



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 16399/2023

In the application between

**MERCHANT COMMERCIAL FINANCE 1 (PTY) LTD
TRADING AS MERCHANT FACTORS
(REGISTRATION NUMBER: 2014/075671/07)**

APPLICANT

And

VALOWORX 33 CC

FIRST RESPONDENT

ARCHAR COLYER HEAD N.O.

SECOND RESPONDENT

ARCHAR ALEXANDER BROWNLEE N.O.

THIRD RESPONDENT

**ANDREW GRANT KIRKMAN N.O.
ACTING IN THEIR CAPACITIES AS THE
JOINT TRUSTEES OF THE CAPE LEOPARD
TRUST (IT 1382/2002)**

FOURTH RESPONDENT

ARCHAR COLYER HEAD

FIFTH RESPONDENT

Date of hearing (application for

leave to appeal):

17 February 2025

Date of judgment: Judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be 21 February 2025

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

VAN DEN BERG, AJ

[1] The applicants (cited as the respondents in the main application) apply for leave to appeal against the judgment handed down on 19 November 2024. The parties are referred to herein as cited in the opposed application (i.e. the applicants in the application for leave to appeal are referred to as the respondents). The respondents were ordered to pay, jointly and severally, the amount of R944,919.85 with interest and the applicant's party and party costs.

THE LEGAL POSITION IN DECIDING IF LEAVE TO APPEAL SHOULD BE GRANTED

[2] Section 17(1) of the Superior Courts Act provides that leave to appeal may only be given where the Judge is of the opinion that:

[2.1] The appeal would have reasonable prospects of success; or

[2.2] There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

- [3] The prospect of success required in terms of Section 17(1)(a)(i) is to be decided without reference to the parties' wishes.¹ *Inn Mont Chevaux Trust v Goosen*² the Court held that:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, ...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. ..."³

- [4] 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 order to succeed, the applicant must convince the Court 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. There must be a sound, rational basis for the conclusion that there are prospects of success.⁴
- [5] Leave to appeal is further granted not in respect of the reasons for the judgment but in respect of the order itself. Therefore, the success of the application for leave to appeal must be related to the outcome of the case and not an argument that fails to dispose of the case in the Appellant's favour.⁵
- [6] In the matter of *Tecmed Africa v Minister of Health*⁶ the Supreme Court of Appeal held:

"[17] First, appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a court of appeal

¹ Rail Commuter Action Group v Transnet Limited trading as Metrorail (Number 2) 2003 (5) SA 593 (C)
² 2014 JDR 2325 (LCC)
³ At para 6
⁴ *S v Smith* 2012 (1) SACR 567 at 570, para 7
⁵ *Goodwin Stable Trust v Duohehex (Pty) Ltd* (2) [1996] 3 All SA 119 (C)
⁶ [2012] 4 All SA 149 (SCA)

agrees with a lower court's reasoning would be of no consequence if the result would remain the same (*Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 354)."

GROUND UPON WHICH TO LEAVE TO APPEAL IS SOUGHT

[7] The respondents base their notice of leave to appeal on the following grounds:

[7.1] That the settlement agreement concluded at Cape Town on 14 December 2020 between the applicant, the first respondent, the Cape Leopard Trust and the fifth respondent is not valid because:

[7.1.1] the fifth respondent only signed the settlement agreement as "*Member for Valoworx CC*" and not in his personal capacity;

[7.1.2] that no resolution was placed before the Court authorising Valoworx 33 CC and/or the Cape Leopard Trust to enter into this settlement agreement;

[7.1.3] that the fifth respondent only became a member of the first respondent on 18 March 2022;

[7.2] That the Court erred in finding that the fifth respondent was liable based upon the suretyship dated 24 December 2012 because the suretyship was signed between the fifth respondent and Merchant Commercial Finance (Pty) Ltd, registration number 1998/018914/07 and not the applicant,

[7.3] that the finding that monies were and/or are due by the first to fifth respondents was incorrect because it is not possible to cede an obligation or debt that does not exist.

VALIDITY OF SETTLEMENT AGREEMENT

[8] The applicant alleges in paragraphs 29 and 30 of the founding affidavit that the parties entered into the settlement agreement and the terms thereof. The respondent admitted, as per paragraph 82 of the answering affidavit, the conclusion of the settlement agreement but denied its validity and binding nature, arguing that the term loan agreements are not valid and binding due to non-compliance with the National Credit Act (Act 34 of 2015), and that Valoworx could never have breached an invalid and unenforceable agreement.⁷

[9] The respondents did not dispute or allege in their answering affidavit that the fifth respondent signed the settlement agreement solely in his capacity as a member of Valoworx, nor do they deny the authority of Valoworx or the Cape Leopard Trust to have concluded the settlement agreement. Most importantly no evidence was presented by the respondents that the fifth respondent only became a member of the first respondent on 18 March 2022. In this regard the respondents, for the first time, alleged in paragraph 1.4 of the application for leave to appeal that:

“...even if the resolutions in respect of the first respondent were signed – which they were not – as per annexure “ACH1” attached hereto it is self-evident that the fifth respondent only became the member of the first respondent on 18 March 2022, some 16 months after the settlement agreement was signed and as such the fifth respondent was not authorised on behalf of the first respondent to enter into the said agreement.”

[10] In motion proceedings, the affidavits constitute the evidence and pleadings. It is trite that the parties must allege the required facts and adduce the admissible evidence in support thereof in their affidavits. Moreover, the respondents admitted the conclusion of the settlement agreement, although they denied its validity on grounds different from those contended for now in the application for leave to appeal. It is trite that an admission may not merely

be withdrawn, and the Court cannot go behind the admission, especially in the absence of any allegation that it was made in error.

FIFTH RESPONDENT'S SURETYSHIP

- [11] The respondents in the application for leave to appeal referred to the signature of the fifth respondent on paginated page 94, where he signed on behalf of Valoworx CC. It is contended in the application for leave to appeal that he did not sign the settlement agreement in his personal capacity. However, no explanation is offered regarding the two signatures on paginated page 95, where the fifth respondent apparently signed as trustee of the Cape Leopard Trust and, second, in his personal capacity.

CASE NOT MADE OUT IN FOUNDING AFFIDAVIT

- [12] Mr Wilkin, who appears for the first to fifth respondents correctly, did not persist in argument with the aforementioned grounds of leave to appeal. He limited his argument to seeking leave to appeal on behalf of the fifth respondent only and not all the respondents. He submitted that the suretyship by the fifth respondent is invalid and unenforceable and that the Court erred in finding differently. Mr Wilkin argues that the applicant does not make out a case in its founding affidavit regarding the validity of the fifth respondent's suretyship.
- [13] The argument goes that the applicant alleges in paragraph 26 of the founding affidavit, that the fifth respondent *'in writing, jointly and severally, irrevocably as surety for and co-principal debtor in solidum with the first respondent [bound himself] for the due and punctual payment of all and any monies which now is or may hereinafter being owing for which the first respondent may or from time to time owe to the 'applicant' from whatsoever cause and howsoever arising...'*. Mr Wikin's argument turns on the meaning of the word 'applicant' as used in paragraph 26. He submits that no amount was owed to the 'applicant' when the suretyship was concluding in 2012 since the applicant was only registered in 2014.

- [14] It is common cause that the fifth respondent executed his suretyship in favour of the applicant's predecessor in title, Merchant Commercial Finance (Pty) Limited (Registration Number 1998/018914/07). In terms of clause 27 of the suretyship executed by the fifth respondent, the applicant's predecessor was entitled to cede the suretyship to the applicant at any time, without reference to the fifth respondent, who acknowledged that he would, upon such cession, be liable to the applicant in terms thereof. Mr Wilkin submits now that the fifth respondent signed the settlement agreement in "*error*". This error relates only to the fact that his suretyship was granted in favour of the applicant's predecessor and not the applicant with whom the settlement agreement was concluded.
- [15] The fifth respondent disputes the validity of his suretyship in the answering affidavit but on grounds different from the alleged error that he now seeks to rely upon. In the answering affidavit, the fifth respondent confined his opposition to alleging that the term loan agreements, suretyships and settlement agreement are void based upon the NCA defences referred to in the judgment. On a conspectus of the evidence, there was never any doubt concerning the identity of the parties involved in the settlement agreement or the applicant's predecessor's rights and title. I cannot see how any other court could conclude that the first respondent was under any misapprehension of the facts.
- [16] In *Shabangu v Land and Agricultural Development Bank of South Africa*⁸ the Constitutional Court also dealt with the validity of a settlement agreement and suretyship. In the Shabangu matter, the suretyship's wording clearly showed that the surety intended to be bound only for the "*indebtedness*" arising out of a specific agreement. However, the facts in Shabangu are distinguishable from the Supreme Court of Appeal's judgment in *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa*⁹ in which case the wording of a bond that secured the claim was wider and provided for

⁸ 2020 (1) SA 305 (CC) at [32] to [36]

⁹ 2016 (1) SA 202 (SCA)

payment by the debtor of *“all amounts whatsoever already owed or may be owed hereafter in terms of advances, cash, credit accounts, fixed loans, credit, promissory notes, loan agreements, instalment sale agreements, lease agreements, other agreements, any facilities granted to the mortgagor.”*¹⁰

- [17] The wording of the fifth respondent’s suretyship is similarly broad in nature, akin to working in Panamo. I cannot see how another court could conclude that the explicit wording of the fifth respondent’s suretyship does not provide for such a situation, where the claim is ceded and transferred from the original creditor to its successor title.
- [18] The settlement agreement in this matter relates directly to an issue or lis between the parties and is not objectionable from a legal or practical point of view. The settlement agreement is not at odds with public policy and achieved a practical and legitimate advantage.
- [19] The applicant indeed presented only in its replying affidavit the evidence of having entered into a sale agreement with its predecessor, under which it acquired the predecessor’s business as a going concern, including all its assets, liabilities, and securities, which encompass the suretyship executed by the fifth respondent. This was, however, in response to the respondents highlighting the discrepancy between the description of the applicant and that of its predecessor as a basis for opposition. The fact remains that the applicant (not its predecessor) and the respondents concluded the settlement agreement. This settlement agreement forms the foundation of the applicant’s claim and serves as a valid cause of liability, encapsulated in the express wording of the fifth respondent’s suretyship.
- [20] In the premises, there is no reasonable prospect of another Court coming to a different conclusion on the totality of the evidence before the Court or as a matter of law.

[21] The Court cannot enquire into details that fall outside the scope of the pleadings or the admitted facts. The grounds of appeal and the argument presented do not demonstrate that the legal issues raised are of substantial importance or of public importance. There is no compelling reason why an appeal should be heard or that it is necessary to attain legal certainty regarding these issues.

COSTS

[22] At the commencement of the proceedings, both Counsels requested me by agreement to correct a patent error in the judgment handed down on 19 November 2024 and the order issued consequently by the registrar on 21 November 2024 regarding the Scale of costs recorded in paragraph 4 to provide for costs on Scale A instead of Scale B. I will grant an order accordingly.

[23] The following order is granted:

[23.1] The Court corrects the patent error in paragraph 4 of the order at the end of the judgment handed down on 19 November 2024 and the subsequently issued order, dated 21 November 2024, to provide for costs on Scale A instead of Scale B.

[23.2] The application for leave to appeal is dismissed.

[23.3] The respondents are ordered to pay the costs of the application for leave to appeal on Scale A.

VAN DEN BERG, AJ

For applicant: Adv A Newton

BPD Inc

For respondents:

Adv L Wilkin

R Allom Attorneys