REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NUMBER: 2019/07842

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

Date Signature

VEGA TURNKEY PROPRIETARY LIMITED First Applicant

(REGITSRTATION NUMBER 2012/083466/07)

CEDAR POINT TRADING 299 PROPRIETARY LIMITED Second Applicant

(REGISTRATION NUMBER 2008/010242/07)

CHARAMBANA CHIMPELO Third Applicant

(IDENTITY NUMBER […])

and

FIRSTRAND BANK LIMITED Respondent

In re: FIRSTRAND BANK LIMITED Applicant

And

VEGA TURNKEY PROJECTS PROPRIETARY LIMITED First Respondent
(REGITSRTATION NUMBER 2012/083466/07)

CEDAR POINT TRADING 299 PROPRIETARY LIMITED Second Respondent
(REGISTRATION NUMBER 2008/010242/07)

CHARAMBANA CHIMPELO Third Respondent
(IDENTITY NUMBER […])

EMMANUEL DZUNANI NYATHI Fourth Respondent

(IDENTITY NUMBER […])

ZWELAKHE GIFT NYATHI Fifth Respondent
(IDENTITY NUMBER […])

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Sixth Respondent

THE MINISTER OF FINANCE Seventh Respondent

THE MINISTER OF PUBLIC WORKS Eighth Respondent

JUDGMENT APPLICATION FOR LEAVE TO APPEAL

SKIBI AJ

[1] The applicants who were the first, second and the third respondents (Sureties) in the main application seek leave to appeal against the money judgment and order which was handed down on 13 December 2019. Leave to appeal is sought either to the Full Bench of this Division, alternatively, Supreme Court of Appeal.

[2] According to the Uniform Rules of Court, the applicants had 15 days to apply for leave to appeal the judgment. The application for leave to appeal was served to the interested parties on 9 January 2020. This application was only brought to my attention on 2 September 2020 through the email which was sent to my Registrar who assisted me at the time the judgment was handed down. The allegations by the applicants that despite various correspondence didn't get any response is not supported by any evidence, as there is not a single proof of those follow up messages. It is almost ten months since the judgment was handed down and there is no explanation under oath as to why there was such a delay. However, during the oral argument counsel submitted that this application was filed timeously on Caselines. I expressed

my displeasure on this not properly explained delay and this is not acceptable and cannot be allowed to continue.

[3.] The application for leave to appeal is premised on the grounds that the court erred in its finding of fact and/or law in that, the Court of Appeal would come to a different finding pertaining to the following:

[3.1] that the court did not find that the loan agreement concluded between Firstrand (respondent) and the principal debtor (Vega Holding) was void because of suspensive conditions or conditions precedent to which the loan agreement was subject, were not timeously fulfilled or waived.

[3.2] the finding of the court that the conduct and/or performance under the loan agreement by Vega Holding have effectively estopped the Sureties from belatedly relying on the non-fulfilment or non-waiver of the relevant conditions.

[3.3] that the court did not find that there was a material and genuine dispute of fact pertaining to timeous fulfilment and/or waiver of these suspensive conditions;

[3.4] the finding of the court that the respondent had lawfully accelerated the debt owed by Vega Holding in terms of the loan agreement;

[3.5] that the court's finding that the Sureties did not discharge their onus rebutting the *prima facie* evidence established by the certificates of balance relied upon by the respondent.

[3.6] the finding that the Sureties were indebted to the respondent.

[3.7] the court failing to find that it was necessary for the respondent to bring an amendment to correct the amount claimed by it in the notice of motion;

[3.8] the Court's finding in relation to the date upon which interest is to be calculated in terms of the judgment;

[4] Section 17 of the Superior Courts Act[1] (the Act) provides that;

"(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;"

[5] The interpretation of Section 17(1) (a) of the Superior Court Act, has been observed in some recent cases where it has been held that this section has raised the test to be satisfied in an application for leave to appeal. I refer to the quoted dicta in the judgment by Bertelsmann J in the case of *The Mont Chevaux Trust v Tina Goosen & 18 Others*[2] where the following was said:

"[6] *It is clear that the threshold for granting leave to appeal against* a

[1] 10 of 2013

[2] 2014 JDR 2325 (LCC) at para [6]

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 Cornwright & Others*[3]*. 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] In *S v Smith*[4] where Plasket AJA (as he then was) put it thus:

"[7] 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."*

[7] In considering the application for leave to appeal, it is of critical important to acknowledge that there is a higher threshold which needs to be met for leave to appeal to be granted in line with the judgments referred to above. In terms of the recent cases cited above and in various higher courts[5], it means that there must exist more than just a mere possibility that another court will – not might – find differently on both facts and law. See also *Nedbank Limited v Steyn N.O & Others*[6]

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[3] 1985 (2) SA 342 (T) at 343H

[4] 2012 (1) SACR 567 (SCA) at para 7

[5] Fair Trade Tobacco Association v The President of the Republic of South Africa s & Others ZAGPPHC 31 (24 July 2020);

[6] 2020 JDR 0754 (GJ) …*[12] Thus, the threshold for granting leave to appeal has been raised in terms of the former section 17(1) of the Act. The usage of the word "would", introduces a stricter test and a higher threshold. See in this regard* ***Acting National Director of Public Prosecution v***

[8] The applicants argued that they have a made a case for granting leave to appeal in that there is a reasonable prospect that another court may come to a different conclusion based on the grounds advanced. On the other hand, counsel for the respondent contended that there is no reasonable prospects of success that another court may come to a different conclusion. It is further contended on behalf of the respondent that in the application for final winding up of the applicants arising out of the same cause of action, Keightley J[7] has rejected the argument by the applicants on some of the grounds relied upon by the applicants in this application.

[9] However, the respondent concedes, correctly so in my view, that there is a patent error in that the order granted in my judgment only with regards to the calculation period of the interest. The respondent's contention is that this is an error which may be cured by myself in terms of Rule 42(1) (b) of the Uniform Rules of this Court. I was also referred to the Supreme Court of Appeal decision of *Thompson v South African Broadcasting Corporation*[8] where Harms JA stated:

> *[5] The applicant does not submit that the costs order was unjustified if the correctness of Grosskopf JA's factual findings were accepted. Instead, the argument is that the factual findings were incorrect and should be reconsidered. In this regard there appears to be a misunderstanding about the power of a court to amend or supplement its findings in contradistinction to its orders. The correct position was spelt out in Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) 307C-G:
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> > *"The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention . . . This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. KOTZÉ, J.A., made this distinction manifestly clear in [West Rand Estates Ltd v New Zealand*

Democratic Alliance *2016 JDR 1211 (GP).*

[7] *First Rand Bank v Vega Holdings Proprietary Limited & Others Case 7841/19* (delivered on 10 May 2020) :The final winding up application: in the matter

[8] 2001 (3) SA 746 (SCA)

> *Insurance Co Ltd 1926 AD 173 at 186 - 7], when, with reference to the old authorities, he said:*
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> *'The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced.'"* (my own underlining)

[10] In response to the argument, counsel for the applicants, disagrees with the submission by the respondent that I can simply amend my order regarding the calculation time as to when the interest should start to run. The applicants contended that if such amendment is granted at this stage it would mean that the application was issued prematurely if a reliance can be placed on the certificate of balance which was issued on 18 April 2019 when the application was instituted on 1 March 2019 and this replacement certificate was only attached to the replying affidavit.

[11] It is not necessary for purposes of this application to discuss the merits of each of these grounds for leave to appeal in detail. Although I am not persuaded about the existence of the reasonable prospects of success on some of the grounds advanced by the applicants, but I am inclined to grant them leave to appeal:

[11.1] It is common cause that there is a patent error in the order I granted on 13 December 2019 regarding the calculation period of the interest on the capital amount. I agree with counsel for the respondent that Rule 42(1) (b) of the Uniform Rules of this Court gives the court a discretion to amend its order/s. The Supreme Court of Appeal

judgment[9] confirms that this is legally permissible in exceptional circumstances.

[11.2] I took some time in order to ascertain as to whether it will be proper for me in the application for leave to appeal to *mero motu* amend the order I granted on 13 December 2019. In the cases before the judgment by the SCA decision of *Thompson*[10] and before the coming into effect of Rule 42 (1) (b) of the Uniform Rules, it appears Courts were guided by the common law principle which stated once the Court has granted an order, it becomes *functus officio*. See the Case of *First Nation Bank of South Africa v Jurgens*[11]*; Seatle v Protea Assurance Co Ltd*[12] *.* However, the Supreme Court of Appeal in *Thompson's case*[13] which is instructive to me says that the Court may amend its order. T*hompson judgment* does not specify that this may be done in an application for leave to appeal. After having heard counsel on this point I am of the view that it will be an irregular for me to *mero motu* amend my order in the application for leave to appeal especially in a case where the very same issue is one of the applicants' grounds of appeal.

[11.3] Another issue raised by the applicants is that the notice of motion was not amended to reflect the capital amount of which I concluded that it has been proven by the respondent based on the certificate of

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[9] *Thompson case Supra* at para [15]
[10] Supra
[11] 1993(1) SA 245 (W) at 246-247
[12] 1984 (2) SA 537 (C)
[13] Supra

balance dated 18 April 2019. There is no merit on this contention. The case law is clear on this point that the court may grant a money judgment on the amount proven even if it is less than what was claimed in the notice of motion. The Court may grant an order on claim proven without requiring the applicant to amend the notice of motion. See the Case of *Rossouw v FirstRand Bank Ltd*[14]; Van Loggernberg, Erasmus: *Superior Courts Practice,* Second Edition, Volume 2, Service 13 at D1-526. However, there may be merit in the contention that the certificate of balance was only attached to the respondent's supplementary papers, albeit, there was an order granted for the amendment of the papers. I am of the view that another may reach a different conclusion on this point and on the issue of suspensive and/or disbursement conditions were timeously fulfilled or waived. It is important to mention that this order has nothing to do with the application for final winding up application which is a completely different matter and having its own legal requirements.

[12] The issues raised in this application do not deserve the hearing and adjudication by the Supreme Court of Appeal. Therefore, I am going to grant leave to the full bench of this Division.

[13] Having considered the matter, the following order is made: –

[14] 2010 (6) SA 439 (SCA) at para [48]

1. The application for leave to appeal by the first, second and third respondents is granted to the Full Bench of this Division;

2. Costs to be costs in the appeal

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N. SKIBI

Acting Judge of the High Court,

Gauteng Local Division,

Johannesburg

DATE OF HEARING:	2 October 2020
DATE OF JUDGMENT:	Delivered by email and on Caseilines

APPEARANCES:

COUNSEL FOR THE Applicants	: Mr M. Kerr-Phillips
	Mathew Kerr-Phillips Attorneys
	Randburg
COUNSEL FOR THE RESPONDENT:	ADV.P.G. Louw
Instructed by :	Werksmans Attorneys

Sandton