



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

CASE NO. 1572/2024

In the matter between:

ASANDA GIDANA

PLAINTIFF

and

MAKANA MUNICIPALITY

FIRST DEFENDANT

THE MUNICIPAL COUNCIL:

MAKANA MUNICIPALITY

SECOND DEFENDANT

THE EXECUTIVE MAYOR:

MAKANA MUNICIPALITY

THIRD DEFENDANT

THE MUNICIPAL MANAGER:

MAKANA MUNICIPALITY

FOURTH DEFENDANT

JUDGMENT

Rugunanan J

[1] The parties are referred to as in the main action.

[2] The plaintiff instituted proceedings in which she claims damages for breach by the defendants (collectively, the municipality) of her employment contract.

[3] In accordance with rule 30(1) of the uniform rules of court, the issue presently for determination arises from an application by the municipality to set aside as premature the plaintiff's notice of bar delivered on 26 September 2024.

[4] This highpoint in the timeline was preceded by two consecutive notices to remove causes of complaint in terms of rule 23(1)(a). The notices were delivered by the municipality on 12 June 2024 and on 17 September 2024, (hereafter the first notice and the second notice, respectively). Both notices were identical in form and indicated that should the causes of complaint not be removed within fifteen days the municipality will note an exception and/or apply for the setting aside of the summons and particulars of claim as an irregular step.

[5] In response to the first notice the plaintiff delivered a notice of intention to amend. Her amended particulars of claim followed on 28 August 2024. Dissatisfied therewith the municipality delivered its second notice. Its content was similar to the first notice but suitably adapted. The plaintiff's notice of bar that followed the second notice, was, according to the municipality, delivered without her addressing the issues in the second notice or anticipating delivery of an exception or, as indicated in heads of argument, possibly a plea that would have been due by 9 October 2024.

[6] Contending that an exception is a pleading the plaintiff submitted that, in relation to the first notice, rule 23(1)(b) obliged the municipality to have filed its exception within ten days no later than 11 September 2024.

[7] For reasons to follow the contention is unsustainable.

[8] In practice a party faced with a notice under rule 23(1) has only two courses: either to amend the pleading in question and remove the causes of complaint by inserting the necessary particularity, or, in the alternative, to stand by the pleading and face the risk of an exception.¹

[9] In response to the municipality's first notice, the course adopted by the plaintiff was to deliver a notice of intention to amend. That notice, delivered on 1 July 2024, incorporated the following wording:

‘[U]nless written objection to the proposed amendment is delivered within 10 (ten) days of delivery of the notice, the amendment will be effected.’

[10] The municipality did not object to the amendment and on 14 August 2024 the plaintiff delivered her amended particulars of claim at an address in East London. Delivery was not effected on the service address in Makhanda nominated by the municipality in its notice to defend the action. Delivery of the amended particulars of claim was thereafter properly effected at the latter address on 28 August 2024. The amended particulars of claim, however, did not, according to the municipality, meaningfully address the various objections contained in its first notice, and for that reason the municipality delivered its second notice on 17 September 2024.

[11] In her heads of argument the plaintiff criticises the municipality for ‘playing games’ and for stalling the action by attempting to engineer a new

¹ *National Union of SA Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 364D-367D and *Erf 1026 Tygerberg CC v Pick 'n Pay Retailers* 2005 (6 SA 527 (C) para 23.

basis for objecting. The municipality contends, and correctly in my view, that it acted well within the prescripts of rule 28(8). For that reason the notice of bar was not an appropriate response to the second rule 23(1) notice and was premature.

[12] Rule 28(8) reads:

‘Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.’

[13] Subsequent to 28 August 2024, delivery of the municipality’s second rule 23(1) notice on 17 September 2024 occurred within the purport and in the timeframe stipulated in rule 28(8).

[14] The notice of bar was premature because the 15 day period in terms of rule 23(1) reckoned until 9 October 2024 and specified in the municipality’s second notice for the delivery of an exception had not yet expired. Accordingly, delivery of the plaintiff’s notice of bar was premature and the notice falls to be set aside.

[15] There remains the issue of costs.

[16] The municipality contended for attorney and client costs including the costs consequent upon the employment of counsel on scale C in accordance with rule 67A. The founding affidavit to this application details the extensive efforts made by the legal representatives of the municipality to persuade the plaintiff to reconsider her position by removing the notice of bar. In argument the plaintiff was reprimanded for having caused unnecessary and frivolous litigation by her unreasonable attitude in seeking to defend the incorrect course adopted by her. It was argued that the court should mark its disapproval of her

conduct by ordering her to pay such costs. The plaintiff was also criticised for the answering affidavit deposed by her attorney in which he vacillated on the subsistence or otherwise of an amendment to the particulars of claim. It was contended furthermore that the plaintiff's accusation that the municipality was trying to stall the litigation over months, was baseless.

[17] The municipality on the other hand is not entirely free from censure. It intended all times to note an exception or invoke proceedings to set aside the summons and particulars of claim as an irregular step. This much is clear from its first and second notices. In argument the municipality attempted to proceed on a different premise by suggesting that it might have sought to file a plea. In that regard it sought refuge in *Nqabeni Attorneys Incorporated v God Never Fails Revival Church and Others*², in which rule 28(8) was held not to apply in circumstances where a declaration had been amended before a plea had been filed and it was found that the period within which a plea ought to be filed meant that rule 22(1) became applicable.

[18] In keeping with the intended course conveyed in the first and second notices, the following submission is made in the municipality's heads of argument:

'But one does not need to rely on case law. The clear wording of rule 28 makes express provision for the procedure contemplated in uniform rule 23 to be followed after an amendment has been effected.'

[19] As the decision arrived at in this matter is based on the effect of rule 28(8) it is unnecessary to comment on the applicability or otherwise of *Nqabeni*.

[20] In these circumstances I do not think that attorney client costs are warranted.

² (40739/2017) [2019] ZAGPJHC 51 (7 March 2019) paras 7-9 and 11-12.

[21] This brings me to the scale of fees for counsel. The purpose served by rule 67A is that it permits a court to exercise control over the maximum rate at which counsel's fees can be recovered under an award of costs on the party and party scale. The arguments were brief and straightforward and the concise affidavits filed by the parties did not manifest any technical intricacy. Oral arguments were succinct. The merits of the action did not assume relevance and the hearing lasted less than an hour. My sense is that scale A is applicable and is more than sufficient for recovery of counsel's fees.

[22] The following order issues:

1. The plaintiff's notice of bar dated 26 September 2024 is set aside as an irregular step.
2. The plaintiff is ordered to pay the costs of the application, such costs to include the fees of counsel on scale A of uniform rule 67A.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant (Defendants): *P N Kroon SC*, Instructed by Wesley Pretorius & Associates Inc., East London c/o Netteltons 118A High Street, Makhanda, Tel 046-622 7149 (Ref: Ms Pienaar).

For the Respondent (Plaintiff): *S Tshikila*, Instructed by PN Moletsane Inc., East London, c/o Mfundo Ntshwaxa Attorneys, 118A High Street, Block B, Makhanda, Tel 046-622 2044 (Ref: Mfundo).

Date heard: 13 November 2025.

Date delivered: 02 December 2025.