



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Not Reportable
Case No: 20358/2024**

In the matter between:

DAMELIN (PTY) LTD

Applicant / Defendant

and

SARGAS (PTY) LTD t/a VEGA PROPERTIES

Plaintiff / Respondent

Coram: DA SILVA SALIE, J

Heard on: 27 August 2025

Delivered on: 3 October 2025

Summary:

Leave to appeal – Rule 27(1) upliftment of bar – section 17(1)(a) Superior Courts Act
– stringent threshold – whether applicant showed “good cause” including bona fide

defence with prospects – purported defences (jurisdiction, utilities, rectification, warranties) found to be opportunistic, belated, or contradicted by lease – no reasonable prospects that another court would differ – leave dismissed with costs.

ORDER

- (i) The application for leave to appeal is dismissed.
- (ii) The applicant is ordered to pay the costs of the application for leave to appeal.

JUDGMENT

DA SILVA SALIE, J

Introduction:

[1] This is an application by the defendant, Damelin (Pty) Ltd (“Damelin”), for leave to appeal against my judgment delivered on 15 May 2025, in terms of which the application for the upliftment of the bar was dismissed with costs.

[2] The plaintiff in the action proceedings, Sargas (Pty) Ltd t/a Vega Properties (“Sargas”), instituted action against Damelin for arrear rental in the amount of R1 160 281,20 together with ancillary relief. The lease agreement relates to the leased premises situate in Observatory, Cape Town utilised as Damelin’s campus.

[3] Damelin failed to deliver its plea to the summons within the prescribed time however subsequently filed its plea. Given that it was out of time, it sought leave from this Court to uplift the bar. I found that Damelin had failed to meet the threshold under Rule 27(1) and was not persuaded that it had shown a bona defence with prima facie prospects of success. In the result, I dismissed the application with costs.

Application for leave to appeal:

[4] Damelin now seeks leave to appeal to the Full Court of this Division, alternatively, to the Supreme Court of Appeal. It is contended that I erred by applying:

- (i) An overly stringent test for the upliftment of the bar.
- (ii) Imposed too heavy a burden upon the applicant to demonstrate its defences.
- (iii) The interests of justice warranted a different outcome.

[5] The test for leave to appeal is trite. Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave may only be granted where the court is of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard. The threshold is a stringent one, intended to filter out appeals lacking in merit.

Grounds for leave to appeal:

[6] The grounds of appeal substantially argue the same issues considered in the main application. The submissions in the main application were considered and rejected, upon detailed consideration of the affidavits filed in the application, the

pleadings, the lease agreement, and the purported defences: that the amounts for utility charges (water and electricity consumption) in respect of the portion of the leased premises were not accurate as well as the additional defence (raised in the supplementary affidavit) that Sargas had made warranties regarding signage and the Millpark Business School, the breaches of which resulted in damages suffered by Damelin.

[7] The jurisdictional defence was abandoned during the hearing of the main application as well as during this application. The application for upliftment of the bar proceeded on the utility charges issue.

[8] Damelin claims that it had been incorrectly charged for the utility charges and as it had not received proof of such charges, it therefore could not accept same as accurate. Sargas has shown that electricity and water meters have been installed at the premises and further, that it sent Damelin monthly reports relating to both the water and electricity meters.

[9] The proverbial pinched shoe for Damelin was that in the lease agreement, Damelin is precluded from raising a claim to remission of rental and set off as a defence. At clause 16 of the agreement, Damelin agreed that it would not be entitled to withhold rental, in that the rental shall be paid in advance on the first day of each and every month, without deduction or demand. In other words, amounts in respect of water and electricity which it considered as having been overcharged, can in any event not be set off against rental due. Whilst other remedies lay open to Damelin to pursue its possible claim in respect of what it considers possible inaccurate charges; these do not include the withholding of rental. A possible claim for overcharged municipal charges does not amount to a specified amount and cannot be considered as a bona fide defence to the liquid claim under the lease agreement for outstanding rental.

[10] In order to overcome the hurdle aforesaid, Damelin alleged in its supplementary affidavit that it has additional defences which it would raise in the action proceedings, and which arise from the breach of the warranties given by Sargas prior to the conclusion of the lease agreement. As a result of these alleged breaches, Damelin would be entitled to commensurate rental remission and a counterclaim for contractual damages.

Rectification of lease agreement defence – alleged warranties re signage and Milpark Business School:

[11] Damelin alleged that Sargas provided it with the express warranty that all municipal licenses and approvals for its signage would be obtained by Sargas. This is though at odds with the non-variation clause in the agreement and also that all signs, notices, billboards or advertisement requiring municipal approval and consent must first be obtained by a tenant, who will be responsible for all and any costs in relation thereto. It also alleged that Sargas warranted that the portion of the premises occupied by Milpark Business School was merely used as an exam centre, however, that it had come to Damelin's attention that numerous students were being diverted from Damelin to the Milpark Head Office which resulted in loss of student registration.

[12] To get around the above clause, Damelin claimed that it would seek rectification of the lease agreement. In other words, that relief would be sought for the lease agreement to be amended to record these warranties. I was also mindful that whilst there was numerous correspondence exchanged between the parties, however, nowhere is reference made to the alleged breaches of express warranties. With reference to the supplementary affidavit, there is nothing to explain what the scope of the signage warranty was, why it was not included in the lease agreement and why it had only been raised for the first time in the supplementary affidavit shortly before the hearing of this matter.

[13] It is alleged on behalf of Damelin that because of signage failure, it placed it in breach of the conditions imposed by the regulations of the Department of Higher Education and the Council for Higher Education, which mandate that all higher education institutions must erect appropriate signage. There is nothing in the papers before me to suggest that this alleged signage breach resulted in Damelin failing to obtain its accreditation to run courses. Signage is technical in nature and has various rules and regulations attached to it. Furthermore, Damelin did not seek rectification of clauses 6.24 - which recorded its acknowledgement that the landlord gave no warranties or assurances that such licences required by the municipality will be granted. Clause 7.3 records that the landlord did not warrant that the tenant will be granted licences in respect thereof for the conduct of its business or that its licences will be renewed.

[14] Damelin's claim that Sargas warranted that the portion of the premises occupied by Milpark was only for an exam centre, and not for trading, is not raised with specific reference to the clause in the agreement it seeks to rectify. Furthermore, the amount of its loss in connection to this claim is unliquidated.

[15] The applicant further argues that I erred in rejecting what it describes as the "Milpark warranty" defence, contending that it raises disputes of fact requiring ventilation at trial. This submission cannot be sustained. The so-called Milpark issue was not raised in the defendant's (purported and late filed) plea at all but was introduced belatedly for the first time in a supplementary affidavit to the upliftment application.

[16] A defence that is absent from the plea cannot properly form the basis of "good cause" under Rule 27(1). The court's task is to assess whether the plea itself discloses a bona fide defence with some prospects of success. Allegations raised only in supplementary affidavits, not reflected in the plea, do not advance the defendant's case. Indeed, they underscore the opportunistic and after-the-fact manner the defendant has attempted to resist the plaintiff's claim.

[17] Even if one were to consider the Milpark allegations, they are unsubstantiated, raised for the first time some time into the litigation, contradicted by the express lease provisions, and expressly denied by the plaintiff and is not quantified. They therefore fall well short of the threshold of a bona fide defence. My rejection of the Milpark issue was accordingly correct, and no appeal court would find that it demonstrates reasonable prospects of success.

[18] I note the applicant's submission that I erred by dismissing the warranty allegations summarily, without allowing them to be ventilated through oral evidence, and that at this stage the applicant was not required to prove its defence but only to allege facts which, if established, would constitute a defence. This contention overlooks the procedural context. The alleged defences were not raised in the plea but advanced belatedly within the upliftment application, not as part of properly joined issues. Rule 27(1) demands that "good cause" be shown, which requires more than a bare assertion; it requires a defence which is bona fide, and which carries some prospects of success.

[19] Where, as here, the allegations are not only unsupported by any contemporaneous material, but also directly contradicted by the lease provisions, they cannot qualify as triable issues. The dismissal of such defences was not for want of oral evidence but because, viewed against the pleadings, affidavits and the contract itself, they lacked credibility, were raised belatedly, and were opportunistic in nature. To elevate such claims to "good cause" would dilute the threshold set by Rule 27(1) and endorsed by the appellate courts.

Good cause:

[20] In my view, the defences purported to be raised to the claim for unpaid rental were not good in law and do not amount to bona fide defences which carry some prospects of success.

[21] Damelin contends that I imposed an unduly high burden in requiring more than a mere allegation of fact. However, Rule 27(1) requires that the bar may only be uplifted upon “good cause shown”, which demands not only an explanation for delay but also a bona fide defence with some prospects of success. The defences advanced were not only lacking in evidentiary foundation but, more importantly, patently contradicted by the contractual terms.

[22] On the papers before me, the applicant failed to demonstrate the existence of triable issues with prima facie merit. Its attempt to recast the same points in the guise of appeal grounds does not surmount the threshold imposed by section 17(1)(a).

[23] For completeness, I add that this matter does not implicate any wider public interest considerations, nor does it raise a novel legal question or conflicting authority that another court might be called upon to resolve. Section 17(1)(a)(ii) of the Superior Courts Act envisages that leave may be granted in the interests of justice, even absent prospects, but nothing in this case brings it within that ambit. The dispute is fact-bound and contractually determined.

[24] In the circumstances, I am not persuaded that there are reasonable prospects of success on appeal. Nor does the application disclose any compelling reason, within the meaning of section 17(1)(a)(ii), why the appeal should be heard. This matter raises no novel question of law, no conflict of authority, and no issue of general importance. Another court would not come to a different conclusion.

Order:

[25] In the result, I order as follows:

“(i) The application for leave to appeal is dismissed.

(ii) The applicant is ordered to pay the costs of the application for leave to appeal.”

DA SILVA SALIE, J
JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION

Appearances

For Applicant/Defendant: Adv. A J Gevers
Instructed by: Mooney Ford Attorneys

For Plaintiff/Respondent: Adv. B Hansen
Instructed by: BDP Attorneys