



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1054/2022

In the matter between:

**CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

APPELLANT

and

TSHEPO GUGU TRADING CC

FIRST RESPONDENT

**SOWETO STEEL STRUCTURAL
ENGINEERING (PTY) LTD**

SECOND RESPONDENT

Neutral citation: *City of Ekurhuleni Metropolitan Municipality v Tshepo Gugu Trading CC and Another* (1054/2022) [2024] ZASCA 81 (28 May 2024)

Coram: MOLEMELA P, SCHIPPERS AND HUGHES JJA AND
SEEGOBIN AND MBHELE AJJA

Heard: 20 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 28 May 2024.

Summary: Property law – spoliation (*mandament van spolie*) requirements – municipality dismantling and removing respondent’s billboard on municipal land – erected contrary to by-law – application to regularise billboard – settlement agreement – operative for two years – agreement lapsing – whether *status quo ante* should be restored.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Molahlehi, Adams and Mahalelo JJ, sitting as a court of first instance):

- 1 The application for special leave to appeal succeeds.
- 2 The appeal is upheld with costs, such costs to include the costs of the employment of two counsel.
- 3 The order of the full court is set aside and replaced with the following:
‘The appeal is dismissed with costs.’

JUDGMENT

Seegobin and Mbhele AJJA (Molemela P, Schippers and Hughes JJA concurring):

Introduction

[1] This is an application for special leave to appeal by the City of Ekurhuleni Metropolitan Municipality (the municipality) in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 (the Act), against the judgment and order of the Gauteng Division of the High Court, Johannesburg (Molahlehi, Adams and Mahalelo JJ) (the full court) delivered on 13 September 2022. On 2 March 2023 this Court referred the application for oral argument in terms of s 17(2)(d)¹ of the Act.

Relevant background

[2] The municipality is the owner of the immovable property situated at Portion 988, Elandsfontein 90-IR described as ‘Gillooly’s Farm’ (the site). The respondent, Tshepo Gugu Trading CC (the respondent), owns a large billboard. In March 2016, the respondent installed the billboard on the site.

[3] On 5 August 2016 the municipality launched an application in the Gauteng Division of the High Court, Johannesburg (the high court) for an order directing the respondent to remove the billboard and to restore the site to its original state. The basis for that application was that the respondent had erected the billboard in contravention of the municipality’s Billboards and Display of Advertisements By-

¹ Section 17(2)(d) reads:

‘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.’

laws of 13 March 2017 (the By-laws) and the Local Government Municipal Systems Act 32 of 2000 (the Systems Act).

[4] The relief sought by the municipality was the following:

- ‘1. The respondent is ordered to remove the billboard, and to restore Portion 988 of Elandsfontein 90-IR to its state prior to the respondent’s construction of the billboard;
2. Should the respondent fail to remove the billboard or part thereof within 60 days of the Court’s order, the applicant is authorised to take all necessary steps to remove the billboard including the authorisation of the sheriff or a suitable alternative contractor to remove the billboard, in which event those costs are to be paid by the respondent.
3. It is declared that the applicant’s decision of 23 June 2015 to approve the respondent’s application to construct the billboard (“the decision”) has lapsed.
4. In the alternative to prayer 3:
 - 4.1 The time period of 180 days in terms of section 7 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) in which to bring a review of the decision is extended in terms of section 9 of PAJA to the date on which this application was served on the respondent.
 - 4.2 The decision is reviewed and set aside.
5. The respondent shall pay the costs of this application in the event of its opposition.’

[5] The respondent opposed the application and filed a counter-application. Those applications were settled in terms of a written settlement agreement between the parties that was made an order of court by Victor J (the Victor J order). The relevant parts of the order read as follows:

‘3. THE REGULARISATION APPLICATION

- 3.1 The respondent will submit an application to the applicant for approval of the Billboard at its current size and/or an application for the approval of an electrical billboard at the same location as the current Billboard (“the regularisation application”).
- 3.2 The respondent will submit the regularisation application within 30 calendar days of this agreement.

3.3 The regularisation application must be submitted by the respondent and will be decided by the [applicant] in accordance with the [applicant's] Billboards and the Display of Advertisements By-laws dated 30 March 2017 and the Municipality Systems Act 32 of 2000.

3.4 The regularisation application must be decided within 30 days of its receipt by the [municipality].

3.5 Nothing in this agreement fetters the discretion of the applicant and/or its delegated officials and/or committees in respect of the determination of the regularisation application.

3.6 In the event that the regularisation application is unsuccessful, the applicant will:

3.6.1 Either remove the Billboard within 60 calendar days or such further period as agreed to between the parties, the costs of which removal are to be paid for by the respondent;

3.6.2 Or reduce the Billboard's size to 81m² within 60 calendar days or such further period as agreed to between the parties, in which event the Billboard may remain erected until the fifth anniversary of the decision pursuant to which it is erect;

3.7 In the event that the applicant fails to remove the Billboard or reduce its size to 81m² within 60 calendar days or such further period as agreed to between the parties, the [municipality] will be entitled to remove the Billboard or cause the Billboard to be removed by a contractor, the reasonable costs of which will be carried paid by the respondent.

3.8 The respondent will have the right to seek to review and/or appeal any decision made in respect of the regularisation application.

4. In the event that the respondent exercises its right to review and/or appeal any decision made in respect of the regularisation application its obligation to remove or reduce the size of the Billboard in terms of paragraph 3.6 remains binding unless:

4.1 The applicant agrees to suspend the operation of paragraph 3.6; or

4.2 A court grants an interdict suspending the operation of paragraph 3.6.

5. RENTAL IN RESPECT OF THE BILLBOARD

5.1 The parties will endeavour to conclude a lease agreement in respect of the Billboard and/or its successor in accordance with the applicant's ordinary terms for leases of such a nature and in compliance with the applicant's tariffs schedule, a copy of which is attached hereto as annexure A.

5.2 Pending the conclusion of a lease agreement, the following arrangement will apply:

5.2.1 The respondent will pay rental in respect of the Billboard from 11 September 2018 to the date that the Billboard is removed.

5.2.2 The rental payable will be fixed in accordance with the applicant's Real Estate Tariffs, being 20% of the gross income received by the media owner (namely the respondent) from the advertiser.

5.2.3 On the first day of each month commencing 1 October 2018, the respondent will provide to the applicant a statement and debatement of 20% of the gross income earned by the respondent from advertisers in the preceding month.

6. ARREAR RENTAL IN RESPECT OF THE BILLBOARD

6.1 The respondent will pay arrear rental in respect of the Billboard from the date that the Billboard was erected and/or began displaying advertisements 11 September 2018.

6.2 The arrear rental is fixed in accordance with the applicant's Real Estate Tariffs, being 20% of the gross income received by the media owner (namely the respondent) from the advertiser.

6.3 By 9 October 2018, the respondent is to provide to the applicant a statement and debatement of 20% of the gross income received from advertisers in respect of the Billboard from the Billboard's erection up to and including 11 September 2018.

7. THE DURATION OF THIS AGREEMENT

7.1 Unless novated by a further agreement (including any further agreement concluded following an approval of the regularisation application), this agreement will operate for a period of two years, namely until 11 September 2020.'

[6] In essence, the Victor J order granted the respondent an opportunity to regularise its non-compliance with the By-laws that governed the construction of billboards on the municipality's land. The respondent agreed to bring an application to regularise the erection of the billboard by 11 September 2020. The order further made provision for payment of rental to the municipality with effect from 11 September 2018, and the respondent undertook to provide the municipality with a statement and debatement of 20% of the gross income which it earned from its advertisers. The statement was to be provided on the first day of each month commencing 1 October 2018. Furthermore, paragraph 6 of the order required the respondent to pay arrear rental in respect of the billboard from the date the billboard

was installed and/or when it began displaying advertisements, such date being 11 September 2018.

[7] Pursuant to the Victor J order, the respondent submitted its regularisation application on 9 October 2018. It failed, however, to make payment of the prescribed fees in terms of sections 54 and 64 of the By-laws to enable the municipality to consider the application.² In a flurry of correspondence that passed between the parties, the respondent admitted firstly, that it had failed to pay the prescribed fees but explained that it was waiting to meet with the municipal manager to obtain the municipality's banking details and hand over two cheques. Secondly, that the billboard was not in compliance with the municipality's By-laws. The municipality's attorneys acknowledged receipt of the regularisation application on 9 November 2018. They indicated that the municipality was willing to consider such application subject to the prescribed fees being paid.

² Sections 54 and 64 of the By-laws provide as follows:

'54. Damage to Municipality property –

- (1) No person shall intentionally or negligently, in the course of erecting or removing any advertising sign, advertising structure, poster or banner cause damage to any tree, electric service or other Municipality installation or property.
- (2) Any costs incurred by Municipality for repair to damaged trees, environment, electric standard, service or any Municipality property, will be for the account of the responsible persons.

64. Tariffs –

- (1) The Municipality shall determine tariffs or fees from time to time in accordance with Section 4(c) of the Local Government Systems Act, Act 32 of 2000 and also in accordance with the provision of the Municipal Finance Management Act, 2003 (Act No. 56 of 2003).
- (2) All refundable deposits will be forfeited to the Municipality in the event of non-compliance of any of the foregoing By-laws or its approved procedural guidelines.
- (3) Every person who applies to the Municipality for permission of an advertising sign or advertisement to be displayed, must on making the application, pay to the Municipality the tariff determined therefore, and no application will be considered until such tariff has been paid.
- (4) The set of rates as drawn up by Municipality and revised from time to time, as appropriate, shall apply.
- (5) The payment of any tariff in terms of this By-law shall not absolve any person from criminal liability arising from his failure to pay nor shall the fact that a person has been convicted of an offence under this By-law relieve him from the liability to pay the appropriate tariffs in terms of these By-laws.'
- (6) Any amount due by a person in terms of the provisions of this by-law, will be a debt due and payable to the Municipality and shall be recovered by the Municipality in any competent Court of Law.
- (7) All tariffs and monies must be paid at the Municipality or at such other places as shall be determined by the Municipality, from time to time.'

[8] The respondent in the meantime failed to pay any rental due in accordance with the Victor J order. It further failed to provide the municipality with a statement of income earned from its advertisers. On 26 November 2019 the municipality launched an application in the high court for an order compelling the respondent to disclose certain financial information regarding the amount of revenue it earned from the billboard (the debatement application). The debatement application as well as a counter-application filed by the respondent are still pending before the high court.

[9] On 23 January 2020 the municipality addressed a letter to the respondent in terms of which the respondent was given a deadline to pay the prescribed fees by the end of February 2020, failing which the municipality would have no option but to exercise its right to remove the billboard at the respondent's expense. Once again, however, the respondent failed to pay the prescribed fees as required by the By-laws. On 23 June 2020 the respondent was advised that the placement of any advertisement on the billboard would be unlawful and that it should desist from doing so. The municipality further advised that it was currently sourcing contractors to remove the billboard from its site. The response from the respondent, through its attorneys on 30 June 2020 was that any removal of the billboard without the respondent's consent and without a court order would amount to a spoliation, entitling it to an appropriate remedy.

[10] The municipality, purportedly acting in terms of paragraphs 3 and 4 of the Victor J order, secured the assistance of Soweto Steel Structural Engineering (Pty) Ltd, the second respondent, to dismantle and remove the billboard on 20 August 2020. The respondent in turn brought an urgent application for a *mandament van spolie* which served before Wepener J on the same day. The application was opposed

by the municipality. By agreement between the parties, Wepener J granted an order in the following terms:

‘...’

2. Pending the final hearing of the matter the First and Second Respondents and anyone under the First Respondent’s mandate are interdicted, ordered and directed to forthwith:

2.1 cease and desist from taking any further steps, or continuing to take steps to dismantle and remove the billboard (“the property”) situate at Portion 988 of Elandsfontein 90-IR described as Gillooly’s Farm (“the Site”), or take any other steps to damage the Property or render same non-functional.’

[11] In its answering papers the municipality averred that the respondent had simply failed to comply with the provisions of paragraphs 3.1, 3.2 and 3.3 of the Victor J order in that it had failed to submit a competent and complete regularisation application within 30 days of that order. The municipality took the point that this failure absolved it from making any decision in the matter. It averred that despite repeated requests to the respondent, as evidenced by the correspondence referred to in its affidavit, the latter had simply failed to comply with the terms of the settlement agreement and the court order. According to the municipality, this non-compliance entitled it to invoke the provisions of paragraphs 3.6 and 3.7 of the order. The respondent was therefore obliged to either remove the billboard or reduce its size to 81m² within a period of 60 days or such further period as may be agreed to between the parties.

[12] The spoliation application was eventually determined by Senyatsi J (the court of first instance). Although the court of first instance found that the respondent was in peaceful possession of the billboard, it nonetheless refused to grant it any relief on the basis that: (a) the municipality had dismantled the billboard and reduced it to a pile of steel structures; (b) it was not possible to restore the *status quo ante* as the billboard had been dismantled; and (c) the remedy of spoliation had become moot

because the order made on 11 September 2018 by Victor J had expired in September 2020. The respondent was granted leave to appeal to the full court.

[13] The full court accepted that the respondent was in peaceful possession of the billboard when it was dispossessed of it by the municipality. On this basis the full court identified the following two issues for determination. The first was whether the impossibility of restoring the billboard was raised in the founding papers to warrant the court of first instance's consideration in that regard. The second was whether the facts of the case supported the conclusion by the court of first instance that there was an impossibility of restoring possession of the billboard. The full court disagreed with the findings of the court of first instance. It found that the court had made erroneous factual findings contained in the municipality's answering affidavit resulting in unfairness to the respondent.

[14] With regard to the first issue, the full court found that this was not an issue that had been raised by the municipality in its answering papers. The issue was raised for the first time in the municipality's heads of argument. It held that the court of first instance, in concluding that the remedy of *mandament van spolie* did not find application in the matter before it, did so on the basis of facts that were not properly pleaded. As to the second issue, the full court reasoned that the court of first instance had not found that the billboard no longer existed but rather that the municipality and Soweto Steel had merely dismantled the billboard. The full court concluded that the integrity or functioning of the billboard was not destroyed and that it had simply been dismantled. On this basis there was no reason why, so the full court held, that possession could not be restored to the respondent.

Test for special leave

[15] For the municipality to succeed in its application for special leave, it is required to show something more than the existence of reasonable prospects of success on appeal.³ In *Cook v Morrison and Another*,⁴ this Court held:

‘The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list . . .’

[16] The test of what constitutes a reasonable prospect of success is well established. The municipality is required to convince this Court that there is a ‘realistic chance on appeal’. In other words, it is required to demonstrate that ‘there is a sound rational basis to conclude that there is a reasonable prospect of success on appeal’.⁵ It is further required to show that ‘something more by way of special circumstances, is needed’.⁶

[17] Before this Court, the primary contention advanced by the municipality was that it had acted lawfully in terms of a valid court order when it removed the illegally constructed billboard from its site. Its case was that it did not take the law into its own hands as the order of Victor J entitled it to remove the billboard in circumstances where the respondent had failed to comply fully with the terms of that order. It was submitted that the respondent had been placed on notice on several occasions to comply with the order and to submit a fully compliant regularisation application in terms of the By-laws but it failed to do so. It was contended that ordering restoration

³ *P A F v S C F* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 24.

⁴ *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) para 8.

⁵ *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016) paras 16-17.

⁶ *Cook v Morrison and Another* para 8.

of the billboard to the respondent in these circumstances would amount to sanctioning an illegality.

[18] There was no dispute that at the time the municipality took steps to remove the billboard from its site, the respondent was in peaceful and undisturbed possession of it. The central issue, however, was whether the full court was correct in ordering the restoration of the *status quo ante*.

[19] The underlying principles governing the common law remedy of a *mandament van spolie* are well-established. As far back as in 1906, Innes CJ in *Nino Bonino v De Lange*,⁷ enunciated the principle underlying the *mandament van spolie* as follows:

‘It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.’

[20] In *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*,⁸ this Court explained the remedy as follows:

‘Under [the *mandament van spolie*], anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor – a fraud, a thief or a robber – is entitled to the *mandament*’s protection. The principle is that illicit deprivation must be remedied before the courts will decide competing claims to the object or property.’

⁷ *Nino Bonino v De Lange* 1906 TS 120 at 122.

⁸ *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality* [2007] ZASCA 70; [2007] SCA 70 (RSA); 2007 (6) SA 511 (SCA) para 21.

[21] In *Ngqukumba v Minister of Safety and Security and Others*,⁹ the Constitutional Court described the remedy as follows:

‘The essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the *maxim spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.’

[22] It is trite that in order to obtain a *mandament van spolie* an applicant has to show that (a) she or he was in peaceful and undisturbed possession of the thing, and (b) she or he was unlawfully deprived of such possession. In view of the strict requirements of the remedy, there are a limited number of defences which a respondent can raise in spoliation proceedings. As the authors of LAWSA point out: ‘No spoliation is committed where a person is lawfully deprived of his or her possession. The respondent can justify his or her dispossession of the applicant by showing that the applicant has genuinely and freely consented to give up his or her possession or that he or she was authorised by a court order or by statute to dispossess the applicant....’¹⁰

[23] Whilst the first requirement poses no difficulty in the present matter, the second requirement has to be considered. The question that arises is whether the municipality had ‘unlawfully’ deprived the respondent of possession of the billboard when it took steps to dismantle it on 20 August 2020. To answer this question, it is necessary to have regard to the underlying reasons for the conclusion of the settlement agreement and the Victor J order. The conclusion of the settlement agreement must be seen in context and against the background facts set out above.

⁹ *Ngqukumba v Minister of Safety and Security and Others* [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) para 10.

¹⁰ 27 LAWSA 2 ed para 108.

The fact that the respondent was required to submit a regularisation application in compliance with the By-law and within the time frames stipulated in the agreement, points to an acknowledgement on its part that its conduct in installing the billboard on the municipality's site was unlawful and had to be rectified. The consequences of not complying with the By-laws were fully spelt out in paragraph 3.7 of the Victor J order. The terms of the court order made it plain that in the event of any non-compliance by the respondent, the municipality would be entitled to remove the offending billboard.

[24] The court order empowered the municipality to remove and dismantle the structure in the event that the regularisation application was unsuccessful. The regularisation process had to, in terms of the court order, be done in conformity with the applicable By-laws. The order explicitly stated that mere submission of the regularisation application was not a *fait accompli*. The application had to comply with all the prescripts of the relevant By-laws. Clause 3.5 clearly spelt out that the municipality's discretion was not fettered by the agreement between the parties.

Relevant By-laws

[25] It is common cause that the billboard was illegally constructed in that its size and proximity to the intersection contravened the municipality By-laws governing outdoor advertising. It remained an illegal structure until it was dismantled. The relevant By-laws in this respect are the following. Section 3(1) of the By-laws provides:

‘These By-laws apply to all outdoor advertising in the area of jurisdiction of the Ekurhuleni Metropolitan Municipality and are binding on all persons, including the State, state organs, state agencies and all state institutions, seeking to display or erect advertising signs or advertisements.’

Section 52(5) provides:

‘Every application must be accompanied by the prescribed application fee and, where applicable, a deposit as determined by the Municipality from time to time.’

Section 52(14) provides that:

‘An application which has shown no substantive progress due to any act or omission on the part of the applicant shall be deemed to have lapsed one year after date of submission to the Municipality, unless motivation to the contrary is supplied to the satisfaction of the Municipality or delegated department.’

Section 64(3) provides as follows:

‘Every person who applies to the Municipality for permission of an advertising sign or advertisement to be displayed, must on making the application, pay to the Municipality the tariff determined, therefore, and no application will be considered until such tariff has been paid.’¹¹

[26] One of the requirements that had to be met for a successful application was payment of the prescribed fees at the time the application was lodged. Despite numerous requests from the municipality for the respondent to comply with this requirement, it failed to do so. The respondent instead came up with new proposals which contradicted the terms of the court order. Amongst the proposals made was that the billboard be left intact in exchange for the respondent performing certain functions in favour of the municipality.¹²

[27] The municipality was not authorised to consider the regularisation application without the prescribed fees being paid. Doing so would be to violate its own By-laws. The failure to pay the prescribed fees meant that the respondent had submitted a non-compliant regularisation application. Absent a compliant regularisation application there was no obligation on the municipality to consider the application.

¹¹ Ekurhuleni Billboards and Display of Advertisements By-Laws of 30 March 2017.

¹² Tshepo Gugu proposed to:

- ‘b) Take up responsibility to maintain Gillooly’s farm and keep it in excellent landscaping condition;
- c) Employ 10 Ekurhuleni Youth and empower them with landscaping skills;
- d) Taking occupation of dilapidated buildings at Gillooly’s farm and establish a thriving Nursery & Landscaping College;
- e) Establish a township greening and tree planting project from the Nursery and empower, beautify and greenize the Townships of Ekurhuleni on an ongoing and full time basis.’

[28] Section 52(14) of the By-laws provides that every application which has not shown substantive progress lapses after 12 months from the date of submission. The respondent's application lapsed on 7 October 2019. Despite this, it only attempted to make payment sometime in November 2019, long after the 12 months had lapsed. It is clear from the wording of s 52(14) that the section affords an applicant time to remedy whatever defect might exist in the application within 12 months from date of submission, thereafter such application lapses.

[29] Notwithstanding the fact that the application had not shown progress for a period of 12 months, due to non-payment of the prescribed fee, the municipality wrote to the respondent on 23 January 2020, more than 15 months from the date of submission, requesting it to pay the prescribed fee before 28 February 2020, failing which the municipality would be left with no option but to remove the billboard. This letter served to clear up any misunderstanding and/or confusion that might have existed on the part of the respondent, for whatever reason. The municipality also clarified to whom and how such payment had to be made.¹³ Despite all of this the respondent failed to comply, leaving the municipality with no option but to enforce the terms of the court order.

[30] Consequently, we find that the municipality was justified in taking steps to dismantle the billboard as it did on 20 August 2020: in the particular circumstances, the respondent was not in lawful possession of the billboard. Allowing this structure to remain on the municipality's land, would be to sanction an illegality. From the outset, the respondent was fully aware that the erection of the billboard was in violation of the By-laws.

¹³ 'City planning deals with all applications for Outdoor Advertising. All applications for outdoor advertising should be submitted together with an agreement as well as the fee for the administration of the lease. All monies must be paid to Ekurhuleni finance building and a copy of the proof of such payment handed to the relevant person accepting applications, must be submitted to the municipality.'

Mootness

[31] A further point raised by the municipality was that, at the time the respondent had approached the full court the appeal was moot. The Victor J order had a two-year lifespan. The settlement agreement provided that ‘unless novated by a further agreement (including any further agreement concluded following an approval of the regularisation application), this agreement will operate for a period of two years, namely until 11 September 2020’.

[32] The jurisprudence on mootness is trite. Courts generally shy away from entertaining issues that are no longer relevant and have no practical effect. The limited resources of courts should be directed at dealing with live disputes. In *Police and Prisons Civil Rights Union v South African Correctional Service Workers’ Union and Others (Police and Prisons Civil Rights Union)*,¹⁴ the Constitutional Court, however, reiterated that mootness should not be an absolute bar to the justiciability of an issue. The court may entertain an appeal, even if moot, where the interests of justice so dictates.¹⁵ The determination whether the interests of justice so dictate involves an exercise of a discretion by the court after considering various factors, including whether the order will have some practical effect as well as the extent of its importance to the parties or to others.¹⁶

[33] The full court found that the municipality had wrongfully interfered with the respondent’s peaceful possession, since the power or authority of the municipality to remove the billboard depended on the rejection of the regularisation application,

¹⁴ *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; [2018] 11 BLLR 1035 (CC); 2018 (11) BCLR 1411 (CC); (2018) 39 ILJ 2646 (CC); 2019 (1) SA 73 (CC) paras 43-44; *Solidariteit Helpende Hand NPC and Others v Minister of Cooperate Governance and Traditional Affairs* [2023] ZASCA 35 paras 12-14.

¹⁵ *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) para 9. See also: *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* [2013] ZACC 45; 2014 (2) SA 603 (CC); 2014 (2) BCLR 212 (CC) para 104.

¹⁶ *Ibid* fn 14 para 44.

which did not materialise. By focussing solely on the issue of restoring possession to the respondent, the full court ignored the terms of the court order and the failure on the part of the respondent to regularise its otherwise illegal installation. In so doing, the full court had erred.

[34] As mentioned already, the regularisation application lapsed on 7 October 2019 as a result of non-compliance by the respondent with s 64(3) of the By-laws. The municipality, however, afforded the respondent a further extension until 28 February 2020 to comply. The municipality commenced with the dismantling of the Billboard only on 20 August 2020, almost seven months after its letter of 23 January 2020. The municipality was therefore within its rights to invoke sub-paragraphs 3.6 and 3.7 of the Victor J order.

[35] The above conclusion renders it unnecessary to deal with whether the restoration of the *status quo ante* was competent in the circumstances where the billboard was partially dismantled. From the photos on record, it is clear that the display screen, media player and control system had been removed and all that was remaining is the steel frame. Although the court would ordinarily order the restoration of the *status quo ante*, the difficulty facing the respondent is that the structure that is sought to be restored in any event violates the By-laws in terms of both its size and location.

[36] This Court in *Eskom Holdings SOC Limited v Masinda*¹⁷ found that ‘although it is correct that spoliation requires restoration of possession as a precursor to determining the existence of the parties’ rights . . . , there may well be circumstances in which a court will decline to issue spoliation . . .’. One such circumstance, is where the *status quo ante* is to be restored through unlawful means and through placing the

¹⁷ *Eskom Holdings SOC Limited v Masinda* [2019] ZASCA 98; 2019 (5) SA 386 (SCA) para 12.

members of the public in danger. It is for this reason that the size and location of billboards is prescribed in the By-laws.

[37] In conclusion, we deem it necessary to compare the situation that faced the municipality herein with that faced by the respondent in *Ngqukumba v Minister of Safety and Security (Ngqukumba)*.¹⁸ This was a case involving the spoliation of a motor vehicle, the engine and chassis numbers of which had been altered. In upholding the appeal, the Constitutional Court reasoned thus:

‘It seems to me that on this subject the Supreme Court of Appeal proceeds from the premise that a tampered vehicle is no different from an article the possession of which would be unlawful under all circumstances. That is an erroneous premise because possession of a tampered vehicle will be unlawful only if it is ‘without lawful cause’. That leads me to a crucial point of departure. It is that in this case we are not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Had we been concerned with objects of that nature, then the *mandament van spolie* might well not be available, but that issue is not before us and need not be decided. The fact that we are here concerned with an article that may be possessed quite lawfully makes all the difference. On the assumption that an individual can never possess heroin lawfully, the Supreme Court of Appeal’s heroin example is not apt. At the risk of repetition, the simple point of distinction is that an individual can possess a tampered vehicle if there is lawful cause for its possession.’

[38] We consider that unlike in *Ngqukumba*, where the unlawful possession of a tampered vehicle had not yet been determined, in the current matter it is not in dispute that from the time of its erection, the billboard did not comply with the law – it is an illegal structure. The respondent was aware of this fact throughout. In our view, no court is permitted to countenance a glaring illegality. Nor should a court turn a blind eye on the prescripts of the law and the importance of observing them. After all, the By-laws are designed to maintain order, ensure public safety, and create

¹⁸ Ibid fn 9 para 15.

harmonious living environments. They also play a vital role in promoting sound business interests and competition as well as regulating community life.

[39] Having found that the municipality had acted within the confines of the court order, both the application for special leave and the appeal ought to succeed. There is no reason why costs should not follow the result.

Order

[40] We accordingly make the following order:

- 1 The application for special leave to appeal succeeds.
- 2 The appeal is upheld with costs, such costs to include the costs of the employment of two counsel.
- 3 The order of the full court is set aside and replaced with the following:
‘The appeal is dismissed with costs.’

R SEEOBIN
ACTING JUDGE OF APPEAL

N M MBHELE
ACTING JUDGE OF APPEAL

Appearances

For the applicant: P Strathern SC (with him E Sithole)

Instructed by: AF van Wyk Attorneys, Johannesburg
Webbers Attorneys, Bloemfontein

For the respondent: W Krog

Instructed by: Le Mottée Rossle Attorneys, Johannesburg
Badenhorst Attorneys, Bloemfontein