



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

CASE NO: A031723-2022

**REGIONAL COURT, JOHANNESBURG
CASE NUMBER 0537/21**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

DATE

21/8/2023

SIGNATURE

In the matter between:

DUBE, THULANI

Appellant

and

THE MINISTER OF POLICE

First Respondent

**THE NATIONAL COMMISSIONER OF THE SOUTH
AFRICAN POLICE SERVICE**

Second Respondent

**THE GAUTENG PROVINCIAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Third Respondent

THE MINISTER OF HOME AFFAIRS

Fourth Respondent

THE DIRECTOR GENERAL OF HOME AFFAIRS

Fifth Respondent

JUDGMENT

MOORCROFT AJ [DU PLESSIS AJ CONCURRING]:

Summary

Appeal from Magistrates' Court – section 83(b) of Magistrates' Courts Act, 32 of 1944 – rule or order having the effect of a final judgment - A judgment is final if it is definitive of the rights of the parties and has the effect of disposing of at least a substantial portion of the relief claimed - question of fact to be must be considered through the lens of the interests of justice

Ruling in application for further and better discovery is not a final judgment

Appeal dismissed

Order

[1] In this matter I make the following order:

1. *The appeal is dismissed;*
2. *The appellant is ordered to pay the costs on the scale as between attorney and client.*

[2] The reasons for the order follow below.

Introduction

[3] The appellant lodged an appeal against a judgment of the learned magistrate Reddy in the Regional Court in Johannesburg granted on 19 September 2022. The judgment was given in an opposed application by the appellant (then plaintiff) for the discovery of certain documents in terms of rule 23(3) of the Rules of the Magistrates Court.

[4] The appellant is the plaintiff in an action against the respondents as defendants. He claims that he was unlawfully arrested by members of the South African Police Service who charged him with being an undocumented immigrant. The particulars of claim were amended to allege that the plaintiff was arrested under the name 'Bongani Dube' instead of under his own name. The respondents deny that the appellant was ever arrested and has placed his identity and *locus standi* in dispute.

[5] The respondents went on oath to say that the alleged records of the appellant could not be located and did not exist. His name does not appear in any of the records of the respondents.

[6] The name of 'Bongani Dube' does however appear in the records as an illegal immigrant. These records are comprised of a notice of rights¹ in terms of the Constitution of 1996, an occurrence book,² a cell register,³ and a so-called Lindela identity card. The respondents have attached these documents to their answering affidavit in the application to compel further and better discovery. The appellant is therefore in possession of these documents.

[7] It is alleged on appeal that the magistrate erred in finding that documents sought to be discovered by the appellant were not in the possession of the respondent except for those that had already been discovered and that formed part of the answering affidavit in the application to compel discovery. It is also alleged that the learned magistrate erred in finding that no warrant of detention for the purposes of deportation, warrant of release from detention, and fingerprint records of the appellant existed despite the fact that in terms of the amended particulars of claim the appellant (Thulani Dube) and one Bongani

¹ SAP14A.

² SAP10.

³ SAP14.

Ndlovu is in fact the same person, and that the learned magistrate erred in relying on the judgment in *Dube v Member of Executive Council*.⁴

The appealability of the Magistrate's judgment

[8] The High Court's inherent jurisdiction does not extend to the assumption of jurisdiction when jurisdiction is not conferred upon it by statute.⁵ It is necessary therefore to determine if the Court has the jurisdiction to entertain the appeal.

[9] Section 83 of the Magistrates' Courts Act, 32 of 1944, reads as follows:

"83 Appeal from magistrate's court

Subject to the provisions of section 82, a party to any civil suit or proceeding in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal against —

(a) any judgment of the nature described in section 48;

(b) any rule or order made in such suit or proceeding and having the effect of a final judgment,⁶ including any order under Chapter IX and any order as to costs;

(c) any decision overruling an exception, when the parties concerned consent to such an appeal before proceeding further in an action or when it is appealed from in conjunction with the principal case, or when it includes an order as to costs."

[emphasis added]

⁴ *Dube v Member of Executive Council* 2018 JDR 1218 (GJ). In this matter Sutherland J (as he then was) stated that the ambit of rule 35 of the Uniform Rules applicable in the High Court (the counterpart of Rule 23 in the Rules of the Magistrates' Court) was limited to imposing a duty on a litigant to discover documents *et cetera* in its possession. A litigant could not be compelled to discover documents it did not have.

⁵ *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A).

⁶ A judgment includes a decree, a rule, and an order. See section 1.

[Section 83 substituted by s 16 of Act 15 of 1969 and amended by s 2 of Act 102 of 1982.]

[10] The judgment by the learned magistrate in the application for discovery was not a judgment of the nature described in section 48 of the Act and referred to in section 83(a).⁷ Section 48 of the Magistrates Court Act refers to a judgment given at the end of a trial action. Section 83(c) is also of no relevance. It relates to exceptions. What remains is section 83(b).

[11] For the reasons set out below the appellant cannot rely on section 83(b) as the judgment in the application does not have the effect of a final judgment.⁸ A judgment is final if it is definitive of the rights of the parties and has the effect of disposing of at least a substantial portion of the relief claimed. The question whether judgment is definitive of rights and disposes of a substantial portion of the relief claimed is a question of fact and must be considered through the lens of the interests of justice.

[12] Interlocutory orders that are not final in effect are incidental to a pending action and are orders made in the course of the progress of the litigation through the court without determining the main issue in the action.⁹ Such interlocutory orders are not final judgments and are not appealable in terms of section 83(b). The policy considerations underlying the principle includes discouraging piecemeal appeals.¹⁰ Orders for discovery or the production of documents are not appealable¹¹ for this reason.

[13] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*¹² Corbett JA distinguished between simple interlocutory orders that are not appealable and other interlocutory orders that are or may be appealable. The distinction was described as follows by Schreiner JA in the majority judgment in *Pretoria Garrison*

⁷ Van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* Act-p585.

⁸ Chapter IX of the Act (sections 61 to 79) deals with execution of judgments and is likewise not of any relevance. See also *Philani-Ma-Afrika and Others v Mailula and Others* 2010 (2) SA 573 (SCA) in respect of execution of High Court orders. Reference was made in the latter judgment to *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA).

⁹ Van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa* Act-p587, *Guardian National Insurance Co Ltd v Searle* NO 1999 (3) SA 296 (SCA).

¹⁰ See *Health Professions Council of South Africa v Emergency Medical Supplies and Trading CC t/a EMS* 2010 (6) SA 469 (SCA) paras 17 to 19.

¹¹ See *McLaren v Wasser* 1915 EDL 153, *Le Roux v Montgomery* 1918 TPD 384, and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

¹² *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A).

*Institutes v Danish Variety Products (Pty) Ltd*¹³ with reference to the judgment of the Appeal Court in *Globe and Phoenix G.M. Company v Rhodesian Corporation*.¹⁴

“From the judgments of WESSELS and CURLEWIS, JJ.A., the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'. The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit. ”

[14] The majority held that an order directing the furnishing of further particulars was not appealable.

[15] The principle that appealability hinges on whether the order sought to be appealed is definitive of the rights of the parties and disposes of at least a substantial portion of the relief grant in the main proceedings is to be found also in High Court practice, but the older authorities must be read with the caveat that Constitutional values have introduced the more “*context-sensitive standard of the interests of justice*”¹⁵ favoured by our *Constitution*” when considering appeals against interim orders.¹⁶

[16] The decision in *Nova Property Group Holdings Ltd and Others v Cobbett and Another*¹⁷ is informative. In the court *a quo* Tuchten J granted an order for the production of certain documents in terms of Rule 35(12) of the Uniform Rules of the High Court but dismissed an application in terms of Rule 35(14). In doing so the Learned Judge

¹³ *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) 870.

¹⁴ *Globe and Phoenix G.M. Company v Rhodesian Corporation* 1932 AD 146. See also *Mathale v Linda* 2016 (2) SA 461 (CC).

¹⁵ The Constitutional Court has also held in respect of an appeal directly to the Constitutional Court against the granting of an interim interdict in terms of section 167(6)(b) of the Constitution, 1996, the common-law requirements for appealability of interim orders was now subsumed under the constitutional “*interest of justice*” standard: *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) paras 40, 41 and 179.

¹⁶ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 53.

¹⁷ *Nova Property Group Holdings Ltd and Others v Cobbett and Another* 2016 (4) SA 317 (SCA).

interpreted section 26(2) of the Companies Act, 71 of 2008. The appellant appealed the dismissal of the Rule 35(14) application with the leave of Tuchten J.

[17] Kathree-Setiloane AJA referred to the fact that they were conflicting judgments on the interpretation of section 26(2) of the Companies Act

[18] and that leave to appeal was justified on the grounds set out in section 17(1) of the Superior Courts Act, 10 of 2013. The respondent was constrained to concede that the judgment though not appealable under the test in *Zweni v Minister of Law and Order*,¹⁸ was nevertheless appealable under section 17(1) of the Superior Courts Act.

[19] The judgment deals with the interpretation of provisions of the Superior Courts Act and is not on all fours with an appeal from the Magistrates Court that must comply with section 83 of the Magistrates Courts Act.

[20] In the present appeal the appellant launched appeal proceedings but failed to deal with section 83 of the Magistrates Courts Act in argument. It was argued on behalf of the respondents that a cost order on the scale is between attorney and client was justified on the basis that the respondents were forced to come to court on an appeal that had no prospects of success. I agree with this submission.

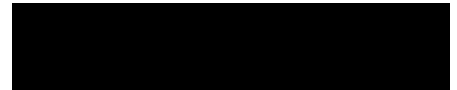
Conclusion

[21] I therefore make the order as set out above.


J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

¹⁸ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 531J to 533B.

I agree and it is so ordered



WJ DU PLESSIS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judges whose names are 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 of the judgment is deemed to be **21 AUGUST 2023**.

COUNSEL FOR APPELLANT:	S VOBI
INSTRUCTED BY:	BUTHELEZI NF ATTORNEYS
COUNSEL FOR RESPONDENT:	M COOVADIA
INSTRUCTED BY:	STATE ATTORNEY
DATE OF THE APPEAL:	3 AUGUST 2023
DATE OF JUDGMENT:	21 AUGUST 2023