IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 25696/2024

In the matter between:

NEW LIFE HOLDINGS (PTY) LTD	Applicant
And	
STEFANUS VAN WYK VAN DER HOVEN	First Respondent
JACOBUS REYNEKE VAN DER HOVEN	Second Respondent
NEIL FRANS ROETS	Third Respondent

Neutral Citation: *New Life Holdings (Pty) Ltd v Van Der Hoven and Others* (Case no 25696/2024) [2026] ZAWCHC … (01 June 2026)

Corum: **Lekhuleni J**

Heard: 21 May 2026

Delivered: 1 June 2026

Summary: Leave to appeal - Contract – Test for leave to appeal - difference between suretyship agreement and guarantee – Guarantee clauses make it clear that the contract between the parties is not a suretyship but creates principal and independent obligations which remain enforceable notwithstanding the invalidity or unenforceability of the guaranteed obligations. Application for leave to appeal dismissed.

JUDGMENT – LEAVE TO APPEAL

LEKHULENI J:

Introduction

[1] For convenience, I will refer to the parties as they are cited in the main application. This is an application for leave to appeal the whole of the judgment *('the main judgment')* of Nuku J dated 23 October 2025 to the Full Court, alternatively to the Supreme Court of Appeal ('the SCA') in terms of section 17(1)(a) of the Superior Courts Act 10 of 2013 *('the Superior Courts Act')*. In that judgment, Nuku J granted an order in favour of the applicant. The order directed the respondents to jointly and severally pay the applicant a capital amount of R8,376,045.00 in accordance with the guarantee agreement, dated 31 March 2023, signed by the respondents in favour of the applicant. Since Nuku J is currently acting in the Constitutional Court, the Judge President has allocated this application to this court for consideration of the respondents' leave to appeal application.

Brief background facts

[2] To give context to the order I make hereunder, I deem it proper to briefly set out the background facts underpinning this application. On 14 March 2023, in Pretoria, the applicant, duly represented, and Climealine, also duly represented, concluded a written agreement under which the applicant sold its 25 per cent shares and its loan account in Imalisoft to Climealine. The purchase price for the shares was agreed at R8 million, and the purchase price for the loan account was determined at R618,500.00, payable in monthly instalments. Pursuant to the conclusion of the share sale agreement, the applicant transferred the 25 per cent shares to Climealine.

[3] During March 2023, the applicant and the three respondents concluded a written guarantee agreement in terms of which the respondents jointly and severally, irrevocably and unconditionally, guaranteed and undertook as principal and independent obligation in favour of the applicant, its successor in title and assigns, the due and timeous performance by Climealine of all the guaranteed obligations. The respondents bound themselves as co-principal debtors in solidum with Climealine for the due and timeous payment by Climealine of each amount owing by Climealine to the applicant under the share sale agreement.

[4] The applicant alleged that during December 2023, Climealine defaulted on its obligations under the share sale agreement by failing to make payment to the applicant and thereafter continued to fail to pay the contractually agreed instalments. The applicant thereafter claimed the outstanding amount owing and payable to the applicant. On 5 August 2024, the applicant issued a demand to each of the respondents in terms of clause 5.10 of the guarantee, calling on the respondents to make payment in the sum of R8 376,045 plus interest at the rate of 15,75 per cent from 1 July 2024 to the date of payment. The applicant contended that despite the demand, the respondents failed to make payment, which, according to the applicant, constituted a breach of the guarantee agreement. The applicant thus instituted an application against the three respondents, praying for judgment against them for the outstanding amount of R8 376 045.00.

[5] The respondent opposed the application and raised two preliminary points of *lis pendens*. In the first preliminary point of *lis pendens*, the respondents averred that the applicant seeks a money judgment against them based on two agreements: the share sale agreement and the guarantee. The respondents asserted that, on proper interpretation of the guarantee, their liability under the guarantee depends on Climealine's liability to the applicant under the share sale agreement. This is necessarily so, in that, in terms of the guarantee, the respondents are liable to the applicant for the obligations of Climealine to the applicant in terms of the share sale agreement. According to the respondents, the purpose of the guarantee is obviously to make the respondents liable for Climealine's debts under the share sale agreement, only if Climealine is liable to the applicant in the first place.

[6] The respondents further stated that the applicant repudiated the share sale agreement it had with Climealine when, in its letters attached to the founding affidavit marked FA4, FA6, FA7 and FA8, it purported to cancel the share sale agreement. According to the respondents, the applicant was not entitled to cancel the share sale agreement, so that its purported cancellation is a repudiation. Climealine accepted the applicant's cancellation of the share sale agreement and tendered the return of the applicant's shares and loan account to the applicant. Pursuant to the cancellation of the agreement, Climealine claimed repayment of the sum of R1.5 million it paid the applicant in the Limpopo High Court ('the cancellation action'). The respondents

further asserted that following the cancellation of the agreement, Climealine's reciprocal obligations to pay the purchase price for the shares and loan account were suspended.

[7] More importantly, the respondents posited that the summons in the cancellation action in the Limpopo High Court was issued on 3 March 2024. The applicant's plea in that action is dated 5 June 2024 and delivered on that date. This application was instituted on 5 December 2024, well after the cancellation action. To this end, whether the share sale agreement was cancelled and whether the applicant repudiated the share sale agreement are *lis pendens* in the cancellation action. The respondents' second point in limine concerned whether Climealine is liable to the applicant to pay the amounts claimed against the respondents in this application. The respondent asserted that the issue of whether Climealine is liable to the applicant in terms of the share sale agreement is the subject matter of another action in the Limpopo High Court instituted by Climealine against the applicant. The respondents contended that the issue in this application is thus pending in the Limpopo High Court action.

Findings in the main Judgment

[8] The principal issue in the main judgment was whether the guarantee agreement created autonomous and independent obligations enforceable upon written demand, or whether the respondents' liability was merely accessory to the underlying obligations of Climealine under the sale of shares agreement. After considering the issues, the court concluded that the guarantee created principal and independent obligations enforceable notwithstanding disputes relating to Climealine's liability under the sale of shares agreement.

[9] The court also found that clause 5.10 of the guarantee requires the respondents to pay upon receipt of a written notice (demand) from the applicant stating that any amount is due and payable. The court also noted that this clause also provided that the respondents' liability to pay shall be joint and several, and that the obligations to pay shall be notwithstanding that the respondents dispute their liability to make such payment. The court found that the guarantee agreement makes

it clear that the respondents' obligations to pay are triggered when the applicant provides written notice demanding payment of any amount the applicant claims is owed.

[10] The court rejected the respondents' argument that the use of the term co-principal debtor in one or more clauses of the guarantee indicates an intention to make the respondents' liability subject to Climealine's liability. The court noted that the reference to the respondents at para 5.1.2, as binding themselves as co-principal debtors in solidum with Climealine, cannot, without more, result in the respondents' obligations being the same as those of Climealine. The court also found that the respondents' defences regarding the dispute over Climealine's liability are unhelpful. In the absence of fraud, the court found that the respondents cannot avoid payment once the applicant served them with a written demand stating that any amount is owed. In the court's view, the applicant has done so, and it followed that the applicant was entitled to judgment. Consequently, the court granted judgment in favour of the applicant. It is this order that the respondents seek leave to appeal so that they can challenge it in the Court of Appeal.

Grounds of Appeal

[11] The respondents raised several grounds of appeal. In summary, the respondent's grounds of appeal, as discernible from the notice of appeal, can be summarised as follows: The respondents assert that they have a reasonable prospect of success on appeal. The respondents contended that the court erred in the main application in finding that the notice under clause 5.10 of the guarantee renders the respondents liable without more, and that it is not permissible for the respondents to rely on clause 5.4. The respondents submitted that the court interpreted clause 5.10 of the guarantee as barring them from relying on clause 5.4 to raise a defence to the applicant's application. The respondents further asserted that clause 5.10 should not be interpreted as barring them from raising a defence.

[12] The respondents believe interpreting clause 5.10 in a way that denies them the right to rely on clause 5.4 breaches the rule that, as far as possible, every word in a contract should be given a meaning. If clause 5.10 means that the respondents

cannot rely on clause 5.4 as a defence, then it renders clause 5.4 meaningless. The respondents contend that the meaning ascribed to clause 5.4 in the main judgment suggests that even if it was common cause that Climealine paid the purchase price for the shares and loan account in terms of the sale of shares agreement in full, then nonetheless, the respondents remained obliged to pay the same amount to the applicant for a second time.

[13] In addition, the respondents believe that an interpretation of clause 5.10 that bars them from relying on clause 5.4 is also contrary to the rule of interpretation that a contract should be interpreted in favour of validity rather than invalidity. The respondents argued that the interpretation of clause 5.10 in the judgment does not give due consideration to the context of the guarantee itself, the circumstances in which it was concluded, or the purpose of the guarantee.

[14] The respondents also stated that the court erred in finding that the guarantee does not make the respondents' obligations conditional on Climealine's obligations. In the respondents' view, this finding does not give due consideration to the fact that the guaranteed obligations are Climealine's obligations. Therefore, if Climealine has no obligations, there are no guaranteed obligations. The respondents pointed out that their obligations are therefore conditional upon the continued existence of Climealine's obligations.

[15] Notably, the respondents pointed out that the summons in the cancellation action in the Limpopo High Court was issued on 3 March 2024. The applicant's plea in that action is dated 5 June 2024 and delivered on that date. This application was instituted on 5 December 2024, well after the cancellation action. To this end, the respondent asserted that the question of whether the share sale agreement was cancelled and whether the applicant repudiated it is *lis pendens* in the cancellation action.

[16] The respondent stated that they are entitled to rely on the cancellation of the sale of shares agreement. As such, the application should have been dismissed with costs. The respondent also argued that the application to strike out the new material

in the replying affidavit should have been granted and that the application to admit the respondents' fourth affidavit should have been admitted.

The applicable legal principles

[17] The respondents' application for leave to appeal is based on section 17(1)(a) of the Superior Courts Act. Section 17 of the Superior Courts Act regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

> '(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
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> (*a*) (i) the appeal would have a reasonable prospect of success; or
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> (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.'

[18] The test, which had been applied previously in similar applications, was whether there were reasonable prospects that another court might come to a different conclusion. With the enactment of section 17 of the Superior Courts Act, the threshold for granting leave to appeal a judgment of the High Court has been significantly raised. There can be little doubt that the use of the word 'would' in section 17(1)(a)(i) of the Superior Courts Act implies that the test for leave to appeal is now more onerous. The intention is clearly to avoid our courts of appeal from being flooded with frivolous appeals that are doomed to fail.[1] The use of the word 'would' in subsection 17(1)(a)(i) of the Act imposes a more stringent threshold compared to the provisions of the repealed Supreme Court Act 59 of 1959.[2]

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[1] *See Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Mayya International* (EL926/2016, 2226/2016) [2016] ZAECGHC 137 (10 November 2016) para 4.

[2] *S v Notshokovu* [2016] ZASCA 112 para 2.

[19] What is required of this Court is to consider, objectively and dispassionately, whether there are reasonable prospects that another court will find merit in the arguments advanced by the respondents.[3] These principles emphasise that the requirement for a successful leave to appeal is more than a mere possibility that another court might come to a different conclusion. The test is whether there is a reasonable prospect of success that another court would come to a different conclusion.

Discussion

[20] The respondents' main grounds of appeal are that there are reasonable prospects that another court would find that Nuku J erred in dismissing their grounds of opposition. I must mention from the outset that I am not persuaded that the submissions raised by the respondents in the application for leave to appeal would, or, for that matter, might be upheld by another court. I must emphasise that all the grounds raised by the respondents in this application were thoroughly and thoughtfully considered by the court and largely rejected in the main judgment.

[21] On the grounds of appeal discussed above, it is necessary for this court to emphasise that there is a difference between a suretyship agreement and a guarantee agreement. A suretyship is only one form of intercession, that is, a transaction in which one person undertakes liability for another's debt.[4] A suretyship agreement is accessory to a principal obligation. Suretyship can only exist as accessory to a principal debt. Put another way, every suretyship is conditional upon the existence of a principal obligation.

[22] In *Orkin Lingerie Co (Pty) Ltd v Melamed & Hurwitz,*[5] Trollip J observed that a contract of suretyship in relation to a money debt is one in which a person (the surety) agrees with the creditor that, as an accessory to the debtor's primary liability, he too will be liable for that debt. Importantly, in the context of this case, the essence of suretyship is the existence of the principal obligation of the debtor to which that of

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[3] See *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Maya International* [2016] 137 (ZAECGHC) 137 (10 November 2016) para 4.
[4] Forsyth CF and Pretorius JT Caney's: *The Law of Suretyship in South Africa* (2010) 6 ed at 26.
[5] 1963 (1) SA 324 (W) at 326.

the surety becomes accessory. Simply put, for there to be a valid suretyship, there must be a valid principal obligation between the debtor and the creditor.[6] Thus, if the principal debtor's obligation is legally non-existent, for example if it is founded upon a fraud, there can be no suretyship of it. It was stated in *African Life Property Holdings (Pty) Ltd V Score Food Holdings Ltd,*[7] that guaranteeing a non-existent debt is as pointless as multiplying by nought.

[23] Conversely, with a guarantee, on the other hand, a person (guarantor) undertakes as a self-standing principal obligation to indemnify the creditor of another person on the happening of certain events. The guarantor's obligation is therefore independent from that of the debtor, even if that is to indemnify the creditor for losses suffered because of a debtor's non-performance, irrespective of the grounds, therefore. If a creditor suffers losses when it transpires that the debtor's principal contract to the creditor is invalid, the guarantor's obligation remains in force and he will have to pay those losses, whereas a surety's obligation falls away and he will not have to pay anything.[8]

[24] It must be stressed from the outset that the guarantee between the parties in this matter must be interpreted in a manner that gives effect to its terms. The guarantee under discussion is categorised as an on-demand guarantee. In *Set Square Developments (Pty) Ltd v Power Guarantees (Pty) Ltd and Another and related matters,*[9] the SCA observed that on-demand guarantee requires no allegation of liability on the part of the contractor under the construction contract. What is required for the payment is a demand by the claimant, stated to be based on the event specified in the bond. Simply put, the beneficiary must comply with the terms of the guarantee. The SCA reaffirmed the principle of autonomy of the performance guarantee from the underlying contract in *Joint Venture between Aveng (Africa) (Pty) Ltd/Strabag International GMBH v South African National Roads Agency Soc Ltd*.[10]

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[6] Forsyth CF and Pretorius JT Caney's: *The Law of Suretyship in South Africa* (2010) 6 ed at 30.
[7] *African Life Property Holdings (Pty) Ltd v Score Food Holdings Ltd* 1995 (2) SA 230 (A) at 238E-F.
[8] See *Hutchinson v Hylton Holdings and Another* 1993 (2) SA 405 (T) at 412E; Forsyth CF and Pretorius JT Caney's: *The Law of Suretyship in South Africa* (2010) 6 ed at 26.
[9] (099/2023 and 150/24) [2025] ZASCA 64 (20 May 2025) para 20
[10] 2021 (2) SA 137 (SCA) para 7; see also *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) 382 (SCA) paras 11-17.

[25] The principles referred to above apply with equal force to the present matter. In fact, the respondents contended that the court erred in the main judgment in finding that the guarantee does not make the respondents' obligations conditional on Climealine's obligations. According to the respondents, this finding fails to consider that the guaranteed obligations are Climealine's obligations and that, if Climealine has no obligations, there are no guaranteed obligations. The respondents assert that their obligations are therefore conditional upon the continued existence of Climealine's obligations.

[26] I have carefully considered the guarantee agreement in its entirety, and I respectfully believe that the submissions of the respondents in this regard are incorrect. The respondents have knowingly and purposefully signed the guarantee agreement. The agreement they signed is entitled 'Guarantee' by and between the 'applicant and the respondents'. The nature of their obligation under the guarantee agreement is wholly independent of any underlying contract.[11] This agreement and its terms are different from those of a suretyship agreement. As discussed, it's important to emphasise that our law is settled and firmly recognises the autonomy principle. This principle establishes the autonomy of the performance guarantee from the underlying contract.[12]

[27] In my view, the contract under consideration should be read holistically rather than being pigeonholed and interpreted in a manner that favours one party. Clearly, construing the impugned agreement and giving meaning to all the words used therein, the agreement between the parties is not a suretyship agreement but a guarantee agreement. All the provisions therein read together are consistent with a guarantee agreement. The respondents suggest that the guarantee agreement, notwithstanding its heading and other terms, must be interpreted as akin to a suretyship agreement, as they contend that their liability can arise only if Climealine is liable to the applicant. The respondents contend that the guarantee obligations are Climealine obligations. If Climealine has no obligations, there are no guaranteed

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[11] *Bonifacio and Another v Lombard Insurance Company Limited* (247/2023) [2024] ZASCA 86 (4 June 2024) at para 16.

[12] *Joint Venture Aveng (Pty) Ltd / Strabag International GmbH v South African National Roads Agency SOC Ltd* 2021 (2) SA 137 (SCA) para 7.

obligations. This argument, in my view, is at odds with the substance of the guarantee agreement and cannot be correct.

[28] For completeness, clause 5.2 of the guarantee provides:

> 'For the avoidance of any doubt, the obligations of the guarantors, jointly and severally, under this agreement are principal and independent obligations and are and will remain enforceable notwithstanding the invalidity or unenforceability, for any reason whatsoever, of the guaranteed obligations.'

[29] Clause 5.10 of the guarantee provides as follows:

> 'Upon receipt by the guarantors, or any of them, of any written notice from the seller stating that any amount is payable by the guarantors, or any of them, or that the guarantors, or any of them, are obligated to perform any obligation to the seller, in terms of this guarantee, the guarantors jointly and severally, shall, notwithstanding that the guarantors, or any of them, may dispute their liability to make such payment immediately.'

[30] Clause 8.1 of the guarantee agreement provides:

> 'The guarantors waive any right they may have of first requiring the seller (or any director, shareholder or agent on its behalf) to proceed against or enforce any other rights or security, or to claim payment from any person or the purchaser before claiming from the guarantors under this agreement. This waiver applies irrespective of any law or any provision of any agreement, document or guaranteed obligation to the contract.'

[31] From these clauses, it cannot be disputed that the guarantee under consideration amounts to a performance guarantee, which consists of an undertaking to make payment of an amount of money on the happening of a specified event. A guarantee of this nature must be paid according to its terms.

Liability under it is not affected by the relationship between the other parties to the transactions that gave rise to its issue.[13]

[32] The clauses quoted above make it clear that the contract between the parties is not a suretyship but creates principal and independent obligations which remain enforceable notwithstanding the invalidity or unenforceability of the guaranteed obligations. These clauses, when read together with other clauses of the agreement, in particular clause 2, 5.1.2; 5.4; 10.1 relied on by Mr Van der Merwe, the respondents' counsel, point to one direction only: that the contract between the applicant and the respondents was a guarantee agreement as opposed to a suretyship agreement. All the terms of this agreement, when read together, attest to this finding.

[33] Significantly, the clauses quoted above are inconsistent with the respondents' proposition, which attempts to characterise the guarantee agreement as an ordinary accessory suretyship agreement. The respondents contend that if Climealine's obligation ceases, the guaranteed obligations likewise cease. This argument, with respect, ignores the structure and wording of the guarantee agreement. The guarantee expressly provides that the respondents' obligation remains enforceable notwithstanding any disputes regarding Climealine's liability. Clause 5.2 negates the respondents' proposition.

[34] The guarantee explicitly states that the obligations of the guarantors, jointly and severally under this agreement, are principal and independent and remain enforceable despite the invalidity or unenforceability, for any reason whatsoever, of the guaranteed obligations. Additionally, clause 5.4 records that the guarantee constitutes continuing covering security and will remain in force until the guaranteed obligations have been unconditionally discharged. These obligations have not been discharged, as payment was not made to the applicant; hence, judgment was granted against the respondents.

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[13] See *Firstrand Bank Ltd V Brera Investments CC* 2013 (5) SA 556 (SCA) para 2; *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA) paras 19 and 20; *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A) para 38; and *Minister of Transport and Public Works, Western Cape, and Another v Zanbuild Construction (Pty) Ltd and Another* 2011 (5) SA 528 (SCA) paras 11 – 15).

[35] To this end, I agree with the views expressed by Mr Voster SC, counsel for the applicant, that if the respondents' approach to the guarantee is endorsed, it will result in a distorted interpretation of the guarantee's clear language and will render several clauses therein meaningless and superfluous. Consequently, I am of the view that the respondents have failed to establish a reasonable prospect that another court would arrive at a different conclusion. In the circumstances, granting the respondents leave to appeal to the full court or the SCA will, in my opinion, be a waste of judicial resources. I am not persuaded at all that there are any reasonable prospects that the respondents' assertions would (or, for that matter, might) be upheld by another court. On a conspectus of all the facts placed before this Court, there are no prospects of success in granting leave to appeal and the respondents' application for leave to appeal must fail.

Order

[36] In the result, the following order is granted:

36.1 The respondents' application for leave to appeal is hereby dismissed.

36.2 The respondents are ordered to pay the costs of this application jointly and severally on a party-and-party scale, including the costs of two counsels where so employed, on scale B.

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LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant: Adv J Vorster SC

Adv WJ Botha

Instructed by: Herman Vermaak Attorneys

For the first and second Respondents: Adv Van der Merwe

Instructed by: Senekal Simmonds Attorneys