

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: YES/NO

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

(3) REVISED

DATE: 02 July 2024 SIGNATURE: [...]

CASE NR: 084568/2023

In the matter between:

P[...] M[...]

APPLICANT

and

S[...] H[...] P[...]

FIRST RESPONDENT

FIRST RAND BANK

SECOND RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 2 July 2024

JUDGMENT

MARUMOAGAE AJ**A INTRODUCTION**

[1] This is an opposed application for leave to appeal against the order (and the whole judgment) that was handed down on 27 November 2023. Before approaching this court for leave to appeal, the applicant directly applied for leave to appeal to the Constitutional Court. The Apex court dismissed the applicant's application with costs.

[2] The applicant also brought a condonation application for the late filing of her application for leave to appeal. As such, the court is called upon to decide whether to grant condonation. If condonation is granted, then determine whether a case has been made for the application for leave to appeal to be granted.

B CONDONATION

[3] The order (and the judgment) that the applicant seeks leave to appeal against was delivered on 27 November 2023. The applicant did not request leave to appeal at the time the judgment which incorporated the order was delivered. This is because the judgment was delivered virtually. In terms of Uniform Rule 49(1)(b), the applicant had fifteen (15) court days to bring her application for leave to appeal.

- [4] In terms of Uniform Rule 1, public holidays, weekends, and non-court days are not included in the computation of any time expressed in days prescribed in the Uniform Rules of Court. In 2023, the last day of term was 3 December 2023. In 2024, the first day of term was 22 January 2024. This means that the applicant had until 15 February 2024 to bring her application for leave to appeal to this court.
- [5] The applicant filed her application for leave to appeal on 19 February 2024. The applicant is under the impression that this application was late by 38 days. The applicant appears to be counting by including days when the court was in recess. Those days are not court days. This application for leave to appeal is only late by two days. This is because 17 and 18 February 2024 constituted a weekend.
- [6] The reason this application was brought late is that the applicant first approached the Constitutional Court for leave to appeal. The Constitutional Court dismissed her application on 19 February 2024.
- [7] The respondent opposes the applicant's condonation application. He argues that the explanation for the delay is neither reasonable nor made in good faith. Further, the application for leave to appeal has little to no chance of success, and he will suffer prejudice that cannot be compensated by an appropriate costs order.
- [8] I am of the view that there is no merit in the first respondent's argument. Both parties appear to be of the incorrect impression that the applicant's application for leave to appeal ought to have been brought when the court was in recess.

This is incorrect because the days that are outside the term dates cannot be regarded as court days. On a proper calculation of the *dies*, with which this application ought to have been brought, the applicant was only two days late. That can hardly be regarded as an unreasonable delay that justifies condonation not being granted.

[9] In any event, the applicant was well within her right to utilise every legal avenue that was at her disposal. If it was legally permissible to bring an urgent application directly to the Constitutional Court, the applicant cannot be penalized for exercising that option. I am of the view that condonation should be granted in this matter.

C GROUND OF APPEAL

i) Applicant's case

[10] The applicant raised several grounds for her application for leave to appeal. According to the applicant, the court erred and misdirected itself in holding that she failed to discharge urgency and that the matter was quite unusual. Further, the court erred by striking her 'application' for reconsideration off the roll for want of urgency and stating that this 'application' was not before the court.

[11] The applicant submitted that the court's judgment is confusing because it described the applicant, who was the first respondent in the main reconsideration proceedings, as the actual applicant before the court. It was contended that this is because the court was of the view that the applicant

placed the application on an urgent roll and attached the answering affidavit to the urgent application for the interim interdict that was heard on 5 September 2023. This was even though there was no application in the form of a notice of motion and founding affidavit in terms of Uniform Rule 6. The applicant argues that the matter was simply set down through the filing of a notice of set down with an answering affidavit. This was the same application that served before Pistorius J.

[12] The applicant submitted that there is nothing unusual about the reconsideration of court orders. This is because Uniform Rule 6(12)(c) demands that two jurisdictional requirements for the reconsideration of an order be satisfied. First, the order must have been granted on an urgent basis. Secondly, the order must have been granted in the absence of a litigant. It was argued that both requirements were met for the reconsideration of the order. Further, the litigant setting the matter down in terms of this rule is not the applicant and reconsideration is not an application.

[13] Mr Marweshe, on behalf of the applicant, argued that in considering the issue of urgency, the court ought to have not only considered the totality of the facts but also adopted the best interest of the minor child principle. This is because depriving the child of maintenance warrants the Court's intervention on an urgent basis as the upper guardian of the minor child.

[14] It was further submitted on behalf of the applicant that the test for urgency is that the allegations advanced must cry out for urgent resolution for a litigant to

be granted an indulgence to jump the queue. Further, the court ignored the factors advanced by the applicant as to why the matter is urgent, which are:

[14.1] the first respondent has known about the relief claimed in the notice of set down for some time. He was served with the answering affidavit on 3 October 2023. The matter was set down and subsequently removed from the roll. It is simply not possible to leave this matter hanging;

[14.2] the supplementary affidavit was prepared within hours of the court issuing its order. The relief sought was of such a nature that the hearing could not be later than 13 October 2023, because an order granted in the applicant's favour would have ensured that the child would be retained at her school;

[14.3] in respect of the deviation from the Practice Directive that requires urgent applications to be set down on the Thursday before the Tuesday hearing, the urgency of the matter made it necessary to arrest the ongoing gross infringement of the minor child's rights given the continuous harm to the minor child.

[14.4] any further delays presented a greater risk of the minor child being expelled from school for non-payment. The harm will be done to the Constitution itself if the matter could not be dealt with urgently because any further delays could not be countenanced.

[15] It was further argued on behalf of the applicant that the court misconstrued the nature of the matter before it. It was contended that the applicant did not

launch an urgent application in terms of Uniform Rules 6(12)(a)&(b). There was no notice of motion. The applicant simply set down the matter by notice to the other parties.

[16] Further, the parties in the reconsideration proceedings remained the same, and the applicant in this matter was not an applicant in those proceedings. It was contended further that the court's findings were completely wrong because the court failed to observe the Uniform Rules of Court. In the applicant's heads of argument, it was stated that *'the Honourable AJ invented his own Rules and concluded that the first respondent was the applicant – and brought an urgent application before him'*.¹

[17] Based on these grounds, the applicant contends that there are prospects of success in appeal and a different court might arrive at a different decision. It was submitted on behalf of the applicant that the court *'... failed or misconstrued the principle underpinning the reconsideration'*.²

[18] The applicant's main contention is that the first respondent deprives the minor child of the required maintenance. Lastly, Mr Marweshe emphasized that while the Constitutional Court dismissed the applicant's urgent application, it did not address the merits of this matter.

ii) First Respondent's Case

[19] In response, the first respondent submitted that considering the merits of this matter, the applicant failed to demonstrate that she has any prospects of

¹ Para 48.3 of the applicant's heads of argument.

² Para 57 of the applicant's heads of argument.

success in appeal. Further, this application is vexatious and made in bad faith. According to the first respondent, he has consistently placed evidence in the form of documents before the court relating to medical aid, school fees, and transport payments concerning the minor child's maintenance. However, the applicant has failed to disclose that the first respondent has been maintaining the minor child.

[20] Ms Bennett, who appeared on behalf of the first respondent, agreed with the applicant that the process of reconsideration is not an application. She nonetheless, contended that the fact that the applicant's urgent application to the Constitutional Court was dismissed with costs, illustrated that there is no merit in her application for leave to appeal before this court.

D APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

i) Leave to Appeal

[21] Section 17(1) of the Superior Courts Act³ provides two grounds upon which leave to appeal can be granted, a reasonable prospect of success,⁴ and some other compelling reasons why the appeal should be heard.⁵ The applicant, both in the written and oral arguments relied exclusively on the former.

[22] The assessment is based on the subjective view of the judge who decided the matter of whether the appeal would have a reasonable prospect of success, and not 'may' or 'could' have a reasonable prospect of success. I was referred

³ 10 of 2013.

⁴ Section 17(1)(a)(i) of the Superior Courts Act.

⁵ Section 17(1)(a)(ii) of the Superior Courts Act.

to the Supreme Court of Appeal decision of *MEC for Health, Eastern Cape v Mkhitha and Another*, where it was held:

'... leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard'.⁶

[23] The Supreme Court of Appeal in *Smith v S*, held that:

'[w]hat the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal'.⁷

[24] It was held *Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Another*, that *'[t]he test is simply whether there are any*

⁶ (1221/2015) [2016] ZASCA 176 (25 November 2016) para 16.

⁷ 2012 (1) SACR 567 (SCA) para 7.

reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success'.⁸

[25] In *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others*, it was held that:

'[w]hatever a party or the parties may prefer, it remains the duty of the trial judge to consider what court is the more appropriate in the circumstances of the case. ... The inappropriate granting of leave to appeal to this court increases the litigants' costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court having to compete for a place on the court's roll with a case which is not'.⁹

ii) Reconsideration

[26] In terms of Uniform Rule 6(12)(c), *'[a] person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order*'.

⁸ (213/16) [2017] ZASCA 17 (22 March 2017) para 18.

⁹ [2003] 3 All SA 123 (SCA) para 23 (para 6 of the concurring judgment).

[27] It was held that in *Industrial Development Corporation of South Africa v Sooliman, Mohammed and others*, that:

'The rationale is to address the potential or actual prejudice because of an absence of audi alterem partem when the ex parte order was granted. The rule is not a "review" of the granting of the order. A "reconsideration" is, as has been often said, of wide import. It is rooted in doing justice in a particular respect; ie to allow the full ventilation of the controversy. In my view it would be a pretence at justice to craft a mechanical approach which disallowed a full ventilation which would be the outcome, if a relevant reply, if any, was to be prevented'.¹⁰

iii) Appealability of matters that are struck off the roll

[28] The general rule used to be that the order of striking off the matter from the roll is not appealable.¹¹ However, the Constitutional Court has demonstrated that there are instances where the order striking off the matter from the roll can be appealed against. In *Mtolo and Another v Lombard and Others*,¹² the Constitutional Court was faced with an '*... application for leave to appeal against an order in terms of which the Gauteng Local Division of the High Court struck from the roll an application brought by way of urgency*'.¹³ This court granted leave to appeal directly to it.

¹⁰ *Industrial Development Corporation of South Africa v Sooliman, Mohammed and others* [2014] JOL 31118 (GSJ) para 9.

¹¹ *Thembane Cleaning Services CC v Johannesburg Road Agency and Another* (38169/2019) [2020] ZAGPJHC 152 (11 February 2020) para 22.

¹² 2022 (9) BCLR 1148 (CC)

¹³ 2022 (9) BCLR 1148 (CC) para 1.

[29] The Constitutional Court in *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others*, held that the test is whether hearing the appeal serves the interest of justice.¹⁴ It then proceeded to provide certain factors that can be considered when deciding whether an interim order (i.e. striking off the matter from the roll) is appealable.

[30] Some of the factors that must be considered include whether irreparable harm would result if leave to appeal is not granted, whether the interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review, and whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to wasteful use of judicial resources or legal costs.¹⁵

iv) *The best interest of the child*

[31] Section 28(2) of the Constitution of the Republic of South Africa, 1996 (hereafter 1996 Constitution) provides that '*[a] child's best interests are of paramount importance in every matter concerning the child*'. This constitutional provision is given effect by section 7 of the Children's Act.¹⁶ Among others, this section provides that when determining what is in the best interests of the child, the capacity of the parents, or any specific parent to provide for the needs of the child must be considered.¹⁷ Further, section 18(2)

¹⁴ 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) para 20

¹⁵ *Ibid.*

¹⁶ 38 of 2005.

¹⁷ Section 7(1)(c) of the Children's Act.

(c) of the Children's Act, provides that parents have the parental responsibility and right to contribute to the maintenance of their children.

[32] In *S v M*, the Constitutional Court stated that:

'the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. Thus, the concept of "the best interests" has been attacked as inherently indeterminate, providing little guidance to those given the task of applying it'.¹⁸

[33] In *B v M*, it was held that

'The complexity of the "best interests" principle require[s] the court to consider all factors which contribute towards ascertaining children's "best interests. It is necessary to avoid a unidimensional focus which fails to suggest a careful balancing of the different ingredients which may all point towards and comprise the children's "best interests"'.¹⁹

[34] In *L.C v J.P.T*, it was pointed out that:

'[w]hen applying the best interest of the child, it is important to always bear in mind that everyone comes from a socially embedded background within the context of social relationships, including children. Children are dependent on their caregivers for their survival. Children and their caregivers are relational, interconnected, and

¹⁸ 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) para 23.

¹⁹ [2006] 3 All SA 109 (W) para 148

*interdependent. It may not necessarily be in the best interest of children to overemphasise their subjectively viewed “best interest” over the interests of their parents or appointed caregivers, who are clearly acting in what they perceive to be in their best interests’.*²⁰

E EVALUATION

[35] The court was heavily criticized for its characterization of the matter. The starting point, in an attempt, to understand the nature of the proceedings brought under Uniform Rule 6(12)(c) is the assessment of the heading of this rule. The heading of this rule is ‘Applications’. I do not agree that when a reconsideration is sought, such a process cannot be referred to an application merely because no notice of motion was served and filed. Apart from notifying the other party of the process that has been initiated, the purpose of the notice of motion is to ask for a particular relief from the court.

[36] In reconsideration proceedings, the party seeking reconsideration is allowed to notify the other party of the process through a notice of set down, and they need to inform the court of the relief they are seeking, which is the setting aside of the order granted in the party’s absence.²¹ This process is constantly referred to as an application by different divisions of the high court.²²

²⁰ (B1979/2023) [2023] ZAGPPHC 1884 (6 November 2023) para 48.

²¹ See generally *Competition Commission v Wilmar Continental Edible Oils and Fats (Pty) Ltd and others* [2018] 3 All SA 517 (KZP).

²² See for instance *Basil Read (Pty) Ltd v Nedbank Ltd and another* 2012 6 SA 514 (GSJ) para 22; *Executrix (Girliie Tetani) Estate Late Mbuyiselo v Wesbank: a Division of FirstRand Bank Limited and another* [2016] JOL 36813 (ECM) para 1; and *Industrial Development Corporation of South Africa v Sooliman, Mohammed and others* [2014] JOL 31118 (GSJ) para 9.

- [37] The reconsideration application is not a type of procedure that is brought quite often to the court which demonstrates its unusualness. This is an application where the person pursuing it does not have to bring a separate application. All that such a person must do is simply set the matter down for hearing. Such a person can also serve and file an answering affidavit. This is certainly something that is not done in the ordinary course.
- [38] Notwithstanding being the respondent in the urgent application that led to the order that is sought to be reconsidered, such a party automatically becomes the applicant in the reconsideration application. This is because such a litigant initiated a process that allows it to now actively pursue a particular relief i.e. reconsideration.
- [39] Even at the hearing of the matter, the applicant for reconsideration will be allowed to be the first party to make oral submissions to motivate for the relief sought. In the reconsideration application, the applicant who was cited as the first respondent in that application was granted an opportunity to make submissions first and to reply after the conclusion of submissions made on behalf of the first respondent, who was cited as the applicant in those proceedings. This is a right that is usually granted to applicants in motion proceedings.
- [40] It is worth noting that the reconsideration notice of set down is not an ordinary notice of set down. It does not merely inform the other party of the date of the hearing. It is drafted in the usual form of a notice of motion where the desired relief is also indicated. Most importantly, attached to this notice of set down is

an affidavit that makes a case for the relief sought. In my view, there is no merit to the criticism advanced by the applicant in this regard, and this ground of appeal must accordingly fail.

[41] Another ground of appeal is the fact that at the heart of the dispute between the parties is the maintenance that the first respondent in this matter should pay towards the child. The applicant initially indicated that the first respondent did not pay maintenance but later indicated that the first respondent did not contribute sufficiently towards the maintenance of the child. The first respondent maintains that he has tried his best to contribute towards the maintenance of the child and that the applicant is not being truthful that he has not been paying child maintenance.

[42] I am of the view that the totality of the evidence before the court demonstrates that the first defendant has attempted to contribute towards the maintenance of the child. The first applicant attached various documents to his supplementary affidavit that indicate some of the payments that he has made. While the first respondent may not have fully complied with the maintenance order, it cannot be accurate that he has not contributed towards the child's maintenance. It may well be that his contribution does not sufficiently cater to the maintenance of the child. However, it is incorrect to create the impression that the first respondent is not, at all, making any maintenance contribution.

[43] Child maintenance is an important issue that ought to be taken seriously. It is important to hold those who have maintenance responsibilities accountable and ensure that they honour their obligations. However, that must be done in

accordance with the law based on the immediate needs of the child and the parents' available means.

[44] The reality is that financial circumstances change, and adjustments may have to be made. Where there is an allegation that one of the parents has not fully complied with their maintenance obligations, the maintenance court ought to be approached to adequately investigate and determine the issue. In my view, this is not an issue that should be rigorously litigated at the high court at great costs to both parents.

[45] While the issue of child maintenance invokes the best interest of the child inquiry, I am not convinced that it necessarily follows that the best interest of the child is negatively affected where parents have not demonstrated unwillingness to maintain their children. In this case, the first respondent provided some evidence of his efforts in maintaining the child. Whether or not this is true is a factual issue that can be adequately addressed by the maintenance court following a proper investigation. It will be in the best interest of the child for a proper investigation to be conducted to ascertain the financial capabilities of both parties to meet the maintenance requirements of the child.

[46] I doubt that the urgent court was the most appropriate court to determine this issue. If I was wrong on this score, and the best interests of the child were prejudiced by my order, then the judges of the Constitutional Court would have granted the applicant direct access to that court as it did in *Mtolo and Another v Lombard and Others*.

- [47] While these judges may not have determined the merits, they certainly carefully considered the papers and also read my judgment to understand the issue they were requested to determine. In their collective wisdom, they decided to dismiss the applicant's application. In my view, this is an illustration that my order did not negatively affect the best interest of the child.
- [48] It is actually, in the best interest of the child that the issue relating to both parties' maintenance obligations be thoroughly investigated and determined by the maintenance court. This court should be provided an opportunity to properly evaluate all the evidence and investigate both parties' respective incomes to determine how much they can afford to proportionally contribute toward the maintenance of the child in line with their respective means.
- [49] The maintenance court has the power to vary the maintenance order and Pistorius J's order does not preclude any of the parties from approaching the maintenance court to deal with the issue of maintenance and allow this court to adequately assess the parties' respective means.²³ I am of the view that the best interest of the child as a ground of appeal must also accordingly fail.
- [50] Another criticism levelled against the main judgment is that the court ignored the factors advanced by the applicant as to why the matter was urgent. In my view, none of these factors indicated the urgency of the matter. In paragraph 16 of the main judgment, it is stated that the applicant in this matter, '*... does not provide a sense if why there was a need to place his application for reconsideration on an urgent roll to justify the ordinary rules of the court being dispensed with*'.

²³ See generally *Cohen v Cohen (born Coleman)* (010/2002) [2003] ZASCA 5 (3 March 2003).

[51] There is nothing in Uniform Rule 6, which deals with applications generally, that makes provision for applications for reconsiderations to be heard in an urgent court as a matter of course. Where there is a need for such an application to be disposed of by an urgent court, the ordinary rules applicable to urgent matters must be observed, failing which the matter must be struck off the roll. It is not an answer to say that children's matters are inherently urgent. Urgency is determined on a case-to-case basis.

[52] It was argued strongly on behalf of the applicant that the two jurisdictional requirements provided for in the Uniform Rule 6(12)(c) were satisfied. Pastorious J's order was granted on an urgent basis and in the absence of the applicant. Perhaps if the matter could have been enrolled in the normal roll, the inquiry would have been restricted to these jurisdictional elements, hence the matter was not dismissed but struck off the roll. Unfortunately, in an urgent court, the jurisdictional requirements provided for in Uniform Rule 12(a) must first be established.

F CONCLUSION

[53] The matter is still alive and the applicant can set it down in the normal roll to be adjudicated. There is no need to burden either the full court of this division or the Supreme Court of Appeal with an application that can still be determined and finalized by a single judge of this division. In my view, there are no reasonable prospects of success on appeal.

[54] Having regard to the factors outlined by the Constitutional Court that may justify leave to appeal being granted in a matter that was struck off from the

roll, I am of the view that none of those factors are present in this matter. As a result, leave to appeal must be refused. Both parties are partially successful in this matter and there is no need to award costs against any of them.

[55] The post-divorce litigation in which the parties are engaged does not seem to be serving the best interests of the child. There is also a pending variation application which has been going on for almost five years. In my view, the maintenance issue is not an issue that is difficult to the extent that it cannot be amicably resolved between the parties through honest financial disclosures. If needs be, this is a matter that can successfully be mediated or taken to the maintenance court to be finalized.

ORDER

[56] In the result, I make the following order:

1. The applicant's application for condonation is granted.
2. The applicant's application for leave to appeal is refused.
3. No order as to costs.

[...]

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Appearances:

Attorney for the Applicant: Mr Marweshe

Instructed by: Marweshe Attorneys

Counsel for the Applicant: Adv Cid Bennett

Instructed by: McTaggart Eksteen Inc

Date of the Hearing: 8 May 2024

Date of Judgment: 2 July 2024