

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]**

Not Reportable

CASE NO: 1779/15

Heard on: 03/03/16

Delivered on: 31/03/16

In the matter between:

VUYANI JOHNSON

Plaintiff

and

XESIBE CONSTRUCTION CC

1st Defendant

CAMDEKOM ENGINEERING CC

2nd Defendant

**MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF ROAD AND PUBLIC WORKS,
EASTERN CAPE, BHISHO**

3rd Defendant

**INGQUZA HILL LOCAL MUNICIPALITY
THE MANAGER OF INGQUZA HILL LOCAL
MUNICIPALITY**

4th Defendant

5th Defendant

**MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF LOCAL GOVERNMENT
AND TRADITIONAL AFFAIRS**

6th Defendant

JUDGMENT

NHLANGULELA DJP:

[1] This matter served before me in the opposed motion court as an application brought by the second defendant in terms of Rule 23 (1) of the uniform rules of this Court. I will refer to the parties as are cited in the summons purely for the purposes of convenience.

[2] The issue that this Court is called upon to decide is whether the second defendant, as the excipient, is entitled to an order of costs, given that the plaintiff has filed a notice of intention to amend the particulars of claim in response to the application for the setting aside of the particulars of claim.

[3] The gist of the plaintiff's refusal to pay the costs in that since the plaintiff, legally represented by a firm of attorneys residing in East London, had not appointed a correspondent upon which to serve the notice of amendment on 23 October 2015, the last day on which to respond to the notice of exception. The response was ultimately served on 20 November 2015. The application for exception, later followed by a notice of set down, had already been served upon

the plaintiff on 04 November 2015 when the notice to amend was served on 20 November 2015. .

[4] The method adopted by the parties with regard to the service of documents upon the second defendant can be traced from the documents that have been filed of court. The summons commencing action was issued by Mduma Mjobo Attorneys of Lusikisiki, locally represented by Fikile Ntayiya & Associates of 50 Madeira Street, Mthatha. On 31 August 2015 Andre Schoombee Attorneys of East London delivered a notice to defendant on behalf of the second defendant to Ntayiya through its correct fax/email address. The telephone and fax address of Schoombee was set out on that notice. On 02 October 2015 Schoombee delivered the notice of exception to Ntayiya using a fax/email address. A copy of the covering letter to Ntayiya, which appears on page 5 of the papers, shows that service by means of fax/email was sanctioned by both parties “as per mutual telephonic discussions about the delivery of the notice of exception. Mr Mjobo did not contend otherwise when he argued that matter. In terms of the rules, the plaintiff, Ntayiya to be specific, had to ensure that the notice to amend was served upon Schoombee within 15 days, reckoned from 02 October 2015. That was not done.

[5] The date stamp proving delivery of the notice to amend upon the second defendant, reads 20 November 2015. And the recipient of that process was Smith Tabata Attorneys of 34 Stanford Terrace, Mthatha. It is common cause that these are second defendant's local correspondents as is stated in the notice to amend that reads: "As Arranged Telephonically With Cindy [of Schoombee] On The 09/11/2015 to Serve At Offices Of Messrs Smith Tabata Attorneys..." To my mind Ntayiya must have telephoned Schoombee to arrange for the service of the notice in exactly the same way that Schoombee had done when serving their notice of intention to defend. Further, the 9th November 2015 is the date not without any significance if one has regard to the fact that on the same date Schoombee had served the notice that the second defendant was proceeding with the application to set aside the particulars of claim due to absence of a response to the notice dated 02 October 2015. The names of the second defendant's local correspondent was provided on the notice of 09 November 2015.

[6] With respect, I find it difficult to understand how the objection, raised in the opposed court from the bar, and for the first time, could be the justification for the refusal to pay costs. The further submission, that the service of the notice to amend upon the first defendant on 23 October 2015 demonstrates an attempt on

the part of the plaintiff to serve the notice upon the second defendant on the same date, is incomprehensible.

[7] On the foregoing, I am unable to find fault on the part of the second defendant.

[8] I may as well state for the purposes of completeness that it was open to the plaintiff upon receipt of the notice to defend to raise an objection on the issue of a local correspondent. In the circumstances of this case he cannot cry foul on the face of a choice that he made voluntarily to engage in telephonic arrangements with Schoombee.

[9] The following order is appropriate:

- 1. The plaintiff to pay the costs of hearing on 03 March 2016 including those for the notice in terms of Rule 23.**

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

For the plaintiff : Mr M. Mjobo of
Mduna Mjobo Attorneys
c/o Fikile Ntayiya & Ass
MTHATHA.

For the defendant : Adv. J.L. Hobbs
Instructed by : Andre Schoombee Attorneys
c/o Smith Tabata Attorneys
MTHATHA.