REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 42609/11

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

28 MARCH 2013 FHD VAN OOSTEN

In the matter between

ERNEST JACQUES DU TOIT **PLAINTIFF**

and

MARGARET WYNNE BREDENKAMP **FIRST DEFENDANT**

GARY MARK CARLISLE **SECOND DEFENDANT**

Practice - Appeal - Leave to Appeal - grounds in support of - not sufficient merely to allege that court erred in certain respects - must also set out why the court erred- application defective - leave to appeal on merits refused.

J U D G M E N T
(LEAVE TO APPEAL)

VAN OOSTEN J:

[1] The unsuccessful plaintiff in the action now seeks leave to appeal against the whole of my judgment and the resultant order granting absolution from the instance with costs.

[2] Four grounds in support of the application for leave to appeal are set out in the notice of application for leave to appeal. It is alleged in all the grounds that I erred in certain respects. Counsel for the defendants submitted, with reliance on the judgment of Leach J (as he then was) in *Songono v Minister of Law and Order* 1996 (4) SA 384 (ECD), that the notice of application for leave to appeal is defective in that it fails to properly specify the grounds of appeal relied on. I agree. The mere reference to the court having erred was pertinently disapproved of in *Killian v Geregsbode, Uitenhage* 1980 (1) SA 808 (AD), where Rabie CJ, in dealing with the grounds of appeal set out in a notice of appeal in an action in the Magistrate's Court, held:

'Para 1 van die kennisgewing van appél bevat bloot 'n bewering dat die landdros fouteer het deur die betrokke bevel te gee, *sonder om te sê in welke opsig hy fouteer het*, en dit kan nie gesê word dat dit 'n grond van appél bevat soos deur Reël 51(7) vereis word nie.'

[Emphasis added]

On this ground alone leave to appeal ought to be refused.

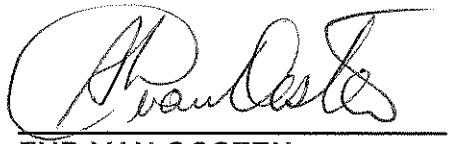
[3] Notwithstanding the above finding I nevertheless consider it necessary to deal with the merits of the application. Counsel for the plaintiff merely reiterated the attack against the finding that rectification of the agreement should have been sought and pursued in order to cast a contractual duty on the defendants to "confirm" the amount of the loan account, as alleged in the particulars of claim. Counsel submitted that the obligation to pay was on the defendants and that therefore, it should be read into the agreement that they bore the duty to "confirm" the amount as pleaded. I am unable to agree. Both the plaintiff and the defendants had an interest in finality as to the amount of the loan account. The books of account were in possession of Ms de Vries. Had it been the intention of the parties to specifically confer the duty on either one of the contracting parties, one would have expected words to that effect of which there are none.

[4] The second leg of the judgment deals with the interpretation of the word "confirmation" within the context of the agreement and the factual issue whether "confirmation" in the wider sense had been effected by the email and the annexure thereto. Counsel for the plaintiff contended for a narrow interpretation of the word with the result, so the argument went, that the "confirmation" of the amount of the loan

account, if not accepted as correct by the plaintiff, was to be regarded as no confirmation at all which, of course, in turn would have triggered the deeming provision. The argument is fallacious. There is no indication from a plain reading of the words used in clause 6 of the agreement that the "confirmation" had to be accepted as correct in all respects by the plaintiff before it would be regarded as a "confirmation". As I have dealt with in the judgment the clause clearly envisaged preventing inaction on this aspect. Had the plaintiff not been satisfied with the "confirmation", as eventually came to pass, he was not left without remedies to obtain the necessary relief.

[5] I am not satisfied that another court will reasonably come to a different finding. There are accordingly no reasonable prospects of a successful appeal.

[6] In the result leave to appeal is refused with costs.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE PLAINTIFF	***ADV E RUDOLPH***
PLAINTIFF'S ATTORNEYS	***WERKSMANS***
COUNSEL FOR THE DEFENDANTS	***ADV HA VAN DER MERWE***
DEFENDANTS' ATTORNEYS	***FLUXMANS INC***
DATE OF HEARING	***27 MARCH 2013***
DATE OF JUDGMENT	***28 MARCH 2013***