



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	Reportable: No
(2)	Of interest to other judges: No
(3)	Revised: Yes
 SIGNATURE:	

CASE NO: 4755/2022

In the matter between:

HENDRIK PETRUS CELLIERS
PAUL ERNEST MCMENAMIN
IZAK JACOBUS BOOYSEN
JOHANNES VENTER

1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT

and

KLEINFONTEIN AANDELEBLOK (EDMS) BPK
CITY OF TSHWANE METROPOLITAN MUNICIPALITY

1ST RESPONDENT
2ND RESPONDENT

Coram: A Vorster AJ

Heard: 25 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by uploading the judgment onto <https://sajustice.caselines.com>, and release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 31 October 2024.

ORDER: LEAVE TO APPEAL

The application for leave to appeal is dismissed with costs

JUDGMENT: LEAVE TO APPEAL

A Vorster AJ

Introduction

- (1) On 2 August 2024 I handed down one judgment in two matters under consideration. The matters came before me on 21 April 2023, and since the issues to be decided in the two applications overlapped, the parties agreed that the matters should be heard simultaneously, and that one judgment should be handed down in respect of both applications.
- (2) A notice of application for leave to appeal was delivered and directed against the orders granted under case number: 4755/2022. The applicant in the notice

of application for leave to appeal is the applicant in the main application, and the respondents in the notice of application for leave to appeal are the respondents in the main application. I will refer to the parties as they are referred to in the main application.

- (3) Leave to appeal is sought to the Supreme Court of Appeal, alternatively to a full court of the Division. Leave is sought on the bases that (i) 'there are reasonable prospects of success on appeal'; and (ii) 'there are compelling reasons why leave to appeal should be granted'.

Issues for determination

- (4) Applications for leave to appeal are governed by rule 49(1) of the **Uniform Rules of Court** and §§ 16 & 17 of the **Superior Courts Act**, No. 10 of 2013.
- (5) In terms of rule 49(1)(b) 'when leave to appeal is required and it had not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against'.
- (6) In terms of section 16(1)(a)(i) of the Act an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6). Section 17(6)(a) of the Act provides:

"If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a

Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal."

(7) Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including whether there are conflicting judgments on the matter under consideration.

(8) Considering the statutory and regulatory matrix, three questions for consideration arise in the application for leave to appeal. These questions are not distinct but interrelated. The first question is whether the applicant filed a proper notice of application for leave to appeal which concisely and succinctly set out the grounds upon which leave to appeal is sought. The second question is whether the appeal would have a reasonable prospect of success or whether there are compelling reasons which exist why the appeal should be heard such as the interests of justice. The third question is whether the application for leave to appeal sets out expressly why the default position of an appeal to a

full court of the Division should not prevail, as well as the questions of law or fact or other considerations involved which dictate that the matter should be decided by the Supreme Court of Appeal.

Did the applicant file a proper notice of application for leave to appeal

- (9) The notice of application for leave to appeal must set out the grounds upon which leave to appeal is sought. The rules do not define 'grounds', but authorities seem to agree that it should be an error of law or facts alleged by the applicant as the defect in the judgment appealed against upon which reliance is placed to set it aside. See for example - **Xayimpi & others v Chairman, Judge White Commission (formerly known as Browde Commission) & others** [2006] JOL 16596 (E).
- (10) An appeal may also lie against the exercise of judicial discretion. See – **Knox D'Arcy Ltd and Others v Jamieson and Others** 1996 (4) SA 348 (A) [also reported at [1996] 3 All SA 669 (A)].
- (11) The first enquiry is accordingly whether the notice clearly and succinctly set out in clear and unambiguous terms the incorrect findings of law or fact, or the basis upon which it is contended that the court did not act judicially. For an illuminating discussion on the distinction between findings of law, findings of fact, and judicial discretion see **Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited** [1992] 2 All SA 453 (A) at pages 457 – 459.

- (12) Incorrect findings of fact cannot arise outside the record of proceedings because, save in exceptional circumstances, an appeal court will not permit disputes of fact or expert opinion to be raised for the first time on appeal. See - **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others** 2005 (2) SA 359 (CC) at 388F-389A. An applicant in an application for leave to appeal needs to show that from the text of the decision appealed against (*ipsissima verba*) that an accepted fact differs from a common cause or undisputed fact in the record of proceedings.
- (13) The **Constitution**, legislation, the common law, and customary law are the laws of the Republic. There is a clear hierarchy of laws, with the **Constitution** being the supreme law of the Republic. See – Section 2 of the **Constitution**. Common law and customary are subject to any legislation, consistent with the **Constitution**, which specifically deals with it. See - **Alexkor Ltd and Another v Richtersveld Community and Others** (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) at par 51.
- (14) An applicant in an application for leave to appeal who relies on an incorrect finding of law must clearly and succinctly identify the incorrect legal principle applied by the court, and the correct legal principle that should have been applied. An appeal on a question of law means an appeal in which the question for argument and determination is what the correct legal principle, or correct interpretation of a legal principle is.
- (15) This is however not the end of the enquiry, since an appeal can only be noted against the judgment itself (i.e., the substantive order), not the reasons for the judgment, or the way the Court arrived at the judgment. See - **Cape**

Empowerment Trust Ltd v Fisher Hoffman Sithole 2013 (5) SA 183 (SCA) at 198I–J. Even if an applicant in an application for leave to appeal succeeds in convincing the Court that it erred in fact and / or in law, it must also show that the judgment (substantive order) would have been different if the Court applied the correct law or facts. The notice should therefore clearly specify what orders will be sought on appeal.

- (16) In the context of a judgment, legal issues and factual issues can never truly be separated and the question of fact must first be answered before the court will know which legal question must be dealt with.
- (17) To determine whether the court acted judicially, a determination needs to be made with reference to all the relevant facts and principles. If an application is based on the contention that the Court failed to act judicially, the notice should clearly and succinctly set out all the relevant facts and legal principles which the applicant relies upon, and the decision which in the result should reasonably have been made by the Court properly directing itself.
- (18) Turning to the matter under consideration, the applicants advanced 18 grounds in support of their application for leave to appeal (quoted verbatim with only letter case and punctuation corrected):

“(i) *The court a quo erred in not granting the relief sought by the applicants in the notice of motion.*

- (ii) *The court a quo ought to have granted an interdict against the first respondent, interdicting it from commencing or continuing with activities that are manifestly unlawful.*
- (iii) *The court a quo should have granted a final interdict preventing the first respondent from acting unlawfully until such time as the first respondent has procure the necessary authorisations and approvals.*
- (iv) *Accordingly, the court a quo erred in only granting an order against the second respondent ("the municipality") in circumstances where an interdict against the first respondent was justified.*
- (v) *In circumstances where the first respondent acts unlawfully (in the absence of the necessary approvals), the court a quo should have found that it has no discretion whatsoever but to grant the interdictory relief as is sought by the applicants.*
- (vi) *The aforesaid is especially so in circumstances where the first respondent conceded that the necessary approvals are not in place.*
- (vii) *Accordingly, the court a quo could have on the facts that were common cause, granted an interdict against the first respondent.*
- (viii) *The Court a quo, after correctly finding that none of the legislative provisions dealing with land use rights have been complied with and thereafter correctly finding that the provisions of the National Building Regulations and Building Standards Act had not been complied with, should have found that the aforesaid constitutes offences and that the court*

a quo, in the circumstances, has no discretion but to interdict the first respondent from so acting.

- (ix) *The court a quo should have found that a deliberate flouting of the law should not be countenanced.*
- (x) *The court a quo erred in not finding that the applicants have a clear right to seek interdictory relief against the first respondent on the grounds set out in the founding affidavit.*
- (xi) *It was explained in the founding affidavit why the applicants are detrimentally impacted upon and has a clear right to prevent the first respondent from continuing with its unlawful actions to the detriment of the applicants.*
- (xii) *The court a quo should thus have found that the applicants have demonstrated a clear right worthy of protection and that such requirement has been satisfied.*
- (xiii) *The court a quo furthermore erred in seemingly finding that the applicants had an alternative remedy available that militates against the granting of a final interdict.*
- (xiv) *The court a quo should have found that the interdictory relief granted against the municipality does not constitute a satisfactory alternative remedy to the final interdict sought by the applicants against the first respondent.*

- (xv) *The court a quo also erred in its finding on the “clean hands” doctrine, as the absence of unclean hands was clearly demonstrated in the papers.*
- (xvi) *There is nothing in the papers that could possibly have justified a finding by the court a quo of the applicants’ hands being “not merely ‘unclean’ but dripping with moral turpitude”.*
- (xvii) *The court a quo should have found that it is abundantly clear from the papers that the applicants were not informed of the first respondent’s unlawful activities when they took occupation in Kleinfontein.*
- (xviii) *The court a quo thus ought to have granted the interdictory relief as sought in the notice of motion against both the first respondent as well as the municipality and should have ordered the first respondent to pay the applicants’ costs on the scale as between attorney and client.”*

(19) The notice merely lists the purported errors, and in criticizing the Court’s findings, the applicants woefully failed to identify the facts clearly and succinctly (with reference to the record) and legal principles (with reference to the laws of the Republic) underpinning these contentions. This means that the grounds are so widely expressed that if leave is granted it will be left open to applicants to canvass almost every finding of fact and ruling of law made by the Court.

(20) The peremptory requirement that an application for leave to appeal must set out the grounds upon which leave is sought is not met when incorrect findings are merely listed. Since an appeal will not lie against the reasons for the Court’s judgment but against the substantive order, whether a Court of Appeal will

agree with the reasoning of this Court would be of no consequence if it cannot be shown that the result would have been different. See - **Atholl Developments (Pty) Limited v Valuation Appeal Board for the City of Johannesburg** [2015] JOL 33081 (SCA) at paras 10 – 11. Several of the grounds are directed at the reasons for the Court's judgment and not the substantive order, it falls short of the requirement.

- (21) What compounds the criticism of the notice is that it does not specify whether the grounds are based on incorrect findings of fact or law, or whether the attack is against the Court's failure to act judicially. Even if the grounds can be deduced from the notice, the defect is not cured because it is not for the Court or the respondents to have to analyze the notice to establish what grounds the applicants intended to rely upon but did not clearly set out. The rambling notice of appeal falls woefully short of the requirement that the notice must set out the grounds upon which leave to appeal is sought. See - **Songono v Minister of Law & Order** 1996 (4) SA 384 (E) at 385 E – I & 386A.
- (22) The notice of application for leave to appeal does not correctly identify a singular factual finding in the judgment which conflicts with an established or common cause fact as evidenced by the affidavits which served the function of both pleadings and evidence. It also does not, identify an established legal principle which conflicts with the legal principles the Court applied to the facts of the case.
- (23) As most of the grounds are directed at the Court's findings (reasons) as opposed to the substantive order, and the grounds are not clearly and succinctly set out in the notice, there is no proper application for leave to appeal before me and on this basis alone the application should be dismissed.

- (24) However, the merits of the application were fully argued before me so notwithstanding my views on the notice of application for leave to appeal, I will nonetheless proceed to deal with the other issues for determination which I've identified earlier in the judgment.

Reasonable prospect of success or compelling reasons why the appeal should be heard

- (25) In considering the application for leave to appeal I am guided by the criteria laid down in **Ramakatsa v African National Congress** [2021] JOL 49993 (SCA) at par 10.

"Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as opposed to "could" possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the

facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."

- (26) As I've already indicated the notice of application for leave to appeal does not specify whether the Court erred in fact, or in law, or failed to exercise a discretion judicially. The heads of argument delivered on behalf of the applicants does very little to improve the situation. This leaves the Court in the unenviable position that it must deal with every 'ground' on the bases that the Court erred in fact, erred in law, or failed to exercise its discretion judicially.
- (27) Most of the grounds advanced approximate opinion, are inferential and abstract, and are useless to the Court in determining whether it erred in fact or in law, or whether it failed to exercise its discretion judicially. The grounds were so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeals. See - **Hing and Others v Road Accident Fund** 2014 (3) SA 350 (WCC).
- (28) On a very liberal reading of the grounds, it would seem as if it were the applicants' case that (i) the Court's usual discretion to refuse the grant of an interdict was ousted when it was shown that the 1st respondent acted unlawfully, and that the Court therefore erred in law when it refused to grant an interdict under circumstances where, on the common cause facts, the respondents were acting unlawfully; alternatively (ii) that the Court failed to exercise its discretion judicially when it refused to grant the interdict.

- (29) In as far as the first ground is concerned, the applicants rely on **Lester v Ndlambe Municipality** (514/12) [2013] ZASCA 95 (22 August 2013) and **United Technical Equipment Co (Pty) Ltd v Johannesburg City Council** 1987(4) SA 343 (T). In both these cases the court dealt with public law remedies where the applicants were municipalities seeking the enforcement of a statutory right, flowing from a statutory contravention, which also amounted to criminal offences. In both these cases it was held that the law does not afford the court a discretion to refuse to grant an order aimed at enforcing the statutory right. The legal principle embedded in these cases is that the courts have a duty to ensure that the doctrine of legality is upheld and to grant recourse at the instance of **public bodies** charged with the duty of upholding the law.
- (30) What distinguishes the matter under consideration is that the applicants sought to safeguard private law interests, by relying on statutory contraventions. The applicants have no statutory right, flowing from a statutory contravention, to safeguard private law interests through the enforcement of the relevant laws relating to planning and building regulation. The cases are not authority for the proposition that the court's discretion to refuse an interdict, where an applicant seeks a private law remedy, is ousted when the conduct complained of also amounts to a statutory contravention.
- (31) In as far as the refusal to grant an interdict is concerned, the only avenue open to the applicants will be to convince an appeal court that the Court failed to exercise its discretion judicially in applying the law to the facts. To determine whether the applicants will have reasonable prospects of success on appeal on

this basis, one needs to consider the standard of interference that an appellate court will be justified in applying.

- (32) The standard of interference and the test was authoritatively discussed in the well-articulated judgment of Khampepe J in the matter of **Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another** (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) at par 83 – 89:

[88] *When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised:*

"... judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles" (footnote omitted).

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

[89] *In Florence, Moseneke DCJ stated:*

"Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within

the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making."

- (33) I refused to grant an interdict because (i) the applicants failed to demonstrate a clear right; and (ii) I deemed the relief granted against the 2nd respondent constituted an adequate alternative remedy.
- (34) The applicants contend that the 1st respondent's breach of statutory provisions relating to planning laws and building regulation automatically confers on them a clear right to an interdict. I could not find support for this proposition, and the authorities seem to suggest quite the opposite, namely, that the question as to whether the breach of a statutory provision gives rise to a private cause of action, is one of construction of the statute. Before concluding that the statute gives rise to a private cause of action the questions need to be answered whether the operative statute anticipates, directly or by inference such cause of action, whether there are alternative remedies, whether the object of the statute is mainly to protect individuals or advance public good, etc. See - **Steenkamp NO v Provincial Tender Board of the Eastern Cape** (CCT71/05) [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (28 September 2006) at par 42. None of the laws being contravened anticipates directly, or by inference, that a breach should give rise to a private cause of action. The fact that the laws expressly provide for public law remedies, which are at the disposal of local authorities, suggests quite the opposite.
- (35) The applicants contend that the mandamus against the 2nd respondent, namely, to immediately take appropriate steps to enforce all relevant laws

relating to planning and building regulation, is not an effective or adequate alternative remedy. The only basis for this contention is that for many years the 2nd respondent failed to enforce the laws, and the applicants have a reasonable apprehension that it will persist to do so. The applicants did not make out a case in the papers that the 2nd respondent will likely not comply with an order compelling it to enforce the relevant laws. The fact that the applicants sought an order to that effect is inimical to the very notion that they are doubtful whether the 2nd respondent is likely to enforce the laws when compelled to do so through an order of court. The fact that the legislature equipped local authorities with public law remedies to address statutory contraventions militates against a finding that such remedies, when implemented by a local authority, are not effective or adequate.

(36) In paragraph 119 of the judgment, I expressly held as follows:

“In deciding on an appropriate enforcement mechanism, the COT is implored to consider the extent of the breaches that have occurred over the past 30 years. The shareholders and directors of the KAEB are clearly a group of individuals with an identified hierarchy engaged in significant criminal activity. The directors and their predecessors have shown themselves capable of egregious and criminal behavior, insidiously evading laws relating to municipal planning and building regulation, and the KAEB is eligible to be labelled a criminal enterprise.”

(37) It is therefore clear from my judgment that I considered the conduct of the 1st respondent and its members as not only unlawful, but illegal and a criminal offence. I was and remain in respectful agreement with the authorities that the law cannot and does not countenance an ongoing illegality which is also a criminal offence. To do so would be to subvert the doctrine of legality and

undermine the rule of law. I accept that the Court had a duty to uphold the doctrine of legality, by refusing to countenance the ongoing statutory contraventions and criminal offences by the 1st respondent and its members, which includes the applicants. By granting a mandamus against the 2nd respondent I did exactly that.

- (38) I am not convinced that the way I exercised my discretion was at odds with the law. It is arguable that another court would have favored a different option but unfortunately for the applicants that is not the test. I am not convinced that the applicants have reasonable prospects of success on appeal.
- (39) In as far as the compelling reasons are concerned, the applicants contend that my reasoning contradicts what had been found in other judgments, and a reconsideration would serve the public interest in that it would be to the benefit of the occupiers of Kleinfontein.
- (40) The conflicting judgments are not dealt with in the application for leave to appeal and in argument Counsel for the applicants referred to **Lester** and **United Technical Equipment** referred to supra. I've already indicated that those judgments are distinguishable from the matter under consideration, and I am not convinced that my judgment is in conflict or contradicts any of those judgments.
- (41) The question whether a final interdict should have been granted was fact-specific and did not raise a discreet issue of wider public importance. The issues which were decided were decided on the facts and circumstances of the case based on well-known principles applicable to final interdicts.

- (42) In **Swart v Heine and Others** (192/2015) [2016] ZASCA 16 (14 March 2016) at par 13 the Supreme Court of Appeal held as follows:

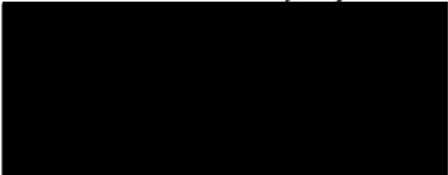
“There is a further disconcerting aspect to this appeal. The issues in this appeal are simple and straightforward and do not involve complicated or complex issues of law. This is a case where leave to appeal should not have been granted at all...

Leave to appeal should not be granted where there is no reasonable prospect of success on appeal, or no compelling reason why an appeal should be heard — s 17(1)(a) of the Superior Courts Act 10 of 2013.”

- (43) I disagree that a reconsideration by a court of appeal would be for the benefit of the occupiers of Kleinfontein, as the applicants contend. The applicants cannot speak on behalf of the other occupiers. They were not before Court and were not joined. The applicants did not make out a case in their founding affidavit that they were acting in the interest or for the benefit of the other occupiers or shareholders, or in the broader public interest. Leave to appeal would accordingly only serve the interests of the applicants.

Conclusion

- (44) Considering my finding that the applicants do not have reasonable prospects of success on appeal and that there are no compelling reasons why leave to appeal should be granted, I do not propose to deal the question as to whether leave should be to a full court or the Supreme Court of Appeal.
- (45) On a conspectus of all the issues raised I propose to dismiss the application for leave to appeal with costs.



A. VORSTER AJ
Acting Judge of the High Court

Date of hearing: 25 September 2024

Date of judgment: 31 October 2024

Counsel for applicant: Adv. J.A. Venter

Instructed by: TC Botha Incorporated

Counsel for first respondent: Adv. A.T. Lamey

Instructed by: Hurter Spies Incorporated