

SOUTH AFRICA / JUDGMENT

Van Wyk v Van Wyk (507/2017) [2024] ZAECELLC 46 (16 September 2024)

[2024] ZAECELLC 46

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

507/2017

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO. 507/2017

NOT REPORTABLE

In the matter between:

JACQUELINE MARY VAN WYK

Plaintiff

and

PIERRE CHARLES VAN WYK

Defendant

RULING ON ISSUE OF COSTS ARISING FROM

CASE MANAGEMENT CONFERENCE

HARTLE J

- [1] The parties appeared before me on Friday, 6 September 2024, ostensibly under the guise of a conference scheduled in terms of Rule 37 (8)(a).
- [2] The conference was at the request of the plaintiff's attorneys who filed a notice in terms of Rule 37 (8)(a) in the following terms:

“BE PLEASED TO TAKE NOTICE THAT the Plaintiff hereby requests a Pre-Trial Conference before a Judge in Chambers in terms of the provisions of the aforementioned Rule.

BE PLEASED TO TAKE NOTICE FURTHER THAT the Plaintiff requires the parties Attorneys and Advocates to be present before the Judge in Chambers for purposes of conducting the proceedings further:

BE PLEASED TO TAKE NOTICE THAT the said pre-trial conference before a Judge in Chambers is imperative for the conduct of the part heard trial proceedings in the abovementioned matter, the part heard trial to resume before this Honourable Court on Monday the 23rd September 2023.

Kindly enrol the matter accordingly.”

- [3] The registrar in response generated a “Second Case Flow Management Notice” (Form B) calling upon the parties to appear in chambers before me on the said date. As is the custom, the notice instructs the parties what to do before a judicial case management conference pursuant to the provisions of Rule 37A and what documents to file and paperwork to process before the meeting.
- [4] It is common cause that divorce actions are not as a general rule subject to case management and that the Registrar perfunctorily issued the notice without regard to this anomaly.[1]
- [5] Also a unique feature of the matter is the fact that the action is part-heard before Kunju AJ and that the trial is due to be continued at month end. The ostensible purpose of the conference is to gauge the defendant’s response to certain interrogatories put to him ahead of the trial proceeding.
- [6] The defendant’s legal representatives filed a Notice in terms of Rule 30 (2)(b) objecting firstly to the plaintiff’s invocation of Rule 37 (8)(a) whereas the trial is already underway; secondly to the registrar’s Second Case Flow Management Notice in terms of Rule 37 A calling upon the defendant to appear before me at the case management conference prompted by the plaintiff’s request in the first place; and thirdly, to the plaintiff’s attorney’s purported “reaction” to the registrar’s incorrect notice on the basis that each step taken was irregular and calling upon the plaintiff to remove the causes of complaint. [2]
- [7] I was informed that the dies referenced in the notice expired on 4 September 2024, two days before the purported conference. None of the irregular steps complained of were corrected and the defendant (duly constrained by the registrar’s notice to appear that was not withdrawn as requested) appeared before me on the 6th.
- [8] Prior to the conference I had issued a directive to the parties through my clerk to glean what the proposed meeting was all about as follows:

“If the Registrar’s random second case management notice is the reason the parties think they need appear before me tomorrow they can safely disregard it, especially since the trial is part heard.

But if there is another reason they wish to have an audience with me (I'm not seeing why that is necessary) they should please inform me of that reason and provide a brief agenda for discussion tomorrow.

I notice in any event that there is certain contention about a notice in terms of Rule 37 (8)(a) and that a Rule 30 (2) notice has been issued in respect thereof.

If I am supposed to engage with any of the correspondence or notices referred to, the parties should provide copies. There is a reference, for example, to a letter dated 5 August 2024 giving cover to a Rule 37 (8)(a) notice. There is also the Rule 30 notice itself. I have not seen these.

I am however almost certain that the Registrar sent the second case flow management notice in error and by rote.

I await to be advised by the parties.”

- [9] This at least met with the plaintiff's agreement that the registrar's Second Case Flow Management Notice had been sent in error, but Mr. Yazbek who appeared on her behalf insisted that the parties were still entitled to appear before me to prevail upon the defendant to respond at the conference to the list of interrogatories posed on her behalf.[3]
- [10] Even before my directive Mr Yazbek had also made it plain in correspondence addressed to the defendant's attorney (notwithstanding the latter's formal objection to the notices and process) that he would certainly appear at the conference in order to make submissions in respect of the plaintiff's Rule 37 notice. This he did, causing the defendant's legal team to make an appearance before me as well.
- [11] Mr. Sishuba who appeared with Mr. Barter on behalf of the defendant at the conference at the outset recorded the latter's objection to the fact that they had been un-procedurally summonsed to be present before me. They came prepared with written submissions which again complained of the irregular manner in which they were called to chambers (both attorney and advocate) by invoking the registrar's assistance under the guise of Rule 37A, took issue with the fact that the trial is part-heard whereas the provisions of Rule 37 relate strictly to conferences preceding the commencement of a trial; and also complained of the obtuse manner in which the defendant was being forced without an appropriate amendment in terms of the rules to agree to issues that do not feature in the pleadings.
- [12] The concession that the registrar's notice had been issued in error should have put an end to the matter as far as the defendant was concerned but the plaintiff insisted on pushing her agenda (using the Registrar's template which applies for an entirely different purpose) to engage around the issues raised in the “Statement of Issues” filed as a “reaction” thereto.

- [13] I should point out that the parties hold opposing views on the question of whether the machinery contemplated by the provisions of Rule 37 (8) can even be invoked once a trial has commenced.[4] This is however not an issue I need to decide for present purposes. Indeed, I was only required to determine who is liable for the costs of the putative conference, an issue I reserved for proper reflection.
- [14] Without interpreting the applicability of Rule 38 (8) in the unique scenario, the option had remained open to the defendant at that point still to have pursued a formal application to set aside the irregular steps complained of which he might have done but for the plaintiff's fiat of causing him to attend the conference using the registrar's agency which Mr Yazbek conceded had been in error.
- [15] Although the plaintiff had been invited to walk back the irregular steps by notice as well as by subsequent correspondence, she persisted at her own peril in holding the defendant over a barrel to attend the case conference.
- [16] In deciding the issue of costs I take no binding view on the merits of the defendant's remaining objections. Whilst they might to an extent now have become academic, the point is that it was not for the plaintiff to argue those objections before me in the case management forum since the defendant had filed a notice of objection and especially not so after conceding that the Registrar should not have prevailed upon either party to have come before me under the pretext that the case management protocol applied.
- [17] Simply put the plaintiff should have called off the purported conference especially once I too had intimated that I did not see the need for either party to appear before me under the circumstances.
- [18] Unfortunately the plaintiff prevailed upon both the defendant's attorney and counsel to appear even knowing their objection which they were still entitled to vindicate and should bear these wasted costs.
- [19] I issue the following order:
1. The plaintiff is directed to pay the defendant's wasted costs occasioned by the putative case management conference of 6 September

2024, such costs to include the cost of counsel.[5]

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF PRE-TRIAL

CONFERENCE : 6 September 2024

DATE OF RULING : 16 September 2024

Appearances:

For the Plaintiff : Mr. M Yazbek of Stirk Yazbek Attorneys, East London (ref. Mr. Yazbek).

For the Defendant : Mr. M H Sishuba together with Mr. D Barter of Abdo & Abdo, East London.

*Judgment delivered to the parties electronically on this date by email.

- [1] Rule 37A (1)(a) read with the Directives of the Judge President of this Division concerning case management.
- [2] The reaction entailed the formulation of the plaintiff's "statement of issues" in contemplation of the conference which read in effect as a list contemplated in Rule 37 (4).
- [3] Although framed as a "statement of issues" the questions posed resemble a Rule 37 (4) list.
- [4] Mr. Sishuba referred me to the full bench appeal judgment of *Katlou Boedery v Tsui Vincent Matsepe N.O. and Another*, a judgment of the Western Cape Division, Case No. A79/21, dated 19 April 2022, although as an illustration that the unprocedural method adopted by the plaintiff justified a costs order against her. In that matter the court however reflected upon the provisions of Rule 37 (4) as being obviously applicable in a pre-hearing scenario. A subsequent meeting with a judge in chambers in terms of Rule 37 (8)
 - (a) would be next level or an alternative step for a litigant frustrated by a lack of co-operation or bona fides on the part of his opponent in circumstances where that opponent has either not attended a pre-trial conference or has failed to a material degree to promote the effective disposal of the litigation (See paragraphs [26] – [27]. It is not necessarily authority for the suggestion that the subrule cannot ever be invoked as a tool at the disposal of an aggrieved litigant experiencing such frustration once the trial has commenced and I specifically make no pronouncement on its efficacy as a remedy available to the plaintiff in the circumstances which drove her to ask for the conference before me as a Judge in chambers. Mr. Yazbek sees the utility of the rule in a different light. In his view the phrase in sub-rule 8 (a). "... to continue with a conference before a judge in chambers" especially contemplates a conference involving a judge after a trial has commenced and is in keeping with the well accepted notion that conferencing is a fluid process that continues until the conclusion of the trial.
- [5] No submissions were made to me concerning what scale I should peg such costs at but the parties may approach me to amplify the order in this respect assuming there is consensus that the default scale should not apply.

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Prepared on 9 October 2026 · Esheria