



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

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
<u>09/02/2023</u>	
DATE	<u></u>
	SIGNATURE

CASE NO. 18449/21

In the matter between:

AFRIFORUM

Applicant

And

THE MINISTER OF FINANCE

Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an application for leave to appeal against the whole judgment of this court handed down on 21 September 2021 in terms of which an urgent application by applicant was dismissed on the findings mainly that:

- 1.a *the matter was not urgent based on the applicant's inability to demonstrate the failures of government to promptly procure and distribute the Covid 19 vaccines, to all the provinces in the country and the alleged imminent danger to the health of the people in the country. The applicant's said inability was dispositive of the alleged urgency.*
- 1.b *that the applicant, not being an organ of State, had no standing to request the respondent to exercise his statutory discretionary powers and exempt organs of State charged with the responsibility to select service providers, in terms of the Act, for the procurement and distribution of Covid 19 vaccines, let alone to bring an urgent application to compel the respondent to do so;*
- 1.c *that, in respect of the interdict, the order sought was incompetent as the granting thereof would have been an infringement of the doctrine of separation of powers;*
- 1.d *that the intended participation of the persons whose interests the applicant alleged to represent was moot in light of the application having being brought after the government had announced that the*

procurement of service providers was almost complete and the persons concerned had, admittedly by the applicant, not applied for consideration. The applicant's allegation that more tenders could still be issued was mere speculation and not substantiated either.

- [2] None of the above conclusions have been meritoriously, if at all, challenged by the applicant in its grounds of appeal, despite them individually being dispositive of the applicant's case.

REQUIREMENTS FOR LEAVE TO APPEAL

- [3] Section 17 of the Superior Courts Act 10 of 2013 sets out the requirements to be met by the applicant for leave to appeal being that:

3.1 the court may grant leave to appeal where it is convinced that:

- (a) the appeal would have a reasonable prospect of success; or
- (b) there is some other compelling reason why the appeal should be heard, including the existence of conflicting decision on the matter under consideration; or
- (c) the decision on appeal will still have practical effect; and
- (d) where the decision appealed against does not dispose of all the issues in the case, and the appeal would lead to a just and prompt resolution of all the issues between the parties.

- [4] In *Zuma v Democratic Alliance* [2021] ZASCA 39 (13 April 2021) the court held that the success of an application for leave to appeal depends on the prospect of the eventual success of the appeal itself. In *The Mont Chevaux Trust v Tina Goosen and Others* 2014 JDR 2325 LCC the court held that section 17(1)(a)(i) requires that there be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against before leave to appeal is granted.

“An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal.” - See: *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016).

MOOTNESS OF THE RELIEF SOUGHT ON APPEAL

- [5] A few months after the judgment in this matter had been handed down, the Supreme Court of Appeal ruled that the respondent's regulations to the PPPS Act setting out the requirements intrinsically linked to the impugned provisions of section 2(d) of the PPPS Act for qualification for selection as a service provider were unlawful and invalid. The applicant was aware of the case pending before the SCA at the time of bringing the

urgent application. The decision of the SCA put paid to the pre-requisites for qualification for selection as a service provider, but does not affect the validity of the requirements of the impugned provisions of section 2(d) of the Act. It has to be noted that the provisions of the Act, and not the regulations, were the issue for determination in the urgent application before this court. Those provisions of the Act remain extant.

CONCLUSION

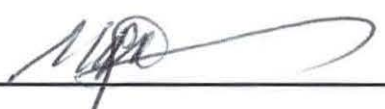
- [6] The provisions of section 16 of the Superior Courts Act preclude the court hearing an application for leave to appeal from granting leave to appeal for the mere presentation of arguments on extant valid provisions of the law. Based on this, leave to appeal is refused.

COSTS

- [7] The general principle that costs follow the outcome of the case holds in this matter.

ORDER

- [8] Resulting from the findings in this judgment, the following order is made:
1. The application for leave to appeal is dismissed with costs.



MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

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JUDGMENT IS ELECTRONICALLY TRANSMITTED TO THE PARTIES
ON...09... FEBRUARY 2023.