REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 14261/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 16 August 2022

In the matter between:

AUSWELL MASHABA Applicant

and

THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR, INLCUDING ORGANS OF STATE First Respondent

ITUMELENG MOSALA NO Second Respondent

THE HONOURABLE JUSTICE RAYMOND MNYAMEZELI MLUNGISI ZONDO NO Third Respondent

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JUDGMENT

DE VOS AJ

Introduction

[1] The applicant seeks, in the main, to review a subpoena issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State ("the Commission").

[2] The applicant's complaint is that the subpoena did not contain all the necessary information. Specifically, the subpoena was not in terms of the format prescribed by section 3(2) of the Commissions Act, 8 of 1947 and did not sufficiently draw the applicant's attention to his rights and obligations.

[3] The application was moved in the unopposed motion court. Naturally, this Court's attention, in unopposed court, turns first to the requirements of notice. The purpose of notice is to ensure the respondents are aware of the relief being sought against them and is provided an adequate opportunity to defend against that relief. As the respondents are not before the Court, the Court has to satisfy itself that their absence is not as a result of inadequate notice.

[4] In this case, the particular notice requirement at play, is found in Rule 6(5)(b)(iii) of the Uniform Rules of Court.[1] Rule 6(5)(b)(iii) requires that the notice of motion must provide that the application will be moved on a "stated day". The notice of motion did not provide a "stated day" on which the relief would be sought. Consequently the respondents did not know on what day the application was to be moved.

[5] The Court has to determine whether the respondents have received adequate notice of the relief being sought.

The facts

[6] The Commission issued a subpoena on 9 February 20221 for the applicant to appear before at 10h00 on 24 February 2021. The applicant did not heed the subpoena and

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[1] The Rule provides that the applicant must in its notice of motion -

> "(iii) set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and must further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice."

failed to attend the Commission. The consequence of this failure is a possible criminal charge. Whilst the applicant has not been charged, it is this possible threat of a criminal charge that motivates the present application to review and set aside the subpoena.

[7] The notice of motion did not provide a date on which the application would be moved. The notice of motion also did not provide a date on which the matter would be moved in the event that it was unopposed. In short, the notice of motion did not provide the respondents of notice of when the matter would be proceeding, whether it was opposed or not. The effect is that the respondents would not know when their matter would be heard in court.

[8] None of subsequent steps taken by the applicant alters this position. The applicant generated two notices of set down. These notices did contain the set down date. However, neither of these notices of set down came to the attention of the respondents.[2]

[9] In summary, the respondents were not given notice of the "stated day" on which relief would be sought against them. The Court, with these concerns in mind, issued directives to provide the applicant with an opportunity to address these issues.[3] The

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[2] On 2 February 2022 the applicant's attorney deposed to an affidavit in terms of paragraph 6 of the Directives of 18 September 2022. Whilst this affidavit creates the impression that all parties were invited to CaseLines and would have notice of the set down, it is apparent that not one of the respondents were invited to CaseLines.

[3] The directive provided as follows:

"WHEREAS -

1. The matter has been set down on the unopposed court
2. The notice of motion contains no set down date (See case Lines CL 1-1 and 1-4)
3. The return of service indicates that the notice of motion was served on the parties (see CL 2-1)
4. There is no return of service of a notice of set down
5. There is a printout of the set down of 14 June 2022 appearing on case lines (CL3-5)
6. The attorney of record, Mr Cameron has filed an affidavit indicating that "all parties/their legal representatives in these proceedings have been invited to the matter on case lines" (CL 5-2 at para 4.2)
7. The document at CL3-5 is illegible to the Court save for the section indicating that the matter has been set down on 14 June 2022
8. The Court has caused a print out of all parties invited to the matter on caselines attached hereto as X (as it stood on 27 June 2022).

applicant accepted the invitation and filed submissions and an affidavit in response to the directive. The upshot of the applicant's response is that it was not in dispute that the notice of motion did not provide a "stated day" on which relief would be sought.

[10] Factually distilled, the respondents did not receive notice of the date on which relief would be sought against them.

The law

[11] Rule 6(5)(b)(iii) requires that a notice of motion must indicate that a matter "will be set down for hearing on a stated day". The rule demands a notice of motion to reflect, as near as may be, Form 2a of the First Schedule. The form prescribes that "if no such notice of intention to oppose is given, the application will be made on the ____ at ____(time)". The text of the rule and the prescribed form, both require that a date be provided on which the application will be made.

[12] In *Meme-Akpta v Unlawful Occupiers of 44 Nugget Street*[4] (handed down on 26 June 2022) Fisher J considered the requirement that a notice of motion must contain a stated day as provided for in rule 6(5)(b)(iii). The facts before Fisher J was that the notice of motion did not contain a stated day for the hearing. The Court held -

> "This omission is, without more, **fatal** to the application and it should not be entertained. Indeed **the registrar is not empowered to issue such an application in the absence of a stated date for appearance on the notice of motion**. This notwithstanding, the unopposed motion court is often faced with such inchoate process. The notice of motion is then followed by a notice of set down which is apparently meant to cure this illegality. **What is envisaged is that a respondent may be faced with notice of process but given no means to appear and deal with it**." [5](emphasis added)

The Court invites the applicant to address the following two issues:

1. Have the respondents been invited to the matter on caselines? If not, then an explanation for paragraph 4.2 of the affidavit at CL5-2 is invited.
2. Have the respondents received notice of the set down of the matter?

The applicant is invited to file an affidavit that deals solely with these two issues before the end of the week.

[4] Meme-Akpta and Another v The Unlawful Occupiers of ERF 1168,City and Surban,44 Nugget Street,Johannesburg and Another (38141/2019) [2022] ZAGPJHC 482 (26 July 2022).

[5] Id at paragraph [18].

[13] Whilst the decision is in the context of eviction law, the Court was interpreting the same rule at play in this matter, rule 6(5)(b)(iii). The pertinent fact on which Fisher J bases this finding, is the absence of a stated day in the notice of motion.

[14] Fisher J then addresses the attempt to cure the absence of a stated day by the subsequent filing of a notice of set down. Fisher J concludes the notice of set down does not cure the illegality. In this case, this does not arise, as the notices of set down were not brought to the attention of the respondents.

[15] Rule 6(5)(b)(iii) ensures that a respondent is given notice of when relief is being sought against them. Requiring notice of a stated day is not a formalistic application of procedural rules. The rule, whilst procedural in nature, protects a fundamental principle of fairness - that generally a person be afforded an opportunity to be heard before a court grants any relief against it. In this case, the respondents were not provided adequate notice as they were not informed of the day on which relief would be sought against them.

[16] One can imagine an argument that it is the respondent's inaction that paved the applicant's path to seek relief in the unopposed court. However, our courts have held that "if the notice of motion is defective, it makes no difference that the respondents did not respond".[6]

[17] The applicant's contention is that there is no requirement to provide a notice of set down in the context of default applications. This misses the point. The concern is not the failure to provide a notice of set down. The concern is the failure to provide a stated day on which relief will be sought in the notice of motion. In addition, whilst rule 31(4) dealing with default applications dispenses with the need for a set down, the present matter, being a review application, is to be considered within the four corners of Rules 6 and 53.

[18] The procedural requirement of notice safeguard the fundamental principle of audi alteram partem. The notice requirement ensures that a respondent is aware of proceedings and provided a true opportunity to be heard. The notice requirement has not been met and consequently the principle of audi breached.

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[6] Watloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd and Others 2008(5) SA 461 (T) at paragraph [29].

CONCLUSION

[19] The Court also notes that there has been no Rule 16A notice filed in this matter. The relief sought is administrative in nature and therefore engages section 34 of the Constitution. A constitutional issue is raised in the application. Moreover, if the issuance of a subpoena in the Commission is reviewed and set aside, it potentially holds consequences for other subpoenas the Commission has issued over the years. The matter is therefore one of public importance. It is exactly the type of matter that cries out for the filing of a Rule 16A notice. On this basis alone, it would be appropriate for the Court to postpone the matter to permit the applicant to comply with Rule 16A.[7]

[20] The Court was also concerned with the time lapse between the decision being taken (February 2021) and the institution of proceedings (21 January 2022). However, in light of the Court's finding on service, it will not express itself on this aspect.

ORDER

[21] In the result, the following order is granted:

1. The application is postponed sine die in order for the applicant to comply with:

    a. Rule 6(5)(b)(iii) of the Uniform Rules of Court by providing the respondents with a stated day on which relief will be sought ; and

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[7] In Phillips v South African Reserve Bank and Others [2012] ZASCA 38; 2013 (6) SA 450 (SCA); 2012 (7) BCLR 732 (SCA), the court of first instance (North Gauteng High Court) postponed the matter *sine die* (indefinitely) on the day of hearing because it found that Mr Phillips had not complied with rule 16A as there was no indication that he had filed a notice or, if it had been filed, that the notice had been placed on the relevant notice board. The High Court held that failure to comply with rule 16A(1) could not be condoned, and that if the applicant persisted with his constitutional challenge, the matter would have to be postponed so that rule 16A could be followed, and that Mr Phillips would bear the costs of the postponement. The High Court ordered Mr Phillips to pay "wasted costs" to the respondents. The Supreme Court of Appeal, however, set aside the order. The Court, per Farlam JA at para 55, also suggested a way forward in light of the frequency of non compliance with rule 16A, part of which was that—

> "those responsible for drafting (and settling) founding affidavits in constitutional cases . . . should make it a practice of inserting an allegation that a notice (a copy of which is annexed) has been prepared in terms of the rule, and is to be handed to the registrar . . . when the founding . . . affidavit is filed."
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> Farlam JA also urged respondents, specifically organs of state, to "follow the practice of checking as soon as the papers are received that the rule has been complied with and, if it appears not to have been, of bringing the omission to the attention of the applicant's attorney".

See also De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another (CCT223/14) [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) (24 November 2015) at paragraphs [60] - [64].

b. Rule 16A of the Uniform Rules of Court.

I de Vos

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Adv R Wells
Instructed by:	John Joseph Finlay Cameron
Date of the hearing:	14 June 2022
Date of judgment:	16 August 2022