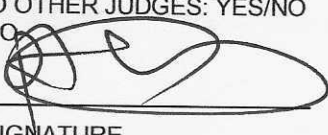


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 13723/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	
DATE	SIGNATURE

In the matter between:

DOOLA, RIYADH

Applicant

and

FIRST RAND BANK LIMITED TRADING

Respondent

PRIVATE BANK AND AS FNB

JUDGMENT ON LEAVE TO APPEAL APPLICATION

MALUNGANA AJ

- [1] This is an application for leave to appeal against the interlocutory order and judgment granted by this Court on 09 May 2023. In a consolidated proceedings the Court set aside as irregular step, the applicant's (respondent in the main application) rule 30 application dated 28 July 2021, and further dismissed with costs the latter's application to strike out certain parts of the respondent's (the applicant in the main application) affidavits. The background to the judgment and order is clearly set out in the judgment

and it is not necessary for me to regurgitate it in this judgment. However, for context purposes, it is apposite to state that the first application before me was in terms of rule 30 in which the respondent in these proceedings sought to set aside as irregular step the applicant's application. The other application was to strike out certain averments contained in the respondent's affidavit on the basis that they are irrelevant and do not advance the case.

[2]

The grounds for leave to appeal against the order and its reasons can be paraphrased as follows:

- (a) The Court erred by taking into consideration the judgment made by Moorcroft which did not form part of the papers;
- (b) The Court erred in referring to the parties instead of the Applicant, in that the Rule 35(12) in an action advances the matter, wherein a rule 35(12) does not advance an application before court;
- (c) The Court erred in paragraph 10 in disregarding the respondent's averments under paragraph 11.4 of the answering affidavit;
- (d) The Court failed to take into consideration that Rule 35(12) may be brought at any time before the hearing of the main matter.
- (e) The Court further failed to take into consideration:
"3.6.1 paragraph 11.6 of the Respondent's Answering Affidavit stating that:
"11.6 Also, this Rule 35(12) notice was filed after the filing of my Rule 30 application claiming that the replying affidavit is irregular step and not before my Rule 30 application. There was no further step taken from the filing of the Applicant's purported replying affidavits to my Rule 30 application."
(f) The Court failed to consider the Respondent's replying affidavit and application to strike certain paragraphs of the Applicant's replying affidavit (being the second application to strike) which application was consolidated with the main rule 30 application;
- (g) The Court ought to have found that the paragraphs mentioned in the Founding Affidavit; Replying and Answering Affidavit to the Counter Claim had to be struck out on the grounds that there are irrelevant and prejudicial;
- (h) The Court further ought to have found that the Notice in terms of Rule 35(12) does not further the matter and therefore does not constitute a further step in terms of Rule 30.

- [3] In argument the applicant submitted that the Court ordered the Applicant to pay the costs of the application on a punitive scale (attorney and client) but did not set out reason for such a punitive costs order. The applicant further argued that the Court erred in making a finding that the Applicant's Rule 30(2)(b) Notice was filed out of time. According to the applicant the Rule 30 application was not before the Court. It was not open for this Court to make such finding as it was an issue to be determined by the Court hearing the Applicant's Rule 30 Application.
- [4] As regards the lack of prejudice, the applicant submitted that prejudice need not be categorically stated. It can be inferred. The Rule does not require an allegation of prejudice, but rather the Court must be satisfied that there will be prejudice.
- [5] In contrast to the applicant's submissions, the respondent submitted that the applicant failed to comply with the provisions of rule 35(13), which state that: "The provisions of this rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications."
- [6] The respondents further raised the issue of appealability of the interlocutory order, and referred this Court to the recent Constitutional Court decision in *Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC), in which the Court laid down the principles relating to the appealability of interim interdicts, and argued that the principle is applicable to this matter.
- [7] According to the respondent, the order compelling a litigant to discover documents is not determinative of the rights of the parties, and does not dispose of a substantial portion of the relief claimed. An appeal against the order dismissing the application will, the respondent submits, have the effect of prolonging the litigation in that the appeals will be heard in a piecemeal fashion, which will result in wasteful use of judicial resources and incurrance of legal costs. For the reasons that will follow, I am respectfully in agreement with the respondent's submission in this regard. However, it is convenient first and foremost to have regard to the applicable legislation governing leave to appeals.
- [8] With the enactment of section 17 of the Superior Court Act, the threshold for granting leave to appeal a judgment of the High Court has been significantly raised. The word 'would' in subsection 17(1)(a)(i) of the Superior Court Act imposes a more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959.¹
- [9] In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*², the Constitutional Court observed that Courts are loathe to encourage the wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effective, and that

¹ *Mount Chevaux Trust [IT 2012/28 v Tina Goosen and 18 Others]* 2014 JDR 2325 [LCC] at para 6.

² *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 50.

are susceptible to reconsideration by another court when final relief is determined.

[10] The conventional principles relating to the appealability of the interim order have somewhat been subsumed under the constitutional interests of justice standard.³ The appealability no longer depends largely on whether the interim order appealed against has final effect or dispositive of a substantial portion of the relief claimed in the main application.⁴

[11] Having weighed carefully all the germane circumstances, I hold that the order sought to be appealed against has no final effect, and is not dispositive of the substantial portion of the relief claimed. Even if my conclusion is wrong, the appeal bears no reasonable prospect of success. Moreover, there are no compelling reasons why it should be granted. The appeal will only lead to delay in the determination of the dispute between the parties. For these reasons, and those set out in the impugned judgment the application must fail.

Order

[12] In the premises the application for leave to appeal is dismissed with costs.



P H MALUNGANA

Acting Judge of the High Court
GAUTENG DIVISION, JOHANNESBURG

Heard on: 27 March 2024

Delivered on: 27 May 2024

APPEARANCES:

For the Applicant:	Adv. Gerry Nel SC
Instructed by:	Vally Chagain & Associates
For the Respondent:	Adv. Ross Shepstone
Instructed by:	AD Hertzberg Attorneys

³ *United Democratic Movement and Another v Lebashe Investments Group (Pty) Ltd and Others* (1032/2019)[2021]ZASCA 4[2021] 2 All SA 90 (SCA) (13 January 202) at para [4].

⁴ *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016(6) SA 279 (CC) at para 40.