"ANNEXURE 11"
Practice Directive 61

IN THE HIGH COURT OF NAMIBIA

Case Title: HEAD OF THE WINDHOEK MUNICIPAL POLICE SERVICE V COUNCIL OF THE MUNICIPALITY OF WINDHOEK & OTHERS	**Case No:** HC-MD-CIV-MOT-GEN-2021/00208 **Division of Court:** HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE GEIER	**Heard on:** 15 September 2021 **Delivered ex tempore on:** 15 September 2021 **Released on**: 28 October 2021

Neutral citation: *Head of the Windhoek Municipal Police Service v Council of the Municipality of Windhoek & Others* (HC-MD-CIV-MOT-GEN-2021/00208) [2021] NAHCMD 501 (15 September 2021)

IT IS ORDERED THAT:

1. The respondent's legal practitioner of record's failure to attend court on 8 September 2021 is hereby condoned.

2. The Order of 11 August 2021 is hereby rescinded.

3. The case remains struck from the roll.

Following below are the reasons for the above order:

[1] What serves before the court is a second attempt made on behalf of the applicant to resuscitate and to further prosecute an urgent application which was struck on the 4th of June 2021.

[2] A first request for directions, dated 21 July 2021, culminated in an order - made on 11 August 2021 - and which - given the outcome of this second request for directions - clearly appears to have been wrongly made and thus requires rescission.

[3] Be that as it may, as I have indicated, what serves before the court today is a second request for directions.

[4] In this request the applicant applies for the allocation of a hearing date of part A of the application - that is the part that was struck - and its determination, with the assistance of supplementary heads of argument.

[5] Mr Boonzaaier addressed the court on behalf of the applicant in support of this further request for directions and Mr Kauta replied on behalf of the respondents.

[6] Unfortunately both counsel did not consider the impact of the Supreme Court decision made in *Swakopmund Airfield CC v Council of the Municipality of Swakopmund* 2013 (1) NR 205 (SC) on the requests made for directions.

[7] Mr Boonzaaier mainly rested his application on the requirements of Practice Direction 27(5), which states that an urgent application must be continued in the normal course on the Judicial Case Management roll of the judge who struck the matter.

[8] Related, of course, to the said Practice Direction is Rule 73(5) of the Rules of Court, which also indicates that an urgent application, which has been struck, may be set down in the normal course – and - importantly, that in such case, the Rules of Court and the Practice Directions are to apply.

[9] I believe that it is stating the obvious, that both the said rule and the referred to Practice Direction must be read subject to the referred to Supreme Court decision.

[10] If one then has regard to what the Supreme Court states it becomes clear what options an applicant has once an application has been struck due to a lack of urgency.

[11] The first option is apparent from paragraph [27] of the judgment. It shows that 'resuscitation', in the instance where an urgent application was found to lack urgency, is only possible, where, immediately after the striking of the application due to lack of urgency, a further application is made, (normally from the bar), by the unsuccessful litigant to pursue the application on the same papers, suitably amended, and the court grants such relief.' Clearly this scenario is not applicable in the present instance as this option was not utilised. I mention it simply because it would have been one of the options available.[1]

[12] Secondly, and this appears from paragraph [28] of the said judgment :

'[28] … Where a court refuses to condone non-compliance with the rules that is, generally speaking, the end of that particular process unless the court gives other directions regarding its prosecution or unless the parties otherwise agree. Because there was no adjudication on the merits of the disputes between the parties, a litigant may, now in the ordinary course and using the prescribed form, bring such dispute before the court. However, once the matter is struck from the roll for lack of urgency, it is no longer part of the litigious process and an applicant is left with various options which he can choose from. He can again use the affidavit evidence which supported the urgent application but he will have to adapt his notice of motion to now comply with the rules in regard to forms and times prescribed for delivery of a notice to oppose, delivery of answering affidavits etc. He could bring a totally new application or he may choose to take no further steps. In this particular instance the applicant chose to bring a new application based on fresh affidavits … Another indication that the matter, once struck from the roll, was not alive, is that whatever choice an applicant should make, it would again have to serve that process on the other party.'

[13] If one only has regard to the cited rules and Practice Directions that explains why the court reacted, as it did, to the applicant's first request for directions. At that stage the court did not have regard to the *Swakopmund Airfield* case, nor was the judgment drawn

[1] Compare *Swakopmund Airfield CC v Council of the Municipality of Swakopmund* at '[27] … Resuscitation in the instance where an urgent application was found to lack urgency seems to me to be only possible where, immediately after the striking of the application for lack of urgency, a further application is made (normally from the bar) by the unsuccessful litigant to pursue the application on the same papers, suitably amended, and the court grants such relief.'

to the court's attention. On a consideration of the *Swakopmund Airfield* case however, the order that I issued on the 11th of August 2021, in response to the first request for directions, appeared to be obviously patently wrong.

[14] In my view, the said Supreme Court decision governs the manner in which urgent applications may be prosecuted further - and thus also the position of the current case - and the Rules of Court and the referred to Practice Directions are obviously merely subservient to that judgment and must be read- and interpreted in conjunction- and in line with it.

[15] Important for the understanding of today's decision is that the Supreme Court decision makes it clear that the case, which the applicant instituted in this instance, was no longer part of the litigious process once the court struck the application on 4 June 2021 – and that was the end of that matter. Three scenarios arose in such circumstances and I have already indicated above why the first option is no longer applicable. Also the third option, that would have been available to the applicant, was not utilised, because the applicant who insists, unremittingly, to obtain an urgent hearing date, failed to launch fresh proceedings, through which he could, by now, have obtained the desired hearing date, would he not have doggedly persisted with - what I believe was - a flawed approach. But as I have observed before, this option was not utilised, that is the option to start afresh by bringing a totally new application.

[16] As far as the remaining option is concerned, the Supreme Court's decision is very clear. For the applicant, to again, have proceeded on the affidavits that were filed for purposes of the urgent application heard in June, the applicant would have had to adapt his notice of motion to now comply with the rules in regard to the forms and times prescribed for the delivery of notices to oppose and the filing of answering affidavits etc.

[17] In addition - and whatever the choice - the applicant would - in any event - have had to serve the amended process on the other parties again. The applicant however did none of this, and in such scenario the application continues not to be part of the litigious process. It accordingly remains struck.

[18] By that same token, it will have become clear, that the order of 11 August 2021 was incorrect and should never have been granted in respect of an application that, also at that stage, did not forms part of the litigious process. That order is consequently

rescinded hereby.	
Judge's signature:	**Note to the parties:**
Geier Judge	Not applicable.
Counsel:	
Applicant	**Respondent**
M Boonzaaier *Instructed by* Brockerhoff & Associates Legal Practitioners	PU Kauta *of* Dr Weder, Kauta & Hoveka Inc.