

SOUTH AFRICA / JUDGMENT

Motsewarona Construction and Maintenance (Pty) Ltd v Matjhabeng Local Municipality (1752/2022) [2023] ZAFSHC 163 (20 April 2023) [2023] ZAFSHC 163

COURT

Free State High Court, Bloemfontein

BEFORE

C Van Zyl

CASE / FILE NUMBER

1752/2022

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 1752/2022

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MOTSEWARONA CONSTRUCTION &

MAINTENANCE (PTY) LTD

Applicant

and

MATJHABENG LOCAL MUNICIPALITY

Respondent

CORAM: VANZYL, J

HEARD ON: 20 OCTOBER 2022

DELIVERED ON: 20 APRIL 2023

- [1] In this application the applicant is seeking payment from the respondent in the amount of R34 627 906.37, with interest and costs. The applicant's cause of action is a document, dated 8 February 2022, which document, according to the applicant, constitutes an acknowledgement of debt by the respondent in favour of the applicant in the aforesaid amount.
- [2] According to the applicant it rendered services to the respondent between August 2018 and August 2020 pursuant to lawful procurement processes which resulted in various letters of appointment concluded between them. The acknowledgement of debt emanates from the aforesaid services which the applicant duly rendered to the respondent, but for which the respondent failed to pay.
- [3] The respondent is opposing the application. An answering affidavit was filed on behalf of the respondent, to which the applicant subsequently filed a replying affidavit.
- [4] For the sake of clarity:
1. I will refer to this application as the main application; and
 2. I will refer to the parties as cited in the main application.
- [5] The merits of the main application are not relevant for present purposes.

Documents/papers filed subsequent to the filing of the replying affidavit in the main application and before the commencement of the hearing on 20 October 2022:

- [6] On 9 September 2022 the main application was enrolled by the applicant for hearing on 20 October 2022.
- [7] The applicant's heads of argument were supposed to have been filed by 12h00 on Wednesday, 12 October 2022, but same were only filed on Thursday, 13 October 2022 at 10h35, without any explanation for the said late filing thereof.
- [8] The respondent's attorney of first instance thereupon requested the applicant's attorney of first instance by means of two letters, dated 13 October 2022 and 14 October 2022 respectively, to agree to a postponement of the application. Both letters were met with no response.
- [9] For the aforesaid reason, and also because, according to the respondent, it "has become necessary for Respondent to file a Further Affidavit and needs to seek leave to do so", the necessity for which "having arisen because of the new evidence and material introduced by Applicant in its Replying Affidavit without leave of the Court", the respondent filed an application for postponement on 17 October 2022. In terms of the Notice of Motion the respondent requested that the main application be postponed to a date to be agreed upon by the parties, alternatively a date to be determined by the court. No Notice of Opposition or any other form of response was filed by the applicant in response to the respondent's application for postponement.

[9] On 19 October 2022, the day before the hearing of the main application, the respondent filed its interlocutory application for

leave to file a Further Affidavit. The proposed Further Affidavit is attached to the said application as annexure "X".

[10] The morning of the hearing of the main application, shortly before the commencement thereof, I received a document from the General Office titled "Applicant's Supplementary Note on Authority", dated 20 October 2022, and which, according to the Registrar's stamp appended thereto, had been filed at court that very same morning. The said Supplementary Note dealt with the question of the authority of the deponent to the answering affidavit filed in opposition to the main application.

Events at the commencement of the hearing on 20 October 2022:

[11] Mr Grobler appeared on behalf of the applicant and Mr Louw on behalf of the respondent.

[12] At the commencement of the hearing I expressed my uncertainty as to whom to call upon first, since I was, due to the circumstances set out above, in the dark as to what I would be requested or expected to adjudicate upon during that day's hearing.

[13] Mr Grobler then addressed me and stated that since the authority of the deponent to the answering affidavit filed on behalf of the respondent in the main has been placed in dispute from the outset, he submits that it would be apposite for me to adjudicate upon the question of authority, since it is an overarching question for purposes of both the application for postponement and the main application. He consequently requested that I indeed deal with the two applications accordingly. Mr Grabler indicated that it was for that purpose that he filed the "Supplementary Note on Authority", which, according to him, was not meant and should not be considered as supplementary heads of argument, but a mere summation of the aspects which he shall address during his oral argument.

[14] I then indicated to Mr Grobler that I am not inclined to deal with the matter in such a piecemeal manner. I indicated that I have the main application before me in two lever arch files which consists of 559 pages, in relation to which the applicant's heads of argument had been filed late and the respondent had not filed any heads of argument. I received the respondent's application for postponement of the main application three days prior to the hearing in which the respondent indicated that it will be requesting a postponement of the main application in order to bring an application for leave to file a Further Affidavit and to file its heads of argument, to which no response whatsoever was forthcoming from the applicant. The afternoon prior to the hearing I received a third lever arch file containing the respondent's application for leave to file a Further Affidavit, to which the Further Affidavit is attached, the totality of which comprises another approximately 400 odd pages. All of the above occurred without a single indication to me as to what the respective parties will be requesting from me during the hearing. I presumed that I will be requested to entertain the merits of the application for postponement. Then, very shortly before the commencement

of the hearing, I received the applicant's Supplementary Note, in which it was for the first time indicated that the applicant will apparently request that the issue of authority be adjudicated upon during the hearing.

- [15] I indicated that if I adjudicate upon the authority issue only, it means that depending on what finding I make, the matter will have to be re-enrolled and dealt with at a later stage again, for purposes of the adjudication of the application for leave to file a Further Affidavit, which application was not yet ripe for hearing at that stage, and/or eventually for the determination of the merits of the main application. I indicated that I would prefer for the matter to be dealt with once off when it is ripe for hearing in totality.
- [16] Mr Grabler submitted that the fact of the matter is that should I find that the deponent to the answering affidavit filed in opposition to the main application, Mr Vanga, was not authorised to have opposed the application, it will mean that there will no longer be opposition to the main application, the application will be considered to be unopposed and can then be dealt with swiftly on the unopposed motion court roll. Such a finding will have the subsequent result, so Mr Grabler contended, that Mr Vanga also has no authority ("as no new evidence of any authority has been presented") to apply for the postponement of the main application and then there is no proper application for postponement. If Mr Vanga is found not to have been authorised to oppose the main application, it will axiomatically also follow that there is then no proper application for leave to file a Further Affidavit, since the same purported authorization is being relied upon in that founding affidavit.
- [17] Mr Louw indicated that the respondent was just as in the dark as I was, especially because no response was forthcoming from the applicant with regard to the respondent's application for postponement. However, because Mr Louw anticipated the possibility that the applicant may have the stance of requesting that the authority issue be adjudicated, he drafted heads of argument on the point the previous night which came to hand shortly before the commencement of the hearing. He, however, did not consider it proper that the heads be filed directly at my chambers instead of it being formally handed up in open court after leave thereto be granted by the court. He consequently indicated that he is ready to argue the question of authority, should I so determine.
- [18] As a result of the aforesaid submissions, I indicated that I was willing to entertain the application for postponement and the main application on the issue of authority. I then accepted Mr Louw's heads of argument, dated 20 October 2022, from the bar. Mr Grabler indicated that he was unaware that his Supplementary Note had found its way directly to me, that that was not his intention and that he apologises for same.
- [19] Both counsel then fully addressed me on the authority dispute.

The relevant averments in the answering- and replying affidavits filed in the main application:

- [20] I deem it apposite to set out the averments in respect of authority, or the lack thereof, contained in the answering- and the replying affidavits.

[21] Mr Mtutuzeli Vanga ("Mr Vanga") deposed to the answering affidavit in opposition to the main application. In the said affidavit Mr Vanga, inter alia, averred that he is:

"1.1 A major male person and the Manager: Legal Services of the respondent, Matjhabeng Local Municipality;

1.2 Authorised to oppose this application on behalf of the respondent, as appears from the delegation of powers annexed hereto as annexure "AA1";

"

[22] The aforesaid annexure "AA1" to the answering affidavit is a letter addressed to Bokwa Attorneys, dated 26 May 2022. It reads as follows:

"RE: DELEGATION OF POWERS: MP VANGA

The abovementioned matter refers.

In terms of the delegated powers as assigned to me as the Municipal Manager as per Item IA10 of 2021 dated 22 November 2021, I hereby

delegate the following powers to Mr MP Vanga, Acting Executive Director: Corporate Services (Senior Manager: Legal Services).

Section 59 of the Incidental Powers of the approved delegated powers:

Signing, authenticating and/or executing documents to commence legal process with regards to the matters involving the following service providers.

- 1.
2. Motsewarona Construction & Maintenance (Pty) Ltd.
- 3.
- 4.
- 5.
- 6.

We trust that you will find the abovementioned in order."

The letter was signed by the Municipal Manager and to the right of her signature, Mr Vanga's signature was appended above his name and the inscription "Accepting delegation of powers".

[23] Mr Vanga also stated in the answering affidavit that both the Chief Financial Officer and the Municipal Manager of the respondent were unwilling to depose to confirmatory affidavits pertaining to certain issues regarding the applicant's claim.

[24] Mr Vanga furthermore stated as follows at paragraph 23 of the answering affidavit:

"One of the aspects which concerned me after this application had been served, was the fact that the accounting officer/municipal manager, Zingisa Khuthaza Tindleni, did not give instructions that the application be opposed "

[25] On 20 July 2022 the applicant filed a notice in terms of rule 7 in which it was stated that the applicant "disputes the authority of the deponent to the respondent's answering affidavit, Mr Mtutuzeli Vanga, to oppose the application on behalf of the respondent and to act on respondent's behalf'. The notice further stated that the applicant requires "the necessary Council/Accounting Officers resolution to authorise said deponent to act as he has".

[26] In the respondent's reply to the aforesaid notice, dated 3 August 2022, the respondent filed documents which it described as follows:

"1. Extract of Minutes of Council Meeting held on 22 November 2021 signed by the Speaker, Councillor B Stofile;

2. Table of contents of the delegated powers;

3. Incidental powers, paragraph 2; and

4. Letters of written delegation of power given to M P Vanga, Senior Manager: Legal Services."

[27] Part B, No. 35 of the second document listed above, deals with "Incidental powers (Powers not explicitly conferred by statute)", being the third document listed above, which, inter alia, reflects the following:

Section: 1

Power conferred: Commencing with any legal process, whether civil or criminal, on behalf of the Municipality.

Delegating Authority: Council

Delegated body: None

Conditions: Subject to receiving a report from the Executive Mayor

Sub-delegates: R

Section: 2

Power conferred: Defending or opposing any legal process, whether civil or criminal, against the Municipality.

Delegated body: Municipal Manager

Conditions: After consultation with the relevant departmental head

Sub-delegates: Y

[28] A copy of the letter attached to the answering affidavit as annexure "AA1", the contents of which I quoted earlier, was also filed as part of the rule 7 reply, being the fourth document listed in the said reply.

[29] In the replying affidavit the following allegations were made in paragraph 3 thereof under the heading "Lack of Authorisation":

"3.1 Mr Vanga and Messrs Bokwa Attorneys ("Bokwa") have not received instruction from the Municipal Manager to oppose this application.

3.2 Mr Vanga attached a delegation of powers letter ("delegation letter") from the Municipal Manager dated 26 May 2022 to his answering affidavit as contended proof that he is authorised to depose to the answering affidavit and to oppose this application on the respondent's behalf.

3.3 In response to the rule 7 that was issued by the applicant to the respondent disputing the authority of Mr Vanga, an extract from the Council minutes dated 22 November 2021 was attached indicating in essence that the Municipal Manager is the delegating body to delegate the power to oppose any legal process and that, in terms of the delegation letter that such authorisation was purportedly given to Mr Vanga (which is in dispute).

3.4 Mr Vanga's alleged authority is defective and of no legal consequence in that:

3.4.1 The delegation letter merely authorizes Mr Vanga to perform acts related to the commencement of legal process against inter alia the applicant.

3.4.2 The delegation letter does not make mention of any sort of dispute by the respondent against the duly signed acknowledgement of debt.

3.4.3 Further to this, Mr Vanga is not instructed nor authorized to oppose the current relief.

3.4.4 Finally, the true Accounting Officer of the respondent, Mrs. Z. Zingesi in her position as Municipal Manager ("Mrs. Zingesi"), does not support the opposition to the applicant's application. In fact, Mrs Zingesi confirms that she did not sanction such opposition, nor does she take issue with the amounts claimed by the applicant.

3.5 Indeed, the Municipal manager gave Mr Vanga and Bokwa the instruction not to oppose this application as the monies are due to the applicant, hence the acknowledgement of debt. ...

3.8 What is clear, is that Mr Vanga has gone on a frolic of his own...

3.9 Consequently, this fully rebuts any proper foundation for Mr Vanga, or whoever he took his instructions from, to oppose the current relief sought."

The founding affidavit filed in support of the respondents application for postponement:

[30] The founding affidavit deposed to by Mr Vanga filed in support of the postponement, contains the following allegations in respect of authority:

1. "1.2 ...my authority remains the same as it was at the time of the filing of the answering affidavit. .."
2. "2. As will be noted from the Notice in terms of Rule 7 issued by the
... applicant... on 20 July 2022, the authority of the Municipality's attorneys of record is not challenged."
3. "30. The applicants have also relied on hearsay evidence and attempt alleging that Tindleni did not authorize me to depose to the answering affidavit and state that she does not support the opposition of the application, because she has verified the claim as aforesaid. This is not so:

30.1 ... she unlawfully suspended me in an attempt to frustrate me in investigating the applicant's claim, whereafter I brought an urgent application for an interdict uplifting the suspension, under case number 3922/2022 in the above Honourable Court ("the interdict application").

30.2 In her answering affidavit dated 19 August 2022 Tindleni said under oath that "The municipal council resolved to oppose the proceedings" (referring to the main application and five (5) others) and that she "... suggested ... that power be delegated to legal services" and she "accordingly signed the delegation" (meaning the delegation to 'legal services'

- being me) to oppose the main application. I will ensure, if necessary, that the papers in the interdict application are properly before this

Honourable Court when this application is heard, to prove the above.

30.3 Consequently, Tindleni can never seriously allege that she did not authorize the opposition of the application"

Approach in reaching my conclusions:

- [31] Like I have indicated earlier, both Mr Grabler and Mr Lauw fully addressed me on the question in respect of authority. For reasons that will become evident shortly, I, however, do not intend dealing with the merits of their arguments.
- [32] For purposes of this judgment, I listened to the recording of the hearing held on 20 October 2022, to ensure that I have a proper recollection of the arguments presented to me and consequently, to ensure that my findings in this judgment are, in my view and to the best of my ability, correct and properly substantiated.
- [33] The arguments presented to me were based on the contents of the answering- and replying affidavits filed in the main application. The factual basis of the respective arguments, and consequently counsel's references to and reliance upon applicable legal principles and case law, were therefore restricted to the allegations and facts as reflected in the aforesaid two affidavits, which I also quoted earlier in the judgment.

- [34] The crux of Mr Grobler's argument, without dealing with the detail thereof, were to the effect that the authorization on which Mr Vanga relies, was not properly delegated and is fatally defective in more than one respect. It was further Mr Grobler's contention that despite the fact that the respondent and Mr Vanga had been alerted to the said defects, both in the replying affidavit and in the applicant's heads of argument, nothing was done by the respondent in an attempt to rectify same - no new evidence had been presented, no confirmatory affidavit had been filed and/or no council resolution had been filed explaining and expanding upon Mr Vanga's authority.
- [35] Mr Louw pointed out that the challenge of authority as initially raised by the applicant in the rule 7 notice, were pertaining to the authority of Mr Vanga to oppose the application on behalf of the respondent and to act on the respondent's behalf. However, in the replying affidavit a new challenge was raised, in that the authority of Bokwa Attorneys was now challenged.
- [36] According to Mr Louw, the aforesaid new challenge in reply is one of the reasons why it became necessary for the respondent to file a Further Affidavit in response thereto, but for which the leave of the court is necessary. Mr Louw contended that in the proposed Further Affidavit the respondent shows "that what the Municipal Manager in fact did was to delegate the authority and we append correspondence from the Municipal Manager where she in fact confirms that she unwittingly delegated the authority to Vanga to oppose and appointed Bokwa Attorneys". It is also shown that the Municipal Manager confirmed under oath in another application which served in this court that she authorised Mr Vanga to oppose the application and that Bokwa Attorneys were properly authorised to act on behalf of the respondent. Mr Louw submitted that the authority of Mr Vanga and Bokwa Attorneys is consequently clarified in the proposed Further Affidavit.
- [37] Mr Louw further pointed out that prayer 3 of the Notice of Motion filed in respect of the application for leave to file a Further Affidavit, makes provision for the applicant to file a reply to the proposed Further Affidavit, should it so choose.
- [38] As a result of the totality of the aforesaid submissions, I again perused the application for leave to file a Further Affidavit, which includes the proposed Further Affidavit. From a mere reading of the proposed Further Affidavit, it is evident that it contains numerous averments, as well as documentary attachments, in respect of the authority of both Mr Vanga and Bokwa Attorneys.
- [39] I need to make it abundantly clear that:
1. I make no finding regarding the merits or demerits, correctness or not, of any of the submissions and contentions made by counsel referred to above.
 2. I make no finding regarding the admissibility and/or probative value of the allegations in respect of authority contained in the proposed Further Affidavit.

3. I am acutely aware that leave to file the proposed Further Affidavit has not yet been granted and that the proposed Further Affidavit has consequently not yet been accepted into evidence as part of the main

application.

4. I am also acutely aware that the application for leave to file a Further Affidavit may still be dismissed by the then presiding Judge.

[40] The fact of the matter is that there is a pending application for leave to file a Further Affidavit, which proposed Further Affidavit, inter alia, deals extensively with the issue of authority. Should I adjudicate upon the issue of authority at this stage based on the papers as they stand, I will effectively exclude the potential evidence regarding authority as contained in the proposed Further Affidavit, should leave to file the Further Affidavit eventually be granted.

[41] When the status of the main application as it currently stands is to be explained in action procedure terms, I would describe it to be that the defendant's (respondent's) case is not yet closed, it still intends calling a witness to testify. In those circumstances a trial court cannot pronounce its judgment before closure of the defendant's case. The same principle applies here.

[42] Should the application for leave to file a Further Affidavit eventually be granted and the Further Affidavit accepted into evidence, it may have a crucial impact on the outcome of the eventual determination of the issue of authority, irrespective of whether it ultimately be determined as a separate issue or as part of the hearing on the merits of the main application.

[43] In my view, it will not only be pre-mature, but completely irregular and improper for me to adjudicate upon the issue of authority whilst the interlocutory application for leave to file a Further Affidavit is still pending. The said application has not yet been adjudicated; in fact, it was not even ripe for hearing yet at the time of the hearing in casu. That application and the fact that relevant evidence in respect of authority may still be forthcoming should the application be granted, cannot simply be ignored.

[44] In my view the main application is consequently to be removed from the roll. Although the application for postponement has become academic, it also served before and I therefore have to make a ruling in regard thereto. It also stands to be removed from the roll.

[45] In an attempt to prevent the ere-occurrence of a similar situation in future, I deem it appropriate that the hearing of the main application and the application for leave to file a Further Affidavit are to be enrolled for the same date. That will obviously not necessarily mean that they will be adjudicated simultaneously, since the then presiding Judge may and probably will determine that the application for leave to file a Further Affidavit be adjudicated upon first. However, at least then the presiding Judge will be in a proper position to determine how the matter is to be dealt with. I make no

determination

in this regard since it will obviously be in the discretion of the court.

[46] Unfortunately the outcome of this judgment is indicative of the potential dangers in dealing with, or attempting to deal with, matters in a piecemeal fashion.

Costs:

[47] In so far as the costs are concerned, I consider it appropriate that costs stand over for later adjudication. The facts and circumstances that led to the unfortunate outcome of this judgment, are on record. The court who presides over the merits of the application for leave to file a Further Affidavit and/or the merits of the main application, will be in a better position than myself to determine the issue of costs once the success of the respective applications have been determined.

Order:

[48] The following order is made:

1. The main application and the respondent's application to postpone, dated 17 October 2022, are removed from the roll.
2. The main application and the interlocutory application for leave to file a Further Affidavit are to be enrolled for the same date.
3. The order in paragraph 2, supra, is not in any way to interfere with the discretion of the then presiding judge as to the how the two applications are to be dealt with.
4. The wasted costs of 20 October 2022, as well as the costs of the respondent's application to postpone, stand over for later adjudication.

C. VAN ZYL, J

On behalf of the applicant: Adv. S. Grabler SC Instructed by: Kruger Venter Inc Bloemfontein
On behalf of the respondent: Adv. MC Lauw Instructed by: Hill, Mchardy & Herbst Inc. Bloemfontein

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