IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no:**6458/2022**

In the appeal of:

X-PHARM (PTY) LTD **APPLICANT**

and

EMOYAMED HOSPITAL (PTY) LTD **FIRST RESPONDENT**

EMOYA PROP MED(PTY) LTD **SECOND RESPONDENT**

JUDGMENT BY: **MOLITSOANE, J**

The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 10 AUGUST 2023. The date and time for hand-down is deemed to be 10 AUGUST 2023 at 12h30.

Adjudicated on Heads of Arguments as directed by Court.

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[1] This is an application by the Second Respondent, for leave to appeal the whole judgment and order of Gusha, AJ delivered on 25 May 2023. Gusha, AJ being unavailable since her acting stint has ended, I am now seized with this application. The Applicant opposes the granting of the relief sought. The First Respondent did not participate in these proceedings.

[2] Section 17 of the Superior Court Act 10 of 2013 states:

> **"Leave to appeal**
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> 17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
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> (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 under consideration;
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> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
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> (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."

[3] Section 17(1) requires that an Applicant seeking leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success in the appeal. In *Democratic Alliance v President of the Republic of South Africa and Others*[1] the Full Court held as follows:

> "The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, *Van Heerden v Cronwright and Others* 1985(2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word 'would 'as opposed to 'might 'serves to emphasise this point. As the Supreme Court of Appeal said *in Smith v S* 2012(1) SACR 567 (SCA) at para 7;
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> 'More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[1] (21424/2020) [2020] ZAGPPHC 326(29 July 2020) paras [4] – [5].

[4] The court in *Ramakatsa and Others v African National Congress and Another*[2] held as follows:

> "[10] Turning the focus to the relevant provisions of the Superior Courts Act[3] (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice.[4]… I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. ... The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.[5]"

[5] In my view the liability of the Second Respondent is based on the narrow point raised by the Court a quo as set out as follows at the end of the judgment:
"[42] …I hold that the applicant was in peaceful and undisturbed possession of the premises until disturbed herein by the respondents on the 24th December 2022. I am fortified in this finding by the following; albeit that the applicant conceded that it had no dispute with the 2nd Respondent, the fact is there is a clear nexus between the 1st and 2nd respondent. The latter being the owner of the premises in question and the former acting as sub-lessor of the premises. It is particularly illuminating that neither of the respondents disavow locking and or issuing the instruction to lock the premises, choosing only to focus on the fact that the applicant stated in its papers that it did not know who of the 2 respondents spoliated it. In view of the nexus between the respondents, the dispute between the applicant and the respondents the most plausible inference to draw is that they are co-spoliators." (my emphasis)

[6] It is necessary to succinctly set out the following common cause facts: The Second Respondent is the owner of the building known as Phase 3A situated at

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[2] [2021] ZASCA 31(31 March 2021.
[3] "*5. Section 17(2)(d) Act 10 of 2013*."
[4] "6. *Nova Property Holdings Limited v Cobbett & Others* [2016] ZASCA 63: 2016 (4) SA 317 (SCA) para 8."
[5] "9. *See Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA)*; MEC Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 para 17."

the property known as Emoya Estate. The Second Respondent has leased the premises aforementioned to the First Respondent. The First Respondent, in turn, sub-leased to the Applicant for the latter to conduct a professional business of a pharmacy. Mr. Jacobus (Buks) Westraad is the director of both the First and Second Respondent.

[7] It is in my view trite that the Applicant must make out its case in the founding affidavit, for this reason, the Applicant stands and falls on the case it made on its founding affidavit. This principle was articulated as follows in *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co(Durban) and Another*[6]*:*

> "The correct approach to the problem was enunciated clearly by CANEY J in *Bayat and Others v Hansa and Another 1955(3) SA 547 (N) at 553D:*
>
> '…the principle which I think can be summarised as follows…that an applicant for relief (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving ex parte or on notice to the respondent…'".

[8] The Applicant, in its founding affidavit unequivocally avers that the " *First Respondent, on the 24th December 2022 deprived the Applicant undisturbed possession of the property by changing locks, subsequently closing the shop and preventing applicants staff to entering the premises*[7]*."*

[9] In the roundabout turn, later in the founding affidavit, it is contended that it was either the First or Second Respondent who changed the locks of the property. The court a quo did not deal with this apparent discrepancy. In my view, the Court a quo seems to have drawn an adverse inference on the fact that neither of the Respondent accepted responsibility for changing locks. In my view, the Court a quo did not appreciate that it is not the case for the Applicant that the Second Respondent changed the locks and so caused the spoliation. There was no obligation on the part of the Second Respondent to deny an allegation which was not directed to it.

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[6] 1980(1) SA 313 (D & CLD) at 315 E-H and 316A.
[7] Paginated record, page 6 para 3.1 of the Founding Affidavit.

[10] The case for the Applicant was at all material times it had a sublease agreement and had interactions and was spoliated by the First Respondent. it is its case that the Second Respondent was only joined in these proceedings *ex abudanti cautela*[8]. The only reason given by the Applicant to cite the respondents "*as co-respondents in this application is(sic) due to ignorance of their identity*[9]", not as possible co-spoliators as found by the Court a quo.

[11] That there is a nexus between the First and Second Respondent is beyond dispute. Mr Westraad is the director of both entities. Both are separate legal entities with distinct legal personae. The First and Second Respondents have an existing lease agreement on the property in issue. The nexus ends there. The Court sitting in appeal will have to deal with the issue of whether there is any evidence to show that the Second Respondent was instrumental in causing the First Respondent to evict the Applicant. The nexus between the Respondents, being one of lessor and lessee as pleaded by the Applicant will have to be explored to decide whether, in the absence of any evidence, imputes liability on the Second Respondent. I express serious reservation in this regard. In my view, the nexus as found by the Court a quo, is irrelevant to the issue in this case. I accordingly find that the Second Respondent is entitled to the relief sought. I accordingly make this order:

ORDER

1. The Second Respondent is granted leave to appeal to the Full Court of this Division, the whole judgment and order of this court granted on 25 May 2023;

[8] Paginated record page 11 para 4.16 of the Founding Affidavit.
[9] Ibid.8.

2. The costs shall be costs in the Appeal.

P. E. MOLITSOANE, J

On behalf of the Applicant:	Adv. D.M GREWER
Instructed by	HJ BOOYSEN Attorneys Inc.
	BLOEMFONTEIN

On behalf of the 2nd Respondent:	Adv. J.S. Rautenbach
Instructed by	Symington De Kok Attorneys
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