

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. 7908/17

In the matter between:

THOZAMA ANGELA ADONISI	First Applicant
PHUMZA NTUTELA	Second Applicant
SHARONE DANIELS	Third Applicant
SELINA LA HANE	Fourth Applicant
RECLAIM THE CITY	Fifth Applicant
TRUSTEES OF THE NDIFUNA UKWAZI TRUST	Sixth Applicant
and	
MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE	First Respondent
PREMIER OF THE WESTERN CAPE PROVINCE	Second Respondent
THE PHYLLIS JOWELL JEWISH DAY SCHOOL (NPC)	Third Respondent
CITY OF CAPE TOWN	Fourth Respondent
MINISTER OF HUMAN SETTLEMENTS	Fifth Respondent
THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	Sixth Respondent
MINISTER OF PUBLIC WORKS	Seventh Respondent
MINISTER OF HUMAN SETTLEMENTS: WESTERN CAPE	Eighth Respondent
SOCIAL HOUSING REGULATORY AUTHORITY	Ninth Respondent
MINISTER OF RURAL DEVELOPMENT & LAND REFORM	Tenth Respondent
MINISTER OF FINANCE	Eleventh Respondent
GARY FISHER	Twelfth Respondent

APPLICANTS' SUBMISSIONS ON COSTS OF THE POSTPONEMENT OF THE HEARING OF THE APPLICATION FOR LEAVE TO APPEAL ON 13 NOVEMBER 2020

Introduction

1. In its application for leave to appeal, Province asks that the costs of the application for leave to appeal be costs in the appeal.
2. The Applicants submit that, for the reasons given below, when hearing the application for leave to appeal on 12 March 2021, this Court should order that Province should bear the Applicants' wasted costs of the postponement and the Applicants' costs of the hearing of 13 November 2020.

The Court's directive, Province's affidavits, and the postponement on 13 November 2020

3. On 11 November 2020 Judge Gamble's then registrar, Ms Moose, sent an email to the legal representatives of the parties as follows:

"The Presiding Judges have directed me to address the parties as follows in regard to the applications for leave to appeal in the Tafelberg matter set down for hearing on Friday 13th November 2020.

Both the National Minister and Reclaim the City have filed applications to admit further affidavits with the Court referring to a public statement issued on 18 September 2020 by the Premier of the Western Cape and the MEC for Human Settlements to the effect that the sale of the Tafelberg property to the Day School has been abandoned and that certain aspects of the judgment might be considered moot.

Neither the Province nor the City have responded to the applications to admit such affidavits, either by opposing the applications or by filing any responding affidavits. As matters presently stand, the affidavits fall to be admitted on an unopposed basis.

The affidavits now form the basis for an argument by those parties that a significant part of the litigation has become moot by virtue of the fact that the sale has either been cancelled by agreement between the parties thereto or because the Day School has withdrawn from it.

In this regard I must draw to your attention that when co-ordinating the set down of the applications for leave to appeal I included ENS Attorneys in my mailing list as they acted for the Day School. In response thereto I received an email from Attorney J Zieff on behalf of the Day School requesting me to no longer forward any correspondence to his firm because the Day School had withdrawn from the agreement.

The Judges note from the heads of argument filed on behalf of the Province yesterday that it takes the view that the issue of the sale to the day School is not moot. The heads of argument seem to suggest that the latest affidavits are irrelevant and the statement annexed thereto does not merit consideration by the Court.

*The parties are referred to the decision of the Supreme Court of Appeal in POLMED v Lamana 2011 (4) SA 456 (SCA) pursuant whereto **parties are obliged to act pro-actively and properly take a court into their confidence in relation to any post-judgment developments which might trigger the provisions of s16(2)(a)(i) of the Superior Courts Act.***

*In the circumstances, I am directed to inform you that the Court will not be inclined to hear any application for leave to appeal by the Province until such time as the position has been **fully clarified** under oath by a person duly authorised thereto on behalf of the Province.*

Please consider the urgency of the situation and be advised accordingly.”

[emphasis added]

4. On 12 November 2020 Province delivered an affidavit deposed to by Ms Fiona Stewart on that day, with the stated purpose of confirming that the deed of sale had not been cancelled. The affidavit reflected that:-
 - 4.1. PJJDS had indicated that it no longer wished to proceed with the sale of the Tafelberg properties;
 - 4.2. the WCG respondents were in principle amenable to a termination, to be effected by way of a written agreement of termination ("*termination agreement*");
 - 4.3. a draft termination agreement had been prepared but it had not yet been signed by both parties to the deed of sale, the deed of sale therefore remained in place;
 - 4.4. the draft termination agreement contained two suspensive conditions;
 - 4.5. only once the termination agreement had been signed on behalf of both parties and the suspensive conditions had been fulfilled would the deed of sale be cancelled.
5. At the hearing on 13 November 2020 the application for leave to appeal was postponed *sine die*, with costs to stand over for later determination.
6. On 10 December 2020, Province's senior counsel sent an email to Ms Moose, copied to the legal representatives of the other parties, reflecting that the applications for leave to appeal were postponed by the Court on 13 November 2020 in order to allow time for the deed of sale of the Tafelberg properties to be cancelled, that he had been instructed that the deed of sale had been cancelled, and that the

applications for leave to appeal could now proceed on that basis.

7. Following an email exchange between the senior counsel for the Minister of Human Settlements and Province's senior counsel, Ms Stewart delivered a further affidavit, deposed to on 19 January 2021.
8. It appears from Ms Stewart's further affidavit that by 12 November 2020:-
 - 8.1. Mr Katz of the PJJDS had already signed the termination agreement;
 - 8.2. the first suspensive condition had already been fulfilled, namely the original letter of guarantee had been returned to PJJDS.
9. The second suspensive condition in the termination agreement was that the transfer costs should be reimbursed to PJJDS by the State Attorney.
10. There is no explanation in Ms Stewart's affidavits as to why those facts were not placed before the court on 12 November 2020. Had they been, it would have been clear that there was nothing contentious in respect of the termination agreement and that it was just a matter of the provincial Minister signing it and the transfer costs being reimbursed for the cancellation of the deed of sale to take place.
11. In the Applicants' view, if those facts had been properly placed before the Court on affidavit, the hearing of the applications for leave to appeal would have proceeded on 13 November 2020.

Costs

12. In its application for leave to appeal, Province asks that the costs of the application for leave to appeal be costs in the appeal.

13. The Applicants submit that, when hearing the application for leave to appeal on 12 March 2021, this Court should order that Province should bear their wasted costs of the postponement and their costs of the hearing of 13 November 2020.
14. The Court had expressly directed on 12 November 2020, that the position in respect of the cancellation of the deed of sale had to be fully clarified.
15. In the case referred to by the Court in its directive, and which the Applicants referred to in their heads of argument, i.e. *POLMED v Lamana* 2011 (4) SA 456 (SCA) ("*Lamana*"), the SCA pointed out at paragraph 13, in respect of the then section 21A of the Supreme Court Act, 59 of 1959 (which dealt with mootness), that if facts relevant to the appeal court's exercise of a discretion under section 21A do not appear from the record, they should be placed before the court by way of an affidavit by the party seeking to rely upon them, and in sufficient time to enable the other party to deal therewith, and that the same applies to an application for leave to appeal in whatever court it is brought. Section 16(2)(a) is the equivalent provision to the old section 21A.
16. In *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (In Liquidation) and Another* 2018 (4) SA 433 (SCA), the issue of mootness arose in respect of an application for leave to appeal being heard by the SCA (the court *a quo* had refused an application for leave). By the time that the application was heard, the proposed appeal had become moot. The SCA expressed the view that where an appeal or proposed appeal becomes moot by the time leave to appeal is first sought, it will be generally be appropriate to order the appellant or would be

appellant to pay costs, since the proposed appeal was still-born from the outset.¹

17. It appears from Province's 18 September 2020 joint media statement that aspects of its application for leave to appeal were already effectively moot when it filed its application for leave to appeal on that day. However, Province has not clearly articulated or conceded exactly which aspects it contends are not moot and which it concedes are moot. It was contemplated though – as expressed in the joint media statement and as appears from the Cabinet Resolution authorizing the application for leave to appeal ("FS 2" to Ms Stewart's further affidavit) that if the agreement of sale was cancelled, there were aspects of the orders or judgments which may become moot and that "*those aspects will not form part of the appeals pursued thereafter.*"
18. The Applicants were ready to proceed at the hearing on 13 November 2020 and placed on record that they were reluctant to incur the substantial further costs that would be occasioned by a postponement.
19. In *Member of the Executive Council for Local Government, Mpumalanga v IMATU* (2002) (1) SA 76 (SCA) at paragraph 15, the High Court had reserved costs in respect of two applications for postponements. The SCA held that: "*Courts should not reserve costs of postponements and the like unless there are special circumstances because Courts that deal with the merits later, especially Courts of appeal, are not really in a position to decide the costs of interlocutory matters.*"
20. In summary, Province should be held liable for the Applicants' wasted costs arising out of the postponement on 13 November 2020 in that: (i) if it had acted pro-actively

¹ Para 10.

(as it was required to do in terms of *Lamana*) on 18 September 2020, when it first became aware that aspects of the appeal were effectively moot, the application for leave to appeal would not have been set down for hearing until all the necessary loose-ends had been tied-up; and (ii) if it had complied with this Court's 11 November 2020 directive to **fully clarify** the situation, the hearing would have been able to proceed on 13 November 2020.

PETER HATHORN SC
CORIAAN DE VILLIERS

Applicants' counsel
Chambers
11 March 2021