

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
BLOEMFONTEIN

Case No: 1490/2024

*Court a quo case no: 4755/2022*

In the matter between; -

HENDRIK PETRUS CELLIERS

FIRST APPLICANT  
(first Applicant a quo)

PAUL ERNEST MCMENAMIN

SECOND APPLICANT  
(Second Applicant a quo)

IZAK JACOBUS BOOYSEN

THIRD APPLICANT  
(Third Applicant a quo)

JOHANNES VENTER

FOURTH APPLICANT  
(Fourth Applicant a quo)

AND

KLEINFONTEIN AANDELEBLOK (PTY) LTD  
(REGISTRATION NUMBER: 2018/209461/07)

FIRST RESPONDENT

THE CITY OF TSHWANE METROPOLITAN  
MUNICIPALITY

SECOND RESPONDENT

---

FILING SHEET: SECOND RESPONDENT'S ANSWERING AFFIDAVIT

---

**BE PLEASED TO TAKE NOTICE THAT** the second Respondent in the above matter herewith evenly serves and files the following:

- **SECOND RESPONDENT'S ANSWERING AFFIDAVIT**

DATED AT **BLOEMFONTEIN** ON THIS THE **31<sup>ST</sup>** DAY OF **JANUARY** 2025.

---

**MARIVATE ATTORNEYS INC.**  
**ATTORNEYS FOR THE RESPONDENT**

MARIVATE HOUSE  
1016 CLIFTON AVENUE  
LYTTELTON MANOR EXT 3  
CENTURION  
PRETORIA, 0157  
TEL: 012 341 1510

Email: [leseho@marivate.co.za](mailto:leseho@marivate.co.za)

[rhulani@marivate.co.za](mailto:rhulani@marivate.co.za)

**REF: MR MARIVATE/HENDRIK/LIT.255**

**C/O DU TOIT LAMBRECHTS INC**

15 WILCOCKS ROAD  
NOORDHOEK  
BLOEMFONTEIN  
9301

TEL: 051 433 1415

Email: [infobfn@dtllaw.co.za](mailto:infobfn@dtllaw.co.za)

**TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT**

**AND TO: DR TC BOTHA INC ATTORNEYS  
ATTORNEYS FOR THE APPLICANTS**

16 JAN VAN RIEBEECK STREET  
ERMELO

Tel: 017 819 1881

Cell: 083 627 1158

Email: [litigation@tcbothalaw.co.za](mailto:litigation@tcbothalaw.co.za)

[conradbotha@gmail.com](mailto:conradbotha@gmail.com)

**REF: C BOTHA/YK/LC0349**

**C/O MCINTYRE VAN POST**

12 BARNES STREET

WESTDENE

BLOEMFONTEIN

[christiaan@mcintyre.co.za](mailto:christiaan@mcintyre.co.za)

**MCINTYRE VAN DER POST INC**

**31-01-2025**

**TEL: 051 505 0200**

8:19





IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

BLOEMFONTEIN

SCA Case No: \_\_\_\_\_ / 2024

Court a quo Case No: 4755/2022

In the matter between:

**HENDRIK PETRUS CELLIERS**

First Applicant  
(First Applicant a quo)

**PAUL ERNEST MCMENAMIN**

Second Applicant  
(Second Applicant a quo)

**IZAK JACOBUS BOOYSEN**

Third Applicant  
(Third Applicant a quo)

**JOHANNES VENTER**

Fourth Applicant  
(Fourth Applicant a quo)

and

**KLEINFONTEIN AANDELEBLOK (PTY) LIMITED**  
(Registration Number: 2018/209461/07)

First Respondent  
(First Respondent a quo)

**CITY OF TSHWANE METROPOLITAN  
MUNICIPALITY**

Second Respondent  
(Second Respondent a quo)

---

**SECOND RESPONDENT'S ANSWERING AFFIDAVIT**

---

I, the undersigned,

**MAKGOROMETJA AUGUSTINE MAKGATA**

do hereby make oath and state:

## INTRODUCTION

1. I am an adult male employed by the second respondent ("**the City**") as the Group Head: Economic Development and Spatial Planning at the address 252 Thabo Sehume Street, Pretoria.
2. Unless the context indicates otherwise, the contents of this answering affidavit fall within my knowledge and are both true and correct. Where averments are made which fall outside of my personal knowledge, I attach the necessary documents hereto which are in my possession by virtue of my position.
3. Where I make allegations which are of a legal nature, I do so on the advice of the City's legal representatives which I accept to be correct.
4. I have read the applicant's founding affidavit in the application for leave to appeal. While the City does not intend to respond to each averment made therein, it is apposite to bring to this Court's attention what is set out hereunder.

## PURPOSE OF THIS AFFIDAVIT

5. The City is of the view that this application for leave to appeal has no prospects of success and leave to appeal ought not to be granted.

6. The purpose of this affidavit is to put facts before this Court regarding the Order handed down by Vorster AJ in the main application ("**the Vorster Order**") against the City and what the City has done thus far to ensure that effective steps are taken to compel compliance with the land use and development which took place on what is currently farm land.

7. In addition, and to the extent necessary, the City wishes to make it clear that the City has specified constitutional duties insofar as land use and building activities are concerned which the applicants failed to take cognisance of. To make this clear it is trite that the nature and the role of the City can be summarised in respect of the development in casu, ("**Kleinfontein**") as follows:

7.1. The new constitutional order conferred in the words of Cameron JA a "radically enhanced status on municipalities" which is "materially different" from the pre-Constitutional era. This is articulated in *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* 2007 (4) SA 276 (SCA) at para 37.

7.2. The new dispensation created Local Authorities (the City) that are profoundly democratic, ensures a

measure of self-government, is mandated to be developmental and functions in cooperation with, and under the supervision of, the national and provincial spheres of government.

7.3. The applicants are in conflict with certain members of the first respondent, Kleinfontein Andeleblok (Pty) Limited, a share block company ("**the share block company**"). The applicants seek relief primarily to compel the City to prosecute the share block company "represented by their directors" with whom the applicants are at loggerheads.

7.4. In respect of the prosecution process it is important to note that the relevant legislation, *inter alia*, provides for the demolition of the residential structures and other communal property over a protracted period of time. The eviction of 650 households and demolition of residences and communal structures to serve the community are in principle, not to the benefit of the community.

7.5. The narrow attack and the interim relief sought by the applicants to compel the City to prosecute the directors of the share block company will not resolve the issue of

establishing townships and providing the necessary services to the community.

7.6. Ironically, the land use complained of was executed and structures erected with the consent of the applicants over an extended period. The City is currently busy with law enforcement and has issued contravention notices to the share block company in respect of the properties referred to in the founding affidavit ("**the property**") in compliance with the Court Order. The contravention notices were founded on the following legislation:

7.6.1. the Spatial Planning and Land Use Management Act, 16 of 2013 ("**SPLUMA**") read with clause clauses 33(1) and 33(2) the Tshwane Land Use Scheme, 2024;

7.6.2. section 36 of the City of Tshwane's Land Use Management By-law 2016 (Amended 2024);  
and

7.6.3. the National Building Regulations and Building Standards Act 103 of 1977.

- 7.7. The notice procedure forms part of the process to compel proper compliance from the share block company.
- 7.8. Since the contravention notices were duly served on the empowered officers, who accepted service on behalf of the land owner, the City has not received any response from Kleinfontein nor has there been any compliance with the contravention notices.
- 7.9. Consequently, the City is in the process of bringing Court proceedings against Kleinfontein interdicting them from further contravening the legislation and also seeking an order compelling Kleinfontein to establish a township and municipal internal and external services. The City is in any event obliged to do so in terms of the relevant legislation.
- 7.10. The final interdict sought by the applicants is misplaced in the law enforcement process to address the different non-compliance steps that must be taken by the City in fulfilment of its constitutional duties. The City accepts its constitutional obligation to supervise the township establishment process and to ensure that the township is provided with such engineering services as it deems

necessary through the said process. The City also accepts its obligation to oversee the building plan and erection of structures.

7.11. As stated, the City has taken effective steps to compel proper compliance with its statutory obligations.

8. Any further order in this regard will be tautologous as this Court accepted in *Elmir Property Projects (Pty) Ltd t/a Elmir and Another v Bankenveld Homeowners Association (Pty) Ltd (522/2023 and 524/2023) [2024] ZASCA 141 (21 October 2024)* (paragraph 40).
9. If this application is granted and the matter goes on appeal, the real issue, which is the unlawful township establishment and statutory contravention, will not be solved.
10. The fact that the development of Kleinfontein settlement provides housing to a huge community has a unique and dramatic effect on the compliance processes of the respective statutory provisions which the City must comply with. As a general basis of the City's constitutional objectives, the City must strive within its capacity to achieve to provide services and promote development to the community of Kleinfontein.

11. The exceptional manner in which the Kleinfontein development came about and the fact that the applicants participated in this process makes the compliance with existing structures and municipal services complicated and can only be resolved with the assistance of engineering experts. To demolish these structures and services will not be to the benefit of the community and will render approximately 650 families homeless.
12. I am advised that it is in the interests of justice that this Honourable Court considers this affidavit in deciding whether or not the applicants ought to be granted leave to appeal and also in determining the merits of the appeal in the event that leave to appeal is granted. The acceptance of this affidavit by this Honourable Court will not prejudice any of the parties that participated in the proceedings before the court *a quo*.

#### **THE PROCEEDINGS IN THE COURT A QUO**

13. As is apparent from the judgment of the Court *a quo* (paragraph 58), the City did not participate in the proceedings pertaining to the main application.
14. Despite the City not participating, the City nonetheless has a right of access to Courts as guaranteed in section 34 of the Constitution. The City has an interest in this matter as the local



authority within which the property in question is situated and as the party which has authority to enforce the relevant legislation.

15. During February 2022, the City was served with a copy of the application launched in the Court *a quo*.
16. Upon receipt of the application that served before the Court *a quo*, the application was circulated to the relevant departments within the City, being the Economic Development and Spatial Planning Department and the Built Environment and Enforcement Department, for comments.
17. From the comments received from the Departments the City resolved not to oppose the application for the following reasons:
  - 17.1. Firstly, it was apparent to the City that the real dispute between the applicants and Kleinfontein was largely a shareholders' dispute, the background of which the City was not privy to and in which it was not necessary for the City to interfere;
  - 17.2. Secondly, the City was not opposed to execute the relief sought against it, to enforce the provisions of the National Building Regulations and Building Standards Act 103 of 1977 (**"the Building Standards Act"**), the Spatial Planning and Land Use Management Act 16 of 2013

("SPLUMA"), the City of Tshwane Land-Use Management Bylaw 2016 ("LUM Bylaw"), and the Tshwane Town-Planning Scheme, 2008 (revised 2014) ("the Scheme") (collectively referred to as "the relevant legislation"); and

- 17.3. Thirdly, given the numerous changes in administration within the City, there were different views and instructions given to officials on how to handle the issue of the Kleinfontein settlement. The current position is that the law enforcement proceedings have to proceed which in any event will be in compliance with the Vorster order.

Given the reasons above, the City decided not to oppose the application, nor to file a notice to abide.

#### **THE JUDGMENT AND ORDER OF THE COURT A QUO**

18. The Vorster Order against the City in the Court a quo stated:

"That the second respondent (the City of Tshwane Metropolitan Municipality) be ordered to immediately take steps to enforce all relevant laws relating to planning and building regulation in as far as it relates to the farms comprising the Kleinfontein settlement."

19. The reasons for the Vorster Order are set out in the judgment as follows:

- 19.1. The use of the property commenced in the early 1990s (Kleinfontein). The settlement constitutes a contravention of the Scheme. In terms of ordinance 40(2) or 58(2) of the Town Planning and Township Ordinance, the use of the properties in contravention with the Scheme constitutes a criminal offence (paragraph 82);
- 19.2. Kungwini Municipality and Metsweding District, in which the Kleinfontein farms were located, were absorbed into the City on 18 May 2011 and as a result the City obtained exclusive municipal, executive and legislative competence over the area where Kleinfontein is situated (paragraph 83);
- 19.3. SPLUMA confirms that municipalities are the appropriate authority to take decisions on matters concerning land use planning and land use management in line with the functional area of "municipal planning" which the Constitution has allocated to local government in Part B of Schedule 4 of the Constitution (paragraph 85);
- 19.4. In terms of section 26 of SPLUMA, an adopted and approved land use scheme has the force of law, and all landowners and users of land are bound by the provisions of such land use scheme (paragraph 86);

19.5. Section 32 of SPLUMA deals with the enforcement of an approved land use scheme and allows for a municipality to pass Bylaws aimed at enforcing its land use scheme (paragraph 87);

19.6. Section 58 of SPLUMA deals with offences and penalties for contravention of the Act and states that a person who uses land contrary to permitted land use in section 26(2) is guilty of an offence. Equally, a person who alters the form and function of land without prior approval in terms of SPLUMA for such alteration is guilty of an offence. Section 58(2) of SPLUMA provides that such person who is guilty of an offence may be sentenced to a term of imprisonment not exceeding 20 years or to a fine calculated according to the ratio determined for such imprisonment in terms of the Adjustment of Fines Act 101 of 1991, or both a fine and imprisonment (paragraph 88);

19.7. The land comprising Kleinfontein is used for purposes that are not permitted by the Scheme and the use of the land, including the continued expansion of the settlement, in contravention of the Scheme constitutes a criminal offence in terms of SPLUMA (paragraph 89);

- 19.8. The conclusion of all contracts for the sale of erven by the directors of Kleinfontein and its shareholders in contravention of the LUM Bylaw is a criminal offence (paragraph 93);
- 19.9. The land comprising the Kleinfontein settlement is used for purposes that are not permitted by clause 14(3) of the Scheme which limits the permitted land uses for properties that are zoned "undetermined" (paragraph 95);
- 19.10. The occupation of the buildings situated within Kleinfontein contravenes section 14(4) of the Building Standards Act as the buildings are occupied without certificates of occupancy having been issued in terms of section 4(1) of the Act and its regulations thus the occupancy of the buildings constitutes a criminal offence (paragraph 100);
- 
- 19.11. The City has a duty to enforce the relevant laws relating to the land use planning and building regulations and consequently has *locus standi* to apply for an order compelling the share block company to develop the property lawfully;
- 19.12. In deciding an enforcement mechanism, the City is implored to consider the extent of the breaches that

have occurred at Kleinfontein over the past 30 years  
(paragraph 119).

20. As stated hereinabove, the City accepts its constitutional obligation to ensure the establishment of a township on Kleinfontein which includes, as may be determined, the provision of engineering services. If in the future, the share block company or the owner of the property fall short in this regard, any affected party can approach a competent court for appropriate relief.
21. The applicants' contention that the order granted against the City is not an effective or adequate alternative remedy as argued in the application for leave to appeal was correctly rejected by the Court *a quo* (judgment in application for leave to appeal, paragraph 35).
22. In fact, since the granting of the Vorster Order, the City has begun taking the necessary steps to ensure that it complies therewith.
23. While the City takes such necessary steps, the share block company is not precluded from taking steps to comply with the relevant legislation, which steps include a land development application as contemplated in section 16 of the LUM Bylaw.

## THE PROSPECTS OF SUCCESS ON APPEAL

24. Before this Honourable Court grants the applicants leave to appeal, it should enquire whether the appeal will have a reasonable prospect of success, or whether there are any compelling reasons why the Court should be inclined to hear the appeal. In this case, I submit there are no such reasons.
25. It appears from the application that the applicants' gripe with the Vorster Order is the fact that the interdictory relief sought against the share block company was refused. The fact that this is the focal point of the application for leave to appeal is a further indication that the litigation between the applicants and the share block company is primarily a shareholders' dispute into which the City is being involved as a coercion tool.
26. Nonetheless, what is important for this Court to note is the fact that in enforcing the provisions of the relevant legislation against the share block company and/or the applicants will result in different permutations. The share block company will have to establish a township subject to the City's Town Planning Scheme and LUM Bylaws. In the event that this is successful and meets the requirements set by the City, further litigation will be unnecessary.

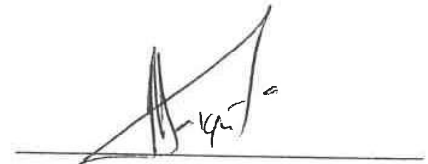
WJ  
M

27. Considering that there is a Court order which directs the City to enforce the relevant legislation and the fact that the City has begun taking steps in that regard, it is improbable that the share block company will continue with the expansion of Kleinfontein. If they, however, endeavour to proceed with development, the City will take effective steps to put an end to such further illegal conduct.
28. The Court *a quo* correctly found that the order granted against the City constitutes an adequate alternative remedy to the interdictory relief that the applicants sought against the respondent.
29. The so-called belief of the applicants is incorrect. As indicated, the effective steps to compel proper compliance are in place and will be enforced. This militates against the order constituting a satisfactory remedy (as alluded to in paragraphs 8.22 and 8.23 of the founding affidavit).
- 
30. In ***Hotz and Others v University of Cape Town 2017 (2) SA 485 (SCA)*** this Court held, in relation to the absence of an alternative remedy requisite, that the existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives



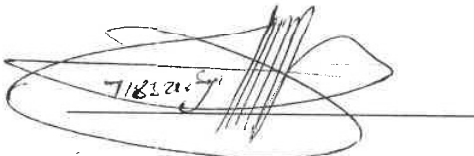
similar protection to an interdict against the injury that is occurring or is apprehended.

31. By enforcing the relevant legislation against Kleinfontein as well as any other person who is in contravention of the law, the unlawful and illegal conduct will wholly come to an end. In effect, the injury allegedly committed against the applicants will be apprehended.
32. It is unfathomable that as the City is taking the necessary steps to give effect to the Vorster Order that Kleinfontein will continue with the activities which the applicants sought to interdict.
33. With respect, the applicants' application has no prospects of success on appeal. The applicants have not made out a case on any compelling reasons that exist upon which this Court may hear the appeal. The application also does not raise issues of public importance or constitutional issues as alleged (paragraph 10.1 of the founding affidavit).
34. Consequently, the applicants' application for leave to appeal ought to be dismissed with costs.



**DEPONENT**

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at GARSFONTEIN on the 26<sup>th</sup> **JANUARY 2025**, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

  
71812157

**COMMISSIONER OF OATHS**

FULL NAMES: M. PRIN MAMATUBU

CAPACITY: SERGEANT

ADDRESS: 277 Egon Osoor Street  
GARSFONTEIN S.A.P.S.

