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

CASE NO: 2020/13298

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

[10 NOVEMBER 2023]
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SIGNATURE

In the matter between:

APOSTOLIC FAITH MISSION SOUTH AFRICA, RANDBURG ASSEMBLY	Applicant

and

ARROWHEAD PROPERTIES LIMITED	First Respondent
EXCELLERATE REAL ESTATE SERVICES (PTY) LTD t/a JHI PROPERTIES (PTY) LTD	Second Respondent
CUMULATIVE PROPERTIES LTD	Third Respondent
UNLOCKED PROPERTIES 23 (PTY) LTD	Fourth Respondent
MAFADI PROPERTY MANAGEMENT (PTY) LTD	Fifth Respondent

J U D G M E N T
(LEAVE TO APPEAL)

NEL AJ

[1] This is an application for Leave to Appeal against a portion of the Order granted by me in an opposed application instituted by the Applicant.

[2] The Applicant seeks leave to appeal to the Full Court of the Gauteng Provincial Division, alternatively the Gauteng Local Division, alternatively to the Supreme Court of Appeal.

[3] The portions of the Order appealed against are the following:

[3.1] The dismissal of the Applicant's claim for a reconciliation and subsequent payment of a rental deposit;

[3.2] The payment by the Applicant of the costs of the First, Second and Third Respondents; and

[3.3] The payment by the Applicant of the costs of the Fourth Respondent as from 5 November 2020 up to, and including the date of the hearing.

[4] The Applicant does not seek leave to appeal against the portion of the Order in which I ordered the Fourth Respondent to pay the Applicant's costs up to 14 November 2020 on the Magistrate's Court scale.

[5] In the Opposed Application the Applicant sought the following relief:

[5.1] That the Respondents are ordered to pay, jointly and severally, the one paying to pay the other to be absolved, the amount of R243 533.07 to the Applicant;

[5.2] In the alternative:

[5.2.1] that the Respondents be ordered to provide the Applicant, within 7 days from the date of the Order, with a reconciliation account reflecting all transactions, including the rental deposit, in respect of the rental administration relating to the Applicant's lease of certain premises, for the period from 1 October 2014 to 28 February 2019;

[5.2.2] that the Respondent or Respondents who are in possession of the Applicant's rental deposit or the balance thereof, be ordered to make payment of that amount to the Applicant within 7 days from the date of delivery of the reconciliation account;

[5.3] That the Respondents pay, jointly and severally, the one to pay the other to be absolved, the costs of the Application on the scale as between attorney and own client;

[5.4] Further and/or alternative relief.

[6] After having read the papers and having heard argument on behalf of all of the parties, I granted an order in the terms as already set out above in paragraphs [3] and [4].

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

[7] The Applicant has raised the following grounds of appeal (supported by submissions relating to the various grounds of appeal) in its Notice of Application for Leave to Appeal:

[7.1] That I erred in granting the relief as set out in the Order, in respect of which the Applicant seeks leave to appeal ("the First Ground of Appeal").

[7.2] That I erred in failing to "*properly apply legal principle and requirement*" that a tenant in the position of the Applicant, who paid a rental deposit to a lessor, is entitled to receive a complete reconciliation from the lessor regarding the rental deposit held by the lessor ("the Second Ground of Appeal").

[7.3] That I erred in ordering the Applicant to pay costs, after "*incorrectly making observations and findings regarding the obligation to provide reconciliation"* to the Applicant relating to the rental deposit paid by the Applicant ("the Third Ground of Appeal").

[7.4] That I erred in failing to find that the Respondents only reacted to providing information and making payment after receipt of the Applicant's application, and that the Applicant was indeed substantially successful, "*after incorrectly making observations regarding the duty to provide a reconciliation*" ("the Fourth Ground of Appeal").

[8] At the hearing of the Application for Leave to Appeal the Applicant's counsel only made certain specific submissions in respect of the Second Ground of Appeal which I will deal with below.

[9] Despite submissions only being made in respect of the Second Ground of Appeal, I have in any event considered all of the grounds of appeal as raised in the Notice of Application for Leave to Appeal, and will deal with them separately below.

THE RELEVANT FACTUAL MATRIX OF THE APPLICATION

[10] On 4 July 2014 the Apostolic Faith Mission and the First Respondent, Arrowhead Properties Limited ("Arrowhead") concluded a written Lease Agreement ("the First Lease Agreement") in terms of which the Apostolic Faith Mission Leased Premises situated in Randburg, to be used as a church ("the Leased Premises"), from Arrowhead.

[11] In terms of the First Lease Agreement the Apostolic Faith Mission was required to pay a deposit of R 243 533.07 to Arrowhead, which deposit amount was duly paid by the Apostolic Faith Mission.

[12] Prior to the expiry of the First Lease Agreement, the Leased Premises were sold by Arrowhead to the Third Respondent, Cumulative Properties Limited ("Cumulative"). The Apostolic Faith Mission and Cumulative concluded a written Lease Agreement ("the Second Lease Agreement"), which Lease Agreement would endure for one year.

[13] The Leased Premises were thereafter sold by Cumulative to the Fourth Respondent, Unlocked Properties 23 (Pty) Ltd ("Unlocked"). During the

period that the Leased Premises were owned by Arrowhead and Cumulative, the Second Respondent, Excellerate Real Estate Services (Pty) Ltd t/a JHI Properties (Pty) Ltd ("Excellerate") was appointed as the Managing Agent for Arrowhead and Cumulative.

[14] During the period that the Leased Premises were owned by Unlocked, the Leased Premises were managed by the Fifth Respondent, Mafadi Property Management (Pty) Ltd ("Mafadi").

[15] The lease agreement in respect of the Leased Premises terminated on 31 January 2019, and the Apostolic Faith Mission vacated the Leased Premises, by 28 February 2019.

THE REASONING AS SET OUT IN THE JUDGMENT

[16] The Apostolic Faith Mission is clearly entitled to repayment of the rental deposit amount paid by it as security in respect of the Leased Premises, provided that it had complied with its contractual obligations.

[17] It was not disputed by any of the Respondents that the rental deposit amount, or such portion thereof that may be owing to the Apostolic Faith Mission was to be repaid to the Apostolic Faith Mission.

[18] Unlocked accepted that it is the particular Respondent that has the obligation to repay the rental deposit amount to the Apostolic Faith Mission, it being the ultimate Lessor.

[19] The initial amount of the rental deposit that would have been repayable to the Apostolic Faith Mission was R243 533.07.

[20] Unlocked was therefore obliged to repay the rental deposit, less any amounts that may have been required to discharge the Apostolic Faith Mission's obligations within a period of three months after the termination of the Lease Agreement (or the vacation of the Leased Premises).

[21] In the Replying Affidavit of the Apostolic Faith Mission, it was stated that Cumulative had indicated in correspondence that an amount of R42 174.86 would be deducted from the rental deposit amount of R243 533.07 leaving a balance of R201 358.21, which would be paid over to Unlocked.

[22] In the Replying Affidavit, the Apostolic Faith Mission described the amount of R201 358.21 as "*in fact the exact amount being the remainder of Applicant's deposit*". There was also reference to the deduction of the amount of R42 174.86 from the initial deposit amount in the Founding Affidavit of the Apostolic Faith Mission.

[23] The Apostolic Faith Mission clearly accepted that the amount transferred to Unlocked, being R201 358.21 was the rental deposit amount that would be repayable by Unlocked to the Apostolic Faith Mission at the termination of the lease period.

[24] The Apostolic Faith Mission also accepted that in terms of the Second Lease Agreement, Unlocked was entitled to deduct any arrear amounts from the rental deposit amount.

[25] In the Answering Affidavit, Unlocked alleged that the Apostolic Faith Mission was in arrears in an amount of R143 586.68. In the Apostolic Faith Mission's Replying Affidavit filed in response to Unlocked's Answering Affidavit, the

Apostolic Faith Mission admitted that it was indebted to Unlocked in an amount of R81 974.74.

[26] In the Replying Affidavit, the Apostolic Faith Mission therefore contended that the amount due to it was R162 133.53, together with interest thereon. Such amount was clearly calculated by deducting the admitted arrears due to Unlocked (R81 974.74) from the initial rental deposit amount of R243 533.07.

[27] Such calculation ignored that an amount of R42 174.86 had already been deducted from the rental deposit of R243 533.07, leaving the balance of the rental deposit paid to Unlocked as being R201 358.21, which the Apostolic Faith Mission had already accepted as being the rental deposit amount.

[28] The admitted indebtedness to Unlocked of R81 974.74 should accordingly have been deducted from the amount of R201 358.21, and not the amount of R243 533.07. Upon a proper calculation, the deposit rental amount repayable to the Apostolic Faith Mission by Unlocked as alleged by the Apostolic Faith Mission, was R119 383.47 and not R162 133.53.

[29] As at 14 November 2020, Unlocked had made payment of an amount of R149 254.77 to the Apostolic Faith Mission. Unlocked alleged in a Supplementary Affidavit that the Apostolic Faith Mission had therefore been paid "*the full balance of the deposit that is due to it*".

[30] In the Replying Affidavit, the Apostolic Faith Mission did not dispute such allegation but pointed out that it had to launch the Application in order to obtain a response from the Respondents and complained of the "*obstructive*

behaviour" of the Respondents. The Apostolic Faith Mission referred to the "*belated calculations*" of Unlocked but did not suggest that the calculations were wrong or inaccurate.

[31] Having regard to the calculations referred to above, I concluded that Unlocked had overpaid the Apostolic Faith Mission, even taking into account the interest payable on the balance of the rental deposit that was repayable.

[32] I accordingly found that no further amounts were repayable by Unlocked (or any of the other Respondents) to the Apostolic Faith Mission.

LEGAL PRINCIPLES APPLICABLE TO AN APPLICATION FOR LEAVE TO APPEAL

[33] Section 17(1) of the Superior Courts Act, No. 10 of 2013, as amended, reads as follows:

> "*17(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 judgments on the matter under consideration; or*
>
> *(b) the decision sought on appeal does not fall within the ambit of Section 16(2)(a); and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.*"

[34] In the matter of *The Mont Chevaux Trust v Tina Goosen and 18 Others*[1] it was held as follows:

[1] 2014 JDR 2325 (LCC) at para 6.

> "*It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. … The use of the word 'would' in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against."*

[35] In the matter of *Acting National Director of Public Prosecutions and Others v Democratic Alliance, in re Democratic Alliance v Acting National Director of Public Prosecutions and Others*[2] the Full Bench of the Gauteng Division held that the Superior Courts Act has raised the bar for granting leave to appeal and referred to the extract from the *Mont Chevaux Trust* matter referred to above.

[36] Whilst it is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised, it was not precisely clear what was meant by the phrase "*a measure of certainty*", as set out in the *Mount Chevaux* matter.

[37] In the unreported matter of *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v L Mayya International*[3] the Court stated that it was of the view that the "*measure of certainty*" standard propounded by the Judge in the *Mont Chevaux Trust* matter may be placing the bar too high, and that it would be unreasonably onerous to require an applicant for leave to appeal to convince a judge, who invariably would have provided extensive reasons for his or her findings and conclusions, that there is a "*measure of certainty*" that another Court will upset those findings.

[38] The Court in the *Valley of the Kings* matter held that a judge is still required to consider, objectively and dispassionately, whether there are reasonable

[2] 2016 JDR 1211 (GP).
[3] (EL926/2016, 2226/2016) [2016] ZAECGHC 137 (10 November 2016).

prospects that another Court will find merits in arguments advanced by the losing party.

[39] In the matter of *The Member of the Executive Council: Health and Social Development, Gauteng Province v Daphne Mthimkulu*[4] the Court, in considering the more stringent threshold, stated[5] that Section 17(1) should not be interpreted as setting the bar so high as to effectively deny an applicant any chance of being granted leave to appeal, as it could not be what the legislature intended.

[40] I am of the view that there can be no doubt that the use of the word "would" in Section 17(1)(a)(1) of the Superior Courts Act, indicates that the test for leave to appeal is now more onerous[6], and that an applicant for leave to appeal must satisfy the court whose judgment is sought to be appealed against, that the appeal would have a reasonable prospect of success.

[41] The test of reasonable prospects of success was set out by the Supreme Court of Appeal in the matter of *S v Smith*[7]. The Supreme Court of appeal stated[8]:

> "*In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal, or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[4] [2018] ZAGPJHC 405 (21 May 2018).
[5] At para 35
[6] *S v Notshokovu* 2016 JDR 1647 (SCA), [2016] ZASCA 112; *Nwafor v Minister of Home Affairs* 2021 JDR 0948 (SCA).
[7] 2012 (1) SACR 567 (SCA).
[8] At para 7.

[42] In the matter of *Hunter v Financial Services Board*[9] the Court stated as follows[10]:

> "*An appeal will have prospects of success if it is arguable in the narrow sense of the word. It requires that the argument advanced by an applicant in support of an application for leave to appeal must have substance. The notion that a point of law is arguable on appeal, entails some degree of merit in the argument. The argument, however, need not be convincing at the stage when leave to appeal is sought, but it must have a measure of plausibility.*"

[43] It is clear that an applicant for leave to appeal must convince the Court hearing the application for leave to appeal that its prospects of success on appeal are realistic, based on substantiated and rational grounds.

THE FIRST GROUND OF APPEAL

[44] The First Ground of Appeal is simply a general statement that I erred in failing to grant the relief as sought by the Applicant.

[45] In support of the First Ground of Appeal the Applicant stated that I should have held that:

[45.1] "*The evasive and obstructive actions*" by the Respondents necessitated the launching of the application for relief by the Applicant;

[45.2] The Applicant was entitled to receive a reconciliation of account in relation to the rental deposit paid by the Applicant in terms of the lease agreement, from the Respondents, for the full period of the Applicant's tenancy;

[9] 3 (3275/2016) [2017] ZAGPPHC 258 (16 March 2017).
[10] At para 5.

[45.3] The Applicant was entitled to demand and receive repayment of the rental deposit paid by the Applicant;

[45.4] The Applicant was entitled to the costs of the application.

[46] As regards the first statement made, it is clear that the Applicant was required to launch an application for the relief as sought by the Applicant and for payment of its rental deposit, and the necessity of such conduct was reflected in the cost order as made by me.

[47] As regards the statement that the Applicant was entitled to receive a reconciliation of account in respect of the rental deposit paid, having regard to the factual allegations made in the affidavits, it became unnecessary to order a reconciliation of account in respect of the rental deposit, as the amount of the rental deposit repayable to the Applicant could easily be calculated, having regard to the Applicant's own version.

[48] As regards the statement that the Applicant was entitled to demand and receive repayment of the rental deposit, the Applicant did indeed receive repayment of such portion of the rental deposit that was owing to the Applicant.

[49] As regards the final statement that the Applicant was entitled to the costs of the application, the Applicant was granted the costs of the application insofar as the Applicant was entitled to payment of its costs, by the Fourth Respondent, for the period until 14 November 2020.

[50] In the circumstances, the First general Ground of Appeal is without merit, and would certainly not justify an appeal process.

THE SECOND GROUND OF APPEAL

[51] The Second Ground of Appeal raised by the Applicant is that I erred when I failed to "*properly apply legal principle and requirement that a tenant who paid a rental deposit to a landlord, is entitled to receive complete reconciliation from the landlord regarding the rental deposit held by the landlord."*

[52] The first submission made in support of the Second Ground of appeal was that I erred when I held in the Judgment that the nature of the relief that the Applicant sought was essentially a statement and debatement.

[53] The Applicant contended that I misinterpreted the nature of the relief sought by the Applicant, as the Applicant required a reconciliation in respect of all transactions relating to the rental deposit paid by the Applicant. It must of course not be forgotten that in addition to such reconciliation the Applicant also sought repayment of the rental deposit or any portion of the rental deposit due to the Applicant.

[54] In the circumstances, there is no distinction between the relief of a reconciliation and payment, and the relief of a statement and debatement and payment.

[55] The term "*statement and debatement*" is simply the appropriate legal term for the nature of the relief sought by the Applicant, despite it being described in the Notice of Motion as a reconciliation and payment thereafter.

[56] In the circumstances, I am satisfied that there is no merit in the suggestion that I misinterpreted the nature of the alternative relief sought by the Applicant.

[57] In any event, and as already set out above, there was no basis for the granting of an order for reconciliation, and even if the description of the relief sought as being a statement and debatement is incorrect, it would not impact on the Order granted.

[58] It was also submitted in support of the statement that I erred in describing the relief sought as a statement and debatement, that the purpose of the application related to the rental deposit paid by the Applicant, and that the reconciliation sought required the details of the deposit amounts' "*whereabouts*", the "*possible/alleged*" use of the rental deposit money that all three of the landlords were each individually obliged to provide a reconciliation for the rental deposit for the different time periods when it was in their respective possession.

[59] There is simply no basis for such submissions. The Applicant's claim for a reconciliation and the payment of any amounts that may be found to be due to the Applicant, are clearly contractually based, and may only be sought from the lessor in control of the Leased Premises at the time that the lease agreement terminated and the rental deposit became repayable.

[60] There is simply no reason for any of the previous lessors to provide a reconciliation of the rental deposit amount, particularly having regard to the facts of the matter, being that at the time that the rental deposit amount was paid to Unlocked by the previous lessor, the Applicant agreed that the amount of the rental deposit had been reduced to R201 358.21, and described such amount as "*the exact amount being the remainder of Applicant's deposit*".

[61] In the circumstances, it is entirely unnecessary to require a reconciliation from any previous lessors, when it is factually known what the rental deposit amount was at the time of Unlocked becoming the lessor of the Leased Premises.

[62] It was further submitted in respect of the Second Ground of Appeal that I correctly found that the issue in the application was about the repayment of the rental deposit money and the amount of the rental deposit money to be repaid to the Applicant, but that I erred in finding that the Applicant was able to calculate the amount to be repaid to the Applicant.

[63] It is correct that the Applicant only became aware of the necessary information to enable it to calculate the amount of the rental deposit repayable to it, shortly prior to the hearing of the application, and that the Applicant was forced to launch the application in order to obtain a proper reconciliation from the lessor. Such conduct has been clearly reflected in the manner of the costs order made by me, in terms of which Unlocked was ordered to pay the Applicant's costs from the inception of the application until 14 November 2020, despite the Applicant's claim for a reconciliation and subsequent payment of rental deposit being dismissed.

[64] The Second Ground of Appeal is similarly without substance, and certainly does not render the Order appealable.

THE THIRD GROUND OF APPEAL

[65] The Third Ground of Appeal raised is that I erred, when after "*incorrectly making observations and findings regarding the obligation to provide reconciliation to the Applicant about the rental deposit money paid by the Applicant,*" I ordered the Applicant to pay costs.

[66] The submissions made in support of the Third Ground of Appeal were that I did not properly consider that the failure to provide information and a reconciliation continued until after the launching of the application, despite many reasonable requests to do so, and that I failed to properly consider that Unlocked deliberately ignored all reasonable requests to provide information and a reconciliation.

[67] It was submitted that a Court of Appeal would find that the three respective landlords, being Arrowhead, Cumulative and Unlocked only reacted after the launching of the application, and that the Applicant was therefore substantially successful in launching the application, and that the Applicant would be entitled to the costs of the application.

[68] As fully set out in the Judgment, there was simply no need to institute an application against the First, Second, Third and Fifth Respondents, being Arrowhead, Excellerate, Cumulative and Mafadi. The submission made during the hearing of the application in such regard was essentially that the Applicant contended that it had to sue all five respondents on the basis that it did not know which of the Respondents held the rental deposit amount. A secondary reason submitted was that the Apostolic Faith Mission sued all five respondents as a result of their obstructive conduct.

[69] The Applicant's legal representatives should have been well aware that Excellerate and Mafadi were merely the agents of the three lessors and that the agents could never be sued for the conduct or obligations of the lessors.

[70] Even if the Applicant was disgruntled by the responses, or the lack of responses, constituting the "*obstructive conduct*", it certainly did not create a cause of action as against any of the Respondents.

[71] The obligation to repay the rental deposit lay with Unlocked, being the contractually bound lessor at the time of the termination of the lease agreement, and at the time that the rental deposit amount (or such portion thereof that may be owing), became repayable to the Applicant.

[72] It was entirely irrelevant which of the lessors physically held the rental deposit amount, as the aspect of repayment was the obligation of Unblocked.

[73] In the Judgment I refer to the matter of *Spearhead Property Holdings (Pty) Ltd v END Motors (Pty) Ltd*[11] where the Supreme Court of Appeal stated the following:

> *"This much is, however, settled in our law: successors-in-title to owners of leased property are bound to recognise the existence of the lease and an* ex legae *substitution of the purchaser for the lessor/seller takes place in the lease upon sale of such property. Thus the rule relieves the seller of all rights and obligations flowing from the lease which are transferred to the buyer on transfer."*

[74] There can accordingly be no doubt that as from the date of purchase of the Leased Premises by Unlocked, being 6 August 2018, any obligation to repay any rental deposit became that of Unlocked, and the previous lessors were

[11] 2010 (2) SA 1 (SCA).

relieved of such obligation. The identity of the holder of the rental deposit amount is accordingly irrelevant, and the lack of knowledge on the part of the Applicant as to which lessor physically held the rental amount, did not justify the claim against all five respondents.

[75] In the circumstances, the seeking of relief as against the other four respondents was not justifiable, and was certainly not based on any proper legal basis.

[76] In the circumstances I find that there is no merit in the Third Ground of Appeal.

THE FOURTH GROUND OF APPEAL

[77] The Fourth Ground of Appeal is simply that I erred when "*after incorrectly making observations regarding the duty to provide reconciliation*" I failed to find that the Respondents only reacted to provide information and make payment after being served with the Applicant's application, and that the Applicant was therefore "*substantially successful*".

[78] The Fourth Ground of Appeal clearly overlaps with the First and Third Grounds of Appeal, and as already set out above, and for the reasons set out in the Judgment, I clearly had regard to the conduct of Unblocked, and I made the costs order in the manner as granted, being that Unlocked was to pay the Applicant's costs up to 14 November 2020.

PROSPECTS OF SUCCESS ON APPEAL

[79] As set out above, an application for leave to appeal must satisfy the Court that there are reasonable prospects that another Court will find merit in the applicant's argument, and that the appeal would have a reasonable prospect of success.

[80] The applicant must also show, based on substantial grounds, that it has realistic prospects of success on appeal.

[81] The Applicant in this Application for Leave to Appeal has not been able to demonstrate that there are any reasonable prospects of success on appeal.

[82] I am of the view that there are no prospects of success on appeal at all.

[83] Having regard to what is set out in the Judgment and as set out above, I am satisfied that there are no prospects of success on appeal, and accordingly make the following order:

[83.1] The Application for Leave to Appeal is dismissed;

[83.2] The Applicant is to pay the Respondents' costs of the Application for Leave to Appeal.

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G NEL
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date Heard:	31 October 2022
Date of Judgment:	10 November 2023

APPEARANCES:

For the Applicant:	Adv J C Klopper
Instructed by:	Louis Benn Attorney
For the First, Second	
And Third Respondents:	Adv R Shepstone
Instructed by	Richmond Attorneys
For the Fourth Respondent:	Adv W Pye SC
Instructed by:	Shaie Zindel Attorneys