



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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 14/12/2022

A Maier-Frawley
A Maier-Frawley

CASE NO: 2021/25614

In the matter between:

VBS MUTUAL BANK (IN LIQUIDATION)

Applicant

and

**THE UNIVERSAL SERVICE AND ACCESS AGENCY
OF SOUTH AFRICA**

Respondent

J U D G M E N T

(Application for leave to Appeal)

MAIER-FRAWLEY J:

1. For convenience, I will refer to the parties as they were denoted in the main judgment. VBS applies for leave to appeal to the Supreme Court of Appeal, alternatively, the Full Bench of this court, against part of the judgment and order handed down by me on 11 August 2022. USAASA has opposed the application for leave to appeal.

2. The grounds of appeal upon which leave to appeal is sought are set out in the notice of application for leave to appeal and need not be repeated in this judgment.
3. The core complaint pursued on behalf of VBS at the hearing of the matter is that when interpreting the true import of the payment undertaking and in concluding that by giving the payment undertaking, USAASA did not incur an independent payment obligation to VBS, I failed to consider the purpose of the payment undertaking, which was to provide security to VBS for the funding advanced by it to Leratadima.¹ A related complaint is that I failed to properly consider relevant conduct on the part of USAASA, more specifically, certain further payments that were made by USAASA into the VBS bank account pursuant to Leratadima's instruction to USAASA, on 19 April 2016, for payment to be made into the latter's Absa bank account.² Such conduct, so it was submitted, demonstrated that USAASA considered itself bound by its payment undertaking, which it also considered to be enforceable.
4. All further complaints raised in the Notice of application for leave to appeal, whilst not either individually or specifically pursued at the hearing of the matter, relate to the ultimate complaint that on a proper interpretation of the true import of the payment undertaking, I ought to have found that the payment undertaking created an enforceable payment obligation on the part of USAASA to pay VBS monies that were due and owing by USAASA to Leratadima.
5. In terms of section 17 of the Superior Courts Act, 10 of 2013:

¹ The purpose of the undertaking was recorded in par 4 of the judgment and was indeed taken into account and considered in the judgment in paras 28 and 50.

² Payments made by USAASA into Leratadima's Absa bank account were mentioned in paras 4 & 20 of the judgment, which should be read in conjunction with paras 19, 33, 40 and 50 of the judgment.

“(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) ...”

6. The use of the word ‘would’ in section 17 (1)(a)(i) of the Superior Courts has been held to denote ‘*a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.*’³ Such approach was endorsed in this division in *Acting National Director of Public Prosecutions and Others v Democratic Alliance*⁴ To this may be added, further cautionary notes sounded by the Supreme Court of Appeal in dealing with appeals. In *S v Smith*,⁵ it was stated that in deciding whether there is a reasonable prospect of success on appeal, there must be ‘*a sound, rational basis for the conclusion that there are prospects of success on appeal.*’ In *Dexgroup*,⁶ the SCA cautioned that the ‘*need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on*

³ *The Mont Chevaux Trust and Tina Goosen & 18 Others* (Case No. LCC 14R/2004, dated 3 November 2014), at para [6], followed by the Land Claims Court in *Daantjie Community and Others v Crocodile Valley Citrus Company (Pty) Ltd and Another* (75/2008) [2015] ZALLC 7 (28 July 2015) at par 3.

⁴ *Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at para [25], a decision of the Full Court which is binding upon me.

⁵ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

See too: *Mec for Health, Eastern Cape v Mkhitha and another* (1221/2015) [2016] ZASCA 176 (25 November 2016) where the following was said: “*An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.*”

⁶ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2012 (6) SA 520 (SCA) at par 24.

appeals that lack merit.' In *Kruger v S*,⁷ the Supreme Court of Appeal reiterated the need for a lower court to act as a filter in ensuring that the appeal court's time is spent only on hearing appeals that are truly deserving of its attention and that the test for the grant of leave to appeal should thus be scrupulously followed. In order to meet the test for the grant of leave to appeal, '*more is required than the mere 'possibility' that another court might arrive at a different conclusion.*' Referring to *S v Smith*, the Supreme Court of Appeal went on to state that it is not enough that the case is arguable on appeal or not hopeless, instead the appeal must have '*a realistic chance of succeeding.*' More recently, In *Notshokovu*,⁸ the Supreme Court of Appeal held that an appellant faces a higher and more stringent threshold in terms of the Act. Ultimately, In *Ramakatsa*,⁹ the Supreme Court of Appeal held that '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.'

7. The pleaded case for VBS in its founding affidavit was that USAASA (represented by its CEO) and VBS (represented by its CEO) concluded an agreement in terms whereof USAASA would make all payments due to Leratadima [under the supply contract], to VBS.¹⁰
8. At the hearing of this application, counsel for VBS submitted that payment into Leratadima's VBS bank account effectively constituted payment to VBS,

⁷ *Kruger v S* 2014 (1) SACR 647 (SCA) at paras 2 and 3

⁸ *Notshokovu v S* (157/15) [2016] ZASCA 1112 (7 September 2016) at par 2.

⁹ *Ramakatsa v African National Congress* (724/2019) [2021] ZASCA 31 (31 March 2021) at par 10, referring to *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); MEC Health, Eastern Cape [2016] ZASCA 176, par 17

¹⁰ Underlining my emphasis. See: Par 41 of the Founding affidavit.

based on the principle of *commixtio*, whereby funds paid into a customer's bank account become the property of the bank.

9. It was further submitted that when regard is had to the text of the payment undertaking, USAASA confirmed, in par 1 thereof, that it would make payment in respect of the supply and delivery of set top boxes to it by Leratadima in accordance with the provisions of clause 12 of the supply contract. In par 2, so it was submitted, USAASA recorded that it held an amount of R344,360 million to honour its indebtedness to Leratadima, with the 'clear implication' that sufficient funds were being held to honour the undertaking provided in par 4, i.e., to make all payments regarding the supply contract into Leratadima's VBS account. Thus it was submitted that on a 'reasonable interpretation', the irrevocability of the undertaking given in par 3, i.e., to pay Leratadima within 30 days of receipt of a signed delivery note and receipt, also relates to the undertaking in par 4, i.e., to make all payments regarding the supply contract into Leratadima's VBS account.

10. In paras 8 to 16 of the main judgment, I considered the relevant background matrix which preceded the payment undertaking being given by USAASA. In paras 17 to 26 of the judgment, I set out the sequence of events that followed upon the payment undertaking being given by USAASA until the main application was launched. In paras 35 -45 of the judgment, I set out the relevant context. Par 4 of the judgment records the purpose of the undertaking, which I considered in par 50 of the judgment. In para 47 of the judgment, I considered the text of the undertaking.¹¹ In all, I considered the relevant context, purpose and text in interpreting the meaning and import of the undertaking furnished by USAASA in arriving at the conclusions stated in paragraphs 48 & 49 of the judgment. Having considered the competing contentions of the parties against the triad of text, purpose and context, I

¹¹ In par 34 of the judgment, I set out the contents of the undertaking furnished by USAASA.

concluded that USAASA did not incur an independent payment obligation to VBS in terms of its letter of undertaking.¹² The reasons underpinning my conclusion, amongst others, were the following:

- 10.1. USAASA was not a party to the facility agreement concluded between VBS and Leratadima and therefore did not incur any obligations thereunder to either VBS or Leratadima.¹³ Nor did

¹² The judgment referred to *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 ALL SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18 and *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at paras 25, 26 & 51, regarding the relevant principles of interpretation to be applied by the court.

At the hearing of this matter, I was urged to consider *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at para 67, where the Constitutional Court, endorsing *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) (*Novartis*) at paras 27-28, stated as follows:

“This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. As the Supreme Court of Appeal held in *Novartis*:

‘This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. . . . A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing’ ”

Reliance was also placed on *Murray and Roberts Construction v Finnat Properties* 1991 (1) SA 508 A at 514 D-H for the submission that contracts should not be held lightly unenforceable. There the Appellate Court stated that “It must be allowed at once that PCI is composed in a somewhat staccato fashion, and that its terse language is often clumsy and not ideally clear. For example, it does not appear from clause 1 by what means and according to what criteria MRC and the Board are to achieve the ‘finalisation’ of the price for erven. PCI is, however, ‘a commercial document executed by the parties with a clear intention that it should have commercial operation’ (see the remarks of Colman J in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670F - H); and a Court should therefore not lightly hold its terms to be ineffective...”

These cases reiterate the same principles that *Endumeni* espoused, as elucidated in *Capitec Holdings*, and do not, with respect, change the result of the interpretative enquiry conducted by me.

¹³ See par 40 of the judgment read with fn 18 thereto. This is because, as pointed out in fn 18 of the judgment, the doctrine of privity of contract has the effect that USAASA cannot incur an obligation arising from an agreement it was not a party to.

USAASA consent to be bound by any of the terms of the facility agreement in its letter of undertaking. VBS was furthermore not a party to the supply contract and therefore acquired no rights in terms thereof.

- 10.2. USAASA in fact only commenced making payments due to Leratadima [under the supply contract] into the VBS account after receipt of Leratadima's written instruction on 19 April 2016 for it to do so.¹⁴
- 10.3. Nowhere in the letter of undertaking is there any reference that USAASA accepted any obligation to pay VBS. In terms of the express wording of the payment undertaking, all payments due to Leratadima were still to be made *to* Leratadima under the provisions of the supply contract, and not *to* VBS, as was VBS's pleaded case.
- 10.4. Clause 15 of the supply contract prohibited any cession of rights, save by mutual consent.¹⁵ Leratadima did not cede its right and entitlement to payment under the supply contract, to VBS. Without a cession of rights in favour of VBS, USAASA remained obliged in terms of the supply contract to make payment to Leratadima, and no one else. USAASA did not agree in terms of its undertaking to pay VBS and no new contract was either created substituting VBS as USAASA's creditor. Thus, USAASA and Leratadima remained bound in terms of their supply contract, which they could vary by mutual consent.¹⁶
- 10.5. Therefore the undertaking did not create an independent legal obligation but was merely a letter providing some comfort to VBS.¹⁷

¹⁴ Par 42 of the judgment.

¹⁵ Par 10.5 of the judgment.

¹⁶ Par 48 of the judgment.

¹⁷ Paras 48 & 49 of the judgment.

11. At the hearing of the application for leave to appeal, counsel for VBS acknowledged that payment into Leratadima's VBS bank account 'always remained' a discharge by USAASA of its payment obligations to Leratadima under the supply contract. The principle of *commixtio* does not assist VBS in circumstances where it is accepted that the underlying basis for payment by USAASA into the VBS account, remained a discharge by USAASA of its obligation to pay Leratadima for goods sold and delivered by it to USAASA under the supply contract. Put bluntly, the underlying basis for payment into the VBS account was not to give money to VBS, and nothing stated in the letter of undertaking changed USAASA's obligation to pay only its supplier (Leratadima) or, in the absence of cession, nothing in the letter of undertaking created an independent obligation for USAASA to pay VBS in place of Leratadima.¹⁸ In order to properly secure its position, VBS ought to have obtained a cession of the right of Leratadima to all payments due by USAASA to it. VBS failed to obtain that right. The absence of cession is effectively the death knell of VBS's claim. This fact underscored the reasoning in paras 47-50 of the judgment.
12. As pointed out in par 50 of the judgment, even accepting that VBS wanted to obtain security for the repayment of its loan to Leratadima or to limit its exposure in respect of monies advanced, by obtaining confirmation from USAASA that it would make all payments owing to Leratadima under the supply contract into Leratadima's VBS account, the letter of undertaking still did not create an independent obligation on the part of USAASA to pay VBS, an interpretation arrived at in paragraphs 48 and 48 of the judgment, which was fortified by the provisions of the facility agreement which were referred to in par 50 of the judgment, including the prohibition against cession (save by consent between USAASA and Leratadima) in the supply contract, as

¹⁸ See par 48 of the judgment.

alluded to in paragraph 48 of the judgment. In any event, as pointed out in the judgment, USAASA has in fact paid Leratadima for the goods ordered by it and supplied by Leratadima under the supply contract, and has thereby discharged its payment obligations under the supply contract in full.¹⁹

13. It will be recalled that on 7 February 2017, Leratadima instructed USAASA to make all payments due to it under the supply contract into Leratadima's Absa bank account,²⁰ albeit that it in so doing, it acted in breach of its obligations under the facility agreement.²¹ USAASA acted on that instruction by commencing payments into the Absa account on 9 October 2017. The fact that USAASA made a few payments into the VBS account after receipt of the aforesaid instruction, for reasons that remain entirely unknown, does not either derogate from the conclusion arrived at in paragraphs 48 to 49, read with par 50 of the judgment.²²
14. On a dispassionate reconsideration of the facts and the law I remain unpersuaded that there exists a reasonable prospect that a court of appeal could reasonably arrive at a different conclusion. No other compelling reason as to why leave to appeal should be granted has either been asserted.
15. For the reasons given, the application falls to be dismissed. I see no reason to depart from the general rule that costs follow the result. Both parties employed the services of two counsel. The applicant in fact employed the services of two senior counsel whilst the respondent employed the services

¹⁹ Para 4 read together with paras 18, 20 & 25 of the judgment.

²⁰ As mentioned in para 19 of the judgment.

²¹ See para 15.3, read with paras 19 & 50 of the judgment.

²² I must point out that par 18 of the judgment, which records the period during which payments were made by USAASA into the VBS account, erroneously records the last payment as having been made on **22 February 2022**, whereas the correct date is actually **22 February 2018**. (See fn 10 of the judgment.) This was not a point taken on appeal, and nothing turns on it, save that I was mindful that certain payments were made into the VBS account after Leratadima's instruction to USAASA to pay into its Absa bank account.

of one senior and one junior counsel. The matter warranted the engagement of two counsel and accordingly I will allow therefore in the order that I make.

16. Accordingly, the following order is granted:

ORDER:

- 1 The application for leave to appeal is dismissed with costs, including the costs attendant upon the employment of two counsel.



**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing:	9 December 2022
Judgment delivered	14 December 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 14 December 2022.

APPEARANCES:

Counsel for Applicant:	Adv M. Antonie SC together with Adv E. Van Vuuren SC
Attorneys for Applicant:	Werksmans Attorneys
Counsel for Respondent:	Adv C. Erasmus SC together with Adv M Ramaili
Attorneys for Respondent:	State Attorney.