IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,

(MBOMBELA MAIN SEAT)

CASE NO.: 2692/2022

(1) REPORTABLE: **YES**

(2) OF INTEREST TO OTHER JUDGES: **YES**

(3) REVISED **YES/NO**

FOURIE AJ

DATE12 MAY 2025

SIGNATURE

In the application between:

NAD PROPERTY INCOME FUND (PTY) LTD	**FIRST APPLICANT**
ERF […] H[…] TECHNOPARK INVESTMENTS (PTY) LTD	**SECOND APPLICANT**

AND

NELSON WISEMAN TIVANE	**FIRST RESPONDENT**
ELEGANT FUEL (PTY) LTD	**SECOND RESPONDENT**
THE BUSHBUCKRIDGE LOCAL MUNICIPALITY	**THIRD RESPONDENT**
THE MPUMALANGA PROVINCIAL GOVERNMENT DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS	**FOURTH RESPONDENT**
THE MINISTER OF ENERGY FOR THE REPUBLIC	**FIFTH RESPONDENT**

OF SOUTH AFRICA

THE CONTROLLER OF PETROLEUM PRODUCTS IN THE NATIONAL DEPARTMENT OF ENERGY **SIXTH RESPONDENT**

JUDGMENT

<u>FOURIE AJ</u>

<u>INTRODUCTION:</u>

[1] The current application, as set down and as was heard on 8 May 2025, is but the latest in a long line of litigious processes, all involving the same parties. The matter as set down constitutes a hearing in due course of a matter initially set down to be heard on the urgent Court roll of this Court on 18 June 2024 before Msibi AJ, on which day the matter was struck from the roll due to a lack of urgency.

[2] The main matter concerns several applications, interlocutory applications, attempts at appeals, and litigious processes in this Court, the Supreme Court of Appeal and the Constitutional Court.

[3] The catalyst application is one wherein the First and Second Applicants secured an interim interdict in this Court on 25 July 2022, in which Mashile J ordered as follows:

1. *Part A of the Application is dealt with as one of urgency, and the Court condones the non-compliance with the Rules of this Honourable Court in terms of Rule 6(12) of the Uniform Rules of Court.*

2. *The Respondents are interdicted, pending the final resolution of Part B of the Notice of Motion, for continuing with any further construction and ancillary activities aimed at the establishment of a petrol filling station on a*

property known as Stand No. 2[...], T[...], Acornhoek, Buschbuckridge Local Municipality ("Subject Property").

3. *The Respondents are interdicted, pending the final resolution of Part B of the Notice of Motion, from conducting the business of a petrol filling station and all ancillary or subsidiary activities on the Subject Property.*

4. *The costs of Part A of this application shall be paid by the Respondents, jointly and severally, the one paying the other to be absolved.*

[4] Insofar as clarification is necessary, Part A of the application mentioned by Mashile J refer to the interim interdict sought and granted, and Part B relates to a review application.

[5] The essence of the Order granted by Mashile J is that, pending the finalisation of the review application, the First and Second Respondents are interdicted from constructing and operating a petrol filling station.

[6] In the current application, the First and Second Respondents apply for the upliftment of the interim interdict granted by Mashile J on 25 July 2022 pending the finalisation of the review application.

[7] As the matter has been stated, restated, evaluated, and re-evaluated, as will be seen hereinafter, on countless times and to avoid any confusion, the parties shall be referred to as in the main and initial application that served before Mashile J on 25 July 2022.

[8] For further clarification, the Applicants in the current application, being the party that seeks the upliftment of the interim interdict, are the First and Second Respondents ("The Respondents"), and the parties opposing the current application are the First and Second Applicant("The Applicants") in the initial application, who are also the Applicants in the review application.

[9] At the hearing of the matter, Advocate Savvas indicated that he only held a mandate to act in the matter on behalf of the Second Respondent, although in essence the relief as sought would be in favour of the First Respondent also.

CHRONOLOGY OF EVENTS:

[10] To restate and evaluate all the previous litigious processes between the respective parties would serve no practical purpose under normal circumstances, but given the animosity between the respective parties and the fact that the Applicants, in opposing the application, seek a punitive cost order to be paid by the Respondents' legal representatives *de bonis propriis*, an aspect which I need to deal with at the end of this judgment, the restating of the events that have unfolded leading up to the current application become significant.

[11] For all other reasons and as far as it relates to the legal question this Court is faced to pronounce upon, as will be seen later in the judgment, the previous litigious processes are of no real influence.

[11.1] On 25 July 2022, the Order of Mashile J was handed down as already addressed.

[11.2] On 27 July 2022, and two days after the Order of Mashile J, the Second Respondent's attorneys of record applied for leave to appeal against the judgment of Mashile J.

[11.3] On 17 August 2022, the application for leave to appeal against the Order of Mashile J was dismissed by Mashile J with costs.

[11.4] After the dismissal of the application for leave to appeal by Mashile J, the Second Respondent proceeded to apply directly to the Supreme Court of Appeal for leave to appeal against the judgment of Mashile J.

[11.5] On 11 August 2023, the Second Respondent's petition to the Supreme Court of Appeal was dismissed with costs.

[11.6] On 28 August 2023, the Second Respondent applied to appeal against the Order of Mashile J to the Constitutional Court.

[11.7] On 4 June 2024, the Second Respondent was notified that its application to appeal to the Constitutional Court had been dismissed with costs.

[11.8] In as far as it relates to Part B of the original application being the review application, the Applicants made application to compel the delivery of the required records which application was opposed by the Second Respondent who filed a conditional application and counterapplication for the separation and enrolment of a point of law in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court.

[11.9] The issues pertaining to the compelling of the record and the issues as raised by the Second Respondents were heard by Greyling-Coetzer AJ on 24 October 2023, and judgment was handed down on 24 January 2024, in which she granted the application to compel and dismissed the counter-application of the Second Respondents with costs.

[11.10] On 7 March 2024, this Court was requested to hear an application for leave to appeal against the decision of Greyling-Coetzer AJ and on 10 June 2024, the application for leave to appeal was dismissed.

[11.11] Flowing from the aforesaid, the current application was born.

[11.12] It is important to point out that, after the application was issued by the Respondents, the following documents have become available, which the Respondents wish this Court to take into consideration:

[11.12.1] The Department of Mineral Resources and Energy has filed the record of proceedings regarding the issuing of licenses to the First Respondent.

[11.12.2] The municipality filed its record of proceedings in respect of the zoning of the property in question.

[11.12.3] The Applicants have filed their Rule 53(4) Supplementary Affidavit in the review application.

[11.12.4] The Second Respondent has filed its Rule 53(3) Answering Affidavit in the review application.

[11.13] It is further accepted by the parties that the municipality has filed a notice of intention to oppose and has until 21 May 2025 to file their Answering Affidavit in the review application.

[11.14] At the hearing of the matter, it was conceded by both Advocate Savvas, appearing on behalf of the Respondents, and Advocate Venter, appearing on behalf of the Applicants, that the only issues outstanding for the main application to be finalised, as the papers currently stood, were:

[11.14.1] The filing by the municipality of their Answering Affidavit, followed by a possible Replying Affidavit, which Answering Affidavit is to be filed on 21 May 2025.

[11.14.2] The parties were to obtain a date for the review application to be heard.

[11.14.3] Heads of Argument in respect of the review application needed to be filed if the parties so wished, whilst being guided by the practice directives of this Court.

[11.15] I find no reason why the Applicant could not have, by now, applied for a date for the review application to be set down. Given the exorbitant number of appeals and interlocutory applications, the Court cannot, however, fault the Applicants for being overly cautious in not obtaining a date for the review application to be heard, to avoid unnecessary costs being incurred in respect of the matter.

[11.16] During the argument, Advocate Savvas highlighted the fact that many unknown eventualities in respect of the matter might arise, which the Court needed to take into account when making the current order. Whilst I agree that there would always be the possibility of unforeseen issues that might arise in any litigious process, if the same is to be taken into regard currently, it would amount to nothing more than mere speculation.

[11.17] During the hearing of the matter, I conveyed a sentiment to the respective counsel appearing, that it was my view that, if the total of the review process and application could be equated to a 100 meter athletics event, then the athletes, in the current matter being the litigants, would have run 90 meters of the race already, and that it was only the final 10m stretch of the race that remained in order for the issues between the Applicants and Respondents, which obviously cause significant grievances to the respective parties, to be finally pronounced upon.

[12] It is against the backdrop of the aforesaid that the Court evaluated the application of the Respondents

NATURE OF THE APPLICATION:

[13] The application at hand is one of a truly unique nature. I would not go as far as to agree with Advocate Venter appearing on behalf of the Applicants that the application is a beast of unknown description, but it is accepted by the respective practitioners appearing that the proposition advanced by the

Respondents which they wish this Court to order upon, is one that is yet to present itself in any matter in which the Courts have pronounced on at least in our country and at least as far as they could gather. As such, this Court cannot be guided by any prevailing legal president in evaluating whether the relief the Respondents seek ought to be granted or not.

[14] Much was said by the respective legal representatives in respect of the previous appeals brought by the Respondents.

[15] The general view of counsel was, that it was, at least to a certain degree, accepted by the parties that the initial order by Mashile J was now indeed regarded as an Interim Order, which is evident from the fact that the Respondents try to revisit the Interim Order, and further that neither the Supreme Court of Appeal nor the Constitutional Court found it to be in the interest of justice to nonetheless, despite it being such, deal with the matter.

[16] I cannot attempt to phrase it any better than Unterhalter AJA (as he then was) in the matter of **TWK AGRICULTURAL HOLDINGS (PTY) LTD v HOOGVELD BOERDERY BELEGGINGS (PTY) LTD** 2023 (5) SA 163 (SCA) where, in referencing the matter of **ZWENI v MINISTER OF LAW AND ORDER** [1992] ZASCA 197; 1993 (1) SA 523 A, he stated on behalf of the Supreme Court of Appeal and confirmed that the Zweni triad remains relevant and has not been supplanted by the development of our *jurisprudence*. The interest of justice standard, the Court held, must also be considered in the context of two other principles, <u>legal certainty</u> and <u>finality in litigation</u>, which are themselves key components of the rule of law. ("own emphasis")

[17] I do not for one moment wish to state that the current matter ought to be decided on the same principles as an appeal but in any matter where a previous order is to be reviewed, appealed against, reconsidered, or as the Respondents wished to phrase it during argument, revisited, the interest of justice, legal certainty and finality in litigation remain considerations which I believe would always be paramount to take into consideration.

[18] The Respondents submit that the test this Court is to apply is that of "good cause shown" and that the only criterion is the dictates of justice.

[19] It is by now an accepted position that the Courts continually avoid defining, as a principle set in stone, the concept of "good cause" as it remains a discretionary evaluation of each and every Court determining on the facts of each and every case presented before that Court.

[20] The Court is however guided by the principles as stated in the matter of **MADINDA v MINISTER OF SAFETY AND SECURITY** 2008 (4) SA 312 (SCA), where the Court stated at paragraph 10 thereof that:

"Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex, it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the Applicant, and any contributions by other persons or parties to the delay and the Applicant's responsibility therefore."

[21] Good cause in all instances remains a "balancing act" and depending on the facts of each matter, more, or less, weight might be applied to any number of aspects.

[22] The reliance on the aforesaid dictum emanates from the Respondents stating and relying on the matters of **ZONDI v MEC TRADITIONAL LOCAL GOVERNMENT** 2006 (3) SA 1 (CC) at 13A – 14G, **SOUTH CAPE CORPORATION (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD** 1977 (3) SA 534 (A) at 55H, and **BELL v BELL** 1903 TS 887.

[23] The notion advanced by the Respondents is that, at Common Law, a purely interlocutory application may be corrected, altered, or set aside by the Judge who granted it at any time before final judgment and that such could be done on good cause shown. I find it important that Advocate Savvas, appearing on

behalf of the Respondent, continuously requested that the Court not refer to the application of the Respondents as a reconsideration of the application that served in front of Mashile J. Advocate Savvas motioned that one ought rather evaluate the matter as a revisitation of the initial application. I find the notion of Advocate Savvas strange under circumstances where the Respondents themselves, specifically in paragraph 41 of their Replying Affidavit, state that:

> *"The backdrop to this application is set in my paragraph 38 above and is simply that only once the Constitutional Court declined to hear an application to appeal against the interdict granted by his Lordship Mashile J (as he then was) on 25 July 2022 could this Honourable Court be approached for a **reconsideration** of the basis of his Lordship*
> *Mashile J's ruling in the application for leave to appeal that his order was interlocutory."* ***(underlined own emphasis)***

[24] Similarly, the case law on which the Respondents rely does not mention a "revisitation" of an interim interdict but speaks at best for the Respondents at a reconsideration, variation, or rescission.

[25] The Applicants motioned that they were not in a position to advance a proposed test for this Court to apply in the current matter due to the proceedings being irregular and unheard of.

[26] The Court needs to clarify that the Respondents do not seek a rescission or a reconsideration of a simple interlocutory order, as the Court referenced in the matter of **ZONDI** *supra.*

[27] The interlocutory order, being the interim interdict granted by Mashile J, is not a stand-alone order removed from any other application or legal implication. The interim interdict granted by Mashile J walks, proverbially speaking, hand-in-hand with the pending review application. Once the review application is finalised, the interim interdict is similarly dispensed with.

[28] The Respondents request this Court to revisit or reconsider whether an interim interdict phrased in the terms as Mashile J did ought to remain in place pending the finalisation of the review, and premised their submissions on why it ought not to remain in place on the following key points:

[25.1] During the initial Part A application, the Respondents were not properly represented, and due to the inadequacy of the representation of the Respondents, their case was not properly advanced.

[25.2] The record in respect of the review is now complete, and this Court has all the required information to evaluate whether an interim interdict ought to be in place pending the finalisation of the review.

[25.3] The effect of the interim interdict is detrimental to the Respondents, and

[25.4] There has been an exorbitant lapse of time and a tardiness in prosecuting the review by the Applicants.

[29] This Court needs to establish, on the test the Respondents propose whether the Respondents have shown good cause and whether it would be in the interest of justice if this Court revisits or reconsiders the Order of Mashile J to order that the interim interdict of the Applicants be set aside for the remaining period up until the finalisation of the review.

[30] Whilst I accept that the Courts have previously dealt with and pronounced upon matters that concerned the reconsideration, variation, or rescission of simple interlocutory orders, I could find no legal precedent, nor could any of the representatives acting in the matter direct me to any other matters where a Respondent, against which an interim interdict was granted, pending a review being finalised, applied for such relief. Both Advocate Savvas and Advocate Venter submitted that they scrutinised the Law Reports and legal resources

available, but that they could not find any similar incident where a Court was faced with a similar proposition.

[31] I deem it important, in coming to a conclusion in the matter, to deal briefly with each of the grounds on which the Respondents rely in seeking the order they so do.

[32] The notion that the matter was inadequately dealt with initially on behalf of the Respondents does not move the matter any further. At least the First Respondents were represented at the hearing of the matter by one Advocate Sibuyi and although the Respondents currently complained of the standard of the work done by Advocate Sibuyi, he was at least at that stage, the preferred legal representative of the First Respondent and they advanced, under oath, an opposition to the application. If the version advanced was incomplete or false, the First Respondent ought not to have retained, for the hearing of the matter initially, the services of Advocate Sibuyi, and the relevant affidavits presented to the Court ought not to have been signed under oath.

[33] Similarly, and although the matter remained unopposed by the Second Respondent, an employee of the Second Respondent deposed to a Supporting Affidavit in support of the case advanced by the First Respondent. The Second Respondent in the current application indicates that the Deponent to the Supporting Affidavit was not duly authorised and that although the Respondents do not seek this Court to disregard the Supporting Affidavit by one Mr. Frank Mkhonto, the Respondents seek that the Court apply a reduced amount of weight to the content thereof.

[34] It is not the contention of the Second Respondents that they did not receive notice of the application initially, and it is a stated fact that the Second Respondent elected not to partake in the initial interdict application on their own version, as per paragraph 9 of their Founding Affidavit in the current application stated that:

"…. It is a matter of record that the Second Respondent, obviously in good faith, left the opposition of the interdict to the First Respondent, who had appointed Advocate Sibuyi to represent it and did not directly participate in the matter."

[35] Rule 42 of the Uniform Rules of Court does not find any application in the current matter nor do I infer in any way that it does but the view expressed by the Constitutional Court in the matter of **ZUMA v SECRETARY OF THE JUDICIAL COMMISSION OF ENQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION, AND FRAUD IN THE PUBLIC SECTOR INCLUDING ALL GOODS OF STATE AND OTHERS** [2021] ZACC 28, makes an eloquently worded phrase applicable as much in the current matter as it does in respect of the Rule 42 application the Court was faced with therein where the Court state that:

"60. ……… Whilst that matter correctly emphasises the importance of a party's presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the "absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).

[61] The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine

opportunity to participate on account of the proceedings being marred by procedural irregularities. Mr Zuma was given notice of the contempt of court proceedings launched by the Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well within the bounds of what this Court was competent to grant if the crime of contempt of court was established. "

[36] In the current matter, the Respondents knew of the threat and implications the proposed legal relief sought by the Applicants held when the initial application was brought. The Respondents consciously elected to act in a certain manner at that stage. They did so at their own peril.

[37] To re-evaluate or revisit the interim interdict on this ground is devoid of any merit.

[38] In evaluating the effect of the interim interdict on the Respondents, I need to restate that, when the Court initially heard the matter, Mashile J would have weighed up and balanced all the arguments for and against the granting of the interim interdict. One of these issues would have been the impact on the Respondents. Irrespective of the statements made by the Respondents in the current application, the impact on the Respondents has not been as great as they wish to hold out, as it is an accepted fact that the Respondents have not ceased their business operations for the total period the interim interdict has been in place. It necessitated further contempt of Court proceedings to bring the business operations of the Respondents to a halt only on 4 June 2024. This accounts for nearly the whole period since the interim interdict was granted up until the current application was launched.

[39] Similarly, the period that remains to bring the review application to finality cannot be held out by the Respondents to be so great for this argument of the Respondents to persuade the Court in favour of the Respondents.

[40] It is accepted that the interim interdict might have an effect on the Respondents, which is accepted purely for the reason that that is indeed why such an interim interdict was obtained.

[41] The Court initially faced with the interim interdict application was faced with the notion that the review application would, at that stage in July 2022, commence and still found it reasonable to make an order that would halt the business operations of the Respondents, knowing the time a review application would take until finalisation.

[42] Given the fact that in most all aspects the review application is ripe for hearing, this Court cannot accept the notion that, in weighing up all the respective interests of the respective parties, and having regard to the extent to which the review application has progressed, it is necessary or indeed possible for this Court to accept the submissions made by the Respondents in respect of this contention.

[43] Insofar as it relates to the lapse of time and the proposed tardiness to prosecute the review application, the notion by the Respondents is outright rejected. The Applicants have been faced with countless appeals and unnecessary interlocutory applications which, if not solely then greatly, result from litigious actions taken by the Respondents during which the Respondents have yet to be successful.

[44] Although the Respondents were well within their rights to advance the case they wanted to the respective Courts, in sequence, the notion that it is the actions of the Applicants who have delayed the finalisation in the review cannot be accepted.

[45] I truly believe that if the legal representatives of the respective parties utilised the time and resources that have been spent in the appeals and interlocutory applications in respect of this matter in purely pursuing the finalisation of the review, the review would, by now, have been, in all likelihood, finalised and dispensed with.

[46] The propositions by the Respondents pertaining to the prosecution of the review find no favour with the Court that assists the Respondents in the relief they seek.

[47] The only remaining issue raised by the Respondents which I believe is deserving of any significant consideration by me in the current matter is whether this Court ought to have consideration of the review record that has now been completely filed and, before the hearing of the review application to evaluate the review record and to make a finding on the Applicant's prospects of success in the review application as, this is the only way in which the relief the Respondents seek can be obtained.

[48] Whilst I accept that, should the review record be scrutinised by me, and I make a finding on the prospects of success in the review by the Applicant, the Court of review would not be bound by the decision I have taken, as is the normal principle in related matters shall apply, this Court holds significant reservations in dealing with the matter as proposed by the Respondents.

[49] As stated previously, no legal precedent exists where parties have been allowed to revisit an interim order pending the finalisation of the review application, much less when the review application has moved so significantly as in the current matter.

[50] If the Court finds favour with the Respondents' application, a legal precedent shall be set. This legal precedent would, although subject to a test or threshold being met, allow similar litigants in a similar position to approach the Courts.

[51] I cannot accept the submissions by the Respondents that, being requested to evaluate the full review record and ruling on significant aspects thereof, would hold no single implication for the Court evaluating the review application of the matter.

[52] When Mashile J was initially confronted with the application, he ruled in respect of the application, on what the Applicants wished to achieve, and he found that the threshold for an interim interdict was met.

[53] It is important that the test for an interim interdict be restated.

[54] The test for an interim interdict as set out in the **SETLOGELO v SETLOGELO** 1914 AD 221 at 227 and **WEBSTER v MITCHELL** 1948 (1) SA 1186 (W) at 1187 and although these matters were decided in 1914 and 1948 respectively, the fact that they have withstood the test of time indicates that the test is as simple as set out therein, and in the interest of justice to be applied continually as such.

[55] The requirements are:

1. A *prima facie* right, even if it is open to some doubt.

2. Injury actually committed or reasonably apprehended.

3. The balance of convenience.

4. The absence of similar protection by any other remedy.

[56] After the hearing of the current matter, only one of two positions shall prevail, the first being that the application is dismissed and the interim interdict remains intact, or alternatively, the interim interdict is set aside. Irrespective of the aforesaid, the review application shall proceed.

[57] The essence of what the Respondents are seeking cannot be anything else than the Respondents, in requesting a re-evaluation or a revisitation of the interim interdict, is no longer requesting the Court to apply the principles for an interim interdict specifically pertaining to only a *prima facie* right although open to some doubt being the applicable test and requests this Court to amplify the test to be applied and in evaluating the Applicant's case when, being faced with

all the facts filed on the review application and the benefit of all the information on which the Respondents on this stage wish to rely, seeking the Court to scrutinise such evidence and to in essence apply not whether a *prima facie* right open to some doubt exists but whether a clear right exists.

[58] The Respondents seek nothing less than that the Applicants should be forced to re-state their case and prove why their previously obtained order should remain intact.

[59] The proposal by the Respondents in the current matter can at best be described as a Respondent arguing a matter on the return date to argue whether an interim interdict ought to be made final after the parties were allowed the opportunity to advance further evidence to indicate why or why not such an interim order might be made final. The proposition, having regard to the fact that the court is still requested to pronounce on an interim interdict, does not find any traction with me.

[60] The Respondents lost sight of the fact that the interim interdict was ordered in place initially, not as an independent order but as an order functioning to achieve a specific purpose in the review application. The review application not being finalised, and no exceptional circumstances existing in the current matter, the application was doomed to fail from the start.

[61] Even if a Court was to allow an application in the form as the Respondents are currently making, the test to be applied in evaluating whether or not an interim interdict ought to be granted can never evolve into the same test as for a final order, irrespective of the nature of proceedings or the benefit of additional information.

[62] The application by the Respondents, if the Court grants same, will no doubt not only lead to legal-uncertainty and confusion, it would open the floodgates for litigants to bring similar applications once the review record has been filed to avoid waiting for the review to be heard to dispense with the issues at hand and

to use the documents obtained in the review process to bolster a case with which the Court was not initially faced with.

[63] It might be that the day comes when certain information becomes available that requires the intervention by a Court, screaming for justice to be done if the position as per the interim interdict is not revisited pending the review to be finalised.

[64] The current matter is definitely not a matter, given the facts of the current matter, in which this Court is of the intention to set a legal precedent for similar matters.

[65] Another Court faced with different facts might very well entertain those facts and determine an applicable test which would justify the Court coming to the aid of such an applicant. The current matter is not deserving of such.

[66] Having been seized with the matter the Court was necessitated to work through the complete record to ensure that, even if I am not correct in my views in respect of the aforesaid, whether a Court faced with the current facts, irrespective of whether an interim order is in place or not, will have granted such an interim order.

[67] On the facts as they represent themselves, I cannot find any reason why a Court faced with those facts would make any other order than the Order as made by Mashile J and that the Applicant would have met the threshold for the obtaining of an interim interdict if the Court was presented with the same documents I am currently faced with. The *prima facie* threshold the Applicants needed to meet would, in any event, have been met with the information at hand. Although the position might be open to some doubt being placed on it by the review record, it does not cause the *prima facie* position to be dispensed with in totality.

[68] I say so *ex abundanti cautela* and not as a result of finding that the application the Respondents proposed is one that I am willing to give any form of

recognition or legal standing to for the reasons I have already stated. Insofar as it is necessary, the further documents and the information therein as advanced by the Respondents find no favour with the Court in respect of the current application and do not move the Court to a favourable consideration of the Respondents' application.

COSTS:

[69] No reason exists why the normal principle of cost following the successful litigant of a suit ought not be applied. The Applicants' legal representatives utilised a significant portion of their opposition to the current application as well as their address to the Court to request that the Court indicate its displeasure with the litigious tactics of the Respondents by making a punitive costs order against the Respondents. The Applicant further requested that the cost order should be payable by the legal representatives of the Respondents themselves.

[70] The Constitutional Court in the matter of **FERREIRA v LEVIN NO AND OTHER** 1996 (2) SA 621 (CC), held that the award of costs unless otherwise indicated is in the discretion of the Court.

[71] The Constitutional Court further, in the matter of **SA LIQUOR TRADERS ASSOCIATION AND OTHERS v CHAIRPERSON GAUTENG LIQUOR BOARD AND OTHERS** 2009 (1) SA 565 (CC) stated:

> *"An order of costs de bonis propriis is made against attorneys where a Court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the Court's displeasure. An attorney is an officer of the Court and owes the Court an appropriate level of professionalism and courtesy.*

[72] Costs are ordinarily ordered on a party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own

pocket. The obvious policy considerations underlying the Court's reluctance to order costs against the legal representative personally are that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without regard for their personal convenience. In that context, they ought not to be intimidated either by their opponent or even, I may add, by the Court. Legal practitioners must present their case fearlessly and vigorously but always in the context of a set of ethical rules that pertain to them, and that are aimed at preventing practitioners from becoming a party to the deception of the Court. It is in this context that society and the Courts, and professions demand absolute personal integrity and scrupulous honesty of each practitioner – see in this regard **MULTI-LINKS TELECOMMUNICATIONS LIMITED v AFRICA PREPAID SERVICES NIGERIA LIMITED** 2013 (4) ALL SA 346 GMP at paragraph 34.

[73] It seems to me that a practice has evolved whereby legal opponents, when seeking costs at the end of a matter believe that costs on a *de bonis propriss* scale should somehow be, after the scales of party and party, followed by attorney and client follow as a higher scale to indicate success in a litigious matter or to even indicate the Court's displeasure with the fact that a litigant has approached Court.

[74] This Court is of the view that a punitive cost order, being an order against the litigant on an attorney and client scale, remains the highest punitive scale of costs that can be awarded against a litigant, which ought already be regarded as to be reserved only for the most extreme of circumstances.

[75] The evaluation of whether costs on a *de bonis propriis* scale becomes applicable in any matter speaks not of the merits of a matter, it speaks of the conduct of a person acting in a specific capacity.

[76] Attorneys and counsel are representatives of clients. Unless the Court makes an express ruling that they were acting on the proverbial frolic of their own, the Court is bound to accept that they presented the matter on the express instructions of their clients. In the current matter, the Court is tasked to

evaluate whether the legal representatives of the Respondents conducted themselves in a manner that can be seen as negligent, unprofessional, or unethical.

[77] Even though the Court is in full agreement with the Applicant that the application was ill-conceived and was doomed to fail from the start, the Court cannot make a finding that the legal representatives for the Respondents acted unethically, discourteously to their opponents, unprofessionally or negligently. If anything, it is evident that the legal representatives for the Respondents are vigorously pursuing the case that their client has requested them to pursue.

[78] I am accordingly not persuaded that the legal representatives for the Respondents ought to be burdened by a costs order to be payable by them in their personal capacities, and no sufficient case in this regard has in any event been made out. It would seem that, in addressing the issue of costs, the Respondents merely wanted to convey the seriousness of yet another cost order being granted against the Respondents. This proposition I can accept if one has regard to the history of the litigious processes. The current application is one that, given the facts of the matter, ought never have been brought and ought never have been persisted with. As a result thereof, I can find no reason why exceptional circumstances do not exist to deviate from the normal principles pertaining to costs.

[79] This Court cannot allow a situation where a litigant, such as in the position of the Applicants currently, ought to be left out of pocket resultant of the actions of the Respondents in making the application as they did. It is accordingly justified that an order on an attorney and client scale be granted.

CASE MANAGEMENT:

[80] At the hearing of the matter, I indicated to the parties that I am of the intention of case managing the matter as far as I am able to do so. As such, and embedded in the Order I make hereinunder, the parties are directed to move the review application as quickly as possible under the circumstances.

ORDER:

[81] For all the reasons before, I make the following Order:

1. The application is dismissed.

2. The First and Second Respondents, jointly and severally, shall pay the costs of the First and Second Applicants on an attorney and client scale.

3. The parties are directed to, in compliance with case management of the review application, approach the office of the Registrar within 10 (ten) days of this order to obtain a date for the review application to be heard. The parties shall jointly address a letter to the office of the Judge President within 20 (twenty) days of obtaining a provisional date for the hearing of the review application to seek an expedited date for the review application to be heard in an attempt to finalise the review application as quickly as possible. The parties shall agree on the filing and timeframes of any outstanding issues in respect of the review application by completing and filing a Form B by no later than 10 June 2025.

H F FOURIE AJ

ACTING JUDGE OF HIGH COURT, MBOMBELA

Counsel for the Applicants:	**ADV VENTER**
Instructed by:	**IVAN PAUW & PARTNERS ATTORNEYS**

Counsel for the Respondents:	**ADV SAVVAS**
Instructed by:	**MKA ATTORNEYS**

Judgment reserved on:	08 MAY 2025
Date of delivery:	12 MAY 2025