

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

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| (1) | REPORTABLE: <b>NO</b>                  |
| (2) | OF INTEREST TO OTHER JUDGES: <b>NO</b> |
| (3) | REVISED: <b>Yes</b>                    |

Date: **2<sup>nd</sup> November 2022** Signature: \_\_\_\_\_

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

**CASE NO:** 47010/2021

**DATE:** 2<sup>nd</sup> November 2022

In the matter between:

**APPLEBITE ROADHOUSE (PTY) LIMITED**

First Applicant

**GONBAR INVESTMENTS CC t/a  
APPLEBITE ROADHOUSE & PIZZERIA**

Second Applicant

**ALEX JAY CATERING CC t/a THE APPLEBITE EXPRESS**

Third Applicant

and

**APPLE BITE (PTY) LIMITED**

First Respondent

**SIMUL ENTERPRISES CC**

Second Respondent

**Heard:** 2 November 2022

**Delivered:** 2 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 14:30 on 2 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.

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## ORDER

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- (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]

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### Adams J:

[1]. I shall refer to the parties as referred to in the original application by the first, second and third applicants for interdictory relief against the first and second respondents based on unlawful competition and passing-off. The first and second respondents are the first and second applicants in this application for leave to appeal and the first, second and third respondents herein were the first, second and third applicants in the said application. The first and second respondents ('the respondents') apply for leave to appeal against the judgment and the order, as well as the reasons therefor, which I granted on 20 September 2022, in terms of which I had granted the second and third applicants the interdictory relief claimed by them against the respondents. I also granted a costs order against the first and second respondents.

[2]. The application for leave to appeal is mainly against my factual finding and legal conclusion that Mr Pavlos Christoforakis sold not just the business, but also the trading name, 'The Applebite Roadhouse and Pizzeria', to a Mr Xanti Revelas, who then on sold the business – as well as the trade name and the related logo and signs – to Mr Raymond Mack Daniels. I erred and misdirected myself, so the respondents contend in this application for leave to appeal, in not finding that the members of the third applicant only purchased the business and the right to trade as 'The Applebite Roadhouse and Pizzeria' from the premises owned by Mr Pavlos Christoforakis and to whom the third applicant paid monthly commercial rentals. In sum, therefore, it is the case of the respondents that the Court *a quo* ought to have found that the trade name, 'The Applebite Roadhouse

and Pizzeria', was at all times retained by Mr Pavlos Christoforakis, as were the original logo and the trade sign, which has always been prominently displayed at the original business premises of 'The Applebite Roadhouse & Pizzeria'.

[3]. The first and second respondents also contend that the court *a quo* erred in finding that confusion exists as a result of a misrepresentation being made by them that the goods which they offer are the goods of the second and third applicants or that the respondents are somehow connected to the second and third applicants. Moreover, so it is argued by the respondents, I erred by not finding that the use of the mark 'Apple Bite' at its current original geographical location, is so far removed in space that a reasonable shopper would not suspect that the goods sold by the respondents are those of the second or third applicants.

[4]. 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, from time to time, the business known as 'The Applebite Roadhouse & Pizzeria' was sold as a going concern from one owner to the next for purchase prices, which by express agreement between the sellers and the buyers, included amounts in respect of the goodwill of the business. This, to my mind, is as clear an indication as one will ever get that there was goodwill in the business and that its reputation was closely related to its trade name. It is therefore far-fetched for the first and second respondents to suggest that the use of the trade name and the related logos and signs were retained by the original owner all those many years ago, when they sold to the business.

[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 23<sup>rd</sup> 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*<sup>1</sup>, 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*<sup>2</sup>, 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*<sup>3</sup>. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in

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

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

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

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*<sup>4</sup>.

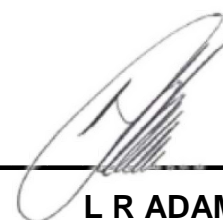
[9]. I am not persuaded that the issues raised by the first and second respondents in his application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are no reasonable prospects of another court 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:

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



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

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<sup>4</sup> *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: 2<sup>nd</sup> November 2022

JUDGMENT DATE: 2<sup>nd</sup> November 2022 – judgment handed down electronically

FOR THE FIRST, SECOND AND THIRD APPLICANTS: Advocate A P Allison

INSTRUCTED BY: Tshepo Mohapi Attorneys,  
Norwood, Johannesburg

FOR THE FIRST AND SECOND RESPONDENTS: Advocate Aucamp

INSTRUCTED BY: Thompson Attorneys, Pretoria

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