



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

Case Number: 2020/34408

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO



18/12/2024

Signature

Date

In the matter between:

FORCE FUEL (PTY) LTD

FIRST APPLICANT

LABAT AFRICA LTD

SECOND APPLICANT

And

HOLLARD INSURANCE COMPANY (PTY) LTD

RESPONDENT

JUDGMENT: LEAVE TO APPEAL

TSATSAWANE AJ

INTRODUCTION

- 1 The applicants, who were the first and second respondents in the main application, seek leave to appeal against the whole of the judgment and orders granted by this Court.
- 2 The application for leave to appeal is opposed by the respondent. Both parties filed heads of argument and supplementary heads of argument. I am indebted to both counsel for their assistance in this regard.

THE CONTEXT

- 3 In the main application, the respondent sought an order directing the second applicant to pay it an amount of R 20 000 000, 00 together with interest thereon “*at the prime overdraft rate of Absa Bank Limited, plus 2% from 10 April 2020 to repayment thereof*” and costs of the application on an attorney and client scale¹.
- 4 On 19 August 2019, the first applicant executed a deed of indemnity as guarantor in favour of the respondent. The deed of indemnity records that the respondent has agreed to, “*at the written request of the Guarantor ... execute or procure the execution, of a Guarantee or Guarantees on behalf of the*

Guarantors or any subsidiary, associated company or companies ... or any other entity or person mentioned in such written request/s, which request/s shall be regarded as incorporated herein.”

- 5 In terms of the deed of indemnity, the guarantor undertook and agreed “*to pay to the Insurance Company immediately on first written demand any sum or sums of money which the Insurance Company may be called upon to pay under the Guarantee/s, whether or not the Insurance Company at such date shall have made such payment, and whether or not the Guarantor admits the validity of such claim against the Insurance Company under the Guarantee/s.*”
- 6 On 16 August 2019, the second applicant executed a deed of suretyship and indemnity in favour of the respondent. The deed of suretyship and indemnity records that the respondent has, at the first applicant’s request, “furnished or provided and may hereafter furnish or provide, at the written request of the Guarantor, certain guarantees ... in favour of certain persons, companies ... for the due payment by the Guarantor or any other company ... mentioned in such request ... of any monies now or from time to time hereafter owing ... under any contract which it may have entered into or which it may thereafter enter into.”
- 7 In terms of the deed of suretyship and indemnity the second applicant “*hereby interpose and bind myself/ourselves as surety/sureties for and co-principal debtor/s jointly and severally with the Guarantor, in solidum for the due*

¹ Paragraph 1 of the notice of motion.

payment by the Guarantor to the Insurance Company of all and any amounts which the Guarantor may be liable to pay to the Insurance Company under the Indemnity” and further undertook and agreed “to pay the Insurance Company on demand any sum or sums of money which the Insurance Company may be called upon to pay under any Guarantee whether or not the Insurance Company shall, at such date, have made such payment, and whether or not the Guarantor ... admit the validity of such claims against the Insurance Company under the Guarantee.”

- 8 In a letter dated 8 August 2019², the first applicant requested the respondent “to issue a guarantee, in the name of FuelEx (Pty) Ltd ... in favour of Engen, in the amount of R 20 000 000.” This letter is on the first applicant’s letterhead and was signed by Gordon Walters in his capacity as the first applicant’s financial director³. This was accordingly the first applicant’s request to the respondent to issue a guarantee on behalf of “any other entity or person mentioned in such written request/s” as contemplated in the deed of indemnity. In my judgment, I concluded that the question whether this request was made at the behest of FuelEx (Pty) Ltd is irrelevant to the question whether the second applicant is liable for the first applicant’s debts in terms of the deed of suretyship and indemnity.

² Annexure FA4 to the founding affidavit.

³ Gordon Walters was also the second respondent’s financial director, a fact which is restated in paragraph 23 of the second respondent’s heads of argument.

- 9 Pursuant to the aforesaid request and on 13 August 2019, the respondent issued a guarantee in the name of FuelEx (Pty) Ltd in favour of Engen Petroleum Ltd in the requested amount of R 20 000 000, 00⁴ and Engen Petroleum Ltd claimed that amount from the respondent. The respondent paid that amount to Engen Petroleum Ltd.
- 10 In opposing the respondent's application for payment of the aforesaid amount, the second respondent contended that the conclusion of the deed of suretyship and indemnity was not authorised and that it is not bound by it. It further contended that the conclusion of the deed of suretyship and indemnity would constitute the provision of financial assistance to the first respondent in terms of section 45 of the Companies Act 71 of 2008 and that there was no compliance with that section and consequently, the deed of suretyship and indemnity is void.
- 11 On the basis of the documentary evidence placed before me, I concluded that there was no merit in the contention that the conclusion of the deed of indemnity and deed of suretyship was not duly authorised and held that the second applicant was liable to the respondent and I granted an order directing the second applicant to pay the respondent the amount of R 20 000 000, 00 as claimed by the respondent.

⁴ Annexure FA5 to the founding affidavit.

THE APPLICATION FOR LEAVE TO APPEAL

- 12 The applicants seek leave to appeal against the order directing the second applicant to pay the respondent the amount of R 20 000 000, 00.
- 13 In their heads of argument in support of their application for leave to appeal, the applicants limited their argument to the following two issues:
- 13.1 The true nature of what the respondent calls the guarantee in the founding affidavit, the express wording of the guarantee, its legal consequences and the respondent's failure to make out a proper case for the relief sought by it.
- 13.2 The proper interpretation of the guarantee and the additional obligation which rested on the respondent in formulating its case in its founding affidavit.
- 14 At the hearing of the application for leave to appeal, I pointed out that the issues raised in the applicants' heads of argument and argued by the applicant's counsel were not before me at the hearing of the main application and that the judgment which is the subject of the application for leave to appeal did not deal with them. In fact, I could not have dealt with them because they did not form part of the basis on which the applicants opposed the main application. As a result of this, I invited both counsel to file supplementary heads of argument on whether I

should entertain the applicants' new points of law raised for the first time in the application for leave to appeal.

15 I am indebted to both counsel for their supplementary heads of argument from which I got the necessary guidance. Both counsel agree, correctly so, that a new law point may be raised for the first time on appeal subject to issues of fairness and prejudice to the opponent. I accordingly proceed to consider whether the new issues justify leave to appeal because I am satisfied that the respondent had a reasonable opportunity to deal with whether such issues justify leave to appeal.

16 The applicants contended that on a "*closer inspection of what the [respondent] calls the guarantee, it becomes evident that it is not in fact a guarantee but rather a surety*" and that "*its operation will only come into play when the primary obligation is proven, or is shown to be due.*" On the basis of this interpretation, the applicants contended that:

"21. *The applicant has failed to make any reference to the primary obligation of FuelEx (Pty) Ltd in the founding affidavit, how it was calculated, how it came to being or any other material information which could result in a finding that the applicant, as surety and co-principal debtor, was liable as an accessory to the main application.*

22. *This is fatal to the case of the applicant, and should be enough to convince the honourable court that leave to appeal should be granted to the second respondent.*

25. *What follows, it is submitted, is the fact that the underlying causa, i.e. the principal debtors' obligations, must exist before the surety is obligated to perform, and accordingly, it was incumbent on the applicant, as surety, to have satisfied itself that the principal obligation was due, and more so, to have dealt with the principal obligation in its founding papers.*

26. *This, the applicant has failed to do insofar as the applicant has misconstrued its obligations in terms of the document it calls a guarantee in circumstances where ex facie the document, it is a surety as it does not create a self-standing obligation but an ancillary one.*

27. *Absent any allegations that the monies are due and payable by the principal debtor, the surety is not obligated to pay and accordingly, there is no cause of action in the founding affidavit.*" (Own emphasis).

17 Furthermore, the applicants contended that the ultimate flaw in the application is that:

"35.2 *The applicant was not 'obligated' to pay any monies to Engen save where the applicant established, and properly pleaded, that the principal obligation was due, this it failed to do.*

35.3 *The applicant, as surety, was also obligated to establish the amount of the principal obligation, which it failed to do as its liability, if it could*

be invoked, would be limited to only that indebtedness which the creditor could prove.

35.4 It was not established in the founding papers that any amount was owed by the principal debtor to the creditor and as such, the fact that the applicant made payment to the creditor absent such facts, does not make a cause of action on the papers.” (own emphasis).

18 It is clear from what I have quoted above that the applicants criticize the respondent for misconstruing the contractual documents upon which it relied and that it failed, due its misconstruing such documents, to make certain averments in its founding affidavit and that “*there is no cause of action in the founding affidavit*”. In this regard, the applicants have gone further to state what they say the respondent should have addressed in its founding affidavit but failed to do. For purposes of this application for leave to appeal, I assume, without deciding, that the applicants are correct in what they say.

19 Assuming that the applicants’ criticisms of the respondent are correct, it follows that there are certain facts which have not been pleaded and in respect of which evidence was not placed before the Court. Prior to the hearing of the main application and during the time allowed for the exchange of affidavits, the parties filed very comprehensive supplementary affidavits raising therein a wide range of issues. There is no reason given as to why the applicants did not, at that stage, contend that: “*Absent any allegations that the monies are due and payable by the principal debtor, the surety is not obligated to pay and accordingly, there*

is no cause of action in the founding affidavit” as they do in paragraph 27 of their heads of argument. If this was done at that stage, the respondent would have had a reasonable opportunity to deal therewith. The same applies to the other factual criticisms levelled against the respondent in the paragraphs quoted above.

20 It would be unfair and prejudicial to the respondent to grant leave to appeal on the basis of the new issues raised by the applicants for it to face, on appeal, factual criticisms which could and ought to have been raised in the various supplementary affidavits filed of record and to which the respondent could have responded.

21 Granting leave to appeal in the present circumstances would leave the applicant without an answer to the criticisms raised by the applicants as part their new issues, such as that *“there is no cause of action in the founding affidavit”* and that the respondent did not say anything about the primary obligation in its founding affidavit, *“how it was calculated, how it came to being or any other material information which could result in a finding that the applicant, as surety and co-principal debtor, was liable as an accessory to the main application.”*

22 In the premises, I am of the view that:

22.1 The law points raised by the applicants in this application for leave to appeal cannot be fairly determined on appeal without prejudicing the

respondent because they raise issues which, even on the applicants' version, are not covered in the respondent's affidavits.

22.2 It would be unfair and prejudicial to the respondent to grant leave to appeal simply on the basis of the applicants' new law points because such points cannot be fairly determined without the respondent having dealt with the facts raised by the applicants in their contentions in support of their application for leave to appeal.

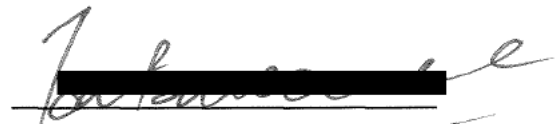
22.3 There is no reasonable prospect of success on appeal because the issues relied upon by the applicants were not before me at the hearing of the main application. For this reason, it cannot be said that I erred in not finding in favour of the applicants on issues which were not before me at the hearing of the main application.

22.4 The application for leave to appeal ought to be dismissed with costs.

23 I make the following order:

23.1 The application for leave to appeal is dismissed with costs.

23.2 The second applicant is ordered to pay the respondent's costs of this application for leave to appeal which shall include all the costs incurred by the respondent in opposing the application for leave to appeal.


KENNEDY TSATSAWANE SC

**Acting Judge of the High Court
Gauteng Division, Johannesburg**

This judgment was prepared and authored by Acting Judge Tsatsawane. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 18 December 2024.

Appearances:

FOR APPLICANTS:

Adv S McTurk

FOR THE SECOND RESPONDENT:

Adv A Kruger