



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT LOCAL COURT)**

CASE NO. 1524/2013

In the matter between:

TOTAL ENERGIES BRITE STAR STATION
(PTY) LTD
KANYA MDAKA

First Applicant
Second Applicant

And

THE DEPARTMENT OF MINERAL RESOURCES
& ENERGY

First Respondent

THE CONTROLLER OF PETROLEUM PRODUCTS

Second Respondent

THE MINISTER OF THE DEPARTMENT OF
MINERAL RESOURCES & ENERGY

Third Respondent

SPARGS SELLA YEMOTO (PTY) LTD

Fourth Respondent

ENSPA TRADING COMPANY (PTY) LTD

Fifth Respondent

**RULING AND BRIEF REASONS IN RESPECT
OF PRELIMINARY ISSUES RAISED BY THE
FOURTH AND FIFTH RESPONDENTS
AT THE HEARING OF THE APPLICANTS’
RULE 30A (2) APPLICATION TO STRIKE OUT
THEIR DEFENCE IN THE REVIEW APPLICATION AND
TO ENTER DEFAULT JUDGMENT AGAINST THEM**

HARTLE J

[1] The applicants apply on the basis provided for in Rule 30A (2) of the Uniform Rules of Court for an order striking out the fourth and fifth respondents’ defence “*against the applicants’ claim*”, which can only be a reference to the main application for review (“the review application”), and for “*default judgment, as set out in the Draft Order, in the absence of other opposing parties in the matter*”. No draft order has been provided but the implication is clear that the applicants purport by their notice, if they succeed with the relief to strike out their defence, to simultaneously seek default judgment against all the parties in the review application whereas the fourth and fifth respondents have in effect been cited only as interested parties in the review application.¹

¹ There is other amorphous relief being sought against the fourth and fifth respondents in the main application but that is neither here nor there for present purposes.

[2] The “*other*” parties against whom this significant relief is being sought have evidently not been served in terms of rule 4 (1)(a) read with sub-rule (9) of the Uniform Rules of Court. This impacts the fourth and fifth respondents in that they are being drawn into interlocutory proceedings that depend for their existence on the vitality of legal proceedings that for the moment appears to be inchoate without proper service of the initiating documents on the primary parties in the review application.²

[3] That was one of the fourth and fifth respondents’ preliminary objections raised at the putative hearing of the interlocutory application before me on 2 April 2024 concerning why I should refuse to hear the application and strike it from the roll.

[4] The second objection arises in the fact that Griffiths J issued a case management order on 26 January 2024 pursuant to a case management conference in which he directed that certain fundamental issues going to the standing of the applicants and to the jurisdiction of this court first be decided before the merits of the review application are dealt with. More specifically he directed that all other issues “*in these matters*” are stayed pending finalization of the specific sub-issues outlined in his directive. Quite evidently these outlined issues will be dispositive of the review application itself and any matters tangential thereto if the court finds against the applicants on the listed aspects.

² The applicants are seeking condonation for this failure in a separate interlocutory application but it is in my view an application doomed from the outset as the service provisions in rule 4 are peremptory. Despite having been aware of the fourth and fifth respondents’ objection to this deficiency from the inception the second applicant has yet to instruct the sheriff to serve the papers on all the parties.

[5] For this reason, the fourth and fifth respondents argue that the case management order stands in the way of this court hearing the interlocutory application which was commenced before the case management conference. In other words, the present application is one of “*those matters*” that are to be stayed.

[6] The third preliminary objection is that the contested application has been enrolled for hearing during the present court recess whereas paragraph 15 (i) of the practice directions of this court envisage that no opposed applications (except rule 43 applications) shall be heard during recess, that is “*not without good cause or sufficient urgency being shown*” why the converse should apply.

[7] The test whether the proviso should be resorted to must be determined against the peculiar history of the present matter. The applicants initially purported to enrol the same application in December 2023 during recess when Stretch J was on duty (as an urgent application) and again before me on 9 January 2024 (as an ordinary but opposed interlocutory application) while I was on recess duty. I struck the matter from the roll for the exact same want of good cause or exigency and offered the second applicant the opportunity to rather try and resolve the various side issues that had emerged by then by way of a case management conference before a judge in chambers.

[8] Whilst being alive to the fact that the applicants thereafter purported to enrol the application on the unopposed roll during term (I believe on the appropriate roll),³ the second applicant again sought to inveigle his way in during the present recess

³ See Amended Joint Rule of Practice 15 (c) read with 15 (b).

amidst an incredibly busy unopposed motion court roll⁴ and took up at least an hour of the court's time during which I entertained a hearing ultimately of only the preliminary objections raised by the fourth and fifth respondents concerning why I should not hear the matter.

[9] In seeking to circumnavigate his way around Griffiths J's order, the second applicant adverted to an application for leave to appeal thereagainst which he filed with the Registrar on 19 February 2024, contending that by its mere filing the operation and execution as it were of the case management order is suspended pending the decision of Griffiths J in respect of the applicants' application for leave to appeal. As far as he is concerned, recess aside, the stay imposed by Griffiths J does not impair him whatsoever from proceeding with the present application.⁵

[10] The second applicant also relied upon the claimed inherent urgency of the environmental matters implicated in the main application as a reason for enrolling the opposed interlocutory application in the midst of the Easter recess.

[11] It surprised me to learn during the present proceedings (gleaned from in excess of six hundred pages on the court file that I was obliged to read to appreciate the context of the interlocutory application) that the initiating process has not been served on the primary parties in accordance with the peremptory rules of this court. Before that happens there appears to me to be absolutely no point in countenancing

⁴ There were 90 matters enrolled for hearing on the unopposed motion court roll on 2 April 2024.

⁵ The fourth and fifth respondents have contrariwise stood back in asserting their rights raised in their separate interlocutory application in terms of rule 7 read with rule 30A (1), on the understanding that these issues will be dealt with as preliminary issues before the hearing of the review application as envisaged by Griffiths J in his case management order.

the side spats between the parties in the present application or any other of the numerous interlocutory applications that have since been issued out by the applicants in the matter.

[12] Leaving aside the fact that the utility for and relevance of the present interlocutory application hangs on the vitality of the main proceedings, that is the review application, there is in my view merit in the concern that a present day hearing of the interlocutory application compromises the interests of the first three respondents who have not been served and who may well want to avert any default judgment being granted against them (sic) especially in circumstances where they will notably be “*absent*” at any hearing that ensues and likely be at the receiving end of an adverse order implicating their vital interests.

[13] As for the status of the applicants’ purported application for leave to appeal against Griffiths J’s order, the nature of the order sought to be appealed against is akin to that of an interlocutory order which is different than a final order as envisaged in section 18 (1) of the Superior Courts Act, No. 10 of 2013.

[14] An application for leave to appeal against Griffith J’s order, if it is even appealable on its own merit as a case management directive, would not in my opinion suspend its operation pending the decision of the application for leave to appeal, or an appeal thereagainst as the case may be. This is because section 18 (2) of the Superior Courts Act provides as follows:

“(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not

having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is *not* suspended pending the decision of the application or appeal.” (Emphasis added)

[15] But even if I am wrong in classifying the case management order in this manner, the second applicant’s argument that the filing of his application for leave to appeal should in the meantime scupper the objective of Griffiths J’s order (which is to preclude the very pursuit of the present application) does not assist them because the notice of application for leave to appeal was filed out of time. Even if only by one day, the late lodging of the application will require to be condoned before it gains any traction on the basis envisaged by section 18 (1) of the Superior Courts Act,⁶ if the latter provision applies at all in these circumstances as I have observed above.

[16] But whether the purported application for leave to appeal against the case management order of Griffiths J is pursued or not, it is in my opinion inimical to the objectives of case management to have the operation of orders made by judges in their capacity as judicial case managers held in limbo pending obstructive challenges against them such as in the present situation. These orders are essential to the management of the court’s resources, the effective running of its institutional

⁶ See *Panayiotou v Shoprite Checkers (Pty) Ltd and Others 2016 (3) SA 110 (GJ)* which confirms the need to revive an appeal process that is out of time by an appropriate application for condonation before it can have the effect of suspending the operation of a judgment within the meaning contended for in section 18 (1) of the Superior Courts Act.

business and the expeditious resolution of disputes in as short a time as possible. Amended rule 30A (1) provides a mechanism whereby to enforce case management orders or directions but not much thought has been given to what happens if a party has any real objection to their validity or otherwise. In my own experience differences have been sorted out between legal representatives practically, or by the parties appearing before me again to have orders revised. Even though the 2nd applicant appears in person he is equally bound by the essential objectives of case management and should adopt a pragmatic approach rather than a technical complicated one involving the parties in all sorts of tangential interlocutory application and unnecessary point taking.

[17] Once the review application has been served per sheriff and all parties are properly before the court and upon its ultimate enrolment there is no reason why the applicants cannot raise their objection against the proposed separation of issues at that juncture (making it unnecessary to challenge the order of Griffiths J on appeal) although I anticipate that a court will permit the fourth and fifth respondents to assert their preliminary objections raised in the review application before dealing with the merits of the proposed review application. It is to my mind a simple matter of logic. If this approach does not appeal to the parties perhaps they should consider agreeing to abandon the case management order and leave it to the reviewing court to decide what approach is to be adopted at the ultimate hearing, that is assuming that the proceedings are regularised by proper service in the short term.

[18] Applications are not in the ordinary course subject to case management but a special dispensation was afforded to the second applicant in this instance because he appears in person. Evidently, though he has little regard for the judge's authority in

this respect and even less concern for the interests of the parties against whom he is litigating. This court will however not countenance such unfair play in the litigation.

[19] As for the supposed urgency, it hardly lies in the mouth of the second applicant to complain when he has himself been the cause of the delay and has ignored two clear intimations to him by this court before that the hearing of the interlocutory application is not sufficiently urgent to be heard during recess. Despite having had his application struck off the roll before for exactly the same reason, he yet persists in getting his own way.

[20] I am satisfied that the preliminary objections raised by the fourth and fifth respondents to the applicants' interlocutory application have merit on all the bases relied upon by them, but for the primary reason that the review application is inchoate and the secondary reason that a hearing of it during recess is not warranted, I am in agreement with them that it is appropriate to strike the matter from the roll.

[21] As for the issue of costs, it hardly seems appropriate that the second applicant should insist on a recourse to the "*Biowatch*-principle".⁷ The principle established by the Constitutional Court in that matter can have no application in a scenario such as the present. Further, until the court determines the issue of the second applicant's standing to represent the first applicant, he is to be held liable to pay for wasted costs of the enrolment of the matter on the first applicant's behalf in addition to such costs incurred in his personal capacity in this respect.

⁷ *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) SA 232 (CC).

[22] In the result I issue the following order:

1. The applicants' interlocutory application is struck from the roll.
2. The second applicant in his personal capacity is directed to pay the costs of the application.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 2 April 2024

DATE OF JUDGMENT : 5 April 2024

Appearances:

For the applicants: Mr. K Mdaka in his personal capacity and purporting to represent the first applicant, Ngcobo.

For the fourth and fifth respondents: Mr. C Wood instructed by Drake Flemmer & Orsmond, East London (ref. Mr. Pringle).