

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)**

**CASE NUMBER:**

7142/2010

5 **DATE:**

10 JUNE 2010

In the matter between:

**DAVID MICHAEL PFAFF**

1<sup>st</sup> Applicant

**JACK ALWORTH SMITH**

2<sup>nd</sup> Applicant

10 and

**LORNA FAY CAMERON**

Respondent

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**J U D G M E N T**

**(Application for Leave to Appeal)**

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**LOUW, J:**

20 This is an opposed application for leave to appeal against the  
judgment and order made by me in this matter on 10 June  
2010. The applicants were the defendants at the trial. It is  
trite that the criteria for leave to appeal are whether there is a  
reasonable prospect that another court will come to a different  
conclusion and also that the matter is of substantial  
importance to applicants or to both parties.

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The fact of the matter is that this is a case of substantial importance to the parties and this application turns on the reasonable prospect of another court coming to a different conclusion.

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I have set out in the history of the matter fully in the judgment. Mr Engelbrecht, who appeared for the applicants this morning submitted that the raising of the area of the right of way on the servient tenement was something which was  
10 reasonably foreseeable at the time that the servitude was created in order to gain access to the dominant tenement. In any event, he contended that if there were an infringement, monetary compensation should have been ordered. Given the lie of the land at the time, it was clearly foreseeable that in  
15 order to gain access to the dominant tenement some increase of the height of the road would be necessary. This would be determined by the state of the dominant tenement at the time and not by the improvements that were subsequently effected by the applicants on the dominant tenement. The increase in  
20 height beyond 500mm was necessitated by the improvements on the dominant tenement. This could have been avoided the applicants planning and thereafter carrying out the improvements, bearing in mind that they were not entitled to raise the servitude road to a higher level than the 500mm  
25 determined by the natural lie of the land. In addition, I  
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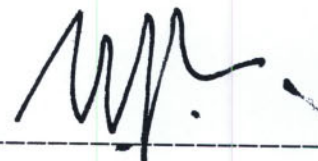
exercised the discretion for the reasons set out in the judgment, not order to order that money be paid as compensation for the infringement.

- 5 Mr Van der Merwe opposes the application on behalf of respondent.

I am not satisfied that there is a reasonable prospect that another court will come to a different conclusion or will  
10 interfere with the exercise of the discretion not to order monetary compensation.

The APPLICATION FOR LEAVE TO APPEAL IS REFUSED WITH COSTS.

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LOUW, J

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**IN THE HIGH COURT OF SOUTH AFRICA****(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

23305/2010

**DATE:**

12 NOVEMBER 2010

5 In the matter between:

**KLOOF INVESTMENT 2004 CC**

Applicant

and

**GARY ISAACS**

Respondent

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**J U D G M E N T****MIA, AJ:**

This is an application for ejectment of the respondent from the premises described as Shops 11C and 11D, Palm Hof Centre, Kloof Street, Gardens, Cape Town and a further order directing the respondent to pay the costs of this application on an attorney and own client scale. There were a number of issues that the parties had disputes with regard to. However, when the matter came before me, the parties indicated that there was no opposition to the issue with regard to condonation for the late filing of the opposing papers. With regard to the further aspects, the parties indicated that there were no further outstanding issues. The request was that this Court only consider the application of clause 4.6 of the agreement between the parties and its application to this matter.

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Briefly, the background to this matter is that the respondent and the applicant entered into a lease agreement for premises for the period 1 January 2008 until 31 December 2012. It appears that during the course of 2010 there was an averment  
5 that the respondent had not been paying rentals herein and a demand was sent to the respondent. Following on the respondent's failure to make payment in terms of demand, a summons was issued out of the Cape Town Magistrate's Court.

10 At the time of commencing hearing this matter, I was informed that in order to succeed in this matter, the applicant would withdraw the matters pending in the Magistrate's Court. There was nothing placed before me indicating that such matters were in fact withdrawn. Having regard to the papers, there are  
15 a number of disputes that have been raised between the parties which disputes ought to have been addressed by way of action. On the papers, neither of the parties have indicated that they request that this matter be addressed by oral evidence.

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Ordinarily, having regard to the founding and opposing affidavits, in the event that there are disputes, either the respondent may call for the deponents to be cross-examined in terms of Rule 6(5)(g) of the Uniform Rules of Court. This was  
25 not in fact done so in this matter. The Court is thus faced with

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the position that there are disputes in this matter. The respondent relies on *compensatio*, indicating that there are a number of claims that it has against the applicant in this matter, specifically for the lack of storage space for refuse, the  
5 lack of access to parking bays and the leaking roof.

The respondent places an amount of R1 000,00 value to each parking bay and the respondent then also calculates its loss of 25 metres square use of the premises as a result of the lack of  
10 a storage facility for refuse, and avers that in view of that lack of 25 metres square, there is an amount of overpayment for rentals due and due to this that there was an overpayment for rental for the previous years, which places them in credit with the applicant herein.

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In instances where there appears to be disputes, I refer to the case of Room Hire Company Property Limited v Jeppe Street Mansions Property Limited 1949(3) 1155 at 1163 where the Court refers to various disputes of fact which may arise. In  
20 the present case, the dispute of fact that is applicable in this matter, is where the respondent disputes the averments made by the applicant in the matter. The Court in the Room Hire Case refers to Rule 9 (5) (applicable Rule at the time) of the Uniform Rules of Court and indicated that the respondent may  
25 have the option of calling for the deponents to be cross-  
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examined, and that such cross-examination would be sufficient to safeguard the respondent.

In the Room Hire Case at 1164 the Court said the following:

5 "... the Court should ordinarily decline to decide the dispute, purely on the probabilities as disclosed in the affidavit and should, at its discretion, select the most suitable method of employing *viva voce* evidence for the determination of the dispute." In this instance, as I have indicated, the parties  
10 have not availed themselves of that instance. The Court says at 1165 that "in other circumstances, the Court's discretion may well be exercised in the direction of either dismissing the application or of sending the parties to trial with such direction as to costs and of filing pleadings as it deems fit. Whatever  
15 particular course should be taken, depends on the circumstances of each case, and that it is undesirable to lay down any rule of exercise of the Court's discretion."

Now having regard to the rule applied in Plascon Evans Paints  
20 v Van Riebeeck Paints 1984(3) SA 623, I have had regard to the versions that have been placed before the Court. The applicant knew full well at the stage when it launched this application that the respondent had raised a defence on material aspects in the Magistrate's Court. The respondent  
25 had indicated that he was not indebted to the applicant and

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why he had not breached the agreement of lease. The applicant thus accordingly knew that a real or a genuine or *bona fide* dispute of fact would have been raised in this court and despite this knowledge, the applicant proceeded to bring  
5 this claim by way of application.

The issue of the respondent's alleged indebtedness on the breach, are material and should be ventilated in an action in due course. The issue of *compensatio* which is raised by the  
10 respondent herein and which the applicant indicates that the Court should not have reference to with regard to clause 4.6 of the agreement signed between the parties, which is found at page 24 of the pleadings herein, is not capable of determination without having regard to the aspects that are  
15 raised with regard to the parking bays, the reduction of space for refuse disposal and with regard to the leaking roof.

Thus having regard to the above, I find that there are *bona fide* disputes of material facts which are not farfetched and that  
20 makes this application incapable of succeeding on the papers. The applicant ought to have proceeded by way of action and I accordingly DISMISS THE APPLICATION WITH COSTS.



23305/2010

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JUDGMENT

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A handwritten signature in black ink, consisting of a large, stylized 'M' and 'A' intertwined, with a horizontal line drawn through the middle of the signature.

MIA, AJ

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**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No.: 23305/2010

In the matter between:

**KLOOF INVESTMENT 2004 CC**

Applicant

and

**GARY ISAACS**

Respondent

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**ORDER**

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**MIA AJ:**

I have heard counsel for the applicant and the respondent herein. I have also had the benefit of perusing the record herein.

I am not persuaded that there are reasonable prospects that another court may come to a different conclusion.

The applicant's application for leave to appeal is dismissed with costs.

  
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**MIA AJ**