IN THE LAND COURT OF SOUTH AFRICA
HELD AT RANDBURG

Case number: 2025 – 168480

Coram: Montzinger AJ

Heard: 06 May 2026

In the matter between:

MASOTHA HEZEKIA NGWENYA	First Applicant
DUNGEZULA DANYELA NZIMA	Second Applicant
ZAKHELE VILAKAZI	Third Applicant

and

GROW AND MORE (PTY) LTD	First Respondent
MARTHINUS HERMANUS STAPELBERG	Second Respondent
VAN SCHALKWYK STAPELBERG	Third Respondent
MINISTER OF THE DEPARTMENT OF LAND REFORM AND RURAL DEVELOPMENT	Fourth Respondent

LEAVE TO APPEAL JUDGMENT

(DELIVERED ELECTRONICALLY ON: 11 MAY 2026)

Montzinger AJ:

Introduction

[1] On 12 March 2026 I delivered judgment in the main application brought by the three applicants against the first to third respondents. I will continue to refer to the parties as I did the main judgment.

[2] In the main judgment[1] I confirmed, with variations, the *rule nisi* previously granted, and made orders directed at restoring and protecting the applicants' rights as occupiers under the Extension of Security of Tenure Act 62 of 1997 ("ESTA"). The relief related to four matters regarding (i) school bus access for the children resident on the farm; (ii) restoration of access to potable water; (iii) the right to repair and maintain the dilapidated mud structures in which the applicants live; and (iv) the right to continue cropping and grazing on the demarcated areas they have used for many years.

[3] The respondents now apply for leave to appeal against the whole of the judgment and orders to the Supreme Court of Appeal, alternatively to a Full Court of this Court. They have filed an extensive notice and detailed heads of argument. The application is opposed.

[4] Before I turn to the merits of the application, a preliminary observation about the form of the application is warranted. The notice of application for leave

[1] *Ngwenya and Others v Grow and More (Pty) Ltd and Others* [2026] 2 All SA 397 (LCC)

to appeal extends to some 93 paragraphs over 20 pages. The main judgment, without its obligatory formal requirements, runs to approximately 39 pages and 101 paragraphs. The notice therefore approaches the judgment in length and almost mirrors it in structure. I do not doubt that this exhaustive cataloguing of asserted errors was intended to convey that the judgment is so comprehensively flawed that the list of complaints could not responsibly be made shorter. The impression it conveys to me is, with respect, the opposite.

[5] A notice that strives to track the judgment almost paragraph for paragraph, advancing every conceivable complaint without distinguishing the main issues from the peripheral, suggests not an abundance of meritorious grounds but rather an inability to identify the discrete propositions on which the appeal must stand or fall. The proper function of a notice of leave to appeal is to focus the mind of the judge whose judgment is under attack on the discrete errors said to have infected the order. Where, as here, the notice diffuses rather than focuses that inquiry, it does not assist the court; if anything, it tends to confirm that the order made does not lend itself to a clearly identified error.

[6] However, criticism of the format how a party presents the grounds on which leave to appeal is sought, is not a basis to refuse leave. I am required to consider the application dispassionately with reference to the facts and the law[2], which I will do by first briefly stating the test for leave to appeal and then evaluating the grounds on which reliance is placed, against that test.

The test for leave to appeal

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[2] *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA);

[7] Section 17(1) of the Superior Courts Act[3] provides that leave to appeal may only be granted where the judge is of the opinion that (i) the appeal would have a reasonable prospect of success, or (ii) there is some other compelling reason why the appeal should be heard. The threshold is well-known and has been restated in many decisions.

[8] In addition to the section 17 threshold our courts have also given guidance on how to assess an application for leave to appeal in order to determine whether the threshold has been met. In particular in what circumstance it can be said an appeal has reasonable prospect of success and what the factors are that constitutes a compelling reason[4]. Ultimately, as I have already stated, a court must assess the application dispassionately and with reference to the facts and law. Also, a court considering an application for leave must be satisfied on proper grounds, that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough[5]. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal[6].

[9] With regards to what may be regard as "compelling reasons" our courts have found that it may include considerations of substantial public importance,

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[3] Act 10 of 2013.

[4] *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA); *Ramakatsa v African National Congress* (Case no 724/2019); *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA)

[5] *The Mont Chevaux Trust (IT 2012/28)* v *Tina Goosen and 18 Others* (LCC 14R/2014, unreported, 3 November 2014).

[6] *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 referring to *S v Smith* 2012 (1) SACR 567 (SCA) para 7; *Ramakatsa supra* at para 10. See also *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA).

an unsettled question of law, conflicting case law, or a discrete issue of statutory interpretation with implications for future cases. Yet even where such reasons are advanced, the merits of the proposed appeal remain often decisive.[7]

[10] It is against the stated framework that I must consider whether the application meet the threshold for leave to appeal to be granted.

The Van Oudtshoorn affidavit

[11] I begin where, on a fair reading of the application, the analysis must begin. The respondents have placed at the centre of their attack on the main judgment the proposition that no clear right was established in respect of any of the four heads of relief, and that the application was riddled with material disputes of fact incapable of resolution on the papers. The difficulty for the respondents, and it is a difficulty that runs through every ground of appeal they have raised, is that they themselves filed, in support of their opposition, the affidavit of Mr Louis van Rheede Van Oudtshoorn. That affidavit independently confirms the rights that were in issue.

[12] Mr Van Oudtshoorn is the son of the late Mr Schalk Willem Cilliers van Rheede van Oudtshoorn, who was the previous owner of Kolwani farm before its sale in 2014 to Klein Vrystaat Boerdery and, in due course, to the first respondent. Mr Van Oudtshoorn lived on the farm and farmed there with his father. He has no interest in the present dispute. The respondents tendered his evidence not the applicants.

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[7] *Caratco supra*

[13] The statements made in the Van Oudtshoorn affidavit, on which the respondents themselves relied, are in effect, the four corners of the relief that I granted. Whatever criticisms may be levelled at the reasoning by which the order was reached, the basis of the order is the very evidence that the respondents themselves elected to put before the Court. They cannot now, in their application for leave to appeal, argue that the rights so confirmed were never established. They placed Mr Van Oudtshoorn's evidence on the record because they regarded him as a credible witness and the Court also accepted his evidence that corroborated the applicants' case.

[14] I observed in the main judgment[8] that the Van Oudtshoorn affidavit is *"particularly compelling because Mr van Oudtshoorn has no interest in the current dispute".* Nothing the respondents say in the application for leave to appeal weakens that observation. They do not suggest that Mr van Oudtshoorn was untruthful. They do not seek to repudiate his version. They cannot. He was their witness.

[15] The consequence is significant for the test that must now be applied. The respondents' own evidence having confirmed the applicants' pre-existing rights, and the respondents being successors in title bound to those rights by section 24 of ESTA,[9] it is exceedingly difficult to see on what factual or legal foundation an appellate court could disturb the order. The order does no more than restore and protect what the respondents' own witness confirmed had always existed.

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[8] at para [59]
[9] Section 24 of ESTA

The grounds of appeal

[16] I turn now to address the grounds of appeal. I do so succinctly, in deference to the principle that an application for leave to appeal is not an opportunity to re-argue the merits, and because the analysis of the impact of the Van Oudtshoorn affidavit above has already largely answered them.

Ground 1: Water obligations under ESTA and the Constitution

[17] The respondents contend that I erred in finding that they bear a positive statutory and constitutional obligation to provide water to the applicants, that I misapplied *Mshengu*[10] and misconstrued ESTA, and that I impermissibly extended a vertical state obligation horizontally onto a private landowner. They say my finding creates legal uncertainty and has wide precedential effect.

[18] The premise of this ground is mistaken. I did not find that the first respondent was obliged to install water infrastructure for the applicants, or that fault on its part was irrelevant in the abstract, or that constitutional duties resting on the State had been extended horizontally. What I found in the main judgment[11], was rather narrower and rested on facts that are common cause. I found that the applicants had pre-existing access to water from a borehole on the farm; that the respondents acquired the farm with the borehole in operation; that the borehole subsequently became inoperable while under the respondents' control; that the respondents took no meaningful steps to restore that access; and

[10] *Mshengu and Others v Msunduzi Local Municipality and Others* [2019] ZAKZPHC 52; [2019] 4 All SA 469 (KZP).
[11] at paragraphs [69] to [78]

that, in the result, the applicants now draw drinking water from a source they share with livestock.

[19] These findings sit comfortably within section 6(2)(e) of ESTA, i.e. the right *"not to be denied or deprived of access to water"*, read with section 24 of ESTA, which binds the respondents as successors in title. They sit equally comfortably within *Daniels*[12], which confirms that the rights of ESTA occupiers are enforceable horizontally and that the protective duties they generate are not exclusively negative. The respondents' disagreement with the result is not the same thing as a sound, rational basis for thinking that another court would alter it. Nothing in the notice or heads of argument identifies a discrete legal proposition with which a Full Court or the Supreme Court of Appeal could plausibly take issue, given the facts.

[20] Again, I have to point out that the applicants' pre-existing right of access to water is the very fact confirmed by Mr Van Oudtshoorn. Even if I were wrong as the respondents contend, an appellate court would still be confronted with the unchallenged evidence that there was a borehole and that the applicants and their families used it. To roll back the order would be to leave the applicants drinking from an animal trough while the respondents, who control the infrastructure, are absolved of any duty of restoration of the access to water. No appellate court is likely to take that course.

Ground 2: Final interdict requirements

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[12] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

[21] The second ground is that the requirements for final interdictory relief were not met.

[22] The clear right point fails for the reasons given above. Each right is confirmed in the Van Oudtshoorn affidavit and by the respondents' own concessions. The water right does not lie exclusively against the State. ESTA places direct duties on landowners not to deprive occupiers of access they previously enjoyed. The disputes of fact were addressed in the main judgment[13]. They were either not disputes at all, or were disputes of degree only, or did not affect the outcome. As to harm, the daily reality of children walking long distances on dark farm and public roads to reach school, families drawing water alongside livestock, and dwellings deteriorating in circumstances where the applicants are forbidden to do repairs, is harm of the most concrete kind. As to alternative remedies, the respondents' proposals are unilaterally revocable and create no enforceable rights for the applicants. None constitutes an alternative remedy in any meaningful sense.

Ground 3: Failure to apply the Plascon-Evans rule

[23] The third ground is that I failed to apply the rule in *Plascon-Evans*[14]. This complaint is misconceived. I expressly applied the rule. I stated in the main judgment[15], that the alleged disputes did not render the matter incapable of determination on the papers, that the respondents' version was assumed to be correct where genuine and material, and that the matter was ultimately decided

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[13] at paragraphs [35] to [41]
[14] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–635C.
[15] at paragraph [41]

on the common cause facts together with the respondents' own version. That is precisely what *Plascon-Evans* requires.

[24] The respondents' quarrel is not, in truth, with the rule but with the result. They invite an appellate court to re-weigh the papers and reach a different conclusion on the facts. That is not the function of an appellate court, and it is not a proper basis for leave to appeal. Where, as here, the determinative facts are confirmed by the respondents' own witness, the application of *Plascon-Evans* could only have produced one outcome.

Ground 4: Improper reliance on replying affidavits

[25] The fourth ground is that I erred in relying on material allegations made for the first time in reply. It is not clear I that I did so. The applicants made their case in the founding papers; the replying affidavits responded to matters raised in answer. To the extent that any matter ventilated in reply assumed greater prominence at the hearing, this was because the respondents had themselves placed it in issue. There is no reasonable prospect that an appellate court would set aside the order on this ground.

Other points specific to each head of relief

[26] The notice of leave to appeal proceeds, after the four general grounds, to a series of complaints arranged under the headings school bus, water, housing and grazing. I have considered each of them. They largely repeat the four general grounds in different language, and they are answered by the same considerations. Two specific complaints, however, deserve a brief word.

[27] First, in relation to housing, the respondents say the order is too wide and may be read as applying eternally to any structure now or in the future. That objection is, with respect, an overreading of the order. Paragraph 6 of the order interdicts interference with the rebuilding or repairing of "*their existing dwellings on the same footprints of the current structures, to the extent reasonably necessary to ensure the habitability and safety of those dwellings"*, and limits the materials to be used. The order is limited and tied to the existing footprint. Whatever an appellate court might say about the precise wording, no appellate court could reasonably refuse to recognise the right, given Mr Van Oudtshoorn's confirmation that permission to repair the mud structures had always existed.

[28] Secondly, in relation to the school bus, the respondents protest that the alternative arrangements they offered should have been accepted. As I held in the main judgment, those alternatives are unilaterally revocable and provide no security for the vulnerable school children. There is no realistic prospect of an appellate court regarding offers that may be withdrawn at will as adequate substantial redress.

No compelling reason exists

[29] The respondents argue, in the alternative, that compelling reasons exist for leave to be granted because the principal judgment has wide precedential effect and ought to be considered by the Supreme Court of Appeal. I do not agree.

[30] The main judgment is fact-specific. It applies established principles and the protective scheme of ESTA to a particular factual matrix in which the prior owner's evidence confirmed the rights asserted. It does not lay down a new rule

of general application. It does not depart from existing authority. The legal questions identified by the respondents, whether ESTA imposes any positive duty on a landowner, whether section 6(2)(e) is purely negative, whether the State's constitutional duty extends horizontally, are addressed in *Daniels* and *Mshengu*, which I followed. They are not novel, and they are not unsettled to a degree that calls for appellate intervention on these particular facts.

[31] In any event, even where compelling reasons are postulated, the merits of the proposed appeal remain the dominant consideration. For the reasons already given, the merits do not favour the respondents.

An appeal lies against the order, not the reasons

[32] There is one further consideration that, in my view, places this matter beyond the reach of leave to appeal. Standing back from the detail, the application is in substance an attack on the reasoning of the judgment rather than on the order. Where an appellate court might, on its own analysis, arrive at the same order on different reasoning, leave to appeal will ordinarily be refused, however attractive the alternative reasoning might be.

[33] On a conspectus of the grounds advanced, this is precisely such a case. The respondents quarrel with how the rights were characterised, with how the duty in section 6(2)(e) was articulated, with how *Daniels* was applied, with the framing of the constructive eviction analysis, and with the manner in which *Plascon-Evans* was deployed. They do not, and cannot, argue away the underlying facts on which they themselves relied. An appellate court, working from those same facts, would on any reasonable view be driven to make an order

that protects the applicants' access to water, recognises the school bus arrangement, allows the applicants to repair the existing mud structures so as to render them habitable, and confirm the demarcated grazing rights described by Mr Van Oudtshoorn. The reasoning may be expressed differently. The conclusion will be the same.

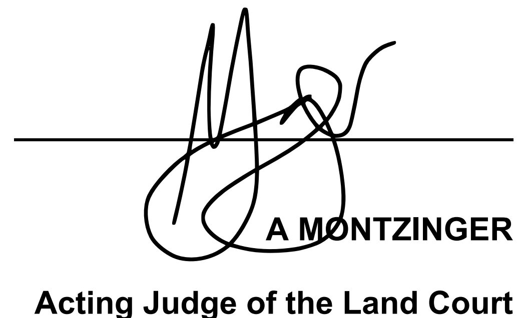
Conclusion and order

[34] In these circumstances, leave to appeal is not warranted and must be refused. In respect of costs, I follow the general approach of this Court that costs are not awarded against the unsuccessful party in matters of this nature. I see no reason to depart from that approach.

[35] In the result, the following order is made:

1. The application for leave to appeal is refused.

2. Each party to pay their own costs.



A MONTZINGER

Acting Judge of the Land Court

Appearances:

Counsel for applicants:	Adv B Lukhele, A Dlamini
Attorneys for applicants:	Ledwaba Mazwai
Attorney for respondents:	Cox & Partners Inc Attorneys
Counsel for respondents:	Adv G Van der Walt SC