

REPUBLIC OF SOUTH AFRICA



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

Case No: 2020/30452

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

20. 02.2025

DATE

A handwritten signature in black ink, appearing to read "M. van Rooyen", is written over a horizontal line.

SIGNATURE

IN THE MATTER BETWEEN:

MOSES VAN ROOYEN

APPLICANT

AND

MINISTER OF POLICE

1st RESPONDENT

MINISTER OF JUSTICE AND

2nd RESPONDENT

CORRECTIONAL SERVICES

NATIONAL PROSECUTING

3rd RESPONDENT

AUTHORITY

JUDGMENT [LEAVE TO APPEAL]

SIWENDU J

- [1] The applicant (Mr Van Rooyen) seeks leave to appeal against the Judgment and order dated 21 November 2024 striking his application off from the Unopposed Motion Court Roll. The applicant considers the judgment and order a rescission of prior interlocutory orders obtained and a refusal of the default judgment. The circumstances of the application for leave to appeal and the striking out order are as follows:
- [2] Mr Van Rooyen is the plaintiff in an action instituted to recover damages against the Minister of Police (first respondent), the Minister of Justice and Correctional Services (second respondent) and the National Prosecuting Authority (third respondent) following an alleged unlawful arrest and detention.
- [3] The State Attorney defended the action, and assigned the case to Mr D Lebenya (Ref: 3914/20/P26/mp) of that office. On 25 February 2021, Mr Lebenya defended the action on behalf of the respondents and raised several special pleas which included a failure to comply with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (ILPACOS Act).
- [4] Mr Van Rooyen obtained two interlocutory court orders, on 16th September 2021, (first court order), and on 8 November 2021 (second court order).

- [5] The first court order directed the respondents are to reply to Mr Van Rooyen's discovery Notice in terms of Rule 35(1) dated 11 June 2021, within ten (10) days from the date of service of the order. They failed to comply. The second court order struck out the respondents' defence to Mr Van Rooyen's claim. The respondents were held jointly and severally liable and ordered to pay the costs of the application on the party and party scale, the one paying and other to be absolved.
- [6] It bears mentioning that although Mr Lebenya had delivered filed a notice to oppose the application to strike out the respondent's defence, dated 3 November 2021, the application to strike out the defence appears to have proceeded unopposed. It was on the strength of the second court order that Mr Van Rooyen proceeded to seek a default judgment before the unopposed motion court.
- [7] It was common cause that Mr Van Rooyen had not sought condonation for the failure to comply with Section 3 of the ILPACOS Act. The question of the failure to comply with ILPACOS Act and seek condonation was squarely raised with Counsel for Mr Van Rooyen at the hearing of the application for default judgment.
- [8] The court invited Counsel to provide written submission on a range of it concerns. That invitation is apparent from for paragraph 13 of the Judgment appealed against. Written submissions were made to the Court on 3 May 2024 in response thereto. The judgment appealed was written based on those submissions. Counsel stood by those submission during the hearing of the application for leave to appeal.¹

¹ Although not in respect of an appeal, the power to dispose of a matter without hearing *further* oral argument is envisaged in section 19(a) of the Superior Court Act 10 of 2013.

[9] The point of departure is whether the court was (a) bound by the interlocutory orders made, (b) whether they were erroneously in the face on the special pleas of non-compliance with Section 3 of the ILPACOS Act and absent condonation under section 3(4). I am of the view that the failure impairs Mr Van Rooyen's right of audience by the court until condonation for the failure is granted.

[10] In the written submissions, Counsel for Mr Van Rooyen contended I was bound by the interlocutory orders, and that it was impermissible for me to *mero motu* raise the question of compliance raised in the special plea. He placed

reliance on decision of the Supreme Court of Appeal in *Fischer and another v Ramahlele and others*²(*Fischer*) in support of the argument.

[11] I hold a different view, first on the ground that the decision in *Fischer* deals with a different scenario from the present case, namely that the court may not decide a matter that is not defined by the parties in the pleadings. In this case, the matters raised flows from the pleadings before the Court. Counsel contends that there were no pleadings before me since the plea and the special plea were struck out. This is a circular argument going to the heart of the court's concerns about the procedural regularity for granting the interlocutory orders.

[12] Secondly, the injunction by the Court in *Fischer* is not unqualified. Thirdly, the submissions disregard the authorities referred in the judgment, namely,

² [2014] ZASCA 88; 2014 (4) SA 614 (SCA) at [22].

the *Premier of the Western Cape Provincial Government No v BL*,³ In *Mabaso v National Commissioner of Police and another*⁴ and, importantly, Rule 42 (1) of the Uniform Rules.

[13] The above authorities make it clear that the provision in ILPACOS Act adds procedural hurdle to the enforcement of all rights to which it applies. The provision is for the benefit of the State litigant. It has not been complied with in its present case.

[14] In so far as the binding nature of an interlocutory orders, most recently in *Allied Steelrode (Pty) Ltd v Dreyer*,⁵ this court was trenchantly criticised for an “insufficient consideration given by the trial court in granting the separation order” even though the separation order was granted in April 2019 by another Court, some two years prior to the allocation of the trial to it. As I read the

judgment by the SCA, a court ought to and must inquire into the appropriateness of an interlocutory order even if it was granted by another court. Of course, the difference in the present case, is one of procedural regularity and compliance with legal prescripts.

[15] An unusual feature which cannot be left unsaid is the persistent failure by the State Attorney to participate in the proceedings. Although it purported to oppose the application to strike out its defence, and delivered the requisite notice of opposition, it appears the State Attorney did not follow thorough. Mr Van

³ [2012] 1 AH SA 465 (SCA); 2012 (2) SA 1 (SCA).

⁴ [2019] ZASCA43; 2020 (2) SA 375 (SCA)

⁵ (unreported, SCA case no 1120/2022 dated 21 December 2023) at paragraph [18]

Rooyen set down the application to strike out before the unopposed motion court.

[16] Counsel for Mr Van Rooyen relied on this failure, and submitted the State Attorney was aware of the order (s) and has not sought to rescind it or set it aside. He contended further that the Court's order extended to the Rule 35 (1) notice, incorrectly so.

[17] The persistent failure to participate in the proceedings by the State Attorney is puzzling and must be decried. It played itself out at the hearing of the appeal. The first hearing of the application for leave to appeal was scheduled for hearing on 30 January 2025. Counsel for Mr Van Rooyen was at pains to stress that he had notified the State Attorney of the hearing, and they elected not to participate.

[18] Out of caution, the hearing was rescheduled to 10th and the Registrar tasked with the duty to notify the State Attorney. Notwithstanding the notification, the State Attorney failed to attend the hearing, and the application for leave to appeal proceeded in its absence. I am of the view that these failures do not avail Mr Van Rooyen.

[19] Turning to the requirements for leave to appeal, at the hearing, at the hearing Counsel contended that he had not been given an opportunity to address on what he termed was "a rescission" of the interlocutory orders. At first blush, the argument prompted the court to intimate an appeal might lie and leave be granted to the Full Court on that issue. I was of the view that there may be a compelling reason why the appeal should be heard. On consideration, I have come to a different conclusion and invited Counsel to make oral submission in this regard.

[20] Despite the wording of the order, Counsel persisted that the court "rescinded" the interlocutory orders. The trite principle is that an appeal

lies against the order of the court. In this instance, although I find that the interlocutory orders were erroneously granted and do not bind the court, the order granted is not “a rescission” of the interlocutory orders as submitted. It is not definitive on the default judgment sought either. The application was struck off from the roll. A final word has not been spoken on the matter and the applicant is not without remedies.

[21] Moreover, Counsel did not specify the provision on which he relies for leave to appeal. He was invited again to state the provisions on which he relies to address the above. Section 17 of the Superior Court Act 10 of 2013 states that:

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that —

(a) (i) the appeal would have a reasonable prospect of success; or

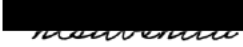
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[22] The Courts have repeatedly affirmed the import of the provision limits the right to appeal cases whether there *would* be reasonable prospect of success. The test is “stringent” and the section “raises the bar” for the criterion for granting leave to appeal. The grounds for appeal fail and do not meet the test.

[23] Secondly, the issues raised in the application for leave to appeal are settled in our law and the Supreme Court of Appeal. The application has no reasonable prospects of success. Lastly, the order striking out the application for default judgment from the roll is not appealable. Another Court will not come to a different conclusion.

In the result, I make the following order:

a. The application for leave to appeal is dismissed with no order as to costs.


NTY SIWENDU
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment is handed down electronically by circulation to the Plaintiff's Legal Representative and the Defendant by email, publication on Case Lines. The date for the handing down is deemed 20 February 2025

Date of appearance: 10 February 2025

Date Judgment delivered: 20 February 2025

Appearances:

For the Applicant: Advocate Phamba

For the Respondents: State Attorney (non-appearance)