REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER : 2019/24664

(1)	REPORTABLE	NO
(2)	OF INTEREST TO OTHER JUDGES	NO
(3)	REVISED	

26/1/2023
DATE

SIGNATURE

In the matter between:

MALAKITE BODY CORPORATE	**1st Applicant**
GREENSTONE CREST BODY CORPORATE	**2nd Applicant**
and	
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**1st Respondent**
CITY POWER JOHANNESBURG SOC LTD	**2nd Respondent**

J U D G M E N T
(APPLICATION FOR LEAVE TO APPEAL)

VAN DER BERG AJ

[1] This is an application for leave to appeal against my judgment of 11 November 2022.

TEST

[2] The application is governed by section 17(1) of the Superior Courts Act 10 of 2013 which provides:

> *"17* ***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,*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a), and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

[3] In *MEC Health, Eastern Cape v Mkhitha*[1] the Supreme Court of Appeal said the following (reference to other authorities omitted):

> *"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.*
>
> *[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."*

LEAVE TO APPEAL TO BE GRANTED

[4] I will consider two paragraphs of the notice of application for leave to appeal ("the notice") together.

[5] In paragraph 4 of the notice the applicants state that my finding that the lifestyle centres must be billed on a non-domestic tariff and/or business tariff *"contradicts section 6.1 of the City Council's tariff policy which define domestic tariff being applicable to 'private houses, dwelling units, flats, boarding houses,*

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1 *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016)

hostels, residences …"".

[6] Paragraph 6 of the notice reads:

> *"The Honourable Court erred in finding that 'lifestyle centres' cannot be viewed ancillary to the applicants as 'a housing estate'. The view adopted by the Court a quo is incorrect insofar as it seems to find that the 'lifestyle centres' are not and/or cannot be ancillary to the purpose of the residential estate."*

[7] There is a reasonable prospect that a court of appeal may find that the lifestyle centres are "ancillary to the applicants as a housing estate" if regard is had to following: the purpose of the lifestyle centres, the fact that equipment in the lifestyle centres belong to the body corporates, and the fact that the body corporates are only open to residents of the estates. If so, there is then also a reasonable prospect that the appeal court may find that the whole of the estates therefore falls within the definition of "domestic tariff" in section 6 and ought to be billed accordingly for electricity consumption.

[8] In the light of the definition in section 6.1 of the tariff policy, it is necessary to determine whether the restaurants or gyms are used for "business purposes". There is however no definition or description of "business purposes" in the tariff policy. There is a reasonable prospect that a court of appeal may find that notwithstanding the absence of evidence how and on what basis the restaurants and gyms operate, the restaurants and gyms are not used for business purposes.

[9] No authority could be found by counsel or by me dealing with the definition of

domestic tariff or business tariff in section 6 of the tariff policy. To my mind this is a factor to be considered in favour of granting leave to appeal.

[10] In my view the applicants have shown a reasonable prospect of success as set out in *Mkhitha*. Leave to appeal should therefore be granted to the full court of this Division. The matter does not fall within the ambit of section 17(6)(a)(i) or (ii) of the Superior Courts Act and does not the justify the attention of the Supreme Court of Appeal.

NEW GROUNDS AND/OR ARGUMENTS

[11] An appeal lies against the order, not the reasons, of the court *a quo*.[2] If leave is granted on the basis of one ground, the appellant may still argue other grounds on appeal. It is therefore not necessary to traverse all the grounds of appeal. However, new grounds and arguments were raised in the notice and in argument, and it is desirable that I deal with them briefly as I could not do so in my judgment.

Argument that units are separately billed

[12] In the applicants' heads of argument presented in the application for leave to appeal the following is submitted:

> *"Section 5(10) of the By-laws makes reference to communal loads for both domestic and non-domestic uses which cannot be separated. It shall be argued that this is not the case in the present matter and as such*

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2 *Tavakoli and another v Bantry Hills (Pty) Ltd* 2019 (3) SA 163 (SCA) at paragraph 3

reliance on the section to substantiate the Court's finding is incorrect. The residential units are each individually and separately billed for their utilities which is billed separately from the restaurant and gym."

[13] There are a number of problems with this submission:

1. As pointed out in heads of argument submitted on behalf of the respondents in the application for leave to appeal, individual and separate bills are attended to by the scheme itself and not officially done by the respondents. The individual units are not separately read nor billed by the respondents.

2. The applicants are sectional title schemes and electricity is billed on one account to the erf/sectional title scheme as a whole.

3. This submission or argument was not raised in the affidavits in the court *a quo*. No argument was advanced that each resident can be separately billed. Had this argument been raised, it may have required analysis of other sections of the By-laws. (It is not even clear that this argument is properly raised in the notice of application for leave to appeal.)

Section 74(3)/Unfair discrimination/Equity

[14] The applicants further raise as a ground of appeal that the court failed to consider section 74(3) of the Systems Act and that the court's finding amounted to unfair discrimination. Elsewhere in the notice it is stated that the court "*...failed to consider whether it would be equitable and affordable for the*

individual residents of the Applicants who reside in a residential estate to pay non-domestic and/or business tariffs for electricity…"

[15] This is not part of the relief or the arguments raised at the hearing of the main application. There was no application to review or set aside or challenge the policy, the by-law or the tariff. There is no basis in the affidavits for advancing these arguments.

New evidence

[16] In one of its grounds of appeal the following statement is made, almost in passing:

> *The Applicants intend to adduce new evidence on appeal which indicates that the applicants do not make a profit from the 'lifestyle centres'".*

[17] The following dictum is directly on point:[3]

> *"20. In order for an appeal court to consider the admission of new evidence, there should be a reasonably sufficient explanation why the evidence sought was not led at the trial or hearing. There should also be a prima facie likelihood of the truth of the evidence; and the evidence should be materially relevant to the outcome. Non-fulfilment of any of these requirements would normally be fatal. Each case should be considered on its particular merits. There may be rare instances where a court will be more disposed to grant the*

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3 *Assetline South Africa (Pty) Ltd v Manhattan Delux Properties (Pty) Ltd* 2021 JDR 2670 (GJ). See also: *Gumbo NO v Spruyt* 2020 JDR 1761 (GP) at paragraph 12

relief for some special reason.

21. *All I have before me is a statement made in the Notice of application for leave to appeal, and in the heads of argument, that new evidence exists. No affidavit has been placed before me to indicate what the nature of the evidence is; or who is intended to depose to the evidence.*

22. *Further, there is no explanation as to why the evidence could not have been secured and presented at the hearing of the matter. The respondents do not say why they were unable, until now, to gather the alleged new evidence to show that the quantum claimed is incorrect. The same holds true for the alleged evidence about the absence of insurance. The respondents did not take issue with the legality of the agreement in opposing the main application. This seems to be an attempt to open up an entirely new defence to the claim. It was not raised before, and I am not told why it could not have been raised before.*

23. *In the absence of these explanations, there cannot be any substance or merit in this ground of appeal."*

Authority of Mr Mashau

[18] In respect of the finding in the judgment that Mr Mashau did not have the authority to have made a decision that the lifestyle centre should be billed on a residential basis:[4] at the hearing of the application for leave to appeal it was submitted in oral argument on behalf of the applicants that although Mr Mashau might not have had authority, the court should have regard to an

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4 Judgment, paragraph 37

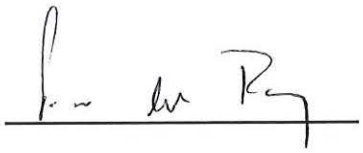
earlier email on the same email string from one Nico Remmers.[5] However, this email refers to an investigation in respect of zoning where each unit is dealt with separately. This once again highlights the problem of merely attaching emails to an affidavit without properly dealing with the issue in the affidavit itself.

ORDER

[19] The following order is made:

(1) Leave to appeal is granted to the full court of this Division against the judgment and order of 11 November 2022.

(2) Costs of the application for leave to appeal are costs in the appeal.



VAN DER BERG AJ

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5 The email is on CaseLines 004-21

APPEARANCES

For the applicants:

Adv B D Stevens
Instructed by:
Jurgens Bekker Attorneys

For the respondents:

Adv S Jackson
Instructed by:
Moodie & Robertson

Date of hearing: 12 January 2023

Date of judgment: 26 January 2023