



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No:046908/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
29 February 2024	
DATE	SIGNATURE

In the matter between:

MARINDAFONTEIN (PTY) LTD

Applicant

And

16TEN PROPERTIES (PTY) LTD

1st Respondent

**UNLAWFUL OCCUPIERS OF HANGAR H9 PETIT
AIRFIELD**

2nd Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicant launched an application for leave to appeal against the whole judgment and order I granted on 21 December 2023 in terms of which I dismissed the application for eviction of the first respondent.

[2] Reference to the respondent in this judgment shall refer to 16Ten Properties (Pty) Ltd which is the only party participating in this *lis*.

Background

[3] The factual background has been set out *in extenso* in my judgment and same will not be repeated in this judgment. Briefly the applicant sought an order for the eviction of the respondent from Hangar H9 (H10/2) (*leased premises*)¹ which is situated at the Petit Airfield, Rudi Street, Benoni. The applicant contended that the respondent has breached the lease agreement, firstly, by subletting the leased premises without applicant's written consent and secondly, by effecting alterations of the leased premises without applicant's written approval. I found that the email and whatsapp communications exchanged (*exchanges*) between the parties established that there was indeed written consent granted to the respondent for both subletting and alterations.

[4] The applicant is aggrieved by my judgment and order and seek leave to appeal same. The applicant contends that I erred as the said exchanges did not grant the respondent the required written consent as there was no specific reference to subletting or alteration therein.

¹ I made a finding that the application for eviction from the hangar is incompetent as the leased premises in the lease agreement refers to the ground footprint of the hangar used by the lessee and not the hangar itself.

Legal principles

[5] In the application for leave to appeal the applicant relies on section 17 of the Superior Court Act which provides that leave to appeal would be granted where the court is, *inter alia*, of the opinion that the appeal would have a reasonable prospect of success and further that the adjudication of the appeal would be precedent setting.

[6] It is trite that the provisions of section 17 of the Superior Court Act have introduced a higher threshold to be met in application for leave to appeal and the inclusion of the word ‘*would*’ require the applicant to demonstrate that another court would certainly come to a different conclusion.²

[7] The mere possibility of success, an arguable case or one that is not hopeless is not enough.³ There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal⁴.

Parties’ submissions and analysis.

[8] As set out above the applicant contends that I erred in my finding that there was a written consent for the subletting on the exchanges as they both did not specifically refer to both or either subletting and/or alterations.

[9] The respondent on the other hand contended that, when considered in context, it is clear that the exchanges clearly demonstrated that there was consent in writing for

² *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325. *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016), *Acting National Director of Public Prosecutions and Others v Democratic Alliance: In Re Democratic Alliance v Acting Director of Public Prosecutions and Others* 2016 ZAGPPHC 489.

³ *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016) at para 17

⁴ *S v Smith* 2012 (1) SACR 527.

subletting given even though the word subtenant was not used. In this regard there was an indication that Mr Hugo Visser (*Mr Visser*) who acted for the applicant did state the amount payable by the tenant (subtenants whose particulars were known to Mr Visser at all times) for rental and also monthly amount for the security fees. Further that if Mr Visser was surprised or not agreeable, he would have insisted that the respondent's tenants should deal directly with him and not via the respondent.

[10] With regard to the alterations or subdivisions the respondent contends that this was complied with, and the required documents and plans were forwarded to the previous landlord. And the evidence to that effect could not be gainsaid. To this end the respondent contends that my findings are unassailable.

[11] During argument the respondent's counsel raised a point that the crafting of the grounds for leave to appeal set out in the application is not in accordance with rule 49 of the Uniform Rules of Court and the application for leave to appeal must therefore be dismissed with costs.

[12] The respondent further queried the letter of termination as having been defective as it referred to the lease agreement between the applicant and Mr George Minnie (*Mr Minnie*) who was the director of the respondent. The applicant contends that the intention was certainly to refer to the respondent who was represented by the Mr Minnie. The applicant should therefore also accept that, in context, reference to tenant in the exchanges with the respondent that the usage of the word tenants in fact referred to the respondent's tenants.

[13] The applicant contended that the fact that the rental was paid for the extended area of leased land cannot be used as evidence to buttress the argument that there was written consent. It appears that the respondent had acted in accordance with the understanding

that the applicant duly represented, consented in writing to both subletting and the alterations.

[14] It is ineluctable that the parties consummated these changes and the applicant having benefitted by receiving the monthly rentals relative to alterations and monthly security fee in relation to subtenants. It was held in *Wilken*⁵ that *'[I]t by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would be bound to upset the result of such a contract which the parties had carried through in accordance with its terms.'*⁶

[15] The applicant has failed to present persuasive argument to demonstrate that I erred in my findings. In view of my finding as set out below other issues raised by the parties in their arguments need not detain me further.

Conclusion

[16] The applicant has failed to meet the threshold and I am not persuaded that the appeal has reasonable prospects of success and further that another court would come to a different conclusion. To this end the application for leave to appeal is bound to fail.

Costs

[17] There are no reasons presented to unsettle or upset the general principle that the costs should follow the results.

⁵ *Wilken v Kohler* 1913 AD 135. See also *MCC Bazaar v Harris and Jones (Pty) Ltd* 1954 (3) SA 158 (T) and *Enocan Construction (Pty) Ltd v Palm Sixteen (Pty) Ltd* 1972 (4) SA 511 (T).

⁶ *Ibid* at 144.

Order

[18] In the premises I grant the following order:

The application for leave to appeal is dismissed with costs.



Mokate Victor Noko
Judge of the High Court

This judgement was prepared and authored by Noko J is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be **29 February 2024.**

Date of hearing:

15 February 2024

Date of judgment:

29 February 2024

For the Applicant:

Adv L Hollander

Attorneys for the Applicant:

Swanepoel Attorneys

For the Respondent:

Advocate A Bishop

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