



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case no. AR134/22

In the matter between:

KWADUKUZA MUNICIPALITY

APPELLANT

and

STANGVEST INVESTMENTS (PTY) LTD

FIRST RESPONDENT

JABULA HARDWARE

SECOND RESPONDENT

LUQMAAN DHOOMA

THIRD RESPONDENT

YUNOOS DHOOMA

FOURTH RESPONDENT

BIKRUM SINGH

FIFTH RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 16 October 2023.

Chetty J (Balton and Vahed JJ concurring)

[1] The interpretation of town planning schemes frequently gives rise to disputes as to whether the uses of designated erven are permitted by municipal authorities. This is one such case. The KwaDukuza Municipality, the appellant herein, approached the High Court on an urgent basis to interdict Stangvest Investments (Pty) Ltd, being the owner of Erf 981, CBD Stanger, ('Stangvest') and Jabula Hardware, the tenant of the property, ('Jabula') on the basis that either or both were causing or permitting a contravention of the KwaDukuza Land Use Management Scheme ('the Scheme') in circumstances where Jabula began using Erf 981 as a 'hardware store' where such use was considered to be prohibited in terms of the relevant zoning controls. Kruger J dismissed the application, as well as the application for leave to appeal. The matter serves before this court following the granting of special leave by the Supreme Court of Appeal ('the SCA').

[2] By way of background, the KwaDukuza Municipality ('the municipality'), acting in its capacity both as owner of public property and the enforcement authority of the Scheme and the National Building Regulations and Building Standards Act 103 of 1977 ('NBR Act'), contended that Jabula was using a portion of an adjoining property, Erf 3108, CBD Stanger to off-load and store building materials. This property belongs to the municipality and is used as a public parking space. It abuts the property owned by Stangvest.

[3] In addition, the municipality contended that Jabula had effected certain alterations to the building on Erf 981, without the approval of building plans. Accordingly, it was submitted that Jabula had contravened the NBR Act and that its continued occupation of the property in the absence of a certificate of occupation was unlawful. Consequently, it maintained that it was entitled to an order for Jabula's eviction from the property.

[4] The facts are that Stangvest let the premises on Erf 981 in August 2019 to Jabula for a period of five years for the purpose of conducting a hardware store. The agreement was concluded by Mr Jayaram Singh and Mr Yunoos Dhooma, in their respective capacities as directors of Stangvest and Dhooma Supermarket CC, which

traded as Jabula.¹ The premises adjacent to the hardware store house the businesses of a bottle store and a large supermarket, respectively. It would stand to reason that the customers and patrons of all of these businesses use the public parking on Erf 3108. According to the municipality, the supermarket uses the bulk of the parking lot on Erf 3108 in accordance with a deferred parking payment mechanism.²

[5] Shortly after taking possession of Erf 981, Jabula, in and around September 2019, commenced business as a hardware store. It is common cause that both properties in question, Erf 981 and Erf 3108, fall under the Scheme as contemplated in the Spatial Planning and Land Use Management Act 16 of 2013 ('SPLUMA'). In terms of the Scheme, Erf 981 is zoned Mixed Core Use 3 ('MUC 3'). The zoning certificate reflects that MUC 3 sites are intended for retail activities and 'related commercial uses at high intensities that comprise a town centre'. The 'free uses' permitted in MUC 3 include that of a 'shop'. All uses other than those listed as free or permitted by consent of the municipality, are prohibited. A hardware store falls under neither category – neither free nor available through consent. Clause 5.2.4 of the Scheme defines a 'shop' as a:

' . . . building or land used for the selling of goods and appliances; services such as a hairdresser, ticket agency and video hire; showroom (including motor showroom restricted to the display and sale of vehicles only); but does not include an industrial building, garage, service station, milk depot, hotel, funeral parlour, casino and betting depot/totaliser.'

[6] The contention of the municipality in the court *a quo* and before this court is that Jabula's use of Erf 981 as a hardware store is in contravention of the Scheme. The contention that the hardware store also operated on Erf 3108 is unsubstantiated

¹ The answering affidavit by Jabula Hardware ('Jabula') opposing the interim relief records that Mr Yunoos Dhooma, the fourth respondent, is not involved in the management or control of Jabula. He is a director and ought not to have been cited. The controlling member of Jabula is Mr Hoosen Yunoos Dhooma, the deponent to the opposing affidavit. He describes himself as the controlling member of Dhooma Supermarket CC.

² In respect of parking in a Mixed Core Use zone (MUCO), clause 12 of the Additional Controls to the Zoning Certificate for Erf 981 provides that 'where it is physically impractical to provide on-site parking the Local Authority shall call upon the developer to provide a minimum of 50% of obligatory onsite parking and contribute towards the shortfall of parking into the parking reserve fund by way of such payment in lieu. The cash payment shall be calculated basis of the cost to the local authority of providing the car spaces at ground level that would have been required in terms of the scheme. In terms of this clause, a car space shall be taken to be an area of 23 square metres, which includes manoeuvring space. This contribution shall be made on the approval of the building plans and shall be paid before the release of the occupancy certificate.'

and was not persisted with. The inspection of Jabula's premises by three municipal officials – a building inspector; the Director: Development Enforcement (the deponent to the founding affidavit) and the Director: Building Control – all describe the activity on Erf 981 as constituting the operation of a hardware store. The officials took the view that such use was unlawful and contravened SPLUMA. Their observations of Erf 3108 revealed that part of the public parking area had been taken over by Jabula as a builder's yard for the delivery and storage of building materials. The photographs relied on in support of this contention show the presence of a number of trucks parked in the public parking, some bearing the name of Jabula Hardware. Others appear to be those of merchandisers making deliveries or customers collecting goods. One photograph shows the use of a forklift in the process of offloading timber from a truck bearing the name of Jabula Hardware.

[7] The municipality's officers issued contravention notices to the third respondent, who was present at the store at the time of the inspections. The building inspector further concluded that 'part of the building (on Erf 981) had been converted by demolishing internal walls'. The Director: Development Enforcement was of the opinion that these alterations required building plan approval in terms of the NBR Act. As no record of such plans could be found, nor had any application in respect thereof been received, such alterations were considered to be 'illegal building works'.

[8] The aforementioned inspections generated a written demand on 20 November 2019 from the municipality's attorneys calling on Stangvest and Jabula to cease the usage of Erf 3108 and Erf 981 in contravention of SPLUMA and the Scheme. In essence, the contention of the municipality is that the respondents were using Erf 981 as a hardware store, a use not permitted in terms of the Scheme for a property zoned MUC 3. As a hardware store finds no definition in terms of the Scheme, the municipality appears to have settled for the categorisation of Jabula's use of the premises as a '*builder's supply yard*', defined as 'premises which is used for the storage or sale of building material and equipment'.³ The municipality contends that the only reasonable interpretation of the business conducted on Erf

³ Clause 5.2.5 of KwaDukuza Land Use Management Scheme setting out the industrial use definitions.

981 is that of the storage and sale of building materials, a use prohibited in terms of the Scheme.

[9] Insofar as the alteration of the building on Erf 981 is concerned, the founding affidavit alleges that this constitutes an 'erection' as defined in the terms of the NBR Act,⁴ and as no building plans were submitted,⁵ there can be no occupation of the building unless and until a certificate of occupancy has been issued by the local authority.⁶

[10] The last aspect of the relief pertains to Jabula's use of Erf 3108. The photographs which accompany the founding affidavit leave little doubt that Jabula effectively appropriated part of the public parking lot as a builder's supply yard, storing ceramic tiles, bags of cement, timber and a host of other building materials. There is no dispute that they did so without any permission or authority from the municipality.

[11] The municipality turned to the court a quo on an urgent basis contending that an interdict was the only 'fast, enforceable remedy that actually works'. In doing so, it by-passed the other enforcement mechanisms provided for in the Scheme. The relief, set out in the notice of motion, sought a *rule nisi* in the following terms:

'2.

....

- (a) That the respondents are interdicted and restrained from using or permitting to be used the property or any part of the property known as Erf 981, CBD Stanger, also known as 1 King Shaka Street, KwaDukuza as:
 - (i) A hardware store; or
 - (ii) A builder's supply yard; or
 - (iii) In any way in conflict with the zoning of the property for Mixed Core Use 3 in terms of the KwaDukuza Land Use Management Scheme;

⁴ Section 1 of the National Building Regulations and Building Standards Act 103 of 1977 ('NBR Act') defines an 'erection' as being in relation to a building, and 'includes the alteration, conversion, extension, rebuilding, re-erection, subdivision of or addition to, or repair of any part of the structural system of, any building; and "erect" shall have a corresponding meaning.' (my underlining).

⁵ Section 4 of the NBR Act.

⁶ Section 14(4) of the NBR Act.

- (b) That the respondents are interdicted and restrained from using or permitting to be used the property or any part of the property known as Erf 3108, CBD Stanger, from being used:
- (i) For the parking of any vehicle other than a light motor vehicle; or
 - (ii) For the offloading or loading of trucks; or
 - (iii) For the stacking or storing, even on a temporary basis of any goods or materials; or
 - (iv) As part of a hardware store business, or
 - (v) As a builder's supply yard; or
 - (vi) In any way in conflict with the zoning of the property for Mixed Core Use 3 in terms of the KwaDukuza Land Use Management Scheme;
- (c) That, within five days of service of this order upon any respondent, such respondent is directed to cause all buildings and other material stockpiled or left on Erf 3108, CBD Stanger to be removed, failing which the sheriff is directed to attach such materials or goods on Erf 3108 and the applicant is authorised to remove and store materials or goods so attached pending the final determination of this application or further directions by this court;
- (d) That the respondents are directed to vacate, or cause to be vacated, the property described as Erf 981, CBD Stanger, also known as 1 King Shaka Street, KwaDukuza, and not to permit the occupation thereof until or unless a certificate of occupancy, issued after 1 October 2019, as required by section 14 of the National Building Regulations Act and Building Standards Act, 103 of 1977, permitting such occupation may have been issued;
- (e) That the costs of this application shall be paid by the respondents jointly and severally, if unopposed, on the attorney and client scale, such to include the costs of senior or two counsel, where employed; and if opposed shall be paid by any party which unsuccessfully opposes the application, on the attorney and client scale, such to include the cost of senior or two counsel, where employed.

3

THAT the relief in paragraphs 2(a), (b), (c) and (d) above shall operate as interim relief, with immediate effect, pending the return day hereof.

4.

Further and/or alternative relief.'

[12] Stangvest, despite the short notice, delivered a preliminary answering affidavit. It contends that the fifth respondent, Bikrum Singh, is one of fourteen directors of Stangvest. There is nothing to gainsay this or to suggest that he is a 'controlling mind' of the first respondent, as alleged. On that basis, there was no need to join him in these proceedings in his personal capacity. The only basis for the appellant maintaining that the fifth respondent was properly cited is because the fourth respondent (against whom the application was withdrawn) pointed to the fifth respondent as being the 'owner of the property'. This remained the high-water mark of its claim against the fifth respondent, even on appeal. This aspect ought not to detain this court any further as I am satisfied that there was no reason for the fifth respondent to have been drawn into these proceedings.

[13] The thrust of Stangvest's opposition is that the municipality has acted unevenly and selectively in applying the enforcement of the Scheme to Jabula while another hardware store (Singh's Hardware) has been allowed to operate without hindrance in a MUC 3 zone. The premises on Erf 981, presently occupied by Jabula, were previously occupied by another hardware store, PAK Hardware. Stangvest points out that the public parking space on Erf 3108 is often used by the Checkers supermarket (located adjacent to Erf 981) in December to house large refrigeration units, without demur from the municipality. Stangvest denies that any 'erections' have taken place to the building that warrant building plans, and consequently deny that this warrants an application for a new occupation certificate. Ultimately, it contends that the municipality has acted *mala fide* and for an ulterior motive in seeking to harass Jabula, while allowing another hardware store to operate without hindrance.

[14] Jabula's response to the application is that it stored building materials on Erf 3108 in the mistaken belief that it was allowed to. It admits to having used Erf 3108 in contravention of the Scheme. Once this was brought to its attention and the contravention notices were issued, it responded immediately. The immediacy of its compliance to the contravention notices was placed in dispute. Arrangements were made to relocate all of the materials stored on Erf 3108 into a storeroom located

below the hardware shop. According to Jabula, by 26 November 2019 it completed the transition and thereafter did not use Erf 3108 for the stockpiling of goods. Accordingly, it contends that no basis exists for the relief sought in prayer 2(b) and (c) of the notice of motion as the conduct complained of had long since abated.

[15] To the extent that it is alleged to have contravened the Scheme by operating a hardware store from Erf 981, Jabula denies this and contends that a 'shop' is a permitted use in terms of the Scheme and disputes the imputation that it operates a 'builder's supply yard'. The photographs attached to Stangvest's opposing affidavit depict a typical hardware store, with rows of steel shelving containing various building items including paint, sanitary ware and waterproofing materials. In any event, it contended that the building in question from which it operates can by no means be construed as a 'yard', suggestive that this applies to an open space, under the open sky. It accordingly denies that there is any basis for the relief sought in prayer 2(b) of the notice of motion.

[16] Insofar as the municipality contends that Jabula has effected building renovations on Erf 981, Jabula denies this. It admits to removing a portion of one wall which was non-structural and making only cosmetic changes to the premises. In this respect, it admits to having installed new ceilings, floors and carrying out painting and tiling. Neither in its founding affidavit nor in its answering affidavit has the municipality sought to refute this version by producing the existing plans for the premises and indicating the precise location of the alterations and why it contends that they warrant the production of new building plans.

[17] Although the municipality sought interim relief, by the time the matter was eventually argued, all of the respondents had delivered opposing papers. The municipality persisted in its claim for final relief on the papers, which by then had been extensively supplemented. In the intervening period between the dates when the application papers were served on the respondents and when the matter was finally argued, the relief sought by the municipality had undergone a metamorphosis, resulting in the evidence and circumstances which underpinned the relief as set out in the founding papers, changing. The degree of change is disputed by the appellant,

it contending that the change was not substantial and that the respondents had throughout understood the 'substance' of the relief being pursued by the appellant.

[18] When the matter served before Kruger J on 26 November 2020 all of the parties were represented. Counsel for municipality informed the court that the application against the fourth respondent, Yunoos Dhooma, had been withdrawn and tendered his costs. The municipality persisted in seeking relief against the remaining respondents and sought an order in terms of an amended draft order attached to its heads of argument. The terms of the draft order are relevant to the judgment of the court a quo and the argument advanced in this court. I set out the full text of the draft order so that the context in which the matter was approached by the parties may be more clearly understood. The draft order reads as follows (the relief that is additional to that sought in the notice of motion is underlined):

'1.

That the applicant is given leave to withdraw the application against the fourth respondent and is directed to pay the fourth respondent[s] costs until 24 January 2020.

2.

That :

- (a) the respondents⁷ are interdicted and restrained from using or permitting to be used the property or any part of the property described as Erf 981, CBD Stanger, also known as 1 King Shaka Street, KwaDukuza as:
 - (i) A hardware store; or
 - (ii) A builder's supply yard; or
 - (iii) In any way in conflict with the zoning of the property for Mixed Core Use 3 in terms of the KwaDukuza Land Use Management Scheme;
- (b) the respondents are interdicted and restrained from using or permitting to be used the property or any part of the property known as Erf 3108, CBD Stanger, from being used:
 - (i) For the parking of any vehicle other than a light motor vehicle; or
 - (ii) for the offloading or loading of trucks; or
 - (iii) As part of a hardware store business,⁸ or

⁷ On appeal, relief was only sought against the first respondent (Stangvest Investments) and one of its directors (the fifth respondent), and the second and third respondents, being Jabula Hardware and its 'controlling member' respectively. Accordingly, the appellant sought relief as against the 'remaining respondents'.

- (iv) As a builder's supply yard; or
 - (v) In any way in conflict with the zoning of the property for Mixed Core Use 3 in terms of the KwaDukuza Land Use Management Scheme;
- (c) the respondents are interdicted and restrained from:
- (i) using, or permitting to be used the property or any part of the property known as Erf 3108, CBD Stanger, as a driveway or access route to Erf 981, CBD Stanger; or
 - (ii) causing or allowing the delivery of building materials on, or impeding the use of, the parking lot on Erf 981, CBD Stanger;
- (d) That the respondents are directed to vacate, or cause to be vacated, the portion of the property described as Erf 981, CBD Stanger, also known as 1 King Shaka Street, used by the second respondent as a hardware shop [and not to permit the occupation thereof until or unless a certificate of occupancy],⁹ issued after 1 October 2019, as required by section 14 of the National Building Regulations Act and Building Standards Act, 103 of 1977, permitting such occupation may have been issued;
- (e) all costs of this application shall be paid by the respondents jointly and severally, if unopposed, on the attorney and client scale, such to include the costs of senior or two counsel, where employed; and if opposed shall be paid by any party which unsuccessfully opposes the application, on the attorney and client scale, such to include the cost of senior or two counsel, where employed.'

[19] As stated earlier, Kruger J dismissed the application with costs on an attorney and client scale. After reasons for dismissing the application were provided, the municipality sought leave to appeal the order. The application for leave to appeal was dismissed with costs. The municipality then sought special leave from the SCA in terms of s 17 of the Superior Courts Act 10 of 2013. On 14 February 2022 the SCA granted leave to the Full Court. The subsequent notice of appeal delivered by the municipality, dated 21 February 2022, records that the appeal is directed against the 'whole of the order of his Lordship Mr Justice Kruger . . . '.

⁸ In the Notice of Motion the relief originally prayed for included the following additional subparagraph (in subpara (iii)): ' . . . for the stacking or storing, even on a temporary basis of any goods or materials; . . . '

⁹ In place of the words in square brackets, the appellant sought an order in 2(d) of its amended relief to include the following words 'alternatively cause to be vacated the portion or portions of the building on Erf 981 used by the second respondent as a builders supply yard and not to permit occupation thereof until or unless a certificate of occupancy issued. . . '.

[20] It is to the ambit of the order of the SCA granting leave to appeal to this Court that I turn first. Mr *Pillemer* SC, who appeared on behalf of Stangvest in this court and the court *a quo*, raised the point in his heads of argument that the relief for an ejectment order based on Jabula's and/or Stangvest's alleged failure to apply for a certificate of occupation pursuant to having carried out certain alterations to the building on Erf 981, was expressly abandoned during argument in the application for leave to appeal. Accordingly, it was submitted that this ground cannot be resurrected. Reliance was placed on a transcript of the proceedings in the application for leave to appeal where Mr *Goddard* SC, who appeared for the municipality in the court *a quo* and in this Court, stated the following:

'... the applicant doesn't apply for leave to appeal in respect of the refusal of an eviction because they were building without plans. So, it doesn't fall under [the] National Building Regulations Act.'

[21] The appellant on the other hand submitted that in its application to the SCA, it sought leave to appeal against the *whole* of the order of Kruger J, including the relief in prayer 2(d) of the notice of motion. Even though this relief was not persisted with during argument in the application for leave to appeal, counsel did not concede that this leg of its argument had been effectively abandoned or waived. The question which arises is whether in a subsequent petition to the SCA in terms of s 17 of the Superior Courts Act, can the point abandoned earlier, now be resurrected? In *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at para 43 the following was said on this point (footnotes omitted):

'The applicable rule is that enunciated in *Paddock Motors (Pty) Ltd v Igesund*. In that case, the Appellate Division held that a litigant who had expressly abandoned a legal contention in a Court below was entitled to revive the contention on appeal. The rationale for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal Court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of a decision that is clearly wrong.'

[22] Mr *Goddard* placed reliance on *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and others* 2019 (4) SA 471 (SCA) where a contention not pursued in the court *a quo* was nonetheless argued on

appeal in the SCA. In that matter, before the Full Court, all parties accepted that the roads which ran through the estate were public roads and subject to the National Road Traffic Act 93 of 1996. When the matter came before the SCA it was contended that the concession (that the roads were public roads) was erroneously made and was withdrawn by the appellant. Relying on the passage cited from *Alexkor* above, the SCA affirmed the position that the appellant was not bound by a legal concession if the appeal court considers the concession to be wrong in law. It also considered whether the withdrawal of the concession could cause any prejudice to the respondents and whether the facts relating to the issue had been fully canvassed in the affidavits. Mr *Goddard* however accepted that the issue pertaining to the ejectment relief was distinguishable from the issue raised in *Mt Edgecombe*. Here, we are not concerned with the withdrawal of a legal concession, erroneously made. The appellant did not seek leave to appeal before Kruger J on the point of the certificate of occupancy and ejectment from the premises. Accordingly, can it be said that this ground was refused as contemplated in s 17(2)(b) of the Superior Courts Act? It could only have been refused, if it had been sought and denied. As the transcript indicates, it was not pursued by the appellant.

[23] The record before us does not contain the application for leave to appeal to the SCA. Counsel for the appellant informed us that the relief in prayer 2(d) formed part of that application. The application to the SCA was indeed for leave to appeal against the whole of the order. This was accepted by the respondents, who delivered opposing affidavits. As matters transpired, the SCA granted the application in terms of s 17(2)(f) of the Superior Courts Act without any limitation of the issues on appeal. The position before us is not the same as in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) where the SCA was faced with a matter in which leave to appeal had been granted by the court *a quo* on limited grounds. Those limited grounds defined the issues before the SCA, which was of the view that unless the appellant had specifically petitioned the SCA on additional matters, it had no jurisdiction to consider them. The converse situation arises in this matter where leave to appeal was refused by the court *a quo*, and the applicant (appellant) succeeded in petitioning the SCA for leave in respect of the *whole* judgment. This constitutes the 'jurisdictional fact' forming the basis for the hearing of this appeal.

[24] Importantly, s 17(2)(f) provides that the decision of the court to grant or refuse leave 'is final'. In that context, I am of the view that it is not open to this Court to narrow down the grounds on which the appeal may be argued. Leave to appeal was granted without limiting the issues to be argued on appeal, as provided for in s 17(5)(a) of the Superior Courts Act. While the issue appears to have been abandoned in the application for leave to appeal, it was revived in the s 17 application to the SCA.¹⁰ Whatever my views as to whether the relief in prayer 2(d) was abandoned, those are irrelevant in light of the decision of the SCA granting leave against the *whole* of the order of the high court. In any event, I am not persuaded that there was any prejudice to the respondents, nor did the appellant seek to build a case on a foundation not laid before the court *a quo*.

[25] Turning to the merits of the appeal, in the court *a quo* the appellant presented an amended draft order which differed from the relief sought in the notice of motion. Mr Veerasamy, who appeared on behalf of the Jabula respondents,¹¹ submitted that the amended draft order (annexure 'X') emerged for the first time in argument before Kruger J and was based, in part, on issues raised for the first time in the replying affidavit. The court *a quo* adopted the approach that as the facts to support the relief in the draft order did not emerge from the founding affidavit, it was trite that any new matter raised should not be considered. The amended draft order was described by counsel for both sets of respondents as a 'constant moving target', something which the court *a quo* took exception to.

[26] Initially, and at least in the founding affidavit, the case of the municipality was three-fold: first, that the respondents were using their private property on Erf 981 as a hardware store in contravention of the Scheme on the basis that its zoning as MUC 3 did not permit the operation of a hardware store, or what it considered in the

¹⁰ See *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) para 14: '... But when the High Court has limited the grounds of appeal, as it did in this case, this court has no jurisdiction to entertain an appeal on grounds which had been specifically excluded. The fact that these excluded grounds involve issues of illegality does not detract from this principle. If an appellant is dissatisfied with the High Court's decision to limit the grounds of appeal, its remedy is to petition this court to do away with the limitation. Since Newlands has failed to do so, it follows that this court has no jurisdiction to entertain the ground of appeal resting on public policy or illegality, which had specifically been excluded from the ambit of leave granted by the court *a quo*.'

¹¹ Reference being made to the second, third and fourth respondents.

alternative, as a 'builder's supply yard'. The second ground of relief was that the respondents were using the public parking lot on Erf 3108 as a builder's supply yard to store their materials. The third leg was that alterations had been effected to the building on Erf 981 without plans having been submitted and approved by the local authority. Accordingly, the occupation of the premises in the absence of a certificate of occupation in terms of the NBR Act was unlawful, and that until this was obtained, the ejectment of all occupying the building must follow.

[27] The appellant sought to explain the basis for the change in relief, attributing it to the 'change in circumstances'. It submitted that once Jabula and/or Stangvest realised that they were using or permitting the use of Erf 3108 (the public parking space) as a builder's supply yard without the authority of the municipality and in contravention of the Scheme, they moved their unlawful conduct from the public parking lot onto their own private property (Erf 981). It contends that the relief sought in the amended draft order was not 'substantially different' from that in the original notice of motion, and was not brought in bad faith nor was it prejudicial to the respondents.

[28] The respondents took a different approach to the relief sought in the amended draft order and the introduction of new material raised for the first time in reply, contending that the court *a quo* was correct in not taking such material into account. The municipality delivered a replying affidavit after the preliminary answering affidavits had been delivered by the respondents. After the latter had supplemented their answering affidavits, the municipality delivered a supplementary replying affidavit. The application was heard almost nine months later. It was only on the day of the hearing, 26 November 2020, that the municipality presented the amended draft order to the respondents and the court. It is common cause that the respondents had no further opportunity of responding to the new material raised in the municipality's supplementary replying affidavit. Moreover, the respondents were seemingly unaware on the day of the hearing that the new facts relied on would form the basis for the amended relief.

[29] It is no answer on appeal for the municipality to contend that the respondents had prior knowledge of the facts relied upon by the municipality. The crucial issue is

that until the day of the hearing, the respondents had no idea that such facts would form the basis of a different order sought in terms of the amended draft order.

[30] In *Molusi and others v Voges NO and others* 2016 (3) SA 370 (CC), it was emphasised that a fundamental rule of civil proceedings is that the parties must be apprised of the case which they are to meet and a party must formulate its case so as to define the disputes for the other parties and for the court. The court in *Molusi* held in paragraphs 27-28:

‘[27] It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker [Naidoo and Another v Sunker and Others]* [2011] ZASCA 216]:

“If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on.”

[28] The purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone. Of course there are instances where the court may of its own accord (*mero motu*) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed.’

[31] It is perhaps for this reason that Mr *Pillemer* submitted that the case which the respondents had come to meet had morphed into something quite different on the day of the hearing. It is now well established that a party should not be ‘ambushed’ in terms of the case which it has to meet. As the court in *Bethulie Water Forum and another v Bloemwater and others* 2021 JDR 3295 (FB), para 15 held ‘it is impermissible to direct a party to a particular direction in pleadings only to take a different direction in arguments and submissions.’

[32] The question which the court *a quo* ought to have asked, in our view, was whether, for a proper ventilation of the dispute between the parties and in the interest of justice, the amendment ought to be allowed with an award of wasted costs against

the municipality. Alternatively, as Stangvest submitted in this court, the municipality ought to have asked for an adjournment on the day of the hearing, proposed an amendment to the notice of motion and afforded all of the respondents an opportunity to deliver further affidavits to address any new facts raised which underpinned the new relief sought.¹²

[33] While the general rule is that all the allegations on which an applicant relies must appear in his founding affidavit, it is not an absolute rule. The court always has a discretion to allow new matter in a replying affidavit in exceptional circumstances, giving the respondent the opportunity to deal with it in a second set of answering affidavits.¹³ *Erasmus* points out¹⁴ that a court should consider:

‘(i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs.’

[34] Counsel for Stangvest however submitted that the appellant failed to meet the threshold of showing ‘*exceptional circumstances*’.¹⁵ A factor operating against the appellant is that it sat idle for nine months after having delivered its supplementary replying affidavit, only to choose on the day of the hearing to present its amended relief. As to whether new material should be received, the court in *NSPCA v Minister of Environmental Affairs and Others* 2020 (1) SA 249 (GP), para 43 stated:

‘The relief sought has changed over time from the launch of the application, as developments on the ground to some extent overtook the legal process. . . . However — given that the relief sought has not substantially changed but the reasons advanced in

¹² As to ‘trial by ambush’ see *Minister of Land Affairs And Agriculture and Others V D & F Wevell Trust And Others* 2008 (2) SA 184 (SCA), para 43. See also *Los Angeles Body Corporate v Noah and another* [2019] JOL 43162 (GJ), paras 32-33; *Cally Development and Contractors CC v City Manager* 2019 JDR 0968 (GP), paras 17-18; *MC Admin and another v Mohlal* [2023] JOL 59402 (GP), para 19; *Moola and Others v KwaDukuza Municipality and Another* (2194/2017) [2017] ZAKZDHC 18 (21 April 2017), paras 23-25.

¹³ See *Lagoon Beach Hotel (Pty) Ltd v Lehane* NO 2016 (3) SA 143 (SCA) at 152G-H in which it was held that in urgent applications courts are more sympathetic to an applicant and often allow papers to be amplified in reply, with the respondents being permitted to file further answering papers.

¹⁴ D E van Loggerenberg *Erasmus: Superior Court Practice* RS 18 (2022) at D1-67.

¹⁵ *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere* 1984 (2) SA 261 (W) at 270A; *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T) at 91F–92F; *Kwinana and Others v Ngonyama and Others* [2022] ZASCA 48 para 12.

support of it have. . . — I take the view that even though the replying affidavit introduced a new matter, the court in exercising the discretion it has will allow the introduction of such new matter, however subject to it remaining relevant in the determination of costs.’

[35] In *Shakot Investments (Pty) Ltd v Town Council of The Borough of Stanger* 1976 (2) SA 701 (D) at 705A-B the court focused its attention as to when the new facts emerged, holding that:

‘. . . a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.’

[36] In my view, to the extent that the new material introduced by the municipality in its supplementary replying affidavit (to which the respondents had no opportunity to respond) formed the basis of the amended relief in the draft order, I am in agreement with the court *a quo* that such material was correctly not considered. While the amended draft order abandoned the relief in prayer (c) of the notice of motion, certain of the relief in the amended draft order was based on a different, newer set of facts that arose subsequent to Jabula moving the building material off Erf 3108 and onto Erf 981, where it stored the material below the hardware store.¹⁶ I have already expressed my view as to the impermissibility in civil proceedings of the shifting of the goalposts, to the disadvantage of one's opponent. To conclude on this point, I agree with the conclusion reached by the court *a quo*, but for reasons which I have already articulated, rather than a reliance on an absolute rule against receiving new material, which was the approach taken by the court *a quo*.

¹⁶ See *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) and Another* 1980 (1) SA 313 (D) where it held that ‘The correct approach to the problem was enunciated clearly by CANEY J in *Bayat and Others v Hansa and Another* 1955 (3) SA 547 (N) at 553D: “...the principle which I think can be summarised as follows...that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent in his answering affidavits, still less make a new case in his replying affidavits.”

[37] The first issue to be addressed in prayer 2(a) of the amended draft order was whether the operation by Jabula of a 'hardware shop' was in contravention of the Scheme, or whether Jabula was now using *its premises* as a 'builder's supply yard'. Olsen J rejected this argument in *Kwadukuza Municipality v Build-Rite Properties (Pty) Ltd and Others* [2021] ZAKZDHC 24, para 43 where he stated:

'The definition upon which the applicant relies is a definition of a "yard". I know of no use of the word "yard", certainly in the ordinary language I have come across, which conveys that a building (properly so-called) can be regarded as a "yard".'

[38] At the same time Olsen J, in paragraphs 47-48, also ventured to express his view on what a hardware shop, as opposed to a builder's supply yard, would entail:

'[47] A hardware shop is all about the business of selling of goods. Some of them will undoubtedly be building material and equipment. Bearing in mind the wide range of goods which are to be found in any ordinary hardware shop, much of which could be regarded as items or material used in or in the course of building work (from, for instance, nails and hammers through to a pocket of cement), and given the self-evident popularity of, and the need of ordinary people (non-builders) to access, the materials and tools and the like sold in a hardware shop, it is wrong to give the excluded use (builder's supply yard) so broad a meaning as to exclude the operation of a hardware shop inside a building on a property governed by a zoning such as that attributed to Erf 220.

[48] Builder's supply yards, being open land and normally quite large pieces of land, can accommodate the storage and sale of industrial scale quantities of such items as sand, stones, bricks and so on, and therefore attract a significant flow of industrial type traffic in the way of heavy vehicles both delivering materials to the yard and picking material up from the yard for delivery to building sites. That sort of traffic generation and activity would be a considerable obstacle to the enjoyment of the public amenities which are supposed to be available in an area zoned MUC3. The level of storage and trade - generated interference with public amenities by a facility such as a hardware shop contained within a building cannot be compared to that generated by a builder's yard.'

[39] Significantly, *Build Rite* also concerned an application by the KwaDukuza municipality to interdict the operation of a hardware store in a MUC 3 zone. The interdict was refused, and the court affirmed that the operation of a wholesale hardware store did not contravene the Scheme. In reaching this decision, Olsen J also expressed agreement with the conclusion reached by Kruger J in the court a

quo 'on the zoning issue'. In this court, Mr *Goddard* accepted that the municipality was bound by the determination reached by Olsen J and it did not seek to appeal that judgment.

[40] I am in agreement with the conclusion reached in *Build Rite*. However, that only addresses the relief sought by the municipality as it pertains to the operation of a hardware store from the premises in prayer 2(a) of the amended draft order. To the extent that Jabula moved its goods and materials off Erf 3108 and stored them *outside* on Erf 981 while it was preparing the storeroom to accommodate the storage, the municipality contends that storing goods *outside* constitutes a 'builder's yard' which is prohibited. Mr *Pillemer* submitted that on this interpretation, even the storage of goods outside of the premises 'for fleeting moments', including when they are in the process of being offloaded, may constitute a contravention of the Scheme. Such an interpretation, on any score, would appear to be irrational.

[41] In light of what has been set out in some detail above, I am of the view that the operation of a hardware store by Jabula on Erf 981, CBD Stanger, is not in conflict with the zoning of the property for Mixed Core Use 3 in terms of the Scheme. The court *a quo* correctly dismissed the application on this ground.

[42] The next issue to consider is the relief in 2(b) in which the municipality seeks to prevent Jabula from using a municipal owned parking lot and an access road to shops, for any purpose other than parking of light motor vehicles. The interdict sought by the municipality effectively impedes Jabula's right to trade in that it cannot use the parking lot for the purpose of offloading building materials or for the loading of materials purchased by customers into their vehicles, other than if light delivery vehicles are used. The interdict sought by the municipality would extend even to a temporary use by a customer or merchant having business with Jabula, and using anything but a light delivery vehicle. Jabula's offer to contribute to the municipality's 'parking reserve fund'¹⁷ as set out in clause 12 of Additional Controls to the Zoning Certificate, was rejected by the municipality for reasons that appear tenuous at best, with the suggestion being that any acceptance of the offer may be construed by the respondents as a basis to justify their operation of the premises as a hardware store.

¹⁷ Also referred to in the record as a 'deferred parking payment mechanism'.

[43] It was not disputed that as at the time when the municipality delivered its replying affidavit in July 2020 Jabula had ceased using the parking lot as a builder's supply yard. Jabula never denied using the parking lot in a manner that contravened the Scheme. Once this was brought to its attention, and certainly by the time litigation commenced (between 25 November and 4 December 2019), it took remedial action and removed its goods from Erf 3108. Accordingly, by the time the matter was to be argued, the relief sought in prayers 2(b)(iii), (iv) and (v) was moot. The municipality was not satisfied, and contended that the storage of the goods *in the basement* of the premises of Jabula constituted a builder's supply yard. This argument was later abandoned and the contention thereafter was that the storage of goods remaining *out in the open* on Erf 981 (while waiting for the basement to be properly renovated) constituted a builder's yard. Even then, in my view where Jabula used an insignificant portion of the property on Erf 981 to store surplus goods for the hardware store, this did not translate to Erf 981 being categorised as a builder's supply yard.

[44] The municipality then contended that Jabula had unlawfully erected a fence and a driveway access gate, with a 'No Entry' sign on Erf 3108. Again, once this was brought to the respondents' attention, they obtained expert advice and relocated the driveway and access gates. The responses and conduct of the respondents must be seen in the context of an occupant carrying on business legitimately as a hardware store, and at the same time having to comply with strict standards being imposed by the municipality. Notwithstanding, the municipality sought in its replying affidavit to seek additional relief to interdict the respondents from fencing off or 'appropriating any part of Erf 3108' or from using it as a driveway or access route. It is this type conduct that the respondents bemoan as having to deal with a 'moving target' and a constant shifting of the goalposts by the municipality.

[45] It is necessary to point out that at the hearing of the matter it became apparent during the argument on appeal that the many of the captions of the photographs attached to the municipality's supplementary affidavit incorrectly transposed the Erf numbers from 3108 to 981. This was not brought to the attention of the court *a quo*. This no doubt would impact on the interpretation of the affidavits,

to which the photographs were attached, particularly regarding the erection of a driveway gate and a newly created builder's supply yard, both allegedly on Erf 3108. In the result, there was considerable confusion (both to this court and seemingly to counsel) as to which erven was being referred to when the municipality alleged that the Scheme was being contravened at a particular point in time, bearing in mind the contention of the respondents that they were dealing with a 'moving target'. Even against this backdrop, Mr *Goddard* submitted that the respondents nonetheless understood the substance of the municipality's complaint and moved the offending materials onto their own property. I have serious reservations as to whether final relief could have been at all granted, having regard to the confusion that arises when one properly has regard to the allegations (based on the photographs as presented) in the municipality's affidavit. These incorrect factual averments were left unaddressed before the court a quo.

[46] In regard to the restrictions sought to be imposed on the use of the parking lot, although Mr *Veerasingh* contended that the municipality failed to define precisely what it meant by reference to 'light motor vehicles', one can safely assume that the interdict was directed against the use of trucks offloading and loading materials via the public parking space. The point stressed by counsel is that the municipality has not indicated anywhere in the founding papers why the parking is only to be restricted to 'light motor vehicles' only, and more importantly why final relief for an interdict is sought only against those users having business with Jabula. The basis for the municipality's restriction to 'light motor vehicles' only, does not appear to be rational or directed at curbing some mischief, particularly as a 'light motor vehicle', would include a vehicle:

'... the tare of which does not exceed 3 500 kilograms or, where such motor vehicle is- (aa) a bus or goods vehicle, the gross vehicle mass of which does not exceed 3 500 kilograms; (bb) an articulated motor vehicle, the gross combination mass of which does not exceed 3 500 kilograms.'¹⁸

[47] Counsel for the municipality contended that Erf 3108 was contemplated for the use of 'car spaces' – that the Additional Controls to the MUC 3 Zoning Certificate refer to the provision of '*4 car spaces per 100m² of the Gross Floor Area*'. This

¹⁸ Section 15 of the National Road Traffic Act 93 of 1996.

however is not elaborated on in the founding affidavit and there is no certainty as to the rationale for wanting to restrict access to the parking area on Erf 3108 to light motor vehicles. In any event, to do so would be inconsistent with the proclaimed purpose of establishing a Mixed Core Use 3 zone which is aimed at the provision of retail services at 'high intensities that comprise a town centre'.¹⁹ Moreover, the restriction sought to be imposed would effectively preclude those not in possession of a light motor vehicle from parking in a public parking lot. Again, no rational purpose can be discerned from such a restriction.

[48] The court *a quo* dismissed the municipality's contention that Jabula's vehicles were not permitted to park in a public parking space, despite Jabula admitting that forklifts were used to offload goods from trucks bearing building material. Importantly though, the court *a quo* found that the municipality was being selective in enforcing its control over the parking. It is not disputed that the Checkers supermarket and a bottle store are situated in immediate proximity to Stangvest's property on Erf 981. Jabula contends that both these businesses use Erf 3108 in the same manner that it did, yet the municipality has sought to only single out Jabula and Stangvest for the purposes of enforcing the by-laws. To the extent that the respondents accuse the municipality of selective litigation, the court *a quo* endorsed that view, and relied on a photograph annexed to Jabula's affidavit which depicts a large SAB delivery truck, stationary in Erf 3108, presumably making deliveries to the bottle store.

[49] Counsel for the appellant attempted to argue away this finding, contending that the trucks carrying out deliveries to the bottle store were somehow 'infrequent' and 'occasional' as compared to the 'regular' offloading of building materials to Jabula. These submissions were made without any factual basis and without any evidence in the affidavits. Moreover, there is nothing on record to suggest that the use of vehicles delivering goods to Jabula would be any more of a 'nuisance', or would affect the 'municipal amenity' as might exist, to any greater degree than trucks delivering beer bottles and liquor to the bottle store. The disparate approach of the municipality towards the business of Jabula and its immediate neighbours finds no justification, in my view.

¹⁹ MUC 3 zoning certificate of KwaDukuza Municipality.

[50] There is another reason why the approach of the municipality towards Jabula is concerning. It is an accepted fact that small businesses, particularly those located in busy central business districts, receive delivery of merchandise through public thoroughfares. A general dealer selling soft drinks, alongside bread and milk in his shop, would hardly ever receive delivery of goods via a light motor vehicle using a designated loading zone. These are either non-existent or utilised for some other purpose. Vehicles carrying out these deliveries on a daily basis would most likely be loaded with merchandise including those for several other businesses. That is the economy of scale. Such trucks are seen 'double-parked' while off-loading their goods. The same would apply to the bottle store in proximity to Jabula, which seeks to do no more than offload goods outside its premises. The selectivity of the municipality in seeking to secure an interdict directed only at Jabula from accessing the parking lot on Erf 3108, while adopting a supine approach to the bottle store and the supermarket is without justification, and lacks rationality. In this regard, the high court's invocation of the ratio in *Quick Drink Co (Pty) Ltd and Another v Medicines Control Council and Others* 2015 (5) SA 358 (GP) para 32, where no rational basis for the selectivity exists, is endorsed in the present circumstances.

[51] Turning to the relief in 2(d) of the amended draft order concerning the respondents' failure to obtain a certificate of occupation, the municipality relies on Jabula's admission that it removed a 'non-structural' wall for cosmetic purposes. The founding affidavit indicates in general terms that the building inspector who initially visited the hardware store on 4 October 2019 noticed that certain internal walls had been demolished. The deponent to the municipality's founding affidavit confirms that when he visited the premises on 11 October 2019 he observed 'alterations' to the building, which in his opinion required building plan approval. Neither of the two officials concerned sought to provide any detail as to where precisely this alteration or demolition had been effected, nor had they sought to do so with reference to the existing building plans, which would be in the custody of the municipality. The municipality submits that these alterations constitute an 'erection' for the purposes of the NBR Act, requiring planning approval and a certificate of occupation. These allegations are placed in dispute by Jabula who states that these constituted 'minor building works', permitting it to side-step the requirement for a planning approval in

terms of reg A1(5) of the Regulations in terms of s 17(1) of the NBR Act, GN R2378, 12 October 1990.

[52] The affidavits reveal a clear dispute of fact – whether the alterations constituted ‘minor building works’, which is an objective assessment of the work done – which is incapable of being resolved on the papers. Certainly, from the perspective of the appellant which was seeking final relief, I am in agreement that the court *a quo* was correct in dismissing this ground of the relief.

[53] As to the issue of whether the municipality was justified in rushing off to court seeking an urgent interdict against the respondents for a multitude of transgressions, while at the same time ignoring the conduct of other neighbouring businesses, seems to me, to be intertwined with the order of the court *a quo* in dismissing the appellant’s claim with costs on an attorney and client scale. The appellant justified its application contending that the enforcement mechanisms in SPLUMA were inadequate, that criminal prosecutions for a contravention of SPLUMA took too long to finalise and that fines were an insufficient deterrent to curb infringements.

[54] While this may be correct, there is nonetheless an obligation on an administrator to utilise the existing remedies provided for in the legislation before rushing off to court for interdictory relief. There were certainly no exceptional circumstances in this matter justifying the existing mechanisms being jettisoned in favour of the interdictory relief. Moreover, a factor alluded to by the court *a quo*, is that the respondents, through their conduct, did not evince the behaviour of recalcitrant occupiers bent on recklessly carrying on the unlawful operation of their business. On the contrary, even if there is a dispute as to whether Jabula immediately ceased occupying Erf 3108 on receipt of the application papers, what cannot be gainsaid is that Jabula was not unwilling to obey the instructions of the enforcement officers in the contravention notices. To this extent it seems to me that much more could have been achieved had the municipality’s officials continued on the path of engagement with the respondents to secure compliance with the bylaws. This is demonstrated in Jabula’s response, both to the issue of using Erf 3108 as a builder’s supply yard and erecting a fence on the municipality’s property. It acted to ensure compliance with both complaints.

[55] The scheme is an essential component of town planning, and a tool to define the control and regulation of the use of land.²⁰ In *JDJ Properties CC and Another v Umgeni Local Municipality and Another* 2013 (2) SA 395 (SCA) para 28, the court affirmed the general purpose of a town planning scheme which is to achieve 'a co-ordinated and harmonious development of the municipal area . . . in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare'. In general, town planning schemes are intended to operate not in the interests of the general public, but in the interests of inhabitants of the area covered by the scheme.²¹

[56] Where a municipality approaches the court in defence of its constitutional obligations and in the performance of its public duty, unless motivated by ulterior purpose or *mala fides*, courts should be slow to impose punitive costs orders where it is unsuccessful. In this case, there have been allegations of selective enforcement and unevenness in the municipality's conduct. The allegations of disparate treatment in relation to Jabula's competitor, Singh's Hardware, are disputed. There is not enough on the papers, in my view, to make any such finding against the municipality.

[57] There is much to be said for the municipality adopting a different approach to the use by Jabula's immediate neighbours of the parking on Erf 3108, and the 'targeting' of Jabula's business. I am of the view that despite the municipality's single-mindedness in pursuing compliance by Jabula with the provisions of the Scheme, this alone cannot be translated to irrationality or ulterior purpose. It cannot be denied that Jabula's original conduct in relation to the use of Erf 3108 was unlawful. The imposition of a fine would have had no impact. The municipality was entitled and duty bound to approach the court to defend the integrity of its Scheme.

[58] On a proper reflection of the matter, I am of the view that the court *a quo* erred in imposing a punitive costs order on the appellant. At the same time, I am certain that even though Jabula acted promptly to curb its conduct, this may not have

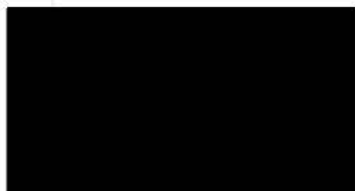
²⁰ See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) para 57.

²¹ *The Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 70D; *BEF (Pty) Ltd v Cape Town Municipality & others* 1983 (2) SA 387 (C) at 401F.

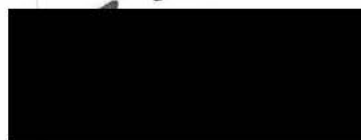
come about without the launching of the application. Accordingly, generally although costs should follow the result, I am of the view that the scale of costs ordered to be paid *a quo* should be tempered, in the form contained below.

[59] I accordingly make the following order:

- (a) Subject to the revised order proposed below, the appeal is dismissed with costs.
- (b) The order of the court *a quo* is set aside and substituted with the following order:
 - '1. The applicant is granted leave to withdraw its claim against the fourth respondent and is directed to pay the fourth respondent's costs up to and including 24 January 2020.
 - 2. The application as against the first, second, third and fifth respondents is dismissed with costs.'



p.p. Chetty J



Balton J



Vahed J

Page 27
overleaf.

Case Information:

For the Appellant:	G D Goddard SC
Instructed by:	Shepstone & Wylie
Address:	24 Richefond Circle, Ridgeside Office Park, Umhlanga Rocks, Durban
Email:	smkhize@wylie.co.za
c/o	Shepstone & Wylie, Pietermaritzburg
Ref:	JTM/mm/KWAD7135.849
Tel:	031 575 7218
Email:	jmanuel@wylie.co.za
For the 1 st & 5 th Respondents:	M Pillemer SC
Instructed by:	Rakesh Maharaj & Company
Address:	87 Mahatma Gandhi Street Suites B & C, Stanger
Ref:	RM/MH/S1520/CIV
Tel:	032 551 1055
Email:	meru.rmandco@gmail.com
For the 2 nd & 3 rd Respondents:	I Veerasamy
Instructed by:	Neerajh Ghazi Attorneys
Address:	6 th Floor, Royal Towers 30 Dorothy Nyembe Street, Durban
Ref:	NG/KP/DHO 1
Tel:	086 124 6369
Email:	neerajh@ngalaw.co.za
Date reserved:	3 March 2023
Date of Delivery:	16 October 2023