IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Before His Lordship Mr Justice Labuschagne AJ on 16 April 2024

Case No: 2010/67006

In the matter between:

RABBONI CENTRE MINISTRIES	Applicant
and	
MULTISAND (PTY) LTD	First Respondent
MIDDELWATER EIENDOMME (PTY) LTD	Second Respondent
MIDDELWATER LANDFILLING (PTY) LTD	Third Respondent
VIRGILIO GOUVEIA DOS SANTOS AND MARIA ISABELLE RODRIGUES DOS SANTOS	Fourth Respondent
NTONJANA STEPHENS MPKWESANA	Fifth Respondent
GIDEON PETRUS DU PREEZ	Sixth Respondent
REGISTRAR OF DEEDS, PRETORTIA	Seventh Respondent
RODNEY NKIBE MOSUOE AND SANNIE NTLHOKOMELENG MOSUOE	Eighth Respondent
ROCCA INVESTMENTS (PTY) LTD	Ninth Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Tenth Respondent
THE PREMIER OF THE PROVINCE OF GAUTENG N.O.	Eleventh Respondent
THE MEMBERS OF THE EXECUTIVE OF THE GAUTENG PROVINCIAL PROVINCE RESPONSIBLE FOR THE DEPARTMENT OF ROADS AND TRANSPORT N.O.	Twelfth Respondent

JUDGMENT

[1] The applicant is Rabboni Centre Ministries, who conducts a church on Portion 27 (a Portion of Portion 17 of the farm Uitvalgrond). In 2010 an action commenced in which the first to fourth respondents sued for a right of way against *inter alia* the current applicant to allow them access to their properties.

[2] After a few days of evidence, a court order was made by agreement between the parties. On 8 June 2016 Prinsloo J made the following order by agreement:

> *"1. A declaratory order is issued that the portion of the road traversing the properties of the first, second, fifth and sixth defendants as indicated on Annexure A, which specific portion is between the public road D980 and the Western boundary of Portion 27 of the farm Uitvalgrond Number 434, Registration Division JQ Gauteng ("Portion 24") be declared a public road. The public road is indicated between the letters "X" and "E" on Annexure A."*

[3] The order further provided that the second and third plaintiffs (first and second respondents in the current application) were entitled to registration of a permanent right of way in respect of the servitude indicated between letters "B" and "X" on Annexure A. "B" and "X" are on the Western boundary of Portion 27. Against registration of the servitude, the second and third

plaintiffs would pay the first and second defendants an amount of R75 000.00.

[4] On 29 April 2021 the Notarial Deed of Servitude of the Right of Way was registered in favour of the first and second respondents.

[5] On 14 July 2021 the applicant launched the current rescission application, which the first, second, third and fourth respondents received on 16 August 2021.

[6] On 21 January 2022 the applicant brought a joinder application for the joinder of *inter alia* the City of Tshwane Metropolitan Municipality as 10th respondent.

[7] At the time when the order was granted by Prinsloo J, the current applicant was an occupant of Portion 27 as well as the adjacent property, the remaining extent of Portion 17. Since the order, the applicant has become the owner of both these properties, which have become consolidated.

[8] The applicant applies for an order setting aside the order granted by Prinsloo J on 8 June 2016. Despite the order being granted with consent of the applicant, the applicant contends that the order was erroneously sought and erroneously granted in the absence of one of the parties, such party being the City of Tshwane. The application is based on rule 42(1)(b). As indicated, the City of Tshwane was not a party to the original action and only became a party to these proceedings after the joinder application referred to above was completed.

[9] The applicant contends that it was not competent for the court to grant an order declaring a public road over the property of the applicant without compliance with the provisions provided for in the Roads Ordinance 22 of 1957. However, during argument, counsel for the applicant conceded that this Ordinance had been repealed (see Section 60 of Act 8 of 2001) when the court order was made.

[10] There are no other formalities identified in the applicant's papers with which there was non-compliance. The repealed 1957 Ordinance was replaced by an Ordinance only referring to provincial roads.

[11] The applicant contends that a public road must be proclaimed a public road by the Local Municipality (**Ethekwini Municipality v Brooks and Another** 2010 (4) SA 586 (SCA) at par [26]).

[12] The applicant contends that there is no Council decision by the City of Tshwane to declare the road a public road.

[13] The impact of the application, if successful, is that it would not only set aside the declaration of that portion of the road between "X" and "E" on the map (i.e. those portions of the road traversing Portion 27 and the remaining extent of Portion 17), but it would also set aside the notarially registered right of way on the Western boundary between the letters "X" and "B". This is a servitude for which the right holders paid. Counsel for the applicant contends that, as there is an interwoven reference to the public road throughout the court order, it cannot be avoided to set aside the entire order

rather than only that portion of the right of way that was declared a public road.

[14] There were interim undertakings in place prior to the granting of the order by Prinsloo J, which, if the applicant succeeds in these proceedings, would be revived. The impact of such undertakings would be that there would be no change in the rights of use of the servitude pending finalisation of the action that served before Prinsloo J.

[15] Although there would be no interim change, it is clear that the applicant seeks the setting aside of the right of way over its property *in toto*, contending that the public road disrupts church services.

[16] The applicant also relies on Rule 42(1)(c) for the rescission, contending that the order was granted as the result of a mistake common to the parties. It is contended that neither party was aware that the Municipality and Premier were necessary parties and were thus both under a common mistake (**Tshivhase Royal Council and Another v Tshivase and Another; Tshivase and Another v Tshivase and Another** 1992 (4) SA 852 (A) at 863 (A).

[17] In addition, the applicant contends that the court has a wide discretion under the common law to rescind its own judgment based on the grounds of *justus error* (**De Wet and Others v Western Bank Ltd** 1979 (2) SA 1031A at 1039 H – 1043 A).

[18] A consent order may be set aside on the grounds of *justus error* under certain circumstances. In **Gollach and Gomperts (1967) (Pty) Limited v Universal Mills and Produce Company (Pty) Ltd 1978 (1) SA914 (AD** the then Appellate Division, per Miller JA, stated:

"It appears to me that a transactio is most closely equivalent to a consent judgment. … Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. I am not aware of any reason why justus error should not be a good ground for setting aside such a consent judgment, and, therefore also an agreement of compromise, provided that such error vitiated true consent and did not relate to motive or to the merits of a dispute which was the very purpose of the parties to compromise …"

[19] A judgment given by consent may therefore be set aside in terms of the common law on good and sufficient cause being shown, where the judgment is the result of *justus error*. In setting aside a judgment by consent the courts have regard to the following factors:

(i) The reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(ii) The *bona fides* of the application for rescission;

(iii) The *bona fides* of the defence on the merits of the case which *prima facie* carries some prospect of success;

(iv) A balance of probabilities need not be established. All these factors must be viewed in conjunction with each other and with the application as a whole.

A very strong defence on the merits may strengthen an unsatisfactory explanation (**Erasmus Superior Court Practice** sv Rule 42 RS16, 2021 D1-565).

[20] The applicant contends that the error did vitiate true consent and that it is good and sufficient cause for the rescission of the judgment at common law.

[21] In supplementary heads the applicant advanced the argument that, in terms of the Constitution (Section 156(1) and (2), Part B of Schedule 5 of the Constitution; Section 8 of the Local Government: Municipal System Act 32 of 2000; Section 83(1) of the Local Government: Municipal Structures Act 117 of 1998) that municipal infrastructure, including roads is a municipal function.

[22] **Bekink, Principles of South African Local Government Law** states the following at page 318:

"Municipal roads

Municipal infrastructure plays an important role in achieving social and economic development and ensuring that other essential services can also be rendered. In this regard, the proper control and maintenance of municipal

roads are of paramount importance. The control and maintenance of municipal roads cannot be done on an isolated basis and must interact with national and provincial initiatives and schemes. Maintenance of municipal roads also includes the provision and maintenance of stormwater systems citywide."

[23] The applicant contends that municipalities alone exercise powers over municipal roads (**City of Tshwane Metropolitan Municipality v Link Africa (Pty) Limited and Others** 2015(6) SA 450 (CC) at par [79] and that a public road must be proclaimed as such by the local authority. Once so proclaimed, the local authority is responsible for its maintenance (**Ethekwini Municipality v Brooks and Another** 2010 (4) SA 856 (SCA).

[24] Counsel on behalf of the first, second and third respondents indicates what changes have taken place since the draft order was made an order of court. These include the following:

24.1 The applicant became the owner of Portions 27 (a portion of Portion 17) of the farm Uitvalgrond on 16 October 2017;

24.2 The first and second respondents had their Notarial Deed of Servitude registered pertaining to their right of way between "X" and "B" on the map. This registration took place on 29 April 2021;

24.3 Almost 8 (eight) years have passed since the court order was made by consent.

[25] The first, second and third respondents (hereafter referred to as "the respondents", unless otherwise indicated) contend that the applicant cannot apply on behalf of the City of Tshwane to have the court order set aside on the basis that the City is responsible for the proclamation of public roads.

[26] The respondent contends that the court order was a negotiated settlement of a live controversy. To that extent, the resolution of the dispute renders the issue *res judicata*.

[27] With reference to the court's discretion to issue a declaratory order in terms of section 21(1)(c) of the Superior Courts Act, 10 of 2013 the respondent advances reasons why the discretion should be exercised against granting of the applicant's relief.

[28] A public road in terms of the National Road Traffic Act, 1996 means *"any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or ay section thereof has a right of access, and includes –*

(a) the verge of any such road, street or thoroughfare;

(b) any bridge, ferry or drift traversed by any such road, street or thoroughfare; and

(c) any other work or object forming part of or connected with or belonging to such road, street or thoroughfare."

[29] The respondents also point out that a road may become a public road at common law, without the involvement of the municipality. This would apply

where a road was used by the public since immemorial. In such circumstances, it would be a public road established by *vetustas*.

[30] In supplementary heads of argument, the respondents also point out that the applicant did not raise the non-joinder of the City of Tshwane in the trial proceedings before Prinsloo J.

[31] The respondents also point out that all the parties were represented by legal representatives of their own choice when the terms of the consent order was formulated.

[32] The respondents contend that *justus error* must be clearly pleaded, and that the applicant has failed to do so (see **Gollach and Gomperts** supra at 926(8) to 927 A).

[33] In the absence of an indication on what legislation the applicant relies for its contention that the municipality alone could proclaim a public road, the plea of *justus error* is not established.

[34] It is correct that, where there is a reliance on a failure of statutory compliance, then such statutes need to be expressly pleaded (**Yannakou v Apollo Club** 1974 (1) SA 614 A at 623 to 624).

[35] A consideration relevant to the relief sought by the applicant is that the municipality does not apply for such relief. The municipality is a party in these proceedings. Only the applicant, who was a party to the negotiated

consent order, alleges non-compliance with unidentified formalities relating to the City of Tshwane.

DISCUSSION

[36] Public servitudes can be created by *vetustas* as immemorial user or by statute. The latter relates to a servitude being established by local authority for the benefit of the general public under empowering statutory provisions (**Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd** 2014 (6) 286 (KZP) at 286 I.

[37] It is not uncommon for rights reserved in favour of the public being found as restrictive title conditions, without involvement of the local authority in creating such conditions. So, for example, in **Trizapax (Pty) Ltd v Graf** 2020 JDR 1825 (GP), Fabricius J enforced the right of the applicant and the public to exercise a right of free and unhindered access to a servitude road registered in favour of the public. In that matter the Title Deed of the subservient property contained a title condition providing for a servitude of right of way in favour of the public. This is an instance where the rights of the public to use of a public road did not flow from a proclamation of the road as a public road by a local authority.

[38] It is correct that municipal infrastructure is the responsibility of a local authority and that it has the power to proclaim, construct and maintain public roads. However, a servitude of public roads is competent as a matter of common law. The only dispute that could arise relates to the duty of

maintenance of a servitude road registered in favour of the public with the consent of the landowners (the **Ethekwini** case was such an instance).

[39] The fundamental premise upon which the applicant approaches the court is therefore insufficient. Further, the relief sought by the applicant sets aside not only the right of way that was proclaimed a public road, but a registered servitude of right of way on the Western border of Portion 27 over which there is no dispute. The relief sought is consequently overbroad.

[40] Further, the changed circumstances and the passing of 8 (eight) years since the court order was made, point away from interfering with the court order.

[41] As the public has an interest in the relief sought by the applicant in these proceedings, but no notice has been given to the public pertaining to the relief sought, this too is a consideration militating against the relief sought.

[42] As far as the relief in terms of Rule 42 is concerned I find the following:

42.1 The applicant has erred in contending that the City of Tshwane was a party in whose absence the court order was granted. The City of Tshwane had no legal interest in the public road being declared, as it was over private property. The road concerned would not become part of the municipal infrastructure, but would remain a common access road for purposes of access to contiguous and landlocked properties over a road available for use by the public as well;

42.2 The order sought was therefore not erroneously granted in the absence of a party.

[43] Similarly, the error identified, namely that only the City of Tshwane could proclaim a public road, does not find application on the facts of this matter. The road was not intended to be a municipal road, proclaimed as such by the municipality. It was a common law servitude of public road in favour of the general public.

[44] I am consequently not persuaded that a cause of action has been established under Rule 42 for the rescission of the order.

[45] The applicant has also failed to establish good cause for rescission of the court order at common law. The error relied upon by the applicant is not common to the parties. The respondents do not agree that there was an error at all. In any event, even if it was an error common to the parties, it is not of the nature that it would vitiate consent. The parties had negotiated a solution regarding access to affected properties owned or occupied by them. The consensus in respect of that solution is not undone by the alleged error. The applicant's application attests to subsequent remorse, rather than establish a *justus error* for rescission. That is insufficient cause for rescission.

[46] In the premises, the application must fail.

[47] I make the following order:

1. The application is dismissed with costs, such costs to be at Scale C in terms of Rule 69, recording that the first to third respondents was represented by senior counsel.

LABUSCHAGNE, AJ