



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: 25 August 2023

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) LTD

RESPONDENT

JUDGMENT

MARX DU PLESSIS, AJ

Introduction

1. The application before me concerns a court order by Van der Westhuizen J handed down on 21 June 2021. The applicant (referred to herein as '**New GX**') applies for declaratory relief in respect of the aforementioned order as well as the variation thereof.
2. The first respondent (referred to herein as '**the COT**') opposed the relief sought by the applicant.

Brief background

3. The following facts appear from the judgment of Van der Westhuizen J:
 - 3.1 New GX approached the COT, presenting to it a proposal for the establishment of a transfer station service.
 - 3.2 New GX and the COT subsequently concluded a notarial lease agreement in respect of property adjoining the site where the transfer station service proposed by New GX was to be erected.

- 3.3 The notarial lease agreement made provision for the recycling of recyclable waste from specifically identified regions and that non-recyclable waste may be disposed of in a particular manner, the particulars of which are not relevant to this judgment.
- 3.4 In addition, it was agreed that New GX would upgrade an existing recycling facility to a Multi-Purpose Waste Recycling Facility, at its own cost, in three phases.
- 3.5 After conclusion of the notarial lease agreement, and on 19 November 2015, a report was tabled before COT's Executive Acquisition Committee (referred to herein as '**the EAC**'). The purpose of the report was to propose that the COT procure a waste processing facility from New GX in respect of non-recyclable waste.
- 3.6 New GX made the proposal to the COT as it was aware of the impending closure of a landfill site used by the COT.
- 3.7 The EAC resolved:
- 3.7.1 To allow a deviation from the normal procurement processes and to authorise the Municipal Manager accordingly;

- 3.7.2 To appoint New GX to provide the transfer service station for two specifically identified areas;
 - 3.7.3 That New GX's appointment was to be effective from the date of commercial operation until March 2030 ; and
 - 3.7.4 That New GX's appointment be linked to the lease period agreed to in terms of the notarial lease agreement.
- 3.8 Although the abovementioned resolution was amended by a further resolution of the EAC dated 23 June 2016, New GX's appointment remained authorised in respect of non-recyclable waste only.
- 3.9 Pursuant to the resolution by the EAC dated 23 June 2016, an amended letter of appointment was issued to New GX and, during August 2016, a service agreement was entered into between New GX and the COT.
- 3.10 In terms of the service agreement New GX was to provide the COT with waste processing services in respect of all recyclable and non-recyclable waste, contrary to the amended resolution of the EAC dated 23 June 2016.

- 3.11 The service agreement also provided for New GX to be paid fees, to be calculated in a specific manner, and other provisions in respect of tonnage and rates in respect of recyclable waste.
- 3.12 The service agreement was drafted by New GX's attorney upon the instruction of New GX.
- 3.13 The COT did not deliver the agreed tonnage of recyclable waste as specified in the service agreement and New GX proceeded to cancel the service agreement. It did so on 1 March 2019.
- 3.14 Subsequent to the cancellation of the service agreement, New GX commenced arbitration proceedings, claiming damages from the COT in terms of the cancelled service agreement. It was during the arbitration proceedings that the COT challenged the legality of the actions taken by the Municipal Manager on the basis that these actions were not authorised in terms of the resolutions of the EAC.
- 3.15 In light of the fact that the legality of the Municipal Manager's actions were challenged, it was agreed between New GX and the COT that the arbitration proceedings be stayed pending a review application to be brought by the COT.

3.16 The review application was argued before Van der Westhuizen J and on 21 June 2021 Van der Westhuizen J handed down the order New GX now seeks to vary.

Judgment and order of Van der Westhuizen J

4. In the judgment, the court records the following arguments raised by both New GX and the COT regarding the order to be granted, as well as its findings in respect thereof:

4.1 New GX recorded itself to be the sole provider for a transfer station service of the nature required by the COT, and that this induced the COT to deviate from normal procurement processes.

4.2 The impugned service agreement included an unauthorised extension of the services to be provided by New GX.

4.3 The unauthorised extension of services and other onerous conditions relating to the provision of a specified tonnage of waste to be supplied to New GX by the COT were included in the service agreement by New GX's attorneys, upon the instruction of New GX.

- 4.4 New GX and the COT were at odds as to the remedy to be afforded to the parties. Public interest is fundamental to determining what remedy would be just and equitable.
- 4.5 New GX contended that it was obliged to obtain financing to enable it to establish the transfer station service and that in doing so, it incurred considerable debt. It could not recoup a profit of approximately R 94 million from the COT because the COT did not supply it with the agreed tonnage of waste and that this resulted in the cancellation of the service agreement.
- 4.6 New GX argued that the review application ought to be dismissed and in the alternative, it argued for an order to be granted in line with the order granted in *Gijima*¹. Such an order being one that would not divest New GX of the rights which it may be entitled to under the service agreement, but for the declaration of constitutional invalidity.
- 4.7 The COT argued that the conduct of New GX differs from that of the respondents in *Gijima* and *Asla Construction*² in that:

¹ State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC)

² Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited (2019 (4) SA 331 (CC)

- 4.7.1 The respondents in those matters performed its duties in terms of the agreements sought to be impugned whereas New GX had not. At the time the transfer station service had not been established;
 - 4.7.2 The agreements sought to be impugned had not been cancelled by the respondents prior to the review applications. New GX had cancelled the service agreement due to an alleged breach of the terms thereof;
 - 4.7.3 Only New GX would benefit if the order sought by it were to be granted as New GX had not completed nor established the transfer station service.
- 4.8 The remedial order sought by New GX is not in the public interest as it will result in the Tax and Rate Payers of the COT to pay approximately R 94 million for anticipated profits had the service agreement run its course.
- 4.9 The respondents in *Gijima* and *Asla Construction* were held to be free from fault, New GX is not free from blame as New GX was the author of the unsolicited proposals made to the COT in respect of the transfer station service and it was New GX who prepared the service agreement, including unauthorised provisions therein.

- 4.10 The unauthorised inclusions in relation to the tonnage of waste to be supplied to New GX lies at the door of New GX and there is no indication that the inclusion thereof was feasible under the circumstances.
- 4.11 In the public interest, it would not be just and equitable to hold the COT to its impugned conduct.
- 4.12 It was conceded by the COT that any rights which may have accrued to New GX prior to cancellation, and to which New GX may be entitled under the impugned agreement, save for rights to claim for loss of profit and claims for shortfalls pertaining to waste, be preserved.
5. It is against this backdrop that the court granted the order in the following terms:
- "1. The decision taken by the first applicant's Executive Acquisition Committee on 19 November 2015 and 26 June 2016 to inter alia resolve that the Municipal Manager dispense with the normal procurement processes, in terms of Regulation 36 of the Municipal Supply Chain Regulations, be declared constitutionally invalid and be set aside;*

2. *The decision by the erstwhile Municipal Manager to dispense with the normal procurement processes, in terms of Regulation 36 of the Municipal Supply Chain Regulations, so that the respondent could be appointed by the first applicant to provide a transfer station service for Regions 3 and 4, be declared constitutionally invalid and be set aside;*
3. *The three-year service agreement entered into on 10 August 2016 by the first applicant and the respondent, for the rendering of waste processing services to the first applicant, in respect of recyclable and non-recyclable waste, be declared constitutionally invalid;*
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;*
5. *No order as to costs be made."*
6. After the judgment and order of Van der Westhuizen J was handed down, New GX amended its statement of claim in the arbitration proceedings. The COT delivered an amended statement of defence,

asserting that the amounts claimed by New GX were in excess of that allowed by the scope of paragraph 4 of the order of Van der Westhuizen J.

7. In view of the nature of the dispute which arose from the parties' amended statements, the COT applied to the arbitrator, the second respondent herein, for a ruling in terms of article 10.1.2 and/or 10.1.3 of the Rules of the Arbitration Foundation of South Africa (AFSA).

Rulings sought by the COT

8. The rulings sought by the COT were:

"6.1.1 Whether the judgment of Van der Westhuizen J has had the effect of nullifying the entire arbitration agreement, and a ruling on whether the remaining disputes arising from paragraph 4 of Van der Westhuizen J may be decided on arbitration (even by consent);

6.1.2 A ruling that only evidence relevant to accrued rights prior to cancellation may be adduced;

6.1.3 *That, save for the first line item in "O" read with Schedule A, the claim as currently formulated by the claimant falls outside the ambit of justiciable disputes;*

6.1.4 *That, save for the first line item in "O" to the statement of claim, in which the heads of damages and line items of damages claimed, fall within the ambit of what remains justiciable and arbitrable.*

6.1.5 *Costs, in the event of opposition, including the costs of two counsel."* (sic)

9. New GX opposed the rulings sought by the COT, its grounds for opposition being:

"3. *The manifest purpose of the order is to preserve contractual rights of the claimant that may have accrued "prior to the cancellation of the service agreement", which phrase is synonymous with "at the time of, or just before cancellation. The High Court did not set aside the service agreement.*

4. *The rider to the order is that the preservation of contractual rights does not include "rights to any claim for loss of profit and claim for shortfalls pertaining to waste"*

5. *The context in which the order was granted is set out in paragraph [46] of the judgment which records that "It was*

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

6. The concession referred to is contained in the following paragraphs of the heads of argument filed on behalf of the applicants in the High Court application:

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."*

7. The High Court thus intended, in accordance with the defendant's concession, to make a form of order along the lines of the one granted in State Information Technology

Agency SOC v Gijima Holdings Ltd 2018 (2) SA 23 (CC), namely an order declaring the services contract invalid, but not setting it aside so as to preserve the accrued contractual rights to which the claimant might have been entitled. The question of the content and extent of the rights that had accrued to the claimant were intended to be determined, as in Gijima in the pending arbitration proceedings."

10. On 12 May 2022 the second respondent provided a written ruling. New GX being dissatisfied with the ruling proceeded to launch the current application for declaratory relief and an order varying the order of Van der Westhuizen J.

Principles applicable to Rule 42(1)(b) applications

11. It is an established principle that once a court has pronounced a final judgment or order it becomes *functus officio*, and it generally has no power to correct, rescind or to alter its order or judgment.
12. There are however exceptions to this general rule, Rule 42(1)(b) of the Uniform Rules of Court being one such exception.

13. New GX relies on the provisions of Rule 42(1)(b) which allows a court, upon application, to vary an order or judgment in which there is an ambiguity.
14. The court's power to vary or alter its own order is limited because it is in the public interest that litigation is brought to finality.³
15. 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 thereof. A court may not alter the import and substance of the order.
16. In adjudicating the present application, this Court is enjoined to interpret the judgement and order of Van der Westhuizen J in order to determine if the court order in its current form reflects the intention of Van der Westhuizen J and if not, whether the amendment of the order as sought by New GX will have the effect of altering the import of the order.

³ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) at paragraph [97]

Principles applicable to interpretation of judgments

17. The well-known approach applicable to the interpretation of court orders is:

*"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."*⁴

18. The purpose of a court order is to grant affected parties' effective relief. The primary objective in interpreting the court order is therefore the determination of the purpose of the court order. This is established from the language used in the judgment and order, which language must be understood in the context of the matter in relation to which the order was granted and the legal context applicable thereto.

⁴ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) (Finishing Touch 163) at paragraph 13.

19. The reasoning set out in a judgment provides an explanation for the order arrived at and provides it with meaning.

New GX's arguments

20. New GX now asserts that the order it seeks is intended to remove an ambiguity in the court order and that the order of Van der Westhuizen J does not reflect the true intention of the court. According to New GX, the ambiguity only came to its attention following receipt of the written ruling by the second respondent.
21. According to New GX, the interpretation of the arbitrator of the phrase *'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'* has the effect of excluding New GX's right to claim compensation for the expenses it incurred and the liability it assumed in the performance of the impugned service agreement.
22. New GX contends that the purpose of the order of Van der Westhuizen J is to preserve its contractual rights, which, barring those expressly excluded, includes its right to claim compensation for the expenses it

incurred and the debt it assumed in the performance of its duties in terms of the service agreement.

23. According to New GX, the interpretation of the arbitrator as set out in the ruling therefore does not accord with the intention, reasoning and findings of Van der Westhuizen J.

24. The bases for New GX's assertions are shortly that:

23.1 Despite the COT applying for declarations of invalidity in respect of the service agreement and the procurement decisions authorising the conclusion thereof, the service agreement was declared constitutionally invalid, but it was not set aside.

23.2 During argument of the review application, the COT contended for an order setting aside the service agreement in full, thereby depriving New GX of any claim.

23.3 New GX opposed the review application and the relief sought by the COT, but argued for an order to be granted along the lines of that granted by the Constitutional Court in *Gijima*, i.e. declaring the agreement invalid, but preserving the accrued contractual rights to which it might have been entitled.

23.4 The COT conceded that an order along the lines of that granted in *Gijima* would be just and equitable, but only if accrued rights to claim for loss of profits and for compensation for shortfalls in the amount of waste delivered be excluded. This concession is recorded in paragraph 46 of the judgment.

23.5 Without further discussion, the order in its current form was granted. New GX argues, that in doing so, the purpose of the court order is to preserve New GX's contractual rights, including its right to claim damages, excluding its right to claim for profits and or loss as a result of shortfalls.

25. I do not agree with the contentions by New GX.

26. The effect of a declaration of constitutional invalidity, whether the agreement is set aside or not, is that the agreement declared to be invalid is thus invalid from its inception, and has no legal effect.⁵ New GX would therefore only be entitled to rights specifically preserved by an order of court.

27. The court expressly preserved rights which may already have accrued to new GX prior to the cancellation of the service agreement, excluding

⁵ *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) at par 134 -137

rights to claim for loss or profit and claims for shortfalls pertaining to waste.

28. The court granted the order after having considered the arguments advanced on behalf of both New GX and the COT. This appears from the judgment itself, in particular paragraphs 33 to 38 and 43 to 44 thereof.
29. In the relevant paragraphs the court finds that the order sought by the New GX is not in the public interest as Tax and Ratepayers within the jurisdiction of the COT would have to pay just short of R 100 million for anticipated profits had the agreement been allowed to conclude by effluxion of time.
30. The order contended for by New GX being one that would not divest the respondent from its rights to which it, but for the declaration of constitutional invalidity, might have been entitled to.
31. The court also found that New GX was not free from blame, which distinguishes New GX from the respondents in *Gijima* and *Asla Construction*. The court states that unauthorised inclusions in the impugned service agreement were included by New GX itself. These

inclusions being provisions the COT could not comply with, resulting in the cancellation of the service agreement.

32. In addressing the preservation of accrued rights under the service agreement, the court recorded the COT's concession as follows:

"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."

33. The concession recorded in the judgment was made in respect of rights that had accrued prior to the date of cancellation only. This concession, recorded in the judgment, is the contention and concession accepted by the court, and which it considered to be just and equitable in the circumstances.

34. Interpreting the judgment and order of Van der Westhuizen J is an exercise which was already embarked on by the arbitrator. I have carefully considered the judgment and order of Van der Westhuizen J and the written ruling of the arbitrator, being mindful of the submissions

made by New GX in respect thereof and that set out above. I align myself with the reasoning and findings set out in the ruling of the arbitrator, and I see no reason to deviate therefrom.

35. In my view, the relief sought by the applicant will have the effect of altering the import and substance of the order of Van der Westhuizen J.
36. The declaratory relief and the amendment sought will broaden the scope of the order of Van der Westhuizen J as it will allow New GX more rights than Van der Westhuizen J intended. I therefore decline to grant the order sought by New GX.
37. I grant the following order:
1. The application is dismissed, with costs.



Z MARX DU PLESSIS
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing:

17 May 2023

Judgment delivered: 25 August 2023

Appearances:

Counsel for the applicant: I B Currie

Instructed by: Edward Nathan Sonnensbergs Inc

Counsel for the first respondent: E C Labuschagne SC

Instructed by: Diale Mogoshoa Attorneys