

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates	YES/NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: UM81/2022

In the matter between:-

MAXIMUM PROFIT RECOVERY (PTY) LTD
Registration No 2001/005576/07)

Applicant

and

RUSTENBURG LOCAL MUNICIPALITY

1st Respondent

BAZUZU TRADING AND PROJECTS CC
(Registration No 2009/201903/23)

2nd Respondent

MTC TAX CONSULTING (PTY) LTD
(Registration No 2015/031553/07)

3rd Respondent

**BAZUZU TRADING MTC TAX CONSULTING
JV**

4th Respondent

VICTOR MAKONA N.O.

5th Respondent

ORDER

The following order is granted:

- i) Leave to appeal to the Full Court of this Division is granted.
- ii) The costs of the application for leave to appeal is cost in the cause, save for where the appeal is not prosecuted, in which case the costs is to be paid by the applicant.

JUDGMENT: LEAVE TO APPEAL**FMM REID J****Introduction:**

- [1] This is an application for leave to appeal against the whole of the judgment and order delivered on 22 June 2023 in which the point *in limine* was upheld that the applicant (Maximum Profit Recovery) failed to exhaust the internal remedies available to it prior to an application to review and set aside a

tender award. The application for review was subsequently dismissed.

[2] This application was launched in April 2022. Based on the volume of the application (comprising of 454 pages) and the record of the review proceedings (comprising of an additional 729 pages) Maximum Profit requested the Judge President for a special allocation. The date of 14 October 2022 was allocated, but the matter could not be heard as a result of other matters crowding out the court's roll. On 14 October 2022 and by agreement between the parties the application was postponed for hearing on 5 December 2022. Judgment was delivered on 22 June 2023.

[3] After considering the facts and the law, I found as follows in paragraph [33] of the judgment that:

“[33] ... the applicant had a right that was affected in the decision made to award the tender to the Joint Venture. This right includes (but is not limited to) administrative fair processes and the audi alteram partem rule.

[34] As such, I find that the applicant should have lodged an appeal in terms of section 62(1) of the

Municipal Systems Act against the decision to award the tender to the Joint Venture.

[35] Had the appeal been lodged within the prescribed time periods, within 21 days of becoming aware of the decision, the appeal might have been adjudicated prior to the signing of the Service Level Agreement and the Joint Venture.

[36] In the premise, the point in limine is upheld and the application is to be dismissed.”

- [4] The grounds of appeal are as follows (as paraphrased):
- 4.1. That the exclusive ground for dismissal was the failure to exhaust internal remedy in terms of section 62 of the **Local Government Municipal Systems Act 32 of 2000** (the Systems Act).
 - 4.2. That the parties were not requested, and did not address the issue of internal remedies in their oral arguments. The issue of internal remedies was raised by the Rustenburg Local Municipality (the Municipality) in its answering affidavit (paragraphs 3.1 to 3.7) and alluded to the following internal remedies:

- 4.2.1. Regulation 49 of the Supply Chain Management Regulations read with paragraph 20.3 of the Supply Chain Management Policy;
 - 4.2.2. Regulation 50 of the Supply Chain Management Regulations read with paragraph 20.4 of the Supply Chain Management Policy;
 - 4.2.3. Rule 41(1)(a)(ii) of the Uniform Rules of Court; and
 - 4.2.4. Section 62(1) of the Systems Act.
- 4.3. That a factual error was made in the judgment in finding that the tender award was based on a “*delegated power as determined in section 62(1)*” of the Systems Act, where it was not alleged in the answering affidavit of the Municipality that such decision was made by a delegated authority. In the replying affidavit it is alleged that the decision was taken by the fifth respondent in his capacity as municipal manager. The application of section 62(1) is therefore misplaced.

- 4.4. The Municipal Supply Chain Management Regulations determines that only the Bid Adjudication or the municipal manager may make a tender award. If the decision was made on a delegated power, same had to be included in the record, which it was not done.
- 4.5. The court *a quo* did not have any regard to section 29(1)(b) (i) of the Supply Chain Regulations.
- 4.6. Once it is accepted that the decision to award the tender was made by the municipal manager, section 62 of the Systems Act is not applicable and there is no internal remedy available to Maximum Profit.
- 4.7. That the Municipality did not dispute Maximum Profit's allegation that there was no appeal possible when Maximum Profit became aware of the identity of the successful tenderer when perusing the website of the Municipality.
- 4.8. That the judgment is in conflict with the judgment of **DDP Valuers (Pty) Ltd v Madibeng Local Municipality** 2015

JDR 2093 (SCA), specifically paragraphs 16, 23, 24, 25 and 26 in which it was found that:

“25. In this case, the appellant as an unsuccessful tenderer would have been entitled to appeal under s 62. However, the municipality had already awarded the contract to the second respondent and the parties had already signed an agreement to that effect resulting in the rights accruing to the second respondent. It follows that the appellant could not resort to that procedure in order to comply with s 7(2) of the PAJA.”

- 4.9. The test to be applied in an application for leave to appeal is set out in section 17(1)(a) of the **Superior Courts Act 10** of 2013 which provides that:

*“(1) Leave to appeal **may only be given** 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, including conflicting judgments on the matter under consideration;”*

(own emphasis)

- [5] The leave to appeal is sought on the basis that the appeal would have a reasonable prospect of success (per grounds

of appeal listed in paragraphs [4.1] to [4.7] above) and that compelling reasons exist to grant leave to appeal, due to the conflicting judgment from the Supreme Court of Appeal as referred to in paragraph [4.8] above.

- [6] In **Erasmus Superior Court Practice** CD Rom & Intranet: ISSN 1561-7476 Internet: ISSN 1561-7475, DE van Loggerenberg, © **Jutastat e-publications** Part A, Volume 3 under the heading “Introduction, Superior Court System and Access to Superior Courts” the author discusses the right of a party to appeal to a higher court, and compares section 20(4) of the **Supreme Court Act** 59 of 1959 (repealed with effect from 23 August 2013) with section 17 of the **Superior Courts Act** 10 of 2013. The author writes as follows:

*“Leave to appeal. Both Acts limit the right to appeal to a higher court against a judgment or order, either by the court appealed from or the court appealed to. This limitation was contained in section 20(4) of the **Supreme Court Act** 59 of 1959, and was re-enacted in [section 17](#) of the **Superior Courts Act 10 of 2013**. In **Besserglik v Minister of Trade, Industry and Tourism (Minister of Justice Intervening)** 1996 (4) SA 331 (CC), dealing with the repealed Act, the Constitutional Court pronounced that the screening of unmeritorious appeals to prevent the flooding of the courts of appeal with hopeless cases did not constitute an infringement of the fundamental right of*

access to courts. The same principle applies to the new Act, save that the wording of section 17 indicates that, in the test whether a potential appeal could succeed, **the bar has been raised: except in extraordinary cases, leave may be granted only if another court ‘would’ come to the conclusion that the appeal had merit.** (See: *Magashule v Ramaphosa* [2021] 3 All SA 887 (GJ) at para [6]; and also cited with approval in, amongst others, *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* (unreported, GP case no 3234/15 dated 28 March 2017) at para [5]; *Pretoria Society of Advocates v Nthai* 2020 (1) SA 267 (LP) at para [5], overruled, but not on this point, in *Johannesburg Society of Advocates v Nthai* 2021 (2) SA 343 (SCA)) Given the case load of all courts, the new section does meet the constitutional threshold of compliance.”

(some footnotes omitted; own emphasis)

- [7] In **MEC for Health, Eastern Cape v Mkhita** 2016 JDR 2214 (SCA) the Supreme Court of Appeal emphasised the application for the test for leave to appeal and reiterated that appeals where there is no prospect of success and appeals which have no merit, should not be granted leave to appeal due to the ever increasing workload on the judicial system.
- [8] Having considered the grounds of the application for leave to appeal, I am satisfied that another court might come to a different conclusion when applying the law to the unique

facts of the matter. I am also of the opinion that a possible conflict in my judgment and the judgment of the Supreme Court of Appeal in **DDP Valuers (Pty) Ltd v Madibeng Local Municipality** 2015 JDR 2093 (SCA) has to be scrutinised by a higher court on appeal.

[9] I therefore deem it in the interest of justice that leave be granted to appeal to the Full Court of this Division.

Cost

[10] The normal order in applications for leave to appeal is that the cost of the application for leave to appeal forms part of the cost of the appeal, save where the applicant / appellant does not pursue the appeal, in which case the cost should be paid by the applicant in the application for leave to appeal.

[11] I find no reason to deviate from this principle and deem an appropriate order to be that cost of the application for leave to appeal be cost in the appeal, with the proviso that the appeal is pursued.

Order:

[12] In the premises I make the following order:

- iii) Leave to appeal to the Full Court of this Division is granted.

- iv) The costs of the application for leave to appeal is cost in the appeal, save for where the appeal is not pursued, in which case the costs is to be paid by the applicant in the application for leave to appeal.

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE OF ARGUMENT: 15 SEPTEMBER 2023

DATE OF JUDGMENT: 16 NOVEMBER 2023

APPEARANCE FOR APPLICANT: ADV APJ ELS

**INSTRUCTED BY: ALBERT HIBBERT ATTORNEYS
231 LANGE STREET
NIEUW MUCKLENEUK PRETORIA
TEL: 012 – 346 4633
EMAIL: jaco@hibbertlaw.co.za
albert@hibbertlaw.co.za
REF: A HIBBERT / JDP / M 633
C/O LABUSCHAGNE ATTORNEYS
CONSTANTIA DRIVE
MAHIKENG**

**APPEARANCE FOR 1ST AND 5TH RESPONDENT:
ADV NG LAUBSHER**

**INSTRUCTED BY: ME TLOU ATTORNEYS INC
NO 43 CNR BADEN POWELL &
VISSER STREET
MAHIKENG
TEL: 018 011 0036
EMAIL: naledi@tlouattorneys.co.za
REF: RUS1/0030/ME TLOU**

APPEARANCE FOR 3RD RESPONDENT: ADV ME MANALA

**INSTRUCTED BY: LAMOLA ATTORNEYS
609, 6TH FLOOR OLIVETTI HOUSE
SOPHIE DE BRUYN AND
PRETORIUS STREET
PRETORIA
TEL: 012 323 9709
EMAIL: info@lamolaatt.co.za
lamolamadimetja4@gmail.com**

**C/O KGOMO ATTORNEYS
56 SHIPPARD STREET, MAHIKENG**