THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 946/2022

In the matter between:

HIGHWAY JUNCTION (PTY) LTD	**FIRST APPELLANT**
SWINBURNE VILLAGE HOMEOWNERS ASSOCIATION NPC	**SECOND APPELLANT**
SWINBURNE STORE CC	**THIRD APPELLANT**

and

DI-THABENG TRUCK AND TAXI (PTY) LTD	**FIRST RESPONDENT**
DI-THABENG LOGISTICS (PTY) LTD	**SECOND RESPONDENT**
DI-THABENG FINANCE (PTY) LTD	**THIRD RESPONDENT**
DI-THABENG FUEL SUPPLY (PTY) LTD	**FOURTH RESPONDENT**
DI-THABENG FUEL MANAGEMENT (PTY) LTD	**FIFTH RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FREE STATE PROVINCIAL DEPARTMENT OF ECONOMICS, SMALL BUSINESS DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	**SIXTH RESPONDENT**
MALUTI-A-PHOFUNG LOCAL	

MUNICIPALITY **SEVENTH RESPONDENT**

THE MINISTER OF WATER AND SANITATION **EIGHTH RESPONDENT**

THE MINISTER OF MINERAL RESOURCES AND ENERGY **NINTH RESPONDENT**

and

ENGEN PETROLEUM LIMITED **AMICUS CURIAE**

Neutral citation: *Highway Junction (Pty) Ltd and Others v Di-Thabeng Truck and Taxi (Pty) Ltd and Others* (Case no 946/2022) [2024] ZASCA 31 (28 March 2024)

Coram: PONNAN, GORVEN and KGOELE JJA and SEEGOBIN and KEIGHTLEY AJJA

Heard: 1 March 2024

Delivered: 28 March 2024

Summary: Interdictory relief – four interdicts sought – interdict granted which adequately protects rights – appeal against refusal to grant further interdicts moot – no basis for entering into whether a further clear right was established.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Zietsman AJ, sitting as court of first instance):

The cross-appeal is dismissed.

JUDGMENT

Gorven JA (Ponnan and Kgoele JJA and Seegobin and Keightley AJJA concurring)

[1] The matter before us is a cross-appeal where the main appeal has lapsed. The parties will be referred to as in the cross-appeal. The first respondent, Di-Thabeng Truck and Taxi (Pty) Ltd (T&T), is the owner of immovable property described as Portion 5 of the Farm Franshoek 1861, district of Harrismith, Free State Province (the property). The property is zoned agricultural. A condition of title, which is recorded in the zoning certificate, also allows use as a place where trucks may be parked. T&T and the second to fifth respondents (the Di-Thabeng entities) were all companies under the effective control of Mr PJ du Toit, until he died during July 2021.

[2] The first appellant, Highway Junction (Pty) Ltd, conducts the business of a truck-stop, where drivers can rest, and a fuel retail facility known as ‘The Highway

Junction’. In excess of 1 500 trucks pass through it per day. The second appellant, the Swinburne Home Owners Association NPC, is a homeowners association of a housing development adjacent to the property. The third appellant, Swinburne Store CC, is the developer of the Swinburne Township on land adjoining the property. The sixth to ninth respondents played no part in either the high court or before us.

[3] The appellants contended that the Di-Thabeng entities were engaged in unlawful activities on the property. These included:

(a) The commencement of listed activities under, and thus contraventions of, the National Environmental Management Act 107 of 1998 (NEMA).

(b) The use of the property contrary to its approved zoning under the Town Planning Scheme of the relevant municipality and contrary to the provisions of the Spatial Planning Land Use Management Act 18 of 2013 (SPLUMA).

(c) The unlawful construction of buildings in contravention of the National Building Regulations and Building Standards Act 103 of 1977 (the NBR).

(d) The unlawful alteration of banks or characteristics of a watercourse on the property without a water use licence in contravention of the National Water Act 36 of 1998 (the Water Act).

(e) The unlawful retailing of petroleum products in contravention of the Petroleum Products Act 120 of 1977 (the PPA).

It is common cause that the Di-Thabeng entities were trading in petroleum products. It is significant that they traded only from the property.

[4] As indicated, the property was zoned for agricultural use and the parking of trucks. As regards point (e), T&T holds a wholesale licence under the PPA. Under the PPA and the relevant regulations, the wholesale licence entitles T&T to sell only in bulk (fuel wholesaling). The word ‘bulk’ is defined in the regulations as meaning ‘1500 litres or more, per transaction of petroleum products’. The operative phrase is ‘per transaction’. The requirement of selling in bulk does not apply to the retail sale of fuel (fuel retailing).

[5] The system employed by T&T (the impugned system) was to sell fuel in what it termed ‘transaction intervals’ of 1 500 litres. The customer was required to pay for a minimum of 1 500 litres of fuel but did not have to take immediate delivery of the full 1 500 litres. It was permitted to collect as and when it needed the fuel in quantities of less than 1 500 litres. So, for example, having paid for a minimum of 1 500 litres of fuel, the customer could collect 200 litres, then 300 litres, and so on until the quantity paid for had been collected. The real issue is whether the regulation envisages that a transaction comprises the simultaneous sale and delivery of a minimum of 1 500 litres of fuel or whether it comprises the sale of a minimum of 1 500 litres without the need for contemporaneous delivery. The appellants contended for the former and the Di-Thabeng entities for the latter interpretation. As such, the appellants contended that the impugned system amounted to fuel retailing, for which the Di-Thabeng entities admittedly did not have a licence, and not fuel wholesaling.

[6] The appellants launched an application for a final interdict in the Free State Division of the High Court, Bloemfontein (the high court). The essential relief sought was:

1 The Di-Thabeng entities are interdicted and/or restrained from any further construction on the property until:

1.1 the necessary environmental approvals have been obtained under NEMA;

1.2 a water use licence has been obtained under the Water Act;

1.3 land use approval has been obtained under the Municipal Planning By-Law; and

1.4 a building plan approval has been obtained under the NBR.

2 The Di-Thabeng entities are interdicted and/or restrained from using the property for any uses other than agricultural until:

2.1 the necessary environmental approvals have been obtained under NEMA;

2.2 the use of land has been changed in terms of the provisions of SPLUMA and/or the Municipal Planning By-Law; and

2.3 the land use accords with the approved building plans on the property.

3 The Di-Thabeng entities are interdicted from fuel retailing at or from the property until a site and retail licence has been obtained under the PPA.

4 The Di-Thabeng entities are ordered to desist from breaching their duty of care as envisioned by s 28 of NEMA and s 19 of the Water Act and remedy their breaches of duty of care through reasonable measures within 60 days from the date of this order.

5 The Di-Thabeng entities are directed to pay the respondents' costs jointly and severally, the one paying, the others to be absolved.

The relief in paragraphs 1 and 4 of the notice of motion was not persisted in. The decision confronting the high court was thus whether to grant one or both of the interdicts sought in paragraphs 2 and 3.

[7] The high court, per Zietsman AJ, granted the following order:

'1. The [Di-Thabeng entities] are interdicted and/or restrained from using the property, known as Portion 5 of the Farm Franshoek No 1861, Swinburne, Free State Province, for any uses other than agricultural, and the parking of trucks, until:

1.1 the use of the land has been changed in terms of the provisions of the Spatial Planning and Land Use Management Act, 16 of 2013 and/or the Municipal Planning By-Law of 2015 read with the Town Planning Scheme 51969.

2. Each party shall pay its own costs.'

It can be seen that the relief granted was not framed in the precise terms of either of the interdicts sought in paragraphs 2 or 3 of the notice of motion. It included much of the relief sought in paragraph 2. The clear effect is that the interdict prevents the Di-Thabeng entities from using the property to conduct any trading, even of fuel wholesaling. The high court did not grant the interdict sought in paragraph 3 of the notice of motion.

[8] The Di-Thabeng entities sought, and were granted, leave by the high court to appeal to this court against the whole of the judgment. The appellants were granted leave by the high court to cross-appeal to this court against the refusal to grant the interdict sought in paragraph 3. This court admitted Engen Petroleum Ltd as *amicus curiae*. In the event, the *amicus* put up heads of argument but, for reasons that shall become apparent, was not called upon to present any oral argument. When the main appeal lapsed, the Di-Thabeng entities could no longer contest the interdict granted by the high court.

[9] Before us, the appellants limited the ambit of the cross-appeal to the refusal of the high court to grant the interdict against fuel retailing on the property until a site licence and a retail licence had been obtained under the PPA. This was the second final interdict sought in the high court. The appellants were requested to address the court on whether that relief was necessary in order to protect their rights. Put differently, they were asked if, in the light of the interdict granted, this court should entertain an appeal against the refusal by the high court to grant a second interdict.

[10] The appellants quite correctly did not contend that they were not adequately protected at present. The cross-appeal was premised on the submission that: (a) the Di-Thabeng entities may yet comply with paragraph 1.1 of order of the high court; and, (b) in that event, the appellants would be bound in any future litigation by the high court's findings against the interpretation contended for by them. As such, if this court did not correct those findings, the appellants could be met with pleas of *res judicata* (it has been decided), or issue estoppel, if they were to subsequently approach a court for that relief. That submission might have had some weight if the issue had been decided by the high court. But, in the view I take of the matter, that was not the case.

[11] It must immediately be acknowledged that the judgment of the high court is not a model of clarity. That applies, in particular, to the specific issue in question. In dealing with it, the high court appears to have set out to interpret what was meant by a transaction. The legal approach to interpretation was neither articulated nor applied. That approach should have included an evaluation of language, context and purpose.[1] In addition, no reasoning was employed in essaying the interpretation. The high court seemed to say that it could not fault the impugned system applied by the Di-Thabeng entities. However, no clear finding was made since the high court immediately went on to say, '. . . however at least a *bona fide* dispute exists as to the interpretation of [what is meant by] one transaction'. That simply restates the issue. It was precisely what was before the high court in order to establish whether or not the appellants had shown a clear right for the second interdict. The conclusion set out above falls far short of a finding on that issue. It is

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

thus open to the appellants, or anyone else, to approach a court afresh for an interpretation, should the need arise.

[12] Since an interdict adequately protecting the rights of the appellants is in place and may be enforced, the relief requesting a further interdict on different grounds does not present a live issue. That renders the matter moot. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[2] the Constitutional Court held that:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

This approach was endorsed in *Pheko and Others v Ekurhuleni Metropolitan Municipality*:

'. . . if the applicants' rights . . . are no longer threatened . . . it will not be in the interests of justice to grant leave to appeal directly to this court.'[3]

[13] That dictum applies foursquare to this matter. The appellants enjoy effective protection of all of their rights in the overarching interdict against trading on the property. Properly considered, the cross-appeal should have been made conditional on the appeal against the interdict by the Di-Thabeng entities proceeding. When the appeal lapsed, the need for any further interdict on different grounds became moot.

[14] Apart from the matter being moot, there are further considerations against arriving at a finding on the interpretation of a transaction. The high court has not

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[2] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 para 21, fn 18.

[3] *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC) para 31. References omitted.

yet spoken the final word on the question. In that sense, this court would be pronouncing on the question as both a court of first and also potentially last instance. Moreover, the *amicus curiae* was admitted to the appeal on the basis that the impugned system was being utilised by other entities who held licences to wholesale fuel. The issue thus has a far wider reach than that of the present dispute. It is one in which parties other than those participating in the appeal have an interest and might reasonably expect to be heard. In those circumstances, it would not be appropriate to pronounce on the matter. In *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others*, even where a declaratory order had been sought, this court took that factor into account:

'All interested parties were not before the court below and there was no indication on the record that a declaratory order, assuming it to be enforceable in its proposed form, would have any practical effect. These factors in themselves presented an insurmountable obstacle for the appellants.'[4]

[15] In the present matter, only interdictory relief was sought by the appellants both in the high court and before us. No declaratory relief was sought. The issue is not before us in that form. As such it is even less appropriate to consider it than was the case in *West Coast Rock Lobster Association*. In any event, granting a declaration of rights is a matter within the discretion of a court. I do not believe it appropriate to do so in the circumstances of this matter.

[16] It remains to consider the question of costs. Once the main appeal lapsed, there was no need for a further interdict in order to protect the appellants. Strictly speaking, the cross-appeal should have been withdrawn. However, the appellants

[4] *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others* [2010] ZASCA 114; [2011] 1 All SA 487 (SCA) para 46.

can hardly be faulted for having persisted in the cross-appeal in the light of the unclear judgment of the high court concerning a finding on the interpretation. As a result, it will meet the situation if no order as to costs is made.

[17] In the result, the cross-appeal is dismissed.

T R GORVEN
JUDGE OF APPEAL

Appearances

For the appellant:	H J De Waal SC with J S Rautenbach
Instructed by:	Cullinan and Associates, Cape Town
	Phatshoane Henney Attorneys, Bloemfontein
For the respondents:	M M Rip SC with F H Nel
Instructed by:	Jacques Classen Incorporated, Pretoria
	Graham Attorneys, Bloemfontein
For the amicus curiae:	D W Eades
	Richard Evans and Associates, Kloof
	Phatshoane Henny Attorneys, Bloemfontein.