


**REPUBLIC OF SOUTH AFRICA**



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

Case Number: 00678/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>24 June 2024</u>	
DATE	SIGNATURE

In the matter between:

**BAYAFZA CC t/a BP KENSINGTON**

Applicant

and

**BP SOUTHERN AFRICA (PTY) LTD**  
**(Registration Number: 1924/002602/07)**

Respondent

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**JUDGMENT**

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**NOKO J**

*Introduction*

[1] The applicant launched an application for leave to appeal the judgment and order I granted on 4 March 2024 where the counter application instituted by the applicant was dismissed with costs. The respondent has in turn launched a conditional counter appeal

against my order and judgment dismissing, with costs, its application for eviction and other reliefs.

### *Background*

[2] The facts relating to this case have been penned comprehensively in the judgment and will not be regurgitated in this judgment. In brief, the parties entered into an indefinite sub-sub lease agreement which may be terminated on a six month notice after a period of four years and six months. In addition, the parties entered into a franchise agreement whose duration was linked to the lease agreement.

[3] The respondent had a sub-lease agreement with Oblix (Pty) Ltd (“Oblix”) for a 20-year period ending on 11 September 2020. The parties entered into an addendum extending the agreement period to 31 December 2029. The addendum provides that Oblix is entitled to select a dealer once the sub-sub lease agreement between the applicant and respondent is terminated.

[4] The respondent terminated the agreement and provided the applicant with a six months’ notice which I found not be effective since the notice period is not in accordance with the lease agreement. I therefore found that the lease agreement was not lawfully terminated. The respondent has accepted my finding in this regard and has subsequently served a proper termination notice<sup>1</sup> after my judgment.

[5] The respondent contends that its entire case is centred on the respondent having conspired with Oblix to flinch its business and goodwill. The said contention is premised on the submission that the respondent has terminated the lease agreement and refuses or declared its intention to pay for the goodwill or business of the applicant. Further that the addendum entered into by Oblix with the respondent was intended to flinch the applicant’s business.

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<sup>1</sup> This was mentioned in passing and does not serve before me for consideration.

[6] The respondent in retort advanced several arguments including the contention that due to my finding that the termination of the lease agreement is set aside, this application became academic. This was predicated on the contention that the claim by the applicant was triggered by the termination which has now been set aside and the claim should also fall off. In addition, the rights flowing from the addendum agreement entered into with Oblix would become effective once the lease agreement with the applicant is lawfully terminated. In view of the fact that the lease agreement was pronounced not to be terminated, such rights are not yet available to Oblix.

*Legal principles and analysis*

[7] Section 17 of the Superior Courts Act provides that leave to appeal would be granted where the court is, *inter alia*, of the opinion that the appeal would have a reasonable prospect of success and/or further that there is a compelling reason for the appeal to be heard.

[8] It is now trite<sup>2</sup> that the provisions of section 17 introduced a higher threshold to be met in the application for leave to appeal and the usage of the word “would” requires the applicant to demonstrate that another court would come to a different conclusion.

[9] The mere possibility of success, an arguable case, or one that is not hopeless is not enough.<sup>3</sup> There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.<sup>4</sup>

[10] I hold the view that the reliefs sought by the applicant were triggered by the termination of the lease agreement. In view of the fact that sub-sub lease still obtains as the termination was declared unlawful and set aside then the applicant’s counter-application became moot. In any event, the said counter application is targeted at Oblix’s

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<sup>2</sup> *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325; *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (“*Mkhitha*”); *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489.

<sup>3</sup> *Mkhitha* id at para 17.

<sup>4</sup> *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para 7.

rights which will become alive only once the sub-sub lease agreement between the applicant and respondent is terminated.

[11] In the premises, I remain impervious that the applicant has succeeded in demonstrating that another court would come to a different conclusion. There is also no other reason why the appeal should be heard or there are conflicting judgments on the matter under consideration. In the premises, the application for leave to appeal is bound to fail.

#### *Costs*

[12] It is trite that the issue of costs is within the discretion of the court. In addition, it is also a general principle that the costs should follow the results. There is no basis to uproot the said principle and I therefore hold that the application is bound to be dismissed with costs.

#### *Order*

[13] In the premises I grant the following order:

*That the application for leave to appeal is dismissed with costs*



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**M V Noko**

Judge of the High Court

This judgement was handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 24 June 2024,

Date of hearing: 31 May 2024

Date of judgment: 24 June 2024

### **Appearances**

For the Applicant: Adv T L Marolen

Attorneys for the Applicant: Lawtons Incorporated

For the Respondent: Adv M Desai

Attorneys for the Respondent: Govender Patel Dladla Inc