



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

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<u>23/1/28</u>	
DATE	SIGNATURE

CASE NO: A2024-031453

A2024-029096

A2024-030656

A2024-030263

In the matter between:

RALPH DENIS DELL

Appellant

and

DR. L.M PRETORIUS

Respondent

JUDGMENT

WINDELL, J:

Introduction

[1] This is an appeal against four orders issued by the Roodepoort Magistrate's Court on 31 August 2023. The appeal was initiated under four different case numbers, however, it was heard on the same day and pertains to the same parties and action. Consequently, a single judgement resolves all four appeals.

[2] The appellant is Ralph Denis Dell, an adult male. He was unrepresented during the hearing of the appeal and appeared in person. The respondent is Dr Lourens Pretorius, an orthodontist, who provided professional medical services to the appellant's minor grandchild.

[3] The appeal is unopposed, but the respondent's attorney, Mr Muyambi, was present in court during the appeal proceedings. Mr Culhane, an attorney with right to appearance in the High Court, held a watching brief on behalf of the respondent.

[4] The appeals were initially set down for hearing on 10 September 2024. The record of the proceedings before the court a quo on 31 August 2023 was however not available on the day of the hearing and the appeal was postponed to 23 October 2024 to obtain the transcript and for further argument.

Background facts

[5] On 19 October 2020 the respondent (plaintiff in the court a quo) issued summons against Rhonja Dell, the first defendant (the minor's grandmother). In the Particulars of Claim the respondent alleged that:

"3. On or during MAY 2020 and at ROODEPOORT, the plaintiff received verbal mandate from the Defendant to render professional medical services in the amount of R 19 533.82 for SKYE DELL on the Defendant's special instance and request and a copy of the statement dated 15 APRIL 2020 is attached hereto marked as Annexure "B".

4. The Defendant failed to pay the amount of R 19 533.82 and in the circumstances the outstanding balance of R 19533.82 is now due, owing and payable.

5. On 16 SEPTEMBER 2020 a letter of demand was served on each of the Defendants by the sheriff, and copies of such letters together with the Return of Service is attached hereto Marked Annexure "C".

6. *Notwithstanding the above, the Defendant failed, refused and/or neglected to approach the Plaintiff to arrange new methods of monthly payments and/or any payment at all.*”

[6] The first defendant failed to submit a notice to oppose the action within the 10-day timeframe provided by the Magistrate Court Rules (the Rules), and the respondent subsequently applied for default judgement against her. Nevertheless, despite not being named as a defendant in the action at the time, the appellant, the minor's grandfather, submitted a notice of opposition to the action.

[7] In his heads of argument before this court, the appellant avers that he filed a notice to oppose, inter alia, because the first defendant had no authority to enter into an agreement with the respondent, and that the summons contained numerous inaccuracies. The appellant further alleges that the respondent refused to correct the summons and threatened to seize property belonging to him if the account was not settled.

[8] Soon after the appellant filed his notice to oppose the action, he applied to be joined as the second defendant in the action. The joinder application was duly granted. The appellant filed his plea on the original particulars of claim (that only cited the first defendant and made averments against the first defendant) in which he disputed that he gave any mandate to the respondent to render the services and instituted a counterclaim for damages suffered to his *“good name, professional image and general standing as a result of vexatious, scandalous, false, irrelevant and prejudicial allegations”* made by the respondent. He claims an amount of R50 000. The appellant's inclusion as a defendant was the catalyst for the counterclaim for damages. The irony is not lost on this court. The counterclaim is opposed by the respondent.

[9] It is common cause that at the time of the lodging of the appeals the outstanding balance claimed by the respondent had been paid by the appellant, which disposed of the respondent's claim. The appellant however informed us during the hearing that the interest on that amount and the costs incurred by the respondent are still being disputed, and as a result, they have not been paid.

[10] Even though the issues between the parties are relatively simple and the primary claim had been settled, the documents included in these appeals are extensive. On our count, the appellant has launched at least 25 interlocutory applications since October 2020. Regrettably, the parties are no closer to finalising the counterclaim and there is no indication that the litigation between the parties will conclude any time soon.

The subject matter of the appeals

[11] The four applications that are the subject of this appeal are the following: A Rule 12(1) application (request for default judgment of the counterclaim), a Rule 60A application (setting aside of irregular steps), a Rule 19(2) application (striking out of vexatious, scandalous, false, irrelevant and prejudicial allegations "claims" in the particulars of claim) and a Rule 23(8) application (dismissal of the respondent's claim for failure to discover).

[12] All four applications were previously set down for hearing but were either postponed or were dismissed for non-compliance with the Rules. For purpose of this appeal, it is not necessary to deal with the previous hearings, as all four applications were again set down for hearing on 31 August 2023 before Magistrate Vosloo (the order that is the subject of the appeal).

[13] On 31 August 2023 the court a quo heard argument and Mr Muyambi made submissions on behalf of the respondent. After hearing argument from both parties, the court a quo dismissed the four applications with costs. It was noted that:

"1) Rule 12 (1) application: Does not comply with Form 5. Application is dismissed.

2) Rule 19(2)- application defective and therefore dismissed.

3) Rule 60A application dismissed- Mr Muyambi said case not ready for discovery at this stage + pleadings not closed. Therefore no discovery or pre-trial meeting. Court agree. Pre-trial removed as it was not ripe; no minutes signed by parties. Mr Dell must plead to served amended pages of particulars of claim.

4) Rule 23 (8) dismissed."

[14] The appellant requested written reasons from the Magistrate for the combined order that was issued on 31 August 2023. On 4 September 2023 and 26 September 2023 respectively, the court a quo furnished written reasons in accordance with Rule 51(1) of Act 32 of 1944, as amended. The written reasons dealt mainly with the Rule 12 and Rule 23 (8) applications and said little about the Rule 19 and Rule 60A applications. A transcript of the proceedings on 31 August 2023 was made available on the day of the hearing which fortunately provided further insight into the court a quo's reasoning for dismissal of the applications. Each of the applications will be dealt with separately hereunder.

Rule 19(2) application: Strike out application

[15] In the striking out application the appellant sought an order "*striking out each of the respondent's claim in the action.*" In support of the relief claimed, he filed a short affidavit in which he stated that he relied on:

3.1.1 *"All the facts that are set out in the Special Plea for the Applicant/2nd Defendant in the Plea as served on 18th February 2022 and is available in the court file at Pages 350 to 355". Annexure "I")*

In the circumstances I submit that the Respondent's claims ought to be Struck Out."

[16] In the special plea the appellant pleaded that the respondent *"have no sustainable, or any at all, basis in law or otherwise to justify the vexatious, scandalous, false, irrelevant and prejudicial allegations in its particulars of claim, inter alia that there had never been an agreement between the plaintiff and either defendant either in writing or verbal, and is clearly vexatious and/or false"* and that the *"action was purely brought to get/extort additional payment from a caring grandmother and/or grandfather who neither had the authority nor the motive to enter into an illegal agreement on behalf of a minor"*. It is further submitted that it is *"scandalous behaviour on the part of the plaintiff and his legal representative to use a minor an/or a third party to discredit person/s he has no legal agreement, or any at all, with."*

[17] Rule 19(2) and (3) provides that where:

"2...any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of rule 55 within 10 days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of the time limit for delivery of a replying affidavit: Provided that

—

(a) the party intending to make an application to strike out shall, by notice, delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and

(b) the court shall not grant the application, unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.

(3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated."

[18] The court a quo requested the appellant to provide the communication addressed to the respondent's attorney in terms of Rule 19 (2)(a) in which the respondent was afforded the opportunity to remove the cause of the complaint. The appellant was unable to do so. As a result, the court a quo found that there was non-compliance with Rule 19 and dismissed the application with costs.

[19] On a perusal of the court record this court was also unable to find any such communication. This issue was not addressed by the appellant in his heads of argument or during oral argument and remains unresolved. We are therefore satisfied that the court a quo did not misdirect itself in finding that there was non-compliance with the Rule. In the circumstances, the Magistrate was correct in finding that the striking out application was prematurely brought.

[20] But even if the court a quo was over technical in its approach, the appellant was unable to show in what respects the particulars of claim were vexatious (allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy), irrelevant (allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter), or scandalous (allegations which may or may not be relevant but which are so worded as to be

abusive or defamatory).¹ The fact that the appellant does not agree with the averments made in the particulars of claim does not make it scandalous, vexatious or irrelevant.

Rule 60A application

[21] The founding affidavit filed in support of the irregular step application is challenging to understand. As far as can be discerned, the appellant launched the Rule 60A application on the basis that the respondent failed to properly serve his opposition to the applications in terms of Rule 23(8), 19(2) and 12(1) and failed to file an answering affidavit within the prescribed timeframes ordered by the court at different times. Consequently, so it is argued, these failures constituted an irregular step which should be set aside.

[22] 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(2) provides that such an application shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —

- (a) the applicant has not himself or herself taken a further step in the cause with knowledge of the irregularity;*
- (b) the applicant has, within 10 days of becoming aware of the step, by written notice afforded his or her opponent an opportunity of removing the cause of complaint within 10 days; and*
- (c) the application is delivered within 15 days after the expiry of the second period mentioned in subrule (2)(b)."*

¹ *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566C–E; *Tshabalala-Msimang v Makhanya* [2008] 1 All SA 509 (W) at 516E–F; *Breedenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) at 321C–E.

[23] The court a quo erroneously referred to Rule 60 and not to Rule 60A during the proceedings and dismissed the application on the basis that the appellant failed to deliver a written notice affording the respondent to remove the cause of complaint. Nevertheless, despite the error, there is no merit in the application. The appellant did not afford the respondent the opportunity to remove the complaint before it brought the application. In the result there is no reason to interfere with the Magistrate's finding and the appeal must fail.

Rule 12(1): Application for default judgment

[24] The respondent did not plead to the counterclaim. On 15 November 2022 the appellant delivered a notice of bar to the respondent for failure to replicate to his plea and pleading to his counterclaim. Simultaneously with the notice of bar, the appellant also filed a request for default judgment of his counterclaim and applied for a trial date and delivered a pre-trial notice.

[25] It is common cause that the counterclaim is for damages and judgment is thus sought for an unliquidated amount of money. The procedure to be followed by a litigant in such circumstances is set out in Rule 12(3A) and (4) of the Rules which provide as follows:

"3A. When a claim is for a debt or liquidated amount in money and the defendant has failed to deliver the notice of intention to defend or, having delivered the notice of intention to defend, has failed to deliver a plea within the period specified in the notice delivered in terms of rule 21B and the plaintiff has in either case lodged a request for judgment, the registrar or clerk of the court may, subject to the provisions of subrules (2), (4), (5), (6) and (6A) grant judgment or refer the matter to the court in terms of subrule (7).

(4) The registrar or clerk of the court shall refer to the court any request for judgment for an unliquidated amount and the plaintiff shall furnish to the court evidence either oral or by

affidavit of the nature and extent of the claim, whereupon the court shall assess the amount recoverable by the plaintiff and give an appropriate judgment.”

[26] The appellant did not lodge his request for default judgment at the clerk of the court but set the matter formally down by way of notice motion for hearing before the court a quo. This was not the correct procedure. It is evident from the transcript of the proceedings on 31 August 2023 that the court a quo took issue with this and as a result dismissed the application for non-compliance with Rule 12 (3A) and (4).

[27] In the written judgment the court a quo gave additional reasons for the dismissal. Firstly, it considered that there was a pre-trial held between the parties on 24 February 2023 before Magistrate Bowen, during which the court confirmed that the pleadings have not been closed and that the matter was not trial ready. Secondly, the respondent filed a notice of intention to amend his particulars of claim in terms of Rule 55A and served the amended pages on the appellant on 6 June 2023. The appellant had not yet pleaded to the amended particulars of claim. Thirdly, the notice of bar did not comply with Rule 21B(2) in that it did not require the respondent to deliver the plea within the prescribed five days of receipt of such notice. Therefore, so it was found, the notice of bar was defective and the appellant could not apply for default judgment as there was no time limit stated in the notice of bar within which the respondent should deliver his plea to the counterclaim. Fourthly, the appellant's affidavit in support of his unliquidated claim did not set out any facts to support the claim. The court a quo remarked that if the appellant desired to present evidence under oath or summon experts, he should request a date for the hearing of oral evidence in open court. This would enable the court to evaluate the evidence.

[28] The appellant submits that the court a quo failed to acknowledge that the Rule 12 application was unopposed, that there was compliance with Rule 12 and that *“all relevant documents had been submitted with the Application and is contained in the Court File, which accompanied the Application”*.

[29] The fact that the matter was unopposed is irrelevant. The court a quo was tasked to peruse the papers and ascertain whether default judgment could be granted. I agree with the court a quo that the appellant did not follow the correct procedure as set out in Rule 12(3A), and that the affidavit accompanying the request did not set out sufficient facts to substantiate the damages sought in the counterclaim. Consequently, on these two grounds alone, the court a quo cannot be faulted for declining to consider the default application.

Appealability of the orders

[30] In any event, the dismissal of the Rule 12, Rule 19 and Rule 60A applications because of non-compliance with the Rules are not appealable. In *Zweni*² the Appeal Court held that:

*“(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

[31] The nature of the orders granted by the court a quo was not final nor was it definitive of the rights of the parties. Under the common law as laid down in *Zweni*, this would have been the end of the matter. However, in *UDM v Lebashe Investment*

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

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.

Group,⁴ the Constitutional Court examined the *Zweni* factors and concluded that, while they remain significant, the current standard is the interests of justice. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,⁵ the Constitutional Court set out the factors a court should consider in assessing where the interests of justice lay:

“ . . . To that end, [a court] must have regard to and weigh carefully all the germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.” (Emphasis added)

[32] In *City of Cape Town v South African Human Rights Commission*,⁶ the SCA elaborated on the test and set out the current approach:

*“[11] The interests of justice standard will inevitably involve a consideration of any irreparable harm. To successfully appeal an interim order an applicant will have to show that it will suffer irreparable harm if the interim appeal were not granted. Even so, stated the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Limited*, irreparable harm although important, is not the sole consideration and the interests of justice require an evaluation of a number of factors:*

“ . . . The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision,

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

⁵ [2024] ZASCA 110 (10 July 2024).

⁶ *City of Cape Town v South African Human Rights Commission* [2021] ZASCA 182 at paras 10-12.

although interlocutory, has a final effect; and whether irreparable harm will result if the appeal is not granted . . .”

[33] There are no facts set out in the papers to suggest that it would be in the interest of justice to allow the appeal of these orders. The appellant will suffer no harm that is serious, immediate, ongoing or irreparable. The appellant is entitled to lodge these applications again if the circumstances permit him to do so.

The Rule 23(8) application

[34] A notice to discover in terms of Rule 23(1) and 23(2) was served on the respondent on 17 November 2022. On 16 March 2023, the appellant obtained an order in the absence of the respondent, in terms of which the respondent was compelled in terms of Rule 23(8) to discover within 10 court days of the order.

[35] The respondent did not discover, and the appellant launched an application for the dismissal of the respondent's claim. The application was opposed.

[36] The court a quo dismissed the application and provided written reasons for the dismissal on 23 September 2023. The Magistrate considered the fact that the plaintiff had amended its particulars of claim, which the appellant had not yet pleaded to, and that the matter was not trial-ready, as determined by Magistrate Bowen. The court a quo thus concluded that the order that was granted in terms of Rule 23(8) was not enforceable and of no effect.

[37] The court a quo erred in this regard. It is trite that an order granted by a court must be complied with until set aside. The court a quo did not sit as a court of appeal of the Rule 23(8) order that was granted and had no authority to declare that such an order was unenforceable. In opposing this application, the respondent's attorney

indicated that they will be applying for the Rule 23(8) order to be rescinded, but at that stage the order was still in place. The appropriate course would have been to postpone the application to grant the respondent the opportunity to apply for the rescission of the Rule 23(8) order.

[38] However, the appellant subsequently paid the full outstanding amount claimed by the respondent which renders this appeal moot. In *Police and Prisons Civil Rights Union v South African Correctional Service Workers' Union and Others*⁷, the Constitutional Court confirmed that courts exist to determine concrete live disputes, but that mootness is not an absolute bar to justiciability when justice so requires. A court must exercise a judicial discretion, taking into account various factors, including whether an order will have some practical effect.

[39] There is no doubt that if this court were to set aside the order of the court a quo and grant the relief claimed by the appellant (to dismiss the respondent's claim) that it would have no practical effect. In any event, the relief sought by the appellant is drastic. Under the circumstances it is doubtful that such relief would in any event have been justified. In the result the appeal against this order must also fail.

[40] In the result the following order is made:

1. The appeal is dismissed.
2. No order as to costs.


L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

⁷ *POPCRU v SACOSWU and Others* 2019 (1) SA 73 (CC) para 44.

I agree

 

W.J. DU PLESSIS

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is 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 23 January 2025.

APPEARANCES

Appellant in person

No appearances on behalf of respondent

Date of hearing: 23 October 2024

Date of judgment: 23 January 2025