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

CASE NO.: 19633/2021

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: Yes
Date: 21/02/22

In the matter between:

DANCING BEAUTY AND HAIR (PTY) LTD (REGISTRATION NUMBER [....])	Applicant

and

NORTHERN CENTRE SHAREBLOCK (PTY) LTD (REGISTRATION NUMBER [....])	First Respondent
URBAN REAL ESTATE (PTY) LTD (REGISTRATION NUMBER [....])	Second Respondent

In re:

NORTHERN CENTRE SHAREBLOCK (PTY) LTD (REGISTRATION NUMBER [....])	First Applicant
URBAN REAL ESTATE (PTY) LTD (REGISTRATION NUMBER [....])	Second Applicant

and

DANCING BEAUTY AND HAIR (PTY) LTD Respondent
(REGISTRATION NUMBER [....])

JUDGMENT

CORAM: Q LEECH AJ

1. The applicant applies for leave to appeal. The applicant was the respondent in the main application.

2. In the main application, I found that the applicant was in unlawful occupation of the property known as Republic Place, situate at Shop 11, Republic Place, Hill Street, Ferndale, Randburg and described as Erf [....], Ferndale Township, Registration Division I.Q., Gauteng. The first respondent owns the property and the second respondent is responsible for letting the property.

3. I granted an order evicting the applicant from the property. The order was granted on 9 December 2021. The applicant was required to vacate the property on or before 1 January 2022.

4. The applicant served by email an application for leave to appeal "against the order" on 23 December 2021. The application for leave to appeal was served within the fifteen (15) day time period provided for in Rule 49(1)(b). However, the applicant failed to upload the application to the electronic filing system within that period and only did so on 12 January 2022. The application for leave to appeal was not lodged within the prescribed time and accordingly the right to appeal lapsed when the filing date was missed (Rule 49(1)(b) of the Uniform rules of Court, read with section 18(5) of the Superior Courts Act 10 of 2013, *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA),* para. 46; and *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016

(3) SA 110 (GJ), para. 14 and 15. Cf. *M Fihrer & Son (Pty) Ltd v Willemse* 1993 (2) SA 713 (T), 718 H - 719 A).

5. The applicant applied for condonation for the late filing. The court has the inherent jurisdiction to grant condonation (*Moluele and Others v Deschatelets, NO* 1950 (2) SA 670 (T), 675 - 676). “The basic principle is that the Court has a discretion“ (*Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), 532 C) and it is for the applicant who seeks such condonation to satisfy the Court that it should exercise its discretion in his favour” (*Yunnan Engineering CC and Another v Chater and Others* 2006 (5) SA 571 (T), para. 22 and 26). See too *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E–G.

6. The court will grant condonation when necessary in the interests of justice (*Moluele supra,* 675) and the discretion is to be exercised judicially upon a consideration of all the facts (*Melane supra,* 532 C). The discretion is not constrained by any rule of thumb which “would only serve to harden the arteries of what should be a flexible discretion” (*Melane supra,* 532 E).

7. As stated in *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour and Another* 1978 (1) SA 1027 (SWA), 1038 C, the court "has an inherent right to grant condonation where principles of justice and fair play demand it to avoid hardship and where the reasons for strict non-compliance with such time limits have been explained to the satisfaction of the Court” (*Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour and Another* 1978 (1) SA 1027 (SWA), 1038 C). “In essence it is a matter of fairness to both sides” (*Melane supra,* 532).

8. The factors that are “usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case” (*Melane supra,* 532 C - D). Other factors are “the nature of the default or negligence, if any, which led to non-compliance, the degree of hardship which will be caused to the party in default if condonation is refused, and any hardship or substantial injustice which may possibly be caused to the other party if relief is granted” (*Moluele supra,* 677).

9. In terms of Rule 49(1)(b), “the court may, upon good cause shown, extend the aforementioned periods of fifteen days”. As held by the full court in *General Accident Insurance Co South Africa Ltd v Zampelli* 1988 (4) SA 407 (C), at 411 C:

> “'Good cause shown' has now, it seems, been accepted to mean that not only must the applicant seeking the indulgence of condonation for the late filing of heads of argument in an appeal - for an indulgence it undoubtedly is - give a reasonable and acceptable explanation for his failure to comply with the Rules, but must also show that he has what Berman J in Ajam v Francke (supra) has described as 'fair prospects of success' in the appeal or what in Louw v Louw (supra) the Court referred to as 'reasonable prospects of success' (see also *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141H). He must also give an acceptable explanation of any delay in applying for condonation (see Saloojee's case supra at 138H).”

10. In the context of an application for leave to appeal, which was refused by the full court but granted on application to the Supreme Court of Appeal, the full court in *High School Ermelo and Another v The Head of Department and Others* [2008] 1 All SA 139 (T), para. 9:

> “The application for condonation cannot succeed. We are aware that usually, a court adopts a robust attitude by granting the condonation, so that the matter is disposed of; for example, in an appeal. However, care must be taken not to create an impression that an application for condonation is a mere formality. An applicant must still make out its case. It is a requirement that for an application for condonation to succeed, an applicant must show reasonable prospects of success; *in casu,* there are none. Secondly, the explanation for the delay is not reasonable; the cause thereof was gross ineptitude on the part of the applicants' legal representatives in putting in an obviously fatally defective notice of application for leave to appeal … Finally, in considering any possible prejudice to the applicants, we took into account the fact that the main application is about to be heard.”

11. As explained in *Melane supra,* at 532 D - E, the factors "are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation … What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong …".

12. In *Melane,* the prospects were - in the opinion of the court - so remote as to unappreciable, and on weighing that important factor with others, refused condonation. Although it was stated in *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) at 529 D - E that the prospects of success consideration does not necessarily enter into an application under Rule 49 (1), the circumstances in which it may not arise are limited and not present in this matter.

13. The applicant briefly addresses some of the usual factors. The applicant emphasises the short delay, which is incorrectly calculated in the application but not to a material degree, proffers an explanation for the delay, alleges there is no prejudice to the respondents and claims good prospects of success.

14. The applicant attempts to explain the inability to file the application for leave to appeal, which I had some difficulty in understanding. However, my understanding of the explanation is, in summary, that the applicant's attorney was unable to operate the electronic filing system on 23 December 2021 without the presence of support staff who were not in attendance as their offices had closed on 15 December 2021. The applicant's attorney abandoned any attempt to file the application until the support staff returned. The support staff returned to the office on 12 January 2022, and the application was filed.

15. The applicant's detailed explanation is that the offices of the applicant's attorneys closed on 15 December 2021 and the employees were due to return on 12 January 2022. However, the attorney responsible for the matter, Mr Mantsha, remained in the office attending to the training of law students who were "working as interns until 23 December 2021." Mr Mantsha appears to have been unfamiliar with the electronic system and enlisted the assistance of one of the interns. Mr Mantsha

and the intern together contacted and obtained guidance from a legal secretary but experienced certain technical difficulties during the “video call”. Mr Mantsha and the intern were ultimately unable to create a new section and upload the application for leave to appeal. The perceived necessity for a new section was not explained.

16. The applicant “submits” that the reason for this inability is that "the date was frozen” and the application could not be uploaded until the date was “unfrozen" by a secretary on 12 January 2022. In another part of the founding affidavit, the applicant states that Mr Mantsha and the intern “were not sanctioned” to add a new section “for the purposes of uploading the notice of appeal”. However, in a couple of places the applicant attributes the inability to a “misunderstanding" or “misinterpretation” of the electronic system.

17. Despite the order of eviction which required the applicant to vacate the premises on 1 January 2022, the applicant's attorney deferred any attempt to file the application until their offices reopened and the support staff returned to work. I can infer that the applicant’s attorney wilfully decided to do so knowing that the application for leave had to be lodged before the order would be suspended and there is no indication of any attempt by the applicant's attorney to inform the respondents’ attorney of their difficulties or to seek their support for a condonation application. The applicant only sought condonation on 26 January 2022, one clear day prior to the hearing of the application.

18. The respondents initially opposed the application but did not file an answering affidavit. The parties thereafter addressed the issue in their heads of argument. However, at the hearing of the matter, I was informed that the respondents withdrew their opposition.

19. Although the explanation for the delay has certain unsatisfactory features, I am aware of the cautionary note that a court should not make an issue of condonation where the parties have not done so (*Ardnamurchan Estates (Pty) Limited v Renewables Cookhouse Wind Farms 1 (RF) (Pty) Ltd and others* [2021] 1 All SA 829 (ECG), para. 35) and the unsatisfactory features must be weighed

against the short period of the delay, partly during an established holiday period, and the absence of any prejudice to the respondents.

20. In my view, the respondents were not brought under the impression that the applicant did not intend to pursue the application for leave to appeal. The delay was not inordinate and the applicant communicated an intention to apply for leave to appeal within the prescribed period prior to the date of the eviction by serving the application on the respondents' attorneys - there was no suggestion that the application for leave to appeal was not received - and failed only to file the application. The respondents did not file an affidavit and did not contend for any prejudice.

21. However, as discussed below, the applicant has placed a defective application for leave to appeal before the court and in my opinion, if those defects are overlooked, the application does not have any prospect of success on the grounds of appeal set out in the application. As the setting out and merit of the grounds of appeal were the main issues, counsel were requested to simultaneously address the condonation and the application for leave.

22. I address each ground of appeal below. I ultimately find that each ground of appeal is bad in law. I nevertheless address the merit of each ground of appeal. I do so in the event that I am wrong in finding that the grounds of appeal are defective and in order to provide some assistance in the event that the applicant proceeds with the matter. As I find that the application for leave is defective and there is no appreciable prospect of success or compelling reason, condonation is refused. In my view, the absence of any prospect or reason outweighs the considerations mentioned above. As stated in *Melane supra,* there would be no point in granting condonation, if there are no prospects of success and there can be no hardship to the applicant (*Moluele supra*).

23. The main reasons for the order can be summarised as follows:

23.1. The lease agreement was common cause.

23.2. The failure to pay the full rental was common cause.

23.3. The impossibility of performance due to the Covid-19 pandemic was not established on the papers and a reduction of rental was precluded by the written lease agreement.

23.4. The alleged oral agreements to pay an amount less than the full rental were not established on the papers and precluded by the terms of the written lease agreement, as was the oral agreement to extend the lease.

23.5. A separate oral agreement of lease, was not established on the papers and the probabilities are that the parties would not have replaced the written lease agreement with an oral lease agreement.

23.6. The fact that the applicant was afforded notice to remedy the breach, failed to do so and the respondents cancelled the lease was common cause.

24. In order to grant leave the court must be of the opinion that the appeal would have a reasonable prospect of success there is some other compelling reason why the appeal should be heard (Superior Courts Act, No. 10 of 2013, section 17).

25. The applicant sought leave to appeal on seven tersely stated grounds without any elaboration. The applicant's heads of argument mentioned only six of the grounds of appeal and in a number of instances the content of the application for leave to appeal was merely repeated and unsupported by any process of reasoning. Counsel for the applicant elaborated on only three of the grounds of appeal in oral argument.

26. In *Songono v Minister of Law and Order* 1996 (4) SA 384 (E), at 385 G - 386 B, it was held that the provisions of Rule 49 of the Uniform Rules of Court are peremptory and the grounds of appeal are required to notify the court of the points that will be raised. The grounds of appeal are bad if, amongst others, they provide no value to the court or fail to specify clearly and in unambiguous terms exactly the case

the applicant intends to pursue. The court must be fully and properly informed and it is not for the court to have to guess at the applicant's case. As stated in *National Union of Metalworkers of South Africa v Jumbo Products CC* 1996 (4) SA 735 (A) at 739 G, the application for leave to appeal "should not place the onus on the Court to glean this case".

27. The application for leave to appeal is required to "indicate in what way and why it is contended that the Court *a quo* erred, either in its findings of fact or its conclusions of law or its application of the law to the facts" (*NUMSA supra,* at 739 B - G). The grounds of appeal must meaningfully define the bases of the intended appeal (*Hing and Others v Road Accident Fund* 2014 (3) SA 350 (WCC), para. 4).

28. The application for leave to appeal in this matter fails to comply with these established principles in setting out the grounds of appeal. The application for leave to appeal states as an example that the court "erred by not finding that the [respondents] did not make out a case for a final interdict" and as another example that the court "erred by not finding that the [applicant] had a valid lease agreement". In the context of a final interdict for eviction in which the written lease agreement, oral variations and extensions to the written lease agreement, and a separate oral lease agreement are in issue, these grounds of appeal "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*" (*Songono, supra* at 385 G), and are of no value to the court.

29. The first ground of appeal is that the order is unconstitutional as it violates the applicant's rights in terms of section 22 of the Constitution. This constitutional issue is not developed in the application for leave to appeal and, in the context of a commercial lease between juristic persons which specifically provides for cancellation and eviction in the event of a failure to pay the agreed rental, the mere statement that the order violates such a right provides no value to the court. The court is neither fully nor properly informed and required to guess at the applicant's case. This task is made more difficult by the absence of any inkling of the case in the applicant's papers and argument.

30. Counsel for the applicant merely submits in the heads of argument delivered in the application for leave to appeal that the order infringes section 22 of the Constitution because it deprives the applicant of its "rights of freedom to trade without any justification", which does not meaningfully define the basis of the intended appeal. The submission is unsupported by any process of reasoning which may guide the court (see *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA), para. 37). And this ground of appeal was not addressed in oral argument.

31. Section 22 provides that "[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law." And section 36 provides that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors …".

32. The applicant failed to raise the point in its answering affidavit. The only reference to section 22 of the Constitution in the main application is found in the final paragraph of the heads of argument filed by the applicant. In that paragraph, counsel merely quotes section 22. It is trite that the issue must be raised in the papers (*Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* 2016 (3) SA 317 (SCA), para. 24). And, "[i]t has been held that constitutional points are to be raised particularly so that it can be dealt with properly" (*Transnet Limited v Vusa-Isizwe Security Services (Pty) Limited* 2014 JDR 1006 (GSJ), at page 30, referring to and quoting with approval from *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 849 A - B). In my view, the issue was not properly raised in the main application and I am not satisfied that the applicant will be permitted to do so on appeal.

33. Furthermore, I understand that only citizens, and accordingly natural persons, may be bearers of the right set out in section 22 of the Constitution, and not juristic persons (see *South African Citizenship Act* 88 of 1995). The applicant made no attempt to persuade me that section 22 should be extended to juristic persons. In

particular, the applicant made no attempt to persuade me that *City of Cape Town v Ad Outpost (Pty) Ltd and Others* 2000 (2) BCLR 130 (C) was wrongly decided.

34. The contention that there is no justification for the order - which is founded on law of general application and generally accepted as reasonable and justifiable - was a bare submission tagged onto the ground of appeal in the heads of argument. As the Constitutional Court held in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC), at para. 83, "the principle of *pacta sunt servanda* gives effect to the 'central constitutional values of freedom and dignity'. The Constitutional Court has further recognised that in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda* … gives expression to central constitutional values." I accordingly fail to appreciate the reasoning for the submission that the enforcement of a lease agreement deprives the applicant of any rights it may have "without any justification". The contract provided that justification. There was no attempt to address any of the issues relevant to such a submission and the papers do not contain the facts required to do so.

35. In my view, this ground of appeal is defective, purports to raise an issue that was not canvassed on the papers or during the hearing in the main application, and in respect of which the applicant has not satisfied me that it has a reasonable prospect of success on appeal.

36. The second ground of appeal is that the court erred in stating that the applicant's personal knowledge is of little value without some indication at least from the context, of how that knowledge was acquired. As stated above, the applicant is a juristic person, and I referred to the knowledge of the deponent to the answering affidavit in the main application.

37. The point is not developed in the application for leave to appeal. The application for leave to appeal does not seek to inform and certainly does not specify the case the applicant intends to pursue. The applicant places the onus, and the burden, on the court to attempt to meaningfully define this ground of appeal. The applicant's heads of argument did no more than restate this ground of appeal without

any process of reasoning and counsel for the applicant did not address this ground of appeal in oral argument. There is no indication whether the applicant contends that I erred in law or fact.

38. The statement in the judgment is a quotation from *President of the Republic of South Africa and Others v M & G Media* Ltd 2011 (2) SA 1 (SCA) para. 38, and accordingly the restatement of that principle is not an error in law. The statement was made in the context of a finding that the denials raised by the applicant to the opening paragraphs of the founding affidavit did not raise genuine disputes of fact. The applicant placed this ground of appeal in that context by referencing the relevant paragraphs of the judgment (para. 6 and 7). The application of the principle to any of those findings of fact is not specifically challenged by the applicant and the applicant does not address the impact of the statement on the findings of fact that informed the order against which leave to appeal is sought. The applicant fails to subject this aspect of the judgment to any critical analysis.

39. The allegations in the opening paragraphs include, amongst others, that the deponent to the respondents' founding affidavit is a director of both respondents, the respondents had resolved to bring the application and appointed the attorneys of record, the citation of the respondents and that the respondents are duly registered companies with their registered addresses at the places stated in the founding affidavit, and the nature of the second respondent's business.

40. The allegations were not genuinely disputed because *inter alia* the denials were bare, the applicant provided no evidence in support of the denials, the deponent to the answering affidavit did not provide any indication as to how he acquired the personal knowledge that the applicant's allegations are allegedly incorrect and the denials were incongruous with the allegations concerning the interactions between the applicant and the respondents. The applicant makes no attempt to indicate on which aspect I should have arrived at a different conclusion or why or what the conclusion should have been.

41. The applicant's heads of argument reframed this ground of appeal as the question "[w]hether the [applicant's] personal knowledge is of little value in respect of

the lease agreement" (para. 15.2). In the context of a written lease agreement, oral variations and extensions to the written lease agreement, and a separate oral lease agreement, the reframing of the ground of appeal in this overly broad manner provides no assistance to the court. I cannot fathom out the meaning of the phrase "in respect of the lease agreement", stated as it is in a vacuum of detail. The question posed by counsel was not further addressed in the heads of argument or oral argument, and the onus was placed on me to glean the applicant's case. I am not prepared to do so. It is not for the court to have to guess at the applicant's case. The applicant is required to specify clearly and in unambiguous terms exactly the case the applicant intends to pursue, and the court must be fully and properly informed.

42. In an unrelated part of the heads, counsel states that "giving no consideration, no weight, and very little weight to the [applicant's] evidence *inter alia,* in respect to force majeure, being Covid-19 pandemic have prevent him to comply fully with the terms of the lease agreement and having unpreccedented (sic) negative effects to his businesses" was a misdirection. I address this statement in the context of the fourth ground of appeal below. I nevertheless mention here that the deponent to the applicant's affidavit in the main application neither mentioned nor demonstrated an unprecedented negative effect on the applicant's business. Counsel made this statement without reference to the papers. The deponent merely alleged that the Covid-19 pandemic prevented full compliance with the lease. As stated below, the mere allegation that the applicant was prevented is insufficient to establish a defence founded on objective impossibility.

43. In my view, this ground of appeal is defective and I am satisfied that the applicant has no prospect of success on this ground of appeal, as a separate and distinct ground of appeal.

44. The third ground of appeal is that the court erred in failing to consider that the lease agreement "is terminated" and accordingly that the non-variation clause is ineffective. The applicant did not develop this ground of appeal beyond this bare statement in the application for leave to appeal, and the context is not provided. The

onus was, once again, placed on the court to glean the applicant's case from the papers.

45. The heads of argument merely repeated this ground of appeal without elaboration, and this ground was not addressed in oral argument. However in another part of the heads, this ground of appeal is coupled to the contradictory statement that I erred in finding that the lease agreement was lawfully terminated (para. 17 and 17.1) and the list of "points and grounds" on which the application is said to be centred poses the question whether the lease agreement was lawfully terminated (para. 15.3). In other words, the applicant effectively contends in the heads of argument that the lease was not terminated. The point the applicant wishes to contest on the basis that I erred in both failing to consider that the lease terminated and accordingly the non-variation clause was ineffective, and in finding that the lease terminated cannot be divined from the papers. The heads of argument instead of assisting the court to understand this ground of appeal, only serve to render it ambiguous.

46. I can only speculate that the applicant is referring to the fact that the non-variation clause was referred to in assessing the contention that the written lease agreement, which terminated, was superseded by an oral lease agreement. As stated in the judgment, at the hearing of the main application, I was invited by counsel for the applicant to consider whether a separate oral lease agreement was concluded that would take effect on the termination of the written lease which contained the non-variation clause. Although the applicant did not state when the oral lease agreement was concluded, it could only have been concluded during the subsistence of the written lease agreement (as it would take effect on termination of the written lease agreement). In that context, I stated in paragraph 25 (with the necessary emphasis) that:

> "[T]he probabilities are such that an oral lease agreement was not concluded, and particularly so as the parties had concluded a comprehensive written lease agreement which was due to terminate by the effluxion of time at the end of the month in which the discussions referred to above took place, *the written lease precluded oral agreements*, the parties

had previously concluded a written addendum to cater for the reduction in the rental, the [applicant] was in breach or alleged by the applicants to be in breach for failing to pay the agreed rental and at the material time the arrears were substantial as the applicants had reversed the reduction granted under the addendum."

47. The fact that the parties had gone to the trouble to include and abide by a non-variation clause in the written lease were facts which, in my view, supported the finding that the conclusion of such an oral lease is improbable. I remain of that view. Furthermore, the conclusion to which I arrived is supported by a number of other facts which the applicant does not seek to contest and, in my view, the conclusion is undisturbed by the removal of the fact that the written lease agreement contained a non-variation clause from the rationale.

48. I reiterate that the oral agreement for which applicant's counsel contended was neither pleaded nor supported by the applicant's evidence. The document on which counsel relied to argue for an oral lease agreement records a discussion that a new written lease would be signed. The new written lease that was contemplated was not concluded. And the deponent to the answering affidavit, who wrote the email, does not allege that an oral agreement was concluded instead.

49. Counsel for the applicant did not vigorously pursue this argument during the application for leave to appeal and instead sought to rely on a new submission that the written lease agreement continued on a monthly basis as an alternative to the oral lease agreement. I understood the contention to be that if the written lease was not properly cancelled and an oral replacement was not concluded, the written lease agreement would continue on a monthly basis after the termination of the lease period. This new point is not contained in the papers or the application for leave to appeal or counsel's heads of argument, save under the overly broad ground of appeal that the court erred in failing to find that the applicant had a valid lease agreement The applicant is not permitted to endlessly raise new points in this manner.

50. In addressing this point in oral argument, counsel for the applicant relied on the terms of the written lease agreement. Counsel could not, however, refer me to the relevant clause of the lease which provided for a monthly lease. The relevant clause is 4.1 of the written lease agreement and the material part provides as follows (with my emphasis):

> "If the Lessee should after expiration of the Lease remain in occupation of the Premises, then:
>
> …
>
> 4.1.2 the other terms and conditions of this Lease shall remain applicable to the Lessee, read with the necessary changes, save that this Lease shall be deemed to have been entered into for a month at a time only.

51. The term applies in the event that the applicant remains in occupation after "expiration" of the written lease agreement, and deems the parties to have entered into a monthly lease on more or less the same terms. The language of expiration read in the context of a lease that provides for termination and cancellation in other clauses, indicates that the deemed position is triggered by remaining in occupation after the expiry of the lease period provided for in the written lease. And does not apply in the event of cancellation or a dispute about the validity of the cancellation. This is partly confirmed in another term of the lease (clause 22), which provides that the conversion to a monthly lease after cancellation is at the lessor's discretion. The communication of the exercising of that discretion must be contained in writing. There was no suggestion that this was done. The applicant made no attempt to grapple with the logical absurdity of an interpretation that deems a monthly lease to have been concluded in the event of the applicant holding over after the respondents have cancelled the written lease agreement or the difficulty presented by the term which expressly provides for the continuation after cancellation.

52. The term on which reliance was placed (clause 4.1) is specifically framed as a deeming provision. In other words, a position that is deemed to exist unless the

contrary clearly appears from the facts. The common cause facts of this matter demonstrate that the respondents had no intention of entering into a monthly lease and the applicant cannot foist that position on them by unlawfully remaining in occupation. The purpose of the term in question is to provide certainty through an express term in circumstances which may establish a tacit relocation of the lease. In the absence of such circumstances, the term does not apply. In my view, this is confirmed by another term of lease which expressly provides for the payment of rental in the situation where the right to remain in occupation is disputed for whatsoever reason (clause 20.5), which is the case in this matter.

53. In my view, this ground of appeal is defective and the applicant has not satisfied me that it has a reasonable prospect of success on appeal. This disposes of both the third and fifth grounds of appeal. The latter ground being that I erred in not finding that the applicant had a valid lease agreement.

54. The fourth ground of appeal is that I erred in not finding that the Covid-19 pandemic is a *force majeure* which prevented the applicant from making payment of the full rental amount and accordingly the applicant was not in breach of the lease agreement. In the context of the matter and the judgment, this ground too is defective. In order to be of some value to the court, the application for leave to appeal must indicate in what way and why the court erred. The issue raised in this ground of appeal was the main issue in the application and the relevant facts, the law and the application of the law to the facts was addressed in detail in the judgment, despite the dearth of material provided by the applicant. The application for leave to appeal makes no attempt to address the judgment and, to make matters worse, in oral argument counsel for the applicant simply restated the few facts available without pointing out in what I erred in arriving at the conclusion in the judgment. In the absence of the “what and why”, a court is constrained to revisit and subject its own reasoning to critical analysis without the assistance of the very party who is attempting to persuade the court that it erred. This places the onus and a burden on the court to ferret out a potential error in its own reasoning. In my view, such a situation is unacceptable and delays the administration of justice.

55. In essence, I found *inter alia* that:

55.1. The applicant had the onus.[1]

55.2. The allegation and its consequences were serious and accordingly there was a heightened demand for the evidence before the court will find the allegation established.[2]

55.3. The circumstances which resulted in the alleged impossibility were material[3] and the alleged impossibility must be decided on the facts.[4]

55.4. The applicant's allegations are bald. The applicant does not set out the circumstances which resulted in the alleged objective impossibility and which entitle it to a reduction in rental.[5]

55.5. The assertions by the applicant are no more than bare conclusions. The constituent probative facts that may establish those conclusions.[6]

55.6. The applicant provides no evidence to support the allegation that the payment of the agreed rental was objectively impossible.[7]

55.7. The mere *ipse dixit* of the deponent to the answering affidavit that the applicant was prevented from performing in full is generally insufficient and particularly so in the context of this matter.[8]

56. The only relevant authority referred to in the heads of argument filed by the applicant clearly indicates the facts required in order to embark on an enquiry into objective impossibility. The papers are devoid of such facts and application for leave to appeal does not mention any specific errors in relation to the facts. I, accordingly, pressed counsel for the applicant to indicate the facts which should persuade me that there is a reasonable prospect of success on appeal. Counsel could only refer to

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[1] Judgment, para. 30.
[2] Judgment, para. 31.
[3] Judgment, para. 28.
[4] Judgment, para. 30.
[5] Judgment, para. 28.
[6] Judgment, para. 35.
[7] Judgment, para. 30.
[8] Judgment, para. 35.

two facts: The existence of the Covid-19 pandemic, and the “lockdown rules”. On a general level those facts were not in issue, and were accepted by the respondents and contained in the judgment.

57. The issue is whether those facts are sufficient to establish objective impossibility. As stated in the judgment, the court was not provided any particularity and certainly no evidence on which to assess the impact of the pandemic and the "lockdown rules" on the business of the applicant, and in that context, I stated that:

> 57.1. The following can be discerned from the papers. The lease records that the property may be used for the sole purpose of conducting a hair salon. … The unforeseeable circumstances that allegedly prevented performance are limited to the Covid-19 pandemic. In the answering affidavit, the applicant does not refer to the “lockdown rules” mentioned in the heads of argument. However, in the replying affidavit, the respondents state that the applicant was “statutorily required to refrain from economic activity” in terms of the regulations under the National Disaster Management Act 57 of 2002 from 15 March 2020 to 19 June 2020, after which the applicant could resume operations. The date when the applicant did so and what its experiences were, are not explained.[9]
>
> 57.2. The applicant does not explain the nature of the impact of the Covid-19 pandemic on the business of a hair salon in general or with specific reference to the business of the applicant. The applicant does not make the statement contained in the heads of argument that as a consequence of the pandemic, the applicant could not afford to comply with the payment obligations and there is no evidence to support the contention. In any event, if the applicant could not afford to pay, an assessment of the reasons is required as the financial circumstances may be self-created. Although the applicant does state that it could not ‘comply fully’, the financial position of

[9] Judgment, para. 32.

the applicant is not set out and the applicant made some payments and made arrangements to liquidate the outstanding arrears.[10]

57.3. The applicant neither alleges nor presents any evidence of the period of the impact of the Covid-19 pandemic on its business. The period during which the applicant was allegedly prevented from performing in full is of particular importance as the parties concluded an addendum to the lease agreement, in June 2020, which provided for a conditional reduction of the rental and certain other charges for the months of April to July 2020. … However, the reduction and deferment could be reversed if the applicant failed to comply with the lease in the subsequent period. As stated above, the applicant fell into arrears in August 2020 and the reduction was reversed some time later in March 2021. In response, the applicant reiterates *inter alia* that the pandemic prevented compliance, presumably the applicant means that compliance was prevented for the entire period in which it remained in arrears. In my view, the pandemic could not be described as unforeseen once the parties had concluded the addendum and had done so 'by reason of the problems caused by the Coronavirus (sic) and to assist the Lessee' (addendum, clause 1).[11]

58. Counsel resorted to contending that I should take judicial notice of the impact of the Covid-19 pandemic and the regulations under the National Disaster Management Act 57 of 2002 on the businesses of hair salons in general and the applicant in particular. In subsequent paragraphs counsel states that "giving no consideration, no weight, and very little weight to the [applicant's] evidence *inter alia,* in respect to force majeure, being Covid-19 pandemic have prevent him to comply fully with the terms of the lease agreement and having unprecedented negative effects to his businesses" was a misdirection.

59. It may be permissible to take judicial notice that the pandemic and regulations had a negative impact on businesses specifically mentioned in the regulations.

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[10] Judgment, para. 33.
[11] Judgment, para. 34.

However, in my view, this dose not assist the applicant in establishing objective impossibility and misses the point for *inter alia* the following reasons which are set out in the judgment:

> 59.1. A change in commercial circumstances which causes compliance with the contractual obligations to be difficult, expensive or unaffordable, is generally insufficient (*Unibank Savings and Loans Ltd (Formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W)198 D - E; *Johannesburg Consolidated Investment Co v Mendelsohn & Bruce Limited* 1903 TH 286; *Hansen, Schrader and Co v Kopelowitz* 1903 TS 707; *Matshazi v Mezepoli Melrose Arch (Pty) Limited* [2020] 3 All SA 499 (GJ) at para. 40.5).[12]
>
> 59.2. As the authorities mentioned above indicate, events of the nature contemplated in this matter usually cause a reduction in customers or have some other effect that causes revenue to reduce, and in the context of the business concerned, the rental is considered by the lessee to be unaffordable. The inability to afford the agreed rental is ordinarily subjective and depends on the means of the lessee concerned. The applicant presents no facts or evidence which demonstrate that the pandemic was the direct cause, rendering the payment of the agreed rental unaffordable and its payment objectively impossible.[13]
>
> 59.3. A further difficulty is that, in order to avoid the cancellation, the applicant must demonstrate an entitlement to a reduction in the agreed rental to the level of the paid amount. The amount to which the agreed rental should be reduced requires evidence because, "[i]n every case a value judgment, based on objective criteria, will be required to establish whether it is just that the bargain should, to the extent still possible, be upheld and the obligations of the parties adjusted" (*World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W), para. 10). The applicant does not indicate the extent of the reduction which it claims or how it should be determined and

[12] Judgment, para. 36.
[13] Judgment, para. 37.

provides no objective criteria. I cannot exercise a value judgment in the absence of facts and evidence.[14] And the applicant does not demonstrate that it paid the reduced amount.

60. A further hurdle in the path of the applicant's prospects on appeal is that although the entitlement to a reduction of rental may be founded on an implied term, "the parties may override the implied terms (*Bischofberger v Vaneyk* 1981 (2) SA 607 (W), at 611A) and, accordingly, 'agree that the risk of impossibility of performance is to fall upon the debtor' (*Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A), 585 B)."[15]

61. As stated in the judgment, "the [applicant] does not allege such a term or indicate that such a term is compatible with the express terms of the lease, which overwhelmingly exclude claims by the [applicant]. In particular, the lease provides that '[t]he Lessee shall not be entitled to claim from the Lessor any remission of rental or any other charges payable in terms of the Lease for any reason whatsoever and nor shall the Lessee in any circumstances have any claim against the Lessor for damages or otherwise be entitled to withhold or defer payment of rental and other charges for any reason whatsoever' (clause 13.3). In my view, this express term precludes a claim for a reduction of rental.[16]

62. The applicant did not address any of these difficulties.

63. In my view, this ground of appeal is defective and the applicant has not satisfied me that it has a reasonable prospect of success on appeal.

64. I have addressed the fifth ground of appeal above.

65. The sixth ground of appeal is that I erred in finding that the respondents had made out a case for a final interdict. The sixth ground of appeal is defective for the reasons stated above. The application for leave to appeal provides no indication as

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[14] Judgment, para. 38.
[15] Judgment, para. 39.
[16] Judgment, para. 39.

to which requirement is in issue. I was required to attempt to glean the case the applicant intends to pursue from other material. I am none the wiser after attempting to do so. The heads of argument merely state one of the “points and grounds” to be whether the respondents had satisfied the requirements of a final interdict and that I erred in finding that the respondents had satisfied those requirements. The heads of argument proceed to state that the statement that the respondents had met "the requirement" for a final interdict constituted a “misdirection”, without any elaboration or process of reasoning. And counsel for the applicant did not address this ground of appeal in oral argument.

66. The heads of argument set out authorities stating the requirements for a final interdict and the principle that an application for final relief must be determined by reference to *Plason-Evan Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A). There is no attempt to apply those authorities to the judgment. The applicant does not indicate which issues were not decided on an application of *Plascon-Evans* and should have been decided differently. A reason for that could be that *Plascon-Evans* provides the mechanism to resolve opposing versions and, on the material issues, there were no disputes of fact and certainly no genuine disputes.

67. The authorities provide that the acceptance of the version set out by the respondent in applications for final relief is required “in the event of conflict” (*Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 260 I; *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA), para. 20). It is "undesirable to attempt to settle *disputes of fact* solely on probabilities disclosed by the affidavit evidence” (*DA Mata v Otto, NO* 1972 (3) SA 858 (A), 865 H, emphasis added). A matter can be determined on the basis of the probabilities in the absence of real, genuine and *bona fide* dispute of fact, and it follows that a court can do so where the facts are common cause (*Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), para. 12; *Truth Verification Testing Centre v PSE Truth Detection CC and Others* 1998 (2) SA 689 (W) at 698 H - J). A decision on the probabilities implies the rejection of a version, which is not required on common cause facts (cf *NDPP v Zuma* 2009 (2) 277 (SCA), para. 26)

68. As mentioned above, I applied *Placon-Evans* to the denials raised against the allegations in the opening paragraphs of the founding affidavit and found that those denials did not raise genuine disputes of fact and, for the reasons stated, I could have regard to the facts stated by the respondents. The applicant does not dispute the stated legal position or its application to the facts in respect of those denials.

69. The defence of objective impossibility of performance was not established due to the absence of facts on material issues and the couple of facts on which the applicant relied were common cause. The applicant in fact received the benefit of the respondents' setting out of the regulations under the National Disaster Management Act 57 of 2002. I was not satisfied that those undisputed facts established objective impossibility.

70. The contention that a separate oral agreement was concluded was neither pleaded by the applicant nor supported by material facts. It was not the applicant's version that a separate oral agreement was concluded. Counsel argued for that agreement at the hearing of the matter based on an email attached by the respondents which was common cause. I found that the email did not establish an oral contract of lease.[17] The applicant faced an added difficulty regarding the authority to conclude the contract.[18] Counsel did not press the argument in respect of an oral lease agreement with any enthusiasm in the application for leave to appeal and instead pivoted to rely on a monthly lease. I dealt with that contention above.

71. In my view, this ground of appeal is defective and the applicant has not satisfied me that it has a reasonable prospect of success on appeal.

72. The seventh ground of appeal is that I erred in not finding that the respondents failed to comply with the lease agreement as the respondents had failed to issue a certificate of arrears. The point raised in this ground of appeal is not contained in the papers and was not raised at the hearing of the main application. The application for leave provides no indication how I erred in relation to a point that

[17] Judgment, para. 23.
[18] Judgment, para. 24.

was not raised in the papers and does not correspond with the terms of the lease agreement in this matter.

73. The point is raised in this application because, as I was informed by counsel for the applicant, this court in another matter granted leave to appeal on the question "[w]hether the applicant was required by the terms of the lease agreements to issue a certificate on the outstanding arrears before terminating the lease agreement or before taking any legal action against any of the Respondents and whether the respondents have complied with the terms of the lease agreements" (para. 15(1)(d)).

74. The judgment in the application for leave to appeal in that matter was placed before me. The judgment merely states in respect of a number of grounds of appeal that the applicants have reasonable prospects of success. The judgment does not set out the reasons for that conclusion.

75. The main judgment was not placed before me. It nevertheless appears from the judgment in the application for leave to appeal that the facts of the matter before the learned Judge were materially different to the present matter. The only similarity to which counsel for the applicant could refer was that the respondents in the application for leave to appeal before me were the respondents in that application, and a lease agreement was in issue. There was no indication that the terms of the lease were similar. The ground of appeal underlying the stated question suggests that the terms were different. The ground of appeal in that matter was that "[t]he Applicant failed to meet *the lease requirement of issuing a certificate on the outstanding arrears <u>before</u> terminating the lease agreement or <u>before</u> taking any legal action* against any of the Respondents" (para. 11(4)) (emphasis added).

76. The corresponding term in this matter provides that "[a] certificate issued by [the second respondent] as to any amount allegedly owing by the Lessee to the Lessor howsoever arising shall be prima facie evidence of the amount owing" (clause 20.3, part B). The applicant neither pleaded nor referred to this term in the answering affidavit. There is no indication in the language, context or purpose of the lease that the respondents are required to issue a certificate and required to do so before terminating the lease. The term is permissive. The term permits the

respondents to prove the applicant's indebtedness by means of a certificate. The certificate serves only as *prima facie* proof. The respondents are free to prove the indebtedness by any other means, if they so choose. In this matter, the failure to pay the full rental was not in dispute, the applicant admitted it was in arrears and the "reconciliation of the [applicant's] account", which sets out the arrears, was not disputed. The extent of the arrears is, in any event, irrelevant for the purposes of the eviction application.

77. The written lease agreement provides for the conditions under which the respondents may cancel (clause 20.1 and clause 22). The relevant conditions are: None payment of the agreed rental or other charges, notice and failure to remedy. The respondents satisfied those conditions. There is no suggestion in any of the terms of the lease that cancellation and the right to "re-enter and repossess the Premises" (clause 20.1) and to "compel ejectment" (clause 20.4) are subject to the prior issuing of a certificate of arrears.

78. Counsel for the applicant nevertheless states in the heads of argument that I erred "by finding that Applicant did not comply with the lease agreement". I assume counsel intended to state that I erred in finding that the applicant had complied. I point out that the respondents' compliance with the lease agreement was not in issue in the main proceedings.

79. Counsel for the applicant proceeds to state in the heads of argument that "[t]he [respondents] failed to provide the [applicant] with a certificate of arrears *as required by the agreement*" and replicates the ground of appeal in the matter mentioned above by stating that "the [respondents] failed to meet *the lease requirement of issuing a certificate on the outstanding arrears <u>before</u> terminating the lease agreement or <u>before</u> taking any legal action* against the [applicant]" (my emphasis). Counsel states "[t]hat the [respondents] did not have a clear right to evict the [applicant] without providing with certificate on the outstanding arrears." There is no process of reasoning in the heads and there was no attempt to provide any reasoning in oral argument to substantiate the contention that the respondents were required by the agreement to provide a certificate and required to do so before

terminating the lease. And I am not persuaded that the applicant has a reasonable prospect of success on this ground of appeal.

80. The sole reason provided by counsel for the applicant in pursuing leave to appeal on this ground was that leave had been granted in the matter mentioned above. This, counsel maintained, constituted compelling circumstances under section 17(1)(a)(ii) of the Superior Courts Act, No. 10 of 2013. I mention the granting of leave to appeal for compelling reasons is not mentioned in the application for leave to appeal or the heads of argument, other than in the quotation of the whole of section 17, and not motivated. The focus in both documents is on "a reasonable prospect of success".

81. "In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. [The applicant for leave] must satisfy this court that it has met this threshold" (*Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA), para. 2). "The merits of the appeal remain vitally important and will often be decisive" (*Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) at 330 C).

82. In my view, the granting of leave to appeal in another case between different parties on different facts, and on a point that was not raised in the papers in the matter before me, and has no prospect of success, does not constitute a compelling reason.

83. Accordingly, this ground of appeal is defective, purports to raise an issue that was not canvassed on the papers or during the hearing in the main application, and

in respect of which the applicant has not satisfied me that it has a reasonable prospect of success on appeal or which constitutes a compelling reason.

84. In the premises, I make the following order:

(1) The application for condonation is dismissed.

(2) The application for leave to appeal is dismissed.

(3) The applicant shall pay the costs of both applications.

QG LEECH
Acting Judge of the High Court of South Africa,
Gauteng Local Division, Johannesburg

HEARD ON:	28 January 2022
DATE OF JUDGMENT:	21 February 2022
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