IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

9/9/16

CASE NO: 32975/2014

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

09-SEPT-2016
Date

K. La M. Manamela

In the matter between:

The Standard Bank of South Africa Limited	Plaintiff
and	
Sindile Project Enterprise CC	First Defendant
Sindile Sewula Mthombeni	Second Defendant
Thulani Patrick Mthombeni	Third Defendant

JUDGMENT (APPLICATION FOR LEAVE TO APPEAL)

MANAMELA, AJ

Introduction

[1] The plaintiff (and applicant for current purposes) (the Bank) applies for leave to appeal a decision made on 29 April 2016 in terms of which the Bank's claim against the defendants was dismissed with costs. The Bank had claimed repayment of monies advanced in terms of an overdraft facility to the first defendant (Sindile Project), secured by suretyship provided by the second and third defendants (the Sureties). The Bank submits, in this application, that the appeal "would have" [1] a reasonable prospect of success at appellate level, in the Full Court of this Division, alternatively, the Supreme Court of Appeal. The defendants oppose this application for leave to appeal in support of the decision.

[2] I followed the lead of the parties in evidently retaining their citation as in the action. However, as already employed above, I will refer to the plaintiff as the Bank; first defendant as Sindile Project and second and third defendants, collectively, as the Sureties. And when I collectively refer to Sindile Project and the Sureties, I will use the reference defendants. These appellations were also used in the judgment sought to be appealed.

[3] The application was heard on 27 July 2016 and at the end thereof I requested counsel to file heads of argument. I am grateful to have received the heads of argument on 08 August 2016 and 23 August 2016. There is also the added benefit of the transcription of the trial proceedings of 29 April 2016.

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[1] In terms of section 17(1)(a) of the Superior Courts Act 10 of 2013 leave to appeal may only be given when the Court is of the opinion that the intended appeal "would have" a reasonable prospect of success. This is said to signify a raised threshold from provisions of the repealed Supreme Court Act 59 of 1959 and "indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against". See the unreported decision of the Land Claims Court by Bertelsmann J in *The Mount Chevaux Trust v Tina Goosen & 18 Others* (LCC14 R/2014) (03 November 2014) at par 6; cited with approval by the Full Court of this Division in the decision in *Acting National Director of Public Prosecutions & Two Others v Democratic Alliance, In re Democratic Alliance v Acting National Director of Public Prosecutions & Three Others* (19577/2009) GDHC (24 June 2016) at par 25.

Grounds of appeal

[4] The Bank's grounds of appeal are, in the main, that the Court erred, in the following respect:

[4.1] "in finding that the Plaintiff had failed to establish the existence of an oral agreement with the First Defendant";

[4.2] "in concluding that the Plaintiff had failed to prove the quantum of its claim";

[4.3] "by finding that the Plaintiff had failed to make out its claim against the Second and Third Defendants as sureties", and

[4.4] "... by finding that the Plaintiff was unsuccessful with its claim against the First, Second and Third Defendants".

[5] The rest of what is stated to be part of the grounds of appeal relates to the actual reasons for judgment, rather than the substantive order in the judgment.[2] Therefore, I will specifically deal with the grounds in paragraphs 4.1 to 4.4 above. But, in fact I will only deal with the first three grounds, as the fourth ground is the consequence or outcome of determination made in respect of the other grounds. I am satisfied that this approach will also address what is stated in support of those grounds. I use the grounds as subheadings for further discussion.

[2] See *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355 cited with approval in the recent decision in *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) at par 39.

Existence of an oral agreement

[6] The Bank disputes the correctness of my finding that, other terms of the oral agreement [besides the parties to the agreement; date of agreement and place of agreement], specifically with regard to the rate of interest chargeable by the Bank, were not proven.[3] Closely related to this, was my finding that monies were indeed advanced by the Bank to Sindile Project, but that there was no evidence of acceptance by Sindile Project of the terms of overdraft facility or the oral agreement, as pleaded and testified. The Bank submits that there was adequate evidence advanced at the trial to support a contrary finding. Also that in the absence of controverting testimony on behalf of Sindile Project at the trial, I ought to have accepted the Bank's version.

[7] I did not find evidence, mainly from the CDDS Systems Notes or computer notes used by the Bank, confirming terms of the oral agreement between the parties. And quite importantly, in my view, there was dearth of evidence to prove acceptance, expressly or otherwise, of the terms of the oral agreement by Sindile Project. In other words, other than the lack of evidence proving the terms of the alleged oral agreement, nothing was proffered to evince the meeting of minds of the parties, especially from the side of Sindile Project, in acceptance of the alleged terms.

[8] I will deal with the above issues further below in the discussion relating to *quantum* issues, particularly regarding the bank statements which formed part of the trial bundle.

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[3] See par 34, read with pars 31 -33, of the judgment.

Proof of the quantum of claim

[9] The Bank submits that the *quantum* of its claim was proven through the testimony of its witnesses and the certificates in terms of section 15(4) of the Electronic Communications and Transactions Act 25 of 2002 (the ECTA).[4] It is submitted that I made an error in not admitting the bank statements as part of the evidence before Court. For my part, I did not reject the bank statements or directly pronounce on their admissibility. This is explained below.[5]

[10] There are two certificates in terms of the ECTA in the trial bundle. During the trial only one certificate appearing on indexed pages 17 to 18 (the First Certificate) was dealt with in the evidence, and not the one on indexed pages 70-71 (the Second Certificate). The Second Certificate was only mentioned in the heads of argument (filed in lieu of closing legal arguments).[6]

[11] The submission in the heads filed for the Bank was to the effect that, Ms Jaca, the second witness for the Bank, dealt with the Second Certificate in her testimony. But this is obviously incorrect. Ms Jaca dealt with only the First Certificate[7] and the other witness Ms Koobair could not verify the signatory to the First Certificate.[8] I am aware that I did not point out this mistake in the judgment, but in my view, not much, if anything, would have turned on it at that stage.

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[4] See pars 24 -26 of the judgment.
[5] See pars 25 and 26 of the judgment.
[6] See par 9.7 and its accompanying footnote 38 of the Bank's heads of argument dated 04 March 2016.
[7] See from line 10 on p 41 up to line 14 on p 42 of the transcript.
[8] See lines 6-8 on p 9 of the transcript.

[12] Therefore, the Bank's current argument that the bank statements were before the Court is not alive to the fact that the Second Certificate wasn't dealt with at all. In argument both certificates are simply conflated into one, when the Bank prepared two certificates. I did not understand the argument to be that the bank statements will be admissible without their accompanying certificate in terms of the ECTA.

[13] The importance of all these, in my view, is that the First Certificate only deals with the CDDS Systems Notes or computer notes.[9] The Second Certificate deals with the bank statements. There bank statements included in the trial bundle are for 27 February to 31 March 2010;[10] 29 February 2012[11] to 30 August 2014. They do reflect charges levied by the Bank from time to time. Ms Koobair dealt with some of bank statements, but not with all of them. However, the bank statements on their own and with the probative value (at the level of rebuttable proof) statutorily awarded by a certificate in terms of section 15(4) of the ECTA may, perhaps, have assisted the Bank in proving the *quantum* of its claim. I did not deal with the Second Certificate at all as same, in my view, wasn't dealt with during the trial.

[14] I was referred during argument and later in the filed heads of argument in this regard, by Mr MT Shepherd appearing at the hearing for the Bank, to the decision of the Supreme Court of Appeal in *Firstrand Bank v Venter*.[12] This was mainly to support the argument that the bank statements ought to be accepted as they were not placed in dispute when the Bank's witness testified thereon. This may be so, but I still had a problem in accepting, as part of the evidence before the Court, the bank statements not identified in the ECTA certificate before

[9] See par 11 of the judgment for a brief narration of the mechanics of the CCDS computer system.
[10] See trial bundle on indexed pp 72-83.
[11] See trial bundle on indexed pp 84-252.
[12] (829/11) [2012] ZASCA 117 (14 September 2012).

the Court: the First Certificate. Besides, I find the facts in *Firstrand Bank v Venter* very distinguishable from this matter, especially as in that decision there was testimony regarding the certificate in terms of the ECTA and the bank statements were clearly identified,[13] which is not the case herein.

[15] Obviously, in my view, there would also have been, apart from *quantum* issues, a need to prove that the statements were received or ought to have been received by Sindile Project, as they were properly addressed and dispatched to an address of Sindile Project.[14] This wasn't done.

Claim against the Sureties

[16] It is also submitted that I was wrong not to find in favour of the Bank against the Sureties. The Sureties had bound themselves, in terms of the suretyship agreement, that a certificate of balance produced by the Bank would constitute *prima facie* proof of indebtedness against them. The Bank argues that this was sufficient to find in its favour in respect of the Sureties, despite the lack of success in the claim against Sindile Project, as the principal debtor.

[17] In this regard, my finding was that the defence in *rem* obtained for the Sureties as opposed to a defence *in personam* to the principal debtor.[15] Therefore, in my view, the Bank could not succeed against the Sureties when they were unsuccessful in establishing a claim against Sindile Project.

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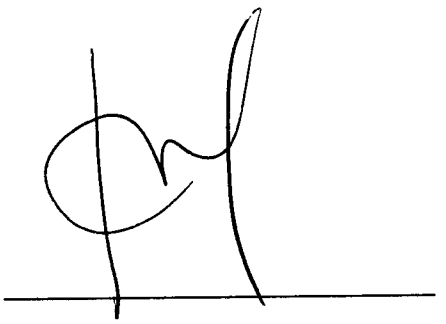
[13] See *Firstrand Bank v Venter* at pars 16 and 18.
[14] See *Firstrand Bank v Venter* at pars 14 and 17.
[15] See pars 35 and 36 of the judgment.

Conclusion and Order

[18] As indicated above, section 17(1)(a) of the Superior Courts Act requires that leave to appeal be granted when the Court if of the opinion that the intended appeal "would have" a reasonable prospect of success. It has already been found that this signified a raised threshold (indicating some measure of certainty)[16] from the previous requirement that an applicant for leave needed to show a reasonable prospect that another court might come to a different conclusion.[17] In my view the Bank did not meet this requirement, thus the application fails. Costs will follow this result.

[19] In the premises, I make the following order:

(a) The application for leave to appeal is dismissed with costs.



K. La M. Manamela

Acting Judge of the High Court

09 September 2016

[16] See *The Mount Chevaux Trust v Tina Goosen & 18 Others; Acting National Director of Public Prosecutions & Two Others v Democratic Alliance, In re Democratic Alliance v Acting National Director of Public Prosecutions & Two Others* (both unreported decisions) cited in par 1 and its accompanying footnote 1.

[17] See *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H.

Appearances:

For the Plaintiff	:	Adv MT Shepherd
Instructed by	:	Findlay & Niemeyer Attorneys
		Pretoria
For the 1st, 2nd and 3rd Defendants	:	Adv HP West
Instructed by	:	Locketts Attorneys
		Pretoria