



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) Reportable: No

(2) Of interest to other Judges: No

(3) Revised: yes

Date: 29/05/2023

Δ Maier-Frawley

CASE NO: 2021/34634

In the matter between:

**ITUMELENG MAFOKO
MABUYI ROWENA MEMELA**

First Applicant
Second Applicant
(Respondents *a quo*)

and

VBS MUTUAL BANK (IN LIQUIDATION)

Respondent
(Applicant *a quo*)

Neutral Citation: *Itumeleng Mafoko & Another v VBS Mutual Bank (In Liquidation)*
(Case No: 34634/2021) [2023] ZAGPJHC 536 (29 May 2023)

J U D G M E N T

(Application for leave to appeal)

MAIER-FRAWLEY J:

1. For convenience, I will refer to the parties herein as ‘the sureties’ and ‘VBS’ respectively. The sureties, being the applicants herein and the respondents *a quo*, apply for leave to appeal to the Supreme Court of Appeal, alternatively, the Full Court in this division, against the whole of the judgment and order

which I handed down on 9 February 2023. In terms of the order, the sureties were ordered, jointly and severally to pay VBS the sum of R 1 million together with *mora* interest thereon and costs on the attorney and client scale. The application is opposed by VBS.

2. The grounds on which leave to appeal is sought are set out in the notice of application for leave to appeal, filed of record, and need not be repeated in this judgment. Save in the one respect mentioned below, no new or novel issues or legal points, apart from those that were dealt with in the main judgment, have been raised or relied on by the sureties in the application for leave to appeal.
3. In terms of section 17 of the Superior Courts Act, 10 of 2013:

“(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;

(b) ...”
4. It is now settled that the threshold for the granting of leave to appeal under section 17(1)(a)(i) is higher than what it was under the previous Supreme Court Act, 1959. In *Notshokovu v S* [2016] ZASCA112 (7 September 2016), par 2, the Supreme Court of Appeal stated that an appellant ‘faces a higher and stringent threshold, in terms of the present Superior Courts Act compared to the provisions of the repealed Supreme Court Act.’ Similarly, in *Acting*

*National Director of Public Prosecutions and others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions and others*¹ the Full Court held that the Superior Courts Act has ‘raised the bar for granting leave to appeal’, referring with approval to the following passage from the judgment of Bertelsmann J in *Mont Chevaux Trust v Goosen*²:

“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 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.”

5. For purposes of this judgment, only the main points canvassed during oral argument at the hearing of the matter, need be addressed. These include that:
 - 5.1. The amount awarded against the sureties is profoundly ‘staggering’, with the implication being that the judgment ought for such reason alone to be scrutinized by a superior court;

(As regards this submission, which is rather incredulous, the reality is that many judgments have far reaching consequences for one or another litigant. The sureties willingly bound themselves to contractual liability for R1 million on the terms set out in the suretyships and bore the risk, as any other litigant, that their defences may not be upheld).

¹ [19577/09] [2016] ZAGPHC489 (24 June 2016), at para 25.

² 2014 JDR 2325 (LCC).

- 5.2. The founding affidavit lacked necessary averments and factual evidence to underpin or support the judgment and order and any failure by the sureties to object thereto in the answering affidavit could not cure such 'fatal defect', therefore the court *a quo* erred in failing to find that a cause of action had not been made out by VBS in its founding papers for the relief sought and granted;

(This complaint was considered and dealt with in paragraphs 61 and 65 to 68 of the main judgment).

- 5.3. The court *a quo* erred in taking account of new matter raised in the replying affidavit, thereby erring in failing to ignore such matter and in granting condonation for the late filing of the replying affidavit in circumstances where the sureties were not afforded an opportunity to deal therewith and were thereby deprived of their right to *audi alteram partem*;

(The *audi alteram partem* complaint was raised for the first time on appeal. Significantly, the prejudice now contended for is that the sureties were not afforded the opportunity by the court to deal with new matter contained in the replying affidavit. The complaint that new matter was impermissibly included in the replying affidavit, which allegedly prejudiced the respondents, was dealt with in paras 13, 14 and 74 of the judgment. As regards, the *audi* complaint, it is noteworthy that the sureties elected to argue the matter on the basis that their contention that the court was legally bound to ignore any new matter appearing in the replying affidavit would be upheld and/or that the court would exercise its discretion against VBS. They

neither sought a postponement of the matter to cure any alleged prejudice to them if the matter were to proceed without affording them the opportunity to file a supplementary affidavit, nor did they avail themselves of the right to seek leave to file a supplementary affidavit to deal with the new matter. They chose to proceed on the basis that their contentions would be upheld, notwithstanding the risk of same being rejected by the court).

- 5.4. The quantum of the indebtedness of the sureties was not established by primary facts in the founding affidavit and consequently the court erred in having regard to annexure 'FA9' to the founding affidavit, being the principal debtor's bank statement in respect of its account held at VBS for purposes of determining the extent of the liability of the sureties in respect of the outstanding indebtedness owed by the principal debtor (Leratadima [in liquidation]) to VBS.

(On a contextual reading of the main judgment, I had regard to the contents of Annexure 'FA9' in circumstances where the sureties failed in their answering affidavit, to point out any errors in the bank statement and failed to object to its production and where the amount of the principal debtor's liability was not in dispute).

6. Ultimately, the sureties submit that given the magnitude of the monetary order granted against them, the complexity of the issues arising in the matter, the seriousness of the matter and the importance of the outcome on appeal, not only to the sureties but to both parties, it is compelling for leave to appeal to be granted.

7. The main judgment is detailed and comprehensive reasons were for provided therein for the findings made and conclusions reached therein. I stand by the judgment and reasons provided therein in respect of all complaints raised in the notice of application for leave to appeal.

8. Salient common cause facts were referred to in paragraphs 54 to 55 and 70 to 71 of the main judgment in terms of which it ultimately remained undisputed that valid contracts of suretyship concluded by the sureties were in existence; that the source of indebtedness (*causa debiti*) in terms of such agreements was one in respect of which the sureties undertook to be liable; and that the said indebtedness was due and payable in consequence of the principal debtor's default of payment of its outstanding liability to VBS. It will be recalled that by the time the matter was argued, VBS accepted that the amount for which the sureties undertook liability, being the maximum amount of R1 million, was to exclude any interest charges for which the principal debtor (Leratadima) was liable. That meant that in so far as the outstanding principal indebtedness (comprising capital, costs and charges levied in terms of the facility agreement, but excluding any interest charges) exceeded the amount for which the sureties undertook liability under the suretyship agreements, then the sureties would only be liable for the sum of R1 million. Ultimately, the principal debtor's outstanding liability to VBS, which exceeded the sum of R1 million, was supported by a certificate of balance which accorded with the entries appearing on Leratadima's bank statement (annexure 'FA9' to the founding affidavit), the aggregate total amount of which was not effectively challenged in the answering affidavit. In so far as the aggregate total amount so certified included interest, the main judgment found, in paragraph 60, that the amount, sans interest, was easily ascertainable on the basis therein set out.

9. Having dispassionately considered the main judgment and the opposing contentions of counsel in their written and oral argument, I am not left with any measure of certainty that there exists a reasonable prospect of success on appeal. However, I accept that this court may grant leave to appeal if persuaded that compelling reasons to do so exist.³ Counsel for the sureties made a compelling argument for leave to appeal to be granted to the Supreme Court of Appeal, for the following reasons:

- (i) In regard to the complaint referred to in paragraphs 6.2 and 6.4 above, which, amongst others, was that no factual evidence was provided in the founding affidavit to underpin or support the judgment,⁴ the legal point on which clarification by a superior court is sought is whether and to what extent the lack of objection in the answering affidavit could cure the alleged defects in VBS's founding papers and its reliance on 'hearsay' evidence contained in annexure 'FA9' to the founding affidavit;

³ See *Caratco (Pty) Limited v Independent Advisory (Pty) Limited* 2002 (5) SA (SCA), par 2, where the following was said: *"In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal."*

⁴ Amongst others, in respect of VBS's failure to plead and prove the fulfilment of the suspensive conditions in the facility agreement (dealt with in the judgment in paras 61 and 65 to 68) and the failure by VBS to plead in its founding papers that annexure 'FA9' was introduced to reflect the liability of the sureties.

- (ii) In regard to the *audi alteram partem* complaint referred to in paragraph 6.3 above,⁵ the legal point on which clarification is sought by a superior court is whether, in the absence of a party –which party is legally represented and who has at all material times enjoyed the benefit of legal advice and who asserts that new matter is contained in the replying affidavit - to avail him/herself of the right to apply for leave to file a supplementary affidavit in order to deal therewith, it is incumbent on a court to either disregard new matter raised in the replying affidavit (the implication being that a court has no discretion to have regard to same) or to *mero motu* postpone the hearing of the matter to allow for the filing by the respondents of a supplementary affidavit, so as not to infringe the *audi alteram partem* principle;
- (iii) Aligned to (i) above, the legal point on which clarification is sought by a superior court is whether, in a claim based on the enforcement of a suretyship contract (as opposed to a claim based on the enforcement of the main loan agreement) the failure to allege and prove the fulfilment of suspensive conditions governing the main contract, which contract, as was common cause, was enforceable and was performed by the contracting parties (VBS and Leratadima) and which contract was also relied on by the sureties in the answering affidavit as being extant and in force, renders the claim against the sureties fatally defective, warranting the dismissal thereof; and in addition, whether the invalidity of the main contract can, as a matter of law, be asserted in argument by the sureties without same having been pleaded by them in the answering affidavit.

⁵ The *audi alteram partem* complaint was raised for the first time on appeal. The complaint that new matter was impermissibly included in the replying affidavit, which allegedly prejudiced the respondents, was dealt with in paras 13, 14 and 74 of the judgment.

10. In the result, I make the following order:

10.1. Leave to appeal to the Supreme Court of Appeal is granted.

10.2. The costs of the application for leave to appeal are costs in the cause of the appeal.

**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 25 April 2023
Judgment delivered 29 May 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 29 May 2023.

APPEARANCES:

Counsel for Applicants (leave to Appeal): Adv SG Maritz SC
Instructed by : Carreira & Associates Inc.

Counsel for Respondents (leave to appeal): Adv E. Van Vuuren SC
Instructed by: Werksmans Attorneys