

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBERS: 2023-115449

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

V.S. NOTSHE

29 January 2024

In the matter between:

ANTI CLIMB AFRICA (PTY) LTD

Applicant

and

**PURCHASING CONSORTIUM
SOUTH AFRICA NPC**

First Respondent

WATERBERG TVET COLLEGE

Second Respondent

JUDGMENT

NOTSHE AJ:

- [1] This matter served before me on an urgent basis. I read the papers and heard Counsel for the parties. I made an order and indicated that written reasons would follow later. These, then, are the reasons.
- [2] This is an application for the review and setting aside of the decision of the second respondent. The second respondent had awarded a tender to the first respondent for the erection of a fence on the premises of the former.

- [3] The respondents opposed the application both on the merits and special defences. The special defences are the misjoinder of the first respondent and that this Court does not have jurisdiction to adjudicate on the matter.
- [4] Despite the fact that these points were raised in the answering papers, the applicant chose not to deal with them pertinently.
- [5] It is trite law that application proceedings are both the pleadings and evidence rolled into one. A litigant is required to state its case in the papers and lead evidence in support thereof.
- [6] In this regard, the following was held in *Eagles Landing Body Corporate v Molewa NO and Others*:¹

"The principle applicable is that all the necessary allegations upon which an applicant relies, including those that accord it locus standi in the matter, must appear in the founding affidavit and an applicant will generally not be allowed to supplement its founding affidavit by adducing new grounds in its replying affidavit. In Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 368H the following was stated:

'It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in A petitions or founding affidavits, including facts to establish locus standi or the jurisdiction of the Court. See Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 2nd ed at 75, 94. In my view this practice still prevails.'

In Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H - 636B Diemont JA is reported to have stated the following:

'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:

". . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the

¹ *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T) para [36].

application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, "it is not permissible to make out new grounds of the application in the replying affidavit" (per Van Winsen J in SA Railways Recreation Club and Another v Gordonias Liquor Licensing Board 1953 (3) SA 256 (C) at 260). It follows that the applicant in this matter could not extend the issue in dispute between the parties by making fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the Bar."

- [7] In this case the applicant failed to deal with the defences raised by the respondents. It did not lead evidence to deal with the defences raised by the respondents.
- [8] In his heads of argument and in argument counsel for the applicant sought to rely on the provisions of section 1 of Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). The section defines a Court to include a court within whose area of jurisdiction the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced.
- [9] The problem, however, is that there is no evidence led in the papers to bring this case within the jurisdiction of this court. A party that wishes to rely on a legal position has to state facts on which the legal principle is to be applied. A party cannot adopt a spraying and praying approach, i.e. spraying of facts and praying that one of them will hit the target. That approach is unhelpful and cannot succeed.
- [10] In the circumstances, the applicant has failed to prove that this court has jurisdiction to adjudicate upon this dispute.
- [11] I therefore made the following order:
 - 1. The application is dismissed with costs on a scale between the attorney and own client.
 - 2. Such costs include costs of senior counsel.


V.S. NOTSHE
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 29 November 2023
Order: 29 November 2023
Judgment: 29 January 2024

Appearances:

For Applicant: O Ben-Zeev (with KV Plaatjies)
Instructed by: Mbatha CS Attorneys Inc.
c/o FH Munyai Inc.

For First Respondent: L Kotze
Instructed by: GMI Attorneys.

For Second Respondent: TALL Potgieter SC
Instructed by: De Beer Attorneys
c/o Rooseboom Inc.