IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case Number: 1490/2024

In the appeal :

HENDRIK PETRUS CELLIERS	**First Appellant**
PAUL ERNEST MCMENAMIN	**Second Appellant**
IZAK JACOBUS BOOYSEN	**Third Appellant**
JOHANNES VENTER	**Fourth Appellant**

and

KLEINFONTEIN AANDELEBLOK (PTY) LTD	**First Respondent**
THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**Second Respondent**

FILING NOTICE: OPPOSING AFFIDAVIT

PLEASE TAKE NOTICE that the Opposing Affidavit of the First Respondent is delivered evenly herewith.

DATED AT BLOEMFONTEIN on 3 February 2025.

SIGNED: S ESTERHUIZEN

J H CONRADIE (HUR12/0073 (JHC/AB))
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TO : THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND TO: MCINTYRE VAN DER POST ATTORNEYS
Attorneys for Applicants
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MCINTYRE VAN DER POST INC
03 -02- 2025
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Copy hereof received this day
of February 2025.

obo Attorneys for Applicants

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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

BLOEMFONTEIN

SCA Case No: **1490/2024**

Court *a quo* case no: **4755/2022**

HENDRIK PETRUS CELLIERS	First Applicant
PAUL ERNEST MCMENAMIN	Second Applicant
IZAK JACOBUS BOOYSEN	Third Applicant
JOHANNES VENTER	Fourth Applicant
and	
KLEINFONTEIN AANDELEBLOK (PTY) LTD	First Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Second Respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

RIAN EVERT PIETER GENIS

do hereby make oath and state as follows:

1. I am an adult male businessman residing at no 2 Rooibok, Wildparkweg, Kleinfontein, Gauteng. I am a director and shareholder of the first respondent.

2. I am, at present, the chairperson of the first respondent's board of directors. I am duly authorised by the first respondent's board of directors to depose to this affidavit on behalf of the first respondent. I refer to a copy of a resolution of the first respondent's board of

directors attached as annexure **"A"** in terms of which it has also been resolved that the first respondent opposes the application for leave to appeal.

3. The facts set out in this affidavit fall within my personal knowledge or have become known to me by virtue of my position as a director and chairperson of the first respondent.

4. I do not intend to traverse the test and applicable principles in an application of this nature as they are well-known. It is contended that for the reasons set out herein, the application for leave to appeal should be dismissed with costs on the basis that there is no reasonable prospect of success on appeal and that there is also no compelling reason why leave to appeal should be granted.

5. Before I answer to specific averments contained in the paragraphs of the founding affidavit, there are certain matters and issues to be raised upfront and in general.

6. **FOURTH APPLICANT (VENTER) NOT A PARTY TO THE APPLICATION:**

6.1 The first applicant (Celliers) who deposed to the founding affidavit and the applicants' attorneys of record, are well aware of the fact that Dr Johannes Venter (joined in the application as the fourth applicant) has advised the applicants' attorneys on two occasions after the judgment of the court *a quo* was delivered on 2 August 2024 that he does not want to participate in further appeal proceedings.

6.2 I refer in this regard to a letter dated 23 August 2024 addressed to Mr C Botha of the applicants' attorneys of which a copy is attached as annexure **"B"** and a further email to Mr Botha dated 11 November 2024 of which a copy is attached as annexure **"C"**.

6.3 The email of 11 November 2024 was also sent to me and to the first respondent's attorneys, Hurter Spies Inc. In the latter email, Dr Venter states that his previous request was not adhered to. It is further to be noted from the foot of annexure **"C"** that Mr Botha acknowledged on 24 August 2024 the email from Dr Venter which was sent on Friday, 23 August 2024 and to which the letter (annexure **"B"**) was attached. The email of Dr Venter appears on the second page of annexure **"C".** Mr Botha responded to the email of 11 November 2024 in an email dated 11 November 2024 which email was also copied to me. A copy of the latter email is attached hereto as annexure **"D".**

6.4 Dr Venter is also no longer a shareholder of the first respondent and moved out of Kleinfontein in December 2024.

6.5 The averments made by the first applicant in paragraphs 1.3, 2.4, and 2.5 of the founding affidavit with reference to Dr Venter are misleading and incorrect.

6.6 There are also no confirmatory affidavits of the second and third applicant to substantiate the first applicant's averment in paragraph 1.3 of his founding affidavit.

7. RELIEF SOUGHT IS NOT CLEAR:

7.1 The reference in prayer 1 of the notice of application for leave to appeal read with the founding affidavit is ambiguous. There is no application for leave to appeal against the *"whole of the judgment and order"*. The applicants' grievance is not directed at the order made by the court *a quo* for a *mandamus* against the second respondent ("COT") in par 163.1 of the judgment but at the refusal to grant also a

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final interdict which was sought in prayer 1 of the notice of motion in the court *a quo*.

7.2 The *mandamus* was sought in prayer 2 of the applicants' notice of motion in the court *a quo*.

8. **THE ISSUE OF NON – JOINDER:**

8.1 The applicants fail to deal with the non-joinder issue with reference to the refusal of the final interdict sought by the court *a quo*.

8.2 The Court *a quo* in paragraph 120 of its judgment did not find it necessary to pronounce on the non-joinder issue because the court dismissed the relief sought for a final interdict on its merits.

8.3 For purposes of their *locus standi,* the applicants were joined in the Court *a quo* in their personal capacities having an interest in the development at Kleinfontein as shareholders of the first respondent and their alleged interest in the upholding of laws such as "SPLUMA", the "By-Law", "the Scheme" and the Building Standards Act.[1] The applicants did not rely on the broader standing in terms of section 38 of the Constitution and did not purport to act on behalf of any other shareholder or to act in any representative capacity.

8.4 Specifically with reference to prayer 1 of the notice of motion (final interdict relief) the first respondent raised as a point *in limine* in paragraph 4 of its answering affidavit in the court *a quo* the non-joinder of fifty -two (52) individuals and the non-joinder of the trustees of two trusts who have bought shares in the first respondent

[1] The acronyms used by the applicants.

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and who are members. The names of the 52 individuals and their addresses and shareblocks (demarcated areas of use of the immovable property) in relation to the properties of the first respondent were set out in paragraph 4.3 of the first respondent's answering affidavit. The names of the two trusts and their allocated portions of land were also set out.

8.5 The relevant portion of the relief sought in prayer 1 of the notice of motion in the Court *a quo* read as follows: [2]

" 1. That the First Respondent be interdicted from commencing or continuing with the following activities or allowing such activities to commence or continue:

1.1 The construction and development of any buildings or dwelling houses;

1.2 The setting out of any additional erven, alternatively stands, that will cause any expansion of the existing unlawful township known as the Kleinfontein Nedersetting on the properties mentioned hereinbelow;

1.3 Providing any further services (including water, electricity, sewerage, stormwater and sanitation) to any additional erf or stand situated within the unlawful township;..."

8.6 The relief sought was much wider than the belated attempt in paragraph 3.9 of the founding affidavit in the present application to narrow the ambit down to the first respondent and to refer only the construction and development of <u>new</u> buildings and dwelling houses, omitting also to mention the existing infrastructure such as roads and other services which have been put in place at high cost by the first respondent and capital expended by shareholders through purchasing of their shares to enable the first respondent to put the infrastructure in place so as to

[2] Reading somewhat differently from the summary in paragraph 3.9 of the founding affidavit in the present application.

enable them to use a part of the immovable property and to erect dwelling houses on their allocated stands.

8.7 The notice of motion followed with a description of the eight properties of the first respondent on which the development has taken place which property descriptions, incidentally, were incorrect in several respects (save for one description in paragraph 1.4 of prayer 1) when compared with the property descriptions in the deeds office.

8.8 In paragraph 3.7 of its answering affidavit, the first respondent gave an accurate description of the properties supported by a copy of the property descriptions obtained from the office of the registrar of deeds attached as an annexure. Notwithstanding this, the incorrect property descriptions are repeated in paragraph 5 of the founding affidavit in the present application except for the description in paragraph 5.1.1 which is correct.

8.9 With reference to the non-joinder issue raised, the first respondent in paragraph 4.2 of its answering affidavit alluded again to the incorrect property descriptions that do not accord with the records of the registrar of deeds.

8.10 Furthermore, regarding the 52 persons and trustees on behalf of the trusts, the first respondent alluded to the fact that they have shares in the first respondent and are contractually entitled (just as the applicants were) to construct a dwelling or develop the relevant portion of land subject to the deed of incorporation of the first respondent and its Internal Rules but have not yet commenced or finalised same yet.

8.11 In paragraph 4.4 of the first respondent's answering affidavit it was stated that the aforementioned persons have a direct and substantial legal interest in the order

that the court may grant in respect of the relief sought by the applicants because it affects their right to build on and to develop the portions of the property assigned to the shares.

8.12 In paragraph 4.5 of the first respondent's answering affidavit it was further pointed out that "KSK Finansiële Koöperatief Beperk" furnished financing in respect of many of the properties and also has a direct and substantial legal interest in respect of the relief sought by the applicants.

8.13 In terms of the Share Blocks Control Act[3] the very essence of a share block scheme including the definition and section 4 of the Act, entails a right or interest in the use of immovable property or part of the immovable property.

8.14 Apart from the legal interest of the said members and the point *in limine* raised by the first respondent, no steps have been taken by the applicants to join the said persons. This in itself forms a ground on which the application for a final interdict could not succeed. The enforcement of a land use scheme which affects the rights of people on property to which the scheme applies requires their joinder. [4]

8.15 Over and above the raising of the point of non-joinder by the first respondent a court can raise it *mero motu.*[5]

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[3] No 59 of 1980
[4] **Johannesburg City v K2016498847**(Pty) Ltd 2022(3) SA 497 (GJ) at par [20].
[5] Herbstein & Van Winsen, ***The Civil Practice of the Superior Courts of South Africa,*** Sixth Edition, Dendy & Loots, Juta, Volume 1, at p. 7-3.

9. **DISCRETION OF THE COURT *A QUO* AND ANSWER IN GENERAL:**

9.1 The court has a discretion to refuse a final interdict. This is because it is a drastic remedy.[6] The discretion is bound up with the question of whether the rights of the other party complaining can be protected by any other ordinary remedy. [7]

9.2 In the context of this case a final interdict is even more drastic and would impede the use and enjoyment of several persons of their rights and enjoyment of the use of their property through the operation of the share block scheme and as members of the first respondent whilst an application for rezoning in terms SPLUMA is pending in order the regularise the township and which can conceivably be rezoned by the COT.

9.3 The interdict would deprive a vast number of members of the first respondent of their right to housing in terms of section 26 of the Constitution including section 26(3). An attenuation or obliteration of the incidents of occupation falls within section 26(3) of the Constitution. [8]

9.4 There has not been any averment by the applicants or any finding by the court *a quo* that the share block scheme operated by the first respondent is in contravention of section 5 of the Share Blocks Control Act. The first respondent has also demonstrated in its answering affidavit (paragraph 3.14) and with proof by supporting documents that on 2 March 2018, the Registrar of Companies approved the former co-operative's conversion to a share block company. Part of the supporting documents attached was an architect certificate issued in terms

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[6] Erasmus, **Superior Practice, Third Edition**, Volume 2 at p. D6 – 16A.
[7] CD Prest: ***The Law and Practice of Interdicts*** (Juta), at pp. 47 – 48. See also: **Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll en 'n ander** 1986(1) SA 673 (O); **United Technical Equipment Co (Pty) Ltd v Johannesburg City Council** 1987(1) SA 343 (T) at 346.
[8] **Motswagae and others v Rustenburg Local Municipality and another** 2013(2) SA 613 (CC) at p.617 C – D.

of section 5 (2) of the Share Blocks Control Act. The applicants' case has been founded on non-compliance with the Building Standards Act, SPLUMA, the By Law and the Scheme.

9.5 For the reasons given by the court *a quo* in the main judgment and in the judgment refusing leave to appeal, it submitted that in the exercising of its discretion, the court afforded the most suitable alternative remedy to the applicants in the form of a *mandamus* against the COT.[9] This was also a less drastic remedy than a final interdict.

9.6 When a court has exercised its discretion, the scope of interference by a court on appeal is limited. It means that a court of appeal is not entitled to interfere with the exercise by the lower court of its discretion unless it failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously, or exercised its discretion upon a wrong principle or as a result of the material misdirection of the facts or the law.[10]

9.7 It is submitted that the applicants failed to acknowledge the discretion of the court *a quo* and to the contrary alleged that the court did not have discretion. Such is fatal to the present application. As a result, the application lacks specific averments in what respects the court *a quo* failed to exercise its discretion judicially with reference to any material misdirection of the fact or the law. [11]

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[9] See inter alia paras 102 and 103 of the main judgment and paras (28) – (34) of the judgment refusing leave to appeal.

[10] **Malan & Another v Law Society, Nothern Provinces** 2009(1) SA 216 (SCA) at 222 F-G. See also paragraph (32) of the judgment of the court *a quo* refusing leave to appeal and the reference to **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited** 2015 (5) SA 245 (CC).

[11] See also paragraph (22) of the judgment of the court a quo refusing leave. The present application is similarly defective.

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9.8 An application for leave to appeal or an appeal is not a rehearing. The application for leave to appeal is to a large extent, albeit in summary form, a repetition of the founding affidavit in the application in the court *a quo* to which the first respondent has answered. [12]

9.9 The applicants rely on authorities that the court did not have the discretion not to issue an interdict because of the illegality of the development. [13] However, the authorities relied upon[14] all related to instances where local authorities sought to enforce the provisions of a town planning scheme and where the courts have pointed out that the public authorities have a statutory duty to uphold the law. [15]In other words, the remedy sought by the public authorities was of a public law nature and not of private law nature as was the relief sought by the applicant's in casu with reference to prayer 1 of the notice of motion which was in the form of common law interdict.

9.10 The applicants sought an appropriate other remedy, namely a public law remedy in the form of a *mandamus* against the second respondent which the court granted. It is an adequate remedy. There are in turn a range of remedies for the second respondent (COT) in respect of SPLUMA.[16] Town planning schemes and zoning fall within the meaning of "municipal planning" and the constitutional competence of a municipality.[17] The COT also has certain powers in terms of the Building Standards Act to grant to an owner or a person the use of a building prior to the issuing of an occupancy certificate.[18] In ***Wierda Properties***[19] this

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[12] See for instance paragraphs 3.4 to 3.12 of the founding affidavit in the present application.
[13] See paragraph 1.9 (wrongly numbered) at p. 19 of the founding affidavit.
[14] See paragraphs 1.3 to 1.4 (erroneously numbered paragraphs) at p. 14 of the founding affidavit and paragraphs 6.9 to 6.12 at pp. 15 -16.
[15] See also paras (28) – (34).
[16] Section 32 of SPLUMA.
[17] **Johannesburg Municipality v Gauteng Development Tribunal** 2010(6) SA 182 (CC) at paras [57] and [63].
[18] **Wierda Properties v Sizwe Nstsaluba Gobodo** 2018 (3) SA 95 (SCA) at p. 103B-G
[19] Supra at 103 G

Honourable Court said: " *As stated the primary focus of the statute is not on private contractual relationships, but on those between local authorities and builders, users and occupants*".

9.11 As far as the erection of residential houses or dwellings is concerned, it is not that the first respondent does so but the shareholders/members of the first respondent in terms of their rights in terms of their shareholding/membership in the shareblock scheme. To this extent, it is submitted that section 4 of the Building Standards Act does not apply to the first respondent.[20]

9.12 The applicants do not make any averment of substantive non-compliance with building standards in that the dwellings or other buildings do not meet the requirements of building regulations so that they present safety risks or are not suitable for intended use or harm or a reasonable apprehension of harm, or that the buildings do not comply with section 10 of the Building Standards and that the court misdirected itself in failing to take such into account. The use and occupation of buildings are not prohibited by section 4(1) of the Building Standards Act[21].

9.13 A key feature of the applicant's case is that the COT cannot approve any building plans because the properties are not correctly zoned in terms of SPLUMA, the Bylaw and the Scheme for residential development. [22] This lack of compliance with the Scheme the first respondent submits is not incurable and the COT has the power to rezone the development so that the township complies with all the laws.

9.14 The applicants reap the benefits as shareholders and exercise their rights in terms of the share block scheme and occupancy within the share block scheme for a number of years. It was pointed out in paragraphs 3.18 and 3.19 of the first

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[20] **Wierda Properties** (supra) at par [15].
[21] **Wierda Properties** (supra) at par
[22] Paragraphs 1.5 to 1.8 of the founding affidavit at pp. 17 -18 of the present application.

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respondent's answering affidavit that the second applicant and Dr Venter (fourth applicant in the court *a quo*) were directors of the first respondent between August 2019 and November 2020 and the first applicant a member of the formalising committee during the said period and therefore an integral part of steps to formalise and regularise the township development.

9.15 The applicants sought to cause serious harm to the functioning of the first respondent by influencing and encouraging shareholders of the first respondent to withhold levies and not to pay any financial obligation towards the first respondent. Ironically, which actions could lead to the demise of the first respondent and sabotage its whole endeavour to obtain approval for the township development and to legalise the development with the COT which the applicants claim has not been done with the necessary speed. For this reason, the court *a quo* granted an interdict against the applicants (cited as respondents) in the application brought by the first respondent under case number 6713/2022.[23]

9.16 The first respondent has pointed out in paragraphs 3.12 to 13.13 of its answering affidavit that the current board of directors of the first respondent has embarked on a committed campaign to formalise the Kleinfontein township, to finalise incomplete procedures, to obtain all necessary approvals to comply with all the statutory and other requirements. For this purpose, a variety of professionals including town planners, environmental specialists, engineers land surveyors and other necessary specialists have been employed and the submission of the continuation and finalisation of an application in terms of section 60 of SPLUMA dated 24 August 2017 has been submitted to the municipality. The progress with the application has been explained with the necessary supporting documents attached to the answering affidavit in detail.

[23] Paragraph 164.1 of the main judgment and order granted.

9.17 The Court *a quo* also referred to the fact that the initial application for township development process was hamstrung by the final declaration of constitutional invalidity of 2 chapters of the Development Facilitation Act, 67 of 1995 by the Constitutional Court[24]

9.18 The Court *a quo* correctly found that the second respondent has a duty to enforce the relevant laws relating to land use planning and building regulations.[25]

9.19 For the purpose of affording the applicants a suitable public law remedy instead of the common law remedy of a final interdict, the Court also relaxed the *par-delictum* rule[26] which in itself involves the exercising of discretion.[27]

9.20 There are meritorious considerations in this matter as to why the matter should rather be left to the municipality for purposes of township development and compliance with building regulations in the exercising of the court's discretion. In enforcing the relevant laws, the municipality has a wide range of options as to how it wishes to enforce the law in all of the present circumstances.[28] Therefore, it is best to leave it in the hands of the municipality, and the Court a quo was, with respect, quite correct in doing so. It is submitted that it also accords with the separation of powers doctrine.

9.21 There is not any ground raised in the application for leave to appeal which would establish a basis, on which a court of appeal would interfere with the discretion exercised by the Court, and no reasonable prospect of success exists or a compelling reason exists for the court of appeal to interfere.

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[24] **Johannesburg Municipality v Gauteng Development** (supra). See paragraphs 34 to 36 of the main judgment of the court a quo.
[25] Par 117 of the main judgment.
[26] Par 127 of the main judgment.
[27] **Afrisure CC v Watson NO** 2009(2) SA127 (SCA) at 143 A-B
[28] Section 32 of the **Spatial Planning and Land Use Management Act,** 16 of 2013 (SPLUMA).

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9.22 It is evident from the judgment that for purposes of consideration of the granting of the final interdict (as opposed to the *mandamus*), the Court was disinclined in the exercising of its discretion to relax the *par-delictum* rule in favour of the applicants because of their unclean hands and own moral turpitude.[29]

9.23 The Court *a quo* quite correctly found that it was common cause that the applicants' own use of the property was unlawful and illegal. [30]

9.24 At the heart of the interdict, which the applicants sought was to deprive the first respondent and other shareholders and holders of contractual rights in the first respondent of the rights which they themselves enjoy. It is quite clear that the court, in the exercising of its discretion, would not have relaxed the *par delictum* -rule in favour of the applicants for purposes of granting a final interdict in the circumstances. After all, what prejudice or harm can the applicants claim when they enjoy the fruits and benefits of the scheme? Their dishonourable conduct further flows from the fact that they unlawfully induced other shareholders to withhold levies from the second respondent.

9.25 As far as a clear right that had to be established by the applicants is concerned, it is submitted that the Court correctly found that the second respondent, with reference to the Constitution and the relevant local government laws, was the responsible authority that should enforce these laws.[31]

9.26 The Court correctly also found that with reference to the municipal services (which formed part of the interdictory relief sought), the applicants had no clear

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[29] Par 126 of the main judgment.
[30] Par 105 of the main judgment
[31] Par 106 of the main judgment. It is also evident from section 32 of SPLUMA which provides various mechanisms for enforcement.

right to do so as such a right could not be located in the memorandum of incorporation of the second respondent. [32]

9.27 It is submitted that applicants have no reasonable prospect of success on appeal.

9.28 As to the consideration of whether a compelling reason exists to grant leave to appeal, the question whether a final interdict should have been granted is fact-specific. It does not raise a discreet issue of wider public importance, which in this matter would have a bearing on future matters. In particular, also, the question of whether an alternative remedy exists, which entails exercising a discretion by the Court a quo, is fact-specific and does not constitute a compelling reason. These issues were decided in the present matter on the facts and circumstances of the case based on well-known principles and elements applicable to final interdicts.[33]

9.29 It is submitted that the Court a quo's judgment is also not in conflict with other judgements. [34]

9.30 In addition, the question whether a compelling reason exists, cannot be divorced from the merits of the matter. As demonstrated above, no reasonable prospect of success exists in particular considering the fact that an adequate alternative remedy was sought and was granted by the Court.

9.31 It is also incorrect that a reconsideration by a court of appeal would be for the benefit of the occupiers of Kleinfontein, as the applicants contend. The applicants cannot speak on behalf of the other occupiers. They were not before the Court and were not joined. The applicants also did not establish a basis for broader

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[32] Paras 107 – 108 of the main judgment.
[33] See also par (41) of judgment in the application for leave to appeal.
[34] Par (40) of the judgment refusing leave to appeal.

standing in their founding affidavit and were not acting in the interest or for the benefit of the other occupiers or shareholders or in the broader public interest.

9.32 Leave to appeal would only serve the interests of the applicants and their own personal agendas against the first respondent which ultimately culminated also in the interdict that was granted by the Court a quo in the separate application under case number 6713/2022.

9.33 I turn to answer briefly seriatim to the individual paragraphs in the founding affidavit avoiding repetition of what has been stated above.

10. **AD PARAGRAPHS 1 AND 2:**

I have dealt with the issue concerning the fourth applicant in paragraph 6 above.

11. **AD PARAGRAPHS 3.3 TO 3.8:**

11.1 The first respondent fully accepts and it has not been in dispute that it has to comply with SPLUMA, the Bylaw, the Town Planning Scheme and the Building Standards Act. SPLUMA only came into operation on 1 July 2015.

11.2 The first respondent has not been in existence for decades but only since March 2018. Various attempts were made by the first respondent's predecessors and its governing structures in order to obtain approval for rezoning and township development. It is in the interest of residents to do so. It is not as if the laws were just ignored. Kleinfontein has also been hamstrung in its process to obtain approval as has been alluded to in the judgment of the Court *a quo*.

11.3 The first respondent fully explained in the Court *a quo*, as also referred to in paragraph 9.17 above, what has been done and what is being done to regularise

the township development. It is not that the first respondent and its directors are sitting idle on the matter. It is an elaborate process involving consideration by various departments of the COT. The first respondent cannot stop its functioning in the interest of its members and residents in Kleinfontein. It must comply with its memorandum of incorporation and contractual obligations failing which it would lead to the demise of Kleinfontein and its entire development thus far.

12. **AD PARAGRAPH 3.9:**

12.1 The contents of this paragraph contain subtle but material differences compared to the formulation of prayer 1 of the relief sought in the notice of motion a quo. The relief sought was not confined to only new buildings and dwelling houses. I have referred to this in paragraphs 8.6 – 8.7 above.

12.2 It has also already been pointed out that the relief sought to prohibit any further services would adversely and seriously affect the existing rights of shareholders of the first respondent. This also applies to prohibiting the setting out of stands for existing members. I have also dealt with this aspect in paragraphs 8 and 9.3 above.

13. **AD PARAGRAPH 3.11:**

Considering the circumstances of each case and a development, the municipality has a range of remedies in terms of SPLUMA, the By-Laws, the Scheme and the building standards act to enforce laws and to regularise development. Again, the first respondent and its board of directors did not exist decades ago.

14. **AD PARAGRAPH 5.1**

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14.1 Except for the property description in paragraph 5.1.1 of the applicants' founding affidavit, the remainder of the property descriptions in this paragraph do not accord with the property descriptions of the offices of the registrar of deeds and are, in several respects, incorrect.

14.2 As pointed out before, the first respondent provided the Court *a quo* in paragraph 3.7 of its answering affidavit with the correct property descriptions. Notwithstanding this, the applicants persist in the present application with incorrect property descriptions to which the final interdictory relief which they sought in prayer 1 of the notice of motion pertains. The applicants never attempted to amend the relevant portion of prayer 1 in the notice of motion containing the errors with the property descriptions.

15. **AD PARAGRAPHS 5.2 TO 5.11:**

15.1 I do not intend to traverse each and every paragraph as the same averments were made in the founding affidavit in the Court *a quo* which were dealt with by first respondent. The history of the development has also been dealt with by the first respondent and in the main judgment of the Court *a quo*.

15.2 The applicants oversimplify the history. Ironically, they invested and actively participated in the "unlawful township" as they repeatedly call it.

15.3 I need to point out that the procurement of approvals by the predecessors of the first respondent and its board of directors was not without difficulty considering changing public bodies and legislation. The second respondent (COT) was also not initially involved by virtue of the fact that Kleinfontein at first was located within

the area of the Kungwini Municipality.[35] It was only since the enactment of SPLUMA in 2015 and with the adoption of the Scheme thereafter and the repeal of the Development Facilitation Act with transitional provisions inserted in terms of section 60 of SPLUMA, that approval efforts could be taken further with the COT and after the registration of the first respondent in 2018.

15.4 The first respondent and its board of directors did not exist in 2010. It was disputed in the papers before the Court a quo that half-hearted attempts were made by the first respondent or its predecessor to regularise the housing development and to seek to obtain the necessary approvals.

15.5 The undertakings referred to in paragraph 5.10 were not idle and were *bona fide*, considering all the efforts made to obtain the necessary approvals.

16. **AD PARAGRAPHS 5.12 TO 5.13 :**

These averments are bald. They were dealt with and disputed in the Court *a quo*, and the Court did not make any such factual findings in favour of the applicants. The applicants do not allege that the Court *a quo* made any misdirections of fact.

17. **AD PARAGRAPH 5.15:**

It is denied that the applicants were entitled to an interdict for the reasons already given above and particularly also not entitled to the relief in the absence of a number of third parties who would have been adversely affected by such an interdict.

[35] Paragraphs 80 to 85 of the main jugdment in the court a quo.

18. **AD PARAGRAPHS 5.17 – 5.19:**

18.1 It is correct that the zoning of Kleinfontein is currently classified as "undetermined" in terms of the Scheme.

18.2 It is however incorrect that "undetermined" is confined to agricultural purposes. The uses referred to by the applicants are the primary uses in undetermined zoning. Several consent uses are permissible in terms of the Scheme. I attach a copy of an extract from Table B to the Scheme to illustrate all the permissible uses as annexure **"E"**.

19. **AD PARAGRAPHS 5.20 – 5.24:**

19.1 The contents of these paragraphs have been answered by the first respondent in the Court *a quo*. The allegations are simply untrue in particular the allegations of a lackadaisical approach. The Court *a quo* made no adverse findings against the first respondent in this regard, and there is no averment of any misdirection by the Court *a quo* in this regard.

19.2 The shareholders/members of the first respondent would have dismissed the board of directors if these averments against them were true.

19.3 In addition, the applicants have remedies in terms of the Companies Act and company laws to dismiss the directors if they fail to act diligently or breach their fiduciary duties towards the first respondent and its members.

19.4 It is simply untrue that the first respondent's board of directors has no serious intention to legalise the Kleinfontein Development. The first respondent, as

previously mentioned, explained in detail in the answering affidavit in the Court *a quo* what has been done as far as the application in terms of SPLUMA is concerned. To this extent, there is a dispute of fact.

19.5 There is also no merit in the overstatement of the so-called ever-expanding unlawful township.

20. **AD PARAGRAPHS 5.25 – 5.26:**

The "undetermined" zoning classification has been dealt with. The township is capable of being rezoned by the COT so that it complies fully with the Scheme and the By- law. The applicants have also not alleged that the application for rezoning is futile and that the township development is not capable of being regularized.

21. **AD PARAGRAPH 6:**

21.1 The contents of these paragraphs have already been dealt with before in paragraph 9 and need not be repeated. As also pointed out by the Court *a quo* in its judgment refusing leave to appeal, the authorities relied upon by the applicants relate to instances where local authorities applied for an interdict and exercised their statutory remedies. The applicants did not establish a case for a public law interdict in the form sought in prayer 1 of the notice of motion. It was founded on a common law interdict.

21.2 Furthermore, it is denied, that the Court *a quo* had no discretion and should have granted final interdictory relief. Where public law remedy is sought in a case of illegality, a court has wide discretionary powers to craft a just and equitable remedy in terms of section 172(1)(b) of the Constitution. It does not follow that

the only remedy is an interdict. Even where a statutory law remedy is exercised, the court has a discretion according to the circumstances of a case.[36]

21.3 Section 32 of SPLUMA provides various enforcement options and remedies that a municipality can exercise at its discretion. The applicants did not present evidence that they had called upon the municipality to exercise any of the enforcement remedies.

21.4 The provisions in SPLUMA are further amplified with enforcement powers afforded to a municipality in terms of the By-law, which includes enforcement powers and various options, including compliance notices and powers afforded to Development Compliance Officers.[37] The Building Standards Act also provide for enforcement powers and building control officers and the issuing of compliance notices.[38]

21.5 The aforementioned illustrates the wide scope of alternative remedies that can best be exercised by the municipality.

22. **AD PARAGRAPH 7:**

22.1 The contents of these paragraphs are mere repetitions of the averments in the Court *a quo.* They have also been answered by the first respondent in the Court *a quo,* and it need not be repeated. They were denied and are still denied. The averments of the applicants do not advance the case any further in an application for leave to appeal.

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[36] **BSB International Link CC v Readam South Africa (Pty) Ltd and Another** 2016(4) SA 83 (SCA) at paras [27] – [28].
[37] Sections 35 and 38 – Land Use Management By -Law of the COT of 27 March 2024.
[38] Sections 5, 6, and 10.

22.2 The Court *a quo* has correctly dismissed the final interdictory relief sought against the first respondent.

22.3 I have already dealt above with the discretion of the Court *a quo* in respect of an alternative remedy which was granted and it need not be repeated.

23. **AD PARAGRAPH 8:**

23.1 The contents of these paragraphs have, to a large extent, already been dealt with before in this affidavit in paragraphs 9 and 12 above and regarding the non-joinder of interested shareholders who would be as adversely affected in the event of an interdict sought in prayer 1 of the notice of motion.

23.2 To the extent that the applicants aver that the Court has erred in its findings in certain respects, it is denied.

23.3 As previously mentioned, the applicants have not established a case that the court misdirected itself in exercising its discretion.

23.4 I have also explained that in terms of the Share Blocks Schemes Act, the first respondent is contractually and legally bound to give effect to the rights of existing shareholders and members and their right to use parts of the immovable property for purposes of construction of dwelling houses.

23.5 The allegation that there is a strain on existing services or an absence of sufficient services is simply unsubstantiated.

23.6 The relief sought by the applicants was not confined to future conduct but would affect the existing rights of shareholders, as the relief was aimed at affecting the

2LS

continuation of construction of existing buildings or dwelling houses and not only the future commencement thereof. This would primarily adversely affect shareholders in the exercising of their rights of use. The first respondent no longer builds buildings. Only existing share block holders do so. The first respondent only maintains roads, sewage dams, water resources and stormwater.

23.7 The court correctly found that the *mandumus* was a suitable alternative remedy.

23.8 It is also incorrect, as alleged in paragraphs 8.25 to 8.31, that the municipality's enforcement powers are limited to existing illegalities. Section 32 (2) of SPLUMA is clearly directed also at appropriate preventative or remedial measures that may be applied by a municipality when seeking an order of court.

23.9 There is no merit in the contentions of the applicants.

24. **AD PARAGRAPH 9:**

The first respondent has no further submissions to make regarding this paragraph. This Honourable Court is well aware of the authorities and the test in an application for leave to appeal.

25. **AD PARAGRAPH 10:**

25.1 It is submitted that there is no compelling reason why leave to appeal should be granted for the reasons already stated before. There are also no conflicting judgements as alleged.

25.2 The authorities with reference to compliance with town planning schemes are well established including the duties and powers of municipalities in relation thereto.

25.3 There is no reasonable prospect of success on appeal, which is a relevant factor in determining whether a compelling reason exists.

25.4 This matter is fact and circumstances-specific, and the Court a quo applied the principles to the facts and circumstances and, in the process, exercised its discretion judicially in refusing the interdict.

25.5 It is respectfully submitted that should this Honourable Court decide to grant leave to appeal, such an appeal would not warrant the attention of this Honourable Court.

26. **AD PARAGRAPH 11:**

26.1 It is submitted for the reasons stated before there is no reasonable prospect of success on appeal and no compelling reason why leave to appeal should be granted.

26.2 Accordingly, it is respectfully submitted that the application for leave to appeal stands to be dismissed with costs.

R E P GENIS

THUS SWORN AND SIGNED AT Brooklyn ON THIS 01 DAY OF FEBRUARY 2025, BEFORE ME AS COMMISSIONER OF OATHS, THE DEPONENT HAVING ACKNOWLEDGED THAT SHE UNDERSTANDS THE CONTENTS OF THIS

AFFIDAVIT, HAS NO OBJECTION IN TAKING THE OATH AND REGARDS THE OATH AS BINDING ON HER CONSCIENCE AFTER COMPLYING WITH THE REQUIREMENTS OF GOVERNMENT NOTICE R1258, DATED 21 JULY 1972, AS AMENDED.

7183768-0 SGT
SEJENG L. L.

COMMISSIONER OF OATHS

BEFORE ME:

NAME:

CAPACITY:

ADDRESS

SUID-AFRIKAANSE POLISIEDIENS
STASIE BEVELVOERDER
2025 -02- 01
BROOKLYN
SOUTH AFRICAN POLICE SERVICE

RESOLUTION OF THE BOARD OF DIRECTORS OF
KLEINFONTEIN AANDELEBLOK (PTY) LTD
TAKEN ON 23 JANUARY 2025
("the Company")

RECORDED THAT:

The Company is currently involved in a legal dispute under the High Court case number 47522/2022 wherein the opposing parties have applied for leave to appeal to the President of the Supreme Court of Appeal under case number 1490/2024, after their application for leave to appeal was dismissed by the presiding judge.

RESOLVED THAT:

1. The Company's appointed Chairperson at the date of this resolution, being **RIAN EVERT PIETER GENIS** is authorised by the entire Board of Directors, to:

   1.1. Depose to any affidavit in connection and on behalf of the Company with regards to the aforementioned Application for Leave to Appeal; and

   1.2. Provide the appointed legal representatives of the Company with the necessary instructions to perform their duties in the best interests of the Company opposing the Application for Leave to Appeal; and

   1.3. Perform any and all actions that would be necessary to give effect to the Company's decision to oppose the Application for Leave to Appeal as well as any further legal proceedings that may arise from same.

RIAN EVERT PIETER GENIS
ID NO: 7211015026087
CHAIRPERSON

DANIËLFERDINAND BOSMAN DE BEER
ID NO: 6807245139086
VICE-CHAIRPERSON

LJS RCJ

JAN ADRIAAN BEYERS
ID NO: 7805195009084
DIRECTOR

MARTHINUS JOHANNES HENDRIK COETZER
ID NO: 5605165094088
DIRECTOR

JAN CONSTAND CONRADIE
ID NO: 9312275024081
DIRECTOR

PETRUS BAREND GELDENHUYS
ID NO: 7304135050085
DIRECTOR

GEORGE WILLEM VAN DYK
ID NO: 6112195061087
DIRECTOR

HENDRIK ALBERTUS CORNELIUS VAN NIEKERK
ID NO: 6112195061087
DIRECTOR

ANNEXURE "B"

Dr. J Venter
Rooihartbees 4
Wildpark
Kleinfontein
Rayton
1001

23 August 2024

Mr. C Botha
Dr TC Botha Inc Attorneys
16 Jan van Riebeeck Str
Ermelo

My whatsapp to yourself dated Tuesday 5 August 2024 @ 12:55 wit subsequent follow up non-answered or declined calls @ 17:17 and 20:12 refers.

Please accept this letter as confirmation that I Dr. Johannes Venter with ID No 5910245032086 has not received legal advice nor agreed to any appeal regarding case 4755/2022.

Could you kindly please remove my name from the appeal as I do not wish to be added in this matter.

Sincerely Yours

Dr. J Venter
0761876491

LVS

ANNEXURE "C"

Begin forwarded message:

From: Johannes Venter <drjventer@gmail.com>
Date: 11 November 2024 at 08:32:19 SAST
To: Conrad Botha <bothaconrad@gmail.com>, admin@hurterspies.co.za, rian.genis@kleinfontein.org.za
Subject: Re: Johan Venter Appeal case 4755/2022

More Conrad

My skrywe aan jou soos bo aangeheg met datum Vrydag 23 Augustus 2024 verwys.

Neem asb kennis dat dit tot my aandag gebring is dat my naam nie van die apel saak verwyder is soos versoek.

Mag ek weereens bevestig dat ek nie deel van die Henk Cilliers, Sakkie Booysen en Paul Mcmenamin groep is en dat ek dus nie deel uitmaak van hierdie regsgeding soos van na Regter Voster se uitspraak nie.

Mag ek u dus vriendelik maar ook dringend versoek om my naam van alle korrespondensie in hierdie saak te verwyder soos versoek in my skrywe 23 Augustus 2024.

Vrede Groete
Dr J Venter

On Sat, Aug 24, 2024 at 11:41 AM Conrad Botha <bothaconrad@gmail.com> wrote:

Goeie dag Johan,

Dankie, ek neem kennis.

Regards/Groete

Conrad Botha

Dr TC Botha Incorporated
16 Jan van Riebeeck Street, Ermelo.
341 The Rand, Menlo Park, Pretoria.
Office/Kantoor : 017 819 1881
Cell / Sel : 0836271158
Secretary : litigation@tcbothalaw.co.za

On Fri, Aug 23, 2024 at 12:09 PM Johannes Venter <driventer@gmail.com> wrote:

> Middag Conrad
>
> Ontvang asb vir jou aandag.
>
> Vrede Groete
> Johan

ANNEXURE "D"

From: Conrad Botha <bothaconrad@gmail.com>
Date: 11 November 2024 at 13:04:31 SAST
To: Johannes Venter <drjventer@gmail.com>
Cc: admin@hurterspies.co.za, rian.genis@kleinfontein.org.za
Subject: Re: Johan Venter Appeal case 4755/2022

Middag Johan,

Dankie vir jou epos.

EK het reeds by ontvangs van jou eerste epos jou weg gelaat by die regsaksie. Jou naam verskyn bloot bo-aan die kopstuk van die bestaande stukke.

Regards/Groete

Conrad Botha

Dr TC Botha Incorporated
16 Jan van Riebeeck Street, Ermelo.
341 The Rand, Menlo Park, Pretoria.
Office/Kantoor : 017 819 1881
Cell / Sel : 0836271158
Secretary : litigation@tcbothalaw.co.za

TABLE B: USE OF LAND AND BUILDINGS

USE ZONE NUMBERS AND NOTATION ON MAP	USE ZONES	USES PERMITTED	USES WITH CONSENT USE	USES NOT PERMITTED
(1)	(2)	(3)	(4)	(5)
	PUBLIC GARAGE (continued)		Shop Special Use	
19 	**UNDETERMINED**	Access Control Agriculture Farm Store Home Enterprise subject to Schedule 9	Agricultural Industry Airfield Animal Boarding Place Auctioneer Backpackers Beauty Salon Builder's Yard Camping Site Commune Conference Centre Equestrian Centre Flea Market Garden Centre Guest House Health Spa Helipad Institution Lodge Medical Consulting Rooms which do not comply with Schedule 9 Municipal Transitional Settlement subject to Schedule 16 Parking Site Petting Zoo Picnic Place	All other uses not listed in Columns (3) and (4)

TABLE B: USE OF LAND AND BUILDINGS

USE ZONE NUMBERS AND NOTATION ON MAP	USE ZONES	USES PERMITTED	USES WITH CONSENT USE	USES NOT PERMITTED
(1)	(2)	(3)	(4)	(5)
	UNDETERMINED (continued)		Place of Day Care for the Aged which does not comply with Schedule 9 Place of Child Care which does not comply with Schedule 9 Place of Instruction which does not comply with Schedule 9 Place of Public Worship Place of Refreshment Power Station Retail Industry which does not comply with Schedule 9 Shooting Range Shop Social Hall Solar Power Plant Special Use Sport and Recreation Ground Tourist Facilities Wall of Remembrance in conjunction with a Place of Public Worship Veterinary Clinic which does not comply with Schedule 9 Veterinary Hospital Zoo	
20	**PUBLIC OPEN SPACE**	Access Control Caretaker's Flat Club House	Agriculture Camping Site Flea Market	All other uses not listed in Columns (3) and (4)