IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 53694/2020

1. REPORTABLE: ~~YES~~/NO
2. OF INTEREST TO OTHER JUDGES: ~~YES~~/ NO
3. REVISED: YES/ ~~NO~~
DATE: 2 April 2024

In the matter between:

NEW GX ENVIRO SOLUTIONS AND

LOGISTICS HOLDINGS (PTY) LTD **APPLICANT**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **FIRST RESPONDENT**

JUSTICE SANDILE NGCOBO N.O. **SECOND RESPONDENT**

In re:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **FIRST APPLICANT**

ACTING MUNICIPAL MANAGER – CITY OF

TSHWANE METROPOLITAN MUNICIPALITY **SECOND APPLICANT**

THE ADMINISTRATOR - CITY OF

TSHWANE METROPOLITAN MUNICIPALITY **THIRD APPLICANT**

and

NEW GX ENVIRO SOLUTIONS AND
LOGISTICS HOLDINGS (PTY) **RESPONDENT**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MARX DU PLESSIS, AJ

Introduction

[1] On 25 August 2023 I delivered a judgment in this matter and dismissed New GX's Rule 42(1)(b) application. New GX now applies for leave to appeal. The parties are referred to as they were in the Rule 42(1)(b) application.

[2] In terms of the Rule 42(1)(b) application, New GX applied for declaratory relief as well as the variation of an order by Van der Westhuizen J handed down on 21 June 2021.

[3] New GX sought this relief in relation to paragraph 4 of the order granted by Van der Westhuizen J which declares the following:

> *"4. It is declared that any rights which may already have accrued prior to the cancellation of the service agreement and to which the respondent would be entitled under the impugned service agreement of 10 August 2016, save for any rights to any claim for loss of profit and claim for shortfalls pertaining to waste, be preserved;"*

[4] The relief sought by New GX was premised on the assertion that paragraph 4 of the order by Van der Westhuizen J, as quoted above, does not reflect the true intention of Van der Westhuizen J.

[5] The basis for this assertion being that Van der Westhuizen J intended to make an order in line with a concession made by the COT in its heads of argument. The concession relied on by New GX being:

> *"69. We submit that it would be just and equitable if this court following the declaration of invalidity was to order that, the respondent be entitled to any rights which have already accrued and which it is*

entitled to under the service agreement save for rights to any claim for loss of profits and claims for shortfalls pertaining to waste, be preserved.

70. The just and equitable relief proposed above would enable the respondent at arbitration to claim for all its expenses pertaining to the construction of the transfer station as well as amounts for the works which it already performed. To that end the city would not stand to benefit unduly from the declaration of invalidity."

[6] The judgment of Van der Westhuizen J however records the concession made by the COT as follows:

"[46] *It was conceded on behalf of the applicants that any rights which may have already accrued prior to the cancellation and to which the respondent would be entitled under the impugned service agreement of 10 August 2016, save for any rights to any claim for loss of profit and claim for shortfall pertaining to waste, be preserved. In that regard it, it would be just and equitable to hold so."*

[7] I found that the concession recorded by Van der Westhuizen J in the judgment of 21 June 2021 is the contention and concession accepted by Van der Westhuizen J and which Van der Westhuizen J held to be just and equitable in the circumstances. New GX argues that I erred in reaching this conclusion.

[8] According to New GX, it is apparent from the judgment of Van der Westhuizen J that the court intended to accept and give effect to the COT's concession as set out in its heads of argument, and that Van der Westhuizen J considered granting an order along those lines to be just and equitable.

[9] The effect of paragraph 4 of the order by Van der Westhuizen J is to deprive New GX of a claim for expenses and loans it had incurred in order to perform in terms of the impugned service agreement, i.e. contractual damages. This, New GX argues, is contrary to the intention of Van der Westhuizen J which was to grant an order allowing New GX to claim for such expenses and loans.

The test for leave to appeal

[11] In terms of the provisions of section 17(1) of the Superior Courts Act, 10 of 2013 (***the Superior Courts Act***), leave to appeal may only be granted when the appeal would have a reasonable prospect of success; or where there is some other compelling reason why the appeal should be heard.

[12] The threshold to be met by an applicant for leave to appeal in terms of the provisions of section 17(1) of the Superior Courts Act was recently explained

by the Supreme Court of Appeal in the matter of ***Ramakatsa v African National Congress*** as follows:

"*[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance*

of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist." [1] (footnotes omitted)

Grounds for leave to appeal

[13] The grounds upon which New GX seeks leave to appeal is briefly summarised in paragraphs [7] – [9] above.

[14] Upon reading and considering the judgment of Van der Westhuizen J it is apparent that the concession made by the COT in its heads of argument in no way factored into the judgment and order of Van der Westhuizen J. The judgment makes no reference to this concession whatsoever.

[15] The concession referred to by Van der Westhuizen J, which he found to be just and equitable considering the facts and circumstances of the matter before him, is the concession recorded in paragraph [46] of the judgment dated 21 June 2021 and which I quote in paragraph [6] hereof.

[16] Van der Westhuizen J held that this concession constituted a just and equitable remedy in so far as the preservation of New GX's accrued rights

[1] [2021] ZASCA 31 at para [10]

under the impugned service agreement were concerned. This finding of Van der Westhuizen J has not been overturned and is not subject to an appeal.

[17] According to New GX, I erred in finding:

(1) that the COT's concession was correctly recorded in paragraph [46] of the judgment of Van der Westhuizen J; and

(2) that Van der Westhuizen J intended to the give effect to the concession so recorded.

[18] New GX argues that these findings are a material misdirection on my part. According to New GX, an appeal court will hold that the phrase "*any rights which have already accrued prior to the cancellation*" did not form part of the COT's concession, and that it was not the intention of Van der Westhuizen J to grant an order divesting New GX of its contractual rights, in particular its right to claim compensation for expenses it incurred in order to perform in terms of the impugned service agreement.

[19] The concession recorded in paragraph [46] of the judgment accords with paragraph 4 of the order granted by Van der Westhuizen J. The order and its meaning are clear and unambiguous, so too is the effect thereof.

[20] It is evident from the judgment of Van der Westhuizen J that the order granted correctly reflects the intention of Van der Westhuizen J as the order was based on a finding by Van der Westhuizen J that New GX was not free from blame, as well as the concession which Van der Westhuizen J recorded in paragraph [46] of the judgment dated 21 June 2021, and which Van der Westhuizen J found to be just and equitable in the circumstances.

[21] The fact that Van der Westhuizen J did not intend to preserve New GX's right to claim for expenses it incurred in the performance of its obligations under the impugned service agreement is, in my view, further underscored by the fact that Van der Westhuizen J declined to grant New GX relief, which it argued for, the effect of which was not to divest New GX of its contractual rights under the impugned service agreement, but for the declaration of invalidity.

[22] New GX's claim for compensation for expenses it incurred in order to perform in terms of the impugned service agreement is a right which accrued to it in terms of clause 12 of the impugned service agreement, upon cancellation

thereof, and is nothing other than a contractual right under the impugned service agreement.

[23] The provisions of Rule 42(1)(b) allow a court, upon application, to vary an order or judgment in which there is an ambiguity. The power to vary an existing court order is limited to the extent of the ambiguity and a court may only amend an order if, on a proper interpretation thereof, the order does not give effect to the true intention of the court granting the order.

[24] Rule 42(1)(b) does not allow or empower a court to alter or vary findings or to vary or alter the import and substance of an order.

[25] The basis of New GX's contentions is that the COT's concession was incorrectly recorded by Van der Westhuizen J. Any alleged or perceived error or misdirection in relation to the concession made by the COT is not an error or misdirection that can properly be corrected or ameliorated by a court in terms of Rule 42(1)(b).

[26] In my view, there is no indication in the judgment of Van der Westhuizen J that the court intended to grant an order in line with the concession made by the COT, and with the same effect as proposed by the COT, in its heads of argument.

Conclusion

[27] In terms of the Rule 42(1)(b) application which served before me, the court was asked to vary the court order dated 21 June 2021 in order to bring it in line with the true intention of Van der Westhuizen J.

[28] Paragraph 4 of the order granted by Van der Westhuizen J follows the wording of paragraph [46] of the judgment exactly. As stated above, the effect of paragraph 4 of the order by Van der Westhuizen J is to deprive New GX of a claim for expenses and loans it had incurred in order to perform in terms of the impugned service agreement. This much is common cause.

[29] Omitting the phrase "*any rights which have already accrued prior to the cancellation*" from paragraph 4 of the order by Van der Westhuizen J dated 21 June 2021, or granting the order sought by New GX in the Rule 42(1)(b) application, will have the effect of allowing New GX the right to claim contractual damages in terms of clause 12 of the impugned service agreement which accrued to it upon cancellation thereof.

[30] Doing so would not only broaden the scope of the order of Van der Westhuizen J but would also alter the substance and import of the order. This will be at odds with the finding made by Van der Westhuizen J in paragraph [46] of the judgment as well as the reasoning set out in the judgment.

[31] New GX's argument that varying the order of Van der Westhuizen J dated 21 June 2021 will bring it in line with the intention of Van der Westhuizen J is not borne out by the findings and reasoning of Van der Westhuizen J in the judgment dated 21 June 2021.

[32] In the circumstances, I find there are no reasonable prospects that another court would come to a different conclusion and no compelling reason exists why an appeal should follow.

I make the following order:

1. The application for leave to appeal is dismissed, with costs.

Z MARX DU PLESSIS

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 25 March 2024

Judgment delivered:	2 April 2024

Appearances:

Counsel for the applicant:	I B Currie
Instructed by:	Edward Nathan Sonnensbergs Inc
Counsel for the first respondent:	E C Labuschagne SC
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