

SOUTH AFRICA / JUDGMENT

Malawu v MEC for the Cooperative Governance and Traditional Affairs, Eastern Cape and Another (779/2020) [2020] ZAECGHC 72 (29 June 2020)

[2020] ZAECGHC 72

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan

CASE / FILE NUMBER

779/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO. 779/2020

Date

heard: 25 June 2020

Date

delivered: 29 June 2020

In

the matter between:

SIYABULELA

MALAWU

Applicant

and

THE MEC FOR

CO-OPERATIVE

GOVERNANCE AND

TRADITIONAL

AFFAIRS,

EASTERN CAPE

First

Respondent

THE MUNICIPAL
COUNCIL:

AM AHLATHI
MUNICIPALITY
Second Respondent

JUDGMENT

RUGUNANAN, J

- [1] This application served before me on 25 June 2020 as one of urgency in which the applicant sought to review and set aside the decision of the first respondent, taken on 18 March 2020, to remove him from office as a councillor in terms of item 14(6)(b) of the Code of Conduct in Schedule 1 of the Local Government: Municipal Systems Act[1]. This relief is couched in Part B of the applicant's notice of motion. Part A was disposed of in terms of an agreed order taken before Tokota J on 26 March 2020. The order incorporated a timetable for the filing of a record, further affidavits and heads of argument. At the instance of the first respondent the issue relating to urgency and the costs occasioned by the postponement of the matter were reserved. (Parenthetically I add that the issue of the reserved costs were not argued hence the order below makes no provision therefor).
- [2] The proceedings were conducted through an online videoconferencing medium and since the relief in Part B affected only the first respondent, the second respondent did not participate but maintained a watching brief. The first respondent (to whom I will hereinafter refer to as "the respondent") resisted the relief claimed by the applicant both on the merits and on the ground that the application had improperly been brought on the basis of urgency. For reasons to follow, I consider that the matter may be disposed of on the latter basis and find it unnecessary to express any view on the merits, this notwithstanding that the papers are complete in the sense that the parties had filed their respective affidavits and that the matter was ripe for hearing. In any event, the merits as they appear from the papers before me are not so closely linked to the urgency issue if one considers (from what appears below) the applicant's failure to provide explicit detail of the circumstances that render the matter urgent.
- [3] Counsel for the applicant, Mr Matotie, submitted that the urgency of the matter is underscored by the circumstance that there is a community without representation by a councillor serving on the municipal council of the second respondent. By operation of section 25 of the Local Government: Municipal Structures Act [2], Mr Matotie stated that a municipal by-election, which had been previously postponed because of the national lockdown, is due to be held in July 2020. He conceded, however, that this is not mentioned anywhere in the applicant's papers. On behalf of the

respondent, Mr Rorke SC, submitted that the applicant's departure from the ordinary form of notice of motion (i.e. Form 2(a))

is not justified by any of the allegations set out in the applicant's founding affidavit.

- [4] Before proceeding to consider the submissions by the parties' counsel it is convenient to recapitulate the essential principles underlying urgent applications which inform this judgment. An applicant that seeks to have its non-compliance with the ordinary rules relating to notice periods, forms and service of court process condoned, is required to set out in its papers a reasonable and satisfactory explanation for such non-compliance. But where it is contended that the matter necessitates urgent enrolment and adjudication, other than in the normal course of proceedings, the applicant must explicitly allege the circumstances which establish that a hearing in due course will not meet the exigencies of the matter and that it will suffer prejudice. The grounds on which the applicant alleges urgency must be set out in its founding affidavit (see *Mbizana Development Forum v Minister of Justice and Constitutional Development and Others* [3]).
- [5] As for the form of the notice of motion, rule 6(12) of the Uniform Rules of Court permits an abridgement of the conventional time frames prescribed by rule 6(5)(b). Depending on the circumstances of a case, an applicant is allowed to make its own rules, but this is subject to the stipulation in rule 6(12)(a) that this shall "as far as practicable" be in accordance with the existing rules. This contemplates an "adjustment, not abandonment" of the ordinary form of

notice of motion. In this regard, it is expected of an applicant, or more specifically, the applicant's legal representatives to carefully analyse the facts of a case with proper consideration being given to the degree of relaxation of rule 6(5) as may be dictated by the exigencies of the case without disregard for the interests of the other party and their legal representatives, nor disregard for any inconvenience occasioned to the court by having to entertain the application on an urgent basis as a departure from the established filing and sitting times of the court. It also bears emphasising that the issue whether an applicant's modification of the rules on the grounds of alleged urgency was unacceptable should not be obscured by the perception that the matter is ripe for hearing because it has been postponed and the papers are complete by a particular date (see generally *Caledon Street Restaurants CC v D'Aviera* [4] and the authorities cited therein).

- [6] In proceeding to evaluate the submissions by counsel for the parties,

I give consideration to the extent to which the applicant sought a modification of his notice of motion, the averments relied upon

therefor and whether they are sufficient.

- [7] A convenient starting point commences on Friday 20 March 2020 with the directive issued by Beshe J in terms of Practice Rule 12(a)(i) of the Joint Rules of Practice[5] that this application "may be enrolled as an urgent application on Thursday, it being a normal motion court day". Seemingly, the applicant adopted the approach that the directive was conclusive of the urgency issue and this relieved him of the obligation to make out a proper case therefor when argument on Part B of the notice of motion was presented. In *Mbizana supra* Goosen J expressed himself thus:

“The [Practice] Rule only contemplates that directions will be issued in respect of matters to be heard other than during normal motion court hours. A direction issued by a judge in chambers that a matter be enrolled on an ordinary motion court day can therefore mean no more than that the judge concerned did not consider that the matter warranted his or her attention outside of normal motion court hours, leaving the question as to the justification for urgent enrolment on a motion court day to be considered by the judge presiding over that motion court. Accordingly, the direction issued in this matter does not mean that the application must of necessity be dealt with as one of urgency.”

[8] Following the directive, the applicant served the application on the office of the State Attorney on Monday, 23 March 2020 at 12h57. The applicant’s notice of motion determined that the hearing of the matter be set down for Thursday 26 March 2020 at 11h00 (a period of three days after the application was served on the State Attorney). The notice of motion stipulated (by a leeway of three hours) that the respondents were required to notify the applicant in writing on or before 23 March 2020 at 16h00 should they intend opposing the application. The notice of motion did not stipulate a time period for the filing of answering affidavits by the respondents. Undoubtedly, this is a material deviation from the ordinary form of notice of motion. On 26 March 2020, Part A was dealt with in terms of the agreed order.

[9] The averments relied on by the applicant to justify the aforementioned procedure are the following:

“9. The reason why PART A of the notice of motion ought to be adjudicated as a matter of urgency will transpire from the remainder of the contents of this affidavit as I am dealing with the grounds of urgency in a separate paragraph herein.

...

35. As a consequence of my illegal removal from the office of councillor of the second respondent, any action and decision taken to replace me will be invalid and will negatively impact and affect the rights of the second respondent’s citizens.
36. The second respondent will be obliged to declare a vacancy as a result of which a by-election will have to be held. Any replacement councillor sworn in to replace me from within the citizens of the second respondent will be invalid as my removal did not happen in terms of the prescripts of Schedule 1 of the Systems Act, for reasons stated above...
37. ... my removal from the council of the second respondent, albeit unlawfully, will trigger a ward by-election where the citizens of the second respondent will have to vote for a new councillor, thereby incurring unnecessary huge expenses for the costs associated with a by-election.”
- [10] Relying on *Sikwe v S A Mutual Fire & General Insurance Co. Ltd* [6], Mr Matotie submitted that an application is not necessarily defective if the ordinary form referred to in the rule is not strictly complied with - for it is the substance of the affidavit that will weigh with a court if the only reasonable inference from the facts is that the matter is one of urgency. I am not

convinced that the present case is sustainable by this submission. Rule 6(12)(b) obliges an applicant to set forth “explicitly” the circumstances that render the matter urgent and to state reasons why it could not be afforded substantial redress at a hearing in due course. To my mind this requires of an applicant to state clearly and with objective [7] detail those circumstances, leaving no room for confusion, uncertainty or assumption. Put otherwise, an applicant’s mere assertions have no relevance unless they consist of allegations of fact constituting the evidence on which the applicant relies (see *Hülse-Reutter and Others v Gödde* [8]).

- [11] An overview of the extracts from the founding affidavit indicates that the grounds relied on by the applicant for the procedure adopted by him are wholly insufficient to justify the procedure resorted to. There is no indication or detail that the date on which a vacancy would be declared has been determined, or that a date for a by-election is predictably imminent, or that such by-election will take place on a date before the hearing of the review in the ordinary course. The consequence is that a proper assessment of urgency where an applicant could otherwise be barred from being afforded substantial redress in due course, cannot be meaningfully undertaken.
- [12] Following delivery of the record in accordance with the order of 26 March 2020 the applicant filed a supplementary affidavit on 17 June
2020. Considering that section 25 of the Local Government: Municipal Structures Act sets out a time frame and a publication requirement for a ward by-election, it is inexplicable that the applicant failed to supplement his papers with factual detail relevant to the scheduling of the by-election. As such, the earlier statement by Mr Matotie falls to be disregarded.
- [13] The conclusion drawn from the above is that the degree of abridgement of times and deviation from rule 6(5) was greater than the exigency demanded by the case and certainly not commensurate therewith. [9] On a practical level this did not justify the matter being set down on the third day after the application was served. Mr Rorke correctly relied on *Mbizana* [10] *supra* for his submission that the applicant’s departure from the ordinary form of notice of motion was not justified by the allegations set out in the founding affidavit, and is illegitimate.
- [14] Although the matter was ripe for hearing on 25 June 2020 and the merits were argued this should not obscure the fact that the applicant unacceptably truncated the rules. The present case typifies an instance necessitating that this court should not be hesitant to take exception to the applicant’s presumptuous conduct.
- [15] In the result, I consider the following to be an appropriate order:
- (a) The application is struck off the roll with costs including the costs consequent upon the employment of two counsel.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

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This judgment was handed down electronically by circulation to the abovementioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h30 on 29 June 2020.

[1] Act No. 32 of 2000, as amended

[2] Act No. 117 of 1998, as amended

[3] (1256/2013)

[2013] ZAECMHC 8 (13 June 2013) at para [8]

[4] [1998] JOL 1832 (SE), pp 6-7

[5] i.e. The Joint Rules of Practice for the High Courts of the Eastern Cape Province (revised January 2020). The full text of practice rule 12 reads as follows: “12. URGENT APPLICATIONS (a) In urgent applications: (i) “The practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the application papers are placed before the judge and in which the reasons for urgency are fully set out. In this regard, sufficient particularity is to be set out in the certificate for the question of urgency to be determined solely therefrom and without perusing the application papers. The certificate of urgency will be placed before the judge who will make a determination solely from that certificate as to whether or not the matter is sufficiently urgent to be heard at any time other than the normal motion court hours. Should he or she determine that it is sufficiently urgent, he or she will then give directions as to the time and place, when and where the application is to be heard.” (ii) Details of why the applicant alleges a matter is urgent should also be set out in the founding papers.” (iii)

[5] i.e. The Joint Rules of Practice for the High Courts of the Eastern Cape Province (revised January

2020). The full text of practice rule 12 reads as follows:

“12. URGENT APPLICATIONS

(a) In urgent applications:

(i) “The practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the application papers are placed before the judge and in which the reasons for urgency are fully set out. In this regard, sufficient particularity is to be set

out in the certificate for the question of urgency to be determined solely therefrom and without perusing the application papers. The certificate of urgency will be placed before the judge who will make a determination solely from that certificate as to whether or not the matter is sufficiently urgent to be heard at any time other than the normal motion court hours. Should he or she determine that it is sufficiently urgent, he or she will then give directions as to the time and place, when and where the application is to be heard.”

(ii) Details of why the applicant alleges a matter is urgent should also be set out in the founding papers.”

(iii)

[6] 1977

(3) SA 438 (WLD) at 440H-441A

[7] See *Ntozini and Others v African National Congress and Others* (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) paras [10] and [13]

[8] 2001

(4) SA 1336 (SCA) at para [14]

[9] *Luna Meubelvervaardigers Edms Bpk v Makin t/a Makin's Furniture Manufacturers* 1977 (4) SA 135 (W) at 137

[10] (1256/2013)

[2013] ZAECMHC 8 (13 June 2013) at para [9]

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