IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***5 July 2021*** ***Signature***: *Z Majavu*

CASE NO: 28255/2018

In the matter between:

HOLDSWORTH-JENKINS: JAQUELINE-JANE	First Applicant
JENKINS: LEE EVAN	Second Applicant
And	
WORLDWIND LOGISTICS (PTY) LTD	Respondent

In re:

WORLDWIND LOGISTICS (PTY) LIMITED	APPLICANT
(registration no: …….)	
and	
HOLTSWORTHS-JENKINS; JACQUELINE	
JANE JENKINS	FIRST RESPONDENT

LEE EVAN SECOND RESPONDENT

Coram: **Majavu AJ**

Heard: 17 June 2021

Delivered: 5 July 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 13h00 on 5 July 2021

Summary: Application for leave to appeal against judgment handed down on 16 March 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 a party and party 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 16 March 2021. None of the parties submitted heads of argument. For ease of reference, the parties in this application will be referred as in the application *a quo*.

[2] Needless to say, and only to the extent that the respondents (applicant for leave to appeal) deemed it necessary to foreshadow the grounds with a disclaimer[1], I have no reason to doubt that this application is noted with due respect to me and the court. I assure the respondents that I take no umbrage at the fact that an application for leave to appeal has been launched against my judgement. Quite frankly, this disclaimer was not necessary.

[2] I battled to distil the exact nature of the grounds on which this application is mounted, but nevertheless appreciate the general import, as paraphrased below. What ought to be clear and concise grounds of appeal, read like heads of argument.

General thrust of the grounds

[3] it is contended that I erred:

(a) in finding that the facts deposed to by the applicant representatives may be used as common cause facts in order to establish relief prayed for.

[1] "all submissions and contentions reflected here in and made with respect and deference due to the High Court, the judgement and the judge concerned." The

(b) in not finding that in opposed application proceedings, the factual version of the applicant can only be employed to the extent that it is admitted by the respondents, together with all other facts deposed to by the respondents (the Plascon Evans Rule)

(c) in not finding that the suitability of the premises for the purpose was further supported by the subsequent conduct of the applicants' representatives, to the extent that a prior inspection did not report any defects to have been material to the extent of rendering it unfit for purpose for which it was rented.

(d) in not finding that the applicant by its own conduct up to 11 January 2018, repudiated the said lease agreement.

(e) in not finding that notwithstanding the fact that immediately upon receiving notice or complaint regarding the state of disrepair of the property, the lessor immediately undertook steps to forthwith address the complaints.

(f) in not finding that there was any obligation on the lessors to address the complaints other than those few complaints, for which it was liable in terms of the lease agreement.

(g) in finding that, handing over the premises in an allegedly defective state amounts to a repudiation by the lessors.

(h) in not finding that the only factual issue for determination was whether the letters by the lessee in which it repudiates the agreement and the act of retaining the key amount to a repudiation in law.

(i) in finding that the Rental Housing Act ("the RHA") is applicable.

(j) in finding that the Consumer Protection Act ("the CPA") is applicable, presumably as a result of an *ex post facto* desktop research undertaken by the lessors' (respondents') attorneys after the matter was argued before me, with reference to their statutorily prescribed threshold relating to the turnover of the affected company, the applicant, (lesee). In fact, belatedly as recorded in paragraph 23 of the application for leave to appeal, it is indicated that *"the lessors in turn bringing an application to the above honourable court of appeal to admit this evidence as proof that the lessee company is not subject to the CPA and that it has deliberately misled the above honourable court a quo in this regard."* In my view, this does not assist the respondents to meet the applicable threshold with reference to the application for leave to appeal, which I will more fully deal with here under. There is no merit in this ground and I accordingly dispose of it forthwith. This is an abuse of the appeal process.

Other compelling reasons

(k) it is further contended that there are further compelling reasons why the appeal should be heard, including matters of public interest and legal

certainty involving some applicable acts of Parliament, with reference to both the RHA and CPA. This is couched in general terms.

Counter claim

(l) lastly, it is further contended that I erred in not granting the counterclaim, alternatively, in not permitting the matter to proceed to trial to the extent that there were disputes of fact.

[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;*
>
> *(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. It is clear that the test is higher now.

[6] The stricter or higher bar so to speak, when adjudicating application for leave to appeal, was also followed in the matter of the Acting National Director of Public Prosecution v Democratic Alliance (Society for the protection of our Constitution and Amicus Curiae)[2]:

> 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 you 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*[3] *, albeit* in criminal proceedings, however

[2] 2016 JD R1211 (GP at page 13

[3] 2016 JDR 1647 (SCA)

in my view, 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, 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 essence of the grounds on which this application is mounted, against the applicable test.

[8] 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. The same mischief seems to be exactly what the introduction of the regime of an application for leave to appeal is meant to obviate.

[9] The fact that the grounds appear to be intertwined, should in no way *defocus* the court from the real and applicable test, regardless of how well the "would-be appellant" appears to be re arguing the case.

Turning to the grounds

[10] As observed above, the general *tenor* of the grounds relates to matters on which I have clearly expressed myself in the judgement *a quo*. To the extent that I reasoned and eventually made findings regarding the applicability of the RHA and the CPA, I remain unpersuaded that there exist any reasonable prospects of another court coming to a different conclusion to the one I did. I stand by the earlier reasons in the judgement.

[11] On the question of the admissibility of facts that are otherwise inadmissible, it is clear that the issues that I found to be common cause, were indeed common cause. The probative value and weight which I attached to them, is a matter solely for the discretion of the court, which discretion must be exercised judiciously. On the facts before me, I did exercise that discretion judiciously and not in violation of the Plascon Evans rule, as contended by the respondents. In fact, I was satisfied that notwithstanding the that there is a dispute of facts (as contended for by the respondents), which I disagree with, I was nevertheless satisfied that the facts as averred by the applicant and in large measure admitted by the respondents. I held the view that such disputes were indeed *not irresoluble* on the papers. I will accordingly not over elaborate on the well-entrenched principle, lest I further obscure the matter.

Counter claim

[12] It remains my considered view that the counterclaim was correctly dismissed. There exists no possibility that another court will come a different decision.

Conclusion

[13] It is my considered view that, both in the hearing *a quo* and in this application, the respondents have not advanced any cogent grounds, which could lead another court to arriving at a different decision. There are simply *no* prospects of success, let alone reasonable. I am also unable to find any other special circumstances or any, said to be in the public interest, in favour of granting leave to appeal. The issues engaged in the judgment are plain and simple. The fact that the respondents are aggrieved by the decision reached, does not in of themselves, morph into public interest or exceptional circumstances, nor have they pointed out such. Merely taking issue with the court's evaluation and/or assessment of the facts and applicable pieces of legislation before it, hardly passes muster. An example of some, but by no means exhaustive of what could constitute special circumstances were listed as follows in the case of *Westinghouse Brake and Equipment*[4]

> *(a) the appeal raises a substantial point of law;*
>
> *(b) the matter is of very great importance to the parties or of great public importance;* and
>
> *(c) where refusal of leave to appeal would probably result in a manifest denial of justice.*

[4] Westinghouse Brake and Equipment v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A)

[14] But for the fact that both parties feel strongly about their respective stance, none of the other questions were, in my view, answered in the affirmative. It is unsurprising that in litigation, the litigants would generally feel very strongly about the importance of the cases. In this instance, and I put it to both parties' counsels and it appears that the ever increasing costs related to this matter, appears to be of little concern to them, when adjudged against the relative lower *quantum* at the centre of the dispute. I hasten to add that, it remains the litigants' right to ventilate that disputes through the courts and to do so to their satisfaction, however, it is always important not to lose sight of the attendant costs. I leave that observation at that.

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

Order

(i) The application for leave to appeal is dismissed with costs, on a party and party 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:	17 June 2021
JUDGMENT DATE:	5 July 2021
FOR THE APPLICANT:	Adv C van der Merwe
INSTRUCTED BY:	Minnie & Du Preez Inc.
FOR THE RESPONDENTS :	Adv C Van der Spuy
INSTRUCTED BY:	Lanham – Love Attorneys