

SOUTH AFRICA / JUDGMENT

Ndabeni and Others v Tshepiso
Mphehlo Executive Mayor and
Others (Reasons) (598/2024) [2024]
ZANWHC 291 (2 December 2024)
[2024] ZANWHC 291

COURT

North West High Court, Mafikeng

BEFORE

T Masike

CASE / FILE NUMBER

598/2024

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IN THE HIGH COURT OF SOUTH
AFRICA
NORTH WEST DIVISION, MAHIKENG
CASE NO.:
5988/2024

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
TSHEPISO
MPHEHLO EXECUTIVE MAYOR
1st
RESPONDENT
MAHIKENG
EXECUTIVE COUNCIL
2nd
RESPONDENT

ADV
DINEO MONGWAKETSE
3rd
RESPONDENT
SPEAKER
MS GAGOANGWE MATHE
4th
RESPONDENT
REASONS
FOR ORDER DATED 28 NOVEMBER 2024

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 appeared in person. The first applicant (Mr. Ndabeni) informed the Court that he was appearing on behalf of the second and third applicant. Mrs. Ntsamai appeared for all of the respondents.

[3]
After hearing argument from both the first applicant and Mrs. Ntsamai, 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 party and party scale, Scale “B”.

[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 nor an

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

The Court referred Mr. Ndabeni to

the third page of the document. The Court pointed out to Mr. Ndabeni that although the police

official whose names are not written on the

document and who is identified as a commissioner of oaths signed the document under

the signature of Mr. Ndabeni. The police official failed to attach a certificate below Mr. Ndabeni's signature certifying that Mr. Ndabeni had 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 and had no comment.

[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 15 October 2024, he had sent a letter of demand on behalf of the second and third applicant to the first respondent, the executive Mayor Tshepiso Mphehlo. The letter requested specific information with regard to the lack of vision, leadership and execution within the Mahikeng Local Municipality, the D – Account and a full disclosure report on the disposal of strategic assets of the Bophuthatswana sovereign state.

[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 applicants sought the requested information to ascertain the state of governance and leadership in the Mahikeng Local Municipality and undermines their rights to transparency, performance and accountability. 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 and address

the inappropriate conduct exhibited by the first respondent.

The Court further noted that the applicants sought the interdicting of convening of the Mahikeng Executive Council meetings until the requested information is provided.

[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, THE SECOND RESPONDENT, THIRD RESPONDENT AND FOURTH RESPONDENT

FROM CONVENING THE MAHIKENG MUNICIPALITY EXECUTIVE COUNCIL MEETINGS UNTIL THERE IS TRANSPARENCY, PERFORMANCE AND ACCOUNTABILITY”.

[22] The

respondents have opposed the application and Mrs. Ntsamai for the respondents submitted to

the Court that there is no legal connection

between the claim for the requested documentation and the prayers to interdict the

convening of the Mahikeng Municipality Executive Council Meetings.

[23]

Mrs. Ntsamai further submitted that the matter is not urgent, and the documents sought are public

documents which the applicants could have

easily accessed through the Municipality portal. Mrs. Ntsamai

submitted that the relief

sought by the applicants is bad in law.

[24] The

applicants failed to make out a case for locus standi to bring

the application and there isn't a resolution from the second

and third applicant authorizing the Mr. Ndabeni to

bring the

application on behalf of the second and third applicant.

[25]

Mrs. Ntsamai further submitted that the applicants should have

followed Promotion to Access to

Information Act, Act 2 of 2000 to

request the information but failed to do so. Mrs. Ntsamai submitted

that the conduct of the applicants

amounted to holding the

Municipality at ransom. Mrs Ntsamai submitted that the application of

the applicants was an exercise in

cut and paste because the relief

sought was similar to the relief sought in 2 other applications that

the Court had heard before

this matter was heard.

[26] Mr.

Ndabeni in reply submitted that the application was not a cut and paste exercise and that the argument that the applicants should have accessed the information through the Municipality portal is not good enough.

ANYLYSIS

[27]

Although Mr. Ndabeni informed the Court that he is representing the second and third applicant 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 this applicant. The respondents have challenged this averment. Mrs. Ntsamai challenged this averment in her oral submissions by stating there isn’t a resolution from the second and third applicant attached to the papers of Mr. Ndabeni authorizing Mr. Ndabeni to launch this application on behalf of the second and third applicant.

[28] Mr.

Ndabeni had further indicated to the Court that he is not an attorney or an advocate. In the face of the challenge to the authority of Mr. Ndabeni to institute the application on behalf of the second and third applicant, Mr. Ndabeni should have presented acceptable proof of authority that he is authorized by the second and third applicant to bring the application. In any event, 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 third applicant were before the court on 22 November 2024 when this matter was heard.

[29] The

document marked “FOUNDING AFFIDAVIT” was not properly commissioned. 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.

[30]

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 which the applicants rely for an order interdicting the convening the Mahikeng Municipality Executive meetings. There is no legal connection between the documents sought by the first, second and third applicant and interdicting the sitting of the Mahikeng Municipality Executive meetings.

[31] Mr.

Ndabeni failed to make appropriate allegations to establish the locus standi of the applicants for the relief that they seek. 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 failed in this regard.

COSTS

[32]

Mrs. Ntsamai submitted because of the conduct of the first applicant, an appropriate costs order would be costs on a party and party scale, Scale “B”.

[33] 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 that there was no urgency in the matter, no case was made out for the locus standi for the applicants to bring the application and no case was made out for the relief sought by the applicants.

[34] 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:

[35]

Resultantly, the following order was made: -

(ii)

The first applicant is ordered to pay the costs of the application on a party and party scale, Scale “B”.

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

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INSTRUCTED BY

: IN PERSON

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Prepared on 10 October 2026 · Esheria