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

Case No: 2024-031868

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

11 July 2025

In the matter between:

INDEPENDENT DEVELOPMENT TRUST (IDT)

First Applicant

(Registration No. IT669/91)

TEBOGO MALAKA N.O

Second Applicant

ZIMBINI HILL N.O

Third Applicant

THIMOTHY SUKAZI N.O

Fourth Applicant

DR MICHAEL SUTCLIFFE N.O

Fifth Applicant

PROF. RAYMOND NKADO N.O

Sixth Applicant

KARABO SIYILA N.O

Seventh Applicant

LERATO KUMALO N.O

Eighth Applicant

PRUDENCE MKHWANAZI N.O

Ninth Applicant

MPILO MBAMBISA N.O

Tenth Applicant

KRISHEN SUKOEV N.O

Eleventh Applicant

ADV LUFUNO NEVONDWE N.O

Twelfth Applicant

REHANA PARKER N.O

Thirteenth Applicant

And

MOEPATHUTSE PROPERTY INVESTMENTS (PTY) LTD
(Registration No. 2015/114982/07)

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MYBURGH, AJ

INTRODUCTION:

[1] The Applicants are the Independent Development Trust, registered as such, being a Schedule 2 state-owned entity and programme implementation agency as prescribed by the Public Finance Management Act 1 of 1999 (PFMA), represented herein by its current trustees, the second to thirteenth applicants. In this judgment, as in my previous judgment, I will refer to the Applicants jointly as “the IDT”.

[2] The IDT launched an application seeking an order that the IDT’s decision,

taken on 04 November 2022, to award the bid to the respondent to provide suitable office space at 4[...] S[...] Drive, Building B, Route 21 C[...] P[...], Irene, Pretoria to the IDT for a period of sixty (60) months be declared constitutionally invalid, reviewed, and set aside.

[3] The IDT further sought an order declaring that any contract and/or lease agreement and/or service level agreement concluded between the IDT and respondent pursuant to the decision to award the bid to the respondent, is declared null and void *ab initio*.

[4] The application was heard on 5 May 2025 and on 16 May 2025 I handed down judgment in this matter, dismissing the application and ordering the IDT to pay the costs of this application, such costs to include the cost of two counsel where employed, to be taxed on Scale C.

[5] The IDT applied for leave to appeal against the aforementioned judgment, which argument was heard on 27 June 2027.

CONFIRMATORY AFFIDAVITS:

[6] In my judgment I dealt with the ruling on hearsay evidence.

[7] The failure to deliver the said confirmatory affidavits was common cause during the argument on such ruling.

[8] However, and in the Application for Leave to Appeal, the IDT submits that I erred in the ruling on admissibility of hearsay by disregarding the fact that the two confirmatory affidavits, referred to in the Founding Affidavit, were in fact before me.

[9] The confirmatory affidavit of Ms Mahali Moloi was indeed uploaded onto Caselines on 5 May 2025 at 09h55, thus 5 minutes prior to the application being heard

in Court. It was uploaded by Mr Olwethu Peter, a senior associate at the Applicant's attorneys of record.

[10] The confirmatory affidavit of Mr Makhura was indeed uploaded onto Caselines on 5 May 2025 at 09h56, thus 4 minutes prior to the application being heard in Court. It was again uploaded by Mr Olwethu Peter, a senior associate at the Applicant's attorneys of record.

[11] The confirmatory affidavits were uploaded in a newly created section 25, headed "Confirmatory Affidavits". The application itself was uploaded in section 2, headed "Pleadings".

[12] At no stage prior to judgment did the Applicant inform the Court of this, and it only came to my attention following consideration of the application for leave to appeal.

[13] The Consolidated Practice Directive 1 of 2024, applicable in this division, in paragraph 6.1 states that service of process in terms of the Uniform Rules of Court remains strictly enforceable. In paragraph 6.2 it is stated that the uploading of original notices or process to CaseLines or Court Online (whichever platform is applicable to the relevant case in terms of this directive) will be regarded as compliant with the Rules of Court as the effective date of proper filing of the document, but not the service of same. Any party may be called upon at any time by the registrar or by a Judge to produce the original document so uploaded.

[14] In paragraph 6.3 it is stated that service should still be effected in terms of Rule 4 or 4A of the Uniform Rules of Court, as the case may be.

[15] The uploading of two affidavits 5 minutes before a hearing is not in compliance with the Practice Directive. In addition, the affidavits were not properly delivered, as they were not, on the facts before Court, served. The affidavits were further uploaded without proffering some explanation and without seeking condonation. I

interpose to state that both affidavits were only commissioned after delivery of the answering affidavit.

[16] The two confirmatory affidavits were therefore not before Court and the Court did not exercise any discretion not to allow the said affidavits.

[17] In my judgment I found that the IDT failed to show any breach of clause 12.3 of the SCM policy. I further found that there was no evidence before me which showed a contravened clause 13.1.

[18] The tender process and subsequent award of the tender to the Respondent was not contrary to the prescripts of Section 217(1) of the Constitution.

THE TEST:

[19] In ***Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Another*** (213/16) [2017] ZASCA 17 (22 March 2017) at para 18 the SCA stated that the test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success.

[20] The SCA has bemoaned the regularity with which leave is granted in respect of matters not deserving. See ***Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & others*** 2003 (5) SA 354 (SCA) para 23.

[21] In ***MEC for Health, Eastern Cape v Ongezwa Mkhitha & The Road Accident Fund*** [2016] ZASCA 176 the SCA held that the test for granting leave to appeal is as follows (para 16-17):

“Once again it is necessary to say that Leave to Appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that Leave

to Appeal may only be granted where the Judge concerned is of the opinion that the Appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard.”

[22] See in this regard also **Dexgroup (Pty) Ltd vs Trustco Group International (Pty) Ltd and Others** 2013 6 SA 520 (SCA).

[23] In **Fusion Properties 233 CC v Stellenbosch Municipality** [2021] ZASCA 10 (29 January 2021) (para 18), it was stated that –

“Since the coming into operation of the Superior Courts Act there have been a number of decisions in our courts which dealt with the requirements that an applicant for leave to appeal in terms of Section 17 (1) (a) (i) and 17 (1) (a) (ii) must satisfy in order for leave to be granted.

The applicable principles have over time crystallised and are now well established. Section 17 (1) provides, in material part, that leave to appeal may be granted 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....

Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave”.

[24] In **Chithi and Others; in re: Luhlwini Mchunu Community v Hancock and Others, Chithi and Others; In re: Luhlwini Mchunu Community v Hancock and Others** (423/2020) [2021] ZASCA 123 (23 September 2021) it was held at para 10:

“The threshold for an application for leave to appeal is set out in section 17(1) of the Superior Courts Act, which provides that leave to appeal may only be given if

the judge or judges are of the opinion that the appeal would have a reasonable prospect of success...”

[25] In ***Nwafor v The Minister of Home Affairs and Others*** [2021] ZASCA 58 (12 May 2021) at para 21 the court stated that:

“Section 17(1) of the Act sets out the statutory matrix as well as the test governing applications for leave to appeal. The section states in relevant parts, and in peremptory language, that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success”.

CONCLUSION:

[26] Having considered the argument advanced by the parties I find myself unable to conclude that the Applicants have a reasonable prospect of success, or that the interest of justice requires leave of appeal to be granted, and as such I make the following order:

1. The Application for leave to appeal is refused with costs, such costs to include the cost of counsel on Scale C.

SJ MYBURGH

ACTING JUDGE OF THE HIGH COURT, PRETORIA

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 11 July 2025.

Date of hearing: 5 May 2025

Date of judgment: 16 May 2025

APPEARANCES:

For Applicants: Adv JA Motepe SC
 Adv N C Motsepe

For Respondent: Adv AJP Els SC
 Adv JL Myburgh