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

CASE NO: 2020/13723

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

DATE
SIGNATURE

In the matter between:

DOOLA, RIYADH	Applicant
And	
FIRST RAND BANK LTD trading inter alia as RMB PRIVATE BANK and as FNB (Registration Number: 2011/009111/07)	Respondent

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JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal – section 17 (1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 – reasonable prospects of success

Appealability of interlocutory orders – interests of justice

Section 17(1)(c) of Superior Courts Act – interlocutory order may be appealable inter alia when order disposes of any issue or any portion of the issue in the litigation

Order

[1] In this matter I make the following order:

1. *The late filing of the application is condoned;*
2. *The application for leave to appeal is dismissed;*
3. *The applicant is ordered to pay the costs of the application for condonation and for leave to appeal on the attorney and client scale.*

[2] The reasons for the order follow below.

INTRODUCTION

[3] This is an application for leave to appeal against a decision[1] I handed down on 27 October 2022. The application was brought out of time and the application for condonation for the late filing is not opposed. The late filing is condoned.

[4] I refer to the parties as in the judgment; to the applicant for leave to appeal as the surety and to the respondent as the bank.

[5] In paragraph 7 of my judgment reference is made to a pending Rule 30 application and an application to strike out parts of the replying affidavit in the main application. These applications came before my Brother Malungana AJ who on 9 May 2023 set aside the Rule 30 application as an irregular step, dismissed the application to strike, and granted a punitive cost order. In the course of his judgement[2] Malungana AJ held that the Rule 35(12) notice referred to herein amounted to a further step in the proceedings.[3] He therefore answered the question I left open in paragraph 12 of my judgment.

[6] Section 17(1)(a)(i) and (ii) of the Superior Courts Act provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. An applicant in an application for leave to appeal must convince the court that the prospects of success are not remote but have a realistic chance of succeeding. A mere possibility of success is not enough. There must be a sound and rational basis for the conclusion that there are reasonable prospect of success on appeal.

[7] In *Ramakatsa and others v African National Congress and another*[4] Dlodlo JA

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1 *Doola v Firstrand Bank Ltd trading inter alia as RNB Private Bank and as FNB* [2022] ZAGPJHC 837, 2022 JDR 3215 (GJ), [2022] JOL 56118 (GJ).

2 *First Rand Bank Limited t/a RMB Private Bank and as FNB v Doola* [2023] ZAGPJHC 456.

3 Ibid para 12.

4 *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA), also reported as *Ramakatsa v ANC* [2021] ZASCA 31. See also the various authorities listed in *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and*

dealt with the authorities as follows:

> *"[10] … The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."*[5]

[8] In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*[6] Wallis JA said that:

> *"The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit."*

[9] I approach this application on the basis set out above and mindful of the fact that I am not called upon to decide whether my judgment was right or wrong. The test is and remains that of a reasonable prospect of success that is not remote, and that is based on sound and rational grounds.

NON-COMPLIANCE WITH RULE 35(13).

[10] It is argued on behalf of the bank that the surety failed to invoke the provisions of Rule 35(13) and could not rely on Rule 35(12). However, rule 35(12), unlike Rule 35(1), (2), (3), and (14), applies to any proceedings and not only to action proceedings. Rule 35(13) does not govern to Rule 35(12).[7]

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another 2023 JDR 3696 (GJ) footnotes 4 to 10.

5 Footnote 9 in the judgment reads as follows: "*See Smith v S [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); MEC Health, Eastern Cape v Mkhitha [2016] ZASCA 176 para 17."*

6 *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA) para 24.

7 *Moulded Components & Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) 459B–C. See Cilliers, Loots & Nel *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th ed 2009, 789.

[11] There is no merit in the submission that the surety was not entitled to invoke Rule 35(12).

APPEALABILITY OF INTERLOCUTORY ORDERS

[12] Interlocutory orders that are not final in effect are incidental to pending proceedings and are orders made in the course of the progress of the litigation through the court and without determining the main issue in the action.[8] Such orders are generally not appealable. The policy considerations underlying the principle include discouraging piecemeal appeals.[9] Orders for discovery or the production of documents are not appealable for this reason – these are interlocutory orders in effect as well as in form.[10]

[13] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[11] Corbett JA distinguished between simple interlocutory orders that are not appealable and other interlocutory orders that are or may be appealable. The distinction was described as follows by Schreiner JA in the majority judgment in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*[12] with reference to the judgment of the Appeal Court in *Globe and Phoenix G.M. Company v Rhodesian Corporation*:[13]

> *"From the judgments of WESSELS and CURLEWIS, JJ.A., the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'. The earlier judgments were interpreted in that case and a clear*

8 *Guardian National Insurance Co Ltd v Searle* NO 1999 (3) SA 296 (SCA).

9 See *Health Professions Council of South Africa v Emergency Medical Supplies and Trading CC t/a EMS* 2010 (6) SA 469 (SCA) paras 17 to 19.

10 See *Mylchreest v European Diamond Mining Co Ltd* (1885) 3 HCG 270, *McLaren v Wasser* 1915 EDL 153, *Le Roux v Montgomery* 1918 TPD 384, and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

11 *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A).

12 *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) 870.

13 *Globe and Phoenix G.M. Company v Rhodesian Corporation* 1932 AD 146. See also *Mathale v Linda* 2016 (2) SA 461 (CC).

> *indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit."*

[14] The majority held that an order by the magistrate directing the furnishing of further particulars was not appealable.

[15] The principle that appealability hinges on whether the order sought to be appealed is definitive of the rights of the parties and disposes of at least a substantial portion of the relief grant in the main proceedings is of long standing,[14] but the older authorities must be read with the caveat that Constitutional values have introduced the more *"context-sensitive standard of the interests of justice*[15] *favoured by our Constitution"* when considering appeals against interlocutory orders.[16]

[16] The judgment by the Supreme Court of Appeal in *Philani-Ma-Afrika and Others v Mailula and Others*[17] provides an illustration of the operation of Constitutional interest of justice principles: The High Court granted leave to appeal and granted leave to execute pending the outcome of the appeal. The question arose whether the order granting leave to execute was appealable. Farlam JA said in the Supreme Court of Appeal:

> *"[20] It remains for me to deal with the issue referred to this court by the Constitutional Court. The application was brought in the Constitutional Court because it was believed that the execution order was not susceptible to appeal to the full bench of the High Court or to this court. That belief was erroneous. It is clear from such cases as S v Western Areas Ltd and Others*[18] *2005 (5) SA 214 (SCA) (2005 (1) SACR*

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14 *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 531E to 533B.

15 The Constitutional Court has also held in respect of an appeal directly to the Constitutional Court against the granting of an interim interdict in terms of section 167(6)(b) of the Constitution, 1996, the common-law requirements for appealability of interim orders was now subsumed under the constitutional *"interest of justice"* standard: *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) paras 40, 41 and 179.

16 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 53. See also *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) para 8, *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA) paras 25 – 26

17 *Philani-Ma-Afrika and Others v Mailula and Others* 2010 (2) SA 573 (SCA) para 20.

18 This judgment was concerned with the dismissal of an objection to an indictment or charge in criminal proceedings.

> *441) in paras 25 and 26 at 226A - E that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice. See also Khumalo and Others v Holomisa[19] 2002 (5) SA 401 (CC) (2002 (8) BCLR 771) in para 8 at 411A - B. The facts of this case provide a striking illustration of the need for orders of the nature of the execution order to be regarded as appealable in the interests of justice. Counsel were agreed that if the appeal on the merits of the eviction order were to succeed no further attention need be paid to the application for leave to appeal against the execution order - the latter being premised on the former. In any event, in view of the suspension of the execution order by the Constitutional Court, the point, as counsel agreed, became moot. In the circumstances no order is required in respect thereof."*

If the eviction order were to be executed only for the appeal against the order to succeed later, harm would have been done to the appellants and there would be no justification for the eviction itself. It may be argued that the eviction order was final in effect in the context of the case – once it is done it cannot be undone.

[17] In *Nova Property Group Holdings Ltd and Others v Cobbett and Another*[20] the Supreme Court of Appeal dealt with the appealability of an order dismissing an application for discovery made in terms of Rule 35(14) of the Uniform Rules of Court. Kathree-Setiloane AJA (as she then was) said that the enquiry to determine what is in the interests of justice is fact-dependent. There were four conflicting judgments that merited the attention of the Supreme Court of Appeal, and it also was common cause between the parties that if the Judge *a quo*'s interpretation of a provision of the Companies Act[21] was correct then the real issue in the main application would be resolved as envisaged in section 17(1)(c) of the Superior Courts Act. It would *"lead to a just and prompt resolution of the real issues between the parties"* as required by section 17(1)(c) of the Superior Courts Act.

[18] In deciding this application for leave to appeal one must therefore not look at the interlocutory nature of the order in isolation, but decide whether it is in the interests of justice to grant leave based on the facts of the case read with the legislation and the

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19 In this case the Constitutional Court was seized with an application for leave to appeal on a constitutional matter.

20 *Nova Property Group Holdings Ltd and Others v Cobbett and Another* 2016 (4) SA 317 (SCA) paras 8 to 11.

21 Section 26(2) of the Companies Act, 71 of 2008.

authorities. For the reasons set out below I hold that there are no interest of justice considerations that would merit an order granting leave to appeal.

[19] I deal with the issues raised in argument under different headings below.

AUTHORITY OF THE BANK'S DEPONENT

[20] I dealt with the authority of the bank's deponent in paragraphs 13 to 16 of the judgment. I am satisfied that the authority of the deponent was established in the founding affidavit in the main application.

[21] The surety never invoked Rule 7 of the Uniform Rules.

THE STRIKING OUT APPLICATION

[22] I dealt with the striking out application in paragraphs 17 to 22 of the judgment. The surety did not seek to make out a case of prejudice in the event that the *"offending"* material was not struck out, and I found that the averments made were relevant in the context of the application and the case that the bank was answering.

[23] Even if I were wrong in holding that the averments were relevant, the striking out application would still fail because of the absence of prejudice. If they were irrelevant they could be merely ignored.

THE DOCUMENTS SOUGHT IN THE RULE 35(12) NOTICE

[24] I dealt with Rule 35(12) in paragraphs 23 to 27 of the judgment. The test under

Rule 35(12) is relevance.[22] A party is not entitled to a document merely because it is referred to, but is entitled to it when it is relevant. The surety did not seek to make out a case for relevance.

[25] He does say that he needs the documents to lay criminal charges. The fact that he wishes to pursue unidentified criminal charges against the bank or bank officials does not make the documents relevant to these proceedings.

[26] The National Credit Act, 34 of 2005 does not apply to the agreement for the reasons set out in paragraph 6 of the judgment. This is not a finding as suggested in the notice of appeal but a statement of common cause facts on common cause legislation. It is obviously so that had different parties entered into different agreements not now before Court, then different legal principles might have been applicable. The surety's argument is that had he and not Northend been the principal debtor then the National Credit Act would have applied as he is a natural person rather than a juristic person, and if that were the case then the reckless credit provisions of the National Credit Act would have applied, and therefore the reckless credit provisions do apply.

[27] The argument is devoid of logic. When credit was extended, it was extended to a juristic person with turnover in excess of the prescribed minimum. There was, on common cause facts, no need to apply the reckless credit provisions of the National Credit Act. The surety argues that had he entered into the agreement as the principal debtor the reckless credit provisions would have been applicable but the fallacy lies in the fact that this is not what happened.

[28] Most if not all of the documents referred to in paragraph 33 of the judgment fall into this category. It must also be noted that all the documents referred to, whether forming part of the credit application or not, would have emanated from Northend or from the surety. The surety represented Northend in its dealings with the bank.

[29] The surety also referred to documents that are not referred to in the bank's founding affidavit in the main application. These are listed in paragraph 34 of the judgment. When a party in an application seeks discovery of a document that he or she suspects to exist but that is not referred to in the opposition's affidavit, the correct machinery to obtain discovery is to utilise the machinery provided by Rule 35(1), (2), (3)

[22] *Democratic Alliance v Mkhwebane* 2021 (3) SA 403 (SCA) para 41.

and (14) read with Rule 35(13), and to do so at the appropriate time.

[30] As is the case with the documents listed in paragraph 33 of the judgment, no facts are alleged to substantiate an argument that the documents listed in paragraphs 36, 37 and 38 of the judgment are relevant to the pending application.

[31] It is argued on behalf of the surety that in the Rule 35(12) notice and subsequent application the surety was not seeking an order that the bank discover the documents sought, but merely an order that the bank *respond* to the Rule 35(12) notice as required by Rule 35(12)(a)(i), (ii) or (iii). This is a semantic argument – discovery in terms of Rule 35(12) and in the ordinary meaning of the word in this context is that a party discovers by acting in one of the three ways listed in paragraphs (i), (ii), or (ii) of Rule 35(12)(a).

[32] In this matter the bank failed to respond and the surety brought an application to compel in terms of Rule 35(12). In order to succeed, the surety had to make out a case that it was entitled to the relief; this at the very least included averments that the documents sought are relevant to the pending main application – if not, the application to compel discovery is merely academic.

Had the surety made the necessary averments in the founding affidavit, the bank would of course have been required to deal with the point. The surety made out no case for relevance and on the facts of this case, must fail.

[33] Ordering the bank to object to the production of the documents in writing in terms of Rule 35(12)(a)(ii) would in my view be placing form over substance, given that the bank had not produced the documents or filed an affidavit stating that the documents were not in possession of the bank.

THE WASTED COSTS OF THE ENROLMENT IN APRIL 2022 AND THE COSTS OF THE APPLICATION

[34] The surety seeks leave to appeal the order I made in respect of the wasted costs of an earlier appearance and also seeks to appeal the cost order in the application as

argued before me. I dealt with the cost aspect of the case in paragraphs 40 to 49 of the judgment. I am of the view that this ground for leave to appeal stands or falls with the rest of the application for leave to appeal as an order granting leave to appeal only in respect of the cost order would not be justified by virtue of section 16(2)(a)(ii) of the Superior Courts Act. No exceptional circumstances exist and such an appeal against costs only would have no practical effect or result. Conversely, if leave were granted, the costs orders will be argued on appeal as well.

THE PAPERS BEFORE THE COURT

[35] The Court file as it was placed before me on the Caselines platform contained the notice of motion and founding affidavit in the main application, the counter – application, the answering affidavit that also served as a founding affidavit in the counter-application, the bank's replying affidavit, and the various notices.

[36] The history of the matter is set out in paragraphs 4 to 12 of the judgment. It provides background information and do not constitute findings. For instance, no finding was required that the Rule 30 notice of 26 July 2021 was out of time. Notice was clearly given more than ten days after the delivery of the affidavit and I merely stated this fact as background to the application before me. I did not have to decide whether it was properly before Court and what should happen because notice was given after expiry of the relevant period. The fact that mediation had not delivered the desired results was a common cause fact and also did not require a finding by me.

[37] No finding of negligence was made in paragraph 12 of the judgment as is alleged in the notice of application for leave to appeal.

COSTS

[38] There is no reason to deviate from the grounds upon which a punitive cost order was granted and I make such an order.

CONCLUSION

[39] No case is made out for leave to appeal in this interlocutory application and no interests of justice issues are raised to merit leave to appeal.

[40] I therefore grant the order in paragraph 1 above.

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J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **7 DECEMBER 2023**

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INSTRUCTED BY:	VALLY CHAGAN & ASSOCIATES ATTORNEYS
COUNSEL FOR RESPONDENT:	R SHEPSTONE
INSTRUCTED BY:	A D HERTZBERG ATTORNEYS
DATE OF THE HEARING:	29 NOVEMBER 2023
DATE OF JUDGMENT:	7 DECEMBER 2023