

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

5 CASE NUMBER: 20350/2012

DATE: 24 NOVEMBER 2015

In the matter between:

D L [M.....] Applicant

10 And

L S [M.....] Respondent

J U D G M E N T

15 DAVIS, J:

Introduction:

[1] This is an application in terms of Rule 30(1) of the Uniform Rules of Court. The applicant and first respondent, husband and wife, in a divorce action which is pending before this Court, in which the first respondent has instituted action against the applicant, as well as the trustees of several trusts (“the Trust”) in October 2012.

/BW

/...

[2] In February 2015, applicant brought an application in terms of Rule 33(4) of the Uniform Rules of Court, for a

20350/2012

separation of issues in the divorce action. He sought a separate determination of the following issues at a preliminary trial: the claims for a decree of divorce, it being common cause that the marriage had broken down irretrievably, as well
5 as the contact arrangement in respect of the parties' minor child. Inasmuch as the applicant consented to a maintenance order claim by the first respondent in respect of the child, he proposed that an order could be granted by consent at the first trial. At the second trial it was proposed that the first
10 respondent's proprietary claims be determined; that is her accrual claim, including her claims in respect of the Trust assets, as well as her claim for damages.

[3] It appears that the trustees supported this Rule 33(4)
15 application, but brought a counter-application in terms of Rule 33(4) to the effect that the legal issue, regarding the effective date upon which the extent and value of the parties' estates must be calculated for the purposes of the first respondent's accrual claim, should be determined separately. It appears
20 that first respondent initially opposed this counter-application, but subsequently accepted that the issue of the effective date should be determined separately and prior to the determination of her accrual claim.

25 [4] Thereafter the Trust and the first respondent further
/BW /...

agreed that the hearing on 18 June 2015 could be employed to argue the merits of the effective date issue before Ndita J, together with the main Rule 34 application.

5 [5] On 3 September 2015, Ndita, J handed down a ruling in the Rule 33(4) main application and in the counter-application, in what has been referred to as a composite order, in terms of which she ruled that the issues should be separated as sought by the applicant in the main Rule 33(4) application. The
10 learned judge further ruled, in respect of the counter-application, that the effective date issue must be determined separately in accordance with the agreement between the first respondent and the trustees. It appears that she did not determine the merits in respect of the effective date issue, as
15 the first respondent and the trustees had invited her to so do.

[6] On 8 September 2015, first respondent's attorney advised the case management judge in the divorce action, Mantame, J, that the first respondent intended to appeal the
20 Rule 33(4) order.

[7] The letter generated by Ms Catto, legal representative of the first respondent, reads as follows:

25 "We refer to correspondence directed to you by the first defendant's attorney, on 4 September 2015, relating to

/BW

/...

the further conduct of this matter and requesting you to reconvene a Rule 37(8) conference. Our instructions are to request reasons for the order granted by the honourable Ms Justice Ndita, with a view to appealing the order, which we were advised by counsel is finally in effect.” (My emphasis).

[8] On 8 September 2015, first respondent’s attorney delivered a letter to Ndita, J, enclosing a request for reasons for the order which she had granted. That reads thus:

“We are advised by counsel that the order is final in effect, and that our client should consider an appeal against its terms. We are accordingly instructed to request that you please furnish us with your reasons for the order at your earliest convenience to enable our client to lodge an appeal should it be warranted. To the extent it is necessary to do so, we attach a formal notice requesting reasons for the order.” (My emphasis).

[9] There followed a formal request, which reads thus:

“Request for reasons for order.

Be pleased to take notice that first respondent hereby requests reasons for the court’s order dated 2 September 2015 and handed down on 3

September 2015.”

[10] On 16 September 2015, the applicant served a notice in terms of Rule 30(2)(b) on the first respondent, notifying her of the intention to apply in terms of rule 30(1) for an order setting
5 aside the request for reasons as an irregular step, and affording the first respondent an opportunity to withdraw the request for reasons within a specified period.

10 [11] Mr Pincus, who appeared with Ms Gassner on behalf of the applicant, correctly defined the core question as follows: Applicant contends that the Rule 33(4) order constitutes a simple interlocutory order or ruling which is not appealable, and that consequently the first respondent is not entitled to
15 apply for reasons in terms of Rule 49 in respect of the decision relating to the Rule 33(4) main application.

First respondent argues that she is entitled to reasons for the purposes of considering an appeal. She contends in the
20 alternative, that even if the Rule 33(4) order is not appealable, she nevertheless has a right to request reasons. Much of Mr Pincus’ submissions concerned the appealability of the order of Ndita, J.

[12] As I indicated in open court, the determination of the
25 legal fate of this order has to be decided by the judge who

/BW

/...

granted the order, namely Ndita, J. It would be entirely improper of this Court to encroach upon the scope of Ndita, J's powers. I have no intention of doing so and have full confidence that the matter will be properly and fully argued, should it be necessary, before the learned judge.

[13] There is one caveat that I must, however, offer in respect of this observation. This flows directly from Mr Pincus' argument. Mr Pincus contends that as there could never have been a basis for an appeal on any of the issues decided by Ndita, J, the entire request for reasons must have been generated for ulterior purposes, in particular "a delaying tactic" on behalf of first respondent.

[14] In summary, Mr Pincus submitted that Rule 33(4) orders, are non-appealable, within the meaning as set out in Zweni v Minister of Law & Order 1993 (1) SA 523 (A) at 531, and do not, in any way, fall under any of the exceptions which have been recognised by our courts. By contrast, in her answering affidavit, first respondent submits that the requirements for appealable as set out in Zweni are not "cast in stone". Mr Pincus conceded that our courts have recognised some limited exceptions to the general principles set out in Zweni, supra. For example, in Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A), the court

held that the dismissal of an application for the recusal of a judge was appealable, because the decision, although not defining the parties' rights, or disposing of any of the relief claimed in respect thereof, had a very definite bearing on these rights. It is clear from this judgment that the court regarded the dismissal of the recusal application as a special case, involving a fundamental decision which went to the core of proceedings and, if incorrectly made, would have vitiated them. However, as Hefer, JA said at 10F:

10 “However, the passage in question does not purport to be exhaustive or to cast the relevant principles in stone.”

[15] Notwithstanding this *caveat*, Mr Pincus referred as further authority for his argument to a case which had been cited by the court in Moch, namely Van Streepen v Germs (Pty) Ltd & Transvaal Provincial Administration 1987 (4) SA 569 (A). He submitted that a Rule 33(4) order is a ruling within the meaning discussed by Corbett, JA (as he then was) in Van Streepen at 580E, namely that not every decision made by the Court in the course of judicial proceedings constitutes a judgment or an order. As Ndita J made a ruling and not a judgment, there was no necessity to provide reasons. A Rule 33(4) specifically provides that a separate order does not necessarily have to be made on application by one of the parties, but can simply be made *mero motu* by the court, if it

appears to be convenient to do so. Hence, on Mr Pincus' line of argument, as the order of Ndita, J cannot be appealed, no justifiable purpose could have possibly been served by first respondent's conduct.

5

[16] The only point on which I wish to comment with regard to the question of appealability is the following: As Mr Fitzgerald, who appeared with Ms Dicker on behalf of first respondent, noted, the approach to the issue of whether an order is appealable, has become far more flexible since Zweni,
10 supra. As set out in Phillips v SA Reserve Bank & Others 2013 (6) SA 450 (SCA) in paras 24-28, the classification of an order as either interlocutory or final, is not determinate of its appealability. The courts have been more pragmatic and hence
15 decide what is appropriate in any given case. See National Treasury v The Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) at para 24, where Moseneke, DCJ said:

“It is so that courts are rightly reluctant to hear appeals against interim orders that have no final effect and that,
20 in any event, are susceptible to reconsideration by a court when the final relief is determined. That, however, is not an inflexible rule. In each case, what best serves the interests of justice dictates whether an appeal against an interim order should be entertained. That
25 accords well with developments in case law dealing with

when an appeal against an interim order may be permitted. This court has granted leave to appeal in relation to interim orders before and has made it clear that the operative standard is “the interest of justice”. To
5 that end it must have regard to and weigh carefully all germane circumstances.”

[17] On the basis of this approach Mr Fitzgerald submitted that the order granted by Ndita, J, may be final, or, at least,
10 final in effect, and may hence prove to be definitive of certain rights of the parties, particularly if the separation of issues, including the divorce, is not capable of being amended by a trial court. Mr Fitzgerald observed that if the divorce was separated and this order was not appealable, the inevitable
15 consequence would be that there would be no longer a divorce action pending, and accordingly first respondent, *inter alia*, would no longer be able to avail herself of any remedy in terms of Rule 43 of a contribution to costs for the second leg of the litigation.

20

[18] Applying the flexible approach to appealability, Mr Fitzgerald submitted that the order, or part thereof, granted by Ndita, J, may well be appealable. The only point of consequence for the present dispute that emerges from this
25 excursus, is that to assert boldly that nothing in the order can

ever be appealable, and that no other reasonable inference could be drawn from first respondent's conduct, other than a motivation based solely on delay, must be regarded as unsustainable if, as appears to be the case, Mr Pincus' argument is based purely on an inference. More than that concerning the questions of appealability, I do not wish to comment. These are questions for another court, and I have found it distinctly uncomfortable to be required to even traverse this particular issue, as it encroaches upon the domain of another court.

[19] Significantly, when pressed in argument, Mr Pincus appeared to abandon the second point which had been contained in his notice and written argument, namely that a litigant does not have a general right to request reasons for a ruling or an interlocutory order which is not appealable. Initially he adopted the view that judicial pronouncements regarding a court's duty to give reasons have only been made in relation to appealable orders. A general right to request reasons for any judgment or decision, regardless of its nature, as contended for by the respondent, would unduly hamper the conduct of proceedings and impede the administration of justice.

[20] But it this point more than any other, which is dispositive
/BW /...

of this application. The question which arises is whether a litigant has a right to be provided with reasons for any order which is granted by a court. The case law has not been targeted precisely towards the kind of dispute with which this
5 court is unfortunately confronted. However, in Mphahlele v FNB (Ltd) 1999 (2) SA 667 (CC), Goldstone, J said at para 12:

“There is no express constitutional provision which requires judges to furnish reasons for their decisions.
10 Nonetheless in terms of s1 of the Constitution, the rule of law is one of the founding values of our democratic state and the Judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily
15 account for their decisions by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large, which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial
20 decisions. Then too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal, or where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower
25 court is correct. And finally, it provides guidance to the

public in respect of similar matters. It may well be, too that where a decision is subject to appeal, it would be a violation of the constitutional right of access to courts, if reasons for such a decision were to be held by a judicial officer.”

[21] Justice Goldstone continued at para 18:

“Courts of first instance invariably furnish reasons for the decisions, whether in criminal or civil cases. As I have already suggested, if they failed to do so, they might be in violation of their constitutional duty.”

[22] In Strategic Liquor Services v Mvumbi N.O. & Others 2010 (2) SA 92 (CC), the court said at para 15:

“It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and when a judgment is appealed, written reasons are indispensable. Failure to supply them, will usually be grave lapse of duty, a breach of litigants’ rights and an impediment to the appeal process.”

[23] In my view, the right to be provided with reasons, is inextricably coupled to the principle of legality. See Wessels v Minister of Justice & Constitutional Development 2010 (1) SA 128 (GNP) at 141. Section 34 of the Republic of South Africa /BW

/...

Constitution Act 108 of 1996, encapsulates the core principles of the rule of law (see in general Beinart 1962 *Acta Juridica* 99. In turn this principle must include the right of a litigant to be given reasons by a court. Absent such a right, transparency is cloaked in darkness, accountability is honoured in the breach.

[24] It is extremely disturbing, in my view, that senior legal practitioners can mount an argument that runs so fundamentally against the core of a legal system, whatever their frustrations may be with regard to the conduct of the requesting party.

[25] It is a foundational principle of law that proceedings in court should be open and that parties should understand, not simply how they won, but also how they lost. The principle of legality incorporates rationality and accountability. It imposes a duty on all manner of functionary to provide reasons for her, his or its decision. It must follow, insofar as court proceedings are concerned, that a similar right should be available. There is, therefore, no merit in the application which has been brought by applicant.

[26] This in turn, brings me to the rather more unfortunate part of this case, that is the question of costs. Mr Fitzgerald

/BW

/...

20350/2012

submitted that it would be appropriate for this Court to make an award of costs *de bonis propriis* against the legal representatives of the applicant. In order to decide this matter, I was greatly assisted by the extremely helpful heads of Mr Muller, as well as his oral argument, Mr Muller appeared on behalf of respondent's counsel in this connection. Mr Muller referred to the decision in Multilinks Telecommunications Ltd v Africa Pre-Paid Services Nigeria Ltd [2103] 4 All SA 346 (GNP) at para 34:

10 “Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances, and pursuant to a discretion judicially exercised, is a party ordered to pay costs on a punitive scale. Even more exceptional, is an order that a legal representative should be ordered to pay the costs out of his own pocket. It is quite correct, as was submitted, that the obvious policy consideration underlying the Court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their clients' rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated, either by their opponent or even, I might add, by the court... It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court, or in other ways

/BW

/...

related to the conduct of the proceedings. This is an every day occurrence. This does not, however, *per se*, ordinarily result in a court showing its displeasure by ordering the particular legal practitioner to pay the costs for his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of a legal practitioner...”

[27] It must be so that an award of costs *de bonis propriis* against legal representatives, can only be made in very serious cases, such as dishonestly, wilfulness or a level of negligence which extends to the highest degree. If a court extends the boundaries beyond these very circumscribed limits, litigation would be chilled. Counsel must be permitted to make legal mistakes without the risk of a drastic court order. Law invariably is not so clear that a level of accurate precision, should be required without the risk of a punitive costs order of the weight of a cost order *de bonis propriis*.

[28] Mr Muller correctly noted that applicant’s counsel and attorney, all senior practitioners were of the genuine belief that the first respondent’s request for reasons constituted an irregular step. They were further of the belief that the request was itself a strategic move by the first respondent and an abuse of the process of court designed to delay the divorce

proceedings. It appears that they were also fortified by a very senior attorney acting for the Trust, who was also of the opinion that the request for reasons constituted an irregular step in terms of Rule 30.

5

[29] Mr Muller's argument has considerable merit. I accept that an order of this nature would have an extremely chilling effect on the ability of legal practitioners to pursue their clients' rights and interests and present their case in the
10 fearless and vigorous way which should be demanded. It would also run counter to a common sense reaction of the courts to practitioners, whom they consider may have advised their clients to bring an ill considered application. Courts, understandably, have been loath to mulct the legal practitioner
15 in costs, save in exceptional circumstances.

[30] I cannot accede to the request insofar as a cost order *de bonis propriis* is concerned. That being said, the idea that senior lawyers would argue a point so antithetical to the
20 foundation of a legal system is disturbing. I do consider that the course of action what was employed by applicant, to the effect that the first respondent was not entitled to be given reasons, not entitled to consider whether there may be an appeal, is so fundamentally incongruent with core legal
25 principles and a basic sense of justice, that it would be
/BW /...

incorrect of this Court not to express its displeasure at this conduct. Accordingly it is correct, in my view, to impose some form of sanction in these circumstances.

- 5 **Accordingly the application is dismissed with costs, including the cost of two counsel on an attorney and client basis.**

10

DAVIS, J