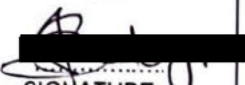


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 3159/2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO	YES/NO
(3) REVISED: YES/NO	YES/NO
.....05 Sep 2025..... DATE	 SIGNATURE

In the matter between:

ENKULISWENI PRE-SCHOOL

Plaintiff

and

NEDBANK LIMITED

Defendant

JUDGMENT-LEAVE TO APPEAL

BALOYI AJ

Introduction

[1] In this application for leave to appeal my judgment and order of 18 November 2024, I refer to the parties as originally cited in the particulars of claim and plea. I directed that I would decide the application on the papers and directed the parties to file written submissions. Accordingly, there were no oral submissions.

[2] At the outset, it is necessary and appropriate that I express my regret and apology to the parties that delivery of this judgment is much delayed due to circumstances that are not of the parties' making. Judgment has been much delayed and I regret the inconvenience caused to the parties as a result and I will extend my apology to the Acting Judge President.

[3] I now turn to consider the application.

Case for Leave to Appeal

[4] Section 17(1) of the Superior Courts Act 10 of 2013 sets the standard when leave to appeal may be granted. The defendant does not state in its notice which of the grounds listed in section 17(1) it relies upon and I agree with the plaintiff that the notice is to that extent defective. Notwithstanding, I consider whether the application meets the standard in section 17(1)(a)(i), the balance

of that section being, in my view, obviously not applicable, considering both the defendant's notice for leave to appeal and written submissions.

- [5] As Advocate Kabinde points out in his written submissions, the test for leave to appeal as now set out in section 17(1)(a)(i), has been explained thus *"It is clear that the threshold for granting leave to appeal against a judgement 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. See Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. 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."*(see *Mont Chevaus Trust v Tina Goosen and 18 others 2014 JDR 2325 (LCC)*). Accordingly, for the defendant to succeed in this application, I must find that there is a reasonable prospect that an appeal court will arrive at a different order to mine.
- [6] The defendant seeks leave to appeal and lists 14 factual findings which it asserts I ought not to have made, and credibility findings that it contends I ought to have made in favour of the defendant. They are too numerous to set out (some of the complaints are further expanded upon in sub-paragraphs which provide further detail of the errors complained of). It is my respectful view that it serves no useful purpose to repeat the list of complaints in this judgment and suffice to say they are a list of findings the defendant laments I did not make in its favour. Importantly, the defendant does not state why the conclusions and findings I made are wrong and that there is a reasonable prospect that an appeal court will come to a different order.

- [7] The facts relating to the plaintiff opening bank account number 1156149096 with the defendant, and the withdrawal of monies from that account are fully set out in the main judgment, are largely common cause and I do not repeat them in this judgment save as may be necessary. The claim against the defendant is for monies withdrawn from the bank account by Mr Michael Kolonsi, one of the four signatories to the defendant's account opening documents. The defendant's Mr Manny Mabapa completed the account opening documents and signed on behalf of the defendant. The plaintiff claims payment on the basis that Mr Kolonsi was not authorised by it to transact on the account and he was included and enabled to withdraw the disputed amount through fraud or negligence of the defendant. The defendant's pleaded defence and in evidence is that Mr Kolonsi was authorised by a resolution of the plaintiff taken at a meeting of the plaintiff on at Maponya, Soweto, on 12 October 2017 and a resolution of 9 September 2017 – the latter resolution does not authorise Mr Kolonsi to transact alone on the account and I therefore need say no more about it. It was common cause that Maponya refers to the defendant's branch at Maponya Mall, Diepkloof, Soweto. The defendant contends that I ought to have found that Mr Kolonsi was authorised to make the disputed transactions on the bank account.
- [8] In the plea, the defendant states that the plaintiff authorised Mr Kolonsi, the plaintiff's Mr Edward Wandile Mlangeni, Ms Simangele Marvelous Mosimane and Ms Musa Edith Sikhosana to open and Mr Kolonsi to transact on the account.

[9] The resolution of 12 October 2017 is recorded by the defendant's Mr Manny Mabapa, a common cause fact, in pre-printed forms of the defendant completed when the account was opened on 12 October 2017 at Maponya, Soweto. The document, about which I say more further in the judgment, *ex facie*, authorises Mr Kolonsi, the plaintiff's Mr Mlangeni, Ms Mosimane and Ms Sikhosana to open and operate the bank account.

[10] From the evidence of both parties, there was no meeting of the plaintiff on 12 October 2017 which authorised Mr Kolonsi to operate the plaintiff's bank account and to make withdrawals on the account, let alone to transact alone. Mr Mabapa, who importantly completed the documents on behalf of the plaintiff, could not have been any under any misapprehension that such meeting was held by the applicant, and that such meeting gave authority to the four signatories at a meeting on the day, in particular that Mr Kolonsi was authorised to transact alone on the bank account. In any event, Mr Kolonsi did not rely on this purported resolution of the plaintiff as authority to conduct the disputed transactions. And yet, it is this purported meeting and resolution which is at the heart of the defendant's defence of the claim, absent which, the defendant had to fail in its defence. The evidence does not support the defendant's plea and defence that the plaintiff authorised Mr Kolonsi in a meeting held on 12 October 2017 to transact on the account and I do not consider that an appeal court will come to a different conclusion. The defendant does not contend that there is any prospect, let alone reasonable prospect as required by section 17(1)(a)(i), that an appeal court could come

to a different conclusion on this factual question. This alone is dispositive of the application.

- [11] From the evidence, including the defendant's evidence, it is evident that the plaintiff held no meeting on 12 October 2017 at which Mr Kolonsi was authorised to be a signatory to the account and to make the disputed withdrawals from the account. It bears repeating that (i) Mr Mabapa did not contend that any such meeting was in fact held and passed the resolutions in the account opening documents; and (ii) Mr Kolonsi did not rely on this purported resolution for authority to transact on the account. The evidence simply does not support the defence of the defendant. It must follow that if such a meeting did not happen, no resolutions of the plaintiff, (i) as recorded in page 2 of the defendant's form "Application for Transactional Current Account Juristic Persons (COMPANY, CLOSE CORPORATION, PARTNERSHIP, TRUST)"; and (ii) in the defendant's form with heading 'Extract of Minutes – Clubs/Societies/Non-Profit Organisations' which reads, *inter alia*: "We, the undersigned, duly authorised to act for and on behalf of the above club/society/non-profit organisation ... warrant that at a duly constituted meeting of the member/committee/directors held at Maponya on 12/10/2017 It was resolved that the organisation establish a banking relationship with Nedbank and ... to open and operate a, when required, various banking facilities, accounts or services, including Electronic banking services ..."; and (iii) in the document with heading 'RESOLUTION OF CLUBS/SOCIETIES/NON-PROFIT ORGANISATIONS TO ADD BUSINESS ACCOUNTS TO AND MAINTAIN ELECTRONIC PROFILE' which records

that the four signatories as they appear thereon warrant that on 12 October 2017, a meeting of the plaintiff attended by all trustees of the plaintiff at Maponya resolved that the plaintiff is, *inter alia*, authorised to nominate beneficiary account payments and to require once-off payments and that Mr Kolonsi is authorised ‘*to sign all documents and to do all things necessary to give effect to the resolution*’, was taken on the day authorising Mr Kolonsi to conduct the disputed transactions on the account. Mr Mabapa completed these documents on behalf of the defendant and did not assert in his evidence that such a meeting of the plaintiff occurred or that he was otherwise led to believe by the plaintiff that it held such a meeting at which a resolution as recorded in the documents or authorising Mr Kolonsi to conduct the disputed transactions. That Mr Mabapa was aware that no such meeting occurred and no such resolution was taken by the plaintiff authorising Mr Kolonsi is the obvious conclusion from the evidence and there is no reasonable prospect that an appeal court will find otherwise.

- [12] A further reason that the defendant has no reasonable prospect on appeal is the plaintiff’s Constitution which prescribes in clause 9.2 thereof that “... *Whenever funds are taken out of the bank account, the chairperson and at least two other members of the preschool must sign the withdrawal or cheque.*” There is no evidence that clause 9.2 of the Constitution was amended by the plaintiff to enable Mr Kolonsi to transact on the bank account. The Constitution was part of the account opening documents given to the defendant’s Mr Manny Mabapa who assisted the plaintiff with the opening of the account and he admitted in evidence that he became aware of clause 9.2. Mr Kolonsi was not

the chairperson of the plaintiff and in any event it was never the defendant's case that it believed or was led to believe that Mr Kolonsi was the chairperson of the plaintiff.

[13] In its heads of argument in the present application, the defendant raises for the first time a defence that it is not liable for the plaintiff's pure economic loss because the conduct causing pure economic loss is not prima facie wrongful and does not give rise to liability for damages unless consideration of public and legal policy in accordance with constitutional norms require that such omissions, if negligent the plaintiff should be recompensated by the defendant for the loss suffered. Suffice only to state the obvious that this was not the defendant's basis for resisting the claim and it is not permissible to raise it belatedly in the present application. The defendant chose a defence in its plea and in its defence to resist the claim and it does not avail it to raise a new defence at this stage. It chose the horse to ride and at this stage it is too late to dismount.

[14] Finally, the defendant asserts in its heads of argument (and not the notice for leave to appeal) that the judgment and order it seeks to appeal extends *"Aquilian liability to cover claims of pure economic loss against bankers in instances where an entity's own agents sign account opening documents, which established the contractual relationship between the parties. This extension of a legal duty owed by a bank to its customers will have a profound impact for the banking industry which seeks to move to electronic transactions instead of manual over the counter transactions."* My judgment and order do

no such and this contrived ground for leave to appeal has no basis in the judgment and order, and therefore no merit.

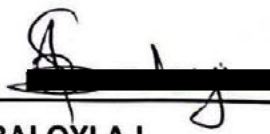
[15] Having considered the 14 grounds for leave to appeal relied upon by the defendant, I am satisfied that none meets the standard set out in section 17(1)(a)(i) for leave to be granted. The application has no merit or reasonable prospect of success.

[16] The plaintiff seeks that it must be awarded costs in the event that the defendant fails in the application. There is no reason that costs should not follow the cause and the defendant has not contended or demonstrated otherwise.

[17] Having found that the application has no merit, I am not satisfied that an appeal has any reasonable prospect of success and the application must fail. I accordingly make the following order.

Order

(i) The application for leave to appeal is dismissed with costs.


S BALOYI AJ

Acting Judge of the High Court
Gauteng Division, Johannesburg

FOR THE PARTIES:

For the Plaintiffs:

Adv. K Kabinde

Instructed by:

Letlhage Attorneys

For the Defendant:

Adv M Matsiela

Instructed by:

CDH Attorneys Incorporated

Date of filing of heads (matter decided in

17 December 2024

chambers and therefore no hearing):

Date of judgment:

05 September 2025