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

Case NO: A2023/123739

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: YES/~~NO~~

DATE: 28 AUGUST 2024

SIGNATURE

In the matter between:

M[...] **G[...]** **K[...]**

Appellant

and

M[...] **Z[...]** **K[...]**

Respondent

ORDER

1. The appeal is struck from the roll
2. No order as to costs.

JUDGMENT

WINDELL, J

[1] This is an appeal against the judgment of the Regional Court Randburg (Magistrate Mr N.Sewnarain), dated 13 June 2022, dismissing an application in terms of Rule 60(A) of the Rules of the Magistrate Court Act 32 of 1944 (“the application”).¹ The appeal is unopposed.

[2] Rule 60A(1) provides that a party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside. Rule 60A(3) provides that *“if at the hearing of an application in terms of subrule (1) the court is of the opinion that the proceeding or step is irregular or improper it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order it deems fit.”*

[3] The background facts leading to the application are common cause. The appellant and the respondent are in the process of a divorce. The respondent instituted a Rule 58 application in which she, inter alia, sought an order that the Report of the Family Advocate be made an order of Court pendente lite.

[4] The appellant opposed the Rule 58 application. Whilst the Rule 58 application was still pending before the Magistrate’s Court, the appellant launched the application against the respondent in which he sought an order from the court that *‘the respondent is to refrain from abuse of the court process’*. The application was instituted on the basis that the respondent’s Rule 58 application was an abuse of the court process and the relief she sought in that application could not be granted. In support of the application the appellant filed a lengthy founding affidavit with a plethora of annexures in which he made several averments. I will only mention a few: The Family Advocate’s report was not sanctioned by the court; alternatively the Judicial Officer lacked authority to impose obligations on the Family Advocate; Regulation 6 to the Mediation to Certain Divorce Matters Act grants the Family Advocate the discretion to source capacity but does not confer jurisdiction to an

¹ **“58 Interim relief in matrimonial matters**

(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

- (a) Interim maintenance;
- (b) a contribution towards the costs of a pending matrimonial action;
- (c) interim care of any child; or
- (d) interim contact with any child.”

Office of the State Family Advocate that is outside the jurisdiction of where the action was instituted to conduct an enquiry; An in loco inspection was carried out alongside conducting an interview with the sibling of the Respondent yet the foregoing did not occur in respect of the Applicant which is indicative of bias; The Office of the State Family Advocate lacked the consent of the Applicant to interview people whom it refers to in its Report; The Office of the State Family Advocate sought no order of Court to override the Applicant's well-reasoned refusal to grant consent; The Office of the State Family Advocate failed to probe parental alienation syndrome for deliberate frustration of contact between the minor children and the Applicant for at bare minimum five hundred days.

[5] The court a quo delivered an ex-tempore ruling and dismissed the application. The appellant was also ordered to pay the respondent's costs. The appellant filed a notice to appeal and the court a quo was requested in terms of Rule 51(8) of the Rules to provide his written reasons.

[6] The learned magistrate gave three reasons why there was no prospect of success on appeal. Firstly, he found that the dismissal of the application was not appealable as it does not amount to a final judgment that is dispositive of the matter. Secondly, the Magistrate's Court does not have the jurisdiction or authority as a creature of statute to grant such an order. Thirdly, the applicant accepted the lack of jurisdiction to grant such an order and accepted the dismissal of the application.

[7] It is only necessary for purposes of this appeal to deal with the court a quo's finding that the matter is not appealable.

[8] The court a quo made no finding on the merits of the application but struck it from the roll. Nevertheless, it also stated that the court lacks the authority to grant the order sought. The order of the court a quo is thus clearly interim in nature. Dealing with appealability of interlocutory orders, the Appeal Court in *Zweni*² held that:

² *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A) at para 24.

'(G)enerally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. . . .³

[9] The order of the court a quo is not final nor is it definitive of the rights of the parties. It also does not have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. However, in *UDM v Lebashe Investment Group*,⁴ the Constitutional Court examined the *Zweni* factors and determined that, while they continue to be significant, the current standard is the interests of justice.

[10] In *Government of the Republic of South Africa and Others v Von Abo*,⁵ the Supreme Court of Appeal summarised the present approach to appealability of orders and found:

"It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice." (Footnotes omitted.)

[11] In *Vresthena*,⁶ Mbatha JA emphasised that the interests of justice standard will involve a consideration of irreparable harm.⁷

[12] There are no facts set out in the papers to suggest that the appeal should be heard in the interest of justice. The appellant will suffer no harm that is serious,

³ See also *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A) at 414F – H.

⁴ 2023 (1) SA 353 (CC) at paras [43] and [45].

⁵ 2011 (5) SA 262 (SCA) at para [17].

⁶ *City of Tshwane Metropolitan v Vresthena (Pty) Ltd* [2024] ZASCA 51 (18 April 2024).

⁷ See also *Cyril v Commissioner: South African Revenue Services* [2024] ZASCA 32 (28 March 2024).

immediate, ongoing or irreparable. In fact, no harm at all was suffered, as the court a quo made no finding about the Family Advocate's report. The application was simply removed from the roll and the appellant could have raised his concerns about the Family Advocate's report at the hearing of the Rule 58 application, which in my view, was the most appropriate forum. The appellant institution of the application was a waste of judicial resources and led to needless expenses.

[13] I am thus satisfied that the order of the court a quo is not appealable. In the result the following order is made:

1. The appeal is struck from the roll.
2. No order as to costs.

L WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

I agree

A P DEN HARTOG
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Delivered: This judgement was prepared and authored by the Judges whose name are 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 for hand-down is deemed to be 28 August 2024.

APPEARANCES

Appellant: In person

Respondent: No appearance

Date of hearing: 30 April 2024

Date of judgment: 28 August 2024