STRICTLY CONFIDENTIAL AND PRIVILEGED

IN THE SUPREME COURT OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

SCA Case No.

GP Case No. 14332/18

In the matter between: -

PASSENGER RAIL AGENCY OF SOUTH AFRICA	Applicant *a quo*
and	
SAYANGENA TECHNOLOGIES (PTY) LTD	First Respondent *a quo*
RETIRED JUSTICE EZRA GOLDSTEIN	Second Respondent *a quo*
RETIRED JUSTICE MEYER JOFFE	Third Respondent *a quo*
and	
#UNITEDBEHIND	*Amicus Curiae* in High Court

LEGAL OPINION

BY	:	**MK MATHIPA**
BRIEFED BY	:	**LEEPILE INCORPORATED ATTORNEYS**

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INTRODUCTION

1. I have been briefed by **Leepile Incorporated Attorneys** ("**my instructing attorneys**") to prepare a legal opinion for Passenger Rail Agency of South Africa ("**PRASA**"), in regard to the current appeal before the Supreme Court of Appeal – which is an appeal against the full court judgment of the Pretoria High Court in the matter of ***Passenger Rail Agency of South African v Siyangena Technologies (Pty) Ltd and Others*** (Case Number 2018/14332 and 2018/11314). The judgment was delivered on 8 October 2020. The appellant is Siyangena Technologies (Pty) Ltd ("**Siyangena**")
2. The nature and scope of the legal opinion sought is contained in a letter which PRASA's acting Group Executive: Legal, Risk and Compliance, Mr Sifiso Simelane ("**Simelane**") wrote to Mr Kenneth Leepile of my instructing attorneys on 14 July 2021. In paragraph 4 of that letter, the following questions are asked: -

2.1. What are the chances that PRASA may be called upon to pay Siyangena the full amounts on its own without deductions or set-off, this taking into account the Gijima case?

2.2. In view of the history of this matter, is it fair even to consider settlement, and if yes, what would have been taken into account in settling the matter?

2.3. Given that this matter is already at the tail end of litigation, is it therefore wise to even consider a settlement or to let the matter to its logical conclusion?

2.4. In the event that the SCA take the Gijima line, what impact would that have on PRASA compared to fighting the case to its logical conclusion?

3. There are additional questions which the Chairperson of the Board of Control of PRASA, Mr Leonard Ramatlakane, has raised in a follow-up email to Simelane of 29 July 2021 at 12:00, which can be paraphrased as follows: -

3.1. The legal opinion should help guide on a roundtable discussion with Siyangena and how to commit them to “re-repair” what has since been damaged during the lockdown level 5 without us having to pay for such further work;

3.2. What are the probabilities to be compelled to pay full contract value given that we haven’t even started with appointment of an Evaluator/Engineering to calculate what payment is due?

3.3. Mr Montana was dealing with the allegation that his property was paid for by the proceeds of Siyangena corruption – now that Montana

appeared and provided an explanation of growing his property portfolio, will this not weaken us during the appeal?

3.4. If the Court accepts that Mr Montana had a credible explanation, what happened to part payment as awarded already? Can the Court offer the company 100% with interest like (Gijima /SITA) case?

3.5. If Siyangena provided information that they wanted to find a settlement and we were not responsive, what would the implication be? i.e. would the Board of Control be – panelist for such failure?

3.6. What is our benefit to negotiate the matter?

3.7. Do you see similarity with our case with Gijima/SITA (They were awarded full cost without doing the work and SITA was blamed.)?

3.8. The Siyangena insurance covered PRASA, is that still the case and can this be part of settlement round table discussion?

3.9. Clearly Siyangena wants to be paid and they seem to want payment of full contract with escalations if there are but their persistence speaks to full payment if they succeed? Does it mean that judgment on this matter directed the parties to settle, will this result in the negotiated outcome to be [an] order of the Court? Does this mean that PRASA could be asked to pay in line with the contracts that were set aside?

3.10. Should PRASA push hard that Siyangena restore/reinstate all the equipment to what they were before COVID19 (installed to functional capabilities and repairing all vandalised and stolen equipment)?

4. I have divided this opinion under the following headings: -

4.1. Introduction

4.2. Pertinent Background

4.3. What the High Court judgment says.

4.4. Law on settlement of disputes during litigation

4.5. Gijima Judgment

4.6. Response to the Questions asked

4.7. Conclusion

PERTINENT BACKGROUND

Contracts between PRASA and Siyangena

5. PRASA awarded Siyangena Technologies (Pty) Ltd ("**Siyangena**") a number of contracts related to the installation of an integrated security access management system ("**ISAMS**") at various PRASA stations. The first appointment, to instal speed gates, access control and surveillance system was at a tender amount of R61 803 461.55. was made on 30 April 2010. Thereafter the appointments were made in Phases.

    5.1. On 31 March 2011, PRASA appointed Siyangena in what is known as Phase 1 appointment. In the latter appointment Siyangena was appointed to additional sixty-two stations at a contract price of R1.9 billion. The appointment was not subjected to an open tender process as required by section 217 of the Constitution of the Republic of South Africa, 1996 ("**Constitution**").

5.2. PRASA appointed Siyangena to Phase 2 on 1 July 2014 which sought to extend the installation of ISAMS to 162 PRASA stations across the country. In contravention of section 217 of the Constitution and the Public Finance Management Act 1 of 1999 ("PFMA"), the procurement process for this appointment was only open to a few bidders. The evaluation of the bids was not done strictly in accordance with the specifications of the tender. The total price for Phase 2 was R2.5 billion.

5.3. On 19 September of 2014, PRASA appointed Siyangena in an Addendum to upgrade the equipment installed in Phase 1 and to provide maintenance and a warranty that was coexistent with Phase 2. The Addendum contract was at a price of R800 million. The Addendum appointment was made without any open tender process as required by section 217 of the Constitution and related legislation, policies and prescripts.

PRASA's first application for self-review

6. Back in 2016, PRASA instituted an application in the Pretoria High Court for the review of its own decisions to conclude various contracts referred to above with Siyangena for want of compliance with section 217 of the Constitution and other related legal prescripts. That application was dismissed on 3 May 2017 on the grounds that the "*review application was not brought within the 180-day period because the relevant dates, for purposes of Section 7 of PAJA*[1]*, occurred between 2011 and 2014, and the application was*

[1] The acronym "PAJA" stands for "Promotion of Administrative Justice Act 3 of 2000."

launched in 2016."[2] Another reason was that, whilst PRASA had not complied with the 180-day period, it had not made application for extension of the 180-day period in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"). PRASA's application for leave to appeal was dismissed on 7 July 2017. It seems that PRASA did not petition the Supreme Court of Appeal to seek leave to appeal, which means that that application ended there.

7. It seems that the PRASA application referred to above was launched after Siyangena had instituted arbitration proceedings to enforce payment in terms of the impugned contracts referred to above. It also seems that after the PRASA application was dismissed, Siyangena returned to the arbitration proceedings. PRASA responded by seeking an urgent order to stay the arbitration proceedings pending the determination of its own fresh review application.
8. On 5 March 2018 PRASA brought a fresh application in the Pretoria High Court to review and set aside its own decisions to conclude various contracts with Siyangena, and to declare the said contracts unlawful and invalid, and set them aside. PRASA also sought an order to set aside arbitration clauses in those contracts so that all the issues between the parties could be resolved in Court.

Judgment of the Pretoria High Court

9. The unanimous judgment of the full court of the Pretoria High Court can be simplified as follows:

[2] Para (2) of the judgment of Sutherland J below para 26 of judgment.

Declaration of invalidity (Section 172(1)(a) of the Constitution

9.1. The Court declared unauthorised the signing of the JBCC agreements signed on 31 March 2011 and 1 July 2014, and the signing of the addendum agreement dated 19 September 2014.

9.2. The Court reviewed and set aside the decisions of PRASA to approve the appointment of Siyangena for the supply and Installation of Integrated Security Access Management System (ISAMS) Phase 1 and Phase 2 tenders, and the decision to appoint Siyangenga for the guarantee, maintenance and upgrading of the equipment as provided for in the addendum agreement dated 19 September 2014.

9.3. The Court set aside agreements dated 31 March 2011 and 1 July 2014 and the addendum agreement dated 19 September 2014.

9.4. The Court set aside the arbitration agreements contained in clause 40 of the JBCC agreements of 31 March 2011 and 1 July 2014, and the arbitration agreement contained in clause 40 of the said JBCC agreements to the extent that such agreement is incorporated in the addendum agreement dated 19 September 2014.

Just and equitable remedy (Section 172(10(b) of the Constitution

9.5. In carrying out its duty to determine an appropriate remedy as it was required to do by section 172(1(b) of the Constitution, the Court ordered the parties to: -

9.5.1. agree on an independent engineer within 30 days of the order, failing which the Court be approached to appoint one

9.5.2. The appointed engineer's task is to value the works performed by Siyangena, serve a report on the parties and file the report in Court within a reasonable period;

9.5.3. PRASA and Siyangena to agree on the value of the works within 90 days of served with the report of the engineer, failing which the court to determine the value of the works;

9.5.4. The payments made by PRASA to Siyangena before the date of the order of the judgment are to be set-off against the value of the works as agreed or determined by the court;

9.5.5. After the set-off, PRASA is to pay the deficit if any, to Siyangena within a reasonable period; and

9.5.6. Siyangena is to pay excess, if any, after the set-off, to PRASA within a reasonable period.

9.6. Siyangena was ordered to pay the costs.

LEGAL POSITION ON SETTLEMENT

10. Before I answer the specific questions which PRASA has and in regard to which they have asked for my opinion, I wish to first explain the legal position in regard to settlement of litigation disputes which are pending before the Court. Then I will explain the *Gijima* judgment. When that foundation has been laid, I will answer the questions asked, one by one.

General rule on settlement of legal disputes

11. The general rule is that parties in a dispute before the Court can reach a settlement agreement outside of Court before judgment is given in the matter.

Parties are always encouraged to explore chances of settling a matter. Rule 41(3) of the Uniform Rules of the High Court of South Africa provides that if any a settlement or an agreement to postpone or withdraw is reached, it shall be the duty of the attorney for the plaintiff or applicant to immediately inform the registrar accordingly.

12. Let me bring this closer to home. If in the current appeal before the Supreme Court of Appeal, an agreement could be reached that Siyangena withdraws its appeal, and that the parties would remain bound by the full court judgment of the Pretoria High Court referred to above, that would be in order. Such a settlement is proper as it does not alter or set aside the current full court judgment of Pretoria High Court.

Judgment in rem

13. It is important appreciate that, whilst the parties are free to reach an out-of-court settlement in their legal dispute before the Court, such settlement agreement may not violate the Constitution, any law or change a judgment of Court which determines the objective status of a person or thing. For example, a judgment which declares a decision to award of a tender to be invalid for violation of section 217 of the Constitution, is a judgment *in rem* in that it is an objective pronouncement on the validity of an administrative act. Its impact goes far beyond the parties before the Court.

14. The legal position was summarised as follows by the majority judgment of the Constitutional Court in **Airports Company South Africa v Big Five Duty Free (Pty) Limited and others ("*ACSA*")**: -

> ***"[1] This judgment makes clear two legal propositions. The first is that a judgment in rem may not be set aside by only a settlement agreement between the litigating parties in an appeal against that judgment. For a judgment in rem to be set aside by a settlement agreement, the court hearing the appeal must give its sanction to the agreement being made an order of court on the basis that the setting aside is justified by the merits of the appeal. The second is that the court sanctioning the settlement agreement should give its reasons for doing so.***
>
> ***[2] A judgment in rem determines the objective status of a person or thing.[3] This Court has adopted an objective theory of invalidity regarding the exercise of public power.[4] A judgment that declares a tender invalid, because it is unlawful in contravention of section 217 of the Constitution,[5] is an objective pronouncement on the constitutional validity of an administrative act. That kind of judgment has a public character that transcends the interests of only the litigating parties. It is a specific kind or example of a judgment in rem."[6]*** (My underlining for emphasis)

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[3] *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368H.

[4] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 31; *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira*) at para 26.

[5] Section 217 of the Constitution states:

> "(1) 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.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[6] [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (1) SA 1 (CC) paras 1-2.

15. What we learn from the above quotation is that any settlement agreement which has the effect of altering or setting aside a court judgment, which declares a decision to award a tender invalid for violation of section 217 of the Constitution, must be brought before the Court hearing the appeal. That Court must give its approval on the basis that the setting aside of that judgment is justified by the merits. Then the settlement agreement is made an order of the Court.

16. A settlement agreement reached between the parties can only be made an order of the Court if it conforms to the Constitution and the law.[7] The reason why a settlement agreement which is to be made an order of Court must conform to the Constitution and the law is that once it has been made an order of Court it assumes the status of court order and must be interpreted the same way as any other court order. Madam Justice Theron, writing for the majority of the Constitutional Court in **Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd**[8] put it as follows: -

There are sound reasons why a court should carefully scrutinise a settlement agreement before making it an order of court. Once a settlement agreement is made an order of court, it is interpreted in the same way as any judgment or order and affects parties' rights in the same way.[9] ***Madlanga J in Eke put the matter thus:***

> ***"The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis***

[7] ACSA para 13.
[8] [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 25.
[9] *Eke* above n 15 at paras 29-30.

between the parties; the lis becomes res judicata (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order."[10]"

17. It is now plain that once a court declares the award of a tender invalid, the impact of that decision goes beyond the two parties due to the fact that it is an objective decision on the validity of an administrative act. It is also plain that the parties are not at liberty to settle the dispute in a way that alters or sets aside the judgment being appealed against. They must bring their settlement agreement before the appeal court and that court will consider the merits of the matter, the Constitution, the law and the merits of the appeal, before it makes the settlement agreement an order of the Court.
18. If, however, all what happens is that the parties agree that the party appealing should withdraw the appeal, so that they are bound by the judgment of the court from which the appeal is made, it is within the powers of the parties to reach such a settlement agreement and it does not have to be made an order of the Court. All what Siyangena would need to do is to inform the registrar of the Supreme Court of Appeal of its decision to withdraw the appeal.[11]

GIJIMA JUDGMENT

[10] Id at para 31.

[11] I am now aware of any requirements which Siyangena would need to satisfy in order to withdraw its appeal. If it goes that route, its legal representatives would need to ensure that it complies with any requirements that I might not be aware of.

19. I would like to explain the Constitutional Court judgment in ***State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd***[12](***"Gijima"***). The *Gijima* matter came to Court as an application for self-review by the State Information Technology Agency Soc Limited ("**SITA**").

Background to Gijima

20. SITA provides information technology services (IT services) to state departments in South Africa. It does so by concluding agreements with private service provides, which in turn render IT services to the relevant state departments. A department requiring IT services submits a business case and user requirements to SITA. SITA prepares a procurement schedule for the execution of a request and a detailed costing of the proposed contract. SITA concludes a business agreement with the relevant department for the provision of the IT services to the department. SITA is therefore the one that procures the services of a private service provides which in turn provides IT services to the relevant department.[13]
21. SITA appointed Gijima as a service provider to render IT services to the KwaZulu-Natal Health Department from 1 March to 31 July 2012. SITA also appointed Gijima as service provider to provide IT services to the national Department of Defence ("**DOD**") from 1 April to 31 July 2012. These appointments were made on SITA's standard terms applicable to agreements of that nature. These appointments were made as part of an out-of-court settlement agreement between SITA and Gijima.

[12] [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC).
[13] *Gijima* para 3.

22. The background to the settlement agreement is that on 25 January 2012, SITA gave Gijima notice of termination of an agreement which it had concluded with Gijima since 27 September 2006 for the rendering of IT services to the South African Police Service ("**SAPS Agreement**"). The termination of the SAPS Agreement was to take effect on 31 January 2012. As a result of the termination of the SAPS Agreement, Gijima instituted an urgent application in the Johannesburg High Court against SITA on 1 February 2012. On 6 February 2012, SITA and Gijima entered into a settlement agreement which was not made an order of the Court. The settlement agreement was intended to compensate Gijima for the loss of about R20 million that it would have suffered as a result of the termination of the agreement. It is in accordance with the settlement agreement that SITA appointed Gijima to render IT services to the KwaZulu-Natal Health Department and to DOD.

How the appointments were made

23. In making the appointments in execution of the settlement agreement, SITA and Gijima agreed that SITA would comply with all its internal procurement procedures in respect of the two agreements. Throughout the engagement between the two parties, Gijima was concerned if SITA had complied properly with its procurement processes. SITA assured Gijima that it had the authority to enter into the settlement agreement. The following clause was inserted by SITA in the agreement for the rendering of IT services to DOD.

> **"SITA <u>unconditionally warrants, undertakes and guarantees that it has taken all steps necessary to ensure compliance to any</u>**

> **relevant legislation governing the award of the Services to the Service Provider and specifically towards ensuring that this Agreement is entirely valid and enforceable, including but not limited to the Public Finance Management Act 1 of 1999. Indemnifies the Service Provider against any loss it may suffer should this warranty be infringed.**[14] (My underlining)

24. At some later stage, at a meeting where the agreement to render services to DOD was concluded, SITA's former executive for supply chain management once more allayed Gijima's fears by giving it an assurance that SITA's executive committee had the power to authorise agreements up to an amount of R50 million.

Payment dispute

25. The DOD agreement was extended by three addenda until on 30 May 2013 when SITA informed Gijima that it was not intending to renew the DOD agreement any further.
26. A payment dispute arose between the parties. As at 30 May 2013 SITA allegedly owed Gijima an amount of **R9 545 942.72**. When the dispute could not be resolved, Gijima instituted arbitration proceedings in September 2013. It was at the arbitration that SITA resisted the claims by alleging that the DOD agreement and the related three addenda that extended it, were invalid for want of compliance with section 217 of the Constitution. It was the first time that SITA adopted this stance. SITA also alleged that Gijima had not performed in terms of the DOD agreement and the concomitant addenda. On

[14] *Gijima* para 6.

20 March 2014 the arbitrator issued an award, stating that he did not have the jurisdiction to adjudicate the question whether proper procurement processes had been followed.

SITA heads to Court

27. It was as this stage that SITA instituted an application in the High Court to set aside the DOD agreement and the three addenda. The application was dismissed on the grounds that SITA had delayed to bring it, had not applied for condonation, and the Court was of the view that, in any case, there was no basis for condonation. It held that it would not be just and equitable to set aside the DOD agreement and the related addenda and accordingly dismissed the SITA application with costs.[15]

SITA appeals to the SCA

28. SITA appealed to the Supreme Court of Appeal ("**SCA**"). By a majority decision the SCA dismissed SITA's appeal.

The Constitutional Court

29. SITA made application for leave to appeal to the Constitutional Court. The Constitutional Court made the following order:
    29.1. It granted SITA leave to appeal.
    29.2. It upheld SITA's appeal.
    29.3. It declared the decision of SITA to appoint Gijima as a service provider to tender IT services to DOD under a contract from 1 April to 31 July

[15] *Gijima* para 10.

2012 and three decisions to extend it through three addenda, constitutionally invalid.

29.4. The Constitutional Court also held that the order of constitutional invalidity did not have the effect of divesting Gijima of any rights it would have been entitled to under the contract, but for the declaration of invalidity.

Reasoning behind Constitutional Court judgment

30. It is important to appreciate that, in terms of section 172(1)(a) of the Constitution, when a court is deciding a constitutional matter within its power, it must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. That is the reason why, once the Constitutional Court found that the decision to appoint Gijima in regard to the DOD contract, and decision to extend it three times, were inconsistent with section 217 of the Constitution, it had no option but to declare those decisions constitutionally invalid.

31. Once the Court has declared any law or conduct invalid, it is bound by section 172(1)(b) to make any other order that is just and equitable. These are wide powers which are bounded only by the considerations of justice and equity. In the Gijima judgment, the Court took into account the following:

31.1. That SITA delayed for just under 22 months to approach the Court to have its decisions reviewed.

31.2. That Gijima may well have performed under the related contracts whilst SITA sat idly by and only raised the question of invalidity of the contracts when Gijima instituted arbitration proceedings; and

31.3. From the outset Gijima was concerned whether the award of the contract complied with legal prescripts, raised the issue with SITA repeatedly and SITA assured it that a proper procurement process had been followed.

32. After taking the above factors into account, the Constitutional Court came to the conclusion that, justice and equity dictated that, despite the invalidity of the decisions to appoint Gijima and to extend those appointments, SITA should not be allowed to benefit from having given false assurances and from its own undue delay in instituting the review proceedings. It then concluded that, in the circumstances of the Gijima case, a just and equitable remedy dictated that the decisions to appoint Gijima and to extend the contracts be declared constitutionally invalid, with a rider that the declaration of invalidity did not have the effect of divesting Gijima of any rights to which – but for the declaration of invalidity- it might have been entitled to. It seems that whether Gijima had any such rights could only be determined back at the arbitration proceedings.

33. It is therefore important to appreciate that the Constitutional Court did not give Gijima anything new that it did not have from its contracts with SITA. If it had performed, it would be entitled to payment in accordance with the terms of the contracts. If it had not, it must follow that it would not be entitled to payment. All what the Constitutional Court did was to protect Gijima, an innocent party,

from the impact of its decision to declare constitutionally invalid the decisions to appoint it and to extend the related contract through three addenda. It did so because Gijima was an innocent party that had been given false assurances by SITA and SITA had unduly delayed to bring the review application whilst SITA might have continued to perform in terms of the impugned contracts.

QUESTIONS ASKED BY PRASA

34. I now turn to express my opinion in answer to the questions which PRASA has asked. I will reproduce each of the questions before I express my opinion.

Question 1

What are the chances that PRASA may be called upon to pay Siyangena the full amounts on its own without deductions or set-off, this taking into account the Gijima case?

35. In my view, it is unlikely that PRASA may be called upon to pay Siyangena the full amounts on its own without deductions or set-off, taking into account the *Gijima* judgment. I say this for the following reasons: -

    35.1. First, it is important to appreciate that in *Gijima,* the Constitutional Court did not call upon SITA to pay Gijima the amount of money which Gijima said SITA owed it. All what the Constitutional Court said was

that its declaration of the constitutional invalidity of the decision to appoint Gijima in regard to the DOD contract and related three addenda, did not have the effect of divesting (depriving) Gijima of any rights that it would have been entitled to under the contract but for the declaration of invalidity. This means that Constitutional Court left the determination of any amounts that Gijima would have been entitled to another forum, such as arbitration, if the parties could not reach an agreement. All what it meant is that SITA could not use the Constitutional Court judgment as a defence against Gijima's claim. Otherwise, all other possible defences remained available to SITA.

35.2. The second reason why I am of the view that is unlikely that the Supreme Court of Appeal may call upon PRASA to pay Siyangena full amounts without deductions is that, unlike Gijima, Siyangena is not an innocent party. It participated in irregular and unlawful procurement of its services without asking any questions and without asking for any assurance on the part of PRASA that procurement prescripts were being followed. Even if the Supreme Court of Appeal were to find that Siyangena was not involved in corruption, it is unlikely that it may find that it was innocent.

35.3. Furthermore, the Court cannot afford to ignore the findings that some work done by Siyangena was unnecessary whilst some of the work was not reasonably required or that some work was of poor quality.

Question 2

In view of the history of this matter, is it fair even to consider settlement, and if yes, what would have been taken into account in settling the matter?

36. Settlement is always possible before judgment is given in a matter. However, it must be kept in mind that this matter involves the constitutional validity of the decisions which PRASA took when it appointed Siyangena, and in regard to which the full court of the Pretoria High Court has pronounced itself. It must be remembered that it was PRASA that brought the matter to Court and that it was successful in that judgment was granted in its favour.

37. Whilst the parties can try and propose a settlement in regard to the remedy, they cannot, without the sanction (approval) of the Supreme Court of Appeal, settle or change the fact that the agreements and addendum which PRASA and Siyangena concluded were found to be constitutionally invalid for want of compliance with section 217 of the Constitution. They cannot change a Court judgment by means of a settlement agreement on their own.

38. If the parties were to come up with a settlement agreement, they would have to ensure that it complies with the Constitution, the PFMA, all applicable laws and the Pretoria High Court judgment, and it is approved by the Supreme Court of Appeal. It must be kept in mind that what the Court found unconstitutional in Gijima were decisions which emanated from a settlement agreement between SITA and Gijima which was not made an order of the Court.

39. It is not easy to tell in advance of any settlement negotiations, if it would be fair to consider a settlement. If, for example, Siyangena were to agree to withdraw its appeal at the Supreme Court of Appeal and abide by the current

judgment of the full court of Pretoria High, that would be an appropriate settlement and would save the parties.

40. However, apart from an agreement for Siyangena to withdraw is current appeal, there is a reason why PRASA should not try and settle the matter, namely that it is the one that brought the self-review application, it had a constitutional duty to do so and it was successful in the High Court.

Question 3

Given that this matter is already at the tail end of litigation, is it therefore wise to even consider a settlement or to let the matter to its logical conclusion?

41. Settlement can be considered any time before judgment is given. It is not easy to know if the matter is at the tail-end of litigation because it may still have to go to the Constitutional Court if any of the parties is not satisfied with the outcome of the appeal hearing in the Supreme Court of Appeal.

42. In my view, it is undesirable for PRASA to institute a self-review application, secure the judgment it wanted and then want to settle the matter at the time when Siyangena is the one that is appealing. When an organ of state institutes an application for self-review, it must take the matter until its logical conclusion. I wish to reiterate that there was a constitutional duty on PRASA, upon discovery of irregularities in its procurement process, to go to Court for self-review. It also has a duty to defend the judgment of the Court which has been granted in its favour.

Question 4

In the event that the SCA take the Gijima line, what impact would that have on PRASA compared to fighting the case to its logical conclusion?

43. If the Supreme Court of Appeal were to take the Gijima line, the impact on PRASA would be that the matter could go be back to arbitration where Siyangena would have to prove its case. It would be open to PRASA to raise any defence to any of the claims, including such defences as work was not done, work was not within scope, work done was of poor quality or that work done was not reasonable required. It would, however, be important and necessary for PRASA to apply for leave to appeal the judgment of the Supreme Court of Appeal, to the Constitutional Court so that that Court, which is the one which came up with the Gijima judgment, could have the last word on the matter.

Question 5

The legal opinion should help guide on a roundtable discussion with Siyangena and how to commit them to "re-repair" what has since been damaged during the lockdown level 5 without us having to pay for such further work.

44. My understanding is that the contracts with Siyangena have been terminated and that Siyangena is no longer on site. Moreover, the decisions to enter into those contracts and the addendum thereto have been declared

constitutionally invalid for want of compliance with section 217 of the Constitution. In this context, any settlement agreement that seeks to bring Siyangena back to repair what was damaged during lockdown level 5 would violate the Pretoria High judgment, section 217 of the Constitution, the PFMA and no doubt also the supply chain management policies of PRASA. It must be kept in mind that what the Constitutional Court found constitutionally invalid in Gijima emanated from settlement agreement to appoint Gijima without an open tender process in violation of section 217 of the Constitution.

Question 6

What are the probabilities to be compelled to pay full contract value given that we haven't even started with appointment of an Evaluator/Engineering to calculate what payment is due?

45. It is unlikely that PRASA can be compelled to pay the contract value because the Court would normally appreciate that payments on contracts are based on performance. Unless a party has carried out its obligations in terms a contract, it cannot be entitled to full payment. This could be one of the reasons why the Constitutional Court in *Gijima* did not order that SITA make any payment to Gijima.

46. It must be kept in mind that if Siyangena agrees to withdraw its appeal, that would give the parties an opportunity to start the process of appointing an engineer. Until then, the execution (implementation) of Pretoria High Court judgment is suspended by the appeal. That much is made plain by section 18(1) of the Superior Courts Act 10 of 2013.

Question 7

Mr Montana was dealing with the allegation that his property was paid for by the proceeds of Siyangena corruption – now that Montana appeared and provided an explanation of growing his property portfolio, will this not weaken us during the appeal?

47. I am of the view that the explanation provided by Mr Montana will not weaken the case of PRASA on appeal. The fact remains that the decisions taken by PRASA, in which Mr Montana was involved, were in direct violation of section 217 of the Constitution, the PFMA and PRASA's own procurement prescripts, and Siyangena was a willing participant which does not seem to have cared to know if its appointments were lawful.

Question 8

If the Court accepts that Mr Montana had a credible explanation, what happened to part payment as awarded already? Can the Court offer the company 100% with interest like (Gijima /SITA) case?

48. Let me start with the last of the two questions. There was no 100% offer in the Gijima/SITA judgment. What the Constitutional Court did there is that it decided not to deprive Gijima of its right to sue SITA on the bases of the impugned contract and the related three addenda. Gijima still had to go and prove its claim.

49. I now turn to answer the first of the two questions. I am not certain that I understand what is referred to as "part payment". If it refers to payment already made to Siyangena by PRASA, then it will have to be taken into

account in dealing with any claim that Siyangena has against PRASA. If I have not understood the question, I am open for a follow-up consultation where the question can be clarified.

Question 9

If Siyangena provided information that they wanted to find a settlement and we were not responsive, what would the implication be? i.e. would the Board of Control be – panelist for such failure?

50. As the matter is now before the Supreme Court of Appeal, any information that Siyangena might provide about its intention or attempt to settle the matter with PRASA would be irrelevant. The only question before the Supreme Court of Appeal is whether the judgment of the full court of the Pretoria High Court is correct.

51. The parties are in the Supreme Court of Appeal because Siyangena took the matter there. It is Siyangena which is refusing to accept the judgment of the full Court of the Pretoria High Court. And it is only Siyangena which can withdraw its appeal before the Supreme Court so that the parties can comply with the judgment of the Pretoria High Court.

52. As this matter is now in the hands of PRASA's legal representatives, ideally, any settlement negotiations must take place between Siyangena's legal representatives and those of PRASA, on PRASA's instructions of course. The bottom line is that PRASA had a constitutional obligation to institute the

self-review application and has a further obligation to defend the judgment to the Pretoria High Court which was decided in its favour.

Question 10

What is our benefit to negotiate the matter?

53. It is not easy to predict in advance if there is any benefit for PRASA to negotiate the matter. If the negotiations can result in Siyangena agreeing to withdraw its appeal, that would no doubt save PRASA litigation costs. If, however, the negotiations end up with an alteration of the current judgment of the Pretoria High Court, then the road ahead may still be long because the settlement agreement would need to be submitted to the Supreme Court of Appeal for it to sanction it and write a reasoned judgment based on the merits of the case, the Constitution and the law.

Question 11

Do you see similarity with our case with Gijima/SITA (They were awarded full cost without doing the work and SITA was blamed.)?

54. I do not see much similarity between this matter and that of Gijima. First, the Constitutional did not award anything to Gijima. All that it effectively said is that it was not deprived of its right to sue on those contracts. Second, in *Gijima*, Gijima had been misled by SITA into believing that SITA had followed procurement procedures. Gijima was concerned about any possibility that the procurement of its services could be a violation of law.

55. It is also important to remember that SITA guaranteed Gijima that it had taken all steps ensure compliance with any relevant legislation governing the award

of the services of Gijima and specifically towards ensuring that the related agreement was valid and enforceable, and indemnified Gijima against any loss that it might suffer should the guarantee be infringed. In the end, the only similarity between the two cases is that in both of them an organ of state had made application for self-review.

Question 12

The Siyangena insurance covered PRASA, is that still the case and can this be part of settlement round table discussion?

56. I do not have information to be able to answer this question. I can answer it later when I have been provided with the Siyangena insurance to understand its terms and conditions.

Question 13

Clearly Siyangena wants to be paid and they seem to want payment of full contract with escalations if there are but their persistence speaks to full payment if they succeed? Does it mean that judgment on this matter directed the parties to settle, will this result in the negotiated outcome to be [an] order of the Court? Does this mean that PRASA could be asked to pay in line with the contracts that were set aside?

57. The judgment in this matter directed the parties, not to settle, but to agree on an engineer within 30 days failing which the Court would do it for them. However, if the question is whether the Supreme Court of Appeal could direct

the parties to settle, that would be unusual because it would mean that the Court will have not given a final judgment on the matter.

58. When a court is called upon to determine whether an award of a tender by an organ of state is valid or not, it acts in terms of section 172(1)(a) of the Constitution. First, if it finds that the decision to award the tender is invalid, it must declare it invalid. Second, in terms of section 172(1)(b) of the Constitution, the Court must determine a just and equitable remedy. In doing so, it has wide powers, bounded only by the considerations of justice and equity. It was in its determination of a just and equitable remedy that the full court of the Pretoria High Court decided that an engineer be appointed to value the works performed by Siyangena, serve the papers on the parties and file a report in Court on such values within a reasonable period. The parties are directed to agree on the value of the works, based on the report of the engineer, within 90 days, where the payments. The motivation was that Siyangena had done some work for PRASA even though its appointments were unlawful.

Question 13

Should PRASA push hard that Siyangena restore/reinstate all the equipment to what they were before COVID19 (installed to functional capabilities and repairing all vandalised and stolen equipment)?

59. I do not know the context of this question. Keeping that in mind, I wish to say that PRASA cannot get Siyangena to do any work for it without securing its services through an open competitive bidding process as required by at least section 217 of the Constitution, the Public Finance Management Act 1 of 1999

("**PFMA**"), the related regulations and the supply chain management policies of PRASA. The fact that the agreement would be reached as a settlement does not exempt PRASA from compliance with the applicable prescripts. In this regard, we can draw our lessons from the *Gijima* judgment.

CONCLUSION

60. In conclusion, I wish to recap the following: -

60.1. It is open for PRASA and Siyangena to consider settlement of the current appeal before the Court. The easiest way to settle is for Siyangena to withdraw its current appeal so that the parties can implement the judgment of the full Court of the Pretoria High Court.

60.2. If the parties are to agree on a settlement which alters or sets aside the judgment, or any of the orders, of the full court of the Pretoria High Court delivered on 8 October 2020 under Case Numbers 2018/14332 and 2018/11314, such a settlement agreement must be submitted to the Supreme Court of Appeal for it so consider it with a view to making it an order of the Court.

60.3. In light of the fact that it is PRASA that brought the review application to Court and had a constitutional duty to do so, and the judgment is in its favour, it is undesirable that PRASA takes steps to settle the matter other agreeing that Siyanda withdraws its appeal, if that is what it so decides to do.

61. I opine accordingly. I am available to consult further with PRASA on any aspect of this opinion and on any matter that PRASA wants to raise with me in relation thereto.

MK MATHIPA

CHAMBERS, DUMA NOKWE
TUESDAY, 31 AUGUST 2021