

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **067524/2023**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>26/09/2024</u>	
DATE	SIGNATURE

In the matter between:

**BLOEMFONTEIN CORRECTIONAL CONTRACTS
PROPRIETARY LIMITED**

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Respondent

**G4S CORRECTION SERVICES (BLOEMFONTEIN)
RF (PTY) LIMITED**

Second Respondent

This matter was heard in open court and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

KUBUSHI, J

Introduction

[1] The applicant, who is the 2nd respondent in the main application, applies in terms of rule 49(1) of the Uniform Rules of Court read with section 17(1) of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”), for leave to appeal to the Supreme Court of Appeal, alternatively, to the Full Court of this Division of the High Court, against the whole order of this Court delivered on 17 April 2024.

[2] For the sake of convenience, the parties in this application are referred to as cited in the main application.

Facts

[3] The application for leave to appeal emanates from an *in limine* point taken by the 1st respondent in the main application. The primary issue that was sought to be adjudicated in the main application was in relation to a concession agreement that was concluded between the applicant and the 1st respondent. The concession agreement involved the operations at the Mangaung Correctional Centre (“the Centre”) whereat the applicant had been awarded a tender to operate the Centre. The applicant in turn subcontracted the 2nd respondent in respect of the services that were to be provided at the Centre.

[4] A dispute arose between the applicant and the 1st respondent pertaining to the concession agreement. Pursuant to the said dispute, the 1st respondent wanted to terminate the agreement, alleging certain breaches of the agreement by the applicant. The applicant, in contestation of the impending termination of the agreement, approached court for interim interdictory relief pending the institution of an action against the 1st respondent to prevent the allegedly unlawful cancellation of the agreement. The application was opposed by the 1st respondent.

[5] The applicant had in those proceedings cited the 2nd respondent with no specific relief sought against it. It was alleged that the 2nd respondent was cited in the papers by virtue of its interest in the outcome of the proceedings. Even though no particular relief was sought against it, the 2nd respondent filed an extensive answering affidavit and heads of argument in support of the relief sought by the applicant. In addition, the

2nd respondent, through its counsel, made appearance at the hearing of the main application with the intention to argue its purported case in support of the applicant.

[6] It is against this backdrop that at the commencement of the hearing, the aforesaid *in limine* point was taken. The 1st respondent, in raising this point, lamented that the 2nd respondent had no standing in the proceedings on the ground of privity of contract. The 1st respondent contended that as the 2nd respondent was not a party to the concession agreement, it (the 2nd respondent) had no standing to assert any rights or obligations which attach to an agreement to which it is not a party.

[7] Both the applicant and the 2nd respondent opposed the *in limine* point contending that the 2nd respondent was entitled to participate in the proceedings because it has an interest in the matter, which interest the 1st respondent had, apparently, admitted in its answering affidavit.

[8] Besides the reason advanced by the applicant in its founding papers why it had cited the 2nd respondent in the papers, being its interest in the outcome of the proceedings, no other reason was proffered by the 2nd respondent. It was only in oral argument that the 2nd respondent's counsel mentioned that the interest contended for by the 2nd respondent included the interest of its employees, the inmates of the Centre and public interest. This, the 1st respondent opposed on the ground that such interest was not a direct interest as envisaged in the *Medihelp* judgment,¹ but was, instead, a financial interest which carried no weight.

[9] The court *a quo* ruled in favour of the 1st respondent. It upheld the *in limine* point and did not allow the 2nd respondent to participate in the proceedings. The reasoning of the court was on the basis that there was no privity of contract between the 1st respondent and the 2nd respondent, neither was there any *lis* between them, and the 2nd respondent had failed to establish a direct and substantial interest in the proceedings.

¹ *Medihelp v Minister of Finance NO* [2020] ZASCA 29 at paras 7 - 9.

Grounds for Leave to Appeal

[10] The 2nd respondent raised a plethora of grounds in its application and supplementary application for leave to appeal, which are not to be repeated in this judgment. The sum total of all these grounds is the issue of determination of a direct and substantial interest in the outcome of proceedings. These grounds were summarised as follows during oral argument:

[11] It is argued that the court *a quo* misdirected itself when it made the following findings:

- 11.1 that there was no direct and substantial interest on the part of the 2nd respondent.
- 11.2 that there was no privity of contract between the 1st and 2nd respondents.
- 11.3 that the relief sought in the heads of argument differed from the relief that was called for in the answering affidavit.

[12] The 1st respondent is opposing the application for leave to appeal on a point *in limine* and the merits. The point *in limine* is taken on the ground that the order is not appealable. The defence on the merits is that there are no reasonable prospects of success, no compelling reason that the appeal be heard, and no question of law of importance, whether because of its general application or otherwise, in respect of which a decision of the Supreme Court of Appeal is required.

Issues for determination

[13] On the *in limine* point, the issue is whether the order is appealable.

[14] On the merits, the issue is whether the 2nd respondent has made out a case to be granted leave to appeal in terms of uniform rule 49(1) read with section 17(1) of the Superior Courts Act. The question, therefore, is whether the 2nd respondent has made out a case to be granted leave to appeal.

Applicable Law

[15] As earlier indicated, the 2nd respondent has approached this court for leave to appeal in terms of uniform rule 49(1) read with section 17(1) of the Superior Courts Act. Uniform rule 49(1) provides as follows:

"49. Civil Appeals from the High Court

(1) (a) When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.

(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given at a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days."

[16] Section 17 of the Superior Courts Act, on the other hand, provides that –

"17. Leave to Appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

Discussion

[17] The test for the granting of the application for leave to appeal based on section 17(1)(a) of the Superior Courts Act, is trite and need not be repeated in this judgment.

[18] Applying the test stated in section 17(1)(a) of the Superior Courts Act, when considering all of the grounds raised by the 2nd respondent in the application for leave to appeal, in this court's opinion, there are no reasonable prospects that the appeal

will succeed; and there are no compelling reasons, presented to this court, why the appeal should be heard. This is said based on the reasons that follow hereunder:

Whether there was direct and substantial interest on the part of the 2nd respondent.

[19] In the main application, on the basis of the *Medihelp* judgment, it was found that the 2nd respondent has no standing because it has no direct interest in the proceedings.

[20] Relying on the *Van Staden* judgment,² the high watermark of the 2nd respondent's submission during argument in the main application, was that it was entitled to participate in the proceedings by merely being cited in the proceedings and that it was given such right by merely being cited. In light of the *Medihelp* judgment that held that for a party to have standing, it must have a direct interest in such proceedings, the court *a quo* dismissed the 2nd respondent's argument and found that there was no direct interest on the part of the 2nd respondent, and as such, the court made an order that the 2nd respondent should not participate in the proceedings.

[21] In this application, the argument is that the finding of the court *a quo* that the 2nd respondent should not participate in the proceedings is novel and in conflict with *Van Staden* which makes the court an outlier on this issue. The contention is that another court would come to a different conclusion mainly because the 1st respondent had on the facts conceded that the 2nd respondent had a direct and substantial interest.

[22] As a point of departure, it should be said that reliance by the 2nd respondent on *Van Staden*, in this regard, was misguided. *Van Staden* is no proposition that as a matter of principle, a party cited in legal proceedings is entitled without more to participate in those proceedings. *Van Staden* turned on its own specific facts. As such, there is nothing novel about the finding of this court. The law remains as stated by the Constitutional Court that a party can only participate in legal proceedings if such party has a direct and substantial interest in the outcome of the proceedings.

² *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* 2019 (4) SA 532 (SCA) at para 13.

[23] The test of direct and substantial interest has been adopted and confirmed by the Constitutional Court in *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others*,³ where it was held that:

"What constitutes a direct and substantial interest is the legal interest in the subject matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or to be affected by the order sought."

[24] In *Snyders and Others v De Jager (Joinder)*,⁴ the Constitutional Court held that:

"A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest."

[25] The inclination in this regard is to agree with the submission made by the 1st respondent's counsel that in order for a party to have *locus standi*, a party to litigation must have a direct and substantial interest in the right which is the subject matter of the litigation (failing which, a party lacks legal standing). Counsel correctly argued, also that, in determining whether a party has a direct and substantial interest in the matter, the test is whether he or she has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court. Accordingly, so counsel argued, although a party may have an interest (other than a legal interest) in the outcome of the litigation (by way of a financial interest or other interest), this does not constitute a direct and substantial interest in the litigation. In elucidation of this argument, counsel referred to a number of Supreme Court of Appeal judgments, that are, indeed, on point.⁵

[26] Counsel for the 2nd respondent argued further that the court *a quo* misdirected itself in finding that there was no direct and substantial interest on the part of the 2nd respondent. The contention is that the court *a quo* could not have come to such a finding because the 2nd respondent's direct and substantial interest was conceded by

³ 2017 (5) SA 1 (CC) at para 9.

⁴ 2017 (5) BCLR 604 (CC) at para 9.

⁵ See *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) at para 21; *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) at para 9; *South African History Archive Trust v South African Reserve Bank and Another* 2020 (6) SA 127 (SCA) at para 30; *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 12; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

the 1st respondent in the answering affidavit. As such, counsel is of the view that another court would come to a different conclusion on appeal.

[27] This argument by counsel for the 2nd respondent is unmeritorious. There is no concession made by the 1st respondent in this regard. As alleged in the applicant's founding papers, the 2nd respondent was cited in the papers by reason of its interest in the outcome of the matter. The allegation was further elaborated to state that the interest contended for was extensive interest that included the interest of the employees of the 2nd respondent, the inmates of the Centre and the interests of justice. It cannot be disputed that an adverse outcome of the proceedings can only impact on the 2nd respondent's financial interest as a subcontractor. It is thus apparent that the interest referred to here is a financial interest and not a legal interest. The concession by the 1st respondent, if any, does not clothe the 2nd respondent with standing. The law as it stands is that there must be a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court.⁶

Whether there was no privity of contract between the 1st and 2nd respondents

[28] The court *a quo* in this regard made a finding that there was no privity of contract between the 1st respondent and the 2nd respondent, neither was there any *lis* between them that would give the 2nd respondent standing in the proceedings. Counsel for the 2nd respondent argues that the court *a quo* misdirected itself in concluding that the principle of privity of contract played any role at all and that another court would come to a different conclusion on appeal.

[29] In terms of the doctrine of privity of contract, parties who are not privy to a contract cannot sue or be sued on it. It goes without saying that a subcontractor who has no privity of contract with the party who has an agreement with the main contractor, cannot sue or be sued by such a party. Similarly, in this matter, given that no privity of contract exists between the 1st respondent and the 2nd respondent, the 2nd respondent, as a subcontractor, cannot sue the 1st respondent with whom the applicant (the main contractor) has contracted. The further agreement that counsel for the 2nd respondent seeks to rely on to establish privity of contract between the 1st

⁶ See also, *Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction and Others* 2011 (6) SA 331 (GSJ).

respondent and 2nd respondent does not assist because that agreement does not form part of the cause of action in the main application (the interim interlocutory relief). The claim in that application is based only on the concession agreement.

Conclusion

[30] The issue of whether the relief sought in the heads of argument differed from the relief that was called for in the answering affidavit was extensively dealt with in the judgment of the court *a quo* and does not require a repeat in this judgment.

[31] Furthermore, the 1st respondent's argument that the order of the court *a quo* to not allow the 2nd respondent to participate in these proceedings does not directly implicate the provisions of section 34 of the Constitution, is correct.

[32] The Constitutional Court has held that "the right of access to courts contained in section 34 [of the Constitution] is significant in that it represents an enabling right to access a court to have a justiciable dispute decided".⁷ As argued by counsel for the 1st respondent, there is no dispute at all between the 1st respondent and the 2nd respondent and certainly no "justiciable dispute". Were it otherwise, a party would be permitted, under section 34, to approach a court in circumstances that no justiciable dispute exists. It is neither sensible, nor in accord with section 34 of the Constitution.

[33] Without having to deal with the question of whether the order is appealable or not, it is obvious that there are no reasonable prospects of success on appeal. No case is made out for the granting of the application for leave to appeal on the ground of some compelling reasons. The application ought to be dismissed.

⁷ See *Social Justice Coalition and Others v Minister of Police and Others* 2022 JDR 2047 (CC) at para 47.

Order

[34] The application is dismissed with costs, which costs are inclusive of the costs of senior counsel on scale A.


E M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant:

WB Pye SC instructed by Faksen
(Incorporated in SA as Bell Dewar Inc.)

For the First Respondent:

PG Cilliers SC, TWG Bester SC & M
Rantho instructed by AM Vilakazi Tau
Inc Attorneys

For the Second Respondent:

Bruce Leech SC & L Choate instructed
by Webber Wentzel

Date of hearing: 10 September 2024

Date of judgment: 26 September 2024