

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 23833/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
	
SIGNATURE	DATE 25 June 2024

In the matter between:

MERCHANT WEST (PTY) LTD

Respondent/Applicant

and

JONATHAN MICHAEL MOLYNEUX-KILLIK

First Applicant/Respondent

ANTON EUGENE VAN DEN HEEVER

Second Applicant/Respondent

**FLIGHTSHARE MAINTENANCE
COMPANY (PTY) LTD**

Third Applicant/Respondent

FLIGHTSHARE (PTY) LTD

Fourth Applicant/Respondent

**JUDGMENT
(APPLICATION FOR LEAVE TO APPEAL)**

STAIS AJ:

This judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.

Introduction

- [1] This is an application for leave to appeal against my judgment handed down on 14 December 2023 under the above case number, in which I refused to refer the matter to trial and held the applicants liable under suretyship agreements to pay, jointly and severally, the one paying the other to be absolved, the balance of R10,258,794.53 due and payable in terms of a master instalment sale agreement ("instalment sale agreement"), to the respondent, together with interest and costs. Leave to appeal is sought to a Full Bench of this Division, alternatively, to the Supreme Court of Appeal.
- [2] The applicants advance numerous grounds in support of their application, all of which sought to motivate the argument that there are reasonable prospects of success on appeal.

Test to be applied

- [3] In terms of section 17(1) of the Superior Courts Act, 2013 leave to appeal may only be given in the event I am of the opinion that the appeal would have a reasonable prospect of success or if there is some other compelling reason why the appeal should be heard. The applicants rely only on the former basis for their appeal.
- [4] Prior to the coming into effect of the Superior Courts Act, the test to be applied in an application for leave to appeal was whether there were reasonable prospects that another court may come to a different conclusion.¹ However, the position has changed in that section 17(1)(a)(i) provides for leave to appeal to be given only where the judge is of the opinion that the appeal would have a reasonable prospect of success.

¹ Section 20 of the Supreme Court Act, 1959

- [5] The court in *Mont Chevaux Trust v Tim Goosen and 18 Others*² held that the threshold for granting leave to appeal has been raised and that the use of the word “*would*” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.
- [6] The Supreme Court of Appeal held in *S v Smith*³ that an appellant now faces a higher and more stringent threshold. More is required to be established than that there is a mere possibility of success or that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must be a sound and rational basis for the conclusion that there are prospects of success on appeal. This finding in *S v Smith* was recently confirmed by the Supreme Court of Appeal in *Four Wheel Drive Accessory Distributors CC v Rattan N.O.*⁴

Grounds of appeal

- [7] I do not propose to rehearse the content of the application for leave to appeal or the arguments that served before me, nor to repeat what was set out in my judgment. I am mindful that an appeal is supposed to be aimed at an order of the court and not its reasoning.
- [8] In any event, in argument before me Mr Dyke SC abandoned several of the grounds of appeal (*inter alia* those which sought to introduce a new case not previously argued and not factually grounded in the applicants’ affidavits) and confined his argument to the single question whether there was a meeting of the minds of the parties to the instalment sale agreement
- [9] The issue that was pertinently raised in the answering affidavit, turned on what the parties’ intended when they concluded a ‘loan facility’. The applicant’s case is that the instalment sale agreement is a “*simulated agreement*” that was induced by “*deceit*” or “*error*” (whether mutual or unilateral was not explained) or “*unfair treatment*”, and “*cancelled*”. Essentially, the argument was that the

² 2014 JDR 2325 (LCC). Approved by the Full Bench of the Gauteng Division, Pretoria in *Acting National Director of Public Prosecutions v Democratic Alliance* 2016 JDR 1211 (GP)

³ 2012 (1) SACR 567 (SCA)

⁴ 2019 (3) SA 451 (SCA)

true intention with the 'loan facility' was that the respondent would make available a shareholders' loan which could be accessed as a revolving credit facility as and when funds were required. Such an agreement is clearly at odds with the terms of the instalment sale agreement.

- [10] Before me, Mr Dyke SC appropriately conceded that the instalment sale agreement was a commercial transaction in the nature of both a 'loan' and a 'facility'. At least in that sense then there was a meeting of the minds between the parties thereto, i.e., the respondent and the principal debtor (the fourth applicant). The first to third respondents, who are liable as sureties, did not challenge the suretyship agreements and are not parties to the instalment sale agreement.
- [11] As Mr Stockwell SC (who appeared with Mr Venter) pointed out, an array of sequential documents, by their terms duly considered in context and for purpose, speak to the conclusion of the instalment sale agreement – including the shareholders' agreement; the respondent's 'facility letter' which refers specifically to the instalment sale agreement "*to be signed*" between the respondent and the principal debtor; and a board resolution specifically authorising the first applicant to sign the instalment sale agreement on behalf of the principal debtor. It is not in dispute that the first applicant duly signed the instalment sale agreement on behalf of the principal debtor, and that the parties then conducted themselves in accordance with its terms and gave effect thereto by the principal debtor paying some R10m in terms of the instalment sale agreement by means of an agreed monthly debit order for aircraft received by it, before defaulting on the balance. It cannot assist the applicants to rely on a version that the first applicant, who acted as the principal debtor's duly authorised agent when concluding the instalment sale agreement, did not know or agree with what he was doing.
- [12] My reasoning *inter alia* held that either of the *caveat subscriptor* or parole evidence rules are destructive of the applicants' defence to the claim. Significantly, the applicants' grounds of appeal do not engage with the relevant principles, nor do they challenge the authorities that support my findings. Mr Dyke, at my invitation and having accepted that the legal principles are well-

established by the authorities I referred to, was hard pressed to argue this point. Ultimately, he was unable to persuade me that I had erred in this regard.

[13] In the result, I am unable to find that an appeal would have a reasonable prospect of success.

Order

[14] The following order is made:

1. The application for leave to appeal is dismissed with costs, such costs to be on the scale as between attorney and client (which shall not be less than scale C) and shall include the costs of two counsel, where so employed.



P STAIS SC
Acting Judge of the High Court
Johannesburg

APPEARANCES:

Applicants: Adv B Dyke SC
Instructed by: Barter McKellar Attorneys
Respondents: Advv R Stockwell SC and AJ Venter
Instructed by: Uys Matyeka Schwartz Attorneys
Date of hearing: 25 June 2024
Date of judgment: 25 June 2024