

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 1483/2011

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

Date:

WHG VAN DER LINDE

In the matter between:

Nedbank Limited

Applicant

And

Binder: Joseph Frederick

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Van der Linde, J:

[1] This is an application for leave to appeal against a judgment I gave on 7 April 2016 in a trial action between the above parties. The applicant was the plaintiff and had sued the respondent for capital, interest and costs, in his

capacity as a surety for a principal debtor who, according to the applicant, owed it money.

[2] In the event I held that the principal debtor did not owe the applicant any money, and so neither did the surety. The order I made at the end of the judgment was therefore to have dismissed the claim with costs.

[3] The application for leave to appeal is unopposed. There is also no application for leave to appeal against the order I made at the end of the judgment, nor against any part of the reasoning that led to the order. The application for leave to appeal is against a decision that I made obiter in the course of the judgment. This decision was that the clause in the suretyship which entitled the applicant to rely on a certificate of balance, was invalid.

[4] This application is complicated by the fact that the decision sought to be appealed did not dispose of any part of the relief claimed by the applicant in the trial. Nor would an appeal against the decision *“lead to a just and prompt resolution of the real issues between the parties,”* as envisaged in s.17(1)(c) of the Superior Courts Act 10 of 2013.

[5] I accordingly raised with Mr Wasserman, SC who appeared with Mr Wickins for the applicant (neither appeared for the plaintiff at the trial), whether the decision concerned was appealable. Counsel submitted that it was, and drew my attention to the recent judgment in the Constitutional Court in *City of Tshwane Metropolitan Municipality v Afriforum and Another*, [2016] ZACC 19 (19 May 2016) in which the majority referred with approval to *Zweni v Minister of Law and Order*, 1993 (1) SA 523 (A) at 532J to 533 A.

[6] Zweni is of course authority for the proposition that the judgment (or order) appealed against must have disposed of at least a substantial portion of the relief claimed in the main proceeding. Afriforum however also held at [40] that the common law approach to appealability is subservient to the supreme law which prescribes that the constitutional interests of justice is the only requirement for appealability. Granted, this was said in the context of interim orders and the previous statute; but one would have thought that final orders and the current statute are an a fortiori case.

[7] In the present matter there is no live issue between the parties concerning the interpretation I gave to the certificate clause. But I accept counsel's submission that if the applicant cannot appeal, the applicant is left in the invidious position of having a judgment strike down a clause in its standard form suretyships, a matter of far-reaching consequences, without having the opportunity to persuade a court of appeal that I was wrong.

[8] In my view the interests of justice therefore require that my decision concerning the validity of clause 6 of the suretyship be appealable. I accept too that there is a reasonable prospect of success on appeal; matters of interpretation of written instruments can often be bedeviling.

[9] The application was brought late. There is an application for condonation supported by an affidavit. It explains how the applicant was first advised one way and then the other. There is no prejudice to the respondent. In the circumstances the condonation should be granted.

[10] I believe that the full court of this division is the appropriate forum for the appeal. In the result I make the following order:

- (a) The application for condonation for the late filing of the application for leave to appeal, dated 17 August 2016, is granted.
- (b) The applicant is granted leave to appeal to the full court of this division against the decision in paragraph [19] of my judgment of 7 April 2016, in which I found that clause 6 of the suretyship, exhibit D in the trial, is invalid and unenforceable.
- (c) No order as to costs issues.

WHG van der Linde
Judge, High Court

Date of hearing: 22 August, 2016
Judgment Date: 24 August, 2016

For the applicant: Adv. JG Wasserman, SC
With him: Adv. GD Wickins
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