REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

Case no: 13759/2019

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

M OLIVIER **18 December 2023**

In the matter between:

NUANCE INVESTMENTS (PTY) LTD	**Applicant**
and	
MAGHILDA INVESTMENTS (PTY) LTD	**First Respondent**
JONATHAN BRUCE SANDLER N.O.	**Second Respondent**
GEOFFREY ALAN WEST N.O.	**Third Respondent**
ANTHONY DE AGUIAR N.O.	**Fourth Respondent**
THE REGISTRAR OF DEEDS, PRETORIA	**Fifth Respondent**
INVESTEC BANK LTD	**Sixth Respondent**

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date for hand-down is deemed to be on 18 December 2023.

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

OLIVIER AJ:

INTRODUCTION

1. The dispute between the parties (to whom I shall refer as they are in the main application) can be traced back to 2007 when the applicant, Nuance Investments ("Nuance"), as purchaser, concluded a Sale Agreement, a Development Agreement, and a Lease Agreement, with the first respondent, Maghilda Investments ("Maghilda") and the Sanjont Trust ("Sanjont" – second to fourth respondents are cited as its trustees) in respect of certain portions of a property known as Elandsdrift in the Magaliesburg area ("the property").

2. It later emerged that the agreements were void *ab initio* for non-compliance with several statutory requirements.

3. In the execution of the Sale Agreement, Nuance paid, as purchase consideration, to Maghilda an amount of R17,343,214.00 in respect of Portion 6 of the property, and to Sanjont the total amount of R42,656,786.00 in respect of Portion 39 of the property.

4. The transfer of ownership in Portion 4, Portion 6 and Portion 39 to Nuance occurred on 13 May 2008; a first mortgage bond was registered over the three portions in favour of Investec Bank Ltd (B 47166/2008) ("the Investec Bond").

Simultaneously, a second bond (B47412/2008) ("the Bond"), was registered in the Deeds Office in favour of both Maghilda and Sanjont over the three portions as security for the remaining payments as contemplated by the Sale Agreement.

5. During 2012 Nuance instituted an action in the Pretoria High Court against Maghilda and Sanjont, relying on unjustified enrichment as the cause of action, for repayment of the purchase consideration against re-transfer of Portion 6, Portion 39 and Portion 4 of the property on the basis that the agreements were null and void. The High Court in Pretoria found in favour of Sanjont and Maghilda, but on 1 December 2016, the Supreme Court of Appeal upheld the appeal of Nuance and found that: the agreements were null and void from the outset and had no legal force and effect; the claim of Nuance for the repayment of the purchase consideration had not been extinguished through prescription; against transfer of the relevant portions of the property, free from the Investec Bond, Maghilda and Sanjont had to repay the purchase considerations made by Nuance Investments to them, plus interest. No mention was made of the Bond.

6. The Supreme Court of Appeal order is as follows:

> 1. The appeal is upheld with costs including costs of two counsel.
> 2. The order of the court a quo is set aside and replaced with the following orders:
> 2.1 It is declared that (a) the purported sale agreement dated 21 November 2007 is null and void from the outset with no legal force and effect; (b) the purported incidental development agreement dated 21 November 2007 is null and void from the outset with no legal force and effect; (c) the purported lease agreement dated 15 January 2008 is null and void from the outset with no legal force and effect.
> 3. The special plea of prescription raised by the First to Fourth `Defendants is dismissed.
> 4. Against the transfer of the Remaining Extent of Portion 6 of the Farm Elandsdrift 527 JQ to the First Defendant, free from any mortgage bond held

by Investec Bank Ltd, the First Defendant is ordered to pay an amount of R17,343,214 to the Plaintiff; together with interest on the amount of R17,343,214 at the prescribed rate of 9% per year calculated from the date of demand herein (which is 23 June 2009) to the date of payment thereof;

5. Against the transfer of the Remaining Extent of Portion 4 of the Farm Elandsdrift 527 JQ and the Remaining Extent of Portion 39 of the Farm Elandsdrift 527 JQ to the Second to Fourth Defendants jointly, free from any mortgage bond held by Investec Bank Ltd, the Second to Fourth Defendants jointly are ordered to pay an amount of R42,656,786 to the Plaintiff; together with interest on the amount of R42,656,786 at the prescribed rate of 9% per year calculated from 23 June 2009 to the date of payment thereof.

6. The counter-claim of the First to Fourth Defendants is dismissed.

6.1 The First Defendant and the Second to Fourth Defendants, jointly in their capacities as trustees of the Sanjont Trust, are ordered to pay the costs hereof jointly and severally, the First Defendant paying the Second to Fourth Defendants to be absolved and the Second to Fourth Defendants jointly paying the First Defendant to be absolved, with such costs to include the costs of two counsel.

7. Maghilda and Sanjont unsuccessfully applied to the Constitutional Court for leave to appeal against the findings and order of the Supreme Court of Appeal on the issue of prescription. It was around this time that the respondents launched proceedings against the applicant, claiming some R500 million as damages based on fraudulent misrepresentations and non-disclosures, and a further claim for some R49,5 million as unjustified enrichment.

8. In ongoing correspondence following the SCA order, the applicant’s attorneys requested that the respondents consent to cancellation of the Bond. The respondents refused; they insisted that the Bond provided security for any debt and that debts owed on account of damages and enrichment must be discharged before consent to cancel the Bond would be provided.

9. In this court the applicant sought a declarator that the Bond is void, alternatively voidable; that the Bond be set aside; and that the Registrar of Deeds be ordered and authorised to cancel the Bond. This would require, in part, a consideration of the scope of the debts and obligations covered by the Bond, including whether the Bond covers claims for damages and unjust enrichment. This involves the interpretation of the Bond.

10. The applicant faces a Catch-22 situation: the Registrar of Deeds will not register transfer until the respondents give their consent, but they will consent only if their claims for damages and unjustified enrichment have been discharged. This caused a stalemate with regard to the implementation and carrying into effect of the 2016 SCA Order and is the primary reason why the application was brought.

11. I ruled in favour of the applicant and made the following order:

    1. The second covering mortgage bond B 47412/2008 ("the Bond") registered in favour of the First Respondent and Second to Fourth Respondents jointly in their capacities as trustees of the Sanjont Trust, in respect of the below properties all registered in the name of the Applicant, is declared void ab initio, is set aside and is ordered to be cancelled by the Registrar of Deeds, namely:

        a. The Remaining Extent Portion 6 (a portion of Portion 1) of the Farm Elandsdrift No. 527, Registration Division JQ, Province Gauteng, registered in favour of the First Respondent;

        b. The Remaining Extent Portion 4 (a portion of Portion 1) of the Farm Elandsdrift No. 527, Registration Division JQ, Province Gauteng, registered in favour of the Second to Fourth Respondents jointly in their capacities as trustees of the Sanjont Trust; and

        c. The Remaining Extent Portion 39 of the Farm Elandsdrift No. 527, Registration Division JQ, Province Gauteng, registered in favour of the Second to Fourth Respondents jointly in their capacities as trustees of the Sanjont Trust.

2. The Fifth Respondent (The Registrar of Deeds) is ordered and authorised to cancel the Bond in respect of Portion 6, Portion 4 and Portion 39 against registration of transfer by the Applicant of Portion 6 in the name of the First Respondent and of Portion 4 and Portion 39 in the names of the Second to Fourth Respondents jointly in their capacities as trustees of the Sanjont Trust.

3. The First Respondent and the Second to Fourth Respondents jointly in their capacities are trustees of the Sanjont Trust are ordered, upon demand by or on behalf of the Applicant, to sign all necessary documents, take all steps and do all things necessary to enable the Fifth Respondent to pass transfer of Portion 6 into the name of the First Respondent and of Portion 4 and Portion 39 into the names of the Second to Fourth Respondents jointly in their capacities as trustees of the Sanjont Trust.

4. In the event of the First Respondent and/or the Second to Fourth Respondents jointly in their capacities as trustees of the Sanjont Trust failing to comply with the provisions of prayer 3 above, the Sheriff of this Court is authorised and instructed, on behalf of the Applicant, to sign all necessary documents, take all steps and do all things necessary to enable the Applicant to pass transfer of Portion 6 into the name of the First Respondent and Portion 4 and Portion 39 into the names of the Second to Fourth Respondents jointly in their capacities as trustees of the Sanjont Trust.

5. The First Respondent and the Second to Fourth Respondents, jointly in their capacities as trustees of the Sanjont Trust, are ordered to pay the costs of this application, jointly and severally, the First Respondent paying the Second to Fourth Respondents to be absolved and the Second to Fourth Respondents jointly paying the First Respondent to be absolved.

12. The respondents seek leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court of this division, against the whole of the judgment and order.

THE GROUNDS OF APPEAL

13. The respondents base their application for leave to appeal on three grounds: findings pertaining to *res judicata*, findings under the heading "access to court", and findings in relation to the obligations secured by the bond.

First ground: Res Judicata

14. In the SCA, the respondents had sought cancellation of the bond on the ground of invalidity, as part of its counterclaim. They argued in this court that the matter was now *res judicata* because their counterclaim was dismissed by the SCA, meaning that the question of cancellation of the Bond had been decided by the SCA.

15. The applicant submitted that it was pursuing a different cause of action. The respondents never sought declaratory relief, as the applicant was doing in the present case. The relief sought by the applicant relates to the implementation of the SCA order and seeks to compel the respondents to consent to the cancellation of the Bond. It was argued that neither the High Court nor the Supreme Court of Appeal gave any final judgment on the validity of the Bond on any of the factual grounds now being relied upon by the applicants in this application.

16. In essence, the test for *res judicata* is whether the cause of action and the relief sought is the same as in the earlier matter. "Cause of action" is ordinarily used to describe the factual basis, the set of material facts that gives rise to the legal right of action of a creditor or claimant and, complementarily, the corresponding debt or obligation of the debtor or defendant.[1]

17. The respondents argue that I adopted too strict a test in determining whether the same cause of action existed. They rely on *Tradax Ocean Transportation SA v MV Silvergate*, referred to by the Constitutional Court in *Ascendis Animal Health (Pty) Limited v Merck Sharp Dohme Corporation and Others,* in support of their

[1] See *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] 4 All SA 154 (SCA) at para [23]; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F-H.

view that current law demands a less stringent exaction of the "same cause of action" requirement: "*cause of action*", they say, should be understood as referring not to the cause of action in the strict sense but to "the same matter in issue".[2]

18. The respondents submit that if this more expansive test is adopted by another court, there is a reasonable prospect that such court would conclude that the issue is *res judicata*.

Second ground: "Access to Court"

19. The applicant complained that the respondents were attempting to deny it access to court. The respondents argued that the applicant was precluded from approaching this court for the relief it seeks on the basis that the applicant had not raised this relief in the 2012 action. The applicant raised various points in reply, but the essence of its argument is that the relief was necessitated by the "obstructive conduct" of the respondents by not giving effect to the outcome of the 2012 High Court action and/or implementing the 2016 SCA order.

20. I found that the application was necessary to get clarity on whether the respondents were justified in refusing to consent to the cancellation of the Bond. The respondents argue that in doing so I implicitly dismissed the defence raised by them that the applicant had made an election. The respondents argue that in 2012 the applicant had a choice between two directly opposite causes of action, the first being to proceed with a claim to cancel the Bond, and the second being not to do so. When it proceeded in the 2012 action, the applicant elected not to proceed with relief to cancel the Bond and abided that election until 2019 when it sought to undo that election. The applicant was fully aware of the Bond and its consequences.

[2] *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* 2020 (1) SA 327 (CC) at para [115]; *Tradax Ocean Transportation SA v MV Silvergate properly described as MV Astyanax and Others* 1999 (4) SA 405 (SCA) at para [54].

21. According to the respondents, the applicant had the right of access to court in relation to applying to court to cancel the Bond but squandered it. It made an election then and is now bound by it. There is, therefore, no access to court issue.

Third ground: Interpretation of the Bond

22. One of the questions for determination was whether the Bond secured only indebtedness or obligations in accordance with the Sale Agreement, or whether it extended beyond the Sale Agreement to include other debts or obligations, including claims for damages and unjustified enrichment.

23. Which debts or obligations are secured by the Bond is a matter of interpretation, which requires a determination by the court through application of the rules of interpretation.

24. The respondents relied on *Panamo Properties 103 (Pty) Limited v Land and Agricultural Development Bank of South Africa* in support of their interpretation.[3]

25. In *Panamo* the Land and Agricultural Development Bank ("the Bank") and Panamo had entered into an agreement in terms of which the Bank would lend Panamo money to buy land to develop a township on it. They concluded a mortgage bond over the property which was duly registered. The bond secured any existing or future debts that Panamo might owe to the Bank. In the preamble to the bond, the passing of the bond referred to an undertaking by Panamo to pass a "continuous covering bond as security for [Panamo's] liability towards the Bank for whatsoever reason".[4] (This wording is broadly similar to that used in the Bond.)

26. The SCA found that the loan agreement was invalid, unenforceable and void, due to non-compliance with statutory formalities.[5]

[3] 2016 (1) SA 202 (SCA).
[4] At para [32].
[5] At paras [21] & [22].

27. The next question was whether the voidness of the loan agreement rendered the bond invalid? The Bank contended that the bond in its favour remained valid and constituted real security for a possible enrichment claim.[6] (In the present case, the respondents submit that the Bond secures both a damages and an enrichment claim.) After referring to the authorities that, as a general principle of law, an unenforceable principal obligation renders an accessory obligation unenforceable the court stated as follows:

> [25] That does not mean that a principal obligation must exist before a mortgage is entered into: it may be given as security for a future debt or as a covering bond. But when enforcement of the bond is sought it must be in respect of a valid obligation. And when determining whether an obligation is secured by a bond, one must have regard to its particular terms.

28. The respondents argue that the present case and *Panamo* appear to be almost on all fours and that this court was bound to follow it as SCA authority. The respondents are partially correct – this court is bound by the law on which the decision is based, but not bound by either the application of the law to the facts, or *obiter dicta*.

29. I then proceeded to consider which debts or obligations were secured by the Bond. Paragraph 1 of the Bond, which sets out the cause of the debt, is important. It provides that the Bond covers every indebtedness or obligation of whatsoever cause or nature, whether now existent or yet to arise, which the Mortgagor will from time to time and for the time being owe to the Mortgagee or either of them pursuant to the provisions of the Sale Agreement. The applicant's case was that any debt/obligation arising from delict and/or enrichment was not secured by the Bond, as it was not pursuant to the Sale Agreement. The respondents' case was that the Bond was a continuing covering security for all and any sums owing or would be owing or claimable from whatever cause arising. The respondents relied on several provisions in the Bond with similar

[6] At para [23].

wording to that in *Panamo*. Much depended on the meaning of "pursuant to the provisions of [the Sale Agreement]".

30. It is unnecessary for me to restate here the specifics of each side's submissions; these are set out in my written judgment, along with my analysis of the respective submissions. I found that the Bond did not cover claims for unjust enrichment and damages. In coming to this conclusion, I adopted the approach formulated by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[7] and endorsed by the Constitutional Court in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd.*[8]

31. Both *Endumeni* and *Trinity Asset Management* should be read in conjunction with the later judgment in *University of Johannesburg v Auckland Park Theological Seminary and Another*[9] where the Constitutional Court held the following:

> [65] This approach to interpretation requires that 'from the outset one considers the context and the language together, with neither predominating over the other'. In Chisuse, although speaking in the context of statutory interpretation, this court held that this 'now settled' approach to interpretation is a 'unitary' exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.
> [66] The approach in Endumeni 'updated' the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to Endumeni that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting the contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract."[10]

[7] 2012 (4) SA 593 (SCA) at para [18].
[8] *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC).
[9] 2021 (6) SA 1 (CC).
[10] At paras [65] - [66]: original footnotes omitted.

32. It is possible to make out a case in support of either side's interpretation of the Bond if one were to cherry-pick excerpts from the Bond – but this would not be the proper approach to adopt. The court's duty is to look beyond individual excerpts to the Bond as a whole to determine which debts and obligations it covers. A piecemeal approach would run counter to the approach mandated by the Constitutional Court.

33. The provisions of the Bond must be interpreted in a unitary manner, with due consideration to the wording, the background, and the other relevant factors identified by the courts. A unitary interpretation requires that the provisions be interpreted in a sensible way that gives effect to the whole of the contract, and not only parts of it.

THE TEST FOR A SUCCESSFUL LEAVE TO APPEAL APPLICATION

34. The old test was whether there was a reasonable prospect that another court 'might' come to a different conclusion to that of the court of first instance. Section 17(1)(a) of the Superior Courts Act now provides that leave to appeal may only be granted where the judge concerned is of the opinion that 'the appeal would have a reasonable prospect of success' (s 17(1)(a)(i)), or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration (s 17(1)(a)(ii)).

35. The Land Claims Court in *Mont Chevaux Trust* held *obiter* that the wording of this subsection raised the bar of the test that must be applied to the merits of the proposed appeal before leave should be granted.[11] The Supreme Court of Appeal in *Notshokovu v S* confirmed this view:[12]

> It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised in the new Act. The former

[11] *The Mont Chevaux Trust v Tina Goosen* 2014 JDR 2325 (LCC).
[12] *Notshokovu v S* [2016] ZASCA 112 (7 September 2016).

test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion. 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. (Footnotes omitted.)

36. The Supreme Court of Appeal has explained that the prospects of success must not be remote, but there must exist a reasonable chance of success. An Applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.[13] An Applicant must convince the Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of success. More is required than a mere possibility of success, or that the case is arguable on appeal, or that the case cannot be categorised as hopeless.[14] (My emphasis.)

SHOULD LEAVE BE GRANTED?

37. Mr Bham SC referred me to several decisions regarding the interpretation of instruments in the Gauteng Division where the court a quo granted leave to appeal to higher courts.[15] *Nel v De Beer and Another* is a recent example where the SCA rejected the High Court's interpretation of an agreement in favour of its own interpretation.[16]

[13] *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021).
[14] *S v Smith* 2012 (1) SACR 567 (SCA).
[15] *IPA Foundation (NPC) v South African Pharmacy Council (leave to appeal)* 2023 JDR 3552 (GP); *San Ridge Rental Property (Pty) Limited v The Municipal Manager: City of Johannesburg Metropolitan Municipality and Others* 2022 JDR 1294 (GJ); *Minister of Police and Another v Miya (leave to appeal)* 2022 JDR 3504 (GP).
[16] 2023 (2) SA 170 (SCA).

38. I have considered the submissions. In my view the required threshold has been met; there are reasonable prospects of success in terms of s 17(1)(a)(i).

39. I am satisfied that the argument made by the respondents in respect of the third ground is a sufficient basis on which to grant leave to appeal. I need, therefore, not consider the first two grounds. The legal principles of interpretation which I have set out above, are clear. However, as submitted by respondents' counsel, different courts may reasonably come to different conclusions when applying these principles to particular instruments. There are reasonable prospects of success.

40. Which court should hear the appeal? Section 17(6) of the Superior Courts Act provides:

> (6)(a) If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider —
>
> (i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or
>
> (ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.

41. It is peremptory for a court to direct that the appeal be heard by a full court of the Division, unless either of the two exceptions is present. The Supreme Court of Appeal should consider only those matters that are truly deserving of its attention.[17] I do not think that this matter requires consideration by the SCA; the

[17] *Kruger v S* 2014 (1) SACR 647 (SCA) at para [3].

exceptions are not applicable. A full court of this Division is adequately placed to consider the appeal.

I MAKE THE FOLLOWING ORDER:

1. Leave to appeal against the judgment and the order is granted to the Full Court of the Gauteng Division, Johannesburg.
2. The costs of this application are to be costs in the cause in the appeal.

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M. Olivier
Judge of the High Court (Acting)
Gauteng Division, Johannesburg

Date of hearing: 9 November 2023

Date of judgment: 18 December 2023

On behalf of the Applicant: C.A.C. Korf
Instructed by: VFV Attorneys

On behalf of Respondents: A. E. Bham SC (with T. Dalrymple)
Instructed by: Knowles Husain Lindsay Inc