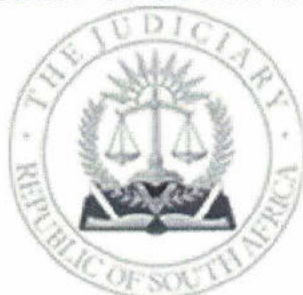


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024/077172

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
(4)	9/9/2024
	DATE
	SIGNATURE

In the matter between:

DSM NUTRITION PRODUCTS SOUTH AFRICA

1st APPELLANT

and

A O'ROURKE

1st RESPONDENT

SANDRA VAN EEDEN

2nd RESPONDENT

SQ FEED MIXING (PTY) LTD

3rd RESPONDENT

PLM INDUSTRIES (PTY) LTD

4th RESPONDENT

PETROS JOHANNES LE ROUX

5th RESPONDENT

JUDGMENT

MAKUME, J

Introduction

- [1] On the 20th August 2024 in the Urgent Court for the week of 19 to 23 August 2024, I granted an order in the absence of the Applicant and struck off the

application from the roll. I further ordered Applicant to pay costs occasioned by the striking which costs shall include Counsel's reservation fees for the day, on scale C in terms of Rule 69 of the Uniform Rules.

- [2] When the matter was called on the 20th August 2024, it was only Counsel for the Respondent who appeared there was no appearance for the Applicant. Counsel for the Respondent informed the Court that there has been no agreement to remove or postpone the matter hence his application to have the matter struck off the roll which I duly granted.
- [3] On the 22nd August 2024 Counsel for the Applicant appeared in Court without their opponents and requested to recall the matter and reverse the decision I had already made. I declined and informed Counsel to bring an application in terms of the Rules and serve such application on the Respondents.
- [4] The Notice of Motion for reconsideration of the order served before me on the 30th August 2024.

Background Facts

- [5] The Notice of Motion seeking urgent relief against the Respondents was issued on the 11th July 2024 it was set down for hearing in the Urgent Court on Tuesday the 20th August 2024 at 10.00. The Notice of Motion did not specify dates on which Answering Affidavits and further pleadings to be filed save to say that such Answering Affidavits were to be filed within fifteen days of service of the Notice of Motion.
- [6] Answering Affidavits were eventually filed and served. In the Answering Affidavit all the Respondents raised a point in *limine* that the matter was not urgent and does not deserve to be placed on the Urgent roll.
- [7] On the 14th August 2024 six days before the date of hearing the Applicant's attorneys addressed a letter to the Deputy Judge President and copied me in which the following was said:

“(5) Due to the above events we do not anticipate that the application will be ripe for hearing in the week of the 20th August 2024. Moreover given the sizeable papers in the matter which now number 589 pages without the replying affidavit, we do not consider that the matter can be disposed of fully and properly in less than four and half hours as referred to in paragraph 25.1.6 of the Revised Consolidated Practice Directive 1 of 2024 (12 June 2024).”

- [8] On receipt of that letter I then addressed the following letter to all the parties on the 16th August 2024

“ You letter dated the 14th August 2024 has reference. This matter must by notice be removed from the roll on the basis of the agreed timelines for filing of further documents. The parties will then liaise with the office of the Deputy Judge President about their request for an expedited hearing.”

- [9] On Tuesday the 20th August 2024 there was no notice of removal uploaded and no appearance for the Applicant. I referred Counsel for the Respondents to the correspondence mentioned about whereupon Counsel informed me that there was no agreement to remove the matter from the roll as they still maintain that the matter was not urgent.

THE RECONSIDERATION APPLICATION

- [10] It does not make a difference whether this application is for reconsideration in terms of Rule 6(12) (c) or to set aside the order in terms of Rule 42 of the Uniform Rules of Court. The crux of the matter is whether the parties had agreed to have the matter removed from the roll or not and if so on what terms
- [11] Prior to the date of hearing it is so that the Applicant had addressed a request to the office of the DJP for a special allocation on the opposed roll in view of the voluminous papers already filed. Attorneys for the third to fifth Respondent Messrs Schuman Van Der Heerden & Slabbert raised a concern about that

request and said that the application was not only premature but this was an attempt at “queue jumping” by the Applicant.

- [12] The Deputy Judge President responded in a letter dated the 23 July 2024 that the Applicant was at liberty to enrol the matter on the Urgent court roll of the week 19th August 2024 subject thereto that it was able to satisfy the urgency threshold.
- [13] On the 16th August 2024 the Applicant uploaded a practice note to the effect that “the matter was to be removed from the roll by agreement and that Counsel will attend Court on the 20th August 2024 to see to the removal.
- [14] On receipt of the practice note attorneys for the third to fifth Respondent informed the Applicant by letter on the same date that they were not aware of any agreement to remove the matter from the roll. They indicated that in the event of a removal the Applicant must tender wasted costs. The attorneys of the second Respondent also aligned themselves with the view that the matter was not urgent and any removal must be accompanied by a tender for wasted costs.
- [15] On receipt of the correspondence from the attorneys of the second and third to fifth Respondent the Applicant proposed that the issue of costs be reserved and further that a draft order to that extent will be handed up to Court by junior Counsel on Tuesday the 20th August 2024.
- [16] A notice of removal was uploaded after the hearing and it reads as follows:
- “Kindly take note that the Applicant hereby removes the matter from the roll as directed by the honourable Justice Makume in his letter dated the 16th August 2024 a copy of which is attached.”
- [17] I find this notice of removal very disturbing the removal was not at my instance it was a directive in view of the letter of the 14th August 2024 addressed to the

Deputy Judge President. Secondly the practice note says the removal is by agreement amongst the parties it says nothing about the directive of the 16th August 2024 which I regrettably think was used for wrong purposes.

- [18] A further disturbing factor in this matter is that in his email dated the 16th August 2024 at 15h31 Ms Alexia Ricardo writes as follows:

“ We have undertaken to send a junior advocate to Court to ensure that the matter is removed from the roll as a courtesy to the Court. There are no wasted costs involved in the circumstances but if the Respondents contends that there are such costs can be reserved for determination at the hearing of the application. The urgent court does not usually entertain arguments concerning costs.”

- [19] The notice of removal filed after the 20th August 2024 is silent on the issue of costs. Clearly no agreement had been concluded on the consequence of a removal. In the result I believe the Respondents that there was no agreement.

- [20] Rule 42 (1) of the Uniform Rules of Court reads as follows:

“The Court may in addition to any other powers it may have, *mero motu* or upon the application of any party affected rescind or vary:

- a) An order or judgement erroneously sought or erroneously granted in the absence of any party.”

- [21] The Applicant need to prove that the order was granted erroneously and that there is good cause to set it aside. The order was definitely not granted erroneously it was based on information that was to the knowledge of the Applicant who elected not to attend Court despite an undertaking to send junior Counsel to Court which did not happen.

- [22] The Court in **ISDN Solution (Pty) Ltd vs CSDN Solution CC and Other 1996 (4) SA 484 (WLD)** in dealing with an application for reconsideration of an order in terms of Rule 6(12) (c) said the following at page 487 (b):

"The Framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operational will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So too will questions relating to whether an imbalance, oppression or injustice has resulted and if so the nature and extent thereof and whether redress is open to attainment by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein."

[23] In this matter I am not inclined to exercise my discretion in favour of the Applicant. I have taken into consideration the following:

- 23.1 The Applicants absence in Court on the 20th August 2024 has not been explained to my satisfaction.
- 23.2 It is the Applicant who chose the date of the 20th August 2024 and when the Respondents attorneys informed them by letter dated 16th August 2024 that costs should be tendered they had knowledge that Respondents will attend Court to apply for a striking from the roll.
- 23.3. The third to fifth Respondents at all times contended that the Applicant's application is not urgent and that the approach to the DJP amounted to impermissible queue jumping.
- 23.4 The DJP himself informed the Applicants that they may set the matter down for the 20th August 2024 but they will have to satisfy that Court that the matter was urgent. Clearly the DJP had formulated a preliminary view on urgency.

[24] In the result I order that the application for reconsideration or set aside of my order dated the 20th August 2024 is hereby dismissed with costs.

Dated at Johannesburg on this 9th day of September 2024



M A MAKUME
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	30 August 2024
DATE OF JUDGMENT	:	09 September 2024
FOR THE APPELLANTS	:	Adv E Venter
INSTRUCTED BY	:	Messrs Ricardo & Partners
FOR THE RESPONDENT	:	Adv Thompson
INSTRUCTED BY	:	Messrs Schuman van der Heerden