

SOUTH AFRICA / JUDGMENT

N.S v A.D (2022/257) [2025] ZAGPJHC 632 (20 June 2025)

[2025] ZAGPJHC 632

COURT

South Gauteng High Court, Johannesburg

BEFORE

LANGE

CASE / FILE NUMBER

2022/257

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NUMBER: 2022/257

(1)

REPORTABLE: YES /

NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

20/06/2025

In

the matter between: N[...]
S[...]
Applicant
(Identity
number: 8[...])
and
A[...]
D[...]
Respondent

JUDGMENT

LANGE AJ

Introduction

1. This is an opposed interlocutory application brought in terms of Rule 30(2)(b) and Rule 30A of the Uniform Rules of Court.

Background

2. The applicant (who is the applicant in the main application and respondent in the counter application to which this interlocutory application relates) served a Notice in terms of Rule 30(2)(b) and Rule 30A on the respondent on 12 February 2025 (the Notice), in terms of which the respondent was afforded ten days within which to remove the cause of the applicant's complaint.

The respondent refused to do so.

3. On Thursday 27 February 2025, the applicant served a notice in terms of rule 30A with a supporting affidavit on the respondent. The respondent filed her notice of intention to oppose on 13 March 2025 and her answering affidavit on 3 April 2025.
4. The matter was thereafter set down on the opposed family court motion roll and came before me on 22 May 2025.

Applicable rules and law

5. Rule 30A provides as follows:

“(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

- (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.”

6. Whilst it is beyond the scope of this judgment to set out in detail all of the issues raised by the applicant in his notice in terms of rule 30(2)(b) and 30A read with rules 27(1), rules 28(1) and (2), and rule 6(15), I wish to highlight the following arguments advanced by the applicant:
- a. The respondent delivered a replying affidavit in her counter application on 10 February 2025, which was delivered 6 months out of time and 9 court days before the allocated date for the opposed hearing in the Family Court on 24 February 2025.
 - b. The respondent failed to properly seek leave to extend the time periods and comply with the provisions of rule 27 which are mandatory and require a substantive application, on notice, together with a supporting affidavit wherein a full and reasonable explanation is to be given for the delay.
 - c. The respondent delivered a notice of motion together with the above referred replying affidavit, which is in itself highly irregular, in which the respondent seeks (a) to supplement various and unspecified previous affidavits,
 - (b) for condonation for the late filing of her affidavit and (c) to strike out annexures to the applicant's previously filed affidavits.
 - d. The notice of motion is irregular and not in compliance with the provisions of rules 6(15), 27 or 28 in that it is not accompanied by a supporting affidavit which is required in terms of rules 6(15) and 27. Further, the applicant was not afforded an opportunity to deal with these issues raised by the respondent nine court days before the allocated date for the hearing of the main application.
 - e. In the impugned notice of motion, the respondent seeks an order to strike out annexures attached to the applicant's founding affidavit filed in 2022 and supplementary affidavit filed in December 2024 without utilising and complying with the provisions of rule 6(15) in that she did not file a substantive application to strike, nor did she file a supporting affidavit to provide reasons/grounds for such relief.
 - f. There is a paragraph at the end of the respondent's replying affidavit, stating that: "WHEREFORE I pray for an order dismissing the Applicant's application with costs on the attorney client scale and an order directing the appointment of forensic psychologist to investigate the Applicant's alienation of Athena from me which costs of the investigation are to be paid in full by the Applicant and that the Applicant pays the costs of my counterapplication", which is not the relief sought by the respondent in her notice to her counter application dated 12 June 2023. This is therefore an amendment of the respondent's notice to her counter application and is not in compliance with Rule 28 which sets out the requirements should a party wish to amend pleadings or a document.

7. Ms Abro, both in her heads of argument and in argument before me, made the submission that this court must determine, as an objective question of law or fact, whether there has been non-compliance by the respondent. It was held by the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*[1] that the court does not have a discretion in this regard. The Constitutional Court held —

“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.”[2]

8. Rule 30A cannot be read in isolation though and Rule 30(3) states:

“If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.”

9. In *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency* it was stated that:

“Rule 30(3) contemplates a two-stage process. A court must first satisfy itself that the proceeding or step is irregular or improper. If it is so satisfied, it has the wide power to set the proceeding aside in its entirety or in part, grant leave to amend or make any order as it deems fit. These are, no doubt, wide powers. Following its conclusion that a step or proceeding is irregular or improper, a court however, is required to make an order “[3]

10. The Uniform Rules seek to regulate the procedure relating to litigation and not the substance of the pleadings. Any grievance raised by a party in terms of rule 30 must relate to an alleged procedural irregularity in the conduct of the litigation. If a court finds a particular step to be irregular, it has wide powers including the ability to afford the party against whom the complaint is raised an opportunity to remove the cause of complaint. In the current matter, however, the respondent has clearly taken the stance that there is no irregularity and that therefore there is nothing for her to remove.
11. No explanation is proffered by the respondent as to why she served a notice of set down without any supporting affidavit. Whilst I take cognisance of the fact that she requested condonation for the late filing of the replying affidavit in the replying affidavit itself, she ought to have filed an affidavit with the impugned notice of motion setting out the grounds for the relief sought and the replying affidavit ought to have been an annexure to the application, which would have rendered her compliant with the applicable rules.

12. Whilst this may have been overlooked by the respondent's legal representatives initially due to the fact that, as the respondent states, they prepared the replying affidavit under some tight time constraints, once alerted to the issue by the applicant's notice in terms of Rule 30(2)(b) and 30A read with rules 27(1), rules 28(1) and (2) and, 6(15); it would have been prudent for the respondent to withdraw the notice of motion and replying affidavit and comply with the Uniform Rules of Court.
13. The respondent also does not deal satisfactorily with the other grounds raised by the applicant in his notice in terms of Rule 30(2)(b) and 30A read with rules 27(1), 28(1) and (2) and 6(15).
14. Neither the respondent's heads of argument nor the argument presented in court by Ms Metzger provided a cogent and satisfactory response as to why the respondent did not remove the cause of complaint once alerted to it. Ms Metzger argued that the applicant's Notice was not clear enough as to the reasons for the Notice, however this is not borne out by a simple reading of the Notice which sets out, in detail, the paragraphs in the replying affidavit to which the applicant objected, as well as the rules which the respondent had breached with regard to the notice of motion and replying affidavit filed.
15. When questioned about the appropriateness of this application, when the subject matter of the main application involves the best interests of a minor child, Ms Abro correctly stated that just because a matter is a family law matter, it does not give litigants license to simply ignore the rules of court as this would lead to uncertainty and chaos. I take her point, and I am of the view that the application was necessary and warranted.
16. Whilst I am sympathetic to the respondent's feeling that she is litigating at a disadvantage as the applicant is more moneyed than she is, this is not a reason to completely flout the rules of court. This is the sole reason advanced by the respondent regarding the complaint that her replying affidavit was filed six months out of time. It is, with respect, not sufficient. It does not explain why the respondent's legal representative did not write to the applicant's legal representative during this period and advise them of the difficulties the respondent was facing in the litigation.
17. At the very least, when the respondent received the application by the applicant for leave to file a supplementary affidavit in December 2024, or even on receipt of the notice of set down on the opposed family court roll on 23 January 2025, it would have behoved her to send a letter to the applicant's attorney of record and let her know that the respondent intended to file a replying affidavit and was just trying to gather the means to do so. She also had the option of trying to find counsel to represent her pro amico, but this option is not canvassed at all in the answering affidavit.
18. The respondent contends that the applicant is trying to silence her; in this regard Ms Metzger contended that by seeking an order that the Respondent's affidavit filed on 10 February 2025 be "set aside", the applicant is attempting to proceed with his application to terminate the

respondent's parental responsibilities and rights in respect of her daughter, Athena, on an unopposed basis. Ms Abro, when questioned on this point, stated in oral argument that the applicant has no objection to the respondent filing an amended notice of motion and filing a replying affidavit but that this must be done correctly, in terms of the rules of court, so that he is given an equal opportunity to consider the proposed amendments.

19. The respondent further contends that it is the applicant who is abusing the rules of court by "nit picking". However, once again this is not borne out by the common cause facts; it is clear that the applicant has complied with all the rules of court, at considerable cost to him, throughout the application; in this regard, the applicant brought a substantive application for leave to file a supplementary affidavit in December 2024 and then on receipt of the applicant's replying affidavit, a mere nine days before the scheduled date for the hearing of the main application, the applicant's attorney of record prepares and, two days later, serves, a notice in terms of rule 30 (2)(b) and rule 30A alerting the respondent to the irregularities in the impugned notice of motion and replying affidavit.
20. The applicant's attorney of record then also writes to the respondent's attorney of record requesting that they agree to the postponement of the matter on 24 February 2025 but the respondent, inexorably refuses. This forces the applicant to then prepare and launch a comprehensive application for a postponement and a costs order, which relief the respondent opposes but which relief was then granted to him by the court.
21. Rule 30 envisages that any irregular step complained of must cause prejudice to the party seeking to set it aside. It is accepted

though, that even if a procedural step may be found to be irregular but it presents no prejudice in the further conduct of the case to the party complaining thereof, there would be no need to set it aside.[4]

22. In the present case, the late filing of the replying affidavit has already been dealt with through the applicant's postponement application and the costs order granted against the respondent. I can see no further prejudice to the applicant in allowing the respondent's replying affidavit to stand. The only prejudice to the applicant would come if the applicant was not afforded an opportunity to respond thereto. Any potential prejudice to the applicant is cured, however, by giving him an opportunity to deal with each of the impugned allegations in the replying affidavit by filing a further supplementary affidavit in response to the respondent's replying affidavit.
23. In any event, the applicant's complaints regarding the content of the replying affidavit are best dealt with by the court hearing the main application. It is beyond the scope of this court to evaluate whether there are allegations that are scandalous, vexatious or irrelevant and prejudice the applicant without considering the merits thereof.

Costs

24. The issue of costs is a sensitive one. Whilst in commercial matters it is the norm that costs follow the result, in family law matters there is a tendency not to grant costs orders against parties on the basis that they are all acting in the belief that their actions are in the best interests of the minor children involved. This cannot be said to be the case in this matter however which relates to the procedural aspects of litigation and not the merits of the matter.
25. In support of his claim for a *de bonis propriis* costs order, Ms Abro submitted that the respondent's attorney, Mr Armstrong, of Shepstone and Wylie, had conducted this litigation in a manner which is inconsistent with the standard to be expected from a legal practitioner. He has acted in an obstructive manner by failing to at the very least correspond with the applicant's attorney prior to filing the impugned notice of motion and replying affidavit 9 court days before the allocated date for the hearing; refusing to remove the causes of complaint as raised by the applicant in the rule 30(2)(b) notice and indicating that should an application for a postponement or an application in terms of the rules be brought, same would be opposed (which conduct has already resulted in a costs order against the respondent); seeking substantive relief by way of a counterapplication in the middle of the opposed postponement application which conduct has similarly resulted in a costs order against the respondent; the abject failure and refusal to comply with the rules of court which an attorney ought to be ofay with; and general irresponsible and grossly negligent conduct and reckless litigation.
26. The applicant makes a strong case for a *de bonis propriis* costs order and relies on the dicta in *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd (Multi-Links)* where it was stated that —

“It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care.

See, for instance, Cilliers et al *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* 5 ed vol 2 at

984. See also *D Ward v Sulzer* 1973 (3) SA 701 (A) at 706G - 707H.”[5]

27. The respondent contends that this application is an attempt to bleed her dry of every last penny she has to oppose the relief the applicant seeks and to litigate her into submission. The respondent's attorney of record offers the applicant the opportunity to file a

supplementary affidavit and to withdraw this application; however, it is not for the respondent or her attorney of record to grant consent for the filing of a further supplementary affidavit. In terms of Rule 6(5)(e) only the court may grant consent to a party seeking to file a supplementary affidavit. A party cannot therefore be punished for relying on the rules of court in the conduct of his/her proceedings.

28. It is apparent from affidavits filed by both parties that their respective legal representatives have locked horns in this matter and their personal animosity for one another appears to have coloured the manner in which this matter has been litigated.
29. Whilst a reading of the affidavits and annexures filed tell a tale of two attorneys locked in combat, that is not reason enough to overlook the fact that this application could have been avoided had the respondent's attorney of record taken a more common sensical approach. I see no reason to burden the respondent with a further costs order especially where she is reliant on the advice of her legal representatives in the conducting of her application.
30. At the same time, bearing in mind the dicta in *Multi-Links*, I am not convinced that the applicant has satisfied the requirements for a *de bonis propriis* costs order against Mr Armstrong. He has not in my view acted in a manner that shows "dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court" or "gross incompetence".
31. At the same time, I am cognizant of the respondent's dire financial situation and see no reason for her to be burdened with costs which could have been avoided. She has stated under oath that Mr Armstrong is acting *pro amico* but that she had to engage counsel to finalise her replying affidavit. She does not take this court into her confidence regarding the costs for opposing the application and what, if any, she has had to bear.
32. There can be no doubt that the subject matter of the main application is a serious one and that the best interests of the parties' minor child is best protected when both parents are ably represented. In the circumstances, I am of the view that in so far as Ms Metzger has charged fees for the present interlocutory application, the respondent should not be burdened with the costs thereof and such fees are to be paid by Mr Armstrong.

Order

33. In the result, I make the following order:
 1. The respondent's notice of motion dated 10 February 2025 is set aside.
 2. The final paragraph of the respondent's replying affidavit which states "'WHEREFORE I pray for an order dismissing the Applicant's application with costs on the attorney client scale and an order directing the appointment of forensic psychologist to investigate the Applicant's alienation of Athena from me which costs of the investigation are to be paid in full by the Applicant and that the Applicant pays the costs of my counterapplication'" is struck out.

3. The applicant is granted leave to file a supplementary affidavit to the respondent's replying affidavit, which is to be filed by no later than 30 June 2025.
4. The applicant shall thereafter apply for a date on the opposed family court roll for the hearing of the main application.
5. The applicant shall be liable for his costs. Mr Armstrong shall be liable for any costs incurred by the respondent in opposing this application.

LANGE, AJ

JUDGE OF THE HIGH COURT

JOHANNESBURG

FOR THE APPLICANT: ADVOCATE M ABRO instructed by

SHARDLOW ATTORNEYS

FOR THE RESPONDENT: ADVOCATE L METZER instructed by

SHEPSTONE & WYLIE ATTORNEYS

[1]2018

(4) SA 1 (CC).

[2] Id at para 79.

[3] 2023

(4) BCLR 361 (CC) at para 26.

[4] Bloem and Another v NWK Limited

[2024] ZANWHC 83 (20 March 2024) at para10.

[5] 2014(3) SA 265 (GP) at para 35.

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