IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 24520/2018

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

……..…….....
SIGNATURE DATE: 24 August 2020

In the matter between:

MULTIPOINT LOGISTICS CC **First Applicant/Defendant**

NTLANTLA GEORGE GULE **Second Applicant/Defendant**

and

FIRSTRAND BANK LTD T/A NISSAN FINANCE **Respondent/Plaintiff**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NGALWANA AJ:

Introduction

[1] On 28 March 2019 I handed down judgment in which I granted summary judgment in favour of the respondent.

[2] I came to know of an application for leave to appeal against that judgment on Monday 10 August 2020 when I received a CaseLines link to a related application (for the rescission of Justice Spilg's judgment pending the finalisation of this application for leave to appeal) although it appears that the notice of application for leave to appeal (dated 15 April 2019 and served on respondent on 17 April 2019) against my judgment may have been filed some time in 2019. There is no court stamp on it.

[3] The parties were invited to file heads of argument by Friday 14 August 2020. It was indicated that the application would lapse if the applicants should fail to file their heads of argument by this date. The respondent's heads are dated 30 March 2020. While the filing sheet is dated 6 April 2020, it is not clear when the heads were in fact filed. The applicants' heads of argument, comprising five short paragraphs of one short sentence each and on one page, are dated 9 June 2020. It is not clear when they were filed either. I have considered both sets of heads. The applicants' heads deal with a rescission application launched by the respondents against the judgment or order of Justice Spilg, not with the leave to appeal against my judgment of 28 March 2019. They have not filed heads of argument in the application for leave to appeal as directed. In the circumstances, I considered not writing this judgment because, on my directive, the application has lapsed for failure by the applicant to prosecute the application by taking the next step of filing heads

of argument as directed and without any explanation. Nevertheless, I thought best to write the judgment on request from the respondent's attorneys.

[4] It is in my view not necessary to schedule oral argument in the covid-19 circumstances now prevailing. The arrangements for video conferencing (to which I as the Judge presiding have no access) in order to hear oral argument on issues that have already been determined, argument that has already been advanced, and on the basis of a standard that is capable of being determined on written argument, are in my view not worth the trouble.

The Standard

[5] It is axiomatic that the applicable standard in applications for leave to appeal in the high court has traditionally been whether there is a reasonable possibility that another Court may come to a different conclusion than that reached by the Court of first instance.

[6] Now the position is governed by the Superior Courts Act 10 of 2013 which says leave to appeal may be granted where

6.1 the appeal would have a reasonable prospect of success;[1] or

6.2 there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;[2] or

[1] Section 17(1)(a)(i)
[2] Section 17(1)(a)(ii)

6.3 the decision sought will have a practical effect or result;[3] and

6.4 the appeal would lead to a just and prompt resolution of the real issues between the parties even where the decision sought to be appealed does not dispose of all the issues in the case[4].

Analysis

[7] The standard of prospects of success is now more stringent than the old traditional position. Now an applicant must show that the appeal would have reasonable prospects of succeeding.

[8] On the undisputed facts in this case the application meets none of these four requirements. The applicants advance three grounds for their application:

8.1 The first is that this court erred in determining that the copy of the lost agreement relied on by the respondent was duly proved in terms of the Electronic Communications and Transactions Act, 2002 ("the ECTA") and that the generic agreement relied on was of any force.

8.2 The second is that this court erred in determining that the National Credit Act ("the NCA") was not applicable to the second applicant who was not a corporate entity with assets or income in excess of the threshold

[3] The effect of section 17(1)(b) read together with section 16(2)(a)(i) is that where the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
[4] Section 17(1)(c)

required. In addition, they say, the respondent did not prove that this was not a large agreement as defined in the NCA. The respondent, they say, has not complied with the above section in respect of second applicant.

8.3 Thirdly, they say this court erred in determining that the second applicant be ordered to return the vehicle in question as the second applicant is merely a surety for payment of any amount due.

[9] Each of the grounds is merely stated without any argument to sustain them. There is no merit in any of them. The first ground is imprecise and vague as it does not explain precisely what about the agreement needed to be proved and in terms of what specific provision/s of the ECTA. In any event, the applicants have advanced no compelling argument to displace my satisfaction with the integrity of the information contained in annexure “B” to the particulars of claim as articulated in the main judgment.

[10] The second and third grounds are simply not of the sort that would successfully repel a summary judgment. Even if proven, neither ground would forestall a summary judgment against the first applicant. As a co-principal debtor with the first applicant, the second applicant must suffer the fate of the first applicant. That is the effect of suretyship. And so, for purposes of summary judgment, a co-principal debtor is not a separate person to be treated differently and by different standards from those by which the principal debtor is treated. The surety effectively steps in the shoes of the principal debtor. If different standards applied in respect of the surety, that would defeat the purpose of suretyship. In addition, the principal debt in terms of the agreement is in excess of the prescribed amount for large agreements.

The applicants have not suggested otherwise or provided evidence showing that the principal amount to which the agreement relates is less than R250,000. It is thus unclear what further proof the applicants expect the respondent to provide.

[11] For these reasons, the appeal has no prospects of success and there is no compelling reason for the appeal to be heard. It would thus be unpardonably louche to burden the appeal court with this case.

[12] In the result, the following order is made.

Order

Leave to appeal is refused with costs.

V Ngalwana
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Appearances

For the applicants: Mervyn Fehler

Instructed by: Mervyn Fehler Attorneys

For the respondent: BM Lukhele

Instructed by: Rossouws Lesie Inc

Date of respondent's heads: April 2020

Date of applicants' heads: no heads filed

Date of judgment: 24 August 2020