the fact that no formal contract had been signed and Magwa just heard that it was appointed. The dire need to commence was raised on behalf of the DPW.
- [70] On Thursday 19 March 2020 Magwa, represented by Mr Lejaka, Pringle's co-director, attended the site-handover meeting and received an appointment letter from representatives of the Second Plaintiff. The

letter, dated 18 March 2020 and signed by Mpho Rakau acting Director: Legal Services on behalf of the Director General, Adv S Vukhela, is “BP7”.

- [71] On Friday 20 March 2020 the DPW demanded commencement of the project with immediate effect, which demands persisted during the course of the weekend.
- [72] On Saturday 21 March 2020, Profteam’s Van Meyeren arranged an urgent meeting at Magwa’s offices in Benoni for Sunday 22 March 2020. It was to be attended by representatives of the DPW, Magwa and Profteam.
- [73] The meeting took place but was not attended by officials from the DPW. Van Meyeren handed the contract to Pringle and instructed him to complete it, utilising the amended BOQ, sign it and have it delivered to Ms Jabulile Mabaso at the offices of the DPW without delay.
- [74] On Monday 23 March 2020, Lejaka, Pringle’s co-director in Magwa personally handed the original contract document to Ms Mabaso at Public Works Offices in Pretoria. Profteam did not receive a signed copy of the agreement and was instructed to continue.
- [75] This agreement was signed and submitted based on the representations made by the senior officials of the DPW, the involvement of the DoD and the written direction issued by the Minister that indicated that the urgent construction was to commence with the support of the Cabinet and having regard to the State of Disaster that was announced by the President of the Republic of South Africa.
- [76] Profteam, on behalf of the DPW, demanded Magwa’s attendance on site and immediate commencement. On 23 March 2020 Pringle was personally on site and site establishment was commenced with.
- [77] The area and terrain that had to be covered during the contract period is

without basic services and accommodation and ablutions had to be provided. Security of equipment and materials as well as the safety of employees and contractors were throughout a concern.

[78] Magwa knew that the fence had to be constructed in areas where continuous illegal border crossings were taking place. Site establishment, store facilities and ablutions were a constant struggle as the fence first expanded eastwards for 20 km and then 20 km towards the west.

[79] Pringle states that it is near impossible to explain to the Court the difficulty in terrain and practical problems that Magwa faced to obtain access to materials and equipment and to get it to site on an expedited basis.

[80] On 23 March 2020, the National Lockdown was announced and was to commence on the 26 March 2020. On or about 25 March 2020, Magwa was informed that it was foreseen that payment could not be made in terms of the agreement as a result of the potential closure of the DPW's offices and access to payment systems as a result of the hard lockdown that was announced.

[81] The next day Lock Down commenced and the practical problems for all businesses and the functioning of life in general became a reality. It was clear that the Senior Officials of the Department anticipated the impact of the lockdown and realised that a project of this magnitude would impact on the financial means of the First Defendant to continue without payment.

[82] Magwa was requested to prepare a "progress draw" on the work that was forecasted to be completed three weeks into the four-week project. Magwa proceeded under the guidance of Profteam to prepare an invoice based on the instructions and information disclosed by the DPW. An invoice was prepared based on 60 % completion and delivered to the

DPW. The latter approved the payment, and Magwa received payment into its bank account on 30 March 2020.

[83] From 26 March 2020, normal trade and freedom movement was impossible. Only essential services could be performed, and most factories and suppliers closed as a result of the lockdown. It became a mad scramble to arrange permits for Magwa and its employees, contractors and even suppliers. Pringle describes it as a logistical nightmare to get transport approved and materials and equipment to the respective sites and areas where construction were to be undertaken, as everything was closed.

[84] No-one knew exactly how to operate having regard to the restrictions, but what remained clear from the DPW and the instructions from the Profteam, was that the fence had to be completed in the prescribed time frame.

[85] Magwa not only had problems with the site pre- lockdown but had to implement all the Covid Measures pertaining to a safe working environment. This was strictly enforced by the DPW and its agent, Profteam.

[86] Regular progress meetings were held by all the role players and the pressure was relentless on Magwa to finish on time. The advent of the National Lockdown was not regarded as a factor that allowed an extension of the time frame within which the fence was to be constructed.

[87] Magwa despite extreme adversity, which included threats from illegal border crossers and thefts, kept to the timelines. This included Pringle, being on site full time in order to ensure that the timeline was adhered to and the fence, as specified be constructed as was ordered by the Cabinet and Minister De Lille.

[88] Magwa proceeded to complete the erection of the fence in terms of the

agreement by 20 April 2020 and on 21 April 2020 the formal handover and inspections of the fence occurred, and practical completion was certified.

[89] The aforesaid did not occur without incident. Theft and continued breaches occurred and the absence of the DoD in providing patrols along the fence being constructed had an adverse impact on the ability of Magwa to keep up with the timeline.

[90] These issues were raised in the progress meetings but to no avail. In desperation, Magwa obtained the services of private security to patrol and safeguard not only its employees, equipment, and materials, but also the numerous breaches and attempts thereto. This was not included in the BOQ as was the COVID measures that had to be implemented.

[91] Despite the clear directive of the Minister and the involvement of the DoD in the entire process, no DoD patrols took place during construction.

[92] The officials of the DPW and role-players from the DoD were involved in the inspection of the fence on an almost daily basis. When the fence was completed, the limited “snags” were rectified to all role-players' satisfaction.

[93] Practical completion in terms of the agreement was reached and signed off not only by the DPW but also by the officials appointed by Profteam to oversee the project. Inspections were performed by representatives of the DoD and the DPW. Drones were flown across the whole fence to verify the completion and state of the fence.

[94] The contract has since reached final completion. Irrespective of the final handover, Magwa was requested to keep the private security that it had arranged in place until the 24 April 2020 as the DoD was not ready to patrol the fence at the time of handover. Magwa complied with this request and kept private security that it paid for in place until the evening

of the 24 April 2020.

[95] Pringle also states that Magwa performed its obligations in terms of the agreements in the *bona fide* but mistaken belief that its appointment and agreement were valid.

[96] He contends that:

1. the failure by the Minister of Public Works to fully appreciate her powers regarding instructions to the DPW, her directive to act with great haste, the subsequent actions by senior officials of the DPW and DoD, caused the first defendant to commit fully to performance in terms of the contract and to comply with the timeframe and the specifications;
2. were it not for the aforementioned representations Magwa would not have contracted or become involved in an urgent project of the extent and financial exposure that it faced in a complex and extremely truncated time period;
3. Magwa and/or its directors were not involved in the planning, approval, design, or specifications of the fence;
4. Magwa was not involved in the procurement process other than doing what it was instructed to do;
5. The costs expended was solely expended as a result of the representations regarding the validity of the process made by the DPW and the Minister of Public Works;
6. Hence, he contends in the light of the circumstances it would be just and equitable that this Court order that, irrespective of the invalidity of the appointment and

agreement, the rights that vested in terms of the invalid contract remain vested and to order payment of the amount due in terms of the contract alternatively as recalculated by the Defendants' expert witness.

Mr Martin Lejaka's (Lejaka) evidence

[97] Lejaka's evidence on oath is also admissible as evidence in chief on the same basis as that of Pringle.

[98] He is a co-director of Magwa and was involved in the aforementioned project and specifically confirms that on 19 March 2020 he attended a site handover meeting and received the appointment letter from representatives of Profteam identified as annexure "BP8" by Pringle.

[99] He also personally handed the original contract document relating to the aforementioned project to Ms Mabaso on 23 March 2020 at the DPW in Pretoria. He did not receive a signed copy of the agreement and was instructed to proceed with the project and that the agreement would be dealt with the Legal Department.

[100] The aforementioned contract was solely concluded by Magwa as a result of its longstanding relationship as a contractor on behalf of the DPW and as a result of the urgent directive to proceed with the construction of the emergency borderline fence.

[101] The project in itself exposed Magwa to great financial and reputational risk having regard to the extremely short time within which construction had to be concluded.

[102] Magwa was faced by risk and the hardship having regard to the working conditions, which was further exacerbated by the lockdown.

[103] Despite the adverse conditions Magwa was successful in concluding the project and spent millions of rands in complying with the instruction

appointment and the construction of the fence in accordance with the design and specifications as prescribed by the DPW and/or its representatives and/or agents.

[104] An order ordering the amount already paid to Magwa being repaid as a result of the Department and the Honourable Minister of Public Works' mistakes in representing that the process and appointment was lawful, will be unjust and punishment for Magwa for no wrong committed on its part. He contends that it in a *bona fide* manner assisted when the National State of Disaster was announced and, on the available information, Cabinet ordered an emergency project for the fence to be erected in order to ensure safety and to prevent the spread of the virus.

Mr Veldtman's (Veldtman) evidence

[105] Magwa also engaged the expert services of Veldtman a Professional Construction Project Manager whose evidence should also be regarded as uncontested evidence in chief. He states that he read the Rule 36(9) (b) summary of his testimony and opinions as well as his CV and confirms that the aforesaid are reflective of his opinions pertaining to this matter and are true and correct.

[106] I hasten to add before analysing his evidence that any opinion he expresses as to what is just and equitable is of no consequence. The latter value judgment rests with this court. Hence, I also exclude any reference to same from the summary below.

[107] I have no intention of rehashing his CV here save to highlight certain components thereof:

1. He is a specialist construction project manager at Virtual Consulting Engineers (VCE) following a career, starting in 1970 and spanning 37 years at the Dept. of Public Works (DPW). His expertise focuses on the design and

development of civil infrastructure (incl. bulk earthworks; roads and storm water; water and sewage networks; water purification and wastewater treatment works). As Director of Special and Major Projects for the DPW he was responsible for a portfolio of > 740 projects to the value of R4.3billion. He has been awarded an IMFA Public Service Award for Inspiring Success Leadership and other awards. He initiated and developed the innovative Repair and Maintenance Programme (RAMP) to address the deterioration of state-owned facilities in an efficient and cost-effective manner (for total infrastructure of ±R10 billion) and he was responsible as the lead design engineer for several new and existing wastewater treatment works to the total project value of R254 million. He is on the forefront of the development of maintenance friendly and effective designs. He has experience in institutional arrangements, strategic development planning and project management.

2. Between 2001 – 2007 he initiated, designed, and developed an innovative Repair and Maintenance Programme (RAMP) for the DPW to address maintenance backlogs at numerous state-owned facilities (total estimated backlog = R2 billion);
3. He led the innovative programme to the conclusion and execution of 741 projects and contributed to effective service delivery nationwide. The programme created > 8000 employment opportunities and empowered numerous previously disadvantaged business enterprises (total R 4.3 billion);

4. He was Departmental Director of Special and Major Projects for the DPW between 1997 & 2007 where he managed 741 projects as part of RAMP.

[108] It is clear that he is an experienced project engineer and that his years in the DPW stands him in good stead.

[109] He had access to the documentation discovered by the respective parties as well as the invoices rendered by First Defendant to the DPW relating to the Beitbridge Land Port of Entry: 36 Months Repair, Maintenance and Servicing of Buildings, Civil, Mechanical and Electrical infrastructure, and installations (hereinafter "RAMP") (WCS 052500) tender, which was utilized as the basis for the costing of the border fence project.

[110] He expressed the following views in his statement under oath read with his expert notice:

1. In order to set out the process to be followed he distinguishes between the different role-players, i.e., the client (DPW) the engineer/consultant and the contractor.
2. In particular, a project such as the border fence is developed in 6 stages i.e. stage 1 – inception, stage 2 – viability, stage 3 – design and development, stage 4 – documentation and procurement, stage 5 – contract administration and inspection, stage 6 – closeout. (I interpose here that he is clearly speaking only of PHASE 1 the tender under discussion.)
3. The roles and responsibilities of all role-players as follows:
 - 3.1. THE DPW
 - 3.1.1. The DPW initiated the project based on the ministerial directive in terms of section 27(2)(1)

of the Disaster Management Act, 57 of 2002 for the emergency securing of the South African border post. The goal was to appoint a contractor on 20 March 2020 with completion of the emergency border fence within one month.

3.1.2. The actions taken commenced with a site visit on 18 March 2020 to determine the scope of work and the viability of the proposed contract. The DPW undertook to dedicate a project manager to oversee the project and to appoint a construction project manager to oversee construction on site on a full-time basis. These initial actions represent a portion of the Department's roles and responsibilities and stage 1 and 2 and confirms the quality control which would be seen in stage 6.

3.1.3. The following was lacking from the initial stages:

- a. any evidence pertaining to the planning, feasibility, cost analysis and/or needs assessment performed by the Department in order to be able to provide meaningful input and advise pertaining to costing. He would have expected a clear analysis of the different types of fences, the effect thereof, the planning with the SAPS, South African Defence Force and related agencies pertaining to operation and patrol as well as additional measures apart from the fence, including the construction of sufficient lighting in order to enable guarding

parties and patrolling parties to be effective during night-time to clearly identify potential breaches. The actions and responsibility of the Department of Public Works as the client in this regard did not meet the standard expected and had an adverse impact on the subsequent briefing of the contractor which is represented by the lack of clear specifications and/or drawings as to what was expected.

- b. the documentation setting out the risk of the project and the subsequent disclosure thereof to the contractor could be found from the documentation. A potential impact of such risk would normally be considered by a contractor when preparing the bill of costs in order to assess for risk and potential unforeseen costs in the event of a non-variable contract or in order to justify potential variation orders that may follow in the project. The lack thereof is not only to the detriment of the Department and the consulting engineer, but also adversely impacts on the contractor who now has to provide pricing based on several unknown factors which has to be included in the pricing structure.
- c. As a result of the process followed, i.e. a negotiated tender price and the submission thereof to the NBAC for approval of the tender award (ratification) Magwa was appointed as contractor on 18 March 2020 and Profteam, as the consulting engineer. These actions concluded stages 1 to 4 as executed by the

Department Directorate for Special and Major
Projects.

3.2. Profteam

3.2.1. Profteam was appointed on 20 March 2020, two days after Magwa's appointment by the DPW. This appointment was in accordance with the scope of services and tariff of fees for persons registered in terms of the Engineering Professions Act, 46 of 2000. (the EP Act). In normal circumstances the consulting engineer will be appointed to be responsible for involvement in the scope of services, staged 1 to 6. Due to the defined scope of work from the initiation of the project, the Department concluded stages 1 to 4 on their own.

3.2.2. It can be assumed that, although not yet officially appointed, Profteam was involved by the DPW in the determination and extent of the engineering work and costs based on the existing contract with Profteam RAMP Beitbridge.

- 3.2.3. The reference to a consulting engineer for purposes of the EP Act refers to a professional registered in terms thereof or a juristic person who employs such a professional engaged by a client on a project to undertake construction monitoring. Construction monitoring relates to the process of administering the construction contract and overseeing or inspecting the works to the extent of the consulting engineer's engagement for the purpose of verification that the works are being completed in accordance with the requirements of the contract, that the designs are being correctly interpreted and that the appropriate construction techniques are being utilized.
- 3.2.4. The contract for the security fence at Beitbridge port of entry was guided by the General Conditions of Contract for Construction Works, 2nd ed, 2010 (GCC).
- 3.2.5. The engineer is the person who manages the contract as agent o(f) the employer and is given considerable authority by the contract to administer the construction contract. The engineer is required to take actions to deal with situations that affect time, money, and quality as they arise during construction. The function of the engineer is described in clause 3.1 of the GCC with reference to clause 6, payments and related matters.

3.2.6. Clause 6.1. 0.1 states:

“With regards to all amounts that become due to the contractor in respect of matters set out in clause 6.10. 1.1, 6.10.1, 2, 6.10.1.3, 6.10.1.4 and 6.10.1.5 below, he shall deliver to the engineer a monthly statement for payment of all accounts he considers to be due to him (in such form and such date as may be agreed between the contractor and the engineer or failing agreement has the engineer may require) and the engineer shall, by signed payment certification, issue to the employer and the contractor, certify the amount he considers to be due to the contractor, taking into account the following:”

3.3. Magwa

3.3.1. The contractor means any person or juristic person under a contract to a client to perform the works on a project including a subcontractor under contract to such contractor. The contractor's involvement commences at stage 5 with site handover to commence with the construction of the works. The quality of plant workmanship and materials are covered under clause 7 of the GCC. The onus is on the contractor to produce work that conforms in quality and kind to the requirements specified. This implies that the contractor must apply quality controls, referred to as process control, as opposed to acceptance control performed by the engineer and employ experienced persons to provide and ensure that such quality is attained. The engineer has the authority to set additional requirements with regard to such quality.

- 3.3.2. Completion of the work is addressed under clause 5.1.4 of the GCC and the Certificate of Practical Completion (“CPC”) under clause 5.1 4.2 of the GCC. When the contractor submits a request or a CPC, the engineer must compare the completed works with the requirements for practical completion as set out in the scope of work or in the absence of such specifications. There are criteria applied to consider whether the work has reached the stage of readiness. A list of items that do not comply with the specifications or the criteria must be given to the contractor. The list must be the final list of items that needs to be completed for practical completion. An engineer should guard against adding items to such a list as this may disrupt the contractor from achieving practical completion in good time.
- 3.3.3. On the available documentation Magwa had no part in stages 1 to 4 and ought therefore not to be adversely affected or compromised for events and processes implemented prior to the awarding of the contract and expenditure for construction resulted from that contract.
- 3.3.4. The GCC is not the sole contract and only forms part of the tender documentation. It is of cardinal importance to consider that the planning in stages 1 -4 is there to limit the risk and uncertainties in a project especially in a case like the Beitbridge contract where the potential for a major financial dispute is a risk consequence for the DPW.

3.4. The relevant contract documentation

- 3.4.1. For the uniformity of contract documentation (referred to SANS 294), one should clearly distinguish between the conditions of tender and the conditions of contract specifications and terms of measurements and payments. The implications of the above are:
- 3.4.2. Each contract stage can only be addressed once.
- 3.4.3. Issues relating to the tender, procurement, will generally fall away once the contract is awarded to the successful contractor.
- 3.4.4. Specifications are written independently from the conditions of the contract.
- 3.4.5. Systems of measurements shall stand alone, independently of the specifications.
- 3.4.6. It is mandatory in the industry to use either GCC, JBCC, FDIC or NEC or any other approved construction contracts for construction contractors. In the GCC 2010 project specification is accommodated in the contract data. He also attaches a typical contract organogram applicable to a DPW Construction Contract marked "B". The totality of the relevant documentation relevant to the contract and the performance requirements are set out in the tender procedures, compulsory returnable documents, agreement and contract data, specific notice to DPW-07(EC) in the form of an offer and acceptance.

3.4.7. The documents forming the contract consist of the following: Agreement and contract pricing data, Scope of work, Standards specifications, Project specifications; Additional specifications, Technical and particular specifications, and Additional specifications.

3.5. Dealing with the appropriation of risk

3.5.1. The risk transferred to Magwa in this contract was not of a nature that it could assess it comprehensively beforehand. In GCC 2010 the employer must accept the risk that the contract cannot properly assess. It is a salient characteristic of GCC to ensure fairness, the risk of depreciation and allocation and to apply a well thought-out plan and procedure to deal with the risk related to the position of the site, with high criminal and danger elements, late instructions, delays by the employer, suspension of work and to address physical conditions such as in this case, the Covid 19 lockdown circumstances and having regard to the unreasonable short contract of 1 calendar month in which to complete the 40 km border fence.

3.5.2. GCC 2010 complied fully with the requirements of the Construction Industry Development Board (“CIDB”) for the procurement of engineering and construction work. The GCC 2010 is based on an administration and management of a construction contract and is suited for a full range of contract administration complexity. To appoint a professional engineer is the administrative object as the agent of the DPW in accordance with the GCC.

3.6. The pricing data

3.6.1. The costing of the works was done under the supervision and guidance of Profteam. The methodology followed was described by the DPW with the utilization of the tender rates for the Beitbridge port of entry repair and maintenance contract number H15/042. The exact pricing schedules were used for the border fence with the same item descriptions, item numbers, payment reference, numbers and tender rates only changing the quantities to accommodate the length of the 40km emergency fence line. The rates applicable to contract H15/042 was obtained by means of an open tender process which at the stage was confirmed as being fair, reasonable and market related by the tender evaluation report and the Tender Adjudicating Committee in awarding the contract to Magwa. The construction costs therein are fair, reasonable, and market related. The tender rates are dating back to March 2016 when the contract was placed on tender.

3.6.2. Having regard to the fact that it appears to be common cause that the 2016 contract rates were to be utilized it is important to note that that tender provided for escalation. That escalation constitutes a CPAP of 14.52% which was applicable to the contract and subsequently approved on payments made in terms of that tender.

- 3.6.3. Save for a period of three months, subsequent to the last claim made in terms of that contract, it would appear that the contract which according to the Plaintiffs ought to have been utilized already clearly indicated for an increase of 14.25% on the respective items from the date of acceptance of those tenders. The reliance on the original tender rates (without escalation) as made by the Plaintiffs are illogical, irrational, and not in line with what is practiced nor what was applicable to the contract utilized as the base for the contract price in relation to the border fence.
- 3.6.4. If the non-escalated rates are utilized, it would not only be unfair and unreasonable but would not constitute a just and equitable treatment of Magwa having regard to the circumstances in which it was to prepare its tender and the allegations levelled against it pertaining to inflation of the prices.
- 3.6.5. His approach pertaining to ascertaining the fair and reasonable item rate from the existing maintenance contract utilises an objective item rate. It was accepted by virtue of an open tender and implemented by all the parties. In this regard he states that in order to calculate the costs, he performed a recalculation of the rates on the items as contained in the bill of quantities.

- 3.6.6. In assessing the bill of quantities as prepared he picked up that the majority of the increased prices were only attributed to three major items, and he proceeded to recalculate the items calculating each of the utilized items in the BOQ in accordance with the 2016 commencement rate adapted by the approved CPAP rate of 14.25%. His calculations are reflected in Annexure "C" to the expert summary. (This cannot be accessed once the whole Application is extracted in portable document format (PDF) and can only be accessed by hyperlink from Caselines. It consists of an Excel spreadsheet which is locked by a code and the formulas in each notebook constituting the spreadsheet is thus inaccessible. This required him to calculate the various numbers in the notebooks styled PG FENCE BOQ and REPAIR FENCE BOQ manually so as to see if same corresponds with the notebook styled H16-22 SUMMARY).
- 3.6.7. The attack against the Preliminary and general items by the Plaintiffs is unwarranted. In having regard to the requirements in the site establishment reference must be had to SANS1200A. In item 100.01 provision is made for fixed PMG costs.

- 3.6.8. The first item which ought to have been foreseen in the initial fixed fees under “1” would have included additional accommodation for workers on the fence, (2) additional ablution facilities for fence works, (3) established material storage and depot. Firstly, this ought to be included in any site establishment as a fixed cost and not as opined in the report of the SIU, ought to have been excluded. This report of the SIU does not form part of the Appeal Record, but the SIU thinking is nevertheless clear from this witness' opinion.
- 3.6.9. Secondly, item 100.02 which provides for time related items, had an additional amount of R70 000.00. This, having regard to the 40km fence line involved, provides for the transport of materials on the fence route and the contract administration costs. Recalculated that amount provided for with CPAP is R81 673.37 as reflected and R80 167.32. In this regard reference must be made not only to the BOQ but to the original quantities applicable to the maintenance contract.

- 3.6.10. In addition to the aforementioned the circumstances as set out would entitle Magwa to rely on a variation order being issued as provided for in the GCC. In this regard it must be pointed out that the situation materially changed after the announcement of the lockdown and curfews that were applicable as well as additional compliance regulations that were made applicable to essential services providers, their employees and occupational health and safety in that regard.
- 3.6.11. Similarly, criticism is levelled at the OHS and HIV awareness. At the onset it needs to be pointed out that implementation thereof would not entail the same employees who already had the training and the measures taken. This had to be redone and can therefore not be ignored and the same escalation in terms of the agreed CPAP has to be implemented which is done on the amended bill.
- 3.6.12. Having regard to the variations it has to be considered that the advent of Covid-19 and the subsequent regulations and directives issued had an adverse impact on what a contractor had to comply to as enforced by the Department on site.
- 3.6.13. Having regard to what manifested apart from Covid-19 on site, is that there were no beacons and/or on lines pegged out by the DPW or the Engineer (presumably Profteam) and the contractor had to engage the services of a land surveyor in order to determine the correct length of the fence.

3.6.14. Over and above the aforementioned, the adverse security conditions and absence of patrols had an adverse impact on the theft of commodities and threats of breaching of the fence as constructed. This caused the contractor to engage security services in order to do the job which the DPW and its User clients had to perform. This similarly impacts on the risk and costing of the project.

3.6.15. These risks should have been identified by the Department during the planning stages and included in the preliminary and General BOQ to enable the contractor to price for the additional cost and risks. Due to the lack thereof this would in the circumstances entitled the contractor to claim a variation order and in particular for security in the amount of invoices R327,157.85 (ex VAT), for Covid-19 measures in the amount of R164,684.63 (ex VAT), for the land surveyor R44,479,75 (ex VAT), and an amount of R360,000-00 (ex VAT) for the removal of the existing fence and transport related thereto. The total amount of variation of R896,222.23 (ex VAT).

3.6.16. The aforementioned scope of work and amounts were not included in the bill of quantities and was not at date of the final re-measurement claimed. These are costs that the contractor would be entitled to claim in the circumstances by way of a variation order. It is properly reflected in the revised draft preliminary final account attached to his expert notice as annexure "D". This annexure, similar to annexure "C" can only be accessed from Caselines per hyperlink and consists of an Excel Spreadsheet with notebooks described as SUMMARY, PG FENCE BOQ and FINAL PP2.

3.6.17. Having regard to the fixed commencement rate, the application of CPAC and the variation orders, that the draft final account as attached hereto is fair and reasonable.

3.7. The criticism levelled pertaining to alleged poor quality workmanship.

3.7.1. A clear distinction has to be drawn between a superior design and an ordinary design. The design in question can at best be described as a standard fence utilized in the past by the DPW and having regard to the fact that the Department itself did not regard the emergency fence as its final solution, but as temporary measure until such a time as an international standard border fence could be erected.

- 3.7.2. In order to make the following assessment, he obtained a time relevant quotation that were prepared for a high security fence that were addressed to the minister of public works prepared by inter alia Betafence, a copy of which is annexed hereto as annexure "E" which was provided on 1 May 2020.
- 3.7.3. The costing involved in the fence for 43000m meters amounted to a total project value, inclusive of VAT an amount of R334,059,185.62. The example of the fence reflected in the brochure of that fence, clearly illustrates that as a type of superior design fence and not an ordinary fence as was instructed by the DPW as an emergency measure.
- 3.7.4. A fence of superior design nature would involve a process of planning of approximately 12 months and construction of the fence for a period in excess of 12 months. This illustrate the difference between an emergency measure as was implemented by the DPW and for which the contractor was appointed, and a superior design fence and the time involved in such a construction.

- 3.7.5. One cannot attribute poor workmanship based on the lower specification design as was utilized *in casu*. In addition, thereto as pointed out by the Plaintiffs' own investigations, the fence was to be utilized as an interim measure having regard to the limited time that was available. It is therefore of the utmost importance that the planning phase as alluded to in stages 1 to 4 would be needed in order to do a proper design and investigation for a superior design fence as that illustrated by the Betafence design and proposal compared to the design and specifications that were provided to the contractor.
- 3.7.6. An ordinary fence would be sufficient for its purpose if sufficient detection measures were introduced and the cooperation of the role-players such as the South African Defence Force, Border Patrols, other government agencies responsible or these inspections were performed.

3.7.7. As illustrated by the lack of initial planning by the DPW, the brief and instruction to Magwa was to erect the ordinary design and specifications. Having regard to the absence of clear evidence and/or examples of lack of quality, compared to practical completion that was reached and certified, not only by the consulting engineer, but also the officials of the DPW who were present at the handover and inspection the allegation of poor workmanship is not supported by the objective evidence. For any fence to perform successfully at the Beitbridge border adequate lighting and patrolling of the fence will be crucial.

3.8. The contract specifications

3.8.1. As alluded to earlier the specifications are of the utmost importance. The layout of the fence can only be compared with the specifications and drawings issued to the contractor. Having regard to the available documentation and with reference to the organogram already referred to earlier, no provision is made for the scope of work specification under C3 and therefore there were no reference to (1) standard specifications SANS12000, (2) project specifications, (3) technical and particular specifications, (4) additional information and (5) site information.

- 3.8.2. A drawing was provided during the tender stage, but this drawing is the DPW drawing for various types of fences and the fence layout for the Beitbridge emergency border fence is not detailed on this drawing.
- 3.8.3. Discrepancies were noted between the bill of quantities, the type drawing forming part of the tender documentation and the drawing issued on site after handover. A copy of a table reflecting the discrepancies is annexed as Annexure F (not available).
- 3.8.4. The above discrepancies make it difficult to understand the exact type of fence, the DPW had in mind for the border fence. In addition, it placed an unacceptable high risk on the construction activities also having regard to the unreasonable short construction period with its concomitant financial consequences which were outside the control of the contractor.

3.8.5. The concertina razor coils: Criticism is levelled against the concertina razor coils as well as the height of the fence in total. As indicated above, the diameter of the razor coils as well as the height of the fence is not clearly specified and should have been corrected during construction by means of a variation order as the DPW is responsible for a clear and exact specification for work and not the contractor. If the drawing on site is taken as the required specifications, the total fence height is 1.8m high with 3x730mm diameter coils stacked on each other which in theory should be a fence of 2.16 (m) high. However, in reality, when a concertina razor is fixed and extended to the manufacturer's instruction, the 730mm diameter coil will reduce in diameter to 600mm-630mm. Taking into account that coils, when stacked onto each other and although fixed to the straining wires, could result in further sagging, thereby reducing the height of the fence. The reality is that 3x730mm coils extracted and fixed on top of each other will result in a fence height at 1.8 and 1.89m.

3.9. The value of the project

3.9.1. The viability of the project and the effectiveness of the type of fence is definitely not the responsibility of the contractor who was contracted to construct the fence as specified in the contract documentation.

- 3.9.2. The planning and procurement stages of a project are stages 1-4. The contractor's responsibility is for stages 5-6 and for the execution and construction of the scope of work in accordance with the specifications which in the case of this contract, does not exist. At these stages the engineer is responsible to ensure the interests of the employer and that the contractor execute the work in accordance with the drawings and specifications. During this stage the GCC provides the necessary guidance and conditions to manage the execution of the work.
- 3.9.3. It should be noted that any non-compliance by a contractor or failure to comply with the specific norms and quality is managed under the conditions of the contract and does-not imply a loss of value for the client.
- 3.9.4. Experience has showed that an ordinary fence of this nature can be effective to control borders subject to effective operation, such as patrols on a 24-hour per day basis subject to the patrols being able to monitor the complete fence line on a full-time basis.
- 3.9.5. The one crucial component that should have formed part of the fence specification is the provision of security lighting to enable patrols to patrol the fence line at night when intrusions are at its highest probability. An alternative option will be a fencing system of a much more superior design at a much higher cost as alluded to earlier herein.

3.9.6. The absence of a lighting and detection system and the lack of operating patrols rendered the emergency fence ineffective, not the construction or the layout of the emergency fence itself.

3.9.7. The old Beitbridge border fence consisted of two plain fence line barriers with the main fence in the middle consisting of only a pyramid of razor coils stacked in the form of a triangle of $\pm 2\text{m}$ high. This fence had a lethal electric shock and a detection system and was very effective and were maintained and operated by the SA Defence Force. Due to a total neglect this fence has been destroyed, stolen, and vandalized to the point of being non-existent. No mention is made in the investigation report on the initial failure by the Department and its client to ensure the continued maintenance of the fence.

3.10. Conclusions

3.10.1. From the available contract documentation and events, the proper professional feasibility and planning of the contract is not evident from the available documentation. The DPW did not comprehend the management of a border fence in the hostile environment of the Beitbridge fence where criminal elements are the norm and illegal border crossings, and smuggling is an established practice.

- 3.10.2. From past experience the hesitancy by the SA Defence Force and SAPS to patrol the fence, especially during night-time, always rendered a standalone fence, a risk absent the necessary detection and control measures. To refer to the fence as not fit for purpose is incorrect. The fence is fit for purpose depending on the correct detection and/or patrol measures as dealt with above. The fence that the Plaintiffs seemingly would have wanted erected are fences that would not be viable in the extremely truncated time period provided for in the project and for the interim emergency measure that was the clear reasoning for the directive to be issued by the Minister of the DPW.
- 3.10.3. The value of the final invoices as recalculated and annexed hereto constitute just and equitable compensation for the risk and costs incurred by the contractor.
- 3.10.4. The opinions expressed on behalf of the Plaintiffs in the discovered documentation are not supported by the objective facts.
- 3.10.5. He is of the view that Magwa will be justly compensated for the project if the DPW is ordered to pay the amount of R 35 707 387,20 (less the amount already paid), subject to the final agreed remeasurement of the project.

Witnesses from Profteam

Evidence of Johannes Cornelius Swarts (Swarts)

[111] Profteam delivered an expert summary from Johannes Cornelius Swarts who is a Professional Project Manager/design and construction

supervision and a registered Engineer. I intend dealing here with his expert summary. He also delivered a witness statement under oath in similar vein as his expert summary and its annexures. The annexure numbers to that statement differs from the numbers in his expert summary although there is a considerable amount of overlap.

[112] Once again, I have no intention to detail his full qualifications and experience which were uncontested and are in my view extensive in the field of project engineering. His qualifications, registrations and experience appear from his CV attached to his expert summary marked JCS.

[113] He was at the relevant time a technical director heading the Roads division in the Zutari Polokwane office. He is a registered professional engineer at the Engineering Council of South Africa (ECSA) as well as a member of the South African Institution of Civil Engineering (SAICE). He has a BEng Civil degree and has also completed various training and development courses and obtained his NQF 4 (project management) and NQF 7 (develop and promote labour-intensive construction strategies - partial) and completed a training course on the general conditions of Contract 2010 and 2004.

[114] Zutari was appointed as sub-consultant for supervision and project management during the implementation of the 40 km emergency border fence at Beit Bridge Port of Entry (20 km both sides of the bridge). He was responsible for management and reporting to a professional team of implementation and engineering related functions. This included familiarisation of designs, meetings with stakeholders, monitoring material orders and deliveries, monitoring contractor's programme and progress, quality control and approvals, checking of daily diaries, site instructions, measurements for certification of quantities, recommendations on claims, defects list and control of repairs.

[115] In his expert summary he relies on his expertise as a Professional

Project Manager Manager/design and construction supervision and registered Engineer. His qualifications, registrations and experience as dealt with above supports his expertise in the aforesaid capacities and most certainly allows him to express the opinions as stated in the expert summary i.e. that the project was completed and substantially complied with the specifications.

[116] His opinion is based on his experience and training and his participation in the project as professional engineer and on:

[117] His reading of the scope of works document submitted to the DPW annexed hereto as Annexure 1. (Caselines 5-68). (It bears the logo of the DPW and states at the top of the first page **PHASE1: 40KM BOREDERLINE (sic) INFRASTRUCTURE AND INSTALLATION BETWEEN RSA/ZIMBABWE: APPOINTMENT THROUGH EMERGENCY DELEGATION FOR SECURING OF BORDERLINE FENCE.)**

[118] It is clear that this document was drawn up for the DPW by van Meyeren on behalf of Profteam on 19 March 2020 and that the contract price was already calculated at R37,176,843.50. It implicates Mr GK Lukhele and Ms Jabulile Mabaso on the part of the DPW, B. Pringle on the part of Magwa and H.L.van Meyeren, JH Möller and J Campher on the part of Profteam. It would also require Magwa to appoint approximately 12 teams to work on all 8 portions at the same time. The portions constitute 4 portions West totalling 19.6 km and 4 portions East totalling 20.4 km. It is further qualified by a note that all distances are approximately, and a detailed survey will be done on Monday 23 March 2020;

[119] The issued drawings and site instructions annexed hereunto as Annexure 2. Same was signed off on a regular basis by a representative on behalf of Profteam and a representative on behalf of the contractor commencing on 25 March 2020 and terminating on 6 April 2020. The instructions are diverse and intimately connected with the applicable

portion and relevant drawings;

[120] The daily progress reports annexed hereunto as Annexure 3. I will not deal with same in its minutiae. These reports reflect a comprehensive and meticulously record of the activities on site on a daily basis. They show i.a. a steady increase in work completed West and East of the Beitbridge border crossing with a steady increase in staff on site at one stage including general labourers totalling 288 people excluding security staff. They also reflect incidents of theft from early April 2020 – to 16 April 2020 as well as numerous requests for DoD assistance and eventually the appointment of a compliment of private security staff varying during April 2020 from 35 – 46 men. There is also evidence of an increase in the DoD staff but no indication of their exact role on a daily basis. The daily progress is indicated in various formats such as a bar graph reflecting completion of the various tasks as broken down in their various components. These reports also reflect the logistics and supply problems as well as warnings issued to Magwa by Profteam and the fact of Magwa's responses. The detailed warnings are not reflected nor the detail of the responses. There are daily photographs of the progress and appearance of the erected fence. There is nothing indicating a fence delivered in a dilapidated condition or in a defective state;

[121] The weekly progress meetings minutes annexed hereunto as Annexure 4 (Caselines 0005-487). Only weekly progress meeting seemed to have taken place and an intention expressing another meeting to take place on 2 April 2020 with proof of attendance signed on 2 April 2022. I could find no further weekly progress meetings in the record. The available report includes various aspects of the contractor's duties and specifically the discharge of OSH obligations and measures taken to prevent Covid-19 incidents. They also include the issue of a site instruction book and the delivery of site drawings correlated to the pages of the site instruction book. It also includes a Progress, Estimated Final Cost and Cashflow reports and a total Budget Summary;

[122] The daily diaries (Caselines 000-521) annexed to his summary as Annexure 5; covers the following days i.e.:

- a. 23 March 2023 – 31 March 2020; and
- b. 1 April 2020 – 21 April 2020.

[123] These diary entries do not always follow sequentially, and some are duplicated but with the application of some effort are all in place covering the said periods.

[124] These diaries contain *minutiae* such as the rainfall measured in mm and the minimum and maximum temperatures recorded, the temperature ranged from the low 30°C – the high 30°C and even one occasion hit 43°C. To say that the work was done under harsh circumstances would be correct, but where you were part of an open tender contract in the Messina Beitbridge area before as was both Profteam and Magwa, you know exactly what you are letting yourself in for. It also provides for incidents recorded regarding site safety, changes in plant and equipment on site as well personnel changes, whether the contractor submitted certain safety checks and is implementing protective measures against Covid-19 and if not the reasons for the negative status. It also deals with work started, in progress or completed, whether plant is standing as well as work temporarily suspended/delays/disruptions and potential claims. There is provision for general remarks and whether Profteam did a site drive through on a particular day. It reflects Magwa as the contractor and Mr N Swarts or at times Jaco Campher as Profteam's representative. It also provides space for the names of visitors and the organisation they represent. I was unable to reconcile the figures under personnel with the total staff compliments on the site from day to day. This does not mean the information provided here is false. It would appear that the personnel referred to in these daily site reports are that of Magwa, Profteam and at times the Sub-contractors and at no times the general labour compliment.

[125] The interim close-out report, Annexure 6 (Caselines 0005- 599) to his expert summary. It is dated 4 May 2020 and authored by Mr van Meyeren as project manager and approved by himself as project engineer, respectively. This report bears the DPW logo and states the rationale for its existence as follows:

“The Close-out report is compiled to assist as guide for the procurement of the maintenance of the project. The report gives an overview of scope and requirements of the current contract and scope of the follow-on/future contract as well as estimate costs.

The project was in response and to meet the requirements of the Brief furnished by the Departmental Project Manager of Department of Public Works and Infrastructure in terms of **PHASE1: 40KM BOREDERLINE INFRASTRUCTURE AND INSTALLATION BETWEEN RSA/ZIMBABWE: APPOINTMENT THROUGH EMERGENCY DELEGATION FOR SECURING OF BORDERLINE FENCE.**”

[126] It breaks down the Eastern and Western side of the fence in 4 portions each all adding up to a length of 19.6 km on the Western side and 20.40 km on the Eastern side.

[127] It is effectively an overview of the whole project, including the scope of work, and specifications broken down to posts, stays, foundations, mesh panels, Y-standards, straining wire, razor coils, galvanizing, and workmanship in respect of the aforesaid. It also reflects the creation of clearing of an area of 2 meters on the Zimbabwean side and 500 mm on the SA side as well as the positioning of razor mesh panels on the South African side and razor coils facing the Zimbabwean side. It also reflects all the water crossings, gates positions and where applicable changes compared to where they were prior to the erection of the new fence. It further contains a summary of quantities broken down to the amount of posts, stays, and Y-standards used, meters of wires used, meters of razor mesh wire used, the meters of razor coil used, the amount of stream crossings involved and gates.

[128] Towards the end of the report, it deals with the prospect of a new contract and the prospect of continuation of preventative maintenance of the fence as constructed. The issue of breakdown maintenance is also dealt with.

[129] It provides an estimate of the cost of Corrective maintenance of the fence in the sum of R620,000 per year and Preventative maintenance of R6,295,000.00. The latter includes the installation of a fence monitoring system and physical patrolling and daily surveillance of the fence by drone aircraft.

[130] The Conclusion of this report is telling and does away with any doubt in regard to the durability of the fence. It states:

“The department urgently needs to attend to the Current Fence Installation project. This will assist with the upkeep and the actual intension (sic) of the Installation to perform according to the Temporary / Emergency installation (for COVID19 infection spread prevention).

The fence should be inspected daily, daily repairs damages and vandalism should be attended to and noted. Should this not be done then, will the Fence installation fail.

The appointment of a capable contractor would ensure the border line fence is repaired and maintained to ensure the fence is always in a functional state as it was intended to be”.

[131] It leaves the DPW with a clear warning as to the future of the fence if the proposed actions are not followed.

[132] Annexed to this report as Annexure “A” are 28 photographs of the fence at various stages of construction and photographs demonstrating the clearing on both sides of the fence, some of the auger and drilling equipment utilised, the holes dug for stays and tensioning tubular posts, the use of Y-standards every 3 meters, 1 of the 14 gates casted in concrete along the fence line, the hard rock encountered stretching over

a few kilometres, the kind of gates installed, completed razor mesh, straining wires on the west and east portions.

[133] There is also an Appendix “B” reflecting the “as built” drawings and an Appendix “C” which I will style for lack of a better term as a flow chart for the (proposed) Facilities and Infrastructure Maintenance Contact Centre.

[134] Annexure 7 (Caselines 0005-627) to his report which is the certificate of practical completion. This certificate displays certification by Mr van Meyeren on behalf of Profteam and by Pringle on behalf of the contractor as well as one Jabulile Mabaso on behalf of the DPW. There is no evidence that the fence was not delivered in pristine condition.

[135] The certificate of completion (Caselines 0005-630) which seems to be dated 28/04/2020. It contains a description of the work to be handed over by the contractor in accordance with the contract documents. This also refers to an annexure styled addendum “A”. It refers to incomplete and/or unacceptable work which is listed as the 200m markers and 15 master key locks all of the aforesaid with a proposed delivery date of 12 May 2020. These items are also referred to in the certificate of completion itself and it is noted that should same remain incomplete and or unacceptable after the date stated in the Addendum then the Defects Liability Period will be extended by the amount of additional time taken by the Contractor to complete the work specified. It is important to note that this document in the Conditions of Contract has the effect that only the engineer’s signature certifies due completion of the works. The other signatures indicate attendance at the inspection of the works and witnessing the Engineer’s signature.

[136] The inspection request book (Caselines 0005-633) Annexure 9 which comprises:

- a. Three (3) pages reflecting the inspection of the H-frame and Gate (Straining wire, Razor coiled and Mesh) section G1-G6 and each

of which is signed off as complete by the engineer and contractor, save for instances where certain work still had to be done such as G6 where the gate had to be lowered. It reflects the date and time of the inspection and the signature of the contractor and engineer representing them.

- b. Five (5) pages relating to the inspection of the posts (Trench, Concrete, Posts and Stays). Several snags are recorded here and also recorded as completed.
- c. Five (5) pages of the Inspection Request Book pertaining to the inspection of the straining wire and Y-standards all of which is accepted;
- d. Five (5) pages of the Inspection Request Book pertaining to the Mesh Wire and Coils. Some pages reflect under the heading "REMARKS" that clips should be added;
- e. 3 pages of the Inspection Request Book pertaining to the Mesh Wire and Coils which reflects the acceptance of same with snags;
- f. 3 pages of the Inspection Request Book pertaining to Posts (Trench, Concrete, Posts and Stays) some items initially rejected and subsequently accepted all in all 173 posts;
- g. Another 3 pages of the Inspection Request Book pertaining to Posts (Trench, Concrete, Posts and Stays) some items requiring re-installation all in all amounting to 291 posts and 258 stays;
- h. Another 2 pages of the Inspection Request Book pertaining to Straining wire and Y-standards the total standards amounting to 5,678.
- i. Annexure 10 which is the BOQ for the Beitbridge tender H16/022 which contained specifications for a fence. I am unable to identify

from the section dealing with the fences (Caselines 0005-701) which part was specifically relied upon but since this reliance is not disputed and does not take the matter any further than the fact that this pricing was obtained by an open tender it matters not.

- j. Annexure 11 styled the SFR Beitbridge Forecast Loading Schedule dated 15 April 2020 which appears on a document bearing the logo of Sinoville Fencing Rosslyn (Pty) Ltd.
- k. Annexure 12 which is Revision 3 reflecting the status of the fence on 15 April 2020. (Caselines 0005-734-735).
- l. Annexure 13 which deals with a variety of documents such as the water crossings on the Eastern side and actions taken in respect of same, old and new gates positions and actions taken in respect thereof, snag lists and action and completion dates and who must take action the contractor or engineer – in most instances the duty of action seemed to fall on the contractor-same being signed off by what appears to be both the engineer and contractor's representative,(some of the detail issues are listed).(Caselines 0005—739), a cost request for approval. (Caselines 0005-740), an extract of the Inspection Request book signed by Profteam's representative and 2 representatives of Magwa, Profteam approving same and Magwa submitting the request, 5 pages of the Inspection Request book dealing with quantities and inspection outcomes reflecting snags where applicable with regard to Post (trench, concrete, posts and stays) with relevant dates and times signed by a representative of Profteam, a similar 5 page list dealing with straining wires and Y-stands, a similar 5 page list of Mesh and Razor Coils, a similar 3 page list detailing the same type of information in respect of 12 gates, a breakdown of the 4 eastern portions in respect of quantities of wires etc per portion and snags described as progress disruptions, a list of

water crossings including the relevant lengths and taken regarding snags, another 5 page list reflecting quantities of wires etc utilised across what appears to be the eastern side of 20.4 km, a 13 page list in inverse date order (Caselines 0005-769) listing posts, stays etc. and other infrastructure utilised across the various eastern portions - this list also references daily temperatures on some of the pages, several pages of drawings dealing with particular problems such as i.e. a concrete slab to prevent under digging, an extract of the information request book signed by 1 Magwa representative and approved by 2 Profteam representatives, a 5 page snag list prepared by Profteam dealing with the Western portion of the fence with action dates and completion dates up to 22 April 2022, 3 pages of the Inspection Request Book relating to Post (Trench Concrete Post and Stays) indicating acceptance and where applicable rejection of stays signed by a Profteam representative and a representative from the Contractor – the latter appears to be duplication of earlier similar documents judged by the quantity of stays and total of Y-standards – (see for instance Caselines 0005-793 and 795), 2 pages of the Inspection Request Book relating to straining wire and standards accepted and rejected where applicable, 3 pages of the Inspection Request Book relating to Mesh wire and Coils mostly accepted, a list of 13 water- crossings on the Western side with detail actions, a list of 13 old and new gate positions, another list of water crossings specifying lengths, the latter 2 lists of water crossings are on the Western side, a list of 27 water crossings on the Eastern side, another list of 6 old and new gates positions, another list of 13 water crossings on the Western Side with detail actions and finally another lists of 13 old and new gates.

[137] The above completes the annexures relied upon by Mr Swarts. It is also necessary to refer to Mr Swarts' sworn statement in which he confirms the evidence and opinions expressed in his Expert Summary read with the annexures referred to above. A few more details emerge from his

affidavit:

- a. He works for Zutari a firm of engineering consultants;
- b. He led the engineering team which performed the standard engineering function during the implementation stage of the border fence project;
- c. He was given the specifications for the fence and told by Mr van Meyeren that the standard fence design for the DPW was to be used by adapted by adding six razor wire coils to one side of the 1.8m diamond mesh fence;
- d. He implemented the fence which had the following specifications agreed upon by the DPW, DoD, Magwa and Profteam.

[138] The specifications were:

- a. Post and Stays: All post and stays 2.4m high, min. wall thickness 2mm and fully galvanize; 101 mm Ø straining tubular posts; 89mm Ø intermediate tubular posts; and 50mm Ø tubular stays;
- b. Foundations: 650 x 400 x 400 mm (25mpa / 1 9 mm stone at each post and stay, or 4000 x 650 deep.
- c. Mesh Panels: Fully galvanized 1.8m high razor mesh panels.
- d. Y-Standards: 2.4m Mittal (black) standards.
- e. Straining Wire: 4mm thick fully galvanized straining wire (high-tensile, GRADE A).
- f. Razor Coils: 730mm fully galvanized concertina razor wire.
- g. Galvanizing: all posts and stays hot dip galvanized.

h. All other material galvanized, unless specified.

[139] The drawings (the same as annexed to his expert summary) were formally issued to the contractor on 25 and 27 of March 2020, as is evidenced by pages 001051 and 001052 of the site instruction book annexed to his affidavit as Annexure "3".

[140] Due to the hard lockdown and the absolute time limit placed on the project by DPW there was a change to the material specifications which is set out on page 001053 of the site instruction book. He annexed a copy thereof as Annexure "4" to his affidavit and also appears as part of the site instruction book attached to his expert notice. This site instruction was given on 27 March 2020. The straining posts were now 101mm and 2mm thick, the intermediate posts were 89mm in diameter and 2mm thick, the straining wire was now specified as 4mm lightly galvanized, the intermediate post and stays was now to be powder coated and the bottom backfilled section dipped in bitumen, dovetail clips (to be fitted) at 1m c.t.c.

[141] The change of material specification was communicated to DPW at the weekly progress meeting of 9 April 2020. A copy of the minutes of this meeting is Annexure 5 to the witness statement. (It also appears in the annexure to his expert witness summary), I am unable to find a reference to this communication in the minute. Again, same is of no consequence given that the evidence is uncontested.

[142] The change in specification was also clearly communicated to the department in the daily reports which included a material delivery schedule indicating the type of material used. These reports were also attached to his expert summary.

[143] As part of his functions, he ensured that the engineering team as well as the contractor and its subcontractors had a full understanding of the specifications and requirements.

[144] He also attended to meetings with the farmers to co-ordinate the fencing activities on their farms.

[145] He evaluated the contractors' program and decided to attend to the programming for the project together with Profteam's personnel. He did so on Microsoft Projects, a program designed to help with programming of projects.

[146] Meetings were held with the contractor on a daily basis to align the daily activities and the program. Recurring quality control issues were discussed with the contractor as well as the shortage of resources to complete the project in time.

[147] As part of the engineering team, two technicians were allocated to each of the western and eastern portions overseen and managed by him. Progress was measured on a daily basis in daily diaries, a copy of which is annexed to both his witness statement and expert summary.

[148] His daily reporting in the daily diaries and to the project manager of Profteam was captured in the daily reports to DPW. Instructions were issued when required to address non-conformance to quality, non-adherence to program activities and required changes due to terrain or material challenges.

[149] Mitigation of health and safety concerns by the occupational health and safety agent were enforced and managed. All materials delivered to the site were checked upon delivery. Quality control was done through check lists and "requests for approval" sheets. Copies of these documents are annexed to both his affidavit and his expert witness summary.

[150] Measurements were taken from approval sheets and incorporated in the payment certificates. He also prepared and submitted as built drawings, copies of which are annexed to both his affidavit and his expert witness summary.

[151] A practical completion certificate and a completion certificate were prepared by him and signed off by the Magwa, Profteam, the DPW (the client) and the DoD. Copies hereof are annexed to both his affidavit and his expert witness summary.

[152] In his opinion, the project was completed and substantially complied with the specifications. He confirms further that he has formed this opinion based on his experience and training and participation in the project as professional engineer.

Evidence of Harry Louis van Meyeren (van Meyeren)

[153] He describes himself as a major male project engineer employed by Profteam. His CV is attached as annexure "1" to his statement and demonstrates an extremely wide experience and background in project management striding the fields of IT, Telecommunications and Construction, to name but three, over a period of 23 years. His employment record reflects i.e. that he has been a Director of Profteam and functioned as Construction Project and Programme Manager since 2014 to date.

[154] As a Project Manager at Profteam, he has been responsible for site supervision and contract and document management of various repair and maintenance projects of the repair and maintenance. He is currently involved in the repair and maintenance of infrastructure at 51 Port of Entries to a total contract value of ZAR 562 million.

[155] He has specialist knowledge of the GCC and has executed numerous projects relating to the General Conditions of Contract for Construction Work (GCC) and JBCC. He includes in the list of projects he has been involved in since 2014 the Beitbridge Port of Entry: 2014 – 2021; Repair, Maintenance and Services of Buildings, Civil, Mechanical and Electrical Infrastructure Installations (36 Months), (DPW). He was responsible for overall management, design, documentation, construction, and contract

administration, and close out.

[156] van Meyeren states the following in his affidavit;

- a. On 16 March 2020 at 14:50, Profteam received an-email from the DPW originating from Mr Goodwill Lukhele's email address inviting it to attend a meeting at the Beitbridge Land Port of Entry ("Beit Bridge LPOE") on 17 March 2021 at 11:00 in order to conduct a site visit and discuss the proposed scope of work and cost estimate for a borderline fence. It was also copied to: Bertram Pringle; Henk Moller; harryvm@profteam.co.za; Cristelle du Plessis, Jabulile Mabaso (the DPW); Wasnaar Hlabangwane;(the DPW) Batho Mokhothu, (the DPW) Siphamandla Ngcobo (the DPW) and Siyabonga Xaba (the DPW).
- b. The e-mail indicated that the DPW was proposing to have the fence constructed as a part of, or an extension of, the existing Repair and Maintenance Beit Bridge Project. A copy of the e-mail is annexed to his affidavit as Annexure "2" and its importance is rated as "High".
- c. It reads as follows:

"Good day all.

The Department of Public Works and Infrastructure is proposing to do the border line fence through the existing RAMP Beitbridge project.

You're therefore urgent requested to meet on site (Beitbridge (*sic*)LPOE) tomorrow morning @ 11:00 in order to conduct a site visit and the proposed scope of the works including the cost estimate of the border line fence.

Regards

Goodwill Lukhele PrCPM

Department of Public Works and Infrastructure

Chief Construction Project Manager”

[157] Mr Lukhele is registered with the South African Council for the Project and Construction Management Professions and is as such, a person with single point responsibility for the management of projects within the Built Environment from conception to completion including the management of related professional services.

[158] The e-mail was resent at 15:03, a copy of which is annexed as Annexure 3 of his affidavit. On this occasion, Annexure 3 was, however, also directed to Hillside Trading, another contractor.

[159] In a subsequent email the venue for the meeting was designated as the SAPS Barracks at 11h00 at Beitbridge border post. Later the same day at 15:48, Mr Lukhele, by e-mail, informed Profteam Hillside Trading, Asatico and Virtual Consulting Engineers of the venue for the meeting. A copy of the e-mail is annexed to his affidavit as Annexure 4.

[160] The site meeting set up in the e-mails was attended by representatives of the DPW, SAPS, the DoD, Magwa, Profteam, Hillside Trading, Asitico and Virtual Consulting Engineers. A copy of the signed attendance register is annexed to his affidavit as Annexure 5.

[161] Profteam was later appointed as principal agent (representing the DPW).

[162] The meeting was led by Mr Lukhele. He indicated that the purpose for the meeting was to discuss and determine the scope of works and to decide on the procurement strategy for an emergency project.

[163] Mr Lukhele sketched the background to the meeting and that the project was at the direction of the Minister of Public Works and Infrastructure, Ms Patricia de Lille, MP.

[164] A copy of the directive is annexed to his Affidavit as Annexure 7. It bears

the Logo of the Minister of the DPW and is directed to: DG: Adv Sam Vukela, the CFO Mr Mandla Sithole, the DDG: Construction Management: Mr Batho Mokhotu, for INFO: to the Deputy Minister: DPW Noxolu Kiviet, MP, and copied to Minister of Defence and Military Veterans.

[165] The Subject is described as:

MINISTERIAL DIRECTIVE IN TERMS OF SECTION 27(2)(1) OF THE DISASTER MANAGEMENT ACT, NO 57 OF 2002 FOR THE EMERGENCY SECURING OF THE SOUTH AFRICAN BORDER POSTS

[166] The content reads as follows:

“On the 1st of March 2020, President Cyril Ramaphosa addressed the nation with regards to the Covid-19 outbreak, this comes shortly after the declaration of the corona virus as a global pandemic by the World Health Organization.

The President has declared a National State of Disaster, subsequently outlining a number of emergency measures to be implemented to mitigate the risk of the virus. One of the measures announced by the President is that South Africa's borders and ports are to be secured with Immediate effect. The aspect related to DPWI is that 35 of the 53 land entry points will be closed. This measure will, however, not be effective if the fences at the border are not secure, which in many places, they are not.

In terms of Section 27(2) of the Disaster Management Act, No 57 of 2002, which relates to procedures that I, as the Minister of Public Works and Infrastructure should follow for functions under the mandate of the Department, where the President has declared a National Disaster, I hereby invoke item (l).

I have consulted with the Cabinet, and in particular the Minister of Defence, Ms Mapisa-Nqakula, and accordingly issue this directive that emergency procurement procedures shall be undertaken with immediate effect in relation to the erection and repairs of the border fences, with the first focus

being on the Beitbridge Border Post, together and in parallel with the other identified hotspots.

This Directive includes the following conditions:

The Project Team which shall be led by the DDG'. Construction Management together with a senior person from Defence (who is to urgently arrange and be responsible for the logistics) shall have a site visit with the Contractor by the latest Wednesday 18 March 2020 to undertake the due diligence, secure the brief and personnel needs, determine the provisional costs, identify the emergency construction timeline;

The contractor shall be appointed and commence work by the latest the end of this week, namely 20 March 2020;

The CFO: DPWI shall be advised as to the costs in order to secure the provisions for this emergency variation order (VO). Further, the CFO shall put emergency mechanisms in place for payment of the Contractor for work undertaken on a weekly basis;

The DDG: Construction Management shall identify competent site managers (1 per hotspot) that will be permanently on site during the rollout of this emergency construction. Further there will be one Project Manager identified who will be responsible for the oversight of the entire project and accountable for the delivery in terms of the emergency, expedited timeline;

A delivery progress report shall be provided to myself together with the Minister of Defence on a weekly basis.

Yours Sincerely,

(Signed in manuscript)

Ms Patricia de Lille, MP

Minister of Public Works and Infrastructure

Date: 16.03.2020 (also in manuscript)"

[167] Mr Lukhele had indicated that DPW had invited three repair and maintenance program (RAMP) contractors and their consulting engineers working on projects in the area. He indicated that the three RAMP projects' bills of quantities (BOQ) were to be assessed as a variation order (VO) process requires scheduled rates which were previously sourced through a competitive tender process.

[168] After consideration of the BOQ's it transpired that the Beitbridge LPOE contractors BOQ had a security fence in the list of activities and scheduled rates applicable to the construction of a security fence. The scheduled rates were baselined in 2014 through a competitive tender process.

[169] The DPW asked that the RAMP projects BOQ be used to determine if a VO could be issued as the rates are already available. The Beitbridge LPOE BOQ had most of the items and rates needed to fit the fence specification agreed upon by DPW and the DoD. It was agreed at the site meeting that the fence will extend 20kms on either side of the Beitbridge LPOE.

[170] The type and size of the fence was agreed at the site meeting between representatives of all the stakeholders.

[171] The issue of who would be responsible for maintenance and/or preventative maintenance on the new fence was raised and it was decided that KAM (DPW Key Accounts Manager) should liaise with the DoD and come up with a maintenance plan or the issue of a maintenance plan must be referred for a higher-level decision.

[172] It was decided and agreed by all the stakeholders at the meeting that a 1.8 metre diamond mesh fence with a straining post and Y-standards and six razor coils on the Zimbabwean side complying with the further specifications had to be built.

[173] The specifications agreed to at the meeting were as follows:

- a. Post and Stays: All post and stays 2.4m high, min. wall thickness 2mm and fully galvanize; 101 mm Ø straining tubular posts; 89mm Ø intermediate tubular posts; 50mm Ø tubular stays; Foundations: 650 x 400 x 400 mm (25mpa / 19 mm stone at each post and stay, or 400 x 650 deep.
- b. Mesh Panels: Fully galvanized 1.8m high razor mesh panels.
- c. Y-Standards: 2.4m Mittal (black) standards.
- d. Straining Wire: 4mm thick fully galvanized straining wire (high-tensile, GRADE A).
- e. Razor Coils: 730mm fully galvanized concertina razor wire.
- f. Galvanizing: all posts and stays hot dip galvanized and all other material galvanized, unless specified.

[174] A resolution was taken to consider the contractor currently working on the service and maintenance contract at the Beitbridge border post. DPW was to let all attendees know when the next meeting will take place on the decisions made. A site inspection was held, and all the attendees travelled the 40 km route to ascertain the scope of the project.

[175] The meeting resolved to consider the contractor currently working on the service and maintenance contract at the Beitbridge border post for the maintenance once the fence was erected – Magwa and Profteam completed bid documentation which is annexed as Annexures 8 and 9'

[176] Pringle signed the construction tender documents on 18 March 2020 on behalf of Magwa tendering R 37,176,843.50 including VAT. The Magwa tender is calculated per item specified. van Meyeren signed the engineering tender documents on behalf of Profteam on 18 March 2020 tendering R3,259,071.48 in accordance with the standard professional scale of applicable fees. (For present purposes and given that it is

common cause that the agreements are invalid despite their acceptance which appears from Annexures 10 and 11 to this affidavit, there seems to be no point in analysing these documents in any detail. I will take into account that despite the illegality of the agreements the letters of acceptance of the tenders were signed on behalf of the DDG of the DPW.)

[177] In the result Profteam thereafter acted as the DPW agent on site in accordance with the standard approach under the GCC and similar type of contracts. Profteam prepared a document setting out the scope of work on 19 March 2020, which was supplied to the DPW, a copy of which is annexed to this affidavit marked Annexure 12. (This document corresponds with Annexure 1 to Swarts' expert summary and has already been analysed above. Swarts' Annexure 1 is in colour and with the attached photographs is more legible and comprehensible than van Meyeren's black and white scanned copy).

[178] Proof of e-mail transmission of the scope of work to the DPW is annexed as Annexure 12A. Profteam also prepared a document which sets out the borderline fence project execution plan on 19 March 2020 a copy of which is annexed to as Annexure 13. This document bears the DPW logo and is prepared by van Meyeren and verified by J Möller.

[179] It states that the DPWs' Project Manager main responsibilities are:

- a. To manage the project during the design and documentation; tender and construction stages of the project;
- b. It includes departmental duties such as funding and payments. These duties include:
 - i. Profteam, as multi-disciplinary professional service practice, also acting as Principal Agent of the Client at Borderline Fence Project and will include inter alia:

- ii. Close liaising and co-operating with the Departmental Project Manager;
- iii. Receiving instruction from the Departmental Project Manager;
- iv. Compiling and updating the Planning Program;
- v. Coordinating and arranging weekly site meetings and daily inspections;
- vi. Liaising with Client Departments if so instructed;
- vii. Furnishing of daily and weekly project reports;
- viii. Issuing of written instructions;
- ix. Receiving notices according to the building contract;
- x. Issuing of weekly interim payment certificate;
- xi. Issuing final payment certificates for practical and final completion;
- xii. Making recommendations in respect of period where penalties are applicable;
- xiii. Submit a Close-out report on time;
- xiv. Ensure that the Final Account is handed in on time;
- xv. Administration of and supervising the contract in accordance with the requirements;
- xvi. Other duties which could reasonably be expected of a principal agent;
- xvii. Project Execution Plan, including project planning program;

- xviii. Final Design Report, including drawings and pre-tender estimate;
 - xix. Draft Bid document, including drawings; Final Bid documentation, including drawings; Procurement of a Contractor in accordance with the Planning Programme; Tenderer risk assessment;
 - xx. Site inspection, meeting, and minutes. Shall send invitations to all role players, chair all site meetings, prepare minutes, and distribute to all concerned;
 - xxi. Variation orders preparation;
 - xxii. Application for additional funding including all relevant documentation;
 - xxiii. "As-built" drawings compiled and register at DPW archiving office;
 - xxiv. Site layout plans, which will include all services, such as existing structures, facilities, roads, paving, fencing as well as storm water drainage system, electrical power and equipment, sewer network, water reticulation system and fire-fighting equipment;
 - xxv. Progress payment certificates;
 - xxvi. Fee accounts;
 - xxvii. Final Account;
 - xxviii. Final fee account.
- c. The Service Provider will forward reports as per Department's request: Interim Close-out report; Final Close-out report; Interim Final

Account; Contract completion report, including a cost reconciliation report of the project; Final Account; Audit reports; In depth evaluation report of all civil and structural equipment/assets; Certificate of compliance; Indemnity by Consultant;

- d. Daily reports: Site Diary report done by the full-time site staff during the repair phase; Progress report, including a construction program linked to the expenditure and projected cash-flow; Financial report for consultant and contractor, excluding CPA and including retention calculation; Contract report;
- e. Occupational Health and Safety report, including toolbox minutes; Maintenance report, including breakdown maintenance, corrective maintenance and preventative maintenance and site record keeping;
- f. HIV/AIDS report.
- g. Damage report
- h. Penalty report, including calculation for: Late completion; OHS target not reached;
- i. Monitoring functions of the Health and Safety Agent include but are not limited to: Application for permit to perform construction work; Health and safety plans, including monitoring; Risk assessment of contractors; Appointment to be made by contractors; Training due before construction work begins; Medical fitness certificates for specific functions; Preventative measures and protection plans; Notification of controlled installations, such as water and wastewater treatment plants and an incinerator; Provision of information to maintain health and safety on site; Registration, subscription, etc. of contractors; Access control to and access provision on construction site; Records kept by principal contractor.
- j. Project key personnel is also designated in this document;

k. It also sets out Profteam's Capital Resources; (In dealing with Swarts' evidence several aspects of this project execution plan were seen as it unfolded in practice);

[180] On 19 March 2020 at 11:00 representatives of the Magwa and Profteam and the DPW attended at the Beitbridge Port of Entry for a site handover meeting.

[181] The site was formally handed over to Magwa. The document acknowledging the handing over of the site in terms of clauses 1.3 and 1.4 of the GCC was signed by Jabulile Mabasu of the DPW and a representative of the contractor. A copy of the acknowledgement is annexed to van Meyeren's affidavit marked 14;

[182] Profteam prepared a minute for the site handover meeting, a copy of which is annexed to van Meyeren's affidavit as Annexure 15. This minute is extremely detailed and makes it clear that all representatives must be duly delegated and was signed by Magwa and Profteam on 22 March 2023;

[183] On 27 March 2020, Profteam produced master drawings for the border fence itself, gates, and river ways. Copies of the drawings are annexed hereunto as Annexures 16, 17 and 18. (They appear to be more detailed than those referred to earlier by Swarts). The master drawings also contained the specifications for the build as well as detailed requirements in relation to workmanship and materials.

[184] These plans were transmitted to the DPW and accepted without demur. The daily progress reports produced by Profteam are annexed as Annexure 19; (I have already dealt with them in the discussion on Swarts' evidence); The progress reports were transmitted to the DPW; each of these daily reports reported to DPW on the project location, contract information and contract details, labour, and plant, OHS and problems encountered, progress, delivery of material from suppliers, and

quality of work with a summary; The daily reports also included photographs of the ongoing work; Proof of e-mail transmission of the daily reports to the DPW is annexed as Annexure 19A;

[185] As early as the 2nd of April 2020, Profteam reported problems with security during the construction and on the very next day reported that the contractor was looking into appointing security. On 4 April 2020, Profteam reported that contact had been made with Major Mtsamayi;

[186] On the last daily report dated 20 April 2020, the cumulative security issues mainly theft and breaches of the fence was listed and set out for the entire construction period.

[187] He invites the Tribunal to have specific regard to paragraph 8 of the report of 20 April 2020 from which it is clear that the DPW was made aware on a daily basis of the attacks on the fence and the resultant breaches. He also annexes to this statement as Annexure 20 the minutes of weekly reporting meetings with the DPW;

[188] Each of these minutes is signed by a representative of Magwa and Profteam and by a representative of the DPW. He draws the Tribunal's attention specifically to the minute of the weekly progress meeting held on 21 April 2020. He draws the Tribunal's attention to paragraph 4.1.3 of the minutes where it is recorded that the DoD will look after the security of the fence once it is handed over to DPW;

[189] He annexes Annexure 21 being quality control and inspection checklists completed by Magwa and Profteam representatives on site. These documents are attached to demonstrate to the Tribunal that Profteam at all times fulfilled its function on behalf of the DPW diligently and that it fulfilled its function to keep proper records of the whole construction process;

[190] He further attaches as Annexure 22 signed off snag lists also demonstrating that the Second Defendant fulfilled its functions. Diligently

and that the snags listed were attended to by Magwa. He attaches as Annexure 23 a daily site diary kept up by Swarts which documents the daily progress for record-keeping purposes by Profteam;

[191] Profteam also attended to the compliance with the Occupational Health and Safety Act 85 of 1993. He annexes Annexure 24 a bundle of documents indicating the steps taken by Profteam to ensure compliance with the Act which included safety audits. He draws the Tribunal's attention to the recordal of the daily temperatures in the daily diary; (I have referred to same in the discussion of Swarts' evidence);

[192] The fence was erected in four weeks in extremely hot conditions. On 4 May 2020, Profteam transmitted a draft close out report to the DPW, a copy of which is annexed hereunto as Annexure 25. The Tribunal's attention is drawn to part 7 where the Second Defendant motivated for continued maintenance to the fence and in particular motivated for the installation of a fence monitoring system and the patrolling and daily surveillance of the fence through security personnel and/or drone aircraft;

[193] The department was specifically told that:

“The fence should be inspected daily, daily repairs, damages and vandalism should be attended to and noted. Should this not be done then, will the fence installation fail.”

[194] (I have already referred hereto in the discussion of Swarts' evidence)

[195] He annexes Annexure 26 and 27 a certificate of practical completion in terms of clauses 5.1.1 to 5.1.3 of the general conditions of contract and a certificate of completion in terms of clauses 54.4, 54.5 and 54.6 of the general conditions of contract. The certificate of practical completion was signed on the 20 April 2020 by representatives of the Defendants, the DPW and the DoD.

[196] The certificate of completion was signed on 28 April 2020 by representatives of the Defendants, the DPW and the DoD. The fence was completed as per the specification and in compliance with the contract's provisions and duly certified to be completed by all the parties;

[197] He also refers to drone footage which clearly demonstrates and indicates that the fence was erected to specification and handed over to the department (I noticed that it is part of the Witness Bundle which went unchallenged, downloaded it and the statement is correct as far as one can see).

[198] The footage was taken on the 20th of April 2020. Readers of this affidavit can download the footage from the following link: <https://1drv.ms/v/s!AqLYKAu8yYOjipJtXqSUuCrbj2A9Mw?e=ZMLXPo;> He seeks that the footage be an exhibit as if annexed to this statement as Annexure 28;

[199] The Defendants fully performed their obligations in terms of the agreements in the *bona fide* but mistaken belief that the agreements complied with Section 217 of the Constitution and with the prescribed procurement process in terms of the Treasury Regulations and other Regulations applicable.

[200] It is apparent from what is set out in this statement and from the documents attached to it that an immense effort was put into erecting the fence complying with specifications supplied to the Defendants by DPW and the DoD.

[201] A lot of professional time was spent to comply with the obligations created by the agreements during the hard lockdown period. He contends that it would not be just, nor equitable, to order the Profteam to repay all the monies that had been paid to it nor to deny payment of what is still due, but for the voiding of the agreement.

[202] In his view the Defendants have fully performed, and it would be just and

equitable to dismiss the First and Second Plaintiffs' claims and to grant the counterclaim.

[203] The aforesaid concludes the evidence for Profteam.

Evaluation of the Evidence

[204] It is clear from the uncontested evidence that Magwa and Profteam acting under a GCC styled construction agreement for the erection of Phase 1 of a 40 km borderline fence between South Africa and Zimbabwe did so under ministerial instruction from the Minister of the DPW, Ms Patricia de Lille signed on 16 March 2020 a day after the President of South Africa declared South Africa to be in a National State of Disaster under the Disaster Management Act 57 of 2002 (the DMA).

[205] The fence was to be constructed within a period of a month and by no later than 20 April 2020. The timeframe was such that a fence in the nature of the former electrified fence borderline fence which fell into disrepair due to neglect could not be constructed. Given the time constraints it was inevitable that the fence would probably be of a lower standard than its predecessor and cover only a distance of 40km. The equivalent of the old border fence would according to Magwa's independent expert take 12 months to plan and another 12 months to construct at a price in excess of R334 million.

[206] The DPW did not follow an open bidding process and opted for a negotiated outcome. The task to so negotiate was delegated to Mr Lukhele who is a Professional Construction Project Manager (PrCPM) and the chief construction project manager of the DPW. He commenced the process on 16 April 2020 by inviting Magwa, Profteam and the other people listed in paragraph 10 and 12 of Annexure A to a meeting to be held on 17 March 2020 at 11h00 At the Beitbridge LPOE.

[207] At the time both Magwa and Profteam was still involved in the performance of another contract with the DPW (only finalised on 17

March 2021), which contained certain specifications for a fence pertaining to the Beitbridge Border Post construction itself. In awarding the latter tender in 2016 to Magwa and Profteam the DPW followed an open bidding process as is required under the Treasury Regulation 16A.6.1.

[208] The specifications and prices for the new borderline fence were sourced from the BOQ of that contract. In the negotiation process it was agreed to escalate the pricing in terms of the CPAP formula applicable to the border post contract to emulate the pricing prevailing in March 2020. Mr Lukhele suggested that the process undertaken was to be dealt with as an extension or variation order of the Beitbridge contract (sometimes referred to as the RAMP contract). This much is clear from the email invitation that was sent to Magwa.

[209] Mr Pringle is of the view that the specifications was agreed between the DPW and the DoD. There is no direct evidence to this effect.

[210] The above view is supported by Mr van Meyeren. He makes it clear that the distance the fence would cover on each side of the Beitbridge border post is 20 km and that this was agreed upon between all the “stakeholders”. One can but wonder whether this includes the other parties present as well other than the DPW, Magwa and Profteam and perhaps the DoD.

[211] He also states that the type and size of the fence was agreed between all the stakeholders present. I pose the same question as before.

[212] Magwa was notified of its appointment by Profteam on 18 March 2020 with the instruction to be on site on 19 March 2020.

[213] The appointment of Magwa and Profteam for the construction of the new fence was signed by a Mpho Rakau acting director of Legal services of the DPW on behalf of Adv S Vukhela the DG of the DPW on 18 March 2020.

[214] Magwa received the contract with an amended BOQ on 22 March 2022 from Profteam's Mr van Meyeren with instruction to complete it and deliver same to Ms Jabulile Mabaso of the DPW. Mr Lejaka a co-director of Magwa did so on 23 March 2022.

[215] According to Mr Lejaka the aforementioned contract was solely concluded by Magwa as a result of its longstanding relationship as a contractor on behalf of the DPW and as a result of the urgent directive to proceed with the construction of the emergency borderline fence. (Caselines 0006-47).

[216] After the announcement of the Lockdown on 23 March 2020, to commence on 26 March 2020, and on approximately 25 March 2020, Magwa was requested to prepare a "progress draw". Mr Pringle ascribes it to DPW assuming that with lockdown Magwa's financial means might come under pressure. With the assistance of Profteam an invoice was prepared for 60% of the contract price and submitted and payment was received on 30 March 2020. When I during the course of argument put it to Mr Scheepers acting for Magwa that such pre-payment is extraordinary he glibly suggested that an actuarial adjustment could easily be made and that the contract contemplated payment on a weekly basis.

[217] The prepaid amount received by Magwa totals R21,819,878.28. and the prepaid amount received by Profteam is R1,843,004.92.

[218] The fence was erected according to the specifications decided on during the Magwa and Profteam visit with the DPW on 17 March 2020 save in as much Profteam had to amend certain components thereof due to the unavailability of supplies.

[219] The erection of the fence took place under harsh circumstances and no extensions were to be allowed. The highest temperature recorded during the construction was 43 degrees Celsius.

[220] The fence was erected to the point where certificates of practical and ultimately final completion could be issued by Profteam.

[221] Drone footage shows that the fence was delivered in pristine condition. The DPW and DoD was notified it would have to be patrolled and constantly maintained due to continuous attempts of incursion or theft. Magwa ultimately had to appoint a security company to do so during the construction phase due to the DoD not patrolling same.

[222] Mr Daan Veldtman an independent and experienced expert witness for Magwa is of the view that the fence could be effective subject to proper lighting being provided along the fence as well as regular patrolling thereof.

[223] It can be accepted as a fact that the fence delivered only fell into a state of dereliction after Magwa, Profteam and the security company withdrew. The lack of continued maintenance and the failure to patrol it regularly are the most likely causes for the state the SIU found the fence in when it accused Magwa and Profteam for delivering a derelict fence.

[224] The assertions in the Respondents' pleadings to the effect that the state is left with a derelict fence is probably true, but only due to its own conduct. The state of the fence cannot be attributed to the Appellants.

[225] Mr Veldtman's evidence is to the effect that a fence such as the one under discussion is developed in 6 stages. He ultimately concludes that stages 1-4 were performed by the DPW.

[226] He criticizes the DPW as follows —

3.11. The following was lacking from the initial stages:

3.11.1. Any evidence pertaining to the planning, feasibility, cost analysis and/or needs assessment performed by the Department in order to be able to provide meaningful input and advise pertaining to costing. He would have expected a clear analysis of the different types of fences, the effect thereof, the planning with the SAPS, South African Defence Force and related agencies pertaining to operation and patrol as well as additional measures apart from the fence, including the construction of sufficient lighting in order to enable guarding parties and patrolling parties to be effective during night-time to clearly identify potential breaches. The actions and responsibility of the Department of Public Works as the client in this regard did not meet the standard expected and had an adverse impact on the subsequent briefing of the contractor which is represented by the lack of clear specifications and/or drawings as to what was expected.

3.11.2. The documentation setting out the risk of the project and the subsequent disclosure thereof to the contractor could be found from the documentation. A potential impact of such risk would normally be considered by a contractor when preparing the bill of costs in order to assess for risk and potential unforeseen costs in the event of a non-variable contract or in order to justify potential variation orders that may follow in the project. The lack thereof is not only to the detriment of the Department and the consulting engineer, but also adversely impacts on the contractor who now has to provide pricing based on several unknown factors which has to be included in the pricing structure.

3.11.3. As a result of the process followed, i.e., a negotiated tender price and the submission thereof to the NBAC for approval of the tender award (ratification) Magwa was appointed as contractor on 18 March 2020 and Profteam, as the consulting engineer. These actions concluded stages 1 to 4 as executed by the Department Directorate for Special and Major Projects of the DPW.

[227] Having read their respective CV's, the considerable experience of Mr Pringle from Magwa and that of Mr van Meyeren from Profteam is self-evident. It is clear from their CVs in Annexure A hereto that they have between them a wealth of contracting experience with the DPW. They know state procurement and more specifically that an open bidding process is usually followed. Despite their assertions that they acted in the bona fide belief that their respective contracts were valid and the fact that their evidence is undisputed by the SIU I am of the view that phrases such as a "rapid tender process", Mr Lukhele was "unsure exactly how they would implement the tender process", the use of a Ministerial direction and assurances that all is well, are from where I sit pointers to a red flag. Instead of asking themselves whether all is really legal and obtaining legal advice they fell over their feet to accommodate the DPW. It must have been apparent to them that an unusual process is being followed and the final nail in the coffin is the prepayment.

[228] If they could not bring themselves so far as to obtain legal advice the notion of a 60% "progress draw" should have driven them to such action. I am not convinced that they are completely bona fide and probably knew and assumed the risk of the whole process being subject to illegality in the sense of *dolus eventualis*. I merely use this term to categorise their conduct in contrast with the notion of acting in a bona fide belief or being completely innocent. They may not have known the exact reason for the illegality of their respective contracts but in my view

realised something strange is afoot.

[229] Mr Lejaka's observation in paragraph 72 above is apt. **He certainly knew the why although not the illegality behind the way.** The answer to the why is in itself a red flag.

[230] The procurement process followed is most astounding and the obligations on the DPW to follow the infringed regulations is the more applicable. Equally the obligation on Magwa and Profteam to ensure that the process followed is valid, increases.

[231] Since the contract has been invalidated by agreement and confirmed by the Tribunal, the next issue arising is what does the Constitution demand under these circumstances.

The Remedy

4. Section 172 of the Constitution reads 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.”

[232] Given the infringement of section 217 of the Constitution read with the regulations pleaded by the respondents. the appellants agreed to an order that the agreement be declared invalid under section 172(1)(a).

[233] What remains is the “just and equitable order” in all the various contexts

referred to under the discussion of the applicable law.

[234] I accept the court's discretion is unbounded and that the order could be multi-dimensional.

[235] I am of the view that the DPW did receive a fence with a certain value and that it was delivered to specifications of the DPW albeit not a typical border fence as indicated by Mr Veldtman. In fact, the notion that the border could be secured within a month as the direction stated is naïve and clearly based on an uninformed decision taken by the Minister of the DPW. If normal processes were followed at an expedited pace an effective border fence may well have emerged over a shorter period than postulated by Mr Veldtman but that would have involved multiple contractors engaged at a huge cost. The original fence should in the first place have not been allowed to fall in a state of disrepair.

[236] The evidence before me is presented **on** the basis that the court will allow the appellants their profits. Given their ostrich-like conduct in the face of the obvious facts and the lack of a complete state of innocence I am unable to make the order the appellants prayed for.

[237] I am also not satisfied that an order to immediately repay the prepayment would be just and equitable. In my view they should be offered the opportunity to recover their reasonable costs so as to prevent the state from having received something for nothing.

[238] The natural order would of course be to order a repayment upfront but in the absence of any evidence of the profit margin involved in the construction industry and the business of project engineering I am hesitant to do so. Once **they** have proved their reasonable expenses including the costs of securing the fence by way of private security until the date agreed to by the DPW and DoD i.e. 24 April 2020, and if they then owe the state anything, they can make good and an interest rate or amount can be determined, if necessary with the help of an actuary, that

will compensate the state for the loss of the time-value of the money. I intend making this order on the basis that I have an unbounded discretion.

[239] I have looked at the order made by the tribunal and am of the view that with certain adjustments the order may well serve my purpose.

[240] Something should be said of the conduct of the SIU. Not only did they apply late for leave to call expert witnesses they also did not adhere to the agreement between the litigating parties as alluded to by the SIU Tribunal to the effect that the witnesses' evidence on oath will stand as evidence in chief. We live in a post Zondo-Commission era and if they are to give content to their mandate and make any contribution to the eradication of the plague of corruption that has swamped South Africa, they will have to up their game. The minimum they could have done here is to conduct a competent cross-examination of the available witnesses even if they could not make any contrary submission to the witnesses without evidence from their own expert.

[241] In the circumstances, I make the following order:

- a. The Appeal is dismissed with costs, such costs to include the costs of 1 Senior and 1 Junior Counsel.
- b. The order of the SIU tribunal is substituted with the following —
 - i. The Plaintiffs' main claim is dismissed. Their alternative claim is upheld with costs.
 - ii. The Defendants respective counterclaims are dismissed with costs.

- iii. The Defendants are divested of the profits earned from the contracts concluded under contract number H16/022 and HP14/075 between the Department of Public Works and Infrastructure (Public Works) and the first and second defendants respectively (“the contracts”);
 - iv. Within 30 days of this order, the Defendants shall deliver, by filing on Caselines, audited statements and debatement of account reflecting their respective income and expenditure in the contracts, supported by such expert report(s) as are necessary in the circumstances including the costs of engaging private security up to 24 April 2020;
 - v. Within 30 days thereafter, the Plaintiffs shall appoint duly qualified expert(s) to compile a report as to the reasonableness of the Defendants’ expenses and file it on Caselines;
 - vi. Thereafter, the parties shall prepare a joint minute between their respective experts within 10 days and file it on Caselines.
- c. After setting off from the pre-paid amounts the reasonable expenses the Defendants incurred to meet their respective obligations in terms of the contracts, they shall, within 30 days of the period referred to in **paragraph 8** of this order, pay to Public Works the amount standing to their debit. If the Defendants’ reasonable expenses exceed the pre-paid amounts, Public Works shall make payment to the defendants in respect of the amounts standing to their credit.
- d. If a dispute arises from the implementation of this order, any party shall approach the Tribunal for an appropriate order on supplemented papers as necessitated by the circumstances.

- e. The above cost orders are inclusive of the costs of two counsel where so employed.

S. VAN NIEUWENHUIZEN AJ

I Agree:

T.P. MUDAU J

I agree:

J.J. STRIJDOM AJ

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand down is deemed to be 12 December 2023.

For first appellant : Adv G.J. Scheepers S.C instructed by Marisca Le Roux LLR Incorporated.

For second appellant : Adv E.L. Theron S.C instructed by Alant, Gell & Martin.

For respondents :Adv I. Semanya S.C instructed by The Office of the State Attorney.