



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

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE:	YES / ☒
(2)	OF INTEREST TO OTHER JUDGE:	YES / ☒
(3)	REVISED:	☒ / NO
18 July 2018		
DATE		SIGNATURE

CASE NUMBER: 60250/2018

CASE NUMBER: 86068/2018

In the matter between:

MINISTER OF WATER & SANITATION

Plaintiff

and

FUMILE ADVISORY SERVICES (PTY) LTD

First Defendant

JOHN HLAKUDI

Second Defendant

MBALENHLE MANAUKUZA

Third Defendant

NOMBULELO MBEKI

Fourth Defendant

SIFISO MKHIZE

Fifth Defendant

REBECCA NKOMO

Sixth Defendant

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal

representatives by email. The date and time for hand-down is deemed to be 10h00 on 18 July 2025.

Summary: Order ‘Claim is dismissed’ – *In general* equates to an order granting absolution from the instance, unless it is clear from the order and judgement read as a whole that the court intended a final, determinative ruling on the merits of the matter.

JUDGMENT

LE GRANGE AJ:

[1] The first defendant (Fumile) herein seeks leave to appeal this Court’s order, granted on 14 April 2025, which provided as follows:

- ‘1. The plaintiff’s application to amend is dismissed.
2. The plaintiff’s application to re-open its case is dismissed.
3. The plaintiff’s *claim is dismissed*.
4. The first defendant’s *counterclaims are dismissed*.
5. Each party to pay its own costs.’ [Emphasis added]

[2] The main ground of appeal reads as follows: ‘A failure to prove quantum payable does not attract a dismissal of the claim instead, a Court decrees absolution from the instance for failure to prove the quantum payable.’

[3] During the virtual hearing of the application for leave to appeal on 18 June 2025, the entire proceedings were consumed by Fumile’s argument that the Court, having found that services were indeed rendered but that no evidence was adduced regarding the value thereof, ought to have granted absolution from the

instance rather than dismissing the claim. The plaintiff (the Minister) sat as observer and failed to advance any argument on this issue or any other.

Absolution at conclusion of the whole case

- [4] *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th Edition in Chapter 35* sets out the legal position, regarding absolution at the conclusion of the whole case, in relevant part as follows: [footnotes omitted]

‘ In *Corbridge v Welch* De Villiers CJ stated:

By long practice in the courts of South Africa "absolution from the instance" has acquired a wider range than it possessed in the Dutch Courts. The latter courts confined this form of judgment to those cases in which a plea in abatement would be successfully pleaded according to the practice of the English Courts. In this Colony, however, and, *I believe, in the neighbouring states, it has been a constant practice to grant absolution in cases where the plaintiff has not established the facts in support of his case to the satisfaction of the court.* At first it was treated as equivalent to a nonsuit, and confined to cases in which evidence had been given for the plaintiff only. In course of time, however, it was extended to cases in which evidence for the defendant had also been given. It was found convenient to have a form of judgment which would enable the plaintiff to take fresh proceedings without exposing himself to a plea of *lis finite*.

...

After hearing the evidence of both parties and counsels' arguments the court may either deliver judgment immediately or take time to consider its judgment and deliver it at a later date. The judgment is recorded in the judge's notebook and as long as it stands unaltered or unrescinded, it is conclusive proof as against parties of findings of fact directly in issue in the case, actually decided by the court and appearing from the judgment to be the ground on which it was based.

The court may grant judgment outright in favour of either party, or it may give absolution from the instance or, what in effect amounts to the same thing, dismiss the action.

Although there is no express provision in rule 39 for an order of absolution from the instance at the conclusion of the whole case, the practice to grant absolution when a plaintiff has not

established the facts in support of his case to the satisfaction of the court, has been extended to cases in which evidence for the defendant had also been given.’ [Emphasis added]

- [5] As authority for the proposition that an order ‘dismissing the action’ amounts to an order for absolution of the instance, the authors of *Herbstein and Van Winsen* refers to: *Cloete v Greyling* (1907) 24 SC 57 (**Cloete**); *Municipality of Christiana v Victor* 1908 TS 1117 at 1118–1119 (**Municipality of Christiana**); *Eldred v Van Aardt & Bell* 1924 SWA 79 (**Eldred**); *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A) (**Becker**); *Bulford v Bob White's Service Station (Pvt) Ltd* 1973 (1) SA 188 (RA) at 193 (**Bulford**).
- [6] Except for the matter of the *Municipality of Christiana* which I will deal with hereinunder, all of the other matters considered the specific instance which led to the dismissal of a claim. In *Cloete* the claim was dismissed on exception stage, while default judgment was granted in *Eldred*. In the latter, the court (referring to the *Municipality of Christiana*) found it to be clear that the dismissal of an action cannot as a general rule be regarded as a final judgment on which a defence of *res judicata* might be based, but that it is equivalent to a decree of absolution from the instance. In *Becker* (with reference to *Cloete* and the *Municipality of Christiana*) the court regarded a dismissal of a claim on appeal (the claim having been granted *a quo*) as equivalent to an absolution. Lastly in *Bulford* (an appeal from the magistrate court dismissing a claim) the court found the magistrate’s dismissal of the claim, where the measure of damages (as per the evidence advanced) were different to that pleaded, amounted in law to a judgment of absolution.
- [7] The matter of the *Municipality of Christiana* is however different to the extent that the then Supreme Court of the Transvaal construed the words ‘Case dismissed with costs’ and came to the conclusion (with reference to the then rules and criminal charges) that the words are equivalent to a judgment of absolution.

- [8] This Court is in agreement with the proposition that, generally, an order dismissing a claim—or wording to similar effect—amounts to an order for absolution from the instance.
- [9] This general rule, however, warrants a cautionary note. An order dismissing a claim will not, in all instances, amount to an order of absolution from the instance. There are circumstances where the judgment or order clearly reflects the Court’s intention to make a final and definitive determination on the merits of the matter.
- [10] The general rule may find application, particularly in default judgments, procedural dismissals, or where the judgment does not contain clear reasoning or findings on the substantive issues. The important question to be determined in each case remains whether, upon a proper interpretation of the judgment or order—notwithstanding the use of the phrase ‘the claim is dismissed’—the Court intended to pronounce finally on the merits.
- [11] In this regard, the judgment and order must be read holistically to ascertain whether the Court intended to make a conclusive finding on the merits and the substantive rights of the parties. Where no such intention is evident, a claimant ought not to be left remediless.

Judgment considered

- [12] The question that falls to be determined here is whether, notwithstanding the use of the phrase ‘the claim/counterclaims are dismissed’—which, as a general rule, equates to an order for absolution from the instance—the order and judgment issued by this Court ought properly to be construed as such, or whether it constitutes a final judgment on the merits in favour of the respective plaintiff and/or defendants.

The Minister's main claim

- [13] It is apparent from paragraphs [14] to [16] of the judgment that the Minister sought to advance a claim which was not pleaded, thereby justifying the dismissal of the claim on procedural grounds.
- [14] However, the judgment did not end there. The Court specifically recorded that:
- ‘I certainly do not find that Fumile was not overpaid on Invoice 1; however, the Minister has simply failed to advance a claim in its pleadings and to prove same, which proverbially left Fumile (*potentially*) off the hook.’ [Emphasis added.]
- [15] The use of the word “potentially” was deliberate, indicating the existence of a future possibility or contingency.
- [16] It is therefore clear from the above that the Court’s order and judgment were not intended to constitute a final and definitive determination on the cause of action canvassed during cross-examination.

Fumile's counterclaims

- [17] Counsel for Fumile is correct in contending that this Court made a finding that services were indeed rendered by Fumile. This fact is consistent with the Minister’s own version of events.
- [18] The difficulty, however, lies in the fact that no evidence was led regarding the extent of the services rendered or the value thereof. This evidentiary gap is material to the proper adjudication of the claim.
- [19] Fumile, having based its claim in the particulars of claim on specific timesheets as the measure and methodology for quantifying the services rendered, failed to present any supporting evidence relating to these timesheets at trial. Moreover, Fumile’s principal witness deviated from the pleaded methodology, introducing further uncertainty. The Minister, for its part, was likewise unable to provide

clarity on this aspect. For this reason, paragraph [43] of the judgment reads as follows:

‘It was Mr Nteo’s view that the parties are expected to work together where the timesheets and the invoices are in dispute and to agree to a final figure. The view is unfortunately wrong and no such obligation rests upon an opposing litigant. I may say, in the instance it would not have assisted, save for obvious discrepancies which were raised by the Minister, *due to the lack of knowledge at the side of the Minister who could not have been in the position to either confirm or deny the hours spend by every employee.*’ [Empasis added.]

[20] In the premises, Fumile has failed to put its claim or more specifically the quantum thereof on a proper basis or has failed to provide evidence on the basis as set out in the particulars of claim.

[21] In the circumstances, both parties, for all intents and purposes, failed to show up at trial, by failing to put their claims on a proper basis—thereby preventing this Court to carry out its legal function of resolving the dispute(s) fairly and according to the law—justifying the summary dismissal of their respective claims.

[22] In the premises, this Court’s order is not final and definitive on both matters and equates to a judgment for absolution.

Other grounds of appeal

[23] In respect of the remaining grounds of appeal, this Court have, in its judgment delivered on 14 April 2025, fully addressed and provided detailed reasons for each ground raised. This Court accordingly persist in those findings and reasons, and consider them incorporated herein as if expressly repeated and traversed in this judgment.

[24] Considering the above this Court is of the view that an appeal would have no reasonable prospect of success, nor are there compelling reasons why an appeal should be heard.

Costs

[25] Seen that Minister failed to provide any opposition or argument on the grounds of appeal, and considering my earlier order in this regard, I find it to be in the interest of justice that each party should pay their own costs associated also with this application.

Order

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

1. The application for leave to appeal is dismissed.
2. Each party to pay its own costs.


A black rectangular box redacts the signature of the Acting Judge. A curved line is drawn under the box, extending to the left.

AJ le Grange

Acting Judge

APPEARANCES

PLAINTIFF: P Loselo as instructed by the State Attorneys, Pretoria.

FIRST DEFENDANT: ME Manala as instructed by Matela Sibanyoni &
Associates Inc.

SECOND TO SIXTH DEFENDANTS: No appearance.