IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 79462/18

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

DATE: 9 December 2021

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

In the matter between:

LOMBARDY DEVELOPMENT(PTY) LTD	FIRST APPLICANT
KARIN GELDENHUIS	SECOND APPLICANT
JOHANNES FREDRIK GELDENHUYS	THIRD APPLICANT
CECILIA LOOTS	FOURTH APPLICANT
LISA HOPKINSON	FIFTH APPLICANT
LYN CHER CALLE	SIXTH APPLICANT
EMILY MATHILDA BEZUIDENHOUT	SEVENTH APPLICANT
NICOLAAS WYNAND BEZUIDENHOUT	EIGHTH APPLICANT
LIZA HAMMAN	NINTH APPLICANT
HUGH ARUNDEL VAN DER WESTHUIZEN	TENTH APPLICANT

JOHAN SIEBERT VAN ONSELEN ELEVENTH APPLICANT
MARION GRASSINI TWELVE APPLICANT
CARLOS ARTURO GRASSINI THIRTEENTH APPLICANT
MARCOS ARTURO GRASSINI FOURTEENTH APPLICANT

And

CITY OF TSHWANE METROPOLITAN MUNICIPALITY FIRST RESPONDENT

MUNICIPAL MANAGER OF THE TSHWANE METROPOLITAN MUNICIPALITY SECOND RESPONDENT

JUDGMENT

TSATSI AJ

A. INTRODUCTION

1. This application has been heard in a virtual hearing via Microsoft Teams.
2. Although the Applicants submitted that they sought leave to appeal against paragraphs 67.1 to 67.3 of the order, the notice of appeal is an appeal against the judgment and orders,(except the paragraph where condonation was granted), which I handed down on 6 August 2021 pursuant to an opposed application.

B.GROUNDS OF APPEAL

3. I propose to briefly deal with grounds of appeal raised by the Applicants in the application for leave to appeal. This will be a summary and the notice of

leave to appeal raised various issues some of which I will not mention even though I have considered.

4. The Applicants submitted that the Respondents acted in breach of the previous orders, failed to comply with their constitutional obligations to give effect to those orders.

5. The Applicants further submitted that the Respondents' non- compliance with the previous orders is unconstitutional and invalid.

6. According to the Applicants the Court *a quo* erred in ordering that paragraph 3 of the amended notice of motion was moot and should be set aside.

7. The Applicants stated that their replying affidavit did not allegedly introduce impermissible material.

8. The Applicants further stated that the Court *a quo* erred in relying on the Municipal System Act 32 of 2000.

9. In addition the Applicants maintained that the cause of action was allegedly established on the founding affidavit.

10. In addition to the above the Applicants made further submissions explaining why the Court erred.

11. It seems that the Applicants were re-arguing the matter.

C. SUBMISSIONS

12. Adv Ferreira submitted on behalf of the Applicants that the application made on behalf of the Applicants was *mandamus* which constituted compliance. The submission was also that the Court *a quo* should not have granted a costs order against the Applicants since the Applicants approached the Court to protect their constitutional rights. The Court *a quo* should have

considered the principles enunciated in Biowatch a Constitutional Court case.

13. It was submitted on behalf of the Applicants that their application was not frivolous or vexatious, therefore no costs order should have been ordered against the Applicants.

14. Submissions on behalf of the Applicants was that no new allegations were introduced in the replying affidavit. The Applicants' submission was that the Respondents should have objected by way of Rule 28 if they had issues with the amended notice of motion. This submission is incorrect as it was submitted on behalf of the Respondents that the Respondents have a problem with the Applicants' replying affidavit as there were new allegations introduced.

15. Adv Strydom SC submitted on behalf of the Respondents that after the Respondents delivered their answering affidavit, the Applicants waited for the whole year to deliver their replying affidavit. The Respondents' answering affidavit made the Applicants' application redundant as important issues were dealt with in the answering affidavit which made it clear that the Respondents complied with the Tuchten and SCA orders and judgments.

16. Adv Strydom SC submitted on behalf of the Respondents that, the Respondents did comply with the Tuchten and SCA orders and judgments. He further indicated that the relief sought in the Applicants' original application was abandoned. The Applicants then formulated new and additional claims in their replying affidavit. His contention was that the Respondents agree with the judgment and order appealed against. He submitted that the Court can *mero muto* vary an order in which there is a patent error in terms of Rule 42 of the Uniform Rules of Court.

17. Adv Strydom SC further submitted that the Applicants' application was not about protecting their constitutional rights, nor was the application a *mandamus*. It was submitted on behalf of the Respondents that the appeal would not have reasonable prospect of success.

D. THE LEGAL PRINCIPLES

The test in application for leave to appeal

18. Applications for leave to appeal are governed by ss 16 and 17 of the Superior Courts Act 10 of 2013 ('the Act"). Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including whether or not there are conflicting judgments on the matter under consideration.

19. The Applicants have indicated in their notice of application for leave to appeal that the application is premised on the provisions of s 17(1)(a)(i). Reasonable prospects of success has previously been defined to mean that there is a reasonable possibility that another court may come to a different decision[1].

20. The test in the recent Act has obtained statutory force and is to be applied using the word *'would'* in deciding whether to grant leave. In other words, the test is, would another Court come to a different decision. In the unreported decision of the Mont Chevaux Trust v Goosen *;* 2014 JDR 2325 (LCC) para 6, the land claims Court held, albeit obiter, that the wording of the subsection raised the bar for the test that now has to be applied to any application for leave to appeal.

21. It has been held by various authorities that an Appellant faces a higher and stringent threshold in terms of the Act (see Notshokovu v S (157/15) [2016] ZASCA 112 (7 September 2016) para 2).

[1] *V*an Heerden v Cronwight & others 1985 (2) SA 342 (T) at 3431

22. 'It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion, see *Van Heerden Cronwright* & *others* 1985(2) SA 342 (T) at 343H. The use of the word *"would '* in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against.' (see Absa Bank Limited v Transcon Plant and Civil CC and Another (3954/2017P) [2020] ZAKZPHC 19 (23 June 2020).

The grounds of appeal have to be clearly and succinctly set out

23. The Applicants' notice of appeal is in conflict with principles enunciated in Songono v Minister of Law & Order[2], where the Court stated as follows: the application for leave, Leach J (as he then was) set out applicable principles at (385F-368B) "Rule 49 (3), is concerned, it has been held that the grounds of appeal are bad if they are so widely expressed that it leaves the Appellant free to canvass every finding of fact and every ruling of law made by the Court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value to either the Court or Respondent……".

24. The Court in Songono (supra) further held that "… *the lengthy and rambling notice of appeal filed in casu falls woefully short of what was required…….the point is that the notice must clearly set out the grounds and it is not for the Court to have to analyse a lengthy document in an attempt to establish what grounds the Applicant intended to rely upon but did not clearly set out.* …"

25. This view was quoted with approval in Doorewaard and Another v S[3], where the Court stated that , the law governing a notice of appeal (and also notice of application for leave to appeal) is trite. The notice should not contain

[2] 1996 (4) SA 384 (E).
[3] (CC33/2017) [2019] ZANWHC 25 (23 May 2019).

arguments. In casu the notice of appeal contains arguments. The approach was also applied in the following judgments: S v Mc Kenzie 2003 (2) SACR 616 (C); Xayimpi and Others v Chairman Judge White Commission and Others [2006]2 ALL SA 442 (E), S v Van Heerden 2010 (1) SACR 539 (ECP).

26. The Court further held that, it is clear that the application for leave to appeal falls far short of the requirement that the grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms, so as to enable the court and the Respondents to be fully informed of the case the Applicants seek to make out and which Respondents are to meet in opposing the application for leave to appeal.

27. In casu the Applicants failed to state the Uniform Rule/s of the High Court or the Section of the Supreme Court Act 10 of 2013 they rely on to launch the application of leave to appeal. Section 17 of the Superior Court Act 10 of 2013 was only mentioned in the heads of argument.

28. The Applicants have indicated in their notice of application for leave to appeal that the application is premised on the provisions of s 17(1)(a)(i) but added another provision at paragraph 24 of their heads of argument which is that there is some other compelling reason why the appeal should be heard.

29. The Applicants had to confine themselves to what is contained in their notice of appeal and not bring new argument in their heads of argument.

Can an appeal be noted against an order and against the reasons for the judgment

30. It was stated in Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others[4], preamble that an appeal does not lie against reasons for an order or decision, but

[4] 605/2016) [2017] ZASCA 47 (31 March 2017).

against the substantive decision itself.

31. At paragraph 15 of the same case Neotel (pty) Ltd v Telkom, the SCA stated that "While accepting the trite position(*Western Johannesburg Rent Board* supra at 355; *ABSA Bank Ltd v Mkhize and two similar cases* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) para 64; *SA Metal Group (Proprietary) Limited* v International Trade Administration Commission and Another (267/2016) [2017] ZASCA 14 (17 March 2017) para 15) that an appeal does not lie against the reasons for the order, it was argued on behalf of the appellant, in essence, that this case presented an opportunity for this Court to find that, in exceptional circumstances, an appeal may lie against the reasons for an order.

32. It was argued in Neotel that this ought to be found in light of the following: that in *P*hilani–Ma–Afrika & others v Mailula & others; 2009] ZASCA 115; 2010 (2) SA 573 (SCA) at 579 para 20, (Philani- Ma- Afrika) and Nova Property Group Holdings Ltd & others v Cobbett and another; 2016] ZASCA 63; 2016 (4) SA 317 (SCA) at 323 para 8, (*Nova Property*) this Court held that a more flexible approach was called for and that the interests of justice ought to be the main consideration in determining appealability. Further, that the word 'decision' in s 16(1)*(a)* of the Superior Courts Act ought to be interpreted as including the reasons for an order or judgment, where there were exceptional circumstances present.

33. There are no exceptional circumstances stated by the Applicants why an appeal should lie against reasons given. I am not persuaded that there are any exceptional circumstances present that would justify what would be a departure from a trite position.

The Applicant may not introduce new allegations in the replying affidavit

34. Even though the Applicant may introduce new allegations in the replying affidavit as confirmed by authorities some of which were submitted on behalf of the Applicants, the Court has to exercise its discretion to allow such new

allegations.

35. Counsel for the Respondents referred me to the case of Tractor & Implement Agencies BK v Vennootskap D & G Cilliers & Seuns Hoogkwartier Landgoed[5], where the Court stated that the rule to introduce new allegations in the replying affidavit is not absolute. The Court has to exercise its discretion to allow same, giving the Respondents the opportunity to deal with such allegations in the second set of answering affidavit.

The issue of mootness of the amended Notice of Motion

36. Rule 42(1)(b) provides that the Court may rescind or vary any order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission[6]. A patent error or omission has been described as 'an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it, in other words, the ambiguous language or the patent error or the omission must be attributable to the Court itself.

37. Once the Court has pronounced on an order or judgment, it cannot revisit the order or judgment to correct after pronouncing the order or judgment the Court becomes *functus officio*. Its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased[7].

38. There is exception to the general rule and one of the exception is that the Court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the 'sense and substance of the judgment or order[8]. The High Court could be interfered

[5] 2000 (2) SA 571 N A-C.

[6] Rule 42(1)(b) of the Uniform Rules of Court

[7] *De Wet v Western Bank Ltd 1977 (4) SA 770(t) at 780H-781A.*

[8] Firestone South Africa (Ptv) Ltd v Gentivuro Ag 1977 (4) SA 298 (A).

with under Rule 42 and the common law in that it permits a judicial officer to amend, supplement or clarify its judgment, provided that the 'sense or substance' of the judgment is not affected or altered thereby.

The Applicants did not comply with the requirements of *mandamus*

39. It is trite that the three requirements for an interdict are a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy – Setlogelo v Setlogelo 1914 AD 221.

40. The Applicants failed to state clearly what the threat is to which of their rights. The Applicants also failed to state how the said threat is directly linked to the fact that the Respondents allegedly did not comply with their constitutional obligations.(Philip Morris Incorporated and Another v Marlboro Shirt Company SA Ltd and Another 1991 (2) SA 720 (A) at 735B.

41. The Applicants have not shown that there may be injury committed or reasonably apprehended by the Respondents' alleged failure to comply with their constitutional obligations. The term "injury" should be understood to mean infringement of the right which has been established and resultant prejudice.

42. A reasonable apprehension of injury is one which a reasonable man or woman might entertain on being faced with the facts and therefore the Applicants needed not establish on a balance of probabilities the injury will follow (Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another 1961 (2) SA 505 (W).

43. The third requirement for granting of the mandatory interdict is proof that there was no other satisfactory remedy available to the applicants. (Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd 1965 (1) SA 683

(T) at 684G).

44. The application of *mandamus* is that of a final interdict. No doubt, the common law requisites (a clear right, an injury actually committed or reasonably apprehended and no other form of relief available) also apply to a *mandamus* in the constitutional context[9]. The requirements for a mandamus was stated in Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others 1984 (4) SA 295 (SWA) :
"For such an order all the requirements of an interdict have to *be established and the Court will have to decide, inter alia, whether the applicants have established* a *"clear right" (Lipschitz v Wattrus NO* 1980 (1) SA 662 *(T) at 673C - D).*

45. Therefore it follows that the requirements for a final interdict has to be complied with in order to be successful[10]. A mandamus is one of the possible forms of relief the Court may grant if the requirements have been met and if it would provide the appropriate protection[11]. The essence of the application, as previously stated is for a mandatory interdict and thus has to satisfy the requirements for a final interdict, which are: a clear right, an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy[12].

Costs

46. The Constitutional Court cautioned against the abuse of the Biowatch V Registrar, Genetic Resources**[13],** principle. It does not mean risk-free constitutional litigation. The Court concluded that a worthy cause cannot immunise a litigant from a judicially considered, discretionarily imposed

[9] (Pilane v Pilane 2013(4) BCLR 431 (CC) par. 39).
[10] Limpopo Legal Solutions and Others v Vhembe District Municipality and Others (430/2016) [2016] at para 13
[11] Ibid at para 20
[12] Ibid at para 21

[13] *(*CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009*)*

adverse costs order[14].

47. In Ferreira v Levin[15], the Constitutional Court endorsed long-standing High Court and Appellate Division principles on costs awards. Costs are in the discretion of the Court and, in general, the unsuccessful party must pay: *"The [High] Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs".*

E. APPLICATION OF THE LAW TO THE FACTS

48. It is now settled that the threshold for the granting of leave to appeal under section 17(1)(a)(i) is higher than what it was under the previous Supreme Court Act, 1959. The Supreme Court has raised the bar for granting leave to appeal.

49. The Applicants have to convince this Court on proper grounds that they have prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding.

50. The Applicants' notice must clearly set out the grounds so that the Court does not have to analyse a lengthy document in an attempt to establish what grounds the Applicants intended to rely upon. In casu the Applicants added more grounds from the bar on the day of the hearing. Some of the grounds are that the Applicants approached the Court to protect their constitutional rights and that the application was *mandamus.*

---

[14] Lawyers for Human Rights v Minister in the Presidency and Others (CCT120/16) [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) (1 December 2016) at para : 18

[15] *NO* [1995] ZACC 13; 1996 (2) SA 621 (CC); 1996 (1) BCLR 1 (CC).

51. The Applicants also added the provisions of section 17 of the Supreme Court Act they relied on for the first time in their heads of argument which is that there is a compelling reason why the appeal should be heard, which was not in their notice of appeal.

52. In so far as the mootness issue is concerned, the contempt or the declaratory relief sought, were based on the allegations made in the founding affidavit. These allegations were of no further relevance, by virtue of the facts placed before Court in the answering affidavit, which facts were undisputed.

53. The Applicants' case was based on the Tuchten and Supreme Court of Appeal ("the SCA") judgments, which set aside the 2012 Supplementary Valuation Roll ("the SVR") and the 2013 General Valuation Roll ("the GVR"). The imposition of assessment rates were only set aside in respect of the Applicants' properties, and not in respect of any other property holders in the specific area. The judgment allowed for the remittal of the 2013 GVR for reconsideration by the Municipality. In addition no specific order was made in relation to recalculation and how it should be implemented.

54. The Applicants' case was that the Municipality failed to make the necessary adjustments to its accounts, following the Tuchten and SCA judgments, and consequently that the Municipality was in contempt of Court in not complying with the Court order alternatively that it, breached its constitutional obligations to adhere to and take all necessary steps to give effect to the Court order.

55. The crux of the Applicants' case was that the alleged breach of the constitutional obligations was confined to the non- compliance by the Respondents of the Tuchten and SCA judgments and did not relate to the manner of calculation of credits or the failure to provide information in terms of section 27 of the Local Government Municipality Property Rates Act 6 of 2004 ("the MPRA"). The Applicants made this case in their replying affidavit

and later incorporated by way of an amended of the notice of motion.

56. According to the submissions made by the Respondents when the original application was made the Respondents had not yet made any recalculations in respect of the 2012 SVR and the 2013 GVR were not yet replaced by the Extraordinary Valuation Roll "(the EVR"). The compliance with the Tuchten and SCA judgments were allegedly confirmed by facts disclosed in the Respondents' answering affidavit.

57. Accordingly when the facts were disclosed in the Respondents' answering affidavit, in that adjustments were made consequent upon the setting aside of the 2012 SVR, and that the 2013 GVR was replaced by the EVR, it practically meant the end of the Applicants' initial application, that is why the Applicants abandoned their first application and submitted an amended Notice of Motion. The fact of the matter is that the Applicants could not amend their founding affidavit so they incorporated new facts in their replying affidavit to match their new case.

58. Subsequent to that the Applicants formulated the new grounds in their replying affidavit in an attempt to make sure that they are still able to proceed with their application albeit on new grounds.

59. The emphasis on the replying affidavit was now on the alleged unlawfulness of the EVR and that the Municipality was not entitled to impose it at all; that the Respondents failed to give details and a substantiation of its calculations as referred to in section 27 of the MPRA; that the calculations were not adequately done hence reliance on Prof Rombourgh's expert report and that the Applicants were entitled to the statements and debatement of their accounts.

60. Considering the factual basis upon which prayer 3 was based in the founding affidavit, it was submitted in the Respondents' answering affidavit that there was compliance with the Tuchten judgment and accordingly there was no evidence to support the relief for a declaratory order sought by the

Applicants.

61. If one had to consider the facts stated in the Applicants' founding affidavit and those stated in the Respondents' answering affidavit, I was of the considered view that the Applicants could not succeed with prayers 1, 2 and 3, and that the relief sought in terms of prayers 1, 2 and 3 should be dismissed with costs.

62. The Applicants' contention is that the Respondents failed to comply with the Tuchten and the SCA orders and the judgments. The impression created by the Applicants is that the order that I handed down on 6 August 2021 somehow condones the Respondents' alleged contemptuous conduct, this is not the case.

63. As a single Judge, I do not have the power or authority to overturn the order of the SCA or of another Judge, let alone a senior Judge like my brother Tuchten.

64. My view was that the relief sought by the Applicants in terms of prayers 1 to 3 became moot subsequent to the delivery of the Respondent's answering affidavit followed by the Applicants' amended Notice of Motion and new facts stated in the Applicants' replying affidavit. The intention was not to condone the alleged non- compliance of the Tuchten and the SCA orders by the Respondents.

65. The intention of the order was to dismiss the application with costs. Even though the order stated that prayer 3 was moot and should be set aside, the intention was to dismiss the application with costs.

66. A case is moot and therefore, not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. The question that must be answered is whether there exists a discrete legal issue of public importance

that would affect similar matters in the future.

67. *In casu* the question can be answered in the negative as in the event that leave to appeal were to be granted to the Applicants and an outcome in their favour ultimately made, this result will give effect to a position with the same results as that led to an application of leave to appeal in the first place.

68. The issue of explaining the patent error in terms of Rule 42 and common law is just to demonstrate that the intention of the order was to dismiss the application with costs.

69. My considered view is that the Applicants introduced new allegations in their replying affidavit and failed to take the necessary steps to allow the Respondents to answer thereto and the Court to exercise its discretion.

70. Not infrequently, a Court considering an application for leave to appeal its decision, furnishes additional reasons for the order it originally made. Often the additional reasons throw light on the ambit and effect of the order sought to be appealed against. However wrong interpretation of the Court's reasons may result in the Applicant concluding that the order was wrong hence the necessity to launch an application of leave to appeal. Although the Applicants' contention is that they are only appealing the order, if one looks at the notice of appeal, the Applicants are also appealing the reasons.

71. On the day of the application of leave to appeal on 18 November 2021, Counsel for the Applicants submitted for the first time, from the Bar, that the Applicants' application was *mandamus*. This was never pleaded in the original application, or the amended notice of motion, neither was it mentioned in the grounds of appeal.

72. The Applicants did not plead the requirements of a *mandamus*/ mandatory interdict. There was no proper basis in both the notice of motion and the founding affidavit for complying with the requirements of a mandatory

interdict. The Applicants failed to lay a proper basis for the requirements of a mandatory interdict. It is trite that the three requirements for a mandatory interdict are a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy.

73. A mandatory interdict directs a person or an organ of State to do something he or she/ it was in law obliged to do. The Applicants failed to allege and prove a clear right and an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy.

74. I am of a view that I exercised my discretion correctly and judicially by awarding a costs order against the Applicants.

75. I have considered the Applicants' application of leave to appeal, the heads of argument filed by both parties, including oral submissions made on behalf of both parties on the day of the hearing of the application of leave to appeal. I am not convinced that there is reasonable prospect of success that another Court would come to a different conclusion to that of the Court a quo.

76. The reasons for my judgment are fully set out in the judgment handed down on 6 August 2021, I need not repeat them in this judgment.

77. Consequently the following order is made:

77.1 The application of leave to appeal is dismissed with costs, such costs to include the employment of two Counsel.

E.K TSATSI
ACTING JUDGE OF THE HIGH COURT

For Applicants: Adv. N. Ferreira

Instructed by: Adams and Adams Attorneys

For the First and Second Respondents: Adv. T. Strydom SC

With Adv. L.Kotze

Instructed by: Ndombela and Lamola Inc.

Date of hearing: 18 November 2021

Date of judgment: 9 December 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and by uploading on case lines.