



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5893/2023

In the matter between:

**CAROSPAN (PTY) LTD t/a NASHUA BLOEMFONTEIN &
NASHUA ALIWAL**

Applicant

and

**KEI KABILE, MAGISTRATE FOR THE DISTRICT OF
TWEESPRUIT
FRANS FARMING (PTY) Ltd**

First Respondent

Second Respondent

CORAM: LOUBSER, J et MGUDLWA, AJ

HEARD ON: 18 MARCH 2024

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 22 MARCH 2024

- [1] This is an application for the review and setting aside of three different orders granted by the Magistrate's Court of Tweespruit under case number 11/2023. The first is an interim interdict granted against the Applicant on 31 August 2023, the second is an order confirming the *rule nisi* and the granting of a final interdict against the Applicant on 29 September 2023, and the third is a default judgement granted against the Applicant on the same date.

- [2] Section 22 of the Superior Courts Act¹ provides for the grounds upon which the proceedings of any Magistrate's Court may be brought under review before a High Court. Those grounds are the following:

- 22(1)(a) absence of jurisdiction on the part of the Court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

- [3] In its present application, the Applicant is relying on the ground mentioned in Section 22(1)(c), namely gross irregularity in the proceedings. In **Absa Bank Ltd v De Villiers and Another**² Navsa, JA stated the following: "A gross irregularity in civil proceedings in an inferior court means an irregular act or omission by the presiding judicial officer in respect of the proceedings, of so gross a nature that it was calculated to prejudice the aggrieved litigant, on proof of which the court would set aside such proceedings, unless it was satisfied that the litigant had in fact not suffered any prejudice. An example of conduct justifying a review based on a gross irregularity in the proceedings is where a judicial officer acts in a high-handed manner and prevents a party from having its case heard."³ In paragraph 27 of the judgement the learned Judge referred to an earlier case where it was stated that the crucial question is whether the conduct of the presiding officer prevented a fair trial of the issues. If it did prevent a fair trial of the issues, then it will amount to a gross irregularity.

- [4] The two Respondents are not opposing the application for a review. This Court was not provided with a transcribed record of the proceedings in question, but the First Respondent filed reasons for the judgements together with a Notice to Abide by the decision of the Court.

- [5] In the founding affidavit filed in support of the application, it is alleged that the application for an interim interdict was brought *ex parte* and on an urgent basis by

¹ Act 10 of 2013

² [2010] 2 All SA 99 (SCA)

³Par 26

Frans Farming against Carospan on 31 August 2023, that is before a summons issued by Frans Farming against Carospan had been served on the latter. In the summons, Frans Farming alleged that a rental agreement entered into between the parties had been induced by fraud or mistake, and it claimed cancellation of the agreement and the repayment of some R13 000.00 it had already paid to Carospan. In the urgent application, Frans Farming moved for an interim interdict to stop the monthly payments it had to make to Carospan in terms of the said agreement. As indicated earlier, the interim interdict was granted, with the return date being 29 September 2023.

- [6] The present Applicant bemoans the fact that the interim interdict was granted before service of the summons on it. Furthermore, no grounds were advanced whatsoever for the relief sought, it says. However, this is not correct. Full grounds for the interim relief and for the urgency of the matter were in fact alleged in the accompanying affidavit of Frans Farms.

- [7] As for the final interdict and the default judgement that was granted on 29 September 2023, the Applicant points out in its founding affidavit that the interim interdict was served on Carospan, together with the summons, on 12 September 2023. I pause here to mention that Carospan was directed in the summons to file its notice of intention to defend within 10 days if it wanted to dispute the claim. When the matter again came before the court on 29 September 2023, no such notice had yet been filed. In the normal course of motion proceedings, such cause is shown in an answering affidavit filed before the return date. On 29 September 2023, there was no answering affidavit before the court. There was also no notice to oppose the application before the court.

- [8] In the present founding affidavit filed in support of the review application, it is pointed out on behalf of Carospan that on 27 September 2023, that is two days before the final orders were granted, the attorneys of Carospan attempted to serve the notice to oppose in the urgent proceedings and the notice of intention to defend in the action electronically on Frans Farming. The 27th day of September 2023 was the last day for filing of the notice of intention to defend the action, I need to mention on this respect. The attempt to file the notice by e-mail and attempts to make telephonic contact with the attorneys of Frans Farming were unsuccessful,

it is alleged in the founding affidavit. When the matters were called in court on 29 September 2023, the candidate attorney appearing for Carospan handed up the two notices of opposition and intention to defend the action. It is further alleged that the First Respondent then stated that the notice to defend was out of time, while the notice of intention to oppose should have been accompanied by an answering affidavit to be effective. She then proceeded to grant a final interdict as well as default judgement.

- [9] It is further submitted by the Applicant that the conduct of the First Respondent was grossly irregular in granting the said orders. Apart from the fact that the orders were made to the prejudice of Carospan, the First Respondent had acted in a high handed manner and had prevented the Applicant from having its case heard. Carospan further contends that the First Respondent should have postponed the return date to afford the parties the opportunity to file answering and replying affidavits in the application. By failing to do so, the First Respondent entertained the matter as unopposed, thereby committing a gross irregularity. The Applicant was not afforded a fair hearing, it is submitted.
- [10] In the reasons provided by the First Respondent, the First Respondent points out that the summons in the matter was served on the Defendant on 12 September 2023. She further points out that Carospan had failed to give notice of intention to defend within 10 days of service of the summons, as stipulated in the summons. Therefore, on 29 September 2023, she granted default judgement when requested to do so by the attorney appearing for Frans Farming.
- [11] As for the granting of the final interdict on the same day, the First Respondent mentions that Carospan had failed to file any notice of intention to oppose. She then dealt with the requirements for the granting of a final interdict, namely a clear right, irreparable harm, no other remedy and service of the interim order. She concluded that her decision in both the instances were made with regard to the law and the Rules of the Magistrate's Court.
- [12] Now as far as the default judgement is concerned, it is clear on a conspectus of all the facts and circumstances placed before this Court, that the First Respondent has failed to take cognisance of Rules 12(2) and 13(5) of the Magistrate's Court

Rules when she granted default judgement. Rule 12(2) provides that, if it appears that the defendant intends to defend the action, but that the notice of intention to defend is defective in that it had not been properly delivered, *inter alia*, judgement shall not be entered against the defendant unless the plaintiff has delivered notice in writing to the defendant to deliver a notice of intention to defend within 5 days of receipt of such notice. According to the Applicant, the notice of intention to defend was handed up to the First Respondent on 29 September 2023, from which it appeared that there was an attempt to serve the notice electronically on the attorneys of Frans Farming on 27 September 2023. The First Respondent, however, was of the opinion that service had not been effected as the parties had not consented to electronic service.

- [13] If this was the case, then the notice of intention to defend was no doubt defective as contemplated by Rule 12(2). In such circumstances the First Respondent should not have granted default judgement. The fact that she did grant judgement despite the provisions of Rule 12(2), constituted an act of gross irregularity.

- [14] Rule 13(5) provides that a notice of intention to defend may be delivered even after expiration of the period specified in the summons before default judgement has been granted, provided that the plaintiff shall be entitled to costs if the notice of intention to defend was delivered after the plaintiff has lodged the request for judgement by default. In the present matter the notice of intention to defend was handed up to the First Respondent before judgement by default was granted, and therefore the First Respondent also committed a gross irregularity in terms of this rule by granting default judgement against Carospan.

- [15] This brings me to the granting of the final interdict on 29 September 2023. The *rule nisi* contained in the interim interdict called upon Carospan to show cause on 29 September 2023 why the interim interdict should not be made final. The notice to oppose was also handed up to the First Respondent on that day, with the explanation that there was an unsuccessful attempt to serve same electronically on the attorneys of Frans Farming on 27 September 2023. The interim interdict did not specify in which manner cause must be shown on 29 September 2023 why the order should not be made final. Carospan elected to hand in a notice to oppose on that day. If the First Respondent wanted to ensure that Carospan would be

afforded a fair hearing, she would have extended the return date of the *rule nisi* and place Carospan on terms to file an answering affidavit on a specific date. Instead of doing this, she conducted herself in a high-handed manner by simply ignoring the fact that Carospan wanted to oppose, and by granting a final order subsequently. In my view, this also constituted a gross irregularity on the part of the First Respondent.

[16] In view of the Court's findings so far, it is deemed unnecessary to specifically deal with the merits of the reviewing and setting aside of the interim interdict. No order will be made in that respect.

[17] Because the application is not opposed by any of the Respondents, no order of costs will be made.

[18] In the premises, I make the following orders:

1. The Default Judgement granted by the First Respondent against the Applicant on 29 September 2023 under civil case number 11/2023 of the Tweespruit Magistrate's Court, is hereby reviewed and set aside.
2. The confirmation of the rule nisi and the subsequent granting of a final interdict by the First Respondent against the Applicant on 29 September 2023 under civil case number 11/2023 of the Tweespruit Magistrate's Court, is hereby reviewed and set aside.
3. There is no order as to costs.

I concur:


P. J. LOUBSER, J
S.T. MGUDLWA, AJ

For the Applicant:

Adv. J. Donnelly- Bornman

Instructed by:

Peyper Attorneys

Bloemfontein

For the Respondents:

No appearance

/roosthuizen