



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1398/2023

In the matter between:

DJ DE WAAL

Applicant/Defendant

And

STANDARD BANK OF S.A. LIMITED

(Registration Number 1962/000738/06)

Respondent/Plaintiff

In re:

STANDARD BANK OF S.A. LIMITED

(Registration Number 1962/000738/06)

Applicant/Plaintiff

And

DJ DE WAAL

Respondent/Defendant

Coram: Lever J

JUDGMENT ON LEAVE TO APPEAL

Lever J

1. This is an application for leave to appeal a judgment handed down on the 4 April 2025, wherein I awarded Summary Judgment to the plaintiff in respect of three claims. The first being an overdraft facility and the other two were in respect of certain instalment sale agreements.
2. To avoid confusion the applicant for leave to appeal will be referred to as the defendant or defendant/applicant and the respondent in the application for leave to appeal will be referred to as the plaintiff or plaintiff/respondent.
3. The Notice of Application for Leave to Appeal is some 7 pages long and consists of 13 paragraphs setting out the grounds upon which leave to appeal is sought. These 13 paragraphs can be divided into 4 broad themes. It is convenient to deal with the issues raised in the application for leave to appeal on the basis of the 4 themes set out hereunder. It is therefore not necessary to deal with each of the grounds listed as a ground for leave to appeal in the said Notice of Application for Leave to Appeal. In fact, Ms Boonzaaier who appeared for the defendant/applicant herein, at the hearing of the application for leave to appeal approached her argument on a thematic basis. I intend to deal with the issues on a similar basis.
4. However, before turning to these themes it is necessary to set out the current position in regard to the test as to when and in what circumstances leave to appeal should be granted. The test of what needs to be established in order to

be granted the necessary leave to appeal is now set out in s 17(1) of the Superior Courts Act¹, the relevant provisions of which read as follows:

- “17(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 s 16(2)(a); and ...”

5. On the face of it, the wording of the said section, of the Superior Courts Act as quoted above, is that the requirement for granting leave to appeal is more stringent than was previously required. This is in fact what Bertelsman J held in the case of *MONT CHEVAUX TRUST v TINA GOOSEN AND OTHERS*². Bertelsman J held that the test now is not whether another court might come to a different conclusion but in using the word “would” in the said section of the Superior Court Act, the test now is that there is a measure of certainty that another court will reach a different conclusion to the court of first instance.
6. Having regard to the change from ‘could’ to ‘would’ brought about by section 17(1)(a)(i) of the Act there existed some differing approaches on how

¹ Act 10 of 2013.

² 2014 JDR 2325 (LCC).

‘reasonable prospects of success’ would be determined. Such controversy as might have existed appears to have been settled in the case of RAMAKATSA & OTHERS v AFRICAN NATIONAL CONGRESS & ANOTHER³, where Dlodlo JA set out the position as follows:

“...The test for 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.”⁴ (references omitted)

7. The first theme pursued by the defendant/applicant appears in paragraphs 2 to 6 of the Notice of Application for leave to appeal. Broadly, these grounds of appeal deal with the knowledge that the deponent to the affidavit in support of summary judgment had in relation to the business affairs of the defendant/applicant and could allegedly not depose to facts that could counter the contentions of the defendant/applicant.
8. In pursuing this argument, the defendant applicant makes reference to paragraph 7 of his plea which reads as follows:

³ RAMAKATSA & OTHERS v AFRICAN NATIONAL CONGRESS & ANOTHER (Case No: 724/2019)[2021] ZASCA 31 (31 March 2021).

⁴ Ramakatsa case above., para [10].

“Furthermore, insofar as reference is made to clause 4.1.2 of the agreement referring to a material deterioration of the defendant’s financial position, it is denied that there was any such material deterioration, or that the plaintiff’s decision to claim the outstanding on the overdraft facility was based on any alleged material deterioration of defendant’s financial position.”

9. The defendant/applicant’s reliance on this contention is misplaced on a factual level, because: The grounds upon which there might be a breach under the provisions of the relevant contract is pleaded in paragraphs 6.1 to 6.3.2 of the plaintiff/respondent’s Particulars of Claim; Paragraph 7 of the defendant/applicant’s plea deals with paragraph 6.2 of the plaintiff/respondent’s Particulars of Claim; The actual grounds of breach pleaded and relied upon by the plaintiff/respondent are pleaded in paragraphs 8 to 8.3 of its Particulars of Claim; and Plaintiff/respondent did not plead ‘material deterioration of the defendant/applicants financial position’ as an event of breach.

10. Tellingly, plaintiff/respondent pleaded as a ground of breach that the under the provisions of the agreement in respect of the overdraft facility, defendant/applicant “... (failed) to make payments of the amounts as agreed upon the dates stipulated in the Overdraft Facility Agreement; ...”. This arises from a provision in the said agreement that on the 30 November 2020 that the overdraft facility would be reduced from R715,000.00 to R260,000.00 and

defendant/applicant was required to make a deposit on or before the said date to bring the amount owed under the said agreement within the R260,000.00 limit. The defendant/applicant did not do so. The defendant/applicant simply failed to raise a *bona fide* defence to this claim.

11.I refer to paragraphs 6 to 16 as well as paragraph 66 of my judgment in the Summary Judgment application. For the reasons set out above and for the reasons set out in the said paragraphs of my judgment in the Summary Judgment application, there is no rational or realistic basis to come to the conclusion that another court ‘would’ or even ‘could’ reasonably come to a different conclusion.

12.Turning now to the second theme pursued by the applicant/defendant as a ground for leave to appeal. This theme appears from paragraphs 8 to 8.3 of the Notice of Application for leave to appeal. The contentions made in paragraphs 8.2 and 8.3 of the Notice of Application for Leave to Appeal are interwoven with the first theme already dealt with above. They would fail for the reasons already set out in respect of the said first theme.

13.The contentions made in paragraph 8.1 of the Notice of Application for Leave to Appeal have already been dealt with by me in paragraphs 15, 16 and 52 of my judgment in the Summary Judgment application.

14. On the second theme and for the reasons set out above, there is no rational or realistic basis to come to the conclusion that another court ‘would’ or even ‘could’ reasonably come to a different conclusion. Similarly, this second theme as a basis for leave to appeal must fail.

15. The third ground of appeal appears at paragraph 9 of the Notice of Application for Leave to Appeal. It reads as follows: “Section 129 notices does (sic) not contend cancellation.”

16. It is not clear how this forms a basis for granting leave to appeal. To the extent that it was required and relevant I dealt with the aspect of cancellation in paragraphs 59 to 67 of my judgment in the summary judgment application. There is no rational basis to conclude that another court ‘would’ or ‘could’ reasonably come to a different conclusion. Accordingly, the third theme as a basis for leave to appeal must also fail.

17. The fourth and final theme as a basis for leave to appeal is set out in paragraphs 10 to 13 of the Notice of Application for Leave to Appeal. The thrust of this theme is that the defendant/applicant has not had an opportunity to lead evidence and test the plaintiff/respondent’s case in court. That defendant/applicant has not had an opportunity to lead evidence to establish the alleged verbal amendment of one of the instalment sale agreements. That defendant/applicant has not had the benefit of discovery. That summary

judgment is an extreme measure that has deprived the defendant/applicant an opportunity to have his case tested in court.

18.The contention that defendant/applicant has lost the opportunity to lead evidence on the alleged verbal amendment of one of the instalment sale agreements is made despite a non-variation clause that would preclude such evidence.

19.This fourth theme does not provide the defendant/applicant with a basis to seek leave to appeal. In summary judgment proceedings and more particularly under the provisions of Rule 32(3)(b) the defendant/applicant is obliged by way of an affidavit to set out the facts that disclose fully the nature and grounds of his defence to the plaintiff/respondents claims. Furthermore, the defendant/applicant must satisfy the court that he raises such defence(s) in a *bona fide* manner. This failure to set out a defence based on factual contentions under oath and the failure to establish his *bona fides* is evident from reading my judgment in the Summary Judgment application. Accordingly, on this fourth theme, the defendant/applicant has also failed to establish a rational basis for concluding that another court could or would come to a different conclusion.

20.In the circumstances the application for leave to appeal stands to be dismissed.

21. The final remaining issue is the issue of costs. In all of the agreements relevant to this matter the applicant/defendant agreed to pay costs relating to litigation to recover any amount owing under the agreements on an attorney and client scale. The plaintiff/defendant is the successful party in these proceedings and I have not been made aware of any circumstances that would justify a departure from the general rule that costs should follow the event.

Accordingly, the following order is made:

1. The application for leave to appeal is dismissed.
2. The defendant/applicant is to pay the costs of this application on an attorney and client scale.


L.G Lever
Judge
Northern Cape Division, Kimberley.

Representation:

For the Applicant:

ADV MM BOONZAAIER

Instructed by:

MAJIEDT SWART INC.

For the Defendants:

ADV S TSANGARAKIS

Instructed by:

PGMO ATTORNEYS INC.

Date of Hearing:

06 August 2025

Date of Judgment:

15 August 2025