

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: **24th November 2022** Signature: _____

A handwritten signature in blue ink, appearing to be "P. H.", is written over the signature line.

CASE NO: 3321/2021

DATE: 24TH NOVEMBER 2022

In the matter between:

ABSA BANK LIMITED

Applicant

and

MAHLABA, FRANS SIPHO

First Respondent

**ALL PERSONS RESIDING AT THE PROPERTY
UNDER THE CONTROL AND AUTHORITY OF
THE FIRST RESPONDENT**

Second Respondent

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Third Respondent

Coram: Adams J

Heard: 24 November 2022

Delivered: 24 November 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 12:30 on 24 November 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 refused.

ORDER

- (1) The first and second respondents' application for leave to appeal is dismissed with costs.
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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 second respondents from its property in Witkoppen, Gauteng. The first and second respondents are the first and second applicants in this application for leave to appeal and the respondent herein was the applicant in the said application. The first and second respondents ('the respondents') apply for leave to appeal against the whole of the judgment and the order, as well as the reasons therefor, which I granted on 16 August 2022, in terms of which I had granted an eviction order in favour of the applicant against the respondents. I also granted a costs order against them.

[2]. The application for leave to appeal is mainly against my factual findings and legal conclusion that the respondents are presently in unlawful occupation of the said property and that the applicant is entitled to an eviction order. The respondents also contend that I erred and misdirected myself in concluding that the applicant and the first respondent only had a discussion and that they did not conclude an enforceable contract relating to the improvements effected to the applicant's property by the first respondent. I ought to have found, so the respondents contend, that the facts in this matter, properly interpreted, supports a conclusion that a valid and an enforceable agreement had been entered into

between the parties, as contended for by the respondents. The respondents furthermore submit that the court a quo failed to deal with the defence raised by the first respondent to the effect that he enjoyed a lien over the property, which entitled him and the other occupants of the applicant's property to continue their possession thereof. There is no merit in this contention as the point was made in the judgment that no evidence was presented in support of this alleged lien and not details and particulars were provided of the improvements which had allegedly been effected to the property.

[3]. Nothing new has been raised by the first and second respondents 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 respondents in this application for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I said in my judgment, namely that, that, on the basis of the *Plascon Evans* principle, the respondents' version falls to be rejected.

[4]. 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'.

[5]. In *Ramakatsa and Others v African National Congress and Another*¹, 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.

¹ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

[6]. 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.’

[7]. In *Mont Chevaux Trust v Tina Goosen*², 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*³. 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 Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁴.

[8]. I am not persuaded that the issues raised by the first and second respondents in his 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 no reasonable prospects of another court

² *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

³ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

⁴ *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).

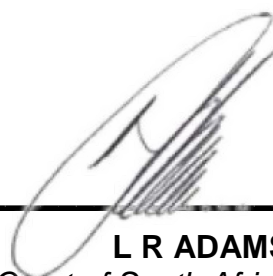
making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeal therefore, in my view, does not have a reasonable prospect of success.

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

Order

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

- (1) The first and second respondents' application for leave to appeal is dismissed with costs.



L R ADAMS

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

HEARD ON:	24 th November 2022
JUDGMENT DATE:	24 th November 2022 – handed down electronically
FOR THE APPLICANT:	Advocate J K Maxwell
INSTRUCTED BY:	Alan Jacobs Attorneys, Melrose Arch, Johannesburg
FOR THE FIRST AND SECOND RESPONDENTS:	Adv Maputa
INSTRUCTED BY:	K Montjane Attorneys, Tembisa
FOR THE THIRD RESPONDENT:	No Appearance
INSTRUCTED BY:	No Appearance