

**THE 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: **21<sup>st</sup> July 2022** Signature:

**DATE:** 21<sup>ST</sup> JULY 2022

**(1) CASE NO:** 27208/2020

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED**

Applicant

and

**AGILE CAPITAL HOLDINGS (PTY) LIMITED**

Respondent

**(2) CASE NO:** 27214/2020

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED**

Applicant

and

**ANVIL PROPERTY SMITH (PTY) LIMITED**

Respondent

**(3) CASE NO:** 27204/2020

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED**

Applicant

and

**CMS MANAGEMENT CC**

Respondent

**(4) CASE NO: 27213/2020**

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED** Applicant

and

**CORNERSTONE CASH INVESTMENTS (PTY) LIMITED** Respondent**(5) CASE NO: 27205/2020**

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED** Applicant

and

**I CAPITAL RISK SERVICES (PTY) LIMITED** Respondent**(6) CASE NO: 27210/2020**

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED** Applicant

and

**LEGERITY (PTY) LIMITED** Respondent**(7) CASE NO: 27211/2020**

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED** Applicant

and

**LITTLE SWIFT INVESTMENTS (PTY) LIMITED** Respondent**(8) CASE NO: 27209/2020**

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED** Applicant

and

**RIPARIAN COMMODITIES (PTY) LIMITED t/a  
BARAK FLUID MANAGEMENT** Respondent**(9) CASE NO: 27215/2020**

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED** Applicant

and

**SD PROPERTIES JHB (PTY) LIMITED** Respondent

**(10) CASE NO:** 3024/2021

In the matter between:

**68 MELVILLE ROAD PROPERTIES (PTY) LIMITED**

Applicant

and

**PHK TRUST**

Respondent

**Coram:** Adams J

**Heard on:** 21 July 2021 – the ‘virtual hearing’ of these matters was conducted as a videoconference on the *Microsoft Teams*.

**Delivered:** 21 July 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 13:00 on 21 July 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 granted

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**ORDER**

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The following identical orders are made in each of the ten applications for leave to appeal under the separate case number:

- (1) The respondent's application for leave to appeal succeeds.
- (2) The respondent is granted leave to appeal to the Full Court of this Division.
- (3) The costs of this application for leave to appeal shall be costs in the appeal.

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## JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

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### Adams J:

[1]. I shall refer to the parties as referred to in the original ten opposed applications – under ten separate case numbers, in respect of which I had, on 23 May 2022, handed down one judgment. The applicant is the respondent in these applications for leave to appeal and the applicants for leave to appeal were the respondents in the main applications. As I indicated in the said judgment, all of these opposed applications against the respondents were based on the same factual matrices underlying the applicant's causes of action, which were almost identical in all of the applications, hence the one consolidated judgment.

[2]. The respondents also raised the exact same defences in opposition to the claims by the applicant against them. Judgment was granted in favour of the applicant against all of the respondents, who were ordered to pay to the applicant the amounts claimed by the applicant, with interest thereon and costs of suit. The respondents apply for leave to appeal against the judgment and the separate orders, as well as the reasons therefor, which I granted on the 23<sup>rd</sup> of May 2022, in terms of which I had granted judgment in favour of the applicant against the respondents.

[3]. It is again convenient to deal with all of these applications for leave to appeal in one judgment.

[4]. The applications for leave to appeal are mainly against my legal conclusion arising from my interpretation of the contractual relationships between the applicant and the respondents, as well as my application of the facts to such an interpretation. This conclusion, so the respondents contend, was incorrect in that I should not have concluded that the 'Total Base Development Cost' had been finally and correctly calculated as envisaged in the written agreements of purchase and sale, which had been concluded by the parties. The stage at which such a calculation could and should have been

done had not as yet arrived, so it was submitted on behalf of the respondents. There are other grounds on which the respondents base their applications for leave to appeal, such as the fact that, according to them, the court *a quo* erred in its legal interpretation of the definition in the agreement of 'the Quantity Surveyor', as well as in its acceptance of the hearsay evidence relating to the 'Total Base Development Cost'.

[5]. Nothing new has been raised by the respondents in this application for leave to appeal. In my original judgment, I have dealt with most of the issues raised and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that the starting point of the inquiry is the wording of the agreement, in terms of which the 'Total Base Development Cost' is defined as 'the total base development cost of the Scheme, as determined by the quantity surveyor, which shall include the cost headings referred to in Annexure "E" hereto.' This, in my view, means that the total base development costs are those costs determined by the Quantity Surveyor.

[6]. 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 23<sup>rd</sup> 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'.

[7]. In *Mont Chevaux Trust v Tina Goosen*<sup>1</sup>, 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*<sup>2</sup>. 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

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<sup>1</sup> *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

<sup>2</sup> *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*<sup>3</sup>.

[8]. In these matters, I am persuaded that the issues raised by the respondents in their applications for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. Those issues include, but are not limited to my interpretation of the relevant provisions of the agreements between the parties and the application of the facts to that interpretation. Another court is likely to find, as contended by the respondents, that the stage envisaged by the agreement at which the total development cost was to be calculated accurately and finally had not yet arrive. The appeals therefore, in my view, have reasonable prospects of success.

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

### **Order**

[10]. In the circumstances, the following identical orders are made in each of the ten applications for leave to appeal under the separate case number:

- (1) The respondent's application for leave to appeal succeeds.
- (2) The respondent is granted leave to appeal to the Full Court of this Division.
- (3) The costs of this application for leave to appeal shall be costs in the appeal.

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<sup>3</sup> *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).

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

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HEARD ON:	21 <sup>st</sup> July 2022 – in a ‘virtual hearing’ as a videoconference on <i>Microsoft Teams</i> .
JUDGMENT DATE:	21 <sup>st</sup> July 2022 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Jonathan Brewer
INSTRUCTED BY:	Vining & Camerer Incorporated, Sandton
FOR THE RESPONDENTS:	Adv Anthonie Troskie SC
INSTRUCTED BY:	Claassen Incorporated, Birdhaven, Johannesburg