IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. 13281/2020

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED

DATE: 16 MAY 2024

SIGNATURE:.

In the matter between:

M[...], N[...] Z[...] **APPLICANT**

And

ROAD ACCIDENT FUND **FIRST RESPONDENT**

Coram: Millar J

Heard on: 8 May 2024

Delivered: 16 May 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 16 May 2024.

Summary: *Application for leave to appeal against the dismissal of an order to compel - Procedure – application to compel party to nominate a date, time and place for the holding of a pre-trial conference in terms of Rule 37(2)(b) – not competent in terms of Rule 30A(1)(a) – correct procedure to be followed is by application of rule 37(3)(b) – Order sought and dismissed interlocutory – no prospects another court would come to a different conclusion or compelling reason to grant leave to appeal – Application dismissed.*

ORDER

It is Ordered:

[1] The application for leave to appeal is dismissed.

[2] There is no order for costs.

JUDGMENT

MILLAR J

[1] On 15 April 2024, an application brought in the present matter in the Trial Interlocutory Court (TIC) by the applicant was dismissed. In addition to the order dismissing the application, an order was also made that the applicant's attorney was not permitted to charge the applicant for the application.

[2] When the order was granted, the reasons for it were given. On 26 April 2024, the applicant brought an application for leave to appeal. The grounds upon

which the application was premised are firstly, that the interpretation and application by the court of the provisions of rule 37(2) read together with rule 37(3)(b) of the uniform rules of court and the practice directives issued for the Gauteng division were in conflict with a judgment handed down in the Gauteng division Johannesburg on 5 March 2024. Secondly, because there were now 2 different interpretations and no reported authority dealing with this procedural issue, this constituted a “compelling reason” for the granting of leave to appeal.

[3] The background to the application is uncontentious. On 15 June 2017, the applicant’s minor child, suffered injuries while a passenger in a motor vehicle. Liability to pay compensation was settled on 7 February 2018. A summons was served on 27 February 2020 and a notice of intention to defend delivered on 16 March 2020.

[4] During the subsequent period, until 12 May 2021 when the respondent’s attorneys withdrew as attorneys of record, the court Caselines file indicates that besides the filing of a notice in terms of rule 36(4) by the applicant and a special plea and plea by the respondent, the only other document filed was the notice of withdrawal as attorneys of record. There is currently no attorney on record for the respondent.

[5] A period of 2 years elapsed before the applicant then delivered a first notice in terms of rule 37(2) on 6 April 2023, calling upon the respondent to attend a pre-trial conference on 12 April 2023. The respondent neither attended the proposed pre-trial conference nor did it respond to the request.

[6] A second notice was sent on 21 April 2023, calling upon the respondent to attend a pre-trial conference on 26 April 2023. Again, the respondent neither attended the proposed pre-trial conference nor did it respond to the request. Finally, on 26 April 2023, a third notice calling for a pre-trial conference on 15 May 2023 was delivered to the respondent.

[7] It met the same fate as the two that had preceded it.

[8] Each of the three notices sent to the respondent also specified that "*in the event of the defendant disputing the date time and place of the Rule 37 Conference as proposed the matter shall be placed before the Registrar for decision.*"

[9] Unable to advance the matter to trial without the holding of a pre-trial conference, the applicant brought the present application on 31 October 2023. On 18 January 2024, it was enrolled for hearing on 15 April 2024 some five and a half months after it was brought.

[10] The order sought by the applicant was as follows:

> *"1. That the Respondent's representatives give indication when they are available to attend a pre-trial at the offices of the Applicant's attorneys of record, alternatively via Zoom, within 5 days of date of service of this order, such date to be no more than 30 days of service of this order.*
>
> *2. That the Respondent be ordered to pay the costs of this Application."*

[11] Before dealing with whether the process followed by the applicant and whether the relief sought established an entitlement to the order, it is necessary to consider the provisions of rule 37.

[12] The relevant provisions of Rule 37 which deals with the arrangement of and requirements for pre-trial conferences, provides:

"(2) (a) In cases not subject to judicial case management as contemplated in rule 37A, a plaintiff who receives the notice contemplated in sub rule (1) shall within 10 days deliver a notice in which such plaintiff appoints a date, time and place for a pre-trial conference.

(b) If the plaintiff has failed to comply with paragraph (a), the defendant may, within 30 days after the expiration of the period mentioned in that paragraph, deliver such notice.

(3) (a) The date, time and place for the pre-trial conference may be amended by agreement: Provided that the conference shall be held not later than 30 days prior to the date of hearing.

(b) If the parties do not agree on the date, time or place for the pre-trial conference, the matter shall be submitted to the registrar for decision.

(4) Each party shall, not later than 10 days prior to the pre-trial conference. . ."(my underlining)

[13] It is apparent from a plain reading of the rule that the procedure to be followed is that the plaintiff, the applicant in the present case, is obligated in the first instance in terms of rule 37(2)(a) to call for a pre-trial conference by nominating a date, time and place for it to be held.

[14] The rule does not prescribe a minimum time period with regards to when a pre-trial conference can be called for. However, since rule 37(4) requires that each party is required to no later than 10 days before the holding of such pre-trial conference, to deliver a list of the admissions which it requires and the enquiries which it will direct and setting out other matters regarding preparation for trial

which will be discussed, it is self-evident that in the first instance, the minimum period within which the pre-trial conference can be called, provided that compliance with rule 37(4) takes place simultaneously is 10 days.

[15] If a notice in terms of rule 37(4) has previously been delivered and at least 10 days have elapsed from the time of the delivery of that notice, then there seems to be no reason why the notice in terms of rule 37(2)(a) could not set out a date and time for the holding of a conference less than 10 days from the date of the delivery of the notice.

[16] While rule 37(2)(a) states that the plaintiff *"shall"* deliver a notice, the same obligation does not fall upon the defendant. Rule 37(2)(b) affords the defendant an opportunity, in the event that the plaintiff does not comply with rule 37(2)(a) to call for compliance. This sub-rule is permissively worded – the defendant *"may"* call upon the plaintiff to comply but there is no obligation upon it to do so.

[17] It is the plaintiff who is *dominus litis* and it is the plaintiff who bears the obligation to shepherd the action to trial without undue delay. However, even if the defendant were to exercise its election to call for a pre-trial conference, it would also be subject to the provisions of rule 37(4).

[18] Rule 37(3)(a) provides for where there is agreement to the holding of a pre-trial conference and to where there is a request and an agreement for the changing of either the date, time, or place at which it was originally proposed to be held.

[19] Rule 37(3)(b) deals with the converse, which is where the parties have not agreed on either the date, or the time or the place for the holding of a pre-trial conference. This sub-rule provides that in such a situation, "*the matter shall be submitted to the Registrar for decision".*

[20] If the plaintiff or the defendant (as the case may be) acts unilaterally in proposing a date, time and venue and the other party fails to attend, this evidences their non-agreement, and triggers rule 37(3)(b). In the present matter, the applicant made three attempts, all of which met with no success.

[21] It was held in *ABSA Bank Ltd v The Farm Klippan 490 CC*[1] that where there has been non-compliance with a rule of court, in the first instance, it is necessary to look to the specific rule itself to see if it contains a remedy. Unlike rule 35 dealing with discovery, which has a remedy for non-compliance set out in rule 35(7) or rule 21 dealing with requests for further particulars for trial, which has a remedy for non-compliance set out in rule 21(4), rule 37 has no such remedy. In order to compel compliance with any provision of rule 37, it is necessary to invoke the provisions of rule 30A.

[22] Rule 30A provides:

> *"(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order –*
>
> *(a) That such rule, notice, request, order or direction be complied with; or*
>
> *(b) That the claim or defence be struck out.*

[1] 2000 (2) SA 211 (W) at 215A-B.

> *(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."*

[23] If regard is had to the provisions of rule 30A(1)(a), an application in which an applicant seeks an order that a particular rule or notice be complied with, it must in its terms accord with the provisions of the specific rule. In the present instance, the application was brought to compel compliance with the provisions of rule 37(2)(b). This is not competent because the rule neither obligates nor compels the defendant to call for a pre-trial conference. Put simply, a party cannot be compelled to do something which the rule does not require of them.

[24] Rule 37(3)(b) provides a mechanism to resolve the impasse of non-attendance at a pre-trial conference or failure to agree to a date, time, and place for the holding of such a conference. The rule requires that in the event of such disagreement, it be submitted to the Registrar for decision.

[25] In the case of non-engagement, such as the present instance, the plaintiff need only, having regard to the provisions of rule 37(4) which would presumably have already been complied with (in the present matter they were not prior to the delivery of the three notices referred to in paragraphs [5] to [6] above), submit to the Registrar a request for the setting of a date, time, and place for the holding of a pre-trial conference.

[26] The rule does not obligate the Registrar to do anything other than resolve the impasse by making the decision of where and when the pre-trial conference is to be held.

[27] In cases where the parties have engaged with each other and there is a disagreement, may be necessary for both parties to make submissions with

their respective proposals and the reasons therefore, in order for the Registrar to make the decision. In this case also, once the decision is made by the Registrar, the notice referred to in paragraph [25] above would be delivered to the respective parties.

[28] In circumstances such as the present, a plaintiff need only, submit a notice headed *"Registrar's decision in terms of rule 37(3)(b)"* on which are set out the proposed date, time and venue to the Registrar who would then, before service of the notice on the other party, affix his stamp as proof of his decision.

[29] Beyond this singular decision, either after having considered the respective party's proposals or a unilateral request, the rule requires no further involvement or engagement by the Registrar in the pre-trial process.

[30] I was referred to the recent judgment in *Hamufari v Road Accident Fund*,[2] in which it was held that:

> *"[5] Having taken opportunity to consider the matter I believe that it could never have been the intention of the Practice Directives to add a burden to the office of the Registrar that it did not anticipate. It could never have been the intention to deal with matters where there has been no engagement and that these matters cannot, and should not, be dealt with on the same basis as where the parties are unable to agree on a date, time or place for a pre-trial meeting as envisaged in rules 37(3)(b)."*
>
> *"[6] As such I find that, if there is proper documentary proof of attempts to engage the delinquent party and that there was no response, it remains open for an aggrieved party to approach the*

[2] [2024] ZAGPJHC 392 (5 March 2024).

Special Interlocutory Court for relief in the form of a compelling order to attend a pre-trial conference."

[31] My attention was also drawn to a General Notice to Legal Profession dated 26 March 2024 issued by the office of the Deputy Judge President in Johannesburg which states:

> "*5.4 Para 27.14 in Directive 1 of 2024 has also been the subject of debate: this paragraph deals with the interaction of the Directive and Rule 37(3) (b) of the Rules of Court. The paragraph states that an order to compel a party to attend a pre-trial conference is subject to the Rule. The scope of the Rule is limited to an inability by the two litigants to agree a time and place to meet and the registrar is empowered to break the impasse. The Rule does not regulate the predicament where the adversary ignores a request to meet or refuses to meet; in such a case, a compelling order is appropriate, and Rule 37(3) (b) is not triggered.*"

[32] Having regard to the provisions of the Rules which I have set out above, I respectfully disagree with the findings in *Hamufari* and with the interpretation cast upon the provisions of Rule 37(3)(b) in the notice of 26 March 2024. Additionally, it bears mention that upon enquiry to the Registrar of this court, the implementation of the practice directive on the basis outlined above has been effective. The consequence is to reduce the overall number of applications that the Registrar is required

[33] Since, the provisions of rule 37(2)(b) cannot be construed as placing an obligation upon a defendant, it follows that an order to compel this is not competent in terms of rule 30A(1)(a). Properly construed, rule 37(3)(b) is the rule that places an obligation on a party, an obligation which if not discharged would entitle the aggrieved party to apply in terms of rule 30(A)(1)(b) for an order striking the defence of the defaulting party.

[34] The obligation upon the registrar in terms of rule 37(3)(b) is placed upon that office by the rules and not by the practice directives.

[35] The purpose of the practice directives[3] is not to replace the rules but is to guide practitioners in the implementation of the rules, having regard to circumstances not specifically anticipated or provided for in the rules. They together with the rules have as their purpose the provision of *"the efficient, expeditious and uniform administration of justice."* [4] The bringing of an additional, legally incompetent and superfluous application which serves to increase both the burden upon the Registrar and costs upon a litigant does not serve the purpose of either the rules or practice directives.

[36] Turning now to the application for leave to appeal.

[37] Firstly, the order sought, and which was dismissed is unequivocally interlocutory in nature[5] and is not appealable.

[38] Secondly, the fact that one court may in the consideration of an interlocutory matter prefer one approach to interpretation of a rule over that adopted by another does not to my mind establish a basis for the granting of leave to appeal. This is the very reason that interlocutory orders and orders which are not final in effect are not appealable.

[39] For these reasons I find that another court would not come to a different conclusion and that the application for leave to appeal must fail.

[40] In the circumstances, I make the following order:

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[3] *Mhlongo and Others v Mokoena NO and Others* 2022 (6) SA 129 (SCA) at para [14].

[4] Rules Board for Courts of Law Act 107 of 1985. *ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC) at para [10].

[5] *Mathale v Linda and Others* 2016 (2) SA 461 (CC).

[40.1] The application for leave to appeal is dismissed.

[40.2] There is no order for costs.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	8 MAY 2024
JUDGMENT DELIVERED ON:	16 MAY 2024
COUNSEL FOR THE APPLICANT:	ADV. S CLIFF
INSTRUCTED BY:	CAMPBELL ATTORNEYS
REFERENCE:	MR. D GUTHRIE

NO APPEARANCE FOR THE RESPONDENT