THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 365/2022

In the matter between:

PUBLIC INVESTMENT CORPORATION SOC LTD **FIRST APPELLANT**

GOVERNMENT EMPLOYEES PENSION FUND **SECOND APPELLANT**

and

TRENCON CONSTRUCTION (PTY) LTD **FIRST RESPONDENT**

GVK-SIYA ZAMA BUILDING CONTRACTORS (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *PIC SOC Ltd and Another v Trencon Construction (Pty) Ltd and Another* (365/2022) [2023] ZASCA 88 (8 June 2023)

Coram: PONNAN, NICHOLLS, GORVEN and MABINDLA-BOQWANA JJA and UNTERHALTER AJA

Heard: 4 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 8 June 2023.

Summary: Jurisdiction – power of court of appeal – judgment sought to be appealed against a nullity – appeal court unable to exercise discretion when no dispute or *lis* exists between the parties – matter struck from the roll.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Neukircher J, sitting as court of first instance):

The matter is struck from the roll with each party to pay its own costs.

JUDGMENT

Mabindla-Boqwana JA (Ponnan, Nicholls and Gorven JJA and Unterhalter AJA concurring):

[1] At the hearing of the appeal, counsel for the parties were, at the outset, required to address this Court as to whether a live dispute or *lis* existed between the parties, upon which this Court could, and therefore should, exercise its appellate jurisdiction. This, in circumstances where the first respondent, Trencon Construction (Pty) Ltd (Trencon), failed to obtain leave to appeal against the dismissal of a review application brought by it in the Gauteng Division of the High Court, Pretoria (the high court). The high court did however grant leave to appeal to the respondents in that application, the first appellant, the Public Investment Corporation SOC Ltd (the PIC), and the second appellant, the Government Employees Pension Fund (the GEPF), against an order that it had issued after it had already finalised its judgment.

[2] Trencon conducts business as a building and civil engineering contractor. The PIC is a corporation established in terms of s 2 of the Public Investment Corporation Act 23 of 2004. It is wholly owned by the State, with the Minister of Finance acting as a representative shareholder on behalf of the State.[1] It is also an authorised financial services provider in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 and conducts business as an asset management company. Its clients are mostly public sector entities, including the GEPF. The GEPF, established by s 3 of the Government Service Pension Act 57 of 1973 (since repealed), is the largest pension fund in Africa. It is regulated by the Government Employees Pension Law, 1996.[2]

[3] Trencon submitted a bid in response to an invitation advertised by the PIC on behalf of the GEPF in November 2019, to appoint a building contractor for a shopping centre in Pretoria (the tender). The tender was awarded to the second respondent, GVK-Siya Zama Building Contractors (Pty) Ltd (GVK). After losing the tender, Trencon launched an application in the high court seeking to review and set aside the PIC's decision to award the tender to GVK. It also sought a declaratory order that the GEPF was an organ of state in terms s 239*(b)*(ii) of the Constitution. On 2 November 2021, the high court dismissed Trencon's application.

[4] After the dismissal of its application, and on 8 November 2021, Trencon filed a notice in terms of rule 42(1)*(b)* of the Uniform Rules of Court seeking an amendment to the high court's order in the following terms:

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[1] Section 3 of the Public Investment Corporation Act 23 of 2004.
[2] Section 2 of the Government Employees Pension Law, 1996 (Proclamation 21 published in *Government Gazette* 17135 of 19 April 1996).

'1. It is declared that the [GEPF] is an organ of state in terms of section 239*(b)*(ii) of the Constitution.

2. Save for the aforesaid order, the application is dismissed.'

[5] The amendment was sought on the basis that the high court had allegedly committed an error or omission by not pronouncing on the declarator sought in the notice of motion that the GEPF was an organ of state in terms s 239*(b)*(ii) of the Constitution. To support this application, Trencon relied on the following observation in the high court's judgment:

'Therefore, in my view, in issuing this tender it cannot be said that the GEPF was performing a quintessentially domestic function. In my view both the function and power were public ones and this being so, the GEPF is an organ of state and the action of the award to GVK was an administrative one and reviewable under PAJA.'

[6] It also contended that the high court had in addition expressed the view, in a footnote, that the declaratory relief sought by Trencon 'is [not] overbroad and shall be limited to this application'. The appellants did not oppose the application to amend; instead, they chose to abide the high court's decision.

[7] On 22 November 2021, the high court granted an amendment of the order that it had given on 2 November 2021, but not in the terms sought by Trencon. It issued the following order (the amended order):

'1 *for purposes of the present application*, the second respondent is an organ of state in terms of section 239*(b)*(ii) of the Constitution.

2 save for the aforesaid order, the application is dismissed.' (My emphasis.)

[8] This prompted the appellants to file an application for leave to appeal against the amended order as well the high court's failure to grant a costs order in their

favour on 13 December 2021. On 31 January 2022, Trencon applied for leave to cross-appeal against paragraph 2 of the amended order, read with the original order, dismissing the application as well as against the high court's failure to grant costs in its favour. This application was accompanied by an application for condonation for the late filing of the application for leave to cross-appeal.

[9] On 4 April 2022, the high court granted the appellants leave to appeal but dismissed Trencon's application for condonation with costs. Before the hearing of the appeal, the Registrar of this Court was directed to dispatch the following note to the parties:

'In this matter, the high court: (a) dismissed Trencon's review application; and, (b) ruled '*for the purposes of the present application that the GEPF is an organ of state*'. Trencon thereafter failed to obtain leave from the high court to appeal against (a), which means that this order is not open to reconsideration on appeal. Thus, even on the acceptance that the appeal by the PIC and GEPF is directed at (b), it will nonetheless be necessary, *at the hearing of the appeal*, for the parties to address the following:

Inasmuch as the final word has been spoken on the application, which is not susceptible to alteration on appeal:

(i) Is there still an existing dispute or *lis* between the parties upon which this court can and should exercise its appellate jurisdiction?

(ii) Will any judgment that issues on appeal affect the rights and obligations of the parties *inter se* or have any practical effect or result as contemplated in s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013?' (My emphasis.)

[10] Section 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 (Superior Courts Act) provides that:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[11] Both parties filed supplementary heads of argument in response to the note from the Registrar. The appellants contended that the legal question regarding the status of the GEPF arose independently of the review relief claimed in the notice of motion. This, in their view, had implications for the GEPF because it informed how it had to conduct itself going forward. Therefore, a dispute still existed between the parties upon which this Court was required to exercise its appellate jurisdiction.

[12] It is well established in our law that 'once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased'.[3]

[13] There are a few exceptions to this rule. A court may within the contemplation of rule 42, for example, (a) clarify its judgment, if it is ambiguous or uncertain to give effect to its true intention, but it may not alter the sense and the substance of the judgment[4] or (b) correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention[5] or (c) supplement the judgment in respect of accessory or consequential matters, such as costs and interest on a judgment debt, it had overlooked or inadvertently omitted to grant.[6] This does not equate to altering a definitive order once pronounced.

[3] *Firestone South Africa (Pty) Ltd v Genticuro AG* [1977] 4 All SA 600 (A); 1977 (4) SA 298 (A) at 306F.
[4] Ibid at 307A.
[5] Ibid at 307C.
[6] Ibid at 306H.

[14] These exceptions were not applicable in this matter. The high court dismissed the application. That should have been the end of the matter. The high court unfortunately did not engage with this issue. Nowhere did it deal with whether Trencon had brought itself within rule 42. It gave no consideration at all to the fact that having dismissed the application, it may have been *functus officio*.

[15] The question of whether the GEPF is an organ of state did not give rise to any self-standing relief. On the application papers as originally framed, the resolution of this question was a step in the determination of the review application. Having dismissed the review, the high court had no power to revisit that order. The amended order was in effect a nullity because it was made without jurisdiction by the court making it.[7]

[16] In this case, Trencon unsuccessfully applied for leave to appeal the dismissal of its application. Its remedy was to then petition this Court for leave to appeal. It did not do so. As the dismissal of the application by the high court was not open to correction on appeal, the final word had been spoken by that court. Logically, the dispute or *lis* between the parties no longer existed upon which this Court could and should exercise its appellate jurisdiction.[8]

[17] The question of whether this Court nonetheless has a discretion to entertain the appeal therefore does not arise. As it was held by this Court in *Port Elizabeth*

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[7] *Master of the High Court (North Gauteng High Court, Pretoria) v Motala N O and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) paras 12 and 14. See also *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 197, in which this principle was endorsed.
[8] *Legal-Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; [2014] 4 All SA 570 (SCA); 2015 (2) SA 568 (SCA) para 22.

Municipality v Smit,[9] '[w]hen there is no longer any *issue* between the parties, for instance because all issues that formerly existed were resolved by agreement, there is no "appeal" that this Court has any discretion or power to deal with'. This approach was endorsed in *Legal-Aid South Africa v Magidiwana and Others*.[10]

[18] In any event, the amended order was limited in scope. The declaration that 'the [GEPF] is an organ of state in terms of section 239*(b)*(ii) of the Constitution' was subject to the qualifier '*for purposes of the present application*'. (My emphasis.)

[19] The expression 'present application' in the amended order, evidently referred to the application brought by Trencon to review and set aside the decision to award the tender to GVK. It could not have any broader application. This means that any order of this Court on appeal will have no practical effect or result beyond the confines of this matter. While the question of whether the GEPF is an organ of state might be of importance to the appellants, the declarator was limited by the court to the specific circumstances of the review application between the parties and does not extend to all tender processes outside its reach. In the circumstances, there would also be no reason for this Court to hear the appeal as contemplated in s 16(2)*(a)*(i) of the Superior Courts Act. In the light of the findings in this judgment, there is no need to consider any other remedy, other than to strike the matter from the roll.

[20] As to costs, Trencon asked for costs to be awarded in its favour because the appellants persisted with the appeal despite the note from this Court directing their attention to the preliminary issue. Before this note, both parties laboured under the

[9] *Port Elizabeth Municipality v Smit* [2002] ZASCA 10; 2002 (4) SA 241 (SCA) para 7.
[10] *Magidiwana* fn 8 above para 22.

impression that the amended order was validly obtained and issued, and susceptible to appeal. Neither party was blameless. The point held to be decisive was raised by the Court. There was no justification in either party having persisted in the matter. In these circumstances, it is appropriate to order each party to pay its own costs.

[21] For these reasons, the matter is struck from the roll with each party to pay its own costs.

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

Appearances

For the appellants:	K Pillay SC with C Tabata and M Dafel
Instructed by:	Bowman Gilfillan Inc, Sandton
	McIntire Van der Post, Bloemfontein
For the first respondent:	M Chaskalson SC with S Pudifin-Jones
Instructed by:	Joubert Galpin Searle, Gqeberha
	Honey Attorneys, Bloemfontein