

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
19/12/19	<i>B Vally</i>
DATE	SIGNATURE

Case No.: 34688/2017

In the matter between:

Transnet SOC Limited**Applicant**

and

IGS Consulting Engineers CC**First Respondent****Turnmill Proquip Engineering (Pty) Ltd****Second Respondent****IGS Join Venture****Third Respondent****WK Construction SA (Pty) Ltd****Fourth Respondent**

JUDGMENT

Vally JIntroduction and the parties

[1] Transnet SOC Limited (Transnet), a state owned enterprise, applies for the setting aside of five contracts it concluded with the respondents. The first respondent, IGS Consulting Engineers CC (IGS) was involved in all five contracts. IGS is a close corporation with one Mr Sipho Sithole (Mr Sithole) as

its sole member. The fourth respondent, WK Construction SA (Pty) Ltd (WKSA) was involved in the first contract. The second respondent, Turnmill Proquip Engineering (Pty) Ltd (Turnmill) concluded two agreements with IGS, which are both titled "*Joint Venture Agreement*". On the understanding that the two Joint Venture Agreements between IGS and Turnmill were in place Transnet contracted with each of them separately, one of the contracts being the second contract and the other being the fourth contract. However, in the end Turnmill played no role in the fourth contract.

[2] Contending that the contracts were marred by illegality Transnet, relying on the principle of legality, seeks (i) a declarator to the effect that the contracts were unlawful; (ii) an order setting all five contracts aside; (iii) orders effectively calling on IGS and Turnmill to account for all the profits they earned; and (iv) an order compelling IGS and Turnmill to pay to it all the profits they earned from the unlawful contracts.

The Facts

[3] Transnet has a unit called the Transnet Group Capital (TGC) previously known as the Transnet Capital Projects. Its Chief Executive Officer (CEO) was a Mr Sipho Linyenga Herbert Msagala (Mr Msagala). He met with Mr Sithole in February 2015, being introduced to him by Mr Sithole's colleague "*in the industry*". This meeting established a relationship between Mr Msagala and Mr Sithole, which as a matter of course included a relationship between Transnet and IGS.

[4] Transnet manages a New Multi-Product Pipeline Project (NMPP) which consumes a substantial part of its capital expenditure. The project involves managing a 715km underground pipeline. The pipeline has two hubs: TM1 located in Durban and TM2 located in Heidelberg. The NMPP falls under the jurisdiction of the TGC. TGC awarded five contracts to the respondents in this matter. For ease of reference I will refer to Transnet and not TGC as the contracting party.

[5] In July 2015 IGS submitted a fraudulent B-BBEE certificate to Transnet. Upon its expiry a second fraudulent certificate was submitted. The certificates depicted IGS to be "*a Qualifying Small Enterprise*", which is an enterprise with a total annual revenue of between R5m and R35m. The certificates were submitted in compliance with Transnet's procurement policies, which allowed for B-BBEE entities to be given preferential treatment in the awarding of contracts.

The first contract

[6] WKSA was appointed on 23 April 2015 to do some work. On 3 July 2015 Mr Msagala approached WKSA and advised it that Transnet wanted an investigation to be conducted on the tanks at TM1 in order to determine why they had failed. He said that the work should be sub-contracted to IGS. This constituted the first contract to IGS. The value of the sub-contract was R10 590 288. IGS delivered its report on 12 October 2015. Upon receipt of an invoice from WKSA Transnet paid WKSA which in turn paid IGS. No money was appropriated for this work. Effectively, this meant that Mr Msagala took advantage of the

existing contract with WKSA by adding to the work already contracted for. However, instead of WKSA benefitting from the contract, he orchestrated the conclusion of the sub-contract, resulting in the benefit of the contract accruing to IGS. WKSA had no previous dealings with IGS, nor did it know who IGS or Mr Sithole were. If the normal process had been followed, and assuming the additional work was properly allocated to WKSA, WKSA would not have sub-contracted it to IGS, but to one of its own preferred sub-contractors. More importantly, there was no need for the additional work to be allocated to WKSA, as the said work had already been performed by an entity named ZAA. Hence, the sub-contracted work was a duplication of work already done. Mr Msagala was aware of this fact. Transnet paid IGS R10 590 288 for work it did not require. In addition, there was inadequate supporting documentation for the invoices received. Despite this, when employees of Transnet who were processing the claim for payment raised the issue, they were instructed to make the payment as it had been authorised by Mr Msagala. WKSA on the other hand only acted as a conduit: it received invoices from IGS, charged Transnet the same amount and upon payment from Transnet paid the full amount to IGS.

The second contract

[7] On 6 July 2015, three days after securing the first contract, IGS, Turnmill, Transnet and WKSA met at Turnmill's premises. Following the meeting all the attendees went to the TM2 where Turnmill was given an opportunity to determine whether it had the capacity to perform certain work.

[8] On 13 July 2015 the second contract was concluded. It was between Transnet and the IGS JV, the third respondent. While the contract was concluded with the IGS JV, the actual Joint Venture Agreement between IGS and Turnmill had not yet been concluded. It was only concluded on 27 August 2015. It was concluded with a specific objective in mind, i.e. *“in respect of the Tightlining Project at Terminal 1 (TM1)”*.

[9] The IGS JV was required to perform *“tight lining”*. Tight lining is an interim mechanism developed (for the provision of fuel) by Transnet to bypass the immediate need and use of the delayed storage fuel tanks that were being constructed at TM1. The value of the contract was R50 485 630.20. Turnmill did most of the work and was paid R11,6m. The rest (R38.4m) was kept by IGS.

[10] This second contract was orchestrated by Mr Msagala. He took advantage of an internal process referred to as the *“emergency procurement procedure”* to award the contract to the IGS JV on the grounds that an emergency had arisen which required immediate attention. However, there was no resolution on the part of Transnet to make any appointment on an emergency basis.

[11] The material terms of the Joint Venture agreement are:

“1.1.4 **“Contracts”** means contracts to be entered into by the Joint Venture with any Transnet SOC Limited;

1.1.7 **“Joint Venture”** means the joint venture constituted in accordance with clause 3.1 between IGS and TURNMILL PROQUIP ENGINEERING.

3 PREAMBLE

3.1 **WHEREAS** the parties have agreed to enter into a Joint Venture agreement for the purpose of working together to achieve. [sic]

3.2 **WHEREAS** IGS has sourced all of the relevant Contracts and TURNMILL PROQUIP ENGINEERING is able to provide all of the relevant expertise.

3.3 **WHEREAS** the parties wish to, in writing, provide for the conduct of the business affairs to this Joint Venture and to govern the relationship between themselves.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

4. **ESTABLISHMENT OF THE JOINT VENTURE AND OBLIGATIONS OF EACH OF THE PARTIES**

4.1 With effect from the Effective Date [date of signature] the parties hereby establish and shall continue on the Joint Venture by the terms and conditions and for the purposes and scope as to find in this agreement.

4.2 The proceeds from any contract entered into will be paid into a Joint Venture Bank Account and TURNMILL PROQUIP ENGINEERING will receive payment of the Agreed Amount and the balance of the Contract Amount to be paid to IGS.

4.3 TURNMILL PROQUIP ENGINEERING shall be responsible for the following:-

4.3.1 Fabrication, Transportation and Erection of Tightlining, commissioning and Testing of the installation and handing over in good order to Transnet

4.3.2 All implementation aspects in regard to the Services.

4.4 IGS will be responsible for:-

4.4.1 Engineering, Project Management, Contracts Management of the Installation of Tightlining, Electrical and Instrumentation at Terminal 1 Bayhead Durban.

4.5 Nothing in this agreement shall be construed as creating a partnership between the parties, their intention being

merely to co-operate with each other and to act in terms of this agreement for the purposes of the Joint Venture.

- 4.6 Save as may otherwise be permitted by this agreement neither of the parties shall be entitled to incur any obligations on behalf of the other or to act on behalf of the other or to act on behalf of or bind the Joint Venture or other party to any agreement.

5. **WARRANTIES AND REPRESENTATIONS**

...

- 5.6 IGS undertakes not to disclose the identity of TURNMILL PROQUIP ENGINEERING to any third party and/or the general public. “

[12] In order to undertake the work required in terms of the second contract the IGS JV was obliged to acquire a grading of 8 or more from the Construction Industry Development Board (CIDB). It failed to do so. The CIDB grading is one attained in terms of the Construction Industry Development Board Act, 38 of 2000 (the CIDB Act). The CIDB is the custodian of the Register of Contractors who tender for and contract with organs of state in respect of construction and engineering related work. Mr Msagala was aware of this requirement and was aware that the IGS JV did not possess a CIDB grading.

The third contract

[13] On the same day, 6 July 2015, (this is the same day the meeting at TM2 took place)¹ the third contract was concluded orally. It, too, was concluded on the instructions of Mr Msagala. It was formally reduced to writing on 27 August 2015. It was between IGS and Transnet without any involvement of Turnmill. IGS

¹ See [7] above

was asked to assess the mechanical installations at TM1 and TM2. The contract value was R50m. The third contract was concluded on the basis of an emergency even though there was no emergency at the time. Instead, both IGS and Transnet used the third contract to attend to events or incidents that occurred after 6 July 2015:

- a. one event, the rupture of valves, only occurred on 12 July 2015 (it is referred to as Task Order P-002), and much of the work that was performed by or on its behalf by one of IGS's sub-contractors was sub-standard;
- b. another event occurred on 2 September 2015 (this relates to Task Order P-001). This task order was for the period 23 September 2015 to 23 December 2015. Much of the work related to this task order was not in accordance with accepted procedures, and the quality of some of the work was not up to standard. One of the reasons for the sub-standard work was that the valves which were produced by a Chinese company, SGOV (the full details of the company were not furnished in the papers), were defective and SGOV expressed an interest in replacing them at a discounted price. Transnet would have to buy the valves. For this reason, a trip to China was arranged for Transnet officials. In the meantime, it was known to all that IGS was interested in being appointed as the supplier of the new valves. Mr Msagala was included in the team of selected officials that travelled to China. Using his authority, he arranged for Mr Sithole to accompany them on the trip. While in

China, the Transnet officials discussed the price of the new replacement valves. Mr Sithole, who had no business to be part of these discussions, was allowed to participate therein and learn of the price that SGOV, a potential competitor to IGS, was willing to charge for the new valves. This was highly irregular and in breach of a number of Transnet policies. During the trip, Mr Sithole purchased thirty electric scooters at a price of \$57 each. Mr Sithole gave Mr Msagala five of these free of charge.

- c. the third event occurred on 8 September 2015. To attend to it Task Order P00-3 was issued to IGS. It was for the procurement of TM2 data packs. The duration of the order was from 8 September 2015 to 31 December 2015. Another company, Group Five, had been contracted and paid to provide the data packs and had undertaken to provide them by the end of July 2015. Instead of insisting that Group Five provide the data packs as it was obliged to, Transnet appointed IGS to provide them. Essentially, the appointment was a duplication of the contract awarded to Group Five;
- d. Transnet officials had discovered the geodesic dome roofs of the tanks at TM2 were leaking. They consulted with Mr Msagala about having them repaired by the company that initially installed them, Murray and Roberts. The cost would be for Transnet as Murray and Roberts was not willing to repair them *gratis*. Mr Msagala was in China at the time with other Transnet officials and Mr Sithole. He

instructed the officials to appoint IGS and not Murray and Roberts to do the repairs.

- e. After the rupturing of the Chinese SGOV valves, Transnet resolved to acquire ten percent of all valves as spare valves. As a result it was necessary to conduct tests on the spare valves. IGS was appointed on 29 March 2016 to do the tests and submit a report. IGS sub-contracted the work to a company by the name of TUV Rheinland AIA Services (TUT). TUT did all the work and was paid by IGS. IGS in turn was paid by Transnet. By utilising IGS Transnet increased the cost of the tests as it paid IGS more than the amount charged by TUT.

[14] Further, Mr Msagala did not have the requisite authority to enter into a contract of such a magnitude. There was also no reason for Transnet not to go to tender for the contract.

The fourth contract

[15] On 4 January 2016 the fourth contract was concluded by virtue of an oral appointment. It was between Transnet and the entity established by the second Joint Venture Agreement. It was for the surcharging and demolition of accumulator tanks at TM1. The written contract was only signed on 6 June 2016 by IGS and Transnet while Turnmill only signed it on 7 June 2016. The contract was for R65 425 000. However, Transnet only paid R43 604 337.89. It suspended the demolition of the accumulator tanks on 11 October 2016. The

fourth contract, too, was the result of an emergency appointment of IGS and Turnmill by Mr. Msagala. No tender process was followed. However, Turnmill did no work and was not compensated.

The fifth contract

[16] On 26 April 2016 the fifth contract was concluded. It was between Transnet and IGS and was for the procurement of replacement valves. This was subsequent to the trip to China. It was issued to IGS pursuant to Transnet following the open tender process. It was the only one issued to IGS where the open tender process was followed. However, IGS was privy to the confidential information of SGOV pricing, which Mr Sithole received by virtue of his involvement in the trip to China. At the same time, IGS supplied the second fraudulent B-BBEE certificate to Transnet. Further, IGS falsely represented that its local content constituted 80% of its bid. Its local content was zero. IGS failed to perform in terms of the contract, which resulted in Transnet cancelling it. The value of the contract was R28 146 085.67. IGS has delivered some valves to Transnet but Transnet has not made any payments to it.

General facts applicable to all the contracts

[17] Compulsory internal procedures and protocols concerning the procurement of goods and services by Transnet from third parties were not followed in the awarding of each of the five contracts. They were by-passed on the instructions of Mr Msagala.

[18] With the exception of the fourth and fifth contracts the work on each of the other contracts was completed and IGS and the IGS JV were compensated for their efforts.

[19] The value of each of the second, third, fourth and fifth contracts exceeded that which could legitimately be awarded to IGS. This was apart from the fact that none of the contracts should have been awarded to IGS on the grounds that IGS had submitted fraudulent B-BBEE certificates.

[20] On 8 September 2015 Mr Msagala registered two trusts and on 10 September 2015 he registered another one. This was in the same month that IGS received its first payment from Transnet. Between September 2015 and March 2016 one of the trusts acquired four immovable properties totalling R15.2m, all paid for in cash. The transaction involving the acquisition of one of the properties was facilitated by an estate agent who contacted Mr Sithole concerning payment of the deposit for the property. Mr Sithole paid the deposit. This particular property was in an estate called Steyn City. Mr Sithole purchased a property in the same estate during the same period as the trust registered by Mr Msagala did so. Over and above the purchase of these properties by the trusts Mr Msagala purchased seven motor vehicles within one year (between February 2015 and January 2016) namely, a Maserati Gran Turismo, a Mercedes Benz C180 Kompressor, a Audi Q7 3 litre Quattro, a Chrysler Grand Voyager, a Toyota Avanza 1.5SX, a Mazda BT 50 and a Hyundai TQ H1 9 seater.

[21] On 7 April 2016 Transnet received an anonymous report contending that IGS had perpetrated fraud against it. Transnet appointed a forensic services company, Nexus Forensic Services (Pty) Ltd (Nexus), to conduct an investigation into the allegations. Nexus conducted its investigations and submitted two reports, one on 15 December 2016 and one on 13 April 2017. After taking legal advice, on 8 August 2017 Transnet wrote to IGS and on 14 September 2017 launched this application.

Applicable legal prescripts to be followed by Transnet when contracting with third parties and Transnet's case

- [22] As a state-owned-for-profit-company, Transnet is bound by:
- a. s 217 of the Constitution of the Republic of SA Act 108 of 1996² (the Constitution);
 - b. s 1 of the Public Finance Management Act, 29 of 1999 (the PFMA) which prohibits engaging in fruitless and wasteful expenditure which is *"expenditure which was made in vain and would have been avoided had reasonable care been exercised"*;
 - c. s 38(2) of the PFMA which prevents an accounting officer from committing the entity to a liability for which no monies had been appropriated;

² For purposes of this case we need only concern ourselves with sub-section 217(1) ,which provides:
 "When an 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."

d. Treasury Regulation 16.A6.4 read with Treasury Instruction Note 8 of 2007/2008 (the Treasury regulation) which command that when normal procurement requirements of an organ of state are not followed because an emergency had arisen, the reasons for non-compliance with the requirements must be recorded and approved by the accounting officer;

e. The terms of the CIDB Act.

[23] Transnet's case is that the awarding of each of the contracts was inconsistent with s 217(1) of the Constitution, and/or s1 of the PFMA, and/or 38(2) of the PFMA, and/or the Treasury Regulations, and/or the terms of the CIDB Act. Thus, contends Transnet, the contracts were unlawful *ab initio*. As a result they fall to be set aside. Transnet seeks a declarator to this effect. In addition, it seeks ancillary orders compelling IGS and Turnmill to account for the profits they earned from the contracts and to pay those profits over to itself.

Turnmill's defence

[24] Turnmil's defence is that there was no partnership or joint venture between it and IGS. It was sub-contracted by IGS to perform the work set out in the second and the fourth contracts. As no relief is being sought against Turnmill with regard to the fourth contract, we will address its defence by looking at the Joint Venture Agreement concluded for purposes of giving effect to the second contract only. The second contract was between Transnet and IGS JV. Turnmill denies that there existed a joint venture bwtween it and IGS. It contends that

there was no contractual nexus between it and Transnet or between any partnership that it supposedly was a party to, or between any joint venture that it supposedly was a party to and Transnet.

[25] Turnmill's explanation for concluding the Joint Venture Agreement relating to the second contract was because, as IGS did not have a CIDB rating, it was disqualified from being considered for the second contract. They agreed that Turnmill would obtain a CIDB rating in order to meet the requirement, otherwise the awarding of the second contract would remain exposed to being impugned. Turnmill obtained the CIDB rating and then the Joint Venture Agreement was signed. Further, it only signed the agreement because it understood from IGS that no partnership would be created between them. It says that it was always under the impression that it was appointed as a sub-contractor by IGS and that the second contract was between IGS and Transnet.

IGS's defence

[26] IGS complained about the length of time it took Transnet to launch the proceedings. It says that Transnet unduly delayed in bringing the application, which delay has caused it prejudice. It asks that the application be dismissed for this reason alone.

[27] As for the merits, it says that it was not party to any irregularities in the processes that were followed when the five contracts were concluded. It was innocent at all times. The contracts were concluded at arms-length. It performed all the duties imposed upon it by each of the contracts and all compensation it

received, was due to it. It also denied that there was anything untoward in the relationship between Mr Msagala and Mr Sithole.

[28] On the issue of the Joint Venture with Turnmill, IGS maintained that the Joint Venture Agreement concluded on 27 August 2015 was signed by both parties, the nature of the agreement was fully understood by both parties and the second contract was with the Joint Venture and not with itself alone.

Analysis and conclusions

[29] Transnet, we know, received information to the effect that IGS had perpetrated a fraud on it. It received the second Nexus report on 13 April 2017. It sought legal advice thereafter and launched the application on 14 September 2017. In my view, 13 April 2017 is a crucial date. It is on that day that Transnet could safely be said to have acquired evidence of the illegal conduct that tainted the five contracts. It brought the application five months later. The illegal conduct that was uncovered was complex. The conduct was on-going and spanned over a period of a year. The facts that were uncovered were complicated. To launch an application involving such a complicated set of facts would consume a considerable amount of time and effort. In my judgment taking five months to do so is perfectly reasonable and understandable. Transnet cannot be said to have unreasonably delayed the launching of the application. Accordingly, I find that the contention of IGS that Transnet delayed the launching of these proceedings unreasonably is without merit.

[30] On any analysis of the material terms of the Joint Venture Agreement³ it is clear that it is not a sub-contract. It is a contract between two business entities. The agreement undoubtedly indicates that IGS and Turnmill are engaged in a cooperative endeavour to see the second contract to finality, to perform all the obligations in terms of that contract and to enjoy the benefits that accrue therefrom. The endeavour was, therefore, for a specific project. In this case, both IGS and Turnmill kept their separate identities but they defined their separate roles in the Joint Venture⁴ and agreed that they would jointly benefit from the second contract. Moreover, there is no dispute in this matter that they performed their obligations in terms of the second contract and that the performance was executed on the basis of the terms of the Joint Venture Agreement. There is also no dispute that both IGS and Turnmill benefitted from the second contract. In addition, that Turnmill applied for a CIDB rating solely for the purpose of inoculating the second contract from being impugned is of more than of just noteworthy value. It is crucial evidence that Turnmill, on its version, was aware of the difficulties of continuing with the second contract. Voluntarily and together, or in collaboration, with IGS it took steps to prevent the second contract from escaping their (its and IGS's) clutches. Thus, there can be no doubt that the Joint Venture was established by IGS and Turnmill. Any reasonable business person who read, signed the Joint Venture Agreement and participated in the execution of the second contract on these terms could not reasonably be under the impression his participation was on the basis that he was acting in terms of a sub-contract.

³ The material terms of the said agreement are quoted above in [11]

⁴ See clauses 4.3 and 4.4 of the Joint Venture Agreement quoted in [11] above

[31] It may be that the Joint Venture Agreement was signed on 27 August 2015 in an attempt to inoculate the second contract from the risk of being impugned on the grounds of illegality (because the party to whom the contract was awarded did not have a CIDB rating). However, that does not invalidate the Joint Venture Agreement. The underlying reason or motive of IGS and Turnmill in concluding the Joint Venture Agreement is irrelevant when determining whether the agreement is valid or not.

[32] It is common cause that the two B-BBEE certificates were forged. IGS claims that it was itself a victim of a fraud and therefore should not be held responsible for having supplied the forged certificate. I cannot agree. It was the duty of IGS to ensure that it supplied correct and valid information in order to enjoy the privilege of qualifying for consideration as a potential contractee by Transnet. It is not for Transnet to establish the authenticity of certificates issued to it by an aspirant contractee. Once those certificates are submitted to Transnet, it is entitled to accept them at face value and thereby privilege the holders of the certificates with the right to be considered as potential contractees. Once it is discovered that a particular certificate is false, the aspirant contractee must accept responsibility and bear the consequence thereof. Transnet is entitled to expect the utmost good faith (*uberrimae fidei*) from potential contractees and that the information they supply is correct.

[33] Neither IGS nor Turnmill could seriously dispute the facts set out in [6] – [10] and [12] – [19] above. They were, therefore, not able to provide an answer

to Transnet's claim that the contracts were irregularly concluded. Neither of them could dispel the claim that on the facts outlined above the contracts were in contravention of the legal prescripts to which Transnet is bound. For this reason, Transnet was obliged to approach the Court to have the contracts declared unlawful and to have them set aside. By doing so, it upholds its duty to rectify the unlawfulness, and protect and uphold the rule of law.⁵

[34] The relationship between Mr Msagala and Mr Sithole was certainly not an arms-length one. Taking advantage of his position as the CEO of TGC, Mr Msagala irregularly and improperly awarded contracts worth substantial amounts of money to IGS or to IGS JV. Mr Sithole paid the deposit on the purchase of an immovable property by Mr Msagala. Mr Sithole purchased scooters for Mr Msagala while they were in China together. Mr Msagala instructed the employees of Transnet to ensure that Mr Sithole was allowed to accompany the Transnet team on the work-related trip to China although Mr Sithole is not an employee of Transnet, nor has any other legitimate reason to travel with them and participate in their business affairs with SGOV. On these facts, I have no difficulty in coming to the conclusion that the relationship between Mr Msagala and Mr Sithole was corrupt.

[35] The relationship between Mr Msagala and Mr Sithole was the key that opened the door for IGS to secure the contracts. To the extent that IGS JV was the party that concluded two of the contracts is of no moment. IGS JV was merely

⁵ *Khumalo and another v Member of the Executive Council for Education: Kwazulu Natal* 2014 (5) SA 579 (CC) at [29]

a conduit that was used to do the work and receive the benefit of the contract. It was created to ensure that Turnmill, which was the party capable of doing the work, was compensated and thereby benefitted from the relationship between Mr Msagala and Mr Sithole.

[36] That the contracts were awarded without due regard for the internal processes is neither disputed nor can it be doubted. The failure to follow the proper procedures in awarding the contracts affected the outcome.⁶ There is no gainsaying that it affected the outcome in a material way. Transnet was never given the opportunity to assess whether IGS or IGS JV were the best suppliers of the goods and services it ultimately sourced from them. Hence, the contracts stand to be set aside on that ground alone. But, this fact (non-compliance with proper procedures) together with the other problems with the five contracts identified above, leads to only one conclusion: the contracts were unlawfully awarded to IGS and to IGS JV. On this finding there is no avoiding the result that they should all be declared unlawful and set aside.⁷ However, this remedy in itself is insufficient.⁸

[37] The obligations of the parties in terms of the contracts have mostly been performed by them. Simply declaring them to be unlawful and setting them aside in these circumstances would not be just and equitable for it results in allowing IGS and Turnmill (with regard to the second contract which was awarded to IGS JV) to profit from these illegal contracts. Such relief would be wholly

⁶ *Allpay Consolidated v Chief Executive Officer, SASSA* 2014 (1) SA 604 (CC) at [27]

⁷ *Id* at [24]

⁸ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at [69]

inappropriate. It would be tantamount to turning a blind eye to the malfeasance of Mr Msagala and Mr Sithole, which lies at the very core of the resulting five contracts. It would send the message that malfeasance pays. It would also not be effective in deterring others from engaging in such conduct.⁹ Such conduct has contributed immensely to the erosion of the moral fabric of our society. It has the effect of prejudicing the poor in our society most for they bear brunt of the wasted costs (derived from the corrupt activities underlying the five contracts) borne by an organisation like Transnet, which provides basic services they rely upon, directly or indirectly, for their daily survival. The interests of justice would not be served if the Court only issued the two orders. In short, the declaratory order as well as an order setting aside of the contracts, while necessary, would in themselves be neither an appropriate nor an effective remedy.

[38] An appropriate, effective and just remedy would require IGS and Turnmill to repay all the profits they acquired by operation of the contracts to Transnet. This would include the first contract, even though in strict terms the contract was between WKSA and IGS. But WKSA was merely following the unlawful instructions of Transnet officials, which instructions were designed to benefit IGS. IGS, it is not disputed, did benefit therefrom. The remedy would protect the rule of law and simultaneously ensure that those who deem it necessary to break the law and hurt the public purse in the course of doing so do not profit from their unlawful conduct.

⁹ Id at [96]

Costs

[39] All parties agreed that costs should follow the result and that the matter warranted the employment of two counsel by any party that was able to employ two counsel.

Order

[40] The following order is made:

1. The instruction on 3 July 2015 by Transnet to WKSA calling on WKSA to conclude a sub-contract with IGS is declared to be unlawful; and,
 - a. The first respondent is to serve and file with the Registrar of this Court an audited statement of the expenses incurred, the income received and the net profit earned under the first contract within sixty (60) days of this order;
 - b. The applicant is to obtain and file with the Registrar of this Court an independent audited verification of the details provided by the first respondent in terms of par 1.a. within thirty (30) days of the receipt of the information, and the first respondent is to permit the auditors appointed by the applicant to have unfettered access to their financial information for this purpose;
 - c. The first respondent is to pay the applicant the verified profit within thirty (30) days of service of the audit verification.

2. The contract concluded between the applicant and the third respondent on 27 August 2015 (the second contract) is declared to be unlawful and is set aside; and,
 - a. The first and second respondents are to serve and file with the Registrar of this Court an audited statement of the expenses incurred, the income received and the net profit earned under the second contract within sixty (60) days of this order;
 - b. The applicant is to obtain and file with the Registrar of this Court an independent audited verification of the details provided by the first and second respondents in terms of par 2.a. within thirty (30) days of the receipt of the information, and the first and second respondents are to permit the auditors appointed by the applicant to have unfettered access to their financial information for this purpose;
 - c. The first and second respondents are, jointly and severally the one paying the other to be absolved, to pay the applicant the verified profit within thirty (30) days of service of the audit verification.
3. The contract concluded between the applicant and the first respondent on 6 July 2015 and formalised on 27 August 2015 (the third contract) is declared to be unlawful and is set aside; and,
 - a. The first respondent is to serve and file with the Registrar of this Court an audited statement of the expenses incurred,

the income received and the net profit earned under the third contract within sixty (60) days of this order;


- b. The applicant is to obtain and file with the Registrar of this Court an independent audited verification of the details provided by the first respondent in terms of par 3.a. within thirty (30) days of the receipt of the information and the first respondent is to permit the auditors appointed by the applicant to have unfettered access to its financial information for this purpose;
 - c. The first respondent is to pay the applicant the verified profit within thirty (30) days of service of the audit verification.
4. The contract concluded between the applicant and the second Joint Venture on 4 January 2016 and signed on 6 and 7 June 2016 (the fourth contract) is declared to be unlawful and is set aside; and,
- a. The first respondent is to serve and file with the Registrar of this Court an audited statement of the expenses incurred, the income received and the net profit earned under the fourth contract within sixty (60) days of this order;
 - b. The applicant is to obtain and file with the Registrar of this Court an independent audited verification of the details provided by the first respondent in terms of par 4.a. within thirty (30) days of the receipt of the information and the first respondent is to permit the auditors appointed by the

applicant to have unfettered access to its financial information for this purpose;

- c. The first respondent is to pay the applicant the verified profit within thirty (30) days of service of the audit verification.

5. The contract concluded between the applicant and first respondent on 26 April 2016 (the fifth contract) is declared to be unlawful and is set aside.

6. The first and second respondents are to pay, jointly and severally the one paying the other to be absolved, the costs of the application, which costs are to include those occasioned by the appointment of two counsel



Vally J

Dates of hearing:

Date of judgment:

For the Applicant:

Instructed by:

For the First Respondent:

Instructed by:

For the Second Respondent:

Instructed by:

BV

9, 10 September 2019

18 December 2019

S Vivian SC with B Morris

Mncedisi Ndlovu & Sedumedi Attorneys

I Hussain SC

Essack Attorneys Inc.

C v d Merwe

Garratt Hugo & De Souza Inc

