THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 879/2022

In the matter between:

POLOKWANE MUNICIPALITY **APPELLANT**

and

DOUBLE FOUR PROPERTIES **FIRST RESPONDENT**

BROADLANDS HOME OWNERS ASSOCIATION NPC **SECOND RESPONDENT**

AND

Case no: 913/2022

In the matter between:

BROADLANDS HOME OWNERS ASSOCIATION NPC **APPELLANT**

and

DOUBLE FOUR PROPERTIES **FIRST RESPONDENT**

POLOKWANE MUNICIPALITY **SECOND RESPONDENT**

Neutral citation: *Polokwane Municipality v Double Four Properties and Another* (879/2022) and *Broadlands Home Owners Association NPC v Double Four Properties and Another* (913/2022) [2023] 158 (23 NOVEMBER 2023)

Coram: MOCUMIE, NICHOLLS and GOOSEN JJA and KOEN and UNTERHALTER AJJA

Heard: 16 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 at 23 November 2023.

Summary: Special leave to appeal – appealability of interim order – interim and interlocutory orders and special leave to appeal.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (G C Muller J and E M Makgoba JP and M G Phatudi J concurring sitting as court of appeal):

The applications for special leave to appeal in case no 879/2022 and case no 913/2022 are dismissed with costs, such costs to include the costs of two counsel, where so employed.

JUDGMENT

Unterhalter AJA (Mocumie, Nicholls and Goosen JJA and Koen AJA concurring):

[1] On 16 November 2023, we had two applications for special leave to appeal before us. The applicants, the Polokwane Municipality (the municipality) and Broadlands Home Owners Association NPC (Broadlands), seek special leave to appeal against the order of the full bench of the high court (Limpopo Division *per* Muller J, Makgoba JP, and Phatudi J).

[2] The above mentioned applications came before this Court in the following way. Double Four Properties (Pty) Ltd (Double Four) is the owner of a property in Polokwane. An office park has been built on this property. On an adjacent property, there is a residential estate, the Broadlands Estate, which Broadlands maintains. In September 2018, Double Four was informed by its tenant in the office park that the drainage pipe was blocked. Upon investigation, Double Four learnt that the drainage system of the office park was connected to the system of Broadlands which was used for the disposal of sewage. Negotiations ensued between Broadlands and Double Four, but to no avail. Broadlands was only willing to receive the waste of the office park for a fee, but the fee could not be agreed. Ultimately, Broadlands informed Double Four that it was making unlawful use of the Broadlands sewer system. And further, that Double Four was unlawfully encroaching on the property of Broadlands by making use of an extended road to secure access. Broadlands declined to reconnect the pipe that conveyed waste from the office park into the Broadlands sewer system.

[3] Double Four also investigated how it had come about that the office park's sewer system had been connected to that of Broadland's, rather than by way of a direct connection from the office park to the sewerage system of the municipality. Although the approved building plans had allowed a direct connection, there were certain technical difficulties in effecting that connection. As a result, the connection was made through the Broadland's system, and the prior owners of the office park, a Trust, had concluded an agreement with Broadlands for this connection, at an agreed fee. The municipality recognised the right of Double Four to be provided with a sewer connection, but required Double Four to apply under the By-laws for this connection. Double Four declined to do so because it contended that the prior owners, the Trust, must have applied to the municipality, and a new owner cannot be required to apply anew.

[4] Double Four applied to the high court for interim relief. It sought to compel the municipality to provide a sewer connection; and that, pending the provision of a permanent connection point, Broadlands reconnect its sewer system to the office park and that Broadlands be interdicted from effecting a disconnection of this drainage installation. Broadlands brought a counter-application against Double Four, seeking an order that Double Four remove its encroachments upon its property. The application came before Semenya J in the high court. She dismissed Double Four's application and granted Broadlands' counter-application. With leave, the matter proceeded to the full bench of the high court. The full court (*per* Muller J) upheld the appeal of Double Four, and made the following order:

'2.1 That the first respondent is ordered to provide a sewer connection to which the drainage installation of the property known as portion 348 (a portion of portion 220) of the farm

Tweefontein 915 situated at the corner of Range Entrance Street and Munnik Avenue, Broadlands Estate, Polokwane ("the Baobab Office Park") can be connected.

2.2 That pending the provision of such permanent connection point, the second respondent is ordered to reconnect the sewer system of the Baobab Office Park with that of the Broadlands Estate, alternatively that the first respondent is ordered to compel the second respondent to do so.

2.3 That the second respondent be interdicted and restrained from constructing, reconstructing, altering, adding to or making any permanent disconnection in or of any drainage installation which may or will have an effect on the proper functioning of the Applicants drainage installation without first having obtained the lawful permission of the first respondent.

2.4 That the orders in prayers 2.1 to 2.3 above shall operate as an interim interdict with immediate effect pending the outcome of an action instituted by the Applicant.

2.5 The costs of the application are reserved for the trial court to consider.

3 The appeal against the counter-application is upheld.

4 The order is set aside and replaced with the following order:

"4.1 The application is referred to evidence in respect of the determination of the amount of compensation.

4.2 The costs of the counter application is reserved."

5 No order is made in respect of the costs of the appeal of the counter-application.'

[5] Broadlands and the municipality applied to this Court for special leave to appeal. This Court ordered that both applications were referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. These applications served before us under separate case numbers: the application of the municipality (case no 879/2022) and the application of Broadlands (case no 913/2022).

[6] At the commencement of oral argument before us, we requested counsel to address us on two threshold issues: first, whether the municipality and Broadlands had satisfied the standard for the grant of special leave, and second, the connected issue as to whether the orders of the high court were appealable. Having heard

counsels' submissions, we made the following order: 'The applications for special leave to appeal in case no 879/2022 and case no 913/2022 are dismissed with costs, such costs to include the costs of two counsel, where so employed'. We indicated that the reasons for this order would follow. These are the reasons.

[7] The grant of an application for special leave to appeal requires the existence of a reasonable prospect of success in the appeal and a showing of special circumstances. These special circumstances may consist of a substantial point of law, a manifest denial of justice, or that the matter is one of great importance to the parties or the public. This is not a closed list.[1]

[8] We invited counsel to accept that in light of the Constitutional Court's decision in *Lebashe*,[2] we are bound to follow its holding that, in this Court, the appealability of an interim interdict is decided by recourse to the considerations stated in *Zweni* and the interests of justice. Counsel did not demur. The order of the high court falls into two parts. First, it upholds Double Four's appeal in respect of the dismissal of its application and grants Double Four interim relief, pending the outcome of an action to be instituted by Double Four. Second, it upholds Double Four's appeal in respect of Broadlands' counter-application, and refers the application to evidence to determine the amount of the compensation.

[9] I consider first the order of the high court that granted Double Four interim relief. The municipality contended that we should grant special leave because the order required it to act in a manner that was contrary to its By-laws and that would

[1] *Cook v Morrison and Another* 2019 (5) SA 51 (SCA) para 8.
[2] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 535 (CC) paras 45 and 46.

offend against the rule of law. The high court's order put in place an arrangement that would allow Double Four's office park to enjoy sewerage removal facilities until such time as a court could make a final determination as to how, by whom, and under what requirement of law such facilities were to provided. Counsel for the municipality placed emphasis upon the requirement in s 4 of the municipality's standard water and sanitation By-laws (the By-law) that a consumer who wishes to utilise the sewage disposal system must apply on the prescribed form for such services, and the Council must approve the application. Double Four has not made such an application and so the high court could not order the municipality to do something that was not in compliance with its By-laws. Hence special leave is warranted.

[10] That contention cannot be accepted. The order of the high court, as against the municipality, was to provide a sewer connection. The municipality recognised its duty to do so, but only once s 4 of the By-law was complied with. The order of the high court does not absolve Double Four from any obligation it may have to make an application under s 4. The order simply requires the municipality to provide a sewer connection. That is a matter of providing the required infrastructure. Section 4 provides the procedure by which a person may conclude an agreement with the municipality to provide for sewage disposal. That is a service that utilises the infrastructure that the order requires. But the order does not compel the municipality to enter into an agreement with Double Four on any basis other than what s 4 of the By-law requires. Accordingly, the order does not compel the municipality to do anything that is unlawful.

[11] Broadlands pressed for special leave on the basis that the order of the high court requiring it to reconnect the sewer system was a final order; it imposed upon a

neighbour a duty without legal foundation; and required Broadlands to provide a service without compensation. The order made by the high court is not final, either in form or substance. It simply restores the basis upon which sewage was disposed of via the connection to Broadlands' drainage pipe for many years. It does so as an interim measure to resolve a problem of public health. The trial action will make a final determination as to whether Broadlands has a duty to make its property available for the disposal of its neighbour's sewerage.

[12] Broadland's complains that the high court's order requires it gratuitously to make use of its waste disposal system for the benefit of the office park. Although Broadlands and Double Four had sought to negotiate a fee, they could not reach agreement. However, this affords Broadlands no basis to secure special leave. It did not oppose the relief sought by Broadlands because it was not paid a fee. It simply contended it was within its rights to bring to an end the use by the office park of its waste disposal system. Broadlands would be at liberty to approach the high court to revise the interim regime so as to claim some compensation for the access it is compelled to provide. It has not thus far moved the high court to do, and cannot use this as a basis to be granted special leave.

[13] There was some debate before us as to whether Broadlands had a legal basis to cut access and whether this was a point of law that warranted special leave. Section 96 of the By-law precludes any person from making any permanent disconnection of any drainage installation. Whether the conduct of Broadlands falls within this prohibition (or indeed amounts to a spoliation) are questions of law that do not need to be determined in an appeal before this court, and hence do not found a basis for special leave. What is apparent from the papers is that Broadlands was not opposed to providing access to its waste disposal system, the issue for it was

simply the fee to be charged. Broadlands, as I have observed, could have raised this issue and sought a reasonable fee, but it did not do so. The high court decided upon a status quo regime to meet the problem of sewage disposal on an interim basis. The high court formed the view that Double Four enjoyed a prima facie right. There is no reason for this court to revisit that judgment. In the action Double Four was required to institute, the rights and duties of the parties will no doubt be decided. In the interim, there is no basis for this court to do so.

[14] As to the order of the high court concerning encroachment, the high court simply ordered that the application was referred to evidence to determine the amount of compensation due by Double Four to Broadlands. It was common ground that there was an encroachment. The high court set out the basis upon which it determined that there was a just and equitable basis for Double Four to compensate Broadlands for its past and future encroachment. And those reasons rejected Broadlands' application for the removal of the encroachment. But this reasoning did not issue in any order, declaratory or otherwise, to this effect. The high court simply referred the issue of compensation to evidence.

[15] The high court thus made no final order at all. The referral it made was to have a court bring the proceedings to finality. Once this is so, there is no final order to appeal. Broadlands is not seeking to appeal the referral to evidence. It takes issue with the reasons of the high court that led it to make such an order. An appeal lies against an order, not the reasons for the order. Consequently, there is no basis for an appeal to this court, much less one predicated upon special leave. Furthermore, this court will ordinarily not entertain an appeal by way of piecemeal proceedings. And there is no reason in this case to deviate from that position.

[16] It follows that the municipality has failed to make out a basis for special leave to appeal. The order of the high court is an interim order as to the access issue. The order is simply interlocutory as to the encroachment issue. In neither case is the test for appealability made out. The *Zweni* test is not satisfied, and no consideration relevant to the interests of justice tilts the balance in favour of the applicants. On the contrary, this is a standard case where the high court has imposed an interim regime as an equitable holding measure that is not appealable to this court. Much less is this so in circumstances where the municipality and Broadlands have enjoyed the benefit of a detailed consideration of the merits of the matter by a full bench. Consequently, the applicants have failed to show that special leave is warranted.

[17] In the result, the order that was given at the conclusion of the oral hearing is here repeated: The applications for special leave to appeal in case no 879/2022 and case no 913/2022 are dismissed with costs, such costs to include the costs of two counsel, where so employed.

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D N UNTERHALTER

ACTING JUDGE OF APPEAL

APPEARANCES

For Appellant (879/2022):	J A L Pretorius
Instructed by:	Mohale Inc., Polokwane
	Honey Attorneys, Bloemfontein
For Appellant (913/2022):	G J DIAMOND
Instructed by:	Bosman Attorneys, Polokwane
	Stander & Partners Attorneys, Bloemfontein
For First Respondent (879/2022 & 913/2022):	L M Malan SC (with him W A De Beer)
Instructed by:	Schoeman Oosthuizen Inc., Polokwane
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