

SOUTH AFRICA / JUDGMENT

Mamahule Traditional Authority v Mabyane and Others (2449/2021) [2021] ZALMPPHC 19 (14 May 2021) [2021] ZALMPPHC 19

COURT

Limpopo High Court, Polokwane

BEFORE

AML Phatudi

CASE / FILE NUMBER

2449/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: 2449/2021

In the matter

between:

MAMAHULE
TRADITIONAL AUTHORITY
FIRST APPLICANT
and
MANTEBELE
MABYANE
FIRST RESPONDENT
THABO MABYANE
SECOND
RESPONDENT
MMAELE GEOGENA
MATSAUNG
THIRD RESPONDENT

JUDGMENT

AML PHATUDI J

- [1] This is the applicants' application for the striking out of the third respondent's notice of intention to oppose and the answering affidavit filed therewith due to non-compliance with the time frames set by the applicants in their notice of motion and the joinder application filled in terms of Rule 10.
- [2] The factual matrix in this application is that the notice of motion and the notice in terms of Rule 10 issued by the applicants calls upon the respondents to serve their notice of intention to oppose by no later than 16h00 of 16 April 2021 and their answering affidavit by no later than 21 April 2021. The call in the joinder application of the third respondents is worded: "TAKE FURTHER NOTICE" that if the third respondent if she wishes to oppose the application to be joined as a third respondent she must do so simultaneously with her notice to oppose the main application, including any intention to oppose the intended application for amendment in court by close of business the 16 April 2021 and to file an Answering Affidavit dealing with both the joinder application and the main application by no later than the 21 April
2021. In other words, the time frames in the notice of motion and the joinder application are the same. The respondents are required to file their notice to oppose and answering affidavit(s) on 16 April and 21 April 2021 respectively.
- [3] All three respondents are represented by one attorney. The attorney drafted the notice to oppose on the 16 April 2021 but only served it on the 19 April 2021. The applicants only came to know of the respondents' intention to oppose the application on the 19 April 2021. The third respondent is the only party who filed the answering affidavit. It is clear from her answering affidavit that she is not deposing for and or on behalf of the other two respondents. Technically, the first and second respondents only filed their notice of intention to oppose with no answer to the applicant's averment in the founding affidavit.
- [4] The respondent did not apply for condonation of the late filing of her notice of intention to oppose and her answering affidavit. The issue before this court is whether the filing of the respondents' notice of intention to oppose and the third respondents answering affidavit should be struck out for non-compliance with time frames as set out by the applicants in their notice of motion.
- [5] Urgent applications are regulated in terms of Rule 6(12) of the Uniform Rules of this Division. Rule 6 (12) (a) stipulates that "in urgent application the court or a Judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of the rules) as it deems fit.

- [6] Rule 6(12)(a) regulates, firstly, the abridgement of times prescribed by the rules; secondly, the departure from established filing rules and lastly, the seating times of the court. It is trite law that every urgent application shall be brought on notice of motion, drawn in accordance with form 2 (A). The applicant is obliged to indicate the date or dates by which any party cited and who is likely to be affected by the relief sought is called upon to deliver the notice of intention to oppose as well as the answering affidavit. The application must be served on the respondents by the sheriff in one or other manner stipulated in Rule
4. There are exception, though, to the said rule. Urgency relates not only to matters of life and death but also to preservation of property or the status quo or the evidence including the commercial interest.
- [7] The principle sets out in the classical case- *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) relating to Rule 6 (12) (a), the court stated:

‘It is of importance to state what the effect of this rule is. In the case of an urgent application an applicant is permitted to act by way of notice of motion without taking into account the rules which are usually applicable. The applicant is, in a certain sense, taking into account the circumstances of the case permitted to make his own rules but “as far as practicable” in accordance with the existing rules. Rule 6(12) therefore makes provision for process subject to rules different from the usual and when an applicant appears before a judge in such a procedural manner he must ask the judge to disregard the rules applicable to ordinary adjudication. He is not obliged to go to the judge first to ask permission to act by means of extraordinary adjudication because Rule 6(12) expressly provides that the judge may deal with such a matter when and where he deems fit. If an applicant acts in terms of this rule and informs the respondent that he regards the application as urgent it follows, in my view, that the respondent is obliged to adhere to the chosen dates and times, in the sense that he runs the risk of an order against him by default if such dates and times are ignored, and entitled to provisionally accept the rules which the applicant has adopted. When the matter comes before the judge he can object, but in the meantime, he dares not disregard the rules which the applicant has made for himself. Even if the rules of court with regard to ordinary adjudication are deemed to determine that an action is instituted when the notice of motion is handed to the registrar in the case of an urgent application the applicant in the absence of the registrar may launch the matter directly to the judge and the judge can disregard the rules of ordinary adjudication in this connection. Rule 6(12) (a) provides that in the case of urgent applications a judge can disregard the “forms and service” prescribed by the rules. Delivery of a notice of motion to the registrar is no “service” but because in the case of an opposed motion the applicable form 2(a) in the first Schedule requires express notice to the registrar and respondent a judge in an urgent case when the registrar is not available can disregard the requirement that form 2(a) be directed to the registrar’.

- [8] If an applicant acts in terms of this Rule 6(12) (a) and informs the respondent(s) that he regards the application as urgent, it follows that the respondent must be obliged, in the sense that he runs the risk of an order against him/her being granted by default. The

respondent(s) is obliged to provisionally accept the rules which the applicant has adopted. When the matters come before court, the respondent(s) can object or can apply for condonation for the late filing of the notices. In the meantime, the respondent(s) dares not to disregard the rules which the applicant has made for himself.

- [9] It is common cause that the applicant set its time frames as to when and how the respondent(s) should serve and file their notice of intention to oppose and to file their answering affidavit. It is further common cause that the respondents only filed their notice to oppose on 19 April 2021- three days after the time frames set by the applicant and the answering affidavit was served and filed on the 23 of April 2021- two days after the expiry of the date set by the applicant.
- [10] It is further common cause that the respondent neither filed the condonation application nor applied from the bar for such condonation in respect of the late filing of the said notice of intention to oppose and/or answering affidavit.
- [11] Counsel for the respondent submits that the abridgment of the rules sought by the applicant as provided for in terms of rule 6(12) (a), applies mutatis mutandis to the respondents when filing the opposing papers. I am afraid, I do not agree with his submissions.
- [12] I indicated herein above the principle set out in the *Republikansie* that obligates the respondent to adhere to the dates and times for filing the opposing papers. If the respondent(s) fail to adhere to such times then he/she runs the risk of an order against him or her by default. Counsel was at pain to persuade me that the rule of abridgment of the rules-Rule 6(12)(a)- applies mutatis mutandis. In the absence of an application for condonation for the late filing of the respondent's opposing papers,(such application can be moved from the bar especially in any urgent applications), I am afraid the rule and the law espoused in *Republikanse* dictates that judgment by default may be entered. This, in my view, leave me with no option but to struck out the third respondent's answering affidavit. The issue to be determine now is the costs.
- [13] It is trite law that costs follow the event. The applicants succeed with their application and they are therefore entitled to their costs. At the commencement of this matter, Mr Mphahlele placed on record the appointment of two counsel. Considering merits and demerits of this matter, I am of the view that this is not as complex as it would warrant the appointment of two counsel.
- [14] In the result, I make the following order.

Order

14.1 The third respondent's answering affidavit filed on 23 April 2021 is Struck out with costs on party and party scale.

14.2 The Respondent's point in limine relating to non-compliance with Rule 41A is upheld.

14.3 The applicant's application is struck off of the roll with no order as to costs.

AML PHATUDI

JUDGE OF THE HIGH COURT

Heard:

28 April 2021

Delivered: 28 April 2021

Revised: 14 May 2021

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