



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

Case No: 2022/5089

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: NO

5/11/22

In the matter between:

MPAPI MORARE

Applicant

and

SHOPRITE

Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 5 December 2022.

JUDGMENT

Molahlehi J

[1] This is an application for leave to appeal against the order made by this court on 10 August 2022. In terms of the order, the applicant's application for a default judgment in terms of rule 31 of the Uniform Rules of the High Court (the Rules) was removed from the roll for non-appearance by the applicant with costs.

[2] The applicant contends that the court erred in finding that his "absence from court on the day the order was issued warranted me to lose the case and the matter to be removed from the roll and I the Applicant be liable for costs because."

[3] The applicant interpreted the order as meaning that his case was dismissed despite being unopposed.

[4] In addition to the above ground of appeal, the applicant has raised the following complaints about the manner in which the court dealt with the matter:

"1.1 The matter is an unopposed default judgment . . . in terms of Rule 31(2) of Uniform Rules of court.

1.2. In my practice note, I, the applicant, indicated that the matter can be disposed of on papers filed.

1.3. The fact the court order even reads "Having read the documents filed of record and considered that matter."

- 1.4. Thus no counsel or legal practitioner was heard or given a moment to influence the Honourable Judge's decision.
- 1.5. Only the papers were read and considered by the Judge.
- 1.6. Including the fact that I, the applicant, never received any ad hoc directives to appear in court from the Honourable Judge
- 1.7. A CaseLines note said that the judge's secretary would contact me.
- 1.8. If the Honourable Judge saw it meet that I present myself before the court, he should have told me to come to court.
- 1.9. But again reiterating the fact that the matter was unopposed and adjudicated on papers filed, it was unnecessary for me to come and present myself before the court.
- 1.10 For whatever I needed to say was said in my practice note and heads of argument.
- 1.11. I followed CaseLines 8 July 2022 directives for Unopposed Motion Court (Section 130 of CaseLines 11 June 2021 Directives also say the same thing):
 - 1.11.1. Section 164.2. says that "the practice note must set out whether the matter may be disposed of on the papers in their absence or whether they require an oral hearing and make whatever submissions they deem relevant and important for the disposal of the matter.
 - 1.11.2. Section 164.3. "If the Applicant wishes to contribute any written submissions about the unopposed matter, such written contribution should be included in the practice note."

- 1.11.3. Section 164.4. "If an Applicant takes the view that an oral hearing is necessary, that view must be stated in the practice note referred above. The mode of disposal of unopposed motions shall be via a virtual mode provided that the Judge seized with the matter retains a discretion to issue ad hoc directives as to the manner of disposal."
- 1.12. The Judge seized with the matter did not communicate to me any ad hoc directives about me making an appearance in court.
- 1.13. In accordance with Section 164.4. above had I or the judge wanted an oral hearing, the matter should have been disposed of via a virtual mode.
- 1.14. Meaning arrangements would have been made for me not to be in attendance but to take part in the disposing of the matter via a virtual mode.
- 1.15. Thus even if I was supposed to take part in the disposal of the matter, I would not have been required to make a physical court appearance.
- 1.16. Thus I followed this court's rules and CaseLines directives.
- 1.17. But I am prejudiced in the matter that the court order was withheld from me and only got uploaded onto CaseLines on 23rd August 2022, nine (9) days after the order was issued surpassing the seven (7) day turnaround time secretary would contact me.
- 1.18. And the court order only got uploaded because I asked for it. Thus my rights as a citizen of the Constitutional Republic of South Africa are violated by the judge's secretary who needs to be reminded to do her job adequately.
- 1.19. Thus the Honourable Judge cannot fault me and remove the matter of the roll for non-appearance because an appearance by myself before the in

court was not required nor did the Judge see it meet for me to make a court appearance.

2. The Honourable Judge ought to have found that:

2.1. Since the matter was an unopposed default judgment Rule 31(2) of the Uniform rules of court.

2.2. And the matter was to be disposed on papers filed as I indicated in my practice note.

2.3. My appearance in court would have served no purpose in the matter.

2.4. Should I have been required to take part in the disposal of the matter, a virtual hearing should have been arranged, in accordance with CaseLines Directives 2021 and 2022 versions.

2.5. The fact that the Honourable Judge did not communicate any ad hoc directives means that the CaseLines directives for Unopposed Motion Court prevail and it was unnecessary for me to make an appearance in court.

2.6. And the fact that the Honourable Judge did not arrange any virtual hearing means my taking part in the disposal in the matter was not required and the matter was rightfully disposed of on papers filed as per my practice note in accordance with CaseLines Directives 2021 and 2022 versions but the court order is contradictory to what the papers filed required as an outcome of the matter.

3. For these reasons I submit that the proposed appeal has reasonable success and that it raises important points of law in reference to the adherence to the Uniform Rules of Court and CaseLines Directives."

[5] In his notice of motion, the applicant sought various declaratory orders against the respondent, his former employer. He further sought compensation in the following terms:

- i) "A lump sum equivalent to the Applicant's Seventeen (17) months' salary which is calculated from October 2020 to February 2022 at the rate of R3675 per month which was the Applicant's salary the time the dispute started. Totalling R62 475-00. . .
- ii) Add a further R62475-00 for unfair discrimination.
- iii) Plus R5 000 000 (five million rands) for delictual liability as a deterrent against similar future conduct by the Respondent.
- iv) The total of the lawsuit in the whole declaration amounts to R5 124 950- 00 (five million one hundred and twenty four thousand and nine hundred and fifty rands)."

[6] The dispute between the parties arose from the contents of the email the respondent had addressed to the applicant following his dismissal. The applicant avers that the contents of the email defamed him and violated his constitutional rights. He contends, based on this, that the respondent committed unfair discrimination and thus contravened the provisions of section 6 (3) of the Employment Equity Act 55 of 1998.

[7] The respondent opposed the application and filed an answering affidavit. According to the respondent, the applicant applied for a default judgment before the matter could be set down for hearing on the opposed motion roll.

[8] The matter was set down for hearing on 10 August 2022. The applicant did not appear in court when the matter was called. According to him, he did not appear in court because he had advised the court that he preferred that the matter be considered on the papers. The respondent, on the other hand, appeared and was represented by Counsel.

Principles governing leave to appeal

[9] An application for leave to appeal is governed by the provisions of section 17(1) of the Superior Courts Act of 2013, which provides as follows:

"Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that-

- (a)(i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of Section 16 (2) (a); and
- (c) where the decision sought to be appealed against does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[10] The two aspects of the leave to appeal are whether (a) the appeal would have reasonable prospects of success, or that there are compelling reasons why the appeal should be heard, and (b) the decision sought to be appealed will dispose of all the issues in the case, unless the appeal would lead to a just and prompt resolution of the real issues between the parties.

The issue determination

[11] This matter turns on whether the order removing it from the roll for non-appearance of the applicant is appealable.

Appealability of the order

[12] The jurisdictional facts necessary for an order to be appealable was set out in *Khumalo and Others v Holomisa*,¹ as follows:

"... appeals will lie against decisions which have the following three attributes: they must be final in effect and not susceptible of alteration by the court of first instance; they must be definitive in some respect of the rights of the parties; and they must have the effect of disposing of a substantial portion of the relief claimed."

[13] The common law approach which was adopted in *Zweni v Minister*,² was that once one of the jurisdictional facts were not satisfied that would be the end of the matter. Although the factors set out in that case still play an important role in determining appealability, the applicable test now is the interest of justice.

¹ (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002).

² 310/91) [1992] ZASCA 197; [1993] 1 All SA 365 (A) (20 November 1992).

[14] In dealing with the issue of appealability of an order, the Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*,³ held that:

"[41] In deciding whether an order is appealable, not only the form of the order must be considered but also, and predominantly, its effect. Thus, an order which appears in form to be purely interlocutory will be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action. By the same token, an order which might appear, according to its form, to be finally definitive in the above sense may, nevertheless, be purely interlocutory in effect. Whether an order is purely interlocutory in effect depends on the relevant circumstances and factors of a particular case. In *Zweni*, it was held that for an interdictory order or relief to be appealable it must: (a) be final in effect and not susceptible to alteration by the court of first instance; (b) be definitive of the rights of the parties, in other words, it must grant definite and distinct relief; and (c) have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[42] An interim order may be appealable even if it does not possess all three attributes but has final effect or is such as to dispose of any issue or portion of the issue in the main action or suit, or if the order irreparably anticipates or precludes some of the relief which would or might be given at the hearing, or if the appeal would lead to a just and reasonable prompt resolution of the real issues between the parties. In *Von Abo*, this court said:

"It is fair to say there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the right of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice." (footnotes omitted).

³ (CCT 39/21) [2022] ZACC 34; 2022 (12) BCLR 1521 (CC) (22 September 2022).

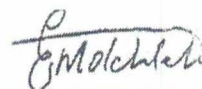
[15] In the present matter as indicated earlier the main cause of action of the applicant is based on unfair discrimination arising from what the respondent said in the email to the applicant.

[16] The order made by this court removing the matter from the roll for non-appearance by the applicant does not address the issues raised by the applicant in his claim. In other words, the order is not definitive of the rights of the applicant, and neither is it of any final effect. Put in another way, the court, in granting the order, never entertained the merits of the dispute between the parties. Accordingly, the order does not dispose of a substantial portion of the relief claimed by the applicant.

[17] In light of the above, I am not persuaded that the applicant has made out a case that the order made by this court on 10 August 2022, is appealable.

Order

[18] The application for leave to appeal is dismissed with costs.



E Molahlehi

JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, GAUTENG
DIVISION, JOHANNESBURG.

Representation:

For the applicant: No appearance.

For the respondents: Adv. S Mathiba

Instructed by: Werksman Attorneys

Heard on: 17 November 2022

Delivered: 5 December 2022