NOMANDELA AND ANOTHER v NYANDENI LOCAL MUNICIPALITY AND OTHERS 2021 (5) SA 619 (ECM)

Citation	2021 (5) SA 619 (ECM)
Case No	4497/2020
Court	Eastern Cape Local Division, Mthatha
Judge	Majiki J
Heard	December 31, 2020
Judgment	December 31, 2020
Counsel	Adv *Kunju* for the applicant. Adv *Bodlani* for the respondents.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Practice — Applications and motions — Urgent applications — Non-compliance with rule 41A(2)*(a)* raised in limine — Whether application to proceed as it stood — Uniform Rule 41A(2)*(a)*.

Headnote : Kopnota

Rule 41A(2)*(a)* provides that '(i)n every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation'; and rule 41A(2)*(b)* that 'a defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation'.

In this case the applicant's urgent application for interim relief was met with respondent's point in limine that the applicant failed to comply with rule 41A(2)*(a)*. At issue was whether the court should allow the application to proceed as it stood.

Held

Rule 41A(2)*(b)* compels the respondents to also file their notice as to whether they agree or oppose referral of the dispute for mediation. The rule did not suggest that their compliance was dependent on the applicant's filing of a rule 41A(2)*(a)* notice. Even if it were, nowhere in the answering affidavit was it stated that they would have wished to explore or not explore the mediation process, but could not do so for reason of the applicant's non-filing. They could have complied with their part of the obligation in terms of the rule or communicated their stance on mediation regardless of the applicant's failure. The rules were meant to be complied with, but they were meant for the court, and not the other way round. While it was ideal that litigants comply with this rule, in the interests of justice the issues raised in the application called for immediate resolution rather than removing the matter from the roll in order for the litigants to pronounce on whether they would agree or oppose mediation. The point in limine would accordingly be dismissed. (See [9] – [11].)

Rules of court cited

Uniform Rule 41A(2)*(a)*.

Case Information

Adv *Kunju* for the applicant.

Adv *Bodlani* for the respondents.

A point in limine in application for interim relief.

Order

1. The point in limine fails, with the costs hereof being costs in the cause.
2. The matter will proceed on the remaining issues.

Judgment

Majiki J:

[1] On 23 December 2020 the applicants approached court on urgent basis for determination of an application for interim relief outlined in part A. The application was enrolled for hearing in the motion court on 29 December 2020. The application for interim relief is opposed by the respondents.

[2] During the hearing of the matter, Mr *Bodlani*, counsel for the respondents, raised a preliminary point of non-compliance with rule 41A(2)*(a)* of the Uniform Rules (the rules), stating that a determination of that issue could be dispositive of the matter at that stage. He submitted that in terms of the said rule the applicant is compelled to issue a notice referred to in the rule. The applicant has failed to comply with the rule and has not made an application for condonation for such non-compliance. Further, because of such failure the respondents were unable to furnish instructions with regard to their position regarding mediation. The matter therefore cannot proceed and should be struck off the roll for reason of non-compliance with the rule.

[3] Rule 41A(2)*(a)* provides:

> 'In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on

each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.'

Rule 41A(2)*(b)* provides:

'A defendant or respondent *shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time* thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.' [Own emphasis.]

[4] Mr *Kunju*, counsel for the applicants, submitted that prayer 1 of the notice of motion seeks condonation for non-compliance with the rules, including the rule complained of, because of the urgency of the matter. Further, before the launching of the application, a letter was sent on behalf of the applicants to the respondents, seeing resolution of the issues that are subject of this application, that yielded no positive result. In the light of that, the matter could not be capable of mediation. Finally, mediation is an alternative dispute resolution. The applicant in the founding affidavit has addressed the issue of having no alternative remedy.

[5] The relief sought in part A of the application which encapsulates what is sought in prayer 1 of the notice of motion is:

'1. That the Applicant's Non-compliance with Uniform Rules of Court relating to form, timeframes and matters associated with service are hereby condoned and that leave is hereby granted to the Applicant to move this application as a matter of urgency in terms

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of the provisions of Rule 6(12) of the Uniform Rules of Court.

2. That a Rule nisi do hereby issue calling upon the Respondents to show cause if any, before this court on 9 February 2021 in the forenoon or so soon thereafter as Counsel may be heard why the following ordered should not be made final:

3. Pending a final determination on:

3.1 lawfulness of the council resolutions of the first respondent taken on 6 and 30 November 2020 and 17 December 2020; and

3.2 lawfulness of a report prepared by the Ad-Hoc committee and any decision taken by the first respondent pursuant to and or as a consequence of the said report, Applicants are entitled to resume their respective duties as employees of the first respondent.

4. Notices issued by the first Respondent for the Applicants to show cause why they should not be suspended and the resultant letters putting the Applicants on suspension are hereby suspended pending final decision on a declaratory and or review that the Respondents have failed to comply with local Government Disciplinary Regulations for Senior Managers 2010 — issued under Section 120 of the Systems Act 2000 (Act 32 of 2000) (hereinafter referred to as the Regulations) before the disciplinary procedures were commenced with.

5. The conduct of the first Respondents to suspend the Applicants from their positions of employment is hereby declared unlawful pending the finalisation of part B.

6. The acting appointments afforded to the third and fourth respondents are hereby suspended pending the finalisation of Part B of this application . . . .'

[6] The issue is whether the court ought to overlook the noncompliance with rule 41A(2)*(a)* and allow the application to proceed as it stands.

[7] I do not agree with the submission on behalf of the respondents that prayer 1 of the notice of motion seeks condonation for non-compliance with the said rule as well. The form referred to in rule 41A would only be necessary, had an election for referral to mediation been made. There would have been no need to seek condonation for non-compliance with the rule relating to that form if no election to mediate were made. The condonation captured in prayer 1 relates to urgency (time frames and matters associated with service). No reading of that paragraph could imply reference to the rule that is at issue in this application.

[8] In what seems to be the applicants' averment about the requirement of s 6(12)*(b)*, regarding not being afforded substantial redress in an application in due course, I am also unable to discern that the applicant intended to make reference to mediation.

[9] Having said that, the rule became effective in March 2020. I have not been made aware that there are available, adaptable instruments in place, including personnel, for effective implementation of the rule in this division. More significant, though, is the respondents' own silence about their stance on mediation. Rule 41A(2)*(b)* compels the respondents to also file their notice as to whether they agree or oppose referral of the

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dispute to mediation. The rule does not suggest that their compliance is dependent on the applicants' filing of a rule 41A(2)*(a)* notice. Even if it were, nowhere have they stated in the answering affidavit that they would have wished to explore or not explore the mediation process, but could not do so for reason of the applicants' non-filing. I am of the view that they could have complied with their part of the obligation in terms of the rule, or communicated their stance on mediation regardless of the applicants' failure.

[10] Finally, it is not to be underestimated that the rules are meant to be complied with. However, it has been stated often by the courts that the rules are meant for the court, and not the other way round. It is ideal that in the near future litigants should comply with this rule. That would ease the congested court rolls and achieve less costly and speedier resolution of disputes. However, in my view, the present application raises important principles relating to compliance with departmental regulations, the respondents' own policies and alleged infringement of constitutional rights to dignity and to lawful and reasonable procedural administration. In the light of this, I am of the view that, in the interests of justice, those issues call for immediate resolution, than to remove the matter from the roll in order for the litigants to pronounce on whether they would agree or oppose mediation.

[11] In the result:

1. The point in limine fails, with the costs hereof being costs in the cause.

2. The matter will proceed on the remaining issues.

Applicants' Attorneys: *BB Nyanda Attorneys*, Mthatha.

Respondent's Attorneys: *Tonise Attorneys*, Mthatha.