



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no: 645/2025

In the matter between:

BERTIE VAN ZYL (PTY) LTD t/a ZZ2

FIRST APPLICANT

[REG NO: 1965/003114/07]

DOORNBULT 624 BOERDERY (PTY) LTD

SECOND APPLICANT

[REG NO: 1996/016541/07]

and

THE MUNICIPAL MANAGER OF

THE POLOKWANE LOCAL MUNICIPALITY

FIRST RESPONDENT

THE CURRENT OCCUPIERS

SECOND RESPONDENT

THE MEC RESPONSIBLE FOR AGRICULTURE

AND RURAL DEVELOPMENT IN LIMPOPO

THIRD RESPONDENT

Neutral citation: *Bertie van Zyl (Pty) Ltd and Another v The Municipal Manager of the Polokwane Local Municipality and Others* (645/2025) [2026] ZASCA 133 (02 October 2026)

Coram: ZONDI AP, MAKGOKA and GOOSEN JJA and MPHAAHLELE and BLOEM AJJA

Heard: 08 September 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 02 October 2026.

Summary: Final interdict – requirements – Contravention of legislation – whether such contravention sufficient to secure a final interdict – need by applicant to establish, by evidence, a causal nexus between the contravention of legislation and the harm suffered by the applicant or the reasonable apprehension of harm.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Semenya DJP sitting as a court of first instance):

1. The application for leave to appeal is dismissed.
2. The applicants shall pay the first respondent's costs, jointly and severally, the one paying the other to be absolved.

JUDGMENT

Bloem AJA (Zondi AP, Makgoka and Goosen JJA and Mphahlele AJA concurring):

[1] Whether the applicants met the requirements for the granting of a final interdict lies at the heart of this application for leave to appeal. The Limpopo Division of the High Court, Polokwane (the high court) found that the applicants did not meet two of the three requirements and accordingly dismissed their application. The high court refused their application for leave to appeal against the order and judgment. The judges of this Court who considered the application referred it for oral argument in terms of s 17(2)(d)¹ of the Superior Courts Act 10 of 2013 (the

¹ Section 17(2)(b) and (d) of the Superior Courts Act reads as follows:
'(a) ...

Act). The parties were also directed to be prepared to argue the merits of the appeal, if called upon to do so. This Court must accordingly first establish whether leave to appeal should be granted and, if granted, whether the appeal must be upheld or dismissed.

[2] The second applicant, Doornbult 624 Boerdery (Pty) Ltd, is a subsidiary of the first applicant, Bertie van Zyl (Pty) Ltd, trading as ZZ2. The second applicant is the owner of portion 94 of the Farm Doornbult 624, an immovable property in the district of Polokwane, Limpopo. It leases portion 94 to the first applicant, who uses approximately 200 hectares of the 256,9596 hectares of portion 94 for the cultivation of tomatoes. The municipal manager of the Polokwane Local Municipality (the municipality) was cited as the first respondent without the municipality having been joined as a party to the proceedings. However, the litigation was conducted on the understanding that the municipality is, in fact, the first respondent. The second respondent has been cited as ‘the current occupiers of the subject property’ and the third respondent is the Member of the Executive Council responsible for Agriculture and Rural Development in Limpopo (the MEC).² Only the municipality opposed the application in the high court and in this Court.

[3] The municipality is the owner of portion 93 of the Farm Doornbult 624, which abuts portion 94. The Sand River runs north of portion 93, which lies between the Sand River and portion 94. The Sand River aquifer is an extremely valuable water

(b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.

(c) ...

(d) The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.’

² The applicants incorrectly cited the third respondent as ‘... the Department of Agriculture, Rural Development, Land and Environmental Affairs of the Limpopo Province’.

resource in the Polokwane area. The municipality channels treated sewage water into the Sand River. The treated water replenishes the aquifer. Commercial farmers, including the applicants, use water from the Sand River to cultivate agricultural products. During 1966, a praedial servitude was registered over portion 93, which entitled the owners of portion 94 to construct a weir in the Sand River, abstract water from it and channel water by means of a pipeline over portion 93 to portion 94. The servitude was registered in favour of portion 94, the dominant tenement, over portion 93, the servient tenement.

[4] During 2015, the applicants became aware that the municipality intended constructing a new wastewater treatment plant (the listed activity)³ on portion 93. They informed the municipality that the listed activity had the potential of damaging the pipeline along the servitude route and infringe on their right of servitude. Consultation between the municipality and the applicants culminated in an agreement between them to the effect that a new pipeline would be constructed by the municipality, also over portion 93, to channel water from the Sand River to portion 94, while allowing the municipality to construct the new wastewater treatment plant. The new pipeline has been constructed and is ready to be used. However, because of the breakdown in negotiations between the applicants and the municipality at that stage, the old pipeline had not been disconnected, and the new pipeline had also not been connected.

³ 'Listed activity', when used in Chapter 5 of the National Environmental Management Act 107 of 1998, means an activity identified in terms of s 24(2)(a) and (d), which permits the Minister, or an MEC with the concurrence of the Minister, to 'identify-

(a) activities which may not commence without environmental authorisation from the competent authority;

...

(d) activities contemplated in paragraphs (a) and (b) that may be excluded from the requirement to obtain an environmental authorisation from the competent authority, but that must comply with prescribed norms or standards ...'.

[5] It is undisputed that the applicants have made a significant financial investment in portion 94 and the farming operations on that land. Those farming operations are reliant on a permanent source of water for irrigation purposes. The applicants complained that the municipality committed unlawful or illegal activities (illegal activities) or allowed the illegal activities to be committed on portion 93. The alleged illegal activities consisted of the disturbance, disruption and/or damage of the pipeline located in the notarial servitude; commencement or continuation with construction work in respect of illegal structures; commencement or continuation with occupation or allowing such occupation of such illegal structures; commencement with or the conduct or continuation of any illegal activities which manifest or which has the potential to manifest in an illegal township on or from portion 93; activities in conflict with the agricultural zoning of portion 93 in the context of the legislation; the unlawful use of water from the borehole on portion 93, to the detriment of portion 94 and the servitude; and the use of an unlawful refuse pit in close proximity of the Sand River, to the detriment of portion 94, the Sand River and the servitude. The applicants alleged that the illegal activities disrupted, disturbed or damaged or have the potential of disrupting, disturbing or damaging portion 94, the servitude or the servitude route.

[6] The applicants perceived these activities as the initiation of an unplanned informal settlement or land invasion on portion 93. They also viewed the municipality's conduct as failure or refusal to prevent or stop certain illegal activities on portion 93. Consequently, the applicants instituted an application in the high court, the purpose of which, in their words, was 'primarily to prevent damage to [portion 94], the servitude and the servitude route'. They sought an order interdicting the municipality from (a) disrupting, disturbing or damaging or allowing the servitude to be disrupted, disturbed or damaged; (b) unlawfully using water from the

borehole on portion 93, to the detriment of portion 94 and the servitude; and (c) unlawfully using a refuse pit in close proximity of the Sand River, to the detriment of portion 94 and the servitude. They also sought an order that the municipality be interdicted from (a) commencing or continuing with construction work, or allowing such acts, in respect of any illegal structures; (b) commencing or continuing with the occupation or allowing such occupation of any illegal structures; and (c) commencing with the conduct or continuation of any illegal activities which manifest or which has the potential to manifest in an unlawful township development on portion 93.

[7] In addition, the applicants sought an order, in the form of a mandamus against the municipality and the MEC, that they be ordered to take steps to enforce the provisions of the statutory provisions. The applicants also sought an order that the municipality be ordered to ensure that all the unlawful activities be suspended with immediate effect and that all illegal structures on portion 93 be evacuated, demolished and removed within fourteen days from the date of the order sought.

[8] In summary, the allegations upon which the applicants relied for the relief sought are ‘water pollution, uncontrolled and disrupting wastage; and damage to the pipeline within the servitude’. They claimed that those factors will seriously impact on the quality and quantity not only of the water availability to them for irrigation purposes, but also the final agricultural product produced on portion 94. They claimed that, should the relief sought by them not be granted, they would sustain severe damage and adverse financial impacts on portion 94 and the farming operations.

[9] The high court dismissed the application, finding that the applicants ‘failed to present evidence of actual harm that the alleged unlawful activities have caused to their business’. Regarding the execution of the project relating to the alternative pipeline, the high court found that there was no reason to believe that the municipality would continue with the construction of the treatment works while the dispute between the applicants and the municipality remained unresolved. The high court also found that, instead of instituting an application for an interdict, the applicants had another satisfactory remedy available, namely the institution of criminal charges against anyone who contravened the statutory provisions. It is against the above findings that it must be determined whether the applicants should be granted leave to appeal against the order dismissing their application with costs.

[10] Leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard.⁴ The applicants relied on the former ground. I will consider the applicants’ submissions against the factual background to determine whether there is merit to the grounds on which they seek leave to appeal. The applicants bear the onus of convincing this Court that ‘... there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not good enough’.⁵ Leave to appeal should be granted only when there is a ‘... sound and rational basis for the conclusion that there are prospects of success on appeal’.⁶

[11] For an applicant to succeed in obtaining an order for a final interdict, it must meet three requirements. They are: (a) a clear right enjoyed by the applicant; (b) an

⁴ Section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013.

⁵ *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176; 2016 JDR 2214 (SCA) para 17.

⁶ *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) para 34. See also *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

injury (harm) to that right or a reasonable apprehension that such a right would be injured (harmed); and (c) the absence of a satisfactory alternative remedy.⁷ Each of the requirements must be met before a final interdict may be granted.

[12] Before I examine whether the applicants have been able to meet the requirements of a final interdict, it is pointed out that the municipality applied to this Court to adduce further evidence about events which occurred after 28 January 2024, when the application was argued in the high court. The applicants did not oppose the application, and the Court admitted the further evidence. It shows that, after 28 January 2024, the parties had further negotiations which culminated in the applicants agreeing to the relocation of the servitude line, on condition that they be permitted to undertake the relocation and that the municipality should compensate them for doing so. The relocation of the pipeline has been completed and the municipality has compensated the applicants therefor. The parties agreed that this effectively means that the applicants' concerns about the disturbance, disruption or damage to the pipeline fell away.

[13] In the applicants' supplementary heads of argument, the live dispute was described as 'whether, on the evidence now before this Court, the Applicants have established the requisites for final interdictory and mandatory relief in respect of continuing unlawful land use, occupation, structures and environmental/planning contraventions on Portion 93, and if so, what constitutionally competent form that relief should take'. In those heads of argument, they identified three issues. The first is whether the appeal retained any practical effect notwithstanding the relocation of the pipeline. The second is whether they have established the requirements of a final

⁷ *Ubuhlebezwe Municipality v Ramsunder* [2023] ZASCA 165; 2024 (5) SA 189 (SCA) para 14.

interdict in relation to the continuing land use and enforcement controversy. The third issue is how the relief sought should be framed.

[14] Regarding the first issue, the settlement of the issues relating to the servitude did not resolve all the issues which the applicants raised in their founding affidavit. The enforcement controversy and the land use issue remain live issues between the parties. In respect of the interdictory relief, in two paragraphs in their notice of motion, the applicants sought prohibitory interdicts against the municipality and in another paragraph, they sought a mandamus against the municipality and the provincial department. A mandamus is nothing other than an order granted in an application for a mandatory interdict. In terms of that order a person is required to perform a positive act to remedy a wrongful situation for which he or she is responsible, or to do something which he or she ought to do if the complainant is to have his or her rights vindicated. An example would be where a person is ordered to demolish a building encroaching on the complainant's land. If the act must be performed not by a private person but by a public official, the order is known as a mandamus,⁸ whereas if the act must be performed by a private person, the order is known as a mandatory interdict. It follows that, for a mandamus to be granted, an applicant seeking final relief, such as in this case, must meet the requirements of a final interdict.

[15] An applicant must identify the right which is to be protected by the interdict. Where an applicant applies for an interim interdict, the right that must be established is a right which, if not protected by an interdict, will be irreparably harmed or injured.⁹ It is sufficient if that right is *prima facie* established, although open to some

⁸ *Jordan and Another v Penmill Investments CC and Another* 1991 (2) SA 430 (E) at 436B-E. See also Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* vol 1 8 ed at 80 – 1.

⁹ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) paras 48-50.

doubt.¹⁰ The right sought to be protected by a final interdict, in contrast to an interim interdict, must be clearly established, hence the phrase ‘a clear right’. The degree of proof of the right is accordingly higher in the case of a final interdict.

[16] The high court found that the municipality did not dispute the applicants’ rights which they sought to protect by means of a final interdict. In this Court, counsel for the municipality, submitted that, since the issues relevant to the servitude were no longer disputed, the applicants had pleaded no facts upon which to ground any right which required protection. That submission cannot be sustained because the applicants stated in their founding affidavit that they required the court to protect their right to the lawful use and development of portion 93 and that they have a clear right in the application and enforcement of the legislation administered by the municipality on portion 93. The finding of the high court that the applicants established that they have a clear right is beyond question.

[17] The next enquiry is whether the municipality’s action or inaction in relation to the continuing unlawful land use and its failure to enforce statutory provisions injured the applicants’ rights. Alternatively, whether such action or inaction created a reasonable apprehension that such land use and failure of enforcement would injure those rights would be injured. To prove an ‘injury’ in the context of the land use and enforcement controversy for purposes of a final interdict, it is enough to show that one or the other of the applicants’ right have been invaded¹¹ or that there is a reasonable apprehension that they would be invaded. An applicant must adduce sufficient evidence to enable the court to find such invasion or a reasonable

¹⁰ *Edrei Investments 9 Ltd (in liquidation) v Dis-Chem Pharmacies (Pty) Ltd* 2012 (2) SA 553 (ECP) at 556A-B.

¹¹ *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* [2005] ZASCA 87; 2006 (1) SA 252 (SCA); [2006] 3 All SA 523 (SCA) para 21. Dictum applied in *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* [2014] ZASCA 169; 2015 (3) SA 532 (SCA); [2015] 1 All SA 55 (SCA) para 27.

apprehension of such invasion. In *Von Moltke v Costa Areosa (Pty) Ltd*¹² it was held that ‘... the party seeking relief must show that he is suffering or will suffer some injury, prejudice, or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general. It is not enough to allege that a nuisance is being committed, he must go further and at the very least allege facts from which it can be inferred that he has a special reason for coming to Court’. The dictum in *Von Moltke* has been approved by this Court in *V & A Waterfront Properties*.¹³ A final interdict will not be granted if an applicant cannot show an injury, prejudice, damage or invasion of a clear right (harm) or that there is a reasonable apprehension that his or her clear right would be harmed. As was held in *Von Moltke*, an applicant must place evidence before the court to prove that, as a result of the respondent’s action or inaction, he or she suffered harm or that he or she has a reasonable apprehension that, without the protection of the interdict, he or she would suffer harm.

[18] The activities about which the applicants complained have been set out above. I deal with each complaint and examine, in each case, whether such activity: (a) has been established; (b) has injured or harmed any of the applicants’ rights; or (c) created a reasonable apprehension of harm to the applicants’ rights. The applicants relied on the undisputed evidence of Mr Jacques du Toit, a registered town-planner, and Mr Johannes Botha, a registered professional environmental scientist. In essence, their reports were that the municipality and the provincial department had not complied with various pieces of legislation. Both deposed to supplementary affidavits as part of the further evidence that was admitted before the hearing of the application for leave to appeal.

¹² *Von Moltke v Costa Areosa (Pty) Ltd* 1975 (1) SA 255 (C) at 258D-E.

¹³ *V & A Waterfront Properties* fn 11 para 21.

[19] During 2016, the municipality adopted the Polokwane Town Planning Scheme, 2016 (the Scheme) in terms of s 24(1) of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). It is undisputed that when the application was heard in the high court, the zoning for portion 93 was ‘agriculture’. Section 183(2) of the Polokwane Municipal Planning By-Law, 2017 (the By-Law) provides that land may be used only for the purposes permitted by the adopted land use scheme. In terms of the Scheme, except for an agricultural building and a game reserve, nature reserve or a nature conservation area, only one building for the accommodation or convenience of human beings may be erected on portion 93. The applicants alleged that the municipality had embarked on or allowed the construction of buildings or other structures and the illegal occupation of those buildings or structures on portion 93, in contravention of the Scheme and the By-Law.

[20] On 8 March 2022, Mr du Toit visited portion 93 and subsequently submitted a written complaint to the municipality, on the first applicant’s instructions, about the alleged development of an informal township, the demarcation of sites by fencing them off and the erection of residential structures. Although Mr du Toit stated in his affidavit that he noticed the demarcation or fencing of stands and the erection of water tanks and residential structures, he did not state in his report or affidavit how many residential structures were erected on the demarcated stands. The municipality’s answer to the applicants’ allegations was that it relocated seven livestock farmers to portion 93 in terms of a resolution of the municipality’s council; and that, of the original number of relocated farmers, only five herdsmen of the farmers remain on portion 93. Those herdsmen reside in temporary structures on portion 93 until they and the municipality agree upon a more permanent solution.

[21] The Scheme provides that only one building may be erected on portion 93 for the accommodation or convenience of human beings. On the municipality's own version, it allowed other buildings, albeit temporary, to be erected on portion 93. The municipality also allowed agricultural land to be used for residential purposes. The evidence suggests that the municipality has contravened or allowed the Scheme and the By-Law respectively to be contravened. Whether accommodating five herdsmen in a few temporary buildings on portion 93 can be seen as 'the initiation of an unplanned informal settlement' or 'the commencement of an illegal township' is doubtful.

[22] The applicants also alleged that the municipality allowed the occupants of the buildings on portion 93 to occupy them without issuing a certificate of occupancy to them, as required by s 14 of the National Building Regulations and Building Standards Act 103 of 1977 (the Building Act). In terms of the Building Act, a municipality shall issue a certificate of occupancy if it is of the opinion that a building has been erected in accordance with the provisions of the Building Act. Although the municipality was aware that farmers and herdsmen occupied the temporary buildings, it did not issue certificates of occupation to them.

[23] On the instructions of the applicants' attorneys, Mr Botha prepared an environmental compliance audit for human settlement on portion 93. He visited portion 93 on 10 March 2022 and compiled an audit report dated 14 March 2022. In that report, he stated that 10 erven were demarcated; temporary buildings had been erected on some of those sites; temporary buildings, cattle kraals, chicken pens and boreholes had been erected on two sites; a solid waste rubbish pit had been dug; and a waterpipe from a borehole was supplying water to water tanks. He did not observe latrines or sanitation facilities. During his visit to portion 93 on 20 August 2026, he

observed ‘separately enclosed or fenced areas, makeshift structures, facilities associated with continued occupation, a water tank and an area in which livestock were being kept’.

[24] Mr Botha also reported that the clearance of potentially 2.7 hectares of indigenous vegetation of agricultural land for residential purposes on portion 93 was not in compliance with activities 27¹⁴ and 28(ii)¹⁵ of the Environmental Impact Assessment Regulations¹⁶ R983 of 2014, which were promulgated in terms of the National Environmental Management Act 107 of 1998 (NEMA). In terms of s 24F(1)(a) of NEMA, no person may commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted an environmental authorisation for the activity. In terms of s 24F(1)(b) of NEMA, no person may commence and continue an activity listed in terms of s 24(2)(d) unless it is done in terms of an applicable norm or standard.¹⁷ The municipality adduced no evidence

¹⁴ Activity 27 of Environmental Impact Assessment Regulations Listing Notice 1 of 2014, GN R983 GG 38282, 4 December 2014 is described as follows in the regulations:

‘The clearance of an area of 1 hectares or more, but less than 20 hectares of indigenous vegetation, except where such clearance of indigenous vegetation is required for-

- (i) the undertaking of a linear activity; or
- (ii) maintenance purposes undertaken in accordance with a maintenance management plan.’

¹⁵ Activity 28(ii) is described as follows in the regulations:

‘Residential, mixed, retail, commercial, industrial or institutional developments where such land was used for agriculture, game farming, equestrian purposes or afforestation on or after 01 April 1998 and where such development:

- (i) ...; or
- (ii) will occur outside an urban area, where the total land to be developed is bigger than 1 hectare; excluding where such land has already been developed for residential, mixed, retail, commercial, industrial or institutional purposes.’

¹⁶ Environmental Impact Assessment Regulations.

¹⁷ The relevant parts of s 24(2) of NEMA read as follows:

‘The Minister, or an MEC with the concurrence of the Minister, may identify-

- (a) activities which may not commence without environmental authorisation from the competent authority;
- (b) geographical areas based on environmental attributes, and as specified in an environmental management instrument, adopted in the prescribed manner by the Minister or an MEC, with the concurrence of the Minister, in which specified activities may not commence without an environmental authorisation from the competent authority;

...

- (d) activities contemplated in paragraphs (a) and (b) that may be excluded from the requirement to obtain an environmental authorisation from the competent authority, but that must comply with prescribed norms or standards ...’.

that an environmental authorisation has been granted for the activities about which the applicants complained, or that the activities were done in terms of an applicable norm or standard.

[25] Mr Botha further pointed out that the municipality had allowed the contravention of s 21(a) and (g) of the National Water Act 36 of 1998,¹⁸ in that a waterpipe from a borehole supplied water to water tanks. The applicants contended that they feared the contamination of water that was channelled through the servitude pipeline. On the assumption that the municipality's inaction amounted to a contravention of s 21(a) and (g), such inaction could not have been a ground upon which a reasonable apprehension of harm could be based. In addition, as the experts' evidence is the foundation upon which the applicants contended for the apprehension of harm, the experts should have indicated in their reports that they had regard to the licence and commented on the licence's shortcomings to the extent that the licence envisaged that boreholes could be constructed.

[26] That there was no indication that the boreholes could have caused harm or an apprehension of harm is demonstrated by the fact that on 2 June 2003, the Department of Water Affairs and Forestry issued a water user licence to the municipality in terms of which the municipality was permitted to construct 3 boreholes. The applicants point out that, when the present application was instituted, that licence had lapsed. That is irrelevant. The point is that the licence envisaged that boreholes could be constructed on portion 93. The licence would not have been issued if the borehole water posed a danger of contaminating the water in

¹⁸ The relevant parts of s 21 of the National Water Act read as follows:

'For the purposes of this Act, water use includes-

(a) taking water from a water resource;

...

(g) disposing of waste in a manner which may detrimentally impact on a water resource.'

the pipeline. The fact that the borehole, about which the applicants complained, was unlicensed, does not, by itself, cause harm to any of the applicants' rights or constitute a reasonable apprehension that their rights would be harmed.

[27] Mr Botha contends that the rubbish pit and future pit latrines, located 1.2 km from the Sand River, contravene s 21(g) of the National Water Act, since the disposal of rubbish and human waste may adversely affect the water in the Sand River, which will ultimately end up at portion 94. Neither in his report nor his affidavits did Mr Botha explain why and how such an eventuality would arise. Also, he did not explain how the pit latrines would detrimentally impact the water in the Sand River.

[28] The municipality has denied contravening any of the above statutory enactments. Save where otherwise shown above, the municipality seems to have breached or allowed the Scheme, the Building Act, NEMA and the regulations promulgated under it, SPLUMA, the By-Law and other pieces of legislation referred to by the applicants to be breached. The contravention of the above statutory and other provisions does not in itself entitle the applicants to the interdictory relief that they sought. They were required to establish, by evidence, that the contravention of the above provisions caused harm to them or that they reasonably apprehended that such contravention would cause them harm. It is in that regard that the applicants fell short. The contravention of the legislation (if any) did not, without more, amount to harm to the applicants' rights nor could the applicants reasonably have apprehended that such contravention would harm their rights in respect of which they sought protection.

[29] Because the applicants have failed to establish that the municipality has harmed any of their rights or that they reasonably apprehended such harm, an appeal

would have no reasonable prospects of success. The application for leave to appeal should accordingly be dismissed with costs.

[30] Before concluding, two aspects of the high court's judgment warrant comment, both relating to its treatment of the last two requisites for a final interdict, namely: (a) an injury or a reasonable apprehension of an injury; and (b) an alternative remedy. Ordinarily, we would not need to do so, as we dismiss the appeal. However, I differ from the high court on its approach to these two issues, lest it be assumed that, by dismissing the appeal, this Court endorses that approach.

[31] As regards the injury, the high court recited the three requisites for a final interdict, relying on this Court's judgment in *Hotz v University of Cape Town*.¹⁹ However, in the next passage, the high court held that the applicants had to establish 'actual injury' to obtain a final interdict. The court said:

'The Supreme Court of Appeal in . . . *Exxaro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd* . . . said the following:

"In my view, TDS failed to establish any injury ie 'something actually done which is prejudicial to or interferes with the applicant's right'."

As can be seen from the summary of the facts of this case, the applicant[s] failed to present evidence of an actual harm that the alleged unlawful activities have caused to their business.'

[32] As mentioned, an applicant for a final interdict must establish harm or a reasonable apprehension of harm. The high court limited the requisite to 'actual harm,' purporting to rely on this Court's judgment in *Exxaro Coal Mpumalanga*

¹⁹ *Hotz and Others v University of Cape Town* [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) paras 29-35.

(Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd (Exxaro).²⁰

This requires clarification. The case concerned a contractor's application for an interdict to prevent a bank from paying out an on-demand performance guarantee to the employer. The contractor alleged that the demand did not comply with the guarantee's strict contractual terms and that the claim was fraudulent. The contractor further alleged that, if the bank paid the employer in those circumstances, the contractor would suffer harm. After setting out the requisites for an interdict, this Court considered whether they were met. It stated:

‘In my view, TDS [the contractor] failed to establish any injury ie ‘something actually done which is prejudicial to or interferes with the applicant’s right’ The alleged injury was firstly, founded on ‘a fraudulent call’ on the guarantee, which – it was conceded – had not been established’

[33] Thus, the sentence relied on by the high court should be read in the context of the case in which the contractor relied on actual harm if an interdict was not granted. This Court did not suggest that an applicant for a final interdict can succeed only if they establish actual injury. The high court therefore misconstrued this Court’s statement in *Exxaro* and, as a result, misapplied the law.

[34] With regard to an alternative satisfactory remedy, the high court found that the applicants had a satisfactory alternative remedy, namely that they could have laid criminal charges against any person who acted in contravention of the above statutory provisions. Counsel for the municipality did not seek to defend that finding. Instead, he suggested that the applicants should have employed the appeal remedies contained in legislation such as SPLUMA and NEMA.

[35] By virtue of the drastic nature of an interdict, a court will not grant an interdict if the applicant has a satisfactory alternative remedy. The facts of each case will

²⁰ *Exxaro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and Another* [2022] ZASCA 76 para 14.

determine whether a remedy is satisfactory. In this case, on 6 May 2022, Mr du Toit lodged a complaint with the municipality on behalf of the applicants. The municipality did not respond to that complaint. By letter dated 30 March 2022, the applicants' attorneys requested the municipality to take steps to prevent harm to the applicants and to enforce the above legislation. There was also no response from the municipality to that letter. Given the municipality's inaction, the Acts to which counsel for the municipality referred did not afford the applicants, who were faced with ongoing contravention of statutory provisions, a satisfactory alternative remedy. In the circumstances of this case, I am of the view that the applicants did not have a satisfactory alternative remedy. The contrary finding of the high court cannot be supported.

[36] It remains to emphasise that the errors of the high court identified above have no bearing on the outcome of the application. Its order is ultimately correct. It is trite that an appeal does not lie against the reasons for judgment but against the substantive order of the lower court.²¹ Thus, whether or not a court of appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same.²² This is the case here.

[37] Regarding costs, the parties employed two counsel, respectively. They agreed that costs awarded to the successful party should include the costs occasioned by the employment of two counsel. I am of the view that the issues involved do not warrant the award of costs of two counsel.

[38] In the result, it is ordered that:

1. The application for leave to appeal is dismissed.

²¹ *ABSA Bank Ltd v Mkhize and Two Similar Cases* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) para 64.

²² *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 853 (A) at 854.

2. The applicants shall pay the first respondent's costs, jointly and severally, the one paying the other to be absolved.

GH BLOEM
ACTING JUDGE OF APPEAL

Appearances

For the applicants:

DJ van Heerden with Z Nyezi

Instructed by:

Joubert & May Attorneys, Tzaneen

Honey Attorneys, Bloemfontein

For the first respondent:

P Maluleke with V Moyo

Instructed by:

Kgatla Incorporated Attorneys, Polokwane

Lovius Block Inc, Bloemfontein.