



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

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / **NO**
(2) OF INTEREST TO OTHER JUDGES: YES / **NO**
(3) REVISED.

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

CASE NO: 2020/39156

In the matter between:

BODY ACTION HEALTH CLUBS (PTY) LTD

Applicant

and

BLUE CREST HOLDINGS (PTY) LTD

Respondent

In re:

BLUE CREST HOLDINGS (PTY) LTD

Applicant

and

BODY ACTION HEALTH CLUBS (PTY) LTD

Respondent

JUDGMENT

McLEAN AJ:

Introduction

1. This is a judgment in an application for leave to appeal.
2. On 14 December 2020, I granted an eviction order in favour of the Respondent, ordering the Applicant to vacate the leased premises owned by the Respondent, by no later than 31 December 2020. I shall refer to this as “**the Eviction Judgment**”.
3. On 28 December 2020, the Applicant filed a Notice of Application for Leave to Appeal, which automatically had the effect of suspending the Eviction Order in terms of section 18(1) of the Superior Courts Act 10 of 2013 (“**the Superior Courts Act**”).
4. The Application for leave to appeal was heard on 27 January 2021.

The Mootness of the Appeal

5. Counsel for the Respondent urged me to dismiss the application on the basis of section 17(1)(b) read with section 16(2)(a) of the Superior Courts Act.

6. Section 17(1) of the Superior Courts Act provides that leave to appeal may only be granted where the three conditions set out in sub-sections (a), (b) and (c) are met. Sub-section (b) lists one of those conditions as being where *“the decision sought on appeal does not fall within the ambit of section 16(2)(a)”*.
7. Section 16(2)(a) provides that: *“When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.”*
8. The Respondent contended that it is common cause that the Applicant would have vacated the premises by 1 May 2021, as it has undertaken to do so, and that for this reason, by the time any appeal is heard, the Respondent would have left the premises and that the matter would have no practical effect or result.
9. The Applicant, however, pointed to Rule 49(18) of the Uniform Rules, which provides that an urgent appeal may be convened on the direction of the Judge President.
10. It is not apparent to me, therefore, that an appeal could not be heard prior to 1 May 2021, and it would be open to either party to approach the Judge President to seek an urgent appeal in these circumstances.
11. I am therefore not convinced that the decision sought on appeal falls within the ambit of section 16(2)(a) as the decision sought on appeal may yet have a practical effect or result. Given the view that I take on the merits of an appeal, I do not refuse the Application for Leave to Appeal on the basis of section 17(1) of the Superior Courts Act.

Leave to Appeal

12. In granting the Eviction Order, I relied upon the express terms of the written lease agreement, which provided that the lease expired on 31 October 2020. Given that the lease had expired, the Applicant could show no right to remain in occupation, and the Respondent (then the Applicant) was entitled to the relief sought in its Notice of Motion.
13. In opposing the relief sought, the Applicant contended that the written terms of the lease agreement were not exhaustive of the terms of the lease agreement, and that it was the parties' intention for the lease to run for a period of *at least* 14 months, and that the Applicant would be entitled to remain in occupation until the alternative premises it was building were completed. In this respect (and in other respects), the Applicant asserts that the lease agreement was partly written, partly oral.
14. In the Eviction Order, I found that it was not open to the Applicant to rely on an alleged oral or tacit term on the lease agreement, as it is precluded from doing so in terms of the parol evidence rule. In this regard, I relied on *Johnston v Leal* 1980 (3) SA 927 (A) at 942I – 943G.
15. In the Heads of Argument filed in the Application for Leave to Appeal, counsel for the Applicant referred me to clause 41 of the lease agreement which provides that:

"This agreement shall only become binding on the Lessor as and when it is actually signed by the Lessor, until which time the Lessee shall have no

claim to the existence of a tenancy, either verbal or written, by reason of negotiations having been conducted or concluded in regard thereto or by reason of the agreement having been drafted and signed by the Lessee only."

16. Neither party referred to clause 41 in the earlier hearing, and the matter is not raised in the papers.
17. It is common cause that the Lessor (the Respondent) did not sign the lease agreement, but that it was signed by the Lessee (the Applicant).
18. Counsel for the Applicant contended, correctly so, that the parol evidence rule only applies to integrated contracts, and that an Appeal Court may well find that, given that the Lessor did not sign the lease agreement, the effect of clause 41 was that the agreement was inchoate, and that the parol evidence rule did not apply.
19. Counsel for the Respondent contended that clause 41 was solely for the benefit of the Respondent, and that the Respondent had clearly waived the clause. I have some doubt that it would be open to the Respondent to waive clause 41, but even if it could, this is not a matter that has been pleaded on the papers before me.
20. In these circumstances, I am persuaded that there is a reasonable prospect that an Appeal Court, in considering clause 41 of the lease agreement, may find that the parol evidence rule does not apply. In this event, the evidence put up by the Applicant on the terms of the partly written, partly oral agreement must be

considered by the Appeal Court, and that Court may come to a different conclusion to the one reached by me in granting the Eviction Order. Accordingly, the appeal would have a reasonable prospect of success.

21. I am therefore persuaded that an Appeal Court may come to a different conclusion and that leave to appeal should be granted.

Order

22. The following order is made:

22.1. Application for leave to appeal to the Full Bench is granted.

22.2. Costs of the application for leave to appeal will be costs in the cause.



KS MCLEAN, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION JOHANNESBURG

Date Argued: 27 January 2021

Date of Judgment: 1 February 2021

For the Applicants: Adv N Stein

Attorneys: Tatham Wilkes Inc

For the Respondent: Adv EJ Ferreira

Attorneys: Texeira Du Toit Attorneys