**REPUBLIC OF SOUTH AFRICA**

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**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

 CASE NO: **90545/18**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

**(3)** REVISED.

**01 SEPTEMBER 2023**

DATE SIGNATURE

In the matter between:

THE SPECIAL INVESTIGATING UNIT **APPLICANT**

and

GEKKONOMICS PROPIETORY LIMITED **FIRST RESPONDENT**

T/A INFONOMIX

SOUTH AFRICAN BROADCASTING **SECOND RESPONDENT**

CORPORATION SOC LIMITED

**JUDGMENT**

**TLHAPI J**

**INTRODUCTION**

[1] The applicant, the Special Investigating Unit (‘SIU’) was established in terms

of the Special Investigating Units and Tribunals Act 74 of 1996 (‘SIU Act’). Its

purpose is to investigate malpractices and maladministration associated with state

institutions as defined in the preamble to the SIU Act.[[1]](#footnote-1)

[2] The President was empowered in terms of section 2(1) of the SIU Act to

establish a Special Investigating Unit and the second respondent as a public entity

was referred for investigation by the SIU under subsection 2(2).[[2]](#footnote-2) The authorisation

was by way of a Proclamation published in Government Gazette No. 41086 dated 1

September 2017 under Regulation Gazette No. 10754 Proclamation No. R.29 of 2917.

The SIU as part of its functions and when its investigations revealed evidence that

would support a civil claim, is empowered to institute proceedings in its own name or

on behalf of the State Institution concerned before a Special Tribunal or before a court

of law.[[3]](#footnote-3)

[3] The Proclamation authorising the investigations, stated that the investigation

by the SIU was as a result of allegations about the affairs of the second respondent

herein, regarding losses the second respondent (‘the SABC’) or the State had

suffered which losses may be recovered. The SABC is not opposing the application.

[4] The SABC is a public broadcaster, a state- owned company, duly registered

under registration number 2003/023915/30. It is identified in Schedule 2 of the Public

Finance Management Act 1 of 1999 (the ‘PFMA’), as a major public entity to which the

PFMA is applicable in terms of section 3(1)(b). The first respondent (“Infonomix”) is a

private company duly registered under number 2015/157386/07 and is identified as

one of the entities to be investigated as stated in the Schedule to the Proclamation.[[4]](#footnote-4)

[5] The following orders are sought in this application:

“1. That the decision of the second respondent of 15 November 2016 to

award the tender to the first respondent is reviewed and set aside

alternatively declared constitutionally invalid.

 2. Declaring the contract concluded between first respondent and second

respondent on 7 December 2016 void ab initio.

 3. Ordering the first respondent to repay all the payments made to

by the second respondent under the said contract.

 4. In the alternative to prayer 3 above, that this Honourable Court orders;

 4.1 The first respondent to render a full account of all payments it received

under the impugned contract and its reasonable expenses, supported by

necessary vouchers;

 4.2 The debate of the said accounts;

 4.3 Payment to the second respondent of whatever profits earned by the first

respondent upon debate of the account;

 5. That the costs of this application be paid by the first respondent and that

such costs shall include the costs consequent upon the employment of

two counsel.”

[6] The SIU investigators collected evidence of fact and had available to them

documents seized from the SABC during the investigations. It is from these documents

where ‘glaring irregularities’ were allegedly discovered regarding a contract concluded

between Infonomix and the SABC on 7 December 2016. In these proceedings the

applicant also relied on affidavits obtained from employees of the SABC during the

investigations.

**BACKGROUND**

[7] The SIU contended that the contract was entered into without following a

competitive tender process as is required by law and regulation, in terms of section

217 of the Constitution, the PFMA, National Treasury Regulations, Treasury

Instructions and the SABC Supply Chain Policies. The SIU dealt with an overview of

the laws and policies of the SABC as stated hereunder.

The Principles Governing Procurement for Goods and or Services in Public Entities

and State Institutions.

[8] The SIU contended that the foundational principles to be observed by the SABC

for the procurement of goods and or services are to be found in the peremptory

provisions of section 217(1)[[5]](#footnote-5) of the Constitution and these are echoed in section

51(1)(a)(i) and(iii) of the PFMA.[[6]](#footnote-6) The PFMA allows National Treasury to make its own

regulations or issue instructions applicable to all institutions to which the Act applies.[[7]](#footnote-7)

[9] The SIU contended that the principles pronounced in section 217 of the

Constitution were applied in the PFMA and adopted in regulations such as

Treasury Regulation 16A6.2,[[8]](#footnote-8) though not applicable to Schedule 2 entities such as the

SABC, gave sense of the meaning behind the prevailing principles of section 217 read

with section 237 of the Constitution which provided that Constitutional obligations be

performed diligently and without delay. A supply chain management system was

required from public entities to which the PFMA was applicable, which provided for

adjudication through bid evaluation and adjudication committees.

[10] The National Treasury circular of 27 October 2004 was referred to, which

provided for the obligations of accounting officers authority to appoint a bid committee

responsible for compiling bid specifications which should be written ‘in an unbiased

manner to allow all potential bidders to offer their goods and or services”. Furthermore,

it required the evaluation and adjudication processes to be done within the ambit of

section 217 and the prescripts contained in the PPPFA and the Broad- Based Black

Economic Empowerment Act 53 of 2003.

[11] The SIU[[9]](#footnote-9) contended that transparency required the set-up of a framework[[10]](#footnote-10)that

allows interested members of the public to access information regarding tenders and

an insight into the type of agreements envisaged. The National Treasury issued a note

to public authorities/ entities[[11]](#footnote-11)giving guidance on how emergency procurements must

be dealt with when employing a deviation from the normal supply chain management.

A procedure was prescribed in the note and a system of procurement procedures even

in the instances of a deviation where applicable.

[12] It was contended that all entities to which the Constitution and the PFMA were

applicable, were required to adopt and comply with such law and, the standards set

out therein,[[12]](#footnote-12) together with instructions from Treasury.[[13]](#footnote-13) These provide for a system

that ensures transparency in supply chain management, a system which complies with

section 217 of the Constitution. The SABC would not be bound by agreements that

are in contravention of procurement processes envisaged in section 217 of the

Constitution.

[13] Although doubting the prescripts of the Supply Chain Management Guide

(‘SCM Guide’)[[14]](#footnote-14)issued by National Treasury, to accounting officers/ authorities, the

SIU referred to it where it dealt with demand management process. As a first step to

be engaged was a total analysis and needs assessment of the goods, works and

services to be procured and an understanding of the end result being that value for

money is achieved in the process.

The Supply Chain Management Policy of the SABC

[14] The PFMA required an accounting authority of a public entity to maintain an

appropriate procurement policy.[[15]](#footnote-15) The SABC approved a Supply Chain Management

Policy (“SCM”) on 26 April 2016 which provided that section 217 of the Constitution

was applicable to it when contracting for goods, services, works and content. The

SABC while recognizing that it was exempt from Treasury Regulation 16A, undertook

to follow the guidelines wherever possible and applicable. There was a Supply Chain

Management division which was responsible for developing a manual detailing the

procurement process of the SABC. Certain salient provisions in the policy documents

of the SABC were identified.[[16]](#footnote-16)The policy provided for procurement thresholds and

according to the procurement mechanism, procurement for goods or services of more

than R2million had to go through competitive bids. ‘The pre-requisite is that there must

be an approved business case, purchase requisition and specifications and further

that the award must be as per Delegation of Authority Framework” (DAF)[[17]](#footnote-17)

[15] The SABC SCM model echoed the requirements of National Treasury Supply

Chain Management Framework.[[18]](#footnote-18) Provision was made for instances of deviations and

exclusions[[19]](#footnote-19) from the SCM policy. Although not contained in the SCM policy, the SIU

contended that it was peremptory that the SABC as a Schedule 2 entity obtain prior

written authority by the relevant treasury before a deviation is implemented as

provided in National Treasury Note 3 of 2016/17.

The SABC Supply Chain Management Procedures Manual

[16] The SCM procedures manual was approved on 15 November 2016 with

effective date being 1 June 2016. The manual is said to emphasize processes that

maintain a framework that is geared to delivering value to the business of the SABC

as stated in the SCM manual[[20]](#footnote-20) and described as the pillars of procurement by the SIU.

The manual emphasises that all procurement complies with the delegation of authority

framework in the policy document and as ‘approved by the board of directors and

delegated to the group executive committee. The manual requires observance of

policy regarding procurement thresholds and processes of procurement for goods

and/or services above R2million.[[21]](#footnote-21)

[17] The SABC SCM manual provides for demand management[[22]](#footnote-22), which is

managed by the Head of Supply Chain Management. This takes place on two levels,

‘strategic demand management and operational demand management’. The demand

manager and any official engaged in procurement must ensure that planning,

assessment and identification of the needs is done; in complex and higher value

procurement the submission of detailed motivation/business case is required and,

compliance with the correct bid process by submitting all specifications for approval

by the Bid Specification Committee before selection; correct contracts have to be in

place.

[18] The manual provided that the SABC was not obliged to consider unsolicited

bids ‘outside the normal supplier selection process and that such bids will be used for

future reference’. If a decision is taken to consider such unsolicited bid, it may only

be done according to the SCM procedures and only if the “product or service offered

is a unique and innovative concept that will be exceptionally beneficial to, or have

exceptional cost advantages for the SABC; that the person who made the bid is the

sole provider of the product and service; that the need for the product of service by

the SABC has been established during its strategic planning and budgeting process;

The reasons for not going through the normal bidding processes are found to be sound

by the Bid Adjudicating Committee or a level as per the DAF”.[[23]](#footnote-23)

[19] Furthermore, the manual provided that in highly specialised markets, where

there was justification ‘to confine invitations to a known sole source supplier(s) or to

negotiate directly with them, a request for a proposal (RFP) is sent to such supplier to

be evaluated according to predefined criteria, and procurement is authorised

according to DAF, which must contain reasons for the selected or closed bid and what

the implications would be if an open invitation or bid was insisted upon.[[24]](#footnote-24) It is

mandatory that the organizations, institutions, and individual who provide goods and

services to government must register on a Central Supplier Database (CSD). In order

to register on the CSD website valid details had to be provided (email address, identity

number, cell number and bank details) From 1 April 2016 the SABC as a public entity

was required to use the CSD.

[20] The SCM manual also provided for the appointment of professional consultants

where the necessary skills to perform the function do not exist, and where it is

reasonably impossible for the SABC to train or recruit in the time available. Their

selection is based on a project basis where three quotations are called for and

accompanied by a detailed motivation from the Executive in the relevant business unit,

through the SCM for service providers process and approval is according to DAF.

Approval must be given by the GCEO/COO/CFO[[25]](#footnote-25) and such a decision is

documented by the Bid Evaluation Committee.

[21] The manual provided for deviations from the SCM procedures of inviting

competitive bids, where it is impractical to invite interested parties at short notice and

where such procurement of goods or services needed immediate attention by the

Executive Directors. The SCM gives examples of situations that may arise. A full

motivation for the deviation is to be forwarded to the Head of SCM for submission for

and approval by way of DAF.

[22] The SABC appointed Infonomix on the basis that it was not feasible to obtain

three quotations or to follow a competitive bid process. The SCM policy provided that

only one quotation may be sourced from Suppliers who were registered on the SABC

supplier database or the central supplier database. The SIU contended there was no

proof or any evidence which indicated that Infonomix qualified in respect of the

exclusionary rule categorising it as having become the *de facto* service provider in

‘digital media tools and software’.[[26]](#footnote-26)Infonomix was only registered as a company in

2015 and it opened up a bank account for the first time on 12 November 2016 which

was the first time it ever received payment from the SABC. Therefore, mention in the

business case or deviation motivation of its alleged ‘de facto’ position in media tools

and software standards as offered by it to many entities in the industry was incorrect.

 The Infomomix Award

[23] The SIU contended that Infonomix did not meet the criteria for acquisition

for an unsolicited bid. According to the investigation and information from affidavits

obtained by the SIU from officials at the SABC, Ms Thandeka Ndlovu mentioned that

from information she had, a gentleman by the name Muthe was seeking opportunity

to present a digital offering to the SABC. Ms Bessie Tungwana confirmed that Mr

Aguma confirmed at OPS that he met with people who presented a digital platform

concept to him, which he thought was needed for the SABC digital platform.

[24] The conclusion of the contract and payment to Infonomix was preceded by a

resolution (annexed as ‘FA2’) taken after an operational summit of the SABC, held

from 11 to 13 October 2016. Gathered from the resolution it was intended ‘to expedite

an aggressive SABC digital media proposition including but not limited to technical

infrastructure, platforms, content, strategic partnership and commercialization of

SABC digital properties’.

[25] Ms Thandeka Ndlovu (Ms Ndlovu) attached to the office of the Group Chief

Executive Officer (“GCEO”) facilitated the meeting. Mr Mutheiwana Rambuwani, a

representative of Infonomix presented a digital strategy proposal and it was then

decided to engage Infonomix for the commercialisation of the digital strategy of the

SABC. As projected the proposal had the potential of generating revenue for the SABC

in the amount of about R83 million. Ms Ndlovu was advised after the meeting by Mr

Tshifiwa Molaudzi (Mr T Molaudzi) and Mr Anton Heunis (Mr Heunis) that there was

value to be derived on the proposal. Attending the presentation were the following

employees of the SABC:

 1,Mr Tshifiwa Mulaudzi, the Group Executive Commercial

 2.Ms Thandeka Ndlovu, the GM in the office of the Group Chief Executive

 Officer;

3.Mr Anton Heunis Commercial Advisor in the office of the Chief Operations

 Officer;

4.Ms Nompumelelo Phasha- GM in the office of the Chief Operations Officer;

Ms Ndlovu recalled that Mr T Molaudzi and Heunis gave feedback to Mr James

Aguma, the GCEO; Ms B Tugwana the acting Chief Operations Officer, (ACOO);

and Ms A Raphela the acting chief Financial officer ( ACFO) and Mr T Molaudzi

undertook to prepare a business case to commence the process of appointment.

[26] Mr T Molaudzi received instructions from Mr Aguma that he wanted the SABC

to conclude a contract with Infonomix through Commercial Enterprises pursuant to the

digital media resolution. The contract was managed through Commercial Enterprises

as it was regarded as a ‘return on investment type of contract’ which required the

SABC to invest R4,5 million for set up costs, ‘in relation to the construction of the

websites in return for R83 million that would be generated over time.’

[27] Mr T Mulaudzi, Group Commercial Enterprises Officer, prepared the business

case and deviation request which were to be submitted simultaneously. He averred

that he was instructed on various occasions to revise the business case to align with

the deviation request which resulted in the business case being signed after the

deviation request.

[28] According to Mr T Mulaudzi’s affidavit[[27]](#footnote-27) the Infonomix proposal addressed the

following:

1.The SABC was battling with a digital strategy and the respondent undertook

 to develop a media proposition which would be commercialised. The first

 respondent identified seven websites that would be suitable for revenue

 creation.

 2,The websites would be repurposed and changed from their current platforms

 to attract consumer interactivity to commercial platforms to create revenue

 generation. ‘The respondent’s would assist the SABC in commercializing the

 seven websites, transforming the websites into the SABC’s immediate digital

 medial proposition.

 3.The first respondent would implement Value Added Services on the seven

 websites.

**The Business Case**

[29] The business case presented for consideration, for a service provider that

would provide for commercialisation of the digital media proposition project, is

annexed as “FA4”. This was ‘intended to build a digital ecosystem that better positions

the SABC, generate revenue for new content offerings via existing channels,

increased traffic to websites, gain more insights to the sales and attract new

advertisers’.

[30] The business case confirms that the SABC was approached by Infonomix an

external service supplier which:

“3.1 specialized in big data analytics, digital strategy development and

implementation, and Value-Added services”. There had been “extensive

engagements with Infonomix to explore a possible partnership

arrangement to ensure that the SABC begins to derive meaningful value

from its digital assets .

4. Financial implications

 Partnership with Infonomix will be on risk/reward dispensation based on

70/30 share of revenue derived from digital sales and VAS. The revenue

split is 70% in favour of the SABC.

4.1 The envisaged Digital Medial proposition projected requires set

 up funding of R4,5 million, The costs are for implementing of a

 new responsive design of 7 websites chosen by the SABC. The

 costs are for website skinning/platform development …..”

[31] The business case document was duly signed by the author Mr T Mulaudzi on

14 November 2016; signed on 15 November 2016 by Ms B Tungwana the Acting Chief

Operating Officer; signed on 14 November 2016 by Ms A Raphela Acting Chief

Financial Officer. The business case was approved on 15 November 2016. Ms

Tungwana averred that she signed the document because it addressed the SABC’s

‘needs, challenges and vulnerabilities. The SIU contended that this alone was not

sufficient to single source a service provider where there might have been others with

better products

**The Deviation**

[32] The request for deviation annexure ‘F5’ was presented for approval on 11

November 2016 and this was prior to the approval of the business case. It was signed

by Mr T Mulaudzi as Business Unit Line Manager; Ms A Mkhize as General Manager

SCM Governance & Special Projects; Mr S Mulaudzi as Head of SCM and Ms

Raphela as GCEO/CFO/COO

[33] Mr S Mulaudzi averred in his affidavit that he had reservations about approving

the deviation request until he met Mr Aguma the former GCEO after seeking clarity on

the matter. Mr S Mulaudzi’s initial view was that the SABC had to embark on an open

tender process because there were insufficient grounds to deviate. He averred that if

the request had been by a junior staff member he would have referred it back and

decided that an open tender be embarked upon. He engaged the GCEO as a matter

of courtesy.

[34] Mr S Mulaudzi and Ms T Ndlovu gave reasons why they thought the deviation

was necessary.[[28]](#footnote-28) The SIU contended that these reasons were a ploy which showed

the lengths to which Mr Aguma was prepared to go at the expense of the SABC, and

that they constituted an after- thought as these reasons are not found in the business

case nor motivation for a deviation. It was contended that the reasons fell short of the

prescripts of section 217 of the Constitution

[35] The SIU contended that it appeared from Infonomix’s responses it wished to

play a significant role in the digitisation of the National Broadcaster by avoiding

competitive tender because an open tender would have disclosed entities with better

expertise. According to the SIU it can be inferred from this response that Infonomix

was aware that the services offered by them were not novel or unique as revealed in

its responses to the SIU.[[29]](#footnote-29)

Conclusion of the Contract with Infonomix

[36] The letter of award to Infonomix was signed by Mr S Mulaudzi on 15 November

2016 being the same date that the business case was approved. The contract[[30]](#footnote-30)

between Infonimix and the SABC was signed by Mr T Mulaudzi on 7 December 2016.

[37] The SIU contended that the award and appointment of Infonomix should have

been subjected to a process before the Bid Evaluation and Bid Adjudication[[31]](#footnote-31). It also

contended that the contract partnership between the SABC and Infonomix which was

valid for five years was concluded where there was no indication of an emergency or

pressing reason that Infonomix was possessed of the ‘unique singularly available

capacity’ sought by the SABC, Infonomix was therefore not a “soul source “ supplier

within meaning as provided in the SCM manual.[[32]](#footnote-32) The contract which was concluded

could be classified as that of rendering a service. The supply chain management

policies were manipulated to favour Infonomix, in particular the SABC’s policies on

demand planning and management provided for in its manuals were not followed. The

SIU contended that the SABC was not obliged to consider unsolicited bids received

outside the normal supplier processes. Infonomix was paid upfront an amount of

R4 550 000 excluding VAT where there was no justification for doing so.

[38] The SIU contended that at the time of its appointment Infonomix was not yet

registered as a service provider on the SABC database, it was only registered on 18

November 2016 and on the Central Supplier Database on 12 December 2016.

Furthermore, it contended that the special payment to Infonomix from the cost centre

of the Chief Financial Officer was not in compliance with the SCM which stipulated

how all payments to service providers should be done.[[33]](#footnote-33)

**PAJA, Legality Grounds and Remedy**

[39] The application is brought in terms of the Promotion of Administrative Justice

Act 3 of 2000 (“PAJA”) alternatively, under the principle of legality in terms of section

172(1)(a).

 The SIU contended that the court was empowered to review and set aside the

decision of the SABC under PAJA because (i) the award was biased or suspected

of bias,[[34]](#footnote-34)(ii) the award was driven by a desire to favour Infonimix and was made for a

reason not authorised by the empowering provisions,[[35]](#footnote-35) (iii) the decision was for an

ulterior purpose or motive,[[36]](#footnote-36) (iv) the award was tainted by fraud and was made in bad

faith,[[37]](#footnote-37) (v) the process and action of awarding the contract was not rationally

connected to the reasons given for it by the SABC.[[38]](#footnote-38) Furthermore, under the principle

of legality the SIU contended that the SIU as an organ of State and its officials can

only exercise and perform functions vested upon them by law and that any purported

exercise of powers and functions not vested in terms of the law were constitutionally

invalid and must be set aside.

[40] The SIU contended that the Infonomix should not be permitted to profit from

an illegality. The representative of Infonomix ought to have known that the contract it

desired to conclude with the SABC must be preceded by an open tender. The pre-

payment it received was unlawful and, that it would be in the interests of justice that

the monies be repaid as prayed for or that an order as prayed for in the alternative

be granted.

[41] Mr Rambuwani who deposed to the answering affidavit on behalf of

Infonomix, contended that the SIU delayed in enforcing its rights in bringing the

application. The application was brought after a lengthy delay from the time that the

decision was taken on 7 December 2016, to the date on which the application was

launched on 19 December 2018, after a period of two years and twelve days. It is

contended that the applicant was aware of the decision and the alleged irregularities

from October 2017 as appeared from the affidavit of Mr T Mulaudzi.

[42] He contended that the SIU failed to exercise its constitutional obligations

diligently as is required in terms of section 237 of the Constitution. Infonomix was

prejudiced by the delay and because the SIU seeks the court’s indulgence, it has

failed to make out a proper case for condonation and, has not provided any

explanation covering the entire period for the delay before it launched this application

and that it stands to be dismissed on these grounds alone,

[43] It is contended further, that the relief sought to declare the contract between

Infonomix and the SABC void *ab initio* is academic. It is contended that Infonomix

has performed its obligation in terms of the appointment and that the agreement

between the parties was terminated by the parties due to the failure of the SABC to

perform its part of the terms of the contract and that the application stands to be

dismissed on this ground alone.

[44] Infonomix contended that the case is not clearly set out in the founding

papers. The papers contain unnecessary lengthy legal argument, and casts

aspersions without any factual foundation, therefore requiring very little for it to

answer to. The introduction of such material was impermissible and was prejudicial

to Infonomix.

[45] According to Mr Rambuweni, at the time of the appointment of Infonomix, the

SABC was experiencing financial difficulties and it found a need to introduce new

innovations to increase revenue with a cash injection. Infonomix as a ‘possessor of

profound digital knowledge, products and experience’ was accordingly invited during

the third quarter of 2016 to make a presentation to a team of SABC’s management

on its vision towards transformation and revenue generation for the SABC on how to

improve sales in the digital space.

[46] Infonomix asserted that during that time the SABC ‘was nowhere near the top

10 media houses when it came to digital sales. Several meetings and presentations

were made to management and the team sought approval for Infonomix to develop

an integrated digital strategy which was presented to the SABC on 23 May 2017

annexed as ‘AA2’ to the answering papers.

[47] Initially seven websites were approved by the SABC:

1. Technical Planning;

2. Content Strategies;

3. User and Consumer strategy;

4. Internal ops strategies;

5. Project Plans;

6. Testing plans;

7. Go-live plans;

[48] The contention by the SIU that the SABC never intended to follow a

procurement procedure that was ‘fair, equitable, competitive and cost effective’ as

provided in section 217 of the Constitution cannot be supported. The SABC took a

resolution at its operations summit meeting to expediate an aggressive digital

strategy including but not limited to “technical infrastructure, platforms, content,

strategic partnerships and the commercialisation of SABC digital properties”.

[49] Infonomix contended that it had no knowledge of the internal procedures at

the SABC. It further had no knowledge that these were not followed before it was

invited by the SABC to make a presentation and before the agreement was signed

on 15 December 2016. The clause 12.1 of the manual provides for circumstances

which merit a deviation which is motivated by the relevant Group Executive for

approval to the head of the SCM division and as per DAF.

[50] Infonomix contended that it is not the case of the of the applicant that the

deviation process was in itself invalid. Matters of a strategic nature are also dealt

with by a deviation process unless advised otherwise by the CFO and given the dire

financial straits in which the SABC was, it was clear that it would be impractical to

invite competitive bids as provided by the SCM policy. What was important was that

a deviation was done as a result of which the contract with SABC was concluded.

[51] Infonomix denied that the decision sought to be reviewed was unlawful, and

contended that its appointment was lawful. It contended that it was an innocent

service provider invited to a meeting arranged by the SABC and, that there were no

allegations that it had failed to meet its obligations in terms of the contract.

[52] In the event that it be found that the agreement was unlawfully concluded the

court was entitled to take into account any possible unjust consequences and make

an order that was just and equitable in the circumstances.[[39]](#footnote-39) Infonomix contended

that in this instance it would be inequitable and unjust if it were ordered to repay

monies it received where it had rendered service in terms of the contract entered

into. It would be prejudiced in that it utilised its ‘time, resources and manpower’

which it could have rendered for other clients. Infonomix contended that it would be

just and equitable that it should be allowed to retain monies it had received and it be

permitted to enforce payment for services already rendered.

[53] In reply the SIU raised an objection to the filing of an affidavit by Mr S

Mulaudzi which was annexed to the answering papers and was titled ‘confirmatory’

Affidavit’. The affidavit did not confirm the content of Mr Rambuwani’s answering

affidavit and the SIU had already in the founding papers addressed excerpts from

an affidavit obtained during its investigation from Mr S Mulaudzi.

[55] In as far as the delay was concerned the SIU denied that there was a delay, it

maintained that and its reasons were explained in a supplementary affidavit. It is

denied that the SABC terminated the contract as a result of its failure to perform. It is

also denied that it was the SABC which first approached Infonomix, as is evident

from annexure ‘FA9’. The SIU stands by its founding papers that the process leading

up to the decision and deviation was flawed and that the SABC failed to follow a

procurement process as provided by section 217 of the Constitution and according

to its policies.

**ANALYSIS AND THE LAW**

Mr S Mulaudzi’s Second Affidavit dated 9 August 2021

[56] Mr S Mulaudzi has filed an affidavit titled ‘confirmatory affidavit’ which has a

hundred and sixty-five paragraphs and together with annexures exceeds three

hundred pages. The SIU has responded to some parts of the affidavit in reply. Counsel

for the SIU contended in heads of argument that this affidavit should not be considered

by the court. Counsel for Infonomix has not addressed this point in the heads of

argument except to object to what seemed to be the SIU making out a case for review

in reply by using Mr S Mulaudzi affidavit. It is not clear which affidavit of Mr S Mulaudzi

is being referred to because there were two affidavits, the first addressed in the

founding affidavit.

[57] It is my considered view that if it is the second affidavit that is being referred to,

I find that it is not properly before the court. As pointed out in reply that Mr S Mulaudzi

has not been joined or intervened as a party, nor has a proper case been made out

why it should be considered as either a confirmatory or supporting affidavit on behalf

of Infonomix. There was further no application to file such affidavit. I shall exercise my

discretion to disregard the second affidavit or any reference to it in argument and I

shall rely on the founding, answering and replying affidavit where relevant to the

answering affidavit.

**CONDONATION**

[58] Infonomix raised the delay of more than two years by the SIU in launching the

application. The SIU explained the delay in a supplementary affidavit. Counsel for

the SIU has dealt with this point *in limine* in its heads of argument and counsel for

Infonomix has not dealt with the issue.

[59] The launch of the application was preceded by an investigation authorised

by the President during September 2017, in a proclamation where the SIU had to

investigate eight entities Infonomix being one of them. The investigations took just

over a year to complete during September 2018 and the application was launched in

December of 2018. I find that the delay was understandable and reasonable and

since the matter has not been taken further, I assume that there is no objection to

condonation being granted. In the circumstances condonation is granted.

**THE INFONOMIX AWARD**

[60] In terms of Act 74 of 1996 (‘the SIU Act’) the SIU was authorised by the

President by proclamation issued in terms of section 2(1)(a)(ii) of the SIU Act to

investigate malfeasance within the SABC. The SABC, is a public entity as provided

in Schedule 2 of the PFMA. The SIU’s functions are provided for in section 4 of the

SIU Act and with regard to this matter in terms of section 4(1)(c)(i) and 5(5) it is

permitted to institute civil proceedings in its name before a court of law .

[61] The SIU launched the application in terms of PAJA alternatively in terms of the

principle of legality. Counsel for the SIU contended that SIU now relies mainly on the

principle of legality as determined in various cases. In Gijima[[40]](#footnote-40) the following was

stated:

“[39]… The principle of legality is “an incident of the rule of law”, a founding

value of our Constitution. In Affordable Medicines Trust the principle of legality

was referred to as a Constitutional control of the exercise of public power.

Ngcobo J put it thus:

“The exercise of public power must therefore comply with the

Constitution which is the supreme law, and the doctrine of legality

which is part of that law. The doctrine of legality which is an incident of

the rule of law, is one the constitutional control through which the

exercises of public power is regulated by the Constitution.”

 [40]….the exercise of public power which is at variance with the principle of

legality is inconsistent with the Constitution itself. In short it is invalid…

…The principle of legality may thus be a vehicle for its review. The

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.”

Counsel for the respondent agrees that this matter was always located only within

the legality principle and nowhere else and that the SIU should not be allowed to flip-

flop between a PAJA and legality review. I am of the view that the matter will be dealt

with on the principle of legality. In the Fedsure Life Assurance[[41]](#footnote-41) the following was

stated:

“ …a local government may only act within the powers conferred

upon it by law. There is nothing startling in this proposition – it is

a fundamental principle of the rule of law, recognised widely, that

the exercise of public power is only legitimate where lawful. The

rule of law – to the extent at least that it expresses the principle

of legality-is generally understood to be a fundamental principle

of constitutional law.”

[62] The SABC complied with the prescripts of procurement as provided in section

217 of the Constitution,[[42]](#footnote-42) and the PFMA[[43]](#footnote-43) by incorporating them in its procurement

policies and manuals. The PFMA places certain responsibilities on officials in a

public entity which includes the SABC.[[44]](#footnote-44) The SABC has incorporated into its policy

and manuals National Treasury’s[[45]](#footnote-45) instructions and guidelines to accounting officers

in public entities on finance and supply chain management.

[63] It is common cause between the parties that Infonomix was identified in the

Proclamation issued by the President as one of eight companies that were to be

investigated. The case against infonomix is mainly based on a discovery during such

investigation by the SIU that the SABC failed to comply with its procurement policies

before appointing Infonomix and concluding a contract. Furthermore, it regarded as

unlawful the upfront payment of R4,5 million.

[64] The SIU contends that there was no justification for such payment and

Infonomix agrees that it received such payment but on the one hand it denied that

there was no basis for such payment because it had rendered a service, however on

the other hand it admits that it required the R4,5 million as set up funding which it

included in its digital media proposition. Infonomix does not indicate the nature of the

services it rendered which justified such payment or explain how the monies were

utilised for set up within the premises of the SABC. The SIU also does not tell this

court what the investigation uncovered regarding the use of the payment as start up

finance and whether there were services rendered to the SABC by Infonomix.

[65] Counsel for Infonomix concedes that neither the quotation process nor

bidding process was followed before the appointment, however, it was contended

that the appointment in terms of the deviation process was lawful in that it complied

with the SABC’s SCM policy and manual. Infonomix has not divulged what these

pre-deviation SCM processes were and which it had knowledge of, that there was

compliance with the SCM policies.

[66] In my view Infonomix, therefore does not dispute that the SIU relied on

policies of the SABC as the basis for it case and on the processes which should

have been engaged by the SABC before awarding the tender, as set out in the

founding papers. It does not dispute the fact that the Head of Supply Chain had the

delegated authority to manage procurement to administer processes such as the

administration of quotations, bids drafting of contracts, pre-qualification of suppliers,

negotiation of contracts with suppliers; conducting due diligence audits on high risk

suppliers and contractors; and to facilitate the appointment of members of the Bid

Specification and Evaluation Committees.(my underlining)

[67] As I see it, the framework for procurement adopted by the SABC not only

complied with the law but it served the public interest because the SABC relies among

other sources of income, on contributions through licence fees from the public. The

SABC’s polices and manuals[[46]](#footnote-46)served to ensure that all employees or functionaries,

without exception abide by a process of procurement that brings transparency and

integrity to the SABC and conforms to section 217 of the Constitution; that public

resources are properly utilised; that malfeasance and corruption in the administration

is rooted out. In as far as the SABC failed to comply with the law, such conduct was

reviewable, and the award may consequently be set aside and the contract entered

into declared void ab initio.

[68] Where provision is made for the eventuality of a deviation, the process

leading up to that state must have followed the laws of procurement for services and

or goods. Section 217 makes it peremptory that the processes preceding the

procurement are fair, equitable, transparent, competitive and cost effective.

[69] In fact, in the answering affidavit Infonomix bemoaned the lengthy founding

papers which it said were mainly argumentative and cast aspersions without factual

foundation, which left very little to answer to. The founding papers were indeed very

lengthy because SIU embarked on an exposition of the laws and SCM procedures

on which it founded its case. In my view there is nothing wrong in that approach. It

would not have served the SIU well if it had not dealt with the source of these

procedures in the founding papers and only dealt with them in argument. Its case is

mainly based on its investigations within the SABC, supported by affidavits obtained

from employees involved and who had personal knowledge of the incident. The

SABC, has not opposed this application. The excerpts from the employees’ affidavits

which were not controverted remain relevant to consideration herein.

[70] Infonomix was very circumspect about the individuals it encountered on

several occasions at the SABC, referring to them as the team. The SIU deals with

the affidavits of Ms T Ndlovu and Mrs Tugwana who had knowledge of the

unsolicited bid made to the GCEO and how a meeting was facilitated for the

presentation by Infonomix before the OPS summit; that Mr T Mulaudzi, Mr Anto

Heunis informed to Ms Phasha and herself of their approval of Infonomix’s proposal

and later they gave feed back to the GCEO, Ms Tungwana Ms Raphela and herself.

A resolution to expedite the commercialization of an aggressive digital strategy was

taken. The resolution standing alone does not validate the process of procurement.

[71] The question that needs to be asked is whether the SABC complied with its

policies before making the award and entering into a contract with Infonomix. In my

view, even if the procurement of the digital strategy was unsolicited and based on a

resolution which may have been classified as necessary or urgent at an OPS

meeting, procurement thereof in all formats identified required that the necessary

demand management be undertaken and correct processes complied with, which

were fair, transparent, equitable, competitive and cost effective, even where it was

necessary to engage a deviation to the process of procurement.

[72] I reiterate the SIU relies on content of the affidavits of the employees as to

what transpired. Infonomix does not have a version of what transpired even though it

had several meetings and met with the team to conclude the agreement. In order to

qualify Infonomix as a sole supplier the SABC had to comply with in paragraph 9.4

and 9.5 of the SCM manual. Infonomix’s stance is that it should not be treated

harshly because it is an innocent service provider, which had no knowledge of the

SABC’s SCM.

[73] In my view this does not bear truth because Infonomix should have known that

the SABC was not a private company but a public entity which would be required to

subject itself to open tender processes, especially where millions of rand were

involved. This is a fact that it could have familiarised itself with the processes before

approaching the SABC to present its unsolicited presentation since it went to great

lengths to research the product it wished to sell to the SABC. Infonomix did not

dispute its responses to the SIU dealt with in the founding papers. The responses

show that Infonomix researched global broadcasting services like ‘Sky’ ‘HBO’ and

others and even knew that the BBC had embarked on a similar project. What was not

established by the SABC was whether Infonomix possessed a product that was

standard in the market and Infonomix in answer does not demonstrate or make out a

case in that regard. The SABC relied on the say so of Infonomix.

[74] The SIU contended that this was indication that Infonomix had no track record

of innovations and expertise in the digital media sphere, that it was a fairly new

company and that it was aware that it would not compete with well established players

in the industry if the procurement for services and goods in this field was subjected to

open tender.

[75] The SABC manual does provide for the appointment of a sole provider.[[47]](#footnote-47) A sole

provider is one that has a product which is unique and innovative. This requires

‘strategic planning’ involving a needs analysis and an evaluation whether the need has

been budgeted for, and in exceptional cases whether there were cost advantages for

the SABC. Reasons had to be provided to the Bid Evaluation Committee for not going

through normal bidding processes, and this should be coupled with a DAF approval.

The SIU relied on the affidavit of Ms Tungwana and Mr T Mulaudzi as to what occurred

when the business case was prepared. According to Mr T Mulaudzi, this document

had to be amended to suite Mr Aguma and it seems that in this instance he took

decisions that should have been made by the Bid Specification and Bid Evaluation

Committees.

[76] The business case penned by Mr T Mulaudzi confirms that the SABC was

approached by Infonomix an external service provider also stating its speciality. The

set up costs were for ‘implementing a new responsive design of 7 websites …for

skinning/platform development’. A partnership arrangement was envisaged on a 70/30

shareholding without any assurance that Infonomix had been in the business and

could render the service. The business case was presented to Mr S Mulaudzi with a

request for deviation as Head of SCM.

[77] The SIU dealt with Mr S Mulaudzi’s affidavit whose first hunch was that there

were insufficient grounds to deviate from the procurement process; he stated that he

would have directed that the request for the deviation for the appointment of Infonomix

for the procurement of digital tools be subjected to open tender if it came from an

employee of lower rank. This meant that he was not in agreement or convinced with

what was proffered in the business case (i) that it was not feasible to apply for three

quotations or a competitive bid process or (ii) that the service to be provided by

Infonomix did not qualify as one of the exclusions listed in the manuals or was an

exceptional case (iii) that the service to be provided by Infonomix was disguised as an

investment type of contract which required the SABC to invest R4,5million for set-up

costs for a projected return of R83million and for profits to be shared (iv) the probability

that Infonomix did not possess the speciality it professed and that an open tender was

justified(v) that this was a procurement of service that it had to go though the Bid

Specifications and Bid Evaluation Committees to evaluate the need for a deviation.

[78] Mr S Mulaudzi was also aware that the policy had set down a procurement

threshold that procurements above R2 million had to be subjected to open tender.

In my view Mr Molaudzi’s first hunch expressed the correct position which his mandate

demanded in terms of the SCM policy and manuals, especially because the SABC

was bound by law and had in principle and in writing confirmed and adopted the law

with regard to procurement and to be bound by the National Treasury Regulation 16A

where applicable. Any other instruction given outside of these policies were therefore

reviewable and invalid and the award thus made had to be set aside. He appended

his signature to the deviation request knowing that the appointment did not comply

with the law. The reasons given by Mr S Mulaudzi as to why he changed his mind after

discussions with by Mr Aguma have no merit. As see it, the discussions were intended

to protect Infonomix by ensuring that it was awarded the tender.

[79] In terms of the policy the decision not to subject the procurement to open tender

was not for Mr Aguma to make alone or for Mr S Mulaudizi to comply with the request

when he knew that procurement policies had not been followed by Mr Aguma, Mr T

Mulaudzi and others. Ms Ndlovu went further and suggested that there were reasons

for not to issuing an RFP(request for a proposal) but this does not explain why the

correct process was not followed. The RFP would have enabled the SABC to evaluate

the risk and revenue available to engage Infonomix to be selected as a sole source

and to present this to the Bid Evaluation Committee according to ‘predefined criteria’

of the SABC. Ms Ndlovu further supported a request for a special payment from the

cost centre of the Chief Financial Officer which request is presented in the business

case. She requested approval for the payment a day after Infonomix was registered

on the supplier data.

[80] The payment of R4,5 million is dealt with in the business case and in the

contract. In the business case it is stated that the:

 “ 4 ……..Digital Media proposition requires set up funding of R4.5 million …

 ……. The costs are for implementing of a new responsive design of 7

 skinning/platform development intended to meet the following

 objectives……

In the contract concluded the following is stated:

 “9.1 In consideration for the services to be rendered by the service provider to

the SABC in terms of phase 1 and 2 of this agreement, the SABC shall pay the

service provider the amount of R4,5 million excluding VAT prior to the

commencement of services.”

The contract does not explain whether the services to be rendered include set up

costs.

[81] In the answering affidavit and without giving details Infonomix contended that

the agreement was terminated by the parties. The SIU denies that the upfront payment

was contractually justified and lawful and further denies that the termination of the

contract was unfair irregular and unlawful. It is also not clear whether any services

were rendered by Infonomix for setting up the websites chosen by the SABC and to

what extent both parties had progressed in implementing the contract, whether any

payments were made to Infonomix over and above the R4,5 million rand. No facts are

given whether the SABC and Infonomix made profits and to what extent any have

been paid out. These facts may not be relevant to prayers 1 and 2 of the notice of

motion in that I have already found that the appointment of Infonomix was reviewable

and should be set aside and consequently the contract entered into was void *ab initio*

where the procurement procedures had not been complied with/

[82] In as far as prayers 3 and 4, are concerned, I am of the view that both Infonomix

and the SABC flouted the SCM procedures, the SABC being the most guilty party by

failing to follow a competitive bidding process as envisaged in section 217 of the

Constitution and the PFMA and, for engaging an unsolicited bid with an entity which

did not qualify as a sole source provider.

[83] None of the employees involved in the malfeasance have been joined

individually to this application which would probably have made them liable in their

personal capacities for the loss the SIU wishes to recover. The prayers suggest there

is probably more to the initial payment of R4,5 million which the SIU wishes to uncover

for example as suggested in the alternative prayer. The SABC has not opposed the

application and in my view an order cannot be made in the circumstances of this case

that only Infonomix repay the loss the SIU wishes to recover where the SIU has not

shown that the SABC had not derived any benefit from the payment it made.

[84] While it is trite that Infonomix should not benefit out of a contract which is void

ab initio, in this instance the SABC may have benefitted from whatever service it

received from Infonomix before the contract was terminated and probably extending

beyond that period. By declaring the agreement void ab initio Infornomix would be

prevented from deriving further benefit from the SABC derived out of the contract.

[85] The SIU has not determined in its investigations what the value of such benefit

might be and it has not made out a case why it should be determined that it is entitled

to an order in the alternative, if in its investigations it did not go further in determining

what gains or losses the SABC suffered as a result of the impugned decision or what

profits were earned. The SIU had full access to information at the SABC from which it

could establish that more than the R4,5 million was paid out. The SIU has made no

demand for repayment of the R4,5 million and additional amounts it might have

uncovered prior to the launch of this application. The SIU does not make out a case

that the SABC itself was not playing open cards and was refusing to avail information

from its books regarding its dealings with Infonomix justifying an order in the alternative

against Infonomix only. Infonomix has not been prior to the launch of this application

been approached by the SIU to give an account of its services to the SABC and

payment received or profits paid out and that Infonomix declined to give such

information. In my view there is scant information available to this court to justify the

rendition of a statement of account and debatement thereof.

[86] In my view it would therefore not be just and equitable to grant prayers 3 or the

alternative prayer 4.

[86] In the result the following order is granted:

1. It is ordered that the decision of the second respondent of 15 November

2016 to award the tender to the first respondent is reviewed and is set

aside;

2. It is hereby declared that the contract entered between the first and second

respondent on 7 December 2016 is void *ab initio*;

3. The first respondent is ordered pay the costs of this application and that

such costs shall include the costs consequent upon the employment of two

counsel;

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**TLHAPI J**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

**HEARD AND RESERVED ON: 26 AUGUST 2023**

**DELIVERED ON: 01 SEPTEMBER 2023**

Appearances:

For the Applicant: Adv J Motepe SC with M V Magagane (instructed by) Werksmans Attorneys

For the First Respondent: Adv M Makgato (instructed by) Manong Pilane Mokotedi Inc

1. Preamble of SIU Act: “….establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public and of instituting and conducting civil proceedings in any court of law….in its own name or on behalf of the State institutions…..to provide for the establishment of Special Tribunal so as to adjudicate over civil maters……” [↑](#footnote-ref-1)
2. SIU Act section2 (1):”The President may ……whenever he or she deems it necessary on account of any of the grounds mentioned in subsection (2) by proclamation in the Gazette (a) establish a Special Investigating Unit in order to investigate the matter concerned.” 2(2) “The President may exercise the powers under subsection (i) of any alleged:

(a)serious maladministration in connection with the affairs of any State Institution;

(b)improper or unlawful conduct by employees of any State Institution;

(c)unlawful appropriation or expenditure of public money or property;

(d)unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;

(e)intentional or negligent loss of public money or damage to public property

(f)……..

(g)……” [↑](#footnote-ref-2)
3. Sections 4(1)(c) and 5(5) of the SIU Act. [↑](#footnote-ref-3)
4. Schedule to the Proclamation:”1.The procurement of, or contracting of goods, works or services by or on behalf of the SABC from………………….Gekkonomix (Pty)Ltd (trading as Infonomix) ……and payments made in respect thereof, in a manner that was:-

(a)Not fair, competitive, transparent, equitable or cost effective;

(b)Contrary to applicable-

 (i) legislation;

 (ii) manuals, guidelines, practice notes, circulars of institutions issue by National Treasury; or

 (iii)manuals, policies, procedures, prescripts, institutions or practices of or applicable to the SABC;

 and related unauthorised irregular or fruitless and wasteful expenditure incurred by the SABC or

 the State.” [↑](#footnote-ref-4)
5. Section 217 (1) of the Constitution: “When and organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.” (my underlining) [↑](#footnote-ref-5)
6. Section 51(1)(a)(i) and (iii) of the PFMA: “(1) An accounting authority for a public entity- (a) must ensure that a public entity has and maintains- (i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii)………..

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost -effective” (my underlining) [↑](#footnote-ref-6)
7. Section 76(4) of the PFMA: “The National Treasury may make regulations or issue instructions to all institutions to which this Act is applicable concerning-

(a)…….

(b)……

(c) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive, and cost-effective.” (my underlining) [↑](#footnote-ref-7)
8. Treasury Regulation 16A6.2-which provides for a supply chain management system in subjecting procurement through a bidding process which requires bids to be adjudicated through a bid adjudication committee-the establishment, composition and functioning of bid specification, evaluation and adjudication committees, the selection of bid adjudication members – bidding procedures -approval of bid evaluations and/or adjudication committee recommendations. [↑](#footnote-ref-8)
9. Section 217(3) of the Constitution provided that National legislation must prescribe a framework….. [↑](#footnote-ref-9)
10. Section 217 of the Constitution and section 76(4)(c) which provides National Treasury to make regulations or issue instructions to all institutions to which the Act applies concerning: “the determination of a framework for an appropriate procurement and provisioning system which is fair equitable transparent competitive and cost effective. [↑](#footnote-ref-10)
11. National Treasury Instructions Note 3 of 2016/17 addressed to all Accounting Authorities of Public Entities and others which was issued as a guide to prevent and combat abuse in supply chain management systems. This instruction (8.1) deals with when an accounting office or authority/officer may deviate from inviting competitive bids in cases ‘of emergency, serious unexpected situations that pose immediate risk to health, life, property etc and where (8.3) sole source procurement may occur where there is evidence that only one supplier possesses the unique and singularly available capacity to meet the requirements of the institution at (8.4)…invite as many suppliers as possible and select the preferred supplier using the competitive bid system. At (8.5)deviation will be allowed in exceptional cases subject to the approval from relevant treasury [↑](#footnote-ref-11)
12. Section 217 of the Constitution and Foot note 9 [↑](#footnote-ref-12)
13. Foot note 11 [↑](#footnote-ref-13)
14. Issued by National Treasury dated February 2004- Chapter 3: 3.1.1;3.1.2; 3.2 [↑](#footnote-ref-14)
15. Section 51(1)(a)(iii) if the PFMA [↑](#footnote-ref-15)
16. Founding Affidavit paragraphs 54: 54.1 to 54.3-“The Head of Supply Chain Management had delegated authority to implement and administer the procedures and processes in terms of the SCM Policy-inter- alia administration of quotations, procurement contracts, pre-qualification of suppliers, negotiation with suppliers….- “ the SCM policy provides for Bid Adjudication, Operations, Bid Specification and Bid Evaluation Committees and the Head is to facilitate the appointment of the Bid Specification and Bid Evaluation Committees- and paragraph 119.2 of the Founding Affidavit and 6.5.1 of the SCM [↑](#footnote-ref-16)
17. Founding Affidavit paragraph 54.4 [↑](#footnote-ref-17)
18. Founding Affidavit paragraph 55 dealing with section 8 of the SCM model- demand management; acquisition management; logistics management; disposal management; risk management; supply chain performance management (footnote 14) [↑](#footnote-ref-18)
19. Section 11 SABC SCM policy: “11.1 In cases where circumstances merit deviation(s) from particular provision(s) of the policy or procedures including emergency purchases, written submissions shall be routed through the SCM division, for approval in accordance with DAF for further approval.

11.2 Where a closed bid is justified, prior approval shall be granted in accordance with DAF” [↑](#footnote-ref-19)
20. Paragraph 62 of the Founding Affidavit. SCM manual para 5.4 the pillars being (a) value for money (b) Open and effective competition which require a framework of procurement laws, policies, practices and procedures that is transparent (documents that must be readily accessible to all parties-openness of procurement process and encouragement of effective competition (c) Ethics and fair dealing; (d) accountability and reporting -……it is an essential element of accountability that there is openness and transparency in administration, by external scrutiny through public reporting- within the procurement framework \*the CFO is accountable to the SABC GCEO for the overall management of procurement activities; \*Managers are accountable to the CFO…\*All people exercising procurement functions must have regard for this policy and are accountable to management; (e)Equity [↑](#footnote-ref-20)
21. Foot Note16 and 17 [↑](#footnote-ref-21)
22. Founding Affidavit paragraph 64 – dealing with paragraph 8 of the Manual. [↑](#footnote-ref-22)
23. Paragraph 9.4 SCM Manual (DAF-Delegation Authority Framework -deals with accountability , transparency in the decision making in all spheres of management-procurement-finances and budget approvals [↑](#footnote-ref-23)
24. Founding Affidavit paragraph 68 (paragraph 10.2 and 10.3 of the SCM [↑](#footnote-ref-24)
25. GCEO (Group Chief Executive Officer)/ COO(Chief Operations Officer) CFO(Chief Financial Officer) [↑](#footnote-ref-25)
26. Paragraph 12.2 of the SCM manual [↑](#footnote-ref-26)
27. FA3 affidavit Mr T Mulaudzi [↑](#footnote-ref-27)
28. Founding Affidavit paragraph 98: Mr S Mulaudzi’s affidavit: Infonomix was going to exploit the advertising space with regard to multimedia set up-A platform that was at the time not operating effectively within the SABC-the idea was to sell advertising space on multimedia…this was treated as a confidential approach to the market/competitors…in the event we were to embark on an open ender process and request for proposal, our competitors ….could reposition themselves to close off the market to the SABC and create an environment where it becomes difficult for the SABC to come in and make favourable commercial impact – Infonomix was going to provide training and establish a unit within the SABC ….Mr Aguma believed strongly that his aspect should not be known to the market because you would then have to include this in your specifications…Infomnomix had current engagements with our competitors. As a result of this, Mr Aguma felt that it would jeorpadise the current relationship of Infonomix with their current clients if they would find out than Infonomix were to tender at the SABC which is a direct competitor-Infonomix had exclusive rights on content and were the sole supplier of sport related content including video based, highlights etc which was to be provided to the SABC,” At paragraph 16 of his affidavit – “although the most viable option would have been to embark on an open tender procedure, I was comfortable that the reasons provided to embark on a deviated procedure were justifiable and documented.”

Founding Affidavit paragraph 99: Ms T Ndlovu’s affidavit: ….reason to deviate…aimed to develop and implement the digital media strategy in a confined manner without losing competitive edge….The project was intended to create an additional digital revenue stream which had not been explored to its full potential by the SABC as the corporation advertises on TV and Radio….” [↑](#footnote-ref-28)
29. Paragraph 4.1 of its responses to the SIU-it saw an opportunity “to be recognised as a digital great for helping lead the national broadcaster into the 21st century mimicking established global players….the BBC embarked on a similar project in 2001…” In Paragraph 4.8 ….it investigated “largest most successful broadcasting services and content providers globally” and “major systems such as HBO, Hulu, Netflix, ESPN, Bloomberg and Sky” [↑](#footnote-ref-29)
30. Salient terms of the contract in Paragraph 111 of the founding affidavit: “3.1 The SABC wishes to engage a suitably qualified service provider to provide the services. The SABC requires the implementation of aggressive digital media proposition including but limited to technical infrastructure, platforms, content, strategic partnership and commercialisation of the SABC digital strategies.

3.2The service provider specializes in big data analytics, digital strategy development and implementation and value-added services and has represented to the SABC that it has the necessary ability, expertise, resources and skills to render the services required by the SABC.

3.1.1 The SABC hereby wishes to appoint the service provider for the development and execution of a digital strategy whose outcome is to launch and run medial sales for the SABC through commercial enterprises.

3.1.2 The SABC further wishes to conform that the service provider will also run Value Added Services;

5.2 The parties agree on a profit share model of 70% to the SABC and 30% to the service provider ………

5.3 With respect to VAS profit share is based on gross revenue less operator costs and/or subscriber competition price. The profit share is 68% to the SABC and 32% to the service provider…..

9.1 In consideration for the services to be rendered by the service provider to the SABC in terms of Phase 1 and 2 of this agreement, the SABC shall pay the service provider the contract amount of R4, 5million excluding prior to the commencement of the services.” [↑](#footnote-ref-30)
31. Founding Affidavit paragraph 119.2 and 120: the SABC procurement policy 6.5.1 and 6.5.2 and 6.8.1 “The BEC is the committee that comprises individual who are specialists from different divisions of the SABC who are brought together to evaluate bid for procurement of goods, services, works or content and make recommendations to the BAC” [↑](#footnote-ref-31)
32. Sole source means “where there is only one supplier” and at 9.5(a) of the manual :”a sole source situations is where there is only one supplier and or OEM for the goods sought.” [↑](#footnote-ref-32)
33. SCM Manual paragraph 10,11(a):” All payments to suppliers are to be made by Finance Department except petty cash disbursements. Suppliers will be paid by electronic funds transfer (EFT) according to the standard agreed and contracted supplier payment terms and conditions. Standard payment terms and conditions must apply where possible. The SABC standard payment terms are 30days from dated of statement. In certain instances, suppliers may request early payment. This needs to be considered at the discretion of the Head of SCM or his delegate.: [↑](#footnote-ref-33)
34. as intended in section 6(2)(a)(iii) [↑](#footnote-ref-34)
35. as intended in section 6(2)(e)(i), and [↑](#footnote-ref-35)
36. as intended in section 6(3)(ii) [↑](#footnote-ref-36)
37. as intended in section 6(2)(e)(v) [↑](#footnote-ref-37)
38. as intended in section 6(2)(f)(ii)(dd) [↑](#footnote-ref-38)
39. Section 172(1)(b) of the Constitution [↑](#footnote-ref-39)
40. State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2018(2)SA 23 (CC) paragraphs [38] [39][40] [↑](#footnote-ref-40)
41. Fedsure Life Assurance v Greated Johannesburg TMS 1999 (1) SA 374 (CC) paragraph [56] ; Affordable Medicines Trust and Others v The Minister of Health and Others 2006 (3) 247 (CC) [↑](#footnote-ref-41)
42. Foot note 5 -the tendering system must be fair, equitable, transparent, competitive and cost effective [↑](#footnote-ref-42)
43. Footnote 15 – maintains “(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent competitive and cost effective” [↑](#footnote-ref-43)
44. Section 57 of the PFMA:” An official in a public entity (a) must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official; (b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility’ (c) must take effective steps to prevent, within that official’s area of responsibility, any irregular expenditure and fruitless and wasteful expenditure any under collection of revenue; (d) must comply with the provisions of this Act to the extent applicable to that official including any delegations and instructions in terms of section 56; and (e) is responsible for the management ….of the assets and management of the liabilities within that officials area of responsibility” [↑](#footnote-ref-44)
45. National Treasury Note 3 of 20120176; and Treasury Regulations 16A6.2 [↑](#footnote-ref-45)
46. Section 2.2 and 5.4 of the SCM manual; foot note 20 and 23 above [↑](#footnote-ref-46)
47. [↑](#footnote-ref-47)