


REPUBLIC OF SOUTH AFRICA



**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
T/A INFONOMIX

FIRST RESPONDENT

SOUTH AFRICAN BROADCASTING
CORPORATION SOC LIMITED

SECOND RESPONDENT

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

[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 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

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 matters....."

² SIU Act section 2 (1): "The President maywhenever 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)....."

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

[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

[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

³ Sections 4(1)(c) and 5(5) of the SIU Act.

⁴Schedule 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."

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 of the Constitution and these are echoed in section 51(1)(a)(i) and(iii) of the PFMA.⁶ The PFMA allows National Treasury to make its own regulations or issue instructions applicable to all institutions to which the Act applies.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 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

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)

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)

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)

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.

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 SIU⁹ contended that transparency required the set-up of a framework¹⁰ 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/ entities¹¹ 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 together with instructions from Treasury.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.

⁹ Section 217(3) of the Constitution provided that National legislation must prescribe a framework.....

¹⁰Section 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.

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

¹² Section 217 of the Constitution and Foot note 9

¹³ Foot note 11

[13] Although doubting the prescripts of the Supply Chain Management Guide ('SCM Guide')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 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 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

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

¹⁴ Issued by National Treasury dated February 2004- Chapter 3: 3.1.1;3.1.2; 3.2

¹⁵ Section 51(1)(a)(iii) of the PFMA

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

¹⁷ Founding Affidavit paragraph 54.4

Chain Management Framework.¹⁸ Provision was made for instances of deviations and exclusions¹⁹ 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 manual²⁰ 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

[17] The SABC SCM manual provides for demand management²², which is managed by the Head of Supply Chain Management. This takes place on two levels,

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)

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"

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

²¹Foot Note16 and 17

²² Founding Affidavit paragraph 64 – dealing with paragraph 8 of the Manual.

‘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

[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 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

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

²⁴ Founding Affidavit paragraph 68 (paragraph 10.2 and 10.3 of the SCM

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/CFO²⁵ 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 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

²⁵ GCEO (Group Chief Executive Officer)/ COO(Chief Operations Officer) CFO(Chief Financial Officer)

²⁶ Paragraph 12.2 of the SCM manual

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

[26] Mr T Mulaudzi 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 affidavit²⁷ the Infonomix proposal addressed the following:

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

²⁷ FA3 affidavit Mr T Mulaudzi

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 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

Conclusion of the Contract with Infonomix

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 competitorscould 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 SABCMr 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 jeopardise the current relationship of Infonomix with their current clients if they would find out that 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...."

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 4.8it investigated "largest most successful broadcasting services and content providers globally" and "major systems such as HBO, Hulu, Netflix, ESPN, Bloomberg and Sky"

[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 contract³⁰ between Infonomix 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 Adjudication³¹. 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 "sole source" supplier within meaning as provided in the SCM manual.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.

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.

3.2 The 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."

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"

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."

[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

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 (ii) the award was driven by a desire to favour Infonomix and was made for a reason not authorised by the empowering provisions,³⁵ (iii) the decision was for an ulterior purpose or motive,³⁶ (iv) the award was tainted by fraud and was made in bad faith,³⁷ (v) the process and action of awarding the contract was not rationally connected to the reasons given for it by the SABC.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.

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 30 days 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.:

³⁴ as intended in section 6(2)(a)(iii)

³⁵ as intended in section 6(2)(e)(i), and

³⁶ as intended in section 6(3)(ii)

³⁷ as intended in section 6(2)(e)(v)

³⁸ as intended in section 6(2)(f)(ii)(dd)

[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 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

³⁹ Section 172(1)(b) of the Constitution

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 Gijima⁴⁰ 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...

⁴⁰ State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2018(2)SA 23 (CC) paragraphs [38] [39][40]

...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 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 and the PFMA⁴³ 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 The SABC has incorporated into its policy

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)

⁴² Foot note 5 -the tendering system must be fair, equitable, transparent, competitive and cost effective

⁴³ Footnote 15 – maintains “(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent competitive and cost effective”

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

and manuals National Treasury's⁴⁵ 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.

applicable to that official including any delegations and instructions in terms of section 56; and (e) is responsible for the managementof the assets and management of the liabilities within that officials area of responsibility"

⁴⁵ National Treasury Note 3 of 20120176; and Treasury Regulations 16A6.2

[66] In my view Infonomix, therefore does not dispute that the SIU relied on policies of the SABC as the basis for its 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 policies and manuals⁴⁶ 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

⁴⁶ Section 2.2 and 5.4 of the SCM manual; foot note 20 and 23 above

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 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 through 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 Mulaudzi'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 Mulaudzi 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:

“ 4Digital 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 Infonomix 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