

SOUTH AFRICA / JUDGMENT

Marindafontein (Pty) Ltd v Stepforth and Another (2022/033875) [2023] ZAGPJHC 1406 (5 December 2023) [2023] ZAGPJHC 1406

COURT

South Gauteng High Court, Johannesburg

BEFORE

PG Louw

CASE / FILE NUMBER

2022/033875

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REPUBLIC OF SOUTH
AFRICAIN THE HIGH COURT OF
SOUTH AFRICAGAUTENG DIVISION,
JOHANNESBURG

Case Number: 2022/033875

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

In

the matter between:

MARINDAFONTEIN

(PTY) LTD

Applicant

And

GLEN

STOPFORTH

First

Respondent

KEVIN

REECE

Second

Respondent

Delivered: 5

December 2023 – This judgment was handed down electronically by
circulation to the parties' representatives by email, being

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to CaseLines and by release to SAFLII. The date and time for
hand-down is deemed to be 10:00 on 5 December 2023.

Summary:

Applicable test for granting leave to appeal – Section 17(1) of
the Superior Courts Act 10 of 2013 – Court must be persuaded
that appeal would have reasonable prospects of success.
Occupation of movable
property situated on immovable property – Right to remain in
occupation of property.

JUDGMENT

PG LOUW, AJ

- [1] The second respondent (Mr Rees)[1] seeks leave to appeal against the whole of my judgment and order, which was handed down on 16 August 2023. I shall refer to the parties as referred to in my judgment. I granted the following order:

“1. [Mr Rees], and all persons claiming the right of occupation of Hangar H19/3, situated at the Petit Airfield, Rudi Street, Benoni (the premises) are evicted from the premises.

2. [Mr Rees] and all such aforementioned persons shall vacate the premises within fourteen days of the granting of this order.
3. In the event that [Mr Rees] and such aforementioned persons do not vacate the premises, the Sheriff of this Court is authorised and directed to evict [Mr Rees] and such aforementioned persons.

4. [Mr Rees] is directed to pay the costs of the application.”

- [2] Mr Rees relies, essentially, on three main grounds upon which leave to appeal is sought. The first main ground is set out in paragraphs 1 to 5 of the notice of application for leave to appeal. This ground pertains to my findings in respect of ownership. The second main ground of appeal is set out in paragraphs 6 to 9 of the notice of application for leave to appeal. This ground pertains to my findings in respect of Mr Rees’ entitlement to occupation. The third main ground of

appeal pertains to my findings in respect of confirmatory affidavits and is set out in paragraphs 10 and 11 of the notice of application

for leave to appeal. In paragraph 12 of the notice of application for leave to appeal, it is concluded that I erred in granting the application and in ordering Mr Rees to pay the costs of the application, when I ought to have ordered Marindafontein to pay

the costs, when dismissing the application, alternatively, I ought to have reserved the question of costs, when referring the matter to oral evidence or trial.

The test in applications for leave to appeal

[3] Section 17(1) of the Superior Courts Act 10 of 2013 provides as follows:

“17 Leave to appeal

- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
 - (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
 - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.” [Emphasis added.]
- [4] Mr Bishop, who appeared for Mr Rees, relied on *Ramakatsa and Others v African National Congress and Another*[2] for the submission that the threshold to be achieved in terms of the Superior Courts Act has not been raised to require a measure of certainty that the appeal court will differ from the court a quo, but rather equates the test under the Superior Courts Act to that under the previous Supreme Court Act 59 of 1959, namely that “a court of appeal could reasonably arrive at a conclusion different to that of the trial court”. The upshot of this submission is that the test is whether another court might reasonably come to a different finding.
- [5] Adams J recently had occasion to consider this question. In *T.L.D v B.G.*,[3] he held the following in this regard:

“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’.

In *Ramakatsa and Others v African National Congress and Another*, 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.

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.’

In *Mont Chevaux Trust v Tina Goosen*, 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. 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*.” [Footnotes omitted.]

[6] I respectfully agree with the considered view expressed by Adams J and, accordingly, I find myself unable to agree with Mr Bishop’s submission that the threshold to be met in an application for leave to appeal has remained unchanged after the Superior Courts Act came into operation. Mr Rees has to meet the more stringent threshold and persuade me to opine that the appeal would have a reasonable prospect of success.

Ownership

[7] According to Mr Rees, I erred in ordering his eviction from hangar H19/3 (the hangar) without finding that Marindafontein was the owner of the hangar. As such, so it is contended, Marindafontein had not established its locus standi to seek Mr Rees’ eviction from the hangar.[4]

[8] A central aspect raised in the notice of application for leave to appeal is my focus upon the ownership of the immovable property (the Petit Airfield), on which the hangar is situated, as opposed to the ownership of the movable property, namely the hangar.

- [9] In his heads of argument, Mr Bishop submits on behalf of Mr Rees that my error was to confuse the hangar (movable property) with the Petit Airfield (immovable property), or to assume that the hangar and the Petit Airfield are one and the same.[5]
- [10] One of the points raised in Mr Bishop's heads of argument is that there is no discussion in my judgment of whether Marindafontein is the owner of the hangar and that the court moved directly to determine if Mr Rees was entitled to be in occupation, without first determining if Marindafontein had the necessary locus standi, as owner of the hangar, to seek his eviction.[6]
- [11] It is common cause that Marindafontein is the owner of the Petit Airfield and that the hangar is situated on the Petit Airfield.
- [12] Mr Hollander who appeared for Marindafontein submitted that ownership of the hangar was irrelevant and that Marindafontein did not have to prove that it is the owner thereof. He submitted that Marindafontein did not have to specifically seek the eviction of Mr Rees from Marindafontein's immovable property as opposed to from the hangar.
- [13] In my view, Marindafontein was entitled to seek the eviction of Mr Rees from Marindafontein's immovable property, no matter which particular part of Marindafontein's immovable property Mr Rees was in occupation of (i.e., the hangar).
- [14] Mr Rees is in occupation of Marindafontein's immovable property by occupying the hangar, and by occupying the hanger he is in occupation of a particular part of Marindafontein's immovable property. These facts, to my mind, dispose of the first main ground of appeal.[7]
- [15] In the founding affidavit, Marindafontein alleged the following:[8]

"The airfield is Portion 49 of Varkfontein 25 IR, and is agricultural land. It cannot, therefore, be subdivided, and first respondent [Mr Stopforth] could consequently not have acquired ownership of the land that the hangar is situated upon. [Mr Stopforth] could also not have acquired ownership of the structure of the hangar, as it has acceded to the land. I attach a photograph as Annexure 'SC3' which depicts the structure that has been erected on the property. It is clear that the hangar is a permanent structure."

- [16] Part of Mr Rees' response in the answering affidavit in this regard is as follows:[9]

"It was further promised to all of the plaintiffs, Mr Coetzee and me that once we had been allocated and received our pro rata share in [Marindafontein] all of the necessary and appropriate steps to formalise the sub division referred to in this paragraph would be taken by [Marindafontein]. At that future point in time all of the plaintiffs and myself would be shareholders of [Marindafontein] with our duly appointed directors who would take the appropriate steps to effect whatever formalities are acquired to secure our rights."

[17] The question of accessio, i.e., whether or not the hangar acceded to Marindafontein's immovable property, is a red-herring. Either it acceded to the Petit Airfield – in which event Marindafontein is the owner thereof – or it did not accede to the Petit Airfield, in which event, even if Mr Rees is the owner thereof, it is situated on the Petit Airfield, which belongs to Marindafontein. In both instances, Marindafontein was entitled to evict Mr Rees from the Petit Airfield.

[18] As such, Mr Rees had to establish a right of occupation in respect of the hangar.

Occupation

[19] In support of his entitlement to remain in occupation of the hangar, Mr Rees relied on alternative agreements.

[20] Sufficient particularity pertaining to when and where these agreements were allegedly concluded; who the representatives were in concluding these agreements; and what exactly the terms thereof were, were not identified.

[21] For the reasons stated in the judgment, Mr Rees did not discharge the duty placed upon him to show an entitlement to occupy the hangar.

[22] In the application for leave to appeal, it is stated that I erred in finding that Mr Rees had relied upon evidence in the alternative

and that I ought to have found, *inter alia*, that properly construed, the use of the term “alternatively” meant no more than “or”, in relation to the plaintiffs in the action which allegedly concluded written hangar sales and land leases “with the Vissers, [or] Marindafontein, [or] the Visser’s appointed nominee/s”, and that all the contracts were thus concluded between each of the plaintiffs and one of the Vissers, Marindafontein or the Visser’s appointed nominee/s depending on which of the contracts is being referred to.[10]

[23] In other words, the court was required to decipher and pick the appropriate version in support of Mr Rees’ case. This

would fly in the face of another ground upon which the court is said to have erred in concluding that Mr Rees relied upon three versions, when the court ought to have found that the evidence considered in totality “establishes a single version by [Mr Rees]”. [11]

[24] In so far as the invoices are concerned, I am said to have erred in finding that the invoices did not support the fact that Mr Rees was paying rental for the hangar. According to Mr Rees, one of the proper inferences I was supposed to draw was that Marindafontein

accepted payment on a monthly basis of the rental amounts from Mr Rees without demur, thereby confirming the existence of a lease

agreement between Marindafontein and Mr Rees. [12]

[25] The invoices relied upon by Mr Rees cannot assist him. It was not the case of Mr Rees in his answering affidavit that the invoices contained a “misdescription” of the hangar as H19/2 (not H19/3) and that the misdescription was attributable to Marindafontein.[13]

[26] Mr Rees ought to have explained in his answering affidavit why the invoices did not refer to the hangar but instead to another hangar

and if this was a misdescription, he ought to have stated as much in his answering affidavit. Absent this, no inference could be drawn by the court that could assist Mr Rees.[14]

[27] Such an inference is also untenable because Marindafontein disputed such payments. In the answering affidavit, Mr Rees stated that:[15]

“We discussed changing the arrangement I had in place whereby I paid my monthly hangar lease payment through Mr Stopforth to [Marindafontein]. Mr Coetzee agreed that I should pay [Marindafontein] directly. I duly did so and I annex marked ‘KR15’ to ‘KR18’, copies of my proof of payments made directly by me now to [Marindafontein].”

[28] In its replying affidavit, Marindafontein stated the following in this regard:[16]

“If [Mr Rees] made payment of the invoices made out to [Mr Stopforth], this was the arrangement between [Mr Stopforth and Mr Rees] and had nothing to do with [Marindafontein]. I deny the discussion referred to in paragraph 59 and deny the allegations in these paragraphs under reply which contrary to what I have stated in paragraph 12 of [Marindafontein’s] founding affidavit save for what I state below.”

[29] The second main ground of appeal[17] does not satisfy me that another court would come to Mr Rees’ assistance.

Confirmatory affidavits

[30] According to Mr Rees, I erred in finding that Marindafontein had put up a confirmatory affidavit by Mr Visser because Mr Visser’s

confirmatory affidavit was only in respect of Marindafontein’s replying affidavit.[18]

[31] In the replying affidavit, Marindafontein denied Mr Rees’ version in respect of his right to occupy the hangar.[19] Mr Visser confirmed this in so far as it pertained to him.

[32] According to Mr Rees, I erred in criticising him for not explaining why Mr Stopforth had not put up a confirmatory affidavit.[20]

[33] Mr Rees is not criticised in the judgment. The reason advanced for the absence of a confirmatory affidavit by Mr Stopforth during argument was found not to amount to an explanation put forward by Mr Rees.[21]

[34] In any event, the finding reached in the judgment in respect of the confirmatory affidavits is not the only reason, but one of many, why the application was granted.

Referral to oral evidence or trial

[35] Mr Rees contends that, in the alternative, I ought to have referred the matter to oral evidence or trial.[22]

[36] As stated in the judgment,[23] neither party wished for the matter to be referred to oral evidence or to trial.

Conclusion

[37] In the circumstances, I am not of the opinion that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.

Order

[38] In the premises, the following order is made:

1. The application for leave to appeal is dismissed, with costs.

PG LOUW

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for Applicant: Adv L Hollander

Instructed by: Alice Swanepoel Attorneys

Counsel for Second Respondent: Adv A Bishop

Instructed by: Dewey McLean Levy Inc

Date of hearing: 27 October 2023

Date of judgment: 5 December 2023

[1] Although the second respondent is cited in the case heading as “Kevin Reece”, he identified himself as “Kevin Rees” in the answering affidavit. I accordingly refer to the second respondent as “Mr Rees”.

[2] [2021] ZASCA 31.

[3] [2023] ZAGPJHC 872 (4 August 2023) [6] to [9].

[4] Application for leave to appeal at para 1.

[5] At para 16.

[6] At para 26.

[7] Application for leave to appeal at paras 1–5.

- [8] At para 13.
- [9] At para 77.
- [10] Application for leave to appeal at para 6.
- [11] Application for leave to appeal at para 8.
- [12] Application for leave to appeal at para 7.
- [13] Application for leave to appeal at para 7.2.
- [14] Application for leave to appeal at para 7.5.
- [15] At para 59.
- [16] At para 68.
- [17] Application for leave to appeal at para 6 – 9.
- [18] Application for leave to appeal at para 11.
- [19] Replying affidavit at inter alia paras 30, 36, 37.
- [20] Application for leave to appeal at para 10.
- [21]

Judgment

at para 51.

- [22] Application for leave to appeal at para 12.
- [23] At para 11.

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