REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

DATE 18 JUNE 2019 SIGNATURE

CASE NO: 22877/2018

In the matter between:

ESKOM HOLDINGS SOC LIMITED	**Applicant**
And	
MCKINSEY AND COMPANY AFRICA (PTY) LTD	**1St Respondent**
TRILLIAN MANAGEMENT CONSULTING (PTY) LTD	**2nd Respondent**

TRILLIAN CAPITAL PARTNERS (PTY) LTD	**3rd Respondent**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**4th Respondent**
MMS NXUMALO N.O.	**5th Respondent**

JUDGMENT

THE COURT

Tsoka J, Baqwa J & Fourie J

INTRODUCTION

[1] The new dawn that engulfed the country in 2018, did not miss Eskom Holdings SOC Limited (Eskom). It brought life to Eskom in that in January 2018, Eskom's old and inactive leadership was replaced by new leadership with new life to undo years of maladministration and corruption within the organization.

[2] In March 2018, Eskom launched the present application for the review and setting aside of its unlawful decisions that resulted in payments which were in excess of R1,7 billion to McKinsey and Company Africa (Pty) Ltd, (McKinsey) the first respondent, Trillian Management Consulting (Pty) Ltd (TMC), the second

respondent and Trillian Capital Partners (Pty) Ltd (TCP), the third respondent hereinafter referred to as "Trillian".

[3] The impugned decisions relate to two contracts concluded with McKinsey in 2015 and 2016 respectively. From the two contracts, the first one endured for a period of three months (2015) while the other known as the Master Services Agreement (MSA) (2016) was between Eskom and McKinsey and was terminated by agreement. Eskom then made payments to both McKinsey and Trillian in excess of R1,7 billion.

[4] In this application Eskom seeks to review and set aside the two agreements as well as the resultant payments in terms of s1(c) of the Constitution. That this is not a review in terms of the Promotion of Administration of Justice Act 3 of 2000 (PAJA) is clear. The application need not therefore be instituted within a period of 180 days from the date the decision was made. The application is founded on the principle of legality in terms of s1 of the Constitution. It need only be instituted within a reasonable time. Although McKinsey and Trillian did not challenge the application on this basis, something needs to be said on this score.

DELAY AND CONDONATION

[5] In *Tasima*[1], the Constitutional Court reasoned thus –

> '...That state functionaries are entitled to challenge exercises of public power, including their own, was recognized by the Supreme Court of Appeal in *Pepcor*, and endorsed by this Court in *Khumalo*. There it was noted that "state functionaries are enjoined to uphold and protect [the Constitution]," and that a court should be slow to allow procedural obstacles to prevent it from lodging a challenge into the lawfulness of an exercise of public power.'

[6] The question may be asked whether are there procedural challenges preventing this court from looking into the lawfulness of the decisions made by Eskom and the resultant payments flowing therefrom? In our view, the answer is a resounding no. We say so for the following reasons. The new board of Eskom took office in January 2018. It immediately investigated the unlawful conduct of the previous board and its decisions and all payments made by it. After securing the necessary evidence, on 29 March 2018, the present application was launched. The launching of the application was made in spite of the deliberate efforts and obstructions made by senior personnel of Eskom in preventing the launching of the present application.

[7] The launching of the application was made notwithstanding the former Eskom officials who actively sought to prevent Eskom's dealings with McKinsey and

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[1] Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC) para 139

Trillian being unmasked. Relevant information was hidden from the new board by senior personnel of Eskom. In addition, some senior personnel of Eskom with the necessary and vital information were either suspended or resigned. Vital and necessary documents were either spirited away or destroyed. Despite these senior personnel receiving legal advice to take swift legal action to protect Eskom's assets, these personnel obstructed any attempts to take legal action. In 2017, once the shenanigans and the unlawful activities of these personnel were uncovered, a letter of demand was issued, which, inexplicably, was withdrawn. Persons who were concerned about the unlawful goings-on at Eskom were either punished or suspended. Notwithstanding the Public Protector's findings of malfeasance in Eskom published in October 2016, no action was taken against anybody to safeguard the interests of Eskom.

[8] In these circumstances it is apt to refer to what this Court (Francis J) said in *Swifambo*[2]. The learned Judge, in condoning a delay of two and a half years for the review of a decision in terms of s1 of the Constitution, said the following –

> 'In my view state institutions should not be discouraged from ferreting out and prosecuting corruption because of delay, particularly not where there has been obfuscation and interference by individuals within the institution.'

[2] Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd 2017 (6) SA 223 (GJ) para 74 - 79

[9] Francis J concluded that –

> 'In my view to hold state institutions too strictly to the prescribed period, and thereby to shield the perpetrators, encourages the commission and concealment of egregious conduct of the nature found in this matter and would discourage prosecution by state institutions. It would also negatively impact on the administration of justice. There is no prejudice to the respondent if the application is heard. The consequences of refusing to hear the application and, as a result, allowing the invalid decision to stand will be borne by the public at large for many future generations. In my view, the hearing of the application will advance the principle of legality and the interests of justice. This is an appropriate case where the time period to have brought the application is extended and should be condoned.'

[10] We share the same sentiments as Francis J. In our view, though there appears to be no delay in launching this application but if regard is had to the obfuscation and interference by individuals within Eskom; the egregious conduct of the senior officials within Eskom; lack of good faith and fidelity towards the interests of this national asset; the interests of justice and the protection of the foundational basis of the rule of law and constitutionalism demand nothing less than condoning the perceived delay in launching the application. To hold otherwise, in our view, would not only be against the interest of justice but would be to perpetrate the mantra that crime and malfeasance indeed do pay.

[11] In the result, the conclusion reached is that the application was brought within a reasonable time. But any perceived unreasonable delay which is not prejudicial to the respondents, is accordingly condoned.

FACTUAL BACKGROUND

[12] The facts in this matter are, in the main, not disputed. They are the following. In 2015 while Eskom was negotiating the MSA with McKinsey, the parties concluded a fixed-fee and fixed term contract. The purpose of the contract was to govern the relationship between the parties pending the conclusion of the MSA.

[13] Although the 2015 McKinsey contract was envisaged to be from the effective date on 1 October 2015, for a period of six months, it endured only for a period of three months until January 2016. In spite of its short-duration McKinsey were remunerated by Eskom as if the contract was for the entire period of six months. The conclusion of this contract was entered into without any tender process. In terms of this particular contract, McKinsey had to have a Supply Development & Localization (SD&L) partner. But no partner was named in the contract. Neither were the terms specified in the said contract. What is clear from the contract, however, is that Trillian was not a party to the contract. In the three months until January 2016 inexplicably McKinsey was paid over R70 million while Trillian was

paid R30,6 million. The latter was paid notwithstanding its CEO's evidence that at that time Trillian had only two employees who had done no billable work for Eskom at all let alone work worth this amount of money.

[14] During the negotiations for the MSA, Trillian did not feature at all as McKinsey's SD&L partner was, during this period, Regiments Capital. This is common cause. It appears that during this period Mr Eric Wood, the director of Regiments Capital and his co-director, Mr Salim Essa, a close associate of the infamous Gupta family, intended to abandon Regiments and to form Trillian. It was only later in 2015 that Trillian was formed. Then Mr Essa became the sole director of Trillian Holdings which owned 60% of the issued shares in Trillian Capital Partners which was the 100% shareholders in Trillian Management Consulting.

[15] It was only in March 2016 that Mr Wood resigned from Regiments Capital and became the Chief Executive Officer of Trillian Capital Partners. When Mr Wood left Regiments Capital, he left with some of the latter's employees who became Trillian Management Consulting's employees. The formation of Trillian Management Consulting in 2015 coincided with Mr Brian Molefe and Mr Anoj Singh, who at that time were at Transnet, also leaving the latter by assuming new senior positions at Eskom with executive roles.

[16] Once Mr Molefe and Mr Anoj Singh arrived at Eskom, senior officials at Eskom who were expected to act in good faith and in the best interests of Eskom,

started to interact with Mr Essa, meeting him at his offices at Melrose Arch, Johannesburg and feeding him with confidential information belonging to Eskom. Some of these officials, in particular, Mr Matshela Koko and Mr Anoj Singh enjoyed trips to Dubai either paid for or facilitated by Mr Essa through the Gupta linked businesses. That these events occurred with the sole intention of favouring or benefiting Trillian, if not fraudulent, is quite obvious.

[17] In the meantime, McKinsey undertook a risk assessment against Trillian. On 15 March 2016, once the risk assessment was concluded, McKinsey came to the conclusion that it is risky for its global image to do business with Trillian and in particular for the latter to be its SD&L partner in executing its mandate to Eskom. McKinsey addressed a letter to Mr Wood on behalf of Trillian stating that –

> 'Our global risk committee has reviewed and discussed the proposal to work with Trillian, as our BBBEE partner on our engagement with Eskom. As a result of this discussion we have decided not to proceed with this proposal.'

[18] On 30 March 2016 McKinsey advised Eskom that it will not be commencing any business relationship with Trillian. In the letter Eskom was further advised that any relationship McKinsey had with Trillian had been terminated and that the termination has since been communicated to the latter. Thus, to all the parties, that is to say Eskom, McKinsey and Trillian, as from 30 March 2016 everyone

knew that McKinsey had no BBBEE partner in its interaction with Eskom. Notwithstanding this knowledge, in April 2016 Trillian was paid the amount of R30,6 million for having done no work for Eskom.

[19] To buttress the point that Trillian was favoured by Eskom for no apparent reason, once the latter was alerted that the former was no longer a BBBEE partner of McKinsey, inexplicably and for no justifiable reason at all, the MSA was terminated. Surprisingly, Trillian was paid about R600 million by Eskom, ostensibly on the basis that Trillian was McKinsey's BBBEE partner and that the payment was allegedly for damages suffered by both McKinsey and its BBBEE partner, which by the way is not named, because of the early termination of the MSA. As a result of the settlement agreement reached with Eskom, McKinsey benefited to the tune of over R1 billion.

THE PROCUREMENT LAW FRAMEWORK

[20] The starting point is the Constitution and in particular s217(1) which requires that when an organ of state, such as Eskom, when contracting for goods or services, must do so "in accordance with a system that is fair, equitable, transparent, competitive and cost effective." As it is clear from the language of s217(1), its purpose is to eliminate fraud and corruption in a public tender process and to secure goods and services, for the public good, at the best competitive price in the market.

[21] The provisions of the Public Finance Management Act (PFMA) promulgated pursuant to s217(1) of the Constitution, echo the objects of the Constitution. In terms of PFMA, Eskom which is listed in Schedule 2 as a public entity, and in particular s51(1)(a)(ii) of the PFMA, Eskom's board, as an accounting authority, must maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective. As a result, Eskom developed policies and procedures collectively known as "Approved Procurement Framework." In addition Eskom is bound by the Treasury Regulations and instructions issued by the National Treasury under s76 of the PFMA. These regulations and instructions are in terms of the PFMA form part and parcel of the Act.

[22] In *Allpay1*[3], these layers of the procurement framework were described as the necessary requirements that must be complied with. The Constitutional Court reasoned thus –

> 'Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution…'

[3] Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Security Agency and Others 2014 (1) SA 604 (CC) para 40

[23] Realizing that this substantial payment by Eskom was unjustifiable and indefensible, McKinsey repaid the moneys to Eskom. The repayment was later followed by a further payment representing interest earned on the moneys earlier received from Eskom. McKinsey is no longer participating in this matter other than to inform the court that at no stage did it conclude any contract with Trillian. Similarly, the National Director of Public Prosecutions is no longer a party to the present action. It withdrew its forfeiture application in terms of the Prevention of Organized Crime Act (POCA) since the preservation order has lapsed. From the uncontested evidence of both Eskom and McKinsey it is clear that Trillian was not entitled to the payment received from Eskom.

[24] In its written submissions and in court it however persisted in retaining the payments received. Although it does not challenge either the 2015 Agreement or the MSA, as its stance is that it has no knowledge of the internal workings and requirements at Eskom, it merely resists to refund the moneys received insisting that it was entitled to the payments as it had an agreement with McKinsey. The only challenge mounted with vigor is that Eskom's case is based on hearsay and that, on this basis the matter should be referred to evidence not only to disprove the hearsay evidence but to resolve the dispute of fact arising as a result of McKinsey' denial that it had an agreement with it which agreement obliged

Eskom to have made the payment to it. What follows we deal with the issues of hearsay and the alleged dispute of fact that must be referred to evidence.

THE HEARSAY ARGUMENT

[25] It was contended on behalf of Trillian that Mr Hadebe, the deponent on behalf of Eskom, had no direct knowledge of any of the facts contained in the founding affidavit, because his appointment was virtually a year after the events narrated in the founding affidavit. It has also been pointed out that Eskom was relying on confirmatory affidavits, various reports, testimony at a Parliamentary Inquiry and information gathered from the *"Guptaleaks"*. The argument is therefore that Eskom has failed to meet the requirements in s3 of the Law of Evidence Amendment Act, 1988 which governs the admission of hearsay evidence. It was pertinently argued that Eskom has failed to demonstrate that Trillian would not be prejudiced by the admission of such hearsay evidence.

[26] As a general rule hearsay evidence is not permitted in affidavits. However, in terms of s3(1) of the Law of Evidence Amendment Act, No 45 of 1988 a Court has a discretion to admit hearsay evidence under certain circumstances. It provides as follows:

> *'Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –*

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the Court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail;

(vii) any other factor which should in the opinion of the Court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

[27] When considering the objection raised by Trillian as well as the provisions of s3(1) of the Act, it is important to bear in mind what the main issues between the parties are. Counsel for Eskom submitted that this case turns on two questions. First, whether the contracts concluded between Eskom and McKinsey, and all payments flowing from those contracts, are unlawful and invalid and stand to be set aside. Second, whether it is just and equitable to order Trillian to return the money it unlawfully received from Eskom.

[28] Counsel for Eskom has also pointed out that the first question is effectively unopposed. McKinsey no longer seeks to defend the Master Services Agreement, the 2015 McKinsey contract and the settlement agreement reached between Eskom and McKinsey. As a matter of fact, in argument Trillian did not seriously dispute the allegation that the said contracts are unlawful.

[29] In argument counsel for Trillian also referred to certain main issues between the parties. It was put as follows:

> *'On the assumption that one or more of the grounds of the rule is good and would result in the setting aside of the two McKinsey contracts, the question is what principles govern the claim for repayment from McKinsey and Trillian. The Constitutions gives the Courts a discretion to order remedial relief that is just and equitable.'*

[30] Counsel for Eskom pointed out that, while Trillian continues to oppose the application, it does not meaningfully dispute the three primary grounds to review and set aside all the impugned decisions. These grounds are:

(a) the Master Services Agreement and the 2015 McKinsey contract were concluded without any open and competitive tender process in breach of s217(1) of the Constitution, the Public Finance Management Act 1 of 1999 and Eskom's procurement policies;

(b) both contracts were concluded in violation of National Treasury Instruction No 1 of 2013/2014 which imposes strict requirements for the procurement of management consulting services; and

(c) the conclusion of the Master Services Agreement without notice to or approval from the Minister of Public Enterprises was in breach of Eskom's Significance and Materiality Framework.

[31] The deponent on behalf of Trillian made it clear, from the outset, that Trillian has no knowledge of Eskom's internal processes. The explanation given reads as follows:

'At the outset, it is incumbent upon me to make it clear that the second and third respondents lack direct knowledge of what precisely transpired in the corridors of Eskom regarding its decision-making processes, save for what

was intermittently communicated to them by the first respondent. Accordingly, in the nature of things, I am unable to deal comprehensively with a large number of the allegations in the founding affidavit.'

[32] The evidence with regard to payments made to Trillian can be summarised as follows:

(a) On 15 March 2016 McKinsey wrote a letter to Trillian titled *"Termination of Interactions between McKinsey and the Trillian Group in respect of the Top Consultants Program at Eskom"* in terms whereof Trillian was informed that McKinsey was no longer prepared to work with Trillian. This letter is part of the record before us;

(b) On 30 March 2016 McKinsey sent a letter to Eskom informing it that it would not be concluding any agreement with Trillian. In terms of this letter it was clearly stated that McKinsey would not be in a position *"to commence a relationship with Trillian"* and *"interactions with Trillian have now been terminated with confirmation having been sent to Trillian"*. This letter is also part of the proceedings before us;

(c) It is then alleged that, despite the absence of a contract, Trillian representatives continued to attend meetings of the steering committee established under the Master Services Agreement. In order to substantiate this allegation reference is made to the steering

committee meeting minutes indicating attendance by Trillian representatives on various dates. These minutes have also been included in the papers before us;

(d) It is also alleged that certain improper and corrupt dealings took place between Trillian representatives and Eskom officials. To substantiate this allegation reference is made to private meetings which took place between Mr Koko (representing Eskom) and Mr Essa (representing Trillian) regarding Trillian's work at Eskom. As proof of this relationship extracts of Mr Koko's testimony in Parliament regarding his visits to Mr Essa, are included in the papers before us;

(e) It is then explained by the deponent on behalf of Eskom which payments were made to McKinsey and Trillian following certain written submissions to the board tender committee. These submissions are also included in the papers before us;

(f) Reference is also made to a resolution of the board tender committee approving a total settlement of R1,8 billion, *"inclusive of payment to the BBBEE partner"* and a further approved cash payment of R800 million *"to cover the utilisation of the consultant's resources to date".* This resolution is also included in the papers before us.

[33] The deponent on behalf of Eskom also explained the problems he had to face in putting together the jigsaw puzzle. They are, *inter alia*, the following:

(a) it appears that deliberate attempts were made by senior Eskom officials to disguise the true nature of certain decisions and to hide relevant information;

(b) many of the key role-players within Eskom have in the meantime departed;

(c) various Eskom executives who had been implicated in maladministration, irregular payments and allegations of corruption have tendered their resignation or had their employment terminated.

[34] Taking into account the nature of these proceedings, the nature of the evidence referred to above and the purpose for which the evidence is tendered, i.e. to obtain an order as prayed for, it appears to us that the evidence referred to above is reliable. First, Trillian has no knowledge of Eskom's internal processes and appears to be unable to seriously dispute, not only the allegation that the said contracts are unlawful, but also the evidence referred to above. Second, taking into account the nature of the evidence, it appears that the facts are mainly derived from contemporaneous documents such as emails, an attendance register and minutes of meetings. We have no reason to doubt the veracity of

these documents and no evidence was presented to indicate that these documents have been falsified.

[35] Also taking into account the nature of the evidence, the probative value or reliability thereof must be considered. This evidence is not only relevant, but it appears to be also the best evidence available. Furthermore, we also have to take into account the problems faced by Eskom in presenting the relevant evidence. Many of the key role-players within Eskom have in the meantime departed. Those executives who had been implicated in maladministration and irregular payments have tendered their resignation or had their employment terminated. It would not only be unrealistic but also unreasonable to expect Eskom to make use of their support in presenting its evidence.

[36] It was argued that Eskom has failed to demonstrate that Trillian would not be prejudiced by the admission of all this evidence. Trillian has already indicated that it has no knowledge of Eskom's internal processes. The allegation that the Master Services Agreement and the 2015 McKinsey contract were concluded without any open and competitive tender process can easily be verified by a respondent such as Trillian. An open and competitive tender process does not take place in secret. It is open for the public to consider. There can certainly be no prejudice for Trillian taking into account these considerations. Furthermore, the documents relied upon by Eskom and annexed to the papers before us have provided Trillian with ample opportunity to investigate the reliability of such evidence and to demonstrate why these documents should not be accepted as

reliable. In this regard we also take into account that the issues between Eskom and Trillian is of significant public interest.

[37] Taking into account all the facts and circumstances referred to above, we are satisfied that the evidence objected to by Trillian should be admitted in the interests of justice and therefore the objection raised by Trillian should be dismissed.

[38] In *Swifambo*[4], Francis J in admitting hearsay evidence in similar circumstances as in the present matter reasoned that –

> '...Hearsay will generally be more readily admitted in application proceedings than n trial proceedings. This general proposition applies more so in review proceedings where the litigant has no procedural election and must bring the review by way of application. It is common cause in tender review proceedings that the members of the public authority who feature in the record of the proceedings may not be before court and may not depose to confirmatory affidavits. It cannot be suggested that all the information in the record relating to the decision falls to be disregarded because it is hearsay...'

[39] Like the Supreme Court of Appeal[5], we also agree with Francis J's reasoning in *Swifambo.* It will indeed be foolhardy to expect the very persons who either acted unlawfully or fraudulently to depose to confirmatory affidavits. In addition, the

[4] See footnote 2 para 25.3
[5] Swifambo Rail Leasing v PRASA (1030/2017) [2018] ZASCA 167 (30 November 2018)

interests of justice would not only be frustrated by the non-admission of the evidence on the basis that such evidence is hearsay, but this rejection of such evidence would benefit the wrong-doers. To do so would not only cover malfeasance perpetrated by persons who displayed lack of fidelity to an organ of the state such as Eskom but would be to pervert the rule of law the very basis of our constitutional state.

REFERRAL TO ORAL EVIDENCE

[40] Trillian seeks to make out a case for this application to be referred to oral evidence in order to afford them an opportunity to cross-examine witnesses in a trial. Its contention is based on issues on which it submits are disputes of facts. Before making reference to those issues it is necessary to give a brief exposition of the legal principles applicable in this regard.

[41] The approach of our courts to the determination of whether a dispute of fact exists or not is summarised in The Civil Practice of the High Courts of South Africa (Herbstein and Winsen) 5th Edition at p294 where the following is stated:
'*The determination of the question of whether a real and genuine dispute of fact exists is a question of fact for the court to decide. The respondent's allegation of the existence of such a dispute is not conclusive. 'In every case the court must. . .. see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence.' If this were not done, the*

respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant'[6]

At p296 the learned authors continue:

'*Once the absence of a bona fide dispute on material facts is apparent, the applicant is entitled as of right to have the claim enforced by the more expeditious and less expensive method of motion proceedings, and the court has no discretion to refuse to entertain such proceedings notwithstanding the loss to a respondent of some tactical advantage that he might have enjoyed in the event of the institution of a trial action.*'[7]

[42] It is trite that a dispute of fact arises when a respondent denies material allegations made by deponents on applicant's behalf and produces positive evidence to the contrary.

However, in *Soffiantini*[8] Price JP said:

> *'If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or dely a petitioner by such a device. It is necessary to make a robust, common-cause approach to a dispute on motion as otherwise the effective functioning of the Court can*

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[6] *Peterson v Cuthbert and Co Ltd* 1945 A.D. 420 at 428

[7] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165, 1166; *Tamarillo (Pty) Ltd v B N (Pty) Ltd* 1982 (1) SA 398 (A) at 431A

[8] Soffiantini v Mould 1956 (4) SA 150 (E) at 154 G-H

be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'

[43] In *Plascon-Evans Ltd*[9] the Appellate Division pronounced on the issue of disputes of fact in motion proceedings as follows:

'[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, where it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5) (g) of the Uniform Rules of Court. . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the

[9] Plascon-Evans Ltd v Van *Riebeeck (Pty) Ltd* 1984 (3) SA 623 at 634H-635B

correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief he seeks. . ..'

[44] This is an application for review and the setting aside of the two contracts and the subsequent payments made as a result thereof. it is trite that a litigant in such proceedings has no procedural election and must bring the review by way of application. To suggest, therefore, as Trillian does, that Eskom ought to have foreseen or ought to have reasonably foreseen the disputes of facts and proceeded differently misses that procedural point.

[45] In seeking referral to oral evidence Trillian makes reference to a number of what it refers to as material disputes of fact which we must now examine.

[46] <u>The subcontract</u>

46.1 In the founding affidavit Eskom states '*when the Master Services Agreement was purportedly concluded in January 2016, it did not include any 'SD and L Annexure' setting out the terms of Mckinsey's relationships with Trillian. Trillian was also not mentioned in any other portion of the agreement.*

This omission of the SD and L Annexure appears to be a result of the fact that McKinsey and Trillian could not reach agreement'.

It continues:

'McKinsey was unable to conclude any agreement with Trillian until Trillian passed McKinsey's internal due diligence checks (known as a 'global risk review.' Trillian failed these checks'.

Finally Eskom concludes:

'Following McKinsey's letter, and to the best of my knowledge, no contract or subcontract was ever concluded between McKinsey and Trillian. There is no evidence that Eskom concluded any contract with Trillian directly.

Ms Mothepu confirms that Trillian was well aware of the fact that there were no contracts in place between Trillian and McKinsey or Trillian and Eskom'.

Notably Ms Mothepu is Trillian's former Chief Financial Officer (CFO).

46.2 What is notable also is that Trillian does not dispute the non-existence of a sub-contract when it states:

> *'Although it was contemplated that a written sub-contract would be signed, this did not eventuate, despite an exchange of drafts. This process began with an email sent by Benedict Phiri to Eric Wood on 30 November 2015 ('EW 11(1)') and culminated with the marked-up version sent by Clive Angel to Vikas Sagar on 22*

February 2016 ('EW 11(2)'). However, the parties did not intend to make that agreement dependant on this formality, as is evidenced by the fact that TMC rendered the required services to McKinsey for the benefit of Eskom and also paid its share, without McKinsey ever objecting'.

46.3 Also pertinent regarding the sub-contract is McKinsey's response in its answering affidavit when it said:

'In the result, after only a few weeks of work on the three-year long Turnaround Programme and as a consequence of Trillian's failure to supply the repeatedly requested information, McKinsey concluded that Trillian did not satisfy McKinsey's due diligence requirements and McKinsey decided not enter into a supplier development partnership with Trillian. Eskom's allegations in its founding affidavit to this effect, is correct'.

46.4 Evidently from the quoted paragraphs it is quite apparent that Eskom and the two respondents, namely Trillian and McKinsey, are in agreement that no sub-contract came into existence between them. It can hardly therefore be argued that in these circumstances a dispute of fact arises let alone a genuine one between the parties.

[47] <u>The existence of a corrupt relationship between Eskom and Trillian</u>

47.1 Trillian also submits that there is a dispute of fact regarding the corrupt relationship which Eskom alleges existed between Trillian and Eskom officials.

In this regard Eskom states (*inter alia*) in its founding affidavit:

'*There is further evidence that Mr Koko and Mr Singh enjoyed trips to Dubai, paid for or otherwise facilitated by Mr Essa and his associates.*

The emails sourced from Eskom's server show that in December 2015 Mr Essa or his associates assisted Mr Koko in obtaining visas for his trip to Dubai in January 2016. Those emails were previously attached to annexure PH1.

Information in the public domain further records that Mr Koko's hotel accommodation and other expenses in Dubai were paid for by Sahara Computers, a company owned by the Gupta family. Investigative reports on this trip are attached as Annexure PH17 and PH18. Mr Koko offered to provide proof to Parliament that this was not the case but to date all that he has produced is an 'invoice' from The Oberoi Hotel in Dubai indicating that the invoice was paid. The source of the payment has never been explained. A copy of this invoice is attached as Annexure PH20.

The disciplinary charges put to Mr Koko in January 2018 included his failure to declare these conflicts of interest and these business gratuities in terms of Eskom's Conflict of Interest Policy. These charges are attached as Annexure PH21. On 16 February 2018, Mr Koko resigned with immediate effect half an hour into his disciplinary hearing'.

47.2 Eskom expands on the corruption link between Trillian, Essa and the Gupta family when it says

'As I have mentioned, Mr Essa was the majority shareholder and a director of Trillian Capital Partners. I attach Mr Essa's biography as well as relevant extracts from a CIPC Director Search, as Annexure PH14 and PH15. Mr Essa is widely known to be a close associate of the Gupta family. Annexure PH15 reflects Mr Essa's role as a director of VR Laser, another company with close links to the Gupta family.

Mr Koko has also admitted that he attended private meetings with Mr Essa regarding Trillian's work at Eskom. In this regard, I attach relevant extracts of Mr Koko's testimony in Parliament as Annexure PH16. . .'

47.3 Trillian's response regarding Eskom's corruption allegations is as follows:

'I wish to make it perfectly clear that, to my knowledge, the Eskom decisions were not brought about by any corrupt dealings on the part of TMC or any of its representatives. The founding affidavit, I am advised, makes out no case to the contrary and is replete with hearsay and irrelevant statements, generalised accusations and aspersions and indeed pure conjuncture. The record, if anything shows a process internal to Eskom that may or may not bear scrutiny from perspective of the principle of legality, but which is inconsistent with corruption or bias'.

47.4 Eskom does make a concession which might seem to an extent to support the above averment by Trillian when it says:

'Eskom accepts that it has no evidence that Trillian improperly participated in any corruption or bribery relating to the awarding of either of the contacts to McKinsey or to Trillian's appointment as sub-contractor. This may be seen from its acceptance of Trillian's allegation that there is no evidence that Trillian introduced McKinsey to Eskom. Rather, Eskom says that this is 'beside the point.'

Its case is that, once the contracts with McKinsey were in place, Eskom officials used those contracts systematically as a convenient vehicle to benefit Trillian.

That, however is a different matter entirely in the context of allegations of corruption.

As far as the case goes, is that there was 'preferential treatment' accorded to Trillian in relation to the contracts themselves, there is similarly, no direct, not even indirect, evidence of corruption. Once again, it must follow that if any treatment was 'preferential' to Trillian, it must perforce also have been 'preferential' to McKinsey'.

What is apparent from the above is that the corrupt relationship that existed between Essa and senior Eskom officials is not disputed by Trillian. Its lack of knowledge thereof does not create a dispute of fact. It is common cause that it is the same officials who fast-tracked and facilitated payments to Trillian when there was neither factual nor legal basis to do so. It is also common cause that Mr Essa was a 60% shareholder of Trillian Capital Partners, the

third respondent. We therefore conclude that no dispute of fact arises on this issue.

[48] Work Performance and Invoices submitted

48.1 To illustrate the nebulous nature of Trillian's claims regarding the nature of the work performed, Eskom references 'work' performed at Majuba Power Station as follows:

'Mr Steyn recalls one Indian national who could have been from E Gateway, he recalls that his name was Mr Saha. He does not recall Mr Singh.

Mr Steyn recalls that Mr Saha was on site at Majuba Power Station for less than a month in approximately January or February 2016. Mr Saha was not an English first language speaker. He was an Indian national. Mr Steyn reports that this created a language barrier and he struggled to communicate with the staff on site, including Mr Steyn. As a result of the language barrier, and the fact that Eskom had sufficiently qualified and experienced engineers and technical personnel on site, Mr Saha was not considered by Mr Steyn to be of value or assistance and within a month of his arrival, Mr Steyn asked that Mr Saha be removed from the Project.

Wood makes several improbable statements in the Trillian Answering Affidavit regarding the 'technical experience' that the individual/s from E

Gateway apparently provided at Majuba Power Station 'providing most of the engineering clarifications on how sections of the Thermal Power Plant operated' (Trillian AA, para 166, pp1224). Mr Steyn confirms that one of the appointees under the Master Services Agreement were technical experts, that Eskom has no need of clarification of how a Thermal Power Plant works, and that Eskom was not provided with such services by Mr Saha, McKinsey or any other party'.

Eskom continues:

'Ms Goodson confirms that as the CEO of TMC she knew only of the involvement at Majuba Power Station of the following TMC employees: Mr Jasher Bharath ("Mr Bharath") was a Trillian employee on the Majuba Power Station Generation work stream who started on 1 March 2016 and Mr Ben Barnard ("Mr Barnard"), later the CEO of TMC , would also attend weekly meetings at Majuba Power Station. . .

. . .

Mr Bharath's role at Majuba Power Station appears to be the high point of TMC's claims of work performed under the Master Services Agreement. All that is alleged is that Mr Bharath had some success in arranging meetings for the Eskom Majuba team (Annexure EW 30(1), pp 1906). This limited work could hardly justify the more than R100 million fee'.

48.2 Trillian alleges that there are disputes arising out of the detail and nature of the work performed in that there are several possibilities contained in

Eskom's submissions namely, there was no work done or there was some initial work or that, according to Trillian at least, there was work from which Eskom derived value, hence the invoices which were submitted by Trillian and which Eskom considers either fraudulent, inflated or unlawful. Eskom further submits that the invoices were not properly substantiated and refers (*inter alia*) to the following example:

"*On 10 August 2016, Trillian sent an invoice for R122, 208, 000.00 (including VAT), addressed to Ms Maya Bhana (General Manager of Mr Anoj Singh's office) ('the MC02 August invoice'). This invoice was signed on 11 August 2016 by Mr Govender and Mr Mabelane. It appears as Item 137 of the Record Bundle. This invoice provided scant details of the basis for this claim. It merely stated*:

"*Professional fees: Financial Advisory for the following Eskom Initiatives:*

- *Project Surge*
- *Private Sector Participation*
- *Online Vending Services*
- *Hitachi*
- *Duvha*
- *Short term funding facility*
- *Long term funding facility*"

48.3 Over and above the content of the Invoices Eskom alleges that "a significant number of irregularities in the manner in which payments were

approved for those Trillian invoices" in that they were made without any contractual basis resulting in Eskom officials having to create fictitious contracts in order to facilitate payments. This was the trend with regard to all the invoices submitted by Trillian to Eskom. As will appear (*infra*) Trillian admitted that the time sheets in support of invoices MC02 and MC03 were fabricated. This was also confirmed by Ms Mothepu.

Corporate Plan Project

[49] Trillian submits that there is a dispute regarding the Corporate Plan Project but Eskom's version is that the conclusion of the project was not legitimate in that it was procured on a sole source basis without any tender process being followed and that it was therefore not in compliance with Eskom's internal prescripts. This matter is dealt with in detail as part of the grounds of review. It does not give rise to any dispute of fact.

Trillian's BBBEE Status

[50] Trillian also claims that there is sufficient dispute around the issue of Trillian's BBBEE status to justify a referral to oral evidence. This is despite the following evidence in Eskom's founding affidavit:

'*As confirmed by Ms Goodson, at the time that Trillian purportedly submitted its invoice on 31 January 2016, it had only two employees. These employees did not*

perform any work for Eskom during this period, and Trillian could not have delivered the work for which it submitted its invoices.

The payment was apparently claimed on the basis that Trillian was a BBBEE Partner/ Supporter Development Partner to McKinsey under the 2015 contract. However, at the time payment was claimed and made Trillian had no black ownership, and was registered as such on Eskom's Supplier Database based on its confirmation of shareholding provided on 1 April 2016. I refer to Annexure PH33 (also Item 110 of the Record Bundle), previously described above.

Trillian made these representations knowing them to be false and with the intention to defraud Eskom."

Ms Goodson is a former Chief Executive Officer of TMC and she derives information from the time she occupied that position with TMC but Trillian does not accept her evidence.

Eskom responds as follows:

'*Wood asserts (at para 37 of the Trillian Answering Affidavit) that TMC had a 60% BEE ownership at all material times. This is apparently based on a shareholding held by Mr Essa. Wood, however, fails to provide any evidence of actual shareholding by Mr Essa nor does he identify precisely when Mr Essa became a shareholder of TMC and he provides no evidence of B-BBEE certification*'. (our emphasis)

[51] Notably, and besides, any apparent conflict between Ms Goodson and Wood in their respective affidavits the version of Ms Goodson has remained unchanged. It is therefore not clear how this issue can serve or be asserted as a basis for referral to oral evidence.

[52] The main issue for determination by this court is whether the contracts concluded between Eskom and McKinsey and the payments flowing therefrom are unlawful and invalid and stand to be set aside. This issue has been settled between Eskom and McKinsey with the latter accepting such unlawfulness and invalidity and repaying all the monies including the interest earned flowing from the impugned contracts.

[53] It is also common cause that Trillian makes no submission to refute Eskom's grounds of review. Just to recap, Eskom's application is the review and setting aside of the two contracts as well as all the subsequent payments flowing therefrom. The grounds for the application have been comprehensively dealt with elsewhere in this judgment but they are:

53.1 <u>No open and competitive tendering processes</u>

Eskom was by law (s 217(1) of the Constitution) required to ensure fair competitive and cost effective procurement

53.2 <u>Breaches of the National Treasury Institution 1 of 2013/ 2014</u>

This Treasury instruction was to ensure fiscal prudence in regard to resources generally but more particularly the public spend on external consultants.

53.3 Breaches of the Significance and Materiality Framework (SMF)

The SMF was meant to give the Minister of Public Enterprises an enhanced capacity to exercise oversight over the affairs of an entity especially regarding contracts above the one-and-a-half billion Rand threshold. A breach of the SMF would result in the invalidation of a tender. See *PRASA v Swifambo Rail Agency* (Pty) Ltd 2017 (6) SA 223 GJ at para 70

[54] Trillian adopts a stance where the issues it identifies as giving rise to disputes of fact ought to be treated in isolation as matters not relevant to or affected by the above grounds of review, the so-called "Trillian Bubble." It seeks to achieve this goal despite the fact that its purported relationship with McKinsey was brought in writing to a decisive end in March 2016. It further seeks to achieve this goal despite its explicit admission that there was no contract between itself and McKinsey on the one hand and Eskom on the other. It also seeks to achieve this goal with the full knowledge that the 2015 McKinsey contract, the MSA agreement and the settlement agreement were unlawful.

'No referral' reasons

[55] There are a number of reasons which emerge from the evidence on the basis of which this matter need not be referred to oral evidence. We discuss these *seriatim*.

55.1 There was no basis in law for payments to be made to Trillian absent a contractual relationship between Eskom and Trillian.

55.2 Payments were made as a result of corrupt dealings between Eskom officials and Trillian representatives. Objective evidence demonstrates how Eskom officials had to create fictitious contracts in order to "legitimise" the payments through the Eskom payroll system.

55.3 The Trillian invoices were either false or with inflated claims of work allegedly performed for Eskom. The invoices presented were fraudulent and unlawful.

55.4 The 'Trillian Bubble' which is encapsulated in the following Trillian statement:

'Eskom's case for the illegality of the McKinsey contracts does not extend to Trillian's contracts with McKinsey. It is not, therefore, necessary for Trillian to engage directly with the grounds of review with the notable exception of the case for corruption on its part'.

The attempt to insulate Eskom's payments cannot stand scrutiny due to the undisputed fact that the payments were all made on the assumption that these were valid contracts with McKinsey. The whole basis of referral

to oral evidence is thus swept away; whether it refers to a subcontract, work performed, invoices, corruption or whatever head Trillian may conjure up to try and refer the matter to trial, the referral submission is not sustainable.

This is evident, for example when one makes reference to Trillian's claims to entitlement to 30% "gain share" which was supposedly flowing from the MSA and Settlement agreements which required McKinsey to have an SD and L Partner and permitted risk-based termination. This is also evident upon a reading of the final settlement agreement which reflected the payments to McKinsey and Trillian as "*in lieu of all claims by McKinsey and its BBBEE Partner for services rendered in terms of the [Master Services Agreement].*"

55.5 It is established law that where an administrative act is declared invalid and set aside, any consequential acts relying on the prior act are rendered invalid. In *Kirland Investments (Pty) Ltd*[10], the Constitutional Court was explicit in stating that

'*[A]cts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set aside*'.

It therefore goes without saying that all payments to Trillian were similarly rendered unlawful and invalid. Referral to evidence in these circumstances would be an exercise in futility.

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[10] MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd 2014 (3) SA 481 CC at fn 74

55.6 Any subcontracting relationship which may have existed between Trillian and McKinsey could not have survived the undisputed termination of the contract by McKinsey in March 2016.

55.7 In its quest to prove or demonstrate the "Trillian Bubble", Trillian seeks to suggest through the so-called dispute of facts (supra) that beyond all the terminated contracts, there existed a tacit agreement arising out of attendance of meetings and alleged work with McKinsey.

This issue was addressed in *Metgovis*[11] when the Constitutional Court discussed the test for a tacit contract and said:

'*The test to be applied is whether the party alleging the existence of the tacit contract "has shown on a balance of probabilities unequivocal conduct" on the part of the other party that proves that it intended to enter into a contract with it.*'

The uncontested evidence of the due diligence test of Trillian by McKinsey and the subsequent unequivocal termination of any relationship with Trillian shows McKinsey's intention to distance itself from Trillian. To suggest otherwise as Trillian tries to do is simply disingenuous.

55.8 The payments to Trillian by Eskom had neither a contractual nor legal basis. The 9 February 2016 letter from McKinsey was written with reference to the 2015 McKinsey contract. It had a specific condition, namely that Eskom could only make direct payments to Trillian upon approval by McKinsey. That condition was never satisfied before

[11] Buffalo City Metropolitan Municipality v Metgovis (Pty) Limited CCT78/18 [2019] ZACC 9 (28 February 2019)

payments started flowing from Eskom to Trillian. None of the invoices submitted by Trillian was approved by McKinsey.

[56] Corruption is the only issue that Trillian seems, even though feebly, to put in issue. Upon examination of the undisputed facts it seems that even on this aspect Trillian fails to make out a case. One of the events that stand out in the corrupt collaboration between Trillian and Eskom officials was the all expenses paid trips enjoyed by Eskom's senior officials, Koko and Anoj Singh, to Dubai which were arranged by Mr Essa and Sahara, a Gupta-owned company.

It is not disputed by Trillian that Mr Essa had a direct interest in Trillian's affairs. At best, all that Trillian's Wood could do was to disclaim any knowledge of these affairs which amounts to a bare denial. No affidavit was filed by Mr Essa who was alleged by Wood to have fled to Dubai.

[57] Trillian claims that

'*Even assuming the correctness of these allegations, they do not assist Eskom. . . in essence the allegations concerning Messrs Koko and Singh do not demonstrate a causal nexus between their alleged receipt of 'gratification' and the conclusion of any agreement with McKinsey or the appointment of McKinsey (or indeed Trillian as subcontractor)'.*

What Trillian states in this excerpt, is far removed from the truth as the following facts demonstrate:

57.1 As Chief Financial Officer, Singh was a signatory to the Board Tender Committee submissions on 8 August 2016 which motivated the R1,8 billion settlement "inclusive of payment to BBBEE partner" which partner is not identified.

57.2 Trillian sent invoices directly to Singh as what appeared to be Trillian's contact person at Eskom.

57.3 The Board Tender Committee's December 2016 resolution appointed Singh, Koko and Mabelane to negotiate the final settlement which included payments to the "BBBEE partner"

57.4 On 6 July 2015 Koko was tasked to conduct negotiations as Group Executive: Technology and Commercial to conduct negotiations of the MSA.

57.5 Koko and Singh sought approval of the 2015 McKinsey contract from the Eskom Board.

Evidently there is a consistent pattern in the behaviour of these senior officials which at the end of the day benefitted Trillian. Another theme in the conduct of these officials was that whenever invoices landed at Eskom's desk they were settled with alacrity and with a total and unseemly disregard for Eskom's internal prescripts regarding payment approvals.

The objective evidence presented by Eskom demonstrates more than just a nexus between Eskom and Trillian's beneficiation but speaks to a theme of consistently corrupt behaviour.

57.6 Invoices

Trillian admits that the "time and materials" invoices (MC02 and MC03) submitted to Eskom were "reconstructed." This confirmed Ms Mothepu's version that these invoices were fabricated. These are the invoices on the basis of which Trillian submitted were proof of work performed and costs specifically incurred.

57.7 Ms Mothepu alleged that all financial advisory work was conducted "at risk" by Trillian, a fact which was admitted by Wood in an affidavit in his dispute with his Regiments partners. Unequivocally Wood states in his supplementary affidavit as follows:

'384 My statement in the litigation against Regiments in relation to the events pertaining to the work done by Trillian at McKinsey's instance for Eskom prior to February 2016 at which stage the contract was entirely risk-based relationship [sic]. There is no contradiction there'.

[58] Demonstrably, the invoices on the undisputed facts were fabricated, fraudulent and unlawful. In the circumstances, not only was Trillian not entitled to payment on the basis thereof and, with equal force, this evidence cannot serve as a basis for a referral to evidence.

[59] The Oliver Wyman Marsh Report (OWM)

This report served as the only report which provided independent analysis of the events surrounding Eskom, McKinsey and Trillian regarding the Master Services

Agreement. The report was highly critical regarding the 'gain share' calculation of the work performed by Trillian at Majuba Power Station.

The report was critical also of the negotiation processes which led to the payments subsequently made in that they were not only poorly documented but also that they lacked transparency.

The OWM Final Report advised against any payments to McKinsey and Trillian pending a review of the value add. Most significantly, the OWM findings were never disputed by Trillian. The OWM findings therefore remain uncontested.

[60] In conclusion, an overall assessment of objective evidence presented by both Eskom and Trillian draws one to the inescapable result that the issues raised by Trillian of disputes of fact are in essence fictitious issues of fact which are aimed at delaying the hearing of the matter and cause prejudice to Eskom. The issues have been dealt with in detail in order to demonstrate the absence of a genuine and *bona fide* dispute on the material facts. In *Soffiantini* (supra) it was stated that "*the Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so.*" *In casu*, almost without exception it has not been difficult to decide whether or not there were disputes of fact. The decision on the matters raised has been at times made easier by the admissions by Trillian which have bolstered the view that there are no disputes of fact.

Most significant of these are the statement made by Wood in a supplementary affidavit to this effect:

'63 Accordingly, on or about 15 December 2015 and, in circumstances I set out in detail below, McKinsey and TMC concluded a partly oral, partly tacit and partly written agreement, the material terms of which were

63.1 . . .

63.2 . . .

63.3 . . .

63.8 The contract would be coterminous with the contract between Eskom and McKinsey'.

Evidently, the contents of paragraph 63.8 when considered with the fact that Trillian does not contest the three grounds of review by Eskom dispel whatever doubt there may be that a referral to evidence is absolutely not required in the present case and that it would only serve to delay the inevitable and a waste of time.

From Trillian' own version it is patently clear that whatever subcontract there may have been, it is not sequested from the main contract. If the main contract is set aside, the subcontract must also fall.

What emerges from the evidence is that the subcontract is not the subject of a genuine dispute of fact. The issue of a genuine dispute of fact was discussed in *SARFU*[12] when the Constitutional Court said the following:

[12] President of the Republic of South Africa and others v South African Rugby Football Union and others 2000 (1) SA 1 (CC) para 235

'[235] It is trite that an application will be referred for oral evidence only if there is a genuine dispute of fact, the resolution of which is material to the determination of the case . . . .'

[61] In the circumstances we find that Trillian has failed to make out a case for referral to evidence.

THE JUST AND EQUITABLE REMEDY

[62] The starting point is the remedial powers courts have in terms of s172(1) of the Constitution. In terms of this section, once a court has made a pronouncement that Eskom's conduct, in the present case, was unlawful, unconstitutional and invalid, it remains for the court to decide on a "just and equitable relief" to be made.

[63] In *Steenkamp*[13], Moseneke, Deputy Chief Justice, reasoned that –

> '...The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the

[13] Steenkamp N.O. v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) para 29

prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'

[64] In *AllPay2*[14], wherein the above-stated public-remedy was approved, the Constitutional Court reasoned that –

'Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.'

[65] The Constitutional Court further stated that "...in the context of public-procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity – in this case the setting aside of the contract between SASSA and Cash Payments – but also in relation to the effect of the order on further procurement..."

[14] AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency (No2) 2014 (4) SA 179 (CC) para 30 - 32

[66] That a party such as Trillian should not benefit from unlawful conduct is more than clear. In the present matter, where there was neither factual nor legal basis for Trillian to be paid such substantial amount of public moneys. It is indeed just and equitable that such moneys be returned to Eskom. To prove that indeed crime, no matter what euphemism is used in describing such unlawful conduct, does not pay. That indeed the cancer of corruption can be eradicated and those who benefit from ill-gotten gains, will be deprived of such gains. In the ultimate end, this would encourage good and ethical behavior in public procurement matters and thus entrench the rule of law.

[67] In the present matter, where the probabilities are apparent that senior officials of Eskom could leave no stone unturned to benefit Trillian; where confidential information belonging to Eskom was leaked to Trillian; where senior personnel of Eskom, who were expected to display the conduct of the utmost good faith and to act in the best interests of Eskom; where there appears to be a corrupt relationship between Eskom's senior personnel and the directors of Trillian, justice and equity demand nothing less than that the moneys paid to Trillian, unjustifiably, be returned to Eskom.

[68] It is apt to refer to what Francis J said in *Swifambo*[15], a decision approved by the Supreme Court of Appeal, when dealing with corruption in the public procurement sphere. The learned Judge said the following –

> 'Corruption is a cancer that is slowly eating at the fabric of our society. If it is left unchecked it will devour our entire society. Chemotherapy is needed to curb it. The chemotherapy in this instance is an effective remedy that will nip the cancer in its bud…'

[69] We agree. The only and effective remedy, that is just and equitable, in the circumstances of this matter, is that the substantial resources paid to Trillian, in the absence of either factual or legal basis, must be returned to Eskom for the utilization of such resources to all the inhabitants of this Country. This will not only be just and equitable, but will be to strengthen the rule of law, the very foundation of any constitutional state such as ours.

[70] Having regard to the aforesaid, the following decisions ("the impugned decisions") are declared to be unlawful and invalid and are set aside:

70.1 The decisions to negotiate and conclude the "Master Services Agreement" between the Applicant ("Eskom") and the first respondent ("Mckinsey"), consisting of:

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[15] See footnote 2 para 125

i) The Eskom Board Tender Committee's decisions on 6 July 2015 and 21 October 2015 to authorize the negotiation and conclusion of the Master Services Agreement between Eskom and McKinsey; and

ii) The decision taken by Mr Edwin Mabelane, Eskom's Chief Procurement Officer, to conclude the agreement with McKinsey between 7 and 11 January 2016.

70.2 The Eskom Board Tender Committee's decisions on 21 June 2016 and 8 August 2016 to authorize the cancellation of the Master Services Agreement and initial cash payments of R800 million in "settlement" to McKinsey and its unnamed "BBBEE partner", the second respondent ("Trillian").

70.3 The Eskom Board Tender Committee's decision on 13 December 2016 to authorize the further payment of R134 million to the unnamed "BBBEE partner", Trillian.

70.4 The decisions to effect "full and final settlement" with McKinsey and its "BBBEE partner", Trillian, consisting of:

i) The Eskom Board Tender Committee's decision on 13 December 2016 to authorize the negotiation and conclusion of a final settlement and its further decision on 8 February 2017 to "*note and support*" the payment of R460 million in settlement.

ii) The further decisions by Mr Mabelane, alternatively Mr Mabelane and senior Eskom officials, to conclude the 2017 Settlement Agreement with McKinsey on 16 and 17 February 2017 and to effect payments to McKinsey and Trillian pursuant to that settlement.

70.5 The decisions to negotiate and conclude the "NEC3 *Professional Services Contract (PSC3)*" between Eskom and McKinsey ("2015 McKinsey Contract") consisting of:

i) The Eskom Board Tender Committee decision of 10 September 2015 approving the negotiation and conclusion of the 2015 McKinsey Contract;

ii) The decision of senior Eskom officials to conclude the contract with McKinsey on 29 September 2015.

70.6 The payments made by Eskom to Trillian arising from the impugned decisions above are declared unlawful and invalid.

70.7 Trillian is ordered to repay to Eskom the sum of R595 228 913.29, together with interest thereon at the prescribed rate, calculated from the date of judgment to date of payment.

70.8 Trillian is ordered to pay the costs of this application including the costs of three counsel.

TSOKA J

JUDGE OF THE HIGH COURT

BAQWA J

JUDGE OF THE HIGH COURT

FOURIE J

JUDGE OF THE HIGH COURT

Date of hearing: 18 – 19 March 2019

Date of judgment: 18 June 2019

Appearances:

For the Applicant:	Adv T Ngcukaitobi & Adv C McConnachie
Instructed by:	Bowman Gilfillan Inc
For the first Respondent:	Adv W Trengove SC, Adv A Cockrell SC & Adv M Stubbs
Instructed by:	Norton Rose Fulbright South Africa Inc
For the second & third Respondents:	Adv M Hellens SC, Adv J Blou SC, Adv J Meiring & Adv T Makgalemele
Instructed by:	Fairbridges Wertheim Becker Attorneys