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

REPUBLIC OF SOUTH AFRICA

CASE NO:11987/2020

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
(4)	DATE: 1 JUNE 2023
(5)	SIGNATURE:

In the matter between:

266 BREE STREET JOHANNESBURG (PTY) LTD	First Applicant
10 FIFE AVENUE BEREA (PTY) LTD	Second Applicant
28 ESSELEN STREET HILLBROW CC	Third Applicant
68 WOLMARANS STREET JOHANNESBURG (PTY)LTD	Fourth Applicant
HILLBROW CONSOLIDATED INVESTMENT CC	Fifth Applicant
MARK MORRIS FARBER	Sixth Applicant
TUMISANG KGABOESELE	Seventh Applicant

and

TUHF LIMITED Respondent

Neutral Citation: *266 Bree Street Johannesburg (Pty) and Others v TUHF Limited* (Case No:11987/2020) [2023] ZAGPJHC 613 (1 June 2023)

JUDGMENT

SENYATSI J

A. INTRODUCTION

[1] This is leave to appeal the judgement I handed down on 21 April 2023. The applicants rely on three grounds of appeal, namely:

(a) First, the erred in finding that the respondent was entitled to accelerate the repayment of the full loan amount. On this ground the aver that the repayment of the loan was extended in what amounts to *a pactum de non petendo* because of the exchange of emails between the parties which was not precluded by the non-variation clause in the loan agreement;

(b) Second, the court erred in finding that TUHF had established the quantum of its claim;

(c) Third, the court erred in not holding that the first and sixth applicant's suretyship were valid, because the s45 (3) (a) (ii) of the Companies Act of 2008 had not been complied with by the sole director and shareholder of the first defendant in the main action on liquidity and solvency test, the suretyship ought to have been declared void.

B. ISSUE FOR DETERMINATION

[2] The issue for determination is whether there is reasonable prospect that the appeal would have a reasonable prospect of success.

C. THE LEGAL PRINCIPLES AND REASONS

[3] The application for leave to appeal is regulated by s 17(1)(a) (i) and (ii) of the Superior Courts Act number 10 of 2013("the Act") Which provides as follows:

"17. (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;"

[4] Our courts have given the true meaning of what is sought to be proven as stated in section 17(1). In Acting National Director of Public Prosecutions and

Others v Democratic Alliance v Acting National Director of Public Prosecutions and Others[1] the court said the following:

"The Superior Court has raised the bar for granting leave to appeal in The Mont Chevaux Trust (IT 201/28) v Tina Goosen & 18 Others, Bertelsmann J held as follows:

'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 might come to a different conclusion see *Van Heerden v Cronwright & 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] In Mount Chevaux Trust v Goosen[2], the court explains the test as follows:

"[3] The principle to be adopted in applications for leave to appeal has been codified in section 17(1) of the Superior Courts Act 10 of 2013 ('the new Act') and is, *inter alia*, 'whether the appeal would have a reasonable prospect of success'. Bertelsmann J, in The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 Others LCC14R/2014, (an unreported judgment of this Court delivered on 3 November 2014) in considering whether leave to appeal ought to be granted in that matter, held that the threshold for granting leave to appeal had been raised in the new Act. Bertelsmann J found that the use of the word 'would' in the new Act indicated a measure of certainty that another Court will differ from the Court whose judgment is

[1] (1957/09) [2016] ZAGPPHC 489 (24 June 2016)
[2] 2014 JDR 2325 (LCC)

sought to be appealed against. Consequently, the bar set in the previous test, which required 'a reasonable prospect that another Court might come to a different conclusion', has been raised by the new Act and this then, is the test to be applied in this matter."

[6] In Matoto v Free State Gambling and Liquor Authority[3], the court referred to Mount Chevaux Trust with approval and said that:

> "…there can be no doubt that the bar for granting leave to appeal has been raised. The use by the legislature of the word 'only' … is a further indication of a more stringent test."

[7] In S v Notshokovu[4] the Supreme Court of Appeal reaffirmed that:

> "an appellant …faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959"

[8] In S v Smith Plasket[5] AJA explained the meaning of 'a reasonable prospect of success' as follows:

> "What the test of reasonable prospect of success postulates is 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 order to succeed, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that these prospects are not remote but have a realistic chance of succeeding. More is required to be established than there is mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in

[3] [2017] ZAFSHC 80 at para 5
[4] [2016] ZASCA 112 para 2
[5] 2012 (1) SACR 567 (SCA) at para 7

other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[9] In Pretoria Society of Advocates and Others v Nthai[6] the court held that:

> "The enquiry as to whether leave should be granted is twofold. The first step that a court seized with such application should do is to investigate whether there are any reasonable prospects that another court seized with the same set of facts would reach a different conclusion. If the answer is in the positive the court should grant leave to appeal. But if the answer is negative, the next step of the enquiry is to determine the existence of any compelling reason why the appeal should be heard."

[10] In the instant application for leave to appeal, the three grounds relied on by the applicants that application for leave to appeal should be favourably considered are not sustainable. First, the so-called pactum *de non petendo* that the first defendant would not be sued because of the alleged extension of the repayment period was not supported by evidence because the emails referred to as the reason for the alleged extension, were in conflict with the non-variation clause of the agreement. Second, the averment that TUHF had failed to prove its claim is not supported by the record of the action when regard is had to the evidence adduced. Third, the contention that the appeal would succeed because s45 of the Companies Act, 2008 was not complied with by Mr Farber when the suretyship agreements were concluded and this cannot be supported by the facts of the case. As said in the judgment, he was to sole director and shareholder of the second applicant. Section 45 is

[6] 2020 (1) SA 267 (LP) at [4]

intended to protect, not only the general body of creditors, but more specifically the shareholders with the view to safeguarding their investment in the company. Mr Farber, being the only shareholder, could certainly not have been expected to perform the liquidity test to protect himself against himself. There is therefore no merit that the court erred in finding that the suretyship agreements were valid.

[11] The applicants have failed to provide compelling reasons why the Court should grant leave to appeal. Accordingly, the application for leave to appeal must fail.

D. ORDER

[12] The following order is made:

(a) The application for leave to appeal is refused with costs on the scale as between client and attorney including the costs of two counsel.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 31 May 2023

DATE JUDGMENT HANDED DOWN: 1 June 2023

APPEARANCES

Counsel for the First to Sixth Applicants:	Adv L Hollander
Instructed by:	Swartz Weil Van De Merwe Greenberg Inc
Counsel for the Respondent:	Adv AC Botha SC
	Adv E Eksteen
Instructed by:	Schindlers Attorneys