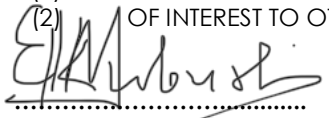
IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 23867/2022

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



E.M. KUBUSHI **DATE: 22 JUNE 2022**

In the matter between:

ETIENNE JACQUES NAUDE	FIRST APPLICANT
GD IRONS (PTY) LTD	SECOND APPLICANT
(In Business Rescue)	
And	
STEYN CITY PROPERTIES (PTY) LTD	FIRST RESPONDENT
GAURDRISK INSURANCE COMPANY LTD	SECOND RESPONDENT

In re: The reconsideration application

STEYN CITY PROPERTIES (PTY) LTD	APPLICANT
And	
ETIENNE JACQUES NAUDE	FIRST RESPONDENT

GD IRONS (PTY) LTD	SECOND RESPONDENT
(In Business Rescue)	
GUARDRISK INSURANCE COMPANY LTD	THIRD RESPONDENT

In re: The main application between:

ETIENNE JACQUES NAUDE	APPLICANT
And	
GD IRONS (PTY) LTD	FIRST RESPONDENT
(In business Rescue)	
GUARDRISK INSURANCE COMPANY LTD	SECOND RESPONDENT
STEYN CITY PROPERTIES (PTY) LTD	THIRD RESPONDENT

APPLICATION FOR LEAVE TO APPEAL JUDGMENT.

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 22 June 2022.

[1] The First and Second Applicants apply herein for leave to appeal to the Full Court of this Division alternatively the Supreme Court of Appeal, against the whole of the judgment and order, including the cost order granted by this court on 10 May 2022, under the abovementioned case number.

[2] This court directed that the application be determined on the papers filed on Caselines without oral hearing as provided for in the Division's Consolidated Directives re Court Operations during the National State of Disaster as issued by the Judge President.

[3] Pursuant to a court order granted by Millar J in the urgent court on 28 April 2022 ("the court order"), the first respondent Steyn City Properties (Pty) Limited, ("Steyn City"), approached this court on 5 May 2022, in terms of Uniform Rule 6(12) (c) for the reconsideration of the court order together with the discharge and setting aside of the court order, the dismissal of the main application and an order of costs on a punitive scale. The court order, *inter alia,* prohibited the second respondent, Guardrisk Insurance Company Limited ("Guardrisk"), from paying an amount of R60 million to Steyn City.

[4] The application emanated from a contract awarded by Steyn City, to the second applicant, GD Irons (Pty) Limited [now in business rescue] ("GD Irons") for the construction of upmarket high-rise apartments. As liability for any debt that may ensue from the contract against GD Irons in favour of Steyn City, Guardrisk issued a Construction Guarantee ("the Guarantee").

[5] The grounds of appeal stated in the application for leave to appeal are dividable into two main sections, namely, those that relate to the Guarantee and those that are premised on section 133 of the Companies Act 71 of 2008 ("the Companies Act").

[6] The grounds of appeal that relates to the Guarantee are stated as follows:

6.1 The Honourable Court erred in not giving any consideration to the contents of the payment certificate, and the fact that the payment certificate, on the face of it and in accordance with the interpretation thereof, authorised payment to the contractor and not the employer, and that the payment certificate could therefore not be relied upon for purposes of payment of the guarantee.

6.2 The Honourable Court erred in not giving proper consideration to the fact that the requirements of the guarantee for payment were not strictly complied with, as is required by law to justify payment on the guarantee.

6.3 The Honourable Court erred in not having found that the guarantee was accessory in nature, and not of such a nature that it created principal obligations, and therefore erred in its conclusion in paragraph [31] of the reasons for the judgment.

[7] This court has in the reasons provided on 23 May 2022 as to why it granted the order it did on 10 May 2022 dealt in depth with the issue of the Guarantee, as it was raised in the applicants' papers that served before this court. The essence of the court's reasoning why it did not consider this argument by the applicants in their favour, is clearly stated in paragraphs [31] and [32] of the reasons as follows:

> "[31] In addition, from the simple interpretation of the Guarantee it is understandable that Guardrisk's liability under the Guarantee was principal and not accessory in nature, and therefore, payment thereunder could, as stipulated in clause 6 of the Guarantee, not be refused or delayed by the existence of any dispute between Steyn City and GD Irons.
>
> [32] Consequently, even Mr Naude's argument that they be granted an indulgence to supplement their papers by filing the experts reports in order to clarify the Payment Certificate attached to the written demand send by Steyn City to Guardrisk, was found to have no substance by the court. The responsibility is

not that of Mr Naude and/or GD Irons to query the Payment Certificate, only Guardrisk as the guarantor, can do so."

[8] In the heads of argument, the applicants argue their case for leave to appeal the judgment and order granted on the contention that:

> "The application must be considered against the background of GD Irons being the construction contractor in terms of a construction contract, where Steyn City is the employer as the other contracting party. Guardrisk guaranteed payments to Steyn City, when these become payable, on the basis of valid payment certificates issued under the terms of the construction contract. Guardrisk issued a guarantee in the form of a payment guarantee which is directly linked to the construction contract, in line with the wording of the guarantee."

[9] This contention by the applicants is founded on the averments that there were various discrepancies with the Guarantee, for instance, it is alleged that there was no compliance with the strict wording of the Guarantee and the requirements therein were not met in order for payment to be effected, and that the payment certificate and the recovery statement were not sufficient to comply with the requirements of the Guarantee.

[10] The further contention by the applicants that the provisions of a guarantee should be followed strictly before payment may be made and becomes due, and that the requirements for payment have, therefore, to be strictly complied with, is in this court's view, valid. However, as this court has found, it was for Guardrisk to raise the disputes relating to the Guarantee, if there were any and if it so wished, – not the applicants. Conversely, there is no evidence on record that Guardrisk raised these issues, it did not even oppose the reconsideration application.

[11] As further, correctly, argued by the respondents in the heads of argument, the Guarantee and the demand that Steyn City delivered to Guardrisk in terms thereof, are all matters as between and confined to Steyn City and Guardrisk. They have nothing to do with either GD Irons or Mr Naude (the applicants).

[12] In regard to the proposition of whether the Guarantee was principal and not accessory in nature, the provisions of the Guarantee in clause 6 thereof, expressly provide that Guardrisk's liability under the Guarantee is principle and not accessory in nature. This clause of the Guarantee required no interpretation but a simple reading thereof, and for this court to have found otherwise, would have been in direct conflict with that undisputed express clause of the Guarantee.

[13] The grounds of appeal that are in respect of the provisions of section 133 of the Companies Act, are stated as follows by the applicants:

13.1 The Honourable Court erred in having found that section 133(1) of the Companies Act, No. 71 of 2008, did not find application in respect of the payment that was sought based on the payment certificate, in that payment was claimed directly for purposes of satisfying an alleged debt by GD Irons to Steyn City, a creditor of GD Irons.

13.2 The Honourable Court erred in not having found that the Guarantee, on a wide and purposive interpretation of section 133(2) of the Companies Act, was not a guarantee as meant in [section 133(2) of the Act].

13.3 The Honourable Court erred in not having properly considered the question whether enforcement of the payment in terms of the

Guarantee was “enforcement action” as is meant in section 133(1) of the Companies Act.

[14] This court also dealt at length with this issue in its reasons. It was the court’s finding that section 133 of the Companies Act does not, in any way, enter the debate and could never have sustained a basis for any entitlement to the relief sought by Mr Naude in the main application.

[15] In the heads of argument, the applicants argue that for purposes of section 133(1) of the Companies Act it must be pointed out that it appears from the recovery statement that R60 million is apparently payable, as a result of the alleged default of the contractor (clause 1.1.5). This means that the contractor, (in business rescue), incurred a debt of R60 million towards the employer, Steyn City. The contention is that it is this debt that has to be paid. Accordingly, so it was argued, there could be no doubt that this is a process by way of which the contractual debt due by GD Irons to Steyn City is enforced. This most certainly constitutes a “legal proceeding” and/or “enforcement action”, as referred to section 133(1) of the Companies Act, so, it was, further, submitted.

[16] These submissions by the applicants are responded to correctly, in my view, by the respondents in the heads of argument when they contend that the court acted correctly in not considering the provisions of section 133 of the Companies Act because by doing so, the court would have ignored the undisputed fact that there were two contractual worlds at play. The first being the contractual relationship between Steyn City and GD Irons in terms of the Main Construction Agreement, and the second being the contractual relationship between Steyn City and Guardrisk in terms of the Guarantee. It further means that this court would have found that section 133(1) of the Companies Act applies as between Steyn City and Guardrisk, in circumstances

where neither of them are in business rescue, and despite the fact that Steyn City was claiming payment in respect of the Certified Indebtedness from Guardrisk in terms of the Guarantee.

[17] The application for leave to appeal is regulated in terms of on section 17 of the Superior Court Act 10 of 2013 ("the Superior Court Act"). The application for leave to appeal, in this instance, is premised on the primary contention that the foreshadowed appeal presents with reasonable prospects of success on appeal in that, so it is contended, another court (an appeal court) will come to a different conclusion on the matter. The applicants, as such, relies on the provisions of section 17(1)(a)(i) of the Superior Court Act, which provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success.

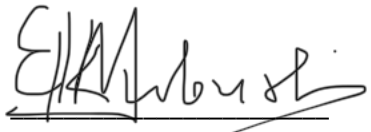
[18] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on 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.[1]

[19] Section 17(1)(a)(i) of the Superior Courts Act, further, makes it clear that leave to appeal may only be given where the judge concerned is of the opinion

[1] Smith v S (475/10) [2011] ZASCA 15 (15 March 2011) para 7.

that the appeal would have a reasonable prospect of success. On the basis of the reasons advanced here above, this court's view is that there are no reasonable prospects of success on appeal in this matter. The applicants have not convinced this court on proper grounds that they have prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding.

[20] Consequently, the application for leave to appeal is dismissed with costs.



E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

FIRST & SECOND APPLICANTS' COUNSEL:	ADV R DU PLESSIS SC
	ADV M BOONZAAIER
FIRST & SECOND APPLICANT'S ATTORNEYS:	WN ATTORNEYS INC
FIRST RESPONDENT COUNSEL:	ADV JE SMIT
	ADV P LOURENS
FIRST RESPONDENT ATTORNEYS:	WERKSMANS ATTORNEYS