



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not reportable

Case Number: 5403/2022

In the matter between:

BLOEM WATER

Applicant

and

**INGEROP SOUTH AFRICA (PTY) LTD
MINISTER OF WATER AND SANITATION**

First Respondent

Second Respondent

Coram: Reinders, J

Heard: 31 October 2024

Delivered: This judgment was handed down in open court on 17 February 2025 and distributed to the parties via electronic mail communication.

Summary: S 27 Superior Courts Act – lack of jurisdiction – orders made

ORDER

1. The order granted on 29 July 2024 by the Honourable Justices S Chesiwe and M Opperman in dismissing the applicant's interlocutory application for leave to file a supplementary replying affidavit with costs on Scale C, is set aside.

2. The main application under case no. 5403/2022 is removed to the Gauteng Local Division of the High Court of South Africa, in terms of the provisions of Section 27(1) of the Superior Courts Act, 10 of 2013.

3. The Registrar is directed to transmit a copy of this order to the Registrar of the Gauteng Local Division, Johannesburg.
4. Costs of this application to be in the cause.

JUDGMENT

Reinders, J

[1] Section 27 of the Superior Courts Act 110 of 2013 directs if any proceedings have been instituted in a Division and it appears to court that such proceedings should have been instituted in another Division, then that court may upon application order such proceedings to be removed to that Division.

[2] It is common cause that the applicant instituted a self-review application in this court under the above case number (the main application). It is common cause that the first respondent opposed such application. Ultimately on 29 July 2024 a bench constituting two judges of this Division concluded that this Division lacks jurisdiction and ordered the matter to be removed from the roll with costs to be in the cause.

[3] The applicant by way of notice of motion now moves for an order that this matter be removed to the Gauteng Local Division of the High Court and that the Registrar be directed to transmit a copy of this order to the Registrar of the Gauteng Local Division, Johannesburg in compliance with Sec 27(2) of the Superior Court Act. The first respondent has no objection to such an order. There would appear to me to be no reason therefore why these orders should not be granted.

[4] The matter however came before me sitting as a single judge. From the papers it can be gleaned that when the matter was heard on 29 July 2024 an application served before court to file a supplementary replying affidavit (for ease of reference the interlocutory application). Argument was heard before that court and that application was dismissed with costs on scale C (the interlocutory order). Thereafter the main application was removed from the roll as the court found it had no jurisdiction to entertain it. The applicant seeks an order from me rescinding or varying the first order dismissing its application to file a

supplementary replying affidavit. The first respondent opposes the application for rescission and/or variation.

[5] The applicant's argument really boils down thereto that, although the court sitting on 29 July 2024 had no jurisdiction to entertain the matter, it did make an order which stands until set aside and that I am en clothed with jurisdiction to set aside or vary that order so that it will place the trial court in Gauteng in a position to reconsider that application and to adjudicate upon it afresh. The first respondent's view is that the determination of whether the court should permit or deny the filing of a supplementary replying affidavit is a procedural determination which is a competent exercise of the court's powers and forms part of the inherent jurisdiction that this court has to regulate its own proceedings. Consequently, the first respondent prays that the relief for variation or rescission should be dismissed with costs, resulting therein that the order dismissing the filing of a further affidavit, should stand when the Gauteng Division adjudicate on the then transferred main application.

[6] It is evident that the parties are not in agreement in respect of the status of the impugned order of 29 July 2019 dismissing the interlocutory application. In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others*¹ it was held by the Supreme Court of Appeal that an order given where the court has no jurisdiction is a nullity and does not require to be set aside - it could simply be ignored. These principles were affirmed by the majority of the Constitutional Court in *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute*² as follows:

"In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others*... the Supreme Court of Appeal, reaffirming a line of cases more than a century old, held that judicial decisions issued without jurisdiction or without the citation of a necessary party are nullities that a later court may refuse to enforce (without the need for a formal setting aside by a court of equal standing). This seems paradoxical but is not. The court, as the font of legality, has the means itself to assert

¹ *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA).

² *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014(3) SA 481 (CC).

the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help.”³

[7] The majority of the Constitutional Court in *Department of Transport v Tasima (Pty) Ltd*⁴ however regarded the finding in *Motala* to be “...a far cry from the inference that any court order that is subsequently found to be based on an invalid exercise of public power can be ignored...”⁵ and adopted a different approach. The work of Erasmus Superior Court Practice⁶ summarises the position as follows: “In summary, the majority held that under s 165(5) of the constitution (a) a court order is binding until set aside irrespective of whether it was valid (b) judicial orders wrongly issued were not nullities but existed in fact and might have legal consequences; and (c) whether the order was enforceable depended on whether the judge had the authority to make the decision at the time that the order was made.”

[8] In *Motala* the court dealt with a court order which is a nullity, whereas in *Tasmina* the court order was invalid. Recently in *Municipal Manager OR Tambo District Municipality v Ndabeni*⁷ the Constitutional Court did not deem it necessary to pronounce on the ostensible tension between the aforementioned two decisions as the court order was lawfully issued by a properly constituted court having jurisdiction.

[9] The court on 29 July 2024 expressed its concern, having adjudicated on the interlocutory application, whether it ought not have considered the question on jurisdiction first before adjudicating any further. Had it done so, it would not have made the order dismissing leave to file a further replying affidavit. Included in the order is a directive which will allow the taxing master to tax the costs on Scale C. Should the order not be set aside, the taxing master would not be in a position to ignore the order as being null and void but will have to comply therewith. It might lead to an appeal by the applicant to have the order set aside. It seems to me therefore practical and legally sensible to set the record straight and transfer the matter to Gauteng as if the matter never came before this Division. The impugned order was made in this Division and it is common cause that this Division had no jurisdiction to adjudicate thereon. I align myself with the view expressed by Schoeman AJA

³ at para [103 footnote 78].

⁴ *Department of Transport v Tasima (Pty) Ltd* 2017(2) SA 622 (CC).

⁵ At para [197].

⁶ Third Ed at D-179.

⁷ *Municipal Manager OR Tambo District Municipality v Ndabeni* [2022] 5 BLLR 393 (CC).

in *Travelex v Maloney*⁸ that should the parties not agree on the status of the impugned order where a court lacked jurisdiction, it should be rescinded and the usual requirements for a rescission application in terms of the common law or Rule 42, do not apply. In my view the presiding judge hearing the matter in the Gauteng Division should have an unblemished review application before it and make the unfettered decisions it deems fit without being bound by orders of a court which did not have the necessary jurisdiction to entertain the matter. It is this division that should in the most inexpensive and expeditious way set the order of 29 July 2024 aside. I have considered the question as to costs and have concluded that the costs of this application should be costs in the cause.

[11] In the result I make the following order:

11.1 The order granted on 29 July 2024 by the Honourable Justices S Chesiwe and M Opperman in dismissing the applicant's interlocutory application for leave to file a supplementary replying affidavit with costs on Scale C, is set aside.

11.2 The main application under case no. 5403/2022 is removed to the Gauteng Local Division of the High Court of South Africa, in terms of the provisions of Section 27(1) of the Superior Courts Act, 10 of 2013.

11.3 The Registrar is directed to transmit a copy of this order to the Registrar of the Gauteng Local Division, Johannesburg.

11.4 Costs of this application to be in the cause.


C REINDERS, J

⁸ Unreported judgment of the Supreme Court of Appeal case no 823/2015 (dated 27 September 2016) at para [16].

Appearances:

On behalf of the Applicant:

Instructed by:

Adv M. Makgato and Adv V. Qithi
Phambane Mokone inc
c/o Symington & De Kok Attorneys
BLOEMFONTEIN

On behalf of the First Respondent:

Instructed by:

Adv A.J Tjoksie SC
Tiefenthaler Attorneys
c/o Honey Attorneys
BLOEMFONTEIN