



**HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 18020/2022

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
31/03/25
DATE SIGNATURE

In the application between:

ALDO GIOVANNI CHIODAROLI N.O

FIRST APPLICANT

DORA ELKE BANTZ N.O

SECOND APPLICANT

MARK- COLIN LAHNER N.O

THIRD APPLICANT

And

YEBOPROP 7 INVESTMENT (PTY) LTD

FIRST RESPONDENT

And

E10 PETROLEUM SA (PROPRIETARY) LTD

SECOND RESPONDENT

LEAVE TO APPEAL JUDGMENT

BAQWA J:

Introduction

1. This is an application for leave to appeal to the Supreme Court of Appeal against the whole judgment of Baqwa J handed down on 4 October 2024.
2. The respondents oppose the application, and such opposition finds support in the Supreme Court of Appeal in the matter of *S.v Smith*¹ where it was held:

“what the test for reasonable prospects of success postulates is 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. 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 there is a mere possibility of success, 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.”

¹ 2012 (1) SACR 567 (SCA) at para 7.

3. The respondents hold the view that the applicant's case is hopeless as there is no sound, and rational basis for the submission that there are prospects of success on appeal.

The Law

4. Section 17 (1) (a) (i) of the Superior Courts Act 10 of 2013 (the Act) provides that leave to appeal may be granted where the judge concerned is of the opinion that:

11.1 The appeal would have a reasonable prospect of success (S. 17 (1) (a) (i)).

11.2 There are some other compelling reasons why the appeal should be heard (s.17 (1) (a) (ii)).

The Test

5. *In MEC for Health, Eastern Cape v Mkhitha and Another*² the Supreme Court of Appeal expressed the test for granting leave to appeal as follows:

"[16] Once again it is necessary to say that leave to appeal, especially to this court must not be granted unless there truly is reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there are some other compelling reasons why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds

² [2016] ZASCA 176 at para 17.

that there is a reasonable prospect or realistic chance of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

6. A similar view was expressed by the SCA in *Ramakatsa and Others v African National Congress and Another*.³

Grounds of Appeal

The lease agreement

7. 7.1 Central to this application for leave is clause 14 of the Agreement and the correct interpretation thereof. It provides as follows:

14.1 The lessee shall (save as provided in clause 12.6) have no claim for damages against the lessor and may not withhold or delay any payment due to the lessor by reason directly or indirectly of:

14.1.1 a breach by the lessee of any of its obligations under this lease occasioned due to any event of vis major or any other cause beyond the reasonable control of the lessor.

14.1.5 any interruption of, or interference with, the enjoyment or beneficial occupation of the premises, unless proven by the lessee to have been occasioned by the wilful or grossly negligent conduct of the lessor or its employees and /or agents.

³ [2021] ZASCA 3` at para 10.

14.2 The lessor shall not, however be excused from specific performance of any of its obligation under this lease, whether express or implied, and particularly (but not only) its obligations to afford the lessee occupation and employment of the premises....

8. The applicant raised the defence of deprivation of beneficial occupation of the property for a period of 22 Months due to a provincial road on which is located being completely shut down and diverted for road construction.
9. In the judgment it is stated that such road closure was an event contemplated in clause 14 of the lease agreement in that it was beyond the reasonable control of the respondents. Consequently, the applicant is directed not to withhold payment in those circumstances.
10. What is patently clear from the judgment is that applicant's defenses are totally unsustainable. This inescapable conclusion in the judgment is firmly based in clause 5 and 7 of the lease agreement which provide.

"5 Rent

5.1 The rental for the premises..... shall be paid monthly, in advance, by no later than 1st day of each and every month, without deduction or set-off whatsoever

7 Payments

7.2 The lessee shall not withhold, defer, or make any deduction from any payment due to the lessor, whether or not the lessor is indebted to lessee or in

breach of any obligation to the lessee.”

11. The applicant also dismally failed to make out a case for the matter to be referred for oral evidence. On its own version, it admitted several breaches. In the circumstances, there is no dispute of facts which requires the hearing of oral evidence and the applicant's reliance on Plascon-Evans is misconstrued and misplaced.

Alleged Misdirection re-renewal of lease

12. This court found that applicant forfeited its right to a renewal of the lease based on the breaches in respect of which the applicant made continuous late payments during 2016 to 2017 and paid no rent from February 2020. Its allegations of having paid monies but producing no evidence regarding when he paid, to whom he paid and how much he paid lay bare its mendacity.
13. *The applicant submits incorrectly that this court misconstrued OK Bazaars⁴ and its relevance to this matter. I cannot demonstrate better how wrong the applicant is than quoting directly from Ok Bazaars at 361 para C where Hoexter AJ, in assessing a similar renewal clause and the lessee's breach said: "It seems to me, with respect, that in requiring the appellant to establish that it had never been guilty of any breach whatever, the learned Judge prescribes too exacting a test. It appears to me that 'faithful' performance by a lessee in the position of the appellant cannot predicate the total absence of even a single breach of the many and often burdensome terms and conditions of a complex contract. So to interpret clause 3*

⁴ 1994 (2) SA 347 (A).

would be to import an unrealistic standard of near perfection hardly capable of attainment of tenants. Such a construction would render the option to renew practically worthless. In my opinion it cannot be supposed that such was the intention of the parties. On the other hand, the words in which the first proviso is couched are , I think, naturally and reasonably susceptible of indicating a test less onerous to the applicant. That less stringent test requires the making of a value judgment as to the broad merits and demerits of the appellant as a lessee based on an objective assessment of the appellant's whole conduct and overall performance of its contractual obligations during the currency of the lease. Such an appraisal must take into account the length of the appellant's tenancy and the full range of its obligation as a lessee. In weighing the significance of such breaches as may have occurred relevant considerations will include the nature and extent of any breach, the frequency of its occurrence, and the appellant's response or lack of response to the respondents' complaints and its insistence upon strict compliance by the appellant."

14. If one were to attempt to make an appraisal of appellant's conduct as suggested by by Hoexter AJ, to coin a phrase, is that 'its conduct was long on default and short on performance' The appellant was far from being a model lessee and correspondence presented by the respondent exchanged during the existence of the lease confirms the undesirable conduct of the appellant.
15. Having regard to all its breaches and more particularly where it failed to make any payment of rentals since February 2020 as stated in the judgment, the nature, extent and frequency of the breaches justifies the forfeiture of the applicant's rights of renewal.

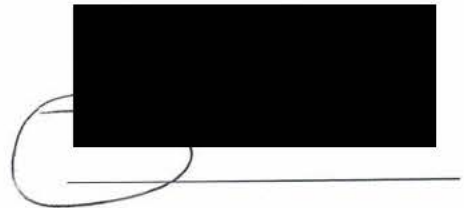
16. *There are no grounds which would justify the application of a "less stringent test" as the applicant tries to claim from the OK Bazaars dictum.*

17. The intervening parties are not parties before this court in the application for leave to appeal and that puts an end to the applicant's case in that regard.

Conclusion

18. In light of the above, the threshold contemplated in section 17 (1) (a) (I) of the act has not been met by the applicant and there are no reasonable prospects that another court would arrive at a different conclusion.

19. In the result the application for leave to appeal is dismissed with costs including costs including costs of counsel.

A handwritten signature in black ink, which appears to be 'Selby Baqwa', is written over a solid black rectangular redaction box. A horizontal line is drawn below the signature.

SELBY BAQWA J

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

Date of Hearing:

Judgment delivered: 31 MARCH 2025

APPEARANCES:

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