



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 2025-091305

NOT REPORTABLE

In the matter between:

ANNENE CATHLENE HOUGH

Applicant

and

ALLAN SMEYATSKY

First Respondent

MAGDALENA SMEYATSKY

Second Respondent

**THE SHERIFF OF THE HIGH COURT,
CAPE TOWN WEST**

Third Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Fourth Respondent

Coram: Anderssen AJ

Heard: 27 August 2026

Delivered: Electronically on 10 September 2026

Summary: Application for leave to appeal – new matter raised on appeal – affidavit in motion proceedings both pleadings and evidence – case not made out in answering affidavit – amounts to trial by ambush – no reasonable prospects of success – also no compelling reason – no merits on new grounds

ORDER

1. The application for leave to appeal is refused.
2. The first and second respondents are directed to pay, jointly and severally, the one paying the other being absolved, the applicant's costs on a party and party scale (Scale C shall apply to counsel's fees).

JUDGMENT

Anderssen AJ:

INTRODUCTION

- [1] The first and second respondents (*"the respondents"*) apply for leave to appeal to the Supreme Court of Appeal (*"the SCA"*), alternatively, to the Full Court of this division, against the judgment delivered on 4 June 2026.
- [2] The respondents rely on section 17(1)(a)(i) and (ii) of the Superior Courts Act.¹ Leave to appeal may only be granted where the court is of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist as to why the appeal should be heard, such as the interests of justice. The SCA, in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*,² pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. For instance, a 'compelling reason' would include an important question of law or discreet issue of public

¹ No 10 of 2013.

² [2020] ZASCA 17; 2020 (5) SA 35 (SCA) at para [2].

importance that will influence future disputes. Nonetheless, the merits remain materially important and often prove decisive.³

- [3] As regards the threshold to be met before leave to appeal will be granted, the SCA, in *Ramakatsa and Others v African National Congress and Another*,⁴ held as follows:

... I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. 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. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.⁵

(Footnotes omitted).

- [4] It is thus still required of the respondents to demonstrate, on proper grounds, that they have reasonable prospects of success – based on the facts and the law, and that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.
- [5] It is immaterial whether an appeal court would agree with the Court *a quo*'s reasoning on the issue, if the result of the appeal remains the same.⁶

The grounds of appeal

- [6] The respondents aver that another court could come to a different finding

³ Ibid, para [2].

⁴ (724/2019) [2021] ZASCA 31 (31 March 2021).

⁵ Ibid para [10].

⁶ See:

President of the Republic of South Africa and Another v Tembani and Others 2025 (2) SA 371 (CC) at para [73].

IPA Foundation NPC v South African Pharmacy Council 2026 (2) SA 56 (SCA) at para [63].

that the sale agreement concluded by the parties is valid and enforceable. According to the respondents there was no meeting of the minds as clause 3 of the contract makes reference to possession passing to the purchaser on registration of transfer. The argument is that possession is not a principle that can be registered in the Deeds Office and there is a difference between ownership and possession. This is the first ground of appeal.

[7] The second complaint is that the date for transfer in clause 4.1 is unspecified. The contract is incomplete, in that the date of transfer must be incorporated in an agreement for the sale of land as it is one of the *essentialia* of the contract and the failure to do so leads to voidness. There has accordingly been non-compliance with the Alienation of Land Act.⁷ In this regard, the first and second complaints are the same – that the contract is void and unenforceable.

[8] The respondents further take issue with the court's decision to enforce specific performance, as opposed to damages. In this reliance was placed on clause 14 which permits the innocent party to call upon the guilty party to rectify any default, failing which the innocent party would have the right to enforce specific performance or claim damages. Clause 14 is allegedly *contra bonos mores* as it permits the guilty party to rectify the default but leaves the innocent party with a costly, and possibly, unenforceable right of specific performance.

[9] The fourth, and final, ground of appeal is that the court's order incorporated an eviction order without there having been compliance with the Prevention

⁷ No 68 of 1981.

of Illegal Eviction from and Unlawful Occupation of Land Act⁸ (“the PIE Act”).

The merits

[10] The validity and enforceability of the sale agreement were not raised as separate and distinct issues that the court *a quo* was required to pronounce on. It was not raised in the answering affidavit and it was not raised in oral argument. When asked by the Court, the respondents’ counsel expressly disavowed taking issue with the validity and binding nature of the sale agreement. He did so, quite correctly, as it was evident from numerous paragraphs in the answering affidavit that the respondents were not placing the validity or the enforceability of the sale agreement in dispute.

[11] I raised with Mr Welgemoed that these grounds of appeal – the first, second and third grounds – are new and were not raised before me in the court *a quo*. Mr Welgemoed argued that the points were not new as the sale agreement was annexed to the founding affidavit and formed part of the pleadings.

[12] As the SCA pointed out in *Quartermark Investments (Pty) Ltd v Mkhwanazi*,⁹ the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed.¹⁰ In such a situation

... the appeal court is bound to deal with it as to ignore it may 'amount to the confirmation by it of a decision clearly wrong', and not performing its essential function.

[13] That ignoring a new point of law on appeal would infringe upon the principle

⁸ No 19 of 1998.

⁹ 2014 (3) SA 96 (SCA).

¹⁰ At para [20].

of legality was explained as follows by Ngcobo J in **CUSA v Tao Ying Metal Industries**¹¹ as follows:

Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law.

[14] I cannot agree with counsel for the respondents that these grounds, now raised for the first time on appeal, are not new points of law. It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence.¹² They serve to define not only the issues between the parties but also to place the essential evidence before the court.¹³ They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out.¹⁴ Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit.¹⁵

[15] **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others**¹⁶ has been accepted as the defining authority on the principle that:

Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established

¹¹ [2008] ZACC 15; 2009 (1) BCLR 1; [2009] 1 BLLR 1; (2008) 29 ILJ 2461; 2009 (2) SA 204 (CC) at para [68].

¹² *Quartermark supra* at para [13].

¹³ *Quartermark supra* at 323F-G; *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at para [28].

¹⁴ *Quartermark supra* at para [13]; *Lecuona v Property Emporium CC* [2010] JOL 25266 (GSJ) at para [4].

¹⁵ *Swissborough supra* at 323J – 324A; *Quartermark supra* at para [13].

¹⁶ 1999 (2) SA 279 (T).

practice would be destroyed. A party would not know what case must be met.¹⁷

- [16] It is thus immaterial that the sale agreement was annexed to the founding affidavit. If the respondents wished to rely on these points of law, they should have identified the portions of the sale agreement on which reliance was placed for the argument and explained what case is sought to be made out. Failing to do so would mean a 'trial by ambush'. In ***Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another***¹⁸ the Constitutional Court stated that trial by ambush cannot be permitted and approved the following passage by the SCA from ***Minister of Land Affairs and Agriculture v D & F Wevell Trust and Others***:¹⁹

'... [T]he case argued before this court was not properly made out in answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest — the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

[Emphasis added.]

- [17] There are thus no reasonable prospects of success for the respondents on any of the first three grounds. As regards the fourth ground, the respondents did raise a defence in terms of PIE, which is why the applicant abandoned her eviction relief. The order simply directed the respondents to comply with

¹⁷ Ibid. At 324F – G.

¹⁸ 2017 (9) BCLR 1164; [2017] ZACC 16; 2017 (6) SA 1 (CC) at para [171].

¹⁹ [2007] ZASCA 153; 2008 (2) SA 184 (SCA) at para [43]. The same passage was again approved by the Constitutional Court, more recently, in *Botha v Smuts and Another* 2025 (1) SA 581 (CC) at para [329].

clause 4.1 of the sale agreement. If the respondents failed to provide the applicant with vacant occupation, as they undertook to do, the applicant would be at liberty to institute eviction proceedings and then the machinery and safeguards of PIE would apply.

[18] I must also consider whether there are any compelling reasons why the appeal should be heard such as the interests of justice. In this instance, the question will be linked to the merits of the new issues raised on appeal as there are no conflicting judgments on the legal matter under consideration, there is no important question of law that would require adjudication on appeal and the matter is not one of unique public interest.

[19] In brief, there is no merit, and thus no prospects of success on appeal, in respect of the new matter raised. The only *essentialia* of a sale agreement in South Africa are (a) the parties to the contract (*personae*), namely a seller (*venditor*) and a purchaser (*emptor*), (b) the thing being sold must be identified (*merx*), and (c) there must be an agreement regarding the purchase price (*pretium*).²⁰ The date of transfer is not one of the *essentialia* of the sale agreement.

[20] Furthermore, it is one of the established canons of interpretation that, if possible, agreements must be construed so as to render them valid.²¹ Over time, our courts have recognised terms that should be implied in contracts, including agreements of sale of land. The respondents, by failing to raise their (new) defences in the answering affidavit, deprived the applicant of the

²⁰ *Cooper and Another NNO v Curro Heights Properties (Pty) Ltd* 2023 (5) SA 402 (SCA) at para [16].

²¹ *A V Theron and Swanepoel Incorporated and Another v Knott* (237/2024) [2025] ZASCA 84 (10 June 2025) at para [30].

opportunity of addressing same and providing evidence as to implied terms and the practices in the Deeds Registries Office. Once parties agree on the *essentialia*, the *naturalia* apply automatically by operation of common law or statute. The abstract theory of transfer applies to the transfer of ownership in immovable property.²² If the point in respect of 'incompleteness' had been raised, it would most likely have been met by an answer based on implied terms and the practices in the Deeds Registries Office.

- [21] I therefore do not believe that there are any compelling reasons that would, nevertheless, compel me to grant the relief sought.

Costs

- [22] Costs must follow the cause. I have been urged to make a cost order *de bonis propriis* as the respondents' attorneys were alerted to the fact that the grounds for appeal largely seek to raise new matter, which had not been raised previously. I am not prepared to do so. The respondents' attorneys are new and they act on the instructions of their clients. There is no indication that they colluded with their clients who have the right to apply for leave to appeal.

- [23] The respondents' attorneys would, however, in light of the correspondence from the applicant's attorneys, have been obliged to warn their clients of the risks in pursuing the appeal.

- [24] I have some concerns about the respondents' decision to continue to pursue the application for leave to appeal in these circumstances. I cannot,

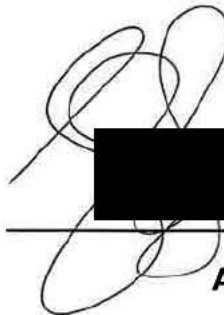
²² *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) at para [21].

however, find that, in pursuing the application, they were abusing a process of court. I am therefore not prepared to make a punitive order. I am, however, willing to grant a party and party order in respect of which Scale C shall be applicable. The respondents employed a senior junior counsel as well as junior counsel. The issues are clearly important to the parties and it is evident from the heads of argument produced by the applicant's counsel that much thought went into dealing with the issues raised.

[25] In the circumstances, I order that:

[25.1] The application for leave to appeal is refused.

[25.2] The first and second respondents are directed to pay, jointly and severally, the one paying the other being absolved, the applicant's costs on a party and party scale (Scale C shall apply to counsel's fees).




ANDERSSEN J S
Acting Judge of the High Court

Appearances:

For the applicant: Adv H Beviss-Challinor
Instructed by: Ulrich Roux & Associates

For the first and second respondents: Adv D Welgemoed with adv K Qaba
Instructed by: ENS Africa