IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case no: AR414/2023
Court below case no: 1491/2021

In the matter between:

FRANCOIS NORTJE **APPELLANT**

and

HENNING JOHANNES DU TOIT **RESPONDENT**

JUDGMENT

Shapiro AJ (Olsen J concurring):

[1] The respondent instituted an action against the appellant in the KwaDukuza Magistrate's Court, claiming damages of R50,000. His claim arises from an incident that occurred on 2 June 2021 when the appellant allegedly forced his way into a disciplinary hearing being chaired by the respondent and, in the presence of others, called the respondent "a f..king racist".

[2] Although the respondent's claim is based on the *actio iniuriarum*, the appellant delivered a lengthy special plea attacking the respondent's legal standing and a plea that is more akin to a defence to a claim of defamation[1].

[3] The appellant baldly denies the allegation that he "gate crashed" a disciplinary hearing, refused to leave that he repeatedly used the words alleged. He then advances a number of alternative defences to the effect that if it is found that he did make the accusation described above, the words were true, and publication was for the public benefit.

[4] The appellant also discovered a myriad of documents, including various emails, tax invoices issued by the firm of attorneys of which the respondent was a partner to its client, the Body Corporate of Sea Haven on whose instruction the two disciplinary enquiries were convened, the outcome of the enquiries together with ancillary documents and documents referring a dispute to the Commission for Conciliation, Mediation and Arbitration.

[5] In February 2022, and in the face of the respondent's discovery affidavit, the appellant delivered a Notice in terms of Rule 23(3) calling upon the respondent to make further and better discovery.

[1] It is not clear why the respondent did not seek to strike out these defences – but that is an issue for the action, and not this appeal.

[6] In amongst the documents sought were documents relating to the authority of the respondent to conduct the disciplinary enquiries and any other work for the Body Corporate, the record of proceedings of the enquiries about alleged misconduct by the two implicated employees, the disciplinary enquiries that were chaired by the respondent on 24 and 25 May 2021 in respect of those employees, any findings that he made and any and all correspondence between the respondent and any other partner of his firm and the trustees of the body corporate in relation to the enquiries and any invoices and statements of account submitted in respect of services rendered arising out of those enquiries.

[7] When those documents were not delivered, the appellant launched an application to compel discovery, which was opposed by the respondent. The respondent argued that the documents sought were not relevant to the action and were not necessary to enable the appellant to prepare for trial.

[8] On 21 July 2023, the court below delivered a written judgement dismissing the appellant’s application to compel, with costs. It is against that order that the appellant appeals.

[9] The first question to be determined is the court below's order is appealable.

[10] In terms of section 83(b) of the Magistrates Court Act 32 of 1944, parties are entitled to appeal any order made in proceedings that has the effect of a final judgment.

[11] This accords with the principles set out in **Zweni v Minister of Law and Order**[2] which holds that a non-appealable decision is a decision which is not final (because the court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[12] In general, interlocutory orders are incidental to a pending action and are orders made in the course of that litigation which do not determine the main issue in the action. Policy considerations underlying this principle include discouraging piecemeal appeals and orders for discovery are not generally appealable for this reason[3].

[13] The appellant has relied on a judgement of the Full Court of this Division in **Santam Ltd v Segal**[4], where it was held that a dismissal of an application to compel further discovery had been finally determinative of the party's rights in that case and was therefore appealable. However, the Court made clear that it was not laying down an invariable rule in this regard and that each case had to be judged on its own facts.

[14] The respondent, acting in his personal capacity, sued the appellant because the appellant allegedly insulted him and made an allegation that in the South African context is both serious and hurtful, if true. Either the appellant said those words, or

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[2] 1993 (1) SA 523 (A) at 536A-C
[3] Dube v Minister of Police and Others (A031723-2022) [2023] ZAGPJHC 931 (21 August 2023) at paras [11] and [12]
[4] 2010 (2) SA 160 (N) at para [7]

he did not. If he did, the utterance was either injurious or it was not.

[15] Mr Reddy, who appeared for the appellant, argued that the court below had made a finding that the respondent launched the action in his personal capacity and, in effect, determined the special plea he submitted that this finding was finally determinative of the issue and therefore appealable.

[16] I disagree. The court below stated only that the respondent issued summons in his personal capacity therefore the documents sought were not relevant. The court noted that the issue of standing would be dealt with at the appropriate time, and that it could not adjudicate on this issue at the discovery stage.

[17] It is precisely because the respondent issued summons in his personal capacity that the appellant attacked his standing to do so. The respondent has not disputed that he acted as an attorney or that he is a partner in his firm. The question of whether he has standing to sue in his personal capacity for an insult directed at him is a legal one based on facts that do not appear to be challenged.

[18] In my view, the court below was correct in its assessment that this issue would be resolved at trial and that no further documents were relevant to its determination. Its accurate observation is neither a finding nor an order.

[19] An order refusing to compel discovery of the first class of documents sought is therefore neither finally determinative of the appellant’s rights nor has the effect of disposing of a substantial portion of the relief claimed.

[20] I turn to deal with the second class of documents, being related to the disciplinary process undertaken by the respondent and services rendered to the body corporate.

[21] The further discovery must be assessed against the legal position that applies to *iniuriarum* claims: a degrading, humiliating or ignominious insult which does not amount to defamation is a recognised example of *iniuria*[5]; a plaintiff seeking damages must allege and prove *animus iniuriandi* (the intention to injure the plaintiff), which can be implied from other allegations and need not be pleaded expressly; the test of whether *animus iniuriandi* can be inferred is objective and *dolus eventualis* is sufficient; although the plaintiff bears the onus of proving *animus iniuriandi*, a defendant cannot place the allegation in dispute by a bald denial unless he denies the act complained of. He must go further and allege the factual basis for the absence of the required *animus*. Malice is not an element of the wrong[6].

[22] The appellant therefore must either deny that he said the words imputed to him or he must set out the factual basis to demonstrate that he lacked *animus iniuriandi*.

[23] If the appellant did not utter the words alleged, the remaining documents sought by him are of no consequence to his defence.

[24] Conversely, if he did utter those words, he must then have formed a view by

[5] There can be little doubt that calling someone a racist in the South African context is degrading and insulting, if untrue or unjustified.
[6] *Amler's Precedents of Pleadings, Ninth Edition 2016, ed: LTC Harms, pages 206 to 209*

the time that he made the statement that the respondent was racist and that he did not therefore possess the intention to injure the respondent. Put differently, if those comments were not injurious, the appellant must have been in possession of sufficient material or knowledge to lead him to make such a statement.

[25] The appellant has also discovered many documents in the same class as the further documents sought, and which have enabled him to advance alternative defences to the claim that are akin to grounds of review against the respondent's decision.

[26] I am not persuaded that documents relating to events that occurred after the injurious statement was allegedly made by the appellant are relevant to whether the appellant was entitled to accuse the respondent of being racist at the time that he did so.

[27] I do not consider that the remaining documents sought by the appellant are so fundamental to his ability to advance his defence that a refusal to order their discovery is finally determinative of his rights, and an order in his favour would not have had the effect of disposing of a substantial portion of the relief claimed.

[28] In my view, the order of the court below was not appealable, and I would dismiss the appeal on this ground alone.

[29] However, and if I am wrong in this conclusion, I would nevertheless dismiss the appeal for the reasons set out below.

[30] I have already found that documents relating to the respondent's appointment or his mandate in his capacity as an attorney are irrelevant to the legal question of whether he, in his personal capacity, suffered the harm alleged or whether the utterances were made.

[31] The court below's refusal to compel discovery of these documents was correct.

[32] Similarly, the appellant either uttered the allegedly injurious words or he did not. If he did, he was either entitled to make the statement at the time that he made it or he was not. The documents sought by the appellant are irrelevant to either scenario and appear to be calculated to demonstrate that the decisions taken by the respondent were not defensible.

[33] Whether or not that was true is a separate question from whether the respondent, himself, was a racist or whether the appellant lacked *animus iniuriandi* when he made those statements.

[34] The court below was therefore correct in refusing to compel the respondent to discover the documents as well.

[35] Turning to the issue of costs, the respondent has sought a punitive costs order against the appellant if the appeal is dismissed.

[36] In my view, the application to compel and this appeal lacked merit and the appellant's prosecution of both has caused a significant waste of judicial resources. Both the court below and this Court have been burdened with opposed hearings in respect of an interlocutory application that should never have been brought in the first place.

[37] The appellant has caused unnecessary costs to be incurred and has delayed an action that has been pending for too long. This appeal is a clear example of the kind of piecemeal appeal that section 83(b) was intended to avoid. The appellant’s conduct is to be deprecated, and I agree that a punitive costs order is warranted.

[38] I propose that the following order be granted:

The appeal is dismissed with costs on the scale as between attorney and client, such costs to be taxed on Scale B as contemplated in Rule 69(7) of this Court’s Rules.

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SHAPIRO AJ

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OLSEN J

JUDGMENT RESERVED: 11 OCTOBER 2024

JUDGMENT DELIVERED: 1 NOVEMBER 2024

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