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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO: 6707/2022

In the matter between:

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

First Applicant

**THE TRUSTEES FOR THE TIME BEING
OF THE RUSNIC TRUST (I[...])**

Second Applicant

THOMAS FRANCIS GALLAGHER

Third Applicant

JACQUELINE FRANCES GALLAGHER

Fourth Applicant

JULIAN DAVID RABINOWITZ

Fifth Applicant

CYRIL IAN GLASER

Sixth Applicant

BARBARA RUTH MAYERS

Seventh Applicant

and

LEONHARD GÄRTNER

First Respondent

ANDREAS ROBERT HERMANN PLANK

Second Respondent

JANINE ADUDE STEPHANIE BEATRICE PLANK

Third Respondent

THE CITY OF CAPE TOWN

Fourth Respondent

Heard on:

4 June 2025

Order Issued on: 29 August 2025 (by electronic mail to the parties)

Judgment delivered on: 22 September 2025

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

KHOZA AJ

Introduction

[1] On 29 August 2025, I granted an order dismissing the applicants' application for leave to appeal to the Supreme Court of Appeal or, alternatively, to the Full Court of this Division against this Court's judgment of 11 April 2025 and directing the applicants to pay the costs of the application, including the costs of two counsel, where so employed.

[2] These are the reasons for that order.

Applicable legal standard

[3] Section 17(1) of the Superior Court Act 10 of 2013 provides that leave to appeal may be granted where the court is 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] Section 16(2)(a) governs moot appeals and reads:

- (a)

- (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
- (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

[5] To succeed in this application, the applicants were required to satisfy this Court that: (a) they have a reasonable prospect of success; (b) there is some other compelling reason why the appeal should be heard; (c) a decision on appeal would have practical effect; and (d) the appeal would lead to a just and prompt resolution of the real issues between the parties.

[6] The principles governing the grant of leave to appeal are well settled. They emphasise that leave is not a mere formality, but a stringent threshold designed to ensure that only appeals with real merit proceed.

[7] In *S v Smith* 2012 (1) SACR 567 (SCA) at 570, para 7), the SCA held that the test of reasonable prospects of success postulates 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. To succeed, an applicant must demonstrate on proper grounds that the appeal has a real, as opposed to a remote, chance of success. There must be a rational and persuasive basis for concluding that such prospects exist.

[8] Similarly, in *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016) at para 17, the SCA confirmed that the prospects of success must be realistic rather than remote, and that “a mere possibility of success, an arguable case, or one that is not hopeless is not enough.”

[9] Further, in *Tecmed Africa (Pty) Ltd v Minister of Health and Another* [2012] 4 All SA 149 (SCA) at para 17, the SCA reaffirmed that appeals lie against the substantive order of a court and not against the reasons for judgment. Whether or not an appeal court agrees with the reasoning of the trial court is immaterial if the result would remain the same (*Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 354)).

[10] When measured against the statutory threshold in section 17 of the Superior Courts Act, and informed by the principles articulated in *Smith*, *Mkhitha* and *Tecmed*, it is plain that the applicants' case falls well short.

[11] Their grounds of appeal are directed largely at this Court's reasoning rather than its operative order, an approach the SCA in *Tecmed* made clear is impermissible. They also recycle arguments already dismissed in the main application without identifying any misdirection capable of persuading another court to reach a different conclusion, contrary to the test in *Smith* and *Mkhitha*.

[12] On every front, therefore, the application runs counter to the settled principles governing leave to appeal.

Grounds of appeal

[13] The applicants advance several grounds of appeal, all of which repeat arguments previously ventilated in the main application. In essence, they contend that this Court erred:

[13.1] in holding that the review of the 2021 building plan approval had become moot as a result of the developers' abandonment of that approval and the City's approval of a revised plan in November 2023;

[13.2] in finding that the 2021 plan could lawfully be abandoned, that such abandonment extinguished its legal force, and that successors in title could not rely upon it;

[13.3] in holding that the approval of the 2021 plan did not implicate the public interest in a manner that precluded waiver;

[13.4] in misinterpreting the Constitutional Court's decision in *Walele v City of Cape Town* 2008 (6) SA 129 (CC), by adopting too wide a proposition that plan approvals do not affect neighbouring rights;

[13.5] in relying on *Searle v Mossel Bay Municipality* [2009] ZAWCHC 9 for the conclusion that the 2021 approval had been superseded; and

[13.6] in granting a costs order against the applicants in circumstances where they maintain that their application raised issues of public interest.

[14] These grounds disclose no reasonable prospect that another court would reach a different conclusion.

Merafong

[15] The applicants contend that the City was not entitled to “disregard” its earlier approval of the 2021 plans. They rely on *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC), read with *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC). Those authorities establish that an apparently binding administrative act stands until set aside by a court and may not simply be ignored.

[16] The characterisation of the City’s action is wrong. The City did not treat the 2021 approval as a nullity or refuse to comply with it. Faced with a fresh application, it exercised its statutory powers under sections 4 and 7 of the Building Act to determine that application, while the developers, who were the sole beneficiaries of the 2021 approval, unequivocally abandoned reliance on it. By approving a new set of plans, the City did not purport to undo its earlier decision outside the bounds of law. It lawfully re-exercised its power, this time on a different factual footing.

Mootness

[17] The applicants maintain that because certain features of the 2021 plans were replicated in the 2023 plans and the City did not concede the review grounds, their review of the first approval is not moot. That submission cannot be sustained. Any objection to those replicated features must be pursued in relation to the 2023 approval. Nor does the City’s refusal to concede the review grounds serve to keep the earlier dispute alive.

[18] The governing principle in mootness is whether setting aside the 2021 approval would produce any practical effect. It plainly would not. Once the developers abandoned reliance on the 2021 approval and the City granted fresh

approval in 2023, the earlier approval ceased to have operative effect. Setting it aside now would not undo the 2023 approval or alter the rights and obligations flowing from it. It would not resolve all the issues between the parties.

[19] To permit parallel litigation directed at an approval that has already been overtaken would offend the doctrine of mootness, whose function is to ensure that courts pronounce only on live controversies with real consequences.

[20] Further, the applicants' election not to amend their notice of motion to include a challenge to the 2023 approval, and not to seek consolidation of the two proceedings, confirmed that the present review would yield no practical utility. Their litigation strategy left the 2021 review barren of live issues.

Waiver and abandonment

[21] The applicants argue that another court could find that the 2021 approval could not lawfully be abandoned. I do not agree. The approval conferred rights solely upon the developers, and at common law such rights may be waived or renounced unless legislation expressly provides otherwise. The Building Act contains no provision to the contrary.

[22] There is accordingly no reasonable prospect that another court could find that the developers were bound to persist with rights they had expressly abandoned, or that the 2021 approval retained operative effect after the 2023 approval was granted.

Walele

[23] The applicants further submit that another court could find that this Court misapplied *Walele*. I am not persuaded. The Constitutional Court in *Walele* held that the approval of building plans is a regulatory act that engages the local authority's statutory duties. It did not hold that such approval confers enforceable rights upon neighbours or that their interests are directly adjudicated at that stage.

[24] This understanding has since been endorsed by the SCA in *City of Cape Town v Reader* 2009 (1) SA 555 (SCA), which confirmed that plan approvals are

decisions between the applicant and the municipality, subject of course to the statutory standards.

[25] Against this backdrop, there is no reasonable prospect that another court could interpret *Walele* as the applicants suggest. The applicants' interpretation attributes to *Walele* a breadth it does not bear.

Successor in title

[26] The applicants also challenge this Court's finding that successors in title could not rely on the 2021 approval once it had been abandoned by the original developer. There is no reasonable prospect that another court could conclude otherwise.

[27] A successor acquires no greater rights than those held by the predecessor. Where the predecessor has renounced the benefit of an approval, no legal foundation exists for a successor to revive or rely upon it. To hold differently would be to confer greater rights upon a successor than those enjoyed by the original holder, an outcome neither recognised by principle nor supported by authority.

Supersession by the 2025 approval

[28] The applicants further challenge this Court's finding that the approval of the 2023 plans superseded the 2021 approval. I am not persuaded that there is any reasonable prospect another court could reach a different conclusion. Sections 4 and 7 of the Building Act authorise the local authority to entertain fresh applications, and once such an application is granted, it necessarily displaces reliance on any earlier approval. This principle has been recognised in the case law, including *Searle*.

Costs order

[29] The applicants also challenge this Court's costs order. I do not consider there to be any reasonable prospect another court could interfere. Once the developers had abandoned the 2021 approval and the City approved a new set of plans, the continuation of proceedings directed solely at the 2021 approval became inappropriate.

[30] The respondents were nonetheless put to the expense of resisting litigation that no longer had practical utility. This Court's decision to award costs reflected a proper exercise of discretion consistent with the principle that costs follow the result.

Conclusion

[31] On the application of section 17(1) of the Superior Court Act, the applicants have not shown reasonable prospects of success, any compelling reason for the appeal to be heard, that a decision on appeal would have practical effect, or that it would resolve the real issues between the parties. The application for leave to appeal must fail.

Order

[32] The following order is made:

1. The application for leave to appeal is dismissed.
2. The applicants are to pay the costs of the application, including the costs of the two counsel, where so employed.

GSS KHOZA
ACTING JUDGE OF THE HIGH COURT

CASE NO: 6707/2022

APPEARANCES

For the Applicants: Adv D Irish SC, with Adv D Lubbe
Instructed by: Van Rensburg and Company

For the First to Third Respondents: Adv D Baguley
Instructed by: Slabbert Venter Yanoutsos Inc.

For the Fourth Respondent: Adv R Paschke SC, with Adv M de Beer
Instructed by: Fairbridges Wertheim Becker Attorneys