IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, THOHOYANDOU

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/ ~~NO~~

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

(3) REVISED.

5 June 2025 .....

DATE

[redacted]

SS GREEN AJ

Case number: 2726/2024

MARIETJIE KRUGER	First Applicant
COETZEE & KRUGER INC.	Second Applicant

And

NSOVO ESTER MALULEKE	Respondent

In re:

NSOVO ESTER MALULEKE	Applicant

And

MARIETJIE KRUGER	First Respondent
COETZEE & KRUGER INC.	Second Respondent
HASANI CHARLES CHABALALA	Third Respondent
EMELDAH NOMHLE NDLOVU	Fourth Respondent
TAXING MASTER, THOHOYANDOU HIGH COURT	Fifth Respondent

JUDGEMENT

GREEN AJ

1. This application came before me on 21 November 2024 due to the main urgent application that had initially been set down for hearing on 19 November 2024 being removed from the roll by the registrar following the unilateral delivery of a notice of removal by the Respondent on the afternoon of 18 November 2024.

2. In this application, the Applicants, who were two of the Respondents in the main urgent application, seek, *inter alia* the wasted costs relating to the unilateral removal of the main urgent application, which the Applicants contend is an effective withdrawal of the main application, as well as the costs occasioned by this application and the costs of the main application.

3. The Respondent has opposed this application, their main points of opposition being that the notice of motion is defective in that it does not make provision for the application to be heard as an urgent application and further contravenes the Superior Court's Act 10 of 2013 in that the Applicant attempts to assign the matter to a specific judge, which prerogative lies with the Judge President of the division.

4. The main application was brought by the Respondent in this application. In the main application the Respondent sought, in effect, to prevent the Applicants from participating in a taxation that had been set down before the Fifth Respondent in the main application on 21 November 2024.

5. The main application was issued by the Respondent in this application on Wednesday, 13 November 2024 to be heard on 19 November 2024, opposed by the Applicants in this application on Friday, 15 November 2024, a replying affidavit and affidavit to supplement the founding affidavit was delivered on Saturday, 16 November 2024 and heads of argument were delivered by the Respondent on 18 November 2024.

6. Following the delivery of the Respondent's heads of argument on Monday, 18 November 2024, the Respondent delivered a unilateral notice at 13:16 removing the urgent application set down for 19 November 2024 from the roll, stating that the main application is removed to allow the taxation to proceed on 21 November 2024 before the Fifth Respondent as scheduled. No tender for costs was made in this notice.

7. I interpose to point out that I was allocated the urgent court roll for the week of 18 November 2024 to 22 November 2024.

8. On 19 November 2024 the registrar of this court excluded the main application from the urgent roll as a result of the notice of removal that was delivered by the Respondent's attorney on 18 November 2024.

9. On 19 November 2024, Mr JP Morton, from Coxwell, Steyn, Vise & Naude Inc. the Applicants' correspondent attorney, appeared in the urgent court on another matter. Mr JP Morton enquired about whether he could call the main application

and I informed him that the registrar had removed the matter from the roll as a result of the notice of removal received the previous day. I informed Mr Morton that I would enrol the matter and deal with the issue of costs should he be able to provide me with proof that the Respondent's attorneys were duly informed that the Applicants would be appearing on 19 November 2024 to argue the costs occasioned by the removal. Mr Morton indicated that he did not have such proof, and the matter was left there.

10. It should be noted that the Thohoyandou Civil Court is currently sitting in Mutale, which is about 30 kilometres from the Thohoyandou High Court building as the Thohoyandou High Court building is undergoing renovations. It takes a considerable time to travel from Thohoyandou to Mutale. I am aware of the judgement where the presiding officer called for the party who had attempted to remove the matter to come to court, however, considering the current location of the court, this did not seem practicable.

11. This application was issued and served on 20 November 2024 at 09:06am and 09:16, respectively. Following service of this application, the Respondent caused a notice of intention to amend the main application's notice of motion to be issued wherein the Respondent sought to effectively remove the prayer relating to urgency of the main application.

12. On perusal of this application it is noted that the Applicants did not consent to the removal of the matter and conveyed same to the Respondent's attorney on 18 November 2024 at 14:04.

13. At the hearing of this matter the parties informed me that the taxation proceeded on 21 November 2024 as scheduled.

14. The issues for determination can be summarised as follows: -

14.1 Whether this court can adjudicate the costs in relation to the unilaterally removed application.

14.2 Whether the Respondent should pay the costs associated with the removal of the main application, and if so, on what scale.

14.3 Whether the Respondent should pay the costs of this application, and if so, on what scale.

14.4 Whether the Respondent should pay the costs of the main application, and if so, on what scale.

15. It is common cause that the main application was brought as an extremely urgent application, had been set down for hearing on 19 November 2024 and was properly opposed with the delivery of an opposing affidavit within the time periods prescribed by the Respondent. It is also common cause that the Respondent's attorneys did not seek the Applicants consent to remove the matter from the roll of 19 November 2024 and to date have not provided a reason for the removal of the main application.

16. The Appellate Division, as it was known then, held in **Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk**[1]:-

[1] 1972 (1) SA 773 (A).

Because Rule of Court 6 (12) envisages that a respondent, in the case of urgent application on notice to the respondent, is entitled to act if he wishes to oppose the application in terms of the rules which the applicant has made applicable in the case of an extraordinary adjudication, the respondent is entitled to rely upon the process of extraordinary adjudication in the event of the applicant, at a late stage, deciding not to proceed with the application and he is entitled on notice of motion and by affidavit to place before Court the papers, if any, and the facts of the incompleted extraordinary process of adjudication and to apply for an order of costs.

17. I reiterate that this application has not come before me because of the Applicants request in their notice of motion but as a result of me being allocated the urgent court roll for the week of 18 November 2024 until 22 November 2024.

18. The Respondent brought the main application on an extremely urgent basis and at the eleventh hour, without explanation decided not to proceed with the urgent application. The Applicants are entitled to bring this application for costs on the same basis as what the Respondent brought the abandoned main application.

19. Notwithstanding me being the judge allocated to adjudicate this matter, I am of the view that being the judge who had been allocated the main application, and who had already read through the papers before being informed of the removal of the matter, I am in the best position to adjudicate this application. Considering the clogged court roll, limited resources and judges, it would be unreasonable to expect another judge to also have to work through the papers relating to this matter in the normal course.

20. Considering the dictum referred to in the *Republikeinse Publikasie's* matter, by which I am bound, I am accordingly satisfied that nothing prevents me from adjudicating this application on the same basis on which the main application was brought, on an urgent basis.

21. There can also be no prejudice to the Respondent has the Respondent has had the opportunity to file a substantive opposing affidavit to this application.

22. The Respondent's legal representatives refused to address me on whether the main application had become moot in light of the fact that the taxation had proceeded. It is unclear what issue remains in the main application, even if the Respondent has effected the amendment to the notice of motion of the main application, the taxation has come and gone.

23. Be that as it may, the question that needs to answered is whether the Respondent was entitled to unilaterally remove the main application from the roll.

24. It is trite that the removal of a matter from the roll is in all practical respects akin to a postponement *sine die* and once an opposed matter has been set down, unless the parties agree to the removal or postponement of the matter, the matter cannot be unilaterally removed by one party and the discretion on whether a matter should be removed lies with the Judge before who the matter is enrolled.

25. Van der Schyff J in **Dey Street Properties (Pty) Ltd v Salentias Travel and Hospitality CC t/a Van Hobs Dry Cleaners**[2], held that the implication was that a party cannot unilaterally postpone a matter where the opposing party's consent cannot be obtained. It is the discretion of the court seized with an application for postponement that prevails. Similar logic as applies to Rule 41(3) applies to the removal of a matter from the roll after it's enrolled for hearing. An applicant, *dominis litis*, is bound to the date determined by it in the notice of motion, for the matter to be heard.

26. This is not a new concept but same was confirmed by Crutchfield J in **Mnguni v Ngwenya and Another**[3].

27. The proper and efficient administration of justice demands that the court must be satisfied about the reasons why a matter cannot proceed, especially where the opponent opposes the removal from the roll or postponement. In such circumstances, the removal of a matter from the roll is not for the taking, the court must be persuaded to exercise its discretion in favour of the requesting party. The underlying consideration in the exercise of the court's discretion must be to do justice between the parties.

28. I agree with the Applicants that the Respondent required the leave of the court to remove the matter in the absence of an agreement with the Applicants.

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2 Dey Street Properties (Pty) Ltd v Salentias Travel and Hospitality CC t/a Van Hobs Dry Cleaners Case No 25461/21 dated 15 July 2021 Gauteng Division, Pretoria at [5].

3 Crutchfield J in Mnguni v Ngwenya and Another (A3065/2020) [2023] ZAGPJHC 117 (13 February 2023).

29. Nowhere in the Respondent's opposing papers does the Respondent address why the application was unilaterally removed from the urgent roll. The Respondent's counsel was also given various opportunities to address me on this issue but refused the opportunities provided.

30. The Respondent brought this application on an extremely urgent basis and at the eleventh hour, without explanation, following effort to ensure compliance with extremely truncated time periods the Respondent unilaterally removes the main application from the roll. Conduct of this nature cannot and should not be tolerated in our courts.

31. The Respondent's conduct in removing the main application as they did, without consent or reason and preventing the Applicants from their opportunity to address the court is vexatious and nothing less than an abuse, especially considering that the purpose of the main application was to prevent the Applicants from participating in the taxation that was scheduled for 21 November 2024 and then unequivocally stating in her notice of removal that the taxation should proceed. It begs the question, what was the actual purpose of the main application?

32. *Dominis litis* does not equate power to enrol and remove a matter as a party sees fit. Especially not on an urgent court roll where an opposing party is compelled to comply with truncated time periods for an extraordinary adjudication. The circumstances may have been different had this been an unopposed matter removed by notice by the enrolling party.

33. As dealt with hereinabove, the Respondent's objection to the format of the notice of motion and non-compliance with Rule 6(5) and 6(12) respectively, has no merit. The Respondent was able to deliver a substantive opposing affidavit, which affidavit to a great extent was a repetition of it papers in the main application and contained case law, which should not be included in answering affidavits. The Respondent was duly represented by two advocates. Any right that she had to oppose this application and have her version considered was not contravened. The matter stood down from the morning until 14:00 so to allow the court to consider the opposing papers that were delivered the morning of the hearing.

34. The principle in *Republikeinse Publikasies* matter is decisive on this issue.

35. The Respondent's contention that the statutory provisions of the Superior Court's Act 10 of 2013 have been contravened are also without merit, this contention has been dealt with above.

36. The non-service of this application on the Third to Fifth Respondents in the main application is also without merit as no relief is sought against these Respondents. None of these Respondents opposed the main application.

37. It is correct that a cost order *de bonis propriis* cannot be made against the Respondent's attorney without notice and being given an opportunity to address the court. As no argument was pursued in this regard, I will not consider a cost order *de bonis propriis*.

38. It should be noted that the First Applicant is an attorney, an officer of this court, and the director of the Second Applicant. The allegations made against the Applicants in this application and in the main are serious. The Respondent's effective abandonment of the relief in the main application and concession that the taxation proceeds as scheduled is a clear indication that the allegations made against the Applicants were frivolous.

39. It has been said that the court makes an order of attorney and client costs in order to mark its disapproval of the conduct of the losing party. In **Public Protector v South African Reserve Bank**[4] the majority of the Constitutional Court, with reference to **Orr v Solomon**,[5] stated:[6]

> More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.

40. Considering the Respondent's conduct in unilaterally removing the main application without consent or explanation, the lengthy opposing affidavit that contained case law, repetition of the allegations contained in the main application,

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4 375 2019 (6) SA 253 (CC). See also Tjiroze v Appeal Board of the Financial Services Board 2021 (1) BCLR 59 (CC) at paragraphs [23] and [24]; Gordhan v The Public Protector [2021] 1 All SA 428 (GP) (a decision of the Full Court) at paragraphs [297]–[304].

5 1907 TS 281

6 At 318C–319A (footnotes omitted); and see Zuma v Democratic Alliance and Economic Freedom Fighters (unreported, SCA case no 1028/2019 dated 13 April 2021) at paragraphs [47]–[52].

the personal attacks on the Applicants, who are professional persons and officers of this court, I am satisfied that a punitive cost order is warranted in favour of the Applicants for both the unilateral removal of the application from the roll as well as this application to be paid by the Respondent.

41. As the merits of the main application was not before me and not argued before me, I am not inclined to make an order in relation to that application and the costs of that application.

42. That application, be it in its initial or amended form, can still be set down for hearing on the merits, or should it be found to be moot, on the costs.

43. With regards to the delay in delivering this judgement, I must humbly apologise to the parties for any inconvenience that the delay may have caused.

44. Following the date of hearing of this matter I encountered various personal tragedies within my family, had various schedule conflictions and my laptop on which the draft judgment and other relevant documents were stored crashed during the first term of this year.

As a result, I make the following order: -

1. The Respondent (Nsovo Ester Maluleke) is to pay the Applicants wasted costs on a scale as between attorney and client occasioned by the removal of the main application, which was set down for hearing on 19 November 2024, which costs are to include travelling costs.

2. The Respondent (Nsovo Ester Maluleke) is to pay the Applicants costs of this application, which was heard on 21 November 2024, on an attorney and client scale, which costs are to include travelling costs.

SS GREEN

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, THOHOYANDOU

APPEARANCES

1.	For the Applicants:	Adv. MJ Kleyn
	Instructed by:	Coetzee & Kruger Inc.
2.	For the Respondent:	Adv. DE Sigwavhulimu
		with Adv. HD Munzhelele
	Instructed by:	Ntsako Phyllis Mbhiza Incoirporated Attorneys.
3	Date of argument:	21 November 2024
4.	Date of judgment:	5 June 2025

Heard on 21 November 2024.

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives via email.