IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 89624/2018

(1)	REPORTABLE: ~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED. YES

DATE:

In the matter between:

THE WILDS HOMEOWNERS ASSOCIATION NPC — **FIRST APPLICANT**

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY — **SECOND APPLICANT**

and

PJJ VAN VUUREN BELEGGINGS (PTY) LTD — **FIRSTRESPONDENT**

THE WILDS MANOR HOMEOWERS ASSOCIATION NPC — **SECOND RESPONDENT**

RE:

PJJ VAN VUUREN BELEGGINGS (PTY) LTD **FIRST APPLICANT**

THE WILDS MANOR HOMEOWERS ASSOCIATION NPC **SECOND APPLICANT**

And

THE WILDS HOMEOWNERS ASSOCIATION NPC **FIRST RESPONDENT**

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **SECOND RESPONDENT**

LEAVE TO APPEAL JUDGMENT

Introduction

[1] This is a judgment in the application for leave to appeal brought by the first respondent against the whole of the judgment and order of this court, handed down on 29 July 2022. The parties are referred to as in the main application.

[2] The background to this matter is dealt with in the main application and I do not propose to repeat it.

The test to be applied

[3] The requirements for applications for leave to appeal are dealt with in *Waco Africa (Pty)Ltd t/a SGB-Cape v Eskom SOC Ltd and Others*[1] as follows

"[7] The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come

[1] *2022 ZA GPJHC 631(2 September 2022).*

to a different conclusion to that reached by me in my judgment. This approach has been codified in s17 (1) (a) (i) of The Superior Court's Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success'

[8] In *Ramakatsa and Others V African National Congress and Another*, the SCA held that the test of reasonable prospects of success postulates a dispassionate decision, based on the facts and the law that a court of appeal 'could' reasonably arrive at a conclusion different to that of the trial court. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[9] The ratio in Ramakatsa simply followed S v Smith 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plaskett AJA (Cloete AJ and Maya JA), held as follows at para 7

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has 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'

[10] In Mont Chevaux Trust v Tina Goosen, the Land Claims Court held (in an obiter dictum) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by SCA in an unreported judgment in Notshokovu v S. In that matter the SCA remarked that appellant now faces a higher and more stringent threshold, in terms of the Superior Courts Act 10 of 2013 compared to that under the provisions of the repealed Superior Court Act 59 of 1959. The applicable legal principle as enunciated in Mont Chevaux has now also been endorsed by the full court of the Gauteng Division of the High Court in Pretoria in Acting National Director of Public Prosecutions and Others V. Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions and others."

The Grounds of Appeal

[4] The first respondent sets out comprehensive grounds upon which the application is advanced even though these are in a number of instances repetitive. I deal with these seriatim.

a) The first respondent submits that this court erred by not taking into account that the first applicant was the developer of the estate and that security was a major consideration and that the order granted would result

in uncontrollable access with attendant security risks.

b) There is no rational connection between the determination of whether or not the relevant roads are public roads and the position of the first respondent as a developer. The first respondent had access through gates 1 and 2 of Trumpeter's Loop as well as Beisa Streets when the estate was initially developed. Security was not compromised at that time and there is no reason why it will be compromised at this time. The order merely gives access to the applicants and there is no basis or evidence on which access should become "uncontrollable."

[6] a) The first respondent further submits that the court should have taken into account that members of the first respondent, by paying levies, maintain the security controls and access gates.

b) The payment of levies is not relevant to the determination of whether the relevant roads are public roads. Further, the first respondent created its own predicament in that it declined the applicant's offer to be incorporated into the estate and become a member of the first respondent at reduced levies during the development phase, which contribution would have assisted the first respondent to manage the expense in this regard.

[7] a) It is averred that the court erred in not taking into account that the township application had been motivated as a secure residential estate and that in the proclamation the municipality approved of the utilisation of the internal roads as privates' roads.

b) The is no evidence to prove that the municipality approved the utilisation of the internal roads as private roads. It is therefore incorrect for the first respondent to make such claim in an application for leave to appeal. No township is allowed to restrict access to public roads within the township unless it had been authorised to do by the relevant municipal council in terms of section 43 (a) or (b) of the Rationalisation of Local Government Affairs Act 10 of 1998 (the Act), which is referred to in the judgment.

[8] a) The first respondent contends that when the township was made (initially in the early 2000's), both the Act and the Local Governance Ordinance 17 of 1939 applied and had to be applied.

b) Whilst it is correct that both the Act and Section 63 of the Local Governance Ordinance 17 of 1939 applied at the stage the township application was made, it is not correct that the municipality had to apply the Act, this is evident from the wording of section 43 of the Act which is referred to in the judgment. The assertion that section 63 of the Ordinance had to be applied corroborates the fact that the roads were public roads as section 63 only applies in the case of public roads.

[9] a) The first respondent states that the court erred in not taking into account that the roads were destined to be utilised as private roads and for that reason the access control erven were demarcated and so proclaimed.

b) The assertion by the first respondent that the roads were destined to be utilised as private roads is made in the absence of any confirmatory evidence. It is factually incorrect.

On the other hand, the demarcation of the access control erven of the roads without traversing the roads, confirms that the roads are public roads.

[10] a) First respondent submits that the court erred by not taking into account that the relief prohibits the first respondent from effectively controlling access.

b) The assertion made by the first respondent is factually incorrect as first respondent is at liberty to the control access as provided for in the Amendment Scheme. It cannot however restrict access provided for in section 43 of the Act.

[11] a) The first respondent further submits that the court erred in not considering that the relief sought would render redundant the township establishment application for a secure residential estate.

b) The first respondent is free to control access as permitted in the Amendment Scheme but is not permitted to restrict access unless it applied for authority to do so in terms of section 43 of the Act. The security of the residential estate is in no way rendered redundant by the order.

[12] a) The court erred in not taking account that it had not objected to the proclamation of extension 27 as it had been motivated to be included in the Wilds Estate.

b) The factual and legal position is that absent any objection by the first respondent, it is bound by the approval and proclamation of extension 27

with Trumpeter's Loop as the public access road. This is the legal situation that existed even prior to the order of this court.

[13] a) The first respondent submits that the court should have found that the approval of the township "sanctioned compliance" with the Act and approved private roads.

b) The evidence shows that the approval was only for access control and not for private roads. Even if the approval of the township "sanction compliance" with the Act, any right to restrict access, had lapsed within-two years of such approval as provided for in section 46 of the Act.

[14] a) The first respondent asserts that the court should have found that neither of the two roads was constructed for the use and benefit of the public.

b) This submission is not supported by the evidence.

[15] a) The first respondent further submits that the court should have found that the internal roads were to be utilised as private roads secured by "strict" access control measures.

b) As already stated there was no evidence that the roads were to be utilised as private roads.

[16] a) The first respondent further states that the court erred in distinguishing the facts in the Mount Edgecombe matter, in terms of which public and private roads are classified on the current utilisation thereof.

b) The Mount Edgecombe matter does not support the first respondent's case. Mount Edgecombe dealt with the use of private roads in a private estate. This case deals with public roads in a private estate and the status of the public roads was established through undisputed evidence from the second respondent. The first respondent merely claimed that the roads in question were private roads without producing any tangible evidence in support of that claim. It is not the respondent's case that it is the registered owner of the roads. In Mount Edgecombe the SCA held that roads were registered erven in the estate. Absent any proof to that effect, the first respondent fails to make out a case. This ground of appeal is also not sustainable.

[17] a) The first respondent states that the judgment and order are in conflict with the Mount Edgecombe judgment as a result of which leave should be granted.

b) Nothing could be further from the truth. As explained in paragraph 16 above, the ratio for the Mount Edgecombe judgment totally distinguishes that case from the present matter. There is therefore no conflict between the two judgments and this ground does not support the granting of leave to appeal.

[18] a) The first respondent seeks support for the notion that the disputed roads are not public roads by relying on the definition of a public road in section 1 of the National Road Traffic Act 93 of 1998.

b) The fact is, "access control" in term of the amendment scheme denotes the public's right of access as envisaged in the latter portion of the said definition. If the two roads had been private roads access control would

not make sense.

[19] a) Further, the respondent relies on the decision in *CDA Boerdery vs. Nelson Mandela Metropolitan Municipality* [2] for the proposition that section 63 of the Local Governance Ordinance 17 of 1939 had been "impliedly repealed" when the constitution took effect on 4 February 1997.

b) That decision was limited to the implied repeal of the levying and recovery in terms of section 10 G (7) of Local Government Transition Act 209 of 1993, and does not constitute authority of general application.

[20] a) Finally, the first respondent submits that the matter is of public importance and involves an important question of law that affects all occupiers of residential estates utilising internal roads.

b) This submission by the first respondent is a general and vague statement which significantly fails to identify the question of law which it regards as an important question law. This matter was decided on the basis of whether the first respondent is the registered owner of the roads, which would render same as private roads.

c) For a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate a significant part of the general public. In the present matter the interests involved concern mainly the first applicant who wishes to execute the development of X27. The first respondent refuses to give the first applicant and his workers the right to

[2] *2007 (4) SA 276 (SCA).*

access X27 by utilising the roads in question. The matter is therefore of no public interest or importance to a significant part of the general public and this ground of appeal is also not sustainable.

d) For the same reasons the matter does not involve an important question of law. The legal points raised by the first respondent are totally unmeritorious and cannot be said to be arguable. In order to be arguable, a point of law must have some prospects of success.

Conclusion

[21] In light of all the above, I conclude that there are no reasonable prospects of success on appeal, alternatively, that another court will come to a different conclusion.

[22] In the result, the application for leave falls to be dismissed with costs.

Order

[22.1] The application for leave is dismissed.

[22.2] The first respondent is ordered to pay costs

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SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of judgment: March 2023

Appearance

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