REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 40106/2012

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

2012-10-29
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

and

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED	Respondent

J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] This is an application launched by the applicants against the respondent on an urgent basis for an order:

1.1 That the matter be heard as one of urgency and that the forms and service provided for in the Rules of Court 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 possible or practicable, be in terms of the Rules, especially or specifically Rule 6(12)(a);

1.2 That the respondent be ordered to close the far left lane of the N3 Highway north-bound, nearest to the applicants' properties and replace the temporary barriers that were in place from 20 March 2010 until 22 October 2012 pending the finalisation of the first to fourth applicants' appeal proceedings against the judgment I (Kgomo J) handed down on 19 October 2012 under Case No. 09716/2010;

1.3 Costs of suit if opposed;; and

1.4 Further and/or alternative relief.

[2] The application is opposed by the respondent.

[3] It should be mentioned at this stage that as at the date of argument of this matter on 26 October 2012 no application for leave to appeal to my aforementioned judgment had been placed before or brought to me. However, the respondent acknowledged that same was served on it by the applicants on 19 October 2012 and filed at court on 22 October 2012. As such this Court deals with this matter with the understanding that leave to appeal my judgment of 19 October 2012 has been noted or sought. Copies thereof were handed in from the bar at the start of argument in court on 26 October 2012.

THE JUDGMENT SOUGHT TO BE APPEALED AGAINST

[4] In the 19 October 2012 judgment (hereinafter referred to as "*the main judgment*" or "*19 October 2012 judgment*" the applicants were the four applicants and two others, namely, Ernest Bernadus Nel (fifth applicant) and Good Nigh Guest House CC t/a Good Night Guest Lodge (sixth applicant). These last two-mentioned applicants expressly and unequivocally dissociated themselves from being seen as or being parties still wishing to continue with the prosecution of that application. As such the cost orders granted in the

main judgment were not applicable to them. That state of mind or intention is manifested by the fact that they are not party to this present urgent application.

[5] The prayers the applicants sought, also on an urgent basis, against the respondent there are almost identical with the orders presently sought. Since there may be some microscopic differences between the two, I proceed to set out the prayers the applicants sought in the initial application that led to the judgment in the main application. They were as follows:

5.1 That the respondent should close the far left lane of the N3 National Road north-bound between Van Buuren off-ramp up to a point in line with the intersection of Arterial Road West and Souvenir Road;

5.2 That the respondent replace the temporary barriers (steel guard rails attached to wooden studs or poles) on the right-hand side of the far left lane of this road between the points referred to herein above;

5.3 That the order so granted should stand and/or prevail as an interim order pending the outcome of that application;

5.4 That the application is postponed *sine die*.

5.5 The applicants were to institute formal proceedings within 60 days.

[6] On 20 March 2012 and after in-depth negotiations between the parties, Halgryn AJ made the following order, hereinafter referred to as "*the interim order*":

> "*BY AGREEMENT, the following order is made:-*
>
> 1. *The Respondent will close the far left lane of the N3 national road, northbound, ('the road') between the Van Buuren on-ramp and up to the point in line with the intersection of Arterial Road West and Souvenir Road.*
>
> 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 hereinbefore.*
>
> 3. *This agreement will prevail as an interim order pending the outcome of this application.*
>
> 4. *This application is postponed sine die.*"

[7] The judgment of 19 October 2010 was aimed at determining if and/or whether the respondent had fulfilled its obligations in terms of or as laid down in the interim order of 20 March 2010 to justify the discharge of that interim interdict.

[8] That judgment did not seek to determine other issues or disputes that the parties may have had between them. The assumption or understanding was that the applicants were still to or rather should have instituted formal

legal proceedings to deal with any other disputes or points of dissensus or disagreement.

[9] After listening to full and comprehensive argument from the parties' counsel, thoroughly perusing the papers filed of record and considering the matter, I made the following order:

> "*(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 (sic) 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.*"

[10] The above is the order from the judgment the applicants are applying for leave to appeal.

FURTHER CONCERNS RAISED BY THE RESPONDENTS AT THE START OF ARGUMENTS

[11] Before Adv Kairinos for the applicants could begin with argument in support of the application on 24 October 2012, Adv Mokoena SC for the respondent raised certain issues pertinently related to the legitimacy of this application or the wisdom for continuing to argue it. At that stage the respondent had not yet filed its opposing papers or answering affidavit.

[12] It emerged that after the applicants filed or served their application for leave to appeal on the respondent but before the latter could have time to react thereto, the papers in this urgent application were served on the latter in the morning of 23 October 2012, calling upon them to appear at court on the same day at 14h00. It also emerged that the parties appeared before my brother Lamont J on 23 October 2012 and the latter ruled *ex tempore* that this application be brought to me for adjudication as I had insight or understanding of issues relevant hereto by virtue of the fact that I dealt with the judgment being appealed against.

[13] Adv Mokoena also brought to the attention of this Court that he was only instructed by the respondent at 13h45 on 23 October 2012, hence he came to court at 14h00 that day without any opposing papers. He also questioned whether this was a new application based on its own facts and circumstances or just a re-incarnation of the previous and determined urgent application.

[14] As I did not have the benefit of Lamont J's ruling and counsel tendered differing versions of what he should have ordered, I adjourned the matter so as to go and talk to Lamont J, which I did. The latter explained to me that he removed the matter from the roll with advice to the parties to approach the Deputy Judge President of this Court to request that the matter be referred to me.

[15] When the court re-convened I adjourned the matter to 26 October 2012 and ordered that the respondent serve and file its answering affidavit by 12h00 on 25 October 2012 and the applicants to file their replying affidavit, if any, by close of day on 25 October 2012. Both parties duly e-mailed my office their affidavits on the evening of 25 October 2012 and I was ready to hear argument at 10h00 on 26 October 2012.

APPLICANTS' ARGUMENT

[16] The applicants argued that I erred in several respects in my judgment in the 19 October 2012 judgment, hence they are applying for leave to appeal. They contended that their safety and that of their family members, those associated with or living or working with or for them, as well as other members of the community living around the area adjacent to the relevant part of the N3 National Road had not yet been addressed when the interim order was discharged. It was also argued on their behalf that the widening of the roadway has had the effect of bringing the road closer to the edge of the embankment over-hanging their properties, thus there being clear apprehension of serious harm or danger in the event of a truck or a vehicle crashing through the concrete barrier the respondent had erected pursuant to the orders granted by Halgryn AJ, more-so that trees that were standing between the road and their properties earlier had also been chopped off during the widening of the road.

[17] The latter aspect (of trees) is a new matter that was never raised in the arguments in the application that led to the 19 October 2012 judgment. Incidentally, both parties herein are still represented by the same counsel who represented them in that main application.

[18] A major bone of contention raised by the applicants is the disallowance or disregarding of the new matters raised in the replying affidavit and further or supplementary affidavits the applicants filed in the main application without the sanction of the court, which affidavits they admitted raised new facts that even tended to raise new causes of action. They contended that had those affidavits been taken into account, this Court would have found that there were disputes of fact that could not have been resolved on the papers and which ought to have been referred to evidence or the whole matter referred to trial.

[19] The applicants conceded that they had agreed to the specifications and the erection of the New Jersey type concrete barriers that the respondent ultimately constructed. However, they argued that new engineers they engaged after the barriers were constructed warned them that the constructed barriers were not high enough to restrain a truck, hence they (the applicants) embarked on the route of filing supplementary affidavits which came up with the new matters that I refused to entertain. My understanding of their argument was that their subjective view that was fuelled by their new engineers, who contradicted the engineers they had engaged when the barriers were designed and built, should have persuaded this Court to make

an exception to recognised rules and procedures and take the new issues raised into consideration.

[20] In substantiation of their argument the applicants relied on the self-same supporting documents and expert reports that were before me before I decided the main application. They also made use of two photos depicting a Sport Utility Vehicle ("*SUV*") having been involved in an accident with its rear part restrained by a concrete barrier from going down the embankment there. There was also an articulated vehicle (truck) that had been stopped from toppling over by the recently constructed New Jersey style barrier. The accidents are said to have occurred during July and September 2012 respectively.

[21] It is of interest that counsel for the applicant even stated that:

> "... *rules are there to be bent* ..."

[22] The applicants conceded that I have correctly set out the chronology in the judgment they want to appeal. Their qualm is, as stated above, that after the new facts arose after the grant of the interim order, they should have been allowed in as exceptional circumstances.

[23] The applicants issued a threat or warning to the court : Should the Supreme Court of Appeal rule, in the event of leave being not granted by this court initially, that the new facts should have been allowed in or considered, I

would be sitting somewhere with a red or whatever correspondingly coloured face, to use the pun.

[24] These temporary barriers have been in place for about two years now.

[25] On the respondent's submission that the retention of the temporary barriers blocking or prohibiting the use of the extreme left lane north-bound is in fact causing a congestion in the road at the points in issue in it, thus contributing to rather than alleviating the occurrence of accidents the applicants stated that congested roads actually cause traffic to travel very slowly, leading to less accidents.

[26] An interesting observation. I will come to it later.

[27] The applicants then dealt with the requirements of the grant of an interim interdict and submitted that they have satisfied same.

RESPONDENT'S SUBMISSIONS

[28] The respondent submitted that there are no reasonable prospects of success on appeal and that this new urgent application was only there to obstruct the respondent in the execution of its constitutional mandate of constructing and maintaining roads for the use by all the people of South Africa. They further submitted that in the execution of that mandate in respect of this particular portion of the N3 National Road it had acted having had

regard to expert advice on issues of safety, free-flow of traffic and other considerations concomitant or pertinent to that mandate. The respondent charged the applicants of blowing hot and cold, approbating and reprobating, all at the same time. It was further argued on their behalf that the applicant sought the replacement of the temporary steel guard-rails with permanent New Jersey style concrete barriers but now they are asking the court to have the self-same guard-rails or temporary barriers reinstated or re-installed. It repeated the accusations it levelled at the applicants, of always shifting the goal posts – a situation that leads to the interim interdict granted by Halgryn AJ on 20 March 2012 being kept in place interminably.

[29] It was further argued on behalf of the respondent that no new exceptional circumstances had arisen to justify the re-installation of the discharged interim interdict, especially when regard is had to the fact that whatever the respondent did was demanded by the applicants, was designed and constructed with the blessing of the applicants and the active participation of their attorneys and engineers.

[30] Counsel for the respondent also dealt with interim interdict requirements and submitted that the applicants had failed dismally to satisfy them.

[31] The respondent asked this Court to dismiss the application on the merits or strike it off the roll due to lack of urgency with a punitive costs order as the applicants' conduct amounted to an abuse of process among others.

WHETHER APPLICANTS HAVE MADE OUT A CASE FOR GRANT OF THIS INTERDICT

[32] Both parties argued urgency. After listening to both it was and is my considered view and finding that this is one of those matters that should be decided on their merits, rather than on a technical point like urgency, in the interests of finality of issues or disputes. This does not mean that I have relegated this aspect or put it on a back-burner. It is a necessary concomitant of urgent applications. My decision is based also on the doctrine of effectiveness of judgments to ensure that courts issue out judgments that are effective, definitive and eliminative of further and/or unnecessary litigation between parties.

[33] The success or failure of this application is in my view inextricably interwoven into or with the applicants' prospects of success should they be granted leave to appeal or the SCA granting same to them if leave is refused by this Court.

[34] The applicants herein are asking this Court to grant to them the same order and/or prayers that they agreed to in the interim order of Halgryn AJ, and which I have deemed fit to discharge. However, when the interim order is scrutinised closely, a peculiar situation comes to the fore.

[35] The *causa* or *rationale* for the grant of the interim interdict previously was that the steel guardrails guarding the extreme left side of the N3 north-bound were inadequate and should be replaced with a permanent concrete barrier of New Jersey style or type. The applicants' experts or engineers actively participated in the design and erection of the permanent concrete barrier until it was in place. The problem arose when the respondent approached the applicants for their final blessing to have the temporary barriers separating the extreme left lane from the other lanes in use to be removed. The applicants prevaricated. That was the reason why the respondent enrolled the main application, leading to my judgment of 19 October 2012, which discharged the interim interdict granted on 20 March 2012.

[36] The respondent has executed that mandate. The applicants, egged on or on the advice of a different set of experts they had retained to investigate noise levels created by traffic on the roadway, completely changed course and wanted the barrier already erected, at some expense if the respondent's version or common sense is anything to go by, dismantled and new barriers designed and ultimately erected. Even the applicants conceded that the 1,2 m concrete barriers permanently constructed were agreed upon.

[37] As I stated in my judgment of 19 October 2012, there is nothing standing in the way of the applicants, preventing them from instituting proceedings in the ordinary course, to address any issues they may have, be they noise levels, drainage or vibrations.

[38] It is my considered view and finding that for the applicants under these circumstances to generate new issues and want to use them to keep an interim interdict that stood to be discharged in place, is not only arrogant and/or self-serving but also *ultra vires* and/or an abuse of process. If what they are now seeking is anything to go by, once any new barriers have been erected, should there be such an order, nothing can prevent them from raising further new issues that may also have the knack of extending the life of this moribund interim order of 20 March 2012. To allow such a situation to occur this Court would be contradicting itself and opening an undeserved or unwanted and not-by-the-rules-of-court permissible or permitted back-door avenue for parties to hold their adversaries to ransom. I would be materialising the respondent's fear and charge that the interim order of 20 March 2012 would have been extended and prolonged or kept alive in perpetuity. I debated the meaning of "*in perpetuity*" *vis-à-vis* "*perpetually*" with counsel for the applicants with regard to his submission that "*in perpetuity*" meant "*for ever*" or until-and-until. Counsel for the applicants' *reposté* was that English was not his mother tongue and that as such he cannot take that argument further.

[39] As stated above, it is my considered view that what the applicants are asking this time round is that the barriers that by order of court ought to have disappeared from sight upon the completion of the job of erecting the permanent concrete barrier should now be reinstated where they were and the far left lane, north-bound of the N3 National Road remain closed to traffic despite all the parties acknowledging that this is a very busy road and a free-

flowing traffic can be achieved if all the lanes are in use. The above concession in my further view acknowledges that traffic congestion can be alleviated if the far left lane in question here is also opened for traffic. Traffic congestion also in my view or inherently is one of the causes of accidents as heavy vehicle brakes over-heat or drivers become impatient. By the above I am not importing into this judgment an unsolicited and unproven expert opinion. It is my further view that that is a matter for common sense or alluded to by the parties in their arguments even though not in exactly those words.

[40] The respondents are thus correct that the applicants are approbating and reprobating at the same time.

[41] The issue of the shifting of goal posts was also an issue in this appeal, just like in the main application. After considering the submissions hereon from both sides, it is my finding that indeed the conduct of the applicants amounts to the shifting of the goal-posts.

[42] The parties herein propounded and held differing views on whether or not the newly constructed New Jersey type concrete barriers are safe where they have been erected. The applicants argued that they are not while the respondent argued that they are.

[43] I went back to the initial technical reports that preceded the construction of this barrier. It is so, *ex abundanti cautela*, that the applicants'

first set of engineers agreed that these barriers were adequate. These were engineers specifically engaged to speak to the adequacy, technical trueness and safety of the barriers. I have come across no new evidence that could make me change the initial outlook and view I formed which led to me arriving at the decision I arrived at in the main application. That invariably talks to the prospects the applicants may have on appeal. They are in my view slim, if not non-existent.

[44] I listened to argument in this Court attentively, read and re-read the technical reports filed herein as well juxtaposed what was argued in this application with what was argued in the main application. There is nothing new raised except the fact that the applicants wish and/or intend to approach this Court for leave to appeal. The applicants' founding affidavit is virtually a re-gurgitation of the previous application's affidavits, expert reports and all.

[45] For the sake of emphasis, the responsibilities of the respondent entail among others the provision, establishment, erection and maintenance of facilities on national roads for the use and convenience and safety of all road users. The respondent is expected to act in accordance with those responsibilities or mandate.

[46] The respondent engaged in in-depth, detailed and technician-assisted negotiations over the type of permanent barrier that ought to be erected on this particular stretch of road. As stated above and in the main judgment, all

the parties were agreed as to what barriers had to be set up or constructed. The respondent proceeded to construct that barrier agreed on.

[47] As has happened, be it by fate or deliberately, the applicants fired the legal representatives that actively participated in the negotiations and implementation of the fruits of those negotiations. They ditched their engineers and engaged new ones who advised them to renege on what they had agreed to with the respondent. They wanted this Court to sanction their change of course or direction in the main application. I refused to allow that to happen as the rules do not permit it. There were and are no cogent, compelling and exceptional reasons and circumstances justifying that.

[48] The previous or main application was premised on or underpinned by considerations of safety. This present application is also still premised on the same safety concerns that I dealt with and considered in the main application.

[49] The applicants have alluded to the respondent being ignorant and reckless in dealing with issues of safety on the roads, especially this part of the N3 National Road, to the detriment of the general public, which include them, the applicants.

[50] This makes it imperative that I look closely who the applicants herein are.

[51] The first applicant is a retired nursing sister residing with her husband, gardener, driver and their families on No 20 Plantation Road, Oriel,

Bedfordview; also known as the remaining extent of Portion 3 of Holding 264, Geldenhuys Estate Small Holdings, which property is owned by the third applicant, who is also the deponent of all the main affidavits deposed on behalf of the applicants in this application as well as the already determined main application.

[52] The second applicant is a limited liability company owned or controlled by the third respondent and the registered owner of No 22 Plantation Road, Oriel, Bedfordview; also known as the remaining extent of Portion 2 of Holding 264, Geldenhuys Estate Small Holdings. It is a commercial property with business rights and has on its offices from which the third applicant's law practice is conducted.

[53] The fourth applicant is a limited liability company controlled or owned by the third applicant, and the registered owner of No 19 Plantation Road, Oriel, Bedfordview; also known as the remaining extent of Erf 76, Oriel Township. The third applicant's residence is situated on this property.

[54] The third applicant's company, i.e. the fourth applicant, is also the registered owner of No 19A, Plantation Road, Oriel, Bedfordview; also known as Portion 1 of Erf 76, Oriel Township. It is a residential property which is rented out to attorney Andrew Boerner who is employed by the third applicant.

[55] From the above, it is clear that we are dealing here with the third applicant's estate or property portfolio. There is nothing sinister with that.

However it takes a noticeable turn when one factors in the applicants' contention that:

> "... *the respondent* [is] ... *ignorant and reckless in dealing with issues of safety on the roads, especially ..., to the detriment of the general public ...*"

[56] The general public the applicants are referring to are people occupying units within the third applicant's property portfolio.

[57] One of the requirements for the grant of an interim interdict is the "*balance of convenience*". The widening of a road should serve the interests of the general public – the whole body of road users compositely. What the applicants are asking this Court to do is elevate their particular interests above those of the other road users. It should not be like that. Individual fears and preferences should be weighed against the interests of the entire society and a balance struck where individual interests are addressed within the bounds and precinct of the general good but not singled out for special or preferential treatment.

[58] When all is considered in this application, the respondents cannot be said or accused of not having taken the applicants' interests seriously, let alone having been ignorant and reckless in dealing with safety issues to the detriment of the general public.

[59] The applicants did not have a good word to put in for the supporting affidavit deposed to in support of the dismissal of this application by Mr Basil

Constantine Calogero. He is the acting Operations Manager for Traffic Management at the respondent. He contended that accidents are wont to happen where some lane(s) is/are closed than when all lanes are in use. I looked through the papers and racked through my inner-self for a reason or ground to disagree with or dismiss the above assertion but could not come up with any. Mr Calogero succeeded in persuading and consequently convincing me that the closure of the extreme left north-bound lane in issue here, instead of reducing or preventing the occurrence of accidents, in fact contributed towards their happening. The reasoning is sound and his opinion and views make sense.

HAVE THE APPLICANTS SATISFIED THE REQUIREMENTS FOR THE GRANT OF AN INTERIM INTERDICT

[60] The requirements for a temporary interdict are well established, as far back as when the leading case of *Webster v Mitchell* 1948 (1) SA 1186 (W) was decided.

[61] In an application for a temporary interdict, the applicants' right need not be shown by a balance of probabilities. It is sufficient if such right is *prima facie* established, even though open to some doubt. The proper manner of approach is to take the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot or does not dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. Then the facts set up in

contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant, he could or should not succeed.

[62] I have already set out the cases for both the applicants and the respondent hereinbefore. When I applied the above criterion I find that right at the on-set, the applicant will find it difficult to go over the first hurdle. The applicants' case, as stated above, approbates and reprobates at the same time. When those aspects from the respondent's version that are not disputed are in turn thrown into the mix, the applicants' case becomes terminally sick. Upon considering the respondent's version it becomes clear and it is my finding that the applicants cannot succeed with this interim interdict.

[63] The respondent has secured the roadway in the manner the applicants wanted before they made an undignified about-turn. The permanent concrete barrier the applicants wanted erected has been constructed. The applicants now are saying the structure they participated in its design and construction is not adequate for their safety. As stated above, that is tantamount to moving the goal posts. It is so that personal safety and security is an important right that needs to be protected. However, in this instance, it is my view and finding that the applicants have elevated their individual or sectoral concerns into public or community concerns unreasonably.

[64] Clayden J put it as follows in the *Webster v Mitchell* case (*supra*) at 1189:

> "*The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the*

> *allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required ...*"

The honourable judge then proceeds to set out the test for *prima facie* right mentioned above. He then proceeds to state that:

> "*If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.*"

[65] In this application, there is no question of mere contradictions or unconvincing explanations by the applicants. The issues to be decided are clear cut and the parties' conduct unambiguous for all to see and judge. The applicants have not proved a *prima facie* right though open to some doubt as required.

[66] Another important consideration to be assessed when a decision is weighed whether or not an interim interdict may be granted is the harm which will be done. The test for a well grounded apprehension of harm is an objective one. The fact that the respondent has constructed a sturdy and dependable barrier that restrained an articulated truck and an SUV from going past it in my view refutes the applicants' allegations of apprehension of harm to their persons and property. Photos supplied by the applicants themselves attest to that. The applicants' *reposté* that this barrier managed to stop those vehicles because the middle temporary barrier had reduced their speed are in

my finding speculative assumptions that are not backed by the requisite expert opinion. This allegation comes up for the first time during argument and it is my considered view that counsel for the applicants is not an expert on such aspects for his view to be taken or regarded as fact.

[67] The requisite of "*balance of convenience*" have also not been satisfied by the applicants. In determining this requisite, the respondent's constitutional mandate or imperatives *vis-à-vis* the general populace should be contrasted with or weighed against the interests or fears of the four applicants. This particular road was widened to benefit the public at large as well as to ensure a free-flowing or smooth traffic. In the peculiar circumstances of this application and in the light of all the admissible facts and circumstances brought to the fore, a situation has arisen where the fears and pessimism of the four applicants may have to yield to the interests and needs of the broader public or populace using this national road.

[68] By applying for leave to appeal my judgment of 19 October 2012 is, in my view, a clear indication that the applicants have a new alternative remedy to fall back on.

[69] The applicants' raising of new matters should not be allowed to create circumstances that may justify the grant of an interim interdict, which incidentally, is couched in similar terms as those of the interim interdict discharged in the 19 October 2012 judgment.

[70] I have already dealt with the aspect of whether the applicants have any reasonable prospects of success in their quest for an appeal. What happened in the main judgment is that it was premised on:

- common cause facts;

- the agreement between the parties to settle the matter because the respondent had erected the concrete barrier that was demanded by the applicants;

- the agreement between the parties' experts or engineers in relation to the New Jersey type barrier which was ultimately erected or constructed by the respondent; and

- the applicants not being allowed to raise new issues in their replying affidavit and their filing of further and/or supplementary affidavits not authorised by the courts; thereby shifting the goal posts "*in mid-match*" or providing a perpetually shifting target.

[71] It is consequently my view and finding that the applicants cannot succeed in this application.

COSTS

[72] The applicants applied for an order of costs on a scale between attorney and own client in the event of the respondent opposing their application and they ultimately succeeded. This in my view points at the seriousness they regarded this application that such an *ultra* punitive costs order would be sought.

[73] The applicants sought a dismissal of this application with ordinary costs in their answering affidavit. However, at the end of argument in court they amended their prayer to seek a dismissal of the application with a punitive costs order.

[74] The assessment of what cost order to award and/or to which of the parties is in the discretion of this Court. The court should exercise that discretion judicially, judiciously and/or correctly, guided by the circumstances peculiar to this application.

[75] I have thoroughly listened to both sides in this matter and meticulously perused the papers they filed. I also went back to the root cause of this application, i.e. the main matter whose judgment the applicants have signified an intent to appeal. I have come to the conclusion that this application was ill-thought, ill-advised, such that it can be categorised as being capricious. The respondents were way-laid and dragged to court at unreasonably short time frames, kicking and screaming.

[76] Such conduct should be discouraged in the strongest terms and a punitive costs order is one way of showing a court's disapproval or displeasure with the conduct of a party.

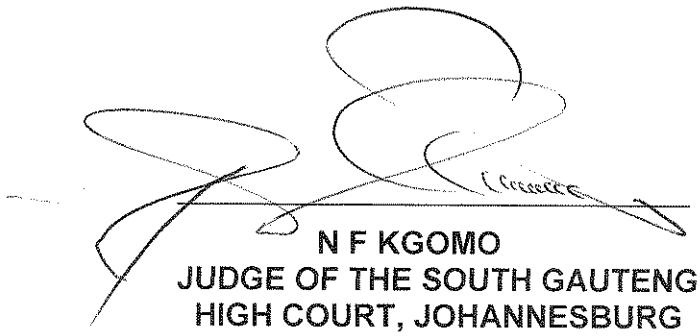
[77] The respondent has in my view, been necessitated to incur unnecessary expenses as a consequence of the applicants' launching of this application. It was harped time and again during argument on behalf of the applicants that the respondent has "*unlimited*" resources; the so-called deep pockets. The respondent is funded by the taxpayer. As such any unnecessary expenditure results in Joe-public paying for same unnecessarily.

[78] It is my finding that the order I am about to issue must be accompanied by a punitive cost order.

ORDER

[79] The following order is made:

> "*79.1 The application is dismissed with costs on a scale as between attorney and client, jointly and severally, the one paying, the others being absolved.*"



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

COUNSEL FOR APPLICANTS	:	Adv G. Kairinos
INSTRUCTED BY	:	Yammin Hammond Inc, Bedfordview
COUNSEL FOR RESPONDENT	:	Adv P Mokoena SC
INSTRUCTED BY	:	Werkmans Attorneys, Sandton
DATE OF HEARING	:	26 OCTOBER 2012
DATE OF JUDGMENT	:	29 OCTOBER 2012