THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 429/2019

In the matter between:

LEPELLE INDUSTRIAL AND MINING SUPPLIES CC	**APPLICANT**

and

STREAKS AHEAD INVESTMENTS (PTY) LTD	**FIRST RESPONDENT**
BOROKA FILLING STATION	**SECOND RESPONDENT**
ERF 344 ONTWIKKELING (PTY) LTD	**THIRD RESPONDENT**
THE CONTROLLER OF PETROLEUM PRODUCTS	**FOURTH RESPONDENT**
BA-PHALABORWA LOCAL MUNICIPALITY	**FIFTH RESPONDENT**
THE MINISTER OF ENERGY	**SIXTH RESPONDENT**
THE MEC, DEPARTMENT OF ECONOMIC DEVELOPMENT ENVIRONMENT AND TOURISM, LIMPOPO	**SEVENTH RESPONDENT**
THE MEC, LOCAL GOVERNMENT AND HOUSING LIMPOPO PROVINCE	**EIGHTH RESPONDENT**
REGISTRAR OF DEEDS	**NINTH RESPONDENT**

Neutral citation: *Lepelle Industrial and Mining Supplies CC v Streaks Ahead Investments (Pty) Ltd and Others* (Case no 429/19) [2020] ZASCA 133 (20 October 2020)

Coram: PONNAN, SALDULKER, MAKGOKA and SCHIPPERS JJA and GOOSEN AJA

Heard: 21 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 09h45 on 20 October 2020.

Summary: Application for special leave to appeal – full court upheld appeal and set aside temporary interdict restraining respondents from constructing service station and trading in petroleum products pending a review of administrative decisions in relation to site and retail licences – facts disclosing that no basis for orders sought and granted by the high court – subsequent administrative action to authorise third respondent not challenged – significant passage of time since trade in petroleum products commenced and present application – no likelihood that court would issue temporary interdict even if requisites established – leave to appeal refused – punitive costs payable in respect of third respondent.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tuchten, Kubushi and Janse van Nieuwenhuisen JJ sitting as a court of appeal): judgment reported *sub nom Streaks Ahead Investments (Pty) Ltd and Others v Lepelle Industrial and Mining Supplies CC* [2019] ZAGPPHC 514

1. The application for special leave to appeal is dismissed.
2. The applicant is ordered to pay the costs of the first and second respondents.
3. The applicant is ordered to pay the costs of the third respondent on the scale as between attorney and client, such costs to include the costs of two counsel.

JUDGMENT

Goosen AJA (Ponnan, Salduker, Makgoka and Schippers JJA concurring)

[1] This matter concerns an interdict to restrain the operation of a fuel filling station pending a review to set aside decisions to authorise its operation. It comes before this court by way of an application for special leave to appeal in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013 against an order setting aside the interdict. In terms of s 17(2)(*d*) the application for leave to appeal was referred for oral argument and, if granted, for the determination of the appeal.

The parties

[2] The applicant is Lepelle Industrial and Mining Supplies CC (Lepelle). It conducts the business of a fuel retailer, Impala Service Station, as the holder of a retail licence issued in terms of the Petroleum Products Act 120 of 1977 (the PPA). Impala Service Station is situated on the R71 Gravelotte Highway at the entrance to Namakgale Township, Phalaborwa, Limpopo Province.

[3] The first respondent is Streaks Ahead Investments (Pty) Ltd (Streaks Ahead). It was the owner of erf 3465, Namakgale B, a property situated within Namakgale Township (the property) upon which a shopping centre complex and fuel filling station was developed.

[4] The second respondent is Boroka Filling Station CC (Boroka), a licensed retailer of petroleum products that operates a fuel filling station on a portion of the property. The third respondent is Erf 344 Ontwikkeling (Pty) Ltd (Erf 344). It is the registered owner of the property, having purchased it from Streaks Ahead.

[5] The fourth and fifth respondents are, respectively, the Controller of Petroleum Products (the Controller)[1] and the Ba-Phalaborwa Local Municipality (the Municipality) whose decisions are the subject of challenge by Lepelle. The sixth respondent is the Minister of Energy (the Minister). Only Streaks Ahead, Boroka and Erf 344 participated in these proceedings.

The litigation history

[6] Lepelle commenced its application against the respondents in October 2014. The application consisted of two parts. In part A of the notice of motion it sought a temporary interdict against Streaks Ahead, Boroka and Erf 344 prohibiting them,

'from taking any further steps whatsoever to continue with any construction activities and/or trading activities and/or retail activities and/or selling of petroleum products and/or conducting business of any nature whatsoever on [the property owned by Erf 344].'

[1] Section 3 of the PPA makes provision for the appointment of a Controller of Petroleum products and such regional controllers as the Minister may decide. The principal function of the Controller is to assist the Minister in the exercise of his powers and functions under the PPA. Section 2E provides that the Minister must prescribe a system for the allocation of site and corresponding retail licences. This system must *inter alia*, intend to transform the retail sector into one that has the optimum number of retail sites; must intend to achieve an equilibrium amongst all participants in the petroleum products industry, and must meet the requirements of licensing as set out in ss 2B and 2C of the PPA. Applications for the granting of site and retail licences lie to the Controller in terms of regulations promulgated under the PPA.

[7] The interim interdict was to be operative pending an internal appeal to the Minister, against the granting of a site licence by the Controller to Streaks Ahead and a retail licence to Boroka. It was also to be operative pending any review application which could flow from the internal appeal process.

[8] Part B of the notice of motion consisted of a final interdict, along the lines outlined above, and a number of declaratory orders relating to the development of the property and the conduct of business on the property.

[9] Although the application was commenced in October 2014 it only served before the Gauteng Division of the High Court, Pretoria (the high court) on 31 October 2016. I shall return to this later in the judgment. On 24 November 2016 the high court per Baqwa J granted an interim interdict in the following terms:

'[Streaks Ahead, Boroka and Erf 344] are prohibited from taking any further steps regarding the construction of a filling station on [the property] held by [Erf 344] under TG 12564/2013; and

[Streaks Ahead, Boroka and Erf 344] are prohibited from any trading activities and/or retail activities of petroleum products of any nature whatsoever on [the property] held by [Erf 344].'[2]

[10] The temporary interdict was made operative pending the internal appeal referred to above. It was also made operative pending the finalisation of the relief sought in part B of the notice of motion.

[2] See *Lepelle Industrial and Mining Supplies CC v Streaks Ahead Investment (Pty) Ltd and Others* [2016] ZAGPPHC 1149 para 60.

[11] On 13 December 2016, Baqwa J heard a further application in which Lepelle sought an order that Boroka be held in contempt of the earlier order. This declarator was granted on 15 December 2016. It was also declared that the order of 24 November 2016 'does not have the effect of a final judgment'.

[12] Notwithstanding this latter declaratory order, Baqwa J granted leave to appeal against both the order of 24 November and that of 15 December 2016 to the full court on 12 April 2017. On 29 March 2019, the full court upheld the appeal against the temporary interdict. It is against this order that Lepelle seeks leave to appeal. The correctness of the contempt order is not before us. It is common cause between the parties that Boroka has, since the inception of the litigation, continued to operate its business from the property and that it continues to do so to the present.

The facts

[13] During the course of 2006, Streaks Ahead identified the property, which was then a vacant site owned by the Municipality, as a site for the development of a retail shopping complex. It entered into discussions with the Municipality for the acquisition of the property and its potential development. The proposed development included a retail shopping centre and a fuel filling station. Streaks Ahead's proposed acquisition and development of the property required several interrelated authorisations. Accordingly, it sought approval for the sale of the land and its rezoning for utilization for business purposes. On 9 November 2007, a deed of sale was concluded between the Department of Housing and Water Affairs and Streaks Ahead in terms of which the latter purchased the property. On the same date the Municipality

approved the rezoning of the property for business purposes. Transfer of the property to Streaks Ahead occurred on 10 July 2008.

[14] At that stage Streaks Ahead envisaged a subdivision of the property to allow for the development of a filling station on the subdivided portion and a shopping complex on the remainder. Its application for subdivision was approved. It was however not proceeded with and was later withdrawn.[3]

[15] On 2 September 2008, an application for approval of the construction of a shopping complex was submitted to the Department of Local Government and Housing. On the same date an application for an environmental authorisation for the construction of a filling station on a portion of the property was submitted to the seventh respondent, the Department of Economic Development, Environment and Tourism. The environmental authorisation process that followed included the notification process and the preparation of a scoping report.[4] On 17 February 2010 the seventh respondent issued an environmental authorisation approving the construction of a new filling station on the proposed portion of the property. The authorisation provided that the approved activity must commence within a period of three years from the date of issue of the authorisation.

[3] The application was withdrawn during the course of 2011. The reason for doing so is not apparent. A subsequent application for subdivision was submitted. This is, however, not germane to the present proceedings.

[4] As prescribed by the National Environmental Management Act 107 of 1998 and the regulations promulgated thereunder. It is unnecessary to set out the detail of these processes for purposes of this judgment.

[16] In the period following the granting of the environmental authorisation negotiations ensued with Total South Africa Ltd regarding the establishment of a fuel retail business on the property. These culminated in an agreement being concluded with Boroka as the envisaged retailer of petroleum products. On 25 November 2012, Streaks Ahead and Boroka entered into a notarial lease in respect of the property for an initial period of 15 years commencing from the first date of sale of fuel from the property. The agreement obliged Streaks Ahead to construct buildings for use as a filling station to specifications approved by Boroka and Total South Africa.

[17] Pursuant to this agreement Streaks Ahead and Boroka submitted applications to the Controller, on 26 November 2012, for site and retail licences, respectively, as required by the PPA. Notices of the respective applications were published on 9 April 2013. On 19 April 2013, the Regional Director of Petroleum Licensing conducted a site visit to the property and recommended approval of the applications. On 7 May 2013 Lepelle submitted an 'interim' objection to the applications for the site and retail licences. It simultaneously filed an application for access to information in terms of the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA). On 16 July 2013, the Controller issued a site licence to Streaks Ahead and a retail licence to Boroka.

[18] While this process was underway, Streaks Ahead and Erf 344 were in negotiation regarding the sale of the property. On 3 September 2012 they concluded an agreement of sale of the property. Registration of transfer of ownership occurred on 21 February 2013.

[19] On 14 September 2012, the Municipality approved the building plans for the construction of the shopping complex. Work to clear the site for construction commenced thereafter. Site works for the construction of the filling station were commenced on 21 January 2013.

[20] Following the issuing of the site and retail licences, and after construction had already commenced on the property, Lepelle instructed a town and regional planner to investigate the matter. The planner provided a report, dated 8 October 2013. On 10 October 2013, Lepelle filed what it termed an 'interim' appeal against the grant of the site and retail licences, in terms of s 12A(1) of the PPA. Lepelle stated therein that it reserved the right to supplement its appeal in the light of its request for access to documents in terms of PAIA. It subsequently filed a supplementary appeal on 19 May 2014. In it, Lepelle raised the fact that transfer of ownership of the property had occurred on 21 February 2013 and that Streaks Ahead was no longer the registered owner of the property. It could therefore not be the holder of a site licence.

[21] It was common cause that, during the course of this appeal process construction of the filling station continued. It was also common cause that construction was completed by May 2014 and that Boroka commenced its fuel retailing activity in the same month.

[22] A second supplementary appeal was submitted on 29 July 2014. This document dealt principally with matters related to the zoning of the property, and the environmental authorisation issued in respect of the development of the property. Streaks Ahead and Boroka submitted their response to the

appeal, as supplemented, on 8 August 2014. Streaks Ahead admitted that ownership of the property had passed to Erf 344. It explained that it was an oversight not to have advised the Controller. It requested an opportunity for it and Erf 344 to rectify the situation by applying for a new licence or transferring the existing licence. It also requested authorisation for the continued operation of the service station.

[23] On 27 August 2014, Streaks Ahead applied to the Controller to transfer the site licence it held to Erf 344. Lepelle thereafter submitted a third supplementary appeal to the Minister on 8 October 2014. As already indicated, the application before the high court was launched on 20 October 2014.

Litigation chronology

[24] It was common cause that construction of the shopping centre and service station had been completed by the time the application was launched. Indeed, by this time the service centre was already fully operational, having commenced business in May 2014.

[25] Streaks Ahead and Boroka, after having invoked rule 35 (12) of the Uniform Rules to request certain documents referred to in Lepelle's papers, filed their answering affidavit on 14 May 2015. Lepelle filed its replying affidavit on 3 July 2015. The application was heard in November 2016.

[26] Between July 2015 and the hearing of the application in the high court, it was common cause, that:

(a) the Minister dismissed Lepelle's administrative appeal on 3 August 2015;

(b) the Minister issued an instruction to the Controller to deal with the contravention of s 2A of the PPA in accordance with regulation 29(2) of the relevant Regulations[5] issued in terms of the PPA;

(c) the Controller, on 28 August 2015, issued a notice to Streaks Ahead and Boroka, providing notice of its intention to cancel the licences subject to receipt of representations by them;

(d) Streaks Ahead and Erf 344 made submissions to the Controller on 3 October 2015, in which they requested that the continued operation of the service station be authorised and that the site licence issued to Streaks Ahead be transferred to Erf 344; and

(e) the Controller transferred the site licence from Streaks Ahead to Erf 344.

The issues to be decided

[27] Lepelle sought special leave to appeal against the order of the full court, which upheld the appeal against the order of the high court. It was required, therefore, to establish special circumstances which would warrant a further appeal. The proper starting point for the inquiry, in this instance, is the order that was granted by the high court.

[5] See Regulations Regarding Petroleum Products Site and Retail Licences: GN R286 in *GG* 28665 of 27-03-2006 (the Regulations).

[28] Sub-paragraph 1 of the high court order[6] prohibited Streaks Ahead, Boroka and Erf 344 'from taking any further steps regarding the construction of a filling station' on the property. On the case presented in the high court, there was no evidence which pointed to any 'further' construction on the property. The applicant's papers disclosed that construction of the filling station had already been completed before the application was launched. The order that was sought and which was granted by the high court was, therefore, without any foundation on the facts. The order was not competent.

[29] The full court appears to have overlooked this aspect. It therefore dealt with a broader issue, relating to the interpretation of provisions of the PPA and the interrelationship between a site licence and a retail licence. I shall return to this later.

[30] The issues concerning the environmental authorisation for the construction of the service station and related issues concerning the subdivision and zoning of the property effectively fell away. A further narrowing of the ambit of issues before this court arose in respect of sub-paragraph 2 of the high court order. The latter order prohibited Streaks Ahead and Erf 344 from conducting 'any trading activities and/or retail activities of petroleum products of any nature whatsoever' on the property.

[31] Counsel for the applicant conceded that, whereas the thrust of the interdict application was directed at retail of petroleum products from the

[6] The order of the high court is set out at para 60 of the judgment (see fn 2 above). Para 60.2 sets out the interdicts at issue in this application. Para 60.2 deals with the operation of the interdicts pending review proceedings to be prosecuted. In this judgment the reference to sub-paragraphs of the order is a reference to the sub-paragraphs of para 60.1 of the judgment.

property on the basis of alleged unlawful competition with Lepelle, the ambit of the order sought and granted was far wider. It impacted all trading activity including that conducted in the shopping complex. I shall return to this aspect later, in relation to costs. It was never the applicant's case that Streaks Ahead or Erf 344 were engaged in any retail activity of petroleum products. Such retail activity was conducted by Boroka. The fact that Streaks Ahead was an erstwhile owner and holder of a site licence provided no factual or legal basis for the interdict against Streaks Ahead. It was no longer the owner of the property at the time that the application was launched, and the site licence had been transferred to Erf 344 by the time the application was heard. Streaks Ahead therefore had no further or future involvement which could be prohibited by any interdict.

[32] Similar considerations applied in relation to Erf 344. It was never Lepelle's case that Erf 344 was involved in the retail of petroleum products or that it would be in the future.

[33] It followed from this that, in respect of Streaks Ahead and Erf 344, no basis existed for the granting of sub-paragraph 2 of the high court order. Again, the full court did not approach the matter on this basis. Be that as it may, it set aside the high court's orders. Based on the true ambit of the issues before that court, it was correct to do so. There is therefore no prospect of success in this regard.

[34] That left only consideration of the case for an interdict against Boroka, prohibiting it from retailing petroleum products. Three issues arose in relation to whether leave ought to be granted to appeal the full court's order setting

aside the interdict. The first concerned the appealability of the interim order, and the second concerned the effect of the passage of time in the conduct of the litigation. The third concerned the basis upon which relief was sought in the high court.

[35] Lepelle contended before the full court and this court, that the orders granted by the high court were interlocutory in nature and therefore not appealable. The full court ought therefore not to have entertained the appeal. The argument, however, was not urged upon us with any conviction.

[36] The full court found that the interim order disposed of a legal issue relating to the status of a retail licence in the event that a site licence is found to be invalid.[7] The full court also found that the closure of Boroka's business for an indefinite period was final in effect.[8] On this basis it held that the high court order was appealable.[9] The appealability point need not detain us. I shall assume, without deciding, that the orders of the high court were indeed appealable and that the full court was correct on that score.

[37] Regarding the effect of the passage of time, as indicated earlier in this judgment, Boroka has been trading as a retailer of petroleum products on the property since May 2014. It has continued to trade throughout the more than six years that it has taken for this matter to make its way to this Court.

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[7] *Streaks Ahead Investments (Pty) Ltd and Others v Lepelle Industrial and Mining Supplies CC and Others* [2019] ZAGPPHC 514 para 24. Before the high court Streaks Ahead and Boroka conceded the 'invalidity' of the site licence since it had been issued to Streaks Ahead when it was not the owner of the property. This concession, as pointed out by counsel for Erf 344 was at odds with the case advanced by Streaks Ahead, namely that it had sought the transfer of the licence to rectify it omission to advise the Controller of the change of ownership.

[8] *Streaks Ahead Investments (Pty) Ltd* (ibid) para 24.

[9] Ibid para 25.

[38] What Lepelle sought, by way of this application was to overturn the full court's order and thereby place this Court in a position similar to the position the high court occupied in November 2016, when it granted the prohibitory interdict.

[39] There was, as the litigation chronology indicates, a substantial delay between the commencement of the application before the high court and its set down for argument. Lepelle elected not to pursue the matter before the urgent court. In its replying affidavit it stated that,

'(i)t was felt by the applicant that an urgent application of the extent of this application with the kind of difficult facts and law involved in this application would not be dealt with in the urgent court. It remains urgent, however, as the applicant is daily suffering further loss.'

[40] That initial delay, with its undoubted impact upon the balance of convenience for the parties, has been compounded by yet further delays. Over the six-year period that has elapsed Lepelle has not pursued its review application to finality.

[41] The fundamental difficulty that this inordinate delay posed for Lepelle is that it was still, on appeal, pursuing a temporary prohibitory interdict. Quite apart from the substantive requirements that Lepelle would have to meet, it would necessarily have to persuade this court that the balance of convenience favours it to the extent that a business, which has been operating for six years, should now be closed because the ongoing prejudice to Lepelle far outweighs the prejudice that Boroka would suffer.

[42] Given the inordinate delay and the fact that, to date, the review relief has not been pursued, there is no prospect that such an order could reasonably issue. Thus, even if it were to be assumed in Lepelle's favour that it could persuade this court that it was otherwise entitled to interdictory relief, it would not be able to meet the critical requirement of satisfying this court that the balance of convenience favours it. On this basis alone leave to appeal must be refused.

[43] As to the relief sought against Boroka, Lepelle's case was that the invalid site licence issued to Streaks Ahead vitiated the retail licence granted to Boroka. Boroka's defence was that it had requested the Controller to permit the continued operation of the retailing business pending the rectification of the site licence, by allowing a transfer of that licence to Erf 344 or to enable Erf 344 to apply for a new site licence.

[44] The high court accepted that the conduct of retailing activities without there being 'a site licence' was unlawful. On this basis it was satisfied that a case for unlawful competition was made out by Lepelle and it therefore granted the order that it did. The high court did not address the outcome of the appeal and the further decisions taken by the Minister and the Controller in regard to the licences.

[45] The full court set aside the high court order based on the finding that the failure of a site licence, by reason of invalidity, does not *ipso facto* result in the invalidity of a retail licence. The full court came to this finding by addressing in some detail the licencing scheme provided by the PPA. It

analysed the powers of the Controller and the circumstances in which a licence can be said to be invalid. In undertaking this analysis the full court examined the nature of the 'link' between site and retail licences as provided by the PPA. Its conclusion that the retail licence held by Boroka was not invalid by reason of the invalid site licence meant that no case for unlawful competition was established warranting the granting of the interdict.

[46] In the light of what follows, I do not consider that the full court was required to reach the question of the relationship between the site licence issued to Streaks Ahead and the retail licence issued to Boroka. That is so because no basis was established for any interdict against Streaks Ahead and Erf 344 as set out earlier in this judgment. Had the full court approached the matter on this basis it would only have been required to consider whether a basis had been established for an interdict restraining Boroka from trading in petroleum products. That aspect of the case could, in my view, equally have been addressed upon a narrow factual basis.

[47] It was common cause that the Minister dismissed the internal appeal and directed that the Controller take certain administrative steps to deal with the fact that the site licence had been issued to Streaks Ahead. This the Controller did, on 28 August 2015, by issuing a notice of intention to revoke the licences. In its notice the Controller identified the contravention which the Minister required it to address as follows:

'The contravention pertains to the fact that the site licence was issued to the Applicant who is not the registered owner of the site. In the appeal you as the site licence holder acknowledged your mistake and stated that you are willing to do whatever is necessary to correct that status quo. You had indicated that you as the licence holder are willing to either apply for a new site licence or transfer the site, if permitted.

In the light of the above deliberations a notice to cancel the licenses in terms of Regulation 29(2) read with Regulation 34 of the Regulations is hereby served by the Controller to Streaks Ahead Investments (Pty) Ltd and Boroka Filling Station CC respectively. The licensee is required in terms of Regulation 29(2) to make representations to the Controller that may be necessary within 30 days after the date of this notice.'

[48] This notice not only specifically addressed the basis upon which Lepelle was challenging the continued operation of Boroka, it initiated a further administrative process in relation to the conduct of Boroka's retailing of petroleum products. Boroka, in its representations to the Controller, requested that its operation be allowed to continue whilst the application for the transfer of the licence by Streaks Ahead and Erf 344 was being considered. It was common cause that Boroka's retail licence was never cancelled or suspended in terms of regulation 29(2). It was also common cause that the site licence was transferred to Erf 344 in terms of regulation 12.

[49] Counsel for Lepelle accepted that the failure by the Controller to cancel Boroka's retail licence, whether by way of a decision not to cancel the licence or the failure to take a decision to cancel the licence, constitutes administrative action which, until set aside on review, has binding legal effect. Counsel also accepted that the lawfulness of the decision to allow Boroka to continue to trade in terms of its retail licence had at no stage been the subject of challenge by Lepelle. Lepelle's challenge, so far as it had gone, had been directed at the validity of the site licence and its transfer.

[50] On the facts, the original administrative decisions which were taken to grant Streaks Ahead and Boroka site and retail licences respectively, were substituted by subsequent administrative conduct. That conduct was such as

to permit Boroka to continue to trade in accordance with the retail licence issued to it.

[51] In the circumstances, the common cause facts did not establish any unlawful conduct on the part of Boroka which could have entitled the high court to grant an interdict prohibiting it from continuing to conduct retail trade in petroleum products. It is however, unnecessary to make any finding on whether the full court's analysis is correct and we refrain from doing so. It suffices to state that, on the facts, Lepelle's case did not meet the first requirement for a prohibitory interdict against Boroka.

Conclusion

[52] Finally there is the question of costs insofar as Erf 344 is concerned. Both Streaks Ahead and Boroka sought the costs of the application on the ordinary scale. However, Erf 344 sought an order before this Court, as it had before the full court that Lepelle be ordered to pay its costs on a punitive scale. It did so on the basis that the prohibitory interdicts sought against it were, from inception of the case, without any factual or legal foundation. Lepelle sought the orders it did in the high court, so it was submitted, notwithstanding that Erf 344's answering affidavit in the application established the absence of any basis for the relief. Lepelle had persisted in defence of those orders before the full court, and brought Erf 344 before this Court, at great expense.

[53] In *In re Alluvial Creek Ltd* 1929 CPD 532 it was held that litigation conduct which is vexatious in effect, if not intent, could warrant a punitive costs order. The court said at 535:[10]

'An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexations. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case.'

That is indeed the position in this instance.

[54] However, the full court refused Erf 344's request for a punitive costs order, on the basis that Erf 344 had made common cause with Streaks Ahead and Boroka in opposing the interdict application, and there was no cross-appeal against the costs order made by the full court. Accordingly, the punitive costs order can apply only to the application before this court.

[55] In the result the following order is issued:

1. The application for special leave to appeal is dismissed.
2. The applicant is ordered to pay the costs of the first and second respondents.

[10] Approved in *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another* 1997 (1) SA 157 (A) at 177D-E.

3. The applicant is ordered to pay the costs of the third respondent on a scale as between attorney and client, such costs to include the costs of two counsel.

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G GOOSEN

ACTING JUDGE OF APPEAL

Appearances

For applicant:	R. Du Plessis SC
	E. Van As
	R. M. Molea
Instructed by:	A Kock & Associates Inc.
	c/o Honey Attorneys
	Bloemfontein

For first and second respondent:	S. D. Wagener SC
Instructed by:	Gerhard Wagenaar Attorneys
	c/o Symington & De Kok
	Bloemfontein.

For third respondent:	A. Liversage SC
	D. van den Bogert
	Jacques Claasen Attorneys
	c/o Hill McHardy Herbst Attorneys
	Bloemfontein