



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2021/2113

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the application for leave to appeal by –

KHAIRANWALI CASH AND CARRY CC	1 st APPLICANT
IMTIAZ AHMED	2 nd APPLICANT
ATHAR MAKHDOOM	3 rd APPLICANT
and	
HEIMANS BUILDING (PTY) LTD	RESPONDENT

In re

HEIMANS BUILDING (PTY) LTD	PLAINTIFF/ APPLICANT
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AND

KHAIRANWALI CASH AND CARRY CC	1 st DEFENDANT / RESPONDENT
IMTIAZ AHMED	2 nd DEFENDANT / RESPONDENT

ATHAR MAKHDOOM

3rd DEFENDANT / RESPONDENT

MUHUMMAD SHAHBAZ BUTT

4th DEFENDANT / RESPONDENT

MALIK RAZA ABBAS

5th DEFENDANT / RESPONDENT

JAWAD ALI

6th DEFENDANT / RESPONDENT

Neutral Citation: *Khairanwali Cash and Carry CC & Others v Heimans Building (Pty) Ltd*
(Case No. 2021/2113) [2023] ZAGPJHC 615 (2 June 2023)

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal – Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 – No reasonable prospects of success

Order

[1] I make the following order:

1. *The application for leave to appeal is dismissed;*
2. *The plaintiff's counter-application is removed from the roll.*
3. *The 1st, 2nd and 3rd defendants [being the applicants in this application for leave to appeal] are ordered to pay the cost of the application for leave to appeal, jointly and severally the one paying the other to be absolved..*

[2] The reasons for the order follow below

Introduction

[3] I granted an order in the plaintiff's summary judgment application on 15 March 2023. I do not repeat what is said in the written judgment and this judgment must therefore be read with the earlier judgment.

[4] The application is brought by the three defendants in the action who were the respondents in the summary judgment application. I refer to the parties as they were referred to in the summary judgment application.

[5] The application is based on three grounds of appeal.

5.1 The court should have found that the agreement commenced when it was signed and not when on the date agreed upon as the commencement date in the lease document. I dealt with this point in paragraphs 6, 13 and 14 of the judgment.

5.2 The court should have found that the defendants were not obliged to pay the municipal charges that the plaintiff as landlord was liable for. I dealt with this point in paragraphs 26 and 27 of the judgment.

5.3 There are triable issues. These issues are not identified but I dealt with the issues under different headings in paragraphs 15 to 23 of 28 to 30 of the judgment.

[6] The application for leave to appeal was set down for hearing on 16 May 2023. On the day Mr Mpandle appeared and informed me that the defendants had briefed new attorneys and that he had been briefed in the matter a few days earlier. He sought the indulgence of a postponement and the application was granted and the first, second and third defendants ordered to pay the costs.

[7] On the 25th Mr Mpandle appeared and sought a second postponement on the basis that the defendants wanted to rely on new grounds of appeal and even, it would seem, new defences to the claims. There was no formal application for a second postponement and after hearing argument I refused the application.¹

[8] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused.

[9] In *KwaZulu-Natal Law Society v Sharma*² Van Zyl J held that the test enunciated in *S v Smith*³ still holds good:

“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.”

¹ The new attorneys and Mr Mpandle were already briefed in the week before 16 May 2023 but they only came on record on 25 May 2023. The previous attorneys of record withdrew on 12 May 2023.

² *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) para 29.

³ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

[10] This passage must be qualified to some extent. In an *obiter dictum* the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*⁴ held that the test for leave to appeal is more stringent under the Superior Courts Act, 10 of 2013 than it was under the repealed Supreme Court Act, 59 of 1959. The sentiment in *Mont Chevaux Trust* was echoed by Shongwe JA in the Supreme Court of Appeal in *S v Notshokovu*⁵ and in other matters.⁶

[11] I am the view that the appeal would not have any reasonable prospect of success and that the threshold for leave to appeal to be granted, was not met.

[12] The plaintiff brought a counter-application in terms of section 18(1) but only pending this application for leave to appeal and only in respect of the ejectment order. It will be rendered moot if this application for leave to appeal were dismissed and it is therefore removed from the roll with no order as to costs. The order as framed does not go so far as to apply in respect of any further applications for leave to appeal.

[13] I therefore make the order in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is

⁴ *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6.

⁵ *S v Notshokovu* 2016 JDR 1647 (SCA), [2016] ZASCA 112 para 2.

⁶ See Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5; *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26,

reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **2 JUNE 2023**.

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J DU PLOOY

INSTRUCTED BY:

HARRIS INC

COUNSEL FOR THE 1st, 2nd AND 3rd
DEFENDANTS:

V MPANDLE

INSTRUCTED BY:

MANGONDWANA INC

DATE OF THE HEARING:

16 & 25 MAY 2023

DATE OF JUDGMENT:

2 JUNE 2023