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

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: **2002/2013**
Date heard: **19/10/2015**
Date delivered: **13/11/2015**

In the matter between:

THE MEC FOR TRANSPORT
NORTHERN CAPE PROVINCE 1st Appellant

THE HEAD OF DEPARTMENT: DEPARTMENT OF
TRANSPORT SAFETY AND LIAISON
NORTHERN CAPE PROVINCE 2nd Appellant

THE CHAIRPERSON OF THE OPERATING LICENCING
BOARD FOR THE NORTHERN CAPE PROVINCE 3rd Appellant

and

GREENPOINT TAXI ASSOCIATION Respondent

***Coram*: Kgomo JP *et* Olivier J *et* Phatshoane J**

JUDGMENT

Olivier J:

[1]. On 19 September 2012 the Operating Licence Board ("*the Board*") for the Northern Cape Province[1] considered a number of applications for operating licences[2]. This triggered court applications by the respondent, the Greenpoint Taxi Association, to compel the provision of certain information and to interdict the third appellant, in his capacity as chairperson of the Board, from actually issuing licences that had been granted[3]. The first appellant, the Member of the Executive Council for Transport in the Northern Cape Province, and the second appellant, the Head of the Department of Transport, Safety and Liaison in the Northern Cape Province, were also respondents in those applications.

[2]. On 29 October 2012 the parties concluded a settlement agreement which was made an order of court and of which the material terms were:

2.1 that the appellants would within 7 days furnish the respondent with certain information;

2.2 that the respondent would within 7 days of receipt of the information request reasons for those decisions in respect of which the respondent intended lodging appeals[4];

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[1] A board as envisaged in section 1 and section 16 of the **Northern Cape Land Transport Act**, 3 of 2003 ("*the Act*").
[2] As envisaged in section 1 of the Act, read with section 33 of the **National Land Transport Transition Act**, 22 of 2000.
[3] Cases number 1737/2012 and number 1832/2012.
[4] Presumably in terms of section 51 of the Act.

2.3 that the appellants would supply such reasons within 14 days of the request; and

2.4 that the respondent would lodge its appeal/s within 21 days of receipt of the reasons, failing which the appellants would be entitled to issue the licences that had been granted.

[3]. The information was not furnished timeously, but this is not really relevant to the present appeal.

[4]. On 27 November 2012 the respondent requested reasons in respect of a number of the applications for operating licences which had been the subject of the Board's meeting of 19 September 2012.

[5]. On 30 January 2013 Mr O F Lategan of the Office of the State Attorney in Kimberley, acting on behalf of the appellants, faxed to the respondent's attorney a document which in his covering letter was described as "*the requested reasons*".

[6]. It is common cause that the respondent did not lodge any appeal within 21 days of receipt of this letter and document, or in fact at all.

[7]. On 19 June 2013 Mr Lategan addressed a further letter to the respondent's attorney. The relevant part of this letter reads as follows:

> "*According to our client you did not timeously pursue the appeals in terms of . . . the Court Order dated 29 October 2012 and consequently we regard the appeal process as finalised.*
>
> *Should we not hear from you within 14 days from date hereof we will proceed with the issuing of the licences in question.*
>
> *We look forward to your reply as we [can not] afford any misunderstanding on this issue.*"

[8]. When nothing was heard from the respondent's attorney the Board proceeded to issue operating licences[5].

[9]. On 3 and 6 September 2013 the respondent's attorney addressed letters to the appellants' attorney, requesting the reasons envisaged in the order of 29 October 2012. This was followed by a meeting between the legal representatives of the parties on 10 September 2013. Subsequent to this meeting further correspondence between the attorneys followed, from which it is clear that they were not in agreement as to what had transpired and what had been agreed at the meeting.

[10]. The respondent then returned to court and obtained an order holding all three appellants in contempt of the order of 29 October

[5] In terms of section 17(4)(c) of the Act.

2012. All three appellants were sentenced to 30 days imprisonment, which was suspended on condition, *inter alia*, that they provide the respondent with "*proper*" reasons[6] and revoke all licences that had been issued in respect of operating licence applications that had been the subject of the agreement and order of 29 October 2012. These findings and orders are the subject of the present appeal, leave to appeal having at first only been granted by the court *a quo* in respect of the conditions of suspension pertaining to the revocation and issuing of licences, but then subsequently by the Supreme Court of Appeal "*against the whole judgment and order of the court a quo, save insofar as that order relates to licence application nr 231804*"[7].

[11]. In view of the exclusion of licence application nr 231804 from the leave granted by the Supreme Court of Appeal, what follows will initially be confined to the appeal insofar as it relates to the other applications for operating licences. I will revert to the issue of licence application nr 231804 in due course.

[12]. The main issues in this appeal are whether the document that had been furnished on 30 January 2013 had constituted reasons and, if not, whether the failure to furnish proper reasons had been wilful and *mala fide*.

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[6] The order erroneously referred to "*2nd respondent*" as the "*Chairperson*" of the Board and as the person who had taken the decisions in respect of which the reasons were to be furnished. The chairperson of the Board was actually the third respondent in that application and the decisions had obviously been taken by the Board, and not by its chairperson alone.

[7] It had been conceded in the court *a quo* that reasons had not been furnished in respect of licence application number 231804 and no leave had been sought to appeal against the findings and orders insofar as they pertained to that application.

[13]. Adv Van Niekerk SC, counsel for the respondent, argued that the particular document in any event made no reference at all to certain of the applications (for operating licences) in respect of which reasons had been requested and that, even if the document could be regarded as constituting reasons in respect of the applications referred to therein, there would not have been compliance in respect of the other applications. Whether this constituted non-compliance with the court order had, however, on the papers been in dispute. In the answering affidavit it had been stated that certain of the application numbers referred to in the request for reasons had been duplicated[8] and that one had applied to a different person and had in any event not been granted. It is trite that in applications where final relief is sought factual disputes will be approached on the basis that the respondent's version will be accepted[9], unless it is "*far-fetched and clearly untenable*"[10], which cannot in my view be said of these explanations in the answering affidavit. Even if it could, there would in the light of the explanations, in my view, have been at the very least a reasonable doubt about whether any failure to provide reasons in respect of those applications had been deliberate and *mala fide*. The question whether non-compliance with the court order had been shown beyond a reasonable doubt and, if so, whether it had been deliberate and *mala fide,* should therefore in my view be confined to those applications (for operating licences) referred to in the document of 30 January 2013[11].

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[8] In the sense that they had applied to the same applicant.

[9] Compare **Staatsdiensliga van Suid-Afrika en Andere v Minister van Waterwese** 1990 (2) SA 440 (NC) at 443G

[10] **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 635C

[11] Subject to what I have already said about application number 231804.

[14]. In my view there is no basis for interfering with the finding of the court *a quo* that the communication of 30 January 2013 did not constitute reasons and that the order of 29 October 2012 had accordingly in this respect not been properly complied with.

[15]. Objectively the document of 30 January 2013 reflects the decisions taken, and in respect of those applications that were granted it reflects the information that had been placed before the Board in motivation of those applications, the fact that no objections had been received and the support that there had been for those applications.

[16]. It does not, however, contain any explanation[12] for the decisions to grant particular applications, or of the role that the motivation, or any part thereof, or the absence of objections or the support may have played in making those decisions.

[17]. For example, what role (if any) did the fact that one of the applicants had been refused membership of the respondent organisation, unless he paid a membership fee of R30 000.00, play? How can a remark that the particular applicant had submitted to the Board a copy of correspondence (with the respondent) be regarded as an explanation, or even part of an explanation, for granting that applicant an operating licence?

[18]. In terms of the order of 29 October 2012 the period within which the respondent would have been entitled to lodge appeals against

[12] Compare **Kiva v Minister of Correctional Services and another** [2007] 1 BLLR 86 (E) para [38]; **Appollis v The Correctional Supervision and Parole Review Board** 2010 JDR 0045 (ECG) para [15] and fn 3

the granting of operating licences would not have commenced to run before reasons were furnished, which meant that licences which had been granted could not be issued until such time as the reasons for the granting of those licences had been furnished and a further period of 21 days had then expired without any appeal having been lodged by the respondent. This means that, insofar as any such licences may in this case have been issued notwithstanding the fact that reasons had not been furnished and that the right to lodge appeals had accordingly not lapsed, such issuing would in effect also have been in non-compliance of the order of 29 October 2013.

[19]. Before considering whether the non-compliance had been wilful and *mala fide*[13] it had to be determined whether all three appellants had been shown, beyond a reasonable doubt, to have made themselves guilty of such non-compliance.

[20]. The settlement agreement of 29 October 2013 was signed on behalf of all three appellants and all three of them were parties to the initial two court applications which were then settled. They must therefore be assumed to have been aware of the order of 29 October 2013.

[21]. The question, however, would then still be which of the appellants had actually been guilty of having failed to comply with the order, in the sense of being responsible for such failure, because it would be only that appellant/s who would have borne "*an evidential burden*

[13] Compare **Pheko and others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as *amicus curiae*)** 2015 (6) BCLR 711 (CC)

in relation to wilfulness and mala fides" and who would have had "*to advance evidence that establishe(d) a reasonable doubt as to whether non-compliance was wilful and mala fides*"[14].

[22]. To the extent that this issue may not be included in the grounds of appeal I am of the view that it was crucial to the resolution of the disputes in the contempt application and that it should therefore be considered on appeal[15].

[23]. The answering affidavit in the contempt application was deposed to by the Deputy Director of the Department concerned, Mrs C E Olivier. The affidavit is styled as "*First, Second and Third Respondents' Opposing Affidavit*", and in paragraph 1 thereof Mrs Olivier claimed to have been duly authorised to depose to that affidavit. It was not made clear by whom or in respect of which of the appellants she had been authorised and there were no supporting or confirmatory affidavits by or on behalf of, in particular, the first and third appellants.

[24]. Mrs Olivier's attitude was that the third appellant had been obliged to furnish the reasons and that the document of 30 January 2013 constituted reasons in respect of those applications that it dealt with, as it had been received from the third appellant. Her affidavit would therefore naturally not contain an explanation for an alleged failure to furnish reasons in respect of those decisions.

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[14] **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) para [42]

[15] Compare **Quatermark Investments (Pty) Ltd v Mkhwanazi and Another** 2014 (3) SA 96 (SCA) paras [20] and [21]; **Sarrahwitz v Maritz NO and Another** 2015 (4) SA 491 (CC) paras [30] and [31]

[25]. In my view Mrs Olivier was quite correct in adopting the attitude that, if that document was what the third appellant had tendered as reasons, the other appellants would have been "*unable to give any other and/or better reasons*". The decisions in respect of which reasons had to be furnished had been taken by the members of the Board, and it is common cause on the papers that the Board makes autonomous decisions and does not in doing so fall under the control of the second appellant, or for that matter of the first appellant.

[26]. This is in fact also the import of the provisions of the Act. It provides the Board with the authority to decide applications for operating licenses, and with the concomitant duty of furnishing reasons for those decisions[16].

[27]. The first and second appellants would in any event for obvious reasons not have been able to provide reasons for decisions taken by the members of the Board, and to the extent that the agreement and order of 29 October 2012 purported to place such a duty on either of them it would in my view not have been enforceable.

[28]. In the same vein it would not have been proper, in my view, to attribute the third appellant's failure (to provide proper reasons) to the first and second appellants. The third appellant, as the chairperson of the Board, was the party who would have been in a position to provide reasons and from whom an explanation for such default could be expected. In this regard the following extract from **Meadow Glen Home Owners Association and Others v Tshwane**

[16] See section 27(2) of the Act.

City Metropolitan Municipality and Another[17] (para [22]) is instructive –

> "*We do not hesitate to endorse what Nugent JA said in this court in* ***Kate***[18]*, that 'there ought to be no doubt that the public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with ordinary principles'. However, it must be clear beyond reasonable doubt that the official in question is the person who has wilfully and with knowledge of the court order failed to comply with its terms. Contempt of court is too serious a matter for it to be visited on officials, particularly lesser officials, for breaches of court orders by public bodies for which they are not personally responsible.*"

[29]. In my view therefore the first and second appellants had not beyond reasonable doubt been shown to have made themselves guilty of non-compliance with the order to furnish reasons[19]. Even though the first and second appellants may technically have agreed to furnish reasons[20] they were in effect and in actual fact always unable to do so.

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[17] 2015 (2) SA 413 (SCA)

[18] **MEC, Department of Welfare, Eastern Cape v Kate**, 2006 (4) SA 478 (SCA) ([2006] 2 All SA 455) para [30]

[19] **Fakie NO v CCII Systems (Pty) Ltd**, **supra**, para [42](c)

[20] Due to the failure to distinguish and particularise in the agreement of 29 October 2012 which of the appellants would in practice be obliged to furnish the reasons.

[30]. The same applies to their undertaking not to issue the licences concerned before the expiry of the period for the lodging of appeals. Licences are issued by an official designated by the Board[21]. The first and second appellants would not have been able to do so or to refrain from doing so. It was never the respondent's case that the first and/or second appellants would have been able to exercise any measure of control over the issuing of licences and no case had therefore been made out that they could have prevented it[22].

[31]. The first and second appellants would not have been able to provide the respondent with the date/s on which the granted licences were going to be ("*will be*") issued. They were not responsible for or in control of the issuing of licences. That was the statutory function and duty of the autonomous Board, and in any event the orders of 29 October 2012 did not enjoin any of them to exercise control over this process.

[32]. In any event, Mrs Olivier explained that the licences were issued whenever the applicants came to uplift them, and that it would therefore not have been possible to give prior notice of such dates.

[33]. I am therefore of the view that the first and second appellants should not have been held in contempt, because it had not been shown beyond reasonable doubt that they had made themselves guilty of deliberate non-compliance with the orders of 29 October 2012.

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[21] Section 36(2) of the Act.

[22] This was in any event also not the effect of the agreement or of the order of 29 October 2012.

[34]. The same would apply to application number 231804, but as already mentioned it was excluded from the leave granted by the Supreme Court of Appeal.

[35]. The position is different when it comes to the third appellant. Insofar as the document of 30 January 2013 is to be regarded as not containing reasons as envisaged in the order, it would be the third appellant, as representative of the body that would have been able to furnish reasons, that would in this capacity have been guilty of non-compliance with the order and who would in this capacity have had to rebut any inference of wilfulness and *mala fides*.

[36]. The fact that Mrs Olivier may have believed the document of 30 January 2013 to have been the Board's reasons did not assist the third appellant. The third appellant did not take the trouble to state that he had regarded the document as the reasons and, if so, why he had held this opinion.

[37]. The fact that Mr Lategan in his covering letter referred to the document as the reasons, is not evidence that he had advised the third appellant to this effect. The letter would have been drafted after the third appellant had presumably provided the document to Mrs Olivier, and there is no indication that the third appellant had at that stage seen the letter. There was no evidence on record to the effect that Mr Lategan or anybody else had advised the third appellant at the relevant time, in other words when the document was made available by the third appellant, that the document

constituted proper reasons, as envisaged in the order of 29 October 2012.

[38]. Mrs Olivier stated that Mr Lategan had advised the appellants that, save for application number 231804[23], "*all the reasons were furnished …… wherefore the time within which the appeals had to be instituted have lapsed*". In his confirmatory affidavit Mr Lategan claimed to have read Mrs Olivier's affidavit and confirmed its "*truth and correctness ….. in so far as it relates to* (him)". It is however clear from the context of Mrs Olivier's affidavit that she was referring to advice given by Mr Lategan at some stage after the document had been sent to the respondent's attorney on 30 January 2013, and probably just before the licences were issued. Such advice would have been given after the fact and would in my view be irrelevant in establishing the third appellant's state of mind at the stage when he submitted the document.

[39]. This, however, is not where it ends. On Mrs Olivier's uncontested evidence the third appellant had tendered the document of 30 January 2013 as the Board's reasons. This is also obviously how Mr Lategan must have understood the third appellant's attitude when he in his covering letter referred to the document as being the Board's reasons. The document was furnished by the third appellant in response to a request for reasons. It also dealt with the applications referred to in that request for reasons[24].

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[23] Erroneously referred to by her as application number 23180.

[24] Except for application number 231804, and other applications which Mrs Olivier explained were either also covered by the contents of the document or had not been granted.

[40]. It would have been easy to presume or infer a wilful and *mala fide* failure[25] on the part of the third appellant had he furnished nothing at all, or if there had been an immediate objection to the document, to which the third appellant had not responded. In this case the third appellant did, however, respond to the request for reasons and it would actually have been more accurate to find that he had failed to furnish proper reasons, rather than finding that he had completely disregarded the order that, when requested by the respondent, reasons should be furnished.

[41]. Although evidence by an applicant that an order had been made, that it had come to the knowledge of a particular respondent and that it had not been complied with would "*normally*"[26] lead to an inference or presumption of wilfulness and *mala fides* on the part of that respondent, this does not mean that, even in the absence of evidence by that respondent personally, the rest of the evidence would not in suitable circumstances be taken into account in deciding whether in a particular case the presumption had indeed arisen or the inference could be drawn, alternatively whether there is a reasonable doubt about such presumption or inference[27].

[42]. The question here was not whether it was likely or probable that the third appellant had regarded the document of 30 January 2013 as constituting reasons, sufficient to enable the respondent to lodge appeals. The question was merely whether it was reasonably

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[25] Compare **Pheko and others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as *amicus curiae*), supra**, para [36]
[26] **Consolidated Fish Distributors (Pty) Ltd v Zive** 1968 (2) SA 517 (C) at 522H; Also see **JC v DC** 2014 (2) SA 138 (WCC) para [37]
[27] Compare **S v Khumalo en Andere** 1991 (4) SA 310 (A) at 328G; **S v Dweba** 2004 JDR 0382 (SCA) para [10]

possible that this had been the third appellant's belief when the document was made available in response to the request for reasons.

[43]. Had this been the case, the third appellant's belief would certainly have been fortified by the fact that the respondent, for at least 7 months thereafter, never took the position that the contents of the document did not constitute reasons and never indicated that the contents of the document were insufficient for the purposes of lodging appeals.

[44]. The contents of the letter of 19 June 2013 are also significant. It had been drafted by the attorney who represented *inter alia* the third appellant. The contents of the letter must be assumed to have been in accordance with the instructions of the third appellant, in his capacity as the chairperson of the Board that clearly wanted to issue the licences that had been granted. The statement in that letter that the appeals had not been pursued in terms of the order of 29 October 2012 would fit in perfectly with a belief that reasons had been furnished, because the order was that appeals had to be lodged "*within 21 days after receipt of the reasons*".

[45]. Even in the absence of an affidavit by the third appellant himself these two letters should in my view have created a reasonable doubt as to whether the third appellant had realised, at the time when reasons had to be given and when the document was made available as such reasons, that its contents did in fact not constitute reasons. To put it differently, in my view there existed a reasonable possibility that the third appellant (and in fact also the other two

appellants) may honestly have believed that the respondent had been provided with sufficient reasons in respect of all those applications (referred to in the document of 30 January 2013) in which it may have wished to lodge appeals.

[46]. Furthermore the June 2013 letter, which was in fact attached to the respondent's founding affidavit, in my view made it clear that the subsequent issuing of licences would not have taken place in a wilful and *mala fide* disregard of the orders of 29 October 2012. It invited the respondent to indicate whether it agreed that the period for lodging appeals had expired and that licences could therefore be issued. It was made clear that the purpose of the letter was to avoid any "*misunderstanding*" in this regard.

[47]. There was no response to this letter by the respondent until September 2013, by which time the Board had on all indications already proceeded to issue the licences. It may be that the failure to respond had been due to a communication problem within the offices of the respondent's attorney, but viewed from the third appellant's perspective the absence of a response would have fortified his belief that he had in fact furnished reasons and, more importantly, that the Board could proceed with issuing the licences.

[48]. Against this background more than a reasonable doubt should have existed as to whether the issuing of the licences had constituted a wilful and *mala fide* disregard of the order of 29 October 2012.

[49]. In my view the third appellant should therefore also not have been held in contempt on the basis of having wilfully and *mala fide* failed to provide reasons and issued licences.

[50]. This would make it unnecessary to deal with the conditions of suspension, and in particular the condition that licences be revoked.

[51]. Suffice it to say that the orders made in the contempt application did not, as was the case in the agreement and orders of 29 October 2012, provide that the persons to whom licences had been issued should be informed of these developments, let alone inform them that they were entitled to be heard on the issue of the revocation of their licences. It appears that at least one of those licences had been issued more than 7 months before the orders were made in the contempt application and that the holders of those licences had been operating and earning an income on the basis of those licences.

[52]. Mr Van Niekerk was constrained to concede that none of the appellants would have had the statutory power to revoke licences under these particular circumstances[28] and it would in my view in any event have constituted a violation of the constitutional rights of the holders of those operating licences to have their licences revoked without affording them an opportunity to comment[29].

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[28] The initial reliance (In the respondent's heads of argument) upon sections 35 and 46 of the Act was abandoned. Although the provisions of section 46 empower the Board to revoke licences, they apply in circumstances that would not have been applicable here and those provisions would in any event have required proper notice to the recipients of the licences, as well as an opportunity to be heard.

[29] Compare **Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd and Others** 2015 (2) SA 539 (CC) para [19]

[53]. I return now to licence application nr 231804. As already mentioned[30] the concession had apparently at the hearing of the contempt application been made on behalf of the appellants that no reasons had been furnished in respect of this application. It had not been one of the applications referred to in the document of 30 January 2013. The only "*explanation*" advanced for this failure was that the third appellant had not yet provided reasons in respect of this application.

[54]. When the Supreme Court of Appeal was approached Mr Lategan, in his founding affidavit on behalf of the appellants, made the concession that, in view of the failure to furnish reasons in respect of this application, the appellants had no grounds upon which to appeal against the finding that they had acted in contempt of the court order as far as this particular application was concerned. Furthermore paragraph 2 of the notice[31] stated that "*No leave* (was) *sought against the order as far as it relates to licence application nr 231804*".

[55]. At the instance of Adv Nkosi-Thomas SC, counsel for the appellants, the opportunity was granted to both sides to file supplementary heads of argument on the question whether this court could and should consider the correctness of the finding of contempt in respect of application number 231804.

[56]. The supplementary submissions on behalf of the appellants are that Mr Lategan's concession was "*an incorrect statement of law*" as he

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[30] Footnote 7 above.
[31] Of the application for leave to appeal.

"(failed) *to appreciate absence of wilfulness and mala fides on the part of the appellants*" and that this court can in the circumstances entertain "*a ground of appeal not covered by the terms of the leave to appeal*". The new ground of appeal was not set out in clear terms, but appears to be that the failure to provide reasons in respect of this application had not been wilful or *mala fide*.

[57]. On behalf of the respondent, on the other hand, it is submitted that there simply is no leave to appeal against this particular finding (or this particular part of the judgment of the court *a quo*), that such a new ground of appeal cannot be entertained where it is not covered by the grounds of appeal to which the Supreme Court of Appeal has restricted its leave to appeal and that, even if it could, the appellants' explanation for the non-compliance did not rebut the inference of wilfulness and *mala fides*.

[58]. It is indeed trite that a court of appeal can in certain circumstances entertain a new ground of appeal, and even raise it *mero motu*[32]. The cases referred to my Miss Nkosi-Thomas in this regard[33] are, however, distinguishable on their facts. In none of those cases did the Supreme Court of Appeal or the court *a quo*, in granting a party leave to appeal to the full bench of a provincial division, restrict the grounds of appeal that could be argued in that court. Where that happens, as in the present case, the full bench will not be entitled to entertain any ground of appeal that is not covered, or that is indeed excluded, by the terms of the leave to appeal. The reasons for this are that the full bench would not in such circumstances itself have

[32] See footnote 15 above.
[33] **Douglas v Douglas** [1996] 2 All SA 1 (SCA) and **Legal Aid Board v The State and Others** 2011 (1) SACR 166 (SCA)

the power to grant leave to appeal on such an additional ground of appeal and that leave to appeal would in effect have been refused in respect of such an excluded ground of appeal[34].

[59]. This would in itself dispose of the belated attempt to challenge the finding of contempt insofar as application number 231804 is concerned. Another approach, which would however lead to the same result, would be to regard this challenge as not really being based on a new ground of appeal, but rather as an attempt to appeal against a finding, or a part of the judgment, in respect of which no leave to appeal was sought or granted. The appellants themselves chose to exclude this part of the judgment when applying for leave to appeal[35]. Leave to appeal is a jurisdictional requirement for an appeal against a judgment (or any part thereof) of a High Court[36] and in the absence of such leave this court would not be entitled to entertain an appeal against a judgment, or against a finding or part of a judgment, in respect of which there is no leave to appeal[37].

[60]. Even if this court could entertain argument on application number 231804, there would not in my view be any basis upon which to interfere with the court *a quo*'s inference and finding of *mala fides* as regards the failure to furnish reasons in respect of this particular application, at least not as far as the third appellant is concerned.

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[34] Compare **Harlech-Jones Treasure Architects CC and Others v University of Fort Hare** 2002 (5) SA 32 (SCA) paras [47] – [56]; **Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd** 2015 (4) SA 34 (SCA) para [14]

[35] Compare **Supreme Court of Appeal Rule** 7(3).

[36] Compare **Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd Minister of Health and Another** 2005 (3) SA 238 (SCA) para [22]

[37] Compare **Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd**, **supra** (footnote 32), paras [11] – [14]

There simply is no explanation for his failure. The letter of 19 June 2013 could not, in this case, be said to have created a reasonable doubt as regards *mala fides* on the part of the third appellant. When it was written the appellants must subjectively have been aware that no reasons at all had been provided in respect of this particular application, as it had not been one of the applications referred to in the document of 30 January 2013, and that the respondent's right of appeal against its granting had accordingly not lapsed. That would fit in with the fact that the appellants had, at the time of the hearing of this appeal[38] (and unlike in the case of the applications that had been granted and which had been referred to in the document of 30 January 2013), not yet issued an operating licence in application number 231804.

[61]. As regards the costs of the contempt application the conclusions to which I have come would mean that the respondent would in that application have been successful in respect of only the one application for an operating licence. There is no appeal against the fact that not only the third appellant, but also the first and second appellants, were held in contempt of the order of 29 October 2012 in respect of, *inter alia*, this particular application for an operating licence. In the circumstances this court also cannot interfere with the finding of contempt against the first and second appellants as far as this particular application for an operating licence is concerned.

[62]. The position is different as far as the sanction of imprisonment, and more specifically the period of such imprisonment, is concerned. It

[38] And as conveyed to us by Mr Van Niekerk from the Bar.

was obviously on the basis of the finding that there had been a deliberate and *mala fide* disregard in respect of the total number of applications for which reasons had been requested that the court *a quo* decided that a period of 30 days imprisonment would be appropriate. If the findings of the court *a quo* are interfered with to the extent that there remains only one application in respect of which there had been contempt, it would limit the extent of the contempt and there should then in my view be a concomitant adjustment to the sanction.

[63]. As far as application number 231804 is concerned the position with regards to the suspensive condition pertaining to revocation would have been complicated by the fact that the order of the Supreme Court of Appeal did not, when this application was excluded from the order granting leave to appeal, distinguish between the finding of contempt in respect of it, on the one hand, and the orders regarding the suspension of imprisonment, on the other. As already mentioned, however, no licence has been issued in respect of this application and Mr Van Niekerk abandoned the suspensive condition pertaining to revocation as far as this application was concerned.

[64]. According to documentation annexed to Miss Nkosi-Thomas's supplementary heads of argument Mr Lategan on 12 May 2014[39] provided the respondent's attorney with a document which he described as "*reasons for the chairperson's decision*" in application number 231804. The document contains information similar to that contained in the document of 30 January 2013. It accordingly, and

[39] In other words only after the court *a qou*'s judgment had been delivered on 17 April 2014.

in view of what has been said above, objectively does not constitute reasons and the suspensive conditions pertaining to the provision of reasons and the issuing of licences would therefore have to remain part of the sanction in respect of application number 231804. It is significant, however, that the appellants at that stage chose to persist in their attitude that such information constituted reasons. That was long after the contempt application had been brought, and even after the replying affidavit in that application had been filed. The appellants would therefore at that stage have been aware of the respondent's attitude that such information would not constitute reasons and would not enable it to consider an appeal, and yet no attempt was made to furnish anything more than had been furnished in the document of 30 January 2013.

[65]. In any event, as also pointed out in the judgment of the court *a quo* there had until then been no attempt at all to purge the default in respect of application number 231804. In my view the respondent would in the circumstances still have been entitled to its costs in the contempt application, and there is no reason to interfere with the order that such costs should be taxed on the scale as between attorney and client. None of the grounds of appeal are in any event directed at specifically the costs order.

[66]. As already pointed out, the first and second appellants do not have leave to appeal against the finding that they too had been in contempt as far as application number 231804 is concerned. It may arguably, in the light of what has been said above, seem unjust to

hold them liable for costs in circumstances where they could not in law have been guilty of any non-compliance in respect of that application. However, as long as the finding remains undisturbed that they had, together with the third appellant, been in contempt in respect of that application, there would be no basis for excluding them from the costs order made by the court *a quo*.

[67]. As regards the costs of the appeal there is no reason why they should not follow the result, and such costs would include the costs of the applications for leave to appeal in both the court *a quo* and the Supreme Court of Appeal.

[68]. In my view the following orders should therefore me made:

1. **The appeal succeeds in part. The orders set out in paragraphs 1 and 2 of the court *a quo's* judgment delivered on 17 April 2014, finding the appellants to have been in contempt and committing them to 30 (Thirty) days imprisonment, conditionally suspended, are set aside and substituted with the following orders:**

   "*(a) The respondents are held in contempt of this Court's order of 29 October 2012 (in case number 1737/12 and case number 1832/12) as far as application number 231804 (for an operating licence) is concerned.*

   (b) The third respondent is committed to imprisonment for a period of 10 (Ten) days, which imprisonment is suspended on the following conditions:

(i) That the order of 29 October 2012 be complied with within a period of 30 (Thirty days) from 13 November 2015 , in particular by within the said period furnishing proper reasons for the decision taken by the Operating Licence Board for the Northern Cape Province on 19 September 2012 in respect of the said application number 231804.

(ii) That no licence be issued in respect of the said application number 231804 until a period of 21 (Twenty one) days after proper reasons have been furnished, has expired without any appeal having been lodged, alternatively until the finalisation of such appeal."

2. **The costs order in paragraph 3 of the judgment of the court *a quo* is confirmed.**
3. **The respondent is ordered to pay the appellants' costs in the appeal, such costs to include the costs of the applications for leave to appeal in both the court *a quo* and the Supreme Court of Appeal.**

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C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I agree and it is so ordered.

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F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I agree.

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V M PHATSHOANE
JUDGE
NORTHERN CAPE DIVISION

For the appellants:	**Adv L G Nkosi-Thomas SC , Adv G D Ngcangisa**
Instructed by:	**The State Attorney, Kimberley**
For the respondents:	**Adv J G Van Niekerk SC**
Instructed by:	**Engelsman, Magabane Inc, Kimberley**