



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 658/2022
Heard on: 22/04/2024
Delivered on: 03/05/2024

In the matter between:

GIDEON JACOBUS KOEGELENBERG

Applicant

and

**THE LAND AND AGRICULTURAL DEVELOPMENT BANK
OF SOUTH AFRICA
PRAIA ROCHA 122 INVESTMENTS (PTY) LTD
GLENN GILMOUR MURDOCH**

**First Respondent
Second Respondent
Third Respondent**

In re:

**THE LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA**

Applicant

and

**PRAIA ROCHA 122 INVESTMENTS (PTY) LTD
GLENN GILMOUR MURDOCH
GIDEON JACOBUS KOEGELENBERG**

**First Respondent
Second Respondent
Third Respondent**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MAMOSEBO J

[1] The applicant in this application is Mr Gideon Jacobus Koegelenberg. He is seeking leave to appeal to the Supreme Court of Appeal (SCA),

alternatively, to the Full Court of this Division against the judgment and order granted on 26 May 2023 granting monetary judgment and declaring certain immovable agricultural properties specially executable in favour of the Land and Agricultural Bank of South Africa (the Land Bank). The second and third respondents, namely, Praia Rocha 122 Investments (Pty) Ltd (Praia Rocha) and Mr Glenn Gilmour Murdoch, have filed a notice to abide the Court's decision.

[2] These are the grounds relied upon by the applicant in substantiation that the Court had erred:

- 2.1 there was an implied term or tacit term in the suretyship agreement imposing a duty upon the Land Bank to inform him of any change in Praia Rocha's ability to pay in terms of the loan agreement;
- 2.2 the Land Bank breached the suretyship agreement with him by not informing him of Praia Rocha's failure to pay;
- 2.3 he was prejudiced by the Land Bank's silence and should have been released from the suretyship;
- 2.4 he did not receive the letter of demand prior to institution of the application as it was not sent to his chosen *domicilium* address; and
- 2.5 the common law of suretyship should be developed as to the existence of implied and/or tacit terms in contracts to bring it in line with the 1996 Constitution.

[3] The test to be applied in determining whether an application for leave to appeal should be granted or not is governed by s 17(1) of the Superior Courts Act¹ which stipulates:

- “(1) *Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
- (a) (i) *the appeal would have reasonable prospects of success; or*
 - (ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
 - (b) *The decision sought on appeal does not fall within the ambit of s 16(2)(a); and*
 - (c) *Where the decision sought to be appealed does not dispose of all issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”*

[4] In *S v Smith*² Plasket AJA stressed:

- “[7] *What the test of reasonable prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. 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.”*

As reiterated by Leach JA in *S v Kruger*³ the Courts should follow the aforementioned test scrupulously in the interests of justice.

¹ 10 of 2013

² 2012 (1) SACR 567 (SCA) para 7

³ 2014 (1) SACR 647 (SCA) at 649d (para 3)

- [5] Mr Harmse, counsel for the applicant, persisted with the argument that there is an implied or tacit term in the suretyship agreement imposing a duty on the Land Bank to notify the applicant of any change in Praia Rocha's ability to repay the loan in terms of the loan agreement. Regard being had to the wording of the suretyship agreement such argument is incomprehensible. The wording makes it clear that it is an ancillary obligation arising from the primary obligation of Praia Rocha. Taking cue from the principle espoused in *Endumeni*⁴ on the correct approach to interpreting contracts, and upon a plain interpretation of the suretyship agreement, I am not persuaded that the Land Bank had a duty to inform the applicant of any default by Praia Rocha. To demonstrate that the applicant was aware of the financial woes of Praia Rocha, as already dealt with in the main judgment, he communicated with the Land Bank by email on at least two occasions, in February and June 2020, nudging the Land Bank to proceed with the sale of the encumbered properties in order to alleviate the debt. This ground therefore stands to fail.
- [6] The applicant could not have been prejudiced by the alleged failure of Land Bank to notify him of Praia Rocha's financial woes and how such failure would relieve him of his suretyship. The fact of the matter is that he became aware of the situation and alerted the Land Bank and urged it to act. This does not support his claim of prejudice. He has thus not made out a case of prejudice on the papers and nothing that supports his stance that he be relieved of his suretyship obligations.
- [7] Mr Harmse further contended that because the Land Bank is an Organ of State it is bound by the provisions of the Promotion of Administrative

⁴ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18

Act⁵ (PAJA) and the Land Bank's management of its arrears constitutes administrative action to be dealt with in terms of PAJA. It was further contended that, because the Land Bank had renegotiated the loan with Praia Rocha in the absence of the applicant, the Land Bank's decision to grant Praia Rocha an extension falls within the purview of s 3(2)(b)(i) and (ii) of PAJA. According to counsel PAJA has therefore introduced an implied term into the suretyship that an Organ of State is obliged to notify the surety of any changed circumstance in relation to the debtor's repayment capabilities. Failing to do so should result in the applicant as surety being discharged from his obligations, it was urged.

- [8] This application, in my view, stems from the Land Bank pursuing an enforcement of a debt and certain agricultural properties declared specially executable. This dispute is contractual in nature and has nothing to do with an administrative decision. PAJA finds no application.
- [9] The applicant further persisted with his contention that he did not receive the letter of demand as it was not sent to his *domicilium* address. The main judgment has dealt with this aspect. The following was authoritatively pronounced by Cameron J in *Sebola and Another v Standard Bank of South Africa Ltd and Another*⁶:

“[74] These considerations drive me to conclude that the meaning of 'deliver' in s 130 cannot be extracted by parsing the words of the statute.

It must be found in a broader approach — by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the s 129 notice in fact reached the consumer. As pointed out earlier, the statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the

⁵ 3 of 2000

⁶ 2012 (5) SA 142 (CC) para 74

s 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer."

See also *Kubyana v Standard Bank of South Africa*⁷.

The applicant did not deny the fact that he was served with the application timeously and therefore enabled to ventilate the matter fully. This is not a legitimate ground to nullify the entire process. On the contrary, it would amount to putting form over substance. It follows that this ground also has to fail.

[10] The applicant's reliance on the principle in *Alfred McAlpine and Son v Transvaal Provincial Administration*⁸ to bolster his contention that the common law needs to be developed, is misplaced. This contention was rejected in the main judgment because the principle does not assist his argument. He has also not raised or argued the requirements to be met for the development of the common law as set out in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*⁹. With the evidence before me I am neither persuaded nor inclined to accept that it is necessary, because our law pertaining to the interpretation of contracts and suretyships is definitively pronounced upon.

[11] Having carefully and dispassionately considered the application for leave to appeal in order to determine whether there are reasonable prospects that another court would come to a different finding than this court had reached, I have not found any. There are, in my view, no cognisable

⁷ 2014 (3) SA 56 (CC) at paras 31, 36, 39, 52 and 53

⁸ 1974 (3) SA 506 (A)

⁹ 2001 (4) SA 938 (CC)

prospects of success nor compelling reasons that warrant the attention of the SCA or the Full Court of this Division, nor are there any compelling reasons to entertain this appeal. I am therefore, satisfied that there are no reasonable prospects of a successful appeal. In the result the application for leave to appeal to the Supreme Court of Appeal alternatively, to the Full Bench of this Division, must fail.

[12] In as far as costs are concerned, there is no reason why costs should not follow the result.

[13] In the result the following order is made:

The application for leave to appeal is dismissed with costs, on a scale as between attorney and client, such costs to include those consequent upon the employment of two counsel.



**MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the applicant:	Adv. J Harmse
Instructed by:	Adrian B Horwitz & Associates
For the 1 st respondent:	Adv. MP Van der Merwe SC
Instructed by:	Adv. A Van der Merwe Leahy Attorneys Inc c/o Van de Wall Inc
For the 2 nd and 3 rd respondents:	BJ Liebenberg and Associates c/o PGMO Attorneys Inc