

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 22782/21

(1)REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
.....
.....
DATE SIGNATURE

In the matter between:

KGWERANO SOLUTIONS (PTY) LIMITED
Applicant

AND

TRANSNET SOC LIMITED

First Respondent

NCUBE INCORPORATED

Second Respondent

JUDGMENT

[1] This is an application which the applicant seeks the following relief: -

That this court should direct the second respondent to rectify, clarify and or

reword its awards dated the 15 August 2019 by removing any ambiguity and / or

errors contained therein in order to meaningfully and accurately define the

recommendation relating to rights and obligations between the applicant and the

first respondent in relation to each other.

[2] The clarity, rectification and / or rewording of the second respondent's award

sought by the applicant revolves around the following: -

- i) That the words "*in accordance with the terms governing the payment of fees*"

as per paragraph 3.4 of the said award be amplified and / or varied and / or

reworded and / or rephrased so as to inform the parties precisely for what

losses and / or expenses, the first respondent is liable to the applicant;

- ii) That the words "*in the ordinary management of the contract entered into*"

contained in paragraph 3.4 of the award be amplified and / or varied and / or

reworded and / or rephrased so as to inform the parties precisely what is

intended to be meant by the said words;

- iii) That the words "*paragraph 2.3 above*" contained in paragraph 3.4 of the

award be amplified and / or varied and / or reworded and / or rephrased so

as to give meaning to the said words, read in the context of the award.
- iv) Granting leaving to the applicant to apply on the same papers supplemented

where necessary for further and / or ancillary relief;
- v) That the second respondent be ordered to pay the costs of this application

including the costs occasioned by the deployment of two counsel;
- vi) In the event the first respondent opposing this application it be ordered to

pay the costs of this application;
- vii) Further and / or alternative relief as this court may deem fit necessary and

reasonable.

[3] The first respondent is resisting the application based *inter alia* on the following

basis: -

- a) That the application is legally flawed as the ombud as a creature of statute is

directed to exercise powers it does not have in that the ombud is directed to

make a determination on issues beyond the complaints in the bidding process;
- b) The applicant is seeking a relief that encroaches unjustifiably on the principle of

separation of powers;

- c) According to the first respondent, the applicant is actually directing this court to

substitute its discretion and to step into the shoes of the ombud in favour of the

applicant;

- d) The order sought by the applicant constitutes a *mandamus* which is available in

limited circumstances obliging a public functionary to act under an enabling Act.

It is argued that the ombud does not have such an obligation to do so;

- e) Failure by the applicant to plead and establish requirements for the relief it

seeks, are enough grounds to dismiss applicant's application.

BACKGROUND FACTS

[4] The applicant submitted a bid during 2018 for the provision of Maintenance and

Rail Network using Ballistic Screening Machines Countrywide as advertised by the

first respondent under Bid number SIC7018 - 2ICDB. (tender contract)

The tender contract was for a period of two years.

[5] During 27 September 2018 the applicant was identified and confirmed as a

preferred bidder under Bid number SIC7018-2CIDB and issued with the letter of

intent. The parties herein in the interim identified the services which the first

respondent would wish the applicant to provide prior to the finalization and execution of a detailed Agreement between the parties.

[6] The purpose of the letter of intent was to declare the intention of the parties in

respect of the required services to be provided by the applicant and will remain

effective until the Agreement is signed by the parties herein or until sixty days

have elapsed from the date of issue of the letter of intent unless terminated by

the first respondent prior to the expiry of sixty days whichever occurs first.

[7] After the issuing of the letter of intent, several meetings were held between the

parties herein and discussed how the tender was to be executed.

During the said discussions, the applicant changed the supplier (Aveng Rail) of

the machinery to be used as the supplier identified in the letter of intent

was unable to supply the agreed machinery. The applicant appointed another

supplier, Plasser South Africa (Pty) Ltd. The first respondent postponed the date

for the commencement of services to be provided by the applicant to December

2018. The letter of intent operative date for sixty days was extended by the first

respondent to 21 January 2021.

During 13 March 2019 the first respondent through a letter sent to the applicant

withdrew the letter of intent alleging that the substitution of the machine

supplier amounted to a material change in the initial tender awarded to the

applicant.

[8] Subsequently the applicant challenged the withdrawal of the letter of intent and

approached the office of the first respondent's ombudsman to intervene in its

dispute to the withdrawal of the letter of intent by the first respondent.

The dispute was among others based on the fact that the first respondent was

informed of the substitution of the machinery supplier and had not noted any

objection and the said machinery were tested by the first respondent and were

deemed to be appropriate for the work to be executed by the applicant. The

applicant was required to commence with its work after the disclosure of a

change of the supplier of the machinery and the applicant mobilized its workforce and resources to execute its task.

[9] It is contended by the applicant that the first respondent would not be

prejudiced in any way by a change of a machinery supplier. On the contrary

the applicant incurred considerable expenses amounting to millions of Rands due

to the unfair withdrawal of the letter of intent by the first respondent.

The applicant sought the reversal of the withdrawal of the letter of intent and it

be allowed to continue with its work as the appointed bidder.

[10] It further requested as an alternative, the ombud to order that the first respondent pay R33 827 295.56 immediately being the costs incurred by the

applicant in preparations to commence with work on behalf of the first respondent. The second respondent was tasked by the first respondent's ombud

to deal with the dispute between the parties. In its award delivered to the

parties, the second respondent upheld the applicant's dispute that the withdrawal of the letters of intent was unlawful and did not uphold the applicant's alternative claim for a directive for payment.

The award read as follows: -

"The award of the bid to Kgwerano Solutions as per the original letter of intent

dated 27 September 2018 and subsequently extended on 2 November 2018 and

21 January 2019 remains valid and the retraction of the LOI in terms of the letter

from Transnet Freight Rail to Kgwerano Solutions dated 13 March 2019 is invalid

and hereby set aside”;

“Transnet Freight Rail is instructed to proceed with Kgwerano Solutions as the

preferred bidder”;

“The parties must conclude the requisite contract as soon as is reasonably

possible, but within a period no longer than 45 calendar days from the date of

issue of this letter”;

“The payment of the costs invoiced by Kgwerano Solutions, as costs incurred to

date, shall be paid in accordance with the terms governing the payment of the

fees due to Kgwerano Solutions in the ordinary management of the contract to

be entered into in accordance with paragraph 2.3. above”

[11] The bone of contention between the parties regarding the award by the second

respondent revolves only around the issue of payment of costs incurred by the

applicant as ordered in the award i.e paragraphs 3.4.

The concern of the applicant regarding the award as per paragraph 3.4 is that it

is not clear for which costs is the first respondent liable to pay and on what

basis such liability for the said costs is to be determined. Accordingly the applicant

submitted that the said award regarding payment of costs (paragraph 3.4) is

ambiguous and needs to be clarified.

[12] The first respondent argues that the invoices submitted by the applicant for

payment as directed in the award fall outside the scope of the award in paragraph 3.4.

The queries raised by the first respondent inter alia related to the following: -

- i) That the costs for rented vehicle has no bearing to the letters of intent;
- ii) That the legal costs are not recoverable by the applicant in terms of the award;
- iii) Regarding the salaries claimed for the applicant's manager, the first respondent sought work schedule for the period claimed to make a determination for work specifically performed;
- iv) The claim for loss of profit cannot be claimed as the award ordered reinstatement of the contract between the parties;
- v) That the mobilization costs incurred are for the applicant's account.

[13] The applicant approached the first respondent's ombud to clarify its award. The

request for clarity was declined by the ombud on the basis that it was *functus*

officio.

In a nutshell, the parties differ diametrically as to the interpretation of paragraph

3.4 regarding the award for payment of costs as ordered by the second respondent. The applicant seeks this court to refer the award back to the second

respondent to rectify, clarify, reword and / or rephrase its award for costs as it is

deemed to be ambiguous and to meaningfully and accurately define which costs

and on what basis is the first respondent liable to pay its incurred wasted costs.

CONDONATION APPLICATION

[14] The first respondent seeks relief for condonation for the alleged late delivery of

its answering affidavit.

It is contended by the first respondent that the applicant's notice of motion is

irregular due to the following: -

- i) That the applicant failed to comply with Rule 6 (13) of the Rules of Court in

that the applicant gave the first respondent 5 days instead of the requisite 15

days as provided by the Rules. The first respondent advised the applicant of

the irregularity in a correspondence addressed to the applicant.

The application for condonation is not opposed.

[15] The first respondent vehemently protested that it delivered its answering

affidavit beyond the prescribed time frames.

It further contended that if this court holds a contrary view that the affidavit is

unduly late and condonation is refused, such a ruling will be prejudicial as first

respondent's rights to a fair hearing will be compromised.

The first respondent contended that it is in the interest of justice that the

condonation application be granted. It is further argued by the first respondent

that the length of the alleged delay is minor being a ten court days delay.

The first respondent submitted that it has strong prospects of success in

opposing the application.

[16] A court may condone non-compliance of the Rules where the applicant

demonstrates that a valid and justifiable reasons exists why non-compliance

should be condoned.

An applicant is to furnish an explanation of his default sufficiently and fully to

enable the court to understand how it really came about and to assess his

conduct and motives.

See **Federated Employees Fire General Insurance Co Ltd .V. Mckenzie**

1969 (3) SA 360 (A) at 362 F-H

Silber .V. Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A

[17] It is trite law that the standard for considering an application for condonation is

in the interest of justice.

See **Grootboom .V. National Prosecuting Authority and Another 2014**

(2) SA 68 (CC) paragraphs [22] and [23]

Whether is in the interest of justice to grant condonation depends on the facts

and circumstances of each case.

[18] It is my view that the first respondent's explanation is bona fide and good cause

has been shown as to why the application should be granted.

The first respondent will suffer great prejudice if condonation is not granted

whereas the applicant's prejudice will be very minimal.

I find that it is in the interest of both parties and more particularly in the interest

of justice that condonation be granted.

The following order is accordingly made:

- 1) That the condonation application is hereby granted;

RULE 7 (1) NOTICE

[19] The applicant contested and disputed the authority and mandate of the first

respondent's attorneys of record in the opposing application.

The first respondent ultimately served and filed the requisite power of attorney

authorizing and mandating the first respondent's attorney of record to oppose

this application.

[20] The notice in terms of Rule 7 (1) of the Rules of Court became moot at the

hearing of the application as the applicant's objection in terms of Rule 7 (1) was

accordingly addressed before the hearing of this application.

APPLICANT'S CONTENTION

[21] It is not disputed that in terms of the award, the first respondent is liable for the

costs incurred by the applicant but applicant contended that the award does not

state the extent of liability on the part of the first respondent and parties herein

cannot agree what costs are due and payable as awarded.

According to the applicant, the impasse and disputes between the parties

necessitated the launching of this application. The applicant's view is that the

first respondent is to be liable for all the reasonable and necessary expenses

incurred from the date of incurrence as the first respondent is the sole cause of

the breakdown of the negotiation between the parties when it unlawfully

retracted the letter of intent.

[22] The applicant stated that its invoices are in accordance with the quote which

a tender was awarded to it and the first respondent cannot now be heard of

querring the same quote it accepted.

In trying to resolve the impasse and first respondent's queries, the applicant submitted that it furnished the first respondent with all the documentations explaining and indicating what amounts were incurred for each

item in its invoices.

Despite the supporting documentation from the applicant, it is alleged that the

first respondent stuck to its guns that the amounts claimed did not accord with

its interpretation of the second respondent's (ombud) award.

It is therefore the submission by the applicant that there is a need and it is

essential that the second respondent's award contained in paragraph 3.4 of the

award be clarified.

[23] According to the applicant, it is in the interest of both parties herein that the said

award be clarified in clear and certain terms without any ambiguity.

In its interpretation to the second respondent's second portion of the award, the

applicant's view is that the second respondent in order to protect the applicant

once the master service agreement had been entered into, attempted to record

that the award should contain provisions for payment in accordance with the

letter of intent. It seems to the applicant that the second portion of the second

respondent award appears to be legally incompetent.

[24] The applicant contended that the first respondent's interpretation of the second

portion of the award that payment of the amount as invoiced by the applicant

should be in terms of clause 2 and clause 3.1 of the letter of intent as if there

was an ordinary management of the contract between the parties during such

period, cannot be correct as there was no such contract.

The first respondent's three different interpretations of the second respondent's

award and believe that it is not liable for the incurred expenses without

substantiating as to the reason thereof, cannot be sustained so argued the applicant.

[25] In an e mail addressed to the second respondent dated the 17 October 2020 the

applicant attempted to explain that its request to the second respondent

requesting clarification for the award was not for the second respondent to make

a determination for amounts as contained in applicant's invoices.

After numerous exchange of correspondences between the applicant and the

second respondent, the second respondent ultimately stated that it is *functus*

officio and it cannot therefore provide the requested clarification of its award.

The view of the applicant is that second respondent's contention that it is *functus*

officio is without any legal basis and approached this court seeking the relief that

the second respondent must be directed to clarify its award. The applicant

argued that the first respondent's conduct is not only mala fide and capricious

in disputing the amounts as invoiced but is intended not to reach an amicable

resolution of their impasse and disputes.

It is applicant's submission that reference by the second respondent to

paragraph 2.3 to its award needs to be corrected as there is no paragraph 2.3 in

the award.

[26] The applicant contended that it is necessary for this court to compel the first

respondent to clarify its award as the applicant has no other alternative but to

approach this Court for an order as per its notice of motion.

The applicant submitted that it has made out a case for the referral of the

award back to the second respondent for clarification as prayed and the first

respondent be ordered to pay the costs of the application including costs

occasioned by the deployment of two counsel.

IN RESPONSE

[27] The first respondent argues that it is only liable for contract fees and related

costs in terms of the letter of intent and not the reasonable and necessary costs

incurred by the applicant as a result of the withdrawal of the letter of intent.

The invoices submitted by the applicant are queried and disputed by the first

respondent. According to the first respondent, the applicant's relief seeking an

order that a discretionary power in its favour to clarify and rectify its award in

the absence of a review relief, is flawed.

The contention of the first respondent is that the ombud does not have powers

beyond those in terms of the empowering provisions as contained in the terms of

the terms of reference of the ombud.

[28] In the opinion of the first respondent the relief sought by the applicant in

directing the ombud to clarify and rectify its award constitutes a *mandamus*.

Such a relief is only available when an administrative organ like the ombud is

compelled to do something that it is obliged to do under an enabling statute. The

first respondent submitted that since the ombud has made a determination, it is

deemed to be valid until it is reviewed. The view of the first respondent is that

an order directing the ombud to rectify and clarify its award under the circumstances of this matter will be *ultra vires* and unlawful.

[29] It is contended that applicant failed to demonstrate that the ombud

has powers to clarify its award like courts and arbitrators are empowered to do.

The first respondent submitted that indeed the courts and arbitrators have the

power to clarify their decisions in exceptional circumstances but argues that the

applicant failed to demonstrate that the ombud's award falls within the aforementioned powers exercised by court and arbitrators.

[30] The first respondent submitted that the application be dismissed on the following

preliminary basis: -

1. The *mandamus* sought by the applicant is not competent in law

-

[31] The first respondent is of the opinion that the relief sought by the applicant is

solely reliant on the legal *causa* of a *mandamus*.

In actual fact the applicant seeks a mandatory interdict to compel the ombud to

perform a positive action.

The first respondent contended that there is no such obligation existing on the

ombud to rectify and clarify its award.

[32] For the applicant to succeed with a mandatory interdict which is final in nature it

must satisfy the following requirements: -

- a) A clear right;
- b) An injury actually committed or reasonably apprehended and;
- c) The absence of similar protection by any other ordinary remedy.

[33] The first respondent's argument is that despite the applicant being a preferred

bidder it does not have a clear right to the relief sought as the invoices claimed

are disputed.

According to the first respondent, the applicant omitted to demonstrate that it

has a clear right to the relief sought.

[34] The submission by the applicant that the continued impasse between the parties

result in the applicant suffering uncertainty is not compliant with the requirement that there is actually an injury committed by the respondent or such

an injury is reasonably apprehended. The first respondent denied that there is

any uncertainty pertaining to the award and disputed that there is an impasse

between the parties herein.

[35] It is contended that the monetary dispute between the first respondent and the

applicant may be resolved through an appropriate dispute resolution rather than

by way of application proceedings. As such the first

respondent failed to satisfy the requirement that it has no alternative remedy.

The contention of the first respondent is that the applicant did not sufficiently

plead to establish its cause of action. It was expected of the applicant to raise

issues upon which it would seek to rely with reasonable clarity to enable the first

respondent to clearly know which case it has to answer.

[36] The first respondent hold the view that the applicant did not adequately

plead the legal requirement and establish the legal requirements of a *mandamus*, and as such the application be dismissed.

The first respondent contended that the impasse in not agreeing to the amounts

claimed by the applicant and the delay in implementing the agreement cannot be

blamed on the first respondent. The correct interpretation of the award by the

first respondent is that it is only liable for costs as per the terms governing the

ordinary management of the contract between the parties and the typographical

error in paragraph 3.4 of the award as opposed to paragraph 3.3 thereof is

negligible.

[37] What the award means is that the terms of payment would be guided by the

contractual terms by the parties.

The terms of reference of the bid stipulates that decisions by the ombud should

accord to the procurement issues of the unsuccessful bidders alone and not the

monetary issues of the successful bidders.

The first respondent submitted that any reference by the applicant to the

ombud's jurisdiction is without any basis. Accordingly the first respondent

argued that the applicant failed to make out a case and its application be dismissed.

[38] The submission by the first respondent is that the ombud is indeed *functus*

officio and until its award is reviewed and set aside, it remains valid. In the

circumstances it would be unlawful to clarify and rectify its award.

Accordingly the first respondent applies for the dismissal of the application as the

applicant has failed to satisfy the requirements for a *mandamus*.

[39] In reply the applicant submitted that the purpose of its application is to obtain

clarity and it is not seeking a *mandamus* or a principal relief.

It is disputed that the applicant is seeking this court to exercise its discretionary

power to be ordered in its favour instead the ombud should be directed to

rephrase its award as it is deemed to be ambiguous.

[40] Contrary to the view of the first respondent, the applicant argues that the ombud

does have jurisdiction and powers to rectify, clarify and rephrase its award in

instances where it is not clear.

Reference to the principle of separation of powers is averred by the first

respondent is irrelevant and baseless in the opinion of the applicant.

The applicant contended that the terms of reference of the ombud permit the

ombud to clarify its determination regarding the liability for costs in the award as

it will be beneficial to both parties in this matter, so submitted the applicant. The

parties herein it is argued, would be better placed to know exactly what the

ombud meant in its award.

[41] The invoices so submitted are according to the applicant is, in terms of the

letters of intent and that the court is not asked to make a monetary award but to

direct the ombud to clarify its award.

The applicant argues that it is not seeking a determination of issues finally in the

motion proceedings but intends to avoid further disputes by requesting that the

ombud should rectify and clarify any ambiguity in its award.

The applicant's view is that a case has been made out for the relief sought and it

be granted with costs.

CONDONATION OF THE LATE FILING OF THE REPLYING AFFIDAVIT

[42] The late filing of the applicant's replying affidavit is hereby granted as it is in the

interest of both parties and in the interest of justice to do so.

ANALYSIS AND LEGAL PRINCIPLES

[43] The dispute and impasse between the parties boils down to the following: -

What interpretation to be accorded to the award by the second respondent.

Secondly the parties do not agree as to whether or not the award be referred

back to the second respondent to be rectified, clarified, rephrased and or

reworded to can enable the parties to fully understand in clear terms what the

award is really all about.

[44] As aforementioned it is not in contention that the first respondent is liable for the

costs incurred by the applicant but what is in issue is to which costs and to what

extent of liability is the first respondent to be held responsible.

It is worthwhile to revisit the terms of reference of the ombud when requested to

intervene when a letter of intent was retracted by the first respondent.

[45] The ombud is generally defined as a natural juristic person seized with authority

to exercise a public power or perform a public action as empowered by the

relevant provision.

The empowering provision for the second respondent would therefore be in

accordance with the terms of reference of the complaint as lodged by the applicant against the first respondent.

[46] Among the powers conferred to the second respondent in terms of the terms of

reference are to investigate, make recommendation, cancelling of the bid,

referring a bid for re-evaluation, amending a bid decisions and to recommend

relevant and appropriate measures against any first respondent's officials.

The ombud in this matter is further empowered to review any bid award as it

deems fit.

The question to be addressed is, does the second respondent permitted to

exercise powers beyond those accorded by the terms of reference in this matter.

[47] It is contended by the applicant that the ombud like any judicial bodies and quasi

judicial bodies is entitled to rectify and clarify its award in case it is ambiguous.

On the other hand the first respondent is of the view that the second respondent

cannot exercise powers or perform a function beyond those conferred in the

terms of reference to it.

[48] A distinction is to be made between the general powers of the ombud and those

that are prescribed specifically or those that fall within the prescripts of the terms

of reference conferred to the second respondent. Accordingly the second

respondent as tasked to deal with the specific complaints relating to the first

respondent about its management of the bidding or procurement, the second

respondent in my view cannot perform any function or has authority to exercise

its powers beyond the empowering provisions as tabulated by the terms of

reference in *casu*.

See **Limpopo Legal Solutions and Another .V. Eskom Holdings Limited**

[2017] ZALMPPHC 1 at 27.

[49] In the circumstances of this case I am not persuaded that the second respondent

is empowered to exercise powers like any judicial and quasi-judicial bodies as its

mandate as an ombud are specifically defined in terms of reference as conferred.

When approached to clarify its award, as it allegedly open to different interpreters and ambiguity, the second respondent pleaded that it is *functus*

officio.

The first respondent argues that since the second respondent is *functus officio*,

the applicant should have embarked on a review process which it failed to do.

[50] In the absence of reviewing and setting aside the second respondent's award,

such award remains valid. According to the first respondent the applicant should

have approached the court instead of the second respondent for clarity of the

award.

The stand point of the applicant is that it was not necessary to review the award

as its request is simply to seek clarity on some aspects of the award that is

ambiguous.

As it is not seeking that the second respondent's revisit the matter, the second

respondent's position that it is *functus officio* is according to the applicant,

without any basis whatsoever.

[51] The principle of *functus officio* dictates that once a decision maker has made a

determination, such decision is deemed to be final. Its purpose is to bring finality

to matters and once made, the decision maker cannot revoke its own decision as

it is deemed final.

See Minister of Justice .V. Ntuli 1997 (2) SACR 19 (CC); 1997 (6) BCLR

677 (CC); 1997 (3) SA 772 CC paragraphs 22 and 29

[52] In my view the contentious issue about the fees to be made by the first respondent in terms of the award, is that such costs are to be paid in accordance

with the terms governing payment of fees to the applicant as contained in the

management contract. Any costs incurred that is not catered for in the terms of

reference cannot be for the account of the first respondent. I regard an award by the second respondent as final and accordingly I am of the opinion

that the second respondent is thus *functus officio*. Referring the said award back

to the second respondent on the basis that it is ambiguous is not sustainable and

helpful to the applicant.

[53] The argument by the applicant that it is merely seeking clarity in my view,

cannot be acceptable as it goes to the heart of the award itself. In the event the

award as requested by the applicant, is rephrased, reworded, corrected and

further clarified, it may have an effect of the second respondent setting aside its

own decision and / or alter its own final relief according to my view if not

satisfied with the award as granted, it has to be reviewed. Until it is reviewed or

set aside by a court, it is presumed valid.

See Oudekraal Estates (Pty) Ltd .V. City of Cape Town and Others 2004

(b) SA 222 (SCA) at 26

[54] I therefore find that the second respondent is *functus officio* as such the second

respondent's authority over the mandate conferred in the terms of reference

ceased when making the final award.

The first respondent contended that the substantiative relief sought by the

applicant is based on the legal *causa* of a *mandamus*.

An order sought by the applicant is to direct the second respondent to rectify

and clarify its award as it is deemed to be short of meaningful and accurate

interpretation.

By compelling the second respondent to exercise its judicial decision making

discretion in favour of the applicant will contravene the principle of separation of

powers.

[55] Relying on a *mandamus*, the applicant has to plead and establish the requirements of a mandate which it is argued it omitted to do and thus the

application is fatally flawed and should be dismissed.

On the flip side, the applicant argues that its case is for the ombud to clarify its

award and it is not seeking a *mandamus*. Accordingly the applicant need not

prove the requirements for a *mandamus*.

[56] The interdict approach as suggested by the first respondent is irrelevant as the

relief sought is simply to request clarity of the said award. The doctrine of

separation of powers finds no application in this matter so argued the applicant.

Since the second respondent has already made a determination, applicant argues

that it seeks the second respondent to clarify what it has already done.

The applicant submitted that it has suffered irreparable harm and has no any

other remedy and pleads that its application be granted with costs.

Mandamus may be broadly defined as a relief or a command compelling a

decision maker to exercise or perform some other statutory duty.

[57] The applicant in *casu* seeks an order that compels the second respondent to

rectify, clarify, rephrase, reword and correct its award. I hold the view that

indeed the application is based on a *mandamus* directing the second respondent

to exercise its quasi-judicial decision making and clarify its award.

For the applicant to be successful with its application it has to meet and establish

the requirements of a *mandamus*.

It is not enough for the applicant to only submit that in the absence of clarity by

the second respondent, it will suffer irreparable harm and that there are no

alternative remedy.

[58] It is expected of the applicant to fully and sufficiently plead and satisfy all the

requirements necessary for a *mandamus*.

The applicant has to demonstrate that it has a clear right to the relief it seeks,

that an actual injury has been committed or it is reasonably expected to be

committed, that there is no other legal remedy available and that it will suffer

irreparable harm.

I find that the applicant did not adequately plead and satisfy all the requirements

necessary to be successful with the relief it seeks in its application.

It is not necessary in my view to further consider and make a determination on

the merits of this matter as the issues have been sufficiently dealt with in the

preliminary bases as raised herein.

[59] After careful consideration of the issues and submissions made by both parties in

this matter, I am of the view that the application falls to be dismissed with

costs.

COSTS

[60] Counsel for the first respondent's view is that the application be rejected and it

be dismissed on the preliminary basis as the applicant failed to make out a case

for its relief sought in the notice of motion.

It is submitted on behalf of the first respondent that although it is an organ of

state, the application is brought for the purpose of commercial gain and

therefore the court should order the applicant to be liable for costs incurred

including costs for two counsel.

[61] It is generally accepted that costs follow the results. A successful party is entitled

to his / her costs unless ordered otherwise by the court.

The court in **Ferreira .V. Levin No and Others 1996 (2) par [3]** held that

the award of costs unless otherwise enacted, is in the discretion of the Court.

The facts of each and every case are to be considered by the court when

exercising its discretion and has to be fair and just to all the parties.

[62] The purpose of an award of costs to a successful party is to indemnify him or her

for the expenses which he has been unnecessarily put through.

I am of the view that the application before this court is complex and the

complexity thereof will be considered when making a determination as to costs.

Having found that the application be dismissed on preliminary basis and for lack

of adequate pleading and failure to satisfy the requirements for a *mandamus* and

generally that the applicant failed to make out a case for the order it sought in

its notice of motion, a costs order is warranted against the applicant.

[63] After considering the facts and submissions made herein, I find that the first

respondent should not have been put through the process of this application

incurring unnecessary expenses in opposing this application.

In **Cronje .V. Pelsler 1967 (2) SA 589 (A) at 593** the court held that the

Court should take into consideration the circumstances of each case.

ORDER

The following order is made: -

- 1) The application is dismissed;
- 2) The applicant is ordered to pay costs including costs of two counsel.

**S S MADIBA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA**

APPEARANCES:

HEARD ON:

16 FEBRUARY 2022

FOR THE APPLICANT:

**MORGAN LAW INC.
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FOR THE FIRST RESPONDENT:

**HARRIS NUPEN MOLEBATSI
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DATE OF JUDGMENT:

30 NOVEMBER 2022

As the ombud failed to assist the parties in determining their rights in relation to

their dispute, parties are entitled to be clarified of any ambiguity arising from the

award.

[39] According to the applicant the view of the first respondent that their dispute may

be resolved through other contractual mechanism is misplaced as the office of

the ombud is the relevant forum to be approached.

The applicant's submission is that the orders of judicial bodies, quasi-judicial

bodies and the ombud ought to be clear and unambiguous. It is contended that

for the ombud to state that it is *functus officio* defeats the purpose for which the

ombud was appointed for.

[40] It is disputed that the applicant is seeking this court to exercise its discretionary

powers as averred by the first respondent is irrelevant and baseless in the

opinion of the applicant.

The applicant contended that the terms of reference of the ombud permit the

ombud to clarify its determination regarding the liability for costs in its award.

The clarify sought from the ombud in its award will be beneficial to both parties

in this matter, so submitted the applicant. The parties herein it is argued, would

be better placed to know exactly what the ombud meant in its award.

[41] The invoices so submitted are accordingly to the applicant, in terms of the letters

of intent and that the court is not asked to make a monetary award but to direct

the ombud to clarify its award.

The applicant argues that it is not seeking a determination of issues finally in the

motion proceedings intends to avoid further disputes by requesting that the

ombud should rectify and clarify any ambiguity in its award.

The applicant's submitted that a case has been made out for the relief sought

and it granted with costs.

The late filing of the applicant's replying is hereby granted as it is in the interest

of both parties and in the interest of justice to do so.

