

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2026-111982

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

DATE

SIGNATURE

In the matter between:

MASHILA KOKO

Applicant

and

**MONT TREMBLANT ESTATE HOMEOWNERS
ASSOCIATION**

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

WENTZEL -THOMPSON J

Introduction

- [1] On 21 June 2026 I dismissed, with costs on Scale B, an urgent application in which the applicant sought relief founded principally on the *mandament van spolie* arising from the respondent's restriction of his access to the MyEstateLife application used at the Mont Tremblant Estate. I rejected the extent of the

urgency, declined to condone the applicant's non-compliance with the Uniform Rules, and held in the alternative that the application failed on the merits.

- [2] The applicant now seeks leave to appeal against the whole of that judgment and the orders made, and asks that the appeal be referred to the Full Court of this Division. The application is opposed. I have had the benefit of comprehensive heads of argument from Mr T Mahlare for the applicant and Mr S McTurk for the respondent, as well as full argument before me, for which I am indebted.
- [3] The grounds of appeal are set out in the notice dated 8 July 2026 and are conveniently grouped under five headings: Urgency; the requirements of the *mandament van spolie*; the alleged misapplication of the authorities; the authority to oppose the proceedings; costs; and mootness.

The test on leave to appeal

- [4] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, *or* that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.¹
- [5] The threshold under the Act is higher than that which applied under the repealed Supreme Court Act 59 of 1959. The use of the word "*would*" connotes a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. There must be a sound, rational basis for the conclusion that there are prospects of success; a mere possibility of success, or the fact that the matter is arguable, is not enough.²
- [6] The two requirements of s 17(1)(a) are disjunctive. This means that even where a court is not persuaded that the appeal *would* succeed, leave may be granted where there is some other compelling reason why the appeal should be heard.

¹Superior Courts Act 10 of 2013, s 17(1)(a).

²*The Mont Chevaux Trust v Tina Goosen and 18 Others* 2014 JDR 2325 (LCC) at para 6, endorsed in *Acting National Director of Public Prosecutions and Others v Democratic Alliance* [2016] ZAGPPHC 489 at para 25; *Notshokovu v S* [2016] ZASCA 112 at para 2 and *S v Smith* 2012 (1) SACR 567 (SCA) at para 7.

Conflicting judgments on the question under consideration are expressly identified in the section as such a reason.

- [7] A judge should not grant leave merely because the losing party is dissatisfied, nor because the judge entertains some doubt in retrospect regarding the correctness of his or her judgment. Equally, however, a judge should not withhold leave in order prevent his or her own reasoning from having to withstand judicial scrutiny, particularly where the question is one of general importance on which the authorities are divided.

Appealability

- [8] The respondent contends, as a preliminary objection, that a refusal to enrol a matter as one of urgency is not a decision having final effect and is therefore not appealable, relying on *Zweni* and the line of authority concerning orders of a preparatory or procedural character.³
- [9] The proposition is correct as a general statement of law: Where a court declines to hear a matter on the urgent roll, the ordinary order is that the application is struck from the roll, and such an order decides nothing between the parties; it is not final in effect and it is thus, not appealable.
- [10] That, however, is not what occurred here. The order I made did not strike the application from the roll, but instead disputed the extent of the urgency and refused condonation for the failure to comply with the time periods prescribed in the Rules. This notwithstanding, I nevertheless considered the merits, dismissed the application, and ordered the applicant to pay the respondent's costs.⁴ I went on expressly to hold that, even if the application were entertained on the urgent roll, it failed on the merits because the applicant had not established possession or quasi-possession of the kind protected by the *mandament*.⁵
- [11] I took this approach as on my understanding, this is one now required of High Court judges by the Supreme Court of Appeal to avoid the matter having to be

³*Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J–533A.

⁴Judgment, order paras (1) to (3).

⁵Judgment at para [37].

returned to the High Court for determination, particularly where a matter is struck from the roll for lack of urgency and the Supreme Court of Appeal finds that the matter was indeed urgent and ought properly to have been heard. The same applies where condonation is refused, not necessarily in the context of urgency, and it is found that it ought to have been granted and the merits determined.

- [12] An order dismissing an application is final in effect, definitive of the rights of the parties on the case as pleaded, and dispositive of the relief claimed. It is therefore appealable. As I determined the merits, the respondent's objection cannot be sustained.

Urgency

- [13] The applicant's first ground is that the court erred in dismissing the application for want of urgency, when the *mandament* is by its nature an urgent remedy directed at the prevention of self-help.
- [14] There is force in the proposition that a spoliation application is ordinarily urgent, since the object of the remedy is the immediate restoration of the *status quo ante*, before all else.⁶ But it does not follow that every spoliation application is entitled to the degree of abridgment of the time periods prescribed in the Rules which the applicant chose. Urgency remains a matter of degree, and the timetable imposed on a respondent must be commensurate with the extent of the urgency and the harm alleged. I found that the matter was not so urgent to grant the respondent but one day to answer the application.
- [15] Counsel for the applicant submits that paragraph 9 of the replying affidavit contained a full explanation for the interval between 13 and 18 May 2026 that included the respondent's failure to respond to correspondence, the briefing of counsel on the afternoon of Friday 15 May 2026, the finalisation of the founding affidavit on Saturday 16 May 2026, and the necessity for the applicant to travel to Limpopo for a family bereavement over that weekend. My judgment simply

⁶*Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC); 2014 (7) BCLR 788 (CC) at para 10.

records that the delay was not adequately explained, and does not expressly deal with this explanation.

[16] I remain of the view that the abridgment adopted - affording the respondent a single day to answer - was not justified on the material before me, and that the applicant did not demonstrate that he would be denied substantial redress in due course. But I am bound to accept that another court, having regard to the explanation in reply and to the anti-self-help rationale of the remedy, might take a different view of the exercise of that discretion. In any event, my finding on urgency is not decisive as the application was determined on the merits in the alternative.

The central question: quasi-possession and third-party access

[17] The substance of this application lies in grounds 1.2 to 1.5 of the notice of application for leave to appeal. The applicant contends that I erred in characterising the facility by which he was able to generate electronic access authorisation codes to grant third parties access as a mere contractual right, rather than as an incident of his possession of his home within the estate. This possession, he insists, included his entitlement to allow the transport service he had engaged to transport his children to and from school to have access, not only to his estate, but his property within the estate.

[18] In paragraph [13] of my judgment I recorded that the effect of *Bill*⁷ was taken “as summarised in the available teaching materials”.⁸ Having now had the benefit of full argument and of the reported judgment itself, I am satisfied that *Bill* says considerably more than the summary conveyed, and that what it says bears directly on the reasoning in my judgment.

[19] Southwood AJ held that a right of access to property is an incident of the possession or control of that property, that *prima facie* a right of access into an estate is an incident of possession of the property within it, and that biometric access and access cards give effect to such access and are “clearly linked to

⁷ *Bill v Waterfall Estate Home Owners Association NPC and Another* (2019/21837) [2020] ZAGPJHC 81; [2020] 3 All SA 115 (GJ); 2020 (6) SA 145 (GJ) (5 March 2020) (Southwood AJ).

⁸ Judgment at para [13].

possession of the property,” and that the resident acquires *quasi-possessio* of those rights by exercising them.⁹

[20] Critically for present purposes, the Southwood AJ did not confine that reasoning to the resident’s own credentials, holding that the access which the applicant’s contractors had been permitted to exercise “*must have been a consequence of the applicant’s possession of the property*”, that such third-party access was “*also an incident of the applicant’s possession of the property,*” and that “[b]oth the applicant’s biometric access and the contractor’s access may, therefore, be protected by means of a spoliation application”.¹⁰

[21] Southwood AJ held further that the existence of an alternative means of entering the estate did not answer the claim, “*given that it is the particular method of access ... which has been deactivated, the applicant has been dispossessed of this right. In these circumstances, it matters not, where this right is the subject matter of the application, that he has an alternative method of accessing the Estate.*”¹¹

[22] Finally, and directly relevant to paragraph [40] of my judgment, Southwood AJ held that the association’s governing contracts and articles of association did not empower it to disable access as “*a means of leverage to ensure compliance with the Rules,*” and that the relevant articles were unenforceable insofar as they purported to do so without recourse to a court.¹²

[23] Two consequences follow from my proper reading of the judgment: First, my reasoning at paragraphs [24] to [30] rested substantially on the fact that the applicant’s own biometric access remained intact, and on the characterisation of the third-party authorisation facility as too remote from his possession. On the applicant’s reading of *Bill*, both propositions are open to challenge on the strength of *Bill*. While not binding on me, this is a decision in my Division and is considerable persuasive authority that must be considered by me.

⁹*Bill* at paras [50]–[52], [76]–[78].

¹⁰*Bill* at paras [89]–[91].

¹¹*Bill* at para [95].

¹²*Bill* at paras [121], [123] and [128].

[24] Second, my observation at paragraph [40] that the applicant “*has the remedy of paying his arrears and thereby having the restriction ... lifted*” sits uneasily with paragraphs [121] to [123] of *Bill*, and with the principle that the *mandament* is indifferent to the underlying merits and exists precisely to deny a party the fruits of self-help. As it turns out, and will appear later in this judgment, this is precisely what the applicant did under protest.

[25] The applicant also submits, correctly, that *De Beer v Zimbali Estate Management Association (Pty) Ltd*¹³ is a less secure foundation than the judgment treated it as being. The applicant in that matter was an estate agent employed by a property enterprise, whose access disc had been deactivated. She held no possessory interest in any property within the estate. The distinction the applicant draws is a real one, and it materially weakens the description of *De Beer* in paragraph [18] of the judgment as “*the leading limiting authority*.”

[26] None of this means that the applicant is correct, and the findings in *Bill* correctly reflect the legal position. There remains substantial authority supporting the conclusion that I came to in my judgment. In *Eskom Holdings SOC Ltd v Masinda*¹⁴ the Supreme Court of Appeal held that the quasi-possession of a right does not attract the protection of the *mandament* where the right is sourced purely in contract; and that the right must be an incident of possession of the property to which it relates. That judgment, which binds me, supports my judgment, as do both *Scholtz* and *Xsinet*,¹⁵ both being Supreme Court of Appeal decisions.

[27] Nor is *Bill* the final word on this issue in this Division. In *Lenz v Blair Atholl Homeowners Association NPC*,¹⁶ Nicholls J (as she then was) held that where a resident had contractually agreed that biometric access would be invalidated while levies remained unpaid, the association’s resort to the contractual

¹³ *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* (6711/05) [2006] ZAKZHC 21; 2007 (3) SA 254 (N) at para 3.

¹⁴ *Eskom Holdings SOC Ltd v Masinda* (1225/2018) [2019] ZASCA 98; 2019 (5) SA 386 (SCA) at paras 21-22.

¹⁵ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 (SCA) at para 13 and *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) at paras 13-14.

¹⁶ *Lenz v Blair Atholl Homeowners Association NPC* GJ 2016/36336, unreported judgment dated 11 April 2016 (Nicholls J, as she then was).

remedies available could not be characterised as unlawful deprivation of possession. A Full Court in KwaZulu-Natal took a similar view in *McGregor v Selborne Park Body Corporate*.¹⁷ A contrary approach was admittedly taken in *Bill, Singh and Fisher v Body Corporate Misty Bay*.¹⁸

[28] There can thus be no doubt that there are conflicting judgments on this issue. In *Leggatt and Another v Blair Atholl Home Owners Association NPC*,¹⁹ a judge of this Division conceded that there is “*no judicial consensus on this issue*,” that the conflict extends across divisions, and that “*these conflicts are occurring regularly in community schemes and that certainty on this point is necessary whichever way it is to be decided*. ” It was on this basis that the court in *Leggatt* granted leave to appeal in terms of s 17(1)(a)(ii).

[29] The present matter takes the question a step further than any of those cases: In *Bill, Singh, Lenz and Leggatt*, it was the resident’s own credentials that were disabled; here they were not. What was withdrawn was an application-based facility by which the resident authorised third parties - relevantly, a scholar transport service conveying his minor children - to enter the estate. Whether that facility is an incident of the resident’s possession of his home, or a revocable contractual right or administrative service, is a question upon which, so far as I have been able to establish, no reported decision has determined.

[30] I remain of the view that the answer I gave is the correct one, and that the facility in issue is properly characterised as a regulated means of admitting others rather than as an incident of the applicant’s own possession. But I am unable to say that the contrary view is not reasonably arguable. Paragraphs [89] to [91] of *Bill* provide the applicant with a direct answer to the very distinction on which my judgment turned, and paragraph [95] provides an answer to the reliance I placed on the applicant’s retained biometric access. A court of appeal, applying those

¹⁷ *McGregor v Selborne Park Body Corporate and Others* (AR224/2020) [2021] ZAKZPHC 87 (8 October 2021).

¹⁸ *Singh and Another v Mount Edgecombe Country Club Estate Management Association (RF) NPC and Others* (3962/2014, 1118/2014, 4375/2014) [2016] ZAKZDHC 2; [2016] 2 All SA 218 (KZD); 2016 (5) SA 134 (KZD); *Fisher v Body Corporate Misty Bay* 2012 (4) SA 215 (GNP).

¹⁹ *Leggatt and Another v Blair Atholl Home Owners Association NPC* (130295/2023) [2024] ZAGPJHC 1753 (22 February 2024) at paras [13]-[16].

passages, might well come to a different conclusion. I am also now more inclined to accepting that the position of a third-party contractor, who had independently been granted access, is on the same footing as that of a school transport facility.

[31] I am therefore satisfied that the applicant has met the threshold in s 17(1)(a)(i) on this ground, and that in any event, there is a compelling reason within the meaning of s 17(1)(a)(ii) why the appeal should be heard. This is because there are conflicting authorities, the question recurs with increasing frequency in community schemes as access control becomes digitised, and the point now raised - whether the digitisation of visitor authorisation carries possessory protection with it - is novel and of public importance as more and more people choose to live in residential estates.

The pleaded case and the relief sought in the notice of motion

[32] The respondent's strongest answer is that that prayer 2 of the notice of motion sought restoration of the applicant's possession of his immovable property and that no relief was sought that was ultimately sought in the matter before me. Of particular significance is that nowhere in the notice of motion was third-party access sought. In this regard it pointed out that the founding affidavit conflated biometric access with use of the MyEstateLife application, and that the case now advanced was made in reply and in argument.²⁰

[33] The function of pleadings is to define the issues and to prevent trial by ambush, and a court determines the dispute the parties have presented rather than one fashioned in argument.²¹ It is now trite that a litigant may not make his case in reply.

[34] The difficulty is that this objection was not the basis on which I decided the matter; I decided it upon the characterisation of the right sought to be protected. Whether the pleaded case is capable of sustaining the relief now contended for is itself a question on which the Court of appeal is better placed to pronounce,

²⁰Notice of motion, prayer 2, read with founding affidavit paras 6.1 and 6.2.

²¹*Bahwiti Investments CC t/a Perfect Drive Tyre and Fitment Centre and Another v Apollo Tyres Africa (Pty) Ltd* (2025/005350) [2026] ZAGPJHC 823 (20 July 2026) at paras 21–22; *Shill v Milner* 1937 AD 101 at 105–106.

with the full record before it. It is not a reason to refuse leave, and the respondent is of course free to advance the point on appeal.

Authority to oppose the relief sought and Uniform Rule 7

[35] Grounds 1.9 and the corresponding submissions concern the authority of the respondent's deponent to oppose the application and to depose to the answering affidavit, and the court's alleged error in requiring compliance with Uniform Rule 7 or in failing to condone non-compliance with it.

[36] This ground has no prospect of success. *Ganes* - upon which the applicant himself relies - is authority for the proposition that a deponent need not be authorised to depose to an affidavit, and that it is the institution and prosecution of proceedings which must be authorised.²² Opposition to an application instituted by another party is not the institution of proceedings. The respondent's attorneys of record acted as its agents in opposing, and their mandate was never impugned by way of a Rule 7 notice.

[37] Moreover, the record reflects that when the applicant's counsel sought a direction as to whether the point would be entertained, and was directed to proceed on the merits, he did so. The point was not pursued.

[38] However, at the hearing of the application for leave to appeal, the applicant's counsel relied upon an unreported decision of *Top Image Africa Ltd v Top Image Brands SA* and another (Case No:2024-014325) delivered in this division on 10 December 2025. However, the respondent's counsel rightly found that this decision does not apply to the fact before me, and *Ganes* remains the persuasive authority. In *Top Image Africa*, the resolution authorising the directors to vote in a winding up was defective. In the matter before me, there is no suggestion that the resolution authorising the attorneys to oppose the application was defective.

[39] And even if it was incumbent upon the first respondent to provide a lawful resolution to oppose the application, I would not have precluded the first

²²*Ganes and Another v Telecom Namibia Ltd* (608/2002) [2003] ZASCA 123; 2004 (3) SA 615 (SCA) at para 19.

respondent from opposing the relief sought on this basis. This is also not a valid ground for leave to appeal and is in any event irrelevant, as I have decided to grant leave to appeal on properly substantiated bases.

Costs

[40] The applicant complains that costs ought not to have followed the result, given the finding that his complaint was not frivolous. An award of costs involves the exercise of a true discretion, and a court of appeal will not interfere merely because it would have preferred a different option within the range of permissible decisions.²³ Standing alone, this ground does not meet the s 17 threshold.

[41] The costs order is consequential upon the dismissal of the application. If the appeal succeeds on the substantive ground, the costs order falls away with it. There is no purpose in excising this ground from the leave which I propose to grant.

Mootness

[42] During the course of argument of this application for leave to appeal, I was informed from the bar that on 28 June 2026, a week after the judgment was delivered, the applicant paid the amount demanded by the respondent, under protest, and that access to the MyEstateLife application - including the facility to authorise the entry of third parties - was thereupon restored. The amount so paid is held in an interest-bearing account pending the determination of the applicant's contention that legal fees were improperly included in his levy account, and he intends to reclaim it should he establish that contention. The position was not disputed by the applicant.

[43] This development raises the question whether the appeal for which leave is sought has become moot. Section 16(2)(a)(i) of the Superior Courts Act provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on that ground alone; and s 16(2)(a)(ii) provides that, save under

²³*Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) at para 113; *Ferreira v Levin NO and Others* 1996 (2) SA 621 (CC) at para 3.

exceptional circumstances, that question is to be determined without reference to any consideration of costs.²⁴

[44] The machinery in s 16(2)(b) to (d) to determine mootness must be decided by court of appeal, not me as the court of first instance.²⁵ It is nonetheless a matter I am bound to consider, because I should not refer to the Supreme Court of Appeal a matter which is destined to be disposed of without reaching the merits, and because the answer bears upon both limbs of s 17(1)(a).

[45] The restoration of access means that the spoliatory relief sought in the notice of motion can no longer be granted, and to that extent the controversy between these parties has been overtaken by events. The adverse costs order does not alter that conclusion, since s 16(2)(a)(ii) requires the enquiry to be conducted without reference to costs.

[46] The dispute is not, however, rendered academic. On the contrary, three matters remain live issues for determination by the appellate court: The first is that the payment was made under protest and the amount is held pending determination of whether the legal fees were properly charged. Whether the respondent was entitled to disable the applicant's access in order to compel that payment is directly material to the applicant's claim to recover it and to the character of the payment itself. It was precisely the use of access control "*as a means of leverage*" which was held to be impermissible in *Bill*.²⁶ The second is that payment under protest is the antithesis of acquiescence; the applicant has not pre-empted his right of appeal.²⁷ The third is that the parties remain bound to one another as resident and association. Nothing in the judgment prevents the respondent from restricting the facility again should further arrears arise or should the amount paid under protest be recovered.

[47] Even on the assumption that the matter is moot as between the parties, mootness is not an absolute bar to leave to appeal; a court retains a discretion

²⁴Superior Courts Act 10 of 2013, s 16(2)(a)(i) and (ii).

²⁵Superior Courts Act 10 of 2013, s 16(2)(b) to (d).

²⁶*Bill* at paras [121] to [123].

²⁷*Dabner v South African Railways and Harbours* 1920 AD 583 at 594; *Hlatshwayo v Mare and Deas* 1912 AD 242 at 259.

to determine an issue which is moot, and the broad distinction drawn in the authorities is between cases in which a discrete legal issue of public importance arises that will affect matters in the future, and cases in which no such issue arises.²⁸ The Constitutional Court has identified the relevant considerations as whether an order will have a practical effect on the parties or on others, the nature and extent of that effect, the importance of the issue, its complexity, the fullness of the argument advanced, and the resolution of disputes between different courts.²⁹

[48] Applied to this matter, those considerations point firmly towards appellate determination: The issue is discrete and purely legal and it is of importance to the very large number of people who live in gated communities and to the associations which administer them. Moreover, its determination would resolve a conflict between courts, which the Constitutional Court has held weighs in favour of entertaining a moot matter.³⁰ This is not a case in which a court would be invited to pronounce upon an abstract question based on hypothetical facts; the facts are settled and the legal question arises squarely upon them.

[49] There is a further and, to my mind, weighty consideration in my determination that I must grant leave to appeal. The practical reality is that a resident whose access has been curtailed will ordinarily pay whatever is demanded, under protest, in order to restore it, and will do so long before an appeal can be heard. If the mootness which follows were in every such case to preclude appellate consideration, the very question which divides the courts would perpetually evade determination. That is itself a compelling reason, within the meaning of s 17(1)(a)(ii), why this appeal should be heard. The present matter is in this respect the converse of *Magidiwana*,³¹ where the Constitutional Court declined to

²⁸*Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* (864/2011) [2012] ZASCA 166; 2013 (3) SA 315 (SCA) at paras 5 and 6, citing *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441 and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 21 and fn 18.

²⁹*Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and Others* (CCT195/19) [2020] ZACC 5; 2020 (4) SA 409 (CC) at paras 46 to 50.

³⁰*Normandien Farms* at para 49.

³¹*Legal Aid South Africa v Magidiwana and Others* (CCT188/14) [2015] ZACC 28; 2015 (6) SA 494 (CC) at paras 21, 27 and 28.

entertain a moot appeal because no discrete legal issue of public importance arose and because the facts were unlikely to be replicated.

- [50] I therefore do not regard the restoration of access as a reason to refuse leave. The parties are in any event obliged to place these developments before the Supreme Court of Appeal, which will form its own view and may invoke s 16(2) if it considers it appropriate to do so.

Conclusion

- [51] For the reasons set out above, leave to appeal should be granted. The determinative consideration is the characterisation of the third-party access facility. On that question, there is a reasonable prospect that another court would come to a different conclusion, and there is in addition a compelling reason, within the meaning of s 17(1)(a)(ii), why the appeal should be heard.
- [52] The grounds relating to the authority to oppose and to costs would not, on their own, have warranted leave. It is nevertheless neither practical nor desirable to grant leave on a piecemeal basis where the order sought to be appealed against is a single order dismissing the application. Leave will accordingly be granted against the whole of the judgment and orders, and it will be for the applicant to decide which grounds to pursue.
- [53] As to the forum, s 17(6)(a) of the Act requires that an appeal be heard by a Full Court of the Division concerned unless the questions of law and fact and the other considerations involved are of such a nature that the appeal requires the attention of the Supreme Court of Appeal.³² The applicant seeks leave to the Full Court. The identification of the appropriate forum is, however, a matter for the court granting leave and not for the parties, and I am not confined by the applicant's election.
- [54] In my view, this appeal requires the attention of the Supreme Court of Appeal, for four reasons.

³²Superior Courts Act 10 of 2013, s 17(6)(a).

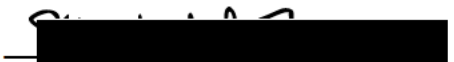
- a. First, the conflict in the authorities is not confined to this Division. It exists within this Division, between *Bill* and *Lenz*; and it exists between and within other Divisions, as appears from the decisions in *Singh*, *Fisher* and *McGregor* from other Divisions. A Full Court of this Division could settle the position locally, but it could not resolve a conflict which transcends a number of Divisions; only the Supreme Court of Appeal can do so.
- b. Second, the anterior question - whether the deactivation of a resident's own biometric access constitutes spoliation where alternative means of entry remain - is already before the Supreme Court of Appeal by virtue of the order granted in *Leggatt*. The question raised in this matter is a direct extension of that question. It is undesirable that the two be determined by different courts, and there may be advantage in their being heard together or in sequence by the same court.
- c. Third, the questions raised in this matter concern the extent of the application of *Eskom Holdings SOC Ltd v Masinda*, a judgment, itself, of the Supreme Court of Appeal. Whether the principle in *Masinda* that rights sourced purely in contract fall outside the *mandament* applies to, or is qualified in respect of, digital access-control systems in community schemes, is a matter upon which the Supreme Court of Appeal is best placed to pronounce.
- d. Fourth, the issue is of considerable general and practical importance: Community schemes now regulate the residential arrangements of a very large number of residents in gated communities. The question whether an association may disable digital access facilities as a means of enforcing compliance, or whether it must first obtain an order of court, requires both a consideration the property rights of residents and the constitutional principle against self-help that is fundamental to the *mandament van spolie*. Certainty is required nationally, and it is required whichever way the question is ultimately decided.

- e. Costs should be costs in the appeal. The applicant has succeeded in this application, but the outcome of the appeal will determine where the incidence of these costs should ultimately lie.

Order

[55] In the result, I make the following order:

1. Leave to appeal to the Supreme Court of Appeal is granted against the whole of the judgment and orders handed down by me on 21 June 2026.
2. The costs of the application for leave to appeal shall be costs in the appeal.


WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of the hearing: 31 July 2026

Date of the judgment: 8 September 2026

Appearances:

For the Applicant: T.A Mahlare instructed by Mashila Koko Attorneys

For the Respondent: S. McTirk instructed by Otto Krause Inc. Attorneys

