

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: 2022-058058

DATE: 24 FEBRUARY 2025

In the matter between:

ENSEMBLE HOTEL HOLDINGS (PTY) LIMITED

First Applicant

ZIAD JAMAL ALI EL-BARAG

Second Applicant

and

SWANVEST 328 (PTY) LIMITED

First Respondent

LEGACY MANAGEMENT HOLDINGS (PTY) LIMITED

Second Respondent

ALLAN PATRICK BREARLEY

Third Respondent

ALBERTUS HENDRICUS DORRESTEIN

Fourth Respondent

NEIL GEORGE YATES

Fifth Respondent

LEGACY HOSPITALITY MANAGEMENT (PTY) LIMITED

Sixth Respondent

LEGACY HOTELS AND RESORTS (PTY) LIMITED

Seventh Respondent

MOHAMED MAHMOUD ALZAROUQ SHAWSH

Eighth Respondent

Neutral Citation: *Ensemble Hotel Holdings and Another v Swanvest 328 and Others (2022/058058) [2025] ZAGPJHC --- (24 February 2025)*

Coram: Adams J

Heard on: 21 February 2025 – ‘virtually’ as a videoconference on *Microsoft Teams*.

Delivered: 24 February 2025 – 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 10:30 on 24 February 2025.

Summary: Application for leave to appeal and application to cross-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 –

Another compelling reason for leave to appeal to be granted (s 17(1)(a)(ii)) – the decision sought to be appealed against involves an important question of law – also, why leave to appeal and leave to cross-appeal granted to the Supreme Court –

Leave to appeal and leave to cross-appeal granted to the Supreme Court of Appeal.

ORDER

- (1) The respondents are granted leave to appeal to the Supreme Court of Appeal.
 - (2) The cost of this application for leave to appeal shall be costs in the appeal.
 - (3) The applicants are granted leave to cross-appeal to the Supreme Court of Appeal against paragraphs (5) and (6) of the order of this Court dated 19 December 2024.
 - (4) The costs of this application for leave to cross-appeal shall be costs in the cross-appeal.
-

JUDGMENT [APPLICATIONS FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original opposed application by the first and the second applicants for an order directing that the business of the seventh respondent ('Legacy Hotels') be sold at a private auction at which only the first applicant ('Ensemble'), the first respondent ('Swanvest 328') and the second respondent ('LMH') would bid. The applicants also apply for ancillary relief relating to the production of a list of company documents of Legacy Hotels, as well as for declaratory and interdictory orders in relation to transactions concluded by the said company, which, according to the applicants, are invalid and should be voided. The first, the second and the seventh respondents in the main application preferred a counterapplication, seeking an order directing Ensemble to sell to Legacy Hotels, which is to repurchase the shares held by the former in the latter, against payment of a net after tax consideration to be determined by an expert professional valuer.

[2]. On 19 December 2024 I handed down a written judgment and an order in terms of which most of the relief sought by the applicants in the main application was granted, excepting only that I ordered the sale to be of the shareholding in the Legacy Hotels as against the business of the said company. I also granted the applicants the ancillary relief relating *inter alia* to the production of documents and the declaration of invalidity of certain transactions concluded by the respondents. Importantly, I issued an order that the issued share capital of Legacy Hotels is to be sold to the highest bidder at a private auction, at which only Ensemble, Swanvest 328 and LMH would be allowed to bid. The first, second and seventh respondents' counterapplication was dismissed with costs.

[3]. The first to seventh respondents (including the first to third counter applicants) ('the respondents') apply for leave to appeal to the Supreme Court of Appeal of South Africa against the whole of the aforementioned judgment and order, including the order for costs. The respondents contend that I erred in granting the aforesaid order and that I should instead have dismissed the applicants' application with costs and that the counter application ought to have been granted also with costs.

[4]. In a nutshell the respondents' case in this application for leave to appeal is that I erred in the manner I directed the relationship between the three shareholders in Legacy Hotels to be severed. I erred, so the respondents contend, in holding that my dissolution order would provide fair value for the shares to be purchased by private auction between the shareholders of Legacy Hotels.

[5]. The respondents also contend that I erred in my conclusion that the applicants had made out a case for relief under section 163 of the Companies Act, yet I found that the respondents had not made out a case for such relief. I erred in law, so the submission continues, in not following legal precedent, such as the principles stated in *Bayly and Others v Knowles*¹, in which it was held that

¹ *Bayly and Others v Knowles* 2010 (4) SA (SCA).

in the case of a breakdown of shareholder relationship, the usual approach is that the majority shareholder willing to be the purchaser and actively concerned with the management of the company, is entitled to buy the shares of the minority at a fair price.

[6]. The respondents furthermore contend that I erred in granting the order for the sale of the shares at a private auction, when that it not what the applicants asked for by the time the matter was heard by me. The only relief that the Court was called upon to consider as regards the applicants' application, was a claim for a private auction at which the opposing shareholder groupings would at a private auction bid for the *business* of Legacy Hotels. A sale of business by private auction would, in any event, so the respondents argue, be inappropriate, unfair and inequitable, for a number of reasons.

[7]. As regards the further relief claimed by the applicants and granted by the court, the applicants submit that I erred in finding that the second applicant (El-Barag) was entitled to all documents requested and by not concluding that there was a real dispute of fact as to whether El-Barag had been denied access to documents required to comply with his fiduciary duties to Legacy Hotels, which had to be decided on the respondents' version. The factual dispute relating to this aspect of the matter, so the respondents contend, should have been decided in their favour on the basis of the *Plascon Evans* rule. The same argument is raised in relation to the declaration of invalidity of certain transactions concluded by Legacy Hotels.

[8]. The applicants, on the other hand, are aggrieved by the fact that I had not granted the order for the sale of the business of Legacy Hotels, as prayed for by them in the amended notice of motion. They therefore make application for leave to cross-appeal to the Supreme Court of Appeal against paragraphs (5) and (6) of my order. In sum, the ground of the cross-appeal is that the Court erred in ordering a sale by private auction of the share capital of Legacy Hotels, as opposed to the assets and business as a going concern of the said company, as the shares of the first applicant (Ensemble Hotel Holdings) in Legacy Hotels were,

and still are, assets owned or controlled, directly or indirectly, by ‘sanctioned entities’, as on 17 March 2011 those shares became sanctioned assets and subject to an asset freeze in terms of UNSC resolution 1973 read with UNSC resolution 1970. This means, so the contention is concluded, that a sale of the first applicant's shares was, and is prohibited by the provisions of section 26B(2) of the Financial Intelligence Centre Act, 2001.

[9]. Nothing new has been raised by the parties in their respective application for leave to appeal and the application for leave to cross-appeal. In my original judgment of 19 December 2024, I have dealt with most, if not all of the issues raised by the respondents and the applicants in their applications for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I say in my said judgment which is that I am of the view that the sale of the shares at a private auction between the shareholders is the fairest mechanism to achieve equitable relief.

[10]. 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’.

[11]. In *Ramakatsa and Others v African National Congress and Another*², 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

² *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

that there is a sound and rational basis for the conclusion that there are prospects of success.

[12]. 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.’

[13]. In *Mont Chevaux Trust v Tina Goosen*³, 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*⁴. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Courts 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*⁵.

³ *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

⁴ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

⁵ *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).

[14]. I am persuaded that all the issues raised firstly by the respondents in their application for leave to appeal, as well as those raised by the applicants in their application for leave to cross-appeal, are issues in respect of which another court is likely to reach conclusions different to those reached by me. I therefore conclude that there are 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 have a reasonable prospect of success.

[15]. Moreover, I am of the view that there is another compelling reason why the appeal should be heard, as envisaged by s 17(1)(a)(ii) of the Superior Courts Act, and that relates to the fact that the issues implicated in this matter are novel insofar as they relate to the dissolution of the relationship between shareholders. Put another way, the decision sought to be appealed against involves an important question of law.

[16]. Leave to appeal should therefore be granted. And in that regard, I believe that, in view of the complexity of the legal issues raised, leave to appeal should be granted to the Supreme Court of Appeal.

Order

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

- (1) The respondents are granted leave to appeal to the Supreme Court of Appeal.
- (2) The cost of this application for leave to appeal shall be costs in the appeal.
- (3) The applicants are granted leave to cross-appeal to the Supreme Court of Appeal against paragraphs (5) and (6) of the order of this Court dated 19 December 2024.
- (4) The costs of this application for leave to cross-appeal shall be costs in the cross-appeal.

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON:	21 February 2025
JUDGMENT DATE:	24 February 2025
FOR THE FIRST AND THE SECOND APPLICANTS:	J Peters SC, together with D Hodge
INSTRUCTED BY:	David Shapiro & Associates, Fellside, Johannesburg
FOR THE FIRST TO THE SEVENTH RESPONDENTS:	A Subel SC, together with H Pretorius
INSTRUCTED BY:	Simpson Incorporated, Killarney, Johannesburg
FOR THE EIGHTH RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance