

SOUTH AFRICA / JUDGMENT

# Kgwerano Solutions (Pty) Limited v Transnet SOC Limited and Another (22782/21) [2022] ZAGPPHC 934 (30 November 2022)

[2022] ZAGPPHC 934

## COURT

North Gauteng High Court, Pretoria

## BEFORE

S S Madiba

## CASE / FILE NUMBER

22782/21

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## IN THE HIGH

## COURT OF SOUTH AFRICA

## (GAUTENG

## DIVISION, PRETORIA)

## CASE NO:

22782/21

REPORTABLE: NO

OF INTEREST TO

OTHER JUDGES: NO

30 NOVEMBER 2022

In the matter

## between:

KGWERANO

SOLUTIONS (PTY) LIMITED

Applicant

AND

TRANSNET SOC

LIMITED First

Respondent

NCUBE

INCORPORATED

Second

Respondent

**JUDGMENT**

[1] This is an application which the applicant seeks the following relief: -

That this court should direct the second respondent to rectify, clarify and or reword its awards dated the 15 August 2019 by removing any ambiguity and / or errors contained therein in order to meaningfully and accurately define the recommendation relating to rights and obligations between the applicant and the first respondent in relation to each other.

[2] The clarity, rectification and / or rewording of the second respondent's award sought by the applicant revolves around the following: -

i) That the words "in accordance with the terms governing the payment of fees" as per paragraph 3.4 of the said award be amplified and / or varied and / or reworded and / or rephrased so as to inform the parties

precisely for what losses and / or expenses, the first respondent is liable to the applicant;

ii) That the words "in the ordinary management of the contract entered into" contained in paragraph 3.4 of the award be amplified and / or varied and / or reworded and / or rephrased so as to inform the parties

precisely what is intended to be meant by the said words;

iii) That the words "paragraph 2.3 above" contained in paragraph 3.4 of the award be amplified and / or varied and / or reworded and / or rephrased so as to give meaning to the said words, read in the context of the award.

iv) Granting leaving to the applicant to apply on the same papers supplemented where necessary for further and / or ancillary relief;

v) That the second respondent be ordered to pay the costs of this application including the costs occasioned by the deployment of two counsel;

vi) In the event the first respondent opposing this application it be ordered to pay the costs of this application;

vii) Further and / or alternative relief as this court may deem fit necessary and reasonable.

[3] The first respondent is resisting the application based inter alia on the following basis: -

a) That the application is legally flawed as the ombud as a creature of statute is directed to exercise powers it does not have in that the ombud is directed to make a determination on issues beyond the complaints in the bidding process;

b) The applicant is seeking a relief that encroaches unjustifiably on the principle of separation of powers;

- c) According to the first respondent, the applicant is actually directing this court to substitute its discretion and to step into the shoes of the ombud in favour of the applicant;
- d) The order sought by the applicant constitutes a mandamus which is available in limited circumstances obliging a public functionary to act under an enabling Act. It is argued that the ombud does not have such an obligation to do so;
- e) Failure by the applicant to plead and establish requirements for the relief it seeks, are enough grounds to dismiss applicant's application.

## BACKGROUND

## FACTS

- [4] The applicant submitted a bid during 2018 for the provision of Maintenance and Rail Network using Ballistic Screening Machines Countrywide as advertised by the first respondent under Bid number SIC7018 – 2ICDB. (tender contract) The tender contract was for a period of two years.
- [5] During 27 September 2018 the applicant was identified and confirmed as a preferred bidder under Bid number SIC7018-2CIDB and issued with the letter of intent. The parties herein in the interim identified the services which the first respondent would wish the applicant to provide prior to the finalization and execution of a detailed Agreement between the parties.
- [6] The purpose of the letter of intent was to declare the intention of the parties in respect of the required services to be provided by the applicant and will remain effective until the Agreement is signed by the parties herein or until sixty days have elapsed from the date of issue of the letter of intent unless terminated by the first respondent prior to the expiry of sixty days whichever occurs first.
- [7] After the issuing of the letter of intent, several meetings were held between the parties herein and discussed how the tender was to be executed.

During the said discussions, the applicant changed the supplier (Aveng Rail) of the machinery to be used as the supplier identified in the letter of intent was unable to supply the agreed machinery. The applicant appointed another supplier, Plasser South Africa (Pty) Ltd. The first respondent postponed the date for the commencement of services to be provided by the applicant to December

2018. The letter of intent operative date for sixty days was extended by the first respondent to 21 January 2021.

During 13 March 2019 the first respondent through a letter sent to the applicant withdrew the letter of intent alleging that the substitution of the machine supplier amounted to a material change in the initial tender awarded to the applicant.

- [8] Subsequently the applicant challenged the withdrawal of the letter of intent and approached the office of the first respondent's ombudsman to intervene in its dispute to the withdrawal of the letter of intent by the first respondent.

The dispute was among others based on the fact that the first respondent was informed of the substitution of the machinery supplier and had not noted any objection and the said machinery were tested by the first respondent and were deemed to be appropriate for the work to be executed by the applicant. The applicant was required to commence with its work after the disclosure of a change of the supplier of the machinery and the applicant mobilized its workforce and resources to execute its task.

- [9] It is contended by the applicant that the first respondent would not be prejudiced in any way by a change of a machinery supplier. On the contrary the applicant incurred considerable expenses amounting to millions of Rands due to the unfair withdrawal of the letter of intent by the first respondent. The applicant sought the reversal of the withdrawal of the letter of intent and it be allowed to continue with its work as the appointed bidder.
- [10] It further requested as an alternative, the ombud to order that the first respondent pay R33 827 295.56 immediately being the costs incurred by the applicant in preparations to commence with work on behalf of the first respondent. The second respondent was tasked by the first respondent's ombud to deal with the dispute between the parties. In its award delivered to the parties, the second respondent upheld the applicant's dispute that the withdrawal of the letters of intent was unlawful and did not uphold the applicant's alternative claim for a directive for payment.

The award read as follows: -

*"The award of the bid to Kgwerano Solutions as per the original letter of intent dated 27 September 2018 and subsequently extended on 2 November 2018 and 21 January 2019 remains valid and the retraction of the LOI in terms of the letter from Transnet Freight Rail to Kgwerano Solutions dated 13 March 2019 is invalid and hereby set aside";*

*"Transnet Freight Rail is instructed to proceed with Kgwerano Solutions as the preferred bidder";*

*"The parties must conclude the requisite contract as soon as is reasonably possible, but within a period no longer than 45 calendar days from the date of issue of this letter";*

*"The payment of the costs invoiced by Kgwerano Solutions, as costs incurred to date, shall be paid in accordance with the terms governing the payment of the fees due to Kgwerano Solutions in the ordinary management of the contract to be entered into in accordance*

with paragraph 2.3. above"

- [11] The bone of contention between the parties regarding the award by the second respondent revolves only around the issue of payment of costs incurred by the applicant as ordered in the award i.e paragraphs 3.4.

The concern of the applicant regarding the award as per paragraph 3.4 is that it is not clear for which costs is the first respondent liable to pay and on what basis such liability for the said costs is to be determined. Accordingly the applicant submitted that the said award regarding payment of costs (paragraph 3.4) is ambiguous and needs to be clarified.

[12] The first respondent argues that the invoices submitted by the applicant for payment as directed in the award fall outside the scope of the award in paragraph 3.4.

The queries raised by the first respondent inter alia related to the following: -

- i) That the costs for rented vehicle has no bearing to the letters of intent;
- ii) That the legal costs are not recoverable by the applicant in terms of the award;
- iii) Regarding the salaries claimed for the applicant's manager, the first respondent sought work schedule for the period claimed to make a determination for work specifically performed;
- iv) The claim for loss of profit cannot be claimed as the award ordered reinstatement of the contract between the parties;
- v) That the mobilization costs incurred are for the applicant's account.

[13] The applicant approached the first respondent's ombud to clarify its award. The request for clarity was declined by the ombud on the basis that it was functus officio.

In a nutshell, the parties differ diametrically as to the interpretation of paragraph 3.4 regarding the award for payment of costs as ordered by the second respondent. The applicant seeks this court to refer the award back to the second respondent to rectify, clarify, reword and / or rephrase its award for costs as it is deemed to be ambiguous and to meaningfully and accurately define which costs and on what basis is the first respondent liable to pay its incurred wasted costs.

#### CONDONATION APPLICATION

[14] The first respondent seeks relief for condonation for the alleged late delivery of its answering affidavit.

It is contended by the first respondent that the applicant's notice of motion is irregular due to the following: -

- i) That the applicant failed to comply with Rule 6 (13) of the Rules of Court in that the applicant gave the first respondent 5 days instead of the requisite 15 days as provided by the Rules. The first respondent advised the applicant of the irregularity in a correspondence addressed to the applicant.

The application for condonation is not opposed.

[15] The first respondent vehemently protested that it delivered its answering affidavit beyond the prescribed time frames.

It further contended that if this court holds a contrary view that the affidavit is unduly late and condonation is refused, such a ruling will be prejudicial as first respondent's rights to a fair hearing will be compromised.

The first respondent contended that it is in the interest of justice that the condonation application be granted. It is further argued by the first respondent that the length of the alleged delay is minor being a ten court days delay.

The first respondent submitted that it has strong prospects of success in opposing the application.

[16] A court may condone non-compliance of the Rules where the applicant demonstrates that a valid and justifiable reasons exists why non-compliance should be condoned.

An applicant is to furnish an explanation of his default sufficiently and fully to enable the court to understand how it really came about and to assess his conduct and motives.

See *Federated Employees Fire General Insurance Co Ltd .V. McKenzie* 1969 (3) SA 360 (A) at 362 F-H Silber .V. *Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A

[17] It is trite law that the standard for considering an application for condonation is in the interest of justice.

See *Grootboom .V. National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) paragraphs [22] and [23]

Whether is in the interest of justice to grant condonation depends on the facts and circumstances of each case.

[18] It is my view that the first respondent's explanation is bona fide and good cause has been shown as to why the application should be granted.

The first respondent will suffer great prejudice if condonation is not granted whereas the applicant's prejudice will be very minimal.

I find that it is in the interest of both parties and more particularly in the interest of justice that condonation be granted.

The following order is accordingly made:

1) That the condonation application is hereby granted;

#### RULE 7 (1) NOTICE

[19] The applicant contested and disputed the authority and mandate of the first respondent's attorneys of record in the opposing application.

The first respondent ultimately served and filed the requisite power of attorney authorizing and mandating the first respondent's

attorney of record to oppose this application.

[20] The notice in terms of Rule 7 (1) of the Rules of Court became moot at the hearing of the application as the applicant's objection in terms of Rule 7 (1) was accordingly addressed before the hearing of this application.

#### APPLICANT'S CONTENTION

[21] It is not disputed that in terms of the award, the first respondent is liable for the costs incurred by the applicant but applicant contended that the award does not state the extent of liability on the part of the first respondent and parties herein cannot agree what costs are due and payable as awarded.

According to the applicant, the impasse and disputes between the parties necessitated the launching of this application. The applicant's view is that the first respondent is to be liable for all the reasonable and necessary expenses incurred from the date of incurrence as the first respondent is the sole cause of the breakdown of the negotiation between the parties when it unlawfully retracted the letter of intent.

[22] The applicant stated that its invoices are in accordance with the quote which a tender was awarded to it and the first respondent cannot now be heard of querring the same quote it accepted.

In trying to resolve the impasse and first respondent's queries, the applicant submitted that it furnished the first respondent with all the documentations explaining and indicating what amounts were incurred for each item in its invoices.

Despite the supporting documentation from the applicant, it is alleged that the first respondent stuck to its guns that the amounts claimed did not accord with its interpretation of the second respondent's (ombud) award.

It is therefore the submission by the applicant that there is a need and it is essential that the second respondent's award contained in paragraph 3.4 of the award be clarified.

[23] According to the applicant, it is in the interest of both parties herein that the said award be clarified in clear and certain terms without any ambiguity.

In its interpretation to the second respondent's second portion of the award, the applicant's view is that the second respondent in order to protect the applicant once the master service agreement had been entered into, attempted to record that the award should contain provisions for payment in accordance with the letter of intent. It seems to the applicant that the second portion of the second respondent award appears to be legally incompetent.

[24] The applicant contended that the first respondent's interpretation of the second portion of the award that payment of the amount as invoiced by the applicant should be in terms of clause 2 and clause 3.1 of the letter of intent as if there was an ordinary management of the contract between the parties during such period, cannot be correct as there was no such contract.

The first respondent's three different interpretations of the second respondent's award and believe that it is not liable for the incurred expenses without substantiating as to the reason thereof, cannot be sustained so argued the applicant.

[25] In an e mail addressed to the second respondent dated the 17 October 2020 the applicant attempted to explain that its request to the second respondent requesting clarification for the award was not for the second respondent to make a determination for amounts as contained in applicant's invoices.

After numerous exchange of correspondences between the applicant and the second respondent, the second respondent ultimately stated that it is functus officio and it cannot therefore provide the requested clarification of its award.

The view of the applicant is that second respondent's contention that it is functus officio is without any legal basis and approached this court seeking the relief that the second respondent must be directed to clarify its award. The applicant argued that the first respondent's conduct is not only mala fide and capricious in disputing the amounts as invoiced but is intended not to reach an amicable resolution of their impasse and disputes.

It is applicant's submission that reference by the second respondent to paragraph 2.3 to its award needs to be corrected as there is no paragraph 2.3 in the award.

[26] The applicant contended that it is necessary for this court to compel the first respondent to clarify its award as the applicant has no other alternative but to approach this Court for an order as per its notice of motion.

The applicant submitted that it has made out a case for the referral of the award back to the second respondent for clarification as prayed and the first respondent be ordered to pay the costs of the application including costs occasioned by the deployment of two counsel.

#### IN RESPONSE

[27] The first respondent argues that it is only liable for contract fees and related costs in terms of the letter of intent and not the reasonable and necessary costs incurred by the applicant as a result of the withdrawal of the letter of intent.

The invoices submitted by the applicant are queried and disputed by the first respondent. According to the first respondent, the applicant's relief seeking an order that a discretionary power in its favour to clarify and rectify its award in the absence of a review relief, is flawed.

The contention of the first respondent is that the ombud does not have powers beyond those in terms of the empowering provisions as contained in the terms of reference of the ombud.

[28] In the opinion of the first respondent the relief sought by the applicant in directing the ombud to clarify and rectify its award constitutes a mandamus.

Such a relief is only available when an administrative organ like the ombud is compelled to do something that it is obliged to do under an enabling statute. The first respondent submitted that since the ombud has made a determination, it is deemed to be valid until it is reviewed. The view of the first respondent is that an order directing the ombud to rectify and clarify its award under the circumstances of this matter will be ultra vires and unlawful.

[29] It is contended that applicant failed to demonstrate that the ombud has powers to clarify its award like courts and arbitrators are empowered to do.

The first respondent submitted that indeed the courts and arbitrators have the power to clarify their decisions in exceptional circumstances but argues that the applicant failed to demonstrate that the ombud's award falls within the aforementioned powers exercised by court and arbitrators.

[30] The first respondent submitted that the application be dismissed on the following preliminary basis: -

1. The mandamus sought by the applicant is not competent in law

[31] The first respondent is of the opinion that the relief sought by the applicant is solely reliant on the legal causa of a mandamus.

In actual fact the applicant seeks a mandatory interdict to compel the ombud to perform a positive action.

The first respondent contended that there is no such obligation existing on the ombud to rectify and clarify its award.

[32] For the applicant to succeed with a mandatory interdict which is final in nature it must satisfy the following requirements: -

- a) A clear right;
- b) An injury actually committed or reasonably apprehended and;
- c) The absence of similar protection by any other ordinary remedy.

[33] The first respondent's argument is that despite the applicant being a preferred bidder it does not have a clear right to the relief sought as the invoices claimed are disputed. According to the first respondent, the applicant omitted to demonstrate that it has a clear right to the relief sought.

[34] The submission by the applicant that the continued impasse between the parties result in the applicant suffering uncertainty is not compliant with the requirement that there is actually an injury committed by the respondent or such an injury is reasonably apprehended. The first respondent denied that there is any uncertainty pertaining to the award and disputed that there is an impasse between the parties herein.

[35] It is contended that the monetary dispute between the first respondent and the applicant may be resolved through an appropriate dispute resolution rather than by way of application proceedings. As such the first respondent failed to satisfy the requirement that it has no alternative remedy.

The contention of the first respondent is that the applicant did not sufficiently plead to establish its cause of action. It was expected of the applicant to raise issues upon which it would seek to rely with reasonable clarity to enable the first respondent to clearly know which case it has to answer.

[36] The first respondent hold the view that the applicant did not adequately plead the legal requirement and establish the legal requirements of a mandamus, and as such the application be dismissed.

The first respondent contended that the impasse in not agreeing to the amounts claimed by the applicant and the delay in implementing the agreement cannot be blamed on the first respondent. The correct interpretation of the award by the first respondent is that it is only liable for costs as per the terms governing the ordinary management of the contract between the parties and the typographical error in paragraph 3.4 of the award as opposed to paragraph 3.3 thereof is negligible.

[37] What the award means is that the terms of payment would be guided by the contractual terms by the parties.

The terms of reference of the bid stipulates that decisions by the ombud should accord to the procurement issues of the unsuccessful bidders alone and not the monetary issues of the successful bidders.

The first respondent submitted that any reference by the applicant to the ombud's jurisdiction is without any basis. Accordingly the first respondent argued that the applicant failed to make out a case and its application be dismissed.

[38] The submission by the first respondent is that the ombud is indeed functus officio and until its award is reviewed and set aside, it remains valid. In the circumstances it would be unlawful to clarify and rectify its award.

Accordingly the first respondent applies for the dismissal of the application as the applicant has failed to satisfy the requirements for a mandamus.

[39] In reply the applicant submitted that the purpose of its application is to obtain clarity and it is not seeking a mandamus or a principal relief.

It is disputed that the applicant is seeking this court to exercise its discretionary power to be ordered in its favour instead the ombud should be directed to rephrase its award as it is deemed to be ambiguous.

[40] Contrary to the view of the first respondent, the applicant argues that the ombud does have jurisdiction and powers to rectify, clarify and rephrase its award in instances where it is not clear.

Reference to the principle of separation of powers s averred by the first respondent is irrelevant and baseless in the opinion of the applicant.

The applicant contended that the terms of reference of the ombud permit the ombud to clarify its determination regarding the liability for costs in the award as it will be beneficial to both parties in this matter, so submitted the applicant. The parties herein it is argued, would be better placed to know exactly what the ombud meant in its award.

[41] The invoices so submitted are according to the applicant is, in terms of the letters of intent and that the court is not asked to make a monetary award but to direct the ombud to clarify its award.

The applicant argues that it is not seeking a determination of issues finally in the motion proceedings but intends to avoid further disputes by requesting that the ombud should rectify and clarify any ambiguity in its award.

The applicant's view is that a case has been made out for the relief sought and it be granted with costs.

#### CONDONATION OF THE LATE FILING OF THE REPLYING AFFIDAVIT

[42] The late filing of the applicant's replying affidavit is hereby granted as it is in the interest of both parties and in the interest of justice to do so.

#### ANALYSIS

##### AND LEGAL PRINCIPLES

[43] The dispute and impasse between the parties boils down to the following: -

What interpretation to be accorded to the award by the second respondent. Secondly the parties do not agree as to whether or not the award be referred back to the second respondent to be rectified, clarified, rephrased and or reworded to can enable the parties to fully understand in clear terms what the award is really all about.

[44] As aforementioned it is not in contention that the first respondent is liable for the costs incurred by the applicant but what is in issue is to which costs and to what extent of liability is the first respondent to be held responsible.

It is worthwhile to revisit the terms of reference of the ombud when requested to intervene when a letter of intent was retracted by the first respondent.

[45] The ombud is generally defined as a natural juristic person seized with authority to exercise a public power or perform a public action as empowered by the relevant provision.

The empowering provision for the second respondent would therefore be in accordance with the terms of reference of the complaint as lodged by the applicant against the first respondent.

[46] Among the powers conferred to the second respondent in terms of the terms of reference are to investigate, make recommendation, cancelling of the bid, referring a bid for re-evaluation, amending a bid decisions and to recommend relevant and appropriate measures against any first respondent's officials. The ombud in this matter is further empowered to review any bid award as it deems fit.

The question to be addressed is, does the second respondent permitted to exercise powers beyond those accorded by the terms of reference in this matter.

[47] It is contended by the applicant that the ombud like any judicial bodies and quasi judicial bodies is entitled to rectify and clarify its award in case it is ambiguous. On the other hand the first respondent is of the view that the second respondent cannot exercise powers or perform a function beyond those conferred in the terms of reference to it.

[48] A distinction is to be made between the general powers of the ombud and those that are prescribed specifically or those that fall within the prescripts of the terms of reference conferred to the second respondent. Accordingly the second respondent as tasked to deal with the specific complaints relating to the first respondent about its management of the bidding or procurement, the second respondent in my view cannot perform any function or has authority to exercise its powers beyond the empowering provisions as tabulated by the terms of reference in casu.

See Limpopo Legal Solutions and Another .V. Eskom Holdings Limited [2017] ZALMPPHC 1 at 27.

[49] In the circumstances of this case I am not persuaded that the second respondent is empowered to exercise powers like any judicial and quasi-judicial bodies as its mandate as an ombud are specifically defined in terms of reference as conferred.

When approached to clarify its award, as it allegedly open to different interpreters and ambiguity, the second respondent pleaded that it is functus officio.

The first respondent argues that since the second respondent is functus officio, the applicant should have embarked on a review process which it failed to do.

[50] In the absence of reviewing and setting aside the second respondent's award, such award remains valid. According to the first respondent the applicant should have approached the court instead of the second respondent for clarity of the award.

The stand point of the applicant is that it was not necessary to review the award as its request is simply to seek clarity on some aspects of the award that is ambiguous.

As it is not seeking that the second respondent's revisit the matter, the second respondent's position that it is functus officio is according to the applicant, without any basis whatsoever.

[51] The principle of functus officio dictates that once a decision maker has made a determination, such decision is deemed to be final. Its purpose is to bring finality to matters and once made, the decision maker cannot revoke its own decision as it is deemed final.

See Minister of Justice .V. Ntuli [1997] ZACC 7; 1997 (2) SACR 19 (CC); 1997 (6) BCLR 677 (CC); 1997

(3) SA 772 CC paragraphs 22 and 29

[52] In my view the contentious issue about the fees to be made by the first respondent in terms of the award, is that such costs are to be paid in accordance with the terms governing payment of fees to the applicant as contained in the management contract. Any costs incurred that is not catered for in the terms of reference cannot be for the account of the first respondent. I regard an award by the second respondent as final and accordingly I am of the opinion that the second respondent is thus functus officio. Referring the said award back to the second respondent on the basis that it is ambiguous is not sustainable and helpful to the applicant.

[53] The argument by the applicant that it is merely seeking clarity in my view, cannot be acceptable as it goes to the heart of the award itself. In the event the award as requested by the applicant, is rephrased, reworded, corrected and further clarified, it may have an effect of the second respondent setting aside its own decision and / or alter its own final relief according to my view if not satisfied with the award as granted, it has to be reviewed. Until it is reviewed or set aside by a court, it is presumed valid.

See Oudekraal Estates (Pty) Ltd .V. City of Cape Town and Others 2004 (b) SA 222 (SCA) at 26

[54] I therefore find that the second respondent is functus officio as such the second respondent's authority over the mandate conferred in the terms of reference ceased when making the final

award.

The first respondent contended that the substantiative relief sought by the applicant is based on the legal causa of a mandamus.

An order sought by the applicant is to direct the second respondent to rectify and clarify its award as it is deemed to be short of meaningful and accurate interpretation.

By compelling the second respondent to exercise its judicial decision making discretion in favour of the applicant will contravene the principle of separation of powers.

[55] Relying on a mandamus, the applicant has to plead and establish the requirements of a mandate which it is argued it omitted to do and thus the application is fatally flawed and should be dismissed.

On the flip side, the applicant argues that its case is for the ombud to clarify its award and it is not seeking a mandamus. Accordingly the applicant need not prove the requirements for a mandamus.

[56] The interdict approach as suggested by the first respondent is irrelevant as the relief sought is simply to request clarity of the said award. The doctrine of separation of powers finds no application in this matter so argued the applicant. Since the second respondent has already made a determination, applicant argues that it seeks the second respondent to clarify what it has already done.

The applicant submitted that it has suffered irreparable harm and has no any other remedy and pleads that its application be granted with costs.

Mandamus may be broadly defined as a relief or a command compelling a decision maker to exercise or perform some other statutory duty.

[57] The applicant in casu seeks an order that compels the second respondent to rectify, clarify, rephrase, reword and correct its award. I hold the view that indeed the application is based on a mandamus directing the second respondent to exercise its quasi-judicial decision making and clarify its award.

For the applicant to be successful with its application it has to meet and establish the requirements of a mandamus.

It is not enough for the applicant to only submit that in the absence of clarity by the second respondent, it will suffer irreparable harm and that there are no alternative remedy.

[58] It is expected of the applicant to fully and sufficiently plead and satisfy all the requirements necessary for a mandamus.

The applicant has to demonstrate that it has a clear right to the relief it seeks, that an actual injury has been committed or it is reasonably expected to be committed, that there is no other legal remedy available and that it will suffer irreparable harm.

I find that the applicant did not adequately plead and satisfy all the requirements necessary to be successful with the relief it seeks in its application.

It is not necessary in my view to further consider and make a determination on the merits of this matter as the issues have been sufficiently dealt with in the preliminary bases as raised herein.

[59] After careful consideration of the issues and submissions made by both parties in this matter, I am of the view that the application falls to be dismissed with costs.

#### COSTS

[60] Counsel for the first respondent's view is that the application be rejected and it be dismissed on the preliminary basis as the applicant failed to make out a case for its relief sought in the notice of motion.

It is submitted on behalf of the first respondent that although it is an organ of state, the application is brought for the purpose of commercial gain and therefore the court should order the applicant to be liable for costs incurred including costs for two counsel.

[61] It is generally accepted that costs follow the results. A successful party is entitled to his / her costs unless ordered otherwise by the court.

The court in *Ferreira .V. Levin No and Others* 1996 (2) par [3] held that the award of costs unless otherwise enacted, is in the discretion of the Court.

The facts of each and every case are to be considered by the court when exercising its discretion and has to be fair and just to all the parties.

[62] The purpose of an award of costs to a successful party is to indemnify him or her for the expenses which he has been unnecessarily put through.

I am of the view that the application before this court is complex and the complexity thereof will be considered when making a determination as to costs.

Having found that the application be dismissed on preliminary basis and for lack of adequate pleading and failure to satisfy the requirements for a mandamus and generally that the applicant failed to make out a case for the order it sought in its notice of motion, a costs order is warranted against the applicant.

[63] After considering the facts and submissions made herein, I find that the first respondent should not have been put through the process of this application incurring unnecessary expenses in opposing this application.

In *Cronje .V. Pelser* 1967 (2) SA 589 (A) at 593 the court held that the Court should take into consideration the circumstances of each case.

#### ORDER

The following order is made: -

- 1) The application is dismissed;\
- 2) The applicant is ordered to pay costs including costs of two counsel.

S S MADIBA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES:

HEARD ON:

16 FEBRUARY 2022

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DATE OF JUDGMENT: 30

NOVEMBER 2022

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Prepared on 11 October 2026 · Esheria