



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

CASE No: D 2348\2020

In the matter between:

KWADUKUZA MALL (PTY) LTD

FIRST APPLICANT

DOUBLE RING TRADING 7 (PTY) LTD

SECOND APPLICANT

and

THE KWADUKUZA MUNICIPALITY

FIRST RESPONDENT

THE MUNICIPALITY MANAGER:

KWADUKUZA MUNICIPAL COUNCIL

SECOND RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 21 September 2022 (Wednesday) at 11:15

ORDER

I make the following order:

The application for leave to appeal is dismissed with costs.

JUDGMENT

Mathenjwa AJ

[1] The applicants seek leave to appeal the judgment and order of this court handed down on 10 June 2022. Leave is sought to appeal to the full court of the KwaZulu-Natal Division of the High Court.

[2] The main grounds set out in the applicants' notice of application for leave to appeal are that: this court erred in finding that it was common cause that when the second applicant applied for the rebate, it was a developer and an agent of the first respondent; that the first applicant, who is the owner of the mall property, never applied for a rates rebate; in holding that the first applicant did not have *locus standi* to bring the application; in ignoring the provisions of the first respondents' rates policy and its rates by-laws in the circumstances of the matter in favour of the provisions of the Municipal Rates Act; interpreting the rates policy and by-laws through the prism of the Act in circumstances where both the policy and the by-laws expressly provide for rebates to attach to properties rather than owners and in holding that the second applicant had no direct and actual interest in the relief sought.

[3] At the hearing of this application, the applicants were represented by Mr *Kisson*, who is not the counsel who represented them at the hearing of the main application. At the outset, the applicants' counsel informed this court that the applicants were no longer pursuing their original grounds of appeal. However, they submit that this court erred in not considering another definition of ownership which is contained in the KwaDukuza Municipality Rates Policy,¹

¹ KwaDukuza Municipality Rates Policy

read with the KwaDukuza Municipality Rates By-Laws,² and Local Government: Municipal Property Rates Act 6 of 2004 (the Act), which gives the second applicant *locus standi*. Section 1 of the Act defines an owner of property as follows:

‘(a) in relation to a property referred to in paragraph (a) of the definition of property ‘means a person in whose ownership of the property is registered;

...

Provided that a person mentioned below may for the purposes of this Act be regarded by a municipality as the owner of a property in the following case:-

...

(viii) a buyer, in the case of a property that was sold by a municipality and of which possession was given to the buyer pending registration of ownership in the name of the buyer.’

The provisions of the Act on the definition of an owner was carried into the Municipal Rates Policy and Municipal Rates By-Laws of the first respondent. This ground of appeal was introduced at the hearing of this application for leave to appeal. Therefore, the applicants’ counsel applied for amendment to their original notice of appeal to include the new ground. The respondent’s council did not object to the amendment and this court granted the amendment accordingly.

[4] In support of their submission that this court erred, the applicants’ counsel refers to paragraph 9 of my judgment where it is stated that:

‘It is apparent from the provisions of the Act that only the owners of immovable property may be exempted from payment of rates and rebates may be granted on rates payable by owners.’

The applicants contended that if this court considered the definition of ownership, which includes persons in the category of the applicants who are buyers and had taken possession of the property, it would not have arrived at the conclusion that

² KwaDukuza Municipality Rates By-Laws (KwaZulu-Natal Provincial Gazette 767 of 28 June 2012).

the applicants are not owners of the property and therefore were not entitled to apply for rates rebates.

[5] Section 17(1) 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—

- (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.’

[4] Leave to appeal is sought in terms of s 17(1)(a)(i) of the Superior Courts Act. Therefore, the crisp question in this application is whether the applicants have a reasonable prospect of success on appeal. The issue of what constitutes reasonable prospect of success was considered in *S v Smith*,³ where Plasket AJA held that:

‘What the test of reasonable prospects of success postulates is 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. 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.’ (Footnote omitted).

[5] In *Acting National Director of Public Prosecutions and others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of*

³ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

Public Prosecutions and others,⁴ the court explained the threshold for granting leave to appeal, where the judgment of Bertelsmann J in the *Mont Chevaux Trust v Goosen*⁵ was cited with approval that:

‘It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.’

[6] The applicants’ counsel correctly pointed out that this court did not refer in its judgment to the definition of ownership in terms of s 1 of the Act probably because this definition was not brought to the attention of the court by the applicants’ counsel, however, so the argument went, the failure by this court to consider other definitions of ownership constitutes a misdirection that would strengthen the applicants’ prospect of success in appeal. I am not agreeable with the applicants’ contention for the following reasons: Firstly, it is apparent from the passage of the judgment cited by the applicants’ counsel that the judgment does not address categories of ownership. It provides that only the owners of properties were entitled to apply for rates rebates and the applicants were not such owners at the time they applied for the rates rebates. For that reason, this court could not have misdirected itself by failing to consider other definitions of ownership because the judgment does not deal with that issue at all. Secondly, the new ground based on the contention that the second applicant was the owner of the property because it was a buyer who was given possession pending registration of the property, was not an issue before this court during the hearing of the main application. As correctly argued by the respondents’ counsel, these

⁴ *Acting National Director of Public Prosecutions and others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and others* [2016] ZAGPPHC 489 para 25.

⁵ *Mont Chevaux Trust v Goosen and others* 2014 JDR 2325 (LCC) para 6.

averments are not even contained in the applicants founding papers. Further, the provisions of s 1(d)(viii) of the Act merely provides that a person who is a buyer, in the case of a property that was sold by a municipality and of which possession was given to the buyer pending registration of ownership in the name of the buyer, may be regarded by a Municipality as the owner of a property. Clearly, the Act does not automatically grant ownership to this category of persons, but it gives a municipality a discretion to regard them as owners of properties. The applicants did not make a case in their founding affidavit or at the hearing of the application that they were or ought to be regarded by the Municipality as owners of the property. Thirdly, the new ground based on the applicants' ownership of the property would contradict the applicants' case as presented in their founding affidavits and during hearing of the main application. The applicants' case was that the second applicant was entitled to apply for rates rebates because it was a developer, not an owner of the property. They contended that a developer who was not an owner of the property, as was the case with the second applicant, was entitled to apply for the rates rebates.

[7] I have considered the grounds of appeal, the submissions made by counsel for the applicants and counsel for the respondent, and I am of the view that the applicants have not shown that there are reasonable prospects of success in the appeal. Therefore, the test for leave to appeal has not been met.

Order

[8] I make the following order:

The application for leave to appeal is dismissed with costs.



Mathenjwa AJ

Date of hearing: 16 September 2022

Date of Judgment: 21 September 2022

Counsel for the applicants: Advocate A K Kisson

Instructed by: V Chetty Inc.
Umhlanga, Durban

Counsel for the respondent: Advocate A Stokes SC

Instructed by: Andrew Incorporated
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