

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

Case number: 2023/014196

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

In the matter between:

DAYAL CONSULTING (PTY) LTD

Applicant

and

**THE UNLAWFUL OCCUPIERS OF UNIT [...]
M[...] B[. .] HEIGHTS**

First Respondent

**THE UNLAWFUL OCCUPIERS OF UNIT 6[...]
M[...] B[. .] HEIGHTS**

Second Respondent

**RUI MIGUEL DE FIGUEIREDO N.O.,
THE TRUSTEE FOR THE TIME BEING
OF THE LWWS HOLDING TRUST WITH
REGISTRATION NUMBER IT3059/04(T)**

Third Respondent

TANYA ROCHA N.O. THE TRUSTEA FOR THE TIME BEING OF THE LWWS HOLDING TRUST WITH REGISTRATION NUMBER IT 3059/04(T) MARIA DA CONCICAO DE FREITAS VASCONCES N.O., THE TRUSTEE FOR THE TIME BEING OF THE LWWS HOLDING TRUST WITH REGISTRATION NUMBER IT 3059/04(T)	Fourth Respondent
MARIO ALEXANDRE DE FIGUERIEDO ROCHA	Sixth Respondent
REVENUE ASSET PROTECTION (PTY) LTD	Seventh Respondent
REDLEX 297 (PTY) LTD	Eight Respondent
EKURHULENI METROPOLITAN MUNICIPALITY	Ninth Respondent

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

[1] The First to Fourth, Sixth and Seventh Respondents ('the Respondents') launched an Application for Leave to Appeal against the whole of the judgment and order evicting them and any persons claiming right thereto and/or all those that occupy the properties, including their family servants and/or employees from the immoveable properties being *UNIT [...] AND UNIT 6[...] M[...] B[. .] HEIGHTS* physically situated at *2[...] S[...] STREET, B[...] G[...], B[...]* ("the properties").

[2] My judgment, which was handed down on 7 August 2024, extensively deals with not only my reasoning but also my findings.

[3] The Respondents' grounds for leave to appeal are set out in a Notice dated 23 August 2024.

[4] The said application is opposed by the Applicant.

[5] The grounds for Leave to Appeal relied upon are summarized by me as follows:

[5.1] The Court erred in addressing the Head Lease and by prematurely finding it to be invalid;

[5.2] The Court erred and misdirected itself in not attaching sufficient weight to the fact that the signing of the resolution took place in the presence of the co-trustee when Mr. Wurdeman appointed Ms. Tanya Rocha as agent.

[5.3] The Court erred in underestimating the significance of the auction pack.

[5.4] The Court erred in not fully applying the principle of *huur gaat voor koop*.

[5.5] The court erred and misdirected itself in not considering section 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969, particularly considering the Applicant's knowledge of the lease.

[5.6] The court erred in not fully applying *dolus eventualis* in relation to the Applicant's knowledge of the lease;

[5.7] The Court erred in overlooking the requirement for proper cancellation of existing leases before an eviction order can be granted.

[5.8] The Court erred in disregarding the several disputes of fact that warranted a referral to oral evidence or trial;

[5.9] The court erred in not sufficiently exploring the just and equitable considerations in the context of the residential nature of the units;

[5.10]. The court erred in not conducting a more detailed examination of the various lease agreements particularly the right of first refusal and deemed offer provisions in the Head Lease.

[5.11] The Applicant's *locus standi* to challenge the validity of the head lease and its internal affairs should be reconsidered;

[5.12]. The court erred in not exploring the video evidence.

[5.13] The court erred by not further considering the impact of the pending Section 381 inquiry into the conduct of the liquidators on the validity of the sale and the rights of the parties.

[6] On 14 March 2019 the Applicant purchased the two properties – units [...] and 6[...] on an auction held by the liquidators of Rapiprop 149 Pty Ltd (in liquidation) ("Rapiprop") at M[...] B[. .] properties consisting of 17 units in the Sectional Title Scheme known as M[...] B[. .].

[7] The Applicant took transfer of the properties on the 9th of October 2020, and they are now held by Sectional Deeds of Transfer ST29433/2020 and ST29436/2020 respectively.

[8] The Applicant is accordingly the registered owner of the two units (the Respondents acknowledge the Applicant's ownership of the units) and is entitled to claim eviction if the Respondents had no right to occupy the said units.

[9] If the occupiers – the Respondents - had raised no valid defence in law and if all the requirements of section 4(8) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ("PIE Act") had been met an eviction order had to follow.

[10] The Respondents opposed the eviction application and claimed that a long-term lease gave them the right to occupation of these units.

[11] The Respondents alleged that the Head Lease and the Sub-Leases are long leases subject to Section 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969 ("the Act").

[12] In terms of Section 1(2) of the Act no lease of land which is entered into for a period of not less than ten years or for the natural life of the lessee or any other

person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period of the lease amount in all to not less than ten years, shall, if such lease be entered into after the commencement of this Act is valid against a creditor or successor under onerous title of the lessor for a period longer than ten years after having been entered into, unless-

- (a) it has been registered against the title deeds of the leased land;
or
- (b) the aforesaid creditor or successor at the time of the giving of credit or the entry into the transaction by which he obtained the leased land or a portion thereof or obtained a real right in respect thereof as the case may be, knew of the lease.

[13] It is common cause that the Head Lease and Sub-Leases were not registered against the title deed of the land. The question to be answered in the absence of registration against the title deeds of the properties, to give validity to the leases, is whether the Applicant at the time of purchasing the properties knew of the long leases.

[14] Knowledge of a lease is insufficient. The Respondents had to prove that the Applicant had actual factual knowledge of a long lease which would have endured und 2060 with a further option of 30 years of renewal.

[15] It is abundantly clear that although reference was made to an *apparent* Head Lease, the units were sold:

- i) without any leases in place and that
- ii) the content of paragraphs [15.1] to [15.7] here in below dictate against the principle of *dolus eventualis* in relation to the Applicant's knowledge of the lease as the only requirement for the operation of the doctrine is actual knowledge of the Applicant of the prior personal right of the Respondents, which was not established and proven by the Respondents:

[15.1] the referral in the information pack to the sale of individual units with no lease –

Units to be sold individual mean without any leases in place." (my underlining)

[15.2] The interpretation of the written words in Clause 2.6 from the extract from the Conditions of Sale – Annexure A, which were confirmed by the parties who initialled the inserted written words.

"*TRANSACTION DETAILS*", between the purchasers and the liquidators of Rapirop depicts in writing clearly that the properties were sold subject to no lease." (my underlining)

[15.3] Confirmation by the attorneys, Messrs Van der Meer & Schoonbee, representing the purchaser of another unit, namely unit [...] in M[...] B[. .] Heights who wrote a letter dated 2 November 2021 to the trustees of LWWS Trust that the sale of the properties took place subject to no lease.

[15.4] No claim for the Poison Pill lease had ever been formally lodged with the liquidators of Rapirop in accordance with insolvency proceedings despite the effective date of liquidation of Rapirop being 18 June 2018.

[15.5] LWWS Trust did not made any attempt to prove the claim of the LWWS lease through due process;

[15.6] LWWS Trust did not object to the draft Liquidation and Distribution Account of Rapirop which disregarded the said claim.

[15.7] Clause 10.2 of the Head Lease with the LWWS Trust which states:
... will have no right to cancel the lease and/or Head Lease or any parts of this agreement" (my underlining)

is clearly indicative of the illogicality and absurdity of the said lease, where it states that the lessor will have no right to cancel the lease agreement. This clause is clearly designed to procure occupation in perpetuity at the expense of the creditors and the *bona fide* purchaser.

[16] The Respondents had to establish a personal right over the properties. This I found the Respondents had failed to do as:

[16.1] a long lease was not registered against the title deeds and

[16.2] actual knowledge at the time of acquiring the property was not established.

[17] The version of the Respondents that a purchaser would purchase properties at an insolvency auction sale subject to a lease running to 2060 with an option to renew until 2090 and with an entrenched no-cancellation clause is implausible and any argument of a *prima facie* case on the Respondents' behalf cannot be sustained.

[18] The existence of the LWWS lease and its operation was furthermore not supported by any material evidence. Such evidence would have strengthened the doctrine of knowledge. The absence of any banking records, rental payments and third-party acknowledgement since 2009 is indicative of the unavoidable conclusion that the lease was created post-fact to prejudice the creditors of Rapirop.

[19] I also considered, as it was raised by the Applicant, the validity of the LWWS Lease signed on 15 November 2009 by the Sixth Respondent (a trustee) and the Fourth Respondent who gave herself out and signed as a trustee of LWWS Holdings Trust. It is evident that the Fourth Respondent only became a trustee in May of 2012 - some three years after signing the Poison Pill Lease. An act of signing and concluding a lease as a trustee prior to the written authority by the Master, cannot be resuscitated by subsequent ratification either by the Master or the Trustee after receipt of the necessary authority.

[20] The Wurdeman resolution also did not aid the Fourth Respondent. It is evident that Mr. Wurdeman, in his personal capacity, nominated constituted and appointed the Fourth respondent, as an agent to act on his behalf with the power of attorney to be his lawful agent in his name, place and stead to attend and generally act on his behalf at all meetings, all administrative functions, all contractual agreements on his behalf in respect of such powers as vested in him as a trustee. Mr. Pereira did not grant the Fourth Respondent any authorization at all. The resolution is accordingly not one that can bind the LWWS Trust. The presence of a co-trustee at the time of granting the said resolution does not alter the fact that the Fourth Respondent was merely an agent of Mr. Wurdeman and not a trustee.

[21] Ms. Tanya Rocha accordingly had no authority to bind the LWWS Holdings Trust at the said time. The LWWS lease could thus not have been validly concluded in 2009 as the Respondents purport to rely on it. It follows that the RAPS lease is also a nullity leaving the Respondents completely stripped of a *bona fide* defence in law. No one can give rights which he himself does not have.

[22] The Respondents' reliance upon the LWWS Head Lease of 2009 and the *huur gaat voor koop* doctrine, namely that the LWWS lease of 2009 trumps the real rights of that of the Applicant as the registered owner armed with the title deeds, is therefore without merit.

[23] The court cannot accept any defence based on the LWWS Head Lease or the RAPS lease raised by the Respondents in this matter over and above that the properties were purchased subject to no leases.

[24] In respect of Mr. Mario Rocha – the Sixth Respondent's report to the Master's Office Pretoria for an investigation into the conduct of the liquidators in terms of Section 381 of the Companies Act it is clear that:

[24.1] the Sixth Respondent is not a creditor of Rapiprop and

[24.2] that the Sixth Respondent has no standing to request such an enquiry;

[24.3] a section 381 enquiry has no bearing on the Applicant as registered owners of the units or the right to occupation.

[25] Furthermore more than five years have elapsed since the appointment of the liquidators and over four years since the sale of Rapiprop's units by the liquidators. The First and Final Liquidation, Distribution and Contribution Account of Rapiprop was published in 2021, and no objection thereto was filed of record.

[26] In assessing the various leases I dealt with:

[26.1] the invalidity of the LWWS Lease,

[26.2] the lack of registration of the long leases and

[26.3] the actual knowledge of the existence of long leases.

The above said issues were raised by the Applicant and the Respondents and had to be considered in detail to assess whether the Respondents had

succeeded in proving a personal right and a *bona fide* defence. In dealing with the LWWS Lease I had to make a finding on the signature thereof by the Fourth Respondent who in 2009 was not a trustee but an agent of Mr. Wurdeman. I had arrived at the conclusion that the Fourth Respondent's signature as a trustee when she was in fact not a trustee was not only against the law but could also not be rectified after the fact. No declaratory relief was granted despite the court having formed a definite view on the validity of the LWWS lease.

[27] In respect of the cancelation of the said LWWS lease same was canvassed in my judgment. The Respondents furthermore had to first establish actual factual knowledge of the long lease for cancellation to come into play and for the principle of "*huur gaat voor koop*" to apply.

[28] The Respondents in their answering affidavit referred to video evidence however the court was never presented with such evidence, nor did the Respondents seek leave to present the evidence. If this evidence was material and essential to establish and confirm the Respondents' personal right the Respondents lack in presenting the evidence speak for itself.

[29] The Applicant as registered owner of the units also has the *locus standi* to challenge the validity and the actual knowledge of the long leases as these defences raised by the Respondents need to be proved by them for them to successfully avoid an eviction order.

[30] I am further of the firm view that there are no disputes of fact raised on the papers, to the contrary the issue of facts on the affidavits were clear, crisp and the court was able to assess the eviction application without difficulty. It is well-known that legal practitioners often argue that a dispute of fact exists where there is none.

[31] . The test to be applied in an Application for Leave to Appeal is set out in section 17(1)(a) of the Superior Courts Act 10 of 2013 which provides that:

"(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;*

[32] The test in an application for leave to appeal prior to the Superior Courts Act was whether there were reasonable prospects that another court may come to a different conclusion. Section 17 (1) (a) has raised the proverbial bar for an Applicant in an application for leave to appeal. The test whether an appeal has any prospect of success should be applied in accordance with the specific wording of the Superior Courts Act 10 of 2013. The question that this court has to answer is whether another court would come to a different conclusion. This implies a certainty. It has to be established in an application for leave to appeal whether another court, being presented with the same issues will come to another decision. (my underlining)

[33] Bertelsmann J, correctly pointed out in *The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC)* at para 6:

*'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others 1985 (2) SA 342 (T)* at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'*

[34] In *MEC for Health, Eastern Cape v Mkhita 2016 JDR 2214 (SCA)* the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found as follows in paragraphs [16] to [18]:

*"[16] Once again it is necessary to say that **leave to appeal**, especially to this court, **must not be granted unless there truly is a 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 is some other compelling reason why it should be heard.*

*[17] An applicant for leave to appeal must convince the court 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. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.***

*[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. **Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel.*** (my emphasis)

[35] Leave to Appeal should accordingly be refused if an appeal has no prospect of success.

[36] I am of the firm view and persuasion that another court would not come to a different conclusion and there is no compelling reason to grant leave to appeal.

ORDER

(1) The First to Fourth, Sixth and Seventh Respondents' Leave to Appeal is refused;

(2) The First to Fourth, Sixth and Seventh Respondents are ordered to pay the Applicant's costs, jointly and severally, the one paying the other to be absolved.

**S VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicant: Adv T Lautré
Instructed by Kaveer Guinness Inc

For the Respondent: Mr T Dunn
Instructed by TJC Dunn Attorneys
Date of hearing: 24 January 2025
Judgment delivered: 3 February 2025