HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

In the matter between Case no. : 82216/17

J. SITHOLE **Applicant**

vs

FIRSTRAND BANK LIMITED **Respondent**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

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1. On 29 May 2018 this court made an order against the Applicant (as Respondent/Defendant) in favour of the Respondent (as Applicant/Plaintiff) in the unopposed motion court. At the time the Applicant had not opposed the action against her nor the application for default judgement against her, had not filed any opposing papers and also failed to appear at the hearing of the matter. After considering the papers and submissions on behalf of the Respondent the relevant order was made.

2. Almost 3½ years later the Applicant filed a Notice of Application for Leave to Appeal dated 14 October 2021. No other papers or processes were filed by the Applicant. Nothing was thereafter done by the Applicant to prosecute the appeal further. Eventually the Respondent set the Application for Leave to Appeal down in order to obtain finality in the matter.

3. The Application for Leave to Appeal was set down for 1 September 2022. The Applicant failed to file any papers and also failed to appear at the hearing of the matter. In fact, in response to a specific invitation by my Register, Me Hudzani Maboho, to attend the hearing, which was conducted virtually, the invitation was specifically declined. Adv J. Minnaar appeared on behalf of the Respondent.

4. The background of the matter is briefly the following: On 29 May 2018 this Court granted a Rule 46A-order and set a reserve price in the amount of R256 462.07.

5. The said order was granted in the unopposed motion court and in the absence of the Applicant. No representations by the Applicant were made as to the merits of the Rule 46A-application nor in respect of the value of the property or the proposed reserve price.

6. Leave to appeal was not requested at the time of the order and Rule 49(1)(b) accordingly became of application. It provides that:

   'When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished ***within 15 days after the date of the order*** *appealed against . . .'.*

7. The grounds of appeal must be clearly and succinctly set out in a clear and unambiguous manner so as to enable the court and the respondent to be fully informed of the case the applicant seeks to make out and which the respondent has to meet in opposing the application for leave to appeal. Rule 49(1)(b) is peremptory in this regard. Cf. ***Songomo v Minister of Law and Order*** **1996 (4) SA 384 (E) at 385J – 386A.**

8. The Applicant dismally failed to meet the requirements of Rule 49(1)(b). The applicant did not seek reasons from this Court as to why the order was granted. The application is furthermore premised on contrived facts. I shall refer to this aspect again herein below.

9. The first difficulty with the present application is the fact that it is hopelessly out of time. In terms of the provisions of Rule 49(1)(b) an application for leave to appeal shall be furnished within fifteen days after the date of the order appealed against. The order was granted on 29 May 2018 and as such the *dies* would have expired on 19 June 2018. The application was only delivered in October 2021. This is more than three years after the application was due.

10. Rule 49(1)(b) provides that the court may, upon good cause shown, extend the aforementioned periods of fifteen days but the Applicant had not even attempted to show good cause in this regard. There is no application for condonation before the Court.

11. Since the application is woefully out of time and no good cause had been shown why the period of fifteen days should be extended, the application stands to be dismissed with costs on the scale as between attorney and client.

12. Despite the lateness of the application I shall nevertheless also briefly refer to the merits of the application for leave to appeal. At the outset it should be pointed out that the approach adopted by the Applicant is flawed. If the Applicant was disgruntled with the order granted, she should more appropriately have approached this Court with a rescission of judgment application either in terms of the provisions of Rule 31(2)(b), Rule 42(1) or the common law.

13. Furthermore, from a reading of the application for leave to appeal it appears that the Applicant is not satisfied with the reserve price set by this Court. The difficulty the Applicant faces in this regard is that no representations were made by her as to the value of the property and all the other factors which may be relevant. The obligation in this regard is on the consumer (the Applicant herein).

14. Regarding the aforementioned it was found in **ABSA Bank Ltd v Mokebe and related cases 2018 (6) SA 492 (GJ)** that it is necessary for a court to determine whether a reserve price should be set based on all the factors placed before it by both the creditor and the debtor when granting an order declaring the property to be specially executable. If a debtor fails to place facts before the court despite the opportunity to do so, the court is bound to determine the matter without the benefit of the debtor's input.

15. In the absence of any input by the Applicant this Court set a reserve price in the amount of R256 462.07. Same was set based on the evidence provided by the applicant in the Rule 46A-application. This evidence, *inter alia*, was:

Market value:	R450 000.00
Municipal value:	R300 000.00
Rates and taxes:	R4 178.10
Outstanding balance:	R166 986.24
Proposed reserve price:	R256 462.07

16. Premised on the aforesaid it is evident that the reserve price was set in accordance with the proposal made by the Respondent.

17. In light of the fact that there was no appearance by the Applicant nor opposing papers filed by her, the Applicant was blatantly dishonest in respect of the following matters. She stated that the Court erred in failing to take into consideration any of the submissions concerning the value and sale of the property, knowing full well that no such submissions had been made by her. She furthermore referred to higher offers received in order to purchase the property despite knowing that no such evidence had been placed before the Court. Furthermore, she referred to her denial of liability to the Respondent and stated that the reasons therefore were before the Court. The Applicant knew that these allegations were false as no evidence had been placed by her before this Court. Furthermore, she stated that the matter ought to have been referred to trial as the Applicant stated that the bond had been securitised, ceded or endorsed and that the Respondent had to prove same. The Applicant also knew that these allegations were false since no evidence had been placed by her before this Court.

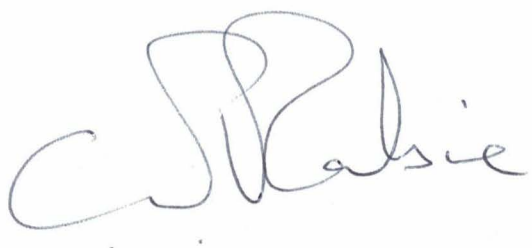
18. Having regard to all the aforesaid I agree with the submission on behalf of the Respondent that despite the application being totally defective and out of time, the application is *mala fide,* contrived and a complete abuse of the processes of this Court. The ineluctable inference to be drawn from the Applicant's application is that its sole purpose was to delay and frustrate the Respondent's efforts to obtain the relief it is entitled to.

19. The application for leave to appeal is fatally defective and out of time and there is no prospect that the appeal would have reasonable prospects of success. No other compelling reason was advanced why the appeal should be heard.

20. Since this application constitutes a gross abuse of the process of this Court a special order for costs should be awarded against the Applicant.

21. Consequently, the following order is made:

    1. The application for leave to appeal is dismissed with costs which costs shall be on the scale as between attorney and client.



C.P. RABIE

JUDGE OF THE HIGH COURT

1 September 2022.