

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 31083/2020

DATE: 29th February 2024

In the matter between:

AIR CHEFS SOC LIMITED

Applicant

and

**THE PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA**

First Respondent

MANTELL, SIMON t/a MANTELLI BISCUITS

Second Respondent

SOUTH AFRICAN AIRWAYS SOC LIMITED

Third Respondent

Neutral Citation: *Air Chefs v The Public Protector and Other (31083/2020)*

[2024] ZAGPJHC --- (29 February 2024)

Coram: Adams J

Heard: 29 February 2024 – ‘virtually’ as a videoconference on *Microsoft Teams*.

Delivered: 29 February 2024 – This judgment was handed down electronically by circulation to the parties’ representatives by email, by being uploaded to *CaseLines* and by release to SAFLII.

The date and time for hand-down is deemed to be 11:30 on 29 February 2024.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal refused.

ORDER

- (1) The second respondent's application for leave to appeal is dismissed with costs.
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JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original review application by the applicant (Air Chefs) for the review and the setting aside of a report by the Public Protector and her findings in the said report. The second respondent (Mantelli's) had also instituted a counter-application in which he sought a review and setting aside of certain of the remedial action ordered by the Public Protector and for an order substituting such remedial action with other remedial action. The second respondent is the applicant in this application for leave to appeal and the applicant is the respondent herein. On 26 January 2024 I dismissed both the review application and the review counter-application and each party I had order to pay his own costs.

[2]. The second respondent applies for leave to appeal against that portion of my judgment and the order (paragraphs 2 and 3), as well as the reasons therefor, in terms of which I had dismissed his counter-application and ordered each party to bear his own costs.

[3]. The application for leave to appeal is mainly against my factual findings and legal conclusion that the second respondent is not entitled to the relief

sought by him. I erred, so the second respondent submits, in fact and in law in not granting an order in the manner sought by him for a review of certain of the findings and the remedial action in the report of the Public Protector dated 31 January 2020. I should not have accepted, so the contention goes, the explanation proffered by the applicant that after the first letter of award (LoA) was sent to the second respondent, it dawned on the applicant that the award of the tender was problematic in that its implementation would result, from a practical point of view, in difficulties. It is also contended by the second respondent that I erred in law in finding that the relief sought by the second respondent is wholly incompetent for the simple reason that the counter-application is in the nature of a judicial review of an administrative decision.

[4]. Nothing new has been raised by the second respondent in this application for leave to appeal. In my original judgment, I have dealt with most, if not all of the issues raised by the second respondent in this application for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I said in my judgment, namely that the Public Protector does not have judicial review powers. The Public Protector's main function is to investigate and to report on maladministration, and then to take appropriate remedial action, in connection with the affairs of any State institution or on the abuse of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by such State institutions. Her powers are limited to her investigating and reporting on maladministration or such other misconduct by a person in the employ of a State institution, 'which results in unlawful or improper prejudice to any other person', and then to take 'appropriate remedial action'.

[5]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned

are of the opinion that ‘the appeal would have a reasonable prospect of success’.

[6]. In *Ramakatsa and Others v African National Congress and Another*¹, 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. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[7]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[8]. In *Mont Chevaux Trust v Tina Goosen*², the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*³. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under

¹ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

² *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

³ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁴.

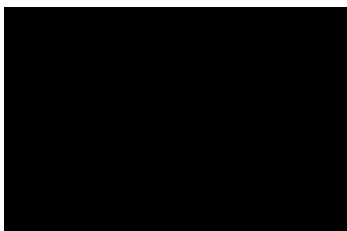
[9]. I am not persuaded that the issues raised by the second respondent in his application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are no reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeal, therefore, in my view, does not have a reasonable prospect of success.

[10]. Leave to appeal should therefore be refused.

Order

[11]. In the circumstances, the following order is made:

- (1) The second respondent's application for leave to appeal is dismissed with costs.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

⁴ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

HEARD ON:	29 th February 2024
JUDGMENT DATE:	29 th February 2024 – Judgment handed down electronically
FOR THE APPLICANT:	Advocate M Majozi, together with Advocate Sihawu
INSTRUCTED BY:	Motalane Incorporated, Waterkloof Ridge, Pretoria
FOR THE FIRST RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance
FOR THE SECOND RESPONDENT:	Advocate Guy Elliot SC
INSTRUCTED BY:	Francis Thompson & Aspden, Cape Town
FOR THE THIRD RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance