THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 285/2023

In the matter between:

HEIDI JOUBERT **APPELLANT**

and

PIERRE JOUBERT **RESPONDENT**

Neutral citation: *Heidi Joubert v Pierre Joubert* (285/2023) [2024] ZASCA 55 (19 April 2024)

Coram: NICHOLLS, HUGHES, MEYER and KGOELE JJA and MBHELE AJA

Heard: 8 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on the 19th day of April 2024.

Summary: Divorce – spousal maintenance – order compelling furnishing of further particulars not appealable.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Loubser J and Mpama AJ, sitting as a court of appeal):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced by the following:

'The appeal is struck off the roll with costs.'

JUDGMENT

Kgoele JA (Nicholls, Hughes and Meyer JJA and Mbhele AJA concurring)

Introduction

[1] The appellant, a social worker by profession, and the respondent, an attorney, were married to each other out of community of property with the inclusion of the accrual system on 4 November 2000. The appeal is a sequel of a counterclaim that was instituted by the appellant in defending the divorce proceedings that were initiated by the respondent against her in the regional court for the Regional Division of the Free State held at Bloemfontein (the regional court). The appeal is against the order handed down by the Free State Division of the High Court (the high court), which on appeal to it by the respondent, set aside the regional court's order compelling the delivery of further particulars requested by the appellant for trial. The appeal is with special leave granted by this Court.

Factual background

[2] The divorce proceedings launched by the respondent are still pending in the regional court. It appears from the pleadings that the parties are *ad idem* that the marriage relationship between them has broken down irretrievably. Both parties delivered notices in terms of section 7 of the Matrimonial Property Act 88 of 1984 (the section 7 notice) and were duly replied thereto.

[3] On 25 June 2021, the appellant delivered a notice requesting further particulars for the purposes of trial. The paragraphs in her request for further particulars which are relevant to this appeal read as follows:

'"5. Particulars in respect of any company, corporation, firm, business, venture or syndicate of whatsoever description ("the entity") in which the Plaintiff holds any interest, whether direct or indirect (through his interest in any trust or any other entity). Plaintiff is requested to provide full particulars regarding any income or benefit received by him from such entity in each tax year for the past three financial years, including:

5.1 dividends/profit distributions accrued or received by him;

5.2 trustee's remuneration accrued or received by him;

5.3 salary and/or commission accrued or received by him;

5.4 director's fee accrued and/or received by him;

5.5 bonuses received or accrued to him;

5.6 drawings made on loan account by Plaintiff;

5.7 interests accrued on credit loan accounts;

5.8 loans advanced to Plaintiff;

5.9 telephone, traveling and entertainment allowances paid by the entity on Plaintiff's behalf or allowance received by Plaintiff in cash or in kind;

5.10 credit card payments made by the entity on Plaintiff's behalf or use of a corporate credit card;

5.11 medical aid and pension fund contributions paid on Plaintiff's behalf;

5.12 contributions paid by entity to short-term insurance premiums and premiums in respect of investment and life policies in respect of Plaintiff's life.

6. Plaintiff is requested to furnish full and precise particulars of:

6.1 His gross and net income (after payment of tax) for each month during the past three financial years to date and the sources thereof;

6.2 His anticipated gross and net income for the next twelve months (from whatsoever source) and the sources thereof."'

[4] The respondent delivered his reply thereto. His response to the particulars requested by the appellant in paragraphs 5 and 6 above was to the effect that the particulars therein sought were not necessary for the purposes of trial and irrelevant to the disputes between the parties. Dissatisfied with the reply, the appellant delivered a notice to compel in terms of rule 16(4) of the Magistrates' court rules. In the application to compel, the appellant contended through an affidavit deposed to by her attorney of record that 'the answer is inadequate in that the respondent cannot refuse to make a full financial disclosure in respect of his existing and prospective means, his earnings capacity, financial needs and obligations including his standard of living having regard to the pleadings, in particular the defendant's (appellant), counterclaim for spousal maintenance'.

[5] On 22 March 2022, the regional court ordered the respondent to answer to the paragraphs so requested in the appellant's request to compel. Aggrieved by this order, the respondent appealed to the high court. The high court set aside the order to compel and relying on the decision of *Rall v Rall*[1] (*Rall*) held that a party cannot be required to give particulars in relation to a bare denial and that the regional court

[1] *Rall v Rall* (2369/09) [2010] ZAFSHC 165 (9 December 2010).

was bound to follow the precedent in *Rall* in this regard. On petition, this Court granted the appellant special leave against the judgment of the high court.

The issues

[6] The first issue to be dealt with is whether the regional court's order, ordering the respondent to provide further particulars, is appealable. Only if it is found to be appealable does the second issue arise, namely, whether the decision of the high court to follow the judgment in *Rall* was justified. Therein it was held that parties in matrimonial actions are not entitled to elicit further particulars to prepare for trial from the other party in circumstances where the latter has pleaded a bare denial.

Appealability of the regional court's order

[7] The appellant's counsel submitted that the high court should not have entertained the appeal by the respondent because it was an appeal against an interlocutory proceeding, and as such the order of the regional court was not final in nature. He argued that even though the appealability issue was not raised before it, the high court was entitled to raise this point of law *mero motu*. The high court, like this Court, the argument continued, was entitled and obliged to consider whether it has or had the necessary jurisdiction to entertain the appeal.

[8] In his brief answer, the respondent's counsel citing a plethora of judgments submitted that the interests of justice enjoined the high court to hear the appeal because the regional court failed to observe a foundational value of the Constitution by not adhering to the doctrine of precedent (following the decision of *Rall*). This is the only reason proffered by the respondent as a basis that the order of the regional court was appealable. This, in my view, presupposes that the respondent accepts that,

but for this reason, the regional court's order compelling discovery is purely interlocutory.

[9] It is trite that an application for a request for further particulars is purely interlocutory. In advancing 'the interests of justice' in this appeal as a basis for the high court proceeding with the merits of this matter, the respondent's counsel overlooked this Court's recent decision in *TWK v Hoogveld Boerderybeleggings*[2] (*TWK*). In *TWK*, this Court interrogated the notion thoroughly after carefully analysing several decisions of this Court which had been willing to part from the *Zweni v Minister of Law and Order*[3] (*Zweni*) judgment and said the following:

'Even if this is so as a matter of principle, as the defendant's counsel reminded us, a number of decisions of this Court have been willing, with different degrees of separation, to part from *Zweni*, or subsume *Zweni* under the capacious remit of interests of justice. I do not here essay a general account of appealability. I do affirm, though, that the doctrine of finality must figure as the central principle of consideration when deciding whether a matter is appealable to this Court. Different types of matters arising from the high court may (I put it no higher normatively) warrant some measure of appreciation that goes beyond *Zweni* or may require an exception to its precepts. Any deviation should be clearly defined and justified to provide ascertainable standards consistent with the rule of law. Recent decisions of this Court that may have been tempted into the general orbit of the interests of justice should now be approached with the gravitational pull of *Zweni*.'[4]

[10] In the same judgment, this Court warned against courts other than the Constitutional Court in adopting the standard of the interest of justice as the foundational basis upon which they decide whether the matter is appealable or not. It remarked:[5]

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[2] *TWK Agricultural Holdings (Pty) v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA).
[3] *Zweni v Minister of Law and Order of the Republic of South Africa* [1992] ZASCA 197; [1993] 1 All SA 365 (A).
[4] *TWK* fn 2 above para 30.
[5] Ibid para 25

'I recognise that there is thought to be a compelling basis to render this Court's approach to appealability consistent with that of the Constitutional Court. And hence to recognise the interests of justice as the ultimate criterion by reference to which appealability is decided. I consider this to be a misreading of the Constitution. Section 167 of the Constitution constituted the Constitutional Court as the highest court. Section 167(3) sets out matters that the Constitutional Court may, and is thus competent, to decide. …the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court. The Constitution thereby states a principle of appealability in respect of the Constitutional Court. The Constitution does so also to allow a person to bring a matter directly to the Constitutional Court or by way of direct appeal (s 167(6) of the Constitution). National legislation or the rules of the Constitutional Court must allow a person to do so in the interests of justice and with the leave of Constitutional Court.

…

To adopt the interests of justice as the foundational basis upon which this Court decides whether to entertain an appeal would put in place a regime that is both unpredictable and open-ended. It would encourage litigants to persuade the high courts to grant leave, when they still have work to do, failing which, to invite this Court to hear an appeal under the guidance of a standard of commanding imprecision. That would diminish certainty and enhance dysfunction. It would also compromise the freedom with which the Constitutional Court selects the matters it hears from this Court.' [6]

[11] This Court was affirming what Jafta J said in the *City of Tshwane Metropolitan Municipality v Afriforum and Another*[7] when he remarked:

'The interests of justice and this standard alone applies to adjudication of applications for leave to this Court. This is so because that standard is prescribed by the Constitution. Section 167(6) of the Constitution provides:

"National legislation or rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court–

[6] *TWK* fn 2 para 27.

[7] *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para 179.

(a) to bring a matter directly to the Constitutional Court; or
(b) to appeal directly to the Constitutional Court from any other court."'

[12] The decision in *TWK*, therefore, circumscribed the approach this Court and other courts, other than the Constitutional Court, can adopt on the issue of the appealability of orders. It concluded that whilst different types of matters may warrant some measure of appreciation that goes beyond *Zweni*, '…the doctrine of finality must figure as the central principle of consideration when deciding whether a matter is appealable to this Court'.[8] Importantly, this matter does not concern an interim interdict where exceptional circumstances might dictate its appealability.[9]

[13] The next question is whether this Court, despite the fact that the high court did not entertain the issue of the appealability of the order of the regional court, is entitled to entertain this issue. This question stems from the respondent's submission that the appealability issue is new and cannot be raised without following the Rules of this Court. First, this Court has the power vested in it by section 168(3) of the Constitution to decide whether the matter was an appeal against a decision and thus appealable or not. It also has jurisdiction to determine whether the lower court's ruling in the proposed appeal is a 'decision' within the meaning of section 16(1)*(a)* of the Superior Courts Act 10 of 2013. In *Minister of Safety and Security v Hamilton*[10] it was further clarified that this Court is not bound by the lower court's

[8] *TWK Agricultural Holdings (Pty) v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA) para 30.
[9] *Old Mutual Limited and Others v Moyo and Another* [2020] ZAGPJHC 1; [2020] 4 BLLR 401 (GJ); [2020] 2 All SA 261 (GJ); (2020) 41 ILJ 1085 (GJ) paras 96-104.
[10] *Minister of Safety and Security and Another v Hamilton* [2001] ZASCA 27; 2001 (3) SA 50 (SCA).

assessment and is entitled to reach its own conclusion on the question. Further, the Constitutional Court in *United Democratic Movement v Lebashe Investment*[11] held:

'…The Supreme Court of Appeal was not only entitled but obliged to determine whether the matter was an appeal against a "decision" and thus an appeal within its jurisdiction ….'

[14] It is clear from the abovementioned authorities that this Court is entitled to adjudicate on the issue of the appealability of the order of the regional court irrespective of whether the high court dealt with it or not.

[15] As far as the other argument that was advanced by the respondent's counsel to the effect that the high court entertained the merits because the regional court failed to observe precedent is concerned, I am constrained by the conclusion that I reached below to only state that whether *Rall* is, in fact, good precedent, is itself questionable. Even though it is trite law that precedent is a foundational value of the rule of law, relying on the notion of the 'interests of justice' to advance this argument cannot in my view, salvage the respondent's case either. First, the issue of appealability was not raised and dealt with by either party or the court during the proceedings before the high court. Secondly, the 'interest of justice' is a fact-based inquiry that cannot be imputed to the judgment of the high court or any court.

[16] The upshot of the above is that the regional court's order to compel the respondent to discover is purely interlocutory in nature. It has no final effect, is not a definitive proceeding, and does not have the effect of disposing of at least a substantial portion of the relief claimed in the pending divorce action between the parties. Neither does it affect the rights of the parties whatsoever. The parties are

[11] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) para 40.

still entitled to prosecute their case and are still at liberty to direct the court to any evidence and to advance any argument that they wish. The high court was obliged to entertain the issue, even if it was not raised, as to whether the matter before it was an appeal against a 'decision' and thus an appeal within its jurisdiction *mero motu.* Its failure to do so amounts to a misdirection which is fatal to the appeal before this Court. This is so because, the high court should not have proceeded with the merits as the regional court's order was not appealable. It should have struck the matter off the roll.

[17] The order of the high court on the merits cannot therefore stand. Thus, the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced by the following:

'The appeal is struck off the roll with costs.'

A M KGOELE

JUDGE OF APPEAL

Appearances

For appellant:	H F Marx
Instructed by:	DDKK Attorneys Inc., Polokwane
	c/o Honey Attorneys
	Bloemfontein
For respondent:	N Snellenberg SC
Instructed by:	Symington & De Kok Attorneys
	Bloemfontein