



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

CASE NO: 2269/2008

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

21 May 2024

DATE

SIGNATURE

In the matter between:

CHRISTINA FUNDISWA KHUMALO

Applicant

and

SHERIFF JOHANNESBURG-CENTRAL

First Respondent

STANDARD BANK OF SA LTD

Second Respondent

Heard: 17 May 2024

Delivered: This Judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines. The date and time for hand down is deemed to be 10:00 am on 21 May 2024.

JUDGMENT (LEAVE TO APPEAL)

GREEN, AJ

[1] This is an application for leave to appeal brought by the First Respondent against my judgement of 8 November 2023. In my judgement I ordered that the First

Respondent pay to the Applicant money which he had attached from the Second Respondent together with interest.

[2] The First Respondent had agreed to abide the result of the main application, but now seeks to appeal the judgement that was granted.

[3] Applications for leave to appeal are regulated by section 17(1)(a) of the Superior Courts Act.¹

[4] Although reasonable prospects and compelling reasons are separate bases for granting leave to appeal there is an interplay between them and if there are low prospects of success compelling reasons will not be enough to justify the granting of leave to appeal.²

[5] In opposing the application for leave to appeal the Applicant has raised the point that the First Respondent, having elected to abide the result of the main application, has perempted any appeal.

[6] In *Zuma*³ the Constitutional Court said:

“It is trite that the doctrine of peremption finds application across our legal landscape. The doctrine tells us that ‘peremption is a waiver of one’s constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party’s self-resignation to the unfavourable order that could otherwise be appealed against. The principle that underlies this doctrine is that ‘no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to approbate and reprobate’.”⁴ (Footnotes omitted.)

[7] In the context of peremption of an appeal the Labour Court in *Davis*⁵ found that a notice to abide is a peremption of a party’s right to appeal.⁶

[8] During argument Mr Hollander accepted that where a party files a notice to abide that normally constitutes a peremption of a right to appeal. However, he argued that the facts of this matter are such that peremption should not arise. As I understood

¹ 10 of 2013.

² *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA).

³ *Zuma v Secretary of the Judicial Commission of Enquiry into allegations of State Capture* [2021] ZACC 28.

⁴ *Id* at para 101.

⁵ *Davis v Bulldog Abrasives SA (Pty) Ltd and Others* [2021] ZALCJHB 136.

⁶ *Id* at para 4

the argument, the “*facts*” that Mr Hollander relies on are that the First Respondent is a sheriff. I have carefully considered whether the fact that the First Respondent is a sheriff should change the normal rule that peremption arises where a party abides a judgement. In my view there are no special circumstances or facts in this matter and the First Respondent’s election to abide my judgement is a peremption of his right to appeal.

[9] In finding that there are no special circumstances or facts to alter the normal consequences of electing to abide a judgement, I have specifically considered that, in her notice of motion, the Applicant claimed return of the money together with interest from the First Respondent. The First Respondent was therefore fully informed that the Applicant sought not only the return of the money but also interest on that money.

[10] Having found that the First Respondent’s election to abide my judgement is a peremption of the appeal it is strictly unnecessary to consider the other points raised by Mr Hollander. However, for completeness I deal with those further points.

[11] Mr Hollander argued that on appeal the First Respondent may introduce further evidence. As I understood this submission, it was to cater for the fact that the First Respondent having elected to abide my judgement had not filed papers and there will therefore be no facts before an appeal court to explain why the First Respondent did not pay the money to the Applicant. If that is so the First Respondent ought, in my view, to have set out what further evidence he might apply to place before an appeal court when seeking leave to appeal. In the absence of an indication of what that evidence might be, there is no basis upon which to grant leave to appeal because there is no contrary version from the First Respondent.

[12] The next point raised by Mr Hollander related to section 35 of the Sheriffs Act.⁷ Section 35(a) provides that if a sheriff fails to pay money a claim will lie against the Fund contemplated in that section. Mr Hollander fairly and correctly pointed out that section 35(b) provides that the sheriff remains liable, notwithstanding that a claim may lie against the Fund. Section 35(b), in my view, answers the point raised by Mr Hollander. Even if the Applicant had a claim against the Fund, on which I make no

⁷ 90 of 1986.

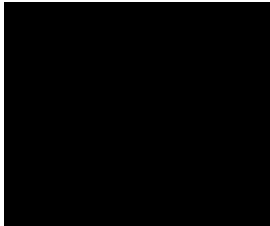
finding, she would nonetheless have been entitled to proceed with her claim against the First Respondent.

[13] For the reasons set out above it is my view that the First Respondent has no reasonable prospect of success on appeal and there are no compelling reasons to justify the granting of leave to appeal.

[14] Given the recent changes to the Uniform Rules relating to the costs of counsel, these were discussed with counsel when the matter was argued. As I understood counsel they were agreed that the costs of this application should be awarded on Scale B.

[15] For the reasons that I have set out, I make the following order:

“The application for leave to appeal is dismissed with costs, with the costs of counsel to be on Scale B.”

—  — I GREEN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Appearances

For the Applicant:

N Nemukula instructed by Khumalo
Attorneys & Associates, Randburg

For the First Respondent:

L Hollander instructed by Mathopo
Attorneys Inc, Rosebank

Date of hearing: 17 May 2024

Date of judgment: 21 May 2024