REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

CASE NO: 19506/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 4 December 2023

In the matter between:

ST. JANES DE CHANTAL HOME	**First Applicant**
JOSEPHINE SMITH	**Second Applicant**
HANNAH KITELE	**Third Applicant**
and	
ANDREW WILLIAM SIMAAN	**First Respondent**
JANES HAVEN CHILDREN'S HOME	
a.k.a JANES HAVEN CHILDREN'S VILLAGE	**Second Respondent**
WEBBER WENTZEL ATTORNEYS	**Third Respondent**
TSHEGOFATSO CLAUDETTE PHALA	**Fourth Respondent**

ALEXANDER WILLIAM PULLINGER	**Fifth Respondent**
CHIARA VAN INGEN	**Sixth Respondent**
CAITLYN VAN RENSBURG	**Seventh Respondent**

JUDGMENT

DE VOS AJ

[1] On 17 August 2023, I removed a matter from the roll and granted an order that the Deputy Judge President's office appoint a case manager. The applicants seek leave to appeal against the removal of the matter from the roll and the referral of the matter for the appointment of a case manager.

[2] The applicants did not appear for the hearing of the application for leave to appeal. The applicants were aware of the date for the application for leave to appeal and received the set down as well as the link for the online hearing. On 1 December 2023, the day of the hearing, the applicants did not appear on the online platform. I stood the matter down, and my clerk sent another mail to the applicants reminding them of the hearing. The applicants did not attend Court.

[3] The application for leave to appeal is brought on a notice of motion and affidavit. In addition, the affidavit contains new matter in the context where the respondent is not procedurally entitled to file an affidavit to dispute this new matter. This is irregular and prejudicial to the respondents.

[4] The absence of the applicants on the day of the hearing, combined with the irregular application for leave to appeal, would be enough to strike the application for leave to appeal from the roll. I have, however, in light of the history of the matter, decided to follow a belt and braces approach.

[5] The application which served before this Court is titled as one in terms of "Rule 30, 42 and 47(3)". It is an interlocutory application in the context of an application launched by the respondents to declare the applicants vexatious litigants (the main proceedings). Justice Kubushi was appointed as case manager in the main proceedings. Between 2017 and 2023, Justice Kubushi repeatedly directed that no new applications may be launched by the parties, no matters between the parties may

be advanced, and no matters may be set down other than those already set down. Justice Kubushi also ordered that matters be heard together. The directives of Kubushi J still stand.

[6] The purpose of the directives was to prevent a proliferation of litigation whilst the main proceedings were continuing. For context, it appears that the parties have been involved in litigation for more than 11 years and that case lines show nine different cases (with separate case numbers) in the broader litigation saga between the parties.

[7] On 20 February 2023, Justice Janse van Niewenhuizen removed another matter from the roll, involving the same parties and related to the relief sought before this Court, and ordered the applicants to comply with the directives of Kubushi J.

[8] In breach of the directives and the order of Janse van Niewenhuizen J, the applicants launched the present application. The respondents delivered a notice in terms of Rules 30 and 30A objecting to a previous set-down of the application as it is in contravention of directives made by Justice Kubushi.

[9] In breach of the directives of Kubushi J, the order of Van Niewenhuizen J, and disregarding the rule 30 application, the applicants set down the application which served before this Court.

[10] The directive of Kubushi J prohibited the parties from taking steps to advance any of the other matters and so the respondents did not file any papers opposing the relief sought by the applicants. The Court could not have entertained the matter in circumstances where the respondents had not placed their version before the Court in compliance with a court directive. The matter was not ripe for hearing and had to be removed from the roll.

[11] There are no prospects of another court finding that the matter should not have been removed from the roll where the applicants launched proceedings in breach of court directives and a court order. Similarly, I do not believe there are prospects of success of another court finding the matter ought to have proceeded in circumstances where the respondents did not file an answering affidavit as they were bound by the directive of Kubushi J.

[12] In addition, the applicants accept, it appears in their application for leave to appeal that the decision to remove the matter from the roll was appropriate. The allegation is

that "If her Ladyship had decided that the application ought to be removed from the Opposed roll, that was sufficient."[1] It cannot be in the interest of justice to grant leave to appeal against an order which the applicant contends is sufficient.

[13] The true issue in the application for leave to appeal appears to be that the Court referred the matter for the appointment of a case manage. The matter is already subject to case management, and the order provided for the appointment of a new case manager, as Kubushi J was unavailable to manage the case at the time of the hearing.

[14] The applicants' application for leave to appeal is at odds with its own notice of motion. The applicants sought, as relief from this Court, that the matter be referred to case management, albeit under Rule 37A. The order which the applicants now seek leave to appeal against is relief which the applicants sought from the Court. In these circumstances, it would not be in the interest of justice to grant leave to appeal.

[15] For all these reasons, the application for leave to appeal stands to be dismissed.

[16] There is another aspect I wish to address. The applicants have sought reasons for the removal of the matter from the roll and referring the matter to the appointment of a case manager. The reasonableness of the request for reasons must be seen in the context of the full background of this matter.

[17] The starting point is the vexatious application launched by the respondents against the applicants in March 2017 (the main proceedings). On 23 June 2017, Justice Kubushi issued the first relevant directive. The directive indicates -

> "no old or new matters involving the relevant parties may be advanced or set down except for that which had already been set down for hearing pending the case management process".

[18] On 10 October 2017, Justice Kubushi had to reiterate the position and indicated to the parties that the directive of 23 June 2017 stands until further notice, and parties are urged to desist from filing further pleadings in all cases under case management. On 24 July 2019, Justice Kubushi issued a further directive confirming that the directives still stand.

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[1] See CL 3.18-16 para 9.24.

[19] On 25 March 2020, Justice Kubushi granted an order that all matters relevant to the main application "are to be enrolled for hearing on the same day." These four communications from the Court (two directives, one communication and one order) intended to streamline the case and limit the proliferation of applications.

[20] In breach of these, the applicants launched an interlocutory application seeking, amongst others, security for costs ("the July 2020 application"). On 29 January 2021, the applicants set down the July 2020 interlocutory application on the unopposed motion roll. On 24 and 25 February 2021, Kubushi J reiterated her directives in email correspondence. This was the fifth clear communication from the Court that the applicants must not institute further proceedings.

[21] In a second breach of these directives, on 26 February 2020, the applicants launched the present application. On 12 April 2021, the present application was set down for hearing on 3 May 2021 and 7 November 2022. The applicants removed the matter on both occasions.

[22] In a third breach, on 6 December 2022, the applicants launched a further interlocutory application seeking default judgment premised on the present application ("the default judgment application"). On 16 January 2023, the applicants set down the default judgment application on the opposed motion roll of 20 February 2023.

[23] On 30 January 2023, the Deputy Judge President advised that the matter was being case-managed by Judge Kubushi and she could be contacted. At this stage, Justice Kubushi J had ordered, directed and communicated clearly to the applicants to desist in their proliferation of matters, and the Deputy Judge President had communicated the position to the applicants.

[24] This did not halt the applicants. The applicants persisted with the default application. On 20 February 2023 served before Justice Janse van Niewenhuizen. Judge Janse van Niewenhuizen granted an order removing the matter from the roll and ordered the applicants to comply with Kubushi J’s directives.

[25] On 23 March 2023, Judge Kubushi advised that all matters should be referred back to the Deputy Judge President to be allocated to another Judge for case management.

[26] Despite this communication, on 28 March 2023, the applicants set down the present application for hearing on 2 May 2023. On 12 April 2023, the respondents filed their

Rule 30A application to the set down of the present application. On 17 April 2023, the parties received correspondence from the offices of the Deputy Judge President advising that the matter would be discussed with Judge President Mlambo and dates for a meeting would be communicated thereafter.

[27] It is in this context, where the applicants were in breach of court orders and several directives, as well as several communications from the Office of the DJP, that the applicants requested reasons. The request for reasons was another breach of the directives of Kubushi J, and the order of Van Niewenhuizen J.

[28] The applicants were requesting reasons for the removal of an unopposed matter. The applicants were also fully aware that it was setting down the matter in breach of the directives of Kubushi J as the order of Janse van Niewenhuizen J removed the matter from the roll and directed that the applicants must comply with Kubushi J's directive.

[29] Worse, were the Court to provide reasons, it would be playing an active role in the applicants' breaches of court orders and the Court would itself be part and parcel of conduct which advanced the proceedings and proliferated the litigation. The Court could not be complicit in conduct that undermines several directives, an order of this Court, and the case management process to which the applicants have repeatedly been ordered by the Court to adhere.

[30] The purpose of the directives was to prevent unnecessary litigation. If the Court provided reasons, it would be undermining the effectiveness and purpose of the directives and court order. It would be untenable if the Court were entangled in an approach which undermines the directives and orders of other Justices of this Court. In these exceptional circumstances, the Court declined to provide reasons.

[31] Moreover, the matter was unopposed, as the respondents had not filed any opposing papers. The Court granted an order for the removal from the roll of an unopposed matter which is blatantly not ripe for hearing.

[32] However, even if I was wrong and I should have provided reasons, I set out the reasons for the removal of the matter from the roll.

[33] The Court removed the matter from the roll in circumstances where the applicants had set it down in breach of the court orders and directives set out above. Any order moving the matter forward would undermine these orders and directives. Also, the

respondents had not filed an answering affidavit, as the directives and orders prohibited the parties from advancing any further interlocutory matters. It would breach the respondent's right to a fair hearing if the matter were to continue. The matter was blatantly not ripe for hearing.

[34] The decision to refer the matter for the appointment of a case manager was taken in light of the applicant's request for such relief and a practical solution for the future management of the matter. The applicants, however, wished the Court to grant such relief in terms of rule 37A. An order for case management in terms of Rule 37A is not available to the applicants as the matter is already under case management. To continue with case management requires the appointment of a new case manager. This is the order the Court granted.

[35] For all these reasons, the matter was removed from the roll and referred to the Office of the Deputy Judge President for case management.

[36] I must consider the issue of costs. The respondents requested the Court to grant an order dismissing the application for leave to appeal with costs. The respondents include practitioners who have been briefed and instructed to appear against the applicants in previous litigation. They have had to come to Court to defend the application – despite the multiple directives and court orders prohibiting the applicants' conduct. In addition, at midnight the night before the hearing the applicants launched a Rule 30 application. The applicants in essence sought to declare the conduct of the court irregular. Rule 30 is available to declare the conduct of parties, not the Court, irregular. The application is irregular and vexatious. In these circumstances, I reserve the costs of this application.

Order

[37] As a result, the following order is granted:

a) The application is dismissed.

b) The costs are reserved.

I De Vos
Acting Judge of the High Court
Pretoria

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Applicants:	In person
Counsel for the respondent:	Advocate T Odendaal
Instructed by:	Webber Wentzel
Date of the hearing:	1 December 2023
Date of judgment:	5 December 2023