REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024-131114

DELETE WHICHEVER IS NOT APPLICABLE
1.REPORTABLE: NO
2.OF INTEREST TO OTHER JUDGES: NO
3.REVISED: NO
[redacted]
28 January 2026 **Judge Dippenaar**

In the matter between:

LTC HOLDING CC	**APPLICANT**
and	
JOHANNESBURG WATER SOC LTD	**FIRST RESPONDENT**
BUILTPRO CONSTRUCTION (PTY) LTD	**SECOND RESPONDENT**
NUTINOX (PTY) LTD	**THIRD RESPONDENT**

LEAVE TO APPEAL JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 28th of January 2026.

DIPPENAAR J:

[1] The first respondent, Johannesburg Water SOC Ltd applies for leave to appeal against the whole of the judgment and order handed down by this court on 12 December 2025. In terms of the order it was declared that tender JW OPS 003/23 lapsed prior to the first respondent making any tender award, the first respondent's decision to award the tender to the second and third respondents was reviewed and set aside, as well as any service level agreements concluded by the first respondent with the second and third respondents, the declaration of invalidity was suspended for 150 days, together with ancillary relief. Leave is sought to the Supreme Court of Appeal

[2] Despite hitherto not participating in the application, a notice of intention to participate was delivered by the third respondent, Nutinox (Pty) Ltd, on 8 January 2026. Therein it was stated that the third respondent would rely on the same grounds as set out in the first respondent's application for leave to appeal. It delivered an application for leave to apply for leave to appeal as well as separate written submissions. At the hearing, the third respondent was represented by Adv Tsatsawane SC.

[3] I was advised by Mr Els SC, who appeared for the applicant, that it was agreed between counsel that if leave to appeal were to be granted, the third respondent's application should be granted and its late participation should be condoned. Conversely,

if leave was refused, the third respondent's application should be refused. Mr Mokhari SC, who appeared for the first respondent, did not object to this approach.

[4] In its application for leave to appeal, the first respondent raised various grounds for leave to appeal. The first respondent contended that there are reasonable prospects of success that another court would grant a different order as envisaged by s 17(1)(a)(i) of the Superior Courts Act[1]. It also contended that there are compelling reasons why the appeal should be heard as envisaged by s 17(1)(a)(ii) of the Act.

[5] Leave to appeal is sought by the first respondent on the following grounds: First, the finality of the tender award and communication thereof. Second, misapplication of Kirland and the functus officio principle. Third, the applicability *Takubiza.*[2] Fourth, the applicability and legal status of the first respondent's supply chain management policy. Fifth, the incorrect rejection of the SCM policy where the applicant had not challenged it. Sixth, the evidentiary burden and application of the *Plascon Evans* rule. Seventh, the evidentiary threshold for proof of notification. Eighth, the service level agreements should not have been declared invalid.

[6] In support of the existence of compelling reasons to grant leave to appeal, it was submitted that the application raises an important and unsettled question of procurement law, being whether a tender award must be communicated to the successful bidder within the bid validity period to be valid.

[7] In sum the third respondent raised the following grounds: that the Supply Chain Management Policy applied and was referred to in the tender documents and that the opt out provision in the notification letter was ignored in the judgment. Second, that the principles in *Aventino*[3] applied. Third, the date on which the final award of the tender had

[1] 10 of 2013.
[2] *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC* 2023 (1) SA 44 (SCA).
[3] *Aventino Ecotroopers Joint Ventures and Others v MEC for the Department of Roads and transport, Gauteng Province and Others* 2025 (4) SA 419 (SCA).

to be made had to be distinguished from the effective date of that decision, not being the date on which decision of an award must be communicated to successful bidder.

[8] I have considered the papers filed of record and the grounds set out in the application for leave to appeal as well as the parties' extensive arguments for and against the granting of leave to appeal. I have further considered the submissions made in the heads of argument of the parties and the authorities referred to.

[9] Leave to appeal may only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, which prospects are not too remote[4]. An applicant for leave to appeal faces a higher threshold[5] than under the repealed Supreme Court Act.[6] A sound rational basis for the conclusion that there are prospects of success must be shown to exist[7].

[10] In applying the relevant principles to the grounds for leave to appeal when measured against the facts, I conclude that the appeal would have a reasonable prospect of success as contemplated in s17(1)(a)(i) of the Act. One of the grounds of appeal relates to the applicability and legal status of the Supply Chain Management Policy. This court had found that the Policy did not apply to the tender. In my view a reasonable prospect exists that another court may come to a different conclusion and that the Policy was referred to in the tender documents and was a binding regulatory instrument which was applicable.[8] If the Policy applies, it may well have a substantial impact on the issues which arise in the matter and on the result. In light of this conclusion, it is not necessary to deal with any of the other grounds advanced in any detail.

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[4] *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para [10]
[5] *S v Notshokovu* Unreported SCA case no 157/15 dated 7 September 2016, para [2]
[6] 59 of 1959
[7] *Smith v S* [2011] ZASCA 15; *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176, para [17]
[8] As pointed out by the third respondent, there are references to the SCM policy in paras 16 and 45 of the Invitation to tender documents.

[11] It follows that the application must succeed. Considering the issues involved it is appropriate that the matter be referred to the Supreme Court of Appeal. There is no basis to deviate from the normal principle that costs are to be costs in the appeal.

[12] In accordance with the agreement between the parties, the third respondent's application for leave to apply for leave to appeal must also be granted. No costs were sought save in the event of opposition. The application was not opposed.

[13] I grant the following order:

[1] The third respondent, Nutinox (Pty) Ltd, is granted leave to apply for leave to appeal;

[2] Leave to appeal is granted to the Supreme Court of Appeal.

[3] The costs of the application for leave to appeal are to be costs in the appeal.

[redacted]

EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING : 26 JANUARY 2026

DATE OF JUDGMENT : 28 JANUARY 2026

<u>APPEARANCES</u>

APPLICANT'S COUNSEL	**:** Mr APJ ELS SC
APPLICANT'S ATTORNEYS	**:** ALBERT HIBBERT ATTORNEYS
FIRST RESPONDENT'S COUNSEL	: Mr WR MOKHARE SC Mr I E TSHOMA
FIRST RESPONDENT'S ATTORNEYS	: BUTHELEZI VILAKAZI INC
THIRD RESPONDENT'S COUNSEL	: Mr K TSATSAWANE SC
THIRD RESPONDENT'S ATTORNEYS	: KMNS INC