

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION LOCAL, PORT ELIZABETH)**

CASE NO.: 4556/2015

In the matter between:

AFRIFORUM (NON-PROFIT COMPANY) (Registration No. 2005/042861/08)	First Applicant
---	------------------------

RATEPAYERS ASSOCIATION OF THE NELSON MANDELA BAY MUNICIPALITY	Second Applicant
--	-------------------------

JACOBUS MARTHINUS GERBER	Third Applicant
---------------------------------	------------------------

And

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	First Respondent
---	-------------------------

ACCESS FACILITIES AND LEISURE MANAGEMENT COMPANY (PTY) LTD (Registration No. 2008/009760/07)	Second Respondent
---	--------------------------

MPILO SAKILE MBAMBISO	Third Respondent
------------------------------	-------------------------

TREVOR HARPER	Fourth Respondent
----------------------	--------------------------

NADIA GERWEL	Fifth Respondent
---------------------	-------------------------

JEZREEL DU PLESSIS	Sixth Respondent
---------------------------	-------------------------

NDIPHIWE MANTYONTYA	Seventh Respondent
----------------------------	---------------------------

JUDGMENT

BESHE J:

[1] In December 2015, applicants launched an application wherein the following relief was sought:

1. That the decision to renew the Stadium Operations Agreement for a further twelve months, from 1 July 2015 to 30 June 2016, is hereby reviewed and set aside;
2. The First Respondent is hereby ordered to appoint a reputable accounting firm to conduct a forensic audit within 20 days hereof;
3. That the accounting firm will be mandated to deliver a report pertaining to the activities of the First Respondent from 1 January 2014 to present date to this above Honourable Court within 30 days of appointment;
4. That the Applicants be permitted to file further papers within 20 days of the receipt of such report;
5. That the Applicants may return this matter to court once such report has been received;
6. That the Applicants be awarded the costs of this Application, such costs to include the employment of two counsel.

KINDLY TAKE NOTICE FURTHER that the accompanying Affidavit of **JACOBUS MARTHINUS GERBER**, together with annexures thereto, will be used in support of this application and will be supplemented in terms of Uniform Rule of Court 53(4).

TAKE NOTICE FURTHER that the Respondents are called upon, in terms of Uniform Rule of Court 53, to show cause why the decision referred to in paragraph 1 should not be reviewed and set aside.

TAKE NOTICE FURTHER that within ten (10) days of receipt of the record from the Registrar, the Applicants may, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of their Notice of Motion and supplement their Founding Affidavit in terms of Rule 53(4) of the Uniform Rules of Court.

TAKE NOTICE FURTHER that the Applicants have appointed Strömbeck Pieterse Attorneys of 7 Bird Street, Central, Port Elizabeth as the address at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if any of the Respondents intend opposing this application they are required:-

- (a) within fifteen (15) days after receipt of the Notice of Motion or any amendment thereof, to deliver to the Applicants' attorney a Notice of Intention to Oppose and, in such notice, to appoint and address within eight (8) kilometres of the office of the Registrar at which it will accept notice and service of all process in such proceedings; and
- (b) within thirty (30) days after expiry of the time referred to in Rule 53(4), to deliver any affidavits that they may desire in answer to the allegations made by the Applicants.

TAKE NOTICE FURTHER that if no such Notice of Intention to Oppose is given, the application for the relief sought will be made on 26th day of January 2016 at 09h30 or so soon thereafter as counsel for the Applicants may be heard.

[2] Essentially the same relief was sought in terms of an amendment of notice of motion dated 14 March 2016. In the "amended notice of motion" the respondents were called upon to dispatch within fifteen (15) days of receipt of the notice of motion, the record of proceedings sought to be reviewed.

[3] However albeit on different dates, all the respondents had given notice of their intention to oppose the application even before the filing of the amended notice of motion.

[4] Second respondent raised certain objections relating to applicants' notice of motion and the purported amendment thereof.

[5] In the meantime, the first respondent who I presume has the requisite record had not filed same with the Registrar. Neither had it filed its answering affidavit. The reason first respondent suggests for not filing an answer is that it was "awaiting the outcome of the Rule 30 skirmish between the applicants and the second respondent in respect of the

record”. I assume it was for the same reason that the record was not delivered to the Registrar. In addition first respondent contends that applicants were attempting to invoke the *Rule 53(1)(b) of the Uniform Rules of this Court*. First respondent, it would seem aligned itself with second respondent, or was also of the view that the applicants had not complied with *Rule 53(1)(b)* in calling upon it to file the relevant record or the timeframes for amending a notice of motion. Second respondent was apparently of the view that it has not been called upon to file the requisite record or the correct procedure had not been followed in amending the applicants’ notice of motion.

[6] In the midst of all the exchange of correspondence between those representing the applicants and second respondent regarding compliance with *Rule 53* on the part of the applicants, the applicants set the matter down in terms of practice rule (EC) number 15 k.

[7] *Rule 15 (k) (i)* provides that:

“k (i) In all matters where a notice of opposition has been delivered but no answering affidavit or notice in terms of rule 6(5)(d)(iii) of the Uniform Rules has been delivered within the period prescribed in terms of the Uniform Rules, the applicant must apply for the matter to be set down on the unopposed roll, and the registrar must set the matter on the unopposed roll under caption “UNCONTESTED OPPOSED MATTERS”. (Court Notice 1/2009 para 2)” The matter was set down as unopposed.

Upon receipt of the notice in terms of *Rule 15 k*, first respondent’s attorneys pointed out to the applicants that the application for set down of the application was premature. Applicants’ attention was first drawn to the possibility of set down being premature on 13 June 2016 and later on the 20 June 2016.

[8] About the 14 June 2016 the applicants complained about first respondent having disregarded the *Uniform Rules of Court* by failing to file the record of the decision by the 21 April 2016 and reminded the first respondent of their entitlement to waive their right to the enforcement of *Rule 53 (1) (b)*.

[9] Both first and second respondents are now asking that the matter be postponed *sine die*, now that the applicants have waived their right to provision of the record. Not because they have been remiss in not filing their answering affidavits but because they had thirty (30) days within which to do so after applicants waived their right to the record as provided for in *Rule 53 (1) (b)*.

[10] *Rule 53* lays down the procedure to be adopted when it is sought to review certain decisions or proceedings. The portion of the rule that is relevant for purposes of these proceedings are *sub rules 4 and 5* which read thus:

“(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add or to vary the terms of his notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall—

(a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office of the registrar at which he will accept notice and service of all process in such proceedings; and

(b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.”

[11] The provision of the *sub rules 4 and 5* are in my view clear and unambiguous. Namely that after the receipt of the record or waiver of right to the record as in this case, the party desiring to oppose the granting of the relief sought has thirty (30) days to deliver their answering affidavit.

[12] Both first and second respondents alerted the applicants to the setting down of the application being premature. Despite this applicant proceeded to set the matter down.

[13] At the start of these proceedings *Mr Crompton* for the applicants intimated that he intended arguing for the granting of the orders sought in the notice of motion but understood that first and second respondents have prepared substantive applications for postponement and that their representatives should perhaps address the court first. He was however adamant that he was going to argue for the granting of the orders sought by the applicants in the notice of motion. He however during his address after counsel for both respondents had addressed me, submitted that the matter was set down for the court to give a direction as *Rule 53* was not clear when it comes to circumstances akin to this matter.

[14] Was there no better way of seeking such a direction than setting the matter down for argument on the merits?

[15] I am inclined to agree with *Mr Nepgen* for second respondent that it was open to the applicants to amend their notice of motion and set different terms or time table for the parties to follow other than the one prescribed in *Rule 53*.

[16] I am satisfied in the circumstances that the matter was set down prematurely, based on the very timeframes set by the applicants in both their notices of motion. In my view the respondents were entitled to expect the periods set out in *Rule 53* to run their course before they could file their answering affidavits. I am satisfied that first and second respondents have shown good cause why the matter should be postponed to give them an opportunity to file their answering affidavits having indicated from the outset that they intended opposing the granting of the relief sought.

[17] Second respondent has sought punitive costs against the applicants.

[18] It is indeed so that applicants forged ahead with the setting down of the application despite being warned that such was premature. Be that as it may, and in view of the fact that *Rule 53* is essentially designed to assist the applicant in a review application, I will exercise my discretion by not ordering applicants to pay punitive costs.

[19] The application for postponement is opposed. I have made a finding *supra* that the setting down of the application is premature. It stands to reason that the application for postponement must succeed. There is no reason why the applicants (main application) should not be ordered to pay the costs occasioned by the postponement.

[20] In the result:

- 1. The main application in this matter is postponed sine die.**
- 2. The first, second and third applicants are to pay the costs occasioned by the postponement jointly and severally, the one paying the other to be absolved.**

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: Crompton
Instructed by	:	STRÖMBECK PIETERSE INC 71 Bird Street Central PORT ELIZABETH Ref.: SWPP/kp/SW0610 Tel.: 041 – 585 0980
For the 1 st Respondent	:	Adv: L Voultos
Instructed by	:	GRAY MOODLIAR ATTORNEYS 19 Raleigh Road Central PORT ELIZABETH Ref.: S Roberts/N10864 Tel.: 041 – 586 3920
For the 2 nd Respondent	:	Adv: JJ Nepgen
Instructed by	:	PAGDENS ATTORNEYS 18 Castle Hill Central PORT ELIZABETH Ref: RH Parker/rjs/ACC15/0111 Tel.: 041 – 502 7200
Date Heard	:	28 June 2016
Date Reserved	:	28 June 2016
Date Delivered	:	29 June 2016