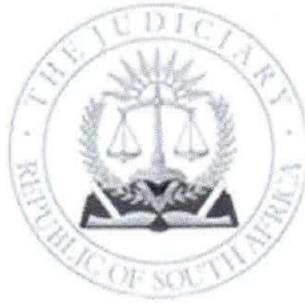




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: 083533/2023

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>		
(1)	REPORTABLE:	YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGE:	YES / <u>NO</u>
(3)	REVISED:	YES / <u>NO</u>
<u>2 November 2023</u>		
DATE		SIGNATURE

In the matter between:

HARRIET ELIZABETH MNISI

1st APPELLANT

SAMSON SHAKOANE

2nd APPLICANT

GABRIEL MATHEBULA

3rd APPLICANT

JETRO MSANGO

4th APPLICANT

MARGARET NDLOVU

5th APPLICANT

and

**MAWULU COMMUNAL PROPERTY
ASSOCIATION**

1st RESPONDENT

LUKE BOB MASANGO

2nd RESPONDENT

IRVIN NQOBIZITHA PHENYANE

3rd RESPONDENT

SOLANE MATHE MALOPE

4th RESPONDENT

JABULILE MATHETHWA

5th RESPONDENT

MESCHACK MHLANGA

6th RESPONDENT

GUGILE NKWINTI

7th RESPONDENT

ZANELE SIHLANGU

8th RESPONDENT

Coram: Le Grange AJ

Heard: 1 November 2023

Delivered: This judgment and order is handed down electronically by circulation to the parties' representatives by email and uploaded on CaseLines. The date and time for hand-down is deemed to be 13h00 on 2 November 2023.

ORDER

It is ordered that: -

1. the requirements relating to form, service and time periods, as provided for in the rules, are dispensed with, and that this matter is dealt with as one of urgency;

2. the order granted on 1 September 2023 by Davis J is reconsidered, in terms of Uniform Rule 6(12)(c), and set aside in its entirety and replaced with the following order, to read: -

“The application is dismissed with costs to be paid by the first, third, fourth and fifth applicants jointly and severally, on a scale as between attorney and client, such costs to include the costs of the reconsideration.”

JUDGMENT

LE GRANGE AJ:

- [1] Before this Court is a *sui generis* application for reconsideration in terms of Uniform Rule 6(12)(c).
- [2] The applicants herein fiercely opposed the application on the basis that: - (i) it is not urgent; and (ii) that the matter is *functus officio* and should therefore be struck from the roll.
- [3] However, when this rampart fell the whole house of cards came down.

Functus officio

- [4] The applicants' contention in this regard is wrong due to the provisions of Uniform Rule 6(12)(c).
- [5] The purpose of the rule is to afford an aggrieved party a mechanism designed to redress imbalances and injustices associated with the order having been granted in *its* absence. It has also been held that the

discretion of the court under the rule is a wide one. The only jurisdictional facts the court is required to consider are whether the order was granted in the absence of the aggrieved party, and whether this was by way of urgent proceedings.¹

- [6] It is undisputed that the respondents were in absence of the urgent application, wherefore this Court (having a wide discretion) may reconsider the application, and by also having regard to further affidavits filed.

Urgency

- [7] What rendered this matter urgent is the fact that there were allegations of material non-service upon the effected parties, as was specifically ordered by, and non-disclosure to Davis J. If that be the case, this court (being the bearer of the judicial authority of the Republic of South Africa) should not hesitate, even for a second, to act expeditiously and swiftly to protect its dignity and integrity.²
- [8] To this is added the fact that the matter came as one of urgency. A reconsideration thereof would be similarly urgent for various of the same reasons, even now more so as a contempt hangs in a balance.

Non-service

- [9] Following a clear directive from Davis J on 29 August 2023 to serve the urgent application on the second applicant, first respondent, second

¹ *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA (W); *Sheriff Pretoria North-East v Flink and Another* [2005] 3 All SA 492 (T)

² *Faraday Taxi Association v Director Registration and Monitoring MEC for Roads and Transport and Others* (58879/2021) [2022] ZAGPJHC 213 (5 April 2022)

respondent, third respondent and fifth respondent, the applicants returned on 1 September 2023 with some returns of service.

- [10] This Court having the privilege of an answering affidavit can find that: - The second applicant and third respondent were all ostensibly 'served' with the application at "Barvale Farm", care of "Rose Mkhonto" a unbeknown person to the parties. The second and fourth respondents predeceased this application. There does not appear to have been any attempt at service on the first respondent or fifth respondent in terms of the directive. As shown in the answering affidavit, the second applicant and fourth respondent do not reside at 'Barvale Farm', a fact bekown to the applicants at the time.
- [11] In the result, this Court finds that there was no effective service, rendering the application effectively *ex parte*, the requirement which had to be adhered to being trite.³

Non- disclosure and the merits

- [12] The whole application is based upon the allegations that: - (i) the respondents are in fact in contempt for non-compliance with the court order granted in 2017; and (ii) that funds are being misappropriated.
- [13] The applicants did not just fail to provide any proof of these allegation but also failed to allege substantial objective facts supporting the allegations. To this was added the fact that it is now evident from the undisputed answering affidavit that the order of 2017 has in fact been complied with.
- [14] Considering the (bare, unaccompanied by *any* confirmatory affidavit or proof of the serious allegation being made) founding affidavit, in the light of the answering affidavit, afresh, it is clear that the applicant's

³ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) paras 45 – 52.

case (substantially) lacks substance, objective facts and proof; and is exclusively based upon assertions, hearsay and adjectives. This is further worsened by the (empty) replying affidavit which met the most important and substantial allegations (in the answering affidavit) which were supposed to be contentious, with a mere comment of 'noticed' and/or 'irrelevant'.

Costs

- [15] The applicants are found to be *mala fide* and should pay the costs on a penalising scale.



A J le Grange

Acting Judge

APPEARANCES:

For the 1st, 3rd, 4th and 5th applicants:

M Muchopa

On instruction of Botha Massyn
& Thobejane Associated
Attorneys

For the 2nd applicant, 3rd, 5th and 6th respondents: G R Egan

On instruction of Murphy
Kwape & Maritz Attorneys