

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE No: 7700/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED: YES/NO
MG PHATUDI J	
	06/02/2024
SIGNATURE	DATE

In the matter between:

SEKGOPO TRADITIONAL COUNCIL

1ST APPLICANT

MOKGADI JOSEPHINE SEKGOPO

2ND APPLICANT

and

**THE CHAIRPERSON OF THE LIMPOPO PROVINCIAL
COMMITTEE ON TRADITIONAL LEADERSHIP DISPUTES**

1ST RESPONDENT

**LIMPOPO PROVINCIAL COMMITTEE ON
TRADITIONAL LEADERSHIP DISPUTES**

2ND RESPONDENT

WILLIAM MATSORANG SEKGOPO

3RD RESPONDENT

**THE MEC FOR CO-OPERATIVE GOVERNANCE AND
HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS**

4TH RESPONDENT

THE PREMIER OF LIMPOPO PROVINCE

5TH RESPONDENT

CORAM

:

M.G. PHATUDI J

HEARD

:

02 NOVEMBER 2023

DELIVERED

:

This judgment was circulated electronically to the parties' legal representatives by email and released to SAFLII. The date and time for delivery of this judgment is deemed to be **06 February 2024 at 10:00AM**.

SUMMARY

: Urgency – re-instatement of fatally defective application not supported by an affidavit contrary to rule 6(1), Uniform Rules of Court – Rule 41(1) (a) creates mechanism for withdrawal of ‘any proceedings’ at any time before set down of matter – issue in *casu* whether a litigant may reinstate by notice of otherwise withdrawn proceedings not tainted by defects – such proceedings capable of reinstatement subject to the provisions rule 41(1) (a) and provided that there has not been set down.

Held, in *casu*, reinstatement application structurally defective not capable of revival – furthermore, even not so, application lacks urgency and had to be struck off the roll with costs.

JUDGMENT

M.G. PHATUDI J:

BACKGROUND:

[1] On the opposed motion court roll of 30 October 2023, were some matters which I had occasion to consider, among them, two distinct applications with different relief invariably involving the same parties.

The one matter (№ 2) was a review application in which the Applicant Mr. Williams Masorang Sekgopo (William) sought an order to review the decision of the First Respondent, The Premier, Limpopo Province under case №: 5799/2018. (the first review) to recognize the Second respondent as a Senior Traditional Leader of Ga-Sekgopo. The other matter (№ 3) case №: 7700/2019 was an urgent application in which the Applicants, Sekgopo Traditional Council and Ms. Mokgadi Josephine Sekgopo, the First and

Second Applicants, respectively, approached this court seeking an order, among other things, that:

- 1.1. That condonation be granted to them for their non-compliance with the Uniform Rules of Court (the rules) relating to service and time frames prescribed, and that this matter be dealt with as one of urgency;
- 1.2. That, this application (case №: 7700/2019) be heard by the same Judge allocated to hear the review application (the first review) simultaneously; and
- 1.3. That the notice of withdrawal of the review application (the second review) issued under case №: 7700/2019, be set aside;
- 1.4. Further that, the second review application referred to above, be reinstated.

The Applicants in the urgent reinstatement application also asked for costs in the event of opposition. The Third Respondent, William, oppose the second review application.

- [2] I interpose at this juncture to mention that on 23 January 2020, the Fourth and Fifth Respondents served a notice to abide the decision of this court and filed the same on 27 January 2020. To that end, no opposing papers were filed by the said respondents in respect of the present urgent application.

[3] At the hearing this matter, counsel for the Applicants, Mr. Mashilo, submitted, *inter alia*, that because of its inherent urgency, the second review application seeking a reinstatement should take precedent and be heard prior to the hearing of the first review application which was enrolled for hearing on the same day. From counsel's submissions, it became patently clear that no consensus was reached that the two review applications be consolidated and heard *in tandem*.

[4] What became clear, however, was that counsel for the Third Respondent (William) Mr. Havenga SC, not only strenuously challenged the urgency of the second review application to be reinstated since its withdrawal, but also lack at all of its merits. The high-water mark in his submission was that an application, once withdrawn, cannot be revived or re-instated.

THE ISSUE:

[5] The issues in this inquiry really are whether, first is the matter sufficiently urgent, and second, whether an application, once formally withdrawn, is capable of re-instatement.

[6] I consider it apposite to first deal with the issue of urgency in this matter.

THE PRINCIPLES

[7] It is long settled in our law that Rule 6(12) (a) and (b) of the Uniform Rules of Court (the rules) govern urgent applications. It provides as follows: -

"Rules 6(12):

(a)

(b) *In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which he averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course"*

[8] This court in the case of **Mabotwane Security Services CC v Sekhukhune District Municipality and Others**¹ held that: -

"16.1 The insertion by the lawmakers of the procedure at the time was, in my view, not intended mere surplusage. The subrule not only requires of an applicant to pertinently aver the circumstances that he/she claims the matter is urgent, but is also required to set forth explicitly the reasons why he/she avers could not be afforded substantial redress at a hearing in due course"

The court went on to state that: -

"[17] Accordingly, a mere perception by a litigant seeking to be heard on an urgent basis and subjectively for own convenience thinking that the matter is sufficiently urgent, cannot in itself be reason that the matter be elevated to urgency. More has to be done to meet the threshold laid down in subrule 6(12)"

¹ (2425/2020) [2020] ZALMPPHC 96 (08.09.2020)

[9] What this rule envisage is simply for a legal practitioner representing a litigant in a given case to carefully scrutinize examine the facts of each case before setting the matter down, and decide whether a proper foundation and reasons for urgency exist and, additionally, why substantial redress could not be obtained at a hearing in due course.

If a litigant substantially delayed in instituting the proceedings, he/she must give a proper and credible explanation for the delay.

The test, ultimately, is if the application were to be enrolled on the normal motion court roll as provided in the rules, an applicant will obtain substantial redress?

[10] In a case such as this, there exists no sound basis to condone the delay, nor does it appeal to the interests of justice to do so.

[11] A brief traverse on the litigation history of this matter will throw light on the facts that militate against the reinstatement application sought purely on urgency basis.

[12] On 12 September 2019, the Applicants launched the second review application in this matter in which they aimed to review and set aside the First and Second Respondents' findings and recommendations dated 04 December 2017.

The Second Respondent, (the “Kgatla Commission”) better described as a Section 26A plenary Committee was established in terms of Traditional Leadership and Governance Framework Amendment Act, 2009.

The Third Respondent opposed the said application and subsequent thereto, filed a Rule 30 A (1) notice on 17 December 2019. The basis of the irregular step notice was that the Applicants did not in their application comply with the provisions of Rule 53. In redressing the irregular step notice, the Applicants gave notice of amendment in terms of Rule 28(1) of the rules, seeking to amend their initial notice of motion, in fulfilment of the requirements Rule 53 (1)(a) to Rule 53(4), which notice was filed on 09 January 2020.

No further procedural steps were taken by the Applicants post the relevant notice to amend.

- [13] Against the said backdrop, the Applicants on 08 June 2021 issued, served, and filed a “notice of withdrawal” of their review application.²

The relevant withdrawal notice duly signed by the Applicants’ counsel, (a trust account counsel), Mr. S M Monyela, state in part that:

“Kindly take notice that the Applicants hereby withdraw their application in the above Honourable court against the Respondents.”

² Paginated Index – part 5 (Review application) pp12-14

I pause to remark that I did not come across any other notice that subsequently recalled the said withdrawal notice, or otherwise decrying that it was erroneously issued, served and filed of record and, therefore, a nullity.

- [14] In a twist in the tail of events, Mr. Monyela, Counsel for Applicants, filed a notice of withdrawal as (sic) legal representative “of record with immediate effect”. This termination of own mandate was served on the Applicants’ Attorneys in the first review application (case № 5799/2018) on 07 August 2023. I take his withdrawal as counsel to be of no force on effect since the self-termination of his role as counsel was brought under a wrong case number of which he has had no standing. His termination, of mandate, however, had no bearing on the initial withdrawal of the review application.

The firm HLM Mamabolo were, nonetheless, introduced as the Applicants’ attorneys of record recently on 28 September 2023, when they issued and served their notice of appointment.

- [15] Realizing that the date for the hearing of the first review application (case № 5799/2018) brought by William against the Limpopo Premier and the present application were imminent, the latter’s attorney only on 13 October 2023 (16h48) dispatched by email a document purporting to be a “founding affidavit” (FA) for the respondents’ attention.

15.1 The said document, it appears, was served on 16 October 2023. The Applicants’ attorneys did not take steps to revive the withdrawn review

application by way of bringing an interlocutory revival application in ordinary motion, instead of bringing an urgent “re-instatement” application under the aegis of Rule 6(12) (a) and (b) of the rules. They in fact, had approximately one month from 28 September 2023, to have lined up their ducks in a row.

15.2 The period 28 September to 16 October 2023, being in excess of 2 weeks, was punctuated by 2 Thursdays in the 2 weeks for Applicants to have enrolled the intended urgent application on the earliest Tuesday available of the next week, if indeed the matter was adequately deemed to be that urgent. This the Applicants did not do.

15.3 They had instead impermissibly filed an uncommissioned “founding affidavit,³” together with annexures not compliant with rule 6 (1) of the rules, which, requires that “every application shall be brought a notice of motion **supported by an affidavit.**”

A document not commissioned professing to be an affidavit does not amount to a sworn affidavit and should, therefore, be discounted. To be valid it has to pass the requirements laid down in the regulations governing the administration of Oaths or Affirmations.⁴ That said, the

³ Paginated index, (reinstatement application) pp 10 – 27

⁴ Section 3 of the Justice of the Peace and Commissioners of Oaths Act 16 of 1963, as amended, GN R 1258 dated 21.07.1972

reinstatement application is therefore fatally defective. There is therefore nothing left to reinstate.

- [16] There is further subsidiary difficulty with the current re-instatement application. The Applicants have not as yet complied with the provisions of Rule 53(3) or 53(4), as amended, of the rules, which are per-emptory regarding furnishing the Registrar with 2 copies of the record and the other parties participating in the litigation. The Third Respondent (William) is entitled, therefore, to have had a full record required pursuant to Rule 53(5) in order to enable him to properly oppose the matter. The Applicant's submission that their withdrawn application is unopposed is unmeritorious. See, *Vereeniging Van Bo – Grondse Van SA v President of Industrial Court* 1983 (1) SA 1143 (T)

IS RE-INSTATEMENT OF A WITHDRAWN APPLICATION AVAILABLE AS A RECOURSE?

- [17] Rule 41(1)(a) of the rules of this court provides a mechanism in terms of which a person who initiated "any proceedings" may at any time before the matter has been set down, and thereafter by consent of the parties or leave of the court withdraw such proceedings. What a litigant needs to do, in any such event, is to deliver a notice of withdrawal and may in it embody a consent to pay costs.

In the present instance, the Applicants delivered their notice of withdrawal of the second review proceedings on 08 June 2021.

Furthermore, in doing so, there is no indication that the Third Respondent or his attorneys consented to the said withdrawal, nor that leave of court was sought and granted beforehand. The relevant notice did not, moreover, tender the costs for the withdrawal which is customary, though not cast in stone. These costs can later be claimable under subrule (1)(a) and (b) of Rule 41.

[18] In a somewhat distinguishable case of **ROUPELL v METAL ART LTD**⁵, the plaintiff was permitted, following a dispute that had arisen post settlement of their dispute, to withdraw his notice of withdrawal, and to reinstate the matter on the roll for hearing. I assume without deciding, that the withdrawal was triggered by the revival of the dispute and the interpretation occasioned by the repudiated settlement put on the table by the defendant. The settlement though later disputed had, in my opinion, then terminated the live *lis* between them, hence the withdrawal.

[19] In the present case, there was a live *lis* when the Applicants filed the ill-fated withdrawal notice of their review application. This was, moreover, served and filed absent any notice of set down filed by either party to the dispute.

⁵ 1972 (4) SA 300 (W)

The 'proceedings' contemplated in Rule 41(1)(a) of the rules refer to a situation where there is a live *lis* between the parties which has not as yet been set down. These proceedings may at any time before the matter has been set down be withdrawn at the instance of the initiator. In that event the concurrence of his/her opponent and leave of the court is not a prerequisite. This must, however, be done before the matter is set down. Once a matter has been set down for hearing, it is not competent for the applicant party to withdraw such proceedings without the consent of other protagonists' or leave of the court.

- [20] Upon a perusal of the Second review application, (case № 7700/2019) it is clear that no notice of set down endorsed by the registrar had found its way in these proceedings before the relevant withdrawal notice was served. There can, therefore, be no impediment that would otherwise preclude the Applicants from reviving the matter. But, the inquiry does not end there. There remains the question whether or not the said re-instatement application was justified by the reasons for urgency and absence of substantial redress at a hearing in due course, if validly prosecuted.

I am inclined to think not.

- [21] The principles enunciated in **Mabotwane's** case⁶ above, militate against a finding of the existence of circumstances of urgency in the reinstatement application. I consider it not useful to echo the court's sentiments already expressed elsewhere in this judgment.
- [22] Furthermore, the Applicant's late filing of their application on urgency basis had put a serious hurdle in the way of their anxiety to be granted audience in this court. They also failed to apply for condonation to mitigate their predicament. It is axiomatic that condoning a litigants' non-compliance with the rules and the Practice Directives applicable in this court is an indulgence that resides in a court discretion⁷.
- [23] Taking into account the facts and the circumstances at play in this matter, this court finds that the reinstatement application the Applicants sought on urgent basis by far falls short of the requirements laid down in Rule 6 (12) (a) and (b) of the rules of this court. No cogent reasons for absence of substantial redress at a hearing in due course were for a moment advanced in their application. In the result, the application is bound to be struck off the roll with costs for want of urgency. What is more, as already shown, is that the founding affidavit is fatal, and thus destructive to the reinstatement application itself. There is nothing surviving to revive.

⁶ See, para: [8] of the said judgment.

⁷ See, also *Grootboom v NPA* 2014 (2) SA 68 (CC) at Para [23] and [32]

THE COSTS:

[24] The general rule is that costs follow the event. In this case, the Applicants had ample time since the withdrawal of the erstwhile counsel to engage alternative legal representatives of their choice in order to bring the reinstatement application of their review on urgent basis. This in turn constrained the Third Respondent to appoint his attorneys, brief senior counsel to oppose the matter which comes at a premium of which he is entitled to recover upon being successful.

To that end, I make the following order:

1. The reinstatement of the review application (case № 7700/2019) is struck off the roll for lack of urgency; and defectiveness;
2. The Applicants are jointly and severally ordered to pay the costs on attorney and client scale.


M. G. PHATUDI J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the Applicants	: Advocate MH Mashilo
Instructed by	: HLM Mamabolo Attorneys Polokwane
Counsel for the Respondent	: Advocate Havenga SC
Instructed by	: Joubert May Attorneys Tzaneen c/o De Bruin Oberholzer Attorneys
Date of the hearing	: 02 November 2023
Date of delivery of Judgment	: 06 February 2024