

SOUTH AFRICA / JUDGMENT

## African Amity NPC and Others v Minister of Home Affairs and Others [2023] ZAGPPHC 503; 51735/2021 (29 June 2023) [2023] ZAGPPHC 503

COURT

North Gauteng High Court, Pretoria

BEFORE

C Collis, G Malindi, M Motha

CASE / FILE NUMBER

51735/2021

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### Source record

IN THE HIGH

COURT OF SOUTH AFRICA,

GAUTENG DIVISION,

PRETORIA

CASE NO: 51735/2021

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

REVISED

29/06/23

AFRICAN

AMITY NPC

(Registration

Number: 2021/8377798/08)

Applicants

ZIMBABWE

EXEMPTION PERMIT

HOLDERS

ASSOCIATION AND OTHERS

And

THE

MINISTER OF HOME AFFAIRS

First

Respondent

DIRECTOR-GENERAL: HOME AFFAIRS  
Second  
Respondent  
PRESIDENT  
OF THE REPUBLIC OF SOUTH AFRICA  
Third  
Respondent  
MINISTER  
IN THE SOUTH AFRICAN EXECUTIVE GOVERNMENT (CABINET)  
Fourth  
Respondent  
Delivered: This judgment  
was prepared and authored by the Judges whose names are reflected and  
is handed down electronically by  
circulation to the Parties/ their  
legal representatives by email and by uploading it to the electronic  
file of this matter on Caselines.  
The date of the judgment is deemed  
to be 29 June 2023.

## JUDGMENT

### THE COURT

### Introduction

- [1] The genesis of this application is 12 October 2021 when African Amity NPC ("the first applicant"), the Zimbabwean Exemption Permit Holders Association ("the second applicant") and twenty-eight (28) listed other applicants launched an application seeking review, declaratory and interdictory relief against the Minister of Home Affairs {"the Minister"} and Others. They seek to review the Minister's decision not to renew the Zimbabwe Exemption Permits Programme ("ZEP Programme") upon its expiry on 31 December 2021.
- [2] The Director-General ("DG") of the Department of Home Affairs ("DHA") on 29 November 2021 issued Immigration Directive 1 of 2021. It provides for a transitional 12 months' period until 31 December 2022 for the ZEP holders to apply for any other visa that they may qualify for. In this period, they are exempted from deportation or deprivation of any of the rights acquired in terms of the ZEP Programme.
- [3] The ZEP is an exemption in terms of section 31(2)(b) of the Immigration Act, 13 of 2011. It exempts the identified category of foreigners or a foreigner from applying for a visa of any form in order to be in the Republic of South Africa ("RSA") and affords such exempted persons the right of permanent residence for a specified or unspecified period when special circumstances exist.

- [4] It is not necessary to traverse the substance or import of the permits because this matter turns on whether the amendment of the notice of motion should be granted and, further, whether a valid application is before Court.

#### The Parties

- [5] The Notice of Motion ("NOM") sets out the applicants as African Amity ("first applicant"), the ZEP Holders Association and the individual applicants, as the second applicant collectively. The first applicant's founding affidavit is deposed to by Ms Emma Dimairho. She states that the 3rd to 30th individual applicants are Zimbabwean Exemption Permit holders who seek relief in their personal capacity. She avers to be the director of the first applicant.
- [6] The second applicant is the Zimbabwe Exemption Permit Holders Association ("the Association"). It is not described further in the Founding Affidavit.
- [7] The respondents are the Minister of Home Affairs, Director-General: Home Affairs and the President of the Republic of South Africa as the first to third respondents, respectively

#### Background

- [8] In the notice of intention to amend in terms of Rule 28(1) dated 13 September 2022, the applicants seek to amend prayers 2, 3 and 4 of its "amended notice of motion"[1] dated 15 March 2022. That the notice does not comply with Rule 28(2) which requires that the notice should invite written objection to the proposed amendment within 10 days thereof, failing which the amendment will be effected, was conceded.
- [9] Rule 28 states:
- "(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who

received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).

- (6) Unless the court otherwise directs, an amendment authorised by an order of the court may not be effected later than 10 days after such authorisation.
- (7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
- (8) 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.
- (9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.
- (10) The court may, notwithstanding anything to the contrary in this rule, at any

stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit."

[10] The application is opposed, and answering and replying affidavits were filed on 5 May 2022 and 30 June 2022, respectively.

[11] The scope of the amendment was the following:

1. Amending prayer 2 in order to include the review of the decision of 2 September 2022 to extend the ZEP for an additional 6

months.

2. Amending prayer 3 for a declaration that the ZEP Holders have a legitimate expectation to apply for permanent residence permits as opposed to the original prayer that they have a legitimate expectation to be permanent residents; and
3. Amending prayer 4 for a declaration that the ZEP Holders have a right to be issued with South African identity documents instead of a direction that they be issued with the South African identity documents.

[12] The notice does not call upon the respondents to deliver written objection thereto within 10 days, if so minded.

- [13] At the hearing of the matter the applicants were only seeking the amendment of prayer 3. The first and second respondents opposed the amendment primarily on the grounds that such an alleged legitimate expectation is unfounded because the conditions attached to the permits is that the ZEP Holders would not be entitled to apply for permanent residence.[2] For this reason, the respondents contend that the amendment would be excipiable.
- [14] Before dealing with the amendment, it is necessary to expand on the background to this application.
- [15] On 9 November 2021 the attorneys for African Amity withdrew as attorneys of record.[3] New attorneys of record were appointed on 22 November 2021[4],being Randall Titus Attorneys ("the new attorneys").
- [16] On 8 December 2021 the new attorneys launched urgent interim interdictory relief pending an application to be heard on a return date on 4 January 2022. The urgent application was set down for 14 December 2021[5]. In this application the supporting affidavit of Ms Dimairho was to be relied upon. The NOM is under the same case number but with the applicants being African Amity and ZEP Holders Association and Others, without listing any individuals. A fourth respondent, being Ministers in the South African Executive Government ("Cabinet") was added to the heading.
- [17] The new attorneys filed a so-called "amended notice of motion" on the same day, 8 December 2021[6], dated 7 December 2021, for the application to be heard on 22 December 2021. However, a notice of set down for a hearing on 28 December 2021 was filed on 21 December 2021.
- [18] On 21 December 2021, a day before the hearing in terms of the "amended notice of motion" dated 8 December 2021, another NOM in an urgent application to be heard on 28 December 2021 was launched. This NOM added the Minister in the South African Executive Government (Cabinet). Again, the affidavit of Ms Dimairho, filed together with the NOM of 12 October 2021, was to be relied upon.
- [19] A further so-called "amended notice of motion" dated 15 March 2022[7] was filed, and seeking among others, a prayer to review the respondent's decision of 5 January 2022 to extend the ZEP for 12 months. The hearing was to be on 8 April 2022 if there was no opposition thereto. A so-called "amended founding affidavit" was signed on 16 March 2022. Mr Chitando, for the new applicant that excludes African Amity, conceded at the hearing that the NOM was not supported by affidavit at the time of its signature. Crucially for the purpose of this judgment, 15 and 16 March 2022 sets the scene for the abandonment of this application by African Amity and the stepping in of Mr. Chiuta to launch what we call "the new application."
- [20] This "amended founding affidavit" is deposed to by Mr Darlington Chiuta. He alleges to be the chairperson of the ZEP Permit Holders Association and that the affidavit is in support of the "amended notice of motion" to which there has been no opposition.

[21] During argument Mr Chitando, for the applicants' Association, informed the Court that he was counsel for the parties in the "amended notice of motion" and "amended founding affidavit" as the application of 12 October 2021 is no longer being continued with by African Amity.

#### Amendment of Notice of Motion

[22] The above background as to the pleadings is relevant for purposes of dealing properly with the Rule 28(4) application. As stated above, the current applicants have sought to amend the NOM originally filed by African Amity.

[23] Rule 28 is explicit about the steps to be followed by a party intending to amend a pleading or document other than a sworn statement. In this case the applicants seek to amend a Notice of Motion. This falls within the ambit of Rule 28(1). A notice of motion is not a sworn statement.

[24] The respondents complied with subrule (2) of the Rule, though late, by filing a written objection to the desired amendment. They did so even though the Rule 28(1) notice did not call upon them to state an objection as required. The grounds of objection were set out as dictated by subrule (3).[8]

[25] The applicants are required by Rule 28(4) to exercise a discretion to apply to court in order to pursue the intended amendment in the face of the objection. Such an application may be lodged within 10 days after an objection is received in terms of Rule 28(2). At the hearing prayer 4 was abandoned and the applicants proceeded only with prayer 3.

[26] The authorities state that there is no strict compliance required with Rule 28(4) in terms of lodging an application for leave to amend. Whether it is necessary for the applicant to lodge an application in terms of Rule 28(4) is contingent on the circumstances of the matter and the subject matter of the amendment before the court. Therefore, failure to lodge an application for leave to amend will not always be fatal, depending on the circumstances of a particular case.

[27] In the case of *De Kock v Middelhoven*[9] the court said:

"...In my view, the new rule 28(4) postulates two procedures by which a party seeking an amendment may approach and follow the court for leave to amend. It is of capital importance to point out in the first place that the choice of the procedure to seek such leave is, by using the word 'may', left entirely to the discretion of such a party. The first procedure that a party pursuing an amendment may use is oral. By this method, all that such a party has to do after receiving the notice of objection in terms of rule 28(3) is to set such a matter down for hearing and, on the date of hearing, simply walk into court and orally apply for leave to amend. The second procedure of applying for leave to amend is to 'lodge an application for leave to amend' as enjoined by the provisions of rule 28(4). What the new rule 28(4) has done is to abolish the regimented procedure of the old rule 28(4) which compelled a party seeking an amendment to bring a substantive application for leave to amend. The new rule 28(4) does not compel a party seeking an

amendment to deliver an application for leave to amend. As I pointed out earlier, it is entirely the decision of the party pursuing leave to amend whether to apply for leave to amend orally or to lodge an application for leave to amend."

[28] *Booyesen and others v Followers of Christ Church of South Africa and Namibia and others* case[10] suggests that although the Rule does not make it peremptory to bring a substantive application under Rule 28(4), it is not an either or situation as the situation of each case may dictate which course is dictated by the circumstances. The court said:

"[18]... First and foremost, I fully agree that the relevant Rule does not signify a peremptory provision but suggests procedural flexibility. However, I am not of the view that it was the intention of the legislator, when making the provisions of Rule 28 (4) discretionary, to afford a litigant an absolute or sole discretion to be exercised on an indiscriminate basis.

[19]... It is quite surprising that the *Middelhoven* decision does not put any limit to that power. The exercise of the discretion afforded should be measured against the nature of the amendment and the subject matter of the case in question. I firmly believe that the circumstances of a particular case will determine which course of action to follow. It is further my view that if a party chooses the wrong procedure out of the two permissible courses of action, it may do so at his or her own peril and runs the risk of an order being granted against him or her.

[20]... the procedure to be followed is determined on a case-by-case basis, depending on the particular circumstances."

[29] The *Booyesen* case is more apt as opposed to the *Middelhoven* case which makes it superfluous to have Rule 28 if parties are at liberty to walk into court and move a proposed amendment which is opposed without affording the court the benefit of appreciating the essence of the proposed amendment and weigh its gravamen and the prejudice that it may have on the opposite party. In this case the issues are profound and touch on constitutional rights. Furthermore, one of the grounds of opposition to the intended amendment is that the amendment, if granted, would itself be excipiable. It is our view that this is one of the cases where a substantive application ought to have been brought.

[30] On 22 September 2022 as mentioned, the first and second respondents opposed the intention to amend.[11]

[31] On 10 October 2022 the applicants filed a notice in terms of Rule 28(4) of the Uniform Rules whereby an application to amend would be brought at the hearing of the main application.

[32] Rule 28(4) calls upon a party intending to amend to lodge an application for leave to amend within 10 days of an objection to the intention to amend in terms of subsection (3). The applicants did not do so within 10 days of the objection although the objection was itself awfully out of time. In casu, there was non-compliance with Rule 28(2) and Rule 28(4) respectively.

[33] The notice intends to further amend the so-called "amended notice of motion" dated 15 March 2022. This "amended" Notice of Motion was itself not granted by the Court. In other words, a non-existent amended notice of motion is sought to be amended. Logically, if the amendment now sought is not granted because of the fatal defects referred to above, and the notice of 15 March 2022 is itself non-existent for lack of being granted, only the notice of motion of 12 October 2021 remains. That notice of motion has become irrelevant in these proceedings because the notice of motion of 15 March 2022 was launched as a new application after the affidavit of Ms Dimairho was replaced by the so-called "amended founding affidavit" deposed to by Mr Chiuta. It must be added here that on 12 October 2022 Ms Sandra Chinyanya deposed to a "Supplementary Founding Affidavit." [12] She claims to be the chairperson of the second applicant without stating what happened to Mr. Chiuta.

#### Amendment of Affidavit

[34] Rule 28(1) permits the amendment of a "pleading or document other than a sworn statement". If the "Amended Affidavit" in this matter is hit by the provisions of Rule 28(1) it therefore renders the application non-existent before this Court.

[35] The current applicants have sought to cast aside the founding affidavit of African Amity and to literally file a new affidavit styled an amended affidavit instead of issuing a new application in their own name.

[36] The case law is clear that an affidavit cannot be amended as contemplated in Rule 28(1). A sworn statement (affidavit) cannot be amended. A party wishing to make changes in an affidavit must file further affidavits, that is, supplementary affidavits.

[37] The above principle is enunciated in *Hyve Events SA Limited v African Energy Chamber NPC and another* [13] where it is stated:

"It is true that a sworn statement is not permitted to be amended because it constitutes the evidence before court in a written form. An amendment of an affidavit would amount to a change of evidence which had been given on oath by way of a mere notice. A party who wishes to change his evidence given on oath must do so on oath, if necessary, by way of a further affidavit."

[38] In *Clear Cut Projects (Pty) Ltd and Another v Minister of Police and Another* [14]

it was said that:

"An affidavit is essentially sworn evidence before the court. If it is amended, then it means change of evidence has taken place. A litigant may not do so merely by a notice. There must be an explanation in the form of a further affidavit to explain the circumstances for such a change and for the court to assess whether it will not prejudice the other party. There is no merit in the argument of the counsel for the applicants that the rule does not apply to applications."

[39] The rule was elaborated on in Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others and two related review applications[15] as follows:

"The court in this matter was faced with the question of, inter a/ia, whether an affidavit, being a sworn statement under oath, was capable of amendment, as is a pleading or notice of motion. The court did not make a final determination on the alleged procedural irregularity but instead the court decided on its merits. However, the court did make a comment on amending an affidavit.

The court held that an affidavit is a sworn statement by a witness setting out a concise statement of the grounds of the complaint and the material facts and points of law relevant to the complaint and relied on by the Commission, which is also the case in a Court of law. The Commission stated that if one wishes to amplify, alter, or widen the scope of an affidavit they must seek leave to deliver a supplementary affidavit in support of the amended allegations. Which would outline the retraction of the previous factual statements and an explanation for the change."

[40] Having regard to the authorities, we are satisfied that there is no provision in the Rules or in law for amending an affidavit.

## Conclusion

[42] In the circumstances the following order is made:

1. The application to amend is dismissed.
2. The main application is postponed sine die.
3. Costs shall be costs in the cause.

C COLLIS JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

G MALINDI JUDGE OF THE HIGH COURT OF SOUTH AFRICA

M MOTHA ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

COUNSEL FOR APPLICANT: Adv S Chitando INSTRUCTED BY: MSM & Associates COUNSEL FOR RESPONDENTS: Adv M Dewrance SC Adv S Magardie INSTRUCTED BY: Sigogo Attorneys

DATE OF THE HEARING: 14 April 2023

DATE OF JUDGMENT: 29 June 2023

[1] 07A-1 of Caselines.

[2] ZEP: Annexure "AA21", 004A-106 of Caselines; Heads of Argument: para 139-140

[3] 015 - 1 on Caselines

[4] 016 - 1 on Caselines

[5] 001A- 1 on Caselines.

[6] 001B - 1 on Caselines.

[7]001D

- 1 on Caselines

[8] 007A-1 of Caselines

[9] 2018 (3) SA 180 (GP) at [17].

[10]

[2021] JOL 50930 (WCC) at [8]-[12].

[11] D07A-1 on Caselines.

[12] 1 on Caselines.

[13]

[2023] ZAGPJHC 129 at [22].

[14]

[2021] JOL 49572 at [13].

[15]

[2011] 1 CPLR 19 (CAC) at [12]-[17].

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