

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: **42704/2019**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: [REDACTED]

Date: 4 April 2025 **Signature:** [REDACTED]

In the matter between:

KPMM ROADS AND EARTHWORKS (PTY) LTD

First Applicant

KPMM CONSTRUCTION (PTY) LTD

Second Applicant

MERAFONG CRUSHERS (PTY) LTD

Third Applicant

PADAYACHEE, VERENTHREN

Fourth Applicant

SCHNEIDER, JOHANN ANTON

Fifth Applicant

TWIDDY, KEVIN BRETT

Sixth Applicant

PADAYCHEE, MESHALL RONA

Seventh Applicant

HICKMAN MICHAEL ALEXANDER

Eighth Applicant

and

**CREDIT GUARANTEE INSURANCE
CORPORATION OF AFRICA LIMITED**

Respondent

JUDGMENT

GOEDHART AJ:

Introduction

- [1] The first and third to eighth applicants seek leave to appeal against the order for summary judgment granted against them on 29 July 2024.
- [2] Leave is sought in terms of Section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 (*the 2013 Act*) which provides:

“17 Leave to appeal

(1) Leave to appeal may only be granted 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;

....”

[3] In *Mont Chevaux Trust v Goosen*,¹ Bertelsmann J held *obiter dictum* that section 17(1)(a)(i) of the 2013 Act imposes a more stringent test for leave to appeal than what was required under the repealed Supreme Court Act 59 of 1959. The view that the 2013 Act raised the bar was endorsed by a Full Court of this division in *Acting National Director of Public Prosecutions and others v The Democratic Alliance & Others*,² as well as by the Supreme Court of Appeal in *Notshokuvo v S*³ and *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another*.⁴

[4] In *KwaZulu-Natal Law Society v Sharma*⁵ Van Zyl J held that the test enunciated in *Smith v S*⁶ still holds good under the 2013 Act. That test is:⁷

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that the 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

¹ *The Mont Chevaux Trust v Tina Goosen & 18 others* 2014 JDR 2325 (LCC); [2014] SALCC 20 (3 November 2014) at para 6.

² (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at para 25. See *Smartpurse Solutions (Pty) Ltd v Firstrand Bank Ltd* (35882/2022) [2024] ZAGPJHC 961(26 September 2024) in which Meiring AJ, following a detailed analysis, rejected that notion that the Superior Courts Act, 2013 introduced a new test.

³ [2016] ZASCA 112 (7 September 2016) at para 2.

⁴ (1221/2015) [2016] ZASCA 176 (25 November 2016) para 16.

⁵ [2017] 3 All SA 264 (KZP) at paras 29 -30.

⁶ 2012 (1) SACR 567 (SCA); [2011] ZASCA 15 (15 March 2011) at para 7.

⁷ At para 7.

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.'

[5] In *Ramakatsa v African National Congress*⁸ the Supreme Court of Appeal reaffirmed that 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.

[6] The applicants raised two points in *limine* in the notice of application for leave to appeal (paragraphs 1-15), which were not persisted with in the hearing, and warrant no further attention.

The respondent's claim

[7] The respondent's claim was premised upon:

⁸ (724/2019) [2021] ZASCA 31 (31 March 2021).

- 7.1. a guarantee issued by the respondent in favour of The South African National Roads Agency Limited (SANRAL) on 28 June 2017 (**the Guarantee**);
- 7.2. deeds of suretyship executed by the fourth, fifth, sixth, seventh and eighth applicants in favour of the respondents for the debts of the first, second and third applicants on 18 July 2017 (**the Suretyships**);
- 7.3. a deed of indemnity executed by the first, second and third applicants in favour of the respondent on 28 August 2017 (**the Indemnity**).
- [8] The Guarantee issued by the respondent was an “on demand” guarantee for the due performance of the first applicant’s obligations, as contractor, to SANRAL for improvements to a national road between Olifantshoek and Kathu (“the Contract”).
- [9] The first applicant did not comply with its obligations to SANRAL. SANRAL terminated the Contract and demanded payment under the Guarantee on 22 October 2019, whereafter the respondent made payment to SANRAL as provided for in the Guarantee.
- [10] The respondent’s claim was that the payment by it to SANRAL under the Guarantee triggered the liability of the first, second and third applicants in terms of the Indemnity, and of the fourth to eighth applicants in terms of the

Suretyships. No relief was sought against the second applicant due to it being in business rescue.

Grounds for leave to appeal

- [11] The applicants argue that there are reasonable prospects that another court would come to a different conclusion on whether the defences raised by the applicants raise triable issues, such that summary judgment should not have been granted.
- [12] The first ground is that SANRAL's demand was not valid as it did not follow, strictly, the terms of the Guarantee. It was further argued that the interpretation of the Guarantee contended for by the applicants has not been dealt with by a court, is a novel issue and warrants the attention of an appeal court.
- [13] Whilst the applicants have raised a novel issue, the question is whether the issue is in fact triable on the applicable legal principles pertaining to "on demand" guarantees. These legal principles are established, and were dealt with in the judgment. The applicants have not demonstrated, with due regard to the applicable authorities considered, that the novel point raises a triable issue.
- [14] The applicants' second ground was that the Indemnity was void for vagueness and thus unenforceable. I found that the Indemnity was not void for vagueness.

The arguments in the application for leave to appeal have not added anything to what was initially considered in the hearing.

[15] The applicants' third ground was that the respondent had pleaded the incorrect interest rate. It was argued that leave to appeal should be granted in that I erred in *mero motu* correcting what I found to be a patent error on the papers. Because the defence raised by the applicants had to be determined with reference to the respondent's pleaded case, it was not open to me to *mero motu* amend a patent error in the respondent's papers in an application for summary judgment.

[16] In *Tumileng Trading CC*⁹ Binns-Ward J noted that most of the old authorities still apply in determining whether the defendant has disclosed a *bona fide* defence, despite the amendment to Rule 32. This approach was affirmed by the SCA in *Cohen NO v Deans*¹⁰ and the Full Bench of this division in *Liquor Network Agency CC and another v Skylim Beverages CC*.¹¹

[17] In *Standard Bank of South Africa v Roestof*¹² it was held that a technical defect due to some obvious and manifest error which causes no prejudice to the defendants can be overlooked. There are three requirements set out in *Roestof*. Firstly, the defect must be a technical defect, not a substantial defect. Second,

⁹ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para 13.

¹⁰ 2023 JDR 1216 (SCA) at paras 25-26.

¹¹ 2025 (2) SA 507 (GJ) at para 14.

¹² 2004 (2) SA 492 (W) at 496F-H.

the defect must be obvious and manifest. Third, there must be no prejudice to the defendant.

[18] The approach was followed in *Coetzee and Others v Nassimov*,¹³ but in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another*¹⁴, Wallis J (as he then was) did not follow this decision and held that the suggestion that a defective summary judgment application could be cured if the defence dealt with the merits of the claim, was incorrect.

[19] These decisions were recently considered by the SCA in *Cohen NO v Deans*.¹⁵ In *Cohen NO*, the SCA considered that it was not necessary to resolve the discord between the *Roestof* or the *Shackleton* approach. The defect in the particulars of claim in *Cohen NO* was however not merely technical because reliance was placed on the incorrect trust deed.¹⁶

[20] In *Liquor Network*¹⁷ the Full Bench held that it did not consider that there was, in fact, a discord between *Roestof* and *Shackleton*.¹⁸ It was held further that the court retains a discretion to refuse summary judgment even if the defendant's affidavit falls short of that which is required. The discretion to refuse

¹³ 2010 (4) SA 400 (WCC) at 402B-403A.

¹⁴ [2010] ZAKZPHC 15; 2010 (5) SA 112 (KZP); [2011] 1 All SA 427 (KZP), para 25.

¹⁵ 2023 JDR 1216 (SCA) at paras 25-26.

¹⁶ Ibid at para 27.

¹⁷ Fn 11 above.

¹⁸ Id at para 22.

summary judgment is triggered *inter alia* where it is reasonably possible that the plaintiff's application is defective or that the defence is a good defence. In such event, the issue must be decided in favour of the defendant.¹⁹

[21] Consequently, on the issue of the incorrect interest rate, and whether, in the circumstances, I was entitled to *mero motu* amend what I found to have been a patent error, there is a reasonable prospect that another court could come to a different conclusion.

[22] As leave is to be granted, the applicants would be entitled to raise all the defences raised in the summary judgment application, in the appeal.

Order

[23] In the result, leave to appeal is granted to the Full Court of this division, with costs to be costs in the appeal.


GOEDHART AJ

ACTING JUDGE OF THE HIGH COURT

¹⁹ Id at para 30.

This judgment was prepared and authored by Acting Judge Goedhart. 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 Case lines. The date for hand-down is deemed to be 4 April 2025.

Date of hearing: 19 September 2024

Date of judgment: 4 April 2025

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