IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: 1144/2019P

In the matter between:

MARSING AND COMPANY (PTY) LTD **APPLICANT**

and

ANDRE RUDY REDINGER **RESPONDENT**

ORDER

The following order is granted:

1. The respondent's application for leave to appeal is dismissed with costs, such costs to be on the attorney and client scale.

JUDGMENT

E Bezuidenhout J

[1] The respondent applies for leave to appeal against a judgment by my now retired brother, Van Zyl J, which was handed down on 5 February 2024. The application was filed on 8 February 2024 and allocated to me on 12 March 2024. Due to me being away on circuit during April to May 2024, the application was only heard on 13 June 2024. The grounds of appeal were set out in the application and read as follows:

'1. The Court *a quo* erred in holding that there was no material dispute of facts on the papers and that as the Applicant had elected to have the matter determined on the papers, the matter was not possible of proper determination on the papers.

2. The Court erred in not deciding the matter on the version of the Respondent as set out in the answering affidavit.

3. The Court erred in ignoring the material disputes of fact and deciding the matter effectively on the version of the Applicant and /or the probabilities.

4. The Court erred in not giving effect to the disputes raised by Respondent which constitute defences in the Respondent's hands (as they had been in the hands of Dalton Sugar Company, (Pty) Limited (In liquidation).

5. The Court erred in not holding that those clauses of the agreement which negated the raising of these substantial defences were contrary to public and that the court should not enforce them.

6. The Court erred in not developing the common law to entitle the Respondent to raise the material and substantial defenses that he raised in the answering affidavit.

7. Alternatively, the Court erred in not limiting the application of such clauses to a reasonable degree.

8. The Court *a qou* erred in not concluding that the clauses of the agreement referred to in the judgment at paragraph [38] were offensive to public policy and should not be enforced.

9. The Court erred in granting Applicant judgment.'

[2] I do not intend setting out the facts of the matter in any detail, as they appear clearly from the judgment. It suffices to say that the applicant sought judgment against the respondent in the amount of R9 630 217.28 in his capacity as surety and co-principal debtor for Dalton Sugar Company (Pty) Ltd (Dalton), which judgment was granted. Dalton has subsequently been liquidated.

[3] Counsel for the applicant as well as counsel for the respondent submitted well-considered written submissions in respect of the application for leave to appeal, for which

I am grateful, bearing in mind that I have not previously dealt with the matter. I was further urged to consider the comprehensive heads of argument that were submitted previously when the matter was argued before Van Zyl J. Both counsels also made well-reasoned and passionate submissions before me, all of which I have carefully considered.

[4] Before I deal with the merits of the application, it is perhaps appropriate to say something about the test to be applied in applications of this nature. In terms of section 17(1)*(a)*(i) of the Superior Courts Act 10 of 2013, leave to appeal may only be given where the judge is of the opinion that 'the appeal would have a reasonable prospect of success', or in terms of section 17(1)*(a)*(ii), if there is 'some other compelling reason why the appeal should be heard'.

[5] In *The Mont Chevaux Trust v Goosen and others,*[1] Bertelsmann J (in an obiter dictum) held that:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, *see Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'

[6] The test was also considered in *S v Smith*[2] where the court held:

'What the test of reasonable prospects of success postulates is 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 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.' (Footnotes omitted.)

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[1] *The Mont Chevaux Trust v Goosen and others* [2014] ZALCC 20; 2014 JDR 2325 (LCC) para 6.
[2] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

[7] In *Four Wheel Drive v Rattan NO*,[3] Schippers JA, with reference to *S v Smith supra,* referred to the principle that leave to appeal should only be granted where 'a sound, rational basis [exists] for the conclusion that there are prospects of success on appeal'. The court is required to test the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles. The court a quo was also criticised for granting leave to appeal when there were no reasonable prospects of success, which resulted in the parties being put through the inconvenience and expense of an appeal without any merit.

[8] It was held in *Democratic Alliance v President of the Republic of South Africa*[4] that 'A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.'

[9] Counsel for the applicant, Mr Sawma SC, referred in his heads of argument to *Ramakatsa and others v African National Congress and another*[5] and submitted that it was now settled by the Supreme Court of Appeal that the test remains that of reasonable prospects which '… 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'.

[10] Returning to the present application, counsel for the respondent, Mr Dickson SC, raised a number of issues, starting with the submission that the court erred in not referring the matter for oral evidence. It was submitted that the court erred by deciding the case on the applicant's version and that it created an unfair hearing where one of the parties wanted his day in court through the hearing of oral evidence. It was also submitted that it was an appealable irregularity where a request for oral evidence was made and then ignored by the court. Mr Dickson SC referred extensively to *South Coast Furnishers CC*

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[3] *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124, 2019 (3) SA 451 (SCA) para 34.
[4] *Democratic Alliance v President of the Republic of South Africa and others* [2020] ZAGPPHC 326 para 5.
[5] *Ramakatsa and others v African National Congress and another* [2021] ZASCA 31 para 10.

v Secprop 30 Investments (Pty) Ltd ('*Secprop*')[6] where the full court, on appeal, set aside a judgment and referred the matter for trial. Govern J, writing for the full court, referred to[7] the classic authority on this issue, namely *Plascon–Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[8] It does not appear from the heads of argument submitted previously that reliance was placed on *Secprop* before Van Zyl J.

[11] I was referred to the following para in *Secprop* where it was held that:[9]

'I conceive that the test to be applied as to whether a genuine factual dispute has been raised on the papers is similar in nature to that in a trial at the point where the plaintiff's case has been closed and absolution is sought before the defence is embarked upon. Here, the test is whether there is evidence upon which a reasonable presiding officer might or could find for the plaintiff. If there is, absolution should be refused. The court does not enter into an evaluation of the credibility of witnesses unless they have "palpably broken down, and where it is clear that they have stated what is not true". Similarly, in motion proceedings, a robust approach can only be taken, and the matter decided on the probabilities, if that clear falsity emerges from the papers. This was clearly stated by Leon J in *Sewmungal and Another NNO v Regent Cinema* where he said:

> "There are, however, more serious improbabilities to which the learned Judge has referred. But they are not of such a nature as to justify the conclusion that they are so inherently improbable that the respondent's version is incredible."

In the light of what I have set out above, I do not believe that it can be said that the version of the respondent raises "bald or uncreditworthy denials . . . fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers" or is "fanciful and wholly untenable," or so "inherently improbable that the respondent's version is incredible". I am satisfied that the respondent "has in [its] affidavit seriously and unambiguously addressed the fact said to be disputed". In the absence of "direct and obvious contradictions" judgment on the credibility of the deponent to the respondent's answering affidavit must be left open.' (Footnotes omitted.)

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[6] *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZP).
[7] Ibid para 5.
[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). Gorven J also made reference to *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and another* [2010] ZASCA 66; 2011 (1) SA 8 (SCA) para 21 and *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.
[9] *Secprop* para 15.

[12] *Secprop* has been referred to in a number of cases, mostly because of its convenient summary of the test formulated by the courts when determining whether real, genuine bona fide disputes of fact exist.[10] In *Rainmaker Logistics (Pty) Ltd v Gravitas Capital (Pty) Ltd*[11] Keightley J referred to *Secprop* and held as follows:

'24. On my reading of the full bench decision in one of the cases referred to, viz. *South Coast Furnishers CC* (see below), the court did not purport to supplant the well-established principles for determining when it is permissible to reject a respondent's version where disputes of facts arise in motion proceedings. In fact, the court not only cited the above dictum from *NDPP v Zuma*, but also applied those principles in upholding the appeal. Where the court in *South Coast Furnishers CC* makes reference to the need for "*clear falsity*" to emerge from the papers, it is in the context of the evaluation of the creditworthiness of a witness. It does not seem to me to have been intended to introduce a stricter test than the one already laid down by the courts to determine when it is appropriate to reject a respondent's version on the papers.

25. What does appear to be clearly demonstrated in *South Coast Furnishers CC* is that a court must consider the nature of any alleged improbabilities in the respondent's version before being robust in rejecting them. These probabilities must be considered within the context of all the evidence before the court, including the applicant's own papers. The court stated in this regard that:

> "These submissions (of the applicant regarding the alleged improbabilities in the respondent's version) have some force. However, they cannot be viewed in isolation. There are features of the applicant's case which must be weighed against the apparent improbabilities on which the applicant relies."' (Footnotes omitted.)

[13] I agree with the sentiments expressed by Keightley J that *Secprop* was not intended to introduce a stricter test and, furthermore, that a court must consider the probabilities of the respondent's version before rejecting them. In *Secprop,* the court dealt with the particular facts of the matter and found that it should have been referred for the hearing of oral evidence. Likewise, in the present matter, the court had to deal with the particular facts of the matter and ultimately found that there were no factual conflicts which are 'sufficiently material, so as to prevent the matter from being decided upon the papers,

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[10] See for instance: *S v Sewnarain* 2013 (1) SACR 543 (KZP) para 31; *Johnstone v Shebab* 2022 (1) SACR 250 (GJ) para 27; and *Moonsamy v Govender* 2018 JDR 2051 (KZD) where Govern J, with reference to his previous judgment, found that certain denials were 'false and untenable'.

[11] *Rainmaker Logistics (Pty) Ltd v Gravitas Capital (Pty) Ltd* [2018] ZAGPJHC 685; 2019 JDR 0268 (GJ) paras 24-25.

as opposed to a referral to trial'.[12] The court did not expressly deal with the improbabilities in the respondent's version or whether it was in any way false and untenable, perhaps being kind to the respondent, but it examined the possible claims and, to a lesser extent, the defences raised by the respondent and concluded that there were none.

[14] It was submitted on behalf of the applicant that the respondent's submissions failed to consider paras 33 and 43 of the judgment where the court found that the alleged disputes purportedly raised by the respondent were irrelevant in that they were precluded by the terms of the facilities agreement concluded between the parties.

[15] It was further submitted on behalf of the respondent that the court failed to adequately deal with the various defences raised by him in his answering affidavit, which inter alia included that the reliance by the applicant on certain draconian clauses was contrary to public policy and should not be enforced. The respondent contended that the common law should be developed to align such clauses with constitutional values. Reference was made to *Barkhuizen v Napier* ('*Barkhuizen*').[13]

[16] It was submitted on behalf of the applicant that the court in its judgment referred to *Barkhuizen* but correctly observed that it had been qualified and explained in the subsequent judgment of *Beadica 231 CC and others v Trustees, Oregon Trust and others* ('*Beadica*').[14] It was further submitted that the court correctly held that the respondent, who bore the onus, had failed to demonstrate that any of the clauses complained of were offensive within the meaning of the *Barkhuizen/Beadica* test. The court had also correctly found, it was submitted, that the respondent had not advanced any factual circumstances which would render it against public policy to enforce the clauses in the particular circumstances of the matter. By way of example, reference was made to clause 28 of the credit agreement in terms of which Dalton had to inform the applicant of any breach or defect within three days of such breach. This was not done, and the respondent gave no explanation why the clause was not complied with.

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[12] Van Zyl J's judgment para 43.
[13] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC).
[14] *Beadica 231 CC and others v Trustees, Oregon Trust and others* [2020] ZACC 13; 2020 (5) SA 247 (CC).

[17] A number of further issues were raised by the parties, all of which I have considered, but I will concentrate on the issue of the alleged disputes of facts, necessitating a referral to oral evidence. It was submitted on behalf of the applicant that the respondent's version was lacking in bona fides and contained many hollow and bald allegations and that he furthermore failed to give a cognisable explanation for the state of affairs. Reference was, inter alia, made to 16 email communications that passed between the parties between July and November 2018 regarding Dalton's liability to the applicant, wherein Dalton's liability was admitted without any hint of complaint or dispute and which the respondent failed to address in any detail in his answering affidavit. I pause to mention that it emerged from the application papers that a winding-up application was brought against Dalton, wherein all parties filed lengthy affidavits, to which extensive reference was made in the present application. The applicant filed a replying affidavit in the winding-up application wherein it dealt in detail with the defences and claims relied upon by Dalton, which were in essence the same as those raised by the respondent in the present application. The respondent was invited to address the allegations of the applicant in that replying affidavit in his answering affidavit to be filed in the present application, which would have been a perfect opportunity to demonstrate the existence of bona fide disputes of fact. The respondent failed to do so. It was submitted on behalf of the applicant that even after reading the applicant's reply and the number of annexures attached to it, the respondent would have been able to seek leave to file a further affidavit, as permitted by Uniform rule 6(5)*(e)*, yet he failed to do so.

[18] I have given careful consideration to the voluminous application papers, the judgment by Van Zyl J, and the detailed submissions made before me. I am of the view that the respondent has failed to convince me that he would have reasonable prospects of success on appeal or that a court of appeal would arrive at a different conclusion than the court. No judgment is ever perfect and often a judge would consider certain aspects which would not necessarily be mentioned in a judgment. I am of the view that the respondent has failed to establish the existence of bona fide factual disputes, justifying a referral to trial. There is no merit in the submission by the respondent that the request to refer the matter to oral evidence was ignored by the court, as it was clearly considered in

para 43 of the judgment. In my view, the court would have been fully justified in arriving at a conclusion that the version of the respondent is false and untenable, and the robust approach of the court was accordingly justified. The matter was furthermore clearly capable of being decided on the probabilities. The respondent has also failed to convince me that the court erred in rejecting his defences. Although the court did not address it in great detail, I am of the view, having considered the papers, that the various defences can safely be rejected. The court, in my view, also correctly found that the respondent has failed to establish that the alleged offensive clauses were against public policy.

[19] As far as the issue of costs is concerned, it was submitted on behalf of the applicant that the credit agreement makes provision for costs to be paid on the attorney and client scale. I see no reason to deviate from the general rule, namely that costs follow the result.

[20] I accordingly grant the following order:

1. The respondent's application for leave to appeal is dismissed with costs, such costs to be on the attorney and client scale.

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E BEZUIDENHOUT J

Date of hearing: 13 June 2024
Date of judgment: 2 August 2024

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