IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

(1)	REPORTABLE: **Yes**
(2)	OF INTEREST TO OTHER JUDGES: **Yes**
(3)	REVISED.
	24 January 2024 [redacted]
	DATE SIGNATURE

CASE NUMBER: 2692/2022

In the matter between:-

NAD PROPERTY INCOME FUND (PTY) LTD First Applicant

ERF 6 HIGHVELD TECHNO PARK INVESTMENT (PTY) LTD Second Applicant

and

NELSON WISANE TIVANE First Respondent

ELEGANT FUEL (PTY) LTD Second Respondent

THE BUSH BUCK RIDGE LOCAL MUNICIPALITY Third Respondent

THE MPUMULANGA PROVINCIAL GOVERNMENT
DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT,
LAND AND ENVIRONMENTAL AFFAIRS Fourth Respondent

THE MINISTER OF ENERGY FOR THE REPUBLIC
OF SOUTH AFRICA Fifth Respondent

THE CONTROLLER OF PETROLEUM PRODUCTS
IN THE NATIONAL DEPARTMENT OF ENERGY Sixth Respondent

JUDGMENT

GREYLING-COETZER AJ

Introduction

[1] This matter relates to two interlocutory applications emanating from a main review application, launched by the applicants in terms of Rule 53 of the uniform rules of court.

[2] The first interlocutory application is brought by the applicants in terms of which they seek the third respondent, Bushbuckridge Local Municipality ("the Municipality"), to be compelled to comply with Rule 53(1)(b) by filing the record of proceedings sought to be reviewed and set aside ("application to compel").

[3] The second interlocutory application is launched by the second respondent, and termed "*Conditional application and counter application for separation and enrollment of point of law in terms of Rule 6(5)(B)(iii)*" ("separation application").[1]

[4] The second respondent seeks enrollment and disposal of its question of law set out in a Rule 6(5)(d)(iii) notice filed prior to the application to compel. It consequentially seeks, the main review application and final interdict be "*struck down*".

[5] The application to compel only seeks relief against the third respondent. The Municipality has not opposed the application to compel. The second respondent opposes the application to compel. This separation application is opposed by

[1] During argument counsel for the second respondent indicated that the application, notwithstanding the heading, is not conditional, but merely a counter-application

the applicants.

[6] During the hearing it became evident that although the applicants filed a complete bundle also containing the separation application, the second respondent sought to refer and rely on the main review application during its address. The latter was not before court. Consequentially, and in order to ensure no further delays in the hearing of the matter, it was agreed that argument would be received, whereafter and by no later than 26 October 2023, a complete set of the papers would be delivered to court for consideration before a determination was made. Said was duly done.

Background

[7] The applicants' review application, being the main application, was brought on 28 June 2022, and comprised of two parts. In respect of Part A, the applicants sought urgent interdictory relief.

[8] Part A of the main review application ("the urgent interim interdict") was granted on 25 July 2022 against the first- and second respondents. The first- and second respondents applied for leave to appeal, which was refused by the court on 17 August 2022. Dissatisfied, the first- and second respondents approached the Supreme Court of Appeal for leave to appeal, which application was similarly dismissed approximately one year later in 2023. The second respondent has now approached the Constitutional Court in respect of leave to appeal, which application is still pending.

[9] In Part B, of the application, paraphrased, the applicants seeks the review and setting aside of:

9.1 the development permit, rezoning approval or consent use approval, purportedly issued by the Municipality on 20 June 2017;

9.2 the issuing, if any of environmental authorization by the fourth respondent in favor of the first respondent and/or second respondent, in terms of Section 24 of the National Environmental Management Act, 107 of 1998 ("NEMA");

9.3 the issuing of site and retail licenses by the sixth respondent, sanctioned by the fifth respondent in terms of the Provision of Petroleum Products Act, 120 of 1977 ("PPA") and the regulations thereto, purportedly lodged on 4 February 2018 and issued during 2018, and

9.4 consequential relief to the review and setting aside of aforementioned, that the first- and second respondents be interdicted from constructing any buildings, as defined in the National Building Regulations and Building Standards Act, 103 of 1977, on the subject property until such time as valid and lawful land use rights, contemplated in the Spatial Planning and Land Use Management Act, 16 of 2013 ("SPLUMA"), environmental authorization (as contemplated in NEMA), site and retail licenses (as contemplated in the PPA) and duly approved site development and building plans (as contemplated in the National Building Regulations and Building Standards Act, 103 of 1977) have been procured.

[10] The applicants' review application is *inter alia* and succinctly set out founded thereupon that they are respectively the owners of the property and business operated as Puma Filling Station which commenced during March 2021. Said filling station is located on the R40 national road that runs in a North/South direction through Acornhoek.

[11] During May 2022 the applicants noticed that the first- and/or second respondents have commenced with the construction of a filling station on Stand 295, Tsakane, Acornhoek. The property is located immediately to the West of the R40, approximately 1,5km to the South of the intersection between the R40 and Thulamahashe provincial road and approximately 2,4km from the Puma Filling Station.

[12] According to the applicants, interested and affected parties and the general community, that will be impacted by the establishment of a filling station, are notified of the applicable processes and invited to participate in the said processes by submitting comments or objections as contemplated in the legislation concerned. This, according to the applicants, is required when application is made for land development authorization, such as rezoning, environmental authorization or the issuing of site and retail licenses. The applicants they were thus denied the opportunity to consider the applications, inclusive of town planning motivation, consideration of impact on the environment and feasibility studies showing the impact on their filling station, as prescribed by law and as is standard practice in the industry.

[13] Pursuant to their investigate into the matter. They obtained a copy of the "*consent use permit for a filling station*". Said permit contained various conditions, *inter alia* that a site development plan had to be submitted before 20 June 2018, failing which approval would lapse, environmental authorization was to be obtained from the fourth respondent, consent was to be obtained from SANRAL, and that the respondents were bound to apply for a business license.

[14] The applicants contend that far as the land use planning "consent" (a permit) was historically issued, such consent or permit would have lapsed by virtue of non-compliance with applicable conditions. Further, should such consent or permit still exist, the granting thereof will be reviewable, as (a) the scheme does not make provision for filling station rights to be granted on land zoned as agricultural by way of an application for consent use/application for a permit; (b) Section 2(2) of SPLUMA prohibits the procurement of land use rights by application of any parallel mechanism that is inconsistent with the provisions of SPLUMA and the applicable bylaw; (c) no, alternatively inadequate, public participation procedures were embarked upon by the respondents, and the applicants were not afforded an opportunity to comment or object to the application concerned. No SANRAL consent nor environmental authorization could be found. The construction of buildings currently undertaken on the subject property are unlawful, as neither a site

development plan nor building plan, as contemplated, has been approved. It was established that a site and retail license in terms of the PPA was issued, but no notice in this respect was given to the applicants.

[15] Founded on a report by Design Engineering Solutions, a company that specializes in determining the economic viability and sustainability of filling stations and the like, the applicants contend the unlawful filling station of the first- and second respondents will have a devastating negative impact on filling station operations conducted by the second applicant.

Facts leading up to these applications

[16] The present two interlocutory applications emanate from Part B of the main review application.

[17] The main review application was served on the third respondent on 28 June 2022, and the third respondent was accordingly obliged in terms of Rule 53 to file the record of proceedings by 19 July 2022.

[18] The first-, fifth- and sixth respondents have complied with their obligations in terms of Rule 53(1)(b).The fourth respondent, in its reply, contends that no record exists and/or that it does not have any record in its possession. The fifth- and sixth respondents filed a complete record of proceedings on 3 October 2022.

[19] Pursuant to the expiry of the period within which to file the record in respect of the Municipality, correspondence was addressed to its legal advisor on 5 September 2022, affording the third respondent 7 (seven) days within which to file the record, failing which the applicants indicated that they would proceed with an application to compel. A further letter was addressed to the Municipality on 19 September 2022. No response whatsoever was received from the Municipality.

[20] On 16 September 2022 the second respondent served a notice in terms of

Rule 6(5)(d)(iii) indicating its intention to raising a question of law. The said notice reads as follows:

"… 2nd Respondent hereby raises the following question of law:

> 1. *The application – being the notice of motion read with an affidavit filed in support thereof – does not disclose any cause of action as required by Rule 53(2)*;
>
> 2. *The application is accordingly to be struck down with costs*."

[21] The application to compel was served on the Municipality on 14 October 2022.

[22] On 18 October 2022 the second respondent served its separation application. Said application comprises of a notice of motion and an affidavit, which stands as founding affidavit relating to the separation application, as well as the answering affidavit to the applicants' application to compel.

[23] On 22 October 2022 the second respondent filed an application to the Judge President for a special allocation to be made in order to facilitate the hearing and determination of the point of law. Aforesaid was followed up by communication directed to the Judge President on 1 November 2022. From that before court it appears that no such special allocation was granted.

[24] The parties proceeded to exchange affidavits and on 25 April 2023, and in line with the practice directive of this Division, the application to compel and the separation application were enrolled for hearing.

<u>Issues for determination</u>

[25] The issues for determination are:

25.1 Whether the second respondent is entitled to a separation of its Rule 6(5)(d)(iii) notice, raising a question of law;

25.2 If found that the second respondent is entitled to a separation, whether the applicants have failed to set out a cause of action in terms of Rule 53(2), on the grounds alleged by the second respondent;

25.3 In the event that it is found that no cause of action has been set out, whether the main review application stands to be "*struck down*";

25.4 If found that the second respondent is not entitled to the separation, it stands to be decided whether the applicants have made out a case to compel compliance with Rule 53(1)(b) in respect of the municipality.

The separation application

[26] The second respondent contends that although there is no specific provision in motion proceedings for the separation of issues, it is a matter within the inherent jurisdiction of a court. Further that a separation of issues is a matter of convenience, efficiency and the interest of justice. The second respondent contends that the court need not further engage itself with the application to compel against the Municipality as the applicants' review application failed to disclose a cause of action.

[27] In persuading this court to grant the separation the second respondent contends that the determination of the question of law as raised in its Rule 6(5)(d)(iii) notice will dispose of the whole matter, thereby avoiding huge and reckless wastage of precious time and costs. Its contended that there is no indication when the Municipality would produce the record of the decision, which might prove to be irrelevant.

[28] The second respondent alleges that should the generally applicable holistic approach be enforced, so that the question of law as raised in its Rule 6(5)(d)(iii) is dealt with the main review application is ripe for hearing, it would result in many volumes of paper to be prepared, and essentially arguments on three different reviews.

[29] The second respondent also submitted that in order to be complete, there

might be the necessity to resort to Rule 35 discovery, oral evidence and cross-examination would be essential considering the time spans between 2017 and 2022.

[30] According to the second respondent meritless and vexatious appeals and cross-appeals may follow. And lastly, that the very existence of the interdict granted against the first- and second respondents is a solid reason for the question of law as raised in its Rule 6(5)(d)(iii) to be dealt without any delay, and the issue to be finally determined on the basis that no cause of action has been demonstrated in terms of Rule 53(2).

[31] The applicants in opposing contend that the separation application is simply an abuse of court process. The review remains unchallenged, and the opportunity has not arisen for the respondents to file any answering affidavit that could possibly challenge what the applicants have set in their founding affidavit with regard to the irregularity and unfair nature of the administrative actions concerned.

[32] It is contended on behalf of the applicants that "points of law", and the reference to Rule 6(5)(d)(iii) afford and opportunity in normal motion proceedings to a respondent to within ten days after having filed a notice of intention to oppose, and it is designed to raise a distinct point in law. It is contended that the application by the second respondent is novel, and in the circumstances incompetent. The points of law speak to so-called defenses and ought to be raised in an answering affidavit to the main review application, and is incapable of being separately raised and decided. The ostensible points of law deal with merits of the review application.

[33] The applicants contend that absent the records and the applicants exercising their right to supplement its founding affidavit and amend its notice of motion, any *in limine* point is premature.

[34] It is submitted on behalf of the applicants that the second respondent seeks to delay the proceedings as long as possible, as the second respondent has

disregarded the interim interdict that was granted, and has embarked upon three applications for leave to appeal.

[35] The applicants further contend that the deponent to the founding affidavit to the separation application/answering affidavit to the application to compel, does not possess the required personal knowledge, as he has only been appointed as attorneys of record in July 2020.

Discussion

[36] A respondent should generally file its answering affidavit on the merits at the same time as it takes a preliminary objection on a point of law.[2] If a respondent, as in this case, exclusively relies on the notice in terms of Rule 6(5)(d)(iii), the allegations contained in the founding affidavit must be taken as established facts.[3] It is also so that a respondent, in spite of having filed an answering affidavit, may raise an objection *in limine* that the founding affidavit does not make out a *prima facie* case for the relief sought.[4]

[37] In ***Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd***[5] the Supreme Court of Appeal commenting on Rule 33(4) and separation of issues in motion proceedings, referred to *Harms, Civil procedure in the Superior Courts Part B High Court at B33.9*, which states:

> '*The provision does not apply to applications, but a court may deal with separate issues in applications in limine and in its inherent power apply a similar procedure to them*."

[38] The Supreme Court of Appeal proceeded to state that when a court in exercising its inherent power in application proceedings, to separate issues *in limine*, it must do so with circumspection.[6]

[39] This court is thus empowered to separate the second respondent's question

2 ***Ebrahim v Georgoulas*** 1992 (2) SA 151 (B) at 154D-G
3 ***Boxer Superstores Mthatha and Another v Mbenya*** 2007 (5) SA 450 (SCA) at 452F-G
4 ***Valentino Globe BV v Phillips*** 1998 (3) SA 775 (SCA) at 779F
5 2019 (3) SA 97 (SCA)
6 ***Louis Pasteur*** (*supra*) at par [33]

of law as raised in its Rule 6(5)(d)(iii) notice, if found that in applying the principles analogous to Rule 33(4), that it is convenient to do so. In considering the latter (issue of convenience), it is opposite to restate that the procedure of separate adjudication of issues is aimed at facilitating the convenience and expeditious disposal of litigation.[7]

[40] *In* ***Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others***[8] it was held:

"*Generally, courts should be slow to allow parties to engage in piecemeal litigation, with the attendance delays … Courts should be circumspect when suggestions are made about the procedure to be followed on the basis that it might shorten rather than lengthen the litigation*."

[41] Wallis JA, on behalf of the majority, in ***Theron and Another NNO v Loubser NO and Others*** 2014 (3) SA 323 (SCA) at par [26] stated that it is undesirable to dispose of an application piece-meal:

> "*In general, however, the desirable course to be followed in application proceedings, where the affidavit are both the evidence and the pleadings, is for all of the affidavits to be delivered and the entire application to be disposed of in a single hearing*."[9]

[42] In *DE van Loggerenberg & Erasmus Superior Court Practice* (2016) 2 Ed, at D1-536 and as referred to by the Supreme Court of Appeal in ***Tshwane City v Blair Atholl Homeowners Association*** 2019 (3) SA 398 (SCA) at 414G-I:

> "*The word 'convenient' within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of <u>appropriateness and fairness</u>. It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration*.

[7] ***Denel (Edms) Beperk v Vorster*** 2004 (4) SA 481 (SCA) at 485A-E
[8] 2012 (3) SA 486 (SCA) at par [49]
[9] See also ***Tau v Mashaba and Others*** 2020 (5) SA 135 (SCA)

(own underlining)

[43] In ***Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Network (Pty) Ltd and Others*** 2010 (3) SA 382 (SCA) at par [90] to [91] the court said the following:

> "*The court has warned that in many cases, once properly considered, issues initially thought to be discreet are found to be inextricably linked. And even where the issues are discreet, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing...*"

[44] It is required of a party, such as the second respondent, to demonstrate convenience, sufficiently so to enable a court to exercise its discretion in a proper and meaningful way.

[45] The second respondent's contentions that the separation will avoid huge and reckless wastage of precious time and costs, avoid volumes of papers to be prepared, avoid argument on three different reviews, avoid discovery, oral evidence and cross-examination does not demonstrate convenience.

[46] Equally the second respondent's contention that future appeals will be avoided if the separation is granted and disposed of in terms of Rule 6(5)(d)(iii) holds no water. Such a determination will be final in effect and subject to appeal. Moreover, the granting of the separation as sought on the basis of a Rule 6(5)(d)(iii) notice, filed in Rule 53 review proceedings and before a respondent is called upon in terms of Rule 53(5)(b) is all but a run-of-the-mill application. The method employed is rather controversial in the circumstance. Making it just as susceptible to a challenge on appeal.

[47] It would indeed be convenient to the second respondent who stands as the beneficiary of the decisions challenged by the applicants, to get the review application out of the way as soon as possible, and consequently the interim interdict as granted and which the second respondent has to date not been able to successfully appeal against.

[48] A separation as sought by the second respondent offends the very purpose of Rule 53. It does not promote fairness between the parties. As held in ***Helen Suzman Foundation v Judicial Service Commission and Others*** 2017 (1) SA 367 (SCA) at 374G-375C at par [13]:

"[13] The primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court. It is established in our law that the rule which is intended to operate to benefit the applicant, is an important tool in determining objectively what considerations were probably operative in the mind of the decision maker when he or she made the decision sought to be reviewed. The applicant must be given access to the available information sufficient for it to make its case and to place the parties on equal footing in the assessment of the lawfulness and the rationality of such a decision. By facilitating access to the record of the proceedings under review, the rule enables the court to perform the inherent review function to scrutinize the exercise of public power for compliance with constitutional prescripts. This, in turn gives effect to a litigant's right in terms of section 34 of the Constitution – to have a justifiable dispute decided in a public hearing before a court with all the issues being properly ventilated." (own underlining added)

[49] Although an applicant in a review application, and in terms of Rule 53(2), is required to set out the decision or proceedings sought to be reviewed, supported by an affidavit setting out the grounds, the facts and the circumstances upon which an applicant relies to have the decision or proceedings set aside, such applicant's cause of action or case is not complete until such time as the record of proceedings had been made available, in the present instance by the third- to sixth respondents, and the applicant has exercised its right in terms of Rule 53(4) to either vary or supplement its founding affidavit and/or amend its notice of motion, or not.

[50] In ***Jockey Club of South Africa v Forbes*** 1993 (1) SA 649 (A) at 660E-F,

Kriegler AJA held that not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings, nor any knowledge of the reasons founding such a decision. Were it not for Rule 53, he would be obliged to launch review proceedings in the dark, and depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly, the procedure created by the Rule is to his advantage, in that it obviates the delay and expenses of an application to amend and provides him with access to the record.

[51] Thus, until such time as access to the record of proceedings has been obtained, the review application is still incomplete and has 'effectively' not been launched.

[52] As stated in ***Jockey Club*** (*supra*)[10] Rule 53 was designed to aid an applicant, not to shackle him. The purpose of Rule 53 is not to protect the decision maker, but to facilitate applications for review and to ensure their expedient and orderly presentation. Such benefits, as it may confer on a respondent, in contradiction to those ordinary enjoyed by a respondent under Rule 6, are incidental and minor. It confers real benefits on the applicant, benefits which the applicant may enjoy if and to the extent needed in his particular circumstances.[11]

[53] The second respondent's contention that notwithstanding the record of proceedings not having been made available by the Municipality, and even prior to the applicant exercising its right in terms of Rule 53(4), the applicants were obliged to set out a cause of action in terms of Rule 53(2), is unsound.

[54] In ***Competition Commission v Computicket (Pty) Ltd***[12] the Court held:

"[20] At first sight one could be pardoned for thinking that, in the light of these two

10 at 661 E

11 ***Jockey Club*** (*supra*) at 662H

12 (853/2013) [2014] ZASCA 185 (26 November 2014)

concessions the Commission would have no answer to Computicket's demand for the record which formed the basis of the decision it seeks to challenge. Nonetheless, the Commission offered not only one, but two answers. Its first answer was that in order to demand the record, Computicket had to make out a prima facie case for review. The only basis relied upon for this contention was that Computicket bears the onus of establishing its review grounds. But as I see it, the basis relied upon amounts to a non sequitur. I agree with the CAC's finding that this argument effectively places the cart before the horse. Not infrequently the ability of an applicant for review to discharge the onus resting on it to make out a case, will depend on considerations appearing – or not appearing – from the record of the material upon which the challenged decision had been made. Moreover, upholding the Commission's argument would give rise to a two-stage enquiry on the merits of the case: first, without the record to determine whether the applicant had made out a prima facie case. If the applicant clears that hurdle, the second stage enquiry then follows to finally determine the merits, this time with the benefit of the record which had now been made available. The proposed scenario, for which there appears to be no justification in logic, is clearly unsustainable. Finally, the argument under consideration is not supported by Rule 53. In terms of this rule, the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be." (own emphasis)

[55] In ***Competition Commission of South Africa v Standard Bank of South Africa Ltd: Competition Commission of South Africa v Standard Bank Ltd; Competition Commission of South Africa v Wako Africa (Pty) Ltd and Others*** 2020 (4) BCLR 429 (CC) at par [120]:

"*…..a distinction must be made between the jurisdiction of the forum to hear the review application and the merits of the review application. If a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of review are meritless. As the Supreme Court of Appeal put it 'the obligation to produce the record automatically flows upon the launching of the application, however ill-founded that application may later turn out to be'.*[13] *This is because, as recognized by the majority decision in Helen Susman, Rule 53 envisages the grounds of review changing after the record has been furnished. The record is*

13 ***Competition Commission v Computicket (Pty) Ltd*** *(supra)* at par [20]

essential to a party's ability to make out a case for review. It is for this reason that a prima facie case on the merits need not be made out prior to the filing of the record." (own emphasis)

[56] In ***Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd***[14] the court restated:

> "*There is no gainsaying that if a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even their grounds of review are meritless*."

[57] There is thus no obligation in terms of Rule 53(2) upon the applicants to have made out a complete cause of action or prima facie case prior to receiving the record and exercising its clear right in terms of Rule 53(4).

[58] Rule 53 does not restrict the second respondents entitlement to take a point by way of a preliminary objection that the supporting affidavit does not make out a *prima facie* case (or cause of action as termed by the second respondent) for the relief sought. This can and should have be done simultaneously with filing its opposing affidavit on the merits.

[59] By filing the Rule 6(5)(d)(iii) notice when it did and then launching the separation application in circumstances where that raised therein could with ease have been dealt with in its answering affidavit to the main review application, the second respondent attempts to short-circuit the natural flow of a Rule 53. The second respondent stratagem is aimed at frustrating the applicants right to interrogate the record of proceedings, vary its founding affidavit and amend its notice of motion, if there is found cause to do so and by implication avoid the courts review function to scrutinize the exercise of public power for compliance with constitutional prescripts.

[60] The second respondent's tactical maneuver have caused not only a delay in the final adjudication of the review application but has put the applicants to

[14] (1299/2021) [2023] ZASCA 39 (31 March 2023)

unwarranted engagement and expense in the circumstances.

[61] Entitlement of the second respondent to have delivered the Rule 6(5)(d)(iii) notice within a Rule 53 application and the strength or weakness of the second respondent's contentions in respect of its 'questions of law' do not stand to be considered in the assessment of whether a separation ought to be granted. This is plain from the fact that the applicants' review application has not become *complete.* It is thus open to the court adjudicating upon the main review application to determine same, if the second respondent stands by its objection alternatively if raised *in limine* through its answering affidavit filed in terms of Rule 53(5)(b).

[62] The second respondent has not demonstrated that a separation of its preliminary objection, as articulated in its Rule 6(5)(d)(iii) notice, can conveniently, appropriately and fairly be separated and adjudicated upon prior to the adjudication of the main review application. Should the second respondent stand by its objection all the issues in the review application should be prosecuted conjointly, regardless of whether a point *in limine* or preliminary objection may dispose of the entire case or not.

[63] Having found as aforesaid, the separation application by the second respondent should fail.

Application to compel

[64] In ***Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others*** 2012 (3) SA 486 (SCA)[15] it was stated that:

> *"… It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of a decision relating to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to*

[15] at par [37]

regulate their own process."

[65] In ***President of the Republic of South Africa v Democratic Alliance and Others*** 2020 (1) SA 428 (CC) the minority judgment reiterated a respondent's obligation to file the Rule 53 record:

> *"[46] The institution of the review application by the Democratic Alliance in terms of rule 53 automatically triggers certain procedural rights in its favour and imposes obligations upon the President, in his capacity as the decision maker. From the date of service of the papers on him, the President was under a duty to dispatch a record of proceedings relating to the impugned decision to the registrar of the High Court in which the review was launched. The President was obliged to do so within fifteen days.*"

[66] On above basis and the authorities relevant to this consideration already dealt with under the separation application the applicants' entitlement to the record of proceedings to be made available by the Municipality cannot be gainsaid. The Municipality is obliged to do so.

[67] Consequentially the applicants are entitled to the relief sought in the application to compel.

Costs

[68] In the application to compel the applicants seek costs against the Municipality and/or any other respondent opposing the application, jointly and severally, the one to pay the other to be absolved. In opposing the separation application, the applicants contend that application amounted to an abuse of process, and they seek a punitive cost order on an attorney-and-own-client scale, including cost of two counsel if necessary.

[69] From that before court, the applicants did not utilise two counsel, and therefore cost of two counsel is not justified.

[70] Costs on an attorney-and-own-client scale is justified in the circumstances

present in this matter for *inter alia* the reasons set out in paragraph [64] *supra*. The second respondent in opposing the application to compel in the manner that it did, utilized the rules of court to obtain an unfair and opportunistic advantage in the litigation. By employing the stratagem of filing the Rule 6(5)(d)(iii) notice at the time and manner that it did and then attempting to enforce same prematurely caused an even longer delay and increased costs than that which would have followed upon a mere unopposed application to compel against the Municipality.

<u>Order</u>

[71] For the reasons aforesaid, the following order is made:

1. The second respondent's "*Conditional application and counter application for separation and enrollment of point of law in terms of Rule 6(5)(B)(iii)"* is dismissed.

2. The second respondent is ordered to pay the cost on an attorney-and-client scale.

3. The third respondent is ordered to dispatch within 10 (ten) days of service of this order upon it, the complete record of proceedings pertaining to the decisions of the third respondent, with the reasons for such decisions, which form the subject matter of the review application brought by the applicants under case number 2692/2022, and as provided for in prayer 1 of Part B thereof.

4. The second respondent and third respondent are ordered to pay the costs, jointly and severally, the one to pay the other to be absolved, on an attorney-and-client scale.

[redacted]

D. GREYLING-COETZER

ACTING JUGDE OF THE HIGH COURT

HEARD:	24 October 2023
COURT FILE UPDATED:	25 October 2023
DELIVERED ON:	This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 14h00 on 24 January 2024.

FOR THE APPLICANTS:

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