

REPUBLIC OF SOUTH AFRICA


 IN THE HIGH COURT OF SOUTH AFRICA
 GAUTENG DIVISION, JOHANNESBURG

Case Number: 22321/18

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
22/1/2024 DATE  SIGNATURE	

In the matter between:

GOLDLEAF INVESTMENTS (PTY) LTD**APPLICANT**

v.

NADINE ORKIN**RESPONDENT**

In re:

NADINE ORKIN**RESPONDENT**

And

GOLDLEAF INVESTMENTS (PTY) LTD**DEFENDANT**

JUDGMENT

MIA, J:

[1] The applicant, the defendant in the trial, appeals the whole of the judgment handed down on 21 April 2023. The issue for determination in the trial was whether or not it was a tacit term of the sale agreement that the applicant would have had to "*supply all of the necessary infrastructure so as to provide a fully serviced site both in respect of municipal and electrical services alternatively that the defendant would ensure that all of the necessary infrastructure was in place so as to provide a fully serviced site both in respect of municipal and electrical services*"¹. If there was such a tacit term, the court was enjoined to determine whether the applicant had breached such a term and caused the respondent to suffer damages. The applicant lodged a counterclaim, and the court was required to determine whether the respondent was liable for the costs of the applicant's counterclaim. The appeal was opposed.

[2] The applicant raised numerous grounds in the application for leave to appeal, which spanned twenty-nine pages and several grounds. To succeed in this application for leave to appeal, in terms of s17(1)(a)(i)² of the Superior Courts Act 10 of 2013, the applicant must satisfy the court that the appeal will have reasonable prospects of success or that there is some other compelling reason why the appeal should be heard. The enquiry does not end there. "If the court is unpersuaded of the prospects of success, it must still inquire whether there is a compelling reason to entertain the appeal. This includes an essential question of law or a discreet issue of public importance that will affect future disputes. The merits remain important and are often decisive."³

[3] I deal with the salient points raised in the appeal.

¹ Record, Caselines (CL) 001-6 - Particulars of claim, para 11,.

² '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.

³ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* (Case no 982/18) [2020] ZASCA 17 (25 March 2020)

[4] It is appropriate to commence with the argument on behalf of the applicant that the respondent's case should fail as she did not testify. Counsel argued that the respondent had not met her case as the evidence tendered amounted to hearsay in that she did not testify in her matter. It was submitted that Mr Orkin's and Mr Parson's evidence constituted hearsay and should not be accepted. Regarding the law of evidence, the evidence of Mr Orkin and Mr Parsons constituted the best evidence. This is so because Mr Orkin and Mr Parsons had the best knowledge about the aspects they testified about. Mr Orkin was best qualified to testify where he assisted his wife each step of the way, completing the agreement and was best placed to testify about the agreement, the process and the payments he made. Mr Orkin was the best witness to explain why they required a lift to be installed as it met his requirement due to frailty.

[5] Mr Parsons, who engaged with Mr Robinson directly, was also the best witness to testify regarding his communication with the contractor. Counsel's submission that the plaintiff was required to testify ignores that the best evidence is necessary. Mr Orkin's evidence about payments made was thus relevant to prove the amount relating to the loss and damages. It was also Mr Orkin's evidence that he and Mrs Orkin would later reconcile the amounts paid from his account. Thus, he was best placed to testify regarding how the parties determined the money would be paid into his account or how they, as partners, contributed to their joint living arrangement. Mr Orkin's evidence indicated as much. The parties need not be married in community of property to share their home expenses. On this ground, I do not see that another court will come to a different conclusion relating to the best evidence rule.

[6] A further ground related to the tacit term, based on paragraph 8 of the judgment which reads:

"and the surrounding circumstances as well as the evidence all point to the developer being responsible for having a fully serviced site in place once the construction was completed to enable the plaintiff to take occupation of the home."

Counsel submitted that the agreement presumes that bulk electricity is supplied to the site. This was erroneous, counsel continued, as Mr Orkin indicated that

no electricity supplied to the site at the time the agreement was entered into. The submission is misguided as a proper reading of the paragraph indicates that the site was to be fully serviced upon completion of the construction. As indicated in the evidence, this was necessary to test the supply of electricity and issue the certificates before handing over the occupation certificate.

[7] Counsel argued furthermore that the court found that there was a tacit term that required the applicant to provide “a fully serviced site both in respect of municipal and electrical services alternatively that the defendant would ensure that all of the necessary infrastructure was in place to provide a fully serviced site both in respect of municipal and electrical services”. Counsel submitted that the court erred in this regard at the outset, as this was an agreement between the applicant and the respondent. As the respondent did not testify in the trial, the respondent did not prove her case. The court referred to the decision of *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*⁴ *In the judgment handed down, an unexpressed term or tacit term can be determined no better than by the officious bystander test. The test on this aspect has not changed, and counsel has not persuaded me that another will find necessary for the respondent to lead evidence in person on this aspect or that the test has changed.*

[8] Counsel further submitted that the court erred in finding that the applicant failed to ensure that bulk electricity was supplied to the site. It was submitted as the court ignored that bulk electricity was supplied to the site and the applicant had obtained a regulation 38 certificate in terms of the Town Planning and Township Ordinance which required internal reticulation. This required cabling to be laid to particular units. The last phase was to be completed during construction. The evidence of the applicant and the contractor was that the applicant was responsible for the supply of electricity. This was supported by the applicant's evidence that he sent various communications to Eskom, approximately fifty-eight.

⁴ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974(3) SA 506 A at 531

[9] Counsel for the applicant referred to these fifty-eight communications of the applicant which occurred between March 2017 and March 2018 to ensure the bulk supply to the site. It is noteworthy that counsel argued that Ms Forstman was not an expert and her view is not decisive. That is so as the applicant's evidence was clear that he engaged with Ms Forstman in respect of many projects, and upon his enquiry about Bellisimo, she indicated a requote was required as the project was "old". It follows that the fifty-eight calls made to Eskom did not relate to the Bellisimo development alone. The applicant was compelled to act on the final stage of the installation on his own evidence when Mr Robinson approached him and indicated that the respondent would be requiring occupation of their unit shortly. The applicant's response was that he was waiting for Eskom. The applicant's plea that there was no obligation to supply electricity, that the plaintiff frustrated the supply or to blame Eskom are all defences that fail.

[10] It was Mr Robinson's initiative, after Mr Parson's enquiry about electricity and the respondent's correspondence demanding information and indicating the loss suffered that caused the applicant sign off and move on the electrical supply. The applicant approved the quotation from Consolidated Power Engineering (CPE) to assist in facilitating the process. The applicant of necessity and on Mr Robinson's advice after Mr Robinson obtained a quotation from CPE appointed the engineering company to address the delay after a substantial delay had already occurred.

[11] Counsel for the respondent argued in the present matter there had been an agreed date for delivery per the sale agreement and building contract which were linked, thus the argument made on behalf of the applicant that the applicant was not placed *in mora* was not applicable. It is evident that Mr Parsons enquired in February 2017 alerting the applicant that their programme may not meet the agreed occupation date if the electrical installation was not complete.⁵ The applicant's response at that stage was that occupation was dependant on Eskom electricity supply. The building contractor informed the developer that the final installation electricity supply was urgent. The applicant

⁵ Caselines 004-499 Correspondence to Mr Parsons

was aware in April 2017 that they would not meet the installation of installation of electrical supply to the unit by the agreed date of occupation. The respondent informed the contractor and developer in April 2017 that they were not able to take occupation due to the electrical supply not being in place and details which parts of the building works have not been completed. Moreover, the respondent placed on record that the delay was costing R 40 000 per month for rental. There is no basis to the argument that the respondent did not bring the breach to the attention of the applicant and the applicant was not required to act on it. The respondent clearly placed her position forward in correspondence dated 19 April 2017.⁶

- [12] The submission that the respondent agreed to the new occupation date and thus waived their rights to claim damages ignores the respondent communication to the applicant and contractor that they incurred losses as a result of the delay. The sale agreement and builder's contract were interlinked and set out a reasonably agreed date for occupation. There was no need to place the applicant *in mora*. The respondent informed the applicant per correspondence that she suffered a loss as a result of the electricity not being installed and not being able to take occupation per the agreement. The respondent demanded that the electricity be attended to, indicating that they, she and Mr Orkin had been prejudiced, as a result of the electricity issue not being attended to until they demanded same and their unit was not habitable without electricity even though they agreed to a new date of occupation. The respondent pointedly indicated the loss they incurred as a result of her not being able to take occupation per the agreed date and having to extend their rental amounting to R40 000⁷ per month. The applicant's view when the respondent raised the date of occupation was that they remain on at their residence. Their home had been sold and the respondent incurred costs as a result of the failure to move into the unit in Bellisimo. The applicant cannot waive away the respondent or her claim when the agreement made provision for occupation within a particular time frame. I am not persuaded that another court would find differently on the aspect of damages.

⁶ Caselines 004-506 Respondent's correspondence to developer

⁷ Ibid 004-507 Respondent's correspondence to developer

[13] It was also submitted that the court erred in failing to take into consideration the claim by the respondent against the contractor, which was alleged to be identical to the claim against the applicant. The aforementioned claim resulted in a settlement when the contractor gave the respondent occupation. The submission was that the respondent had compromised her claim against the applicant when she claimed against the contractor. Whilst the sale agreement and the building agreement were inextricably linked, the settlement agreement between the respondent and the contractor did not imply a settlement between the respondent and the developer. The applicant and contractor had different obligations. The once and for all rule is applicable between the same parties in the same litigation. The applicant did not prove that the respondent claimed for the same breach against the applicant and the contractor. The respondent's claim is against different defendants for different breaches in terms of different agreements albeit to obtain occupation of the same unit. The settlement agreement between the contractor and the respondent makes provision for the respondent to pursue a developer debt and to pay the contractor and proportionate amount upon recovered. The respondents claim against the contractor is not subject to the once-and-for-all rule against the developer. This is because the once-and-for-all rule is applicable in litigation between the same parties.

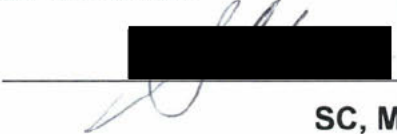
[14] Counsel submitted that the court erred in finding the applicant had no *locus standi* in respect of the counterclaim. The reason for finding there was no *locus standi* is adequately set out in the judgment. I elaborate no further and am of the view that there is no possibility a different conclusion will be reached. The applicant did not pursue this aspect substantially before me.

[15] On the issue of costs, counsel submitted that there was a reasonable possibility that another court would find that the respondent failed to make out her case and the claim should fail with costs. In addition, it was submitted that the counterclaim should succeed with costs. The reasons for granting a punitive costs order are set out in the judgment. I do not intend to elaborate further on the reasons.

[16] Having regard to the standard the applicant must satisfy to succeed I am not persuaded that there are reasonable prospects of success that another court will come to a different conclusion. There is no other compelling reason why the appeal should be heard.

[17] In the result, I grant the following order:

The application for leave to appeal is dismissed with costs.


SC, MIA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the Applicant:	Adv. N Stathern
Instructed by:	Ulrich Roux and Associates
Counsel for the Respondent:	Adv. D Vetten
Instructed by:	Witz Incorporated Attorneys
Date of Hearing:	14 June 2024
Date of Judgment:	22 July 2024