



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

Case No.: | **2025-058782**

In the matter between:

GENFIN (PTY) LTD

Applicant

and

ZULU LOUNGE SA (PTY) LTD

First Respondent

**SHUMAIZ HASHIM ACHARATH PARAKKAT
MAHAL**

Second Respondent

Coram: Montzinger AJ

Heard: 06 May 2026

LEAVE TO APPEAL JUDGMENT

(DELIVERED ELECTRONICALLY ON: 6 MAY 2026)

Montzinger AJ

Introduction

[1] This is the second respondent's application for leave to appeal against the judgment and order I delivered in this matter on 25 March 2026.

- [2] In the main judgment I ordered the second respondent to pay the applicant the sum of R1,424,419.95, together with contractual interest at 5% per month from 25 March 2026 to date of payment, and costs on the attorney-and-client scale. The second respondent now seeks leave to appeal the whole of that judgment and order. Leave is sought to either the Supreme Court of Appeal or in the alternative, to a Full Court of this Division. The application is opposed.
- [3] The issues that arose in the main application and my findings in respect thereof are set out in relatively detail in the main judgment.

The grounds upon which leave is sought

- [4] The more or less six grounds advanced in the notice of application for leave to appeal and the heads of argument are in the main directed at my finding that this Division has jurisdiction to determine the matter. At the heart of those grounds lies the proposition that: because a guarantee in the strict sense is a principal and independent obligation, jurisdiction over a local *peregrine* of the Division can be established only by reference to the four corners of the guarantee agreement, while the separate loan agreement, that contains the place of performance provisions, must be left out of consideration altogether. As the guarantee agreement on its face does not stipulate a place of performance, and as the second respondent is otherwise resident in KwaZulu-Natal, it is therefore contended that the cause of action against him on the guarantee did not arise within this Division.
- [5] It is to be noted that the application for leave to appeal does not pursue any ground of appeal directed at the finding on liability under the guarantee.

- [6] The second respondent contends that an appeal in this matter has a reasonable prospects of success. In the alternative it is also asserted that the matter raises a novel issue of sufficient public importance for leave to be granted. Although, the basis for leave to be granted on the alternative basis is not stated in the notice.

The threshold to be granted leave to appeal

- [7] Section 17(1) of the Superior Courts Act 10 of 2013 lays down the threshold for leave to appeal to be granted. That is that leave may only be given where the judge or judges concerned are of the opinion that (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard.

- [8] In addition to the section 17 threshold our courts have also through case law given guidance on how to assess an application for leave to appeal. In particular in what circumstance it can be said an appeal has reasonable prospect of success and what the factors are that constitutes a compelling reason¹. Ultimately, a court must assess the application dispassionately and with reference to the facts and law. Also, the party seeking leave to appeal must show, on proper grounds, that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal².

¹ *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA); (“SALC”); *Ramakatsa v African National Congress* (Case no 724/2019) (“*Ramakatsa*”); *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para 2, however, even where compelling reasons are advanced the merits of the proposed appeal remain important.

² *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 referring to *S v Smith* 2012 (1) SACR 567 (SCA) para 7

Evaluation

- [9] The main consideration is whether another court would reasonably conclude that, because a guarantee in the strict sense creates a principal and independent obligation, this Court was obliged to determine jurisdiction by reference to the guarantee agreement viewed in isolation, and was not entitled to have regard to the loan agreement at all.
- [10] The legal premise of the argument, that a guarantee in the strict sense creates a principal, independent obligation, is correct. It was accepted in the main judgment, and it accords with the authorities I relied on. It was also confirmed by authorities handed up during the argument for leave to appeal³. The argument's difficulty lies in the next step. It does not follow from the legal independence of the guarantor's obligation that the contractual content of that obligation, including the place at which it is to be performed, must be ascertained without reference to the underlying transaction.
- [11] Independence and incorporation by reference are not mutually exclusive. The independence of the guarantee speaks to the legal nature of the guarantor's liability, that is principal, not accessory and is also not contingent on the creditor first proceeding against the principal debtor. Incorporation, by contrast, is a question of contractual interpretation: what, on a proper construction of the words used, did the parties agree the guarantor would do, and where? The two enquiries are different. The fact that an obligation is independent in legal character does not preclude the

³ *Standard Bank of South Africa Limited v Friedman* (21244/2023) [2024] ZAWCHC 49; 2024 (3) SA 171 (WCC) (20 February 2024) par 20

parties from defining its content by reference to another contract, and the parties to a guarantee very often do so.

[12] The text of the present guarantee leaves no real room for doubt on this score. Clause 3.1.1, which I set out in the main judgment, requires the second respondent *"to punctually pay any and all amounts which may be payable to the Lender from time to time . . . by the Borrower"* and *"to punctually perform any and all obligations which may be owing from time to time by the Borrower in terms of or as a result of the Loan Agreement/s."* On its face, the guarantee defines what the guarantor is to pay by reference to what the borrower is obliged to pay under the loan agreement, and it defines what he is to perform by reference to the borrower's obligations under the loan agreement. Accordingly the guarantee cannot be construed in a vacuum as its very subject-matter and content are derived from the loan agreement to which it expressly relates.

[13] On the question of place of performance, the loan agreement requires payment of instalments into an account maintained by the applicant at its Cape Town branch. Clause 3.1.1 of the guarantee places upon the second respondent the obligation to pay the very amounts owing under the loan agreement. The natural and contextual reading of the guarantee⁴ is that the guarantor undertook to discharge those amounts in the manner and at the place stipulated for the first respondent, i.e. the borrower. To read the guarantee otherwise would be to ignore its express language.

[14] In substance, the argument advanced for leave to be granted is a reformulation of the argument advanced and rejected in the main application. While there was an

⁴ Having regard to the approach in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

attempt to frame it differently the underlying contention is the same. The contractual interpretation that I adopted is not, in my judgment, reasonably open to attack on appeal.

[15] I was referred to a judgment, *SB Guarantee v Burke*, during argument handed down by Le Grange J on 29 April 2026⁵. The learned justice found that the argument that the two agreements (a guarantee and a Common Terms Guarantee Agreement), in that matter, be read together was unsustainable⁶. Although, it is not obvious that the judgment supports the second respondent's argument in respect of my finding of this court's jurisdiction, it is simply distinguishable on the facts. The defendant in that matter relied on agreements between the plaintiff and the bank, who was not a party to the action, and to which agreements the defendant was not a party at all. It was in that context that La Grange J did not accept the defendant's argument that the two agreements be read together.

[16] I am therefore not persuaded that another court, faced with the combination of factors of this matter, would reasonably conclude that the jurisdiction issue was decided wrong. It follows that the second respondent has not demonstrated reasonable prospects of success on the jurisdiction ground.

[17] This matter has the hallmark features of a court ultimately reaching the same conclusion on jurisdiction that I have reached, while the reasoning to arrive at that conclusion may be different. That being a so, leave to appeal is not warranted.

[18] In respect of leave to be granted on the issue of the costs. A court of appeal will only interfere with an order involving a lower court's discretion in limited

⁵ *SB Guarantee Company (RF) (Pty) Ltd Brian Michael Burke* (13536/2021) [2026] ZAWCHC

⁶ par 8

circumstances⁷. A cost order is one of those type of orders that is discretionary⁸. In respect of the cost order made against the second respondent in the main application, there is nothing to point to any independent error in the exercise of my discretion. The order for costs on the attorney-and-client scale was made in accordance with the express provisions of the loan agreement and the guarantee and surety agreement, and there is no challenge to the validity or operation of those provisions. There is no realistic prospect that another court would set aside the costs order made.

[19] In the alternative, the second respondent contends that the appeal should be heard because the matter raises a novel question of sufficient public importance, alternatively because there are conflicting decisions on the issue. The novel question was not identified with clarity and I am also not persuaded, for much of the similar reasons foreshadowed, that the matter raised a novel question that is of public importance.

Conclusion

[20] For the reasons set out above, the application for leave to appeal must fail.

[21] In respect of the costs. The applicant has succeeded in opposing the application for leave to appeal, and there is no reason to depart from the ordinary principle that costs follow the result. In the main judgment I awarded costs on the attorney-and-client scale, in accordance with the express provisions of the loan agreement and the guarantee and surety agreement, by which the parties had agreed to costs on that

⁷ *Fusion Properties 233 CC v Stellenbosch Municipality* (932/2019) [2021] ZASCA 10 (29 January 2021)

⁸ *Giddey NO v J C Barnard and Others* 2007 (5) SA 525 (CC); *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) ([1998] 3 All SA 349)

scale. However, an application for leave to appeal is, qualitatively different from the main contest between the parties. In a limited sense, the litigant is not sparring with the opposing party on the merits of the underlying dispute. To therefore apply the same scale for costs in this application for leave to appeal as I have in the main judgment would in this instance be punitive.

[22] In assessing the appropriate scale, I have considered the factors enumerated in rule 67(2) of the Uniform Rules. Having weighed each of those factors there is no basis to repeat the costs order granted in the main application. In those circumstances, I am therefore minded to rather grant costs on the party-and-party scale, including the costs of counsel on scale B.

[23] In the result, in the following order is made:

1. The application for leave to appeal is dismissed.
2. The second respondent is ordered to pay the costs of the application for leave to appeal on the party-and-party scale, such costs to include the costs of counsel on scale B.



A. MONTZINGER

Acting Judge of the High Court

Appearances:

Attorneys for applicant:

Van der Meer and Partners Inc.

Mr SF Van Zyl

Counsel for applicant:

Mr O' Connor

Attorneys for second respondent:

ER Browne and Sons

Per: Andrew Golschmidt

Counsel for second respondent:

Mr. Holland and Ms Essa