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

CASE NO: 2018/7863

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

5/5/2023
DATE

[redacted]
SIGNATURE

In the application by

MOKKEN, JAN ALEXANDER	Applicant
and	
INTELISEED (PTY) LTD	Respondent

In re

INTELISEED (PTY) LTD	Plaintiff
and	
MOKKEN, JAN ALEXANDER	Defendant

Neutral Citation: *Mokken v Inteliseed (Pty) Ltd* (Case No. 2018/7863) [2023] ZAGPJHC 428 (5 May 2023)

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal – section 17(1)(a)(i) of Superior Court Courts Act, 10 of 2013

Interpretation of contract – text, context and purpose

Order

[1] In this matter I make the following order:

1. *The application for leave to appeal is dismissed;*
2. *The applicant for leave to appeal is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for leave to appeal in terms of section 17(1)(a)(i) of the Superior Courts Act, 10 of 2023 against a decision handed down by me on 7 March 2023. I refer to the parties as they were referred to in the judgment.

[4] In the judgment sought to be appealed, I

4.1 analysed the credit application and suretyship document in paragraph 8;

4.2 briefly set out the evidence in paragraphs 9 to 22, and 25 to 36;

4.3 dealt with the absolution application in paragraphs 23 and 24;

4.4 set out aspects of the law in paragraphs 37 to 54, and dealt with specifically

4.4.1 with the *Endumeni*[1] judgment in paragraph 38;

4.4.2 with the context in paragraph 44, and

4.4.3 with *iustus error*, misrepresentation, and reliance theory in paragraphs 46 to 54.

[5] The grounds are set out in the application for leave to appeal dated 29 March 2023.[2]

[6] The defendant's attorney uploaded an incomplete transcript[3] of extracts from the evidence onto CaseLines but due to an oversight or communication failure did not inform the plaintiff's attorney of this addition to the CaseLines record, and for this reason the appeal was argued over two days to provide the plaintiff's counsel and attorney with adequate time to peruse the transcript.

[7] Mr. van der Merwe argued that the plaintiff's first witness, Mr. Erasmus, testified[4] initially that the credit application form that contains the suretyship in issue was signed by the defendant in the kitchen on the farm where the defendant carried on business after he and the defendant had gone through (or 'walked through') the form. Mr. Lindeque (the plaintiff's second witness) was also present in the kitchen but did not contribute to the conversation.

[8] Mr Erasmus testified that the defendant did not complete the form in his presence but they went through it page by page.[5] Later in the transcript Mr Erasmus again referred to the discussion but did not mention that the defendant signed in his presence.[6] Then when cross-examination recommenced after a lunch adjournment[7] Mr. Erasmus said, according to the transcript, *"It was already initiated and signed with, from Mr Mokken."*

[9] These words do, as Mr van der Merwe submits, create the impression that the

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1 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
2 CaseLines 21-1.
3 CaseLines 022-1.
4 CaseLines 022-33 line 10. See also 022-80 line 20.
5 CaseLines 022-34 lines 10 to 19., 022-85 lines 10 to 20.
6 CaseLines 022-78 to 79.
7 CaseLines 022-85 line 10 onwards.

defendant signed the form not in Mr. Erasmus' presence, but before the meeting. However, what was then put to Mr. Erasmus adds to the confusion: Mr. van der Merwe put to Mr. Erasmus:[8] *"So you arrive on the premises that according to you the form is already completed and he signed and then you go through the form?"* The witness answered in the affirmative. This again seemingly confirms the earlier evidence that when Mr. Erasmus arrived for the meeting the form was already completed, then the defendant signed they went through the form.

[10] One must of course keep in mind that any transcript is accurate only insofar as it was audible to the transcriber. The uncertainty as to whether the defendant signed in the presence of Mr. Erasmus or before Mr. Erasmus arrived on the farm is unfortunate and I assume in favour of the defendant and for the purposes of this judgment that Mr. Erasmus changed his evidence from saying that the defendant signed in his presence to saying that the defendant's signature was already on the form when he arrived at the farm. I do not however regard the question whether the defendant signed during the meeting or signed before his two guests arrived and before a discussion took place as one of cardinal importance. On any of these two versions, the defendant had sight of the document, could read it, could ask his staff to read it, could take legal advice if he so wishes, and could debate aspects of it with Mr. Erasmus as the plaintiff's senior staff member who dealt with him.

[11] The defendant's evidence of course was that the meeting in the kitchen never took place. Mr. Erasmus never 'walked him through' the form. The form was delivered to the farm, he asked his staff whether there was a suretyship and Ms Burger assured him there was none after reading the document. She did not testify and there is no explanation as to whether she saw the suretyship clause, and if not why she did not notice the suretyship clause or how she could have missed it. She told the defendant (who of course did testify) that it did not contain a suretyship even though the defendant had already noticed the word '*borgstelling*.'

[12] The defendant was on his evidence the victim of an intentional[9] misrepresentation[10]

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8 CaseLines 022-86 lines 1 to 10.

9 Mr. Erasmus testified that he cannot recall a telephone conversation with the defendant the day before the form was signed, but he did not testify that he might have made the intentional misrepresentation to the defendant but has now forgotten about it as suggested by the defendant's counsel.

10 See also Judgment, para 57.

by the plaintiff's witnesses but did not rely wholly on the misrepresentation. He relied on Ms Burger and on his evidence Ms Burger was instructed to read the form and having done so, assured him that it contained no suretyship.

[13] In paragraph 36 of the judgment I dealt with the discrepancy between the defendant's evidence in court and his evidence in an affidavit in the summary judgment application, and I said that no attempt had been made to explain the discrepancy. Mr. van der Merwe pointed out in argument that there was an explanation, namely that the affidavit was drafted by an attorney who made an error. To my mind this is no explanation at all: It is understandable that an attorney may make an error, but if the affidavit is then signed under oath by a deponent who says that he had read it and that it was true and correct, when it was not true and correct, the blame can not be laid at the door of the attorney and nor is there an explanation.

[14] The same criticism can be levelled at Mr. Erasmus who signed an affidavit in support of an application for summary judgment confirming an allegation in the particulars of claim that the defendant attended at the offices of the plaintiff to complete the application form. The practice of deponents to sign affidavit placed in front of them without verifying the contents must be deprecated.

[15] The defendant gave his interpretation of section 6 of the General Law Amendment Act, 50 of 1956.[11] It is not known when he formed this view of the legislation, i.e. at the time when the form was signed or only later, and whether his interpretation of the Act was known to, or influenced Ms Burger.

[16] The defendant was never in any doubt about the identity of the firm he contracted with on behalf of Lijane and therefore of the identity of creditor. He knew and understood that it was the firm he knew as Inteliseed, the firm that Mr. Erasmus and Mr. Lindeque

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[11] Judgment footnote 9. I point out that *ignorantia iuris non excusat* is not part of our law. It suffices to refer in this context to the headnote of *S v De Blom* 1977 (3) SA 513 (A): *"At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law" has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the present day concept of mens rea in our law. But the approach that it can be expected of a person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved."*

worked for.

16.1 The defendant never had any relationship with Terason. Terason never supplied seeds to Lijane.

16.2 It was not the purpose of the credit application to establish a supplier/user relationship between Lijane and Terason. The purpose was to continue a long-standing commercial arrangement between Lijane and the plaintiff.

16.3 The reference to '*verskaffer'* in clause 17 on page 4 of the document is an reference to plaintiff, irrespective of whether the defendant laboured under a misapprehension as to the name of the firm. This is so particularly when regard is had to the phrase quoted in paragraphs 8.4, referred to below.

[17] There is also no doubt that the "STANDAARD HANDELSVOORWAARDES" referred to at the bottom of page 3 of the credit application documents that are expressly made applicable between the applicant for credit and "INTELLISEED (EDMS) BPK" are the "TERME EN VOORWAARDES VAN KONTRAK EN BORGSTELLING" that appear at the top of the very next page. It was not the defendant's evidence that he was confused by the phrases quoted in paragraphs 8.4 and 8.7 of the judgment and no other construction of these phrases was contended for.

[18] It was also argued that there was no evidence to suggest that the plaintiff would not have entered into the contract had the suretyship clause been deleted. There was no evidence to the contrary either but the question calls for speculation in any event. The true test was expressed by the Supreme Court of Appeal in *Steyn v LSA Motors Ltd*,[12] namely whether the reasonable man in the position of the offeree would have accepted the offer made by the offeror in the credit application form in the belief that it represented the true intention of the offeror. The test is objective, not subjective.

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[12] *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) 61C – E.

The applicable principles in an application for leave to appeal

[19] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused.

[20] In *KwaZulu-Natal Law Society v Sharma*[13] Van Zyl J held that the test enunciated in *S v Smith*[14] still holds good:

> *"In order to succeed, therefore, the appellant must convince this 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 than 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."*

[21] This passage must be qualified to some extent. In an *obiter dictum* the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*[15] held that the test for leave to appeal is more stringent under the Superior Courts Act, 10 of 2013 than it was under the repealed Supreme Court Act, 59 of 1959. The sentiment in *Mont Chevaux Trust* was echoed by Shongwe JA in the Supreme Court of Appeal in *S v Notshokovu*[16] and in other matters.[17]

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13 *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) para 29.
14 *S v Smith* 2012 (1) SACR 567 (SCA) para 7.
15 *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6.
16 *S v Notshokovu* 2016 JDR 1647 (SCA), [2016] ZASCA 112 para 2.
17 See Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5; *Lakaje N.O v MEC: Department of Health*

[22] I am the view that the appeal would not have any reasonable prospect of success and that the threshold for leave to appeal to be granted, was not met.

[23] I therefore make the order in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **5 MAY 2023**.

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INSTRUCTED BY:	COETZEE ATTORNEYS
COUNSEL FOR APPLICANT / DEFENDANT:	A R VAN DER MERWE
INSTRUCTED BY:	WYNAND DU PLESSIS ATTORNEYS
DATE OF ARGUMENT:	24 & 26 APRIL 2023
DATE OF JUDGMENT:	5 MAY 2023

[2019] JOL 45564 (FB) para 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26,