

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



(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: No

AJ Farber

06 May 2024

CASE NO. 2020/41752

In the matter between :

REMOJA TRUST

First Applicant

REFILWE REGINA MODUPO

Second Applicant

MR JACK MODUPO

Third Applicant

and

FIRSTRAND BANK LIMITED T/A WESBANK

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Farber, AJ:

[1] On 12 October 2023, I in terms of Uniform Rule of Court 30, set aside as an irregular proceeding, the notice of bar which the first and second applicants had delivered to the respondent requiring it to file a plea to their so-called

claim in reconvention. I on that occasion directed that the first and second applicants and Mr Modupo were to pay the costs of the application, jointly and severally, the one paying the others to be absolved.

[2] The first and second applicants and Mr Modupo now seek leave to note and prosecute an appeal to the Full Bench against the order referred to in paragraph 1 hereof.

[3] It will readily be appreciated that I found against the applicants and Mr Modupo on the basis of what is set out in paragraphs [13], [14] and the second segment of paragraph [15] of the judgment. In short, my finding adverse to the applicants and Mr Modupo was squarely based on an analysis of what had procedurally transpired in the matter. I in consequence determined that the notice of bar in question constituted an irregular step in the proceedings.

[4] I need to stress that although alluding to the question of Mr Modupo's standing to participate in the matter I, in the first segment of paragraph [15] of the judgment, made it plain that although it may well be that the notice of bar was a nullity on the basis that it had been signed by Mr Modupo who was neither a legal practitioner nor a party to the litigation, there was no need for me to finally determine that issue. I do, however, record that at the time of handing down judgment in the matter, I was of persuasion that the respondent's contention on the issue of nullity was sound. I still maintain

that persuasion. I, however, did not non-suit the applicants and Mr Modupo on that basis, as I held the firm view that the respondent's case based on the wholly irregular proceeding relating to the issue of the notice of bar was unanswerable and that it was open to me to determine the matter on that sole basis.

- [5] The applicants and Mr Modupo ground the appeal on the basis of the doubts which I had expressed in relation to the validity of the notice of bar. I, however, did not non-suit the applicants and Mr Modupo on that ground and consequently leave to appeal cannot be granted on that basis.
- [6] As to the real and sole basis upon which I found for the respondent the applicants and Mr Modupo did not in the notice of application for leave to appeal set out the grounds upon which they contend that my findings in relation thereto were misconceived and that the Full Bench will come to a different conclusion on the matter. This renders the notice of application for leave to appeal defective. (See in this regard the judgment of Leach J [as he then was] in *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 385B - 386B). I am in all events not persuaded having considered the matter afresh that the Full Bench will in fact come to a different conclusion on the substance of the point in contest in this matter, namely whether the delivery of the notice of bar constituted an irregular proceeding which fell to be set aside.

- [7] During the course of oral argument by Mr Modupo in the application for leave to appeal, it became plain that the real reason why leave to appeal was sought had nothing at all to do with the merits of my finding relating to the irregularity arising from the delivery of the notice of bar. On this score, Mr Modupo clearly and openly made it plain on a number of occasions that the reason why leave to appeal was being sought was to afford the applicants and him an opportunity of placing additional papers before the court of appeal so as to demonstrate that from the inception of the matter, the respondent's conduct had been devious, so much so that the Full Court might well be constrained to set aside the respondent's particulars of claim in the action, a result which the applicants and Mr Modupo had thus far failed to achieve despite several attempts to do so. This is not a ground upon which an application for leave to appeal ought to be considered. There may be other remedies available to the applicants and Mr Modupo but the grant to them of leave to appeal in circumstances where there is no reasonable prospect that the Full Bench will come to a different conclusion on the issue in the appeal, is not one of them.
- [8] The application must consequently fail. I have directed the applicants and Mr Modupo to bear the costs in the main application, jointly and severally, the one paying, the others to be absolved. A similar order will issue in this application save that by virtue of the provisions of Uniform Rule of Court


67A(3) scale A referred to therein will govern the services rendered by counsel for the respondent and its attorneys after 12 April 2024, including any recoverable post-hearing attendances.

[9] It is perhaps well that I point out that counsel on behalf of the respondent contended that the entire application was *mala fide* and contrived and that costs should be awarded on a penal basis. There is much merit in counsel's contention but I must bear in mind that Mr Modupo is not a lawyer. The application for leave to appeal may have been totally misguided, which state of affairs may be attributable to ignorance as opposed to a malevolence of purpose.

[10] In the result the following order will issue:

[10.1] The application for leave to appeal is dismissed.

[10.2] The costs of the application are to be paid on the appropriate scale as between party and party, save that those relating to counsel's appearance and that of his attorney after 12 April 2024 and to any recoverable post-hearing attendances are to be limited to scale A as contemplated in Rule 67A of the Uniform Rules of Court.



G Farber
ACTING JUDGE
OF THE HIGH COURT

Date of Hearing: 2 May 2024

Date of Judgment: 6 May 2024

APPEARANCES

For the Applicants: Mr J Modupo

For the Respondent: Advocate S P Stone

Instructed by: Smith van der Watt Inc.