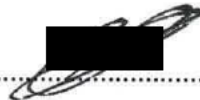


REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
<u>30/7/2026</u>	
DATE	 SIGNATURE

CASE NO: 2025-029781

In the matter between:

MERCAL PROPERTIES CC

Applicant

(REGISTRATION NUMBER: 1999/047219/23)

And

BINYAM TESFAGABIR HAILE

Respondent

(IDENTITY NUMBER: 821001 6409 189)

JUDGMENT – LEAVE TO APPEAL

DREYER AJ:

- [1] This is an application by the Respondent for leave to appeal against the whole of the judgment and order granted by this Court on 4 May 2026. In terms of the order the Respondent was evicted from the premises situated at Shop 1 Jornelle, Court, 33 Melle Street, Braamfontein ("the premises").

The test for leave to appeal

- [2] The test for leave to appeal is set out in Section 17(1) of the Superior Courts Act 10 of 2013 ("the Act"). In terms of Section 17(1)(a) leave to appeal may only be given where the judge or judges concerned are of the opinion that:
- (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.
- [3] In the matter of *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 the Supreme Court of Appeal stated:

[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."*

The Respondent's grounds of appeal

- [4] The Respondent's grounds for leave to appeal is set out in the Respondent's Application for Leave to Appeal dated 25 May 2026. The grounds can be summarised as follows:

- 4.1 First ground – rectification;
- 4.2 Second ground – estoppel;
- 4.3 Third ground – materiality of the breach; and
- 4.4 Fourth ground – disputes of fact concerning the issues of rectification, estoppel and materiality of the breach.

First ground - rectification

- [5] The Respondent contends that the Court erred in finding that the Respondent's case for rectification fails at the requirement of common continuing intention.
- [6] The Respondent is attempting to re-litigate the defence of rectification relied upon, and wishes the Court to revisit factual inferences drawn by this Court.
- [7] The written judgment contains the reasons for the finding and this Court need not elaborate in this regard.

Second ground - estoppel

- [8] The Respondent contends that the Court erred in rejecting the Respondent's reliance on estoppel on the basis that there was no written consent to the renovations.

- [9] Clause 9 of the lease agreement expressly requires the Applicant's prior written consent before any alterations may be made.
- [10] It is common cause that the Respondent made alterations to the premises without the written consent of the Applicant. The Respondent is seeking to rely on oral representations to circumvent clause 9 of the lease agreement.
- [11] The Respondent is again attempting to re-litigate a defence relied upon, i.e. the defence of estoppel.
- [12] The written judgment contains the reasons for the rejection of the Respondent's reliance on estoppel and this Court need not elaborate in this regard.

Third ground – materiality of the breach

- [13] In this regard the Respondent contends:
 - 13.1 the Court erred in finding that the absence of written consent of the renovations under clause 9.1 was itself a material failure to comply with the lease agreement for purposes of clause 19.1.3 of the lease agreement. This conflates the breach with its materiality.
 - 13.2 the Court erred by failing to interpret the lease agreement having regard to its text, context and purpose and, in particular, with regards to the provisions of Section 14(2)(b)(ii) of the Consumer Protection Act 68 of 2008 ("the CPA").
 - 13.3 the Court erred by failing to address engage with the Respondent's threshold submission that the materiality of the breach was part of the Applicant's cause of action, which it was required to allege and prove in its Founding Affidavit.

- [14] Clause 10 of the Schedule of the lease agreement provides *“Be advised that the lease agreement shall be subject to cancellation or review in the event of non-compliance with its terms and conditions.”*
- [15] Clause 10 is a *lex commissoria* and is a departure from the common law. It gives the Applicant the power to cancel the lease agreement in the event of a breach by the Respondent of its terms and conditions.
- [16] Whether a breach has been committed is a matter of interpretation of the lease agreement. In *In North Vaal Mineral Trading Co. Ltd. v Lovasz* 1961 (3) SA 604 (T) it was held *“... a lex commissoria (in the wide sense of a stipulation conferring a right to cancel upon a breach of the contract to which it is appended, whether it is a contract of sale or any other contract). It confers a right (viz to cancel) upon the fulfilment of a condition. The investigation whether the right to cancel came into existence is purely an investigation whether the condition, as emerging from the language of the contract (a question of interpretation), has in fact been fulfilled.”*
- [17] Once it is concluded that the breach committed is one that, in terms of the lease agreement, brings the cancellation clause into operation its seriousness, judged objectively, is irrelevant. In *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) it was held that *“Once there is such a breach, the materiality of the breach is irrelevant and the Court will not enquire into the conscionableness or unconscionableness thereof.”*
- [18] Under the CPA, cancellation clauses will be subject to scrutiny under the provisions in Section 48 relating to unfair, unreasonable or unjust contract terms.

- [19] As already stated above, it is common cause that the Respondent made alterations to the premises without the written consent of the Applicant, in breach of clause 9 of the lease agreement, whereby bringing the cancellation clause into operation. The materiality of the breach is irrelevant.

Fourth ground – dispute of fact concerning the issues of rectification, estoppel and materiality of the breach

- [20] The Respondent contends the Court erred in granting final relief on motion without applying *Plascon-Evans* to the numerous disputes of fact on the papers and, in those situations where the Court did reject the Respondent's version (expressly or impliedly), without finding that the Respondent's version could be rejected on the papers alone.
- [21] The Respondent contends that disputes of fact existed regarding alleged the prior agreement in respect of the renovations, the representations made by the Applicant's representatives and the materiality of the Respondent's breaches.
- [22] This Court evaluated the Respondent's version against the objective evidence being, *inter alia*, the lease agreement, the Schedule to the lease agreement and the documents exchanged between the parties.

Conclusion

- [23] This Court has considered each of the grounds raised by the Respondent. Having done so, this Court is not persuaded that the Respondent has satisfied the test for leave to appeal as set out in Section 17(1) of the Act.
- [24] The Respondent has failed to demonstrate that there is a reasonable prospect of success on appeal, or that there are compelling reasons why the appeal should be heard.

[25] This Court therefore makes the following order:

1. The application for leave to appeal is dismissed.
2. The Respondent is to pay the party and party costs of the application on scale B.


[REDACTED]
E-DREYER

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date for hand down is deemed to be 30 July 2026.

Appearances:

Appearance for Applicant:
Instructed by:

Adv. M Pinder
Joshua Apfel Attorneys

Appearance for Respondent:
Instructed by:

Adv. MCJ van Kerckhoven
Allan Levin & Associates

Date of hearing:

14 July 2026

Date of Judgment:

30 July 2026