

SOUTH AFRICA / JUDGMENT

Ndabeni and Others v Leeming and
Others (Reasons) (6008/2024) [2024]
ZANWHC 293 (2 December 2024)
[2024] ZANWHC 293

COURT
North West High Court, Mafikeng

BEFORE
T Masike

CASE / FILE NUMBER
6008/2024

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IN
THE HIGH COURT OF SOUTH AFRICA
NORTH WEST
DIVISION, MAHIKENG
CASE
NO.: 6008/2024

Reportable: YES/NO
Circulate
to Judges: YES/NO
Circulate
to Magistrates: YES/NO
Circulate
to Regional Magistrates: YES/NO

In the matter between: VUYISILE
CHARLES NDABENI
1st
APPLICANT
GLOBAL
TOURISM LEGACY NETWORKS (PTY) LTD
2nd
APPLICANT
MOTSWANA
RE NA LE RONA NPC
3rd
APPLICANT
And
ANTHONY

LEEMING
1st
RESPONDENT
SUN
INTERNATIONAL OF SOUTH AFRICA (PTY) LTD
2nd
RESPONDENT
BAKGATLA
BA KGAFELA TRADITIONAL AUTHORITY
3rd
RESPONDENT
BAKUBUNG
TRADITIONAL AUTHORITY
4th
RESPONDENT
LEREKO
INVESTMENT (PTY) LTD
5th
RESPONDENT
NORTH
WEST GAMBLING BOARD
6th
RESPONDENT
NORTH
WEST DEVELOPMENT CORPORATION
7th
RESPONDENT
ORTH
WEST PROVINCIAL GOVERNMENT
8th
RESPONDENT
NATIONAL
DEPARTMENT OF PUBLIC WORKS
9th
RESPONDENT
MOSES
KOTANE LOCAL MUNICIPALITY
10th
RESPONDENT
ORDER

INTRODUCTION:

[1]
The applicants in this matter Vuyisile Charles Ndabeni (the first applicant), Global Tourism Legacy (the second applicant) and Motswana Re Na Le Rona NPC (the third applicant) launched an urgent application which was heard on 22 November 2024.

[2]
At the hearing of the matter, the first applicant, Mr. Vuyisile Charles Ndabeni (Mr. Ndabeni) appeared in person. Mr. Ndabeni informed the Court that he was appearing on behalf of the second and third applicant. Mr. Graves SC appeared for the first and second respondent.

[3]
After hearing argument from both Mr. Ndabeni and Mr. Graves SC, the Court reserved judgment and on 28 November 2024 handed down an order

in the following terms:

- (i)
The application is dismissed;
- (ii)
The first applicant is ordered to pay the costs of the application on an attorney client scale, including the costs of Senior Counsel

[4]
What follows hereinunder are the reasons for the court order dated 28 November 2024.

THE LAW

[5]
Every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. (See: Rule 6(1) of the Uniform Rules of the Court).

[6]
An affidavit is a statement in writing sworn to before someone who has authority to administer an oath. It is a solemn assurance of fact known to the person who states it, and sworn to as his statement before some person in authority such as a commissioner of oaths.

[7]
Regulation 4(1) of the Regulations Governing the Administration of an Oath or Affirmation reads as follows: “Below the deponent’s signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.”

[8]

Regulation 4(2) of the Regulations Governing the Administration of an Oath or Affirmation

reads as follows: “The commissioner of oaths shall – (a) sign the declaration and print his full name and business address below his signature; and (b) state his designation and the area for which he holds his appointment or office held by him if he holds his appointment ex officio.”

[9]

In affidavits filed which are filed in support of the notice of motion. It is well established that the applicant should make out his or her case in the founding affidavit and certainly not belatedly in argument.

(See: *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at paragraph 177).

[10]

The founding affidavit must at the least contain the following;

(a)

applicant’s right to apply, that is the applicant’s locus standi. Appropriate allegations to establish the locus standi of an applicant should be made in the founding affidavit. The applicant must satisfy the court that he or she has a direct interest in the relief sought, the interest must not be too remote, the interest must be actual, not abstract or academic and it must be current interest and not a hypothetical one.

The duty to allege and prove locus standi rests on the party instituting the proceedings. (See: *Four Wheel Drive CC v Leshni Rattan NO* (1048/17) [2018ZASCA 124 (26 September 2018) at paragraph 7).

(b)

In addition, the founding affidavit should contain facts indicating that the court has jurisdiction.

(c)

The cause of action on which the applicant relies. (See: *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at 349A – B)

(d)

The evidence in support of the application. In application proceedings, the affidavits take the place of not only the pleadings in an action, but also the essential evidence which is to be led at a trial. (See: *National Credit Regulator v Lewis Stores (Pty) Ltd*

2020 (2) SA 390 (SCA) at paragraph 29).

[11]

A company cannot conduct a case in court except by the appearance of counsel acting on its behalf

(See: *Manong v Minister of Public*

Works (518/2008) [2009] ZASCA 110 (23 September 2009) at paragraph 4).

[12]

In *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624G – H, the court held that a deponent to an affidavit need not be authorized to depose to the affidavit in support of the application.

It is the institution of the proceedings and prosecution thereof that must be authorized.

[13]

In proceedings, where the applicant is an artificial person, evidence is required that the applicant

has duly resolved to institute the

proceedings and the proceedings are instituted at its instance. (See: *Tattersall and Another v Nedcor Bank Ltd.* (340/93) [1995]

ZASCA 30; 1995 (3) SA 222 (AD); [1995] 2 All SA 365 (A) (28 March 1995) at paragraph 10)

THE HEARING OF THE

MATTER

[14]

When this matter was heard, the Court indicated to Mr. Ndabeni that there wasn't a resolution

before the Court from the second

applicant and the third applicant authorizing the bringing of the application. Mr. Ndabeni insisted

that he had filed the resolution

with the registrar of the court.

[15]

The Court then asked Mr. Ndabeni if he was an attorney or an advocate. Mr. Ndabeni informed the

Court that he was neither an

attorney or an advocate. Mr. Ndabeni was then referred to the document written "FOUNDING AFFIDAVIT".

The Court referred

Mr. Ndabeni to the second and third pages of the document. The Court pointed out to Mr. Ndabeni that although

Sergeant Lesego Segwe who is

identified as a commissioner of oaths signed the document under the signature of Mr. Ndabeni. Sergeant

Segwe failed to attach a

certificate below Mr. Ndabeni's signature certifying that Mr.

Ndabeni has acknowledged that he knows

and understands the contents

of the declaration and he further failed to state the manner, place and date of taking the declaration.

Mr. Ndabeni informed the Court

that he did not know that was a requirement.

[16]

Mr. Ndabeni was informed by the Court that the Court had read the document marked “FOUNDING

AFFIDAVIT” and Mr. Ndabeni was

asked if he wished to make any further submissions or if he stood by what is contained in

the document marked “FOUNDING AFFIDAVIT”.

Mr. Ndabeni indicated he stood by what is contained in the document marked

“FOUNDING AFFIDAVIT”.

[17]

The Court considered the contents of the document marked “FOUNDING AFFIDAVIT”. The

Court noted that Mr. Ndabeni made an allegation

that he was duly authorized to bring the application on behalf of the second and

third applicant.

[18]

Mr. Ndabeni averred that on 13 October 2024, he had sent a letter of demand on behalf of the

second and third applicant to the first

respondent. The letter requested specific information to confirm the lawful ownership of

Sun City by the second respondent.

[19]

The Court noted that Mr. Ndabeni averred that the response of the first respondent was dismissive

and disrespectful, demonstrating a contemptuous attitude.

[20]

The Court noted from the reading of the document marked “FOUNDING AFFIDAVIT” that

the first, second and third applicant sought

the requested information to ascertain the legal status of Sun City.

The Court noted

in conclusion, the applicants sought the Court to

compel the respondents to provide the requested documents by the close of business

on 21 November 2024.

[21]

The Court when examining the notice of motion noted the notice of motion sought relief in the

following terms, “AN INTERDICT

RESTRAINING THE FIRST RESPONDENT AND THE SECOND RESPONDENT FROM HOSTING THE NEDBANK CHALLENGE

ON THE 5TH TO 8TH

OF DECEMBER 2024”.

[22]

The first and second respondent have filed their answering affidavit to the document marked “FOUNDING

AFFIDAVIT” of the first, second and third applicant. Mr. Graves SC for the first and second Respondent submitted to the Court that there is no legal connection between the claim for the requested documentation and the prayers to interdict the Nedbank Golf Challenge.

[23]

Mr. Graves SC submitted to the Court that due to the noncompliance with Regulation 4(1) of the Regulations Governing the Administration of an Oath or Affirmation, the application of the first, second and third applicant is not accompanied by an affidavit.

[24]

Mr. Graves SC further referred the Court to the letter dated 13 October 2024 from the first applicant, Mr. Ndabeni. A copy of the letter is attached to the answering affidavit of the first and second respondent and marked “AL1”.

[25]

Mr. Graves referred the Court to a WhatsApp communication from the first applicant, Mr. Ndabeni to the first respondent attached to the answering affidavit of the first and second respondent marked “AL2”. The WhatsApp message titled DRAFT SETTLEMENT AGREEMENT ON SUN CITY / SISA PTY LTD referred to (1) payment of claims loss of income and reputation damage R54b; (2) procurement of executive vehicles for the Motswana re Na Le Rona NPC R10m; (3) Donation of R 10m to Kgosi Manyane Mangope Foundation; (4) Investment of R500m in the Pilanesberg Game Reserve Infrastructure Fund; (5) Strategic Marketing and Business Development Partnership Agreement for 10 years in the Activation of the Nedbank Golf Challenge between SISA and Motswana Re Na Le Rona NPC; (6) Shareholders Agreement with Bakgatla Ba Kgafela and Ledig Business Forum 60% (Bakgatla/Ledig Consortium/ 40% (SISA). This should provide Rights for appointment of Directors and Executive Management; (7) The Sun City/Pilanesberg Gane Reserve Traversing Route Exclusive Rights to PGR,PIS and Lengau Africa Investment Pty Ltd for 20 years; (8) Outsourcing of the Staff Canteen Restaurants to Bakgatla Ba Kgafela and Ledig Business Forum Business; (9) Corporate Social Investment Project, Pilanesberg Wildlife College R20m; (10) Capital Funding of R250m for recapitalization. Commercializing and Rebranding of Pilanesberg

International Airport.

[26]

Mr. Graves SC submitted to the Court that this “DRAFT SETTLEMENT AGREEMENT ON SUNCITY / SISA PTY LTD” is nothing more than extortion of the first respondent and the second respondent by Mr. Ndabeni. Mr. Graves SC moved for the application to be dismissed with a punitive cost order on a attorney and client scale, including the costs of senior counsel.

[27]

Mr. Ndabeni in reply submitted that the “DRAFT SETTLEMENT AGREEMENT ON SUNCITY / SISA PTY LTD” is not extortion. Mr. Ndabeni informed the Court that the first respondent contacted him and asked him how the matter could be resolved and this was his proposal. ANYLYSIS

[28]

Although Mr. Ndabeni informed the Court that he is representing the second and third applicants and, in the document, marked “FOUNDING AFFIDAVIT” at paragraph 1, an averment is made that Mr. Ndabeni is duly authorized to bring the application on behalf of the second and third applicants. The first and second respondent have in their answering affidavit challenged this averment by stating there is no lawful resolution authorizing the first applicant to launch this application for and on behalf of the second and third applicants. There also are no confirmatory affidavits deposed to by the representatives of the second and third applicants.

[29]

Mr. Ndabeni had further indicated to the Court that he is not an attorney or an advocate. The authorities are clear on this issue, an artificial person cannot be represented in court proceedings by a person who is not an attorney or an advocate. I am accordingly not satisfied that the second and the third applicant were before the court on 22 November 2024 when this matter was heard.

[30]

The document marked “FOUNDING AFFIDAVIT” was not properly commissioned. This is also an issue that was taken by the first and second respondent. Mr. Ndabeni did not move an application for

condonation of the noncompliance with Regulation 4(1) of the regulations governing the administration of an oath or affirmation. Accordingly, the application of the first applicant was not accompanied by an affidavit.

[31]

When the matter was heard, the Court viewed the papers of Mr. Ndabeni benevolently because Mr. Ndabeni is not a legal practitioner. There is however a limit within which the Court could look benevolently on the papers. The document marked “FOUNDING AFFIDAVIT” in addition to not being an affidavit, does not speak to the relief that is sought in the notice of motion. Mr. Ndabeni failed to make out a cause of action for the relief that the first, second and third applicants seek. There is no legal connection between the documents sought by the first, second and third applicant and interdicting the Nedbank Golf Challenge.

[32]

Mr. Ndabeni failed to make appropriate allegations to establish the locus standi of the first, second and third applicants. The applicant must satisfy the court that he or she has a direct interest in the relief sought, the interest must not be too remote, the interest must be actual, not abstract or academic and it must be current interest and not a hypothetical one. Mr. Ndabeni in his documents marked “FOUNDING AFFIDAVIT” does not deal with these aspects.

[33]

Mr. Ndabeni failed to adduce evidence in support of the application and the relief that the first, second and third applicants seek. No evidence has been adduced at all in support of the relief sought for interdicting the Nedbank Golf Challenge.

COSTS

[34]

Mr. Graves SC submitted because of the conduct of Mr. Ndabeni, an appropriate costs order would be a punitive costs order on attorney and client scale including the costs of senior counsel.

[35]

The general rule is costs follow the cause, and I found no reason to depart from the rule. In considering an appropriate costs order, the Court considered the conduct of the applicants. The first, second and

third applicant
on 31 October 2024, launched an application in which
they sought an order interdicting the first and second respondent
from holding
the Nedbank Golf Challenge on 5th to 8th
December 2024. That application was brought under case number
5664/24, the matter was to be heard on 12 November 2024.

[36]

Mr. Ndabeni in reply, submitted to the Court that indeed that
application sat before Djaje DJP
on 15 November 2024, and it was
removed from the roll. The first, second and third applicant did not
withdraw the application under
case number 5664/24, nor was the
matter under case number 5664/24 placed on the roll for 22 November
2024. The first, second and
third applicants simply brought the
application under a new case number, 6008/24. The conduct of the
first, second and third applicant
amounts to abuse of court
processes.

[37]

There was no urgency in the matter and there was no reason advanced
as to why the matter under
case number 5664/24 was not placed on the
opposed motion court roll in terms of the practice directives of the
court instead of
bringing a new application under case number
6008/24. Mr. Ndabeni should have taken the Court into his confidence
and disclosed
from the outset that the matter under 5664/24 had sat
before Djaje DJP on 15 November 2024 and that the relief sought
therein is
the same relief sought in the matter under case number
6008/24. The fact that this was raised by the first and the second
respondent
in their answering affidavit, left the Court with the
inference that the first, second and third applicants sought to
mislead the
Court.

[38]

The Court has already found that the second and the third applicant
are not before the court.
It is only the first applicant who is
before the court and any cost order made would have to be against the
first applicant.

ORDER:

[39]

Resultantly, the following order was made: -

(ii)

The first applicant is ordered to pay the
costs of the application on an attorney and client scale, including
the costs of senior
counsel

T MASIKE

ACTING JUDGE OF THE

HIGH COURT

NORTH

WEST DIVISION, MAHIKENG

APPEARANCES

DATE FOR

HEARING

: 22

NOVEMBER 2024,

DATE OF

JUDGMENT

: 28 NOVEMBER 2024

DATE OF

REASONS

: 2 DECEMBER 2024

FOR 1st APPLICANT

: IN PERSON

INSTRUCTED BY

: IN PERSON

Email Address

: ndabenic@gmail.com

FOR 1ST AND 2ND RESPONDENTS : ADVOCATE NOEL GRAVES SC

INSTRUCTED BY

: KNOWLES HUSAIN LINDSAY INC

C/O MAPONYA INCORPORATED

1st FLOOR, OFFICE 29CB

MMABATHO

Email Address

: lettah@maponya.co.za

Or

: grs@khl.co.za/nb@khl.co.za

: noelgraves@counsel.co.za

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