IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG.

CASE NO: 32947/2020

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: NO

8 May 2024 **.....**
DATE

In the matter between:

MAQUASSI LOCAL MUNICIPALITY Applicant

And

KWANE CAPITAL (PTY) LTD Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicant instituted proceedings in terms of which its seeks that its own decision to appoint and enter into contracts with the respondent should be reviewed, declared unlawful and set aside. The reliefs sought include an order directing the respondent to pay back the amount of R3 713 547.92 paid to the respondent pursuant to the appointment and contracts signed. In the alternative, the applicant seeks an order that the respondent repay the amount of R3 713 457.92 on the basis of the breach of contracts. The application is opposed by the respondent and various defences are raised.

Background.

[2] On 29 August 2016 the Council of the applicant took a resolution that a service provider be appointed to assist in the acquisition of new plant and construction equipment (machinery) to implement programs associated with service delivery. The Council resolved that, as a method of payment, the service provider should first acquire the said machinery with its own resources and the applicant would reimburse the service provider on monthly basis over a period of three years. The said reimbursement should cover the capital costs, interest, and maintenance costs.[1]

[1] See Minutes of the Special Council Meeting of 29 August 2016 annexed to the Applicant's Founding Affidavit at 01-31.

[3] The applicant, represented by the municipal manager, Mr Itumeleng Robal Jonas, (*Mr Jonas*) decided to procure services from a service provider through a deviation process[2] in terms of Regulation 32 of the Municipal Supply Chain Management Regulations 2005 (*Regulation 32*) read with section 110 of the Municipal Finance Management Act 56 of 2003 (Municipal Finance Management Act). Regulation 32 allows an organ of state to procure goods and services from a service provider under a contract secured by the other organ of state, subject to certain conditions. The conditions include, that the contract with such a service provider should have been validly procured by the other organ of state and written consent/ approval must be obtained from both that other organ of state and the service provider.

[4] Tsantsabane Local Municipality (*Tsantsabane*) had through a tender process appointed the respondent on 19 November 2014 to provide fleet management services. The applicant requested *Tsantsabane* in writing on 13 July 2016 for its consent in terms of regulation 32 to procure services provided by the respondent. Tsantsabane, represented by its municipal manager, Mr HG Mathobela, gave consent to the applicant in writing on 14 July 2016. The respondent, who was also requested, gave its consent on 20 July 2016.

[5] Pursuant to the aforegoing the applicant appointed the respondent. Both parties (applicant and the respondent) entered into two agreements, an Instalment Sale Agreement and Full Maintenance Lease Agreement. The agreements were signed on 27

[2] The normal process would have involved going out on a public tender as envisaged in the Municipal Finance 56 of 2003.
Management Act.

July 2016 by the applicant represented by Mr Jonas and the respondent (represented by Mr Vuyo Tabata).

[6] On or about 31 August 2016 the respondent submitted two invoices to the applicant. The first invoice (with number IN100382) dated 31 August 2016 for the sum of R3 372 901.81 was for construction plant and machinery. The second invoice (IN100383) dated 31 August 2016 for the sum of R346 646.11 was for the lease of light vehicles. The applicant paid the total amount of R3 713 547.92 in September 2016 to settle both invoices into the Standard Bank account details provided by the respondent.

[7] The respondent subsequently delivered two second-hand graders. The respondent struggled to deliver the outstanding orders and subsequently penned a letter to the applicant on 20 March 2017 explaining the delay in delivering the outstanding machinery. Three months thereafter, on 26 July 2017 and the respondent still having not delivered the outstanding orders the applicant notified the respondent in a letter dated 26 July 2017 that the delivery of further machinery should be halted until further notice.

[8] In the meantime, the aforesaid payment was identified as an irregular expenditure for the period 2016/2017 financial year. The applicant then appointed *Edge Forensic* and Risk Consultants ('*Edge Forensic*') to investigate the process that was followed by the applicant to appoint the respondent. Further, whether the applicant complied with the National Treasury SCM Regulations. Lastly, whether the payment effected by the applicant to the respondent was regular'.[3]

[3] See paragraph 1.3 of the report compiled by Edge Forensic at 01-75 states that the appointment of Edge Forensics was to 'investigate expenditure items appearing in the irregular, fruitless and wasteful expenditure registers and to clear these in preparation for the compilation of the Annual Financial Statement and also for A-G Audit process'.

[9] *Edge Forensic* reported that the appointment of the respondent was regular and in accordance with regulation 32. In relation to the payments *Edge Forensic* stated that *"We are therefore unable to verify and audit authenticity of the invoice as we cannot tally them to any particular item of fleet or any verifiable item in the agreements*". In addition, *"Kwane delivered two second hand graders and not the whole yellow fleet as agreed. Therefore, the amount cannot be in consideration only of two graders. Further that the amount of R346 646.11 is for the lease of vehicles. No vehicles have been delivered to the municipality'*.[4] To this end *Edge Forensic* recommended that the civil suit be initiated against the respondent to claim back the amount paid by the applicant.

[10] The applicant then launched these proceedings for the following orders, first, declaring the appointment of the respondent to provide fleet replacement and construction machinery services to the applicant as unlawful and invalid. Secondly, reviewing and setting aside the appointment of the respondent and the agreements entered into pursuant to the appointment. Thirdly, declaring that the respondent has breached the Instalment Sale agreement and Full maintenance lease agreement concluded between the parties. Fourthly, an order directing that the respondent pay the applicant the amount of R3 713 547.92 paid in favour of the respondent alternatively that the aforesaid amount be paid to the applicant on the basis of unjust enrichment.[5]

[11] The respondent is opposing the application on the basis that no payment as alleged was received by it. Secondly that the applicant has failed to meet the standard for self-review. Thirdly, that there are material disputes of facts, and finally that there was an unreasonable delay to launch the proceedings.

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[4] See *Edge Forensic* Report at 01-79.
[5] The claim for the unjust enrichment is only introduced in the Applicant's Heads of Argument.

Issues

[12] Issues for determination are as follows:

whether the applicant has made out a case to declare the appointment of the respondent as unlawful and invalid,

12.1. whether the applicant has made out a case to review and set aside the appointment of the respondent and setting aside all agreements concluded pursuant to the appointment,

12.2. whether the applicant has made out a case that there is material breach of the Instalment of Sale Agreement and Full Maintenance Lease Agreement,

12.3. whether the applicant has made out a case of an order directing the respondent to repay the amount of R3 713 547.92.

12.4. whether there are dispute of facts.

Submissions *and contentions of the parties.*

Review.

[13] The applicant contends that procurement of services from the respondent is susceptible to be declared unlawful, reviewed, and set aside on the following basis.

[14] First, the applicant has instead of procuring goods and services under the contract between *Tsantsabane* and the respondent decided to enter into separate agreements with the respondent whereas regulation 32 contemplated that the procurement of goods and services must be under the contract secured by other organ of state and not enter into a

new contract. This position, so the argument continued, was confirmed in *Blue Nightingale*,[6] *Skillful 1169*[7] and *Contour Technology*[8].

[15] The respondent failed to submit any substantive argument to gainsay the submission that indeed the entering into separate agreements between the applicant and the respondent offended the interpretation attached by the authorities referred to above. The only submission was that *Edge Forensic* reported that the appointment was above board.

[16] The second reason advanced by the applicant as a basis for reviewing and setting aside the appointment and the agreements is predicated on the argument that there was no indication, as envisaged by regulation 32, that there are benefits and discounts which the applicant would receive from invoking the said regulation.

[17] Third, the applicant contended that it was envisaged that the services and goods procured by the applicant would have to be same services provided under the contract with *Tsantsabane* and this did not turn out to be case. This contention was not advanced comprehensively or with the necessary rigour by referring to specific clauses in the contract with *Tsantsabane* in contrast with the services provided to the applicant.

[18] Fourth, the applicant did not heed the provisions of regulation 32(1)(b) which requires that there should not be a *'… a reason to believe that such contract was not validly procured…'*. There was an indication, so argument continued, from record

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[6] *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality* 2017 (1) SA 172 (ECG)

[7] *KwaDukuza Municipality v Skillful 1169 CC and Another* (11060/2017) [2018] ZAKZDHC 35 (6 July 2018).

[8] *Contour Technology (Pty) Ltd v Mamusa Local Municipality and Another* (KPUM32/2018) [2020] ZANWHC 3 (7 February 2020).

availed by *Tsantsabane* that there was a bidder who was cheaper than the respondent and this is indicative that the procurement process was tainted. This contention was also not argued comprehensively by the applicant.

[19] In retort the respondent contended that, first, the process undertaken in terms of regulation 32 preceding the appointment of the respondent was above board and this was confirmed by *Edge Forensic* in their report submitted to the applicant. As such this point should fail. The applicant's municipal manager contended in reply that the route to challenge the appointment was predicated on his belief that the finding of *Edge Forensic* was in this regard not correct.

[20] Third, the respondent contends that though the presence of irregularity is denied if it is found that there was indeed an irregularity same would not pass the test of materiality. To determine the question of materiality one must link '*the question of compliance to the purpose of the provision*'.[9]

[21] In addition, if the court finds that there was irregularity the next step is for the court to determine an appropriate relief which must be just and equitable. The court may, *inter alia*, limit the retrospective effect of the declaration of invalidity in terms of section 172(1)(b).

[22] The fourth issue raised by the respondent is that there was an undue delay to launch the review proceedings which cannot be overlooked. The respondent referred to several decisions where the courts laid the ground rules that though the court should not readily condone challenges to decisions taken irregularly such challenges should be

[9] See paragraph ii of the Respondent's Heads of Arguments at 22-14.

undertaken as soon as is readily possible. Any action to the contrary would engender uncertainty *'… and give rise to calamitous effects'.*[10] The respondent referred and quoted *Tasima* where the court stated that delays may *'… prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration, and propriety before overlooking a late review, reactive or otherwise'.*

[23] If there was a delay the applicant is required to present facts which will assist the court to determine if same can be condoned. Just like in PAJA challenges, respondent argued, reviews should be embarked upon within reasonable time.[11]

[24] In retort the applicant contends that the municipal manager of the applicant who deposed to the founding papers was only employed in October 2019 and had to collate all that was needed and only managed to launch the proceedings the following year. The submission is that this was not inordinate. In any event, the applicant contends that there is no prejudice that will visit the respondent if the court overlook the delay in launching the review process.

Contractual claim

[25] As an alternative claim the applicant argued that the respondent has breached the contract. The applicant understood that the contract between the parties relate to the

[10] Para 39 of the Respondent's Heads of Arguments at 22-19. Respondent also referred to *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC), *Gijima v Minister of Home Affairs, (Gijima) Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC)(*Khumalo*), *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) (*Tasima*).

[11] Respondent having quoted *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* 2014 (3) SA 481. See para 43 of the Respondent's Heads of Arguments at 22-20.

following, first, that the respondent would supply, over a period of three years, new vehicles and equipment which are functional and in accordance with the specifications of the applicant. Second, that the respondent shall be responsible for the maintenance of the said vehicles. Third, that the municipality shall make payments in advance when requested and upon receipt of the quotation from the respondent. Fourth, that in the event of failure to deliver the applicant shall be entitled to terminate the contract and claim amounts paid in accordance with agreement.

[26] The applicant contends that in view of the applicant's failure to deliver the vehicles as per agreement and or at all and the agreement having lapsed by effluxion of time the applicant is entitled to payment of the amounts paid in advance in the total sum of R3 713 547.92.

[27] The respondent in retort stated that the applicant is mistaken in alleging the breach as the respondent did deliver two graders. The applicant's municipal manager subsequently instructed the respondent not to deliver the outstanding fleet until further notice. The applicant has never reverted to the respondent until the contract lapsed and this was despite the respondent having informed the applicant that it has received funding from Bidvest Bank. If there is any breach, so argued the respondent, then it was occasioned by both parties.

Disputes of fact

[28] The respondent contended that there are disputes of fact in relation to the applicant's alternative claim predicated on the breach of contract. The respondent's version is that the argument on the breach of contracts is unfounded since the respondent

did deliver two graders to the applicant. In addition, the applicant reneged from the agreement by instructing the respondent not to deliver the outstanding machinery.

[29] Ordinarily where there are disputes of fact the matter would be referred to oral evidence. In this instance it is contended that the applicant foresaw the possibility of the disputes of fact but nevertheless opted for motion proceedings. This would warrant a dismissal with costs and not referral to oral evidence.[12]

[30] In the premises the application in respect of the alternative claim should be dismissed with costs.

[31] The applicant contended that the respondent's contention that there are disputes of facts lack merits. It is clear that the respondent failed to deliver the new machinery. This is also the finding of *Edge Forensic* which stated that the requested machinery was not delivered. The applicant also paid for the light vehicles which were also not delivered even a year after payment was effected by the applicant. Therefore, any averment of disputes of fact appears to be unfounded and falls to be rejected. In addition, since the contracts have lapsed, the applicant is entitled to restitution.

Unjust enrichment.

[32] The applicant contends that the facts presented in the papers demonstrate that the requirements for a claim for unjust enrichment have been satisfied. The said requirements being that the defendant must be unjustifiable (without legal cause) enriched at the expense of the plaintiff and the latter being impoverished thereby. In this

[12] See para 47 of the Respondent's Heads of Argument at 22-23, where rrespondent referred to *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) which confirmed that if serious dispute was foreseen dismissal becomes an appropriate order.

regard the applicant paid the amount of R3 713 547.92 on basis of the contracts and respondent has without any legal cause kept the amount and is enriched at the expense of the applicant.

[33] The respondent has not dealt with this issue as it was not in the prayers in the notice of motion and only raised specifically in the heads of argument.

[34] I had regard to the point raised relative to unjust enrichment and opine that even if there could be merits in the said argument the applicant has not requested the court to make an order in terms hereof. The decision I need to arrive at should be foreshadowed in the papers of the applicant and more importantly the prayers in the notice of motion lest my decision could be based on conjecture.

Legal principles and analysis.

Undue delay

[35] Unlike in review applications under PAJA there is no time bar in reviews under the principle of legality.[13] That notwithstanding the constitutional court has stated that *'… it is a long-standing rule that a legality review must be initiated without undue delay and the courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of undue delay in initiating proceedings"*. Delay may in certain instances compromise the effective assessment and

[13] See para [64] in *Semeka* where the SCA stated that '[I]t is well to remember that here, we are dealing with a legality review which is not subject to the time constraints prescribed by s 7(1) of PAJA.'

evaluation of the allegation of illegality.[14] In addition, '… *any delay would validate invalid administrative action.'*.[15]

[36] The three-stage inquiry[16] to determine the question of delay is set out in *Buffalo*[17] are, first, whether the delay was unreasonable. This is a factual inquiry involving value judgment. Second, whether a satisfactory explanation for the delay has been proffered. Thirdly, whether the delay should be overlooked. The courts in general have the discretion to overlook a delay.[18] Such a discretion should however not be exercised lightly.[19] In this exercise the court would also have regard to the following factors at play: the length of the delay, the full explanation given for the delay; the potential prejudice to the parties as well as the possible consequences of setting aside the impugned decision; the nature of the impugned conduct; the conduct of the applicant and the prospects of success on the merits. The factors are not to be considered conjunctively and need a balancing exercise. One aspect may compensate for the absence or weakness of the other. It was stated in *Simeka* that '*[N]otwithstanding the fact that the explanation for the delay is not entirely satisfactory in certain respects, this shortcoming is compensated by strong prospects in favour of the Department*'.[20]

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[14] See *Simeka* at para [68].
[15] *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] 4 All SA 133 (SCA) at para 46.
[16] In contrast it was held in *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) that
the inquiry is a two-stage process which include the second and third pointer identified in *Aurecon*, the latter, having also stated that the interest of justice is also a factor to be put into consideration and it depends entirely on the facts and circumstances of each case. It was also held *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others (Simeka)* (610/2021) [2023] ZASCA 98 (14 June 2023), (*Simeka*) that the test to consider what constitute delay is flexible and facts specific.
[17] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC).
[18] See *Khumalo* judgment at para [47].
[19] See *Tasima* judgment, quoted by *Khumalo* at para [48].
[20] See *Simeka* at para [111], also at para [101] where it was stated that '… *the stronger the prospects of success, the more will a court readily incline in favour of overlooking an unreasonable delay*'.

[37] SITA contended in *Gijima* that if the court is approached on the basis of principle of legality *'… no explanation for the delay was needed'*.[21] The court however held that the applicant had a duty to ensure that such challenge is launched within a reasonable and the court has a discretion to decide to overlook the delay. In *Gijima* the delay was over a period of 22 months and since there was no explanation advanced the discretion could not be exercised in the air and same could therefore not be granted. In other instances, the delay may be longer but condonable as was stated in *Swifambo Rail Leasing*[22] that in view of the fact that the extent of the malfeasance was concealed by the Board of PRASA the delay of three years was overlooked. The court also considered the interest of justice and public interest in overlooking the delay. It was also held in *Simeka* that due to the enormity of the task and preparation and drafting of the papers which was time consuming the delay of 29 months was overlooked.

[38] In the case serving before me the respondent contended that the period of delay should be calculated from 2016 when the appointment was made and the applicant on the other had contends that the municipal manager became aware after his appointment a year before the challenge was mounted. It appears that Mr Jonas may have conveniently not bothered by the infractions hence did not launch the challenge until he left.[23] I find that the period of a year was not unreasonably inordinate and even if it can be considered to have been unreasonably long the delay is to be overlooked.

[39] In the exercise of the discretion, I took into account that ordinarily the municipal manager who was behind this procurement did not take action on behalf of the applicant to challenge the irregular appointment and contracts entered into with the respondent.

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[21] *Gijima* at para [13].
[22] *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa* 2020 (1) SA 76 (SCA) (*Swifambo*).
[23] It appears that the procurement process was commenced by the municipal manager in July 2016 before Municipal Council took the resolution which was only at the end of August 2016.

This was unearthed by the new manager who had to interrogate the contracts awarded and had to also find his ways through the systematic bottlenecks which beset or bedevil the operations in state organs. The respondent has not presented any cogent reasons underpinning the prejudice it would suffer if the delay is overlooked. Importantly the case mounted by the applicant has good prospect of success. Above all it is in the interest of justice that I overlook the delay.

[40] The court may notwithstanding that the fact that there is unreasonable delay still declare, in terms of section 172(1)(a) of the constitution that the state's conduct is unlawful or find the conduct inconsistent with the constitution and invalid. This may then come handy in favour of the state where explanation for the delay is not reasonable but reprehensible.

Self-review.

[41] It is trite that an organ of state can only proceed by way of self-review in respect of its own decision in terms of principle of legality and not Promotion of Administrative Justice Act (*PAJA*).[24] To this end, it is proper that the applicant launched proceedings as contemplated in terms of section 1(c)- of the Constitution. Reference to PAJA principles by the respondent has, if any, limited relevance.

[42] The authorities[25] referred to by the applicant state that where regulation 32 is invoked there is no need for organ of state to enter into another direct contract with the service provider. The respondent contended that the investigation by *Edge Forensic*

[24] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40 (Gijima); *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC); *Transnet SOC Ltd and Another v CRRC E-LOCO SUPPLY (PTY) Ltd and Others* (11645/21) [2022] ZAGPJHB (12 April 2022).
[25] See n 7, n 8 and n 9 above.

cleared the alleged irregularity (interpretation) and the finding by the said company has not been challenged by the applicant. The applicant categorically stated, correctly so, that the decision by *Edge Forensic* relating to the applicability of regulation 32 demonstrates lacks fidelity to the law and as such cannot be followed. To this end I find that indeed the applicant's decision was not in accordance with prescripts of regulation 32 and is also construed as contravening the provisions of section 217 and Municipal Finance Management Act which prescribes procurement regulatory framework.[26] The appointment and entering into separate agreements with the respondent are both susceptible to be set aside.

[43] Against the backdrop of the legal exposition above it is axiomatic that the appointment and the contract entered into offended the principles as set out in section 217 of the constitution as there was appointment and contracts entered into without complying with a system which is fair, equitable, transparent, competitive and cost-effective. Alternatively, it offended the clear provisions of regulation 32 which clearly provides that the applicant may procure goods from the respondent under the contract signed with *Tsantsabane*. In addition, there were no demonstrable benefits and discounts to the applicant as envisaged in clause regulation 32(1)(c).

[44] To this end the appointment and subsequent contract are declared constitutionally invalid and are set aside. If not, I may find myself giving legal sanction to the very evil which section 217 of the constitution and all other procurement related prescripts seek to proscribe.

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[26] Section 1(c) of the Constitution decrees that all to be done must be within the rule of law and section 217 enjoins parties conduct to be lawful and rational. Any decision found to be outside the purview of the statutory provision is susceptible to be set aside. It was also observed in *Gijima* that the pertinent question is '*… did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review*'

Materiality.

[45] As was correctly set out by the respondent the court must when conducting a legal evaluation and where appropriate, '*take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision.'*[27] This was captured concisely by O'Regan J. in *African Christian Democratic Party*[28] that '*[T]he question thus formulated is whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose. A narrowly textual and legalistic approach should be avoided.'*[29]

[46] The purpose of deviation as envisaged by the regulation 32 is, *inter alia*, to avoid incurring and duplicating costs associated with the normal tender process contemplated in terms of section 217 but still ensuring that the services and goods are procured from a service provider whose appointment by another organ of state has complied with the provisions of section 217 of the constitution. To this end a party must directly procure services and goods under the contract entered into with the other state organ. Caution must also be noted that deviations may at times be a fertile ground for malfeasance and corruption.[30] Appointing the respondent directly and entering into direct contract violated the purpose which was intended to be achieved by the said regulation. The irregularity was therefore material and cannot just be discounted.

Just and equitable remedy.

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[27] *Allpay Consolidated Investment Holdings (Pty) Ltd Chief Executive Officer of South African Social Security Agency* 2014 (1) SA 604 (CC) at para 28.
[28] *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC).
[29] *Ibid* at para [25].
[30] The Constitutional Court was quoted in Simeka at para 38 that the Constitutional Court observed that '*deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process*'.

[47] Where the contactor was not complicit or was unaware of the infractions then the remedy would be impacted in contrast to instances where the service provider was not an active beneficiary of the infractions.

[48] The constitution provides in section 172(1)(a) that any conduct found to be inconsistent with it should be declared invalid and the contract falls to be declared as such. Section 172(1)(b) on the other hand gives the court wide remedial powers. The court is empowered to make a just and equitable remedy. So wide is that power that it is bounded only by considerations of justice and equity. In other instances, the court may notwithstanding my findings of irregularity not disgorge the benefit from the service provider or even unduly benefit the applicant. The court held in *Gijima* that SITA '… *must not be allowed to benefit from … its own undue delay in instituting proceedings'*.[31] The court held that despite having declared the award of the contract and subsequent decisions to be invalid such a '… *declaration of invalidity, must not divest Gijima of rights to which – but for the declaration of invalidity – it might be entitled'*.

[49] The applicant did not claim that the repayment should include the interest and has stated during argument that it is prepared to forego same.

Breach of contract.

[50] In view of my finding on the main claim the consideration of the breach of contract as an alternative claim deserves no audience of this court. That notwithstanding the facts are clear that the respondent breached the contract by delivering second hand graders. This would amount to failure to deliver in terms of the agreement hence is a

[31] *Gijima* at para [54].

breach of contract. Secondly the respondent invoiced for the light vehicles which were not delivered even after 4 months after the respondent having stated that it would deliver but failed. The respondent has further submitted that if at all there was a breach both parties have been breached the contract. This was a concession of the breach on the part of the respondent and the applicant did not accept the allegation of the breach of the agreement.

[51] It is noted that the respondent makes no counter claim for the usage of the second-hand grader supplied and furnished no reason why the second-hand graders were supplied. In any event the counter claim may be met with a defence of prescription.

Dispute of facts.

[52] The contention with regard to the disputes of fact was raised in relation to the breach of contract and since the main dispute was decided as it is mentioned above there is no need to therefor consider the issue of dispute of facts. That notwithstanding the alleged disputes of facts appears to be fanciful, fictitious and far-fetched and cannot be entertained as set out in *Plascon-Evans*.[32]

Conclusion

[53] It is my conclusion that the appointment and contracts entered into with the respondent were not in accordance with the constitutional prescripts and or relevant regulatory framework. I am enjoined by section 172(1)(a) of the Constitution to declare

[32] *Plascon-Evans Paints Limited (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* (53/84) 1984 (3) SA 623; 1984(3) SA 620.

any law or conduct which is inconsistent with the Constitution invalid to the extent of its inconsistency.

[54] In compliance with the provisions of section 172(1)(b) I find that it would be just and equitable that the respondent should pay the applicant the amount of R3 713 547.92. The said amount should not include interest.

Costs

[55] The costs shall follow the results.

Order

[56] I grant the following order:

(a) The applicant's decision to appoint the respondent and all contracts concluded between the parties are declared unenforceable, constitutionally invalid, reviewed and set aside.
(b) The respondent is ordered to pay the applicant the amount of R3 713 547.92.
(c) The respondent must pay the applicant's costs.

M V Noko
Judge of the High Court

This judgement is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it on CaseLines. The date of the judgment is deemed to be **8 May 2024** at **10:00**.

Date of hearing: 9 November 2023.

Date of judgment 8 May 2024.

Appearances.

Counsel for the Applicant	Adv G Mashigo.
Attorneys for the Applicant:	Leepile Attorneys Inc.
Counsel for the respondent	Ad NL Mnqandi.
Attorneys for the Respondent	Madlanga & Partners Inc.