



THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA

**MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

From: The Registrar, Supreme Court of Appeal  
Date: 3 April 2023  
Status: Immediate

*Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.*

**The Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another [2023] ZASCA 45**

Today the Supreme Court of Appeal dismissed with costs an appeal from a judgment of Rabie J in the Gauteng Division of the High Court, Pretoria (the high court). The matter arose from a lease of the SALU building in Pretoria to accommodate the Department of Justice and Correctional Services (the DOJ). It was concluded between the Department of Public Works (the DPW) and the owner, Phomella Property Investments (Pty) Ltd, the first respondent (Phomella). The lease was concluded on 22 September 2009 for a period of 9 years and 11 months. It was concluded after utilising the procedure for a negotiated lease rather than an open bidding process. Authority to conclude the lease was subject to the condition that, prior to signature, an assessment of the space required by the DOJ was to be conducted. Despite this not having been done, the lease was signed.

In February 2017, the Special Investigating Unit (the SIU) applied in the high court for the lease to be declared unlawful and for an order that Phomella and Rebosis pay to the DPW the sum of R103 880 357.65. This was said to represent wasteful expenditure incurred during the lease. It was contended that an area greater than

was needed by the DOJ had been leased. The figure represented the SIU's calculation of the rental which had been paid for the supposed excess area. The high court declared the lease unlawful on the basis that the condition to which signature of the lease was subject had not been complied with. It declined, however, to order payment of the amount claimed to represent wasteful expenditure.

The basis for the declaration was s 172(1)(a) of the Constitution which requires a court to declare conduct invalid where it is inconsistent with the Constitution. A discretion then arises under s 172(1)(b) whereby a court may make any order that is just and equitable.

The Supreme Court of Appeal rejected the argument that, where the lease was held to be unlawful, it was necessary to set it aside and declare it to have been void *ab initio*. That is because the enquiries under these two subsections are discreet and not to be conflated. Section 172(1)(a) obliged a court to declare conduct invalid. No more no less. Any additional order fell such as setting aside a contract fell within the ambit of s 172(1)(b).

The discretion exercised under s 172(1)(b) is a true one. As such, an appeal court can interfere with it only if it is not exercised 'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'.

The SIU contended that where a contract has been declared unlawful, the party concerned may not benefit from it. This, however, was based on an incorrect reading of the dictum of the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (Allpay 2)* relied upon by the SIU. Because the discretion is a true one, it is not appropriate to lay down inflexible rules. The remedial power of a court is a wide one, subject only to its being just and equitable. As such, it cannot be based on a principle of no profit, no loss, but on a consideration of the pertinent facts of each

case.

After evaluating the grounds relied upon by the SIU, the Supreme Court of Appeal held that the SIU had not shown that the true discretion exercised by the high court met the threshold for interference on appeal. Its approach could not be faulted. As a consequence, the appeal was dismissed with costs, including those of two counsel where so employed.