

IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 18248/2018

DATE: 2018-05-25

(1)	REPORTABLE: YES <input checked="" type="radio"/> NO <input type="radio"/>
(2)	OF INTEREST TO OTHER JUDGES: YES <input type="radio"/> NO <input checked="" type="radio"/>
(3)	REVISED. <input checked="" type="checkbox"/>
25/5/2018	
DATE	SIGNATURE

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In the matter between

THE NEW RECLAMATION GROUP (PTY) LTD

Applicant

And

TRANSNET SOC LTD AND ANOTHER

Respondent

EX TEMPORE JUDGMENT

20 **ADAMS J.:** I shall refer to the parties as referred to in the original urgent application by the applicant, namely the Reclamation Group (Pty) Ltd. The applicant is also the applicant in this application for leave to appeal. It applies for leave to appeal against the whole of the judgment and the order, as well as the reasons therefore which I granted on the 23rd of May 2018. In terms of the aforesaid order I had dismissed the applicant's urgent application with cost, including the cost consequent upon the employment of two Counsel, after I had reconsidered,

in terms of Uniform Rule of Court 6(12)(c), a previous order which I had granted on the 15th of May 2018 and after I had set same aside.

The order of the 15th May 2018 reads as follows:

- '1 Pending the outcome of this application the following order is made:
2. Interdicting and restraining the first respondent from claiming monies from the second respondent under guarantee number 3134110 issued by the second respondent ('the guarantee');
3. Interdicting and restraining the second respondent from paying any monies to the first respondent in respect of the guarantee;
4. The cost of the hearing of this application on the 15th May 2018 is reserved'.

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The application for leave to appeal is in the main against my factual findings and legal conclusion that the applicant is not entitled to stop payment on the guarantee. I erred in not confirming the interim interdict, so the applicant contends, because the applicant had demonstrated that the first respondent, in demanding payment in terms of the guarantee, has committed fraud, as alleged by the applicant in its founding papers.

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The applicant submits that the court *a quo* erred in not taking into account the authorities relied upon by the applicant in regard to the 'fraud exception', which provide that a court will grant an interdict sought by a party in the same position as the applicant in the

event of it being established that the beneficiary under guarantee was a party to fraud in relation to the documents presented to the bank for payment.

It was also submitted on behalf of the applicant that I should have found that the first respondent's conduct in regard to the demand for payment was disingenuous and fraudulent. I understood this submission to be that I should make that factual finding on the basis of the *ipse dixit* of the applicant. What I found instructive in that regard is the fact that the first time that the claim of fraud was made by the
10 applicant was in its supplementary affidavit filed shortly before the hearing of the first respondent's application for a reconsideration of my order of the 15th of May 2018.

The applicant furthermore contends that the court *a quo* erred in not finding that the first respondent's demand does not comply with the terms of the guarantee. This is so despite the fact that the second respondent accepts that the latest demand which forms the subject of the urgent application complies with the requirements of the guarantee, and that it (the second respondent) had every intention of paying out on same.

20 The grounds on which the applicant bases this application for leave to appeal do not raise any new issues. All of the issues raised by the applicant in this application for leave to appeal have been dealt with in my original judgment. It is therefore not necessary to repeat those in full. Suffice to say that the submissions on behalf of the applicant in my view lose sight of the express wording of the

guarantee. Furthermore the authorities relied upon by the applicant are distinguishable from this matter. The fact of this matter is that it is so that there are disputes between the applicant and the first respondent as to whether the latter is owed money pursuant to a credit agreement. The first respondent has stated in its demand that the applicant indeed owes it a substantial sum. This is denied by the applicant. This however does not mean that the first respondent has committed a fraud. How, it can be asked, does the applicant's disputing of liability to the first respondent, who persist that the
10 applicant owes it monies pursuant to a 'credit agreement', gets elevated to a fraud.

The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in section 17 (1)(a)(i) of the Superior Courts Act 10 of 2013 which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the Judge concerned is of the opinion that "the appeal would have a reasonable prospect of
20 success".

In *Mont Chevaux Trust v Tina Goosen*, which is an unreported judgment of the Land Claims Court, case no: 14R/2014, the court held that the wording of this subsection raised the bar of the test that now has to be applied on the merits of the proposed appeal before leave should be granted. I agree with that view, which has also

now been endorsed by the SCA in an unreported judgment in *Notshokovu v The State*, case number: 157/2015 (7th of September 2016). In that matter the SCA remarked that an appellant now faces a higher and stringent threshold in terms of the Superior Court Act 10 of 2013 compared to the provisions of the repealed Supreme Court Act 59 of 1959.


I am not persuaded that the issues raised by the applicant in its application for leave to appeal are issues in respect of which another court is likely to reach different conclusions. I am therefore of
10 the view that there are no reasonable prospects of another court coming to different conclusions, be that on aspects of fact or law, to the ones reached by me.

The appeal does not in my judgment have a reasonable prospect of success. Leave to appeal should therefore be refused.

In the circumstances I make the following order:

The applicant's application for leave to appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

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 25/5/2018.
