

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 42518/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....
SIGNATURE	DATE

In the matter between:

TUHF URBAN FINANCE (RF) LTD

And

THE HOUSE OF TANDOOR & OTHERS

ERIC MTUYEDWA MPOBOLA

MAHLOKO SIMON MOKHEMA

GLORIA DINAR MOKEMA

BUYISILE MRADU

Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Neutral Citation: *Turf Urban Finance (RF) v The House of Tandoor & Others* (Case No: 42518/2020) [2023] ZAGPJHC 608 (01 June 2023)

JUDGMENT (LEAVE TO APPEAL)

THUPAATLASE AJ

Introduction

[1] This is an application for leave to appeal against the judgment and orders granted by this court on 21 November 2021 in favour of the applicant/plaintiff against respondents/defendants for payment of the sum of R1 556 482.59 jointly and severally, the one paying, the others to be absolved and further declaring the mortgaged property specially executable. The immovable property more commonly known as Erf 444, Bellevue Township, Registration Division IR, Gauteng registered in the names of the respondents.

Grounds of Appeal

[2] The grounds of appeal filed on behalf of the defendants can be summarised briefly as follows: the defendants contends that this Court erred in holding that the plaintiff proved indebtedness by the defendants. The second point raised is that the court erred in finding that there was no disputes of facts. The defendants contend that there are factual disputes of fact patent on the papers.

Principal submissions by the parties

[3] The respondents' main submission is that the court erred in concluding that indebtedness was proved. That the court erred in holding that there was common cause that the respondents were indebted to the applicant, and that this finding constituted a material misdirection of fact which resulted in misdirection on the law. It was submitted that another court hearing the matter and on proper analysis in respect of liability would come to the conclusion different from the one reached by this court.

[4] It was further submitted by the respondents that it is inarguable on the papers that the respondents were disputing liability and more particularly that the applicant did not factor in the payments prior to the conclusion of the loan agreement.

[5] It was submitted by the respondents that there was factual dispute which the court failed to appreciate and to engage with it in respect of the accounting method in computation of the amounts involved.

[6] The applicant aligned its submissions mainly with finding of this court. The applicant submitted that the court was correct to find that it has proved indebtedness. The argument was based on the terms of the loan agreement between the parties. The loan agreement contains a clause stating that a certificate signed by the applicant is prima facie proof of the amount due, owing, and payable. The applicant argued in the circumstances, the amount owing by the respondents was proved and that the applicant kept a detailed record, which is unassailable and that the respondents failed to assail it.

[7] In respect of the second ground of appeal relating to alleged dispute of facts, once more the applicant submitted that there was no error or misdirection on the part of the court. The applicant submitted that the only basis on which the respondents contend for a dispute of fact is concerning the amount owed under the loan agreement. In this regard the respondent made a bare denial of the amount owed. It was submitted that bare denials by the respondents are insufficient to create dispute of fact.

[8] In summary the applicant submitted that indebtedness was established and that there are no facts to impeach its correctness and further that vague and bare denials cannot be taken to have establish dispute of fact. In the end it was submitted that the respondents have not crossed the threshold to establish that the grounds exist for leave to appeal to be granted by this court.

Applicable Legal Principles

[9] The applicant's application for leave to appeal is based squarely on section 17(1) (a) of the Superior Courts Act 10 of 2013¹ (the SC Act). The section regulates

¹ The Superior Court 10 of 2013 repealed in whole the Supreme Court 59 of 1959 and came into operation with effect from 23 August 2013.

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—

(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) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(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.'

[10] The test that was previously applied in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion. The enactment of section 17(1) of the SC Act has led to threshold for granting leave to appeal judgment of the high court been raised. This has come about as result of the use by the legislature of the word 'would' in subsection 17(1)(a) (i) of the SC Act.

[11] In the case of *Mount Chevaux Trust IT 2012/28 v Tina Goosen & Others* 2014 JDR 2325 LCC at para [6] the court stated as:

"It is clear 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 may 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".

[12] What is required of this court is to consider, objectively and dispassionately, whether there are a reasonable prospect that another court will find merit in the arguments advanced by the losing party. See *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Maya International* [2016] 137 (ZAECGHC) 137 (10 November 2016) at para [4].

[13] A clear recognition of this heightened threshold in cases of application for leave to appeal was the case of *Dexgroup (Pty) Ltd v Trusco Group Intl (Pty) Ltd* 2013 (6) SA 520 (SCA) at para [24] where court stated that:

'The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case be deployed by refusing leave to appeal'.

[14] In the case of *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021) the SCA restated the legal position as follows:

'Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice.... I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. ... The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist'.

[15] Reverting to this case, it is the applicant's case that the first respondent failed to make payments of the municipality rates and taxes as per the Agreement. By November 2019 the rates and taxes were in arrears in the amount of R 333,986,21. In addition, the first respondent was in arrears in the amount of R 75 845,89 as of 20 November 2019. Despite demand the first respondent failed to bring its indebtedness up to date. The letters of demand were served on all the respondents at their respective places of *domicilium citandi executandi*. This was in breach of the loan agreement.

[16] As a result of the settlement arrangement, the respondents agreed to the applicant enforcing its right and took cession of the rental income generated by the

property. Such rental generated by the Property proved insufficient to settle the debt and further monthly instalments due to the applicant as per loan Agreement (amended by two subsequent addenda).

[17] There were second letters of demand dispatched to the respondents. This step resulted in further attempts to resolve the issue of non-payment. On the 05 April 2012 the second respondent concluded a Suretyship Agreement in favour of the applicant in respect of the outstanding indebtedness.

[18] On the same day the third respondent who is married in community of property to the fourth respondent also concluded an unlimited Suretyship Agreement in favour of the of the applicant in respect of the property for outstanding indebtedness. The fourth respondent gave her consent to the suretyship agreement.

[19] The fifth respondent, acting in his personal capacity also concluded a written unlimited Suretyship Agreement in favour of the applicant in respect of the property for the outstanding indebtedness as set out in the Agreement.

[20] In terms of these Suretyship Agreements each of the second, third and fifth respondents bound themselves irrevocably as surety for and co-principal debtors in *solidum* with the first respondent for the due and proper performance by the first respondent of all its obligations in terms of and arising from the Agreement. It is clear that there was indebtedness on the part of the respondent and steps were taken to try and correct the situation.

Indebtedness

[21] The respondent has raised an issue of indebtedness as a ground for leave to appeal. It is argued that the court erred in concluding that indebtedness was proved or was a common cause factor. In terms of the loan agreement the certificate of indebtedness will be the *prima facie* proof of the amount owing. Indebtedness is defined in the loan agreement between the parties to mean '*any obligation (whether incurred as principal guarantor or as surety) for the payment of money, whether present of future, actual or possible*'.

[20] In *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) the Appellate Division, as it was then called, held that the certificate of indebtedness is also prima facie proof of the substance of its contents in any litigation to exact payment. At 382A the court dealt with the evidentiary value and purpose of the certificate of indebtedness as follows:

'the main purpose of the certificate clause was clearly to facilitate proof of the amount of principal debtor's indebtedness to the bank at any given time. A similar purpose underlies the provisions of, frequently found in reducible mortgage bonds and in bonds to cover future advances, that a prescribed certificate shall be sufficient or prima facie proof of the amount due thereunder. In such cases the terms of the provision may show clearly that certificate is to have evidential value only for the purpose of obtaining provisional sentence (see for example Standard Building Society v Smits 1934 WLD 4 at 6), but the certificate clause now in question does not expressly make that limitation, nor in my view does the language used justify such an interpretation'.

[21] The certificate in this case and as set out in the loan agreement serves two purposes being to serve as prima facie proof of indebtedness and in case the applicant elected to obtain provisional sentence the certificate would serve as a liquid document. This is clear from terms of clause 12 of the loan agreement under the heading 'Certificate of Indebtedness' the following is agreed between the parties:

12.1 'The amount of Borrower's indebtedness to TUHF in terms of Agreement at any time shall be proved by a certificate signed by any one TUHF's directors; whose appointment, qualification need not be proved.

12.2 A certificate in terms of 12.1 shall -

12.2.1 binding on the Borrower as prima facie proof of the Borrower's indebtedness hereunder.

12.2.2 valid as liquid document against the Borrower in any competent court for the purpose of obtaining provisional sentence against the Borrower thereon.

Dispute of facts

[22] The respondents have persisted with this point that there was a dispute of fact which the court should have recognised and refer the matter for oral evidence. The explanation of what constitute dispute of fact was stated as follows in the *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para [13] that:

'A real, genuine, and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter'.

[23] The issue was also dealt with in the case of *Motala Beleggings and Another v Minister of Rural Development and Land Reform & Others* 2012 (4) SA 22 (SCA) at para [17] stated as follows:

'The department has not raised a real and bona fide factual dispute in its answer. It contents itself with an evasive answer to which it is bound.'

[24] The respondents do not deny the existence of the Agreement and the Mortgage Bond. In addition, their indebtedness is evident from various subsequent arrangements were made to try to bring same up to date.

[25] There is an attempt to deny the existence of the suretyships. This is done in bald and sweeping manner. I am satisfied that there is no genuine dispute of facts. I am not satisfied that the respondents have satisfied the test stated in the case quoted above. The consequence of such failure is spelled out in the case of *Hart v Pinetown Drive -in Cinema* 1972 (1) SA 464 (D) at 469C where the learned judge found that:

'It must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound'.

[26] It is not clear from the answering affidavit if the respondents are denying the existence of the Suretyship Agreements. Such an action by the respondent cannot be countenanced. In the case *Wright v Wright & Another* 2015 (1) SA 262 (SCA) para. 15 the court held that:

'Litigants are required to seriously engage with the factual allegations they seek to challenge and to furnish not only an answer but also countervailing evidence, particularly where the facts are within their personal knowledge'. This the respondents failed to engage with factual to refute any allegations by the applicant in their answering affidavit.

Conclusion

[27] In conclusion the court is satisfied that the respondents have failed to cross the raised threshold of showing that another court 'would' come to different conclusion

on the two grounds of leave to appeal. The respondents have to demonstrate that the appeal enjoys prospects of success.

[24] Application for leave to appeal is hereby dismissed with costs.

T. THUPAATLASE
ACTING OF THE HIGH COURT

Heard on: 26 April 2023

Judgment Delivered: 01 June 2023

APPEARANCES:

For the Applicant: Adv. MJ Cooke

Instructed by: Schindlers Attorneys and Notaries

For the Respondent: Adv.MR Maphutha

Instructed by: Mahanoe Attorneys