

SOUTH AFRICA / JUDGMENT

Air Chefs Soc Limited v Public Protector of Republic of South Africa & Others (31083-2020) [2024] ZAGPJHC 178 (29 February 2024)

[2024] ZAGPJHC 178**COURT**

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

31083/2020

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

1. Not Reportable
2. Not of Interest to
Other Judges
Case
NO: 31083/2020

DATE:

29th
February 2024

In the matter between:

AIR
CHEFS SOC LIMITED
Applicant
and
THE PUBLIC PROTECTOR
OF
THE
REPUBLIC OF SOUTH AFRICA First
Respondent
MANTELL,
SIMON t/a MANTELLI BISCUITS Second
Respondent
SOUTH
AFRICAN AIRWAYS SOC LIMITED Third

	Respondent Neutral Citation: Air Chefs v The Public Protector and Other (31083/2020) [2024] ZAGPJHC --- (29 February 2024)
Coram:	Adams J
Heard:	29 February 2024 – ‘virtually’ as a videoconference on Microsoft Teams.
Delivered:	29 February 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 11:30 on 29 February 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 refused. ORDER (1) The second respondent’s application for leave to appeal is dismissed with costs. JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]
Adams J:	[1]. I shall refer to the parties as referred to in the original review application by the applicant (Air Chefs) for the review and the setting aside of a report by the Public Protector and her findings in the said report. The second respondent (Mantelli’s) had also instituted a counter-application in which he sought a review and setting aside of certain of the remedial action ordered by the Public Protector and for an order substituting such remedial action with other remedial action. The second respondent is the applicant in this application for leave to appeal and the applicant is the respondent herein. On 26 January 2024 I dismissed both the review application and the review counter-application and each party I had order to pay his own costs. [2]. The second respondent applies for leave to appeal against that portion of my judgment and the order (paragraphs 2 and 3), as well as the reasons therefor, in terms of which I had

dismissed his counter-application and ordered each party to bear his own costs.

[3].

The application for leave to appeal is mainly against my factual findings and legal conclusion that the second respondent is not entitled to the relief sought by him. I erred, so the second respondent submits, in fact and in law in not granting an order in the manner sought by him for a review of certain of the findings and the remedial action in the report of the Public Protector dated 31 January 2020. I should not have accepted, so the contention goes, the explanation proffered by the applicant that after the first letter of award (LoA) was sent to the second respondent, it dawned on the applicant that the award

of the tender was problematic in that its implementation would result, from a practical point of view, in difficulties.

It is also

contended by the second respondent that I erred in law in finding that the relief sought by the second respondent is wholly incompetent

for the simple reason that the counter-application is in the nature of a judicial review of an administrative decision.

[4].

Nothing new has been raised by the second respondent 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 second respondent 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 the Public Protector does not have judicial review powers. The Public Protector's main function is to investigate and

to report on

maladministration, and then to take appropriate remedial action, in connection with the affairs of any State institution

or on the abuse

of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected

with his or her employment by such State institutions. Her powers are limited to her investigating and reporting

on maladministration or

such other misconduct by a person in the employ of a State institution, 'which results in unlawful

or improper prejudice

to any other person', and then to take 'appropriate

remedial action’.

[5].

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 judges concerned are of the opinion that ‘the appeal would have a reasonable prospect of success’.

[6].

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.

[7].

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.’
[8].

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].

[9].

I am not persuaded that the
issues raised by the second respondent 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
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.

[10].

Leave to appeal should therefore
be refused.

Order

[11].

In the circumstances, the

following order is made: L R ADAMS
Judge of the High
Court
Gauteng Division,
Johannesburg
HEARD
ON: 29th
February 2024

JUDGMENT

DATE: 29th February 2024 – Judgment handed down electronically

FOR THE APPLICANT: Advocate

M Majozi, together with Advocate Sihawu

INSTRUCTED BY: Motalane

Incorporated, Waterkloof Ridge, Pretoria

FOR THE FIRST RESPONDENT: No appearance

INSTRUCTED BY: No

appearance

FOR THE SECOND RESPONDENT: Advocate Guy Elliot SC

INSTRUCTED BY: Francis

Thompson & Aspden, Cape Town

FOR THE THIRD RESPONDENT: No appearance

INSTRUCTED BY: No

appearance

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

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Prepared on 11 October 2026 · Esheria