IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: NO **Of Interest to other Judges: NO** **Circulate to Magistrates: NO**

Case number: 5700/2021

In the matter between:

WILMA SUSANNA DE KLERK **APPELLANT**

and

NEDBANK LIMITED **RESPONDENT**

CORAM:	AS BOONZAAIER AJ
HEARD ON:	**1**0 FEBRUARY 2022
DELIVERED ON:	13 FEBRUARY 2022

INTRODUCTION

[1] This is an application for leave to appeal against the judgment I handed down on **22 November 2022**. The Applicant contends that the court misdirected itself (when it granted the Summary judgment against the First Defendant) as follows:

(a) That the court *a quo* erred by not finding that the plaintiff cannot rely on any certificates of balance ["COB"] issued in terms of the relevant suretyships as the suretyship clause relied on is *contra bonos mores*. Hence it is offending public policy and accordingly unenforceable as was held in the case of **Nedbank Limited v Grant Stewart McGlashan and 10 others (case number 14714/2016) in the High Court of South Africa, Gauteng Local Division.** The High Court *a quo* furthermore erred by granting prayer 1 to 4 relating to the surety ship while counsel on behalf of the plaintiff conceded that the aforementioned case law constitutes an arguable defence in law and did not pursue to request Summary judgment for the amounts based on the suretyships.

(b) That the court *a quo* erred by finding that the certificates, amounts in annexure "C1"to "C4" to the plea are correct while there was a valid reason to question the amounts and interest rates claimed in the notice of application for Summary judgment. These amounts substantially differs from the amounts and interest rates claimed in the Plaintiff's request for Default judgment in terms of Rule 31 dated 20 May 2022. In the opposing affidavit the First Defendant gives various examples between the amounts claimed and the interest rates (for example paragraph 7.1 and 7.2).

(c) That the court *a quo* erred by failing to take into account that in the affidavit of Mr. Lemmetjies it is not indicated that the amounts sought in the application for Summary judgment differ from the amounts sought in the application for Summary judgment. Mr. Lemmetjies does not provide an explanation for these differences and how the new and lesser amounts were calculated. For example, there is a substantial difference of more than R817 00-00 between prayer 2 of the notice of application for Summary judgment and the Plaintiff's notice for Default judgment without a proper explanation being furnished.

(d) That the court *a quo* erred by failing to take into account that the Plaintiff has not furnished any information to the First Defendant or the Court

about the proceeds generated by the sale of any of the assets of the De Klerk Familie Trust, the gross amounts realize by the sale, the costs charged for the auction, the commission raised by the auctioneers or the net proceeds after the permitted default charges were effected while such information is essential and vital to calculate and verify the amounts outstanding.

(e) That the court *a quo* erred by granting prayer 6 against the First Defendant, while the notice of application for Summary judgment prayer 6 is only sought against Second Defendant.

(f) That the court *a quo* erred by failing to take into consideration that if the First Defendant is successful with a claim under the retrenchment benefit insurance policy it will reduce the First Defendant's liability towards the plaintiff.

(g) That the court *a quo* erred by finding that the Plaintiff has proved its case while the First Defendant has shown that the Plaintiff does not have an unanswerable case and has raised various issues fit for trial as envisaged in the rule.

(h) That the court *a quo* erred by granting Summary judgment where it has been shown that the Plaintiff's case is not unimpeachable and thereby not allowing the First Defendant to exercise her constitutional right to fair trial, while there were ample valid grounds advanced entitling the First Defendant to be granted leave to defend the action.

[2] Counsel for the Respondent is of the view that this application boils down to essentially [4] four grounds of appeal and I agree with him. The grounds be as follows:

i] That the COB clause in annexure" N7.1" to the particulars of claim is

*contra bonos mores (*as it provides for the contents of the COB`s to be

proof" on the face of it") ;

ii] That the certificate amounts in annexures "C1" to "C4"to the plea substantially differs from, the amounts and interest rates claimed in the request for Default judgment;

iii) That in the notice of application for Summary judgment, prayer 6 was only sought against the Second Defendant;

iv) That the ostensible retrenchment benefit insurance would reduce Applicant`s liability towards Respondent.

[3] At the hearing of the application, I asked both Counsel to address me on whether the Court overlooked the concession that was made by counsel of the Respondent where he conceded that the mentioned case law constitutes an arguable defence. Adv for Respondent answered that he indeed made the concession but it was according to the case of **Nedbank Limited v Grant Stewart Mc Glashan and 10 others.**[1] In the **Mc Glashan** case the judge was playing with the words "on the face of it "and compared it with "*prima facie*". Based on that the court found that the Plaintiff cannot rely on any certificates of balance issued in terms of the suretyship. The suretyship clause relied on a *contra bonos mores* clause and is accordingly unenforceable.

[4] Adv for Respondent further argued that the judgment in **Mc Glashan supra** was given by a single judge of the High Court of another division and hence this court is not bound to follow it. To hold that "on the face of it" is stronger than "*prima facie* proof" does not hold water. The judgment in **Mc Glashan supra** is in his view unconvincing and flimsy and should not be followed.

[1] (Case number 14714/2016) in the High Court of SA, Gauteng Local Division.

[5] With regards to the “C1” to” C4” certificates the Applicant pleaded that the balances were outdated and not that it was incorrect. The new certificates of balance which were provided pertains to new amounts after the return of the vehicles to the Respondent.

[6] *In casu* the Summary judgment proceedings was clearly, against the First Defendant. Summary judgment was already granted in previous proceedings against the Second Defendant. Counsel for Respondent pointed it out that the error on page 206 with regards to prayer 6 in the Notice of Motion is thus simply a typo and or printing error. Adv Steenkamp for Appellant conceded that it is a technical point at this stage.

[7] Both counsels conceded that the issue of *lis pendens* was correctly decided in the judgment. Councel for Respondent pointed out that the court correctly accepted the fact that Nedbank denied being an insurer because they are not registered as an insurer under the South African Insurance Legislation.

Counsel for Applicant is of the view that *in casu* the Appellant still has a counterclaim. Counsel for Respondent responded that if it is true, it will have a counterclaim against another third party which is not a party to these proceedings.

THE TEST FOR LEAVE TO APPEAL:

[8] Leave to appeal judgment is regulated by **section 17(1) of the Superior Courts Act of 2013** which provides as follows:

> “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 against 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”

[9] The bar for the granting of leave to appeal has been raised by this section. The former test that leave should be granted if there is a reasonable prospect of success that another Court might come to another decision is no longer applicable. In the unreported case of **Hans Seuntjie Mototo v Free State Gambling and Liquor Authority**[2] the court said the following**:**

> "There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was reasonable prospect that another court might come to a different conclusion. Now, the word "would", indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against**."**

[10] The Court hearing the application must be satisfied that the appeal would have a reasonable prospect of success.

[11] In the matter of **Smith v S,** [3]the court in dealing with the question of what constitutes reasonable prospects of success, stated as follows:

> "That the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts of law that a court of appeal
>
> could reasonably arrive at a conclusion different to that of the trial Court. In order to succeed, therefore, the appellant 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 succeeding. More is required to be established that there is a mere possibility of success that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."[4]

[12] Having not been persuaded by the evidence adduced by the Applicant at the application I am not persuaded that another Court would come to a

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[2] 4629/2017{ZAFSHC} 8 June 2017

[3] 2012(1) SACR567 (SCA) par [7]

[4]The court also elaborated on the test in Ramakatsa v ANC and Others [2021] ZASCA 31 (31 March 2021) at para [10]

different conclusion and order that the Summary judgment be dismissed. as prayed for by the Applicant.

[13] It follows therefore that the leave to appeal application must fail.

[14] The general rule, it is trite, is that costs follow the event. I have no reason to deviate from the rule.

ORDER:

The following order is made:

[15] The application for leave to appeal is refused with costs.

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S BOONZAAIER, AJ

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	Chambers Bloemfontein
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