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IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO.: 10268/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

_____ 11/05/2026
SIGNATURE DATE

In the matter between:

IHAWU FIREARM CENTRE CC

APPLICANT

AND

THE MINISTER OF POLICE N.O.

FIRST RESPONDENT

COLONEL J.M. MOTHLE N.O.

SECOND RESPONDENT

**THE ACTING MAGISTRATE: J.A. MTSWENI
MAGISTRATES' COURT MODIMOLLE N.O.**

THIRD RESPONDENT

DELIVERED:

11 MAY 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be 11 MAY 2026 at 16:00.

Date heard:

15 APRIL 2026

Coram:

NGOBENI J

JUDGMENT

NGOBENI J

[1] The applicant is IHAWU Firearm Centre, a Close Corporation duly registered in terms of the Company Laws of this Country, with its principal place of business at 1[...] E[...] Road, New Germany, Kwa-Zulu Natal, from where it trades as IHAWU FIREARM CENTRE, with dealer number 100084, and has been licensed and registered to deal with firearms.

[2] The first respondent is the Minister of Police N.O., cited in his official capacity as the political functionary responsible for the South African

Police Service (SAPS), in the Republic of South Africa, Pretoria, with his last known address at [...] W[...], 2[...] P[...] Street, Pretoria.

- [3] The second respondent is Colonel Mothle N.O. cited herein in his official capacity as the member of SAPS, with his address at Polokwane Directorate Priority Crime Investigations (DPCI), with his address in Polokwane DPCI offices.
- [4] The third respondent is the Acting Magistrate at Modimolle Magistrates' Court, (he is described as the Additional Magistrate on the search and seizure warrant) cited in his official capacity as the judicial officer who purportedly issued a search and seizure warrant in terms of sections 20 and 21 of the Criminal Procedure Act¹, (CPA), as well as in terms of section 29(1)(a) of the Cybercrimes Act²,(CA).
- [5] On 08 August 2024 the premises of Nkwe Wildlife & Security Services were searched by the police led by second respondent on the basis of the search and seizure warrant which was issued by the third respondent, and firearms and ammunition were seized at the said premises. The applicant following the search and seizure of the firearms and ammunition, launched an urgent application to have its firearms and ammunition returned under case number 9463/2024 (I will also refer to it

¹ 51 of 1977.

² 19 of 2020.

as the withdrawn application for easy reference). On 12 September 2024, the said urgent application was however withdrawn by a notice which was served on the respondents and also removed from the roll of the urgent roll.

[6] The basis for the withdrawal of the application as the applicant submits, was that the applicant was not shown the search and seizure warrant when the arms and ammunition were seized, and the applicant only knew about the existence of same from the answering affidavit of the first and second respondents (respondents). The applicant subsequently issued a new application, under this current case number, 10268/2024 for the return of the said firearms and ammunition, and that urgent application was struck off the roll by Mashamba AJ for lack of urgency on 04 October 2024.

[7] The matter was after being struck from the roll allocated the date on the opposed roll, on 15 April 2026. The respondents started by bringing an application before the court for leave to file a supplementary affidavit, which application was not opposed, and the court eventually granted the respondents leave to file that supplementary affidavit. The contents of that supplementary affidavit are not relevant to what this court has to decide in the instant proceedings.

[8] In the current proceedings the respondents raised an issue that the court cannot proceed with the main application because case number 9643/2024 is still pending. The argument by the respondents is that even though the applicant filed a notice of withdrawal, the matter was already set down and as the respondents never consented to the withdrawal, and the applicant did not approach the court for leave to withdraw to be granted to it, that case is still pending.

[9] In issue between the applicant and the respondents is as to whether case number 9643/2024 is still pending or not because the consent of the respondents was not given and the court has also not given leave for such withdrawal.

[10] The withdrawal, settlement, discontinuance, postponement and abandonment of proceedings are governed by Uniform Rule (Rule/s) 41. Rule 41 reads as follows:

41. Withdrawal, settlement, discontinuance, postponement and abandonment

" (1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which

events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a) shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.

(2) ...

(3) ...

(4) ... "

[11] The court was referred to the case which upon perusal, I believe deals with the doctrine of *lis alibi pendens* extensively, being the case of *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite CC*³ (Caesarstone case), and on paragraph 2 of the judgment the Supreme Court of Appeal (SCA) said the following:

"As its name dictates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated

³ (741/12) [2013] ZASCA 129 (26 September 2013).

between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions”

[12] In dealing with the point *in limine* raised by the respondents in the case at hand, the applicant submits that after the notice of withdrawal was served on the respondents there has not been any positive conduct from the respondents. The respondents did not react to the notice of withdrawal. There was no issue that was raised by the respondents pertaining to that notice of withdrawal, up until now that the issue is raised by the respondents in the current proceedings. The further submission by the applicant is that when the matter was removed it was removed from the urgent roll, and when the notice of withdrawal was filed there was no date yet for the application to be heard on the opposed roll.

[13] The respondents amongst the cases they referred the court to, quoted the case of *Bondev Midrand (Pty) Ltd v Madzie and Others*⁴, which states that in terms of Rule 41(1)(a), a withdrawal cannot occur unilaterally once a matter has been set down, and that this applies to both opposed

⁴ 2017(4) SA 166 (GP) (19 December 2016)

and unopposed matters by virtue of the plain language of the rule that applies in general terms to all proceedings.

[14] In the *Ceasarstone* case, *supra*, the court quoted on paragraph 3 of the judgment, the Writings of Johannes Voet on 'The Exception of Res Judicata' on the identifying features to determine if the suit is pending before another court as follows:

"... Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once taken up is also the place where it ought to be given its ending"

[15] In *Nestle (South Africa) (Pty) Ltd v Mars Inc*⁵ (*Nestle case*), Nugent AJA said the following:

"... Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens)".

[16] It is so that once the matter is set down for hearing, it cannot be unilaterally withdrawn just by notice if the consent of the respondent is

⁵ 2001 (40 SA 542 (SCA)).

not sought, and in the absence of consent from the respondent, leave must be sought from the court⁶.

[17] In the case at hand, the respondents did not react to the notice of withdrawal of the application under case number 9643/2024. The court did not see the said notice of withdrawal in the papers filed, and I therefore do not know as to whether the applicant tendered costs or not. When the court was addressed on this point *in limine*, the legal representative of the respondents informed the court that they are not interested in costs. It therefore becomes difficult for this court to determine the basis of the objection by the respondents of the withdrawal of case number 9643/2024. What remains though is that in the absence of the consent from the respondents, the applicant should have approached the court as required by Rule 41(1)(a) and seek such leave to withdraw the application.

[18] The answering affidavit of the respondents in this proceedings has been filed, and on paragraph 22, deals with the withdrawn application. Paragraph 22.2 reads as follows:

"The failure to cite a party in motion proceedings does not warrant the withdrawal of an application. The applicant ought to have supplemented

⁶ Brondani v Brondani (2021).

its papers by seeking an urgent relief joining the Third Respondent to the proceeding (sic). Therefore, if it is accepted by the honourable court that the Applicant has withdrawn its previous application, it is submitted by the First and Second Respondents that by withdrawal of the application the Applicant has withdrawn the application in its entirety including the cause of action as alleged in the papers”

[19] This court has the inherent jurisdiction to make orders that will bring cases to finality where appropriate. This case at hand is in my view one of those cases that would warrant this court to make such an order to take the matter forward. This court is however unable to make such an order because of the response of the respondents in their answering affidavit, which in my view might raise the special plea of *res judicata*. I will therefore allow the applicant to deal with case number 9643/2024 in the manner that it would deem fit.

[20] The silence of the respondents however, after the notice of withdrawal was served is something that must be frowned upon, because had the respondents reacted, I believe that the issue would have been dealt with appropriately. As it stands now, the applicant has not complied with the provisions of Rule 41(1)(a) in as far as seeking leave from the court is concerned, and I find that the withdrawal of case number 9643/2024 is therefore not valid.

[21] The conduct by the respondents has delayed the adjudication of this matter, and for that reason, I will order that each party bear its own costs. The applicant requested that this court makes an order that a preferential date be allocated by the office of the Judge President because of the delay caused in dealing with this case. I'm inclined to agree to that request for the reasons that I have already outlined above.

[22] In the result the following order is made:

- (i) the point *in limine* raised by the respondents of *lis alibi pendens* is upheld,
- (ii) the court makes an order that the applicant is hereby permitted to make an application to the office of the Judge President of this division for a preferential date due to the delays encountered in adjudicating case number 9643/2024,
- (iii) this case, 10268/2024, is stayed pending the final determination of case number 9643/2024.
- (ii) each party to pay its own costs.

J.T. NGOBENI

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant:

Adv. N. Jagga

Instructed by:

Kotze Low Swanepoel Attorneys

For the 1st and 2nd respondents:

Adv. M.G. Senyatsi

Instructed by:

State Attorney Polokwane

For the 3rd respondent:

No appearances

Date heard:

15 April 2026

Date delivered:

11 May 2026