



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 988/2023

In the matter between:

DR AB XUMA LOCAL MUNICIPALITY

1st Applicant

THE MUNICIPAL MANAGER:

DR AB XUMA LOCAL MUNICIPLAITY

2nd Applicant

and

LOCAL RESIDENTS CITED UNDER

CONSOLIDATED CASE NUMBER 988/2023

1st Respondent

FIRST NATIONAL BANK

2nd Respondent

REASONS FOR JUDGMENT

ZONO AJ:

Introduction

[1] Serving before court was an application for rescission of judgment. On the 21st November 2024 this matter served before court as an opposed motion

matter. It transpired that the matter could not proceed, and both parties agreed to remove the matter from the roll. The parties locked horns only on the issue of costs. The respondent sought that the applicant to pay the wasted costs, whereas the applicant sought that costs stands over for later determination or that there be no order as to costs. I removed the matter from the roll and ordered the applicant to pay costs occasioned by the removal of the rescission application. The exact wording of the court order is thus:

- “1. *The matter is removed from the roll.*
2. *Applicant is to pay the costs occasioned by the removal in the rescission application” (sic).*

[2] Apparently on 05th December 2024 applicants’ legal representatives delivered applicants’ request for reasons for the order granted on the 21st November 2024. I furnish the requested reasons hereinafter. It is apparent that the reasons are not for the whole order, but only for an order of costs. I granted costs occasioned by the removal of the matter from the roll against the Municipality, who is the applicant in the rescission application. It is expedient to state that, I received the transcribed record herein after the 21st February 2025 and I was thereafter able to pen my reasons.

[3] *In Mphahlele*¹Goldstone J held thus:

- “12. *There is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the*

¹ *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667(CC), 1999 (3) BCLR 253 (CC) Para 12.

Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.”

[4] It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants rights and an impediment to the appeal process.² It has been held that the core principles of the rule of law include the right of a litigant to be given reasons by a court.³ Absent such a right, transparency is cloaked in darkness, accountability is honoured in the breach⁴.

[5] As already iterated above that only an application of rescission of judgment was liable to be heard on the 21st November 2024. The Municipality, Dr AB Xuma Local Municipality was the applicant in that application. It may be mentioned that there were other applications in the court file that were still pending, namely, an application to supplement applicant’s founding affidavit and application for contempt of court order wherein the respondent is the applicant. The parties and the court deemed it convenient

² *Strategic Liquor Services v Myumbi NO and others* 2010 (2) SA 92 (CC) Para 15.

³ *GMSA Financial Services: A Division of West Bank; A Division of First Rand Bank Limited v PBF Investors (Pty) Ltd and another* (2358/2017) [2019] ZAECHC 15 (12 March 2019) Para 5 per Mbenenge JP.

⁴ *M v M* (20350/2012) [2015] ZAWCHC 197 (24 November 2015) per Davis J.

that the application for rescission of judgment be heard before the application for contempt of court. The court was advised that application to supplement applicant's founding affidavit would not be insisted upon.

[6] At the beginning of the hearing of the application for rescission of judgment, it transpired that the court file is not properly prepared. Before court was an incomplete record or set of papers. The papers in the court file ended with paginated page number 595, whereas Mr Solik, Counsel for the applicant informed the court that the papers were more than 722 pages. He sought to refer the court to page 722, which page was not before court as papers in the court file ended with 595.

[7] Mr Solik sought an adjournment for him to inspect the court file. That opportunity was granted. Fortunately, his instructing attorney was before court. Upon resumption of the court proceedings, Mr Solik sought the matter to be removed from the roll. The respondent did not object to the application for removal of the matter from the roll. However, the respondents sought costs occasioned by the removal of the matter from the roll to be paid by the applicant. The applicant resisted that costs of the removal be paid by it. It proposed that costs stands over for later determination or that each party to pay its own costs (no order as to costs).

[8] Firstly, the matter was removed from the roll at the instance of the applicant. It is the applicant who sought the matter to be removed from the roll. At that time the respondent had already incurred costs and was ready

to proceed. Were it not for applicant's application for removal of the matter from the roll, the respondent would have been in a position to proceed.

[9] The reason for applicant's application to remove the matter from the roll was that the court file was not in order as adumbrated above. The applicant, for that reason felt constrained to apply for the matter not to be heard on that day. Infact the matter would not have been heard due to the fact that the court file was incomplete and therefore not in order.

[10] Effectively the applicant sought indulgence of the court. A party seeking indulgence pays the costs⁵. There is yet another reason for costs to be awarded against the applicant.

[11] Rule 62(4) of the Uniform Rules (URC) provides thus:

“(4) An applicant or plaintiff shall not later than five days prior to the hearing of the matter collate, and number consecutively, and suitably secure, all pages of the documents delivered and shall prepare and deliver a complete index thereof.”

[12] The applicant violated Rule 62(4) of URC in that it did not collate and failed to suitably secure all pages of the relevant pleadings. I have indicated above that the court file contained incomplete record of pleadings. Applicant's Counsel, Mr Solik satisfied himself that the court file was lacking in this regard, hence he sought the matter to be removed from the

⁵ AC Cilliers “Law of Costs, Page 2-27 issue 14-Para 2.34.

roll. It is the duty of the applicant to ensure that the court file is in order. There was clearly a lapse of duty in this regard. The applicant did not properly prepare the court file notwithstanding that it is enjoined to do so.

[13] During argument, Mr Solik advanced no tangible reason for the applicant not to be saddled with costs occasioned by the removal of the matter from the roll. He stated that he wanted those instructing him to investigate why the court file was not in order. He did not advance any explanation as to how that would help the situation. As I have stated, the instructing attorney was in court, it therefore became not clear how those investigations would salvage the situation. It was demonstrably clear that the applicant failed to ensure that the court file was in order prior to the hearing of the matter. The applicant's attorney is in the coalface of the litigation and as a result of that, with the exercise of reasonable care, he should have been privy of status of the court file.

[14] Parties were not only referred to the provisions of Rule 62(4) of URC, but also to the Rule 3 of the Joint Rules of Practice, Eastern Cape Division which reads as follows:

“(a) in respect of defended trials, opposed motions, exceptions, applications to strike-out, pleas in bar, special pleas, stated cases and appeal cases, the appears are to be secured, paginated and indexed as required by Uniform Rule 62(4), not later than 5 days prior to the hearing of the matter: provided that in all matters enrolled for hearing on the opposed motion court roll the papers shall be secured, paginated and indexed not later than 8 days prior to the hearing of the matter. This requirement will be strictly enforced.”

[15] The Joint Rules of Practice, Eastern Cape Division⁶ are promulgated to give effect to the provisions of Rule 62(4) of the URC. The use of the word *“shall”* in Rule 62(4) of URC is indicative of peremptoriness of provisions⁷. A statutory requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal consequence⁸. Failure to comply with a peremptory provision is fatal.

[16] Where a statute provides that something must be done within a certain time and no power of extension is given to the court, it is presumed that the requirement is peremptory⁹. No powers of extension is given to the court if no good cause is shown in terms of Rule 27 of URC. The preparation of the court file must be done not later than five (5) days prior to the hearing of the opposed matter. Rule 3(a) of the Joint Practice Rules of Eastern Cape Division puts it plain that the provisions are peremptory by inclusion of the following words:

“This requirement will be strictly enforced”

These words means that these provisions require exact compliance.

[17] In conclusion I find that provisions of Rule 62(4) of URC and Rule 3 of joint Practice Rules of Eastern Cape Division are peremptory and require exact compliance. The applicant failed to comply with peremptory provisions. Failure to comply with peremptory provisions must be

⁶ Rule 3 of Joint Rules of Practice.

⁷ LAWSA Vol 25 Page 399 Para 366.

⁸ *Shabalala v Klerksdorp Town Council and another* 1969 (1) SA 582 (T) at 587 A-C.

⁹ GM Cockram: Interpretation of Statute, 3rd Edition, Page 161.

followed by a censure. A costs order is a form of censure for non-compliance with the imperative provisions of the Rules.

[18] Finally, the applicant failed to inform this court as why the respondent should be saddled with costs occasioned by the removal of the matter from the roll. It must be understood that the innocent party must be afforded adequate indemnification. Costs are awarded to indemnify the successful party in general, innocent party in particular for the expense to which she has been put through¹⁰.

[18] I was, and still am, satisfied that the applicant is liable to pay costs occasioned by the removal of the rescission application from the roll.

A.S ZONO

ACTING JUDGE OF THE HIGH COURT

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¹⁰ *President of the Republic of South Africa and others v Gauteng Lions Rugby Union* 2002 (1) BCLR (1) (CC);2002 (2) SA 64 (CC) Para 15.

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Date order issued : 21 November 2024
Date reasons sought : 5 December 2024
Date reasons furnished : 20 March 2025