



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT]**

CASE NO.: EL246/2024

In the matter between: -

DR VIWE NOGAGA

APPLICANT

and

**MAGISTRATE Z. MJALI, DISTRICT COURT
MAGISTRATE, EAST LONDON**

1ST RESPONDENT

ISIBABALE TANDOKAZI NOGAGA

2ND RESPONDENT

**MINISTER OF JUSTICE & CORRECTIONAL
SERVICES**

3RD RESPONDENT

JUDGMENT

ZONO AJ:

[1] The applicant approached this court and obtained an Order on 14 February 2024 in terms which a *rule nisi* returnable on 05 March 2024 was issued. The *rule nisi* was granted on the following terms:

- “1. *A rule nisi do hereby issue calling upon the first, second and third respondents to show cause, if any, on 05 March 2024 why the following order should not be made final:*
- 1.1 *the applicant’s non-compliance with the Uniform Rules of Court, the deviation with/from the forms and service provided for the rules be condoned and directing that the matter be heard as an urgent matter as envisaged in Rule 6(12) of this Court’s Rules (sic).*
 - 1.2 *The execution of the garnishee order granted by the first respondent, Magistrate Z. Mjali on 06 February 2024 to be stayed pending the outcome of the review proceeding instituted as Part B of the application.*
2. *The relief set out in Prayer 1.2 above shall operate as an interim interdict pending the finalisation of Part A and/or Part B of this application.*
3. *Costs be costs in the review.”*

[2] Aggrieved by this aforesaid order, the second respondent delivered a notice styled “NOTICE IN TERMS OF RULE 6(8)”. On the notice, the second respondent requested that the matter be heard on 20 February 2024 at 14:30 pm. In simple terms the second respondent sought to invoke the provisions of Rule 6(8) of the Uniform Rules.

[3] Rule 6(8) of the Uniform Rules provides as follows:

“6. *Applications*

- (8) *Any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than twenty-four hours’ notice.”*

[4] It is common cause that the return day has been fixed. What is in dispute is whether or not an Order was granted *ex parte*.

[5] The term “*ex parte*” by definition refers to proceedings before a court of which the person against whom the Order as sought was not notified – the unilateral

nature of such proceedings is their most prominent feature¹. The subrule comes to the aid of a person who has been taken by surprise by an Order granted “*ex parte*”. The subrule does not apply where the rule or Order was not obtained on “*ex parte*” basis.

[6] On the court file, I found a directive issued by this court in terms of practice rule 12(a)(i) of the Joint Rules of Practice of this division. The learned Judge directed the applicant to serve and file the application papers and the matter was enrolled for hearing on Wednesday, 14 February 2024 at 09:30 or so soon thereafter. It is discernible from this directive that the matter was never intended to be brought on *ex parte* basis.

[7] Further perusal of the court file disclosed that there were returns of service numbered 56, 57, 58 and 59 respectively. Importantly, the one numbered 57 was a return of service in respect of the second respondent. Strangely those returns of service were not in the bundle that was prepared by the second respondent to serve before court for determination of this matter. Page 56 onwards was replaced by second respondent’s papers.

[8] I am convinced that the returns of service referred to above were before court on 14 February 2024 when *rule nisi* was granted. It is inconceivable that a judge can issue a directive and still allow its violation with impunity. I say that

¹ See *Simross Vintners (Pty) Limited v Vermeulen* 1978 (1) SA 779 (T) at 782 H; *Sizwe Development v Auditor General, Transkei* 1991 (1) SA 291 (Tk) at 292 T.

because the learned judge who issued the directive that papers must be served is the same judge who heard the matter and granted the *rule nisi*. I was told from the bar that the matter was heard at 14h30 on that day.

[9] Paragraph 8 of the applicant's replying affidavit categorically states that the returns of service were filed of record. In paragraph 12 of the opposing affidavit the second respondent confirms that, on her arrival at her home at about 16h00 pm her helper gave her the documents and as she was going through them the Sheriff arrived for the second time to serve the Order.

[10] I therefore find that the application was not an *ex parte* application and the Order was not granted "*ex parte*". On this basis alone this application cannot be entertained. The second respondent invoked a wrong and inapplicable provision. The sole jurisdictional requirement to invoke the court's power to exercise its discretion was not satisfied, that is, to show that the Order was granted *ex parte*.

[11] There was also a notice of motion by the second respondent that was filed on 19 February 2024 which was served upon the applicant on the same day. The notice of motion intimated that the second respondent will, on the return date of *rule nisi* issued on 14 February 2024 under this case number make an application for an Order in the following terms:

- “1. That an Order that was granted on 14 February 2024 under case number EL246/2024 be rescinded and set aside in terms of section 42(1)(a) of the Uniform Rules of Court, alternatively common law.*
- 2. That applicant and anyone who unsuccessfully opposed this litigation be ordered to pay costs of this application; and*
- 3. Further and/or alternative relief.”*

[12] In this application the second respondent sought to rescind an interim order granted by this court on 14 February 2024 on urgent basis. Strangely, this application was supported by opposing affidavits. This application too, suffered many deficiencies. Firstly, as the second respondent sought to be heard on a rescission application on urgent basis, there was no certificate of urgency placed before this court in terms of the Joint Practice Rules of this division. In this regard, Practice Rule 12(d)(iii) provides as follows:

“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.”

No such certificate was placed before a judge in accordance with this provision.

[13] The same Rule proceeds to provide as follows:

“Should he/she determine that it is sufficiently urgent, he/she will then give directions as to the time and place, when and where the application is to be heard.”

Should the judge determines that the matter is urgent she/he will determine the time and place of hearing of that urgent application. On this matter no such

directions were sought before this matter could be placed on the roll of urgent matters for hearing. The second respondent clearly exercised a power she did not have. For a valid exercise of power, the power must have a source in law². The Joint Practice Rules have the same force and effect as the Uniform Rules³.

[14] Lastly, Rule 6(12)(b) of the Uniform Rules provides that:

“(b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is (sic) averred render (sic) the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.”

Uniform Rule 6(12) governs urgent applications. These requirements, too, were not satisfied by the second respondent. I therefore find that the rescission application was improperly before the urgent court.

[15] On the conspectus of all of the above factors, I find that this court cannot determine this matter. The matter will have to be removed from this roll and remain on the roll of 05 March 2024, which is the original return date.

[16] Accordingly, the following Order shall issue:

16.1 This matter is removed from the roll.

² *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 CC at para 68; *Lester & Ndlambi Municipality & Another* 2015 (6) SA 283 (SCA) at para 26.

³ See *National Pride Trading 452 v Media 24* 2010 (6) SA 587 (ECP).

16.2 This matter shall remain on the roll of 05 March 2024.

**16.3 The second respondent is hereby ordered to pay costs occasioned
by the set down and hearing of this matter on 20 February 2024.**

A.S ZONO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT : ADV MATOTIE

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FOR THE 2ND RESPONDENT : ADV NZUZO

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REF: PLC/msb/MEL4644

Matter heard on : 20 February 2024

Judgment delivered on : 22 February 2024