IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022/531

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the matter between:

THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	Applicant
and	
THURWOOD INVESTMENTS (PTY) LTD	First Respondent
THE CITY OF EKURHULENI METRO POLICE	Second Respondent

JUDGMENT

MOORCROFT AJ:

Summary

This is an application for leave to appeal. In order to succeed the applicant had to show reasonable prospects of success on appeal. It failed to do.

The applicant initially failed to place evidence before the Court to show that the respondent was acting in conflict with a Council resolution, and in the absence of such evidence it failed to make out a case. There is no reasonable prospect that another Court will come to a different conclusion.

Order

[1] This is an application for leave to appeal. I make the following order:

"1. The application for leave to appeal is dismissed;

2. The applicant is ordered to pay the costs of the application."

[2] The reasons for the order follow below.

Introduction

[3] The applicants seeks leave to appeal in terms of section 17 of the Superior Courts Act against the judgment given by me in the Urgent Court on 16 March 2022.

[4] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused.

[5] In *KwaZulu-Natal Law Society v Sharma*[1] Van Zyl J held that the test enunciated in *S v Smith*[2] still holds good:

> *"In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[6] In an *obiter dictum* the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*[3] held that the test for leave to appeal is more stringent under the Superior Courts Act of 2013 than it was under the repealed Supreme Court Act, 59 of 1959. The sentiment in *Mont Chevaux Trust* was echoed by Shongwe JA in the Supreme Court of Appeal in *S v Notshokovu*.[4]

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1 2017 JDR 0753 (KZP), [2017] JOL 37724 (KZP) paras 29 to 30.
2 2012 (1) SACR 567 (SCA) para 7.
3 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6.
4 [2016] ZASCA 112 para 2. See also Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5; *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26.

Analysis

[7] The applicant is the City of Ekurhuleni Metropolitan Municipality. The first respondent (*"the respondent"*) provides fibre network services within Ekurhuleni. In the application heard in April 2019 the applicant sought various orders relating to its averment that the respondent was installing aerial fibre[5] in Ekurhuleni in conflict with a resolution of the applicant that aerial installation be terminated.

[8] Mr. Sithole submitted that there is a reasonable prospect of success on appeal for the following reasons, as summarised by me:

8.1 The applicant resolved in October 2021 to halt the installation of aerial fibre;

8.2 The resolution must be interpreted to encompass the maintenance of aerial fibre networks, and not only the installation;

8.3 The respondent's wayleave permission to install these poles and fibre cabling lapsed, and the applicant refused to extend the permission;

8.4 In January 2022, the respondent's application for an order suspending the applicant's resolution and extending its permission to install poles was dismissed in the High Court;

8.5 The respondent accepts the binding nature of the resolution, pending the outcome of the review;

[5] Fibre cabling is used for the transmission of digital signal to residential homes and to business premises, and have become ubiquitous.

8.6 The respondent currently had no right to proceed with the installation of aerial fibre cabling in Ekurhuleni;

8.7 The respondent admits that it was still active in the area, albeit that it merely conducted maintenance on the existing aerial network and was not installing fibre cabling;

8.8 Because the respondent admitted working in the area, it carries the onus to show that it was not installing fibre. If it did restrict its activities to maintenance, such maintenance would in any event be in conflict with the applicant's resolution unless it was done on a case by case basis in agreement with the community and the applicant;

8.9 Maintenance should only be conducted in terms of agreement with the applicant and the community.

Interpretation of the resolution

[9] The resolution[6] is not open to the interpretation that it encompasses all maintenance. There would possibly be a number of problems with a resolution that sought to do this, not least objections from the residents with accrued rights who required or wanted access to the Internet, but the question need not be answered as the resolution clearly does not purport to do so.

[6] The resolution is quoted in para 11 of the judgment.

The applicant's case in the founding papers

[10] The applicant relied on a number of bald allegations in its founding papers, none of which were supported by evidence:

10.1 The installation of aerial fibre was the cause of unrest in the area, of such magnitude that it led to arson and murder;[7]

10.2 In March 2022 it was brought to the attention of the applicant that employees of the first respondent was currently conducting work in the area[8] in conflict with the applicant's resolution.

[11] The averment that the installation of poles led to the unrest in the area is supported by an affidavit by a superintendent of the applicant who informs the court that she was told by a daughter of a councillor that she had been attacked by employees of the respondent in her home.

[12] The respondent's employees allegedly ripped poles and wires apart and threw those items into her yard, and threatened to burn down her house. Aside from the hearsay nature of the evidence, the reason for the alleged behaviour of the respondent's employees in destroying their own work is not disclosed.

[13] This affidavit was filed in litigation in the earlier litigation, under case number 2021/59383.

[14] In a letter by the applicant's attorneys dated 7 March 2022 it is alleged that *"we have been informed by employees of our client at the customer care centre of our*

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7 Founding affidavit para 36.1.
8 Founding affidavit, par 39.

client in Kwa-Thema that your client has recommenced with the installation of fibre through poles…"

[15] On 29 March 2022 an employee of the applicant informed the applicant's attorneys that *"there is a company installing aerial fibre in Kwa Thema".*

[16] The applicant also relied on photographs. I dealt with the photographs in paragraph 18 of my judgment.

[17] Despite the dearth of evidence to support its case, the applicant nevertheless proceeded to launch an urgent application.

[18] It did not seek to make out a case for the reception of hearsay evidence, such as there was, under section 3 of the Law of Evidence Amendment Act, 45 of 1988.

Onus

[19] There is no onus on the respondent to prove its defence that it is in fact not engaged in the installation of fibre. The onus remains on the applicant throughout and the applicant failed to lay a basis in evidence for the relief sought.

[20] The applicant sought an interim interdict in prayer 2 of its notice of motion and therefore had to show a prima facie right coupled with a balance of convenience in its favour, an apprehension of harm, and the lack of an alternative remedy. In the remaining prayers it sought final interdicts. In order to obtain final interdicts it had to

show a clear right, in addition to a reasonable apprehension of harm and the absence of an alternative remedy.[9]

[21] There is no evidence that the respondent was acting or intended to act in contravention of the applicant's resolution. There is therefore no case made that there was any apprehension of harm in the context of either an interim or a final interdict.

[22] There is also no evidence that the installation of aerial fibre was the cause, or a cause of unrest in the area.

[23] The respondent's counsel, Mr. Hoffman, argued that the application ought to be dismissed on the ground that the issues are of such a nature that the decision sought will have no practical effect or result.[10] This argument was based on two grounds, the second of which is meritorious:

23.1 The pending review should be finalised soon. It is however impossible to predict how long it would take to finalise the review application.

23.2 The applicant's powers to lawfully regulate affairs in Ekurhuleni and to fulfil its constitutional mandate are not affected by the dismissal of its urgent application and if any person were to contravene the law, the applicant would be able to act through it organs to enforce the law. It

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[9] The correct approach to an application for in interim interdict was stated by Clayden J in *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189. See also *Gool v Minister of Justice* 1955 (2) SA 682 (C) 688D–E. The correct approach to a final interdict was summarised by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E to 635B. See also *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) 540C and the discussion by Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* D6. The correct approach to disputes of fact on affidavit was outlined in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

[10] S 16(2)(a) of the Superior Courts Act, 10 of 2013.

does not need an order against its own police department to do so, nor does it require leave to appeal in this matter for it to do so.

[24] Mr. Hoffman also submitted that insofar as the application for leave to appeal is motivated by the cost order made, this is ruled out as a ground of appeal by section 16(2)(ii) of the Superior Courts Act.

Conclusion

[25] I conclude that there are no reasonable grounds of success on appeal. The applicant failed to place evidence before the Court and there is no rational basis to suggest that there are prospects of success on appeal.

[26] For these reasons I made the order set out in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **15 June 2022**

COUNSEL FOR THE APPLICANT:	E SITHOLE
INSTRUCTED BY:	DU PLESSIS DE HEUS & VAN WYK ATTORNEYS
COUNSEL FOR RESPONDENT:	J M HOFFMAN
INSTRUCTED BY:	SCHINDLERS ATTORNEYS
DATE OF THE HEARING:	10 June 2022
DATE OF JUDGMENT:	15 June 2022