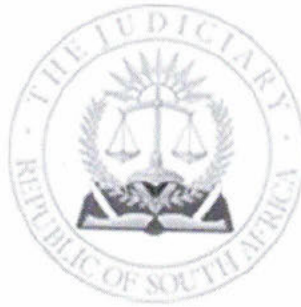




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A346/24

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES


SIGNATURE

6/10/2025
DATE

In the matter between:

**NEW CX ENVIRO SOLUTIONS AND LOGISTICS
HOLDINGS (PTY) LTD**

APPELLANT

and

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

FIRST RESPONDENT

JUSTICE SANDILE NGCOBO N.O.

SECOND RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time of hand-down is deemed to be on 6 October 2025.

JUDGMENT

Phahlamohlaka AJ

Introduction

[1] This appeal serves before this court with leave of the Supreme Court of Appeal. The appeal is against an order handed down by Marx-Du Plessis AJ dated 23 August 2023, in which she dismissed the appellant's application in terms of Rule 42(1)(b).

Factual background

[3] The matter has its origins in an application for self-review brought by the first respondent (the Municipality). The Municipality had entered into a Service Level Agreement (SLA) with the appellant pursuant to the submission of a proposal for the establishment of a transfer station service by the appellant. The agreement entered into between them also contained provisions for the recycling of recyclable waste from specifically identifiable regions and the disposal of that waste in a particular manner. It lastly provided for the upgrade of the existing recycling facility to a multi-purpose waste recycling facility.

[4] The terms of the SLA and the conclusion of the agreement are not relevant for the purposes of this judgment. Suffice it to state that due to the non-performance by the Municipality, the appellant cancelled the SLA on 1 March 2019. Subsequently, the appellant instituted arbitration proceedings to claim damages from the Municipality. It was during these proceedings that the Municipality suddenly challenged the authority of the Municipal Manager that led to the conclusion of the SLA. The arbitration proceedings were then paused, and the Municipality brought a self-review application.

[5] The review was heard by Van Der Westhuizen J who, on 21 June 2021, handed down judgment in that application. It is this order that the appellant sought to vary a quo on the basis that the order granted by Van Der Westhuizen J was ambiguous. The order he granted reads as follows:

‘1. The decisions taken by the 1st applicants executive acquisition committee on 19 November 2015 and 26 June 2016, to inter alia resolved that the municipality manager dispense with the normal procurement process, in terms of regulation 36 of the municipal supply chain regulations, we did let constitutionally invalid and be set aside.

2. The decision by the City's 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 regular regions 3:00 and 4:00, be declared constitutionally invalid and be set aside.

3. The three-year service agreement entered into on 10 August 2016 by the 1st 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 inbound service agreement of 10 August 2016, say for any rights to any claim for loss of profit and claim for shortfalls pertaining to waste, be preserved...”¹

[6] After the judgment and order by Van der Westhuizen J, the appellant amended its statement of claim, and the Municipality amended its statement of defence. The parties then proceeded with the arbitration. During this continuation of the arbitration, the appellant sought specific rulings from the arbitrator. These were the following:

6.1 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).

6.2 A ruling that only evidence relevant to accrued rights prior to cancellation may be adduced.

¹ The disputed phrase

6.3 That, save for the first line in “O” read with schedule A, the claim as currently formulated by the claimant falls outside the ambit of justiciable disputes.

6.4 That, save for the first line 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.

6.5 costs, in the event of opposition, including the cost of two counsel.

[7] These rulings were opposed by the Municipality.

[8] On 12 May 2022, the arbitrator ruled that the effect of the use of the phrase “*accrued rights*” in the Court Order, when read with the particular terms of the SLA and in the circumstances in which the appellant’s claim arose following the cancellation of the agreement, does not accord the appellant the right to claim any of its expenses incurred.

[9] Aggrieved by the arbitrator’s interpretation of paragraph 4 of the Van der Westhuizen order, the appellant launched the *Rule 42(1)(b)* application which served before Marx-Du Plessis AJ.

[10] Marx-Du Plessis AJ (the court *a quo*) said the following in her judgment²:

“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 CX 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.

² Caselines 038-1 at 038-22 to 038-23 para 34 and 35 of the Judgment

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."

Issues

[11] The issue for determination in this appeal is whether the Court *a quo* misdirected itself by dismissing the appellant's Rule 42(1)(b) application. The crisp issue that served before the court *a quo* was the determination of whether there was an ambiguity in the judgment and order by Van der Westhuizen J

Grounds of appeal

[12] The appellant lists about thirteen grounds of appeal. As this appeal turns on whether the court *a quo* erred by dismissing the appellant's application for variation, it is unnecessary to deal with the individual grounds.

[13] It is the appellant's case that the intention of Van der Westhuizen J's order was to grant a just and equitable remedy arising from the declaration of invalidity of the procurement process and the SLA.

[14] The appellant further contends that there is an ambiguity in the phrase "*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 impact service agreement*". The appellant submits that the effect of this ambiguity is to deprive the appellant of a just and equitable remedy which is at odds with the true intention of the order.

[15] The appellant argues that the Municipality had filed heads of argument in the review application which had contained a concession. This concession was recorded in paragraph [46] of the judgment of Van der Westhuizen J which states:

"It was conceded on behalf of the [Municipality] 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 shortfalls pertaining to waste, be preserved. In that regard, it would be just and equitable to hold so."

[16] Accordingly the appellant argued that the appropriate order should be that *"this court following the declaration of invalidity was to order that the respondent be entitled to any rights which may have already accrued and which it is entitled to under the service level agreement save for rights to any claim for loss of profits and claims for shortfalls pertaining to waste, be preserved."*

[17] The appellant further contended that the effect of this order would be as follows: *"The just and equitable relief... would enable the respondent at arbitration to claim for all its expenses pertaining to the construction of the transfer station as well as the amounts for the works which it already performed. To that end the municipality would not stand to benefit unduly from the declaration of invalidity"*. The appellant argues that this concession was made by the Municipality in the review application, but that it unfortunately did not find proper expression in the order granted by Van Der Westhuizen J.

The legal position

[18] It is now settled that the appeal court's powers to interfere with the lower court's decision are limited.

[19] Rule 42(1)(b) of the Uniform Rules of Court provides as follows:

"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

.... (b) an order or judgment in which there is ambiguity, or patent error or omission, but only to the extent of such ambiguity, error omission;"

Discussion

[20] It is a well-established principle of our law that once a court has duly pronounced a final judgment or order, it has no authority to correct or alter or supplement it. Rule 42(1)(b) is therefore meant to correct an order in which there is an ambiguity, or patent error or omission. The Court can therefore change or amend its order but only if it does not affect the substance of the original order.

[21] It is common cause that the appellant did not seek to appeal the order of Van Der Westhuizen J, despite the fact that it was not satisfied with its provisions. Instead, it accepted the terms of that order until the order was unfavorably interpreted by the Arbitrator. Because the order was not interpreted in its favour, the appellant deemed it suddenly necessary to launch an application in terms of Rule 42(1)(b) approximately a year after the order was granted and only after the Arbitrator had granted an award against it.

[22] This brings me to the issue of peremption and *res judicata*. It was argued by the Municipality that the appellant's right under Rule 42(1)(b) to apply for clarification of an ambiguity in the Court Order has been perempted. As alluded to earlier, the appellant only approached the Court *a quo* in terms of Rule 42(1)(b) after being aggrieved by the interpretation of paragraph 4 of the Van der Westhuizen order by the Arbitrator.

[23] In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of the State and Others*³ the Constitutional Court held that:

"It is trite that the doctrine of peremption finds application across our legal landscape. The doctrine tells us that "[p]eremption adoption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavorable order that could otherwise be appealed against. The principle that underlies this doctrine is that "no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to appropriate and reprobate."

³ 2021(11) BCLR 1263 (CC) para 101

[25] In *Mhlontlo Local Municipality and Others v Ngqangula and Another*⁴ the SCA said the following on peremption:

“The principle of peremption safeguards the integrity of the judicial process by preventing litigants from oscillating between contradictory positions, ensuring judicial consistency and fairness. It ensures finality and stability in legal proceedings, which is essential for maintaining public trust in the justice system. The underlying principle of the doctrine of peremption is that a litigant cannot take two inconsistent positions. Accordingly, an unsuccessful litigant cannot appeal a judgment it has acquiesced to. In order to succeed on peremption a respondent must demonstrate with reference to the facts before court that an appellant’s unequivocal conduct after having obtained leave to appeal, is inconsistent with the intention to appeal. In *Qoboshiane N.O v Avusa Publishing Eastern Cape* the test to determine whether an appeal had become perempted was set out as follows:

‘Where, after judgment, a party unequivocally conveys an intention to be bound by the judgment, any right of appeal is abandoned. The principle can be traced back to the judgment of this court in *Dabner v South African Railways and Harbours*, where Innes CJ said:

“The rule with regard to peremption is well settled and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.”

[24] The principles relating to *res judicata* are well articulated in *Bafokeng Tribe v Impala Platinum Ltd*⁵ where Friedman JP said the following:

“A Court must have regard to the object of the *exceptio res judicata*, that it was introduced with the endeavour of putting a limit to needless litigation, and in order to prevent the recapitulation of the same thing in dispute in diverse actions with the concomitant deleterious effect of conflicting and contradictory decisions. This principle

⁴ (115/2022) [2024] ZASCA 5 (17 January 2024) para [13]

⁵ 1999(3) SA 517 (B)

must be carefully delineated and demarcated in order to prevent the hardship of actual injustice to parties.”

[25] It was argued on behalf of the Municipality that the appellant elected to accept the terms of the court order as it is currently formulated and therefore proceeded to arbitration on the issue. It has therefore foregone or perempted its right to challenge the order under rule 42(1)(b). I agree with the first respondent in this regard.

[26] The Municipality further argued that the ambit of the order has been finally determined between the parties in arbitration proceedings and the current application is therefore not competent. In other words, the interpretation of the order is *res judicata*. The Municipality further submitted that the parties agreed that the arbitrator would interpret the ambit of the order, and therefore it is not competent to subsequently seek a revisiting of the order before the High Court under rule 42(1)(b) simply because the ruling is not in its favour. That would be a breach of the arbitration provisions and would undermine the award of the arbitrator, which is binding on the appellant. I agree with these submissions for the reasons articulated.

[27] The appellant approached the court *a quo* with an application in terms of rule 42(1)(b) on the basis that the Van der Westhuizen order was ambiguous. However, it appears the appellant abandoned that argument because it argued that the order resulted “*in an unjust and inequitable situation which is at odds with the true intention of the court order.*”

[28] The Municipality argues that the true nature of the application is that the appellant is troubled by the effect of the Van der Westhuizen order, and not by the alleged ambiguity. This argument, in my view, is well founded. The complaint is not ambiguity, but that the result of the Van der Westhuizen order is to deprive the appellant of a just and equitable remedy and, consequently, resulted in an unjust and inequitable situation.

[29] But Rule 42(1)(b) cannot remedy this situation and makes no provision for a variation on the ground that the order is not just and equitable – that (perhaps) may

have been the subject-matter of appeal proceedings, but as that issue is not before us, we make no findings on that issue.

[30] The appellant took a decision not to appeal the Van der Westhuizen order and now it must live with the consequence of that decision. It is not open to the appellant to relitigate the issues that were before Van der Westhuizen J or the arbitration on appeal. This is exactly what the appellant is attempting to do here.

Conclusion

[31] Given all stated supra, I cannot find any misdirection on the part of the court *a quo* that would justify interference with its order. I am therefore of the view that the court *a quo* correctly dismissed the appellant's application for variation.

[32] For the aforesaid reasons, it is my considered view that the appeal should be dismissed.

Order

[33] In the result, I propose the following order:

The appeal is dismissed with costs including costs of two counsel, to be taxed on Scale C.



KF PHAHLAMOHLAKA
 ACTING JUDGE OF THE HIGH COURT

I AGREE


NEUKIRCHER B

JUDGE OF THE HIGH COURT

I AGREE. IT IS SO ORDERED


COLLIS J

JUDGE OF THE HIGH COURT

Appearances

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Date of judgment: 6 October 2025

Date judgment reserved: 15 April 2025