IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NO: 5734/24

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO/~~YES~~	
(2) OF INTEREST TO OTHER JUDGES: NO/~~YES~~	
(3) REVISED: NO/~~YES~~	
23 January 2026	[redacted]
DATE	SIGNATURE

In the matter between:

VICKY WALDECK AND OTHERS **FIRST APPLICANT**

RUDOLF WALDECK **SECOND APPLICANT**

SA ORGANIC FARMING (PTY) LTD **THIRD APPLICANT**

ERIKA BESTER N.O. **FOURTH APPLICANT**

VICKY WALDECK N.O. **FIFTH APPLICANT**

RUDOLF WALDECK N.O. **SIXTH APPLICANT**

and

DAIMLER TRUCK FINANCIAL SERVICES
SOUTH AFRICA (PTY) LTD **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 23 January 2026 at 10h00.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Coram: Langa J

Introduction and background

[1] This is an application for leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court of the Mpumalanga Division of the High Court, against the whole of the judgment and order, including the costs order, granted against the Applicants by this Court on 9 September 2025.

[2] The Applicants contend that there are reasonable prospects that another court would come to a different conclusion and that there are other compelling reasons why an appeal should be heard, as contemplated in section 17(1)(a) of the Superior Courts Act 10 of 2013.

[3] The facts of the matter are not contentious. In the application the Respondent, who was the Applicant/Plaintiff in the application and action respectively, Daimler Truck Financial Services South Africa (Pty) Ltd ("Daimler"), sought the payment of the amount of R3 094 062.03, together with interest, jointly and severally, from the Applicants who were the Respondents/Defendants in the application and action respectively.

[4] It was not disputed that Mercedes-Benz Financial Services (Pty) Ltd ("Mercedes") and the debtor, SA Zero Waste (Pty) Ltd (in liquidation), entered into the Sale Agreements as pleaded in the particulars of claim in the action by Daimler.

[5] It is further common cause that Daimler was not a party to the said Instalment Sale Agreements and its right to sue is based on its alleged and disputed Cession Agreement with Mercedes.

[6] It is further common cause that SA Zero Waste fell into arrears with payments in terms of the agreements and subsequently applied for business rescue. However, it ultimately signed and entered into a Voluntary Surrender and Agreement of Termination ("Agreement of Termination") on 17 March 2022 with Mercedes in Harrismith, Free State.

[7] Subsequent to the said Agreement of Termination, it is common cause that the vehicles and trailers involved were surrendered to Daimler, which in turn had them valued and sold for a total amount of R3 964 122.92. The total shortfall owing to the Plaintiff on all accounts after the sale was R3 094 062.03 according to the certificate of balance dated 21 August 2024.

[8] Daimler essentially contended that, although it was not a party to the original Sale Agreements, it had entered into a Cession Agreement with Mercedes, in terms of which it assumed all the rights and obligations flowing from the Sale Agreements between Mercedes and SA Zero Waste.

[9] The Applicants admitted that SA Zero Waste entered into the written Sale Agreements with Mercedes and fell into arrears and consequently applied for business rescue. While they accept that the Agreement was terminated and the vehicles handed back to Daimler, they, however denied that Daimler has the *locus standi* to sue and further that this Court has jurisdiction to hear the matter as in their view the matter revolves around the Agreement of Termination, which was entered into in Harrismith, Free State, outside of the jurisdiction of this court.

[10] They further argued that Daimler was not entitled to sell the vehicles and that, in any event, the amount of R3 964 122.92 at which they were sold was not reasonable or market-related. The Fourth to Sixth Applicants, on their part, denied the deed of suretyship only on the basis that no resolution was attached to the summons.

[11] Another issue which the Applicants raised was that the amounts owing constitute a penalty stipulation in terms of section 3 of the Conventional Penalties Act 15 of 1962, and that these must therefore be reduced to an extent deemed just and equitable by this Court.

The grounds of appeal

[12] The first ground relied upon by the Applicants is that the court made an error in holding that the cause of action is the Sale Agreements when the Applicants were being sued as sureties. They contend that the court ought to have found that the cause of action is the deed of suretyship.

[13] The second ground is that the court erred in finding that the contradiction between the date of the alleged cession and the subsequent date of the Termination Agreement entered into by the original creditor, Mercedes, was "of no moment" and consequently erred in finding that the point taken in respect of the Plaintiff's *locus standi* cannot be sustained.

[14] They argue that the court ought to have held that either the Cession Agreement is invalid or did not cover the specific Instalment Sale Agreements, as the alleged cession agreement was concluded with Mercedes on 1 December 2021, but it was still Mercedes, not Daimler, that entered into the Termination Agreement with SA Zero Waste later on 17 March 2022. They argue that this constitutes a contradiction which creates a legal dilemma giving rise to two mutually destructive possibilities, either of which gives rise to a bona fide defence that is good in law. It is on this basis that they argued that Daimler has no *locus standi* to bring this action.

[15] Alternatively, they argue that if the Cession Agreement is valid and applicable, Mercedes would have had no right to terminate the agreements in March 2022, and the Termination Agreement would have been rendered a nullity. They argue, therefore, that this constitutes a triable issue the resolution of which requires the hearing of oral evidence and cannot be dealt with in a summary judgment procedure.

[16] Regarding the third ground, they argue that the court erred concerning the liquidated nature and quantum of the claim by making a finding that the agreement did not require the sale price of the vehicles to be market related or reasonable and that this finding constitutes a material misdirection as it ignores the common law principle that a contractual discretion must be exercised reasonably and in good faith. They argue that the court ought to have found that, through the common law principle of *arbitrio boni viri*, even a wide or "absolute sole discretion" must be exercised reasonably and in good faith. The question of whether this discretion was exercised reasonably can, therefore, not be determined summarily and requires factual investigation, thereby rendering the claim unliquidated and precluding summary judgment until a court has determined the reasonableness of the sale.

[17] The fourth ground is that there are also other compelling reasons why an appeal should be heard, as contemplated by section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013. In this respect, they contend that the judgment raises issues of significant public and commercial importance, such as the application and scope of the *arbitrio boni viri* principle in the context of the sale of repossessed assets where the underlying agreement purports to grant an "absolute sole discretion" to the creditor, particularly in non-NCA commercial matters. They argue that this principle affects thousands of commercial credit agreements, and legal certainty is required to ensure fairness and prevent abuse in the financial services sector. They further argue that it also raises the legal question of when a claim for a shortfall becomes unliquidated for the purposes of Rule 32 of the Uniform Rules of Court, particularly where prima facie evidence suggests the sale was not conducted in a manner to achieve the best price.

[18] Furthermore, a compelling reason exists based on the Court's failure to provide a fully reasoned judgment on all determinative issues raised. The learned Judge erred

in failing to consider, address, or adjudicate upon the central legal dilemma advanced by the Defendants in their papers and developed during oral argument.

Applicable legal principles for leave to appeal

[19] It is trite that applications for leave to appeal are now governed by the provisions of section 17 of the Superior Courts Act 10 of 2013. Section 17 provides as follows:

> "(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;
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> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
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> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[20] It is trite that the test for leave to appeal has changed substantially from the test ordained in terms of the repealed Supreme Court Act 59 of 1959. The current standard is captured succinctly in the case of *Mont Chevaux Trust v Goosen and Others*,[1] in which the Court stated 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, see *Van Heerden v Cronwright and 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."

[1] *Mont Chevaux Trust v Goosen and Others 2014 JDR 2325 (LCC)* para 6.

[21] This position has since been confirmed in several decisions in other Divisions of the High Court. See *Magashule v Ramaphosa and Others,*[2] and *MEC for Health, Eastern Cape v Mkhitha and Another*.[3] It is accordingly generally accepted that the current section is now more burdensome than its predecessor. However, as stated in the *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v AL Mayya International*,[4] "… [the] contextual construction of the phrase 'reasonable prospect of success' still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party."

Analysis

[22] Most of the issues are common cause as stated above. The Applicants admitted that SA Zero Waste had entered into a written instalment agreement and received the vehicles in question. They further admitted that after SA Zero Waste unsuccessfully applied for business rescue, on 17 March 2022, the Voluntary Surrender and Agreement Termination was signed with Mercedes. This was after the cession had already been entered into between Daimler and Mercedes. The vehicles were voluntarily handed over to Daimler.

[23] It must be mentioned that although the Applicants raised the issue of jurisdiction, they did not persist therewith and therefore nothing turns thereon. However, on the cause of action, it is common cause that Mercedes and the First to Sixth Applicants entered into a suretyship agreement in terms of which they bound themselves, jointly and severally, as surety and co-principal debtors for the repayment on demand of all sums of money which the Debtor (SA Zero Waste) may owe to Mercedes, including costs on an attorney and client scale, resulting from the Sale Agreement.

[24] Thus, while the Applicants were sued as sureties, it is clear that the debt is based on the original Sale Agreement, which is the cause of action. It is further clear

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[2] *Magashule v Ramaphosa and Others* [2021] ZAGPJHC 405.
[3] *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176.
[4] *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v AL Mayya International* [2016] ZAECGHC 137 para 4.

that the parties acted on the basis of the cession of the Sale Agreement by Mercedes to Daimler. The Applicants did not plead any facts to show why the cession is invalid, and it is clearly a valid cession signed by the relevant parties thereto. There can be no dilemma as suggested by the Applicants, as they cannot successfully deny the existence of the cession agreement. Thus, nothing turns on the fact that the cession agreement was signed before the Voluntary Surrender Agreement, and Mercedes signed the latter agreement despite the cession. In terms of this cession, the Respondent was entitled to institute the claim for the shortfall.

[25] The contention that the Instalment Sale Agreement was no longer extant and so was the liability cannot be correct. This suggests that the Voluntary Surrender Agreement substituted the original Instalment Sale Agreement, and the shortfall claimed arose from and is dependent upon the Voluntary Surrender and Termination Agreement. This argument ignores the fact that the Instalment Sale Agreement itself provided for a lawful repudiation of the agreement by agreement between the parties to terminate same. This ground cannot stand.

[26] Concerning the ground relating to the sale of the vehicles, it is alleged without facts that the highest possible price was not achieved. In terms of the cession agreement, Daimler, as the cessionary, was entitled to sell the vehicles. Further, it is clear that in terms of the Voluntary Surrender and Agreement Termination, where the total balance outstanding exceeds the net sale amount, such excess shall be the measure of Mercedes' damages arising out of the Debtor's termination of the initial agreement.

[27] Although the issues concerning the quantum and whether the amount is liquidated are raised on appeal, they were, however, not raised in the papers opposing the application for summary judgment. However, there is evidence on record that the vehicles were evaluated and sold for more than their value. There is accordingly no merit in the argument that the sales of the vehicles did not achieve the highest possible price.

[28] I now turn to consider the argument that there are compelling reasons for the appeal to be heard. As stated above, the Applicants argue in this respect that the

judgment raises issues of significant public and commercial importance, such as the application and scope of the *arbitrio boni viri* principle in the context of the sale of repossessed assets where the underlying agreement purports to grant an "absolute sole discretion" to the creditor, particularly in non-NCA commercial matters. The issue of the liquidated amount was not raised in their papers. The Applicants now seek to rely on a general umbrella of the interest of justice despite the fact that this was not part of the issues raised in their papers. There is accordingly no merit in this argument.

[29] Lastly, the contention that the court failed to adjudicate the legal dilemma presented by the Defendants, and that this constitutes an error warranting the grant of leave to appeal, cannot stand. The issue of the so-called dilemma concerning the date of the alleged cession and Termination Agreement was addressed in the above. There could be no dilemma when it was clear that the parties acted on the basis of the cession agreement. This argument is accordingly unmeritorious and ought to be rejected.

Conclusion

[30] In conclusion, I am not persuaded that the Applicants have shown that there are reasonable prospects of success on appeal and that another court would come to a different conclusion. Secondly, they have failed to satisfy the court that there are reasonable prospects of success in the appeal as required by section 17(1)(a)(i) and/or (ii) of the Act. The application for leave to appeal thus ought to be dismissed with costs.

Costs

[31] Concerning the costs, the rule that costs follow the results must clearly apply. The only question to be decided is the scale of the costs. I am satisfied that the case justifies that costs should be on scale C, inclusive of the costs attendant to the employment of counsel where so employed.

Order

[32] In the result, I make the following order:

1 The application for leave to appeal is dismissed with costs on Scale C;

2 Such costs to include the costs attendant to the employment of counsel where so employed; and

3 Such costs to be paid, jointly and severally, by the Applicants, the one paying the other to be absolved.

[redacted]

MBG LANGA

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MIDDELBURG

Appearances

For the Applicants:	Advocate E Nel
For the Respondent:	Advocate CJ Welgemoed
Date heard:	31 October 2025
Date delivered:	23 January 2026