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

CASE NO: 2018/40614

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

21/02/2022
DATE

SIGNATURE

In the matter between:

LASCAD TECHNOLOGY (PTY) LIMITED Applicant

and

ABSA BANK LIMITED Respondent

JUDGMENT

TERNENT, AJ:

[1] I will refer to the parties as they were in the main application.

[2] The respondent brings this application for leave to appeal the whole of my judgment and order which includes the costs order which I made, on 16 October 2019, granting judgment to the applicant.

[3] At the outset, the applicant's counsel raised an *in limine* point that the application for leave to appeal did not comply with Rule 49(4)(b), as also contained in her heads of argument. In this regard, Rule 49(4)(b) is not applicable to applications for leave to appeal and only applicable to appeals, once leave is granted. As such, nothing further needs to be said in relation to this *in limine* point which is not relevant and cannot be sustained.

[4] Insofar as Rule 49 is applicable, it is mandatory that the application for leave to appeal comply with Rule 49(1)(a) which requires that the grounds for leave to appeal must be clearly and unambiguously set out. The purpose of the Rule is to ensure that the opposing party understands what the grounds for leave are and the case which it has to meet.

[5] I am of the view that it is clear from the application for leave to appeal that the respondent seeks to rely on an abandoned legal contention, dealt with below. As such, I am of the view that the application for leave to appeal is clear and that there has been compliance with the Rule.

[6] Following thereupon, the applicant's counsel also submitted that because the contention had been abandoned before me, the respondent had waived its rights to re-argue the point and was *"taking a second bite at the cherry"*. I do not agree with the submissions made by the applicant's counsel in this regard.

[7] In the commentary to Erasmus to the Rule[1] and also in the decision of ***Alexkor Ltd and Another v The Richtersveld Community and Others***[2] it is clear that an expressly abandoned legal contention can be revived on appeal. As set out in the ***Richtersveld*** decision, *"The rationale for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of a decision that is clearly wrong."*[3]

[8] In my view, the respondent was permitted to raise this abandoned contention in its leave to appeal. The point was raised in the answering affidavit, albeit baldly, and was not a new issue or involved any unfairness to the applicant, which comprehensively dealt with it in the replying affidavit, and exposed, as appears below, that it lacked any merit. It is therefore unsurprising that the applicant now opposes this application for leave to appeal.

[9] I also do not agree that the respondent waived its right to raise what was a legal contention. As a consequence, the case of ***Image Enterprises CC v Eastman Kodak Co and others***[4] is distinguishable, to my mind,

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[1] Superior Court Practice, Erasmus Vol 2; page D1-666

[2] 2004 (5) SA 460 (CC)

[3] Paragraph 43 at pages 476-477

[4] 1989(1) SA 479 (T) at 486(C)

and has no application here.

[10] I will now turn to the only issue raised in this leave to appeal. The contention made was that the applicant had failed to make out a cause of action in its founding affidavit in that it had not averred that all of the suspensive conditions set out in the agreement of loan[5], contained in a banking facility letter, had been fulfilled.

[11] That said, the respondent's counsel, during argument, conceded that the application for leave to appeal had no substance and as such should be dismissed.

[12] Needless to say, and despite her doing so, I would nevertheless have dismissed this application for leave to appeal.

[13] The applicant's case, simply put, is that the principal debtor breached the agreement of loan and defaulted on its repayments resulting in the judgment sought against the respondent, as surety and co - principal debtor, for payment of the principal debt and to perfect its security as provided for in the notarial bond with number BN53816/1996.

[14] In the application for leave to appeal I was referred to the decision of ***Ducoudray v Watkins***[6] in support of the ground raised, by the respondent. In this case, summary judgment had been granted and leave was given to appeal the summary judgment order because the plaintiff, in its particulars of claim, had failed to allege certain suspensive conditions

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[5] Clauses 2 and 3 in the facility agreement

[6] 2010 JDR 0381 (KZP)

had been satisfied within the time period specified in the contract in question. The Court found that because a complete cause of action had not been pleaded in the particulars of claim the affidavit in support of the summary judgment application did not comply with Rule 14(3)(c) and the deponent to the affidavit and the plaintiff had failed to verify the cause of action as required by the Rule.

[15] I am not of the view that this case is apposite to this matter. It is trite that summary judgments require strict compliance with the rule. This is so, in order to avoid draconian judgments being given in circumstances where the defendants are not given an opportunity to present their evidence in support of their defence in a trial in due course. It is for this reason that a *prima facie* defence passes muster and/or as in this case an exception, as it were, that a cause of action was not made out in the particulars of claim and was not affirmed in the summary judgment affidavit.

[16] The applicant brought its claims using the application or motion procedure. It is trite law that the founding affidavits in motion proceedings must set out the cause of action and the facts or evidence upon which the applicant relies for its case[7].

[17] Accordingly, *"It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his [it's] case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in*

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[7] ***Hart v Pinetown Drive – In Cinema (Pty) Ltd*** 1072 (1) SA 464 (D0 @ 469 C-E and ***Venmop (Pty) Ltd v Cleveland Proper***ties 2016 (1) SA 78 (G) @ 86A

the replying affidavit."[8]

[18] In exercising my discretion, I am of the view that this is certainly not one of those cases in which the founding affidavit resembles a skeleton.

[19] It is also not disputed, alternatively not *bona fide* disputed, by the respondent, in the face of bare denials, that:

19.1 An agreement was concluded on 12 November 2013, on the terms and conditions as set out in the documents comprising the banking facility letter, which was annexed to the founding affidavit as Annexure "**AB4**";

19.2 The agreement was conditional *inter alia* upon the provision of an unlimited suretyship from the respondent in favour of the applicant as collateral for the principal debtor's indebtedness;

19.3 The condition was complied with when the respondent gave the unlimited suretyship;

19.4 Monies were advanced to the principal debtor;

19.5 The applicant performed its obligations and loaned the monies; and

19.6 The principal debtor defaulted and the respondent became

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[8] ***Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others*** 1974 (4) SA 362 (T)

liable, by virtue of its suretyship obligations, and the security tendered under the notarial bond.

[20] Mr Richards, the deponent to the founding affidavit, baldly alleged that the applicant failed to expressly aver that certain of the suspensive conditions were fulfilled. In this regard he specifically refers to the suretyship and cession of loan accounts by NRA Properties CC (" NRA Properties") and the unlimited suretyship and cession of loan accounts by the respondent.

[21] In reply, the applicant demonstrates unequivocally that security was furnished to it. This included:

21.1 Mr Richards signing a limited suretyship as surety and co-principal debtor, together with the principal debtor, incorporating a cession of claim/loan funds, on 25 February 2013, on behalf of NRA Properties;[9]

21.2 A February 2013 letter from the applicant to the respondent confirming that NRA Properties ceded its loan account in the name of the principal debtor to the applicant;[10]

21.3 Mr Richards signing a general cession, on 26 August 2006, on behalf of the principal debtor;[11] and

21.4 Mr Richards signed an unlimited deed of suretyship and cession

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[9] Annexure **RA3(1), RA**

[10] Annexure **RA3(2), RA**

[11] Annexure **RA3(4), RA**

of loan account, on 4 August 2006, on behalf of the respondent.[12]

Accordingly, Mr Richards knew full well that all of the conditions had been fulfilled.

[22] To the extent that the applicant allegedly may not have expressly alleged in the founding affidavit that all of the suspensive conditions had been fulfilled, it was submitted that these conditions were solely for the applicant's benefit. This appears from clause 2 of the facility agreement which allows the applicant, at its discretion, to waive any collateral, so required.

[23] In my view, and in the exercise of my discretion, the respondent's contention is wholly without merit, and opportunistic. The applicant's case was sufficiently set out in the founding affidavit. Indeed, there is also no question, in the light of the evidence placed before me in the replying affidavit, that these conditions were fulfilled. Furthermore, the conditions were solely for the applicant's benefit, all of which could have been waived by it. On the probabilities, I am satisfied that the respondent and Mr Richards raised a lonely skittle which was easily knocked down.

[24] Additionally, at the initial hearing before me the respondent, correctly in my view, abandoned the contention. The respondent, having done so, never sought to strike the evidence from the replying affidavit or seek a postponement to deal with it or even suggest that these undisputed allegations were in any way prejudicial to it. The reason is clear - there was no merit in this point then or now. In my view, counsel in the main

[12] Annexure **"AB2", FA**

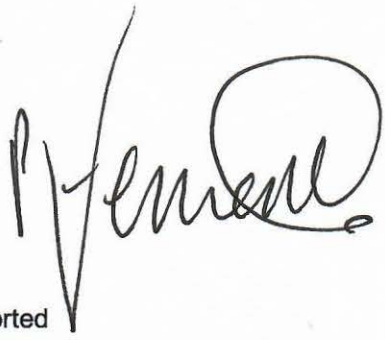
application and here appreciated that a proper case had been made out in the founding affidavit by the applicant, and as I expressly found in my judgment.

[25] Applications for leave to appeal are regulated by section 17(1) of the Superior Courts Act 10 of 2013. The threshold for granting leave to appeal has been raised.[13] Although previously leave to appeal would be granted if there was a reasonable prospect that another Court might come to a different conclusion, now there must be a *"measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against"*. Put differently, the Court hearing the leave to appeal application must be certain that another Court not *"may"* or *"might"* but would come to another conclusion.[14] In the circumstances, I am of the view that there is no reasonable prospect that another Court would come to a different conclusion.

[26] Clause 15 of the suretyship agreement concluded between the applicant and the respondent provides for costs in legal proceedings instituted by the applicant to be awarded on an attorney-client scale.

[27] Accordingly, the application for leave to appeal is dismissed with costs on the attorney-client scale.

P V TERNENT
Acting Judge of the High Court of South Africa



[13] ***Mont Cheveaux Trust v Tina Goosen*** LLC 14 R/2014 Unreported

[14] ***Jacob Gedleyihlekisa Zuma v The Office of the Public Protector and Others*** (99766/2015) [2018] ZAGDP (9 November 2018) at paragraph 62 and ***S v Notshokovu*** (Case No. 157/2015) [2016] ZASCA 112 (7 September 2016) – SCA Unreported

DATE OF JUDGMENT: 21 February 2022

DATE OF HEARING: 21 October 2021 on Virtual Teams Platform

APPEARANCES:

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