

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



CASE NUMBER: 2025/237917

DATE: 29 JULY 2026

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

.....30 July 2026....
DATE

SIGNATURE

In the matter between:

**EPHRAIM SEPHEKA
KHULEKILE SEPHEKA**

First Applicant
Second Applicant

and

**THE PRETORIA NORTH REGIONAL COURT
MAGISTRATE (ELIZABETH DENGÉ)
INEZ FERREIRA
IF PROPERTY SOLUTIONS (PTY) LTD**

First Respondent
Second Respondent
Third Respondent

This order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by e-mail. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her secretary. The date of this Order is deemed to be 30 July 2026.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

DU PLESSIS AJ:

Introduction

- [1] On 26 May 2026 I delivered judgment in a review brought under section 22 of the Superior Courts Act 10 of 2013. I set aside the costs order made by the First Respondent on 7 November 2025 in case number GP/PTANORTH/RC/910/2025, substituted an order that each party bear its own costs, set aside the citation of the Second Respondent in her personal capacity, and ordered the Third Respondent to pay the costs of the review.
- [2] The Second and Third Respondents seek leave to appeal to the Full Court of this Division, alternatively to the Supreme Court of Appeal, against the whole of that judgment. They advance six grounds. The Applicants oppose.
- [3] For the reasons that follow, I have concluded that two of the grounds — those concerning the distinction between appeal and review, and the characterisation of the First Respondent’s conduct as a gross irregularity — meet the threshold in section 17(1)(a), and that there is in addition a compelling reason for those questions to be considered by another court. I grant leave, limited to those questions and to the consequential question of remedy. On the remaining grounds I am not persuaded that the threshold is met, and I refuse leave.

The test

- [4] Section 17(1)(a) of the Superior Courts Act permits leave to appeal to be given only where the judge is of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
- [5] The threshold is a demanding one. The use of “*would*” rather than “*might*” connotes a measure of certainty that another court will differ (*The Mont Chevaux Trust v Tina Goosen* (LCC14R/2014, 3 November 2014) para 6). More is required than that the case is arguable or not hopeless: there must be a sound, rational basis for concluding that there is a reasonable prospect of success (*Smith v S* [2011] ZASCA 15 para 7; *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 paras 16–17).
- [6] Success on appeal means an appeal court coming to a different order, not merely to a different view on a point of reasoning; an appeal lies against the order, not the reasons (*Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715). The enquiry is accordingly whether, correcting any error the Second and Third Respondents identify, another court would or reasonably might be

led to an order different from the one I made. I must guard both against defending my judgment and against granting leave merely to avoid the discomfort of reconsidering it. The opinion required by section 17(2)(a) is to be formed on the statutory test alone.

The scope of the grounds

- [7] Two preliminary observations are necessary about the compass of the application.
- [8] First, the fifth ground as pleaded in the notice of application for leave to appeal is confined to the contention that the substitution of the costs order was effected under section 8(1)(c)(ii) of PAJA and that this was the wrong source of power. In their heads of argument the Second and Third Respondents advance a materially different contention — that substitution was in any event impermissible on the merits, because the requirements for a substitution order identified in *Trencon Construction (Pty) Ltd v Industrial Development Corporation* 2015 (5) SA 245 (CC) were not established. That contention does not appear in the notice. Grounds for leave to appeal must be set out specifically, and an applicant is ordinarily confined to the grounds pleaded; heads of argument may develop a pleaded ground but may not introduce a new one (*Songono v Minister of Law and Order* 1996 (4) SA 384 (E); *Xayimpi v Chairman, Judge White Commission* [2006] ZAECHC 22). To the extent that the *Trencon* argument is advanced as a free-standing attack on the competence of substitution, it is not properly before me. It is, however, subsumed within the question of remedy on which I grant leave below, and the Full Court will be able to consider the appropriateness of substitution in the round.
- [9] Second, the Second and Third Respondents observe in a footnote that the judgment attributes the ground of bias to section 22(1)(a) of the Superior Courts Act, whereas bias appears in section 22(1)(b) and section 22(1)(a) concerns the absence of jurisdiction. The observation is correct and I record the correction. Counsel rightly does not advance it as a ground of appeal, and nothing turns on it.

Grounds on which leave is refused

Ground 1 — the application of PAJA

- [10] I accept, as I accepted in argument, that the Promotion of Administrative Justice Act 3 of 2000 has no application to the adjudicative conduct of a judicial officer. The definition of “*administrative action*” in section 1 excludes the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution, and a Regional Magistrate disposing of costs in opposed proceedings exercises such a function (see *Minister of Police v Nobumba N.O.* (1585/2022) [2023] ZAECQBHC 11 para 9). My references to sections 5(3), 6(2)(a)(iii) and 8(1)(c)(ii) of that Act were misplaced, and I record without reservation that they were wrong.
- [11] I record, further, that I accept the force of the submission, founded on *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) para 12, that a judicial officer’s reasons are those contained in her judgment, that she may not supplement them ex post facto, and that no adverse inference properly falls to be drawn from her election to abide. To the extent that my judgment drew such an inference, I do not seek to defend it.
- [12] It does not follow that leave should be granted on this ground. Ground 1, standing alone, is an attack on the legal framework rather than on the order. Whether the concession of these errors is capable of producing a different order depends not on Ground 1 but on whether, once PAJA and the abiding inference are set aside, there remains a sustainable finding of a reviewable defect resting on the face of the judgment and on section 22 and the common law. That is the very question raised by Grounds 2 and 3, on which I grant leave. Ground 1 is therefore not an independent basis for leave: it succeeds on the law but achieves nothing on its own, and its true significance is as a component of the question I address under Grounds 2 and 3. Leave on Ground 1 as a discrete ground is refused.

Ground 4 — the successful party and the court correcting itself

- [13] I did not decide the review on the footing that the First Respondent was correcting her own earlier decision, or that the Third Respondent was not the successful party. The judgment records expressly that it was not necessary to decide whether that consideration alone would have warranted interference. The consideration bore upon the content of the substituted order, not upon whether the costs order was liable to be set aside. An appeal court differing from me on this point would not, on that account alone, be led to a different order on the setting-aside; it would at most revisit the shape of the substituted

order, which is a matter falling within the remedy question on which I grant leave. Leave on Ground 4 as a discrete ground is refused.

Ground 6 — the Rule 53 record

[14] The complaint that the review was determined without the record does not, in my view, meet the threshold, for three reasons, each sufficient. The obligation to despatch the record under Rule 53(1)(b) rests on the decision-maker, not the applicant; the Second and Third Respondents neither applied to compel it nor sought a postponement to procure it, and raised its absence only in argument. The review was confined to a question apparent *ex facie* a reasoned written judgment which was before me, the substantive outcome being accepted and not in issue. And *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA), and *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC), concern the importance of the record where it is withheld from a litigant who seeks it; neither compels the conclusion that a review confined to the four corners of a written judgment must fail for want of a transcript that no party sought to procure. I record, however, that the adequacy of the material before me to sustain an inference as to what the First Respondent did or did not consider is bound up with the merits of Grounds 2 and 3, and to that extent the point remains live on the appeal I am about to permit. Leave on Ground 6 as a discrete ground is refused.

Grounds on which leave is granted

Grounds 2 and 3 — appeal or review, and gross irregularity

[15] These grounds, taken together, put in issue whether the defect I identified — an unexplained differential treatment of the costs of the parties' respective points *in limine* — is a reviewable irregularity within section 22(1)(c) of the Superior Courts Act, or is at most a misdirection in the exercise of a discretion, which is the province of appeal. I remain of the view I expressed in the judgment. But I am persuaded that the contrary view enjoys a reasonable prospect of success, for the following reasons.

[16] The Second and Third Respondents rely on authority, which lends real support to their characterisation. In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 265 the Constitutional Court, drawing on *Ellis v Morgan* 1909 TS 576 and *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551, held that the crucial enquiry in a gross-irregularity complaint is whether the conduct complained of prevented a fair trial of the issues, that the

complaint must be directed at the method and not the result, and that the reasoning of the decision-maker must not be confused with the conduct of the proceedings. In *Nobumba* a Full Court held, on facts not far removed from the present, that a complaint founded on error in a magistrate's exercise of function takes issue with the result and not the method and so sounds in appeal, not review. I did not have these authorities before me. Another court, with them before it, might reasonably conclude that a complaint about the absence of recorded reasoning on a collateral question of costs is a complaint about reasoning, and therefore about result, rather than about the conduct of the proceedings.

- [17] There is, in addition, a tension within the judgment which the Second and Third Respondents are entitled to have examined. The judgment found, on the one hand, that the First Respondent furnished a reason for the one costs order she made on the points *in limine*, and, on the other, that the judgment discloses no exercise of a judicial discretion in respect of the costs of the Third Respondent's points. The judgment also accepted that it was open to a presiding officer to award costs against one party on a dismissed point while refraining from doing so in respect of another — that is, that the disposition fell within a range of permissible alternatives (see *Naylor v Jansen* 2007 (1) SA 16 (SCA) para 21 on the nature of the discretion as one in the narrow sense). It is reasonably arguable that a disposition falling within the range of permissible alternatives cannot at the same time be one in respect of which no judicial discretion was exercised at all, and that a presiding officer commits no irregularity, still less a gross one, by not recording her reasons for declining to make an order she was not obliged to make. Whether the differential treatment was an aberration requiring explanation, or the orthodox absorption of the costs of dismissed interlocutory points into the costs of the result, is a question on which another court might reasonably reach a conclusion different from mine.
- [18] I have not overlooked that these grounds are directed at findings I continue to regard as correct. But section 17 does not ask whether I adhere to my judgment; it asks whether another court would reasonably be persuaded to differ, to the point of a different order. If Grounds 2 and 3 succeed, the review fails and the First Respondent's costs order revives. That is a different order, and the prospect of it is, in my view, a reasonable one rather than a fanciful one.
- [19] There is the further consideration contemplated by section 17(1)(a)(ii). The proper characterisation of an unexplained or differential costs disposition by a

lower court — as a reviewable gross irregularity or an appealable misdirection — is a question of some general importance to the review practice, and the decision in *Nobumba* may be said to pull against the approach reflected in my judgment. The existence of potentially conflicting approaches is, on the statute's own terms, a compelling reason for the question to be considered by another court, independent of the prospects on the merits.

The consequential question of remedy

[20] If the finding of a reviewable defect is disturbed, the remedy falls away with it. If it is not, a question remains as to whether the appropriate remedy was substitution rather than remittal, and whether the substituted order — that each party bear its own costs — was the appropriate exercise of the discretion, given the acceptance in the judgment that a range of outcomes was permissible. Although the source of the substitution power was wrongly identified in *PAJA*, the power to substitute exists on a section 22 review under the court's inherent jurisdiction (section 173 of the Constitution), informed by the considerations in *Trencon*. Because the remedy stands or falls with, and is analytically entangled with, Grounds 2 and 3, I consider it appropriate that the question of remedy travel with those grounds on appeal, and I grant leave accordingly.

The forum

[21] Given that the questions on which leave is granted include the reconciliation of the approach in the judgment with that in *Nobumba* and *Sidumo*, and are of some general importance, the appropriate forum is the Full Court of this Division.

Costs

[22] Where an application for leave to appeal is granted, the costs of the application are ordinarily costs in the appeal, and I see no reason to depart from that course. The Applicants' opposition, though unsuccessful on the grounds on which leave is granted, was not unreasonable, and the fairest order is that the costs of the application be costs in the appeal.

Order

[23] In the result, I make the following order:

1. Leave to appeal to the Full Court of this Division is granted, limited to:

- 1.1 the question whether the conduct of the First Respondent in respect of the costs treatment of the parties' respective points in limine constituted a reviewable irregularity within section 22(1)(c) of the Superior Courts Act 10 of 2013, alternatively bias within section 22(1)(b), or whether it was at most a misdirection in the exercise of a discretion cognisable only on appeal (Grounds 2 and 3); and
 - 1.2 in the event that the finding of a reviewable defect is upheld, the question whether the appropriate remedy was the substitution effected by this Court, and whether the substituted order was appropriate (the question of remedy, and Ground 5 to the extent pleaded).
2. Leave to appeal on the remaining grounds (Grounds 1, 4 and 6, as discrete grounds) is refused.
3. The costs of the application for leave to appeal shall be costs in the appeal.



DU PLESSIS AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Date of hearing: 29 July 2026

Date of judgment: 30 July 2026

APPEARANCES

For the Applicants: Adv E Sepheka
Instructed by: Mahlakoane Attorneys, Pretoria

For the 2nd & 3rd Respondents: Adv R A Britz
Instructed by: BFJ Van Zyl Attorneys, Pretoria

For the 1st Respondent: No appearance