



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
<u>04 March 2026</u>	 SIGNATURE
DATE	

APPEAL CASE NO: A52 / 2024

In the matter between:

MBOMBELA MUNICIPALITY

APPELLANT

And

NTOMBIZODWA EMMA MASEKO

FIRST RESPONDENT

TENKO PRODIPIX JV

SECOND RESPONDENT

GUTSHWA TRADITIONAL COUNCIL

THIRD RESPONDENT

STATION COMMANDER:

FOURTH RESPONDENT

KABOIKWENI POLICE STATION

MASTER OF THE HIGH COURT**FIFTH RESPONDENT*****CORAM: RATSHIBVUMO AJP & NOBANDA AJ***

JUDGMENT

Delivery: This matter was heard on 20 February 2026, and judgment was reserved. This judgment was delivered by uploaded to *CaseLines* on 04 March 2026.

RATSHIBVUMO AJP:**[1] Introduction.**

This is an appeal against a decision and/or decisions of the Regional Court, Mpumalanga, sitting in Mbombela (the court *a quo*). At the centre of the appeal is the question of whether the Magistrate's Court can revive a lapsed *rule nisi*. The tiptoeing skills of the appeal court are put to the test in that the temptation to divert into issues not raised on appeal appears near irresistible. The reason for this is that although the merits of the case are glaring, the court *a quo* did not engage them, and they were not ventilated on appeal.

[2] Background.

On 19 May 2023, the First Respondent, acting in her representative capacity as the executor of the deceased's estate, approached the court *a quo* on an *ex parte* application, which was heard and granted on an urgent basis. The court *a quo*, per Regional Magistrate Khumalo, granted a *rule nisi* order, *inter alia*, interdicting the Appellant from entering, building on, or developing the piece of tribal land allocated by the Third Respondent to the deceased for

occupation. The order further called upon the Appellant and the Second to the Fifth Respondents to show cause as to why the order should not be made final. Only the Appellant filed the opposing papers and even anticipated the return date.

[3] In the opposing papers, the Appellant raised several points *in limine*, including a lack of urgency and whether the First Respondent made a case for the *ex parte* application being justified. The Appellant also disputed that the First Respondent and/or the deceased owned the land in question.

[4] On the return date, several points *in limine* raised by the Appellant were dismissed. It, however, became necessary, as the matter was argued, for the court to conduct an *inspection in loco*, as the parties might be arguing over a different piece of land. The court *a quo* postponed the matter as a partially heard application to 01 August 2023, to conduct an *inspection in loco* together with the parties. On the appointed date, only the legal representatives were present, as the Regional Magistrate, seized with the application, was not in. He was able to send a message indicating his predicament for that day and that the parties should arrange a new date for conducting an *inspection in loco*.

[5] The First Respondent's legal representative, Mr. Maseko, left the court to attend to other commitments that he discussed with the Appellant's legal representative, Mr. Rachidi. His understanding was that Mr. Rachidi would stand in for him to have the *rule nisi* extended to 04 August 2023. What happened next is very concerning from a professional ethics standpoint. Mr. Rachidi confirmed that Mr. Maseko had made this request to him but denied having acceded to it. According to him, he only takes instructions from his client, and when he later reached out to the client, who instructed him to

oppose the extension of the *rule nisi*, he had to oblige. Even if this version is accepted as is, it is worrying that Mr. Rachidi took no steps to inform Mr. Maseko of the client's instructions, which negated his request, as he had already left. The outcome of the case was not even conveyed to Mr. Maseko.

[6] It was only on 04 August 2023, when Mr Maseko attended court, that he learned that the matter had been struck off the roll the previous day, owing to his absence. He attempted to reach Mr Rachidi by telephone to understand why he did not carry out what they had agreed, but the calls went unanswered. From the record before us, it does not look like the magistrate was aware that the matter was a partially heard application before another magistrate. With the matter struck off the roll, the *rule nisi* also lapsed.

[7] An urgent application was launched on *ex parte* basis for the reinstatement of the lapsed *rule nisi*. This application was opposed by the Appellant. The main reason for the opposition was that the Magistrates' Court lacked the jurisdiction to revive a lapsed *rule nisi*. Other reasons were added to the main one, including the points *in limine* that were raised in the main application.

[8] The reinstatement application was argued before the same Regional Magistrate who was seized with the main application when it was adjourned for *inspection in loco*. After the legal representative for the First Respondent had provided a case law to his opponent, the Appellant's legal representative, the latter made a concession and admitted that the Magistrates' Court had the necessary jurisdiction to revive a lapsed *rule nisi*. With this concession, the court *a quo* proceeded to reinstate the lapsed *rule nisi*, thereby reviving the original *rule nisi*. The matter was then postponed for further hearing in the main application. It was further agreed that on that day, the court would conduct the *inspection in loco*.

[9] Instead of visiting the disputed land for the *inspection in loco*, the presiding officer was informed on the return date that the Appellant intended to appeal against the decision reviving the lapsed *rule nisi*. He postponed the matter to 31 January 2024, to allow the Appellant to file the request for reasons in accordance with Rule 51(1) of the Magistrates' Court Rules (Rule 51(1)).

[10] On 31 January 2024, a different legal practitioner, Adv Mzimba, appeared for the Appellant. He told the court that his instructions were only to request a postponement, as the Appellant had by then filed a notice in terms of Rule 51(1). At this stage, it was apparent that the Appellant sought to postpone the matter pending the appeal process in respect of the decision to revive a lapsed *rule nisi*. He emphasised that if the court were to continue hearing the main application (the application to confirm *the rule nisi* granted on 19 May 2023), he would not take part, as he had no further instructions.¹

[11] This did not stop the court from inquiring from Adv Mzimba if the decision to conduct the *inspection in loco* would then fall away in light of the developments, to which the counsel indicated that his instructions were that the Appellant wanted the reasons for the decision. When pressed whether the *inspection in loco* would therefore no longer be necessary, he responded, "I guess so."² With this response, the court was ready to proceed to hear the case on the merits without conducting the *inspection in loco*. It was, however, forced to postpone the matter due to the lateness of the hour.

[12] On 04 April 2024, a certain Mr. Mashele appeared for the Appellant with instructions to request a postponement for Mr. Rachidi, who had since fallen ill, to be present. The court refused that request. The First Respondent's legal representative proceeded to address the court on the merits, and the court

¹ See p. 275-243 to 075-244 on Court Online bundle.

² See p. 275-248 on Court Online bundle

granted an order confirming the *rule nisi* without giving a judgment or reasons for the order. Shortly thereafter, the concerned magistrate retired.

[13] Approach to interlocutory appeals.

The application and the decision to revive the *rule nisi* were treated as interlocutory to the main application. This is apparent from the fact that the application to revive was brought under the same case number as the matter that was struck off the roll, and the original application was referred to as the main application.

[14] This question is relevant because it guides the conduct of proceedings once an appeal is lodged. The treatment of appeals against the interlocutory rulings depends on the hierarchy and the standing of the court whose decision is being appealed. If that court is a High Court, the first step would be to apply for leave to appeal. In granting or refusing leave, the court must consider whether the interlocutory decision is appealable.

[15] In *Cloete and Another v S; Sekgala v Nedbank Limited*³ the Constitutional Court said,

““In any event, this Court has held that in considering whether to grant leave to appeal, it is necessary to consider whether “allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs”. Similarly, in TAC 1 (*Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (5) SA 703 (CC) para 9.), this Court stated that “it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance”. This is one of the main reasons why interlocutory orders are generally not appealable while final orders are.’

³ *Cloete and Another v S; Sekgala v Nedbank Limited* [2019] ZACC 6; 2019 (5) BCLR 544 (CC); 2019 (4) SA 268 (CC) para 57.

[16] Just because an order is interlocutory is not decisive as to its appealability.

A judgment or order is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief.⁴

[17] In *City of Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd and Others*⁵, the High Court had found urgency in the application and granted an order to the effect that ‘pending the hearing of the second part of the application, the first respondent was ordered to restore electricity and/or water supply to the applicant’s property within 14 days of the order.’ On appeal, the court outlined the criteria for appealability, emphasising that the High Court's order had a final effect and was definitive of the parties' rights. The interests of justice were considered, leading to the conclusion that the order was indeed appealable.

[18] When the parties apply for a leave to appeal an interlocutory order, the trial court is bound to consider the *Zweni* triad referred to above in deciding whether to grant leave.

[19] When the appeal is against the decision of a Lower Court, the approach is different because the appellant has an automatic right to appeal. The trial court cannot even consider the appealability of its judgment or whether the *Zweni* requirements have been met. It is for the appeal court to weigh such and dismiss the appeal if they are not met, or uphold the appeal when the

⁴ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

⁵ 2024 (6) SA 159 (SCA). These requirements were quoted with approval by the Constitutional Court in *Cloete and Another v S; Sekgala v Nedbank Limited supra*, at para 39.

interests of justice permit. In essence, what the trial court does when a litigant initiates the steps to appeal, as the Appellant did *in casu*, is to postpone the matter pending the outcome of the appeal.

[20] What the court *a quo* did was to proceed with the hearing without considering the Appellant's version, thereby denying it the *audi*. Without judgment or reasons for the order, one cannot tell whether, when confirming the *rule nisi*, the answering affidavit was taken into account, or to what extent or how the court dealt with the issue of the *inspection in loco*, which it had once ruled to be necessary. It suffices to say the court *a quo* considered a *rule nisi* after closing the door for the Appellant, who was already on record opposing the application by the First Respondent. This was irregular.

[21] The authority to revive a lapsed *rule nisi*.

The challenge against the Magistrates' Court's authority to revive a *rule nisi* after it has lapsed following its striking from the roll loomed large in this appeal. It is the sole ground of appeal that is still standing. Since the appeal was lodged after the *rule nisi* was confirmed, the Appellant also appealed against the final order made by the court *a quo*. When the presiding judicial officer was asked for reasons for the judgment, the *rule nisi* had not yet been confirmed. No further request was made after the *rule nisi* was confirmed.

[22] The concession made by the Appellant before the court *a quo* was that the Magistrates' Court was authorised to revive a lapsed *rule nisi*. Interestingly, no reference is made to that concession on appeal by the Appellant.

[23] Rule 31(2)(a)(ii) of the Magistrates Court Rules provides,

“Where an action, application or a matter has been struck off the roll due to the non-appearance of the parties on the date of trial or hearing, the request must be

accompanied by an affidavit setting out the reasons for the non-appearance and for the reinstatement of the matter.”

[24] This Court was referred to the judgment by the full bench of the Western Cape, where in *Turner and Another v Ntintelo and Another*⁶ this rule was scrutinised. In that case, a *rule nisi* had been granted, but the case was later struck off the roll, thereby lapsing the *rule nisi*. The appellant argued that Rule 31(2)(a)(ii) did not empower the Magistrates’ Court to revive the lapsed *rule nisi*.

[25] In analysing this argument, Lekhuleni J and Adams AJ relied on *Jojwana v The Regional Court Magistrate Mr Mene*⁷ which was decided before Rule 31 was amended in 2021⁸. In *Jojwana*, the court found that, to the extent that there is no express provision in the rules for the striking of matters from the roll or removal of matters already set down for trial, rule 31 must be interpreted to have impliedly included removals and striking off. The full bench agreed with those sentiments, saying “[I]n our view, in addition to the reinstatement of cases envisaged in rule 31(2)(a)(ii), the rule must be interpreted to have impliedly envisaged the applications for the revival or reinstatement of lapsed interim orders when reinstatement applications are made.”⁹

[26] The court of appeal concluded with the following words that find application to the case before us,

“It must be stressed that the application was not dismissed but was removed from the roll. The difference between striking a matter off the roll and dismissal is that in the case of dismissal, the matter is disposed of and can no longer be set down on the roll again. If the applicant wishes to proceed with the matter, he would have to start the matter *de novo*.

⁶ A 248/22 [2023] ZAWCHC 51 (8 March 2023).

⁷ 2019 (6) SA 524 (ECM).

⁸ Prior to the 2021 amendment, Rule 31(2) provided, “[W]here an adjournment or postponement is made *sine die*, any party may by delivery of notice of reinstatement set down the action, application or matter for further trial or hearing on a day generally or specially fixed by the registrar or clerk of the court, not earlier than 10 days after delivery of such notice.

⁹ See *Turner supra* at para 55.

While on the other hand, striking of a matter off the roll has nothing to do with the merits of the case. It is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for reinstatement. *Skhosana and Others v Roos t/a Roos se Oord and Others* 2000 (4) SA 561 (LCC) at para 19.”¹⁰

[27] We share the court's sentiments in *Turner*. The argument that the Magistrates' Courts lack jurisdiction to revive a lapsed *rule nisi* has no basis in law. An argument to the effect that the Magistrates' Courts are creatures of statutes and, as such, cannot regulate their own processes is a misdirection in the circumstances of this case. An appeal on the basis that the Magistrates' Court did not have the jurisdiction to revive the lapsed *rule nisi* stands to be dismissed as it flies in the face of Rule 31(2)(a)(ii) of the Magistrates' Court Rules. Unfortunately, this finding does not dispose of this appeal altogether.

[28] Having considered this jurisdictional aspect in favour of the First Respondent, the question remains as to what should happen to the *rule nisi*. There are issues raised in the Appellant's answering affidavit that are yet to be considered by the court in determining whether to confirm or to discharge *rule nisi*. The decision by the court *a quo*, without hearing the Appellant's version, was unjustified and irregular. There was no substantial harm to be suffered by anyone, in particular, the First Respondent, if the appeal in the interlocutory decision was to be allowed to run its course, since *rule nisi* was already granted.

[29] In all fairness to all parties and for practical reasons, the merits of the *rule nisi* application still need to be considered by the court. These merits cannot be considered by this Court as they were not even before the court *a quo*. We are of the view that the proper remedy is to allow the merits of the application. i.e. the

¹⁰ See *Turner supra* at para 62.

confirmation of the *rule nisi*, to be considered the same way it would have been had the court *a quo* postponed it, pending the outcome of the appeal.

[30] Costs.

Since both parties scored some success in this appeal, it is fair for each party to pay its own costs. This should also apply to the reserved costs of 07 February 2025.

[31] The Order.

The following order is made:

31.1 The Appeal is upheld.

31.2 The Magistrate's decision dated 04 April 2024 is set aside and replaced with the following:

31.2.1 The application is postponed *sine die*, pending the outcome of the appeal.

31.2.2 *Rule nisi* granted 19 May 2023 is extended until the date of the outcome of the appeal.

31.3 Parties are directed to, within 60 days from the date of this judgment, set the matter down for the hearing of the main application, before a different Magistrate, at the Regional Court, Mbombela, which date shall be within 90 days from the date of this decision.

31.4 *Rule nisi* is extended for 90 days from the date of this judgment, or such earlier date that the application may be set down to.

31.5 No order as to costs.


TV RATSHIBVUMO

ACTING JUDGE PRESIDENT

I agree.


PL NOBANDA

ACTING JUDGE OF THE HIGH COURT

FOR THE APPELLANT:

ADV. TP KRUGER SC

INSTRUCTED BY:

RACHIDI INC

MBOMBELA

FOR THE 1st RESPONDENT:

MR. MP MASEKO

INSTRUCTED BY:

MP MASEKO INC

MBOMBELA

DATE HEARD:

20 FEBRUARY 2026

DATE OF JUDGMENT:

04 MARCH 2026