

REPUBLIC OF SOUTH AFRICA



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

Case Number: 45850/2023

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

In the matter between:

RUDOLPH JOHANNES VAN WYK RAUTENBACH

Applicant

and

SOUTH AFRICAN SECURITISATION PROGRAMME

RF LTD

Respondent

In re:

SOUTH AFRICAN SECURITISATION PROGRAMME

RF LTD

First Defendant

DANIEL FRANCOIS DU TOIT

Second Defendant

RUDOLPH JOHANNES VAN WYK RAUTENBACH

Third Defendant

JUDGMENT-LEAVE TO APPEAL

KRÜGER AJ:

Summary

Application for leave to appeal against summary judgment- deponent to affidavit supporting application-certificate of balance- compliance with Rule 32(2)-purported illegibility of part of written contract between the creditor and debtor annexed to particulars of claim-co-principal debtor and guarantor- not involved with principal debtor and having no knowledge- Gruhn v M Pupkewitz & Sons (Pty) Ltd 1973 (3) SA 49- section 17 of the Superior Courts Act, 10 of 2013

Introduction

- [1] This is an opposed application for leave to appeal by the third defendant against a judgment granted by me on 6 June 2024 in an application for summary judgment by the plaintiff against the third defendant based on the latter's guarantee as co-principal debtor and guarantor for the debt due by the first defendant to the plaintiff in terms of a written contract. In opposition to the application for summary judgment, the third defendant raised several technical defences, none of which I found to establish a substantive defence on the facts as pleaded.
- [2] Herein after the third defendant is referred to as the applicant and the plaintiff as the respondent.
- [3] The reasons for granting summary judgment in favour of the respondent are comprehensively set out in my judgment in granting summary judgment. It does not bear repeating herein.

Grounds raised by the applicant in its notice of application for leave to appeal

- [4] In summary, the applicant's grounds for appeal are firstly, that the court had erred in finding the deponent to the respondent's affidavit in support of its

summary judgment application was someone who complied with the requirements of Rule 32(2) to do so, and that the author of the certificate of balance was authorised to do so.

- [5] Secondly, that the court had erred in dismissing the applicant's contentions in respect of the alleged illegibility of the terms of the written contract annexed to the particulars of claim ("*the legibility issue*"). The applicant's point essentially is such finding was unjustified where the applicant had pleaded that relevant terms of the annexed contract was illegible, despite which the respondent omitted providing a legible copy. The applicant's matter is contended to be distinguishable from the judgment in *DSV South Africa t/a DSV Air and Sea v Phoenix Neomed (Pty) Ltd*¹ as in that matter a legible copy of the contract was made available to the defendant before pleading. The court is stated to have erred in finding the applicant "...*should have assumed...*" the terms of the contract pleaded corresponded with the terms contained in the annexed contract and ought to have pleaded thereto in the alternative rather than solely relying on the illegibility thereof.
- [6] Thirdly, the court had erred in finding the applicant "...*was in the position to properly plead to..*" the first defendant's alleged breach of the contract in circumstances where the applicant was no longer involved in the business of the first defendant for some time.

Analysis and consideration

- [7] The arguments put forth by the applicant's counsel correspond with what was advanced at the hearing of the application for summary judgment. In essence, the submission is that the grounds set out in the application for leave to appeal are interwoven to the extent that the respondent's application did not fall within the parameters stipulated in Rule 32. In the result, the applicant was not required to set out a defence to the extent provided for in the authorities and in particular *Breytenbach v Fiat SA (Edms) Bpk*.²

¹ (2022-011215) [2023] ZAGPJHC 1028 (13 September 2023) at [13]

² 1976 (2) SA 226 (T)

[8] The relevant portion of section 17 of the *Superior Courts Act*³ (“the Act”) provides that leave to appeal may only be given should the court be of the opinion the appeal would have a reasonable prospect of success or should there be some other compelling reason why the appeal should be heard.⁴ In *Ramakatsa and Others v African National Congress and Another*⁵ the Supreme Court of Appeal held as follows:

“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”

In *S v Smith* it was held that more is required to be established than the possibility of success, that the case is arguable on appeal or that it cannot be categorised as hopeless.⁶

With that in mind I proceed to consider the applicant’s grounds for the application for leave to appeal.

[9] The respondent had cogently set out in its affidavit filed in support of its application for summary judgment the facts and grounds upon which the deponent to the affidavit is entitled to depose to it as required in Rule 32(2), in particular as to the basis upon which he may verify the cause of action, has knowledge of the facts and may swear as to its veracity and has authority to do so. He confirms the sum claimed as being the amount due and payable. This aspect was dealt with in the judgment and need not be repeated. It remains

³ 10 of 2013

⁴ “(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.”

⁵ [2021] JOL 49993 SCA at [10]

⁶ 2012 (1) SACR 567 (SCA) at [7]

clear that the deponent in deposing to the affidavit complies with the requirements of R 32(2) and the authorities in respect thereof.

[10] As regards the attack on the acceptability of the certificate of balance because the author was not in the employ not a manager of either Sunlyn of the respondent, but a litigation manager in the employ of Sasfin, it failed for much the same reasons as the attack on the deponent to the affidavit in support of the application for summary judgment. In argument and in revisiting the papers and the argument at the hearing of the summary application, counsel for the applicant, correctly in my view, conceded that he could not take the matter further in this respect.

[11] In heads of argument filed in opposing the application for leave to appeal, it is pointed out that the applicant in its affidavit resisting summary judgment did not raise defences pertaining to the quantum of the respondent's claim as certified in the certificate of balance, the certificates acceptability and in particular that the author of such certificate was not the person authorised to do so. Respondent's counsel submitted that any divergence between the applicant's plea and the affidavit resisting summary judgment should be regarded as demonstrative of an absence of *bona fides* or any serious intent by the respondent to advance such defences as triable issues at trial in the absence of reasonable explanation. Counsel referred me to two judgments in this division in substantiation of these submissions namely *Nedbank Limited v Uphuhliso Investments and Projects (Pty) Limited and others*⁷ and *Nogoduka-Ngumbela Consortium (Pty) Limited v Rage Distribution (Pty) Limited trading as Rage*.⁸

[12] I am in broad agreement with the above judgments and the authorities quoted therein in respect of this issue. The applicant has not advanced any reasons as

⁷ [2022] 4 All SA 827 (GJ) at [25]-[31] with extensive reference to the judgment of Moorcroft AJ, also in this division in the unreported matter of *Vukile Property Fund Limited v True Ruby Trading 1002 (CC) trading as PostNet and another* 2020/9705, 21 May 2023 in which it was remarked that when a defendant realises that defences raised in its resisting affidavit go beyond its plea should then seek to address that disconnect or deficiency by seeking to first amend its plea so that the plea, once amended, would align with its affidavit resisting summary judgment. Rule 32 does not deprive a defendant from at any stage amending his plea, including after summary judgment proceedings had been launched but before the hearing thereof. But should the defendant leave the plea unamended, this may be demonstrative of a lack of good faith or of any serious intent on the part of the defendant to advance that defence as a triable issue at trial.

⁸ [2022] JOL 53403 (GJ) at [7]

to why the plea in respect of the certificate of balance differs from the defence presented in the affidavit resisting summary judgment. In the result I find the applicant's submission pertaining to these issues to be without merit.

- [13] Regarding the legibility issue, the applicant's attempt at distinguishing this matter from the clear authority of DSV must fail upon a proper reading of paragraph 13 of that judgment. It reads:

"But if this was a basis that prevented the defendant from pleading it could have raised several provisions in the Rules to deal with this. Rules 30 as an irregular proceeding read with Rule 18(12) or Rule 35(12) or 35(14). It did not. Nor it appears did it do what any other litigant might have done in similar circumstances and asked for a better copy to be furnished before it filed its plea. Moreover, this contract was likely to be in the possession of the defendant whose director had signed it. In any even a more satisfactory copy of the agreement was made available to the defendant prior to it having to file its answering affidavit in the summary judgment application. The defendant does not say in this affidavit that it was precluded from raising a defence in its plea that it would otherwise have raised had it had a more readable copy of the contract that it had now received."

- [14] It is clear that the provision by the plaintiff in that matter of a legible copy of the contract is not the essential basis of the Court's judgment in respect of the illegibility of the contract. It is merely an additional ground in support of the Court's finding. The respondent's counsel pointed out the guarantee signed by the applicant records not only that the applicant acknowledges having received a copy of the contract and the schedules thereto, but also confirms the he is aware of its terms.⁹ In response, the applicant's counsel argued that the guarantee is dated 22 April 2020 whereas the contract was concluded thereafter. I am not persuaded that this negates the applicant's acknowledgment recorded in the guarantee as the contract and schedules thereto records that it was signed on 22 and 28 April 2020 by the respective

⁹ SAS3 to the particulars of claim, paragraph 4, CL 02-53

parties.¹⁰

- [15] It is not correct that I found the applicant should have assumed that the terms of business pleaded are correct and should have pleaded thereto. I found the applicant had elected not to plead any defence valid in law whilst it might have done so in the alternative to what was pleaded on the assumption the extensive pleading of the terms in the particulars of claim were correct. Defences such as absence of consensus, misrepresentation, error and the like might have been raised had there existed facts in support thereof. Instead, the applicant hung its coat on his alleged inability to read the relevant part of the contract.¹¹
- [16] The applicant does not dispute my finding that the illegible part of the contract is legible when read on CaseLines which provides for a document to be viewed and zoomed in. I found whilst it is at first blush illegible, on closer inspection it is legible, though it requires patience and perseverance.¹²
- [17] I find the issues raised by the applicant pertaining to the illegibility issue remain unconvincing and need not bother another court.
- [18] The same applies to the third complaint raised by the applicant, namely his disassociation from the first defendant who is the principal debtor in the matter. The principle set in *Gruhn v M Pupkewitz & Sons (Pty) Ltd*¹³ is not axiomatic. For a court to exercise its discretion in favour of a defendant, the exceptional nature of its inability to respond to allegations needs to be established. This the applicant failed to do. The facts the applicant relied upon does not compare to the exceptional nature of the facts in *Gruhn* as example and which is extensively recorded in my judgment.
- [19] In my view, for the reasons set out herein and in the judgment, the applicant complied with the requirements stipulated in Rule 32(2) in applying for summary judgment to be granted.

¹⁰ Annexures SAS1a, SAS1b, SAS1c and SAS1c to the particulars of claim, respectively at CL02-43, CL02-45, CL02-46 and CL02-48

¹¹ At [25] of the judgment

¹² At [23] of the judgment

¹³ 1973 (3) SA 49

Conclusion

[20] In *Majola v Nitro Securitisation 1 (Pty) Ltd* the Supreme Court of Appeal held that where a court found a defendant had no *bona fide* defence, it should be slow thereafter to grant leave to appeal, lest it undermines the purpose of summary judgment procedure to prevent sham defences from delaying the enforcement of a plaintiff's rights.¹⁴

[21] I am not satisfied the applicant has shown proper grounds to exist that he has reasonable prospects succeeding on appeal.

[22] At the hearing of the application for leave to appeal, I requested the parties' respective counsel to address me upon whether or not there existed any other compelling reason for the matter to be referred to a court of appeal. None was forthcoming. I hold the view that the facts of this matter are particular to this case and do not implicate issues of public interest or law as envisaged in section 17(1)(a)(ii) of the Act.

[23] The applicant had agreed in the guarantee to make payment of any legal costs that may be awarded against him on the scale of attorney and own client.¹⁵

[24] Having regard to all of the above, I make an order as set out below.

Order

[25] The application for leave to appeal is dismissed;

[26] The applicant is to pay the respondent's costs of the application for leave to appeal on the scale as between attorney and own client.



N. S. KRÜGER
NAME OF JUDGE

ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

¹⁴ 2012 (1) SA 226 (SCA) at [25]

¹⁵ Annexure SAS3 to the particulars of claim, par 10 at 02-53

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **29 October 202**

For the applicant: Adv P Marx instructed by Gerhard Botha Attorneys

For the respondent: Adv S Aucamp instructed by ODBB Attorneys

Date of hearing 24 October 2024

Date of judgment: 29 October 2024

