
A party may retain profits derived from an unlawful contract: a look at the ‘no loss, but no gain’ principle

On 28 November 2025, the Supreme Court of Appeal (SCA) handed down judgment in *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others*. The judgment clarified the nature of the remedial discretion enjoyed by the Court under section 172(1)(b) of the Constitution, and the import of the judgment of the Constitutional Court in *Allpay II*.¹

The SCA held that in considering a just and equitable remedy, the court is not precluded from considering benefit or profit, in the analysis. This is because, as the Constitutional Court held in *Allpay II*, the principle is that any benefit derived by a firm, as the result of an unlawful contract, “should not be beyond public scrutiny”. This, the Court held, necessitates that any benefit derived from an unlawful contract falls to be scrutinised to determine *how* the court should exercise its discretion. In this regard, the SCA emphasised that if benefit from an unlawful contract is excluded from remedial consideration altogether, the benefit would axiomatically fall beyond public scrutiny, because of its exclusion from the very exercise the court is required to undertake, in arriving at a just and equitable order.

Mafoko Security (Pty) Ltd (“Mafoko”) was awarded a tender to provide security services to the SABC. The award to Mafoko was made by the SABC’s interim Board, despite the Bid Adjudication Committee and the Group Executive Committee of the SABC recommending that the tender be awarded to Mjayeli Security (Pty) Ltd (“Mjayeli”), it having scored the highest on price and empowerment. Mjayeli applied to have the award reviewed and set aside, in the High Court. The SIU was, after the launch of the review, tasked with investigating the award to Mafoko. The SIU found that the award was unlawful, and applied as an intervening party to Mjayeli’s pending review application. In the review proceedings, the SIU sought a disgorgement order against Mafoko. The High Court set aside the award of the tender to Mafoko and granted the disgorgement order.

On appeal to the SCA, Mafoko argued that the High Court misconceived the nature of the just and equitable discretion it enjoyed under section 172(1)(b) of the Constitution. In assessing this contention, the SCA confirmed its earlier decision in *Special Investigating Unit v Phomella Property Investment (Pty) Ltd and Another*,² concerning the interpretation of *Allpay II*. In *Phomella*, the SCA held that the so-called principle of “no loss, but no gain” was not consistent with *Allpay II*, and the

¹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC).

² 2023 (5) SA 601 (SCA).

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“remedial latitude” the Court had exercised in other decisions in which it made just and equitable orders.

The Court held, interpreting *Allpay II*, that the award of an unlawful tender does not give rise to a *right* to benefit from an unlawful contract. It held that while this is true, the Court is not precluded from permitting a party to enjoy the benefit of a contract, in the exercise of its remedial discretion. *Allpay II*, the Court held, requires that any benefit derived “should not be beyond public scrutiny”. The Court must scrutinise the benefit to determine how it should exercise its just and equitable discretion. In making this determination, the conduct of a person awarded the tender must be considered. So too are considerations such as whether the firm had a constitutional duty to provide the relevant service, and the content and duration of that duty.

On the evidence before it, the SCA found that Mafoko could not be found to be culpable in the award of the unlawful tender; that it provided the services required; that its performance was not criticised; and that the SABC sought an order requiring Mafoko to continue to provide the services. It was clear that the High Court had committed an error of law, in adhering to the no loss, but no gain principle.

In overturning the High Court’s order, the SCA stated that the finding that the award of the tender was unlawful, “does not oust from consideration whether a blameless tenderer that is required to continue to render a service to the state cannot enjoy any profit”. It further found that private gain is not opposed to the public good. Finally, it found that the paramountcy of the public good does not exclude the possibility of profit being warranted from an unlawful contract. It stated that on the evidence before it, Mafoko could not be said to have been culpable.

For these reasons, the SCA remitted the matter to the High Court to reengage the parties to consider a just and equitable order, as the evidence before it was not sufficient for the SCA to make that order.

Key Takeaways

The judgment finds that, as held in *Phomella*, *Allpay II* is no authority for the no loss, but no gain principle. The Court finds that the High Court erred in adhering to the principle, because the series of decisions it had relied on – which had similarly adhered to the principle – were wrongly decided. The Court is required to scrutinise the benefit derived from the unlawful contract, in determining a just and equitable order. In this analysis, the Court is not precluded from permitting a party to enjoy the benefit of a contract. The conduct of the party awarded the tender is crucial to the analysis.

Developing

On 27 December 2024, the SCA delivered judgment in *Zeal Health Innovations (Pty) Ltd v Minister of Defence and Military Veterans and Another*.³ The SCA’s judgment in this case was appealed to the Constitutional Court and the appeal was argued in November 2025. The judgment of the Constitutional Court in *Zeal Health*, which is awaited, may be significant as the issues raised in the matter concern the exercise of a court’s discretion under section 172(1)(b) of the Constitution in making a just and equitable order after having declared a decision to award a tender unlawful.

³ (967/2023) [2024] ZASCA 183 (27 December 2024).

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Significantly, the SCA in *Zeal Health* declared the award of a tender and the subsequent contract in that case as unlawful and constitutionally invalid; however, it ruled that such declaration of constitutional invalidity does not have the effect of divesting the innocent tenderer of any rights to which it would have been entitled under the contract. While the SCA did not explicitly reference *Allpay II*, nor refer to *Phomella's* interpretation of *Allpay II*, the proper interpretation of the Constitutional Court's judgment in *Allpay II*, as interpreted by the SCA in *Phomella*, is currently before the Court.

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