REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER:58806/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 11 December 2023

SIGNATURE:

In the matter between:

DIPLOBOX (PTY) LTD.
T/A PRETORIA INSTITUTE OF LEARNING — **1ST APPLICANT**

ABDUL TANYWA — **2ND APPLICANT**

HARRY HLATYWAYO — **3RD APPLICANT**

PRETORIA INSTITUTE OF LEARNING NPC — **4TH APPLICANT**

JEPPE COLLEGE OF COMMERCE AND
COMPUTER (PTY) LTD. — **5TH APPLICANT**

and

OZMIK PROPERTY INVESTMENTS (PTY) LTD **RESPONDENT**

JUDGEMENT – APPLICATION FOR LEAVE TO APPEAL

Barit, AJ

Introduction

[1] The applicants in the application for leave to appeal, are Diplobox (Pty) Ltd (Diplobox), and four others who were the unsuccessful parties in the matter decided by the Court *a quo*. Diplobox is making an application for leave to appeal against the whole judgment and the order delivered on 27 October 2022.

[2] The application has been opposed by the respondent, Ozmik Property Investments (Pty) Ltd. (Ozmik).

[3] In the Court *a quo*, the matter was an application for summary judgement brought by Ozmik, the plaintiff. The five defendants, being Diplobox (Pty) Ltd. T/A Pretoria Institute of Learning (first defendant); Abdul Tanywa (second defendant); Harry Hlatywayo (third defendant); Pretoria Institute of Learning NPC (fourth defendant); and Jeppe College of Commerce and Computer (Pty) Ltd (fifth defendant).

[4] Ozmik Property Investments (Pty) Ltd., is a company with registration number 1999/010501/07, duly incorporated in accordance with the company laws of South Africa. The first applicant is Diplobox Investments trading as Pretoria Institute of Learning, with registration number 2010/03288/07, duly incorporated in accordance with the company laws of South Africa.

[5] Diplobox, is asking the Court to grant leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court of Gauteng Division of the High Court of South Africa.

[6] Diplobox's contention in its application for leave to appeal, is in essence the following:

6.1 That Diplobox are not bound by a clause in the agreement of lease which states:

> *"The LESSEE agrees and understands not to appeal against any decision of such Arbitration or Court of Law."*

6.2 That Diplobox are denying that they are liable to make payment to Ozmik in any amount at all.

Other grounds, in Diplobox's application were taken into consideration, but nothing turned on them, or alternatively were part of, or associated with one of the above-mentioned grounds.

[7] In a nutshell, Diplobox entered into an Agreement of Lease with Ozmik for certain premises, to be used as a school. Diplobox paid rental for January 2020 as per the lease agreement. Thereafter, Diplobox failed to comply with its payment obligations. Hence, placing Diplobox in default, and in breach of the Agreement of Lease. Subsequent thereto, the Covid-19 lockdown regulations took effect on 26 March 2020 at 23h59. Diplobox insists that it is entitled to a full remission of rental payments from 26 March 2020 to 30 December 2020. Irrespective of the Covid-19 lockdown regulations with respect to schools, being partially removed on 1 June

2020, with a further substantial removal on 6 July 2020, and being completely removed by 9 August 2020. Allowing all schools to resume a 100% pupil attendance as at this date.

Remembering, Diplobox being in default of its rental payment obligations in terms of the Agreement of Lease, prior to the implementation of the Covid-19 lockdown regulations, and subsequent to the lifting of the lockdown restrictions.

Hence, the action in the Court a quo with Ozmik claiming payment from Diplobox.

[8] After having heard counsel for the parties, on 4 July 2023, judgement was reserved.

The Act

[9] Diplobox in its heads of argument for leave to appeal, has made reference to section 17 (1) (a) and has provided several refences in respect thereto.

[10] Section 17 (1) (a) of the Superior Courts Act 10 of 2013 ("the Act") states that:

> *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that - the appeal would have a reasonable prospect of success (Section 17 (1) (a) (i)) or; there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. (Section 17 (1) (a) (ii))".*

[11] The Supreme Court of Appeal has held in the matter of *MEC for Health, Eastern Cape v Ongezwa Mkhitha & The Road Accident Fund,*[1] that the test for granting Leave to Appeal is as follows (para 16-17):

> *"Once again it is necessary to say that Leave to Appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that Leave to Appeal may only be granted where the Judge concerned is of the opinion that the Appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard". (My underlining)*
>
> *"An application for leave to appeal must convince the court on proper grounds that the applicant would have 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 "would be a reasonable prospect of success on appeal". (My underlining)*.

[12] This is apparently in contrast to a test under the previous Supreme Court Act, 1959 that Leave to Appeal is to be granted where a reasonable prospect was that another court might come to a different conclusion. *(Commissioner of Inland Revenue v Tuck).*[2]

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1 MEC for Health, Eastern Cape v Ongezwa Mkhitha and The Road Accident Fund [2016] ZASCA 176 (25 November 2016).

2 Commissioner of Inland Revenue v Tuck; 1989 (4) SA 888 (T) at 890 B-C.

[13] In the matter of *Fusion Properties 233 CC v Stellenbosch Municipality*,[3] it was stated:

> *"Since the coming into operation of the Superior Courts Act there have been a number of decisions in our courts which dealt with the requirements that an applicant for leave to appeal in terms of Section 17 (1) (a) (i) and 17 (1) (a) (ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17 (1) provides, in material part, that leave to appeal may be granted 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….*
>
> *Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave".*

[14] In Chithi and Others; in re: *Luhlwini Mchunu Community v Hancock and Others,*[4] it was held:

> *"[10] The threshold for an application for leave to appeal is set out in section 17(1) of the Superior Courts Act, which provides that leave to appeal may*

[3] Fusion Properties 233 CC v Stellenbosch Municipality [2021] ZASCA 10 (29 January 2021) (para 18).

[4] Chithi and Others; in re: Luhlwini Mchunu Community v Hancock and Others [2021] ZASCA 123 (23 September 2021) ("para 18").

only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success……"

[15] In *S v Smith*,[5] the court stated that:

"Where the test of reasonable prospects of success postulates is 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 order to succeed therefore the applicant must convince this court on proper grounds that the prospects of success of appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established then 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."

[16] The Supreme Court of Appeal in the matter of *Notshokovu v S,* **[6]** held that an applicant *"faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959 (para 2)".* (My underlining).

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[5] S v Smith 2012 (1) SALR 567 (SCA) [para 7].

[6] See also the Supreme Court of Appeal in the matter of Notshokovu v S [2016] ZASCA 112, where it was held that an Appellant "faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959 (para 2)".

[17] Reading Section 17 (1) (a) of the Act one sees that the words are: *"Leave to Appeal may only be given where the Judge or Judges concerned are of the opinion that - the appeal would have a reasonable prospect of success".* (My underlining)

[18] Bertlesmann J, in the *Mont Chevaux Trust v Goosen and Eighteen Others,*[7] stated the following:

> *"It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised by the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion, see Van Heerden v Cromwright and Others (1985) (2) SA 342 (T) at 343 H".*

[19] In a recent case, in this division, Mlambo JP, Molefe J, Basson J, cautioned that the higher threshold should be maintained when considering applications for leave to appeal. *Fairtrade Tobacco Association v President of the Republic of South Africa,* [8] the court stated:

> *"As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal ground of appeal".*

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[7] Mont Chevaux Trust v Goosen and Eighteen Others (2014 JDR) 2325 (LCC) at para 6.

[8] Fairtrade Tobacco Association v President of the Republic of South Africa (21686/2020) [2020] ZAGPPHC 311.

[20] From the above, and in considering the Application for Leave to Appeal, the Court is aware that the bar has been raised. Hence, this higher threshold needs to be met before leave to appeal may be granted.[9]

The Facts

[21] A document entitled "Agreement of Lease" was signed on behalf of Ozmik and Diplobox and the five respondents.

[22] Ozmik and Diplobox signed the Agreement of Lease on 15 January 2020. The second, third, fourth and fifth applicants signed the Agreement of Lease on 19 December 2019.

[23] This agreement included the identification of the property as well as the terms of payment together with further details, terms and conditions. Included was the suretyship clause affecting the second, third, fourth and fifth applicants. The effective date being 1 January 2020.

[24] During the course of the lease, circumstances beyond the control of Ozmik and Diplobox, came into play. Namely the onset of Covid 19.

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[9] In the Annual Survey of South African Law (2016) (Juta, Cape Town p706), the following is stated in a discussion on the case of Seathlolo v Chemical Energy Paper Printing Wood and Allied Workers Union (2016) 37 ILJ 1485 (LC). The court noted that Section 17 of the Act sets out the test for determining whether leave should be granted: "Leave to appeal may only be granted if the appeal would have a reasonable prospect of success. According to the court the "would" in Section 17 (1) (a) (i) raised the threshold. The traditional formulation of the test only required Applicants for leave to appeal to prove that a reasonable prospect existed that another court might come to a different conclusion. That test was also not applied lightly. The court noted that the Labour Appeal Court had recently observed that the Labour Court must not readily grant leave to appeal or give permission for petitions. It goes against the statutory imperative of expeditious resolution of labour disputes to allow appeals where there is no reasonable prospect that a different court would come to a different conclusion". (My underlining)

[25] Certain regulations were promulgated in terms of Section 27(2) of the Disaster Management Act No. 57 of 2020 and came into effect on 26 March 2020 at 23h59.

[26] Diplobox contends that due to factors not in the actual agreement, full and effective use of the said premises became problematic (i.e. the deprivation) from 26 March 2020, to 30 December 2020. Raising a defence of supervening impossibility of performance.

[27] Certain payments were made by Diplobox, and then they stopped paying prior to the declaration of the Covid-19 lockdown.

[28] Hence, Ozmik (the plaintiff) claimed payment from the Diplobox (defendant).

The Law of Contract

[29] Gibson, in *South African Mercantile and Company Law* (6th Edition, 1988 p10) gives a definition which is all encompassing, of a contract:

> "*A contract is a lawful agreement made by two or more persons within the limits of their contractual capacity, with a serious intension of creating a legal obligation, communicating such intention, without vagueness, each to the other and being of the same mind as to the subject-matter, to perform positive or negative acts, which are possible of performance."*

Gibson maintains that all the essentials as listed in this definition must be part of any valid contract. Without these essentials the contract becomes a nullity.

Hence, Gibson subdivides the definition into 7 specific items, any one of which if missing will invalidate or what might be believed to be a contract.

(a) The agreement must be lawful.

(b) The agreement must be made within the limits of the party's contractual capacity.

(c) The parties must seriously intend to contract.

(d) The parties must communicate their intention to each other.

(e) The agreement must not be vague.

(f) The parties must be of the same mind as to the subject matter.

(g) Performance is possible.

[30] Further, on signing a contract the parties become servants to the terms thereof and they acknowledge and concede to the Law of Contracts[10]. The *pacta sunt servanda* principle is the cornerstone of the Law of Contract and prescribes that the terms of a contract freely and voluntarily entered into by the parties must be honoured. And are binding in law, unless they are *contra bonos mores,* which is not Diplobox's contention. If a party neglects its obligations that party acts unlawfully.[11]

[10] University of The Free State v Christo Strydom Nutrition (CSM) In re: University of The Free State v Christo Strydom Nutrition (CSM) (2433/2019) [2022] ZAFSHC 174 (18 July 2022) at para [11].

[11] R.S.H V A.J.T (4523/2022) [2023] ZAFSHC 64 (8 March 2023), at para [35].

[31] In *Barkhuizen v Napier,*[12] the Constitutional Court held that public policy requires parties to honour contractual obligations that have been freely and voluntarily undertaken, further stating:

> *"This consideration is expressed in the maxim* pacta sunt servanda *which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity."*

[32] In *Basson v Chilwan and others,*[13] Eksteen JA referred to:

> *"The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible …"* and *"... if there is one thing that is more than public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."*

The Ozmik Diplobox Contract

[12] Barkhuizen v Napier [2007] ZACC 5; 2007 (5) SA 323 (CC) at para [57].

[13] Basson v Chilwan and others [1993] ZASCA 61; 1993 (3) SA 742 (A) at 762H.

[33] In paragraph 19.1 of Diplobox's application for leave to appeal, Diplobox states the following:

> *"It was common cause on the pleadings that the Plaintiff and the First Defendant had entered into a valid agreement of lease in respect of the Premises."*

[34] The contract between Ozmik and Diplobox is headed with the words "Agreement of Lease", and then proceeds with various clauses clearly for the lawful use of the premises. In addition, there are attached Schedules of Conditions, Resolutions and Deeds of Suretyship.

(a) The parties representing Ozmik (the plaintiff) and Diplobox (the defendant) are named, including their capacities.

(b) The nature of the agreement between Ozmik and Diplobox, including the signing thereof shows the intent to contract.

(c) The details subheading to the contract, clearly indicates the mutual obligations in terms of the agreement.

(d) The agreement in terms of essentials (e.g., address of premises, rental, period of lease) are all determinable and not vague.

(e) The signed contract clearly contains a meeting of the minds

(f) Performance of the intended lease, at the time of contracting, was possible.

[35] From the above the following is pertinent:

(a) Firstly, in terms of the law as to what a contract is, all essentials are present in the agreement between Ozmik and Diplobox.

(b) Secondly, Diplobox has made certain payments to Ozmik but in February 2020, already placed itself in breach of its payment obligations.

(c) Thirdly, in addition, the parties had freedom to contract in the manner that they themselves deemed fit.

(d) Fourthly, Ozmik, Diplobox, and applicants two, three, four and five, ratified the acceptance of the terms of the lease agreement by adding their signatures thereto.

Howsoever one views this matter, it has to be accepted that Diplobox signed the agreement and regarded itself bound by the terms and conditions, given the aforementioned, and the fact that Diplobox paid rental for January 2020.

[36] It should be noted that clause 1.1 of the Agreement of Lease reads as follows:

> *"The monthly rental payable in terms of this lease, shall be payable monthly in advance, without deduction on the first day of each calendar month, provided that the rent in respect of the first month shall become due and payable by the LESSEE on date of occupation."* (My underlining)

[37] The clause imposes an obligation on Diplobox (the lessee) to make payment for rent. As it is always the case, and it was the case *in casu*, that rental is made payable in advance. In other words, the lessee uses and enjoys the immovable property (premises) after having paid for it upfront.

[38] Regardless of the undertaking given to Ozmik by Diplobox in terms clause 1.1 of the lease agreement, Diplobox defaulted on its payment obligations as early as February 2020 and March 2020. Several weeks before the Covid-19 lockdown regulations came into effect.

[39] Diplobox continued to remain in default for several months after the Covid-19 lockdown restrictions with respect to schools had been partially lifted on 1 June 2020, with a further substantial removal on 6 July 2020, with the official resumption of normal school activities and attendance in terms of the regulations taking effect on 9 August 2020. The three stages of reintroducing pupils back into the school, did not prevent Diplobox from resuming its teaching activities as early as 1 June 2020 until full capacity was reached on 9 August 2020.

[40] Diplobox further alleged that Covid-19 restrictions deprived it of the full use of the premises: that performance of its obligations in terms of the lease agreement were impossible, and that Diplobox were entitled to a full reduction in rental from 26 March 2020 to 30 December 2020. Further alleging that it was not obliged to pay Ozmik anything.

[41] In the dicta of *Hennops Sport (Pty) Ltd v Luhan Auto (Pty) Ltd*,[14] the Appeal Court of the Gauteng Division of the High Court of South Africa, held that:

> *"Since the advent of COVID-19 pandemic and the legislative intervention for the management thereof, a debate arose in various circles as to whether*

[14] Hennops Sport (Pty) Ltd v Luhan Auto (Pty) Ltd (A52/2022) [2022] ZAGPPHC 953 (2 December 2022).

the restriction regulations, particularly during what was known as hard lockdown, brought to the fore vis major*, which would have entitled parties to be discharged from their contractual obligations. A number of legal pronouncements were made, some in conflict of each other regarding the correct legal position on the debate."*

[42] In the matter of *Slabbert N O & 3 Others v Ma-Afrika Hotels t/a Rivierbos Guest House*, [15] the Supreme Court of Appeal held that:

> *"It is plain that regardless of any considerations that could be made for remission of rent from April 2020 to September 2020 (on the acceptance that there was an impossibility of performance due to restrictions on trade), the respondent, in any event, failed to pay rent when it fell due on 1 October 2020, 1 November 2020 and 1 December 2020, thereby breaching clause 7.1.1 of the lease agreement. This entitled the Trust to cancel the lease agreement in the event of rent not being paid on due date."*

[43] Likewise, *in casu,* regardless of any consideration that could be made for the remission of rent for 1 April 2020 and 1 May 2020, *(on the acceptance that there was an impossibility of performance due to restrictions on trade),* Diplobox, in terms of clause 1.1 was obliged to pay rental in advance without deductions, for the periods 1 February 2020, 1 March 2020, 1 June 2020, 1 July 2020, 1 August 2020, 1 September 2020, 1 October 2020, and 1 November 2020. As the complete

[15] Slabbert N O & 3 Others v Ma-Afrika Hotels t/a Rivierbos Guest House (772/2021) [2022] ZASCA 152 (4 November 2022).

lockdown with respect to schools, was only in effect for the period 27 March to 31 May 2020. All schools were able to resume partial attendance on 1 June 2020, then a further increased attendance on 6 July 2020, and again on 9 August 2020, when all schools officially reopened with a 100% attendance permitted. These are the dates on which Diplobox could officially have resumed partial and ultimately full operations, without any impediment.

[44] Accordingly, it stood to reason that even if it were to be accepted in Diplobox's favour that the Covid-19 regulations prevented or restricted trade, were behind Diplobox's default in the payment of rental and related charges, there was no justification for the default which occurred prior to 27 March 2020, or after 1 June 2020, despite the diminished commercial ability that may have resulted from the Covid 19 pandemic.

[45] Hence, the doctrine of impossibility of performance could not conceivably have been triggered beyond 1 June 2020, or before the Covid-19 lockdown regulations took effect on 26 March 2020 at 23h59.

[46] Diplobox was required in terms of clause 1.1 and 18 of the lease agreement, to pay such amounts monthly in advance (regardless of any right it might have to claim for a remission of rental), and, thereafter, claim any such remitted rental from Ozmik. Diplobox (the lessee) was not permitted to simply deduct what it conceived to be an amount that represents the remission, as was the case *in casu*. Diplobox were obliged to continue paying all amounts due to Ozmik associated with the leased premises.

[47] Further, there is a non-variation so-called *Shifren* clause,[16] in the lease agreement (clause 18) which provides as follows:

> *"This lease incorporates the entire agreement between the LESSOR and the LESSEE, and the LESSEE records that no representation of any nature whatsoever have been by the LESSOR or any person acting on the LESSOR'S behalf to the LESSEE inducing it to enter into this lease. <u>No alteration or variation of this lease shall be of any force or effect unless it is recorded in writing and signed by both the LESSOR and the LESSEEE.</u> The LESSOR shall not be responsible for any representations which may be made from time to time by its servants or agents at the leased premises, and it is that such persons have no authority whatsoever to vary the terms or waive compliance with any of the terms of the lease."* (My underlining).

[48] There is a good reason for the existence of such non-variation clause in contractual arrangements, which our courts, including the Constitutional Court have declared binding. The rationale behind them, are to avoid disputes between contracting parties, exactly as in the case *in casu*.

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16 In the matter of *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren and Others* 1964 (4) SA 760, the standard non-variation clause, known as "the Shifren clause", was recognised by the Supreme Court of Appeal. The *Shifren* clause is an entrenchment clause and in principle binds parties to the provision that a written contract may only be amended if certain formalities are complied with. Mostly, in practice, amendments are only allowed if effected in writing and signed by all parties to the contract. Cameron JA, as he then was, summarised this principle in the case of *Brisley v Drotsky* 2002 (4) SA 1 (SCA): Paragraph 2, stating that: *"… contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject matter of a contract, which they may alter only by again resorting to writing."*

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[49] There is a problem with the averments made by Diplobox with respect to Covid-19 remission, simply being that Diplobox, by all accounts failed to pay even the balance of the monthly rental due prior to the Covid-19 lockdown regulations and subsequent thereto. So, Diplobox was in arrears with its monthly rental obligations and therefore in breach of the lease agreement.

[50] As, at end of November 2022, Diplobox was in arrears in an amount of R2,409 690.66 as per the liquidated amount computed on Ozmik's affidavit.

[51] Having regard to the essential legal requirements of a lease agreement and the Common Law principles, what matters is the foundation of a contract as opposed to the one-sided object of contracting. Accordingly, although the lockdown regulations impacted upon the profitability of the non-essential business of Diplobox, this amounted to a commercial impossibility, rather than an absolute supervening impossibility.[17]

[52] Considering the nature of the lease agreement: it was not changed or destroyed by the implementation of the lockdown regulations. Hence, there is no supervening impossibility discharging Diplobox from its obligation to pay rental.

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[17] See also: Taylor v Caldwell 122 Eng. Rep. 310 (Q.B. 1863) para 33. The Court stated: *"We think, therefore, that the Music Hall, having ceased to exist, without fault of either party, both are excused, the plaintiff from taking the gardens and taking the money, the defendants from performing their promise to give the use of the HALL + GARDENS and other things"*
Krell v Henry [1903] 2 K.B. 740; and
Herne Bay Steam Boat v Hutton [1903] 2 K.B. 683.

[53] Nowhere in the Regulations lies a prohibition of performance of a lease agreement. It is my considered view, that the conclusion by Diplobox that performance was prohibited is a wrong one in law.

[54] In the matter of *Hennops Sport (Pty) Ltd v Luhan Auto (Pty) Ltd*,[18] the Appeal Court of the Gauteng North High Court held that:

> *"There is nothing in the regulations that prevented conclusion of lease agreements. In a lease agreement, performance takes place if the lessor give the lessee the usage and enjoyment of a thing. I pause to mention that the use and enjoyment is of the thing leased and not the purpose for which it was leased. <u>If the lessor gives, as it was the case in this matter, the lessee usage and enjoyment of the thing leased, then rental payment becomes an awaited performance</u>. The regulations did not render it illegal to give usage and enjoyment of an immovable property, neither did it render it illegal to pay rental. … The conclusion to reach, in casu, is that the regulations may have diminished the profitability of Luhan but did not render it illegal for Luhan to pay rent…"* (My underlining).

[55] Further, it is of paramount importance to note that the lockdown only sought to restrict the movements of person's in and out of businesses. It did not mean that operations should cease. Given that the regulations did not affect the virtual manner of conducting business, a large number of businesses begun operating

[18] Hennops Sport (Pty) Ltd v Luhan Auto (Pty) Ltd (A52/2022) [2022] ZAGPPHC 953 (2 December 2022) at para 23.

virtually and continued to earn an income, even though it was at a lessened level. Further, the restrictions did not imply that the computers, furniture and/or other items that were kept or housed inside the immovable property before the lockdown, could no longer be housed there.

[56] Nowhere in the section 27 (2) of the Disaster Management Act 57 of 2020 regulations did it imply that financial obligations in respect of lease agreements must not be honoured. Therefore, it must follow that ceasing of operations did not imply a hiatus of lease agreements. Certainly, during the hard lockdown, premises continued to be hired and rent continued to be paid. There was nothing unlawful about that process. Performance in respect of the lease agreement was not made impossible.

[57] Hence, Diplobox's contentions that it is entitled to a full reduction of the liquidated amount owed to Ozmik, with respect to the non-payment of its obligations to payment rent as per the "Agreement of Lease", is without merit.

Clause 17.6

[58] Clause 17.6 of the Agreement of Lease reads as follows:

> *"Any dispute between the Lessor and the Lessee arising out of this lease shall at the option of the LESSOR be submitted to arbitration in terms of the provision of the arbitration act 1985, or any amendments thereto. Alternatively, should the LESSOR so decide, it shall be entitled to proceed against the LESSEE by way of action or application, and the LESSEE hereby consents to the jurisdiction of the appropriate Magistrate's Court in*

regard to any such proceedings arising thereto or indirectly out of this issue. Notwithstanding that the amount claimed would otherwise exceed the jurisdiction of the Magistrate's Court. Nothing contained in this clause, however, shall be deemed to oblige the LESSOR to proceed against the LESSEE in the Magistrate's Court and the LESSOR shall be entitled should it be so decided to proceed against the LESSEE out of the appropriate division of the Supreme Court. <u>The LESSEE agrees and understands not to appeal against any decision of such Arbitration or Court of Law</u>." (My underlining).

[59] Diplobox has taken issue with respect to the court raising *mero motu* clause 17.6 of the contract.

[60] Diplobox in support of their contention stated that neither Diplobox nor Ozmik raised this point.

[61] Reference is made in Diplobox's "Further submissions in its application for leave to appeal", to *Fischer v Ramahlele,*[19] […] where the Court stated:

> *"… [T]here may also be instances where the court may* mero motu *raise a question of law that emerges fully from the evidence and is necessary for the decision of the case."*

[19] Fischer v Ramahlele and Others [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13.

[62] It is noted that the dicta states "*that emerges fully from the evidence*". The evidence is simply that it is in the very contract that the whole matter is about and the judgement of which is subject to the application.

[63] Further, the particular sentence in question clearly appears on para 25 of the judgement of the court *a quo* – the very judgement the applicant is asking for leave to appeal.

[64] The Constitutional Court, in the matter of *CUSA v Tao Ying Metal Industries and Others*,[20] stated that:

> *"… Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged,* mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law."*

[65] Further, Diplobox stated in paragraph 6.2 of its "Further Submissions of clause 17.6 of the Lease Agreement" in the application for leave to appeal, that:

[20] CUSA v Tao Ying Metal Industries and Others (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) ; [2009] 1 BLLR 1 (CC) ; (2008) 29 ILJ 2461 (CC) (18 September 2008), para 68. See also Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA (A) at 24B-C: "If … the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the Court could hardly be bound to ignore the fundamental problem and only decides the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision."

"… the clause limits the first defendant's constitutional right of access to courts in terms of section 34 of the Constitution …"

[66] The principal question in this application for leave to appeal is whether this Court should consider this new argument, which Diplobox seeks to raise for the first time, which was previously not raised in its pleadings in the court *a quo,* where the court rejected Diplobox's main argument in a contractual dispute with Ozmik.

[67] Diplobox now seeks to challenge the constitutionality of clause 17.6, despite Diplobox not raising this point when the matter was before the court *a quo,* and the only reason for this seems to be, to give credence to its application for leave to appeal.

[68] Diplobox had a fair hearing before the court *a quo*, where Diplobox was able to present all the arguments it wished. The arguments Diplobox then sought to advance were fully ventilated, properly considered and comprehensively determined.

[69] In terms of the contract, Diplobox (the applicant in this application for leave to appeal), understood and agreed not to appeal any decision of any Court of Law (the Court *a quo).* Diplobox chose to ignore their undertaking in respect of clause 17.6 of the contract and now have proceeded with this application for leave to appeal.

[70] The final sentence of clause 17.6 of the Agreement of Lease is clear and precise in that it states the words "not to appeal". Given these considerations, the arguable

points which Diplobox seeks to appeal with respect to clause 17.6, do not take the matter any further and are without merit.

Liquidated Amount

[71] Diplobox raised issue with respect to the 'liquidated amount' put before the Court *a quo* by Ozmik.

[72] A liquidated amount is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment or, in different words, where the ascertainment of the amount in issue is a matter of mere calculation, as *in casu.*

[73] In this regard, the Uniform Rules of Court 32(1) provides:

> *"(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgement on each of such claims in the summons as is only –*
>
> *(a) on a liquid document;*
>
> *(b) for a liquidated amount in money;*
>
> *(c) for delivery of specific movable property.*

[74] In the People's Law Dictionary[21], 'liquidated amount' is described as follows:

[21] The People' Law Dictionary by Gerald and Kathleen Hill, Published by Fine Communication; https://dictionary.law.com.

"an amount of money agreed upon by both parties to a contract which one will pay to the other upon beaching (breaking or backing out of) the agreement or if a lawsuit arises due to the breach".

[75] In the matter of *Freeman and Another v Beckett and Another,* [22] the Court stated:

"'A liquidated amount in money' is an amount which is either agreed upon or which is of speedy and prompt ascertainment. In this regard see Lester Investments (Pty) Ltd v Narshi *1951 (2) SA 464 (C);*[23] Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd.[24] *In* Botha v W Swanson & Company (Pty) Ltd.[25] *Corbett J puts the test as follows:*

> *"[A] claim cannot be regarded as one for "a liquidated amount in money" unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.""*

[76] Applying these principles *in casu,* I conclude that the claim of Ozmik is indeed 'for a liquidated amount in money'. Such is distinguishable from a clam for an

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[22] Freeman and Another v Beckett and Another (17570/2022) [2023] ZAGPJHC 896 (11 August 2023) at para [16].

[23] Lester Investments (Pty) Ltd v Narshi 1951 (2) SA 464 (C).

[24] Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) 1962 (1) SA 736 (T).

[25] Botha v W Swanson & Company (Pty) Ltd 1968 (2) PH F85 (CPD).

unliquidated amount of damages which is a subject of a discretionary assessment by the court.[26]

[77] In the matter of *Pick 'n Pay Retailers (Pty) Ltd t/a Hypermarkets v Dednam*,[27] it was held that although the amount claimed from the defendant was termed "damages" in the plaintiff's particulars of claim, which term didn't usually denote a liquidated sum of money, it appeared from the particulars of claim as a whole that it was in fact only the purchase price of the vehicle that the two parties had agreed upon. It was therefore a liquidated sum of money, that was being claimed from the defendant as damages.

[78] In clause 1.1 of the lease agreement Diplobox agreed to pay Ozmik the monthly rental on the first day of each month, without deduction.

[79] By the end of November 2020, Diplobox was indebted to Ozmik in a total amount of R2,409 690.66. However, Diplobox maintains that due to the Covid-19 pandemic, and the alleged deprivation of the use of the premises, Ozmik is obligated to grant them full remission of rental up to 30 December 2020. Diplobox however maintain that they owe Ozmik nothing.

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[26] Quality Machine Builders v MI Thermocouple (Pty) Ltd. [1984] 4 ALL SA 212 (W). In this case a claim for a *"reasonable remuneration for work done and material delivered"* was a liquidated amount in money.
Pick 'n Pay Retailers (Pty) Ltd. T/a Hypermarkets v Dednam 1984 (4) SA 673 (0)

[27] Pick 'n Pay Retailers (Pty) Ltd. T/a Hypermarkets v Dednam 1984 (4) SA 673 (0)

[80] Hence, it was not necessary for this Court *a quo* to decide whether the restrictive Covid-19 regulations instituted on 26 March 2020 at 23h59, constituted a supervening impossibility of performance that discharged Diplobox from liability to pay the full amount indebted to Ozmik: as Diplobox was already in default by the end of February 2020, of its obligations to pay in terms of Clause 1.1 of the Agreement of Lease.

[81] Despite this, Ozmik, in a sign of good will, reduced the amount indebted to Ozmik by an amount of R600 000.00 and the Court *a quo* rounded it down to R1,800 000.00 as the final amount.

[82] The bringing in of Rule 32 (1) (b) does not take this matter any further.

Diplobox's Bona Fides

[83] In support for summary judgment, Ozmik contended that Diplobox had no *bona fide* defence and therefore no triable issues, and that Diplobox's intention to defend has been delivered solely for the purpose of delay.

83.1. In Ozmik's "Affidavit in support of the Application for Summary Judgment", (dated 16 March 2021, paragraph 4 and 5) the deponent states:

> "*In my opinion the respondent/defendants (Diplobox) have no bona-fide defence to the action and that appearance to defend has been entered solely for the purpose of delay … It is my opinion that the respondents are deliberately relying on the Covid 19 pandemic … to*

avoid all their payment obligation, even though that arose prior to and after the fact …"

83.2. In response, the defendants (Diplobox) in their Answering Affidavit for their Application for Summary Judgment" (dated 8 December 2021, paragraph 47.2 and 47.3) state that:

"*… the defendants are possessed with bona fide defences to the plaintiff's claim … The defendants notice of intention to defend is not relevant to the application."*

This response can only lead the Court to question the bona fides of Diplobox and to also accept Ozmik's contention that the appearance to defend by Diplobox has been delivered solely for the purpose of delay.

[84] It is common cause that Diplobox was in breach of its payment obligations in terms of the Agreement of Lease, prior to the implementation of the Covid-19 lockdown regulations, and subsequent to the lifting of these regulations.

[85] From the argument before the Court a quo, which was evident that Diplobox did not have a triable case, did not have the necessary bona fides, and that it is further evident that Diplobox's intention to defend has been delivered solely for the purpose of delay.

Summing-up

[86] Ozmik and Diplobox entered into a written agreement of lease, for certain premisses.

[87] Diplobox gave an undertaking to pay rental, and then defaulted on their payment obligations.

[88] Diplobox cited the Covid-19 lockdown regulations as being the reason for non-payment, alleging that it was entitled to a full remission of rental.

[89] Ozmik sued upon a written agreement of lease, concluded between it and Diplobox, quantifying a monetary amount in terms of the agreement and in addition allowing a reduction, resulting in a new monetary amount.

[90] Summary judgement was granted on 27 October 2022.

Judgment

[91] Diplobox has admitted the fact that a valid Agreement of Lease existed. Ozmik's affidavit is neither farfetched, nor unrealistic, with Diplobox not being unable to counter or respond adequately other than to proffer a vague or non-sensical response, *inter alia* that: "*The defendants notice of intention to defend is not relevant to the application. … they were excused from making payment of rental arising from the regulations promulgated in terms of section 27(2) of the Disaster Management Act of 2002 ...,* and *… that it was not obliged to pay Ozmik anything."*

The vague manner in which Diplobox have responded demonstrates that they do not have *bona fides.* All leading to their contention that despite a valid Agreement of Lease existing, they are not obliged to pay anything.

[92] In my opinion, the applicant (Diplobox) has no bona fide defence to Ozmik's claim. The claims by Ozmik are not seriously challenged by Diplobox, who does not have

a triable case. Further, where an attempt is made by Diplobox, to challenge a claim, it is vague and/or attempts to take advantage of an advantageous situation in order to escape an obligation.

Simply stated:

(a) Diplobox is bound by the Agreement of Lease – which includes the sentence stating: *"LESSEE agrees and understands not to appeal against any decision of such Arbitration or Court of Law".*

(b) Diplobox's bare denial that it is not liable to make any payments to Ozmik in the face of a valid Agreement of Lease is unacceptable.

[93] The Supreme Court of Appeal's guidance for granting leave to appeal is stated in 2016 in *MEC For Health, Eastern Cape v Ongezwa Mkhitha and The Road Accident Fund*, [28] as Leave to Appeal *"must not be granted unless there (is) truly a reasonable prospect of success."* Further this application for leave to appeal to the Supreme Court of Appeal or to a Full Bench of this division, has not passed the bar which has been raised in terms of Section 17 of the Superior Court Act of 2013.[29] Hence, this application leads me to believe that any appeal would have no truly reasonable prospect of success. In addition, there are no compelling

[28] MEC For Health, Eastern Cape v Ongezwa Mkhitha and the Road Accident Fund [2016] ZASCA 176 (25 November 2016) in para 14 above.

[29] Section 17 (1) (a) of the Superior Courts Act 10 of 2013 states that: *"Leave to Appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success (Section 17 (1) (a) (I))".*

reasons why the appeal should be heard, including conflicting judgments on the matter under consideration.

The Order

[94] I, therefore, issue the following Order:

The application for leave to appeal is dismissed with costs.

L BARIT

Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 4 July 2023

Date of Judgment: 11 December 2023

APPEARANCES

For the First to Fifth Applicants: Advocate B M Gilbert

Instructed by: Ismail Ayob and Partners

For the Respondent: Advocate A Bishop

Instructed by: Cowan Harper Madikizela Inc.