

REPUBLIC OF SOUTH AFRICA



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

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

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Name: FARBER AJ Date: 12 October 2023

CASE NUMBER: 41752/2020

In the matter between:

FIRST RAND BANK LIMITED T/A WESBANK APPLICANT

and

REMOJA TRUST FIRST RESPONDENT

REFILWA REGINA MODUPO SECOND RESPONDENT

JUDGMENT

FARBER AJ:

- [1] The Applicant, First Rand Bank Limited t/a Wesbank (*Wesbank*) seeks an order setting aside a notice of bar, which notice of bar put Wesbank on terms to deliver its plea to a counterclaim which had been filed against it by the First and Second Defendants and a Mr Modupo.
- [2] The Application falls to be considered against the backdrop of the following facts. On 18 December 2020 Wesbank issued summons against the First and Second Defendants for the cancellation of an Installment Sale Agreement and the return to it of the motor vehicle which had formed the subject matter thereof. Additionally, damages flowing from the First Defendants breach of contract, together with interest thereon, was sought. I pause to mention that the Installment Sale Agreement had been concluded by Wesbank with the First Defendant and that the Second Defendant had guaranteed the repayment of the First Defendant's liabilities under it. To complete the picture, I mention that Wesbank in its particulars of claim in the action alleged that the Second Defendant was the sole trustee of the First Defendant.
- [3] On 18 January 2021 the Defendants delivered a notice of intention to defend the action.
- [4] On 28 January 2021 a notice in terms of rules 30 and 30A was served on Wesbank's attorneys. This notice was signed by the Second Defendant, ostensibly on behalf of the Trust and her. Mr Modupo was in terms of the notice said to be the Second Applicant in the proceedings. It is in this regard

perhaps well to point out that Mr Modupo has at no stage sought leave to intervene in the action. He has moreover not as yet been joined as a party therein.

[5] The notice in question was directed against the combined summons which Wesbank had issued in the matter. It was in this regard contended that the issue and service thereof constituted an irregular proceeding. Wesbank did not respond to the notice and on 5 March 2021 the Defendants and Mr Modupo instituted proceedings to set aside Wesbank's combined summons. The notice of motion in those proceedings was signed by Mr Modupo. He also deposed to the founding affidavit in support thereof. A document was attached to the notice of motion and founding affidavit headed "*Claim in Reconversion*". This document was signed by Mr Modupo on behalf of "*The plaintiff in person*" and it proffered a claim against Wesbank in the sum of R147,188.66.

[6] Wesbank signified its intention to oppose the application and on 15 April 2021 it delivered an answering affidavit in the matter. A replying affidavit deposed to by Mr Modupo was delivered on 10 May 2021.

[7] On 19 May 2021 the Defendants and Mr Modupo delivered a notice to Wesbank in terms of rule 11, stating that it was their intention to make application "*for an order of consolidation of application in terms of rule 30 and claim in reconversion (sic)*". Despite being advised that Wesbank contended that the notice in terms of rule 11 was defective, the Defendants and Mr Modupo launched the foreshadowed application for consolidation. It has as yet not been pursued.

[8] In the interim the Defendants' attempt to have Wesbank's combined summons set aside on the basis that it constituted an irregular step within the meaning of rules 30 and 30A had been enrolled for hearing. The matter was considered by the Court (per Manoim AJ as he then was) on 17 March 2022 who dismissed the application, with costs on an attorney and client scale, such cost order to operate against the Defendants and Mr Modupo, jointly and severally, the one paying the others to be absolved. The Court on that occasion directed the Defendants to file their plea in the action within 20 days of the service of an order upon them requiring that they do so. The order in question was served on the Defendants and Mr Modupo on 17 March 2022.

[9] On 19 April 2022 the Defendants and Mr Modupo launched an urgent application against Wesbank. The founding affidavit in those proceedings was deposed to by Mr Modupo. The urgent application was designed to secure a reversal of the order which had been granted by Judge Manoim on 17 March 2022. This application was on 21 April 2022 struck from the roll of cases (per Moorcroft AJ).

[10] On 3 May 2022 the Defendants and Mr Modupo served a notice of bar on Wesbank calling upon it to deliver its plea to the claim in reconvention. It will be recalled that the claim in reconvention had been attached to the Defendants' and Mr Modupo's application of 5 March 2021.

[11] On 5 May 2022 the Defendants and Mr Modupo delivered their plea in the action. They on that occasion omitted to file a claim in reconvention.

[12] On 10 May 2022 Wesbank served a notice in terms of rule 30(2) on the Defendants. In that notice Wesbank contended that the delivery of the notice of bar constituted an irregular step. Wesbank's contentions in this regard were subsequently summarised in paragraph 3 of its affidavit in support of that application thus: -

“3. SUMMARY OF APPLICANT’S ALLEGATIONS TO RESPONDENTS’ IRREGULAR STEP

3.1. *On the 10th of May 2022, the Applicant served a Notice in terms of Rule 30(2), which is attached hereto as Annexure “LL1”, in response to the Respondents Notice of Bar served on the 3rd of May 2022 for the following reasons, which will be more fully explained hereinafter:*

3.1.1. *The Defendants’ Application in terms of Rule 30 and 30A, to which the claim in reconvention was attached, was dismissed on the 17th of March 2022;*

3.1.2. *In its court order dated 17 March 2022, above Honourable Court ordered the Defendants to file their plea within 20 days of service of the court order;*

3.1.3. *The Notice of Bar is premature as Defendants have not filed a plea with a counterclaim in accordance with the provisions of Rule 24(1) of the Uniform Rules of Court.*

3.1.4. *From the document itself, it is not clear whether the Notice of bar has been delivered by the First or Second Defendant. The Notice of Bar contains a signature above the wording "Defendant" without any indication which defendant is signing the document.*

3.1.5. *The Notice of Bar does not contain any contact details or service address details of the Defendants."*

[13] It is clear that in terms of rule 24 a Defendant is required to deliver a claim in reconvention together with the delivery of its plea. Delivery of the two documents must generally take place *simul ac semel*. This may be deviated from in two instances, namely where the Plaintiff consents to the delivery of the claim in reconvention subsequent to the delivery of the plea or, failing such consent, the Court on good cause permits thereof. The converse equally holds good. It follows that it is irregular for a Defendant to first deliver a claim in reconvention and then at a later stage to deliver its plea in the matter. I can hardly conceive of circumstances which would impel a Court to sanction that type of procedure. Nor, in my judgment, would the Plaintiff in the action lightly consent to that mode of procedure.

[14] In this case the Defendants purported to deliver a plea in reconvention on 5 March 2021. The plea followed very much later.

[15] As I have mentioned the claim in reconvention was signed by Mr Modupo. He is not a legal practitioner. He is moreover not a party to the litigation. The claim in reconvention may in consequence be a nullity incapable of sustaining a notice of bar. I need not however finally determine this issue. I say this because the plea in the matter was delivered on 5 May 2022, some fourteen months after the delivery of the so-called claim in reconvention. The bar preceded this and was thus at very best for the Defendants premature in that it was delivered prior to the happening of the two simultaneous steps required under rule 24. It is once these steps are taken that the delivery of a notice of bar will become competent. The procedure adopted by the Defendants and Mr Modupo was in my judgment wholly irregular. Wesbank could not reasonably have been expected to file a plea to the claim in reconvention. Wesbank's contention that the delivery of the notice of bar was in the circumstances irregular is sustained.

[16] I need add that in argument Mr Modupo sought to resist the relief claimed by Wesbank on the basis that absent a resolution of its board of directors permitting him to do so, the deponent to the founding affidavit could not be said to have been authorised to depose to it. It was not necessary for Wesbank to attach to the founding affidavit a resolution to that effect. The challenge of authority is in my view without merit.

[17] Costs will follow the event. Mr Modupo is not a cited party in the litigation. He is however the undoubted guiding mind behind the strategy which the Defendants have elected to adopt in the conduct of the litigation. He for the purposes of costs falls to be treated as one of the parties to the litigation.

The following order will issue:

1. The notice of bar purportedly issued on behalf of the First and Second Defendants on 3 May 2022 is set aside.
2. The costs of the application are to be paid by the First and Second Defendants and Mr J Modupo, jointly and severally, the one paying the others to be absolved.

G Farber

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 10 October 2023

Date of Judgment: 12 October 2023

APPEARANCES

For the Applicant: Adv. Jason Govender

Instructed by: Smith Van Der Watt Inc.

First Respondent: Ramoja Trust

Second Respondent: Refilwa Regina Modupo

J. Modupo J. Modupo