

SOUTH AFRICA / JUDGMENT

Baba v Nedbank Limited (Leave to Appeal) (6535.2024) [2025] ZAWCHC 283 (11 July 2025) [2025] ZAWCHC 283

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

6535/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6535/2024

In the matter between

MOUSSA BABA

APPLICANT

AND

NEDBANK LIMITED

RESPONDENT

Heard: 11 June 2025

Delivered: 11 July 2025

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

THULARE J

ORDER

- (a) The application for leave to appeal is dismissed.
- (b) The applicant to pay the costs on attorney and client scale as envisaged in the suretyship agreement.

- [1] This is an opposed application for leave to appeal against the whole judgment by an Acting Justice whose term had ended at the time of the service of the application. The sole ground for leave to appeal was that the court erred in finding that the principal debt was not extinguished by the payment of the purchase price of the immovable property to the attorneys of the respondent and therefore that the applicant's liability as surety has not been discharged.
- [2] Bestinver Company South Africa (Pty) Ltd (Bestinver) purchased property in Hyde Park (the property) and the respondent loaned Bestinver R15 million to finance the sale. The applicant signed as surety and co-principal debtor to the Bestinver loan. The surety was limited to R15 million plus interests and costs on attorney and client scale. From about November 2020 Bestinver failed to pay the monthly instalments to the respondent thereby breaching the agreement and entitling the respondent to claim payment of the balance outstanding together with interests and costs. Bestinver's indebtedness to the respondent exceeded R16 million. The respondent's case was that as surety and co-principal debtor, the applicant was jointly and severally liable for the debt owed by Bestinver, subject only to the limit stipulated in the deed of suretyship. It was further the respondent's case that it was entitled to judgment against the applicant regardless of the litigation between the applicant's father and Bestinver's liquidators which concerned an amount of R14 million which was held in trust by the respondent's attorneys as a stakeholder.
- [3] The applicant sought the dismissal of the respondent's claim or alternatively the stay of the application pending the outcome of an application lodged by his father and another company, Elite Vision, against the liquidators of Bestinver, which was filed in the Gauteng High Court. According to the applicant, his father and Elite Vision sought a declarator confirming that his family, and not Bestinver, were the true intended recipients of the R14 million advanced by Elite Vision. Elite Vision was a company wholly owned by the Baba family. According to the applicant, Enderby Finance Ltd (Enderby), a company incorporated in the British Virgin Islands provided the Baba family with a short-term loan of R15 million and it was agreed that the funds would be deposited into Elite Vision, and that the Baba's were to utilize the funds for the purchase price of the property. A now deceased liquidator of Bestinver had agreed to Elite Vision's offer to purchase the property and to that end the full purchase

price of R14 million was paid to the respondent's attorney's trust account in addition to transfer duty and other related costs for the transfer. The father delayed with the provision of FICA documents and the liquidators raised a query regarding the nature and purpose of the Elite Vision payment into Bestinver. The liquidators withdrew from the sale. The disputed sale involving Elite Vision is the foundation of the litigation in Gauteng.

- [4] The court granted the judgment sought to be appealed against in favour of the respondent against the applicant for payment of R15 million together with interest and costs on attorney and client scale. I am not persuaded that the appeal would have any reasonable prospects of success or that there was some other compelling reason why the appeal should be heard

[section 17(1)(a) of the Superior Courts Act, 2013 (Act No. 10 of 2013) (the SUCA)]. The contract of suretyship was accessory to the contractual relationship between the creditor and the principal debtor as well as the principal debtor's obligations under it [Van Zyl v Auto Commodities (Pty) Ltd (279/2020) [2021] ZASCA 67 (3 June 2021) para 11]. The obligations of the surety are the same as that of the principal debtor [Kilroe-Daley v Barclays National Bank Ltd [1984] ZASCA 90; 1984 (4) SA 609 (a) at 622H-623H; Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A). A creditor's claim against a surety and co-principal debtor is contingent on the principal debtor's default [Trans-Drakensberg Bank Ltd v The Master and Others 1962 (4) SA 417 (N) at 422. The principal debtor's inability to pay, arising out of insolvency and liquidation is a contingency for which a creditor takes a surety [CF Forsyth & JT Pretorius Caney's The Law of Suretyship in South Africa 6ed (2010) 119 with reference to Voet 46.1.39]. The fact that R14 million may possibly be recovered and may be available did not help the applicant. The respondent was entitled to claim from the respondent the moment the debt became due [Consolidated Textile Mills Ltd v Weiniger 1961 (3) SA 335 (O) at 338A-D]. For these reasons the order was made.

DM THULARE

JUDGE OF THE HIGH COURT

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