

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **4th November 2022** Signature: _____

A handwritten signature in black ink, appearing to be "P. H. M.", is written over the signature line.

CASE NO: 32366/2020

DATE: 4TH NOVEMBER 2022

In the matter between:

MARSCHALL, FRANZ

Applicant

and

SCHLEYER, BARBARA

First Respondent

SCHLEYER, ALBERT

Second Respondent

**ALL OTHER PERSONS HOLDING TITLE TO THE
IMMOVABLE PROPERTY SITUATE AT 97
RUNNYMEAD AVENUE, CHARTWELL, GAUTENG,
UNDER THE CONTROL AND AUTHORITY OF
THE FIRST AND/OR SECOND RESPONDENTS**

Third Respondent

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Fourth Respondent

Coram: Adams J

Heard: 04 November 2022 – the 'virtual hearing' of this application for leave to appeal was conducted as a videoconference on the *Microsoft Teams*.

Delivered: 04 November 2022 - 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 12:00 on 4 November 2022.

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 first, second and third respondents' 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 application by the applicant for the eviction of the first, second and third respondents from his property in Chartwell Agricultural Holdings. The first, second and third respondents are the first, second and third applicants in this application for leave to appeal and the respondent herein was the applicant in the said application. The first, second and third respondents ('the respondents') apply for leave to appeal against the whole of the judgment and the order, as well as the reasons therefor, which I granted on 6 October 2022, in terms of which I had granted an eviction order in favour of the applicant against the respondents. I also granted a costs order against them.

[2]. The application for leave to appeal is mainly against my factual findings and legal conclusion that the respondents are presently in unlawful occupation of the said property and that the applicant is entitled to an eviction order. The respondents also contend that I erred and misdirected myself in not upholding their legal point *in limine* of *lis pendens*. Importantly, on the merits of the eviction application, the respondents submit that the court *a quo* erred in concluding that

the lease agreement between the applicant and the first and second respondents was validly cancelled. There are other grounds on which the respondents apply for leave to appeal, which I do not deem necessary to list in detail.

[3]. Nothing new has been raised by the first, second and third respondents 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 respondents 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, that the breach of the lease has been established as well as the valid cancellation of the agreement as a result of the breach. And, in that regard, the respondents' supposed justification for the non-payment of the arrear rental is irrelevant.

[4]. 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 judge concerned is of the opinion that 'the appeal would have a reasonable prospect of success'.

[5]. 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.

[6]. 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:

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

‘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.’

[7]. 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 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.

[8]. I am not persuaded that the issues raised by the first, second and third respondents 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.

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).

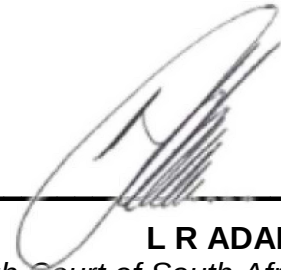
⁴ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

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

Order

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

- (1) The first, second and third respondents' application for leave to appeal is dismissed with costs.



L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	4 th November 2022 – the ‘virtual hearing’ of this matter was conducted as a videoconference on the Microsoft Teams.
JUDGMENT DATE:	4 th November 2022 – handed down electronically
FOR THE APPLICANT:	Advocate Melanie Ipser
INSTRUCTED BY:	Schliemann Incorporated, Somerset West, Cape Town
FOR THE FIRST, SECOND AND THIRD RESPONDENTS:	Advocate Gayle Hardy
INSTRUCTED BY:	Claudia Privato Incorporated, Randburg