

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVIEWED: YES



24 March 2025

Case Numbers: 2024- 136466
2023- 077080 &
2020- 15428

Case Number: 20-15428

In the application for leave to appeal:

CITY OF JOHANNESBURG

Applicant

and

HYDE PARK GARDENS (PTY) LTD t/a SHELL HYDE PARK GARDENS

Respondent

In re:

Case Number: 24-136466

ERF 784 ROBINDALE FIVE (PTY) LIMITED & OTHERS

Applicants

vs

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY & ANOTHER

Respondents

and

Case Number: 23-077080

In the matter between:

ORDICODE (PTY) LTD

Applicant

vs

CITY OF JOHANNESBURG

Respondent

and

Case Number: 20-15428

HYDE PARK GARDENS (PTY) LTD t/a SHELL HYDE PARK GARDENS

Applicant

vs

CITY POWER OF JOHANNESBURG SOC LIMITED [“CoJ”] & ANOTHER

Respondents

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

BADENHORST AJ:

Introduction

1. On 6 January 2025 I handed down judgment in the above three matters. The following Orders which appear at the end thereof are relevant for the purposes of the CoJ's application for leave to appeal in Case Number: 20-15428:

“C. In HYDE PARK GARDENS (PTY) LTD // CITY POWER JOHANNESBURG SOC LIMITED & OTHER Case Number: 20/15428 [No. 9 on the roll] (“the Hyde Park matter”):

- 1) The second respondent (City of Johannesburg) is found to be in contempt of paragraph 2 of the Order made by the honourable Justice Yacoob on 8 July 2020 under case number 2020/15428 [“the Yacoob Order”];

- 2) The questions of:

- i. the appropriate sanction for the contempt of the Yacoob Order;

- ii. which individuals, if any, should be sanctioned; and

- iii. the final determination of case number 2020/15428 (including the resolution of all the disputes arising in respect of City of Johannesburg Municipal Account No: 220096837 which are referenced in the Yacoob Order), are referred for the hearing of oral evidence before me (or another Judge as the DJP may direct) on a date and at a time to be determined by the Deputy Judge President.

- 3) Witness statements

- i. The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided in para. 3.2 hereof.

- ii. Neither party shall be entitled to call any witness unless:

- a) it has served on the other party at least 15 days before the date appointed for the hearing (in the case of a witness to be

called by the respondents) and at least 10 days before such date (in the case of a witness to be called by the applicant), a statement wherein the evidence to be given in chief by such person is set out; or

b) the Court, at the hearing, permits such person to be called even though no such statement has been so served in respect of his evidence.

4) Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

5) The fact that a party has served a statement in terms of para. 3.2 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

6) Within 30 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issues referred to in para. 2 thereof, which are or have at any time been in the possession or under the control of such party.

7) Such discovery shall be made in accordance with Rule of Court 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

8) In the event that the respondents again disconnect the applicants' electricity supply to Shell Hyde Park, located at 99 Winnie Madikizela Drive, Hyde Park, Johannesburg ("the supply of electricity"), in breach of the Yacoob Order, and thereafter fail to reconnect the supply of electricity within two hours of receiving a request (by email or telephone call) to do so, the applicant is hereby authorized to engage an electrician and/or service provider to reconnect the supply of electricity. The reasonable costs incurred in effecting this reconnection shall be borne by the party or parties responsible for the breach;

9) The incidence of the costs incurred up to now shall be determined after the hearing of oral evidence.

D. Respondents' attorneys and counsel of record are invited to make representations to this Court within 30 days of the publication of this order, demonstrating why they should not be prohibited from charging or recovering any fees from the City of Johannesburg, City Power, or Johannesburg Water for work performed in respect of the matters decided

in this judgment in the light of their failures identified herein. If such representations are not filed in a timely manner, or if they are deemed unpersuasive, supplementary orders to that effect will be issued.

E. Mr Ngwana, the CoJ's legal advisor, is invited to make representations to this Court within 30 days of the publication of this order, providing reasons why he should not be personally ordered to pay 20% of the costs incurred by the CoJ and CP in these three matters, arising from his failure to heed the Deputy Judge President's warning in paragraph [45] of the decision in *Millu* (case number 25039/2021). If such representations are not filed in a timely manner, or if they are deemed unpersuasive, supplementary orders to that effect will be issued.

F. This judgment, as well as the following decisions—similarly critical of the administration of the City of Johannesburg,

Ulcombe v City of Johannesburg 18969/2022 (2023 02 01) per Strydom J;

AFHCO Calgro M3 Consortium (Pty) Ltd v City of Johannesburg Metropolitan Municipality and others 2023 JDR 3337 (GJ) per Benson AJ (23 August 2023);

Millu v City of Johannesburg Metropolitan Municipality and Another (25039/2021) [2024] ZAGPJHC 419 (18 March 2024) per Sutherland DJP;

Ackerman v City of Johannesburg (2022/9392) [2024] ZAGPJHC 334 (5 April 2024) per Chetty J link;

Millu v City of Johannesburg Metropolitan Municipality and Another (supplemental judgment) (25039/2021) [2024] ZAGPJHC 420 (29 April 2024) per Sutherland DJP;

Afhco Calgo M3 Consortium (Pty) Ltd v City of Johannesburg Metropolitan Municipality and Others (2022/322) [2024] ZAGPJHC 1057 (18 October 2024) per Amm AJ,

must be brought to the attention of the following officials of the City of Johannesburg:

- a. The Executive Mayor;
- b. The City Manager;
- c. The Head of Revenue Collection;

- d. The Chief Legal Advisor;
- e. The Chief Executive Officer of City Power;
- f. The Chief Executive Officer of Johannesburg Water.

They are invited, within 30 days, to respond to:

The finding of contempt of court in the Hyde Park matter (refer to paragraph [97]); and

The flaws in the answering affidavits and arguments common to all three matters (described in paragraphs [1], [2] and [103] – [111] of this judgment).

They are further invited to respond to the criticism expressed in the six previous decisions of this court listed above.

Any response, or lack thereof, will be duly considered when determining an appropriate sanction for contempt, addressing the outstanding order for costs in the Hyde Park matter, and assessing the necessity for further remedial action at higher levels of the governmental hierarchy.

G. The parties and relevant officials of the City of Johannesburg are directed to email any representations delivered in terms of paragraphs D - F above to the Registrar of the court, Mr. L Mabasa, at LMabasa@judiciary.org.za for the consideration of the court, copied to the applicants' attorneys in the three matters identified in A to C of this order and the Secretary of the DJP's Office, at secretarydjp@judiciary.org.za."

2. On 27 January 2025 the attorney for the CoJ delivered a Notice of Application for leave to appeal against the orders under C, D, E, F and G of the judgment, repeated above.
3. On 4 March 2025 well in advance of the hearing of the application for leave to appeal, the Registrar notified the parties that the court intends, *mero motu* to raise the question whether the Orders in respect of which leave to appeal is applied for (namely paragraphs C & D, E, F and G of the Order quoted above) are appealable considering:

- 3.1. In respect of paragraph C 1 (the finding of contempt of court in circumstances where the penalty for contempt has not yet been determined), in the light of the rule described in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at page 120 D/E as “the salutary general rule that appeals are not entertained piecemeal”; and
- 3.2. In respect of the balance of the Order (paragraph C2 - 8, a referral to oral evidence and associated procedural directives; D - E, invitations to make representations; F, an invitation to senior City Officials to consider and respond to the finding of contempt and court decisions critical of the City’s administration and G, a procedural direction concerning communication of any responses made), in the light of the Zweni Rule (see *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at pages 532J – 533A) read with *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* 2023 (5) SA 163 (SCA) at paragraphs [21], [22] and [27] .
4. In accordance with the notification, the first question is to be decided is whether leave to appeal should (or can) be granted at this stage in the proceedings.

The Zweni test

5. In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at pages 532J – 533A, the well-known test for appealability was stated as follows with reference to the Supreme Court Act of 59 of 1959:

“A ‘judgment or order’ is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings...”

6. As appears from this passage, the Zweni test (as it has become known) is informed by the qualifying words, “judgment or order” in the (now) repealed Supreme Court Act of 59 of 1959. These words do not appear in the Superior Courts Act 10 of 2013.

Section 16 of the new Act is cast in general terms namely: “*an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted*” [underlined]

7. This difference in the two Acts sparked a debate in the Law Reports about the continued relevance of the Zweni test and more particularly whether the only qualifying test for leave to appeal should be “the interests of justice” which is the one applied by the Constitutional Court to applications for leave to appeal in that Court.
8. The issue was carefully considered In TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others 2023 (5) SA 163 (SCA). I refer to the following passages of the decision by Unterhalter AJA (as he then was):

“[21] Whether the decision of a court is appealable is a matter of great importance, both for litigants and for the discharge by an appellate court of its institutional functions. That is why the doctrine of finality has figured so prominently in the jurisprudence of this court. As a general principle, the High Court should bring finality to the matter before it, in the sense laid down in Zweni. Only then should the matter be capable of being appealed to this court. It allows for the orderly use of the capacity of this court to hear appeals that warrant its attention. It prevents piecemeal appeals that are often costly and delay the resolution of matters before the High Court. It reinforces the duty of the High Court to bring matters to an expeditious, and final, conclusion. And it provides criteria so that litigants can determine, with tolerable certainty, whether a matter is appealable. These are the hallmarks of what the rule of law requires.

[22] I do not consider the Superior Courts Act to have supplanted the primacy of Zweni....

[27] To adopt the interests of justice as the foundational basis upon which this court decides whether to entertain an appeal would put in place a regime that is both unpredictable and open-ended. It would encourage litigants to persuade the High Courts to grant leave, when they still have work to do, failing which, to invite this court to hear an appeal under the guidance of a standard of commanding

imprecision. That would diminish certainty and enhance dysfunction. It would also compromise the freedom with which the Constitutional Court selects the matters it hears from this court.”

9. It follows that the Zweni test of finality determines whether the application for leave to appeal qualifies under the Zweni test.

Summary of Paragraphs C – G of the Order:

10. Hyde Park Matter Proceedings (paragraph C of the Order):

- 10.1. The City of Johannesburg is found to be in contempt for violating the Yacoob Order.
- 10.2. Three key issues (arising from that finding) are referred for oral evidence: the sanction for contempt, which individuals (if any) to sanction, and finally resolution of the broader case in that matter (including disputes remaining over the municipal account).
- 10.3. Procedures are put in place for witness evidence, document discovery, and handling electricity supply breaches, including cost allocation for reconnection, if required in the interim.

11. Representation by Respondents’ Attorneys and Counsel (paragraph D of the Order):

- 11.1. Attorneys and counsel are invited within 30 days to explain why they should not be barred from charging/recovering fees for work done on the matter.
- 11.2. Failure to timely file persuasive representations may lead to supplementary orders prohibiting fee recovery.

12. Representation by the City’s Legal Advisor (Mr. Ngwana) [paragraph E of the Order]:

- 12.1. Mr. Ngwana must, within 30 days, provide reasons why he should not be personally liable for 20% of the costs incurred, due to his earlier failure to heed a prior warning.

12.2. Lack of a timely or persuasive response may result in orders imposing that cost share on him.

13. Notification of Related Decisions of the courts in other matters raising similar concerns as those expressed by this court [paragraph F of the Order]:

13.1. A series of related judgments critical of the City's administration are listed.

13.2. These decisions, along with the finding of contempt and identified flaws in affidavits/arguments, must be brought to the attention of several key city officials.

13.3. The officials are invited to respond thereto within 30 days.

13.4. It is indicated that any response, or lack thereof, will be duly considered when determining an appropriate sanction for contempt, addressing the outstanding order for costs in the Hyde Park matter, and assessing the necessity for further remedial action at higher levels of the governmental hierarchy.

13.5. Communication of Representations [paragraph G of the Order]:

All parties and the designated City officials must email their representations to the court Registrar and copy the applicants' attorneys and the DJP's Secretary, ensuring the court receives all input for further consideration.

Only the finding of contempt satisfies the Zweni test

14. The finding of contempt [paragraph C 1 of the Order] unquestionably meets all three criteria of the Zweni test for a "judgment or order".

15. In contrast, the rest of the Orders [C 2 – 9, D, E, F and G] (referral to evidence to determine sanctions and outstanding issues on papers in Hyde Park Gardens matter, fee representations, cost allocation, and further remedial measures in future) are all subject to pending oral hearings and additional representations invited by the Court.

16. None of them satisfies the Zweni test of finality and accordingly the application for leave to appeal in relation thereto is impermissible and deficient.

Reasonable prospects of success: contempt of court

17. Has the applicant established a reasonable prospect that another Court would come to a different finding (*i.e. that no contempt is established on the papers in the Hyde Park matter.*) And is so, is it appropriate for leave to appeal to be granted at this stage when a number of related matters have not yet been resolved?

18. I have carefully reconsidered paragraphs [80] to [97] of the Judgment, especially paragraphs [94] – [97] where the question of contempt and CoJ’s defences are analysed and determined. I am unpersuaded that another Court would take a different view. There is accordingly no reasonable prospects of success on appeal.

19. I mention *en passant* that even if there was a reasonable prospect of success on appeal of the contempt finding, mindful of general rule that appeals are not entertained piecemeal, I would not at this point have granted leave to appeal. I appreciate that the finding made against the applicant is for civil (not criminal) contempt which means that Section 316 of the Criminal Procedure Act does not apply, which lays down as a general rule¹ that what are alleged to be wrong decisions made in the course of a criminal trial, are only capable of correction by way of appeal or review *after the trial has ended*, in other words not before the trial has run its course unless there is a compelling reason justifying it. Although not applicable, the principle informing Section 316 is equally applicable in this matter and strengthens the avoidance of a piecemeal procedure as envisaged by the applicant.

20. It follows that the application for leave to appeal fails the jurisdictional requirement of the Zweni test in part and fails, regarding the finding of contempt in the Hyde Park Gardens matter, to satisfy the test of reasonable prospects of success on appeal. It would in any event have been inappropriate, in my view, to cause a piecemeal process at this stage where the “trial” has not yet been concluded. In the case of the

¹ S v Zuma and Another 2022 JDR 0493 (KZP) paragraph [37].

rest of the Orders, they fail the Zweni test and leave to appeal is accordingly not an available remedy at this stage of the yet incomplete proceedings.

21. The application is accordingly dismissed with costs, including the costs of two counsel where employed.


BADENHORST AJ
JUDGE OF THE HIGH COURT

Heard: 24 March 2025
Judgment: 24 March 2025

APPLICATION	APPEARANCES
ERF 784 ROBINDALE FIVE (PTY) LIMITED // CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Case Number: 24-136466	For the applicant: Adv B Casey For the respondent: Adv E Sithole Instructed by: Ramatshila – Muger Inc
ORDICODE (PTY) LTD // CITY OF JOHANNESBURG Case Number: 23-077080	For the applicant: Adv M Rodrigues For the respondent: Adv E Sithole Instructed by: Madhlopa & Thenga Inc
HYDE PARK GARDENS (PTY) LTD // CITY POWER JOHANNESBURG SOC LIMITED & OTHER Case Number: 20/1542	For the applicant: Adv Yacoob Alli with Adv Zaheera Hoosen For the respondent: Adv E Sithole Instructed by: Madhlopa & Thenga Inc