



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **060853/2023**

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: Yes
 SIGNATURE 30 APRIL 2025 DATE	

In the matter between:

**AFRICAN EXPLORATION AND MINING AND FINANCE
CORPORATION (SOC) LIMITED**

Applicant

and

LME PLANT HIRE (PTY) LTD

Respondent

In the application of:

**AFRICAN EXPLORATION AND MINING AND FINANCE
CORPORATION (SOC) LIMITED**

Applicant

and

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 30 April 2025.

JUDGMENT

INTRODUCTION

[1] The applicant, in terms of section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 [Superior Act], applies for leave, to appeal to the Supreme Court of Appeal [SCA], against the judgment and the second, third and fourth orders granted by this Court on the 9 September 2024. On the 9 September 2024, although the applicant was successful with its legality self-review relief regarding the review of an agreement it concluded with the respondent pursuant to an award BID No. A3/VLAK009/20121, it now wishes to disturb the Court's finding of the just and equitable relief it duly granted. The Court, in exercising its discretion saw fit to declare the agreement invalid but did not set it aside as to preserve the respondent's right to claim payment therein and to limited the applicant's obligations to pay a lesser amount than the tendered and contractually agreed amount [remedial relief]. At the heart of the remedial relief ground, as contended, lies in a misdirection of fact when the Court exercised its discretion.

[2] Other than the remedial relief ground, both Counsel, at the date of the hearing agreed, that remaining issue to be entertained was for the Court to vary the amount of R133 684 170.00 referred to in prayer 3 of the order, in that the amount, having regard to the body of the judgment, appeared to be a clerical error which could and should be varied to recorded R136 684 170.00. Both Counsels submitted that the Court could and should correct its clerical error in terms of uniform 42. Other than these two issues, no other argument was presented. This Court shall first deal with the remedial relief ground before considering the request of variation.

REMEDIAL RELIEF GROUND

[3] To commence a reminder of what the applicant sought in its notice of motion. The applicant in prayer 3 of its notice of motion requested the Court to exercise its discretion in terms of section 172(1)(b) of the Constitution and to grant a just and equitable order as it deems meet. In support of the prayer the applicant therefore did not entertain what it believed a just and equitable order would be nor, did it direct the Court to any pertinent facts in support thereof other than the facts in support of its self-review, namely tainted procurement process which included reference to a Mr Mtombeni and his possible involvement in bringing about the impugned decision. Now, on appeal, the applicant contends that the Court had insufficient facts before it at that time, to determine a just and equitable remedy and should have referred this aspect to trial, a point it raised during argument.

[4] It contends further that insufficient evidence relates, in particular, to the respondent's profit, the value of services rendered and the financial position of the parties in respect of the invalid agreement.

Did the Court have insufficient facts regarding the respondent's profit, the value of services rendered and the financial position of the parties in respect of the invalid agreement and should the Court have referred the matter to trial on the basis contended in the papers before it?

[5] The simple answer to the questions is that the Court had sufficient facts to exercise its discretion and, on the basis contended for the determination of a just and equitable remedy to be referred to trial, it was unnecessary. This answer requires expansion. The respondent filed an extensive answering affidavit which, in part, was criticized by the applicant. What the applicant failed to appreciate at the time was that criticism is one thing but failure to deal with the allegations in reply, when invited to do so, attracts its own consequences. Facts not dealt with are not incompatible facts. In fact, the respondent in its answer dealt with sufficient undisputed facts for the Court to consider. Such facts related to the steps the

respondent had to take to ensure that it, and its employees could meet the obligations of the agreement. The respondent when dealing with the aspect of the prejudice it would suffer if a just and equitable order when regard is to be had that it had already fulfilled the agreement it, *inter alia*, set out its monthly and once-off costs it had to incur, it described the services it provided and, the lengths it had to go to ensure that it met those obligations in favour of the applicant. It clearly and concisely explained its Bills of Quantities and how that was calculated to clarify its tendered price as set out in its reply to tender document. The respondent in detail dealt with Mr Mtombeni, including dealing with the oral 'stop gap' agreement concluded between itself and the applicant and, clearly answered all the allegations in the founding papers as to the "*possible*" influence Mr Mtombeni may have played in the tender process. None of these facts elicited a proper reply from the applicant. A simple reading of the filed reply illustrates the point. The applicant did not even deem it necessary to deal with the respondent's allegations *ad seriatim*. The reply is simply a rehash of the founding papers. As such, the Court correctly accepted the evidence of the respondent which was not dealt by the applicant with which was disturbed in reply.

[6] The applicant's papers demonstrated that the thrust of its relief lay in the tainted procurement process and ensuring that Mr Mtombeni's involvement and possible impropriety was highlighted. Testament of this fact was the applicant, in reply under the heading just and equitable relief pegged its averments on Mr Mtombeni's involvement in the tender process. No mention is made of insufficient facts as the trigger for the referral to trial. In written argument, the applicant's Counsel again when referring to the referral to trial relied on Mr Mtombeni in both the 'stop gap' matter and in the procurement process. Furthermore, any referral to the "stop gap" matter on the papers was unhelpful as the applicant failed to attach the annexure it relied on to sustain relevance. Be that as it may, the thrust of the request for any referral to trial was pegged on Mr Mtombeni alleged impropriety and had nothing to do with the ability to procure insufficient facts relating to the issues now relied on, on appeal. This was not before the Court.

[7] Reliance on any allegation that the Court had insufficient facts is misguided as raised at this time. The fact that the applicant did not nor, could not deal with the

all the facts raised in answer to its satisfaction does not amount to insufficient facts. The respondent's answer indeed elicited a response and in that way the applicant could have provided a reasoned and well balanced reply, including an answer to the respondent's prejudice and it could have in detail dealt with its own financial position. The Court however accepted that the applicant wished to enter into an agreement lower than the tendered amount, that much was clear from the Board's decision and the decision of the 19 November 2021 was not attacked.

[8] The applicant's need, at the appeal stage, for a referral to trial appears to be a means to supplement its own evidence. This is not permissible. Furthermore it now, on appeal, raises another basis for such referral which was not dealt with in its papers.

[9] The Court is again reminded that the thrust of the applicant's case was that an unlawful agreement had been concluded contrary to a Board resolution, and in a tainted bid evaluation. The Board's decision which was common cause. The Board resolved that the management be and is empowered to renegotiate the price down, because the offered bid price was above the applicant's budget price. In consequence, the Board resolved that an agreement to be concluded with a service provider should be at a price duly negotiated to be favourable to the applicant. The Court from paragraph 46 of its judgment stated that the Board did not disclose what a favourable price would be. All that is known is that it should be a price lower than the tendered price and, to be favourable to the applicant. No misdirection of fact is raised in this regard.

[10] Flowing from this and on the 19 November 2021, it is a common cause that Mr Bongani Khumalo advised the respondent that after extensive evaluations of all the bids, the respondent's proposal had been approved and confirmed a value of R136 684 170.00 (VAT inclusive), subject to agreeing to terms and conditions. The value of R136 684 170.00 including VAT was *de facto* a price lower than the tendered price of R137 592 900.00, (VAT inclusive). Although the offer was accepted, it is common cause that the agreement was signed for the tendered amount of R137 592 900.00 (VAT inclusive). In other words the respondent's

tendered price. The decision by Mr Khumalo setting out the applicants offer on the 19 November 2021 was not challenged by the applicant in the application.

[11] Absent a suggestion that this Court misdirected itself on the facts it did consider when it exercised its discretion, absent a suggestion that this Court incorrectly accepted and applied such facts when it exercised its discretion in considering the remedial relief, such consideration of facts must stand. As to the facts which were not before the Court to consider at the time, the Court can't apply facts which the applicant elected not to place before it in the exercise of its discretion. No discretion can be exercised in the air, a remark made by the respondent's Counsel in his heads of argument as referred to in the Gijima matter¹ finds application here. With regard to facts which may have been procured by the referral to trial, the Court considered the basis relied on by the applicant at the time, being the involvement of Mr Mtombeni in the process as a factor for consideration, and applied it to the merits. However, what weight such considerations could bring to bear in the exercise of its discretion to determine the remedial relief remained unclear and inconsequence such evidence was not necessary. The Court had sufficient facts before it and did not deem it necessary, as raised, to refer the determination of a just and equitable remedy to trial.

[12] Having considered the arguments and relooked at the reasoned judgment, the remedial discretion under section 172(1)(b) of the Constitution was exercised from sufficient facts which each party elected to place before it and, from those facts which objectively were available to be in a position to reason a balanced outcome. The applicant's reliance on this ground must fail.

[13] As far as the appeal should be upheld for a compelling reason in terms of section 17(1)(a)(ii) of the Superior Act, the test as set out in the Ramakatsa matter,² namely whether there is an important question of law or an issue of public importance that will have an effect on future disputes. Applying the principle, the

¹ **State Information Technology Agency (SOC) Limited v Gijima Holdings (Pty) Ltd** 2018 (2) SA 23 (CC) at par 49.

² **Ramakatsa v African National Congress** [2021] JOL 4993 (SCA) at par [10].

appellant raises that this is a matter of general importance but fails to expand the submission. One is only left to surmise that because the applicant is an organ of State and the matter relates to the rule of law that, that in itself is a compelling reason to allow the appeal even when the merits are weak, to be compelling.

[14] In so far as the applicant may rely on this matters general importance because of the effect of the order pending arbitration proceedings, such is not of general importance. The need for judicial reviews in circumstances where arbitration proceedings have been initiated is not uncommon, for want of jurisdiction on arbitration. The effect of an order in circumstances when arbitration proceedings have been suspended pending a review, are foreseeable, generally occurring but, are not important. The Court considered the facts of this matter. The pleadings in this matter had not closed. This Court considered the effect the order may have on such proceedings and dealt with it in paragraphs [58-60] under the heading 'counter claim'. The applicant does not rely on any misdirection in this regard.

[15] Furthermore, the Court agrees with the argument raised by the respondent that the legal principles on delay and the interaction between sections 172(1)(a) and (b) are settled and that the examples provided by the applicant's Counsel in his heads of argument to be considered by a Court although correct are not amplified or explained why applied to this matter why this matter falls within the compelling reasons so listed.

[16] This Court is of the opinion that the applicant has failed to meet the threshold of section 17 in respect of both section sections 17(1)(a)(i) and (ii) of the Superior Act and as such the application for leave to appeal must fail on the grounds raised and as argued.

[17] Now as to the variation in prayer 3 which is sought.

VARIATION RULE 42

[18] In the exercise of the Court's discretion, the Court considered the lower amount offered on the 19 November 2021 by the applicant which was accepted by

the respondent. In so doing the Court relied on the content of the exact wording of the offer dated the 19 November 2021. The amount referred to by Mr Khumalo in the letter of acceptance was a Vat inclusive amount of R136 684 170.00. However, the Court in paraphrasing the words of the letter, incorrectly referred to an amount of R133 684 170.00 (VAT inclusive), a '3' instead of a '6' was recorded. It appears that reference to R136 684 170.00 in the evidence became R133 684 170.00 when it was the Court's intention to use the amount which accorded with the evidence as reasoned throughout the judgment. This both parties appreciated.

[19] The parties therefore brought it to the Court's attention and by agreement, at the date of the hearing of this application. Requested this Court to vary the clerical error. This Court therefore finds it inevitable to vary the prayer 3 in terms of rule 42(1)(b) of the Uniform Rules and where it appears in the body of the judgment.

[20] Uniform rule 42 provides that Court may, in addition to any other power it may have, *mero motu* rescind or vary an order in which there is an ambiguity or a patent error or omission, but only to the extent of ambiguity, error or omission. This Court is too mindful of the established principle 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. There are however a few exceptions to the rule. Amongst the exceptions is that the Court may be correct a clerical error, arithmetical or other error in its judgment or order so as to give effect to its true intention.³

[21] At paragraph 21 of the judgment the Court in copying an extract of a letter dated the 19 November 2021 authored by the Acting CEO of the applicant, Mr Bongani Khumalo, the Court made the clerical error was referred to. This error was then repeated in the remaining body of the judgment and order where it appeared in paragraphs 21, 22, paragraph 48, paragraph 57 and accordingly prayer 3.

[22] This Court agrees with the parties and is of the view that the clerical error alluded to falls within the exception and falls to be varied *mero motu* so as to accord with the intention and be in harmony with the evidence before Court. In

³ **Firestone South Africa (Pty) Ltd v Gentiruco A.G.** 1977 (4) SA 298 AD at 307C-G.

consequence the Vat inclusive amount of R133 684 170.00 where it appears is to varied to read a Vat inclusive amount of R136 684 170.00.

[23] As to the costs, there is no reason why the costs should not follow the result. No other proposition was argued.

[24] The Court as a result makes the following Order:

1. The application for leave to appeal is dismissed.
2. The amount of "R133 684 170.00" where it appears in the main judgment is varied and replaced with the amount of "R136 684 170.00".
3. Prayer 3 as it appears in the order of the main judgment is varied and replaced with the following:

"The respondent's rights in terms of the agreement referred to in prayer 1 are hereby preserved and the applicant's obligations in terms thereof is hereby limited to a contract price of R136 684 170.00 (inclusive of Value Added Tax)."

4. The Applicant is to pay the Respondents costs taxed on scale C.



L.A. RETIEF

Judge of the High Court
Gauteng Division

Appearances:

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Date of hearing:

16 April 2025

Date of judgment:

30 April 2025