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**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 191 / 2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 16 September 2024

SIGNATURE

In the matter between:

FOISTER PATRICK MHLONGO

APPLICANT

And

**THE TRUSTEES FOR THE TIME BEING JOINT FIRST RESPONDENT
OF THE PETER NEVE TRUST MT
1266/1996 BEING:**

ELIZABETH IRENE NEVES

PRISCILLA FRANCIS RAMBOTTOM

CHRISTOPHER GILBERT NEVE NNO

**THE CONTROLLER PF PETROLEUM
PRODUCTS**

SECOND RESPONDENT

**THE MINISTER – DEPARTMENT OF
MINERAL RESOURCES AND ENERGY**

THIRD RESPONDENT

J U D G M E N T

RATSHIBVUMO ADJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 08H00 on 16 September 2024.

[1] Introduction

This matter was placed on an urgent court roll of 20 August 2024, for reconsideration of an order granted on 13 February 2024, by Mashile J of this Division. The application for reconsideration is premised on Rule 6(12)(c) of the Uniform Rules of the High Court and is brought by the First Respondent. The order to be reconsidered, dated 13 February 2024 reads,

“1. The matter is enrolled and heard in terms of Rule 6(12) and that condonation is granted for any non-compliance with any applicable Rule of Court and Practice Directive.

2. Pending the finalisation of case No. 2024-003211 in the High Court Gauteng Division, Pretoria for judicial review and setting aside of the Site and Retail licences by the corner of Managa and Sibange Roads of the R[...] M[...], Mpumalanga and known as Stand 7[...] S[...] D, Masibekela at or on the same property as ‘Build It’ (hereinafter referred to as the Site) the First Respondent is interdicted from operating a petrol station and conducting retailing activities in petroleum product from the Site.

3. Costs be paid by the First Respondent.

4. In the event that there are facts and circumstances arising after the date hereof, on facts and circumstances not presently before court, any Respondent may, on notice of Motion to all other parties, apply for a reconsideration of this order.”

[2] The Applicant contends that a similar application has already been considered by the court wherein the application was struck from the roll. It is therefore necessary to determine if this is indeed true before delving into the merits of the case.

[3] Following the handing down of the order referred to above, the First Respondents approached this court on an urgent basis with application to have that order reconsidered, in terms of Rule 6(12)(c) of the Uniform Rules. The application was heard on 27 February 2024. The notice of motion in that application read,

“[B]e pleased to take notice that the First Respondent intends to set the matter down in terms of Rule 6(12)(c) to this Honourable Court on 27 February 2024 at 10:00 or as soon as counsel may be heard for reconsideration of the court order granted on 13 February 2024 in the following terms-

1. The matter is enrolled and heard in terms of Rule 6(12) and that condonation be granted for non-compliance with any applicable Rule of Court.
2. That the court reconsiders the court order granted by the Honourable Judge B Mashile on 13th of February 2024.
3. That the Honourable Court sets aside and delete the Prayer 1, 2 and 3 of the court orders.
4. That punitive costs be ordered against the Applicant...”¹

[4] This application was struck off the roll by Phahlamohlaka AJ of this Division on 28 February 2024 for lack of urgency.² The Notice of Motion and the founding affidavit that laid before the urgent court on 27 February 2024, did not form part of the bundle before this court on 20 August 2024. It was only when the court called for those documents, that the First Respondents availed them to the Registrar of this

¹ See p. 401-402 of the bundle that served before the urgent court on 27 February 2024.

² See p. 444 of the paginated bundle.

court. This was necessary in order to draw the resemblances and differences between them and the current application given the Applicant's submissions.

[5] The Applicant's Notice of Motion in the current application reads,

"[B]e pleased to take notice that the First Respondent intends to set the matter down in terms of Rule 6(12)(c) to this Honourable Court on 27 February 2024 at 10:00 or thereafter as soon as the parties may be heard on the following terms:

1. That the matter be heard in terms of Rule 6(12)(c) of the Uniform Rules of Court.
2. That the order granted by the Honourable Judge Mashile be reconsidered as a whole and set aside.
3. The application for urgent interdict be dismissed for the lack of urgency.
4. The Applicant be ordered to pay costs for this application on an attorney client scale.
5. Sheriff's decision to close my (sic) business be reserved.
6. The court order granted to the Applicant on the 13th of February 2024 be revoked..."

[6] If one compares the two, there is no doubt that the current notice of motion only features cosmetic changes from the one that laid before the urgent court of 27 February 2024 as both were premised on Rule 6(12)(c) of the Uniform Rules and were (are) aimed at reconsideration by the court of the order dated 13 February 2024.

[7] With the order handed down on 28 February 2024, the First Respondents had to choose if they were displeased with the ruling, of which they had an option to bring

an application for leave to appeal, so that the order dated 28 February 2024 could be considered on appeal. The other option available was for the First Respondents to accept the ruling on the lack of urgency and enrol the application on a normal motion roll for it to be adjudicated on its merits.³

[8] It is common cause that shortly after the order dated 28 February 2024, the First Respondents launched an application for leave to appeal that order. The presiding judge brought it to the attention of the First Respondents that their application was not in compliance with Directive 19.1 of the Practice Directives of this Division.⁴ The application was thereafter withdrawn by the First Respondents.

[9] The Applicant submitted before this court that the urgent court erred when it ruled on 28 February 2024 that in an application for reconsideration of an order dated 13 February 2024, which order was made in their default, it was a prerequisite for the First Respondents to show urgency. It was argued that the mere reason that an order was granted on urgent basis is enough reason for the matter to be reconsidered in terms of Rule 6(12)(c) of the Uniform Rules.

[10] Whether there is credence in this argument, would be irrelevant in my view as I am not sitting as a court of appeal to the order dated 28 February 2024. The urgent court did not hear the application for leave to appeal against its earlier ruling. Had the First Respondents proceeded with the application and had it been granted, the matter would have lied before the full court in accordance with section 16(1)(a)(i) of the Superior Court, no. 10 of 2013 which provides,

“[S]ubject to section 15(1), the Constitution and any other law-

³ See *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* (379/05) [2006] ZASCA 51; 2006 (4) SA 292 (SCA) at para 9.

⁴ Practice Directive 19.1 provides, “[A] party filing an application for leave to appeal must simultaneously file the judgment in the matter. If judgment is not available, it shall be obtained by the applicant before the application for leave to appeal is laid before the judge seized with the application for leave to appeal. Where a judgment is delivered *ex tempore*, it shall be the responsibility of the party noting the application for leave to appeal to have the judgment transcribed and submitted to the registrar together with the application for leave to appeal.”

- (a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted-
- (i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6); or..." [My emphasis].

[11] When I sat in the urgent court on 20 August 2024, I was a single judge, just as Phahlamohlaka AJ was, on 27 February 2024. This court therefore does not have jurisdiction to pronounce itself on the correctness or otherwise of the order of Phahlamohlaka AJ handed down on 28 February 2024. Expressing an opinion thereto could only serve as giving unsolicited advice on the prospects of success if the decision of Phahlamohlaka AJ was to be challenged on appeal.

[12] It is therefore improper for the same application that laid before the urgent court on 27 February 2024 to be placed before this court, sitting as an urgent court, without developments to the case that make the application different. Counsel for the First Respondents was at pains to try and point out the differences between this application and the application that was brought before court on 27 February 2024. He highlighted how the First Respondents approached the Gauteng Division of the High Court (Pretoria High Court), which unfortunately referred them to the Mpumalanga Division for recourse in respect of the judgment dated 13 February 2024. I agree that this is the right court with the necessary jurisdiction. Where I differ with the First Respondents is the procedural steps they take to upset that order.

[13] I do not agree that bringing an application before the Pretoria High Court can be considered as "developments" in a case, from the date the order dated 28 February 2024 was handed down. Developments in a case would entail anything that happens that would change the status of a case from being considered as not urgent, to urgent. The First Respondents had to choose if they agree with the order of 28 February 2024, as they seem to have done; thereby conceding that the application was not urgent and that they could not just bring the application for reconsideration without facts that render the application, urgent. With this position,

the application would have to be enrolled for hearing on a normal opposed motion roll, unless there are developments that warrant the application to be heard on urgent basis. The other option which the Applicant appears to have not preferred, was to challenge the order dated 28 February 2024 by way of appeal.

[14] Whichever way this court approaches this application; it is bound to create precedence for the future. For a young Division such as ours, we cannot compromise the rules and procedure even if it appears that decisions are being made based on technicalities. For this court to decide the matter on merits would be equal to hearing an appeal through backdoor. It would as such be a futile exercise for this court to proceed and consider the merits of the application as the issues are not properly brought before it. For this reason, the application would not be dismissed, as the merits of the case were not visited.⁵ This means that the application can still be enrolled for hearing, unless there is an appeal against any of the orders already made herein.

[15] For the aforesaid reasons, I make the following order.

[15.1] The application is struck off the roll.

[15.2] The First Respondents are ordered to pay the costs of this application.

TV RATSHIBVUMO
ACTING DEPUTY JUDGE PRESIDENT
MPUMALANGA

FOR THE APPLICANT:

ADV. DJ SIBUYI
(TRUST ACCOUNT ADVOCATE)

⁵ See *Solidarity obo Botha v Commission for Conciliation Mediation And Arbitration and Others* (JR1281/06) [2008] ZALCJHB 15 (23 October 2008) at para 16.

**C/O:
FOR THE RESPONDENT**

INSTRUCTED BY:

C/O:

DATE HEARD:

JUDGMENT DELIVERED:

THOBELA SINDY ATTORNEYSMBOMBELA

ADV. BG SAVVAS

MURRAY KOTZE & ASSOCIATES

CHRISTO SMITH ATTORNEYS INC

MBOMBELA

20 AUGUST 2024

16 SEPTEMBER 2024