REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 09716/2010

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

2012-10-19
DATE

SIGNATURE

In the matter between:

JUDITH MARY WEBB	First Applicant
INVESTIBILITY 38 (PTY) LTD	Second Applicant
JURGENS STEPHANUS BEKKER t/a JURGENS BEKKER ATTORNEYS	Third Applicant
PROXIMITY PROPERTIES 206 (PTY) LTD	Fourth Applicant
ERNEST BERNADUS NEL	Fifth Applicant
GOOD NIGHT GUEST LODGE CC t/a GOOD NIGHT GUEST LODGE	Sixth Applicant

and

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED	Respondent

JUDGMENT

KGOMO, J:

INTRODUCTION

[1] The applicants herein launched an urgent application on 20 March 2010 in which they sought an order that the respondent be interdicted from opening the far right lane of the N3 national road ("*N3*" or "*the road*") between Van Buuren on-ramp up to a point in line with the intersection of Arterial Road West and Souvenir Road, with the existing guard rail in place, pending the institution within 60 (sixty) days of further legal proceedings that the applicants were advised and they had accepted the advice, that it was necessary.

[2] The parties appeared before Halgryn AJ on 20 March 2010 at which appearance the applicants sought an order.

2.1 That the respondent will close the far left lane of the N3 National Road northbound between Van Vuuren off-ramp up to a point in line with the intersection of Arterial Road West and Souvenir Road;

2.2 That the respondent will replace the temporary concrete barriers on the right hand side of the far left lane of this road between the points referred to herein above;

2.3 That this agreement will prevail as an interim order pending the outcome of this application; and

2.4 That the application is postponed *sine die*.

[3] The purpose of the above application was that the temporary concrete barrier on the right hand side of the far left lane of the road between Van Buuren off-ramp up to the point in line with the intersection of Arterial Road West and Souvenir Road be replaced with a permanent concrete barrier between the specified points on the N3 highway for purposes of safety due to the fact that their properties were located closer to the freeway as a result of the broadening of the road surface.

[4] After protracted negotiations between the parties which was characterised by an exchange of letters and technical data, the parties agreed on how the matter should be settled. For completeness sake it is my view that the entire settlement agreement should be reproduced hereunder to put the matter in its proper perspective:

"***SETTLEMENT AGREEMENT***

WHEREAS:

1 The Applicants launched an application out of the above Honourable Court against the Respondent for the following relief:

1.1 That the matter be heard as one of urgency and that the forms and services provided for in these rules be dispensed with, and that the matter be disposed of at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable, be in terms of these Rules) as to this Honourable Court seems to meet, in terms of Rules 6(12)(a).

1.2 In so far as it may be applicable, that non-compliance with S35 of the General Law Amendment Act 62 of 1955 be condoned.

1.3 That the Respondent be interdicted from opening the far left lane of the N3 national road, northbound ('the road') between the Van Vuuren onramp and up to the point in line with the intersection of Arterial Road West and Souvenir Road with the existing and proposed guardrail in place, pending the institution within 60 days of such further legal proceedings as the Applicants may be advised is necessary.

1.4 Costs of the suit if defended.

1.5 Further and/or alternative relief.

2 An order was granted by the above Honourable Court on 20 March 2010 in the following terms:

2.1 The Respondent will close the far left lane of the N3 national road, northbound ('the road') between the Van Buuren onramp and up to the point in line with the intersection of Arterial Road West and Souvenir Road.

2.2 The Respondent will replace the temporary concrete barriers on the right hand side of the far left lane of the road between the points referred to hereinabove.

2.3 *This agreement will prevail as an interim order pending the outcome of this application.*

2.4 *The application is postponed sine die.*

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

3 *The Respondent shall construct a permanent concrete barrier, which will be situated along the far left lane of the N3 national road, northbound as set out in the design diagram annexed hereto as annexure A and with the dimensions and specifications set out in the design diagram annexed hereto as annexure B.*

4 *The temporary barrier shall remain in place until the permanent barrier is finally constructed.*

5 *The parties consent to this agreement being made an order of court.*

Michaelides Attorney and Conveyancers for and on behalf of the Applicants	*As witness*
Werksmans Attorneys for and on behalf of the Respondents"	*As witness*

[5] This application is re-enrolled by the respondent because they were of the view that they had complied with the terms of the interim order granted on 20 March 2010. It is the respondent's further contention that the interim order was all about the barrier issue, and not any other issues that the applicants were continually bringing up. They (applicants) did not respond or revert to the respondent when this aspect was pointed out to them, only undertaking on 29 June 2011 to revert after taking further instructions.

[6] The respondent further communicated to the applicants on 29 August 2011 their intention to have the interim interdict discharged with a *proviso* that any new issues that have or may arise, be thrashed by and between the parties in the normal way.

[7] The respondent's course of action and/or view was, according to them, informed by the fact that as a result of their successful completion of their mandate the applicants' attorneys, at the time, Michaelides Attorneys, had been terminated and that only the first, second, third and fourth applicants have reinstated the mandate of the third applicant as their new attorneys of record. The fifth and sixth applicants have not appointed any attorneys to represent them.

[8] This application therefore is about whether or not the interim order granted by Halgryn AJ on 20 March 2010 should be discharged.

HISTORY OF THIS MATTER POST INTERIM ORDER

[9] The historical context of this matter is best contextualised by reference to some salient facts relating to the run-in towards the granting of the interim order. Same, in my view, explain what occurred after the granting of the interim order.

[10] Following on various discussions between the parties on the type of concrete barrier (hereinafter to be referred to as "*the agreement barrier*") or

"concrete barriers" to be constructed by the respondent, the respondent's attorneys of record, Werksmans Incorporated, sent a letter to the applicants through their attorneys on 26 August 2010, to which was annexed a diagram of the proposed permanent barrier.

[11] On 15 October 2010 the applicants' attorneys of record then, Michaelides Attorneys, addressed a letter to the respondent's attorneys wherein it was confirmed that the applicants' experts were in agreement with the respondent's proposal regarding the permanent concrete barrier.

[12] On 10 November 2010 the first applicant addressed a letter to the respondent's attorneys wherein again it was confirmed that the applicants' experts were in agreement with the proposed final resolution to the N3 barrier. It was also stipulated in the same letter that the outstanding issues that remained to be resolved by and between the parties were:

12.1 the increased noise level caused by passing traffic on the highway;

12.2 the defective drainage constructed;

12.3 drainage around that part of the N3 in genera; and

12.4 security.

[13] It is common cause that the above so-called "*remaining issues*" referred to above do not form part of the application in terms of which the interim order was granted. They are new issues which the applicants now wanted to negotiate on with the respondent.

[14] On 12 November 2010 the respondent's attorneys confirmed in writing an agreement that the parties had reached during their negotiations and proposed that it prepares a settlement agreement that would be signed by the parties and then be presented to this Court to be made an order which would invariably result in the interim order being discharged. It was also communicated in the same letter that the construction of the permanent barrier would commence on 15 November 2010.

[15] The draft settlement agreement was forwarded to the applicants' attorneys under cover of a letter dated 19 January 2011.

[16] On 21 January 2011 the applicants advised in writing that they were in principle agreeable to entering into the agreement as encapsulated in the draft settlement agreement, provided that it was amended to make provision for the payment of costs.

[17] On 8 February 2011 the parties met to discuss the outstanding issues as raised in the applicants' attorneys' letter of 10 November 2010.

[18] On 27 May 2011 the applicants were advised that the permanent barrier had been finally constructed, thus signifying compliance with the terms of the interim orders, which fact should pave a way for the discharge of same. What is noteworthy from the above letter is that the respondent was also seeking the applicants' co-operation to have the temporary barriers removed so that the far left lane on the N3 on this specific portion of the road in issue in this application could be opened, to allow traffic to flow without any potential danger to the road users. By extension this ought to be interpreted to also include the applicants and all other residents and/or occupants of premises bordering this specific portion of the road.

[19] On 30 May 2011 the applicants' attorneys responded and among others undertook to revert to the respondent after their experts had assessed the barrier before they could agree to the removal of the temporary barrier. In the same letter the applicants re-raised those additional matters that were not part of the interim order. It appeared that the former were dilly-dallying in signing the settlement agreement in the hope that those additional matters could be part of the final settlement of the issues.

[20] On 28 June 2011 the respondent wrote to the applicants wherein the issue of the removal of the temporary barrier were again raised. The attorneys for the respondent also emphasised in the letter that the "*outstanding issues*" that were or had been discussed by the parties did not form part of this application and that they should not be used as an obstacle in relation to the issue of the removal of the temporary barrier, which is the issue

addressed by and/or in the interim order. The respondent called upon the applicants to let their experts inspect the permanent barrier and revert, with comments, if any, by no later than Friday 8 July 2011. In keeping with the Latin or legal maxim, *repetitio est mater studiorum*" the respondent re-emphasised to the applicants that the sole issue covered by the interim order was the issue of the barrier and not other issues that the parties discussed in between. The respondent by way of emphasis repeated their contention that with the construction of the permanent barrier, the respondent has complied with the interim court order.

[21] The applicants' attorneys responded via e-mail on 29 June 2011 and undertook to revert once they have received further instructions from their clients. As at the date of execution of the respondent's answering affidavit, which was done on 20 September 2011, the applicants had not yet reverted to the respondents on the settlement agreement and neither had they given the go-ahead that the temporary barrier may be removed.

[22] At this stage, according to the respondents, it transpired that the mandate given to Michaelides Attorneys by the applicants have then been terminated, most probably because it was agreed that the respondent had executed or complied with its obligations in relation to the interim order. Somehow, the third applicant conjured to be appointed or re-instated as attorney of record to the first, second, third and fourth applicants. The speculation is that because the third applicant is also a party herein, his retainer could have had something to do with the additional issues the

applicants were now bringing to the table. The fifth and sixth applicants did not appoint other attorneys and most probably do not want to have anything further to do with the protraction of the proceedings beyond their natural life span.

[23] In a further endeavour to amicably reach consensus on the discharge of the interim order, and on 29 August 2011, the respondent addressed or caused a letter to be addressed to the applicants, amongst others, reiterating the fact that the respondent had complied with the interim order; further that insofar as any other issues falling outside the application and the interim order were concerned, the respondent was most willing to engage the applicants on a possible resolution of their concerns. The respondent specifically put it on record in this letter that those issues not forming part of the application should not be held against the discharge of the interim order.

THE PLACE OF THE INTERIM ORDER

[24] It is so that once a conduct complained of or the harm, which was sought to be interdicted has been addressed, an interim order granted for that purpose loses its purpose or rationale and it should be discharged. Equally, where a position has been reached where there is no more threat to any rights, the protection whereof may have precipitated the granting of an interim order, the party granted that interim order is no longer entitled to the operation or protection of that interim order as it would have become academic.

[25] The respondent has submitted and argued that in essence there is no need for the interim interdict to operate further, as to allow that to happen would be tantamount to frustrating the respondent in discharging its obligations in terms of the law as well as inhibiting it to address or give effect to other contractual duties.

[26] The respondent further argued and submitted that even before it could file its answering affidavit, in a bid to avert any unnecessary costs being expended by going to court, they approached the applicants through their attorneys to consent to the interim order being discharged as the respondent had done what was expected of it to have same discharged. The latter had constructed the concrete barrier where the one previously complained about was. It is the respondent's complaint, submission and argument further, that what the applicants are now "*gunning*" for is to interdict the respondent in, perpetuity by coming up with further demands which were no longer the subject matter of the court after the interim order was obtained. They are asking this Court to regard this conduct as a deliberate act of abuse of the court process. It is for these reasons among others that the respondent is asking that the interim interdict be discharged with a punitive costs order.

APPLICANTS' VERSION AS TO ISSUES TO BE DECIDED

[27] In their initial practice note relating to this application the applicants set out the issues to be determined to be:

27.1 Whether the respondent has complied with the interim order alternatively with the relief sought by the applicants;

27.2 Whether the concrete barrier constructed by the respondent safeguards the applicants' lives and properties; and

27.3 Whether the applicants are *bona fide* in their disputing of the discharge of the interim order.

[28] In between, the applicants contend that during their communications with the respondent on how and when the interim order may be discharged:

> "*6. ... certain issues arose relating to noise levels, drainage and vibrations. Despite agreeing to the concrete barrier proposed by the Respondent, the Applicants sought expert advice in relation to methods to reduce the noise levels in order to propose such to the Respondent who had done nothing to alleviate this issue (or indeed the drainage).*
>
> *7. New experts employed by the Applicants in the course of his inspection for the purposes of advising regarding the noise levels, also advised the Applicants that the concrete barrier built by the Respondent pursuant to the agreement was not in fact sufficient to protect against heavy vehicles, such as articulated trucks, from crashing through or mounting the barrier and falling into the Applicants' properties.*"
>
> *(- Pp 6 applicants' practice note, paras 6 and 7)*

[29] The applicants were by the above, introducing new matters that were not covered by or were part of the reasons why the interim order was granted. They had engaged "*new*" experts who were to investigate issues like noise

levels, drainage and vibrations and this "*new*" experts advised the applicants to go against the impressions they had given to the respondent that they agreed that the latter had complied with their mandate concerning the construction of the concrete barrier. This prompted the applicants to file a replying affidavit resplendent with the opinions of their new experts, Dr Liebenberg and Mr Kichenbrand. In the same replying affidavit the applicants also went against their earlier word that they were satisfied with the concrete barrier constructed by the respondent.

[30] This replying affidavit in my view opened a can of worms insofar as processes relating to the discharge of the interim order were concerned. It was also filed out of time. The matter had to be postponed in court to allow the respondent to consider it. It precipitated another exchange of supplementary affidavits. The respondents had to engage other experts, namely, Dr Hay and Dr Du Preez to deal with the "*new*" issues raised by the applicants.

[31] Of importance from the supplementary affidavit of the respondent was their submission and contention that:

31.1 The rule *nisi* had become academic and should be discharged;

31.2 The applicants may not raise new matters in the replying affidavit and that this replying affidavit and/or its contents should be struck out; and

31.3 The fifth and sixth applicants were no longer applicants after they had delivered an affidavit stating that they did not oppose the relief sought.

[32] This attracted a further supplementary affidavit from the applicants in reply to the respondent's reply. The applicants argued that they were entitled to so reply as the respondent had not raised the issues contained in its supplementary affidavit in its answering affidavit.

[33] It is my considered view that the above is not entirely correct. The respondent's supplementary affidavit was a response to the "*new matters*" raised by the applicants in their replying affidavit.

[34] It is consequently my further view and finding that the applicants' submission or contention that:

> "*... 18. In such circumstances it is submitted that the Applicants cannot be held to their agreement concerning the concrete barriers as a dispute had arisen between the experts as to whether such barrier is indeed sufficient ...*"

cannot be upheld. These new matters were not issues when the interim order was granted. It may be so that the parties continued in or with discussions about collateral issues related to what they had agreed upon. However, it is my finding that to pounce on such "*new*" issues and claim a dispute of facts

may not only be inappropriate in the circumstances but also somewhat dishonest.

[35] The above superfluous issues informed the formulation by the applicants of the following as issues that this Court now should determine:

35.1 Whether the applicants were entitled to raise the new matters in their replying affidavit and whether such should be struck out;

35.2 Whether the applicants are *mala fide* and whether they are in fact seeking a "*perpetual interdict*" as alleged by the respondent;

35.3 Whether the applicants must be held to their "*agreement*" to accept the building of the New Jersey type concrete barriers that the respondent indeed and ultimately built; and

35.4 Whether the New Jersey type concrete barrier is in fact adequate to protect the homes and persons of the applicants and whether the interim order should be discharged.

[36] What emerges from the above is a concession or admission by or from the applicants that they had agreed to the erection or building of the concrete barriers the respondent had constructed.

[37] It is common cause that the cause of action in the matter that ended up in the interim order being granted was the replacement of the barriers earlier

in place and objected to by the applicants with the New Jersey type concrete barriers the respondent ultimately built. It is also common cause that the construction thereof was as per the parties' agreement.

[38] In *Union Finance Holdings Ltd v I S Mirk Office Machines II (Pty) Ltd* 2001 (4) SA 842 (W), Epstein AJ put it as follows regarding the above aspect:

> "*This is not a case where the applicant is seeking to introduce new matter only. The applicant is seeking to introduce a new cause of action. It is well established that the necessary allegations relating to the cause of action upon which an applicant relies, must appear in the supporting affidavits and that the court will not, save in exceptional circumstances, allow the applicant to make or supplement its case in its replying affidavit.*"

See also: *Bayat and Others v Hansa E and Another* 1955 (3) SA 547 (N) at 553C-G.

[39] It is my considered view and finding that the respondent always was in jeopardy in respect of the issue relating to the concrete barrier. It is now clear that, in the face of their agreement that the respondent had discharged its obligations in respect of the concrete barrier, the applicants jettisoned the original cause of action and are seeking or sought to substitute it with another based on noise levels emanating from a freeway that have been there where it is since time immemorial, drainage issues and vibrations caused by passing vehicles. This does not merely amount to the introduction of a new matter, but may also be understood and should be interpreted to mean an introduction of a new cause of action. By all means, the applicants are at liberty to raise other matters new to the matters covered by the interim order,

however, they should be raised on their own right in their own separate action or application.

WHO RESPONDENT IS AND WHAT ITS ROLE IS

[40] The events that occurred as set out briefly hereinbefore makes it imperative that this Court decipher who the respondent is and what its functions or role is. In so doing this Court will also seek to determine whether or not in the peculiar circumstances of this application, the respondent acted in the manner expected of it.

[41] The respondent was established in terms of section 2 of the South African National Road Agency Limited and National Roads Act, 1998 (Act 7 of 1998) as amended ("*the SANRAL Act*"). It is a public company wholly owned by the State which has been incorporated in terms of the Company laws of the Republic of South Africa ("*RSA*").

[42] The main functions of the respondent are described in Chapter 3, particularly section 25(1) of the SANRAL Act, which reads as follows:

> "*(1) The Agency, within the framework of government policy, is responsible for, and is hereby given power to perform all strategic planning with regards to the South African national road system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic, and is responsible for the financing of all those functions in accordance with its business and financial plan, so as to ensure that government's goals and policy objectives concerning national roads are achieved, subject to section 32(3).*"

[43] Section 26(e) of the SANRAL Act granted the respondent additional powers to provide, establish, erect and maintain facilities on national roads for the convenience and safety of road users.

[44] From the aforegoing it is clear that the respondent did act responsibly in dealing with the applicants by agreeing to have a permanent barrier constructed on the N3 freeway at the points mentioned in the interim order and, can be said, under the circumstances to have adhered to the interim order as well. But for the new issues the applicants are bringing up now, the respondent could validly claim to have satisfied the terms of the interim order. The experts who were advising the applicants when the concrete barriers were planned and constructed were satisfied that the respondent had accomplished the tasks set or required of it in terms of the interim order. Its attorneys of record even packed their bags and left the scene as they too were satisfied that the respondent had done what was expected of it. The new attorneys of record driving this new or extended or elongated application is related to one of the applicants themselves. This in my view raises some eyebrows. Unfortunately I cannot speculate on what the rationale is or was for this or come up with my own conspiracy theories all in an attempt to decipher what things like this came to be or pass. It is not part of my mandate or duties and I will leave it at that.

[45] Correspondence exchanged between the parties when the process of constructing the concrete barriers has been set out above – all culminating in the applicants agreeing that the structure(s) constructed was what the

applicants wanted. They (applicants) now unashamedly state that they are reneging from the agreement they reached with the respondent as a result of other new issues that should have died there when the parties agreed to the interim order being made an order of court.

DELAY OR FAILURE TO INITIATE FURTHER PROCEEDINGS

[46] In terms of paragraph 1.3 of the interim order the applicants were to institute and prosecute further proceedings related to the matters in issue here within 60 days of the date of the interim order, i.e. 20 March 2010.

[47] As at the date of argument of this matter, i.e. 27 July 2012, that was 2 years 4 months and 7 days ago. When the period is converted into days, so that it be seen within the context of the format used in the interim order, that was 852 (eight hundred and fifty two) days ago. Such further proceedings have not yet been instituted. It would appear that the applicants were under the impression that the 60 days ran from the date of discharge of the order. That is not so, for once the interim order was discharged, the rationale for future proceedings would have fallen away.

[48] An application for an interdict *pendente lite* from its very nature requires the maximum expedition from an applicant. The latter may forfeit his right to the temporary relief if he delays unduly in bringing the interim proceedings to finality.

[49] In *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C) Van Wyk J held as follows at page 445C-D:

> "*If one bears in mind the long delays, for which no explanation has been given, that as far back as December the applicant had numerous clear cases of copying in its possession, according to the letter written by the applicant, and that up to now no action has been instituted, it seems that the applicant has erred in selecting this method, namely, an application for an interdict pendente lite, but even if it was the appropriate procedure at the time, the applicant has, by reason of the facts stated above, forfeited its rights to this temporary relief. Had it issued summons at the time when the notice of motion proceedings were instituted, the trial could already have taken place.*"

[50] In the above case the notice of motion was instituted on 14 March 1969. The court delivered its judgment on 9 September 1969. Therefore the period the honourable court ruled was unacceptably long was only 6 (six) months.

[51] The learned judge went further on the same page at lines E-F and stated the following:

> "*There is no such thing as the tyranny of litigation, and a court of law should not allow a party to drag out proceedings unduly ...*"

[52] Courts should not allow failure or undue delay on the part of an applicant to press on with the main application or action after a rule *nisi* had been obtained. Undue delay should lead to the discharge or dismissal of the rule *nisi*.

See: *Bandell v Jacobs* 1970 (4) SA 630 (SWA) at 635B-E.

Chopra v Avalon Cinemas SA (Pty) Ltd 1974 (1) SA 469 (D) at 472E.

[53] The fact that the applicants have done nothing towards the fulfilment of their promise or undertaking to institute further proceedings within 60 days of 20 March 2010 is not only prejudicial towards the interests of the respondent but also a confirmation of the latter's assertion that they (applicants) are enjoying an unfair benefit by ensuring that the interim order operates in perpetuity has merit.

[54] The applicants in their letter of demand dated 15 March 2010 among others stated that:

> "*This letter of demand is concerned only with traffic safety.*
>
> *As far as the other issues raised by our clients are concerned, we herewith reserve their rights, should the need arise, to take appropriate action at the appropriate time and in the appropriate forum.*"

[55] This has not happened and over 800 days had long elapsed or passed. Those safety issues were the ones that underpinned the interim order ultimately granted. Even the applicants' founding affidavit did not raise any other issues other than the building by the respondent of a rigid, non-flexible barrier made of concrete, which has been done. Consequently the question by the applicants whether they were entitled to raise new matters in their

replying affidavit is answered with a No! It thus stands to reason that the new matters raised in the replying affidavit of the applicants stands to be struck out or dismissed.

[56] Another consideration connected hereto is that in order for the applicants to meet the requirements for an interim order and in an attempt to justify the harm which the applicants were likely to suffer in the event the interim order was not granted, they placed facts pertaining only to safety issues before the court.

[57] The applicants argued that apprehension of likely or possible danger to life, limb and property justifies them raising the new issues in reply. That cannot be allowed. They are not issues that are or were germane to the granting of the interim order. I am not saying that they are not important : I am saying that by dealing with or allowing them to be introduced into this present application, it would be tantamount to allowing new facts at this stage, unduly or underserved.

FURTHER AFFIDAVITS AND REPLYING AFFIDAVIT

[58] The applicants indeed concede that they raised new matters in their replying affidavit. Furthermore, subsequent to the respondent's answer to the replying affidavit through their further affidavit, the applicants then came up with further or supplementary affidavits which came up with fresh opinions about or relating to the concrete barrier by new experts.

[59] The respondents are applying that the new matters or further affidavits be struck out.

[60] On the other hand, the applicants contend that as a consequence of the exchange of the further affidavits a dispute of fact has arisen which should be referred to evidence.

[61] Rule 6(5)(e) of the Uniform Rules of Court provides that:

> "*Within 10 days of the service upon him of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of sub-rule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.*"

[62] It is common cause that the filing of further affidavits after the filing of the applicants' replying affidavit were not authorised by the court. It is however also so that the respondent has not raised strident cries against the filing of same but also filed their own. The above irrespective, this Court still has a discretion to allow or disallow any new evidence and/or further affidavits filed without its sanction.

[63] It is a general rule of practice that an applicant should rely upon its founding affidavit to substantiate its case. It should not attempt to make out its case in its replying affidavit.

[64] It is my considered view and finding that the applicants made all the necessary allegations upon which they relied on which resulted in the grant of the interim order, in their founding affidavit. The respondent fully responded to the allegations in its answering affidavit. As a consequence the interim order was agreed upon between the parties based on what was before the court. It is my finding that the applicants are now seeking to or reneging from their original word(s) and are raising the new matters.

[65] If allowed or the applicants' request or conduct is allowed to continue, this would result in these proceedings being open-ended and consequently ending up being what the respondent terms an interim interdict in perpetuity.

[66] It is thus my considered view and finding that the applicants should not be allowed to supplement their case or affidavit by adducing new facts and new material in their replying and further affidavits.

See: *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368H-369B.

Masenya v Seleka Tribal Authority 1981 (1) SA 522 (T) at 523G.

Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd 1984 (3) SA 202 (T) at 205E.

[67] Scholtz JA put it as follows in *Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at 439G-H:

> "*There is one other matter that I am compelled to mention - replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest - and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the Courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.*"

[68] In our present case, it is my view and finding that the above *dictum* should be followed.

[69] The applicants' introduction of new matters lends itself to the interpretation that it may amount to an abandonment of the existing claim (as personified or embodied by) or in the interim order and/or the substitution therefor of a fresh and completely different claim based on a different cause of action.

See: *Triomf Kunsmis (Edms) Bpk v AE&CI Bpk* 1984 (2) SA 261 (W) at 270A.

Johannesburg City Council v Bruma Thirty Two (Pty) Ltd 1984 (4) SA 87 (T) at 91F-92F.

[70] Where a different case is being made in reply which is different from the one made in the founding affidavit, the court should not allow that to happen.

[71] That should be the course of action taken by or in this application.

See: *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) at 316A.

[72] The situation in this application is exacerbated by the fact that the respondent's answering affidavit was filed on 22 September 2011. The applicants waited until the day before the date of hearing or set down, i.e. 25 October 2011, to file the above replying affidavit of some 135 pages.

[73] As stated above, this replying affidavit introduced new averments and/or allegations which are different from the averments and/or allegations made in the founding affidavit. This in turn, in my view, introduced new matters and/or case which was not pleaded by the applicants originally which resulted in the granting of the interim interdict. New documents were attached to the replying affidavit which did not contain issues that formed part of the applicants' case in their founding affidavit. The respondent filed its responding affidavit conditionally or as an act of caution lest the court allowed the replying affidavit to stand.

[74] The filing of the replying affidavit and the respondent's responses thereto led to the matter being postponed by Moshidi J of this Court on that last date of hearing.

[75] Although the applicants tendered the costs occasioned by that postponement, they did not stop there. Five (5) days before this application was to be heard, the applicants filed another or further affidavit without leave from the court or the consent of the respondent.

[76] In the interests of justice and finality of matters, this Court regards the new matters and further affidavits filed herein as being *pro non scripto*.

See: *Sealed Africa (Pty) Ltd v Kelly* 2006 (3) SA 65 (W) at 67B-E.

Waltloo Meat & Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd 2008 (5) SA 461 (T) at 472H-472J.

Standard Bank of SA Ltd v Sewpersadh 2005 (4) SA 148 (C) at 153H-154J.

[77] The introduction of new facts or affidavits may have been justified or justifiable if and when there were special circumstances that justified the filing of the further affidavits. I find that there were no unexpected or new facts which emerged which could have justified the applicants' conduct to do so in the peculiar circumstances of this case.

See: *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 38J.

Nick's Fishmonger Holdings (Pty) Ltd v Fish Diner in Bryanston CC 2009 (5) SA 629 (W) at 641G-642D.

[78] The new matter thus stand to be struck out and are thus struck out. Similarly, all further affidavits coming up with or substantiating new matters are also struck out.

CONCLUSION

[79] In terms of the interim order the applicants were to institute further legal proceedings within 60 days of the date of that interim order. Two years down the line, no such further legal proceedings have been instituted. It is also noteworthy that this application was set down by the respondent, not the applicants. Even the proceedings before Moshidi J were set down by the respondent.

[80] Consequently, the respondent's contention that the applicants' actions are only there to cause an undue delay in the discharge of the interim interdict, and/or it being consciously obstructed in its execution of its mandate, is hard to gainsay or disregard.

[81] The applicants are the ones who dragged the respondent to court, "*kicking and screaming*". Now, they are the ones dragging their feet when the matter should be finalised.

[82] In *Sandell and Others v Jacobs and Another* 1970 (4) SA 630 (SWA) at 635B-E Hoexter J put it as follows about whether the applicants could or should have acted immediately with the institution of the further proceedings or waited for issues relating to the interim interdict to be determined:

> "*Mr. Levy's argument was that relief pendente lite is a special remedy requiring the maximum of expedition on the part of the applicant to institute and prosecute his main action. Counsel pointed out that the applicant Sandell applied for her order on 27th May, 1970; that Mrs. Booysen applied for her order on 28th May, 1970; that Hartmann applied for his order on 15th June, 1970 and that Wronsky applied for his order on 8th June, 1970. Despite the considerable lapse of time between the dates that I have mentioned and the last hearing, no single applicant had actually instituted an action in respect whereof relief pendente lite was claimed by the time when the matter was last heard. In stressing the need for expedition in such cases Mr. Levy referred the Court to the decision in Juta & Co. Ltd v Legal and Financial Publications Co. (Pty.) Ltd., 1969 (4) SA 443 (C) at p. 445. There can be no doubt in my opinion that the facts to which Mr. Levy alluded represent a serious criticism of the conduct on the part of all four applicants. Nor do I consider that there is any substance in the suggestion made by Mr. O'Linn, if I understood him correctly, that in cases of this sort the applicants are fully entitled to await the outcome of the pendente lite applications before instituting their main actions. In my view the actions should have been instituted at once.*"

[83] This is one of the grounds the respondent is asking for the discharge of the interim interdict.

[84] The original or primary complaint of the applicants was that the steel guard rails at the material portions of the N3 freeway were insufficient and should be replaced with a permanent concrete rail. This was in my view done. It is borne out in a letter from its attorneys and experts signifying their satisfaction with what the respondent had done. At folio 83-84 of the papers herein the material portion of the letters (from Jurgens Bekker Attorneys to the Regional Manager, SANRAL, Mr Essa) reads as follows:

> "*This letter of demand is concerned only with traffic safety.*
>
> *As far as the other issues raised by our clients are concerned, we herewith reserve our rights, should the need arise, to take appropriate action at the appropriate time and in the appropriate forum.*"

[85] That appropriate forum is the court wherein the further proceedings were or are to be instituted.

[86] Incidentally, *ex abundanti cautela*, Jurgens Bekker Attorneys is the firm of attorneys belonging to or to which the third applicant belongs.

[87] The applicants' experts recommended a 1,2 m concrete barrier and this is what was constructed. To now start coming up with new facts to the effect that only anything from 1,5 m or higher would be acceptable is in itself also unacceptable.

[88] The arguments and submissions tendered in court by counsel for the applicants were at variance with what is contained in the documents filed

herein : They confirmed their satisfaction with the structure to be built and later after it was built in the papers but came up with a totally different viewpoint in arguments in this Court.

[89] By its nature and extent, the interim order encompassed terms agreed to by the parties that:

89.1 The respondent close the far left lane of the N3 National Road, northbound, between the Van Vuuren off-ramp up to a point in line with the intersection of Arterial Road West and Souvenir Road;

89.2 The respondent replace the temporary barriers on the right hand side of the far left lane of the road between the points referred to above;

89.3 This agreement prevail as an interim order pending the outcome of this application; and

89.4 The main application is postponed *sine die* subject to the institution of further proceedings by the applicants within 60 days of the date of the interim order.

[90] From the aforegoing it is my considered view and finding that the respondent has done enough to justify an approach to this Court for the discharge of the interim order/interdict.

[91] Allowing the interim interdict to remain in force so as to accommodate the new issues, facts or matters raised by the applicants would be prejudicial to orderly administration and the respondent as an entity as well as an affront to recognised and accepted conventions and procedures.

[92] The interim interdict thus stands to be discharged.

[93] There is no justification in my view for any issues to be referred to evidence or the matter to be referred to trial. Issues the applicants allege constitute disputes of fact were not there when the interim order was granted. They were raised in the replying affidavit and further affidavits, mostly as new matters. After being struck out they are *pro non scripto*. Even if they were not struck out, they would have constituted self-contrived and/or or artificial creations of disputes of fact which should not weigh sufficiently with the court to justify any referral to evidence or trial.

COSTS

[94] The respondent has asked for the discharge of the interim order/interdict with a punitive costs order.

[95] The issue of what cost order to grant lies within or with the discretion of the court, judiciously and correctly exercised. The facts and circumstances of each individual case dictates what cost order should follow.

[96] As stated above, there is evidence of how the respondent's attorneys made several approaches to the applicants through their attorneys to settle issues in dispute herein so as to avoid unnecessary costs of having to file an answering affidavit and it going to court for full argument. These were rebutted in the sense of the overtures not yielding the necessary or desired results.

[97] Instead, a replying affidavit was filed, followed by unauthorised further affidavits. A full and lengthy court session(s) ensued.

[98] It is clear from the papers and from argument and submissions in court that all the issues emanating from the interim order were decisively and comprehensively dealt with by the respondents : They engaged their experts and undertook additional designs and labour, at a great expense, to deal with the issues circumscribed in the interim order.

[99] It is my finding therefore, that the proceedings herein were protracted as a result of the applicants' insistence in the face of clear proof that same was unnecessary, to contrive, by their conduct, to have the interim interdict in force perpetually. The applicants' new and/or further demands not only prolonged the proceedings but also resulted in unnecessary expenses to the

respondent, thus capable of being categorised as an abuse of the court process.

[100] Even after the attorneys engaged or retained by the applicants had gone out of the case after their mandate had been "*satisfied*", the applicants, with the exception of the fifth and sixth applicants who categorically indicated that they were satisfied that the respondent had done all to justify a discharge of the interim order, the third applicant, an attorney himself, used his firm of attorneys to continue litigating.

[101] The above among others in my view come down to reckless or negligent conduct of proceedings in a manner that disregarded accepted precepts. Such conduct, just like similar capricious conduct and/or behaviour deserve to be punished with a punitive costs order.

[102] As suggested by Schultz JA in *Minister of Environmental Affairs v Bato Star Fishing* case, *supra*:

> "*... It is time that the courts declare war on unnecessary prolix replying affidavits (read in unnecessary litigation) and upon those who inflate (read in continue with) them.*"

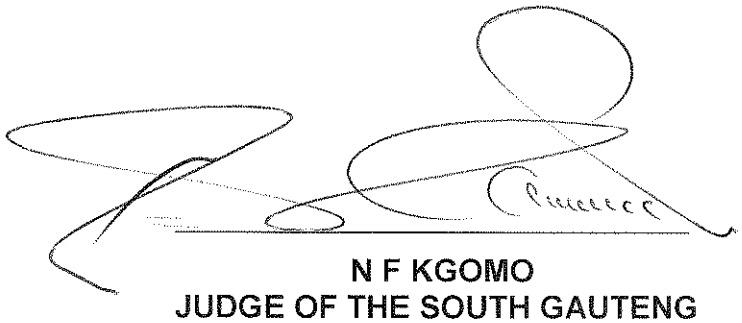
[103] From the totality of evidence in this application and also as viewed from the conduct of both sides, it is my finding that the applicants, i.e. those that continued with the prosecution of this application, should be ordered to pay the costs of this application on a scale as between attorney and client.

ORDER

[104] The following order is made:

(a) The rule *nisi* issued or granted by Halgryn AJ on 20 March 2010 in this Court is hereby discharged because the respondent has satisfied the requisites therein set out;

(b) In addition to those costs that have already been levied or saddled onto the applicants by other courts in relation to this matter, the first to the fourth applicants are hereby ordered to pay the costs hereof on a scale as between attorney and client, which costs should include the costs of two counsel.



N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE APPLICANTS	ADV G KAIRINOS (011) 290 4000/082 565 6696
INSTRUCTED BY	JURGENS BEKKER ATTORNEYS BEDFORDVIEW, JOHANNESBURG TEL NO: 011 – 622 5472/5445
FOR THE RESPONDENT	ADV P L MOKOENA SC 082 496 2734
INSTRUCTED BY	WERKMANS ATTORNEYS MARBLE TOWERS, JOHANNESBURG TEL NO: 011 – 535 8145
DATE OF ARGUMENT/ HEARING	27 JULY 2012
DATE OF JUDGMENT	19 OCTOBER 2012