

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

DATE: 18 APRIL 2024

(1) CASE NO: 17343/2022

In the matter between:

GRINDROD BANKLIMITED

Applicant

And

CULVERWELL, ALLAN MONTAGUE

First Respondent

CULVERWELL, DUSTIN MONTAGUE

Second Respondent

(2) CASE NO: 17345/2022

In the matter between:

GRINDROD BANKLIMITED

Applicant

And

CULVERWELL, ALLAN MONTAGUE

First Respondent

CULVERWELL, DUSTIN MONTAGUE

Second Respondent

Neutral Citation: *Grindrod Bank v Culverwell and Another; Grindrod Bank v Culverwell and Another (17343/2022 & 17345/2022) [2024] ZAGPJHC --- (18 April 2024)*

Coram: Adams J

Heard on: 18 April 2024

Delivered: 18 April 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 18 April 2024.

Summary: Applications for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal refused

ORDER

The following identical order is made in each of the two applications for leave to appeal under the separate case numbers:

- (1) The first and the second respondents' application for leave to appeal is dismissed with costs on the scale as between attorney and own client, such costs to include the costs consequent upon the employment of Senior Counsel.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original two opposed applications – under two separate case numbers, in respect of which I had, on 7 August 2023, handed down one judgment. The first and the second respondents are the first and the second applicants in these applications for leave to appeal and the respondent in these applications for leave to appeal was the applicant in the main applications. As I indicated in the said judgment, these two opposed applications against the respondents were based on the same factual

matrices underlying the applicant's causes of action, which were almost identical in both applications, hence the one consolidated judgment.

[2]. The first and the second respondents also raised the exact same defences in opposition to the claims by the applicant against them. In both matters, judgment was granted in favour of the applicant against the two respondents, who were ordered to pay to the applicant the amounts of R56 million and about R40 million, with interest thereon and costs of suit. The respondents apply for leave to appeal against the judgment and the separate orders, as well as the reasons therefor, which I granted on the 7th of August 2023, in terms of which I had granted judgment in favour of the applicant against the respondents.

[3]. It is again convenient to deal with both of these applications for leave to appeal in one judgment.

[4]. The applications for leave to appeal are mainly against my factual findings and legal conclusions arising from my interpretation of the performance guarantees issued by the respondents in favour of the applicants, as well as my application of the facts to such an interpretation. This conclusion, so the respondents contend, was incorrect. The respondents also contend that I had erred in not upholding the *lis alibi pendens* point *in limine* raised by them in the main application. The respondents also take issue with the award of costs I had granted against them on a punitive scale.

[5]. Nothing new has been raised by the respondents in these applications for leave to appeal. In my original judgment, I have dealt with most of the issues raised and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that the nature and the wording of the Guarantee Agreements between the respondents and Grindrod Bank, as well as the applicable legal principles, do not lend themselves to the defences raised by the respondents in the applications.

[6]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which

came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that ‘the appeal would have a reasonable prospect of success’.

[7]. In *Mont Chevaux Trust v Tina Goosen*¹, the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*². In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*³.

[8]. In these matters, I am not persuaded that the issues raised by the respondents in their applications for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. Those issues include but are not limited to my interpretation of the relevant provisions of the performance guarantees. In my view, the appeals do not have reasonable prospects of success.

[9]. Leave to appeal in both matters should therefore be refused.

Order

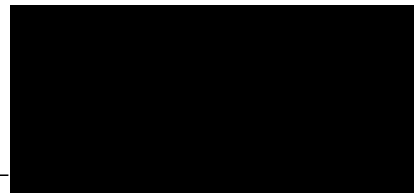
[10]. In the circumstances, the following identical orders are made in each of the two applications for leave to appeal under the separate case numbers:

¹ *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

² *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

³ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

- (1) The first and the second respondents' application for leave to appeal is dismissed with costs on the scale as between attorney and own client, such costs to include the costs consequent upon the employment of Senior Counsel.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	18 th April 2024
JUDGMENT DATE:	18 th April 2024 – judgment handed down electronically
FOR APPLICANT IN BOTH APPLICATIONS	Advocate J E Smit
INSTRUCTED BY:	Edward Nathan Sonnenbergs Inc, Umhlanga Rocks
FOR FIRST AND SECOND RESPONDENTS IN BOTH APPLICATIONS:	No appearance – Ms Sousa (a non-practitioner) ‘appeared’ on behalf of the respondents to apply for a postponement
INSTRUCTED BY:	No appearance – application for a postponement of the application for leave to appeal refused