

SOUTH AFRICA / JUDGMENT

King Sabata Dalindyebo Local Municipality v Zwelitsha (CA78/2022)

[2023] ZAECMHC 29 (13 June 2023)

[2023] ZAECMHC 29

COURT

Eastern Cape High Court, Mthatha

BEFORE

D.O. Potgieter, N.G. Beshe, H Zilwa

CASE / FILE NUMBER

CA78/2022

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FLYNOTES:

CIVIL PROCEDURE –
Notice of set down – Matter
not opposed –
Default judgment obtained after matter set down
without notice – Municipality not given notice of the
“stated
day” on which the relief would be sought
against it should it fail to give notice of opposition –
Court a quo
erred in finding that the omission of a stated day in
the notice of motion had no “external effect” –
Omission
of a stated day constituted a procedural irregularity –
Uniform Rule 6(5)(b)(iii) and Eastern Cape Rule 23(m).
IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION: MTHATHA)
CASE
NO: CA78/2022
REPORTABLE: YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO
REVISED

In the matter between: KING
SABATA DALINDYEBO LOCAL MUNICIPALITY
Appellant
and
BEKENTLA
ZWELITSHA
Respondent

JUDGMENT

POTGIETER J

Introduction

[1] This is an appeal against the refusal by Matebese AJ (“the court a quo”) on 3 February 2022 of an application for rescission of a default judgement granted against the appellant (“the Municipality”)

on 17 November 2020 by Dukada AJ.

[2] The court a quo granted leave to appeal on 31 May 2022 to the Full Court in respect of a limited issue only relating to conflicting

judgements in respect of Rule 23(m) of the Rules Regulating the Conduct of the Proceedings of the Eastern Cape Division of the High Court of South Africa (“Eastern Cape Rules”). The Supreme Court of Appeal (“SCA”) subsequently granted leave to appeal on 11 August 2022 to the Full Court against the entire order of the court a quo.

Brief Background

[3] The background briefly is that the respondent was employed on 23 May 2005 by the Municipality as an Inspector in the Department of Safety and Security at its Mthatha offices. During June 2006 he was appointed as the Acting Assistant Security Manager with effect from 1 June 2006. It was agreed that he would receive an acting allowance representing the difference between his normal salary and the commencing salary of an Assistant Security Manager. This allowance was paid intermittently and was completely stopped during August 2019. As a result, the respondent launched proceedings for the reinstatement of the allowance. The papers were served on the Municipality who failed to give notice of opposition. The matter was then set down without any notice to the Municipality and the relief being sought was granted by default to the respondent by Dukada AJ on 17 November 2020 as indicated. The costs of the application, which were granted in favour of the respondent, were taxed and recovered from the Municipality. The latter brought a rescission application in respect of the order of Dukada AJ approximately at the same time that the respondent took steps to obtain a contempt of court order in respect of the remaining relief granted by Dukada AJ which the Municipality had failed to comply with. As indicated, the rescission application was dismissed by Matebese AJ which in turn spawned the present

appeal.

Merits

- [4] There are various grounds set out in the notice of appeal for the Municipality's contention that the default judgement was erroneously sought or granted as contemplated in rule 42(1)(a)[1]. However, the matter can be disposed of on a limited issue relating to the setting down of the default judgement before Dukada AJ arising from non-compliance with the provisions of Uniform Rule 6(5)(b)(iii) and Eastern Cape Rule 23(m). I proceed to deal with that issue.
- (i) Non-compliance with rule 6(5)(b)(iii)
- [5] The notice of motion in respect whereof default judgement was granted was defective in the following respects. It failed to comply with rule 6(5)(a) which requires that applications must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule of the Uniform Rules. The cause of such non-compliance is the failure to give effect to the requirement of rule 6(5)(b)(iii) that the applicant 'must further state that if no ... notification [to oppose] is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice' (emphasis added). The Municipality was therefore not given notice of the 'stated day' on which the relief would be sought against it should it fail to give notice of opposition. This much is common cause between the parties. The actual issue is the effect of such non-compliance.
- [6] The notice of motion complied in the remaining respects with Form 2(a). It accordingly was not required to nor did it state the hearing date at the commencement of the notice as applies in the case of ex parte applications in terms of rule 6(4)(a) read with Form 2. The upshot of all this was that the notice of motion did not provide any date on which the application would be moved. The Municipality was thus not notified when the matter would be heard in court. The respondent did prepare a notice of set down that contained the date of the hearing, but it was not served on the Municipality. I will revert to the latter issue.
- [7] The court a quo held that the non-compliance with rule 6(5)(b)(iii) was inconsequential and that the respondent was entitled in the circumstances to set the matter down and to obtain judgement without notice to the Municipality. It held as follows in this regard:

"[24] ... In my view the present non-compliance, complained about by the applicant, falls in the category that can be condoned by a court. It is not visited with a nullity. That is clear from the purpose of the rule which, in the core, is to afford the respondent an opportunity to oppose the application by filing a notice to oppose within the prescribed time and by filing an opposing or answering

affidavit, where so advised. This is to honour the age old audi principle.

- [25] However, once a respondent, like the applicant in *casu*, has elected not to file a notice to oppose that clearly signals an intention not to oppose the matter. The failure to indicate a date on which the matter will be heard in the notice of motion has no external effect. It does not deprive him of any procedural right. His election not to oppose the matter remains binding on him irrespective.
- [26] I accordingly disagree with the applicant's argument that the provision of the rule is peremptory such that non-compliance results in a nullity. I also disagree with the argument that the failure constitutes an irregularity that would entitle the applicant to rescission under rule 42 of the Uniform rules of court.
- [27] In my view the respondent was procedurally entitled to set down the matter in the manner he did. He was therefore procedurally entitled to the judgement or order which he obtained by default on 17 November 2020. The applicant, who had not filed any notice to oppose after having been afforded fifteen days to do so, was not procedurally entitled to be served with a notice of set down by the respondent.
- [28] It is trite that a judgement to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the judge who granted the judgement, as he was entitled to do, was unaware."

(emphasis supplied)

- [8] Mr Kunju SC, who appeared on behalf of the Municipality together with Ms Gqetywa, submitted that the court *a quo* erred in finding that the respondent's non-compliance with rule 6(5)(b)(iii) was inconsequential and had no external effect. He submitted that the rule gives effect to the fair trial rights enshrined in the Bill of Rights and was enacted for the benefit of respondents in motion proceedings. The relevant provision of the rule was not complied with by the respondent which amounted in this instance to a breach of the Municipality's fair trial rights.
- [9] Mr Zono, who appeared on behalf of the respondent, submitted that the Municipality was given due notice of the application by means of the service of the papers upon it. The Municipality elected not to exercise its right to oppose the application and is now raising purely technical objections motivated by opportunism. Given the fact that the application was not opposed the respondent was entitled to set the matter down in terms of rule 6(5)(c) without notice to the Municipality. The court order was served on the Municipality and it partly complied with the order by paying the respondent's taxed costs. The rescission application was prompted by a contempt of court application launched by the respondent in respect of the Municipality's failure to comply with the rest of the relief granted in favour of the respondent. In the present matter, the respondent complied with the requirement of fairness by affording the Municipality the requisite period to oppose the application, which it elected not to do. The omission of a 'stated day' for hearing the matter if it is unopposed was not fatal where the Municipality was afforded sufficient opportunity to oppose the application. The purpose of rule 6(5)(b)(iii) was to afford the respondent an opportunity to

oppose the application by filing the notice of opposition and answering affidavit, which was substantially complied with. In the circumstances, the respondent was procedurally entitled to set the matter down in terms of rule 6(5)(c) and to obtain default judgement against the Municipality.

Discussion

- [10] It is trite that in interpreting rule 6(5)(b)(iii) the court should be mindful that ‘... [w]hatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the materials known to those responsible for its production’.[2] It is readily apparent that the relevant provisions of the rule are peremptory and have been enacted for the benefit of the respondent in motion proceedings. The purpose is to notify the respondent when the application would be heard in line with the requirement of fairness which encapsulates the well-established *audi alteram partem* rule and the right of access to courts as entrenched in section 34 of the Bill of Rights.
- [11] Form 2(a) incorporates the provisions of rule 6(5)(b)(iii). It contains the following concluding paragraph: ‘If no such notice of intention to oppose is given, the application will be made on the ____ at ____ (time)’. The text of rule 6(5)(b)(iii) and the prescribed form thus both require that a date should be provided on which the application would be heard if no notice of opposition is given.
- [12] The requirement of a ‘stated day’ as contained in rule 6(5)(b)(iii) was considered by the Gauteng Division, Johannesburg, albeit in the context of an eviction application, in the matter of *Meme-Akpta*[3] where the notice of motion omitted the inclusion of a stated day for the hearing, if the matter was unopposed. The court held as follows in this regard:
- ‘This omission is, without more, fatal to the application and it should not be entertained. Indeed the registrar is not empowered to issue such an application in the absence of a stated date for appearance on the notice of motion. This notwithstanding, the unopposed motion Court is often faced with such inchoate process. The notice of motion is then followed by a notice of set down which is apparently meant to cure this illegality. What is envisaged is that a respondent may be faced with notice of process but given no means to appear and deal with it.’[4]
- [13] That court furthermore held that the delivery of a notice of set down does not cure the defect in question. This issue, however, does not arise in the present matter where the notice of set down was not delivered to the Municipality.
- [14] The same issue was considered by the Gauteng Division, Pretoria in *Auswell Mashaba*[5] where it was held as follows:

“[15] Rule 6(5)(b)(iii) ensures that a respondent is given notice of when relief is being sought against them. Requiring notice of a stated day is not a formalistic application of procedural rules. The rule, whilst procedural in nature, protects a fundamental principle of fairness – that generally a person be afforded an opportunity to be heard before a court grants any relief against it. In this case, the respondents were not provided adequate notice as they were not informed of the day on which relief would be sought against them.

- [16] One can imagine an argument that it is the respondent’s inaction that paved the applicant’s path to seek relief in the unopposed court. However, our courts have held that ‘if the notice of motion is defective, it makes no difference that the respondents did not respond’.
- [17] The applicant’s contention is that there is no requirement to provide a notice of set down in the context of default applications. This misses the point. The concern is not the failure to provide a notice of set down. The concern is the failure to provide a stated day on which relief would be sought in the notice of motion. ...
- [18] The procedural requirement of notice safeguard (sic) the fundamental principle of audi alteram partem. The notice requirement ensures that the respondent is aware of proceedings and provided a true opportunity to be heard. The notice requirement has not been met and consequently the principle of audi breached.”
- [15] I agree with the general import of the conclusion in both Meme-Akpta and Auswell Mashaba that the omission in a Form 2(a) notice of motion of a stated day for the hearing if the application is unopposed, amounts to a material defect and violates the requirement of fairness and the audi alteram partem principle. As indicated by the Supreme Court of Appeal in DF Scott[6] ‘[r]ules of court are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right’.
- [16] In Mukaddam[7] the Constitutional Court stated that:

‘However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the high courts. The Supreme Court of Appeal and this court have their own rules. These rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought.’

(emphasis added)

- [17] The SCA held as follows in Eke[8]:

‘[39] Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose.

...

[40] Under our constitutional dispensation, the object of court rules is ... to ensure a fair trial or hearing.’

[18] The following dicta of the Constitutional Court in *Social Justice Coalition*[9] are also apposite:

‘[51] The right to access to court is more than simply the right to approach a court and initiate a case in support of a justiciable

dispute. The object of going to court is to secure a decision on a dispute and the language of section 34 expressly extends to the right to have a dispute decided. Similarly, the process by which a decision is reached is also covered by the right in its reference to a ‘fair hearing’. Put differently, section 34 is a right that guarantees access to court to have a dispute decided in a fair public hearing.

[54] The rules of Court provide both details of substance and of procedure that govern the litigation of disputes and it would be fair to say that those rules seek to broadly achieve the fair and efficient management of the litigation process. Fairness is ensured by allowing the proper participation of parties and the full ventilation of issues ...’

[19] It is not necessary in the present matter to finally decide (as the court in *Meme-Akpta* seemingly did) whether the omission of a stated day rendered the notice of motion a nullity or whether the defect could have been cured by the delivery of a notice of set down to the Municipality. I do, however, agree with the conclusion in *Meme-Akpta* that this omission was ‘fatal’ to the application in that the request for default judgement should not have been entertained or been granted in the circumstances in the absence of the said material defect having been cured.

[20] The court a quo erred, in my view, in finding that the omission of a stated day in the notice of motion had no ‘external effect’. On the contrary, the fair trial rights of the Municipality were clearly breached in the circumstances. The purpose of requiring notification of a stated day for the hearing, if the matter is not opposed, is to inform the respondent when the application would serve before the court. The purpose of the rule is not limited only to allowing a respondent an opportunity to oppose the application by filing a notice of opposition or an answering affidavit as the court a quo erroneously found. The respondent must be informed of the date of the hearing. The obvious benefit is that the respondent can still appear on that date to seek an opportunity to oppose or to present a defence, despite having, for whatever reason, missed the deadlines stipulated in the notice of motion. This serves to promote the objectives of fairness and the *audi alteram partem* principle. The omission of a stated day accordingly constituted a procedural irregularity for the purposes of rule 42(1)(a).

(ii) Eastern Cape Rule 23(m)

- [21] Mr Kunju furthermore contended that the delivery of the notice of set down only to the Registrar constituted a breach of Eastern Cape Rule 23(m)[10] which resulted in a material irregularity. During argument, Mr Zono on the other hand submitted that Rule 23(m) only covers those institutions envisaged in section 1(2) of the State Liability Act, 20 of 1957, that are represented by the State Attorney. This excludes municipalities. The latter are creatures of statute. Section 115(3) of the Local Government: Municipal Systems Act, 32 of 2000 (“the Systems Act”) requires that all legal process be served on the municipal manager. The Municipality accordingly falls outside the scope of Rule 23(m).
- [22] The court a quo considered this issue and held that the purpose of Rule 23(m) was to extend the right in question only to state organs and entities that are represented by the State Attorney. This does not apply to municipalities. The court thus came to the conclusion, without any elaboration, that it would result in an absurdity to extend the provisions of Rule 23(m) to the Municipality.
- [23] At the hearing of the application for leave to appeal, the attention of the court a quo was drawn to the decision in Umzimbuvu Local Municipality[11] where Norman J found that municipalities, as organs of state, are included in Rule 23(m).[12] This judgment was handed down on 29 March 2022, after the delivery of the judgment of the court a quo on 3 February 2022. The court a quo nonetheless quite correctly considered the judgment and dealt with it in its own judgment on the application for leave to appeal. The court a quo disagreed with the conclusion of Norman J. It held that municipalities are not government departments as envisaged in the State Liability Act. The latter Act requires that legal process involving such departments be served on the office of the State Attorney. The court a quo furthermore expressed the view that it serves no purpose and is not sensible to insist on the service of a notice of set down on the State Attorney whose office does not represent municipalities in litigation. It would therefore be absurd to ascribe such an interpretation to Rule 23(m) given that municipalities do not get represented or served at the State Attorney.
- [24] In my view, the court a quo erred in its interpretation of Rule 23(m). Municipalities are undoubtedly organs of state as defined in section 239 of the Constitution[13] as well as in section 1 of Act 40 of 2002[14]. As such they form part of the State. I am in full agreement with the reasoning of Norman J in this regard in Umzimbuvu Local Municipality.[15]
- [25] The clear purpose of Rule 23(m) is to alert State litigants to pending applications for default judgement in order to afford them an opportunity to protect their interests. There is no reason in principle or logic nor is there any conceivable considerations of policy why municipalities being part of the State, should be deprived of this benefit. It does not follow expressly or by necessary implication from the text of the rule. In fact, it could be expected that if the intention was to single out municipalities as the only state organs not entitled to the benefit, this much would have been expressly stated in the rule. The exclusion of municipalities also does not follow by necessary implication from the reference in the rule to the State Attorney. The intention in this regard clearly was to require that notice be given to a representative of the relevant State organ in the context of pending litigation. The

inclusion of municipalities therefore coincides with the purpose of Rule 23(m).

- [26] Section 115(3) of the Systems Act identifies the municipal manager as the official on whom legal process should be served. Rule 23(m), being subordinate legislation with similar status to the Uniform Rules[16], should be interpreted consistently with the applicable statutory provision. Accordingly, in the case of municipalities, Rule 23(m) would be substantially complied with if the notice of set down is served on the municipal manager. In cases where the municipality might be represented by the State Attorney (which, although not statutorily prohibited,[17] currently does not readily occur in practice) service on the latter would naturally be sufficient. It might be necessary, in the interests of the proper administration of justice, for consideration to be given to amending the rule in order to avoid anomalies such as have arisen in the present matter. Nonetheless, in order to give the necessary guidance, it is in the interests of justice that the above interpretation of the rule in so far as municipalities are concerned, be reflected in the order granted in this matter.
- [27] It follows that the provisions of Rule 23(m) were binding on the respondent who was obliged to serve the relevant notice of set down on the Municipality. His failure to do so, constituted a procedural irregularity as envisaged in Rule 42(1)(a) which precluded the granting of default judgement against the Municipality.

Conclusion

- [28] For the reasons set out above, default judgement was therefore erroneously sought or granted against the Municipality as contemplated in Rule 42(1)(a)[18]. As the SCA indicated '[w]here notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously'. [19] The default judgment should thus have been rescinded by the court a quo. In view of this conclusion, it is not necessary to deal with any of the other grounds relied upon by the Municipality for such relief.
- [29] There is no merit in my view in any of the other defences raised by the respondent. It needs to be pointed out in this regard that the Municipality has clearly not acquiesced in the judgement by having paid the taxed costs as contended by the respondent. The municipal manager indicated in the replying affidavit that he was unaware of such payment. Furthermore, that the Municipality's accounts section that made the payment would not have known that the matter was under challenge. He expressly indicated that the Municipality has not acquiesced in the judgement and that the payment would be recovered from the respondent. He also stated in the founding affidavit that he became aware of the matter for the first time in December 2020 when the relevant court order was brought to his attention. The attorneys of the Municipality investigated the matter in January 2021 and the rescission application was launched at the beginning of March 2021. These averments were not disputed in the respondent's answering affidavit. Furthermore, none of the substantive relief granted was ever implemented by the Municipality. The defence of acquiescence is accordingly not supported by the facts.

[30] Finally, while Rule 31(4) does not require that a notice of set down be given where no notice of opposition is delivered, it is of no assistance to the respondent in the present matter where Rule 23(m) applies and expressly requires that such notice be given.

[31] In the circumstances, the appeal should succeed. In my view the employment of two counsel by the Municipality was not warranted. In fact, the appeal was ably argued by the respondent's attorney himself. The costs of two counsel are therefore not justified.

[32] In the result the following order shall issue:

- (a) The appeal is upheld with costs;
- (b) The order of the court a quo issued on 3 February 2022 is set aside and substituted with the following order-

"1. The order granted in this matter on 17 November 2020 is hereby rescinded and set aside;

2. The respondent is ordered to pay the costs of the application."

- (c) It is declared that in the case of applications for default judgement against a municipality as envisaged in Eastern Cape Rule 23(m), the applicant is required to serve the notice of set down on the Municipal Manager or a person in attendance at the Municipal Manager's office, alternatively on the State Attorney in cases where the latter is the attorney of record for the municipality.

D.O. POTGIETER

JUDGE OF THE HIGH COURT

I agree:

N.G. BESHE

H ZILWA

ACTING JUDGE OF THE HIGH COURT

APPEARANCE For the appellant: Adv V Kunju SC and Adv C Gqetywa Instructed by: Jolwana Mgidlana Inc, Mthatha For the respondent: Mr Zono Instructed by: Zono and Associates, Mthatha Date of hearing: 04/24/23 Date of delivery of judgment: 06/13/23

[1] The rule provides that: '(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary: (a) an order or judgment erroneously sought or granted in the absence of any party affected thereby.'

[1] The rule provides that:

'(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

- (a) an order or judgment erroneously sought or granted in the absence of any party affected thereby.’
- [2] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) at para [18].
- [3] Meme-Akpta & Another v The Unlawful Occupiers of ERF 1168, City and Surban, 44 Nuggett Street, Johannesburg & Another (38141/2019)
- [2022] ZAGPJHC 482 (26 July 2022)
- [4] at para [18]
- [5] Auswell Mashaba v The Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State & Others Case No. 14261/2021 dated 16 July 2022 (unreported)
- [6] DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket 2002(6) SA 297 (SCA) paragraph [9].
- [7] Mukaddam v Pioneer Foods (Pty) Ltd 2013(5) SA 89 (CC) at para [31]
- [8] Eke v Parsons 2016(3) SA 37 (CC) at paras [39]-[40]; Arendsnes Sweefspoor CC v Botha 2013(5) SA 399 (SCA) at para [19].
- [9] Social Justice Coalition & Others v Minister of Police & Others 2022(10) BCLR 1267 (CC).
- [10] The rule is to the following effect: ‘In all cases in which judgment by default is sought against the State (which will include applications where the State has failed to timeously file either a notice of opposition or its opposing papers) a notice of set down is to be served on the State attorney at least five days before the hearing’.
- [10] The rule is to the following effect:
- ‘In all cases in which judgment by default is sought against the State (which will include applications where the State has failed to timeously file either a notice of opposition or its opposing papers) a notice of set down is to be served on the State attorney at least five days before the hearing’.
- [11] Umzimbu Local Municipality v Price Waterhouse Coopers Inc Case No. 2913/2020 Eastern Cape Division, Grahamstown dated 29 March 2022 (unreported)
- [12] The court stated at para 32: ‘I am of the view that because municipalities are included in Act 40 of 2002 as beneficiaries of the notice to be issued before an action is brought against them, that being a procedural issue, there is no logical reason to exclude them when a similar protection (that of service of the notice of set down) is extended to the state by rule 23(m). ... I have no doubt that if the intention was to exclude municipalities (as an organ of state) from the provisions of rule 23(m) that would have been expressed in the rule itself. I accordingly find that the municipality as an organ of state is included in the rule and failure to serve on it of the notice of set down constitutes a procedural error as envisaged in rule

42(1)(a).’

- [13] In terms of the definition organ of state means ‘any department of state or administration in the national, provincial or local sphere of government’.
- [14] The Act titled Institution of Legal Proceedings against certain Organs of State Act defines an organ of state as ‘(b) a municipality contemplated in section 151 of the Constitution’.
- [15] Supra fn 12.
- [16] National Pride Trading 452 (Pty) Ltd v Media 24 Ltd 2010(6) SA 587 (ECP) at para [31].
- [17] Umzimbuvu Local Municipality supra fn 11 at para [31].
- [18] National Pride Trading supra fn 16 at para [33].
- [19] Lodhi 2 Properties Investments CC & Another v Bondev Developments (Pty) Ltd 2007(6) SA 87 (SCA) at para [24].

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