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

The Hon Ms Justice T Ndita
The Hon Mr Justice Ml Samela
The Hon Ms Justice D S Kusevitsky

CASE NUMBER: A252/2023

In the matter between:

THEMBISILE NONHLANHLA KUMALO	1ST Appellant
JABULANI KUMALO	2ND Appellant
SIBUSISO ODWA MAGADLELA	3RD Appellant
BUSISIWE MPHONO	4th Appellant
THAMSANQA RINI	5TH Appellant
T[...] F[...]	6TH Appellant
T[...] L[...] M[...]	7TH Appellant

T[...] M[...]
(In her capacity as guardian of T[...] A[...] M[...])

8TH Appellant

and

NTOMBIZODWA EMELDA MPHONO

1ST Respondent

MASTER OF THE HIGH COURT

2ND Respondent

THEMBALETHU KUMALO

3RD Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 20 JUNE 2025

KUSEVITSKY, J (NDITA and SAMELA JJ concurring):

Introduction

[1] The crux of this appeal centres around an order granted *via* a Chamber book application to compel discovery and the consequent orders granted pursuant thereto.

[2] The litigation history which forms the basis of this appeal is, to a degree, unfortunate. I set out a brief history. During July 2019, the Appellants applied for an urgent application for the removal of the First Respondent as executrix of the estate of the late Daniel Khumalo (“the father/the deceased”). The First Respondent (“the executrix”) is the mother of the First to Fifth Appellants and the wife of the late Daniel Khumalo. The sixth and seventh Appellants, also siblings and children of the deceased, are minors and are represented by their mother, the Eighth Appellant. The Third Respondent is also the son of the First Respondent and the deceased and the sibling of the First to Seventh Appellants. I will refer to the First and Third Respondents as “the Respondents” since no relief is sought against the Master of the High Court, the Second Respondent herein.

[3] At the centre of the dispute, and to the extent that it is relevant to this appeal, is the the control of the deceased's minibus taxi business and its operations. On 24 July 2019, the Appellants brought an urgent applicant for the removal of the executrix and pending the determination thereof, sought an order prohibiting her from making any distributions whilst the main application was pending ("the main application").

[4] On 30 July 2019 ("the July 2019 order"), Davis AJ granted an interim order *inter alia* prohibiting the First Respondent from making any distributions or awards of any assets in the estate pending the determination of the matter, save in connection with the running of the taxi business of the deceased's estate. Part B of the application was postponed for hearing to 8 August 2019.

[5] On 8 August 2019, the First Appellant on behalf of all of the Appellants in their replying papers in the main application, sought a referral of the matter to oral evidence on one narrow issue as to whether the executrix was indeed married to their father at the time of his death.

[6] On 24 February 2020, Davis J made an order, *inter alia*, postponing the main application to 16 March 2020. The record shows that on 1 March 2020,¹ an urgent application to compel discovery in terms of Rule 35(7) was launched by First and Third Respondents directing the First Appellant to produce for inspection *inter alia* all accounting records in respect of income generated from the taxi business of the deceased ("the application to compel"). Paragraph 3 of the application also provided that in the event that the First Appellant failed to comply, then '*the First and Third Respondents may apply on the same papers duly supplemented where necessary, for an order dismissing the Applicants' application² and granting judgment in favour of the Respondents as prayed for in the First Respondent's answering affidavit³*'. It is evident that same was served on the Appellants' Attorney, B Xulu & Partners Inc. ("BXI"), on 4 March 2020. The relief sought was as follows:

¹ Annexure "TK9" to the application

² paragraph 3.1 of the application to compel

³ paragraph 3.2 of the application to compel

“1. Condoning the applicant’s failure to comply and dispense with the forms, Service and time limits prescribed provided for in the Uniform Rules of this Court, and granting leave for this matter to be dealt with as a matter of urgency;

2. Directing that the First Applicant produce for inspection and make available to the Respondents all accounting records in respect of income granted from the taxi business of the late Mpumelelo Daniel Khumalo from 25 March 2018 together with her personal bank statements from 23 March 2018, including February 2020, within five days of delivery of this order;

3. Ordering that, in the event that the First Applicant fails to comply with paragraph 1 above, the First and Third Respondents may apply to this Honourable Court, on the same papers, duly supplemented where necessary, for an Order in terms of;

3.1 Dismissing the Applicants’ application;

3.2 Judgment be granted in favour of the Respondents as prayed for in the First Respondent’s Answering Affidavit;

...

”

[7] The record shows that a further order was made by Davis J on 19 March 2020⁴ (“the March 2020 order”), *via* Chamber Book, where the First Appellant was directed to produce for inspection within 5 days, copies of her bank statements as well as the financial records of the taxi business. It further directed that a failure to produce for inspection such copies to assess the income and expenditure generated therefrom by First Appellant, that the Appellants’ claim in the main application would be struck out⁵; that judgment would be granted in favour of First Respondent; and the dismissal of Applicant’s motion with costs in the main application⁶.

[8] What is gleaned from the papers is that annexure TK3 refers to an order made by Davis J on 24 February 2020 postponing the main application to 16 March 2020 and that on 19 March 2020, Davis J granted the application to compel. In summary,

⁴ Annexure “TK1” to the application

⁵ para 2.1 of the 19 March 2020 Order

⁶ para 2.3 of the 19 March 2020 Order

this order required the First Appellant to provide the executrix with copies of her bank statements and financial records of the taxi business operated by her on behalf of the estate, within five days of the order being granted.

[9] It is common cause that the March 2020 was only served on the First Appellant some two years later on 7 April 2022. No reason for the delay of the service thereof was advanced. On 17 June 2022, the executrix made application for the dismissal and/or striking out of the main application, on the basis that the First Appellant had not complied with the March 2020 order (“the striking out application”).⁷

[10] It is common cause that the application to strike was removed from the roll on 26 August 2022 some two days after the First Appellant had complied with the March 2020 order. Numerous correspondence between the parties followed in order to obtain clarity on the striking out application. The First Respondent’s attorneys of record eventually indicated that their view was that the main application had been automatically dismissed by virtue of the March 2020 order and therefore there was no need to bring an application for that relief. This prompted the application before the court *a quo*.

Court *a quo*

[11] The relief sought in the notice of motion *inter alia* is as follows:

- “1. That it be declared that the Application launched by the First to Eighth Respondents under the aforementioned case number, on 24 July 2019 (“the main application”) was not dismissed on (or after) 24 March 2019 by virtue of the provisions of paragraph 2 of the order of this court dated 19 March 2020, a copy of which is annexed to the founding affidavit filed in support hereof and marked “TK1” (“the March 2020 order”).

⁷ This application was subsequently removed from the roll on 29 January 2022

2. That in the alternative to the relief sought in 1 above, an order that it is declared, in the event that the Applicants are held to have failed to comply with the March 2020 order, that the March 2020 order required the Respondents to apply to this Court, on the same papers duly supplemented, for an order dismissing the Main application.
3. That, in the event of the Honourable Court granting the order(s) in 1 or 2 above, directing the Main Application under the above case number be referred to the hearing of oral evidence for the determination of the issue as to whether the First Respondent was married to the late Daniel Khumalo at the time of his death. In respect of that referral to oral evidence:

...
...”
...

[12] Before the court *a quo*, the Appellants argued that the March 2020 Order could not, as a matter of law, have simply dismissed the main Application without a further order of the Court. During that hearing, it appeared that the manner in which the Appellants relief was formulated was an issue for the presiding officer in that the Respondents contended that it would have been proper for the relief sought to have been brought under the ambit of Rule 42 of the Uniform Rules of Court.

[13] The Appellants, in response to that technical objection, then moved for an amendment in terms of which the notice of motion was amended to include alternative relief that the March 2020 Order be varied in terms of Rule 42 to include a provision that the Main Application could be dismissed only after a further order of the Court. The Court *a quo* did not immediately rule on that amendment and reserved judgment.

[14] The Appellants seemingly in an abundance of caution, filed a formal application for an amendment on 24 July 2023 which was launched before any order in respect of the matter was handed down. That formal application sought an amendment on the same basis and in the same terms as that which was subsequently sought.

[15] The amended notice of motion reads as follows:

- “1. That it be declared that the Application launched by the First to Eighth Respondents under the aforementioned case number, on 24 July 2019 (“the main application”) was not dismissed on (or after) 24 March 2019 by virtue of the provisions of paragraph 2 of the order of this court dated 19 March 2020, a copy of which is annexed to the founding affidavit filed in support hereof and marked “TK1” (“the March 2020 order”).
2. That in the alternative to the relief sought in 1 above, the March 2020 order is varied in terms of Rule 42(1)(a) and (b), having been granted in error-

By the addition of the following after the words: “within 5 (Five) days”:

“After service of this order on the First Applicant’s attorneys”

By the substitution of paragraph 2 which reads:

- 2 *“In the event that the First Applicant fails to comply with paragraph 1 above, the First and Third Respondents may apply to this Honourable Court on the same papers, duly supplemented where necessary, for an order:*

2.1 Dismissing the Applicants’ application;

2.2 Granting judgment in favour of the Respondents as prayed for in the First Respondent’s Answering Affidavit; and

2.3 Costs of suit

3. ...”

[16] On 27 July 2023, the court made an order in the following terms:

“1. Declaration relief sought is dismissed.

2. Application for the late amendment is dismissed

3. Cost on a party to party scale.”

[17] I am in agreement with Mr van Reenen, counsel for the Appellants, who contends that the order is not a model of clarity and must mean that the application before the Court *a quo* was dismissed; so too the application for the late amendment and the Appellants were ordered to pay the Respondents’ costs on a party and party scale.

[18] Pursuant to a request for Reasons, a summary of the reasons advanced by Nthambeleni AJ are as follows:

- a. Once a Court makes a ruling or grants an order it is *functus officio* and the remedies available to a party are to appeal the order or seek its rescission or variation in terms of the Rules of Court or common law.
- b. The Court *a quo* was confronted with an application which was not a rescission application or a variation application but a declaratory order that was “*couched*” in a form to vary the terms of the March 2020 Order.
- c. A “*belated*” amendment was sought of the notice of motion to “*incorporate the substance of what is Rule 42(1)(a) and (b)*” but held that “*no case whatsoever was advanced to justify the court granting the order in terms of the amended notice of motion ...*”.
- d. The jurisdictional requirements of Rule 42(1)(a) and (b) were not canvassed or met.

[19] Thus the findings of the Court *a quo* as advanced by the Appellants were essentially that the manner in which the relief was framed was incorrect in that the amendment which sought to deal with a basis to grant relief in terms of Rule 42 (in the alternative), was not competent for the Court *a quo* to grant.

[20] In sum, the Appellants argue that they were criticised for not bringing relief in terms of Rule 42 but when attempts were made to invoke that Rule, the Court *a quo* did not permit the Appellants to do so. In addition, the Court *a quo* simply failed to

deal with the entirety of the relief sought by the Appellants in their application, that being a referral to oral evidence and variation of an interim order.

Appellants' submission

[21] The record does not contain the grounds for appeal. However, the submissions advanced by Mr Van Reenen in the Appellants' Heads of argument averred that the Court *a quo* erred in dismissing the request for a declaratory order on the following basis:

22.1 The March 2020 order contains no provisions or words to the effect that "*the Main Application is dismissed*" or words to that effect.

22.2 The Main Application could only be dismissed if the Court had determined whether there had been compliance with the March 2020 order. No such application had been considered by the Court;

22.3 The March 2020 order made no provision as to how compliance would be determined, by whom, or when the 5-day period to comply with same commenced;

22.4 A failure of the First Appellant to comply with the March 2020 order could never result in the Second to Eight Appellants' applications being dismissed; and

22.5 The First Appellant had in any event explained why she had failed to comply timeously with the March 2020 order.

Respondents' submissions

[22] The Respondents contend that the relief that the Appellants sought had morphed from declaratory relief into that of a rescission application. The Respondents also contend that the Appellants ostensibly made an about-turn at the Court *a quo* calling for it to interpret paragraph 2 of the March 2020 order. They contend that the Court *a quo* was not asked to determine the validity or otherwise of the March 2020, or to decide whether it was granted in error or not. In support for this contention, they aver that the Appellants conceded this point in their founding

affidavit⁸ . Although not cited correctly, as a basis for their contention, they rely on the following submission in their heads of argument as follows: “...*that it is unnecessary to determine whether the order was properly granted or not. [sic] Submit however that it is unnecessary to do so, as should the Court grant the declaratory order, it would render the issue of the legitimacy of the order moot*”.

Discussion

[23] In my view, this is a mischaracterization of one of the Appellants’ grounds of appeal. The First Appellant opined that it would be impossible to unravel the events that led to the granting of the March 2020 order and not determine whether the order was properly granted or not. They suggested that one need not, in essence, attempt to unscramble the egg in the event that the court *a quo* simply granted the declaratory order and in that event, it would render the issue of the legitimacy of the March 2020 order moot. Of course, if that was indeed done by the court *a quo*, then that would have been the end of the matter. I am therefore not in agreement with the Respondents’ contention that this issue was conceded by the Appellants in their founding affidavit.

[24] It is common cause that a myriad of orders was sought and granted in this matter. In the founding affidavit, the Appellants contend that on the First Respondent’s own version, it was impossible for the First Appellant to comply with the March 2020 order by 26 March 2020 as the order was only served on BXI on 7 April 2022. It would therefore be illogical, they argued, to interpret the March 2020 order to mean that the main application was *ipso facto* dismissed on 26 March 2020, when a copy of the Order granted, and not served, was only served some two years later.

[25] The Respondents in their answering affidavit concede that court orders become effective upon proper service on the affected parties. They agree that on a proper interpretation of the March 2020 Order, that the Appellants, when compelled,

⁸ paras 43 to 44 of the Founding affidavit

had to discover the financial statements within 5 (five) days of *service* of the order. They argue that the First Appellant became aware of the March 2020 order on 4 August 2022 and wilfully disregarded the order and decided to belatedly comply within 20 days of becoming aware of the order. They argue that it is clear that there was proper service of the March 2020 on the Appellants and that the main application was accordingly summarily dismissed as at 11 April 2022, five days after service of the order.

[26] It is common cause that the March 2020 order was obtained *via* Chamber Book application. Indeed, it is not unusual for applications such as these to be brought in this manner. The Cape Practice Directives⁹ sets out which matters may be brought through the Chamber Book and there are obvious advantages for adopting this procedure; expediency and cost being the overarching factors. In applications to compel, the requisite prayers that follow these types of application invariably would be for the defaulting party to produce the requested information or document within a prescribed time, from date of service of the order, failing which the applicant, on papers duly supplemented in due course if the case may be, would, in the event of non-compliance, be entitled to make application for the said action or application to be dismissed as the case may be.

[27] Furthermore, the period for the running of the *dies* starts from the date of *service* of the order, and not from the date that the order is granted. The consequences of the latter are self-evident – in the event of a delay in the issuing of the order, a respondent might be in default through no fault of his or her doing.

[28] In *casu*, the March 2020 order directed the First Appellant to produce the requested documents for inspection “*within 5 (Five) days*”. It is silent as to when this period was meant to begin. Put differently, the order neither tells the First Appellant to produce the said documents within five days from date of the order, nor to produce the documents within five days of the date of *service* the order.

⁹ Western Cape: PN 37 [Service 5, 2017]

[29] The Respondents aver that the March 2020 order was indeed served on the First Appellant, albeit two years later and that because there was non compliance within the requisite *dies* of five days, that the Appellants are *ipso facto* barred and the main application summarily dismissed. Thus, clearly realising the deficiencies in the order, the March 2020 order was served on First Appellant's legal representative on 7 April 2022 some two years after the order was granted. No explanation for the delay was advanced. On 17 June 2022, the First Respondent made an application for the dismissal and/or striking out of the Main application. According to a letter¹⁰ directed to the First Respondent's legal representatives, the First Appellant only became aware of the March 2020 order when the application to strike-out, set down for 29 August 2022, was served on the First Appellant. The First Appellant complied with the March 2020 order on 24 August 2022. On the 26th August 2022, the application to strike was removed from the roll.

[30] There seems to be a dispute as to when the March order was served on the First Appellant's legal Representative. On the First Respondent's version, the March 2020 was served on BXI on 7 April 2022.¹¹ Alternatively, First Appellant became aware of it on 4 August 2022 when the striking application was served and only complied with the order 20 days after becoming aware of the order, on 24 August 2022. In my view, nothing turns of these dates as will become evident. The First Respondent therefore contends on this basis, that the main application was automatically dismissed.¹² The First Respondent further contends that the '*applicants ought to suffer the consequences of the actions of their erstwhile attorneys*'. The answering affidavit does not specify why the remaining minor Appellants should '*suffer the consequences*' of alleged non-compliance by one of the Appellants.

[31] The March 2020 order did not only fail to inform the party when the *dies* would start running, but the order failed to make provision for the service of the application to strike out the Appellants' defence. The Respondents seemed to be under the misapprehension that the striking out of a defence is akin to an automatic barring for failure to deliver a pleading as envisaged in Rule 26 of the Uniform Rules of Court.

¹⁰ Letter dated 24 August 2022 ("TK6")

¹¹ This is contrary to the letter of 24 August 2022. Unfortunately, neither proof of service for the March 2020 order or the striking out application are annexed to the papers.

¹² Again, on their version, it was dismissed on 11 April 2022.

Rule 26 provides that a party will be automatically barred if he or she fails to deliver a replication or subsequent pleading within the time limits or, having failed to deliver a pleading other than a replication or subsequent pleading within the stipulated time limits, then fails to deliver it within the time referred to in a notice by his opponent to deliver such pleading. Being *ipso facto* barred for failure to deliver a pleading is not the end of the road for a litigant. The party is simply barred from filing further pleadings and the pleadings will be deemed closed unless a substantive application is brought to remove the bar in terms of Rule 27. It can never be, that a failure to deliver a pleading or comply with a notice will result in an *ipso facto* dismissal of a litigant's action in the absence of a substantive application to court seeking the dismissal of his or her case and/or default judgment being taken, duly served on the legal representative of the party or upon personal service, as the case may be. The mere fact that an application is brought *via* Chamber Book, does not mean that parties are at liberty to disregard the *audi alteram partem* principle, especially where the dismissal of an action or application is sought.

[32] In the first ruling, the Court *a quo* dismissed the application for declaratory relief. Unfortunately, if one has regard to the Reasons provided, there is no mention at all as to how the court came to this decision. The Court *a quo* misdirected itself by finding that the Appellants were barred from seeking a declaratory order with regard to the March 2020 Order.

[33] As is apparent, there are eight Appellants. Startlingly, the effect of the order as it stands allows the claims of the remaining seven Appellants to be struck out, *mero motu* without notice due to the ostensible non-compliance of the First Appellant. Not only is this impermissible, but it is also unconstitutional. What makes this matter all the more egregious, is the fact that the majority of the Appellants are or were minors at the time claiming from their late father's estate. The Court *a quo* also misdirected itself by dismissing the application in not appreciating the consequences of a dismissal of all seven Appellants' causes of actions, when the order to compel was only against the First Appellant.

[34] In its Reasons, the Court *a quo* referred to the various remedies available to the First Appellant. It mentioned three options. The first was that it could appeal the

order. The Chamber Book application and consequent order was done *ex parte*. The First Respondent avers that the Appellants could not appeal an order taken by Chamber Book which they did not oppose. This is self-evident. In any event, the Court *a quo* failed to take into account Rule 42 which allowed it to *mero motu* rescind or vary an order. This a further basis for the appeal to succeed.

[35] The second decision made was the dismissal of the late amendment of the notice of motion to include relief which was sought in terms of paragraph 2 of the notice of motion. It is trite that a party can seek an amendment at any stage before judgment in a matter has been delivered. What is striking in this matter is that the Appellants were criticized for not adopted that particular course of action and when they did, they were ostensibly penalised by the court for doing so. It is trite that parties should not probate and approbate in proceedings, least of all presiding officers. The failure to entertain the amendment, even though same was not necessary if the Court had simply dealt with the issue of the declaration, was a misdirection. As a consequence, there is no need for me to consider whether or not there was compliance with Rule 42 as stated.

[36] Finally, it is evident that the Court *a quo* failed to, at the very least, deal with the substance of the application, which was for the main application to be referred to oral evidence given the nature of the dispute. The Court *a quo* also failed to deal with the *interim* request that pending the determination of the dispute in the main application, that the Appellants were entitled to a distribution of moneys *in lieu* of their rights to maintenance by the estate and for a contribution to their legal costs. It is common cause that the prohibition has been in place since July 2019. Clause 5 of that Order provides as follows:

“Pending the determination of the matter, all income generated from the said taxi business shall be paid by the First Applicant into the estate banking account, save for amounts reasonably required to fund the operation of the said business.”

[37] The effect of that Order, as argued by the Appellants, is that all income generated from the taxi business of the deceased is to be utilised for the operation of

that business or paid into the relevant banking account. The Appellants state that at the time of the Deceased death, he was maintaining the First Appellant and her siblings who relied upon the maintenance paid to them by the Deceased. They argue that due, in part, to the conduct of the First Respondent, that they are unable to maintain themselves and, *inter alia*, the minor children's school fees are unpaid. The Respondents did not deal with these allegations. They simply reiterated their position that the main application had been dismissed.

[38] It is trite that the Master may, upon application and consent of the executor provide subsistence of the deceased family or household in terms of section 26(1)(A) of the Administration of Estates Act¹³. The July 2019 order makes such payment impossible and it was accordingly on this basis that the Appellants sought to vary paragraph 5 of that order to permit the distribution of money to the Appellants *in lieu* of their rights to maintenance.

[39] The Appellants contend, as stated, that the Respondents are silent on this aspect. In fact, the parties could hardly have envisaged when the order was granted in 2019 that it would take years for the main application to be heard, let alone finalised. The court *a quo* failed to deal with this aspect and it is inconceivable that such an application would have been dismissed *mero motu*. I am of the view that this court is adequately placed to deal with the relief sought and that it would be a travesty of justice if the matter were to be remitted back to the Court *a quo* for hearing and determination when this court is apprised of all of the facts before it. I therefore find no impediment to removing the restriction in paragraph 5 of the July 2019 order and varying it to the extent as claimed since the prejudice to the Appellants are clearly established.

[40] In sum, as a result of the various misdirection, the appeal must succeed.

Costs

¹³ 66 of 1965

[41] It is trite that costs usually follow the result. In *casu*, since the First Respondent is the executrix of the deceased estate, the Appellants seek a cost order against the First Respondent in her personal capacity as opposed to from the deceased estate. They argue that it would be unfair for the unreasonable costs occasioned by the opposition to the application and subsequent appeal to be paid from the estate as the Appellants, as beneficiaries would, in essence be ultimately liable for those costs. I am in agreement with this contention. It is clear that the Court *a quo* misdirected itself in the adjudication of a matter which, on the face of it, could easily have been resolved by a rectification of the order or Declarator as it was patently evident that the order granted in the stated terms was a clear error and oversight by the parties. The First Respondent opportunistically through her legal representatives latched onto this error and sought to dismiss the cause of actions of the remaining beneficiaries due to the 'supposed' non-compliance of the First Appellant. It is all the more unfortunate as this is a family dispute between the mother as executrix and the children as Appellants and it is always desirable for these types of matters to be mediated before coming to court. In any event, I am satisfied that the opposition to the application and subsequent appeal was unreasonable and there is no reason why the beneficiaries, who would ultimately be impacted if the estate were ordered to pay the costs, must be mulcted with the costs. I am satisfied that a personal cost order against the First Respondent is justified.

ORDER

[42] In the circumstances, the following order is made:

1. The appeal is upheld.
2. Paragraph 1 of the amended notice of motion dated 24 July 2023 is granted.
3. The Main application is referred to oral evidence as per paragraph 3 of the amended notice of motion for the determination of the issue as to whether the First Respondent was married to the late Daniel Khumalo at the time of his death.
4. Pending the determination of the Main application, the court order dated 30 July 2019 is varied to permit the distribution of moneys to the

Appellants in *lieu* of their rights to maintenance by the estate and for a contribution to the Appellants' legal costs, subject to the Master of the High Court's consent.

5. The First Respondent is ordered to pay the costs of the application and the appeal in her personal capacity on Scale B.

DS KUSEVITSKY
JUDGE OF THE HIGH COURT

I agree

T NDITA
JUDGE OF THE HIGH COURT

I agree

MI SAMELA
JUDGE OF THE HIGH COURT

For the Appellant : Adv. D Van Reenen

Instructed by : Lionel Murray Schwormstedt & Louw

For the Respondent : Adv. A Busakwe

Instructed by : Cuma Lennox Pinini