



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

In the matter between:-

Case No. 5244/2021

SONWABO CLEOPUS MAMPOZA

Applicant

and

KING SABATA DALINDYEBO LOCAL MUNICIPALITY

First Respondent

**THE SPEAKER OF COUNCIL, KING SABATA
DALINDYEBO LOCAL MUNICIPALITY**

Second Respondent

**THE EXECUTIVE MAYOR, KING SABATA
DALINDYEBO LOCAL MUNICIPALITY**

Third Respondent

**THE MUNICIPAL MANAGER, KING SABATA
DALINDYEBO LOCAL MUNICIPALITY**

Fourth Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

BANDS J:

[1] The applicants seek leave to appeal against the whole of my judgment and order granted in favour of the respondents, handed down on 18 July 2023.

[2] The applicant, an employee of the first respondent whose designation within the municipality is in dispute between the parties, sought an order declaring, unlawful, the first respondent's council resolution, VORDCM 887/06/21 (*"the resolution"*), passed on 30 June 2021, for its alleged want of compliance with rule 27 of the standing rules for the meetings of council and its committees (*"the standing rules"*).

[3] The applicant, in bringing the application, acts in his own interest.

[4] He complains that the resolution, which rescinds¹ resolution MC127/07/08, has the effect of unilaterally and arbitrarily varying his contract of employment with the first respondent and accordingly, that he has a direct and substantial interest in the outcome of the proceedings. The legal basis upon which the applicant relies for his relief is based on the provisions of section 21(1)(c) of the Superior Courts Act 10 of 2013 (*"the Act"*), having repealed and replaced its predecessor, section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959.

¹ This too being an issue in dispute between the parties. The respondents contend that whilst the Municipal Council was, at the time of passing resolution VORDCM 887/06/21, under the mistaken impression that resolution MC127/07/08 (which it purported to rescind) had been taken by it, such resolution was in fact a resolution of the Mayoral Committee. Accordingly, the respondents argue that a resolution which does not exist is incapable of rescission.

[5] In the aforesaid judgment, I found at paragraph [16] that not only had the applicant failed to establish that he holds the position of Senior Communications Officer, as contended for by him, but that he had failed to establish that resolution VORDCM 887/06/21 has the effect of unilaterally and arbitrarily varying his contract of employment with the first respondent.

[6] For the above reasons, I concluded that the applicant lacked the necessary interest in the proceedings, within the context of section 21(1)(c) of the Act, and I dismissed the application. Dissatisfied with this outcome, the applicant launched the present application.

[7] The test to be applied in applications for leave to appeal finds legislative expression in section 17 of the Act, which provides that leave to appeal may only be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[8] Whilst the applicant's notice of application for leave to appeal records at paragraph [9] that "*there are reasonable prospects of success on appeal and there is also a compelling reason why the appeal should be heard*", no reasons were advanced, neither in the notice of application nor in argument, as to the applicability of section 17(1)(a)(ii) of the Act to the present matter.

[9] Accordingly, properly considered, the applicant brings his application in terms of section 17(1)(a)(i) of the Act only.

[10] The Supreme Court of Appeal has on more than one occasion had the opportunity to consider what constitutes a reasonable prospect of success, which is stated to be as follows:²

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[11] It is against this backdrop that this application is adjudicated.

[12] The applicant relies on eight grounds of appeal, each of which are dealt with below.

First ground of appeal

[13] The applicant, mistakenly, contends that the issue of his legal standing (or lack thereof) was raised *mero motu*, for the first time, in my judgment, without having

² *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

Maphana and Another v S (174/2017) [2018] ZASCA 8 (1 March 2018).

Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31 (31 March 2021) at para 10.

afforded the parties an opportunity to canvass this aspect in argument. For this reason, the applicant, in essence, attacks: (i) my finding that the applicant lacked the necessary interest in the proceedings, within the context of section 21(1)(c) of the Act; and (ii) my resultant dismissal of the application on this basis.

[14] The above contention is not only factually incorrect, but it is also misguided.

[15] The issue of the applicant's lack of interest in the proceedings was identified and pertinently raised by the respondents' counsel in argument, based on the factual averments on the papers before court. To this end, approximately two-thirds of the respondents' written heads of argument filed in the main application were dedicated to this aspect, under various headings.

[16] To succeed in obtaining declaratory relief, the applicant had to establish that he has a legally recognised interest, that being a direct and substantial interest, in the order sought.³ It is only once such an interest has been established that the court can then enter the fray and determine whether to exercise its discretion in favour of granting the relief sought by the applicant. Paragraphs [4], [5], and [19] to [23] of my judgment dealt pertinently with section 21(1)(c) of the Act and the two-stage approach to be adopted under the subsection as set out by the Supreme Court of Appeal in

³ *Trinity Asset Management (Pty) Ltd & others v Investec Bank Ltd & others* 2009 (4) SA 89 (SCA) para 16; (574/07) [2008] ZASCA 158. *Cordiant Trading CC v Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) paras 15 to 18; (237/2004) [2005] ZASCA 50. *Illovo Opportunities. Partnership #61 v Illovo Junction Properties (Pty) Ltd & others* (490/13) [2014] ZASCA 119. *Muldersdrift Sustainable Development Forum v Mogale City* (20424/14) [2015] ZASCA 118 (11 September 2015) at para 16.

Cordiant Trading CC v Chrysler Financial Services (Pty) Ltd,⁴ which I need not repeat herein.

[17] The applicant loses sight of his case before court.

[18] As stated, the entire basis upon which he claims to have sufficiency of interest in the order sought is his contention that the resolution, which he seeks to set aside, has the effect of unilaterally and arbitrarily varying his contract of employment between him and the first respondent. In what manner he contends this to be so⁵ is not dealt with by the applicant on the papers.

[19] Perhaps more fundamentally, however, is that it is common cause that: (i) the issue of the position held by the applicant, as contended for by him, was a factual dispute on the papers before the court in prior litigation between the parties, which culminated in the granting of an order by consent on 27 February 2014; (ii) the existing order of court regulates the applicant's remuneration and benefit package with the first respondent; (iii) the applicant has historically been, and is at present continues to be, remunerated in accordance with the terms of such order (notwithstanding the passing of the resolution which the applicant seeks to set aside); and (iv) the parties are bound (and consider themselves to be bound) by the order. Leaving aside the dispute on the papers as to whether the position held by the applicant is a managerial position, the applicant, on his own version at paragraph [18] of his founding affidavit, asserts that the implementation of the order of court effectively meant that he "*was remunerated*

⁴ 2005 (6) SA 205 (SCA).

⁵ Other than in title.

as a manager according to the spirit and purport of the council resolution 127/07/2008". This position remains unchanged, *albeit* that the nomenclature for the salary grade which is applicable to the applicant in terms of the order of court has since changed from "*Grade 3*" following the implementation of the Task Grade System to that of "*Task Grade 15*".

[20] The applicant repeatedly attempted to detract from this aspect in his replying affidavit, instead maintaining that the crisp issue for determination is whether the resolution was passed in contravention of the provisions of standing rule 27 and as such whether it ought to be declared unlawful. To consider this aspect without first establishing the existence of the necessary condition precedent for the exercise of my discretion, would be to ignore the trite legal principles to which I have referred.

[21] Moreover, I am mindful of the words of Willis JA, writing for the Supreme Court of Appeal, in *Muldersdrift Sustainable Development Forum v Mogale City*⁶ where he stated as follows at paragraph [10] thereof:

"...one cannot snatch a remedy from the air. In a unanimous judgment of this court in Oudekraal Estates (Pty) Ltd v City of Cape Town & others Howie P and Nugent JA, referred with approval to the following passage in Wade's Administrative Law:

'The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason.'

Although the passage deals with an administrative decision it would apply equally, in my view, to the right to claim a declaratory order under s 21(1)(c)."

⁶ (20424/14) [2015] ZASCA 118 (11 September 2015).

[22] Accordingly, even if the applicant was correct in his assertion that the resolution was passed in contravention of the provisions of standing rule 27 (in respect of which I made no finding), it does not, on its own, entitle the applicant to the relief sought in the absence of adequate standing.

[23] On a proper application of the law to the facts of the present matter, and for the reasons set out in the main judgment, I do not think that there are reasonable prospects that another court will come to a different conclusion.

Second ground of appeal

[24] The applicant's second ground of appeal takes issue with my factual finding that the applicant failed to establish that he holds the position of Senior Communications Officer and accordingly, that I was mistaken in my finding that he had failed to establish that the resolution "*had any bearing on him.*"

[25] This ground of appeal is predicated on what the applicant terms my disregard for the evidence placed before me "*including annexure "SCM6" to the founding affidavit and annexure "NP9" to the answering affidavit which documents clearly shows that the respondents recognises that the applicant is a Senior Communications Officer and that their denial of this position is just contradictory, not real and genuine, but farfetched and untenable.*"

[26] Various issues arise.

[27] The reason for my conclusions regarding: (i) the position held by the applicant; and (ii) his failure to establish that resolution VORDCM 887/06/21 had the effect of unilaterally and arbitrarily varying his contract of employment with the first respondent, are dealt with in paragraphs [6] to [17] of my judgment. The disputes of fact in respect of these issues, in the absence of oral evidence, fell to be resolved by the application of the *Plascon-Evans*⁷ rule; upon which approach, the findings to which I arrived were based.

[28] Even if the applicant had established that he holds the position of Senior Communications Officer, which, on a proper consideration of the allegations contained in the respective affidavits, he did not; this would not have assisted him in establishing legal standing given the existing order of court, to which I have referred.

[29] This conclusion is the end of the matter, and it would ordinarily be unnecessary and irrelevant to go further. Having said that, I feel compelled to say something about annexures “SCM6” and “NP9” given the applicant’s reliance thereon, coupled with the fact that I did not pertinently deal with these annexures in my main judgment.

[30] Without belabouring the point, annexures “SCM6” and “NP9” are documents emanating from the offices of the first respondent in which the applicant is referred to as the Senior Communications Officer. Specific attention was not drawn to the portions of the annexures, upon which the applicant’s counsel placed reliance in argument, by either of the parties on affidavit. Annexure “SCM6” was attached by the

⁷ *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (AD).

applicant to his founding papers for the purposes of illustrating various salary grades mooted by the applicant and the first respondent during settlement negotiations, including that contained in a proposed agreement of settlement, dated 23 March 2021, by the first respondent. The first respondent, in its answering affidavit, highlights that in an attempt to cease the hostilities between the parties and to put an end to the seemingly endless litigation, it offered to settle the dispute on the terms contained in annexure “SCM6”, which the applicant did not accept, and which offer has since lapsed.

[31] “NP9” is communication, dated 7 December 2018, addressed to the applicant from the first respondent, which predates the proposed deed of settlement, “SCM6”, by some two years and four months. “NP9” was attached to the respondents’ answering affidavit and deals with discussions between the parties in respect of the applicant’s salary grade. The applicant, in reply, instead of placing reliance on the reference to him as the Senior Communications Officer in the said correspondence, contends that the content of the respondents’ affidavit which deals with “NP9” should be disregarded as it constitutes hearsay evidence; alternatively, it is irrelevant. It is not open to the applicant to denounce reliance on the content of annexure “NP9” on affidavit and thereafter seek to attach weight to it in argument. Such positions are diametrically at odds with each other. Had the applicant sought to rely on a portion of “NP9”, it was incumbent upon him to raise it pertinently to enable the respondents’ an opportunity to respond. This the applicant failed to do.

[32] In motion proceedings, the affidavits constitute both the pleadings and the evidence. It is well established, regard being had to the function of affidavits, that it is

not open for a party to merely annex documents to his/her affidavit and to request the court to have regard to it. *“What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.”*⁸ On this score, the Supreme Court of Appeal in *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*,⁹ stated as follows as paragraph [43]:

“It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest — the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein, and the issues and averments in support of the parties’ cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent’s affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.”

[33] Apart from the respondents’ persistent denial in respect of the applicant’s contention as to the position held by him, which, as stated, was not dealt with by the applicant in reply, the respondents explain elsewhere in their answering affidavit that the applicant, given his persistent insistence over the years, has, contrary to the correct position, created confusion amongst the functionaries within the first respondent regarding the position held by him. This on its own, offering an explanation

⁸ *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (TPD).

⁹ 2008 (2) SA 184 (SCA).

for the referral to the applicant as the Senior Communications Officer in the said annexures.

[34] Accordingly, and for the reasons stated, particularly having regard to what I have stated regarding the existing order of court, I am of the view that there are no reasonable prospects that another court will come to a different conclusion.

Third ground of appeal

[35] The applicant contends that I erred in finding that the resolution had no bearing on the applicant despite that it, on the applicant's version, dealt with a position that the applicant was occupying.

[36] This ground of appeal constitutes a duplication of the prior two grounds of appeal. For the reasons articulated, I do not think that there are reasonable prospects that another court will come to a different conclusion.

Fourth ground of appeal

[37] In essence it is contended that I erred by "*disregarding the evidence placed before the court as annexure "SCM3" to the replying affidavit.*

[38] "SCM3" are the minutes of a meeting of the Mayoral Committee, held on 23 June 2021, in which it is recorded, when dealing with a report to the mayoral committee regarding the rescission of resolution 127/07/08, that the applicant had been

requested to recuse himself from the meeting “*as he had (sic) interest on (sic) the above matter, even though he did not declare (sic) interest.*”

[39] Whilst the ground of appeal itself goes no further than I have set out above, the argument advanced on behalf of the applicant is that the recordal of the applicant’s interest, by necessary implication, means that he occupies the position of Senior Communications Officer. I disagree.

[40] This approach requires me to read words into the minutes which are simply not there. Their intended import cannot be read in isolation, but rather must be read in the context in which they were employed. The parties, at the time of the meeting were engaged in settlement negotiations, having been involved in an ongoing dispute regarding the position held by the applicant and his remuneration package for some 9 years, resulting in various court proceedings. This on its own is sufficient interest to request the applicant to recuse himself from the meeting at the relevant time. Such interest should not be confused with the necessary interest required for the purposes of these proceedings, nor does it amount to such. Moreover, it does not stand as proof of the applicant’s contention that he holds the position of Senior Communications Officer.

[41] In light of the above, I do not think that there are reasonable prospects that another court will come to a different conclusion.

Fifth ground of appeal

[42] This ground of appeal again attacks my finding that the applicant failed to establish that he has the necessary interest in the proceedings, within the context of section 21(1)(c) of the Act.

[43] I have dealt with this in detail.

Sixth ground of appeal

[44] Simply put, the applicant contends that I erred in not accepting that the resolution would have the effect of downgrading the post of Senior Communications Officer to a non-managerial post, remunerated at Task Grade 12, which once implemented would prevent the applicant from claiming any benefits associated with the post “*of a Senior Communications Officer as a Managerial Post.*”

[45] The applicant loses sight of the fact that his remuneration is regulated in terms of the order of court, which remuneration the applicant considers to be that of a manager according to the spirit and purport of the council resolution 127/07/2008. I refer to what I have stated in paragraph [19] of this judgment.

[46] Regard being had to the aforesaid, there exist no reasonable prospects that another court will come to a different conclusion.

Seventh ground of appeal

[47] The applicant’s seventh ground of appeal, broadly stated, pertains to my finding that the applicant, at the time of launching the application, was under the mistaken

belief that resolution MC127/07/08 was that of the first respondent's council when it was instead, a resolution of the mayoral committee. Following the filing of the parties answering and replying papers, it was undisputed that resolution MC127/07/08 was that of the mayoral committee.

[48] Essentially, what the applicant contends is that he was not mistaken regarding the identity of the resolution but was instead misled by the first respondent into believing that the resolution was that of the first respondent's council.

[49] There exists no basis on the papers before me upon which I can arrive at the finding contended for by the applicant. Such finding would in any event take the matter no further.

Eighth ground of appeal

[50] In light of what I have stated above, it follows that the applicant's eighth ground of appeal in respect of the costs of the matter, must fail.

[51] For all the above reasons, I consider that the contemplated appeal against my dismissal of the application does not enjoy any prospects of success. It was further not contended that there exists any other compelling reason why an appeal in the circumstances of this matter should be heard.

[52] In the result, the following order shall issue:

1. The application for leave to appeal is dismissed with costs.

I BANDS**JUDGE OF THE HIGH COURT****Appearances:**

For the applicant: Mr Manana
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Coram: Bands J
Date heard: 26 October 2023
Delivered: 30 January 2024