IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2011/32313

(1)	REPORTABLE: ~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3)	REVISED: YES / ~~NO~~
9 May 2025	_____
DATE	SIGNATURE

In the matter between:

CITY OF EKHURULENI METROPOLITAN MUNICIPALITY Applicant

and

BOTES, MARIUS CHRISTIAAN N.O. Respondent

LEAVE TO APPEAL JUDGMENT

WINDELL J

[1] This is an application for leave to appeal by the applicant, the City of Ekurhuleni Municipality (the Municipality) to the Supreme Court of Appeal, alternatively to the Full Court, Gauteng Division Johannesburg. The Municipality seeks leave to appeal an order in which this court granted judgment in favour of the plaintiff (the executor in the estate late Lourens Louis Botes (Mr Botes) for general damages in the amount of R600 000 and past hospital and medical expenses in the amount of R151 035.71.

[2] The action against the Municipality was instituted in 2011—more than thirteen years ago. Following Mr Botes's death on 11 February 2012, the present respondent was substituted as plaintiff in his capacity as the executor of Mr Botes's estate.

[3] Mr Botes's claim arose from a motorbike accident that occurred on 10 July 2010 within the jurisdiction of the Municipality, when he struck a pothole and sustained serious injuries. This court found that the Municipality had a legal duty towards all members of the public to attend to the proper upkeep and maintenance of public roads within its area and that it was negligent for failing to repair the pothole.

[4] The Municipality do not appeal against the factual findings of the court. Neither do they appeal the award in respect of past medical and hospital costs. They only apply for leave to appeal against the general damages ward. They raise one issue only: The claim for damages could not have been awarded as the pleadings were not closed when Mr Botes passed away and therefore *lites contestatio* had not been reached.

[5] It is trite that in terms of the common law, a claim for general damages could not transfer to the estate of a deceased person if the person commenced action but then passed away before the pleadings had closed. The death of Mr Botes, pre-*litis contestatio* therefore meant that any claim for general damages would have come to an end. However, on 13 May 2016, the Court, in *Nkala and Others v Harmony Gold*

mining and Others 2016 (5) SA 240 (GJ), developed the common law. It held that where a plaintiff, who has instituted an action for general damages arising from harm caused by a wrongful act or omission, dies before the matter reaches the stage of *litis contestatio*, such claim does not lapse. Provided that the deceased would, but for his or her death, have been entitled to maintain the action and recover general damages, the action survives for the benefit of the deceased's estate. The party who would have been liable for the general damages had the plaintiff not died remains liable notwithstanding the plaintiff's death.

[6] Thus, by the time the various pre-trial proceedings in the present matter took place—spanning from 2016 to as recently as 2023—and when the trial commenced on 24 January 2024, the principles laid down in *Nkala* had long been established and were accepted as binding authority. It is therefore not surprising that *litis contestatio* was not raised by the Municipality in the pleadings, pre-trial minutes, or at any stage during the trial. Even at the close of the trial, when the parties were afforded an opportunity to file written heads of argument, no mention was made of this issue. It is raised for the first time in this application for leave to appeal and appears to be an afterthought rather than a bona fide ground of appeal.

[7] It is trite that a party may not raise a new issue on appeal that was not pleaded or canvassed in evidence or argument. To do so is impermissible and contrary to the principles of fair trial and procedural fairness. In *Minister of Safety and Security v Slabbert* 2010 (2) SACR 435 (SCA) para 11 the Supreme Court of Appeal held as follows:

> [11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said:

'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue'.

[8] In the present matter, the issue of *litis contestatio* was never placed in dispute. The Municipality participated in the trial without objection, filed pleadings, attended pre-trial proceedings, led evidence, and presented argument. At no stage was it suggested that the plaintiff was precluded from claiming general damages.

[9] The purpose of an application for leave to appeal is not to afford a party the opportunity to introduce a new issue which was never properly ventilated during the trial. The appellate process is directed at determining whether the trial court erred on the issues that were before it.

[10] In my view, this application is an opportunistic attempt by the Municipality to avoid satisfying a judgment lawfully granted in favour of the plaintiff. Courts have repeatedly cautioned against the abuse of process by litigants who, instead of complying with final orders, resort to procedural manoeuvres aimed at delaying enforcement. Such conduct not only undermines the authority of the courts but also erodes public confidence in the integrity of the justice system.[1] These principles militate against granting leave where no bona fide ground of appeal has been shown.

[11] There is therefore no merit in the ground advanced, and no reasonable prospect that another court would come to a different conclusion.

[12] In the result the following order is made:

---

[1] *MEC for the Department of Public Works and Others v Ikamva Architects CC and Others* (867/2022) [2024] ZASCA 95 (13 June 2024)

1. The application for leave to appeal is dismissed.
2. The applicant to pay the costs of the application on Scale B.

_____

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 May 2025.

APPEARANCES

Counsel for the applicant:	Ms K Potgieter
Instructed by:	DDVA & Chiba Attorneys
Counsel for the respondent:	Mr U Jordaan
Instructed by:	Leon JJ van Rensburg Attorneys
Date of hearing:	19 March 2025
Date of judgment:	12 May 2025