



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

Date: **23 JUNE 2022** Signature: 

Case Number: 32823/2021

In the matter between:

**ASH KIRPAL**

Applicant

And

**JUDE PETERS**

First Respondent

**MOSA MMOE**

Second Respondent

**SIPHELELE MHLONGO**

Third Respondent

**FALAKHE SIBIYA**

Fourth Respondent

**SIYABONGA MTAMBO**

Fifth Respondent

**MENZELI KHOZA**

Sixth Respondent

**MARTIN TSHIRELETSO NGOBENI**

Seventh Respondent

In Re:

**JUDE PETERS**

First Applicant

**MOSA MMOE**

Second Applicant

**SIPHELELE MHLONGO**

Third Applicant

**FALAKHE SIBIYA**

Fourth Applicant

**SIYABONGA MTAMBO**

Fifth Applicant

**MENZELI KHOZA**

Sixth Applicant

**MARTIN TSHIRELETSO NGOBENI**

Seventh Applicant

And

**ASH KIRPAL**

Respondent

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**JUDGMENT**

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**NYATHI J**Introduction

- [1] The Respondents brought an urgent application for spoliation on the 02 July 2021 against the Applicant Mr Kirpal. The court granted the order under case number 34633/2021 on the same day.
- [2] On 14 July the Respondents (who were the Applicants in case number 34633/2021) issued and served an application for contempt of court and enforcement of the Court Order dated 02 July 2021.
- [3] On 15 July the Applicant brought an application for reconsideration of the order of 02 July in terms of Uniform Rule 6(12) (c). The basis for the application is that the order of 02 July was granted in the Applicant's absence. It is this application that is before me for reconsideration.
- [4] The parties then filed additional affidavits, a lot of back and forth ensued with the matter removed and re-enrolled.
- [5] The Applicant's case is premised on Mr Ashook Kirpal's founding and supplementary affidavits together with Ms Caroline Zvoma's further supplementary affidavit.
- [6] Both the Applicant and the Respondents have filed heads of argument in this matter.
- [7] The issue of urgency does not arise before me as the court granting the impugned order clearly considered the matter as urgent and dealt with it as such.
- [8] The Applicant seeks the following relief:

- (a) That court order of 02 July 2021 be set aside and that the main application be dismissed.
- (b) That the Respondent in this application be ordered to pay the cost on the scale as between attorney and client.

[9] The Respondent opposes this application.

#### The legal provisions on reconsideration

- [10] Rule 6 (12) (c) provides that “...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.”
- [11] In *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* [1996 \(4\) SA 484 \(W\)](#) at 486H the court termed the absence of the aggrieved party the “underlying pivot” to which the exercise of the power under the subrule was coupled.
- [12] The thrust of the subrule is to afford an aggrieved party a mechanism by which to redress imbalances in, and injustices and oppression flowing from an order granted as a matter of urgency in his absence. Because the aggrieved party was absent and thus could not present his side of the story, he likely suffered actual or potential prejudice which need to be ameliorated.<sup>1</sup>
- [13] A court hearing a reconsideration application of an order which may be either interim or final in its operation, has a wide discretion. The end result may involve deletion of the order, either in whole or in part, or amendment of the order or additions thereto.<sup>2</sup>

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<sup>1</sup> *Industrial Development Corporation of South Africa v Sooliman* [2013 \(5\) SA 603 \(GSJ\)](#) at paragraph [10]

<sup>2</sup> *ISDN Solutions (Pty) Ltd v. CSDN Solutions CC* 1996 SA 484 (W) at 486H.

- [14] Factors which may determine whether an order falls to be reconsidered, include the reasons for the aggrieved party's absence, the nature of the order granted and the period during which it has remained operative.<sup>3</sup>
- [15] The convenience of the parties is another factor to be taken into consideration.<sup>4</sup>
- [16] Where a party had failed to disclose certain material points which might have influenced the Judge not to grant the order, this may have a bearing on whether the court grants or refuses the reconsideration application.<sup>5</sup>
- [17] A court that reconsiders any order in terms of this subrule does so with the benefit of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in affidavits filed by all the parties. In *South African Airways SOC Ltd v BDFM Publishers (Pty) Ltd* [2016 \(2\) SA 561 \(GJ\)](#) it was stated (at 565I) that the 'approach by the court is a comprehensive revisit of the circumstances as they present at the time of the reconsideration'.
- [18] Furthermore, it is important to state that a Rule 6 (12) (c) reconsideration differs from a rescission or variation of order.

### Issues requiring determination

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<sup>3</sup> Erasmus – Superior Court Practice Volume 2 at D1-89

<sup>4</sup> ISDN Solutions (Pty) Ltd v CSDN Solutions CC (*Supra*)

<sup>5</sup> NDPP v. Braun and Another 2007 (1) SA 189 (C).

[19] The issues for determination in this reconsideration application are crisply the following:

- 19.1 Whether the Applicant's (respondent in the urgent application) reasons for failing to appear in court on 02 July 2021 to present his case are justified;
- 19.2 Whether the property spoliated was in the possession of the Applicant (respondent in the urgent application) or in the possession of a third party who had bona fide obtained possession thereof from the spoliator;
- 19.3 Whether the Respondents (applicants in the urgent application) presented all relevant facts, to their knowledge at the time, to the court on 02 July 2021;
- 19.4 Whether the Court Order dated 02 July 2021 is competent in the absence of all the facts; or
- 19.5 Whether the Court Order dated 02 July 2021 is competent based on the evidence before Court currently.

#### A brief discourse on the facts and the legal provisions

[20] In urgent applications the Applicant bears the responsibility to ensure that the application is properly served. In the instant matter, service was effected through the medium of WhatsApp to the Applicant's attorney of record. The application was sent at 18h21 on 02 July 2021, nine minutes before the matter was to be heard at 18h30. The Notice of set down was received after the matter was heard.<sup>6</sup>

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<sup>6</sup> Paragraphs 17 and 34 of Ash Kirpal (Applicant)'s founding affidavit.

[22] In *South African Airways SOC v BDFM Publishers (Pty) Ltd and others* [2016] 1 All SA 860 (GJ), Sutherland J (as he then was) held that the taking of steps to ameliorate the effect of truncated service is “not a collegial courtesy, it is a mandatory professional responsibility that is central to the condonation necessary to truncate the times for service.”

[23] In the South African Airways matter, the court further held that where an urgent application is brought on less than 24 hours’ notice, it is incumbent on the applicant’s attorney to take steps to ensure that service is effective. The court suggested the following very important steps:

- (a) The applicant’s attorney should obtain the respondent(s) contact details or if an attorney is involved, his or her attorney’s details must be obtained.
- (b) Agreement should be reached on the method of service and who will receive service on behalf of the respondent(s).
- (c) The Judge on duty should be alerted and advised whether the respondent has been made aware of the application.
- (d) When the application is ready for service, the applicant’s attorney must make direct contact with the person responsible to receive service on behalf of the respondent(s).
- (e) Sufficient time must be given to the respondent(s) to digest the application.
- (f) When the application is about to be served, the Judge should be consulted about when and where the hearing will take place and how much notice was given to the respondent(s); and

(g) Once the application is served in any manner other than personal service, the applicant's attorney must contact the respondent(s)' representative to confirm receipt of the application.

- [24] In the *South African Airways* matter, service was effected at 10h00 on the day via e-mail. One of the respondents received the application about 30 minutes before the application was heard while the remaining respondents only became aware of the application after an order had been granted to the applicant. The applicant was found to have not given the respondents effective notice of its urgent application. In the result the previously obtained order against the respondents was set aside.
- [25] On the issue of whether the possessor of the property that is subject of the spoliation, both the applicant and the respondent are at odds with one another. Applicant contends that the Respondent had given notice of termination of the lease which he accepted. Respondent is non-committal on this aspect. In paragraph 4.1.3.2 of his answering affidavit the Respondent states: "The legal termination of the agreement, which is disputed, is with all due respect, irrelevant."
- [26] The issue of whether the Respondent had given notice to cancel the lease, the basis on which he had sublet the students as well as the partial payment of the agreed rental amounts were not dealt with, let alone disclosed by the Respondent.
- [27] The new tenant at the "spoliated" property, Ms. Caroline Zvoma, is an interested party in that the outcome of the court order obtained on 02 July 2021 impacts her in a negative sense. She ought to have been joined in the application. The Constitutional Court held in *Matjhabeng Local Municipality v Eskom Holdings Ltd 2018 (1) SA 1 (CC)* that:



*“The law on joinder is well settled. No court can make findings adverse to any person’s interests, without that person first being a party to the proceedings before it.”*

- [28] A further consideration is whether on the evidence adduced by way of affidavits and the CCTV video footage that was played during the reconsideration hearing, and the order that was granted on 02 July 2021 was futile?
- [29] In *Manyatshe v. M & G Media* 2009 ZASCA 96 at [12] the appellant had been defamed by a premature identification of him as an Accused in criminal proceedings. Despite the violation of his rights, the court held an interdict would be of no useful effect and refused the application, a finding upheld on appeal.<sup>7</sup> The reasoning for the refusal was that the order would have been futile, such as in this particular matter where Ms. Zvoma had already moved into the property with the “assistance” of the seven unidentified men who had also “kindly helped” the previous sub-tenants to move their goods out of the flat.

### Conclusion

- [30] In light of the remarks in the *South African Airways* matter, and the method used by the Respondent in effecting service of its application on the Applicant and the time afforded him to prepare to defend the matter, I reach the conclusion that the service was not effective as envisaged in Rule 6 (12) (a). The order thus granted was obtained ex parte and is liable to being set aside on this aspect alone. In the alternative, the order could be set aside on the basis of non-joinder of Ms Caroline Zvoma. This has become moot.

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<sup>7</sup> Excerpt quoted from *South African Airways SOC Ltd v BDFM Publishers* (Supra) per Sutherland DJP.

[31] I make the following order:

The application in terms of Rule 6 (12) (c) succeeds and the order of 02 July 2021 in Case No.32823/2021 is set aside with costs.

A handwritten signature in black ink, appearing to read 'J.S. Nyathi', is written over a horizontal line.

**J.S. NYATHI**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

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DATE OF HEARING: 15 MARCH 2022

DATE OF JUDGMENT: 23 JUNE 2022