

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 26930/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
17 September 2025	
DATE	SIGNATURE

In the matter between:

TAYLA JADE INVESTMENTS CC

Applicant

and

DRD ENTERPRISES (PTY) LTD

Respondent

JUDGMENT

CRUTCHFIELD J

- [1] The respondent in the main application, DRD Enterprises (Pty) Ltd, brings an application for leave to appeal against the whole of my judgment delivered on 24 October 2023. The applicant in the main application, Tayla Jade Investments CC, being the respondent in the leave to appeal application ("the

leave application”), opposes the leave application. The parties are referred to herein as they were in the main application.

- [2] The respondent brings the leave application in terms of s17(1) of the Superior Courts Act, 10 of 2013 (“the Act”), on the premise that the respondent has a reasonable prospect of success in terms of s17(1)(a)(i) or that there is some other compelling reason why the appeal should be heard in terms of s17(1)(a)(ii) of the Act.
- [3] The respondent raised various grounds of argument including the doctrine of *lis alibi pendens*, disputes of fact in motion proceedings as well as the interpretation of jurisdiction clause in lease agreements.
- [4] The respondent, in the main application, declined to deliver an answering affidavit and relied solely on a notice in terms of Rule 6(5)(d)(iii) (“the notice”), articulating various alleged points of law.
- [5] It is apposite to remind the respondent that the choice to deliver a notice in terms of Rule 6(5)(d)(iii) has important consequences, including that averments in the founding affidavit are taken as established facts as there is no competing factual version. See in this regard *Ngomane v Ngomane & Others*¹; *Boxer Superstores Mthatha & Another v Mbenya*²; *Absa Bank v Prochaska t/a Bianca Cara Interiors*³. Similarly in *Minister of Finance v Public Protector & Others*⁴, in which the Court found that a party relying on such a notice may not plead facts or produce evidence in support of the points of law raised in the notice, and which ought to have been placed before the court by way of an affidavit.
- [6] In the absence of an answering affidavit, a court is free to deal with the matter on the points of law and the evidence alleged in the founding affidavit. In the circumstances of the main application before me, where the respondent relied solely on the notice and declined to furnish an answering affidavit, the averments in the applicant's founding affidavit “must be taken as established

¹ *Ngomane v Ngomane & Others* 2021 JDR 2491 (GJ) at paras 4 and 5.

² *Boxer Superstores Mthatha & Another v Mbenya* 2007 (5) SA 450 (SCA) at para 4.

³ *Absa Bank v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) at 514I-G.

⁴ *Minister of Finance v Public Protector & Others* 2022 (1) SA 244 (GP) at [15].

facts by the Court". Furthermore, I am entitled to rely on the content of the founding affidavit.

- [7] In the circumstances, the respondent's attempt to rely on disputes of fact alleged in the notice is wholly without merit as there is no factual version before me other than that articulated by the applicant. As a result of the absence of an answering affidavit, there is no competing factual version from the respondent and a dispute of fact simply does not arise. A court's discretion to order oral evidence or that the matter be referred to trial pursuant to a true and genuine dispute of fact on the papers before it, does not arise in this matter given the absence of an answering affidavit and the respondent's reliance solely on the notice.
- [8] The alleged disputes of fact referred to in the notice do not amount to true disputes facts and the respondent's attempt to rely thereupon is misguided.
- [9] Thus, there is no dispute of fact and the exercise of this Court's discretion to hear oral evidence in the main application as argued by the respondent is without merit.
- [10] As to the respondent's reliance on the ground of *lis alibi pendens*, the respondent argues that the issue of whether the lease was lawfully cancelled or not or whether the lease was repudiated gave rise to the issue of *lis alibi pendens*. This is notwithstanding that the respondent barely relied upon the doctrine in argument in the main application. Before me in the leave application, the respondent argued that the amendment to the pleadings in the Magistrates' Court proceedings did not result in *lis alibi pendens* falling away as the cancellation of the lease remained in issue before me and a court cannot evict an occupant without determining the cancellation.
- [11] The fact is, however, as appears from the cases referred to by me already, that the lawfulness of the cancellation, alternatively the repudiation, is a factual issue and the respondent has not placed any version before this Court. In those circumstances, the applicant's version that it cancelled the lease stands to be accepted and the arguments raised by the respondent, given that they

are arguments relying on facts, do not arise. There is no merit in the *lis alibi pendens* argument raised by the respondent in the leave application.

- [12] As to the issue of the jurisdiction clause in the lease agreement and the interpretation thereof, I dealt with this issue fully in the judgment in the main application and nothing further need be said in this regard. The respondent misconstrued clauses 24 and 22.5, which function to enable the applicant to proceed in “any competent court”.
- [13] In respect of the respondent’s attempted reliance on compelling reasons in terms of s17(1)(a)(ii) of the Act, the respondent relied on factual averments including that there is heavy machinery in the premises and that the respondent will be prejudiced as a result of the eviction order. Once again, there is no version under oath from the respondent that would enable it to rely on compelling reasons of a factual nature. Accordingly, there is no proper basis for compelling reasons of a factual nature to be considered in the leave application.
- [14] In any event, the lease expired by effluxion of time during May 2024 or thereabouts, rendering various of the contentions raised by the respondent to be moot.
- [15] Accordingly, there are no proper grounds demonstrating a reasonable prospect or a realistic chance of success on appeal. There is not a sound, rational basis indicating a reasonable prospect of success on appeal as envisaged in *MEC for Health Eastern Cape v Mkhitha & Another*.⁵
- [16] As to the costs of the leave application, the lease provides for costs of litigation to be on an attorney and client scale. There is no reason to depart from the contractual provision in respect of costs and the costs should follow the order on the merits.
- [17] One further issue remains, being the delay in dealing with the leave application. I heard the main application on 23 October 2023. I delivered a fully

⁵ *MEC for Health Eastern Cape v Mkhitha & Another* (1221/2015) [2016] ZASCA 176 (25 November 2016), paras 16 and 17.

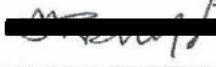
reasoned oral judgment on 24 October 2023. The typed and signed transcript of the judgment was uploaded on CaseLines and published to the parties on about 16 May 2024. The leave application was dated 28 November 2023. The leave application, however, did not come to my attention until 14 August 2025, almost two years after I heard the main application and delivered the judgment on 24 October 2023.

[18] Thereafter, I heard the leave application on 16 September 2025. The delay on the part of the Registrar in the office for leave to appeal in bringing the application to my attention is wholly unacceptable. Furthermore, there is no proper explanation from the respondent as to its failure to prosecute the leave application to finality within a reasonable period of time.

[19] By reason of the aforementioned, in respect of the leave application, I grant the following order:

1. The application for leave to appeal is dismissed with costs on the scale as between attorney and client.

I hand down the judgment.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:	Adv Fernandes instructed by NLA Legal Inc
For the Respondent:	Adv B Gradidge instructed by McCallum Attorneys
Date of the hearing:	16 September 2025
Date of the judgment:	17 September 2025