THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20233/14

Reportable

In the matter between

DAVID SAMUEL AVNIT **APPELLANT**

and

FIRST RAND BANK trading inter alia as
WESTBANK and WESBANK AVIATION FINANCE **RESPONDENT**

Neutral citation: *Avnit v First Rand Bank Ltd* (20233/14) [2014] ZASCA 132 (23 September 2014)

Coram: Mpati P

Heard: In Chambers

Delivered: 23 September 2014

Summary: Leave to appeal – refusal of application by two judges of the SCA in terms of s 17(2)(*c*) of the Superior Courts Act 10 of 2013 – application to the President of the SCA in terms of s 17(2)(*f*) of the Act to refer the decision to the court for reconsideration or review – exceptional circumstances – what constitutes.

ORDER

The application is dismissed with costs.

JUDGMENT

Mpati P

[1] The South Gauteng High Court, Johannesburg granted a money judgment against Mr Avnit, the applicant, in favour of First Rand Bank, the respondent. The judge refused leave to appeal and Mr Avnit's application to this court for such leave was refused on 19 May 2014 by two judges of this court. This is an application addressed to me in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the Act) to refer that refusal to the court for reconsideration, and if necessary, variation. As s 17(2)(*f*) is a new section vesting the President of this court with a power that the incumbent has not hitherto possessed, I think it desirable to set out the approach to be taken to such applications.

[2] Section 17(2) prescribes the manner in which this court is to deal with applications to it for leave to appeal. They are referred to two judges for consideration. If they disagree the President appoints a third judge and the decision of the majority is the decision of the court. Sub-section (*f*) provides that the decision to grant or refuse an application is final, but then introduces the following proviso:

'Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month

of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[3] The origin of the section no doubt lies in the situation that arose in *Van der Walt v Metcash Trading Co Ltd* 2002 (4) SA 317 (CC) where one panel of judges of this court dismissed Mr van der Walt's application for leave to appeal and a differently composed panel granted an identical application raising the same point of law.[1] It is not, however, confined to that kind of situation but is a power available to be exercised by the President of this court in exceptional circumstances.

[4] The term 'exceptional circumstances' is one that has been used in various different statutory provisions in varying contexts over many years. It was first considered by this Court in the context of its power in exceptional circumstances to direct that a hearing be held other than in Bloemfontein. The question arose in *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395, where Innes ACJ said at 399:

'The question at once arises, what are "exceptional circumstances"? Now it is undesirable to attempt to lay down any general rule. Each case must be considered upon its own facts. But the language of the clause shows that the exceptional circumstances must arise out of, or be incidental to, the particular action; there was no intention to exempt whole classes of cases from the operation of the general rule. Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon.'

[1] Mr van der Walt was perhaps fortunate as the party granted leave to appeal was unsuccessful on appeal. *Kgatle v Metcash trading Ltd* 2004 (6) SA 410 (T).

[5] Later cases have likewise declined any invitation to define 'exceptional circumstances' for the sound reason that the enquiry is a factual one.[2] A helpful summary of the approach to the question in any given case was provided by Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and another* 2002 (6) SA 150 (C) where he said:

'1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different: 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different: the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'[3]

To this I would add only that in the exercise of the discretion vested in the President the overall interests of justice will be the finally determinative feature.

[6] In the context of s 17(2)(*f*) the President will need to be satisfied that the circumstances are truly exceptional before referring the considered view of two judges of this court to the court for reconsideration. I emphasise that the section is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President of this Court to

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[2] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) paras 75-77.

[3] At 156I-157C.

deal with a situation where otherwise injustice might result. An application that merely rehearses the arguments that have already been made, considered and rejected will not succeed, unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued. A case such as *Van der Walt* may, but not necessarily will, warrant the exercise of the power. In such a case the President may hold the view that the grant of leave to appeal in the other case was inappropriate.

[7] A useful guide is provided by the established jurisprudence of this court in regard to the grant of special leave to appeal.[4] Prospects of success alone do not constitute exceptional circumstances. The case must truly raise a substantial point of law, or be of great public importance or demonstrate that without leave a grave injustice may result. Such cases will be likely to be few and far between because the judges who deal with the original application will readily identify cases of that ilk. But the power under s 17(2)(*f*) is one that can be exercised even when special leave has been refused, so 'exceptional circumstances' must involve more than satisfying the requirements for special leave to appeal. The power is likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or grave injustice will otherwise result.

[8] Against that background I can deal briefly with Mr Avnit's application. (I shall refer to him as 'the applicant'.) On 2 April 2009 the respondent (to which I shall, for convenience, henceforth refer as 'Wesbank') launched an application against the applicant in the Gauteng High Court, Johannesburg, seeking an order for payment of the sum of USD 3 655 389.97. The claim was based on a surety agreement concluded between the parties, in terms of which the applicant stood surety for the first respondent, Norse Gulfstream Ltd (to which I shall refer as 'the Principal debtor'), for the latter's indebtedness to the respondent arising from a

[4] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-565E.

loan agreement. Wesbank had also registered a mortgage bond over a Gulfstream GIII Jet aircraft (the aircraft) owned by the principal debtor. On 29 May 2009 Blieden J made an order, inter alia, authorising Wesbank to 'take possession of the aircraft wherever [it] may be found', subject to it (Wesbank) providing the respondents with at least five days' notice of any intended sale.

[9] On 2 February 2012, approximately 30 months after the applicant had delivered his answering affidavit, Wesbank sought to file a replying affidavit. This move was vehemently opposed by the applicant. Although he had insisted that Wesbank should apply for condonation for the late filing of its replying affidavit, the applicant nevertheless prepared what he referred to as a 'supplementary affidavit' in anticipation of the court admitting the replying affidavit. In a letter dated 7 March 2012 the applicant's attorneys advised Wesbank's attorneys, inter alia, that should condonation be granted despite his opposition, the applicant would 'require an opportunity to supplement his affidavits . . . and to call for the production of numerous documents referred to by [Wesbank] in its replying affidavit'. The matter was subsequently set down for hearing, on which day Wesbank abandoned its attempt to file a replying affidavit. It had, however, previously delivered a copy to the applicant's attorneys.

[10] The applicant, on the other hand, sought to introduce his supplementary affidavit, but his attempt failed as the court (Mailula J), exercising a discretion,[5] refused to admit it. Apparently, Wesbank had alleged in the intended replying affidavit, that it had received an offer for the aircraft of USD 1,6 million during October 2009 and that it had eventually sold the aircraft to a company controlled by it for R8 675 400. It appears that Wesbank had also conceded that the applicant was entitled to a reduction of USD 1,6 million from the amount claimed.

[5] *Parow Municipality v Joyce & McGregor (Pty) Ltd* 1973 (1) SA 937 (C) at 938H-939A; *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 38I-J.

However, Mailula J granted judgment in favour of Wesbank in the sum claimed, namely USD 3 655 389.97.

[11] In the present application the applicant contends that Mailula J refused to take into account 'admissions and concessions made by Wesbank in its own replying affidavit because it abandoned its condonation application and reliance in its own replying affidavit'. The essence of his complaint is that if Mailula J had had regard to his supplementary affidavit she would not have granted judgment in the amount that she did, but in a reduced sum of USD 2 055 389,97, because the proceeds of the sale of the aircraft had to be deducted from the original amount claimed. The failure by Mailula J to deduct the amount of the proceeds of the sale of the aircraft has resulted in an erroneous judgment or order being given, which, so the argument proceeds, if allowed to stand, would be 'considered as *res judicata*' against him. That, he contends, demonstrates a complete failure of justice; amounts to a deprivation or infringement of his right in terms of s 34 of the Constitution, that is, a denial of his right to have his dispute decided in a fair public hearing before a court of law. He submits that these factors constitute exceptional circumstances which should move me to refer the decision of the two judges of this court to dismiss his application for leave to appeal (petition) for reconsideration by the court and, if necessary, variation in terms of s 17(2)(*f*) of the Act.

[12] I am not persuaded that the factors enumerated in the preceding paragraph constitute exceptional circumstances as envisaged by the provisions of the Act. The applicant cannot approbate and reprobate. He cannot now, after Wesbank had abandoned its attempt to place certain facts before the court because of his opposition, complain that Mailula J failed to consider those facts, when they were never before her. In any event, the issues now alleged to constitute exceptional circumstances were considered not only by the two judges of this court who dismissed the applicant's application for leave to appeal to this court, but also by

Mailula J, who dealt with them in her judgment in the application for leave to appeal argued before her.

[13] The question whether the applicant is liable to Wesbank in the whole amount of the judgment or in a lesser amount is one of accounting. It is not an issue that requires an appeal. The applicant should surely be able to ascertain from any relevant source the exact amount still outstanding and owing to Wesbank by the principal debtor. It cannot be argued, therefore, that a failure of justice has resulted from the order issued by Mailula J.

[14] The application is dismissed with costs.

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L MPATI
PRESIDENT

APPEARANCES

For appellant:	TWB-Tugendhat Wapnick Banchetti & Partners, Sandton Honey Attorneys, Bloemfontein
For respondent:	Lanham-Love Attorneys, Johannesburg McIntyre & Van Der Post, Bloemfontein