Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates	**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

CASE NUMBER: UM173/2022

In the matter between:-

DITSOBOTLA LOCAL MUNICIPALITY Applicant

and

KAWO CONSTRUCTION (PTY) LTD 1st Respondent

MUNICIPAL MANAGER: (DITSOBOTLA LOCAL MUNICIPALITY) 2nd Respondent

ABSA BANK LTD 3rd Respondent

THE ACTING SHERIFF 4th Respondent

CORAM: MFENYANA J

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be **01 March 2024.**

ORDER

(1) *The application for reconsideration of the order of this court granted on 30 May 2023 is dismissed.*

(2) The costs associated with the hearing of the application for reconsideration shall be borne by the first respondent.

JUDGMENT

MFENYANA J

[1] This is an application in which the first respondent Kawo Construction (Pty) Limited ("Kawo"), seeks to set aside, alternatively the reconsideration of the order of this court granted on 29 May 2023. The application is brought pursuant to the provisions of Rule 6(8), alternatively Rule

6(12)(c) of the Uniform Rules of Court.

[2] The notice of motion in respect of the reconsideration application somewhat conflates the roles of the parties. For that reason, and to avoid confusion, in this judgment, the parties are referred to as in the main application.

[3] On 30 May 2023, this court per Reid J issued a rule *nisi* in favour of the applicant ("Municipality"). The effect of the rule is that Kawo was interdicted from selling certain goods belonging to the municipality, which had been placed under attachment and removed by the Sheriff, in execution of an order granted by Djaje ADJP on 11 October 2022 (2022 order).

[4] Kawo was further ordered to return the goods to the Municipality within 24 hours of the service of the order, and prohibited from taking any further steps in executing the order until Part B of the application had been finalised. Part B pertains to the rescission of the 2022 order.

[5] Further in terms of the order, the deponent to the affidavit in support of reconsideration (inadvertently referred to as a

founding affidavit), Mr Kagiso Mamorare (Mamorare), together with Tsietsi Isaac Shema (Shema) were called upon to show cause why they should not be joined to the proceedings, and why 'their conduct which led to the conclusion of the purported service level agreement' between the Municipality and Kawo, on 27 September 2021 should not be referred for investigation by the South African Police Service in order to determine whether such conduct constituted a criminal offence, and the Legal Practice Council respectively.

[6] The costs of Part A of the application, including the costs of counsel on behalf of Kawo were to be borne by the applicant.

[7] The Municipality has filed an affidavit in opposition of the reconsideration application.

[8] The case of the Municipality as set out in its founding papers pertains to a writ of execution in terms of which Kawo attached and removed assets belonging to the Municipality. In short, the Municipality contends that it has filed an application to have the order which gave rise to the writ,

rescinded. Pending the final determination of that rescission, it approached the court to halt the execution until a final determination has been made.

[9] At the heart of the dispute is a Service Level Agreement and an addendum concluded between Kawo and the Municipality on 27 September and 19 October 2021, for the rehabilitation of various roads in Lichtenburg and Burgersdorp. It is this SLA that the Municipality alleges was fraudulently concluded and acted upon, with the result that the order granted by Djaje DJP on 11 October 2022 was obtained fraudulently.

[10] By contrast, what Kawo contends is that it has a valid order, and is thus entitled to execute. It denies any fraud or impropriety on its part or on the part of the representative of the Municipality responsible for concluding the SLA.

[11] It appears from the reading of the papers that when the matter was heard, both parties were represented by counsel. It further appears that having been served less than a day before the hearing of the matter, Kawo was not in a position to meaningfully participate in the proceedings. That is different from saying that the matter was brought ex parte as

suggested by Kawo. Nothing turns on this aspect in my view.

[12] In terms of rule 6(12)(c) a party against whom an order was granted in its absence in an urgent application, may by notice, set the matter down for the reconsideration of the order. The rationale behind the rule is that, at the rehearing of the matter, the court is given the benefit of argument from the party seeking reconsideration, as the initial application would have been granted in the absence of such a party.

[13] Likewise, Rule 6(8) permits any person against whom an order is granted *ex parte*, to anticipate the return day on notice of not less than twenty- four hours.

[14] In the reconsideration application, Kawo raised four points in *limine*. First, it contends that the matter is not urgent as the Municipality failed to meet any of the requirements for urgency.

[15] When the matter was heard on 30 May 2023, it was dealt with as one of urgency, the court having found it to be so. It would serve no purpose for this Court to revisit the issue and reconsider the urgency of the matter *ex post facto*. Considerations of convenience and fairness play an

important role when the court exercises its discretion to entertain a matter on an urgent basis. As the court found in *United Medical Devices LLC v Blue Rock Capital Limited*[1],

> "…(t)he purpose of rule 6(12)(c) is to allow parties who were not present when the urgent … order is made, to approach the court for reconsideration of the order and place facts before the court. To permit the respondents to themselves now claim lack of urgency on the part of the applicants would undermine *audi alteram partem* which rule 6(12)(c) gives effect to".

[16] This point therefore falls to be dismissed.

[17] The second point in *limine* is to some extent linked to the first. It is that the Municipality failed to invoke the provisions of Rule 6 of the Uniform Rules and attempted to bring these proceedings on an *ex parte* basis, which amounts to an abuse of the process of court. I have already stated that having been given notice of the proceedings, albeit in a truncated manner, there can be no merit in suggesting that the application was brought *ex parte*. Bringing an application ex parte, and bringing it on extremely short notice are two different things which do not mean the same thing. Kawo

[1]2016 JDR 0570 (KZD).

says as much in its affidavit when it avers that the Municipality attempted to bring the application on an *ex parte* basis, and approached the court 'on less than 1 day's notice to the respondents'. In my view that is summarily dispositive of this point of law without consideration of any further averments in this regard.

[18] Thirdly, Kawo avers that the Municipality's failure to join Mamorare to the proceedings while it seeks relief against him is fatal to this part of the application. The relief sought by the Municipality in respect of Mamorare is that he be called upon to give reasons why he should not be joined to the proceedings and why his conduct should not be reported to the authorities for investigation.

[19] I am not persuaded that apart from preventing any adverse findings against a party who is not a party to the proceedings, this approach imposes any hardship on Mamorare. It appears to me to be aimed at obviating just that. In any event, the defence of non- joinder is in this context, dilatory, and not fatal to this part of the application as suggested by the first respondent.

[20] Lastly, Kawo avers that there is a dispute of fact which cannot be resolved on the papers, and which is likely to arise in the hearing of the matter. In this regard it points out that the case of the Municipality rests entirely on the credibility of someone who has not confirmed any of the evidence attributed to him on affidavit. It denies the hearsay evidence relied on by the Municipality which it contends it has evidence to the contrary, which will dispel all the allegations relied on by the Municipality, 'completely blowing its case out of the water'. Interestingly, Kawo calls for the application to be dismissed with costs on this basis.

[21] In that averment lies a concession that the contention is premature. What is currently before court is a reconsideration application and not a determination of the final relief. Any dispute of fact, whether real or perceived, has no bearing on the interim relief but on the final determination of the application. It also does not follow that a suit falls to be dismisses purely on that point, short of referring it to trial or for oral evidence.

[22] To the extent that an allegation is made that the case of the

Municipality depends on the credibility of someone who is not before court, and who has not deposed to an affidavit confirming such allegations, it follows that such allegations amount to hearsay and ought to be excluded. That to me stands quite distinctly from the issue of the writ of execution. That part, and dare I say, the main part of the relief is not disputed by Kawo.

[23] As regards the merits, there has been an attempt on the part of both parties to delve into the merits of the SLA concluded between them. That in my view has little or no bearing on the reconsideration of the order issued on 30 May 2023. That order, as prayed for, pertains to Part A of the application. To my mind, the merits of the SLA will ordinarily play a more prominent role in Part B.

[24] Kawo contends that the founding affidavit is littered with hearsay evidence which is inadmissible. This is indeed so. From the onset in its founding affidavit, the Municipality declares that it places reliance on information received from Mr Thabiso Tshabalala (Tshabalala). As correctly pointed out by Kawo, Tshabalala has not deposed to a confirmatory affidavit. The Municipality is tight-lipped on this aspect. No

value can be attached to such evidence.

[25] All these issues are in my view secondary. The main issue before this Court centres around whether the Municipality was justified in seeking to interdict the process. In my view it is. It contends that it has mounted a challenge against the very order which forms the basis of the writ, which if found to have merit would undo the writ.

[26] The relief sought by Kawo in its application for reconsideration, though not set out fully, seeks to reverse the order granted on 30 May 2023. It approaches the court as a judgment creditor seeking to execute a judgment granted in its favour. It essentially avers that the Municipality ought not to have been granted the order that it was.

[27] Kawo places reliance on the decisions in *Oudekraal*[2] and the majority decision in *Kirland*[3], and avers that the Municipality has no cause of action, as Kawo is entitled to relief on the basis of an administrative action which remains valid until set aside on review and further that the Municipality has not brought a counter- application to have the decision set aside.

[2]*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).
[3]*MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).

Thus Kawo avers, that the rescission application by the Municipality is doomed to fail.

[28] The difficulty with this contention is that it is not necessarily correct that if there is no direct affront to the legality of an administrative decision, a court should close its eyes to it. In the present case, this is set to play itself out in Part B. Relevant to this, the Supreme Court of Appeal (SCA) in *Gobela Consulting CC v Makhado Municipality*[4] noted that:

> "…(t)he import of *Oudekraal* was that the government institution cannot simply ignore an apparently binding ruling or decision on the basis that it was patently unlawful, as that would undermine the rule of law; rather, it has to test the validity of that decision in appropriate proceedings."[5]

[29] The SCA also recognised as settled by the Constitutional Court in *Merafong*[6] that *Kirland* 'did not fossilise possibly unlawful – and constitutionally – administrative action as indefinitely effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule of law

[4](910/19) [2020] ZASCA 180 (22 December 2020).
[5] Paragraph 18.
[6]*Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC); See also in this regard: *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; 2020 All SA 397 (SCA).

reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.'

[30] I align myself with the pronouncements above. I do so guardedly in the circumstances of the present case for the sole reason that Part B of the relief sought by the Municipality is yet to be determined. That, in my view is the practical effect of the principles in *Kirland* and *Oudekraal*. They do not apply in a vacuum or with a 'come what may' posture, in a constitutional dispensation. It is the context within which the relief sought by the Municipality should be viewed, bearing in mind, as I have stated, that the issue here to be determined, is the execution of the writ.

[31] In the cold face of a challenge having been mounted against the order of 11 October 2022, it would be untenable for this Court to sanction the first respondent to press ahead with execution, for the following reasons:

[31.1] that it is dutiful for the court to protect its own

integrity;

[31.2] that it would destroy the very basis of coming to court;

[31.3] that it would amount to piecemeal adjudication (should the Municipality's claim be found to be meritorious).

COSTS

[32] It remains to deal with two issues relating to costs. In this regard it is prudent to first deal with the order granted by Reid J on 30 May 2023. Despite its finding in favour of the applicant, the court ordered that the costs of the application be paid by the applicant, including 'the cost of counsel for the first respondent'. The Municipality avers that the court did not apply its mind to the issue.

[33] I must immediately state that the issue of costs is within the discretion of the court seized with the matter. Such can only be interfered with if the court did not exercise its discretion judicially either on material facts or principles of law; if it was influenced by wrong principles of law or reached a decision which could not have been reasonably made by a court

properly directing itself to all relevant facts and principles.[7]

[34] Mindful of these principles, I am of the view that a court seized with a reconsideration, is not sitting as a court of appeal. Save for stating the legal position as I have, I must however decline to deal with this aspect of costs as raised in the papers.

[35] There are two difficulties posed by the costs order granted by Reid J, for the purposes of the present application. The first is that it presupposes that (Kawo) was represented in the proceedings, and effectively opposed the application in which event Kawo would not have met at least one of the jurisdictional requirements for reconsideration in terms of rule 6(12)(c). It defies a cardinal rule upon which reconsideration is premised, namely, the absence of the requester for reconsideration. Second, it would have amounted to a deviation from the trite principle in relation to costs, in circumstances where such deviation is not justified. Simply put, it has the effect of penalising the same successful litigant

[7] *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019).

in whose favour the court has found in favour of.

[36] The second issue is with regard to the costs of the reconsideration application. I cannot find any reason to deviate from the established principle that costs should follow the result.

ORDER

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

(1) *The application for reconsideration of the order of this court granted on 30 May 2023 is dismissed.*

(2) The costs associated with the hearing of the application for reconsideration shall be borne by the first respondent.

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S MFENYANA
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION MAHIKENG

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Date Reserved	**:**	**20 June 2023**
Date of Judgment	**:**	**01 March 2024**