Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NUMBER: 2101/2021

In the matter between:

DEPARTMENT OF ROADS AND PUBLIC WORKS: NORTHERN CAPE	First Applicant
ACTING HEAD OF THE DEPARTMENT NORTHERN CAPE	Second Applicant
RAMONA GREWAN	Third Applicant
CHIEF FINANCIAL OFFICER DEPARTMENT OF ROADS AND PUBLIC WORKS: NORTHERN CAPE	Fourth Applicant
MEC: DEPARTMENT OF ROADS AND PUBLIC WORKS NORTHERN CAPE	Fifth Applicant
FUFE MAKATONG	Sixth Applicant

And

SAMEX CONSULTING (PTY) LTD	Respondent

Heard: 08 February 2023

Delivered: 31 March 2023

JUDGMENT

Phatshoane DJP

[1] This is an application for leave to appeal against the whole of my judgment and order by the Department of Roads and Public Works, Northern Cape (the department), its Acting Head of Department (the HOD), its former HOD Ms Ramona Grewan, in her personal capacity, its Chief Financial Officer (CFO), and its Member of the Executive Council (MEC), Ms Fufe Makatong, in her official and personal capacity (the first to sixth applicants).

[2] I had ordered the department, the first applicant, to comply with the consent order of this Court handed down on 23 November 2021 under Case No: 2101/21 (Mamosebo J order) within 30 days from the date of that order. In the event of non-compliance, the respondent was entitled, if so advised, to approach this court on the same papers, duly supplemented where necessary, for any appropriate relief including but not limited to an order declaring the applicants, including the current serving HOD, to be guilty of contempt. Further contingent relief was also granted.

[3] For reasons fully traversed in the main judgment, which need not be repeated, I had found that the department, its MEC and the two acting HODs, Ms Grewan and Mr Mhlauli, were derelict in not ensuring that the Mamosebo J order was complied with.

[4] The judgment is attacked essentially on the construction I placed on the Mamosebo J order. The applicant's argument, both in the main proceedings and in this application, is that the settlement agreement which underpins the Mamosebo J order is incapable of enforcement as it constitutes an agreement to agree. I had found that generally courts will not enforce 'an agreement to agree'.[1] The proper approach in that form of an enquiry depends upon the construction of the particular agreement.[2]

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[1] *Shepherd Real Estate Investment (Pty) Ltd v Roux Le Roux Motors CC* 2020 (2) SA 419 (SCA) at para 16.
[2] Ibid para 17.

[5] I had also determined that the settlement agreement (as foreshadowed in the Mamosebo J order) ought not to be considered in isolation but had to be read in conjunction with the first main agreement which largely regulates all the contractual obligations between the parties. To this end, in their application for leave, the applicants seek to introduce, for the first time on appeal, legal argument to the effect that the consent order by Mamosebo J constituted a compromise, alternatively, *transactio* of the disputed obligation and that I erred in considering the dispute settlement mechanism as contained in the main agreement.

[6] Section A to the main agreement sets out the settlement of disputes clause in these terms:

'26.1 If *any dispute or difference of any kind whatsoever* arises between the Client [department] and Consultant [Samex] in connection with or arising out of the agreement, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.

26.2 If, after thirty (30) days, the parties have failed to resolve their dispute or difference by mutual consultation, then either of the parties may give notice to the other party of his intention to commence with mediation. No mediation in respect of this matter may be commenced unless such notice is given to the other party.

26.3 Should it not be possible to settle a dispute by means of mediation, then such dispute may be settled in a South African court of law'.

[7] In *Southernport Developments (Pty) Ltd v Transnet Ltd*[3] the agreement to negotiate the terms in good faith had been linked to an arbitration clause which provided that, in the event of a dispute arising between the parties in respect of any of the terms and conditions of the lease agreement, the dispute would be referred to arbitration and the decision of the arbitrator would be final and binding on the parties. Ponnan AJA (as he then was) held that:

'(T)he arbitrator was entrusted with putting the flesh onto the bones of a contract already concluded by the parties… For what elevates this agreement to a legally enforceable one and distinguishes it from an agreement to agree is

[3] 2005 (2) SA 202 (SCA).

the dispute resolution mechanism to which the parties have bound themselves. The express undertaking to negotiate in good faith in this case is not an isolated edifice. It is linked to a provision that the parties, in the event of their failing to reach agreement, will refer such dispute to an arbitrator whose decision will be final and binding. The final and binding nature of the arbitrator's decision renders certain and enforceable, what would otherwise have been an unenforceable preliminary agreement.' [4]

[8] I concluded that the dispute, on the settlement of the terms of reference, between the applicants and the respondent was "of any kind whatsoever" as envisaged in clause 26.1 of the main agreement. I reasoned that on the basis of clause 26 it could not be argued that the parties had no 'deadlock-breaking mechanism' in the event they could not agree on the terms of reference. To the extent that there was an impasse, on the terms of reference, the parties had the means of resolving the dispute through an independent mediation process as provided for in the main agreement.

[9] It holds true that the mediation process may assist the parties to reach an agreement on the terms of reference. To date of the hearing of the application this avenue was not explored despite numerous attempts to resolve the dispute by mutual consultation. However, in the event that the parties reach a deadlock during the mediation process, that may well be the end of the negotiations. An arbitration process is entirely different to mediation. Depending on the terms of reference of the arbitration process or the terms of the agreement the decision of the arbitrator might be final and binding. For this reason, I am of the view that an appellate court may find that clause 26.1 did not provide sufficient 'deadlock-breaking mechanism' in the event of an impasse or that the terms of the consent order, insofar as they required of the parties to reach an agreement on the terms of reference, were illusory or unacceptably uncertain and consequently incapable of enforcement. On

[4] Ibid para 17.

the aforegoing, to my mind, the appeal would have reasonable prospects of success.

[10] Consequently, leave to appeal has to be granted to the Supreme Court of Appeal. I make the following order.

ORDER

1. The application for leave to appeal is granted to the Supreme Court of Appeal.
2. Costs of the application for leave to appeal shall be costs in the appeal.

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PHATSHOANE DJP

Appearances:

For the applicants:	Adv T Sibeko SC (with Mr L Bomela)
Instructed by:	Gqadushe Attorneys, Kimberley.
For the respondent:	Adv L Nyangiwe
Instructed by:	RAMS Attorneys, Johannesburg.
	Mkhokeli Pino Attorneys, Kimberley.