

SOUTH AFRICA / JUDGMENT

PJJ van Vurren Beleggings (Pty) Ltd and Another v Wilds Homeowners Association NPC and Another (89624/2018) [2022] ZAGPPHC 572 (18 July 2022)

[2022] ZAGPPHC 572

COURT

North Gauteng High Court, Pretoria

BEFORE

BAQWA

CASE / FILE NUMBER

89624/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 89624/2018

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED.

YES

18

July 2022

In

the matter between: PJJ
VAN VUUREN BELEGGINGS (PTY) LTD
APPLICANT
THE
WILDS MANOR HOMEOWERS
ASSOCIATION
NPC
SECOND APPLICANT
and
THE
WILDS HOMEOWNERS
ASSOCIATION
NPC
FIRST RESPONDENT
THE
CITY OF TSHWANE METROPOLITAN
MUNICIPALITY
SECOND RESPONDENT

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 07 July 2022.

BAQWA J:

Introduction

- [1] The applicants seek a declaratory that Trumpeter's Loop and Beisa Street in the Wilds Estate, Pretoria are public roads and for an order directing the first respondent to refrain from preventing the applicants access to Trumpeter's Loop and Beisa Street.
- [2] They also seek an order directing the respondents to allow the applicants unrestricted access to Trumpeter's Loop and Beisa Street and an order in terms of which the first respondent is ordered to remove the locks at points "X" "Y" and "C" depicted on a diagram of the Wilds Estate.
- [3] Whilst they initially also sought the removal of the locks at the gates at the junction of Trumpeter's Loop and Wonderfontein Street Shown on "C" they do not for present purposes persist with seeking an order for the removal of the lock at "Y" and the gate at the junction of Trumpeter's Loop and Wonderfontein street.

The Parties

- [4] The first respondent is the Homeowners' Association of the Wilds Estate which is constituted by all the extensions of Pretorius Park shown to the North East as "C", as well as a portion of extensions 17 to the right thereof being X12, X13, X14, X16 and 17 including- the "club house", X16, X19 and X20 on "C".
- [5] The second respondent is the City of Tshwane Metropolitan Municipality, which does not oppose this application.
- [6] The land which constitutes Pretorius Park and is under the control of the first respondent in terms of the Memorandum of Incorporation (MOI) is adjoined by X27 which consists of two portions, the first one being on the south east, marked "C" and the second portion marked "Retirement Village".
- [7] It is the intention of the first applicant to develop the south eastern portion of X27 which can only be accessed through two public roads, namely, Trumpeter's Loop and Beisa Street.
- [8] The first applicant who initially intended to develop X27 as part of the Wilds Estate as indicated in the MOI, no longer wishes to do so. The reason for the change of plan is because the first respondent insists on the first applicant, the developer, paying full levies on the undeveloped erven on X27 from the date of incorporation. The result would be the first applicant incurring costs to the tune of R60 million over the period of development of X27.

Background

- [9] The first applicant was the developer of the Wilds Estate in the early 2000s and the development included the streets which are the subject of this application, namely, Trumpeter's Loop and Beisa Streets. As part of the development, it was envisaged that X 27 would be added as an extension of the Wilds Estate and that it would be governed by one HOA.
- [10] In 2013 the law governing the legal status of erven in a proclaimed township was amended. The effect of the amendment gave rise to the following effects; whereas erven in a proclaimed township had come into existence upon transfer of such erven to purchasers, the position changed and erven would come into existence upon proclamation of a township. This meant that if X 27 were to be incorporated into the Wilds Estate, the developer would have to pay the full levies for the unsold erven in X 27 during the development phase of the erven even before they were transferred to the purchasers. The development phase was estimated to last about four years.
- [11] The first respondent locked the applicants' gate on X 27 at "X" on "C" during 2014. This effectively

denied the applicants access to and from X 27 via Beisa Street. The first applicant did not react to the closure as there was no activity on X 27 at the time.

- [12] During 2016 the first applicant communicated to the first respondent its intention to develop the south eastern portion of X 27. The first respondent stated that it would permit access to X 27 through Trumpeter's Loop on condition that X 27 was incorporated as part of the Wilds Estate and the first applicant paid additional contribution and full levies for it.
- [13] The conditional access caused the first applicant to avoid the incorporation of X27 to the Wilds Estate as the cost of doing so would amount to R60 million. The first applicant tried to negotiate a reduction of the contributions and levies with the intention that if the negotiations failed, it would opt to develop X27 as a separate township.
- [14] X27 was proclaimed as a township on 2 February 2017 and on 7 February negotiations commenced regarding entry to X27 through Trumpeter's Loop and Beisa Street and possible reduction of the contributions and levies regarding X 27.
- [15] The negotiations were not successful resulting in an urgent application for a right of way over Trumpeter's Loop and Beisa Street. The application was struck off the roll for lack of urgency. The present application is aimed at enforcing the applicants' right to access to X27 through Trumpeter's Loop and Beisa Streets.
- [16] On 6 April 2017 it was conveyed to the legal services of the second respondent by the transportation planning division that "satisfactory accesses are available to the township and that a public street system is available to all erven in the township". This statement was made in regard to the streets usable by occupiers of both the Wilds Estate and X27 and the said streets would be inclusive of Trumpeter's Loop and Beisa Streets.
- [17] The applicants have tendered evidence to demonstrate that they have requested access from the second respondent to X27 on more than one occasion but access was refused.
- [18] On 22 May 2017 the applicants' attorney requested such access via K54 from the Gauteng Provincial Government but it was refused on 25 May 2017. Such request was repeated on 25 May for access through Erf 1686 from the second respondent which was declined on 31 May 2017. Instead, the second respondent pointed to Trumpeter's Loop and Beisa Street as a viable alternative for access to X27.
- [19] On 3 July 2017 the applicant's attorney requested second respondent to assist them regarding access to Trumpeter's Loop.

On 6 July 2017 the Director Development compliance of the second respondent requested the Director: Built Environment and Enforcement

Inspectorate of the second respondent to liaise with Metro Police to open the public road, Trumpeter's Loop. He further advised him that in term of section 63 of the local Government Ordinance, the public road must be kept open for the community and that the Wilds HOA has no right to close the public road, unless they buy the road or do a security closure as provided for by Act 10 of 1998.

[20] The applicants' attorney demanded action from the second respondent on 13 October 2017 and the second respondent sent a letter

to the first respondent's attorneys on 30 October 2017 to this effect:

20.1 X 27 is to be allowed access through Trumpeter's Loop, being a public road.

20.2 Final approval of X 27 as a township was granted by the second respondent on the basis that access to it would be obtained through Trumpeter's Loop, to which the first respondent failed to raise objection during the public participation period;

20.3 The access controlled gate which was approved with the establishment of X15 along Trumpeter's, was not approved to restrict access of the public, but was limited to controlled or monitored access which should not infringe on the rights of members of the community in using the public road;

20.4 Denying or restricting access is illegal, unless such restriction is approved- by the second respondent in terms of the Rationalisation of Local Government Affairs, Act 10 of 1998;

20.5 Should the first respondent persist in denying access to Trumpeter's Loop being a public road, the second respondent would approach the High Court for the necessary relief.

[21] The first respondent did not address the first applicant's complaint after receipt of the letter of 30 October 2017 however, the second respondent did not take the matter to High Court as promised and the applicants were left with no option but to launch these proceedings.

The Respondent's Case

[22] It is the applicants' contention that Trumpeter's Loop and Beisa Streets are public roads and that contention forms the foundation of this application.

[23] Whilst the applicants rely on the conditions and legal requirements in terms of which the general plan of Pretorius Park Ext 15 which was formulated together with the provisions of section 63 of the Local Government Ordinance, 17 of 1939 (The Ordinance) and the Rationalisation of Local Governance Affairs Act 10 of 1998, the respondent maintains that when the township was established by the second respondent, the township was motivated as a secure residential estate which included specific erven allocated for the control of access to such residential estate.

[24] The first respondent contends that whilst second respondent had full knowledge of the fact that unrestricted access would not be available to members of the public in regard to Trumpeter's Loop and Beisa Street, it nevertheless approved the township application and acknowledged the restriction of access. It further contends that neither Trumpeter's Loop nor Beisa Street

was constructed and developed "for the use and benefit of the public" in term of section 63 of ordinance.

[25] The first respondent argues that such roads were developed to provide access to the residents of a secure residential estate, which the first respondent, as homeowners association could control for the benefit of the residential estate ensuring the security of its members.

[26] The first respondent relies for support Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh & Others [1] where the definition of a "public road" was considered, in an township considered to be a secure residential estate.

[27] In the said matter (Singh) the SCA considered the provisions of the National Road Traffic Act[2] and the definition of a "public road" contained in section 1 of the Act which includes "any road", street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or any section has a right of access....."

[28] In the Singh matter the SCA concluded that:

"[13] Applying the definition of "public road," thus interpreted, to the present case, it seems to me that the roads

within the estate are not public roads. 'The estate is a private township. In terms of the township approval; the owner- shall construct all the roads in the township to the satisfaction of the local authority'. The approval further provided; 'the; owner of the erf, any further sub-division, or any unit thereon shall have a general right to access over erven 2888 to 2891 subject to whatever rules, conditions and restrictions as are laid down from time to time by the Homeowner's Association for the purpose of ensuring proper control and administration of the use and enjoyment thereof."

[29] At paragraph [14] the court further stated;

"At the inception of the estate, the roads within the estate were private roads. That never changed. The road did not thereafter acquire the character of public roads. The estate is enclosed by a 2-meter-high palisade fence, which is topped with electrified securing wiring. All ingress and egress to the estate are strictly controlled. Gated access points are controlled by security guards. Visitors are required to provide the guards with an access code to gain entry to the estate. In repeat of owners, biometric scanning is employed..."

- [30] Based on the pronouncement in Singh the first respondent contends that Trumpeter's Loop and Beisa Street are not public roads.

Contractual Relationship

- [31] It is common cause that the first applicant is a member of the first respondent and therefore a member of the estate. As such, so the first respondent argues, the first applicant is bound by the rules and regulations prescribed by the first respondent and premised on this approach the relief sought would breach the contractual relationship between the first applicant and the first respondent.

Interdictory relief

- [32] The first respondent further argues that the applicants have not made out a case for interdictory relief in that they have not satisfied the requisite requirements, namely, a clear right, irreparable harm and absence of an alternative remedy.
- [33] The first respondent contends that the relief sought would enable the first applicant to establish Pretorius Park Ext 27 and make use of the first respondent's access road and security control measures without contributing to the maintenance thereof.

The applicants' case

- [34] The first respondent exercises access control as provided for in Amendment Scheme 9489 of the Pretoria Town-Planning Scheme 1974 at Trumpeter's Loop and Beisa Street.
- [35] The applicants contend that the roads within the Wilds Estate, including Trumpeter's Loop and Beisa Street vest in the second respondent in trust to keep same open in terms of Section 63 of the Ordinance in that the general plans of Pretorius Park, in which the roads had been set apart and appropriate for the use and benefit of the public and which had been approved by the Surveyor-General and filed in the Deeds Office.
- [36] Section 63 of the Ordinance provides;

“63

- (1) The council shall have the control and management of all
- (a) roads, streets, thoroughfares, bridges, overhead bridges, subways, including foot pavements, footpaths, side-walks and lanes;
- (b) squares and other open spaces, gardens, parks and other enclosed spaces;
- (c) culverts and ferries;
- (d)

Which have been or shall be at any time set apart and appropriated by proper authority for the use and benefit of the public, or to which the inhabitants of the municipality shall at any time have or acquire a common right, and the same shall be vested in the council in trust to keep same open (save as is otherwise provided in this Ordinance or any by-law), and in repair so far as finances of the council will permit, for the use and benefit of the inhabitants.

For the use of this sub-section-

i. "The expression 'set apart and appropriate by proper authority' shall mean the filing in the Deeds Office or other registration

office of any general plan of a township, agricultural holdings or other division of land or any alteration, addition to or amendment

thereof approved by the Surveyor-General on which are marked such roads, streets, squares, to which the public have a common right of user."

Analysis

[37] The first respondent does not deny the allegation that the general plans of Pretorius Park, in which had been the set apart and appropriate the roads within Pretorius Park, for the use and benefit of the public, and which had been approved by the Surveyor-General had been filed in the Deeds Office. This is so, despite the first respondent's denial of the allegation that Trumpeter's Loop and Beisa street are public roads as contended by the first applicant.

[38] It is common cause that erven 1292 and 1296 as depicted on "C" and "A5" had been earmarked for access control but that does not render Trumpeter's Loop a private road. In terms of the amendment scheme the first respondent is entitled to erect control facilities on the said erven to control access but not restrict access. Restriction of access may only be exercised in terms of sections 43 to 47 of Act 10 of 1998.

[39] Logic dictates that, if Trumpeter's Loop had been a private road, such as in Singh case, Act 10 of 1998 would not apply, and the Amendment Scheme would have been unnecessary as the first respondent would have been at liberty to deal with access of visitors to its private property as it deemed fit. In that case the security erven would not have existed.

[40] The applicable portions of Act 10 of 1998 provide as follows;

"2 purpose

- 1) The purpose of this Act is to rationalise the legislative and administrative framework within which the local sphere of government may conduct its affairs in relation to, amongst other things-
- a) Determining and standardising the status, powers, functions, and duties of a municipal council;

- b)
- c)
- d) Enabling municipalities to effectively conduct their affairs, more particularly with regard to the procurement of goods and services, the execution of works and the conducting of access to public places.
- 2)
- 3) Application of the Act

I) Any person applying or interpreting this Act must-

- a) Give a construction of its provisions in a manner that-
 - i) Is, consistent with the statements of purpose set out in section 2; and

[41] Section 1 of Act 10 of 1998 defines “public places” as “any road, street, thoroughfare, bridge, overhead bridge part or enclosed space (amongst more) vested in a municipality and includes any road, place or thoroughfare which is in the undisturbed use of the public or which have the right to use”.

[42] Section 43 of Act of 1998 provides:

“43 A Municipal Council’s power to restrict/access.

For purposes of enhancing safety and security, a municipal council may-

- a) On its own initiative impose a restriction on access to any public place if it complies with the provisions of section 44; or
- b) Authorise any person, body or organisation to restrict to access to any public place if the provisions of section 45 have been complied with.”

[43] Section 46(1) of Act 10 of 1998 authorises restriction of access for no longer than two years unless a municipal council has extended the duration in terms of section 46(2) of the Act.

[44] Section 25(1) of the Bill of Rights in constitution provides:

“No one may be deprived of property except in term of law of general application, and no law may permit arbitrary deprivation of property”.

[45] It cannot be disputed that the roads vest in the respondent in terms of section 63 of the ordinance and that X27 was approved as a township with Trumpeter’s Loop as the public access road. The first respondent is bound by that decision in the absence of review proceedings to set it aside by the first respondent.

[46] In terms of section 43 (a) of Act 10 of 1998 the second respondent is entitled on its initiative to impose a restriction regarding access to access any place but in order to do so, it has to comply with the provisions of section 44 of Act 10 of 1998 which provides as follows:

“44

- (1) when intending to impose the restriction on access to a public place, a municipal council must:
 - a) Determine the proposal terms of the restriction after consultation with the South African Police Services;
 - b) Pass a resolution confirming the proposed terms and resolve to impose the restriction; and thereafter,
 - c) Comply with the following procedure:
 - i) The intention to impose the restriction must be announced by notice in the Provincial Gazette and where these exist, in one or more newspapers circulating in the area concerned;
...
 - ii)
 - iii) At any time before imposing the restriction, consultations with any relevant interest group may be held in any form, including the holding of an enquiry; and
 - iv)

[47] No evidence has been tendered by the first respondent that it has complied with any of the requirements prescribed in Act 10 of 1998 or that an authorisation has been extended in terms of section 46 (2) of Act 10 of 1998. There is therefore no legal basis to justify the restrictions imposed by the first respondent.

[48] It is common cause that Trumpeter’s Loop and Beisa Street do not form part of the individual properties in The Wilds Estate and have no description as property units. The only feasible way to convert these streets to private roads would be for the first respondent to purchase them, in which event they would be given erf numbers by the Deeds Registry to enable them to be transferred to the first respondent.

[49] The first respondent also raises the issue of security but this is not relevant to the decision whether Trumpeter’s Loop and Beisa Streets are public roads or not. Regarding maintenance thereof, the applicants have indicated their willingness to contribute their prorata share to share to the costs of security services.

[50] The first respondent has let it be known that it would “allow” the applicants access to Trumpeter’s Loop and Beisa Streets provided X27 is incorporated as part of The Wilds Estate and the first applicant pay full levies in respect of all the erven on X27.

- [51] The first respondent's preferred option has however become a non-issue because the first applicant has chosen not to incorporate X27 into The Wilds Estate to avoid paying levies to the tune of R60 million rands after negotiations to reduce the levies or contributions in respect of the security services between the parties had broken down.
- [52] It is also common cause that all the buildings on The Wilds Estate which was constructed by the first applicant were built by contractors who gained access through gate 1 on of the Wilds Estate and at that time, the intention was to build X27 as part of the Wilds Estate. Even though circumstances have changed, the further construction on X27 would be no different and no more than access would be required.

K 54 Road Reserve

- [53] It has been suggested that access could be gained by the applicants through the access road known as K54. Correspondence between applicants' attorneys and the second respondent shows that access through K54 had been refused by the second respondent to the applicants'. Moreover, K54 is a road reserve for the planned construction of a future public road and cannot be re-purposed in order to accommodate the first respondent's unlawful restriction of access to Trumpeter's Loop as a public road.

Reliance on the Singh decision

- [54] The respondent has placed great reliance on the Singh decision but it is evident from the discussion above that the said decision is distinguishable from the facts of the present case. The roads in the Singh decision were private roads and they were part of the estate. Demonstrably and in terms of the law Trumpeter's Loop and Beisa Streets are not part of The Wilds Estate. This is a fact which is confirmed in correspondence by the second respondent which is the responsible and accountable local authority.

Condonation

- [55] The first respondent filed its answering affidavit out of time and it has applied for condonation of the late filing which the applicants' have not opposed due to the fact that they also filed their replying affidavits out of time.
- [56] The reason for the late filing of the answering affidavit was that the first respondent awaited the outcome of the Singh decision from the Supreme Court of Appeal which, according to the first respondent would be critical for its defence in the application.
- [57] In my view there is no prejudice caused to any of the parties by the late filing of the documents mentioned above and in the absence of any opposition, condonation ought to be granted.

Conclusion

- [58] The first respondent's attorneys were informed by the second respondent on 30 October 2017 in unequivocal terms that X27 was to be allowed access through Trumpeter's Loop, (and by necessary application) Beisa Street, being a public road. This assertion was further supported by a statement to the effect that final approval of X27 as a township was granted by the second respondent on the basis that access to it would be obtained through Trumpeter's Loop to which the first respondent failed to raise an objection during the public participation period.
- [59] In the absence of an application to review the second respondent's decision, it does not appear that the first respondent's defences are sustainable.
- [60] In light of the above, I conclude that the applicants have made out a proper case for the relief sought and I make the following order:

Order

- [61] 61.1 The late filing of the answering affidavit and replying affidavit is condoned.
- 61.2 It is declared that Trumpeter's Loop and Beisa Street in The Wilds Estate, Pretoria, are public roads;
- 61.3 The first respondent is ordered and directed to refrain from preventing the applicants, their members (including their visitors), their suppliers, their contractors and their employees (including their agents) to access Trumpeter's Loop at gates 1 and 2, as well as Beisa Street;
- 61.4 The respondents are directed to allow unrestricted access to the applicants to Trumpeter's Loop and Beisa Street;
- 61.5 The first respondent is ordered to remove within 7 (seven) days from this order its locks from the gate at "X" on plan "C"; failing which the applicants are granted leave to remove the locks and the gate; alternatively, to obtain the assistance of Metro Police to give effect to this order.
- [62] The first respondent is ordered to pay the costs of this application.

SELBY BAQWA

JUDGE OF THE HIGH COURT

Date of hearing: 7 February 2022

Date of judgment: 18 July 2022

Appearance

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[1] 2019

(4) SA 471 SCA.

[2] Road Traffic Act 93 of 1996.

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