IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A79/21

In the matter between

KATLOU BOERDERY APPELLANT

AND

TSIU VINCENT MATSEPE N.O. FIRST RESPONDENT
PIERRE DE VILLIERS N.O. SECOND RESPONDENT

Date of hearing: 19 January 2022
Date of Judgment: 19 April 2022 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

INTRODUCTION

[1] This is a full court appeal against the judgment wherein an order was made striking out the respondent's defence in the action between the parties and directing the respondent to pay the costs of the application on attorney and client scale as well as the order of the dismissal of the respondent's counter-application for rescission of an earlier order granted by another Judge. The appellants were granted leave to appeal to the full court.

THE ISSUES

[2] The issues to be determined are:
(a) Whether the respondents were entitled, by virtue of the provisions of Rule 30A to compel compliance with Rule 37(4) pre-trial questionnaire which resulted in an order granted in the absence of the respondents.
(b) Whether there were any Rule 37(8) directives issued and whether the respondents could compel compliance therewith.
(c) Whether the delivery of formal notices and replies thereto in terms of Rule 37(4) constituted an abuse of the court process.
(d) Whether the appellant was entitled to rescission of the order in terms of the provisions of Rule 42(1)(a) by virtue of the fact that it was erroneously sought and granted in the absence of the appellant.
(e) Whether the court correctly exercised its discretion to strike out the appellant's defence.
(f) Whether the court correctly exercised its discretion to award punitive costs against the appellant.

[3] The appellant's case was that the court erred by striking out the appellant's defence where such an order constituted the most drastic relief that a court could grant, and that Rule 30A did not apply by virtue of the fact that Rule 37 provided its own remedy for non-compliance. The case was further that the court had erred in dismissing the appellant's application for rescission of an order in that the respondents were not procedurally entitled to the relief obtained pursuant their application in terms of Rule 30A.

[4] The respondents' case was that in this Division Rule 30A may be used to compel compliance with directives made by Judges at Rule 37(8) conferences and in particular so where the directive made concerned a step agreed to between the parties in writing. It is the respondents' case further that the appellant incorrectly sought to rely on Rule 42(1)(a) for rescission of the judgment granted in their favour and that there was no procedural irregularity in respect of the order of the court.

THE FACTS

[5] The respondents are trustees in the insolvent estate of AF Malan whose estate was finally sequestrated on 26 February 2015. Malan was a dairy farmer. Malan entered into a sale agreement with the appellant in 2011 wherein he purchased 317 jersey dairy cows. In line with the terms of the sale agreement, five head of cattle were delivered by the appellant to Malan monthly and an agreed monthly payment was also accordingly made. In terms of the agreement, ownership of the cattle would vest in the appellant until the full purchase price was paid. In the event that Malan was to default on the terms of the agreement, the parties agreed that the appellant would be entitled to take delivery of the cows delivered to Malan.

THE 23 APRIL DIRECTIVES

[6] Malan allegedly abandoned his farming operation and on or about 25 February 2015 the appellant's representative arrived on the farm, rounded up the remaining cattle and removed 194 head of cattle and took them to the appellant's farm. The respondents' issued summons against the appellant on 23 November 2016 and their case was that the appellant took possession of the 194 cattle of which ownership vested in the insolvent estate and earnings thereof vested in them. The respondents, in the alternative, claimed that if the appellant was no longer in possession of the cattle, then it disposed of them with the knowledge of the insolvent estate's ownership. The respondents prayed for the delivery of the cattle alternatively payment of the value thereof amounting to R1 940 000-00 plus interest and costs.

[7] The appellant filed a plea wherein it admitted that it rounded up 194 head of cattle, but denied that ownership thereof vested in the insolvent estate. After the pleadings closed, the matter progressed to the pre-trial stage. The respondents delivered its pre-trial questions and list of admissions sought from the appellant on 18 April 2019. The material pre-trial was held before Allie J on 23 April 2019. The pre-trial was postponed to 24 May 2019. Ultimately the parties agreed to postpone the pre-trial to 3 March 2020. In a Rule 30A notice dated 5 September 2019, the respondents called upon the appellant to make specific admissions. In the notice, the respondents notified the appellant that they intended, after the lapse of 10 days, to

apply for an order that the plaintiff's notice in terms of Rule 37(4) be complied with or that the appellant's defence be struck out.

[8] The deponent to the supporting affidavit in this notice characterized the application as being in terms of Rule 30A of the Rules seeking to compel the appellant to provide the respondents with the admissions requested of the appellant in terms of Rule 37(4) of the Rules. The deponent alleged that Allie J postponed the pre-trial to 24 May 2019 and directed the parties to file a pre-trial minute on or before 21 May 2019. The deponent alleged that a copy of the pre-trial minute signed by the parties representatives filed on 21 May 2019 was annexed.

[9] What was in fact annexed, was the respondents' draft pre-trial minute for the pre-trial that was to be held on 24 April 2019. Even if one were to think that Allie J had directed as alleged, the annexure could not be in compliance with her directive. It was dated 5 May 2018, its title said it was the respondent's draft and it was not signed by or on behalf of every party. This is not the only problem as regards the alleged directive by Allie J. The respondents were unable to produce a record of such directive. The purported Rule 30A notice of application did not have the record of the alleged directive by Allie J and did not have the pre-trial minute signed by the parties' representatives. In failing to provide at least copies of same, their existence had not been established. The mere say-so of their existence by the candidate attorney is not enough in the context and under the circumstances of the issues between the parties.

[10] As the pre-trial was set down for 23 April 2019, on 18 April 2019 the respondents delivered pre-trial questions and a list of admissions sought from the appellant. Once again, the deponent to the Rule 30A notice of application simply alleged that Allie J directed the appellant to file its reply, failing which the respondents were directed to seek an order compelling the appellant to do so. Rule 37(4) provided that:

"37 Pretrial conference

(4) Each party shall, not later than 10 days prior to the pre-trial conference, furnish every other party with a list of –

(a) the admissions which he requires;

(b) the enquiries which he will direct and which are not included in a request for particulars for trial; and
(c) other matters regarding preparation for trial which he will raise for discussion."

[11] The pre-trial questions and a list of admissions sought by the respondents were filed exactly five calendar days prior to the pre-trial conference. Such a directive would have been premature. In the face of a dispute about its existence, without more from the respondents, I am unable to find that Allie J in fact made that directive. It must be borne in mind that the appellant's case was that it could not be compelled to answer to, or make admissions during the pre-trial phase of the proceedings and that they did not agree to such a directive as envisaged in Rule 37(8)(c). It seems to me that if such directives were made, as it was alleged, the respondents would have ensured the availability of such, included in duly signed minutes, as envisaged in Rule 37(8)(d) of the Uniform Rules of Court. The balance of probabilities, having regard to the totality of the facts already set out, favour a conclusion that Allie J did not make such a directive and this explained why the respondents were unable to produce any objective evidence of their existence.

THE 13 DECEMBER 2019 ORDER

[12] In a notice dated 5 December 2019, the appellant was advised that an application would be made on 13 December 2019 for an order that the appellant be directed to furnish the respondents with the outstanding replies as requested by the applicants in their Rule 37(4) notice within 10 days of service of the order and that in the event of the appellant failing to comply, the respondents shall be entitled to apply on the same papers duly supplemented, for an order striking out the defence of the appellant. On 13 December 2019 a court order was made by default in the following terms:

"1. The respondent is directed to furnish the applicants with the outstanding replies as requested by the applicants in their notice in terms of Rule 37(4), dated 18 April 2019, within ten (10) days of service of this order upon the respondent's attorneys of record;
2. In the event the respondent fails to comply with paragraph 1 above, the applicants shall be entitled to apply to this Honourable Court on the same papers, duly supplemented, for an

order striking out the defence of the respondent in the action instituted under case no. 22758/2016;
3. The respondent shall pay the costs of this application."

[13] The respondents applied to court on 21 February 2020 for an order in the following terms:
"1. The respondent's defence be dismissed, and
2. The respondent be ordered to pay the costs of the application on an attorney and client scale.
3. That judgment be entered against the respondent as per the particulars of claim in the action for an order to: …"
The subparagraphs to paragraph 3 are a repetition of the prayers in the particulars of claim. The application was opposed on two grounds, to wit, that the relief sought was incompetent and amounted to an abuse of the process of court and secondly, that the order granted on 13 December 2019 was erroneously sought and granted.

THE 13 OCTOBER 2020 JUDGMENT

[14] The Rule 30A notice of 5 December 2019 was served on the appellant's correspondent attorneys. In his affidavit, the attorney explained that due to death in his family he could not be in office between 2 December 2019 and 13 December 2019. His offices closed on 13 December 2019 for the festive season, and on that day his secretary resigned and had moved to Gauteng. He was unaware that the Rule 30A application was enrolled for 13 December 2019, the day on which the order was made by default. On 3 February 2020 the respondents launched an application where they sought an order striking out the appellant's defence and for judgment against appellant.

[15] In answering to the application to strike out the appellant's defence, the appellant also simultaneously applied for the rescission of the order granted on 13 December 2019. The appellant's case was that the purpose of Rule 37(4) was to enable the parties to prepare for the pre-trial conference to facilitate the smooth running of the conference and to enable them to reach agreement on as many issues as possible without unnecessary delay. The purpose was not to enable a

party to prepare for trial, but only to curtail issues to be determined at trial. A notice in the form served on the appellant was not envisaged by Rule 37 and the list envisaged in Rule 37(4) related only to matters to be discussed at the pre-trial conference and was not a substitute for trial particulars being sought under Rule 21. The appellant's view was that the respondent abused Rule 37(4) to compel it to furnish trial particulars which should be requested under Rule 21. The appellant's case was that a party aggrieved by the other for non-compliance with a request made in terms of Rule 37(4) was to request a pre-trial to be held before a Judge in chambers

[16] The appellant's case was further that a party could not be compelled to agree to anything during the course of Rule 37 proceedings. This was evident from the fact that Rule 37(8)(c) provided that, even in a case where a conference had been convened before a judge in chambers, the judge may not give directions which might promote the effective conclusion of the matter, but only with the consent of the parties. The appellant did not consent to provide the applicants with any answer to their list of admissions sought. Any order or directive which purported to compel the appellant to make admissions or respond to the Rule 37(4) questionnaire was only competent if such order or directive was with the consent of both parties.

[17] Further, the appellant's case was that in the absence of such consent, and considering the fact that the applicant's Rule 37(4) questionnaire went beyond what a party was entitled to request in terms of that Rule, the relief that the respondents obtained by virtue of the court order and the relief sought in the subsequent application was not competent and could not be granted. The appellant's attorneys, in correspondence, alerted the respondents to the appellant's case and afforded them an opportunity to withdraw their application but the respondents nevertheless persisted with their application. The appellant denied that the respondents were prejudiced by the appellant's refusal to furnish a reply to the Rule 37(4) questionnaire, as Rule 21 was available as an avenue, which limited the request to particulars to the extent that it was strictly necessary to enable them to prepare for trial. Reliance on Rule 37(4) to obtain trial particulars was misplaced. The application for rescission was dismissed and the application to strike out was granted.

THE RULE 30A PROCEEDINGS

[18] The respondents did not set down the pending Rule 37 proceedings after they were postponed before Allie J. The order was the product of a separate process. In other words, the respondents unilaterally jumped out of the Rule 37 process, into and started the engines of a Rule 30A process solely. The question that the appellant raised was whether the respondents, procedurally, were entitled to the relief obtained on 13 December 2019, in Rule 30A reads:

"30A Non-compliance with rules

(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 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.

(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."

[19] In *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 79 at F-G it was said:

"I have no quarrel with the fact that in terms of rule 30A(2) there is an exercise of discretion as to what an appropriate order should be once a court has held – under rule 30A(1) – that there has been non-compliance with the rules. As to the antecedent question arising from rule 30A(1) whether there has, in fact, been non-compliance with the rules, there is no question of an exercise of discretion. The court must determine- as an objective question of fact or law – whether there has been non-compliance. On that question, therefore, a court of appeal makes the simple determination whether the lower court was right or wrong in its conclusion on compliance. The discretion under rule 30A(2) does not feature at all."

[20] The appellant admitted that the Rule 30A notice was served on its correspondent attorney. The appellant's attorney gave an explanation as to why the notice did not come to his attention and that of the appellant. In response, the respondents simply indicate that they have no knowledge of the explanation given

and therefore cannot admit it. In the absence of countervailing evidence, the appellant's explanation stood to be accepted. The appellant and the attorney were not aware of the application against the appellant. I am unable to conclude that the appellant was shown to have been in willful default.

[21] The obvious sometimes needs to be restated. It is the specific provisions of a rule, a request as envisaged in a rule or an order or direction made in terms of a rule that may be enforced in terms of Rule 30A. The respondents in their founding affidavit to the notice of application in terms of Rule 30A alleged that on 18 April 2019 they delivered their pre-trial questions and list of admissions sought. This was just five calendar days before the pre-trial conference which was scheduled for 23 April 2019. Rule 37(4) required them to have furnished the appellant with such lists not later than 10 days prior to the pre-trial conference. The respondents had failed to comply with Rule 37(4). They failed to comply with the provisions of a rule. On their own version they were not entitled, without the consent of the appellant and the permission of the court, to have the lists dealt with on 23 April 2019 [Rule 37(4) read with 37(5) and 37(8)(c)].

[22] Rule 37(8)(c) provides:

"37 Pre-trial Conference

(8)(c) The judge may, with the consent of the parties and without any formal application, at such conference or thereafter give any direction which might promote the effective conclusion of the matter, including the granting of condonation in respect of this or any other rule."

[23] In my view, Allie J could not competently, under the circumstances, make the alleged directives without the consent of the appellant. The further reason, outside non-compliance with the time frames, was that the appellant could not be legally compelled to answer to or to make admissions during the pre-trial conference proceedings [*Kriel v Bowels* 2012 (2) SA 45 (ECP) at par 16]. If Allie J made no directives, the respondents were not entitled to the relief that they obtained. Be it as it may, the 13 December 2019 order was not made during pre-trial conference proceedings within the realm of Rule 37.

[24] The directions which the respondents alleged, in any event, were not the ones envisaged in Rule 37A Judicial Case Management proceedings. The respondents' alleged directions, by Allie J, were those as envisaged in Rule 37 Pre-trial Conference proceedings. These are not directions covered by Rule 30A, when one reads the rule speaking for itself in its own terms. Rule 37(2) makes it very clear that pre-trial conference proceedings are applicable to cases not subject to judicial case management. The scope of the matters to be dealt with, at a pre-trial conference, are set out in Rule 37(5) which refers to subrules (4) and (6) which respectively lists the matters. The list simply comprises matters that are intended to be dealt with at the pre-trial conference [*Fransch v Premier Gauteng* 2019 (1) SA 247 (GJ) at para 10].

[25] The list cannot inexplicably and suddenly change into a request for further particulars as envisaged in Rule 21 at the respondents' pleasure. This is simply because Rule 37(4)(b) specifically provides for the listed matters to be those not included in the request for further particulars for trial. Rule 37(4)(c) specifically narrows the matters on the list to be those which a party will raise for discussion. The discussion is clearly during the pre-trial conference [*Rungasamy v Road Accident Fund* (6585/09) [2009] ZAKZDHC 58 (23 October 2009) para 7]. The list was procedurally clothed as a Rule 37 list and substantively unleashed as a Rule 21 request for further particulars [*Kriel* para 16 at 49C-D]. The respondents had no legal basis to utilize the general Rule 30A remedy for its defective request. The respondents were not entitled, procedurally, to the relief pursuant the application of Rule 30A.

[26] Rule 37(4) makes no provision for a request and the entire Rule 37 makes no provision for a party to be compelled to reply to the list as envisaged in Rule 37(4). It seems to me that the respondents' Rule 30A notice and all the proceedings anchored thereon, were based on the respondents' self-created rules, and not the Uniform Rules of Court. In *Fransch* the court said at para 11:

"[11] The remedy available to any party who is frustrated by a lack of co-operation or *bona fides* on the part of his opponent, is to request that the conference be held before the judge in chambers".

In *MT v CT* 2016 (4) SA 193 (WCC) at para 27 the court considered another alternative for a frustrated party and said:

"In the event that a party is in default of a procedural step, eg has failed to file a reply to a request for trial particulars, or claims that certain documents are not discoverable, the pre-trial procedure is held in abeyance while the parties take the dispute to the motion court for resolution there: the rule 37(8) procedure is not geared to the resolution of pre-trial disputes which invariably require the filing of affidavits and heads of argument."

[27] The remedy in *Fransch* is discerned from a reading of Rule 37(8)(a); 37(8)(c); 37(8)(d); 37(9); 37(10) and 37(11). In my view, where a party had availed themselves of the Rule 37(8)(a) procedure and had requested a judge to hold or continue with a pre-trial conference in chambers, the trial court is obliged, at the hearing of the matter, to consider whether or not a special order as to costs should be made against a party or its attorney because such party or the party's attorney did not attend a pre-trial conference or failed to a material degree to promote the effective disposal of the litigation [*Erasmus: Superior Courts Practice* at DI-501]. These are the special remedies available in Rule 37 Pre-trial Conference proceedings.

[28] Rule 42(1)(a) provides:

"42 Variation and Rescission of Orders

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;"

[29] Rule 30A did not apply to directions issued in terms of Rule 37(8)(c) and in this case no such directives were made in any event. The formal request purportedly delivered in terms of Rule 37(4) was not procedurally competent and amounted to an abuse of process. The respondents abused Rule 37 and delivered a notice which was in essence a request for further particulars and demanded a response thereto, both of which were not envisaged in the Rule. The respondents were not entitled, in law, to the relief sought and granted on 13 December 2019. The order was incorrectly granted. It was an order granted without a legal foundation. It was an order erroneously granted [*Athmaram v Singh* 1989 (3) SA 953 (D & CLD) at 956J-

957A; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 at 417G-H].

RESCISSION

[30] A judgment incorrectly recorded against the appellant fell to be rescinded in terms of Rule 42(1)(a) [See *Custom Credit Corporation Ltd v Bruwer & Others* 1969 (4) SA 564 (D & CLD) at 566D; *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (WLD) at 648F-J. In *Freedom Stationary v Hassam* 2019 (4) SA 459 (SCA) at para 18 it was said:

"As Streicher JA explained in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) [2007] ZASCA 85) paras 25-27, the phrase 'erroneously granted' relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim. See also *Colyn v Tiger Food Industries Ltd t/s Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113; [2003] ZASCA 36) paras 6 and 9. Thus, a judgment to which a party was procedurally entitled cannot be said to have been erroneously granted in the absence of another party."

STRIKING OUT AND PUNITIVE COST ORDER

[31] The striking out of a defence is extremely drastic and meant that the defendant's plea will not be referred to at trial [*Langley v Williams,* 1907 T.H. 197]. It should be resorted to only if the court considered that a party had deliberately and contemptuously disobeyed its order to furnish particulars [*Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk* 1971 (3) SA 455 (T) at 462H-463B]. The application to strike out the appellant's defence in this matter was conceived, predicated and pronounced upon a wrong legal footing. In my view, the decisions to strike out the appellant's defence and to award a punitive cost order, under the circumstances, were not based on a discretion correctly and judicially exercised.

[32] In conclusion, it needs to be stated that in granting the application for leave to appeal, the court a *quo* acknowledged that it did not deal with the issue whether the remedy provided under Rule 30A was applicable where there has been non-

compliance with a Rule 37 direction. For these reasons I would make the following order:

(a) The appeal is upheld.

(b) The order of the court *a quo* is set aside and replaced with the following order:

"(i) The order granted against the respondent on 13 December 2019 is rescinded.

(ii)The application to strike out the respondent's defence is dismissed.

(iii) The applicants to pay the costs, jointly and severally, the one to pay the other to be absolved"

(c)The respondents to pay the costs on appeal, including the costs occasioned by the employment of two counsel.

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DM THULARE

JUDGE OF THE HIGH COURT

I agree.

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V SALDANHA

JUDGE OF THE HIGH COURT

I agree.

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E T STEYN

JUDGE OF THE HIGH COURT