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

Case no: 22803/24

In the matter between:

OURANON PROPERTIES (PTY) LTD

APPLICANT

and

**JBO WORLDWIDE SUPPLIES (PTY) LTC T/A COCO
SAFAR**

RESPONDENT

Coram: SALLER AJ

Heard: 27 June 2025

Delivered: 24 July 2025

JUDGMENT ON LEAVE TO APPEAL

Saller AJ:

- [1] The respondent seeks leave to appeal against my order and judgment delivered in this matter on 20 May 2025, whereby I ordered that it be evicted from commercial property consisting of Shop 9 and Shop 8 (including storeroom 3[...]), Piazza St John, 3[...] M[...] Road, Sea Point (“the premises”). The respondent also seeks leave to appeal my *ex tempore* order refusing it leave to file a further affidavit, with reasons given as part of my judgment.
- [2] The application is opposed.

THE TEST

- [3] Under section 17(1)(a) of the Superior Courts Act 10 of 2013, I may only grant leave to appeal if I am satisfied that an appeal would have a reasonable prospect of success on appeal or there are compelling reasons which exist why the appeal should be heard.¹
- [4] The respondent advanced no argument addressing the second leg in the context of the present matter. In *Ramakatsa* the Supreme Court of Appeal explained the first leg of this test as follows (my emphasis):²

“... The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

¹ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) para 10.

² *Ibid*, with reference to *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); *MEC Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 para 17

- [5] That is the test that will apply to the grant of leave to appeal the main order for the respondent's eviction from the premises.
- [6] An additional consideration applies to my decision to refuse the respondent leave to file the further affidavit. That decision amounted to an exercise of a true discretion.³ It flows from this that in order to show a reasonable prospect of success on appeal on this aspect, the respondent must show that that I “*did not exercise [my] discretion judicially; was influenced by the wrong principles; misdirected [myself] on the facts; and/or ‘reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles’.*”⁴

THE DECISION TO REFUSE LEAVE TO FILE A FURTHER AFFIDAVIT

- [7] I deal with this aspect first because it logically precedes the main order.
- [8] The further affidavit sought to introduce evidence in relation to three matters: the respondent denied that it had received the applicant's breach notice by email; the it advanced an argument relying on a *domicilium* clause; and, lastly, it traversed the economic impact of eviction on the respondent's employees.
- [9] The respondent takes no issue with the legal test I applied, namely that a party seeking leave to file a further affidavit must provide an explanation of why the affidavit is out of time and satisfy the court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received.

³ *Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited* (CCT 290/20) [2022] ZACC 28; 2023 (12) BCLR 1535 (CC) para 39, with reference to *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 85-6, and *Sealed Africa (Pty) Ltd v Kelly* 2006 (3) SA 65 (W) at para 4.

⁴ *Seebed* para 41, with reference to *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC) para 11.

The explanation

- [10] The respondent provided no explanation at all why evidence relating to the respondent's employees could not be put up timeously as part of the answering affidavit, and why the answering affidavit did not traverse the *domicilium* clause on which the respondent sought to rely.
- [11] The only explanation which the respondent provided in the further affidavit related to the email dated 4 September 2024, enclosing the breach notice, on which the applicant relied. On behalf of the respondent, Mr Liebenberg said that at the time he deposed to the answering affidavit, the respondent "*was unsure whether the email had been received*" and for that reason merely noted the applicant's averments relating to its transmission.
- [12] Mr Liebenberg provided no explanation why he did not investigate the applicant's averment before deposing to the answering affidavit.
- [13] He implied, however, that this was because, he said, the email did not form part of the founding papers. But as I pointed out in my main judgment, that is not correct – and the respondent does not challenge this finding: the email forms part of an annexure to the founding affidavit, this is expressly referred to in the email author's confirmatory affidavit, and the email's content was also traversed in detail in the founding affidavit.
- [14] Mr Liebenberg provided no other explanation for not engaging with the email nor its content in the answering affidavit.
- [15] It may be that when he deposed to his further affidavit, Mr Liebenberg repeated a mistake the applicant made in the reply, overlooking the inclusion of the email in the founding papers and attaching it again to the reply. Of course, at the time of deposing to the answering affidavit, Mr Liebenberg would not have seen the reply, and this, too, cannot serve as an explanation.
- [16] In argument, the respondent sought to rely on Mr Liebenberg being a lay person, suggesting that this may have led Mr Liebenberg to not appreciate the

implications of his averments, or lack thereof, in the answering affidavit. This is not an explanation put up by Mr Liebenberg on affidavit. It also ignores the fact that the respondent has been legally represented throughout.

- [17] Against this background, I found that Mr Liebenberg's explanation was inadequate and stretched credulity. The respondent says in para 2 of its notice of application for leave to appeal that the finding is inappropriate. It does not say why. It also says the finding could not have been made without an allegation to that effect on the record. That was not necessary – it is not a factual finding in the dispute, but represents my assessment of the respondent's explanation in the course of deciding whether to allow the late filing of the further affidavit.

Materiality

- [18] On the question of materiality, I considered the evidence which Mr Liebenberg sought to introduce in support of his denial of the applicant's averments as they related to the emailed breach notice. On an application of the Plascon-Evans rule as set out in *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA), I found that such evidence did not create a *bona fide* dispute of fact in the application, and that his denial consequently amounted to a mere "*bare denial*" and thus lacked materiality.
- [19] In para 1.1 of the respondent's notice, the respondent takes issue with my characterisation of the evidence sought to be introduced as a "*bare denial*".
- [20] The finding related to what Mr Liebenberg said, or rather failed to say, in respect of the email address (p[...]) which on his own version is the primary and actively monitored email address for the purpose of communication between the parties – I will refer to it as the "primary email address". Mr Liebenberg put up no material facts directly addressing the applicant's key averment to the effect that the applicant "*transmitted*" the breach notice to the respondent on 4 September 2024 *inter alia* through an email of Ms Duvenhage addressed to the respondent's primary email address.

[21] Instead, the facts which Mr Liebenberg sought to introduce related to the content of three folders (inbox, spam and deleted items⁵) of the primary email address which he searched on an unspecified date between deposing to the answering affidavit and the further affidavit.

[22] Mr Liebenberg made no effort to link the contents of these folders on that unspecified date to the facts on which the applicant relied, i.e. the transmission of the breach notice by email many months earlier on 4 September 2024.⁶ In other words, the fact that he was unable to locate the email months after it was sent does not, without more, address the question whether it was transmitted.

[23] Consequently, even accepted at face value, the facts which Mr Liebenberg belatedly sought to introduce relating to the primary email address were not facts which substantiated his denial of the applicant's case. That accords with the well-accepted understanding in our law of what constitutes a bare denial.

[24] The respondent also complains, at para 1.1 of its notice, that I placed insufficient weight on the respondent's explanation relating to the email's other two addressees. Mr Liebenberg's averments relating to them also did not create a *bona fide* dispute of fact. On the respondent's version, the email address of the second addressee is dormant, and the third addressee confirmed receiving the email but not forwarding it to the respondent. Neither fact has a bearing on the applicant's reliance on the transmission of the breach notice to the respondent by way of email on 4 September 2024 to its primary email address.

Balancing relevant factors

[25] At para 1.2 of the respondent's notice, the respondent says I placed undue weight on the inadequacy of Mr Liebenberg's explanation.

⁵ It is correct, as the respondent points out, that in my Judgment I referred to the inbox folder. That has no impact on my reasoning.

⁶ The respondent does not deny the email was sent. On Mr Liebenberg's own version in the further affidavit, the third addressee Mr. Dry did in fact receive the email.

- [26] In *Hano Trading*,⁷ the Supreme Court of Appeal affirmed the long-standing principle that the court's leave to file an affidavit late and out of sequence is an indulgence. Leave will be granted only if the party seeking the indulgence has shown good reason. When making that assessment, the court has a discretion to consider the facts of the matter, and "*on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry.*" There can accordingly be no complaint against my granting the explanation put up in the present matter primacy among the relevant considerations.
- [27] The respondent also says I placed insufficient weight on other factors, such as the degree of materiality of the evidence and the balance of prejudice (para 1.2 of the notice), as well as the potential for the healing balm of a costs order. The respondent rightly does not suggest that I did not consider these two factors.
- [28] As regards the materiality of the evidence, as set out above, my assessment of the evidence's lacking materiality in fact militated against granting the respondent leave to file the affidavit.
- [29] As regards the balance of prejudice, I acknowledged that this tilted in the respondent's favour. I also considered the healing balm of a costs order as a factor weighing in favour of granting leave. While I mentioned the respondent's opposition to such an order, I did not consider myself bound.
- [30] On balance, I concluded that the factors speaking against my granting leave to file the further affidavit outweighed those speaking in favour. In my view there is no reasonable prospect that an appeal court will find this to be a decision "*which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles*".

⁷ *Hano Trading CC v J R 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) paras 12 and 13

THE GRANT OF THE EVICTION ORDER

[31] On the main application, I granted an order for the eviction of the respondent from the premises. In its notice of application for leave to appeal, the respondent raises the following grounds of appeal: that I erred in finding that the strict enforcement of the contractual terms in this matter was not contrary to public policy and subsequently not grounds for refusing to enforce its terms (para 3); and that I failed to appropriately balance “*the relevant constitutional imperatives*” (para 5) as well as other considerations (para 4).

Strict enforcement of contractual provisions

[32] With reference to the decision in *Beadica*,⁸ I accepted that there may be circumstances in which contractual terms, or their enforcement, are so unfair, unreasonable or unjust that they offend public policy, and in such a case I would be entitled to refuse to enforce those terms. The respondent did not take issue with my reliance on *Beadica*, and para 3 of the respondent’s notice gives little indication of the grounds upon which it says I erred when applying those principles.

[33] On the facts of the matter before me, I found that the respondent’s hardship had not been elevated to a level of public policy harm: no constitutional rights were implicated, the respondent is not in an exceptionally vulnerable or inequitable position, and there was no bad faith on the part of the applicant. In those circumstances I could not decline to give effect to the relevant contractual terms, and unless those findings are disturbed there is no reasonable prospect of an appeal court holding otherwise.

[34] The respondent expressly challenges only one of these findings. It says (para 4.3 of the notice) that the chronology of events leading up to the cancellation and the manner in which the notice of cancellation was delivered, indicate bad

⁸ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC)

faith on the part of the applicant. The notice does not elaborate, and neither did the applicant's heads of argument.

- [35] The sole allegation of bad faith on the record is at paras 48.6 to 48.8 of the answering affidavit, where Mr Liebenberg says that the respondent has not been shown to be unable to “*carry out the terms of the Lease*” and that the applicant accordingly “*acted in bad faith unreasonably, and prematurely by proceeding with legal action despite the Respondent's rectification of the breach and continued performance under the Lease.*”
- [36] As for rectification of the breach – the respondent unilaterally afforded itself 14 days to rectify the breach. For reasons set out at para 20 of the main judgment, it was not entitled to do so. For reasons set out in para 21, as a matter of fact, it also did not do so. The applicant was therefore entitled to cancel the lease agreements and institute proceedings for the respondent's eviction.
- [37] The respondent's subsequent timeous payments of monthly rental and its ability to do so in the future does not change the legal position. As explained at para 22 of the judgment, valid cancellation of a contract is not undone by a subsequent remedy of the breach.
- [38] Nor can the applicant's strict adherence to the contractual timelines prove bad faith which justifies the court's refusal to enforce those very provisions – such reasoning would be entirely circular.
- [39] Lastly, in heads of argument, the respondent relied on the judgment of Moseneke DCJ in the Constitutional Court's decision in *Everfresh*⁹. In that matter, Everfresh sought to enforce what it said was a contractual right to renewal of its lease (I pause to note that in the present matter, the respondent did not plead such a right). The High Court refused, on the basis that the lease did not specify, fix or make definitively ascertainable the amount of rental

⁹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 72.

payable upon renewal. The High Court also found that there was no duty on the landlord, Shoprite, to negotiate a renewal of the lease in good faith. In the Constitutional Court, Everfresh conceded that the High Court's reasoning accorded with the common law. However, it asked the Constitutional Court to develop the common law to as to impose a duty to negotiate in good faith in such circumstances. At para 72, on which the respondent relies, Moseneke DCJ remarked that contracting parties "*certainly need to relate to each other in good faith*". His remarks are *obiter*, and he expressly declined, at para 73, to decide what this might entail in the context of the case at hand.

[40] In *Beadica* the Constitutional Court comprehensively discussed its previous decisions as they dealt with the question of good faith in contract, including its decision in *Everfresh*. At para 43, the Constitutional Court affirmed that in *Everfresh*, it had declined to develop the common law to impose a duty on parties to negotiate in good faith.

[41] *Everfresh* accordingly does not assist the respondent to establish a duty on the applicant to have negotiated in good faith before cancelling the lease, or launching eviction proceedings.

Balancing of relevant considerations

[42] The respondent further says that in balancing the various considerations, I placed undue weight on the principle of *pacta sunt servanda*, at the expenses of other considerations such as harm to employees (para 4.1 of the notice), the absence of hardship falling on the applicant (para 4.2 of the notice), and the applicant's bad faith (para 4.3 of the notice). I have already dealt with the unfounded allegation of bad faith above. No more needs to be said in that respect.

[43] As regards harm to the respondent's employees, there is no evidence regarding such harm on the papers absent admission of the further affidavit. In any event, as I pointed out at para 49 of the main judgment, nothing said there evidences extraordinary harm.

[44] As regards the absence of hardship on the applicant, it is not a requirement for valid cancellation of a lease agreement, nor for the institution of eviction proceedings, that a landlord demonstrate prejudice arising from the breach.

[45] Lastly, unless the respondent is able to show public policy harm of the kind envisaged by *Beadica*, which it has been unable to do, there is no call for a balancing of competing interests in determining whether to give effect to contractual terms.

Constitutional imperatives

[46] The respondent's notice does not say on which constitutional imperatives it relies. Neither do its heads of argument, nor did its papers. This is not a basis for finding that there is a reasonable prospect of success on appeal.

CONCLUSION

[47] Based on what I have said above, I conclude that the respondent has no reasonable prospect on appeal in respect of, either, my order that it be refused leave to file the further affidavit, nor the main eviction order.

[48] On the question of costs, the applicant sought costs on an attorney-client scale as provided in the lease agreements. The respondent advanced no reason why the lease agreements should not be given effect in this respect.

ORDER

[49] For these reasons, the following order is made:

1. The application for leave to appeal is dismissed.
2. The respondent (the applicant in the application for leave to appeal) is to pay the costs on an attorney-client scale.

K S SALLER
Acting Judge of the High Court

Appearances

For the applicant: Adv Renéé Graham
Instructed by: Werksmans Inc.

For the respondent: Adv Kara Meiring
Instructed by: Fairbridges Wertheim Becker