

**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable: YES/NO**

**Of Interest to other Judges: YES/NO**

**Circulate to Magistrates: YES/NO**

Case number: 1640/2021

In the matter between:

**THE MEMBER OF THE EXECUTIVE COMMITTEE:**  
**POLICE, ROADS & TRANSPORT, FREE STATE**  
and

Applicant

**KET CIVILS CC**  
**NWETI CONSTRUCTION (PTY) LTD**  
**DOWN TOUCH INVESTMENT(PTY) LTD**  
**RAUBEX NODOLI CONSTRUCTION JV**  
**TAU PELE CONSTRUCTION (PTY) LTD**  
**SEDTRADE (PTY) LTD**

1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent  
4<sup>th</sup> Respondent  
5<sup>th</sup> Respondent  
6<sup>th</sup> Respondent

**JUDGMENT BY:** MHLAMBI J,

**HEARD ON:** Matter disposed of without oral hearing in terms of  
section 19(a) of the Superior Court Act 10 of 2013.

**DELIVERED ON:**

This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down is deemed to be at 9h00 on 05 May 2022.

**APPLICATION FOR LEAVE TO APPEAL**

**MHLAMBI, J**

- [1] The First respondent (and all the parties in the counter-application, will be referred to as such in this application) filed a notice of the application for leave to appeal in terms of section 16(1)(a)(i) read with section 17(2)(a) of the Superior Courts Act 10 of 2013 on 4 October 2021 which reads as follows:

***“TAKE NOTICE THAT, in terms of section 16(1)(a)(i) read with section 17 (2)(a) of the Superior Courts Act 10 of 2013 (“the Superior Court Act”), the First Respondent (“KET”) intends to apply to the above Honourable Court for leave to appeal to the Supreme Court of Appeal against paragraphs 1 to 5 of the amended order granted by Honourable Mr Justice Mhlambi (“Judge Mhlambi”) on or about 13 September 2021 (the “second order”).***

***TAKE NOTICE FURTHER THAT this application for leave to appeal is brought pursuant to the Judge President’s letter dated 17 September 2021 and addressed to KET’s attorneys, in which the Judge President clarified the position in relation to the contradictory first and second orders. Since this letter does not form part of the Court record, it, together with KET attorneys’ letter of 16 September 2021, are attached marked “LA1” and “LA2” respectively for convenience and ease of reference.”***

[2] The grounds on which the application for leave to appeal is sought are briefly stated as follows:

2.1 Compelling reasons for the application for leave to appeal to be heard:

2.1.1 The court did not grant the second order on 29 April 2021 and there was no subsequent hearing where such an order was granted;

2.1.2 The court failed to exercise its discretion judicially;

2.1.3 The granting of the second order was inconsistent with the principles set out in *EKE vs. Parsons*<sup>1</sup> and *Bengwenyama*<sup>2</sup> as the court simply rubber-stamped the consent order presented to it by the applicant (The Department) and the third to fifth respondents in the counter-application without considering whether the order was competent or appropriate.

2.2 Prospects of success

2.2.1 The order on the merits could not be granted when the application was not urgent;<sup>3</sup>

2.2.2 The order on the merits exceeded the draft consent order.

[3] The application is therefore predicated upon section 17(1) of the Superior Courts Act of 2013 which provides as follows:

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<sup>1</sup> 2016(3) SA 37 (CC); 2015 (11) BCLR 1319 (CC).

<sup>2</sup> *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama-ye-Maswati Royal Council Intervening)* 2011 (4) SA 113 (CC); 201(30) BCLR 229 (CC).

<sup>3</sup> Para 10.1 of the application for leave to appeal.

*“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*

*(a)(i) the appeal would have a reasonable prospect of success; or*

*(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;”.*

[4] The use of the word “*would*” in the statute indicates a measure of certainty that another court will differ from the court which judgment is sought to be appealed against.<sup>4</sup> Where a compelling reason is advanced why the appeal should be heard, a court should give careful and proper consideration to the reason advanced before categorising it as compelling. Section 17(1)(a)(ii) should therefore not be invoked for flimsy reasons.<sup>5</sup>

[5] Before considering the grounds of appeal, a brief background is necessary. “LA1”<sup>6</sup> is the letter addressed to the Judge President of the High Court of the Free State Division, Bloemfontein in which he is asked to intervene in the following respects:

*“6.9.1 By investigating and establishing the source of the second and third court orders. If they emanate from a source other than Mhlambi, J, then they are unlawful and serious breach of the law and the court’s protocols. No doubt the Judge President will address such a breach appropriately.*

*6.9.2 If the second and third court orders emanate from or have been issued with Mhlambi, J’s authority, by –*

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<sup>4</sup> *The Mont Chevaux Trust v Tina Goosen and 18 Others* LCC 14R/2014.

<sup>5</sup> *School Governing Body Grey College, Bloemfontein v Scheepers and Others (South African Teachers Intervening)* (2612/2018) [2019] ZAFSHC 25 (17 January 2019).

<sup>6</sup> Para 1 above.

*6.9.2.1 Establishing from Mhlambi, J whether the second and third court orders replace or exist alongside the first court order striking the counter application of the roll (this apparently is the case according to the department and the other respondent);*

*6.9.2.2 If they replaced the court order, establish from Mhlambi, J which one is ultimately his order; and*

*6.9.2.3 If the ultimate order is the third court order, ask Mhlambi, J to provide his reasons, and the Judge President is asked to issue direction from an expedited application for leave to appeal and or appeal so that KET may challenge the third court order before an open court.”*

- [6] “LA 2” refers to the response of the Judge President to the first respondent’s request, suggesting that in the event of the parties’ dissatisfaction with the manner the presiding judge exercised his discretion, legal pathways should be utilised in order to correct the situation, if necessary.
- [7] Though the first respondent was of the view that the application for condonation was not necessary, such an application was filed and served on 16 November 2021.
- [8] Both the applications for leave to appeal and condonation are opposed.
- [9] On 29 April 2021, the two applications under case numbers 1510/2021(brought by the first respondent as applicant) and 1640/2021(a counter-application brought by the MEC as applicant) served before me on an urgent basis. The order sought in Part A of the first respondent’s application under case number 1510/2021, reads as follows:

*“1. That the non-compliance with the Uniform Rules of Court be condoned and that the matter be heard as an urgent application in terms of Rule 6(12) (a).*

*2. It is declared that:*

*2.1 The first respondent is obligated to initiate the process to terminate any and all contracts concluded between the first respondent and the applicant pursuant to the applicant being a member of the panel of contractors described as the “Panel of contractors for upgrading, periodic, routine and special maintenance of all Free State roads for the department of Police, Roads and Transport for a period of thirty-six (36) months (8CE) and higher on ad-hoc basis” constituted by the first respondent in 2020 under BID 06/2018/19 (“the panel”).*

*2.2 The applicant was entitled to suspend further works under all contracts concluded between the first respondent and the applicant pursuant to the applicant being a member of the panel after being informed of the find of the third respondent that the constitution of the panel was irregular, and in preparation for the termination contemplated in paragraph 2.1 above.*

*3. Pending the determination of Part B,*

*3.1 Directing the first respondent to suspend (save for traffic control services, the preservation of the completed works, and generally keeping the roads safe for use by the public, which services the applicant and the fourth to fifth respondents must continue to provide and the department must continue to pay them for), and interdicting the first respondent from performing in terms of, any and all contracts concluded by it with the applicant and the fourth to*

*eight respondents pursuant them being the members of the panel;  
and*

*3.2 Interdicting the first respondent from issuing instructions (other than in respect of traffic control and preservation of the works and generally keeping the roads safe for use by the public) to the applicant and the fourth to eight respondents pursuant to them being members of the panel to perform under the suspended contracts.*

- 4. Directing the first respondent to provide the applicant and the fourth to eight respondents with full copies of the third respondent's findings within five (5) days of the date of this order.*
- 5. Granting the applicant leave to amend the relief sought in Part B and or file a supplementary affidavit in respect of such amended relief.*
- 6. Directing all respondents who oppose Part A to pay costs of suit, jointly and severally, the one paying the other to be absolved.*
- 7. Further and or alternative relief."*

[10] The order sought in the counter-application under case number 1640/2021 reads as follows:

- "1. That the non-compliance with the Uniform Rules of Court be condoned and the matter be heard as an urgent application in terms of Rule 6(12) (a).*

2. *That this application be heard simultaneously with the application under the case number 1510/2021 as the facts and parties are substantially the same.*
3. *An order in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") reviewing and setting aside the decision of the applicant, acting in his capacity as the accounting officer of the applicant in appointing the first to sixth respondents on the 21st February 2019 in the panel PR&T/BID06/2018/19 for the upgrading, periodic, routine and special maintenance of all Free State road for the department of Police, Roads and Transport for the duration of thirty-six (36) months and any contract made under this panel.*
4. *An order in terms of section 172(1)(a) of the Constitution of the Republic of South Africa, 1996, declaring that the conduct of the applicant and constituting the panel as set out hereinabove is inconsistent with the provisions of section 217 of the Constitution and is invalid to the extent of the inconsistency.*
5. *An order in terms of section 172(1)(b)(ii) of the Constitution of the Republic of South Africa, 1996, suspending the declaration of invalidity of the contracts emanating from the panel and any extensions thereunder until the said contract is completed.*
6. *An order directing any respondent opposing this application to pay the costs of this application, jointly and severally the one paying, the others to be absolved.*
7. *Any order just an equitable as this Honourable Court may deem fit."*

- [11] Paragraphs 1-5 of the “*second order*” referred to in the application for leave to appeal, refer to prayers 1-5 of the counter-application save for the minor amendment in prayer 3 which was made an order of the court. The order granted in court related to the agreement which was reached by the parties and incorporated paragraphs 3-6 of “*the second order*”.<sup>7</sup>
- [12] At the inception of the hearing of the applications, the third, fourth and fifth respondents in the counter-application settled their *lis* with the applicant, the MEC of Police, Roads and Transport, by conceding to an order as reflected in paragraphs 3-6 of the “*second order*”. The agreement was verbally communicated to the court by Mr Snellenburg SC, who acted on behalf of the third respondent. The agreement, and the communication to the court by the third respondent, were confirmed by both Mr Grobblers SC and Mr Pienaar, who acted for the fourth and fifth respondents respectively, as well as Mr Bomela, who acted on behalf of the applicant. The agreement was made an order of the court. Mr Luthuli, who acted on behalf of the first respondent, KET Civils, was present in court and stated the following once the order was made: *“Thank you, my lord. My lord before I start if I may just understand the order that the court has just made....I understand that to obviously be provisional, depending on what the court ultimately decides...otherwise, the agreement that has been reached, cannot be made an order of, until such time, as your lordship has granted the department’s application.”*<sup>8</sup>
- [13] In August 2021, I was presented with the letter dated 6 August 2021 from Messrs Peyper Attorneys, one of the respondents’ attorneys, advising that it was in contestation whether the parties’ agreement was made an order of the court as the first respondent contended that it was not. Paragraph five of the said letter reads as follows:

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<sup>7</sup> See below.

<sup>8</sup> Transcribed record on pages 6 and 7.

*“5. It is by agreement between the parties that we hereby humbly request his Lordship Mhlambi, J to consider the attached record of the proceedings, and more particularly pages 1 to 6 and 53 to 55 to confirm alternatively clarify whether the court had indeed made an order pursuant to the agreement between the Department and the respondents. The court’s clarification will be of critical importance in the pending application under Case no: 1510/2021 that is set down for hearing on 02 September 2021.”*

[14] I responded in writing and confirmed that the agreement that was reached between the applicant, the third, fourth and fifth respondents under Case No: 1640/2021, and as presented in court by Mr Snellenburg SC, was made an order of the court.

[15] In September 2021, I was presented with a letter from the applicant’s attorneys, to which was attached a letter from Adv. L R Bomela. The concern was that the court order in the applicant’s possession omitted some of the prayers in the agreement which was made an order of the court. I was requested to vary the order in terms of Rule 42(1)(b) of the Uniform Rules of Court only to the extent of including the prayers which were omitted from the order. A draft order, much in line with the order granted in court, was attached to the counsel’s (Mr Bomela) letter. The request was not adhered to. I was of the view that the counsel’s approach did not comply with the said rule as, *ex facie* the document presented to me, the other parties were not notified.<sup>9</sup>

### The Transcribed record

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<sup>9</sup> Isaacs v Williams en Ander 1993(2) SA 723 (NC), where it was held that: *“An order which was correctly made but incorrectly typed cannot be corrected or amended in accordance with Uniform Rule 42. However, a court has the inherent competence to correct the order so that it corresponds with the order which it indeed made.”* See also State vs. Wells 1990 (1) SA 816 (A).

[16] In paragraph 2.2 of “LA1”, the applicant contended that: *“Indeed, the two applications served before the Honourable Justice Mhlambi on 29 April 2021. At the commencement of the hearing, Mhlambi, J directed the parties to address him on urgency first and indicated that he would only hear the merits of the applications only if he was satisfied that they were urgent. At that stage, the department and the other respondents in the counter application presented the court with a draft order which purported to settle the litigation between them and the department (to the exclusion of KET). When it appeared that Mhlambi, J was favourably disposed to granting such consent order, KET’s counsel addressed the court on why such proposed consent order was incompetent and could not be granted.”*

[17] In paragraphs 4.1 and 4.2 of the said letter the following was stated:

*“4.1 Fearing that the department and the other respondents would drag their feet and jeopardise the hearing date of 2 September 2021, KET proposed that clarity be sought from Mhlambi, J on the first court order by way of a letter (as opposed to a formal application in terms of Rule 42). KET was of the view that this approach would not only save time, but would elicit a very simple response confirming the order striking the application off the roll.*

*4.2 However, to KET’s surprise, what returned was an order granting the relief sought by the department in the counter application but without the just and equitable remedy preserving the contracts (“**the second court order**”). The second order was sent to us by the other respondents’ attorneys on 2 August 2021. The second court order is back-dated and stamped with the date 29 April 2021. We must point out that since we had no involvement in the process beyond suggesting that the department and the other respondents write a letter to Mhlambi, J (which*

*was copied to us), we do not know whether the second court order was issued by Mhlambi, J or simply by someone in the registrar's office."*

- [18] The first respondent was placed in possession of the transcribed record,<sup>10</sup> a copy of which was attached to the notice of the application for leave to appeal. At the commencement of the hearing, Snellenburg SC addressed the court as follows:

*"Then, I will just ask before my colleagues put themselves on record, that before you proceed, to hear arguments, that you just give us an opportunity to address you on the manner, which we feel this matter must be approached, after everybody is on record...M'Lord, it is quite simple. The third and fourth and fifth respondents in the reactive challenge...have reached an agreement, with the MEC, as applicant in that application... with regards to an order that we concede to, that he can take subject to two very minor amendments. And the first is then, paragraph 3 of that notice of motion. The words in terms of section 6 of the Promotion of Administrative Justice Act 3/2000 and between brackets (PAJA). That is now the reactive counter application. That is taken out, deleted. So, it will simply read: an order reviewing, setting aside the decision of the applicant, acting in his capacity as the accounting officer of the applicant, in appointing the first to sixth respondents and it goes on... Yes, that is removed and then prayer 6, paragraph 6. To read that the: an order directing the applicant to pay the third, fourth and fifth respondents' costs."*<sup>11</sup>

- [19] The amendments and orders sought were granted.<sup>12</sup> It is apparent therefore that the order granted is reflected in paragraphs 3 to 6 of *"the second order"*. The orders for the removal of both the application and the counter-application are reflected on page 55 of the transcribed record.

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<sup>10</sup> Para 15.7: Founding affidavit of the condonation application.

<sup>11</sup> Pages 2 – 4 of the transcribed record.

<sup>12</sup> Lines 15 – 25 on Page 6 of the transcribed record.

## Condonation

- [20] In its application for condonation, the first respondent stated that “*Whatever the judge intended to do on 29 April 2021, it was beyond dispute that it led to great confusion and that confusion was only resolved, not even when the amended order was issued on or about 13 September 2021, but when the Judge President clarified the relationship of the various orders in his letter of 17 September 2021.*”<sup>13</sup> It was further stated that the first respondent could not have been expected to apply for leave to appeal before the clarification was provided and certainly not before or on 13 September 2021 when the amended order appealed against was issued.<sup>14</sup> It could not have applied for leave to appeal within 15 days of 29 April 2021 as it saw the amended order for the first time on 13 September 2021. This order was not granted in open court and was back-dated to 29 April 2021. Its attorneys disputed, as per correspondence dated 21 July 2021, that no other order was granted by the court other than the one that was in the court file, striking the application off the roll with costs.<sup>15</sup>
- [21] The first respondent could also not apply for leave to appeal in May 2021 as the amended order appealed against had not been issued. It was therefore not in wilful default. On 12 November 2021, I received a letter to the effect that the applicant’s application for leave to appeal was filed on 4 October 2021 and that no date had been allocated for it to be heard. There was no need for the first respondent to bring a condonation application as the order sought to be appealed against was not granted on 29 April 2021. The letter was also forwarded to the Judge President, seeking once again his intervention. I responded in writing and informed the attorneys that the application would not

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<sup>13</sup> Para 13: Founding affidavit- condonation application.

<sup>14</sup> Paragraph 13: Founding affidavit- condonation application.

<sup>15</sup> Paragraph 15.8 of the Founding Affidavit.

be entertained before an application for condonation for leave to appeal was filed.

### Analysis

- [22] It would seem that despite the first applicant's protestation that it did not delay in seeking leave to appeal, it sought leave to appeal only on the direction of the Judge President's response to its correspondence and that is when it regarded the "*clock to start running*."<sup>16</sup>
- [23] The thrust of the first applicant's attack or *causa* in both the application for condonation and the compelling reason why leave to appeal should be granted, is that the court did not grant the "*second order*" on 29 April 2021 and that there was no subsequent hearing where such an order was granted.<sup>17</sup>
- [24] It was submitted on behalf of the applicant and the three respondents that the first respondent knew what the court order was when it was made in court on 29 April 2021 and that the order existed before the applications were struck off the roll. The first respondent, it was submitted, attempted to gain traction from the fact that there was initially no typed order in the file and later changed tack to latch onto the erroneous recordals of the order.<sup>18</sup> The court order as granted in court never changed and was simply not correctly typed by the Registrar's office.<sup>19</sup> I agree.
- [25] It is evident from the transcribed record that three orders were made on the same day, namely, 29 April 2021. The first was made before the various counsel could present their arguments and the other two orders were made at the close of arguments when both applications were struck off the roll for lack

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<sup>16</sup> Paragraph 11 of the first respondent's Heads of Argument on page 8.

<sup>17</sup> Paragraph 15.1 of the first respondent's Heads of Argument.

<sup>18</sup> Para 40: Respondents' heads of argument.

<sup>19</sup> Para 37: respondents' heads of argument.

of urgency.<sup>20</sup> It is therefore disingenuous of the first respondent to state that it was unaware of these orders on that day. The first respondent's presentation of the facts as shown in paragraph 16 above, is totally flawed and misleading. The sequence of events is as set out in the transcribed record. There was no draft order that was presented to the court, save the respondents' oral request (which was granted) that the agreement between the parties is made an order of the court.

[26] The first respondent did not deny having received a copy of the transcribed record. It is not denied that Snellenburg SC placed the agreement between the applicant, the third, fourth and fifth respondents on record requesting that it be made an order of the court. It is also not denied that Grobblers SC enquired from the court whether the agreement was made an order of the court. It is also not denied that the applicant's counsel, Mr Luthuli, as well as the applicant's attorneys, were in court when the order was made. It is clear that Mr Luthuli was aware, as at the commencement of the proceedings and before the various counsel's arguments were presented, and long before the applications were struck from the roll for lack of urgency, that the court had made an order as requested by the respondent's counsel. The two other orders granted on that day were the striking off of the two applications towards the end of the proceedings after the oral address by the various counsel.

[27] The court proceedings and the transcript of 29 April 2021 make nonsense of the first respondent's stance, that it only became aware of the judgment on 13 September 2021 when the second order was brought to its attention. The fact is that the agreement between the parties was made an order of the court. This order was neither revisited nor changed from the time it was made to date. Whether the order was provisional or wrongly given, is neither here nor there. It was incumbent on the first respondent or its legal representatives,

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<sup>20</sup> See pages 3, 6 and 55 of the transcribed record.

being fully aware of the order, whether provisional or otherwise, to proceed in terms of the rules to set the order aside if aggrieved by it. The first respondent failed to do so.

- [28] The grounds presented for the condonation application are forced, do not hold water, and are in essence flawed. The application for condonation should therefore fail. In the circumstances, it behoves of me to traverse the grounds of appeal as presented by the first respondent.

Compelling reasons for the application for leave to appeal to be heard

- [29] The first ground advanced for the application for leave to appeal to be heard, is, as in the application for condonation, that the court did not grant the second order on 29 April 2021 and that there was no subsequent hearing where such an order was granted. There is no substance in this proposition as indicated above and it stands to be rejected for lack of substance. It was further contended that the second order was not granted in open court and that, at best, it could have been granted in chambers in the absence of the applicant, without affording the applicant an opportunity to be heard. The contention is unfortunate, lacks substance, and should be dismissed for being devoid of truth.
- [30] The second ground is that the court did not exercise its discretion judicially. It was contended that the consent order granted ameliorated the effect of the auditor general's findings against the department in circumstances where the auditor general was not cited as a respondent. The granting of the second order was inconsistent with the principles in *Eke vs. Parsons* as the court rubber-stamped the consent order presented to it without considering whether it was competent or appropriate. The first respondent could only be bound by the consent order if it elected to abide.

[31] The first respondent failed to state how the court is alleged to have based the exercise of its discretion on incorrect facts or wrong principles of law.<sup>21</sup> The law demands that, when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency and may make any order that is just and equitable.<sup>22</sup> The courts are therefore bound by the constitution to make a declaration of invalidity when confronted with unconstitutionality.<sup>23</sup> In *Eke vs Parsons*<sup>24</sup> the following was stated:

*“This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place “relate directly or indirectly to an issue or lis between the parties. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of the court.” Secondly, “the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order”. That means its terms must accord with both the constitution and the law. Also they must not be at odds with public policy. Thirdly, the agreement must” hold some practical and legitimate advantage”.<sup>25</sup>*

[32] The basis for the first respondent’s suggestion that the court failed to consider whether the order was competent or appropriate is not clear, especially viewed from the background that the court had to traverse the notices and the

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<sup>21</sup> Paragraph 15.2.2 of the Heads or Arguments

<sup>22</sup> Section 172(1) of the Constitution.

<sup>23</sup> *Department of Transport and Others vs. Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 147.

<sup>24</sup> 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) para 25.

<sup>25</sup> Para 26, *supra*.

evidence presented by way of affidavits contained in the two applications which served before it on 29 April 2021.

- [33] In *Bengwenyama Minerals (Pty) Ltd and others vs. Genorah Resources (Pty) Ltd and others (Bengwenyama-ye-Maswati Royal council intervening)*<sup>26</sup> it was stated that a court, when considering whether to grant a just and equitable remedy under section 172(1)(b) of the constitution, to ameliorate the effect of a compulsory order in terms of section 172(1)(a) of the constitution, the rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented-direct or collateral; the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.
- [34] The order granted in terms of the amended prayers 3 to 6 of the counter-application was not mechanically made but made in line with the prevalent legislation, the current law, and the circumstances of the case. In *Big Five Duty Free (Pty) Ltd vs. Airports Company South Africa Ltd and others*<sup>27</sup>, it was stated that the court making the agreement an order of court does not enter into the merits of the litigation: it must do no more than satisfy itself that the agreement relates to the litigation between the parties and that it was not contrary to policy or the law. The order made was both competent and proper.
- [35] On a consideration of the facts of the case, it was not necessary for the first respondent to be bound by the consent order, or to abide by it, as it had no standing in respect of the other respondents' contracts. Its rights, relating to the contracts between it and the department, remained intact.

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<sup>26</sup> 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC).

<sup>27</sup> [2017] 4 ALL SA 295 (SCA) paragraph 17.

## Prospects of Success

[36] In paragraph 23 of its heads of argument, the first respondent queried the contents of the Judge President's letter<sup>28</sup> in that either the scenarios sketched therein could not stand up to legal scrutiny and were not supported by the facts. It contended that it opposed the granting of the consent order because such an order could not be lawfully granted. This submission, as shown above, is devoid of truth. There is no substance in the first respondent's contention that, to the extent that the court found that the application was not urgent, it could not enter the merits and grant any order in that regard.<sup>29</sup> Firstly, the court did not enter the merits. Secondly, the first respondent, it would seem, purposely twisted the facts and the chronology in which the three orders were granted. It is clear from the transcribed record that the orders striking off the applications were granted after the agreement between the parties was made an order of the court. Consequently, the submissions and arguments made under this heading are without substance.

## Conclusion

[37] Both the applications for condonation and leave to appeal are based on the one incorrect fact that the consent order was not granted on 29 April 2021. In the light of the above, there are no prospects that another court would come to the conclusion that such an order was not granted on that day. Consequently, both applications should fail.

[38] The following order is issued:

## **Order:**

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<sup>28</sup> "LA 2".

<sup>29</sup> Paragraph 24.1 of the Applicants Heads of Argument.

1. The applications for condonation and leave to appeal are dismissed with costs, including the costs of two counsel where employed on behalf of the applicant, third, fourth and fifth respondents.

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**JJ MHLAMBI, J**

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