

SOUTH AFRICA / JUDGMENT

Kerja (Pty) Ltd v Milga Properties (Pty) Ltd (Leave to Appeal) (2024-049477)

[2025] ZAGPPHC 478 (16 May 2025)

[2025] ZAGPPHC 478

COURT

North Gauteng High Court, Pretoria

BEFORE

Maier-Frawley

CASE / FILE NUMBER

2024-049477

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-049477

In the matter between:

KERJA (PTY) LTD

Applicant / Respondent a quo

and

MILGA PROPERTIES (PTY) LTD

Respondent / Applicant a quo

JUDGMENT (Leave to Appeal)

MAIER-FRAWLEY J:

1. The applicant seeks leave to appeal against the judgment and order delivered on 25 March 2025 in terms of which I ordered that Kerja (Pty) Ltd (Kerja) be evicted from commercial property owned by Milga Properties (Pty) Ltd (Milga). The order was, amongst others, premised on the valid cancellation by Milga of a written lease in terms of which Kerja had occupied the property.
2. The judgment found that Kerja was not entitled to exercise an option to purchase^[1] the leased property, as sought in Kerja's counter application, in view of Kerja's admitted failure to meet its financial commitments in terms of the lease.

3. In terms of the judgment, Milga's eviction application succeeded whilst Kerja's counter-application was dismissed with costs.
4. Milga opposed the application for leave to appeal.
5. As appears from the judgment, it was common cause between the parties that Kerja had fallen into arrears with its payment obligations under the lease. As the breach had not been rectified by Kerja, Milga cancelled the lease agreement, entitling it to repossess its property.
6. Kerja has not sought to appeal the finding in the judgment that the failure by Kerja to comply with its payment obligations under the lease disentitled it to exercise the conditional pre-emptive right to purchase the property. The order dismissing the counter-application is also not sought to be appealed against.
7. The grounds upon which leave to appeal is sought are that I erred:[2]
 - (i) in finding that the lease had been validly cancelled, in that I failed to consider that 'a second settlement agreement, although with the proviso to determine the outstanding amount' was to be 'seen as a counter- offer to the written agreement,' and in failing to give effect to s 48 of the Consumer Protection Act;
 - (ii) in finding that Kerja had failed to meet its obligations without considering the 'copious amounts' it had spent on improvements it effected to the property, with the result that Milga was unduly enriched at the expense of Kerja, and further, without considering that Kerja did not owe the monies as claimed by Milga 'based on the property improvements, applying the set-off principle';
 - (iii) in entertaining the eviction application in circumstances where an interested party had not been joined, which interested party had launched a joinder application after judgment was reserved but before judgment was delivered;
 - (iv) By failing to reflect a date of eviction in the order and in not providing a reasonable time-frame for Kerja to vacate the premises.
8. I provided full and detailed reasons for the orders I made in the judgment, which I abide by.
9. I intend to deal only with certain novel points raised in the application for leave to appeal. As to the first ground listed above,

the provisions of the Consumer Protection Act were not relied on by Kerja in the eviction application and also did not feature in any of the papers that served before court, such as to enable the point to be canvassed fully in the affidavits.[3] This ground was in any event not pursued in oral argument at the hearing of this application. The judgment dealt fully with the

settlement agreement concluded between the parties, including its breach and cancellation. No second settlement agreement came into being for reasons provided in the judgment.

10. As to the second ground listed above, as indicated in the judgment, Kerja did not pursue a claim for improvements in the matter, nor was a case of undue enrichment advanced by it a quo. Kerja admitted being in arrears with payment in its answering affidavit. A Judgment had also been obtained against it in the Magistrates Court on account of such arrears, which judgment was duly executed upon by Milga.
11. As to the third ground listed above, the point of non-joinder was considered in the judgment and dismissed for reasons given therein. The issue of joinder having already been finally adjudicated upon, it could not be reconsidered by means of a further joinder application.
12. As to the fourth ground listed above, as indicated in the judgment, the lease and settlement agreements were respectively cancelled on 17 April 2024 and 8 January 2024.[4] Kerja's occupation became unlawful pursuant to the cancellation, notwithstanding which, it remained in occupation of the premises. The eviction application was launched on 6 May 2024. Judgment was delivered on 25 March 2025, when an order was granted obliging Kerja to immediately vacate the premises. Kerja had had an entire year to make arrangements to vacate the premises or to have contingent plans in place in the event that its opposition to the eviction application was not upheld. Kerja has remained in occupation pursuant to its application for leave to appeal. It filed a 'Notice of Appeal' on 28 March 2025, despite the fact that it had not yet been granted leave to appeal. The application for leave to appeal was heard in May 2025.
13. At the hearing of the matter, further novel points were raised in argument from the bar, which were not contained in the 'Notice of Appeal' and which were also not covered by the pleadings in the eviction application. The respondent, Milga, did not contend for any unfairness to it if the court were to consider same.[5]
14. Further novel points raised in oral argument pertain to the import of clause 37 of the lease and Milga's own non-compliance with the lease in not providing a property that was fit for purpose; and reliance on the integration rule in support of the contention that the intentions of the parties, which were not contained in the written lease, ought to have been considered by the court.
15. I terms of Clause 37 of the lease:
"The parties acknowledge and agree that they have undertaken to each other to do all such things, take all such steps and to procure the doing of all such things and the taking of all such steps as may be necessary, incidental or conducive to the implementation of the provisions, terms, conditions and import of this lease"
16. Clause 37 must be read in the light of the whole agreement, including clauses 33 and 24 thereof. In terms of clause 33 (i):

"The Lessor does not warrant, and this lease is not made on the basis: i. that the leased Property is or will at any time be fit for the use set out in clause 9 of the lease or for any other purpose whatsoever"

In terms of clause 24:

"The Lessee shall have no claim any damages, remission of rent or otherwise, against the Lessor, for any failure of or interruption in the supply of water, gas, electricity or other amenities provided to the leased Property, whether such interruption arises from the negligence of the Lessor, the Lessor's servants, viz. major, casus fortuitus, or any other cause whatsoever."

17. Kerja contended that clause 37 was a 'pivotal' clause so much so, that clause 37 'overrides' other clauses, such as clause 20,[6] as well as the 'unilateral termination by Milga of the lease' under clause 27 of the lease agreement. That the clause has such overriding effect, is certainly a novel proposition for which no authority was provided and which, in my view, has no cognizable foundation in law. Issues that Kerja had experienced with electricity metres and a lack of electricity supply and certain municipal accounts, all pointed, so it was contended, to Milga's non-compliance with clause 37. Therefore, so it was further contended, Kerja was within its rights to withhold payments under the lease for as long as Milga did not perform. Suffice it to say that none of these contentions hold merit in the light of the provisions of clauses 33 and 24 of the lease.

18. In *Johnson v Leal* 1980(3) SA 927 (AD) at 943 B-C, the integration rule was explained as follows:

"Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract."

19. The integration rule is of no assistance to Kerja. Clause 36 of the lease expressly provided that "no alteration, variation, amendment or purported consensual cancellation of this lease or any addition thereto or deletion therefrom shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties hereto."

20. In terms of section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013, leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or in terms of s 17(1)(a)(ii), where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. As was made plain in *In Kruger v S*,[7] in order to meet the test for the grant of leave to appeal, 'more is required than the mere 'possibility' that another court might arrive at a different conclusion.' Quoting from *S v Smith*,[8] the court went on to state that it is not enough that the case is arguable on appeal or not hopeless, instead the appeal must have 'a realistic chance of succeeding.'

21. Having regard to the foregoing, and having dispassionately considered my judgment, I remain unconvinced that Kerja has met the required threshold for being granted leave to appeal. In my view, none of the grounds listed in the 'notice of appeal' or argued from the bar enjoy any reasonable prospects of success on appeal.[9] No submissions were made in relation to section 17(1)(a)(ii) of the Act and no compelling reasons were either advances for allowing an appeal.
22. The general rule is that costs follow the result. I see no reason to depart therefrom.
23. Accordingly, the following order is granted:

ORDER

1. The application for leave to appeal is dismissed with costs.

AVRILLE MAIER-FRAWLEY

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, JOHANNESBURG

Date of hearing:

9 May 2025

Judgment

delivered

16 May 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 16 May 2025.

APPEARANCES:

Counsel for Applicant(Kerja): Adv L. Marx (Trust Account Advocate) together with Adv GA Ferris
Counsel for Respondent (Milga): Adv M Joubert Instructed by: Ronel Hill Attorneys

- [1] The option to purchase encompassed a conditional pre-emptive right and was contained in clause 2 of the lease.
- [2] Some grounds were duplicated in the 'Notice of Appeal' filed of record and as such, need not be considered separately.
- [3] See Minister of Safety & Security v Slabbert (668/2008) [2009] ZASCA 163 (30 November 2009) at paras 11 & 12.
- [4] Per annexures 'TA19' (cancellation of lease) and 'TA17' (cancellation of settlement agreement) to the founding affidavit.

[5] See *Moroka v Premier of the Free State Province and Others* (295/20)

[2022] ZASCA 34 (31 March 2022) at paras 36-38.

[6] In terms of clause 19, the lessee was not entitled to make any structural or other alterations on the property without written authorisation by the

lessor. In terms of clause 20, "in the event where the Lessor made alterations to, additions to, or installations on the Property with the written authorisation

of the Lessor and not exercise his right to purchase the property at the end lease or if the lease is legally terminated or cancelled

during the term thereof, such alterations to, additions to, or installations on the Property shall at the time of the termination

of the agreement, become the property of the Lessor and the Lessee shall not be entitled to any compensation in respect thereof."

[7] 2014

(1) SACR 647 (SCA) at paras 2-3.

[8] 2012 (1) SACR 567 (SCA) para 7.

[9] As per the test was set out in cases such as *Ramakatsa and Others v African National Congress and Another* (724/2019) [2121]ZASCA 31 (31 March 2021) at par 10 and *MEC for Health, Eastern Cape v Ongezwa Mkhitha & The Road Accident Fund* [2016] ZASCA 176 (25 November 2016) at paras 16-17. In *Mkhitha* at par 17, quoting from *S v Smith*, par 7, the following was said: 'An applicant for leave to appeal must convince the court on proper grounds that there is 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 is a reasonable prospect of success on appeal.' (footnote omitted) (emphasis added).

[9] As per the test was set out in cases such as *Ramakatsa and Others v African National Congress and Another* (724/2019) [2121]ZASCA 31 (31 March 2021) at par 10 and *MEC for Health, Eastern Cape v Ongezwa Mkhitha & The Road Accident Fund* [2016] ZASCA 176 (25 November 2016) at paras 16-17.

In *Mkhitha* at par 17, quoting from *S v Smith*, par 7, the following was said: 'An applicant for leave to appeal must convince the court on proper grounds that there is 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 is a reasonable prospect of success on appeal.' (footnote omitted) (emphasis added).

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