

Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

CASE NO: CIV APP MG06/22

In the matter between:

M[...] Z[...] M[...]

OBO B[...] R[...] M[...]

APPLICANT

And

KHANYISA MOGALE ATTORNEYS

RESPONDENT

Coram: Reddy J

Date of hearing: 29 February 2024

Delivered: The judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 04 July 2024 at 15h30.

ORDER

(i) The application is dismissed.

(ii) Costs are to be costs in the appeal.

JUDGMENT

REDDY J

Introduction

[1] What comes before this Court is an opposed motion to set aside an irregular step within the framework of Rule 30 and Rule 30A of the Uniform Rules of Court, (“the Rules”). The applicant contends that the respondent’s notice of application for the granting of condonation for the late prosecution of an appeal under Rustenburg Magistrates’ Court **Case Number 3112/2020(High Court Case Number CIV APP MG 06/22)** alternatively the granting of an extension of time to prosecute the said appeal which was served on the applicant on 04 August 2022 be set aside.

- [2] In addressing costs, applicant asserts that the cost *de bonis propriis* be ordered against the respondent alternatively that the respondent pay the party and party costs of the applicant.
- [3] The applicant is M[...] Z[...] M[...], an adult female in a representative capacity of the minor child. The respondent is Khanyisa Mogale Attorneys, a registered law firm in terms of the laws of South Africa. The applicant is the plaintiff with the respondent being the defendant in the main action. For the purposes of pragmatism, the appellations of parties will be referred to as cited in this application.

Background facts

- [4] On 03 September 2009, the applicant's minor child sustained serious injuries when he, as a pedestrian was hit by a motor vehicle. On 09 September 2009, the applicant, in her representative capacity provided the respondent with a mandate to pursue a claim for damages against the Road Accident Fund. The mandate was successfully executed with summons being issued in the North Gauteng High Court.
- [5] On 04 September 2019, the applicant through her attorneys demanded payment of the proceeds of the action as ordered by the court. The respondent did not cohere to the demand. Under Magistrates' Court **case number 3112/2020**, at the Rustenburg Magistrates' Court the applicant was successful in obtaining summary judgment.

- [6] The respondent noted an appeal in respect of the summary judgment but failed to have the appeal prosecuted within the peremptory timelines. The inactive legal conduct of the respondent caused the applicant to instruct the Sheriff to execute on the summary judgment. The commencement of the execution process awakened the respondent from its legal quiescence.
- [7] To this end, the respondent countered the instructions of the Sheriff by launching an urgent High Court application under **case number UM 58/22** to stay the execution of the said summary judgment and simultaneously petitioned the court to grant the respondent a period of ninety (90) days to prosecute the lapsed appeal. Peculiarly, with the subset of the application to stay the warrant of execution and the allocation of the ninety (90) day timeline for the prosecution of the appeal, the respondent applied under **case number CIV APP MG 06/22** for the allocation of a date for the hearing of this appeal
- [8] On being served with the respondent's application for the date of the hearing of the appeal, under **case number CIV APP MG 06/22**, the applicant served the respondent with a Notice in terms of Rule 30 and 30A of the Rules. The ventilation of the Rule 30 and 30A application by the applicant were overtaken by events under **UM 58/22**. The urgent relief as proposed by the respondent in the latter application was dismissed.

- [9] This caused a second instruction by the applicants to the Sheriff to persist with the execution process in respect of the summary judgment. The second execution attempt caused the respondent to satisfy the money judgment by tendering the full payment of same.
- [10] After the dismissal of the respondent's urgent application under **UM 58/22**, the respondent served a notice of an application for the allocation of a date for the hearing of the lapsed appeal under **case number CIV APP MG 06/22**. On 20 June 2022, the applicants reacted by the serving a notice in terms of Rule 30 and 30A for the non-compliance with the Rules. On 30 June 2022, the respondent filed a notice of withdrawal of the application for the date of hearing of the appeal and tendered the costs.
- [11] On 04 August 2022 under the cover of **case number CIV APP MG 06/22**, the respondent instructing the very same firm of attorneys who had filed the notice of withdrawal of 30 June 2022 served an application for the condonation for the late prosecution of the appeal in the Magistrates Court, Rustenburg under **case number 3112/2020**, in the alternative the respondent sought the granting of an extension of time for the prosecution of the appeal.
- [12] Predictably, the applicant served a Rule 30 and Rule 30A notice. Notably, this relief namely, the granting of an extension of time for the prosecution of the appeal had been adjudicated on in **UM 58/2022**. This decision remained extant as no appeal process was pursued. It follows that the current application under **case number**

CIV APP MG 06/22 for the condonation or extension of time for the late prosecution of the appeal constitutes and irregular step.

Submissions by applicant

[13] Mr. Montshiwa contended that three crisp issues are dispositive of this application. Firstly, whether the respondent is entitled to reinstate an application after it has formally filed a notice of withdrawal, secondly whether the respondent pursued an irregular step by reinstating an application which was withdrawn, without seeking leave of the court to do so and thirdly whether the respondent's attorney should be ordered to pay costs of this application *de bonis propriis*. In the elaboration of the trio of factors, Mr Montshiwa avowed that respondent had taken an irregular step by reinstating an application which had been withdrawn and in doing so without the leave of the court.

[14] Mr. Montshiwa continued that notwithstanding the applicant availing the respondent with the opportunity to remove the cause for complaint, the respondent failed to do so. In *lieu* of removing the cause for complaint, the respondent filed opposing papers. Mr Montshiwa contended that the respondent had withdrawn its application on 30 June 2022, which was prompted by the applicant's delivery of a notice in terms of Rule 30 and Rule 30A. Mr Montshiwa submitted that the respondent had withdrawn its application following the applicant's Rule 30 and Rule 30A notice *via* its new attorneys of record and cannot reinstate or withdraw its notice of withdrawal without the leave of court.

[15] In exploiting his contention on costs *de bonis propriis*, *Mr Montshiwa* reiterated the trite principles as stated in *Stainbank v South African Apartheid Museum at Freedom Park and Another* (CCT 70/10) [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) (9 June 2011), where Khampepe J stated as follows:

“52 Although the courts have the power to award costs from a legal practitioner’s own pocket, costs will only be awarded on this basis where a practitioner has acted inappropriately in a reasonably egregious manner. However, there does not appear to be a set threshold where an exact standard of conduct will warrant this award of costs. Generally, it remains within judicial discretion. Conduct seen as unreasonable, wilfully disruptive or negligent may constitute conduct that may attract an order of costs *de bonis propriis*.

53 Punitive costs have been granted when a practitioner instituted proceedings in a haphazard manner; wilfully ignored court procedure or rules; presented a case in a misleading manner; and forwarded an application that was plainly misconceived and frivolous.

54 The basic rule relating to the court’s discretion is as relevant to the award of costs *de bonis propriis* as it is in other costs awards. Extending from this discretion, it appears the assessment of the gravity of the attorney’s conduct is an objective assessment that lies within the discretion of a court making the award.”

(footnotes omitted)

[16] Elucidating on the submission of why a cost order *de bonis propriis* was fitting, *Mr Montshiwa* submitted that the respondent’s attorney of record squarely placed himself within the conduct which

attracted a punitive cost order. *Mr Montshiwa* asserted that, “the court is to take notice that the current respondent’s attorney is the one who appears on the notice of withdrawal of the irregular step raised by the applicant. Be that as it may, it is the very same attorney who appears on the second notice of motion which triggered the applicant to raise an irregular step which led to this application and the reinstatement one are similar.”

- [17] On the strength of these submissions *Mr Montshiwa* submitted that a proper case had been made out for the setting aside of the respondent’s reinstated application as an irregular step and for an accompanying cost order *de bonis propriis*.

Respondent’s submissions

- [18] *Mr Hlapolosa* contends that the Rules, make no provision for what the applicant perceives to be an irregular step. Given this absence within the framework of the Rules, it was prudent for the respondent to have opposed this application. *Mr Hlapolosa* states that from a careful reading of the applicant’s founding affidavit, the ineluctable inference to be drawn is that this application is founded on the decision under **UM 58/2022**, wherein the respondent’s application was dismissed. *Mr Hlapolosa* continued that under **UM 58/2022**, the respondent accentuated that the application for condonation was still to be brought, which would relate to **case number CIV APP MG 06/22** which is the main application.

- [19] Effectively *Mr. Hlapolosa* asserts that what the applicant seeks to raise impermissibly, is a disguised exception by way of Rule 30. The argument ran that this is so due to the inapplicability of the

exception procedure to motion proceedings as a result the applicant sought to use the tenets of Rule 30 as an “exception”. The applicant’s contention that the launching of this application was justifiable to reduce litigation is illogical as this application is an obstacle to the expeditious disposal of the matter and only serves to increase costs.

[20] As a consequence *Mr. Hlapolosa* continued that this interlocutory application was entirely unnecessary, frivolous and vexatious. Resultantly, it warrants an appropriate punitive costs order to display this Courts disapproval.

The law

[21] The provisions of Uniform Rule 30 reads as follows:

‘30. Irregular proceedings. - (1) 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.

(2) An application in terms of subrule (1) 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 taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

- (3) If at the hearing of such application the court is of 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 as to it seems meet.
- (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.'

[22] This rule is intended to deal with matters of form not of substance. See: *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and Others* [2023] ZACC 2. It is intended to deal with irregular steps taken by parties during litigation and where the irregularity emanates from the inappropriate use of the rules of court. D Harms *Civil Procedure in the Superior Courts* S1-69 at B30.3 . To my mind it is not to be used as a procedural mechanism to circumvent the efficient and expeditious disposal of matters. It follows that undue focus on minor deviations from the Rules hinders the flow of litigation rather than accelerate it. The words of De Villiers CJ in *Le Roex v Prins Le Roex v Prins* (1883-1884) 2 SC 405 at 407 quoted in *Singh v Vorkel* are still apposite:

'The tendency of recent rules of procedure in this Court has been to sweep away all unnecessary technicalities and hinderances to the speedy and effectual administration of justice'. *Singh v Vorkel* 1947 (3) SA 400 (C) at 406.'

[23] An evaluation of the applicant's interlocutory application is without merit; it is an unnecessary hindrance to the speedy and effectual administration of justice of the main application. It therefore falls to be dismissed. Even if I am incorrect in this regard, and there is a minor deviation from the Rules, this deviation is not a hindrance to the administration of justice. What must be emphasized is that the homely legal metaphor must find application, namely that each application **must** be adjudicated on its own merits.

[24] At its heart, the purpose of the Rules of Court is to oil the wheels of justice to attain the expeditious resolving of disputes with a minimisation of costs. Quibbling about trivial deviations from the Rules of Court retards, instead of enhancing the civil court process. See: *Louw v Grobler and Another* (3074/2016) [2016] ZAFSHC 206. The object of the rules is to secure the inexpensive and expeditious and for the completion of litigation before the courts: they are not an end to themselves. See: *Hudson v Hudson* 1927 AD 259 at 267. *Eke v Parsons* 2016 (3) SA 37 (CC) at 53 A-D, *Centre for Child Law v Hoerskool, Fochville* 2016 (2) SA 121 (SCA) at 131G. To this end, the rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve disputes in a speedy and inexpensive manner. See: *Ncoweni v Bezuidenhout* 1927 AD 259 at 267.

[25] In *Mukaddam v Pioneer Foods Pty (Ltd)* 2013 (5) SA 89 (CC) the apex court commented on the purpose of the Rules of Court as follows:

“[31] However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of court. The Uniform Rules regulate form and the process of the high court. The Supreme Court of Appeal and this court have their own rules. These rules confer procedural rights on litigants and also help creating certainty in the procedures to be followed if a relief of a particular kind is sought.

[32] It is important that the rule of court are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for the courts and the courts are established for rules. Therefore, the primary function of the rules of court is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. After all, in terms s173 each superior court is the master of its own process.

[33] Section 173 of the Constitution provides:

“The Constitutional Court, Supreme Court of Appeal and the High Courts have inherent power to protect and regulate their own process, and to develop the common-law, taking into account the interests of justice.”

[26] In *Eke v Parsons* 2016 (3) SA 37 (CC) the Constitutional Court said:

“[39] Without a doubt, rules governing the court process cannot be disregarded. They serve an undeniable important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of

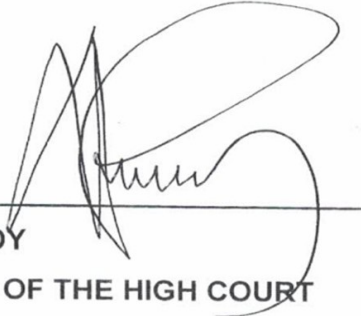
the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said “[i]t is trite that rules exist for the courts, and not courts for the rules.”

[27] In respect of costs, it would be just and equitable that costs be costs in the appeal.

Order

[28] In the premises, I make the following order:

- (i) The application is dismissed.
- (ii) Costs are to be costs in the appeal.



A REDDY
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

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