



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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|-----|----------------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **24 August 2021** Signature:

CASE NO: 21601/2020

In the matter between:

IZANDLA PROPERTY FUND

PLAINTIFF/RESPONDENT

and

AFRO ARCHITECTURAL CC

FIRST DEFENDANT/APPLICANT

SERGE NZEMBELA

SECOND DEFENDANT/APPLICANT

Coram: **Majavu AJ**

Heard: 13 AUGUST 2021

Delivered: 24 AUGUST 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 24 AUGUST 2021

Summary: Application for leave to appeal against judgment handed down on 31 May 2021, no reasonable prospects that another court would arrive at a

different conclusion, neither are there any compelling reasons for the appeal to be allowed, application dismissed with costs on attorney and client scale, including costs consequent upon the employment of counsel.

ORDER

- (a) Application for leave to appeal is dismissed with costs, on an attorney and own client scale, including costs consequent upon the employment of counsel.

Majavu AJ

Introduction

[1] This is an opposed application for leave to appeal against my judgement handed down on 31 May 2021.

[2] The grounds of appeal can be summarized as follows:

2.1 I erred in reducing the substantive defences raised, to technical quibbles, overly formalistic contentions.

2.2 I erred again in stating that the defendant had failed to state the true nature of its defence.

2.3 It was asserted, quite condescendingly, that I failed to consider the relevance of the fact that the lease upon which the plaintiff/respondent relies was purportedly only concluded 15 July 2019 and allegedly made retrospective to 1 March 2019. It is suggested that it is *improbable, if not ridiculous (sic)* to suggest that the defendants/applicants were in occupation of the premises from 1 March 2019 until 15 July 2019 without any agreement.

2.4 I erred by reading the word “landlord out of context”.

2.5 I failed to question the reliability or credibility of Ms Bisschoff with regard to the remainder of her affidavit, given the what is regarded as an earlier false statement.

2.6 I omitted to summarize the evidence or in the alternative, I misstated the version of the defendants/applicants.

2.7 I erred in deciding the true contractual basis of the dispute simply on the papers without due consideration of the countervailing version of the defendants/applicants

2.8 I erred by raising the bar too high for summary judgement proceedings to the extent that I found that the defendants do not raise a triable issue or bona fide defence; and lastly

2.9 That the amount awarded is different to the one actually claimed.

[3] I do not intend to traverse the grounds in the order and manner in which they were raised, however, I will deal with the thrust and general import thereof and weigh that against the applicable test.

[4] A useful starting point is section 17(1) of the Superior Courts Act 10 of 2013 which states 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 judgements on the matter under consideration,...*"

[5] Principally, the above is the applicable framework or lens through which any application for leave to appeal must be assessed.

[6] This court approved, what one can refer to as a more *stricter approach* lens, when adjudicating an application for leave to appeal: This was in the matter of the Acting National Director of Public Prosecution v Democratic Alliance (Society for the protection of our Constitution and Amicus Curiae)¹:

¹ 2016 JD R1211 (GP at page 13)

The Superior Courts Act has raised the bar for granting leave to appeal in the Mount Chevaux (IT 2012/28) v Tina Goosen & 18 others, Bertelsmann J held as follow(s):

“ it is clear that the threshold for granting leave to appeal against the judgement of the High Court has been raised in the new act. The former test where 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) as a 342 (T) at 343H. The use of the word “would” in the new statute indicates a major of certainty that another court will differ from the court whose judgement is sought to be appealed against” [emphasis added]. This new (stricter test approach), which I am bound by, was confirmed by the Supreme Court of appeals (SCA) in *S v Notshokovu*² , *albeit* in criminal proceedings, however in my view and per force of reasoning, the same principle is of equal application in the civil context. In that case the court had this to say:

“an appellant, on the other hand, faces a higher and stringent threshold, in terms of the (superior courts) act compared to the provisions of the repealed Supreme Court Act 59 of 1959. (See Van Wyk v S,

² 2016 JDR 1647 (SCA)

*Galela v S [2014] ZASCA152; 2015(1)
SACR584(SCA) para [14]*"

[7] I deemed it appropriate to sketch the applicable test against which this application would be adjudicated. I will now deal with the grounds on which this application is mounted, against the applicable test. It also bears mentioning at this early stage that, the need to obtain leave to appeal is a necessary filter, through which unmeritorious appeals do not consume limited and overstretched judicial resources. It is incidentally for the same reasons that I, found that, permitting this particular matter to proceed to trial in circumstances where in my view, that the underlying indebtedness remained undisturbed, notwithstanding technical points, lacking in merit, raised by the defendants. The same mischief seems to be exactly what the introduction of the regime of an application for leave to appeal is meant to obviate.

Turning to the grounds

[8] I determined the matter on the papers, without any need to refer any aspect to oral evidence, as the issues were indeed resolvable on the papers. I did not ignore the version of the defendants as critiqued. To the contrary, I considered it and weighed it against that of the plaintiff, as well and the other supporting documents at my disposal. The fact that I arrived at a conclusion different to the one the defendants would have preferred, does not justify such an inference. I remain satisfied that a written lease agreement had in fact been concluded between the parties, and not with another party, with reference to the

Plaintiff, as the Defendants assert and further that such an agreement was indeed breached and that the requirements for summary judgement were met by the plaintiff.

[9] A blanket denial that the defendants concluded the lease agreement with the plaintiff does not, in and of itself morph into a dispute of fact, when *ex facie* the attached lease agreement, as well as the surety agreement, the existence of such an agreement is unassailable. There is no merit in the assertion that the Plaintiff is non-suited on account of a denial that the lease agreement was concluded with it, thus this ground must fail. This seems to be the main defence (and I guess, the main ground) of the applicants. This was made plain by counsel who indicated that if another court finds that the Plaintiff is non- suited, that is the end of the matter. Conversely, one must accept that if it is found that the Plaintiff is not non-suited, then that is also game over for the defendants. I do not find that another court would come to a different conclusion.

[10] In relation to the ground relating to the difference between the amount claimed and the amount awarded, **R 334 681, 95**, as opposed **R 334 618, 95** (as asserted in the notice being an incorrect amount), that is plainly a non-material typo, which is capable of correction either *mero motu* by the Court or on application by either of the parties in terms of rule 42 of the Uniform Rules of Court.

[11] Firstly, the amount stated in the application for summary judgement is **R 334 681,95**, and that is repeated in prayer section/relief sought (para 6) under “**claim 1**”.

[12] Secondly, the same figure of **R 334 681,95** is repeated in the affidavit in support of the application for summary judgement deposed to by Ms Jacqueline Bisschoff (“Bisschoff”) (at paragraphs 5.3 read with 6.1, the latter in turn refers back to the same amount as claimed in the summons), who is self-evidently the relevant portfolio manager employed by Broll Properties, as the plaintiff’s duly authorized management agent.

[13] Thirdly, the only issue, which is now being elevated to a self-standing ground of appeal on the basis of the court being *functus officio* arises from the prayer section of Bisschoff’s affidavit in sub paragraph 1, where the amount is reflected as **R 334 618,95** instead of **R 334 681,95**.

[14] Fourthly, the amount awarded is not out of kilter with the amount claimed even in the summons (POC) as it is correctly reflected as **R 334 681,95** and repeated in the prayer section under “claim 1” sub paragraph 1 as **R 334 681,95**.

[15] Accordingly, in my view, this clear typographical error, when one reads all the pleadings purposefully, cannot be a self-standing ground of appeal. In any event, this ground, formulated as such must fail. I am not persuaded that even on this score, another court would come to a different conclusion.

[16] To the extent that I found that the new rule 32 requires of the court to assess whether the pleaded defence as generally advanced, is a genuine defence or at the very least, is advanced genuinely, as opposed to a sham and put up for purposes of delay³, the court said the following at para 23:

“ a court seized with an application for summary judgement is not charged with determining the substantive merit of the defence, nor with determining its prospects of success. It is only concerned with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham for purposes of obtaining delay”

[17] I have already found that the “wrong party” defence is not sustainable, having found that a written lease agreement was concluded between the parties. So, to the extent that the applicant hangs its ground on it, I remain unpersuaded (even on a relaxed test), that another court would arrive at a different conclusion than the one I arrived at previously.

Conclusion

[18] It would therefore not be in the interests of justice to permit un-worthy defendants to marshal this matter further on to trial. I was also unable to find any other compelling reason in favour of granting leave to appeal.

[19] For these reasons, I make the following order:

Order

³ Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) at para 23

(a) The application for leave to appeal is dismissed with costs, on an attorney and own client scale, including the costs consequent upon the employment of counsel.

Z M P MAJAVU

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	13 August 2021
JUDGMENT DATE:	24 August 2021
FOR THE PLAINTIFF:	Adv B P Geach SC
INSTRUCTED BY:	Rhina Rheeders Attorneys Inc.
FOR THE DEFENDANT :	Adv JG Dobie
INSTRUCTED BY:	Reaan Swanepoel Attorneys