

DISPUTE RESOLUTION ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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After the proverbial horse has 'incorrectly' bolted: Deriving benefit from an unlawful contract

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After the proverbial horse has 'incorrectly' bolted: Deriving benefit from an unlawful contract

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The Supreme Court of Appeal (SCA), in the case of *Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality* (Case No. 60/2021) [2022] ZASCA 28 (18 March 2022) was faced with the question of whether a service provider contracted through a tender bid which has been declared void ab initio, is entitled to payment for services rendered under the void contract.

In this case, the Fetakgomo Tubatse Local Municipality published an invitation to tender for the provision of debt collection services for a period of three years. Sekoko Attorneys submitted a tender to provide the debt collection services and was duly awarded it by the municipality. The municipality provided Sekoko Attorneys with a list of debtors from whom to recover outstanding debts. Sekoko Attorneys collected the sums owed to the municipality and issued invoices to the municipality for payment for the services rendered.

Pursuant to the issuing of the invoices, the municipality came to the realisation that Sekoko Attorneys had in fact not complied with the tender bid requirements as it had failed to provide an original valid tax certificate and a valid central supplier database report. The municipality, in line with the contentious Gijima-principle, under the principles of legality, launched a review of its own decision to award the tender at the Limpopo Division of the High Court. Sekoko Attorneys launched a counter application for payment of the outstanding invoices for services rendered to the municipality under the contract.

The court *a quo*, under the auspices of section 172(1)(a) of the Constitution, which empowers it to declare any law or conduct that is inconsistent with the Constitution as invalid to the extent of its inconsistency, found that the tender was in fact inconsistent with the Constitution

and therefore unlawful and invalid. Moreover, the court *a quo* found that Sekoko Attorneys could not be allowed to derive a benefit from the unlawful contract and dismissed the counter application.

SCA FINDING

In the SCA, Sekoko Attorneys argued that, to the extent that the contract was declared void ab initio, it was incumbent on the court to invoke the provisions of section 172(1)(b) of the Constitution, which allow the court to consider, within its discretion, whether or not to make an order which is just and equitable in the circumstances, which the court *a quo* had failed to do.

The SCA, placing reliance on case law, agreed with Sekoko Attorneys. The SCA held that there are circumstances in which a court, within its discretion, must preserve the rights that have already accrued to a party at the time when the

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agreement is declared invalid. This was the case in these circumstances as the municipality had derived the full benefit of the services of Sekoko Attorneys. The municipality had not complained about the effectiveness of Sekoko Attorneys’ services, nor did it dispute its entitlement to be paid for the services rendered.

The SCA therefore found that it was just and equitable in the circumstances to order the municipality to make payment to Sekoko Attorneys an amount equivalent to that which it would have been entitled under the void tender. In reaching this conclusion, the court was unequivocal about the fact that it clearly could not enforce payment under a void tender, but it could consider whether an amount should be paid on the basis that it was just and equitable for the municipality to do so.

It must be emphasised that this case law should not be used as a ticket to award irregular tenders and subsequently review them under the principle of legality with the safeguard that the service provider will receive payment for the benefit derived by the public body.

As held by the SCA, if properly examined and considered, the facts of each matter will often reveal which remedy is appropriate and necessary. After all, it is as Froneman J said, *“The law often is a pragmatic blend of logic and experience.”*

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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