



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 033896/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<i>03/Mar/2024</i>	
DATE	SIGNATURE

In the matter between:

MARTHA CHRISTINA MYNHARDT

First Applicant

**CHARLES P LOCHNER obo TERTHIA NATANYA VAN
DEVENTER**

Second Applicant

and

LEE VAN DEVENTER

First Respondent

ANNETTE TETKJE STEVENS

Second Respondent

MAGISTRATE RC VENTER

Third Respondent

In re:

TERTHIA NATANYA VAN DEVENTER

Patient

JUDGMENT

MKHABELA AJ:

[1] The first applicant, Martha Christina Mynhardt, seeks leave to appeal an order that reconsidered and set aside an order that was granted on *ex-parte* basis and handed down on 22 September 2023. For convenience, I will reproduce the order that I have made which reads as follows:

- "1. *The application is heard as an urgent application in terms of Rule 6(12) and that non-compliance with the Rules and service is condoned.*
2. *The ex parte order granted by this Honourable Court on 16 May 2023 is hereby set aside.*
3. *Each party to pay their own costs as agreed by both legal representatives.*

[2] I have already described the parties in the main judgment and for convenience sake I shall retain the same reference as applicants and respondents.

[3] The main grounds of appeal against my judgment are first that I have erred in hearing the application for the reconsideration of an *ex parte* order that was granted by this Court on an urgent basis on 16 May 2023.

[4] The second ground is that I have erred in setting aside the *ex parte* order granted by my Sister Justice Francis-Subbiah on the date alluded to above.

The first ground

[5] The first ground of the leave to appeal to the effect that I erred in hearing the reconsideration application as an urgent application has no merit whatsoever and is tantamount to an abuse of the Court process regarding leave to appeal.

[6] This must be so in the light of paragraph 7 of the *ex parte* order granted by Francis-Subbiah J on 16 May 2023 and stamped 17 May 2023.

[7] Paragraph 7 of that order states as follows:

"The attention of Lee van Deventer (first respondent) is directed to the fact that he may anticipate the order within 24 hours as envisaged by Uniform Rule 6(8)."

[8] It is trite that an *ex parte* order that is granted on an urgent basis, could be anticipated within 24 hours' notice. More importantly, the right of the first respondent to approach the Court for the reconsideration of the order was provided for in the Court order itself and contemplated that the reconsideration application would also be on an urgent basis.

[9] Against this background, it is rationally difficult to understand why my decision to hear the application for the reconsideration of *the ex parte* order on an urgent basis was wrong¹ since it is trite that the question as to whether an application is urgent involves the exercise of a court's discretion.

The second ground

[10] The second ground is predicated on the contention that I erred in setting aside the *ex parte* order. Again, this ground of appeal is intellectually dishonest and ill-conceived.

[11] Mr Potgieter, who appeared for the first applicant, conceded during oral submissions that there was no allegation in the founding affidavit to the effect that there were two affidavits *"by medical practitioners who have conducted recent examinations on the patient"* as required by sub-rule (3)(b) of Rule 57.

[12] Having made the concession that sub-rule (3)(b) of the Rule was not complied with, my finding was that such omission was fatal to the justification and continued existence of the *ex parte* order.

¹ Rule 6(8) provides that any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than twenty-four hours' notice.

[13] In the circumstances I am unable to find that the requested appeal would have a reasonable prospect of success or that there is some compelling reasons why the appeal should be heard², including conflicting judgments under consideration.

[14] I am therefore not of the opinion that the appeal would have a reasonable prospect of success as I am obliged to find in terms of the statute and case³ law before granting leave to appeal.

[15] For all the above reasons, the application for leave to appeal falls to be dismissed.

[16] What remains is the issue of costs. In the main application I have exercised my discretion by not awarding costs on the basis that the litigants are family members.

[17] However, it seems to me that the losing party, probably at the instance of her attorney of record, is adamant in pursuing a hopeless appeal – given the fact that the *ex parte* order was set aside primarily on the basis of the concession made by her attorney of record who was also the deponent in the founding affidavit and also represented the losing party in this proceedings.

[18] It is worth mentioning that the concession by Mr Potgieter that there was non-compliance with Sub-rule (3)(b) of Rule 57 was fatal to the continuation and justification of the *ex parte* order.

[19] In my view the attempt to seek leave to appeal the setting aside of the *ex parte* order after in the light of a concession that could not be denied, requires an appropriate costs order and not the one I have granted in the main application.

² Section 17(1)(a) of the Superior Courts Act, 10 of 2013.

³ *Zuma v Office of the Public Protector and Others* 2020 ZASCA 138 (30 October 2020) paras 20 – 22.

Order

[20] In the circumstances, I make the following order:

1. The application for leave to appeal is dismissed with costs.



R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **3 April 2024**.

FOR THE APPLICANTS: Mike Potgieter

INSTRUCTED BY: M B Potgieter

COUNSEL FOR FIRST AND SECOND RESPONDENTS: Adv H C van Zyl

INSTRUCTED BY: ATS Attorneys Inc

DATE OF THE HEARING: 6 December 2023

DATE OF JUDGMENT: 3 April 2024