

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:52530/2011

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

Date: 29 November 2023 E van der
Schvff

In the matter between:

NATIONAL DEPARTMENT OF PUBLIC WORKS

APPLICANT

and

ROUX PROPERTY FUND (PTY) LTD

1ST RESPONDENT

NEDBANK LTD

2ND RESPONDENT

JUDGMENT

Van der Schyff J

[1] The matter set down for hearing is an application for leave to appeal. The first respondent in the main application is the applicant in this application for leave to appeal. For clarity, the first respondent, who applies for leave to appeal, will be

referred to as RPF, and the applicant in the main application will be referred to as DPW. RPF filed a substantive postponement application and seeks the matter to be postponed until 19 February 2023, alternatively a later date agreed to between the parties.

- [2] The reason proffered for the application for postponement is that the application for leave to appeal was set down for adjudication today despite RPF stating that it could not secure the services of sufficiently experienced senior counsel to present it on the said date.
- [3] It is relevant to note that the judgment that RPF seeks to appeal was handed down on 19 December 2022. The application for leave to appeal was filed on the electronic CaseLines file on 11 January 2023, but RPF's legal representative ostensibly failed to invite the Registrar of Appeals to the case file. I only became aware of the application when DPW sent an email enquiring when the matter would be heard on 12 October 2023. During a case management meeting, RPF's legal representative was informed that I am of the view that the undue delay rendered it necessary to finalise the application within this term, and the parties were provided with an opportunity to determine a date suitable to them for the application for leave to appeal to be heard and to file heads of argument. RPF could not secure the services of a preferred senior counsel, and failed to file heads of argument in the application for leave to appeal.
- [4] After considering the affidavits filed in support of and opposing the postponement application, I am of the view that RPF did not make out a case to be granted a postponement. The argument that the application for leave to appeal was not actively pursued for nine months after the notice of application for leave to appeal was filed because either (i) RPF's legal representative waited for my registrar to contact them, despite an undertaking given by them to DPW's attorney in March 2023 that they would follow up with my office, or (ii) that RPF's legal representatives did not follow up and pursued the application for leave to appeal because they were not provided with sufficient funds to pursue the application for

leave to appeal, does not pass muster. The dilemma that the RPF now faces because it is impossible to obtain the services of senior counsel of its choice is solely of its own making.

- [5] RPF did not indicate that it wants to amend or expand the grounds of appeal listed in the application for leave to appeal dated 11 January 2023. Counsel for the DPW highlighted the principle enunciated in *Law Society, Northern Provinces v Mogami and Others*,¹ a principle RPF's legal representative was alerted to during the case management meeting, that:

'Courts are obliged to deal with applications for leave expeditiously and systems ought to be in place enabling courts to hear them soon after having been filed. There is also no reason why they cannot be disposed of in chambers without oral argument.'

- [6] Having stated the grounds of appeal it relies on, I fail to see how RPF can be prejudiced in the application for leave to appeal if it is considered in light of the grounds of appeal raised. As a result, the postponement application stands to be dismissed with costs, which costs include the costs of two counsel.
- [7] As for the application for leave to appeal, the test that the court must apply in considering these applications is stated in section 17 of the Superior Courts Act 10 of 2013.
- [8] The DPW stated in its founding affidavit to the main application that this is a matter which, in the public interest, clearly needs to be determined as expeditiously as possible. I am of the view that there are two compelling reasons for the appeal to be heard by the Supreme Court of Appeal. The first is for the Supreme Court of Appeal to definitively determine whether a National Department, like the Department of Public Works, has the necessary *locus standi* to institute litigation

¹ 2010 (1) SA 186 (SCA) at para [3].

and be cited as an applicant instead of the Minister responsible for the department being cited as the applicant. Is this a mere issue of a semantic distinction between the Minister responsible for the national department and the national minister, or a substantive aspect that may render an application defective? The second is the question as to whether a State-applicant may, in appropriate factual circumstances like the circumstances in this case, approach the court for a declaratory order that a contract it concluded is *ab initio* invalid without specifically instituting a self-review application under the doctrine of legality.² Both issues are issues of law and legal certainty will be provided if these issues are finally determined by the Supreme Court of Appeal to the extent that it needs to be decided and can be dealt with having regard to the papers filed off record.

[9] The application for leave to appeal stands to be granted, and costs are to be costs in the appeal.

ORDER

In the result, the following order is granted:

- 1. The postponement application is dismissed. The applicant in the postponement application, Roux Property Fund (Pty) Ltd, is liable for the costs, which costs include the costs of two counsel.**
- 2. Leave to appeal is granted to the Supreme Court of Appeal, costs to be costs in the appeal.**

E van der Schyff
Judge of the High Court

² The reasoning behind the decision to consider the application, distinguishing it from *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* (CCT 77/13) [2014] ZACC 6, is captured in para [3] – [6] of the judgment.

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant in the application for leave to appeal:	Adv. M van Niekerk
Instructed by:	Naude & Naude
For the first respondent:	Adv. J. Peter SC
With:	Adv. K. M. Mokotedi
Instructed by:	State Attorney
Date of the hearing:	29 November 2023
Date of judgment:	29 November 2023