

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 35888/2022

- (1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED: NO.

30/09/2024

DATE:

SIGNATURE

In the matter between:

TREVOR THABANG MOKOENA

APPLICANT

and

FIRSTRAND BANK LIMITED

RESPONDENT

In re:

FIRSTRAND BANK LIMITED

APPLICANT

and

TREVOR THABANG MOKOENA

FIRST RESPONDENT

RONALD MNDENI NDEBELE

SECOND RESPONDENT

NONTLANTLA PORTIA NDEBELE

THIRD RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 30 September 2024.

JUDGMENT

MEIRING, AJ:

Introduction

- [1] This is an application by which the applicant for leave – the first respondent in the application proper – seeks leave to appeal against the order that this court handed down on 26 April 2024 by which the first and second respondents were directed, jointly and severally, to pay R7,772,392.69, plus interest, and to pay the costs of this application on the attorney-and-client scale.
- [2] This application for appeal was heard virtually on the morning of Friday, 26 July 2024. Both the applicant for leave and the respondent in this application were represented at the hearing.
- [3] The applicant had delivered a detailed notice of appeal. The respondent had submitted written heads of argument. I had regard to both, and, of course, to the oral argument made before me.

The law

- [4] The test whether leave to appeal is to be granted is framed in section 17(1) of the Superior Court Act, 2013:

“17. Leave to appeal

- (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 a reasonable prospect 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 section 16(2)(a); and*
 - (c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”*

[emphasis added]

- [5] The applicant does not say whether he brings this application under section 17(1)(a)(i) or (ii). Yet, the complaints that he serials indicate that he relies only on section 17(1)(a)(i). Thus, he asks this court for leave on the basis that “*the appeal would have a reasonable prospect of success*”.
- [6] The correct legal position is that, if the applicant demonstrates that the appeal would have a reasonable prospect of success (and the requirements in section 17(1)(b) and (c) are also met), the court must grant leave to appeal. The exercise of the power to grant leave is not then in the discretion of the court.¹
- [7] The wording of section 17(1)(a)(i) does not set the threshold for leave to appeal any higher than it was at common law before the promulgation of the Superior Courts Act, 2013. In this regard, I refer to the exposition in the judgment in the application for leave in the related case of *Smartpurse Solutions (Pty) Ltd v FirstRand Bank Ltd*.²
- [8] In its unreported decision in *Ramakatsa v African National Congress*,³ the Supreme Court of Appeal explained the test for leave to appeal:⁴

“If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

[emphasis added]

Analysis of the case for leave

- [9] In large part, the case for leave is a rerunning of the arguments advanced at first instance.

¹ Erasmus *Superior Court Practice*, vol 1, A2-54.

² Case no. 35882/2022.

³ (724/2019) [2021] ZASCA 31 (31 March 2021).

⁴ At para 10.

- [10] In the first place, the applicant said that, since the principal debt upon which his liability as surety rests “*was disputed on bona fide and reasonable grounds*”, this “*prevented*” the court from handing down the order narrated in paragraph 1 above. Yet, by making this argument, the applicant simply repeated what he had said at the hearing of the application. He failed to indicate in what respects the reasoning of this court in its judgment erred such that there might be a “*sound rational basis*” for the conclusion that there is a reasonable prospect of success on appeal. For him to have provided such a basis, the applicant must have addressed the analysis and the dismissal of his two substantive defences, namely that the respondent ought first to “*have exhausted the domestic remedy in clause 14.2.7.1*” (dealt with in paragraphs 56–61 of the judgment) and that the respondent’s dealings with the TPPP certificate meant that it had approached this court with unclean hands (dealt with at paragraphs 62–69 of the judgment). Both in his notice of application for leave and at the hearing, the applicant failed to address the detail and logic of that analysis. Accordingly, as to this first ground, the applicant failed to set out a sound rational basis for his contention that he might succeed on appeal, in other words that there is a reasonable prospect of success on appeal.
- [11] Second, the applicant contended that the *exceptio lis alibi pendens* applies on these facts and ought to have been upheld. He did so by saying that the bringing of the application for final winding-up of the company, Smartpurse, was aimed at obtaining payment of “*a debt ostensibly owed to the Bank, thereby establishing a first cause of action*” and that, by, at the same time, suing on the suretyship, the respondent “*sought to rely on the same cause of action in separate and distinct proceedings from those that were already pending and which concerned the same subject matter*”. Yet, neither in the notice of application for leave, nor at the hearing, did the applicant address the analysis in paragraphs 29–44 of the judgment, in which this court indicated in careful detail why the requirements of the *exceptio lis alibi pendens* do not apply. The applicant did not address the obviously directly contrary decisions in *Collett v Priest*,⁵ *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd*,⁶ and *Electrolux South Africa (Pty) Ltd v*

⁵ 1931 AD 290.

⁶ 1976 (2) SA 856 (W).

*Rentek Consulting (Pty) Ltd.*⁷ By closing his eyes to that analysis and to those decisions, the applicant failed, as far as this complaint goes, from providing a sound rational basis for the conclusion that he has a reasonable prospect of success on appeal. Indeed, the same applies to each of the other grounds, which I proceed to address *seriatim*, as it were.

[12] Third, the applicant said that, by launching “*multiple proceedings on the same cause of action*”, the respondent acted “*in a manner highly prejudicial both to the principal debtor and to the sureties*” and that, in these circumstances, “[t]he prevailing authorities require that ... the Applicant (as surety) should be exempted from liability, inter alia, on the grounds of Public Policy”. In this regard, the applicant relied upon the decision in *Standard Bank of South Africa Limited v Gounden and Another*.⁸ Yet, neither in his notice of application for leave, nor in argument, did the applicant provide any basis for his characterisation that the two motions proceeded on the same cause of action, in the face of the authorities referred to in the previous paragraph that say diametrically the opposite. Nor, indeed, could he indicate how the *Gounden* decision is on all fours with the facts here. That court called that case a “*knife edge*” or very rare case where, on the facts, there was a chance that the respondent’s defences might benefit from a referral to trial. Here, the applicant did not ask for such a referral, nor was there any suggestion at the hearing that a referral to evidence might be required. Nor, indeed, is the decision in *Jans v Nedcor Bank Ltd*⁹ applicable. The applicant has not indicated any respect in which the respondent brought himself within the ambit of the rule that a surety will be released where a creditor does something in his dealings with the principal debtor that has the effect of prejudicing the surety.

[13] The applicant’s attempt, in passing, to rely on the unreported decision in *First Rand Bank v Vega Holdings (Pty) Ltd and Others*¹⁰ to contend that he had rebutted the *prima facie* proof of the certificates of balance, must similarly fail. Not only did the applicant not address this defence in the answering affidavit, but

⁷ 2023 JDR 2981 (WCC).

⁸ (19577/2019) [2020] ZAWCHC 136 (28 October 2020).

⁹ [2003] 2 All SA 11 (SCA).

¹⁰ (7841/19) [2020] ZAGPJHC 423 (10 May 2020).

he did not even respond at all to the paragraph in the founding affidavit to which those certificates were attached and in which they were mentioned.

[14] Finally, the applicant's complaint based on the principle of *pacta sunt servanda* is baseless. It is simply a repackaging of the first substantive defence, which I address above. The *pacta sunt servanda* principle cannot assist where the term upon which a litigant seeks to rely does not apply to these facts, as this court found is the case here. The applicant does not say how the analysis in the judgment is incorrect in this regard.

[15] As I say above, none of the complaints that the applicant advances holds any water. Having applied the test formulated in the Supreme Court of Appeal's decision in *Ramakatsa*, in other words, having dispassionately considered the facts and the law, I find that there is no sound rational basis for the conclusion that in this matter there is a reasonable prospect of success on appeal.

Costs

[16] The costs are to follow the result, including the costs of counsel, taxed on the "B" scale.

Order

1. This application for leave to appeal is dismissed.
2. The applicant for leave will pay the respondent's costs, which may be taxed on the "B" scale.



J J MEIRING
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 26 July 2024
Date of judgment: 30 September 2024

APPEARANCES

For the applicant: Mr S M Ndobe
Instructed by: Ndobe Inc.

For the respondent: Advocate K Mashishi
Instructed by: Edward Nathan Sonnenberg Inc.