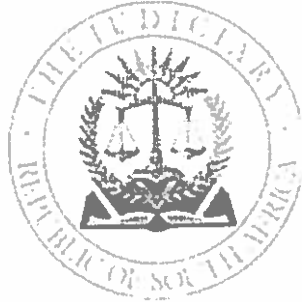


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
02/08/2019	DATE
SIGNATURE	

Case number: 44997 / 2017

In the matter between:

**ABSA BANK LIMITED**

Applicant

and

**PHAKAMOLE TRADING CC**

First respondent

**MOLEBOGENG MBETHE**

Second respondent

**PHAKAMA MPUMELELO NKOSI**

Third respondent

**ADVENT OIL (PTY) LTD**

Fourth respondent

**MOHWELERE TRADING (PTY) LTD**

Fifth respondent

**LAZARUS MODIJANE MBETHE N O**

Sixth respondent

**SYLVIA RASSIE MBETHE N O**

Seventh respondent

**WERNER FULS N O**

Eighth respondent

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## JUDGMENT

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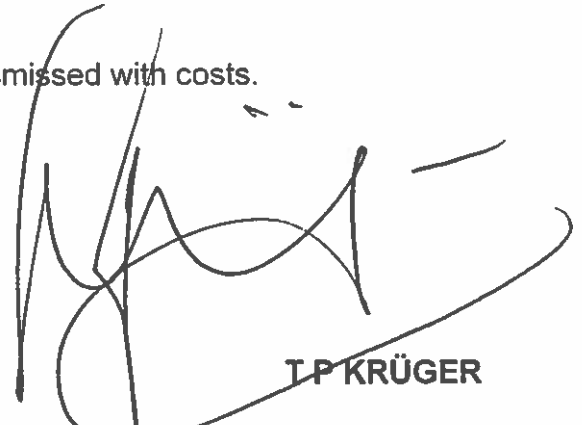
### KRUGER AJ

- [1] The application for leave to appeal was set down to be heard in the High Court on 30 July 2019. On that day protestors blocked the Pretoria CBD, preventing easy access to the court building. Counsel for the respective parties graciously agreed that the application be heard in the arbitration facility at Chambers. The absence of a court transcriber however prevented an *ex tempore* judgment and compelled me to prepare a written one.
- [2] The sixth, seventh and eighth respondents (to whom I collectively refer as the “trust”) seek leave to appeal against the order joining them in their representative capacity as sixth, seventh and eighth defendants in the main action instituted by the applicant against the first to fifth respondents as defendants for payment of amounts due and owing in respect of goods sold and delivered by the applicant to the first respondent.
- [3] The first question to be answered is whether the order granted is appealable. Although the order granted is final in effect, it is merely procedural in that it joins the trust as a party to an existing action. The order prevents a multiplicity of actions and intends to prevent the same evidence being led in separate actions. The order does not prevent the trust from raising any defense available to it and will indeed afford the trust an opportunity to participate in the examination of

the events leading to the signing of the various deeds of suretyship. In this regard it is much like the refusal of an exception, which is not appealable. Accordingly, I hold that the order granted is not appealable and would refuse leave to appeal on this ground alone.

- [4]** Even if I were wrong in my conclusion in the foregoing paragraph, the trust cannot succeed with its application for leave to appeal for the reasons that follow.
- [5]** The trust raised six grounds in the application for leave to appeal. Counsel for the trust combined the grounds of appeal and argued that clause 1.2 of the suretyship as quoted in the judgment was against public policy. This point was not taken in the affidavit resisting joinder and was not considered in granting the relief sought by the applicant. In my opinion in order to rely on this point it needs to be raised in the pleadings whereafter full argument on the issue can be presented, supported by evidence if necessary.
- [6]** In granting the order joining the trust the court exercised a discretion. The trust does not allege that the discretion was not judicially exercised and, in the circumstances, there is no basis that a court of appeal will come to a different conclusion.
- [7]** There is no prospect of success, and in the circumstances I make the following order:

1. The application for leave to appeal is dismissed with costs.



**T.P. KRÜGER**  
**Acting Judge of the High Court**

Counsel for the applicant:

Adv L Meintjies

Instructed by:

Rorich Wolmarans & Luderitz Inc

Counsel for the 6<sup>th</sup> – 8<sup>th</sup> respondents:

Adv T Makgate

Instructed by:

NGA Legal

c/o Klagsbrun Edelstein Bosman De

Vries Inc