



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

(1) REPORTABLE: NO
(2) OF INTEREST OF OTHER JUDGES: NO
(3) REVISED
25/1/2022

DATE

SIGNATURE

CASE NUMBER: 26535/2021

In the matter of

**MOKORO HOLDING COMPANY (PTY) LTD
t/a BRIDGE TAXI FINANCE HOLDINGS**

FIRST APPLICANT

BRIDGE SERVICE PANEL (PTY) LTD

SECOND APPLICANT

CAPITAL PROPFUND (PTY) LTD

THIRD APPLICANT

JT ROSS PROPERTIES (PTY) LTD

FOUTH APPLICANT

And

COG OIL PROPRIETARY (PTY) LTD

FIRST RESPONDENT

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

SECOND RESWPONDENT

**CITY OF JOHANNESBURG PROPERTY
COMPANY SOC LIMITED**

THIRD RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an application for a final interdict in which the applicants seeks an order interdicting the first respondent from using any portion of the public road comprising of the *cul-de-sac* of Tungsten, Strijdompark, Johannesburg for any purpose other than a *public road* as contemplated in the Consolidated Johannesburg Town Planning Scheme for so long as the *cul-de-sac* is zoned as a public road.

[2] The final interdict is aimed at preventing the first respondent from using the *cul-de-sac* at the end of Tungsten Road in Strijdompark in accordance with the written lease agreement concluded by it with the second and third respondents on 24 October 2019.

Parties

[3] The first applicant is Mokoro Holding Company (PTY) Ltd t/a Bridge Taxi Finance Holdings, a private company registered and incorporated in South Africa.

[4] The second applicant is Bridge Service and Panel (PTY) Ltd, a private company registered and incorporated in South Africa. Bridge is in occupation of Erf 432 and Erf 329. Each of these erven are used by Bridge in carrying on its business, pursuant to lease agreements concluded with Capital and JT Ross.

[5] The third applicant is Capital Propfund (PTY) Ltd, a private company registered and incorporated in South Africa. Capital is the registered owner of the property known as Erf 432 (previously erven 426 and 427) Hans Strijdom Drive and Tungsten Street, Strijdom Park.

[6] The fourth applicant is JT Ross Properties (PTY) LTD, a private company registered and incorporated in South Africa. JT Ross is the registered owner of the property known as Erf 329 Strijdompark, which is the vacant land at 329 Tungsten Street, Strijdom Park.

[7] The first respondent is COG Oil Proprietary Limited (“**COG**”), a private company registered and incorporated in South Africa. COG carries on business at 75 Wakis Avenue, Strijdompark, Randburg, the rear of which property borders Tungsten Street, Strijdompark.

[8] The second respondent is the City of Johannesburg Metropolitan Municipality (“**the City**”), a local municipality as contemplated in the Local Government: Municipal Systems Act, 32 of 2000 and the Local Government Municipal Structures Act, 117 of 1998, as amended and published in Provincial Gazette Extraordinary No 141 of 1 October 2000, as amended by Notice 8698/2000 published in Provincial Gazette Extraordinary No 195 of 4 December 2000.

[9] The third respondent is the City of Johannesburg Property Company SOC Limited (“**JPC**”), a public company registered and incorporated in South Africa.

[10] The second and third respondents are cited in this application on account of their interest in the outcome of this application and, particularly, the review that the applicants are launching in respect of the decision taken by the City, alternatively, by JPC, to enter into a lease agreement with COG for the *cul-de-sac* at the end of Tungsten Street, Randburg, which the second applicant uses in the course of carrying on its business.

Background of relevant facts

[11] For purposes of the application it is important to note that Erf 432 and Erf 329, occupied by the second applicant are adjoining erven in the *cul-de-sac* at the end of Tungsten Road. Erf 432 is an office park where the second applicant has its workshop.

The second applicant utilizes the *cul-de-sac* via a gate on Erf 432 in order to enter and exit Erf 329 which it uses as a storage yard.

[12] During 2014 Dr Wright, the Group Operations Officer of the first respondent, COG approached the second and third respondents to purchase or lease the *cul-de-sac* in order to facilitate the expansion of the business of the Clive Teubes Group of Companies¹, of which COG is the property-owning company.

[13] The process took five years until finalization. During the period the intended use of the *cul-de-sac* was advertised by the relevant parties, and no objections were received to the enclosure of the *cul-de-sac*.²

[14] The third applicant purchased the building on erf 432 on 26 July 2016. During December 2019 the property was leased by the third applicant to the first and second applicants. This was after the intended use of the *cul-de-sac* had been advertised to neighbours in the area and no objections were lodge against the intended closure of the *cul-de-sac*.

[15] The business of the first and second applicants concerns the repair of broken-down minibus taxis, and therefore the *cul-de-sac* is used to store the broken-down minibus taxis awaiting repair.

[16] On 24 October 2019 the first respondent, COG entered into a written lease agreement (**the lease**) with the second respondent in respect of the *cul-de-sac*. In terms of the lease the property leased and hired is the *cul-de-sac*. The lease period will be for nine years and eleven months commencing on 1 November 2019. The termination date of the lease will be 30 September 2030. In terms of the lease the *cul-de-sac* is leased for storage purposes.

¹ The Clive Teubes Group of Companies manufactures essential oils and related products for domestic and export use, and it requires the *cul-de-sac* to store drums of oil used in the manufacturing process.

² See clause 32(2) of the lease agreement and the record of JPC's decision furnished to the first applicant on 27 October 2020.

[17] During June 2020 the first and second applicants were informed of the existence of the lease, and as such were aware of the first respondent's intention to enclosed the *cul-de-sac*.

[18] The first respondent requested the first and second applicants to remove the broken-down minibus taxis from the *cul-de-sac* in order for the first respondent to enclose the *cul-de-sac* in line with the lease. Due to concerns raised by the applicants, correspondence and meetings³ followed between the parties involved in order to resolve the issues between them in an amicable manner.

[19] On 27 October 2020 the second and third respondent replied to a request in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (“**PAJA**”) and informed the applicants that the decision to lease the *cul-de-sac* to the first respondent had been taken in terms of the following legislation;

1. section 14(2) of the Municipal Finance Management Act, Act 56 of 2003⁴ read with,
2. Regulation 34(1)(b) of the Municipal Asset Transfer Regulations⁵, and

³ Meetings: 14 January 2021, 3 February 2021, 5 March 2021 and 21 May 2021.

⁴ **Disposal of Capital assets**

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(1) A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset to provide the minimum level of basic municipal services.

(2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public-

- (a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basis municipal services; and
- (b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

⁵ **Granting of rights to use, control or manage municipal capital assets**

34 (1) A municipality may grant a right to use, control or manage a capital asset only after-

- (a) the accounting officer has in terms of regulation 35 conducted a public participation process regarding the proposed granting of the right;
- (b) the municipal council has approved in principle that right may be granted.

(2) Sub regulation (1)(a) must be complied with only if-

- (a) the capital asset in respect of which the proposed right is to be granted has value in excess of R10 million; and
- (b) a long-term right is proposed to be granted in respect of the capital asset.

Definitions

1. (1) “**long term**” means a period of longer than three years

3. the provisions of sections 66 and 79(18) of the Local Government Ordinance 1939⁶. (referred to as the Applicable Law.)

[20] The applicants were informed that the second and third respondents authorised the conclusion of the lease and the “*temporary closure*” of the *cul-de-sac*.

[21] Due to the irreconcilable differences between the parties the situation could not be resolved and on 20 October 2021 the applicants launched an urgent application for an interim interdict ordering the first respondent to refrain from enclosing the *cul-de-sac*. Opperman J dismissed the application on the basis of lack of urgency.

⁶ Section 79(18) provides:

“*The Council may do all or any of the following things, namely-*

(18)(a) Notwithstanding the provisions of the Townships Act, 1907 (Act 33 of 1907, Transvaal), but subject to the succeeding paragraphs and the provisions of any other law

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(i) let, sell exchange or in any other manner alienate or dispose of any movable or immovable property of the council: Provided that where a council exchanges immovable property for other property, the other property shall be wholly or predominantly immovable;

.. .

*'(b) Whenever **a council wishes** to exercise any of the powers conferred by paragraph (a) in respect of immovable property, excluding the letting of any other property than land in respect of which the lease is subject to section 1 (2) of the Formalities in respect of Leases of Land Act, 1969 (Act 19 of 1969), the council shall cause a notice of the resolution to that effect to be -*

(i) affixed to the public notice board of the council; and

(ii) published in a newspaper in accordance with section 91 of the Republic of South Africa Constitution Act, 1983,

in which any person who wishes to object to the exercise of any such power, is called upon to lodge his objection in writing with the town clerk within a stated period of not less than fourteen days from the date of the publication of the notice in the newspaper: Provided that where a council wishes to alienate or dispose of immovable property to the State or a statutory body, the Administrator may exempt the council from all or any of the provisions of this paragraph.”

[22] Consequently the applicants delivered an amended notice of motion in terms wherein the scope of this application has been limited to a final interdict against the use of the *cul-de-sac* for purposes not permitted in law.

[23] Furthermore, on 20 October 2021 the applicants served a judicial review application on the first respondent.

Submissions by the applicant

[24] Council for the applicants argued that the conclusion of the lease agreement between the first, second and third respondents is invalid because the lease prevents the applicants and the general public from transversing the *cul-de-sac*, a *public road*.

[25] It was argued that the proposition by the first respondent that the lease agreement changed the identity and zoning of the *cul-de-sac* lacks in any basis of law. The reasons for the argument are the following;

1. Every piece of land within the area of jurisdiction of a local authority, such as the City, is zoned for a particular use;
2. The zoning, or the use rights, is prescribed by the Land Use Scheme in terms of which the uses to which the land may be put is prescribed;
3. The Land Use Scheme also prescribes the uses to which the land may be put with the consent of the City and the uses for which the land may never be used; and
4. There is a statutorily prescribed process in terms of which use rights may be changed.

[26] Therefore, the applicants argued that the zoning and primary use rights of the *cul-de-sac* are not capable of being changed simply by the conclusion of a contract between the City or owner and a third party, because there is a process prescribed by the City's Municipal Planning By-Law of 2016 ⁷ which regulates the change of use rights.

⁷ Section 21 of the City of Johannesburg Municipal Planning By-Law 2016.
21.Amendment of land use scheme

[27] The applicants further avers that the By-Laws⁸, the Scheme⁹ and the Spatial Planning and Land Use Management Act, 2013¹⁰ (“**SPLUMA**”) impose a criminal sanction for the contravention of the Scheme and as such imposing a binding obligation on land owners and users to use land for the purposes permitted.

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1. (1) An owner of land who wishes to have a provision of the City’s land use scheme or any provision of any other scheme which may still be applicable to the land under consideration amended, may submit an application in terms of this By-law to the City for consideration.
 2. (2) An application for the amendment of a provision of the City’s land use scheme or any other scheme that may still be applicable to the land under consideration as envisaged in subsection (1) above shall comply with the following procedures:
 1. (a) Notice of the application shall be given once by simultaneously publishing a notice in the Provincial Gazette and a newspaper that circulates within the area of jurisdiction of the application site in English;
 2. (b) Such notice shall clearly reflect in terms of which section of this By-law the application is made and which land use scheme or any other scheme is applicable;
 3. (c) Such notice shall reflect full details of the application including, but not limited to, the street address, the name of the township, a clear erf description of the erf concerned and the nature and general purpose of the application;
 4. (d) Such notice shall further reflect the name, postal address, telephone number, fax number and e-mail address of the person submitting the application;
 5. (e) Such notice shall further reflect that the application and its accompanied documents will lie open for inspection at specified times and at specified places at the City’s offices and that any objection, comment or representation in regard thereto must be submitted timeously to the City in writing by registered post, by hand, by facsimile or by e-mail within a period of 28 days from the date of publication of the notice as envisaged in subsection (2)(a) above.
 6. (f) A site notice that contains the same detail as envisaged in subsections (b) to (e) above shall be displayed on the land under consideration in English;
 7. (g) Such notice shall be displayed on the land from the same date as the date of the publication of the notice mentioned in subsection (a) above;
 8. (h) Such notice shall be in the format as determined by the City;
 9. (i) Such notice shall be displayed in a conspicuous place on the land in question where it would be best and easily visible and can be easily read from each and every adjacent public street or other adjacent public place;
 10. (j) Such notice shall be maintained in a clearly legible condition for a period of not less than 21 days from the date of publication of the notice mentioned in subsection (a) above; and

[28] In circumstances where an owner or land users fail to comply with legislation, an interdict against the unlawful use **must** follow, and therefore, the Court has no power nor a discretion to refuse an interdict once it is established that the conduct of which an applicant complains is, an offence. The principle was affirmed by the Supreme Court of Appeal in the matter of *Lester*.¹¹

[29] The applicants contended that the principles in the *Lester case* apply with equal effect to this matter, and therefore the legal principles applicable to the use of land

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11. (k) In addition to the requirements in subsections (a) and (f) above, a letter shall also be dispatched within 7 days of date of the publication of the notice envisaged in subsection (a) above to the owners/occupiers of all contiguous erven, including those on the opposite side of a street or lane by registered post, by hand or by any other means available informing such owners/occupiers of all the detail as prescribed in subsection (2)(b) to (e) above.
 3. (3) Proof of compliance with subsection (2) above must be submitted to the City in the form of a written affidavit within 14 days of expiry of the date contemplated in subsection (2)(e) above.
 4. (4) On receipt of an application in terms of subsection (1) above, the City shall submit a copy of such application :
 - (a) any Roads authority whether local (as a municipal owned Entity), Provincial or National which may have an interest in the application;
 2. (b) any neighbouring municipality who may have an interest in the application; and
 3. (c) any other stakeholder, Municipal Department, Provincial Department, National Department, Municipal Entity or any other interested party who may, in the discretion of the City, have an interest in the application.
 5. (5) The interested parties mentioned in subsection (4)(a)-(c) above to which a copy of the application has been forwarded shall submit its objection, comment and/or representation to the City in writing within 60 days of date of receipt of the application, failing which, it shall be deemed that such interested party has no objection, comment or representation to make.
 6. (6) The City shall forward a copy of each objection, comment and representation received in terms of the notices envisaged in subsection (2) and from the interested parties in terms of subsection (4) above in respect of the application to the applicant and the applicant may respond in writing thereto to the City within 14 days of date of receipt of such objection, comment and/or representation where after the City shall refer the application to the Municipal Planning Tribunal for a decision subject to the provisions of section 58 below.
 7. (7) No decision shall be taken on the application unless due regard has been given to each objection, comment and/or representation lodged timeously.

(8) Subject to section 18(3), in the instance of an unopposed complete application, a decision on the application shall be taken by the authorised official or his/her duly authorised sub-delegate within 90 days of date of expiry of the administrative phase as contemplated in section 57(3) below.

(9) An owner of land may at any stage prior to a decision been taken on the application, amend or withdraw his application provided that with an amendment, the amendment is not regarded in the opinion of the City as being material which would warrant re-compliance with subsections (2) and (4) above.

⁸ Section 62(1)

contained in the Land Use Scheme have to be adhered to. Council for the applicants argued that the first respondents intended unlawful conduct of the *cul-de-sac*, a *public road*, must be interdicted.

[30] The applicants argued that they have the right to a final interdict as they have demonstrated that the intended use of the *cul-de-sac* for storage purposes is in contravention of the Scheme and is an offence. Council for the applicants contended that in such circumstances a final interdict must be granted which was clearly stated in the *Chapman's Peak Hotel case*¹² where the following was stated;

⁹ Clause 43 provides:

“Any person who:

(1) Contravenes or fails to comply with any provision of this Land Use Scheme; or

(2) Contravenes or fails to comply with any requirements set out in a notice issued and served in terms of this Land Use Scheme; or

(3) Contravenes or fails to comply with any condition set out in terms of any provision of this Land Use Scheme;

Shall be guilty of an offence and shall be prosecuted accordingly and may be liable on conviction to a fine or imprisonment as outlined in Section 62 and 63 of the City of Johannesburg Municipal Planning By-Law 2016.”

¹⁰ Section 58

¹¹ *Lester v Ndlambe Municipality and Another* 2015 (6) SA 283 (SCA) at paragraph [26] the following was stated:

“*Local government, like all other organs of state, has to exercise its powers within the bounds determined by the law and such powers are subject to constitutional scrutiny, including a review for legality. In Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) [20] the court expounded on the doctrine of legality as an essential component of the rule of law as follows:

“*These provisions [ie ss 174(3) and 175(4) of the Constitution] imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.*”

The power to approach a court for a demolition order in s 21 is unquestionably a public power bestowed upon local authorities. As such, its exercise must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, as stated, is inextricably linked to the rule of law. See AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another where the court held as follows:

“(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised Public power . . . can be validly exercised only if it is clearly sourced in law”.

In National Director of Public Prosecutions v Zuma Harms DP emphasized that the courts are similarly constrained by the doctrine of legality, ie to exercise only those powers bestowed upon them by the law. The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the court below was constrained by that doctrine to enforce the law by issuing a demolition order once the jurisdictional facts for such an order were found to exist.”

¹² *Chapman Peak Hotel (Pty) Ltd and Another v Jab and Annalene Restaurants CC t/a O'Hagans* [2011] 4 All SA 415 (C) at paragraph [18].

“Once it is accepted that the nature of the right in question is a public right, then it must follow, in my view, that for continuing infringements of the right the only effective remedy is an interdict.”

Submissions by the respondent

[31] The first respondent argued that whether or not the second respondent’s decision to close the *cul-de-sac* was lawful is not the subject matter of the applicants’ case. The reason for the averment is because the decision to close the *cul-de-sac* and to lease the space to the first respondent to use for purposes of storage, constituted an administrative action within the meaning of PAJA.

[32] It was furthermore contended by the first respondent the applicants’ instituted a review application on 20 October 2021, weeks before the hearing. The reason in stating the review was to set aside the decision by the second and third respondent, which is an objective fact. Council for the first respondent argued that this application for a final interdict is an attempt to circumvent the time-barring of the review application and to achieve indirectly what the applicants’ cannot achieve directly.

[33] The first respondent avers that the law is squarely against the applicants’ attempt to negate the administrative decisions of the second and third respondent without taking any steps to review and set aside the decisions in terms of PAJA.

[34] Council for the first respondent further argued that the applicants’ are in breach of the *“clean hands-doctrine”*. The applicants oppose the first respondent’s right to use the *cul-de-sac* for storage purposes as it is expressly recorded in the lease, and they do so on the basis that the public has a right to access the *cul-de-sac*, being a *public road*.

[35] However, the applicants motive is not altruistic, and they do not seek to benefit the public at large, instead, they seek to protect their own use of the *cul-de-sac* as a place to store broken down minibus taxis awaiting repair at the workshop.

[36] Therefore, it is contended on the same arguments by the applicants, should apply to their unlawful use of the *cul-de-sac* and thus should also be precluded by SPLUMA. Therefore, it was argued that the applicants' own argument, if accepted, defeats the relief sought by the applicants.

[37] The first respondent argued that the applicants have failed to demonstrate irreparable harm or the absence of an alternative remedy in order for a final interdict to be granted, and therefore the application must be dismissed.

[38] Council for the first respondent avers that the applicants seek to demonstrate their "*clear right*" to the final interdictory relief on the basis of SPLUMA and its application on the matter. According to the first respondent the argument based on SPLUMA is fundamentally flawed, because the *cul-de-sac* was closed and the lease was concluded with the first respondent in terms of the Municipal Finance Management Act, Act 56 of 2003 ("**MFMA**"), the Local Government Ordinance 17 of 1939 ("**the Ordinance**") and the Municipal Asset Transfer Regulations of 2008. (Applicable Law)

[39] This argument is based on section 66 of Ordinance which deals with the "*closing of certain public places*" and sub-section (1)(b) states;

"Notwithstanding anything to the contrary contained in the Ordinance, a council may, after having given such notice as it may deem necessary, close any street, road or thoroughfare vested in the council-

(i) permanently or temporarily for any particular class of traffic, procession or gathering;

(ii) temporarily for all traffic..."

[40] Therefore, the first respondent contended that the power of the second respondent to close the *cul-de-sac* for the duration of the lease is clearly provided for in the Ordinance. The second respondent exercised its power to close the *cul-de-sac* and thus

the public no longer had right of way to the *cul-de-sac*. The public's right of way is the fundamental premise on which the applicants base their case for a "*clear right*" and therefore in the absence of the public's right of way the case must fail.

[41] The first respondent contended that the second respondent complied with section 79(18) of the Ordinance which states that a municipal council may lease any immovable property of the council, provided that the council causes a resolution to that effect to be affixed to the public notice board of the council and published in one newspaper, which was done.

[42] It also complied with section 14(2) of the MFMA which states that a municipality may dispose of a capital asset provided that the council, in a meeting open to the public, decides that the asset, is not needed to provide the minimum level of basic municipal service. Furthermore, it also has to consider the fair market value of the asset and the economic and community value to be received in exchange for the asset.

[43] The argument raised by the first respondent is that the Asset Transfer Regulations in regulation 34(1)(b) provides that a municipality may grant the use, control or manage a capital asset if the council has approved, in principle, that right may be granted, which right in the matter was granted by a written lease agreement.

[44] As stated in the above arguments the first respondent argued that the applicants failed to take into account the provisions of the Applicable Legislation and they failed to demonstrate that the provisions of SPLUMA override and negate the provisions of the Applicable Law.

[45] The argument by the applicants that the closure of a public road can only be effected by a re-zoning is flawed. It was argued that a formal statutory re-zoning process is unsustainable because the decision to close the *cul-de-sac* were done in accordance with Applicable Law.

[46] Therefore, the argument should fail and the application for a final interdict should be dismissed with costs.

[47] The first respondent in the alternative argued that if it is found that SPLUMA does apply to the facts of the case, the application should still fail because the applicants have elected to pursue a final interdict instead of an application in terms of the Uniform Rule 53 to review and set aside the administrative decision of the second and third respondent in terms of PAJA.

Common cause facts

[48] The following facts are common cause:

1. The *cul-de-sac* at the end of Tungsten Street, Strijdompark is a public road,
2. On 25 October 2019 the first respondent entered into a written lease agreement with the second respondent,
3. The terms of the lease agreement are common cause;
4. The lease agreement permits the use of the *cul-de-sac* for the use of storage, subject to the terms of the lease agreement and prohibits any contravention of “..any town planning scheme applicable to the property...”;
5. The *cul-de-sac* has not been re-zoned from that of a “*public road*”;
6. On 24 May 2021 the applicants were informed by the first respondent of its intention to fence off the *cul-de-sac*, which was to be done on 1 July 2021.

Disputed Facts

[49] Whether the applicants proofed the requirements for the relief sought, namely a final interdict.

Case law and evaluation

[50] The decision to close the *cul-de-sac* to the public and the lease of the *cul-de-sac* to the first respondent for purposes of storage, lies at the heart of the applicants’ prayer for a final interdict, which is premised on the fact that the *cul-de-sac* is a *public road*.

[51] The requirements for a final interdict are:¹³

1. a *clear right* on part of the applicant;
2. and *injury* actually committed or reasonably apprehended; and
3. *no other satisfactory remedy* available to the applicant.

[52] In order to establish that the right in question is a *clear right* the Court has to find that the following exists:

1. confirming that the right *exists in law*, and
2. *proving* that the right exists in *fact*.

[53] Whether an applicant has a right is a matter of *substantive law*, and therefore the right must be recognized by law. The applicants argued that their right for a final interdict to be granted is founded on the fact that the *cul-de-sac* is a *public road*, which is zoned in terms of SPLUMA. This contention is indeed not in dispute. However, a written lease agreement was concluded between the first and second respondents, which stipulates that the *cul-de-sac* was to be closed for public access and be used for purposes of storage by the first respondent.

[54] Rights are also created by contract, and in this instance the first respondents' right of occupation of the *cul-de-sac* is created under the written lease agreement. The existence of the lease is an objective fact. Whether the lease is valid or invalid is not the question to be decided by this Court. It is important not to muddy the water when deciding on granting or dismissing the relief sought by the applicants. The lease stands until set aside in a review process as contemplated in Uniform Rule 53

[55] Furthermore, whether the correct procedures were followed by the second and third respondents in procuring the lease is a matter to be decided in a judicial review application. It is evident to note that such proceedings were instituted by the applicant on 20 October 2021, two weeks prior to this hearing.

¹³ Setlogelo v Setlogelo 1914 AD 221; ABSA Bank Ltd v Dlamini 2008 (2) SA 262 (T).

[56] The *Oudekraal principle* is of importance in the matter. In the *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁴ the Supreme Court of Appeal developed the principle that an unlawful act may produce legally recognisable consequences.

[57] The following was said in the *Oudekraal case*;

“[26] *For those reasons it is clear, in our view, that the Administrator’s permission was unlawful and invalid at the outset...But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator’s approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”*

[58] I am therefore of the view that the decision of the second and third respondents to close the *cul-de-sac* and to conclude the lease with the first respondent, even if unlawful, has legal consequences, until set aside. Therefore, the applicants did not succeed in proving a *clear right* as required for the relief sought.

[59] When deciding on the second requirement for the granting of the relief sought by the applicant, namely, *an injury actually committed or reasonable apprehended*, the applicant must prove some act by the respondents interfered with the applicants’

¹⁴ 2004 (6) SA 222 (SCA).

rights, or that it have a well-grounded apprehension that acts of the kind will be committed by the respondents.

[60] It is common cause that the first respondent approached the applicants on several occasions in order to discuss an amicable solution regarding the fencing of the *cul-de-sac*. It is not disputed that the applicants utilize the *cul-de-sac* for delivery and at times for storage of broken down minibus taxis, whereafter the minibus taxis are being stored in the yard until moved to the workshop.

[61] The contention made by the applicants regarding *injury* is that due to the closure of the *cul-de-sac* it will be unable to off load the broken down minibus taxis and that will prejudice their business. It is common cause that the first respondent, on the other hand, is prepared to create a pathway in the fenced area in order for the applicants to proceed with their business.

[62] If the intention of the applicants are to safe guard the longevity of their business, I am unable to comprehend such a averment of injury. If the first respondent grant the applicants a pathway in the *cul-de-sac* to proceed with their business, in which case the applicants will suffer no injury. The applicants in such circumstances will be required to clear the *cul-de-sac* of the broken down minibus taxis after being off loaded to its storage yard. Which seems to be problematic seeing that the minibus taxis are being stored in the *cul-de-sac*.

[63] Furthermore, an interdict can only be granted to protect a legitimate right. The “*clean hands*” principle discourages illegality, because it will be contrary to public policy to render assistance to those defying the law.¹⁵ The first respondents’ right in

¹⁵ *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) at paragraph [39].

“This leads me to consider the appellants’ reliance on the rule of our law, that the *condictio ob turpem vel iniustam causam* can in principle only be successfully instituted by a plaintiff whose own conduct was free from turpitude, ie who did not act dishonourably (see eg *Daniël Visser op cit* 443; *J C Sonnekus Ongegronde Verryking in die Suid-Afrikaanse Reg* (2007) 139). This rule is expressed in the maxim taken from Roman and Roman Dutch Law: *in pari delicto potior est conditio defendentis* and thus became known as the *par delictum* rule. The principle underlying the *par delictum* rule is that, because the law should discourage illegality, it would be contrary to public policy to render assistance to those who defy the law. Prior to the judgment in *Jajbhay v Cassim* 1939 AD 537, the *par delictum* rule found strict and consistent application in our courts (see eg *Brandt v Bergstedt* 1917 CPD 344). But in *Jajbhay* this court – while affirming the considerations

fencing off the *cul-de-sac* is founded in a lease, whether valid or not. The first respondent is prepared even though a lease exists, to assist the applicants to continue with their business as before.

[64] I am of the view that the applicants intention to sought the relief requested is purely to use the *cul-de-sac* for storage purposes and as alleged not to grant the general public access via the *cul-de-sac*. This fact is confirmed by the photographs of the applicants' usage of the *cul-de-sac* disclosed during the application by the first respondent. Thus, the applicants approached the Court with an ulterior motive which is to obtain an interdict in restraining the first respondent to utilize its rights in terms of the lease.

[65] The last requirement for a final interdict is that the applicant must have *no ordinary or satisfactory remedy*, other than an interdict to protect its rights. An interdict is a drastic remedy, and the Court will not grant an interdict when some other satisfactory form of redress would be adequate or would provide protection.¹⁶

[66] The applicants must allege and establish, on a balance of probabilities, that it has no alternative legal remedy available. It is important to note that an *alternative remedy* can be almost any legal remedy available.

[67] Section 32 of the Constitution¹⁷ deals with the right of access to information and it provides everyone has the right of access to any information that is held by the State or by another person that is required for the protection of any rights.

of public policy underlying the rule – decided that it should be relaxed, as Stratford CJ put it (at 544), in those instances where 'public policy should properly take into account the doing of simple justice between man and man'. Since then the principles enunciated in Jajbhay have been considered and applied in many cases (see eg the decisions of this court in Visser v Rousseau & andere NNO 1990 (1) 139 (A) and Klokow v Sullivan 2006 (1) SA 259 (SCA)). No definite criteria have, however, been laid down to decide whether the rule should be relaxed or not. The reason, I think, is plain. The issue of relaxation may arise in such an infinite variety of circumstances that it would be unwise for the courts to shackle their own discretion by predetermined rules or even guidelines as to when relaxation of the par delictum rule will be allowed."

¹⁶ Erasmus et al (1994) Superior Court Practice, D6-15.

¹⁷ Act 108 of 1996

[68] In terms of PAJA public and private bodies are held accountable to society for its actions and decisions.

[69] Section 32 of the Constitution together with PAJA forms a new approach, aimed at ensuring more effective and efficient administrative processes.

[70] In terms of PAJA section 1 provides that, “**administrative action**, means any decision taken, or failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution;

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public

power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include...”

[71] The decision of the second and third respondents to close the *cul-de-sac* and to lease it to the first respondent meets the requirements of administrative action within the meaning of PAJA. This administrative decision can be reviewed in terms of Uniform Rule 53.

[72] If a final interdict is granted, such relief will render the administrative decision taken by the second and third respondent invalid and unenforceable. The effect thereof will be that the lease concluded, will be unenforceable, even though it exists as a matter of fact. This will result that the applicants will, in an indirect way, deprive the administrative decision taken by the second and third respondents of their force and effect. This will be done without attacking (reviewing) the validity of the administrative action which resulted in the conclusion of the lease agreement.

[73] One has to keep in mind that the second and third respondents have not participated in the application before me, and I agree with the contention of the first respondent in that their non-participation can be due to the indirect manner in which the applicants seek to attack their administrative decision relating to the closure of the *cul-de-sac* and the lease of the property. Furthermore, it is evident that no relief is sought against the second and third respondents which may also be the reason why they did not participate in the application.

[74] I am of the view that the applicants can obtain the relief they sought by way of judicial review proceedings, where the administrative decision by the second and third respondents can be set aside, if a court find that the administrative process was not followed in the closing of the *cul-de-sac* and the conclusion of the lease. It is evident that the applicants have seemingly sought to circumvent the provisions of PAJA and judicial review processes.

[75] In the circumstances, the applicants have not proved the requirements set out in order to obtain a final interdict. The applicant did not prove that they have a *clear right*, that they will suffer *injury or that injury is reasonable apprehended* if an interdict is not granted. Lastly I find that an *alternative remedy* does exist, namely judicial review in terms Uniform Rule 53.

Costs

[76] The general rule pertaining to costs is that the unsuccessful party will be ordered to reimburse the successful party for the costs that has been incurred as a result of litigation.

[77] An award of attorney and client costs is not lightly granted by the court:¹⁸ The court leans against awarding attorney and client costs,¹⁹ and will grant such costs only on “rare” occasions.²⁰

[78] It is clear that normally the court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present.²¹ An award of attorney and client costs is granted by reason of some special considerations arising either from the circumstances which gave rise to the action, or from the conduct of the losing party. The list is not exhaustive.

[79] In *Van Wyk v Millington*²² it was pointed out that the court’s reluctance to award attorney and client costs against a party is based on the right of every person to bring his complaints or his alleged wrongs before the court to get a decision, and he should not be penalised if he is misguided in bringing a hopeless case before the court. If, however, the court is satisfied that there is an absence of *bona fides* in bringing or defending an action it will not hesitate to award attorney and client costs.

[80] The first respondent has been successful in the outcome of the application and therefore is entitled to a cost order. However in awarding cost on attorney and client scale, the court has to find that there is “*some special ground*” present, which justifies a punitive cost order. In the circumstance before me I cannot find any “*special ground*” present which justifies a punitive cost order.

Order

[81] In the premises I make the following order:

1. The application is dismissed.

¹⁸ *De Villiers v Murraysburg School Board* 1910 CPD 535 538; *Rautenbach v Symington* 1995 (4) SA 583 (O) (no exhaustive list of examples); *SA Droëvrugtekoöperasie Bpk v SA Raisins (Edms) Bpk* [1999] 3 All SA 245 (NC) 255H–I 256I–J (attorney and client costs where respondent, in opposing an application, was extremely obstinate). *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) (reckless and prejudicial conduct of a litigant in seeking a postponement in a certain manner), *Nkume v Transunion Credit Bureau (Pty) Ltd and Another* 2014 (1) SA 134 (ECM).

¹⁹ *Moosa v Lalloo* 1957 (4) SA 207 (D) on page 225.

²⁰ *Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd* (2) 1946 TPD on page 226; *Mallinson v Tanner* 1947 (4) SA 681 (T) on page 686.

²¹ *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk v Wetorius Boerdery (Edms) Bpk* 1983 (3) SA 233 (O) on page 237.

²² 1948 (1) SA 1205 (C).

2. The applicants to pay the costs which include the cost of two counsel on party and party scale, jointly and severally the one paying the other to be absolved

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT**

Date of hearing: 02 November 2021
Date of judgment: 25 November 2022

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