

SOUTH AFRICA / JUDGMENT

NT55 Investments (Pty) Ltd and Another v Member of the Executive Council of the Gauteng Provincial Government and Others (4478/20) [2023] ZAGPJHC 986 (1 September 2023)

[2023] ZAGPJHC 986

COURT

South Gauteng High Court, Johannesburg

BEFORE

GC Wright

CASE / FILE NUMBER

4478/20

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 4478/20

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

01/09/23

In the matter between:

NT55 INVESTMENTS (PROPRIETARY) LIMITED FIRST APPLICANT in the main application
FRANCOIS NORTJE SECOND APPLICANT And THE MEMBER OF THE EXECUTIVE COUNCIL OF
THE GAUTENG PROVINCIAL GOVERNMENT responsible for its DEPARTMENT OF ROADS AND
TRANSPORT FIRST RESPONDENT THE MEMBER OF THE EXECUTIVE COUNCIL OF THE
GAUTENG PROVINCIAL GOVERNMENT responsible for its DEPARTMENT OF AGRICULTURE AND
RURAL DEVELOPMENT SECOND RESPONDENT THE MINISTER OF THE NATIONAL
GOVERNMENT FOR MINERALS AND RESOURCES THIRD RESPONDENT THE NATIONAL
REGULATOR OF SOUTH AFRICA FOURTH RESPONDENT EKURHULENI METROPOLITAN
MUNICIPALITY FIFTH RESPONDENT LESEDI LOCAL MUNICIPALITY SIXTH RESPONDENT
TRANSNET SOC LIMITED SEVENTH RESPONDENT

JUDGMENT – APPLICATIONS FOR LEAVE TO APPEAL AND FOR SECTION 18 RELIEF

WRIGHT J

1. The original applicants, NT55 and its moving force, Mr Nortje seek to prevent the building of a road by the Gauteng Department of Roads. They rely on laws about the environment but they are in fact keen to prevent the building of the road so that they can build a rival project for commercial reasons. Before me originally, was an application by them for a temporary interdict against the Gauteng Dept of Roads. As I found in my judgment, their real motive does not detract from their cause of action. I granted what was very clearly an interim interdict in favour of NT55 and Mr Nortje.
2. On 4 February 2022, I handed down a typed, signed judgment. This judgment is to be read with that judgment. By 11 July 2022, my clerk, Ms Vukeya had a trail of emails relating to the hearing of the application for leave to appeal. Despite my best efforts, it is unfortunately common in this Division for applications for leave to appeal to be heard well after they have been launched.
3. Before me now are four applications. First, the MEC for the Gauteng Dept of Roads seeks leave to appeal my order of 4 February 2022. Second, condonation is sought by the MEC for the late bringing of the application for leave to appeal. Third, the MEC seeks an order, under section 18 of the Superior Courts Act, 10 of 2013 that pending appeal, the road may be built. Fourth, NT55 and Mr Nortje seek to strike certain passages from the founding affidavit in the section 18 application.
4. In my view, the Gauteng Dept of Roads has a reasonable prospect on appeal including on the question of appealability but this case does not need the attention of the SCA. It is in the interests of justice that leave be granted.

See *EFF v Gordhan* CCT 232/19 and CCT 233/19, 29 May 2020, especially at paragraphs 48-51. The facts in this case require delicate balance. The law requires careful, nuanced consideration. The need not to thwart Executive power is an important consideration, as is the protection of the environment. The lengthy and convoluted legal proceedings to date in this case are regrettable but, ironically are in my view further reason to grant leave.

5. The application for leave was launched about four and a half months late as the MEC desired a change of lawyers who needed time to read themselves into a long and complicated case. In my view, there is nothing unreasonable in this course of conduct and it is in the interests of justice to grant condonation. Four and a half months is a short time in the greater context of this case. NT55 and Mr Nortje do not themselves appear to litigate with undue haste.

6. Regarding the section 18 application, the MEC sets out in a careful, lengthy and detailed affidavit why the road should be built in the meantime. Economic necessity, the need to protect the main road used by trucks from eThekweni to Gauteng from excessive wear and tear and employment opportunity are some of the facts relied upon. The answering affidavit is also long and detailed. Disputes of fact arise.
7. Because my order of 4 February 2022 was interlocutory, section 18(2) is relevant and the operation of my order is not suspended unless I order otherwise under exceptional circumstances. Under section 18(3), the party seeking such an order needs to show irreparable harm to it if I do not grant the order sought and such party also needs to show that the other party will not suffer irreparable harm if I do grant the order.
8. As I found on 4 February 2022, the relevant decision maker admitted a mistake and sought to correct it. A sensitive floodplain will be harmed irreversibly if the road is built. In these circumstances, the section 18 application stumbles at both hurdles set up in section 18(3). There is no point in causing irreversible harm to the floodplain pending appeal.
9. Regarding the application by NT55 and Mr Nortje to strike out passages from the founding affidavit in the section 18 application, the striking out in my view is without merit. The attack on the founding affidavit in the section 18 application is overbroad, argumentative and nit-picks with the quality of the evidence presented rather than concentrating on the admissibility of the evidence attacked. There is no prejudice to NT55 or to Mr Nortje if the striking out fails.
10. It would be unwise to decide the issue of costs now in the section 18 application or even to make costs in the cause in the application for leave to appeal. As I said in my judgment of 4 February 2022, there are too many variables still in play. The prudent course is to reserve the question of costs.

ORDER

1. Condonation for the late bringing of the application for leave to appeal is granted.
2. The MEC for Roads and Transport in Gauteng is granted leave to appeal the order of Wright J of 4 February 2022.
3. Leave is to a Full Court of the Gauteng Division, Johannesburg.
4. The section 18 application is dismissed.
5. The application to strike certain parts of the founding affidavit in the section 18 application is dismissed.
6. The question of costs in all applications is reserved.

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

HEARD : 1 September 2023

DELIVERED : 1 September 2023

APPEARANCES

APPLICANTS in the main application before Wright J:

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