



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 9823/2022P

In the matter between:

HIRALAL RAMPUL

APPELLANT

and

TRUSTEES OF MANGROVE BEACH CENTRE:

FIRST RESPONDENT

BODY CORPORATE

THE BODY CORPORATE: MANGROVE

SECOND RESPONDENT

BEACH CENTRE

THULANE KHAMBULE N.O.

THIRD RESPONDENT

COMMUNITY SCHEMES OMBUD SERVICE

FOURTH RESPONDENT

Coram: Mossop J

Heard: 3 March 2023

Delivered: 3 March 2023

ORDER

The following order is made:

1. The application for leave to appeal is refused with costs.

JUDGMENT

MOSSOP J:

[1] On 15 December 2022 I delivered a written judgment in an opposed appeal brought in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011. Those parties that played an active role in the appeal were the applicant, who was the appellant in the appeal, and the first and second respondents who opposed that appeal. I shall refer to the appellant as the applicant and I will continue to refer to the first and second respondents by those names.

[2] In the appeal, the applicant appealed against a decision by the third respondent delivered on 28 June 2022 not to grant him relief and sought the setting aside of that order and a declaration from this court that certain special rules that are of application to the second respondent, of which the applicant is a member, are inconsistent with the provisions of the Sectional Titles Schemes Management Act 8 of 2011 and are invalid. Certain alternative relief was also claimed by the applicant.

[3] I dismissed the appeal, with costs. My judgment on the issues is comprehensive and I stand by the reasons set out therein.

[4] What is now before me is an opposed application for leave to appeal against my judgment at the instance of the applicant. It is opposed by the first and second respondents. This morning when the application for leave to appeal was argued, as in the appeal, the applicant was represented by Mr Omar and the first and second respondents was represented by Ms Nicholson. I thank both of them for their submissions and for their discipline in complying with the time limits that I requested

them to adhere to when addressing me. Such time limits were necessary given this court's other duties.

[5] Section 17 of the Superior Courts Act, 10 of 2013 (the Act) regulates applications for leave to appeal from a decision of a High Court. It provides as follows: '(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.'

[6] Prior to the enactment of the Act, the applicable test in an application for leave to appeal was whether there were reasonable prospects that the appeal court may come to a different conclusion than that arrived at by the lower court. The enactment of the Act has changed that test and has significantly raised the threshold for the granting of leave to appeal.¹ The use of the word 'would' in the Act indicates that there must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[7] Leave to appeal may thus only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, and which prospects are not too remote.² As was stated by Schippers JA in *MEC for Health, Eastern Cape v Mkhitha and Another*³:

'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.'

¹ *Public Protector of South Africa v Speaker of the National Assembly and Others* (8500/2022) [2022] ZAWCHC 222 (3 November 2022) para 14.

² *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para [10]

³ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 para 17.

[8] The applicant has delivered a lengthy notice of application for leave to appeal, comprising of 25 pages, on which pages nine grounds are set out in granular detail identifying where I am alleged to have erred, the inference being that there are reasonable prospects that another court would grant a different order to the order granted by me.

[9] Before dealing with the merits of the application, something needs to be said about the delay in hearing this application. It is my habit to hear applications for leave to appeal as soon as practically possible after they have been filed. This application for leave to appeal was delivered on 5 January 2023, before the commencement of the new judicial year. I was, however, on recess duty at that time and received the notice of application on the day that it was filed. Unfortunately, I could not deal with the application during the first session of the first term of 2023 as I was assigned circuit court duties in Madadeni in Northern KwaZulu-Natal. I returned last week from such duties. That explains the delay.

[10] During the period that I spent on circuit, I had ample time to contemplate the merits of this application and this morning I have further considered the arguments, authorities and submissions of the parties addressed to me by Mr Omar and Ms Nicholson.

[11] The second respondent has existed since 1965, when it was initially a share block scheme. In 1994 it was converted to a sectional title scheme and in that year, the special rules that the applicant complains of came into being. The scheme is a mixed use scheme, with the bottom sections of the building being commercial sections and the sections above the commercial sections being residential sections. The scheme is a sizeable one, having 257 sections in all. Of these sections, 235 are residential sections. In the previous proceedings, the applicant complained that the special rules are unfair, unequal and prejudicial to the owners of residential units and that they unfairly discriminate against owners of residential sections in favour of the owners of commercial sections. The basis for this complaint is that, as set out in my judgment, the owners of commercial sections are given 75 percent of the vote at general meetings when the commercial sections only comprise 27 percent of the total area of all the sections in the second respondent. The owners of residential sections,

which comprise 68 percent of the scheme, only have 25 percent of the vote at such meetings.

[12] At this stage, the dissatisfaction with this voting system is the dissatisfaction of the applicant. What the majority of the owners of sections within the second respondent think is not known. While I found that the judgment of Masipa J in *Central Plaza Investments 85 (Pty) Ltd v Body Corporate Mangrove Beach Centre*⁴ did not render the issues before the third respondent *res judicata*, what Masipa J said in her judgment is undoubtedly correct:

‘Mechanisms exist to amend the rules should they wish to do so. They have not pursued that recourse which is available to them and seek for this court to bypass that process and put in place what they wish to be the rules of the scheme.’

In other words, if the applicant is dissatisfied with the special rules, he needs to challenge them at a meeting of the body corporate and have them changed. A court must, as I pointed out in my judgment, act cautiously when asked to change rules that impact on other owners of sections. The rules applicable to sectional schemes constitute a contract between the body corporate and the individual owners and, as was stated in *Wilds Home Owners Association and others v Van Eeden and others*,⁵ a court should hesitate to rewrite a bargain struck between members when the impetus to do so is at the instance of a minority of members.

[13] I consider, briefly, some of the more important aspects raised by Mr Omar in his detailed notice of application for leave to appeal. I make it plain that I do not intend dealing with each and every allegation made in that substantial document:

(a) I do not accept that having found that the third respondent erred in finding that the issue before him was *res judicata*, I was required to allow the appeal and simply refer the matter back to the third respondent. In his notice of appeal, the applicant sought the setting aside of the third respondent’s decision and then required certain declaratory relief to be granted to him. In the result, I set aside the decision and then considered the issue of declaratory relief, but found that it was not capable of being granted. The basis upon which I set aside the third respondent’s decision is irrelevant.

⁴ *Central Plaza Investments 85 (Pty) Ltd v Body Corporate Mangrove Beach Centre*, case number 11454/2015, KwaZulu-Natal Local Division, Durban.

⁵ *Wilds Home Owners Association and others v Van Eeden and others* [2011] ZAGPPHC 101.

The applicant cannot have it both ways: He cannot claim relief but then insist that he should only have been granted half the relief that he claimed;

(b) Whether Mr Christopher Pearson, who deposed to the answering affidavit of the first and second respondents, was conflicted, as alleged by the applicant is of no moment. He is a trustee of the second respondent and stated that he was authorised to act by the board of trustees and put up an affidavit confirming this together with a signed resolution of the trustees of the second respondent;

(c) There was no evidence that rules were applied unequally. There was thus no evidence that some residential owners were subject to the rules and that some were not. The same applied in respect of the owners of commercial sections. There is, moreover, no requirement that owners of those two disparate types of sections should be treated equally. Practical considerations dictate that this simply cannot occur in a mixed use scheme. As the applicant himself points out in his application, rules are to apply equally to owners of units 'put to substantially the same purpose'.⁶ It is facile to suggest that residential units are put to the same use, or have the same purpose, as commercial units; and

(d) Any argument advanced on whether the applicant himself knew of the special rules is of no moment. An appeal from the third respondent lies only in respect of matters of law and not on issues of fact. Whether the applicant knew of the existence of the special rules is a question of fact;

[14] I have fully addressed the issue of the reasonableness of the special rules in a mixed use scheme such as the second respondent in my judgment and I do not intend restating those reasons. Given the benefits that commercial sections bring to a mixed use body corporate, I am unable to agree with the applicant that the special rules are unconstitutional or contrary to public policy or discriminatory in their nature.

[15] Mr Omar has further submitted in his notice of appeal that there are compelling reasons why an appeal should be allowed in the matter. The ordinary dictionary meaning of 'compelling' is attractive, or irresistible, or very convincing. Compelling reasons are allegedly to be found in this matter in the fact that there is an absence of judicial authority on the validity of special rules in the context of mixed use schemes.

⁶ Section 35(3) of the Sectional Titles Act 95 of 1986.

An absence of judicial authority is not on its own, in my view, a compelling reason to permit an appeal. I am, furthermore, unaware of whether other mixed use schemes have special rules and, if they do, what the content of those special rules are. The special rules that I was asked to consider relate only to the second respondent. I cannot therefore agree that there are compelling reasons to allow this appeal.

[16] Having heard argument on the issue of leave to appeal prior to the ordinary court day commencing this morning, I stood the matter down to consider, and prepare, this judgment.

[17] Considering the elevated threshold test when seeking leave to appeal and the facts in this matter, I am not persuaded that there is a reasonable possibility that another court would come to a different decision than the one to which I came.

[18] In the circumstances, the application for leave to appeal is dismissed with costs.



MOSSOP J

APPEARANCES

Counsel for the applicant	:	Mr. M. S. Omar
Instructed by:	:	M. S. Omar and Associates 28 Rhodes Avenue Westville
Counsel for the first and second respondents	:	Ms. J. Nicholson
Instructed by	:	Shepstone and Wylie 24 Richefond Circle Ridgeside Office Park Umhlanga Rocks
Date of Hearing	:	3 March 2023
Date of Judgment	:	3 March 2023