

SOUTH AFRICA / JUDGMENT

Basenzi Construction CC t/a Power Wheel and Tyres and Another v Hofmil Investments (Pty) Ltd (3573/16) [2018] ZAGPPHC 599 (18 January 2018)

[2018] ZAGPPHC 599

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Schyff

CASE / FILE NUMBER

3573/16

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO

OTHER JUDGES

(3)

REVISED

CASE NO.:

3573/16

18/01/2018

In

the matter between: BASENZI
CONSTRUCTION CC t/a POWER WHEEL AND
TYRES
(REG

NO: 2002/081957/23)
1ST
APPLICANT
WINKIE AMOS PETA
([....])
2ND APPLICANT
and
HOFMIL INVESTMENTS (PTY)
LTD
HOFMIL 4(WAREHOUSE)
(REG NO:
159/002691/07)
RESPONDENT

Heard: 4 January 2018
Delivered
18 January 2018

JUDGMENT

Coram; VAN DER SCHYFF AJ

- [1] This is an application for leave to appeal. The notice for application for leave to appeal was presumably drafted in a hasty manner and scant attention was given to detail. It is not a model of good draftsmanship. The first indication hereof is found in the introductory paragraph of the notice for application for leave to appeal. It is not stated in the first paragraph of the notice that the applicants give notice of their intention to bring an application for leave to appeal the judgment and / or order that I made, but that 'the Applicants hereby give notice of intention to bring Application for Leave to Appeal of her Ladyship Acting Judge Evan der Schyff on the 1dh November 2017... '. From the content of the notice for application for leave to appeal it can be deduced that the application is for leave to appeal against aspects of the judgment and the order.
- [2] An application for leave to appeal a decision from a single judge of the High Court is regulated by Rule 49 of the Uniform Rules of Court. The substantive law pertaining to applications for leave to appeal is dealt with in section 17 of the Superior Courts Act, No. 10 of 2013.
- [3] Rule 49(1)(b) prescribes that:

'When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within 15 days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of 15 days.'

[4] Section 17(1) in turn stipulates that:

'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 t1nder consideration;

(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.'

[5] Before the merits of the application are considered, it needs to be determined what is required by Rule 49{1){b), and to what extent a party is bound to the grounds set out in the application for leave to appeal in adherence to Rule 49(1)(b). [The need for such an approach is not only inherent to the process of adjudicating an application of this nature, but necessitated by the fact that it is contended on behalf of the respondent that the applicants failed to set out the grounds of appeal in such a way that it meets the requirements of Rule 49{1)(b), and that the applicants are bound to the grounds as set out in their notice for application for leave to appeal.]

[6] An applicant seeking leave to appeal must set out its grounds of appeal succinctly and in unambiguous terms in order to enable the court and the respondent to assert the case the applicant seeks to make out and which the respondent has to meet in opposing the application for leave to appeal - Songono

v. Minister of Law and Order 1996(4) S.A. 384 (E) at 395J to 386A; Philip v Estate Agency Affairs Board {39922/12) [2013] ZAGPPHC 276 {2 October 2013) para [31]; Fuku v Mpoka (A137/2013) [2013] ZAFSHC 152 (19 September 2013) para [5]; Lewis NO and Others v Cooper NO and Another, Lewis v Soundprops 236 (Pty) Ltd and Others {11292/08, 14889/08)

[2009] ZAWCHC 51 (27 February 2009) para [2]. An application for leave to appeal can be dismissed on the basis of non-compliance with Rule 49{1)

- Lewis NO, supra para [2]; Songono, supra 3866.

[7] In Songono, supra 385E- 386A, Leach J explained:

'I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)(b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded'. In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised.

Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, *Harvey v Brown* 1964

(3) SA 381 (E) at 383; *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808 (A) at 815 and *Erasmus Superior Court Practice* B1-356-357 and the various authorities there cited.

It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory.'

[8] These principles, espoused by Leach J, were approved by the Full Court of the Eastern Cape High Court in *Xayimpi and Others v Chairman Judge White Commission (formerly known as Browde Commission) and Others* [2006] JOL 16596 (E).

[9] In addition, Mavundla J held in *Phiri v Phiri and Others* (39223/2011) [2016] ZAGPPHC 341 (14 March 2016) para [10] that '[i]t does not help the applicant to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in

the notice of leave to appeal, no matter how meritorious these might be, ..., otherwise, there is no need for the Rules. This view accords with the view held by Murray AJ in *Ntsoereng and Another v Sebofi and Another*; *In re: Sebofi v Ntsoereng* (4518/2012) [2016] ZAFSHC 153 (7 July 2016) paras [33] and [52]. (See also *Kilian v Geregsbode, Uitenhage* 1980 (1) SA 808 (A) 8150).

[10] In light of the discussion above it needs to be determined to what extent the applicants' application for leave to appeal meets the peremptory requirements stated in Rule 49(1)(b) and whether the argument raised from the bar is to be discounted for lack of being captured in the notice for application for leave to appeal.

[11] Four grounds of appeal are listed in the notice for application for leave to appeal. Although all these grounds were not expressly persisted with and championed during oral argument, it is necessary to set out these grounds in light of the fact that respondent's counsel argued

that a new ground of appeal was introduced in applicants' heads of argument and raised by counsel from the bar. If it is found that a new ground of appeal has been introduced that was not captured in the notice of application for leave to appeal, I have to decide whether to consider such ground in light of the decisions referred to above read with Rule 49 of the Uniform Rules and section 17 of the Superior Courts Act.

- [13] If the first sentence of this ground of appeal is read in seclusion, it will definitely not pass the test of being clear and unambiguous. If taken as an individual ground of appeal, this first sentence is so broad that it encompasses each factual and legal founding made in the judgment. Such an approach is not tenable in light of the requirement set out in Rule 49(1)(b). It is only when read with the second sentence that a more defined ground of appeal emerges. In light thereof, this ground of appeal is to be restricted as referring only to my rejection of the defence that the contract is a nullity and void ab initio due to the fact that it did not surpass the muster of the National Building Regulation and Buildings Standards Act.
- [14] The applicants' defence that the 'contract is a nullity and void ab initio due to the fact that it did not surpass the muster of the Building Regulation and Standard Act' was not found to constitute a bona fide defence due to the decision in *Hyprop Investments Limited and Another v NSC Carriers and Forwarding CC and Another* (2009/12568, 2009/47543) [2010] ZAGPJHC 20 (12 April 2010). The first ground of appeal is thus directly linked to, and in fact replicated by the fourth ground of appeal. The fourth ground of appeal as contained in the notice for leave to appeal reads- '[t]he Court erred in stating that the decision of *Hyprop Investment Limited v NSC Carriers and Forwarding CC*
- [2010] ZA GP JHC 20 has application in this case as the facts and legal issues before were not substantially similar (sic)'.
- [15] During argument counsel for the applicants indicated that he is not persisting with the ground of appeal that I erred in applying the dicta in *Hyprop Investment Limited v NSC Carriers and Forwarding CC*, supra. In light of the recent decision of the Supreme Court of Appeal in *Wierda Road West Property (Pty) Ltd v Sizwe Ntsaluba Gobodo Inc* (1156/16)
- [2017] ZASCA 170 (1 December 2017) where it was held that a tease agreement is not rendered invalid and unenforceable by ss (4)(1) and 14(1), read with s 4(4) and S 14(4)(a) of the National Building Regulations and Building Standards Act 103 of 1977, the decision not to continue with this
- ground of appeal was correct.
- [16] That leaves the second and third grounds of appeal as contained in the notice for application for leave to appeal. Although these grounds were not referred to at all during oral argument, or addressed in the heads of argument filed by the applicants' counsel, it is necessary to briefly deal with them for the sake of completeness.

- [17] The second ground for appeal reads: '[t]he Court erred in dismissing the Applicant's application for rescission due to the fact that the Court considered documents that were advanced from the Bar (by the plaintiff at trial) which had not been disclosed during exchange (sic) of pleadings or discovery. The effect is that the contract relied upon was not properly before the honourable Court and as a result there was no valid cause of action, thus the applicant had a bona fide defence.'
- [18] For the sake of the record it must be stated that the document handed up from the bar during the rescission application was handed up by the 2nd applicant. It was the contract on which the claim was based. Due to the fact that the summons was not in the court file when I heard the application for rescission, I requested either of the parties to hand up a copy of the contract. After hearing the arguments I reserved judgment. Since the summons was not in the court file I wanted to see on which bases default

judgment

was granted. On 24 October 2017 I had an e-mail sent to both the 2nd applicant (who appeared on behalf of the 1st applicant) and

the respondent requesting them to provide me with a copy of the summons and all the documents attached thereto. Respondent delivered

same to me. The contract attached to the summons was a copy of the original contract handed up by the 2nd applicant. Nothing untoward happened through which the applicants were prejudiced. The cause of action was set out in the summons, and the contract not being in the court file at the time when the application for rescission was argued inconvenienced the court but did not render the cause of action non-existent. The second ground of appeal therefore does not hold water.

- [19] The third, and remaining! ground of appeal set out in the notice for application for leave to appeal reads: 'Based on the above it seems as if the Court did not consider the Applicants (sic) founding affidavit, reply and Heads of Argument as well as the additional documents he sought to introduce in their totality. As application for leave to supplement the pleadings was denied by the honourable Court but the plaintiff was allowed to introduce papers that were not before the Court. (sic) Applicant submits that the Court was not fair nor rational in its decision to allow evidence from the bar from the plaintiff and to disallow applicant application for leave to supplement the pleadings (sic).'
- [20] This ground of appeal does not pass the test of being clear and unambiguous. In addition, as set out in paragraph [18] supra, no new 'evidence was allowed from the bar from plaintiff'. As indicated in my judgment dated 10 November 2017 I did consider both the applicants replying and supplementary affidavits. As explained, I was 'extremely lenient' in considering both only because the applicants were not represented by legal representatives. I did, however, not consider the applicant's 'application for leave to bring new information to the application for rescission of judgment and its concomitant affidavit 'since the court rules have already been stretched to its limits in an effort to accommodate the applicant - , and,

the aspects raised in the affidavit have already been raised previously' - (par [6]). In light hereof this ground of appeal does not hold water.

- [21] At this stage cognisance must be taken of the fact that no claim is made that I erred in misdirecting myself pertaining to any factual finding contained in the judgment of 10 November 2016.
- [22] As far as the grounds of appeal as stated and contained in the notice for application for leave to appeal go, I am not convinced that a proper case has been made out that an appeal has a reasonable prospect of success. As stated in paragraph [4] above, the legislature prescribed in section 17(1) that leave to appeal may only be given where I am of the opinion that the appeal would have a reasonable prospect of success. Hughes J explained in *Nannen and Others v Momentum and Others* (6796/05, 2275/05) [2017] ZAGPPHC 433 (14 June 2017); *Honda Giken Kogyo Kabushiki Kaisha t/a Honda Motor Co Ltd v Big Boy Scooters* (24784/2016)
- [2017] ZAGPPHC 752 (15 November 2017); *BWM Financial Services (SA) (Pty) Ltd v Finlay and Others* (55858/10, 55860/10, 56219/10) [2017] ZAGPPHC 383 (31 March 2017) that the test that applied previously (and this is clearly the test eluded to by the applicants in their notice for application for leave to appeal) in applications of this nature, was whether there were reasonable prospects that another court may come to a different conclusion. She continues:
- 'What emerges from section 17 (1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words 'only' used in the said section. See *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para [6], *Bertelsmann J* held as follows:
- "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 former test whether 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) SA 342 (T) at 343H. 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." [My emphasis]. (*Nannen*, supra par [5]).
- [22] This is, however, not the end of the matter. Despite the poorly drafted, largely vague and ambiguous notice for application for leave to appeal, the main (in fact, only) argument that was raised from the bar that is set out in the heads of argument filed by counsel on behalf of the applicants, needs to be considered. I first need to consider whether any basis was laid in the notice for application for leave to appeal for this ground of appeal to be brought. Counsel for the respondent argued that no such basis has been laid and that I am obliged to follow the dicta in *Ntsoeren and Another v Sebofi and Another*; *In re; Sebofi v Ntsoereng*, supra, and hold applicants bound to the grounds of appeal set out in the notice for application for leave to appeal.

- [23] Counsel for the applicants endeavoured to link the 'new' ground of appeal introduced in the heads of argument to grounds 1 and 4 set out in the application for leave to appeal. If cognisance is taken of the specific wording of grounds one and four as set out in the application, and specifically the argument set out in paragraph 6.2 of the heads of argument, this is an artificial effort to incorporate (literally sneak in) a ground of appeal that was not crisply and clearly set out in the notice for application for leave to appeal.
- [24] The argument that was advanced during the application for leave to appeal that is contained in paragraph 6.2 of the heads of argument, is that '[t]he first ground is that the Honourable Court erred in rejecting the defence that the contract was a nullity and void ab initio and the fourth is that the Honourable Court erred in finding that the matter of Hyprop Investment limited v NCS (sic) Carriers and Forwarding CC (hereinafter referred to as "Hyprop"? is applicable in the application for rescission. I submit that the matter of Gateway Properties (Pty) Ltd v Bright Idea projects 249 CC and Another should be considered in conjunction with the following allegations made by the applicants ... '
- [25] It is evident from the specific wording of the first ground of appeal (as quoted in paragraph [12] above) that this first ground of appeal is specifically aimed at my decision not to uphold the defence 'that the contract was a nullity and void ab initio due to the fact that it did surpass the muster of the Building Regulation and Building Standards (sic), Act, Act 103 of 1977.' The issue is clearly delineated and unambiguously links the first ground of appeal to the issue of the applicability of the National Building Regulations and Building Standards Act 103 of 1977.
- [26] Nothing contained in grounds one or four of the notice for application for leave to appeal alluded to or forewarned of an argument that I erred in not finding that the contract is void ab initio based on the basis of exceptio non adimpleti contractus, and /or 'due to the respondent not being able to have the use and the enjoyment of the premise' in light of the purpose of the lease agreement similar to the situation dealt with in Gateway Properties (Pty) Ltd v Bright Idea projects 249 CC and Another [2014] 3 All SA 577 (KZP) (1 July 2014), and/ or that I erred in not finding mero motu that the applicants could be 'excused from payment of the lease amount total or in part if the lessee did not have full use and enjoyment of the leased premises.'
- [27] This new ground of appeal relates to the finding I made in paragraph [26] of the judgment of 10 November 2017. I stated there that 'In the final instance the applicants' defence that the building they leased was not suitable for the purpose they wanted to use it for, needs to be considered. Even if it is accepted that the building had to be renovated before it could be occupied and even if it is accepted that the removal of the undocumented sub-surface multiple layers of concrete extended the completion date of upgrades, the reality is that the landlord does not guarantee that the 'Leased Premises are fit for the purposes of the business to be conducted by the Tenant or for any other purposes and this Agreement is not made conditional thereon'. Accordingly I cannot find that this is a bona fide defence'.

- [28] I accordingly find that the argument contained in paragraph 6.2 of the applicants' heads of argument as advanced from the bar constitutes a new ground of appeal that was not set out in the notice for application for leave to appeal.
- [29] However, I deem it in the interest of justice not to summarily dismiss this ground of appeal.
- [30] It is common cause that the 2nd applicant appeared in person and in fact drafted the bulk of the affidavits filed on the applicants' behalf in the application for rescission of judgment on his own. Although the 2nd applicant is clearly not illiterate and in fact seems to be a successful businessman who is quite capable of drafting intelligible documents and e-mails, it remains a fact that he was unrepresented. If I am convinced that I did err in coming to the conclusion as quoted in paragraph 27 above, I will be inclined to grant the application for leave to appeal because I am of the view that any material error by me would constitute a compelling reason as provided for in section 17(1)(a)(ii) of the Superior Courts Act, No. 10 of 2013, specifically because the 2nd applicant acted without legal representation, even if the applicants' legal representatives who drafted the notice for application for leave to appeal once again failed him by not drafting a proper notice for application for leave to appeal. Since respondent's counsel also dealt with this new ground of appeal in his heads of argument respondent will not unduly be prejudiced.
- [31] The crux of the new ground of appeal is that the decision in *Gateway Properties (Pty) Ltd v Bright Idea projects 249 CC and Another*, supra (specifically paragraph 24 thereof) with reference to *Thompson v Scholtz* [1998] ZASCA 87; 1999 (1) SA 232 (SCA) (specifically at 247 A-C) provides the necessary authority for a court to have found that 'even in circumstances where there is a warranty clause the lessee can be excluded from payment of the lease amount in total or in part if the lessee did not have full enjoyment of the leased premises' and consequently, that the fact that it is clear from the founding and replying papers relating to the application for rescission of judgment that the applicants did not have the full enjoyment and use of the premises constitutes a bona fide defence.
- [32] In *Gateway* the applicant and 1st respondent concluded a written contract of lease in terms whereof the applicant let to the 1st respondent a portion of the premises consisting of a service station, forecourt and convenience store. The entire agreement was subject to the fulfilment of a suspensive condition that the lessee would be granted the necessary site and retail licences to conduct a service station and to sell petroleum fuel from the premises. These site and retail licences were issued to the lessee. However, the approval of the retail licence was given subject to the zoning being changed, and the lessee could not succeed in securing a zone change in light of the fact that he could not obtain the necessary clearance from the fire department. The lessee claimed that the lessor had to have prior knowledge of this stumble block and of the immense costs that it would require to get the building compliant with the regulations.

[33] The lessor, however, argued that the suspensive condition has been fulfilled because the necessary licences to conduct a service station and sell petroleum fuel from the premises has been obtained. Regarding the failure to obtain a fire clearance certificate reliance was placed on clause 23 of the lease that stipulates as follow:

'The Lessor does not warrant that the premises are suitable for the purposes of the business of the Lessee nor does the Lessor warrant that the premises comply with all legal requirements and by-laws that may be applicable for the purposes of carry on business as contemplated by the Lessee. The Lessee accepts all risks in this regard and undertakes to obtain the requisite licences and permits and approvals to carry on business from the premises.'

[34] The court of appeal, constituted by Van Zyl J and Jappie DJP, held that the contention that the lessee accepted all risks in terms of clause 23 of the lease, and that the lessor's duty simply was to place the premises at the disposal of the first respondent to enable the latter to use it, is devoid of substance (par [24]). They held that 'the essence of a contract of lease is that there must be a certain enjoyment or a certain use of a thing which the lessor undertakes to cause the lessee to have during the period agreed upon and it is actually that which constitutes the subject and substance of the contract and not the leased property itself. It would seem to me that the inclusion of the warranty clause in the agreement was simply a means for the applicant (lessor) to divest itself completely of its common law obligations arising from the agreement. It is clear from the agreement as a whole that the premises were let for a specific purpose. In these circumstances the applicant was under a duty to deliver the property in a condition reasonably fit for the purpose for which it was let.'

[35] I can relate myself to this approach as set out in Gateway, but on the premise that every contract of lease should be interpreted on its own to determine whether the agreement between the parties is susceptible to an interpretation that the warranty contained in the contract (in any) should be discarded or interpreted in a limited sense. The general principle as stated in Gateway can be substantiated with reference to Southemport Developments (Pty) Ltd v Transnet Ltd (440/03) [2004] ZASCA 94; [2005] 2 All SA 16 (SCA) (29 September 2004) where the Supreme Court of Appeal has restated the essential elements for a contract of lease. The SCA held in paragraph (6) that '[t]he essentials of a contract of lease is that there must be an ascertained thing and a fixed rental at which the lessee is to have use and enjoyment of that thing.' The SCA continued and stated in the very same paragraph that whilst it is open to parties to a contract of lease to agree on the intended use of the leased property, such is not to be considered as an essentialia of an agreement of lease. The court then explained with reference to Oatorian Properties (Pty) Ltd v Maroun 1973 (3) SA 779 (A) at 785G that where the parties did agree on the intended use of the leased property such an agreement constitute a material term of the agreement. It is evident from the decision in Oatorian Properties (Pty) Ltd v Maroun 1973

- (3) SA 779 (A) at 785G, that a lessee is bound to use the property for the purpose provided for in the lease, and that the lessor is entitled to cancel the lease in case of a breach. The materiality of the breach is irrelevant. It would therefore likewise be just and equitable to hold that a lessee who is not able to use the leased premises for the intended purpose stipulated in the lease agreement would be able to cancel the contract, if any special requirements that needed to be in existence for the lessee to use the property for

the intended purpose have clearly been stipulated and brought under the intention of the lessor at the time when the lease agreement was concluded.

[36] Where the purpose for which leased property may be used is therefore stated in contract, a clause that the landlord does not guarantee that the leased premises are fit for the purpose of the business to be conducted by the tenant, will not in all circumstances provide a blanket protection to the lessor, but has to be considered in light of all the facts.

[37] In the current application I have to consider whether applicants who, on their own version:

- gave instructions to their attorneys to 'defend the main action and if possible' to reach a settlement (applicants' founding affidavit paras 4.3 and 4.6);
- have since the serving of the summons made numerous payments toward the arrear rentals (applicants' founding affidavit par 4.5; 4.12, 4.13; 4.14);
- regarded the matter as capable of a settlement between the parties (applicants' founding affidavit par 4.6);
- after becoming aware of the fact that default judgment was granted, instructed their 'new attorneys' to propose a new offer of settlement

in terms of Rule 34(1) & (5) (applicants' founding affidavit par 4.11);

- signed the agreement well knowing that certain changes have to be effected before business operations could commence, while already in possession of illegible building plans (e-mail dated April 2015 while contract was signed May 2015);
 - did not request the landlord's permission to effect any alteration to the premises as provided for in clause 8.1.1 (respondent's opposing affidavit par 17.7);
 - effectively took occupation of the property;
 - carried 'on business' from the premises (applicants' founding affidavit par 2)
- 2) to the extent that 'business prospects improved and customers supported the business (applicants' founding affidavit par 5.7), and
- had to be evacuated forcefully from the premises after the lease agreement was cancelled due to the lessee's failure to pay the

monthly charges rental and other charges,

can rely on the principle set out in Gateway where the factual situation was found to be that the lessee was not given possession and occupation of the property and as such was

deprived of the full use and enjoyment of the premises - Gateway, supra para [31].

[38] In addition I have to consider that provision is made in clause 3.2 of the contract for a rent-free period during which approved decorations, fittings and furnishings can be installed with the qualification that if the lessee commences with trading during the rent-free period, the lessor shall be entitled to payment of all charges and rent.

[39] It should be noted that the conclusion of the current rental agreement was not subject to a suspensive condition, and that the purpose for which the premises were leased was set out in the contract as 'tyre sales, replacement, balancing and alignment and battery sales, number plates, brake pads and installations of car tracking system;. It was not stated anywhere in the written contract that the lessee would need to break through multiple layers of concrete to install equipment to enable itself to commence with business. In fact, the respondent stated that a request to engage in such

activities was never received from the applicants (respondent's opposing affidavit par 17.7).

[40] In light of the circumstances set out above, in paragraphs [37] to [39] above, I am of the view that the facts of the current matter are distinguishable from the facts in Gateway and that the warranty contained in the contract between the parties in this application, should not be disregarded on the basis of the Gateway decision.

[41] I accordingly find that there is no reasonable prospect that another court would come to a different

conclusion.

[42] Consequently the following order is made: The applicants' application for leave to appeal is dismissed with costs.

VAN DER SCHYFF

Acting Judge of the High Court

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