

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

CASE NO: 2023-8494

DATE: 11th March 2024

In the matter between:

THE BANCHAN (PTY) LIMITED

Applicant

and

DES NAIDOO & ASSOCIATES

First Respondent

NAIDOO, DES

Second Respondent

Coram: Adams J

Heard on: 8 March 2024 – ‘virtually’ as a videoconference on *Microsoft Teams*.

Delivered on: 10 March 2024 – 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 11 March 2024.

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 succeeds.

ORDER

- (1) The applicant's application for leave to appeal succeeds.
 - (2) The applicant is granted leave to appeal to the Full Court of this Division.
 - (3) The cost of this application for leave to appeal shall be costs in the appeal.
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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 and the second respondents from commercial premises. The applicant is the applicant in this application for leave to appeal and the first and the second respondents herein were the first and the second respondents (the respondents) in the said application. The applicant applies for leave to appeal against the judgment and the order, as well as the reasons therefor, which I granted on 25 May 2023, in terms of which I had dismissed with costs the applicant's application.

[2]. The application for leave to appeal is mainly against my factual findings and the legal conclusions that the applicant's cancellation of the commercial lease agreement was unlawful and of no force and effect in that it did not comply with the cancellation provisions of the lease. I had erred, so the applicant contends, in holding that there was no merit in the applicant's contention that it was entitled to cancel the agreement on the basis of other breaches and not just on the basis that it had failed to timeously remedy a breach after being placed on terms to do so within a particular period. The applicant, in particular, contends that I was wrong in finding that, insofar as the evidence does not support an averment that the first respondent's alleged consistent breaches of the lease agreement is such as to justify the applicant

concluding that the first respondent did not have the intention or the ability to comply with its obligations in terms of the lease agreement, the cancellation of the agreement was not justified.

[3]. Moreover, and on the basis of the authority in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*¹, Mr Nowitz, who appeared on behalf of the applicant at the hearing of the application for leave to appeal, contends that the applicant should not have been 'non-suited' by its cancellation on inadequate grounds. It was fully entitled to thereafter rely on any adequate ground, such as multiple breaches of the lease agreement over a period of time, which were only discovered after time.

[4]. The first and second respondents oppose the application for leave to appeal on the basis mainly that the appeal does not have reasonable prospect of success. It is also alleged by the respondents that because the lease agreement in question will be expiring by the effluxion of time on 31 May 2024, the application for leave to appeal and any possible appeal have, for all intents and purposes, become moot.

[5]. Nothing new has been raised by the applicant 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 applicant here and it is not necessary for me to repeat those in full. Suffice to restate what I said in my judgment, namely that, in my view, the lease was not validly cancelled by the applicant. This, in turn, means that the applicant is not entitled to an eviction order against the first respondent.

[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 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'.

¹ *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 299F.

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

[8]. 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.'

[9]. In *Mont Chevaux Trust v Tina Goosen*³, the Land Claims Court held (in an *obiter dictum*) that the wording of the above 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 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*

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

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).

*Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁵.

[10]. I am persuaded that the issues raised by the applicant in its 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 indeed 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 has, in my view, a reasonable prospect of success.

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

Order

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

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

L R ADAMS

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

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).

HEARD ON: 8th March 2024

JUDGMENT DATE: 11th March 2024 – judgment handed down electronically

FOR THE APPLICANT: Advocate Mark Nowitz

INSTRUCTED BY: Hirschowitz Flionis Attorneys,
Rosebank, Johannesburg

FOR THE FIRST AND THE SECOND RESPONDENTS: Advocate J A Venter

INSTRUCTED BY: Des Naidoo & Associates,
Parkmore, Sandton
