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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 4859/2024

In the matter between:

**THE GREEN POINT RESIDENTS' AND
RATEPAYERS ASSOCIATION**

First Applicant

**THE TRUSTEES FOR THE TIME BEING
OF THE RUSNIC TRUST (IT 2867/09)**

Second Applicant

THOMAS FRANCIS GALLAGHER

Third Applicant

JACQUELINE FRANCIS GALLAGHER

Fourth Applicant

ANDREW VINCENT MCPHERSON

Fifth Applicant

CYRIL IAN GLASER

Sixth Applicant

BARBARA RUTH MEYERS

Seventh Applicant

And

LEONHARD GARTNER

First Respondent

ANDREAS ROBERT HERMANN PLANK

Second Respondent

JANINE ADUDE STEPHANIE PLANK

Third Respondent

THE CITY OF CAPE TOWN

Fourth Respondent

Heard: 22 August 2024

Delivered: Electronically on 10 September 2024

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LEKHULENI J

1. Introduction

[1] This is an application for leave to appeal to the Supreme Court of Appeal (*"the SCA"*) alternatively, to the full bench of the Western Cape High Court in terms of section 17(1) of the Superior Courts Act 10 of 2013 (*"the Superior Courts Act"*), against the whole judgment and order of this Court handed down on 03 June 2024. In that judgment, this Court dismissed the applicants' application for an interdict to cease building works on Erf 1[...] Green Point, also known as [...] J[...] Street Road, Green Point, Western Cape, pending the determination of a review application to set aside the decision of the fourth respondent (*"the City"*) to approve a set of building plans.

[2] In their application for an interdict, the applicants asserted their right to a review as their anchor prima facie right in their founding papers. The applicants focused on proving their prospects of success on review. During the argument of the main application, the court was referred to various grounds supporting the applicants' argument that they have incredibly good prospects of success in Part B (review application) and that the interdict should be granted. In addition, the applicants relied on several cases where the courts held that the prospects of success in the

contemplated review proceedings represent the measure of the strength or otherwise of the alleged right that the applicants must establish prima facie to obtain interim relief. (See *Searle v Mossel Bay Municipality and Other* [2009] ZAWCHC 9 at para 6).

[3] In its ruling, this Court found that ever since the decision of the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) (“*OUTA*”), there has been a considerable shift on the applicable test in applications for an interdict pending review proceedings. The court found that to obtain a temporary interdict, it is no longer enough for an applicant to contend that it has a good review case. In terms of *OUTA*, the prima facie right that an applicant must establish is not merely the right to approach a court to review an administrative decision. It is a right to which irreparable harm will ensue if not protected by an interdict.

[4] In reaching this conclusion, the court also relied on *Khoin and Others v Jenkins and Others* [2023] 1 All SA 110 (WCC) (“*Khoin and Others v Jenkins and Others*”), a full court decision of this division where the court held that protecting the right to review an unlawful decision cannot form the basis for interim relief. The court also relied on *Joostenbergvlakte Community Forum v Montana Development Company (Pty) Ltd*, Case Number: 12205/2023 ZAWCHC (28 December 2023), where it was stated that to interdict building work pending a review, a prima facie right is not established merely if grounds of review show prospects of success. Simply put, there could be no consideration of irreparable harm without a prima facie right to be protected from future irreparable harm.

2. Grounds of Appeal

[5] In summary, the grounds of appeal discernible from the notice of appeal are that the court applied an incorrect test when it dismissed the applicants' application for an interdict. According to the applicants, the requirements for interim interdict pending the review of an administrative decision are well-established and remained unchanged. The applicants asserted that their appeal has a reasonable prospect of success and that there are compelling reasons that the judgment of this Court on the

applicable test of interdicts pending review conflicts with a considerable body of judicial precedent that has developed within the specific context of interdicts for cessation of building works pending review.

[6] The applicants contended that this Court erred in finding that the rights asserted by the applicants were insufficient to find a prima facie right for interim interdictory relief as the building work did not affect the rights the applicants sought to protect. The applicants further asserted that they had established prima facie that the building work of the respondents was being erected in contravention of the Building Act, the City of Cape Town's Municipal Planning By-Law, 2015, and the Development Management Scheme, both as amended, principally on the basis that the building was being built too high, too close to the common boundary and in such a manner that it was objectionable and derogated from the value of their surrounding properties.

[7] The applicants further asserted that the court erred in finding that the alternative remedy for the applicants was a review. According to the applicants, they did not seek a permanent interdict, in which a review would certainly be an alternative remedy. The applicants implored the court to grant leave to appeal to the full bench of this division, alternatively to the Supreme Court of Appeal.

3. Principal Submissions by the Parties

[8] Mr Paschke, the fourth respondent's Counsel, submitted that the Court's judgment and order are correct and that an appeal has low prospects of success. Nonetheless, Counsel submitted that leave to appeal should be granted under section 17(1)(a)(ii) of the Superior Courts Act. Mr Paschke contended that there are conflicting judgments relating to the interdict pending review application. Counsel asserted that this Court followed and was bound by the decision of the full court in *Khoir and Others v Jenkins and Others*. It was Mr Paschke's submission that the applicants continue to assert the approach in earlier cases that either predate *OUTA* or do not refer to *OUTA*. Counsel further submitted that the City's position is clear: the judgment of this Court is correct, and the applicants' reliance on inconsistent historic cases is wrong.

[9] However, Mr Paschke argued that there are other compelling reasons why an appeal should be heard. Despite the clarity and correctness of the judgment, so the contention proceeded, the applicants and other objectors continue to rely on the historic position in construction interim interdict litigation. Counsel submitted that the circumstances in which a party is entitled to a construction interdict pending the review of a municipality's building plan is a discrete issue of public importance that affects many future disputes. To this end, Counsel implored the court to grant leave to the Supreme Court of Appeal in terms of section 17(1)(a)(ii) of the Superior Courts Act, as the appeal involves questions of law of public importance because of their general impact on future cases.

[10] Mr Irish, on the other hand, the applicants' Counsel shared Mr Paschke's view that there are compelling reasons to grant leave to appeal to the Supreme Court of Appeal. However, Mr Irish maintained that this court applied an incorrect test when it dismissed the applicant's application. Counsel urged the court to grant leave to appeal to the Supreme Court of Appeal.

[11] On the other hand, Mr. Muller, Counsel for the first to the third respondents, reiterated his argument in his written submission that the Court's judgment was accurate and that the application for leave to appeal should be dismissed. Counsel submitted in his written submission that *OUTA* has once altered the legal position: an applicant's *prima facie* right cannot merely be a right to review. Mr Muller contended that a full court of this division adopted *OUTA* specifically in the context of building interdicts in *Khoin and Others v Jenkins and Others*, by holding that a right of review cannot form the basis for interim relief.

[12] In addition, Mr Muller submitted that Mayosi AJ considered herself bound by *OUTA* and *Khoin and Others v Jenkins and Others*, when she decided *Joostenbergvlakte Community Forum v Montana Development Company (Pty) Ltd*. Similarly, this Court in the present case was bound by the full Court's decision of *Khoin and Others v Jenkins and Others*. Counsel implored the court to refuse the application with costs, including the costs of two Counsels on Scale C.

4. The Relevant Legal Principles

[13] The applicants' application for leave to appeal is based squarely on section 17(1)(a) of the Superior Courts Act. Section 17 of the Superior Courts 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.'

[14] The test, which was applied previously in applications of this nature, was whether there were reasonable prospects that another court may come to a different conclusion. With the enactment of section 17 of the Superior Courts Act, the threshold for granting leave to appeal a judgment of the High Court has been significantly raised. The use of the word 'would' in subsection 17(1)(i)(a) of the Superior Courts Act imposes a more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959. (*S v Notshokovu* [2016] ZASCA 112 at para 2). In *Mount Chevaux Trust [IT 2012/28 v Tina Goosen and 18 Others* 2014 JDR 2325 (LCC), at para 6, Bertelsmann J stated as follows:

“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 may come to a different conclusion, See *Van Heerden v Cronwright and 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”.

[15] What is required of this Court is to consider, objectively and dispassionately, whether there are reasonable prospects that another court will find merit in the arguments advanced by the losing party. (See *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Maya International* [2016] 137 (ZAECHGHC) 137 (10 November 2016) at para 4).

5. Discussion

[16] This Court cogently explained in its judgment the test applicable in interim interdicts preventing construction pending the determination of a judicial review of the administrative decisions that authorise building work. Crucially, the court was bound by *OUTA*, in which the Constitutional Court held that on the prima facie right leg of the *Setlogelo v Setlogelo* 1914 AD 121 test for interdictory relief, an applicant cannot merely rely on a right of review because review rights do not require preservation *pendente lite*. To succeed with interim interdictory relief, some right other than a right to review must be threatened with irreparable harm.

[17] The applicants take issue with the Court's finding that the test for temporary interdicts pending review has changed since *OUTA*. The applicants rely on cases decided before *OUTA* and argue that in *OUTA*, the Constitutional Court did not establish a new test or law. The applicants also cite two cases which were decided after *OUTA* and contend that the requirements for interim interdict pending the review of an administrative decision have remained unchanged.

[18] In my view, there are conflicting decisions dealing with the test of a prima facie right in interdict applications for the cessation of building works pending a review application. For instance, in *Tavakoli and Others v Phase III Development Company (Pty) Ltd and Another* (22026/2015) [2015] ZAWCHC 188 (11 December 2015), the applicants sought an interim interdict on an urgent basis pending the determination of an application to review and set aside the approval of building plans. In that case, both parties accepted that the applicants' prima facie right was based on the proposed review, even though the approval of the plans would still stand until set aside.

[19] Rogers J, as he then was, relied on *Searle v Mosselbay Municipality and Others* 2009 ZAWCHC 9 at para 6-7; *Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others* 2009 (6) 190 (WCC) para 10, that the prospects of success in the review proceedings represented the measure of the strength or otherwise of the alleged right that the applicants must prima facie establish to obtain an interdict. However, the court did not consider whether that approach is correct.

[20] On the other hand, the Gauteng High Court did not consider the test mentioned in *OUTA* in *Sandton Crowne Properties (Pty) Ltd v Municipal Manager City of Ekurhuleni Metropolitan Municipality Others* [2024] ZAGPJHC 733 (30 July 2024) para 9. An interdict was requested in this case while the Municipality's decision regarding the approval of site development or building plans was being reviewed. The court noted that the requirements of an interdict are well-established. On the requirement of a prima facie right, the court observed that the interdict must protect a prima facie right worthy of protection. Even if the existence of the right is open to some doubts, noted the court, it would be sufficient for an interdict.

[21] As previously stated, in dismissing the applicants' application in the present matter, this Court considered itself bound by *OUTA* and *Khoin and Others v Jenkins and Others*, in determining an application for a construction interdict pending review. In *Khoin and Others v Jenkins and Others*, the full court found that protecting the right to review the unlawful decision cannot form the basis for interim relief. Simply put, there could be no consideration of irreparable harm without a prima facie right to

be protected from future irreparable harm. This Court also considered itself bound by *Joostenbergvlakte Community Forum v Montana Development Company (Pty) Ltd*, Case Number: 12205/2023 ZAWCHC (28 December 2023), where the court found that the right to review an allegedly unlawful decision cannot form the basis for interim interdictory relief pending a review.

[22] From the cases discussed above, it is abundantly clear that there is a conflict of decisions on the test applicable in an application for an interdict pending a review application particularly for building plans. Whilst I am not persuaded of any prospects of success in the applicants' application for leave to appeal, I am of the view that there are compelling reasons to grant leave to appeal as the issues raised in the appeal raise issues of public importance. More so, section 17(1)(a)(ii) of the Superior Courts Act is not limited to conflicting judgments. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2, the SCA stated:

“If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive”.

[23] Notwithstanding this Court's finding and the full court's decision in *Khoin and Others v Jenkins and Others*, the applicants and other objectors continue to rely on the historic position in construction interim interdict litigation. The circumstances in which a party is entitled to a building construction interdict pending the review of the municipality's building plan is a discrete issue of public importance that will influence future disputes. Pursuant to the discussion above, I am of the view that an appeal in this matter demands the attention of the Supreme Court of Appeal in terms of section 17(1)(a)(ii) of the Superior Courts Act. Section 17(1)(a) of the Superior Courts Act permits leave to appeal where: (i) the appeal would have reasonable prospects of success; or (ii) 'there is some *other compelling reason why an appeal should be heard, including conflicting judgments*.

[24] In my view, the appeal in this matter involves a question of law of public importance because of its general impact on future cases. An authoritative judgment from the SCA will be in the interests of (a) owners seeking to exercise their fundamental property right to build under municipal approval, (b) objectors who may be contemplating an interim interdict application, and (c) the City and other municipalities who face the risk of interference with their constitutionally assigned powers.

[25] After careful consideration of the applicants' stated grounds of appeal and the submissions by the various Counsels, I am of the view that leave to appeal should be granted in terms of the provisions of section 17(1)(a)(ii) of the Superior Courts Act. Furthermore, pursuant to the reasons given above, I am of the view that this matter deserves the attention of the Supreme Court of Appeal.

6. Order

[26] In the result, the following order is granted:

26.1 The applicants are granted leave to appeal to the Supreme Court of Appeal against the judgment of this Court delivered on 03 June 2024. The costs of this application will be costs in the appeal.

LEKHULENI J
JUDGE OF THE HIGH COURT
WESTERN CAPE HIGH COURT

APPEARANCES

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