HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 90490/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 23 SEPTEMBER 2022

SIGNATURE

In the matter between:

WITWATERSRAND ESTATES LIMITED	Applicant
and	
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	First Respondent
CENTURY PROPERTY DEVELOPMENT (PTY) LTD	Second Respondent
INVESTEC BANK LIMITED	Third Respondent
VUSUMUZI TSHAYINGWE	Fourth Respondent
DARREN LAWRENCE	Fifth Respondent
KIVASHANA VEERASAMY	Sixth Respondent
THEODOOR DE BOER	Seventh Respondent
PRECINCT RESIDENTIAL (PTY) LTD	Eighth Respondent

Summary: **Leave to appeal** – no reasonable basis to conclude that another court would come to a different conclusion – leave refused.

REASONS FOR REFUSAL OF LEAVE TO APPEAL

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] On 9 June 2022 this court declared that the review application launched by Witwatersrand Estates Limited (WEL) had been instituted beyond the 180 day period contemplated in section 7(1)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that, in the absence of an application for extension of time in terms of section 9 of PAJA, this court had no authority to entertain the review application. On 29 August 2022 this court refused WEL leave to appeal this declaration, indicating that reasons would be furnished later. These are the reasons for that refusal.

The crucial finding

[2] The crucial finding underpinning the declaration was that the proverbial clock had started ticking by no later than 27 June 2018, being the date on which attorneys of the Second Respondent, Century Property Development (Pty) Ltd (Century) had informed WEL's attorneys that the development was proceeding lawfully and that, subsequent to Century's acquisition of the property, it has been subdivided and "*phased in not less than 10 (ten) separate Townships*".

[3] In the main judgment, I referred to the relevant decisions as the "2010 decision" of the City of Johannesburg (CoJ) whereby the initial development was approved and the "2017 decision", which is the decision whereby subsequent townships were established. It is the latter decision which WEL sought to have reviewed and set aside, principally because it was done without notice to it. Leaving aside for the moment the issue of whether the mode of development in terms of the 2017 decision was substantially the same as that of the 2010 decision and whether, having regard to the fact that neither the perimeters of the developed property nor the access roads (i.e. the external features of the property) underwent any changes, which empowered the CoJ to consider "internal" amendments without notice to neighbouring property owners such as WEL, the fact is that knowledge of such a decision had been acquired by WEL by 27 June 2018.

[4] This knowledge must also be viewed in the context that development in accordance with the 2017 decision had commenced in February 2018 already and that WEL, on its version in the founding affidavit, came into possession of a "marketing" brochure depicting an architecht's interpretation of this development somewhere in June 2018, whereupon it became so convinced that Century was acting in breach of the 2010 decision, that WEL's attorneys sent a letter to Century on 18 June 2018, complaining that WEL "*know[s] of no other approvals allowing for any layouts other than the Master Plan and as far as they are aware, there have been no lawful process to obtain approval from the CoJ for any amendment to, or revision of the Master Plan*".

[5] No argument presented to me during the hearing of the application for leave to appeal, convinced me that the starting date of 27 June 2018 was wrong. By then, at the latest, WEL known on should reasonably have known that an administrative decision had been taken. By then it had accused WEL of proceeding with development without an approved amendment form the CoJ and

had been informed in writing that such amendments had been approved, i.e. that a decision had been taken. The view that the clock should only have started once reasons for the decision had been obtained in August 2018 was not pursued with great vigour and, in my view, rightly so. No reasons were either requested nor furnished prior to the launch of the application. As pointed out in the main judgment, the documents obtained in August 2018 merely consisted of what was subsequently termed a "sub-set of the record" by WEL's attorney.

[6] Calculating from 27 June 2018, the prescribed 180 day period had expired by the time of service on Century on 8 January 2019 only. The other (subsequently joined) respondents pointed out that the 180 day period had long expired by the time that these respondents became joined parties to the review application on 20 July 2021.

The res judicata point

[7] There is some uncertainty as to how Khumalo J adjudicated the delay issue when it had been raised by Century during the joinder application by WEL. It is unclear, even from the papers, which WEL argued should have been determinative of the issue, whether she had found that there was no "undue" delay or whether she had in fact made a finding on the time period contemplated in section 7(1)(b) of PAJA. This lack of clarity is exemplified by the parties arguing at one stage that the learned judge had dealt with the delay issue "in general terms" (only).

[8] What is clear however, it that the joined parties had only been joined after the fact and therefore, before their joinder, had not been able to raise the delay issue, which they have subsequently done. WEL's argument that issue estoppel should operate against these parties is manifestly unfounded. An issue cannot be held to have been decided against a party in proceedings in which he had no part.

In fact, it appeared at the hearing of the application for leave to appeal, that an agreement had previously been reached, at least with one of those parties, that the *res judicata* issue would not be raised against it.

[9] Be that as it may, I have not been convinced that the relaxation of the *res judicata* rule as contemplated in *Prinsloo NO v Goldex* quoted in par 5.5. of the judgment, was not in the interests of justice.

Conclusion

[10] In the words of the Supreme Court of Appeal, used in *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/15) [2016] ZASCA 176 (25 November 2016) at [17] there "*... must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal*" and that a "*... mere possibility of success, an arguable case or one that is not hopeless, is not enough*". Applying these principles, I find that there is no reasonable prospect or "*realistic chance*" of success on appeal in respect of either of the two issues dealt with above.

Cross-appeal

[11] The fourth to seventh respondents had delivered a notice whereby they conditionally sought leave to cross-appeal but this application was not proceeded with.

Order

[12] For the above reasons, I made the following order on 29 August 2022:

> The application for leave to appeal is refused with costs, including the costs of two counsel where employed.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 29 August 2022

Judgment delivered: 23 September 2022

APPEARANCES:

For Applicant:	Adv L Putter SC together with Adv H Voster
Attorney for Applicant:	Faber Goertz Ellis Austen Inc., Bryanston c/o FriedLand Hart Solomon & Nicolson Attorneys, Pretoria
For the 1st Respondent:	Adv E Mokutu SC together with Adv N Makaye
Attorneys for the 1st Respondent:	Malebye Motaung Mtembu Inc., Pretoria
For the 2nd Respondent:	Adv M C Maritz SC together with Adv J A Venter
Attorneys for the 2nd Respondent:	Adriaan Venter Attorneys, Pretoria
For the 3rd Respondent:	Adv F H Terblanche SC together with Adv J E Smit

Attorneys for the 3rd Respondents:	Webber Wentzel Attorneys, Sandton c/o Hills Incorporated, Pretoria
For the 4th – 7th Respondents:	Adv K Tswatsawane SC together with Adv G Egan
Attorneys for the 4th – 8th Respondents:	Diale Mogashoa Attorneys, Pretoria
For the 8th Respondent:	Adv M C Erasmus SC together with Adv D J van Heerden
Attorneys for the 8th Respondent:	Weavind & Weavind Attorneys, Pretoria