



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

**Appeal number: A128/2022**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

**WENDELENE MALLETT**

Appellant

and

**FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK**

First Respondent

**HOKANANG COMMUNICATION SOLUTION**

Second Respondent

**LOURENS JACOBS VISSER**

Third Respondent

**CORNELIA JOHANNA ALETTE VISSER**

Fourth Respondent

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**CORAM:**

MATHEBULA, J *et* RANTHO, AJ

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**HEARD ON:**

23 JANUARY 2023

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**JUDGMENT BY:** RANTHO, AJ

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**DELIVERED ON:** The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 07 JUNE 2023. The date and time for hand-down is deemed to be 07 JUNE 2023 at 10H00.

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### **Introduction**

[1]. This is an appeal against the whole judgment and order granted by the Magistrates' Court for the District of Bloemfontein. It concerns the summary judgment granted against the appellant on 26 August 2022.

### **Facts**

[2]. On 19 April 2021, the respondent ("the bank") issued summons against the appellant, who was cited as the fourth defendant in the *court a quo*, for payment of the amount of R 189 003.00 plus interest and costs. Summons were issued on the basis of a suretyship agreement allegedly signed between the bank and the appellant, which was annexed to the particulars of claim marked annexure "A".

[3]. Following the delivery of the appellant's plea on 11 May 2022, the bank proceeded to apply for summary judgment, which application was opposed by the appellant.

[4]. The relevant allegations contained in the bank's particulars of claim were that:

(a). On or about 13 August 2018 and at Bloemfontein it entered into a written overdraft facility agreement with the first defendant, Hoka nang Communications Solutions CC ("*Hoka nang*"), in terms of which it advanced money to the amount of R130 000.00 to the Close Corporation as an overdraft facility;<sup>1</sup>

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<sup>1</sup> Index page 14: para 6 of the POC.

(b). The second and third defendants signed a Consent in terms of the provisions of Matrimonial Property Act, 1984 (Act 88 of 1984) and a copy of the said consent is annexed to the particulars of claim.<sup>2</sup>

(c). In concluding the agreement, it was represented by its duly representative and Hokanang was allegedly represented by the appellant together with the second and third defendants ("*jointly referred to as defendants*");<sup>3</sup>

(d). Defendants allegedly entered into a suretyship agreement with the bank whereby they bound themselves as sureties and co-principal debtors jointly and severally *in solidum* with Hokanang, for the repayment of the overdraft facility advanced by the bank;<sup>4</sup>

(e). The suretyship agreement provides for a term that a certificate issued by any manager of the bank would constitute *prima facie* proof of the correctness of any amount due and owing by Hokanang to the bank;<sup>5</sup>

(f). The agreement between the bank and Hokanang was not subject to the provisions of the National Credit Act 34 of 2005 ("NCA") for as far as Hokanang was a juristic person with an annual turnover, at the time of agreement was concluded, exceeding the threshold as defined in the NCA;<sup>6</sup>

(g). For as long as the NCA did not apply to Hokanang as a principal debtor, the NCA furthermore did not apply to any sureties in terms of section 4(2) of the NCA;<sup>7</sup>

(h). In abundance of caution and only as far as it may be found to be legally required, it delivered the notices in terms of section 129 of the NCA to the Defendants on 1 December 2020.<sup>8</sup>

[5]. On 11 May 2022 the appellant filed her plea raising two special plea defences. The first one was non-compliance with sections 72(1) and 129 of the

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<sup>2</sup> Index page 14: para 7 of the POC.

<sup>3</sup>Para 8 of the POC: Index page 14

<sup>4</sup> Para 15.1 of POC: Index page 17

<sup>5</sup> Para 15.2 of POC: Index page 18

<sup>6</sup> Para 15.3 of POC: Index page 18

<sup>7</sup> Para 15.4 of POC: Index page 18

<sup>8</sup>Para 15.5 of POC Index page 18

National Credit Act (“NCA”)<sup>9</sup>. The second was that the aforesaid agreement was regulated by the NCA and because the bank was charging interest thereto, the required NCR certificate was not attached. The centrepiece defence was that she did not sign in any form or was she ever party to overdraft facilities as alleged by the bank.

### **Arguments in the court a quo**

[6]. The bank contended in the application for summary judgment that the appellant’s special plea in relation to section 72(1) of the NCA cannot be sustained in law because it was unclear as to what ‘notice’ should have been served on the appellant. It further stated that it was not legally obliged to dispatch any notice in terms of section 72(1) prior to enforcing its claim against the defendants or to complete its cause of action.<sup>10</sup>

[7]. With regard to the second special plea, the bank contended that the appellant failed to plead the grounds relied upon for her assertion and that her plea amounted to bare denial.<sup>11</sup>

[8]. It was also contended that, notwithstanding the fact that the suretyship agreement contained a signature in the space allocated for it next to her name, the appellant pleaded that she did not sign the said agreement with Hokanang. It specifically pointed out that:<sup>12</sup>

- (i). Firstly, the agreement signed by the appellant was not with Hokanang but rather with the bank, and
- (ii). Secondly, the appellant failed to plead any reason for her denial.

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<sup>9</sup> Paras 1 and 2: Fourth defendant’s plea: Index page 71:

<sup>10</sup> FA to summary judgment: Index pages 8 to 9 at paras 5.2 to 5.2.2.

<sup>11</sup> FA to summary judgment: Index pages 10 to 11 at paras 6.1 to 6.3.2.

<sup>12</sup> FA to summary judgment: Index page 11 at paras 7.1 to 7.1.2.

[9]. In addition thereto, the bank contended that the remainder of the appellant's plea consisted of bare denials.<sup>13</sup>

[10]. The appellant opposed the summary judgment application on the following grounds:<sup>14</sup>

(a). That the bank failed to comply with sections 129 and 130 of the NCA. She stated that she never received the notice issued in terms of section 129 of the NCA because, at the time when it was allegedly served on her, she had just relocated to Bloemfontein and resided at a different address from the one used for the said service;

(b). That the summons was not properly served on her;

(c). That she was not in Bloemfontein (i.e. the place where the suretyship was signed at) at the time when the suretyship was signed;

(d). She did not give consent for the deceased to sign the suretyship and was not aware of it until receiving the summons;

(e). She was never involved in the business of Hokanang and had no knowledge of the overdraft facility; and

(f). That the signature appearing on the suretyship was not hers and her deceased husband's and therefore did not know who forged their signatures on the said documents.

[11]. It is common cause that the appellant was married in community of property to her deceased husband, who was involved in the dealings with Hokanang at some point. Therefore, her supposed liability in respect of the claim brought by the bank arose from the fact that she allegedly co-signed the suretyship agreement with her deceased husband in favour of Hokanang.

### **Findings by the court a quo**

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<sup>13</sup> FA to summary judgment: Index page 11 at para 8.

<sup>14</sup> Affidavit opposing summary judgment: Index pages 25 to 28 at paras 3 to 6.5.

[12]. The court *a quo* considered the defences raised by the appellant. The learned magistrate was well conversant with the provisions of the rules and case law dealing with the application of this nature. Regrettably, the judgment is unclear as to how he dealt with the points that were raised by both parties in the case he was called upon to adjudicate. What is also unclear is the court *a quo*'s basis for rejecting the arguments advanced on behalf of the appellant.

### **Grounds of appeal**

[13]. The appellant launched an appeal against the whole judgment of the court *a quo* based on the following grounds:

- (a). That the court erred in finding that the appellant did not raise triable issues in her plea and/or affidavit resisting summary judgment;
- (b). That the court erred in finding that the appellant did not fully disclose her defences in her plea and affidavit resisting summary judgement;
- (c). That the court erred in not considering the non-joinder point *in limine* regarding the deceased estate of Clint Mallett, alternatively erred in dismissing the non-joinder point;
- (d). That the court erred in finding that the appellant is bound by the terms of the suretyship agreement which she *prima facie* proves she did not sign;
- (e). That the court erred by finding that the appellant agreed that the certificate of balance may be produced as *prima facie* proof of indebtedness whereas she has *prima facie* proved that she did not sign the suretyship agreement;
- (f). That the court erred by not finding that a factual dispute was raised by the appellant in that she *prima facie* proved that she did not sign the suretyship agreement;
- (g). That the court erred by not referring the matter to oral evidence or dismissing the application for summary judgement on the basis that a factual dispute exists;
- (h). That the court erred by not considering the visual differences in signatures attached to the appellants affidavit as annexures D2 – D3 when compared to page 6 of the suretyship agreement, and furthermore erred by not finding that the signatures differ;

- (i). That the court erred by finding that the main reason why the appellant denies signing that agreement was because she was not in Bloemfontein at the time when it was signed whereas this was ancillary to the main defence of the appellant (which is that she did not sign the agreement, period);
- (j). That the court erred by finding that the appellant did no more than make an assertion that there was a forgery of signatures when the appellant proved that her signature had been forged by putting up evidence of her signature to be juxtaposed with the signature to be found on the suretyship agreement;
- (k). That the court erred by not considering that the appellant had no knowledge of the main contract and suretyship agreement in order to put evidence before court and has no knowledge of the forgery of her signature, save to state that she did not sign the suretyship agreement;
- (l). That the court erred in not considering the fact that there are witnesses, who signed next to the alleged signatures of the appellant and the deceased, who may be called as witnesses, and furthermore erred by not calling for those witnesses to give evidence;
- (m). That the court erred by not considering that the plaintiff failed to prove that consent was provided, in terms of Section 15(2)(h) of the Matrimonial Property Act of 1984, by either the appellant or the deceased and furthermore by finding that the plaintiff had made out a proper case despite not having any proof that the appellant or the deceased signed the consent form as required by the plaintiff's own contract;
- (n). That the court erred by finding that the appellant did not dispute the certificate of balance, whereas the appellant disputed same by denying same in her plea and affidavit;
- (o). That the court erred by placing emphasis on the certificate of balance which was not attached to the particulars of claim at all;
- (p). That the court erred by not considering that the plaintiff failed to prove that it complied with clauses 5, 6, 7 and 8 of the terms and conditions applicable to the overdraft facility, alternatively the court erred by finding that the plaintiff complied with the abovementioned clauses;

(q). That the court erred by not considering that the plaintiff failed to prove proper cancellation of the overdraft agreement in light of the lack of evidence as well as clauses 5, 6, 7 and 8 of the terms and conditions applicable to the overdraft facility;

(r). That the court erred by not considering that the plaintiff failed to bring the section 129 notice to the attention of the appellant;

(s). That the court erred by not invoking its inherent discretion to dismiss summary judgement given the particular circumstances of the matter;

(t). That the court erred by finding that the appellant is liable in the amount of R189 003.00, together with interest as ordered and costs, whereas the application should have been dismissed with costs.

### **Legal principles applicable to summary judgment**

[14]. Rule 14 of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts stipulates that:

*“(1). The plaintiff may, after the defendant has served a plea, apply to court for summary judgment on each of such claims in the summons as is only—*

*(a). on a liquid document;*

*(b). for a liquidated amount in money;...*

*together with any claim for interest and costs.*

*(2) ...*

*(a) Within 15 days after the date of service of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff, or by any other person who can swear positively to the facts.*

*(b) The plaintiff shall, in the affidavit referred to in subrule 2(a), verify the cause of action, the amount claimed, if any, identify any point of law relied upon, state the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded, does not raise any issue for trial.*



(c) *If the claim is founded on a liquid document, a copy of the document shall be annexed to such affidavit, and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day, not being less than 15 days from the date of the delivery thereof.*

(3) *The defendant may-*

(b) *satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or, with the leave of the court, by oral evidence of such defendant, or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action, and such affidavit or evidence shall fully disclose the nature, grounds of the defence and the material facts relied upon therefor..."*

[15]. The procedure provided by the rules relating to summary judgment has always been regarded as one with a limited objective, that is, to enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim.<sup>15</sup>

[16]. The courts have stressed the fact that the remedy provided by summary judgment rule is of extraordinary and drastic 'nature' which is 'very stringent' in that it closes the door to the defendant, and that 'the grant of the remedy is based on the supposition that the plaintiff's case is unimpeachable and that the defendant's defence is bogus or bad in law'.<sup>16</sup> It is only where the court has no reasonable doubt that the plaintiff is entitled to judgment as prayed, that the plaintiff has an answerable case, that summary judgment will be granted.<sup>17</sup>

### **Whether to interfere with the court a quo's decision?**

[17]. It is trite that when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or misdirection

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<sup>15</sup> Herbstein & van Winsen: the Civil Practice of the High Courts of South Africa (5<sup>th</sup> Ed), Vol. 1 on pp 516-517.

<sup>16</sup> Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A); Tesven CC v SA Bank of Athens 2000 (1) SA 268 (A).

<sup>17</sup> Edwards v Menezes 1973 (1) SA 299 (NC) at 304 -5.

on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, a court of appeal may interfere with the decision of the lower court.<sup>18</sup>

[18]. As already pointed out above, the three main defences raised by the appellant in her plea concerned the issues of alleged non-compliance with the NCA, her denial of being present when the suretyship was signed as well as having any knowledge of such agreement.

[19]. The court *a quo* did not deal with the issue of non-compliance with the NCA on the basis that the appellant abandoned the said issue during the hearing of summary judgment application.<sup>19</sup> I am, however, of the view that the issue of non-compliance with section 129 the NCA is of no substance to the issues at hand. This is so, because the appellant admitted in her affidavit that a copy of section 129 notice annexed to the bank's particulars of claim bore the same address as the one she used as her *domicilium* prior to relocating to Johannesburg.<sup>20</sup>

[20]. Having considered the facts presented before it during the hearing of the application for summary judgment, the court *a quo* came to the conclusion that the appellant set out an incomplete defence lacking of particularity.<sup>21</sup>

[21]. In paragraph 16 of the judgment, the learned Magistrate held that the appellant '*danced around*' the issue as to whether, objectively on the facts of this matter, she was liable or not. It then concluded that the certificate of balance was not

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<sup>18</sup> National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999) at para 11; See also Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and another (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) at para 88.

<sup>19</sup> Index – Notice of Appeal: page 12 at para 5.1 of the judgment.

<sup>20</sup> Index: p 25 to 26 : Para 3.4: Opposing affidavit.

<sup>21</sup> Index- Notice of Appeal: page 15 at para 15 of the judgment.

disputed.<sup>22</sup> However, the court *a quo* ignored the fact that the appellant denied having signed or formed part of the agreement in the first place. By concluding that the certificate of balance in relation to the agreement was not disputed,<sup>23</sup> the court *a quo* misdirected itself and came to a conclusion that was not informed by the facts and/or evidence.

[22]. What remains to be examined is whether appellant's denial of signing the suretyship agreement and her alleged lack of knowledge pertaining to its existence constitute triable issues that should have militated against the granting of summary judgment in favour of the bank.

[23]. In ***Tumileng Trading CC v National Security and Fire (Pty) Ltd***<sup>24</sup> the court had the following to say:

"[23] It seems to me, however, that the exercise is likely to be futile in all cases other than those in which the pleaded defence is a bald denial. This is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case. As the current applications illustrate, the exercise is likely therefore to conduce to argumentative affidavits, setting forth as averments assertions that could more appropriately be addressed as submissions by counsel from the bar. In other words, it is likely to lead to unnecessarily lengthy supporting affidavits, dealing more with matters for argument than matters of fact.

#### **Content of the opposing affidavit**

... As has always been the position, the opposing affidavit must "disclose fully the nature and grounds of the defence and the material facts relied upon therefor". The purpose of the opposing affidavit also remains, as historically the case, to demonstrate that the defendant "has a bona fide defence to the action". There is thus no substantive change in the nature of the "burden", if that is what it is, placed on a defendant in terms of the procedure. However,

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<sup>22</sup> Index - Notice of Appeal: page 16 at para 16 of the judgment.

<sup>23</sup> See also Index- Notice of Appeal: page 3 at para 3 of the judgment.

<sup>24</sup> 2020 (6) SA 624 (WCC) at paras 23 to 24.

the broader form of supporting affidavit that is contemplated in terms of the amended rule 32(2)(b), will in some cases require more of a defendant in respect of the content of its opposing affidavit than was the case in the pre-amendment regime, for the defendant will be expected to engage with the plaintiff's averments concerning the pleaded defence. In this regard I anticipate that we shall also see much argumentative matter in the opposing affidavits under the new regime, for argument will be met with counter-argument."

[24]. As stated in ***Maharaj v Barclays National Bank Ltd***<sup>25</sup> the remedy afforded by summary judgment should only be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a *bona fide* defence.

[25]. The bank submitted correctly that, in summary judgment proceedings, it is insufficient for a defendant to merely allege that she has no knowledge of the plaintiff's allegations or that she regards those allegations with suspicion.<sup>26</sup>

[26]. The bank also raised an issue that the appellant's defence of her signature having been forged was dealt with in the opposing affidavit and not in the plea.<sup>27</sup> What cannot be disputed, however, is the fact that, the appellant alleged in paragraph 13.2 of her plea that '*she did not sign any document relating to Hokanang and that Annexure D to the particulars of claim (suretyship) is denied*'. This fact was conceded by the respondent too.<sup>28</sup>

[27]. Furthermore, the appellant pointed the court *a quo* to the fact that the signature affixed to the opposing affidavit and the one she annexed to her affidavit bore similarities and strikingly in contrast with the one appearing on the documents annexed to the particulars of claim. She further placed evidence before the court *a quo*, disputing the signature appearing on the suretyship agreement annexed to the particulars of claim.<sup>29</sup> This should have sufficed for the court *a quo* to refuse the

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<sup>25</sup> *Supra* at para 18.

<sup>26</sup> Para 5.6 of respondent's heads of argument.

<sup>27</sup> Para 8.1 of respondent's heads of argument.

<sup>28</sup> Para 8.2 of respondent's heads of argument

<sup>29</sup> Index pages 27 at para 6.1 of opposing affidavit and pp 48 – 49: Annexure "D1" to "D2".

summary judgment in order to allow the appellant to produce extrinsic evidence in rebuttal thereto before a trial court.

[28]. In my view, the fact that the appellant made no mention of forgery and/or fraud in her plea is neither here nor there because she specifically denied having signed the agreement or ever being a party to it in the first place.

[29]. It has been held by the court in ***Mowchenson and Mowchenson v Mercantile Acceptance Corporation of SA Ltd***<sup>30</sup> that if there is nothing inherently incredible in the defendant's answer that which, if proved, would support a defence that is good in law, the court would be obliged to dismiss the application and to give the defendant leave to defend the action.

[30]. In dismissing the appellant's point of denying the signature, the court *a quo* relied on ***Kgotlakgomang v Joubert***<sup>31</sup> and put emphasis on the fact that the assertion made by appellant about forgery of her signature was not alleged in both the plea and opposing affidavit.<sup>32</sup> The distinct nature of the facts involved in *Kgotlakgomang* and the present case was dealt with aptly in the appellant's heads of argument and thus need not to be regurgitated.<sup>33</sup>

[31]. In addition thereto, the court *a quo* ignored the wording used by the appellant in paragraph 13.2 of her plea when she alleged that she did not sign any document relating to the First Defendant and Annexure "D" to the particulars of claim is denied, as the '*purported signature*' on the suretyship is not hers. This in itself points to the fact that the appellant attributes the signature appearing on the agreement to someone else, other than herself or her late husband. Whether the alleged signature was achieved by means of forgery or fraud was irrelevant for the purpose of the summary judgment application.

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<sup>30</sup> 1959 (3) SA 362 (W).

<sup>31</sup> [2014] ZAFSHC 143 (4 September 2014).

<sup>32</sup> Index – Notice of Appeal: pages 16 – 19 at paras 20 - 22 of judgment.

<sup>33</sup> Appellant's heads of argument at para 12.1 – 12.7.

[32]. The court *a quo* also placed emphasis on the fact that the appellant abandoned the submission that she was not in Bloemfontein during the time when the agreement was allegedly signed.<sup>34</sup> It would therefore appear as though the learned Magistrate took a view that, by not denying to have been in Bloemfontein when the agreement was allegedly signed, the appellant abandoned her entire defence about the signature. This conclusion by the court *a quo* cannot be correct because it is clear from reading paragraph 6 of the appellant's plea what her defence is. Apart from denying being in Bloemfontein when the agreement was signed, she also denied that she had anything to do with it whatsoever.<sup>35</sup> This constitutes a clear bona fide defence to the action.

[33]. I therefore find that the appellant's denial of the signature on the agreement raises a triable issue that requires to be properly ventilated in a trial court.

[34]. The appellant further raised a point that the bank failed to provide sufficient evidence relating to the consent required in terms of the Matrimonial Property Act 88 of 1984. The bank correctly submitted that that the appellant did not raise this issue in her plea. However, this is an issue that emerged from undisputed facts before this Court.

[35]. The bank alleges in its particulars of claim that, during the signing of the surety agreement, the second and third defendants signed a form confirming their marriage to be in community of property. In support thereof, the bank annexed to its particulars of claim confirmation of Marriages in Community of Property Form signed by the said defendants.<sup>36</sup> No such allegations are made in relation to the appellant and her deceased husband.

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<sup>34</sup> Index – Notice of Appeal: pages 12 and 16 at paras 6 and 17 of judgment.

<sup>35</sup> See also respondent's heads of argument at para 8.2.

<sup>36</sup> Para 7 of the POC: Index page 14.

[36]. Relying on an earlier decision on the issue of the raising of point of law on appeal, the Supreme Court of Appeal (“SCA”) had the following to say in **Nwafor v Minister of Home Affairs**:<sup>37</sup>

“[29] The law and principles applicable to the raising of points of law on appeal are trite. The position was aptly described by Wallis JA in Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others as follows:

‘That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of the leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true before this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of legal error on the part of one of the parties in failing to identify and raise the point at an appropriate stage. But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued’.” (own emphasis”)

[37]. In applying the principle enunciated by the SCA in **Nwafor**, I am of the view that the point raised by the appellant in relation to Matrimonial Consent should be considered on the basis of the following:

- (a). it is a point of law stemming from the undisputed facts before the court;<sup>38</sup>
- (b). the point was canvassed fully during the arguments before the court *a quo* and this Court; and

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<sup>37</sup> (1363/2019) [2021] ZACSA 58 (12 MAY 2021).

<sup>38</sup> Index: page14: POC at para 7.

(c). no prejudice will be occasioned to the bank because it will have an opportunity to deal with the said issue fully during trial.

[38]. Having considered the relevant principles outlined above and the facts presented before this Court, I find that the appellant raises the issues that are triable and thus this appeal should succeed.

### **Costs**

[39]. The general rule is that the costs should follow the result, being the successful litigant. I find no reason to deviate from this general rule in the circumstances of this matter.

### **Order**

[40]. Accordingly, I propose the following order:

1. The appeal is upheld with costs.

**M. RANTHO, AJ**

I concur and it is so ordered,

**M.A. MATHEBULA, J**

### **APPEARANCES:**

On behalf of appellant: Adv. K. Naidoo

Instructed by: Salley's Attorneys, Bloemfontein.

On behalf of respondent: Adv H.J. van der Merwe

Instructed by: Jay Mothobi Incorporated, Bloemfontein



