

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
CIRCULATE TO MAGISTRATES: YES/NO

SOUTH AFRICAN MUNICIPAL WORKERS' UNION

MALUTI-A-PHOFUNG WATER (SOC) LTD**MALUTI-A-PHOFUNG MUNICIPALITY**

ACTING CEO: MALUTI-A-PHOFUNG WATER
(SOC) LTD: MR LEPHUTHING

MEC: DEPARTMENT OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS:
FREE STATE

DL ERNEST

M XOLANI

L MALAKOANE

TC SEKHELE

8th Respondent

MR RANTSHO9th Respondent**JG MAHLANGU**10th Respondent**I MOSIA**11th Respondent**NM MBELE**12th Respondent**LS MOKOENA**13th Respondent**LW MAPHIKE**14th Respondent**CORAM:**

VANZYL, J

HEARD ON:

1 DECEMBER 2022

DELIVERED ON:

29 MAY 2023

[1] This matter was initially launched as an urgent application which served before Mhlambi, J on 10 November 2022 in chambers. Mhlambi J made an order in terms of a draft order:

- "1. The application is postponed, based upon the proposal of the applicant, to the opposed roll of 1 December 2022.
2. None of the parties forego any rights they may have to argue any of the raised points of law.
3. The costs of today stand over for adjudication on 1 December 2022."

[2] In terms of the notice of motion the applicant is seeking the following relief:

- "1. That this application be heard as an urgent application....

2. That the appointments of the fifth to fourteenth respondents ('the appointments') be declared to be unlawful and/or irregular.

3. That the appointments be reviewed and/or set aside.

4. That the first respondent and the third respondent, and any other respondent opposing this application, be ordered to pay the costs of the application."

[3] Only the first and third respondents opposed the application and duly filed an answering affidavit, in response to which the applicant filed a replying affidavit.

[4] The fourth respondent filed a notice to abide by the decision of the court.

Succinct background to the application:

[5] The first respondent is a state-owned company and Municipal entity as envisaged by section 1 of the Local Government: Municipal Systems Act with principal place of business situated at Phuthaditjhaba.

[6] The third respondent is, according to the applicant, *"the purported current acting CEO of the first respondent"*. The applicant disputes the validity of the appointment of the third respondent.

[7] The fifth to fourteenth respondents are employees who had recently been employed by the first respondent as General Workers. It is the appointment of these employees which forms the crux of this application. It is the applicant's case that the employees were employed, effectively through the first respondent, without any process having been followed and contrary to the provisions of the Local Government: Municipal Systems Act, the Local Government: Municipal Staff Regulations and the first respondent's Recruitment and Selection Policies. According to the applicant the appointments were made without following any prescribed process whatsoever.

[8] It is consequently the applicant's case that the appointment of the employees should be declared to be unlawful and/or irregular, with the consequence that same should be reviewed and/or set aside.

[9] In dealing with the merits of the application, the applicant sets out as to when it became aware of the appointment of the employees and the subsequent events, which included a letter of demand, dated 13 October 2022, which "*the applicant directedto the first respondent*", attached to the founding affidavit as annexure "FA2", and a further letter of demand, dated 14 October 2022, directed by the applicant's attorneys of record to the first, second and fourth respondents, a copy of which is attached to the founding affidavit as annexure "FA3".

[10] The applicant further dealt with the issue of urgency of the application.

[11] In the answering affidavit of the first and third respondents, which was deposed to by the third respondent, the third respondent, in addition to dealing with the merits of the application, also raised the following points *in limine*:

1. Urgency;
2. The applicant's lack of *locus standi* and the court's lack of jurisdiction;
3. The lack of authority;
4. The applicant's failure to have instituted the application in terms of Rule 53.

Authority:

[12] For reasons which will become evident, I intend to deal with this point *in limine* first.

[13] The founding affidavit was deposed to by Mr Tiisetso Mahlatsi and at paragraph 1 of the founding affidavit he stated as follows:

"I am an adult male and Provincial Secretary of the Applicant, the South African Municipal Workers' Union ('SAMWU'), a trade union duly registered in terms of the Labour Relations Act, 68 of 1996 ('the LRA'). I am duly authorised to depose to this affidavit."

[14] In paragraphs 32 and 34 of the founding affidavit allegations were made that the applicant's Provincial Chair, Mr Tseko Mokoena, made contact with the first respondent's Industrial Relations Officer, Mr Finger, and with the Human Resource Manager, Mr Alexandra, during the week of 11 October 2022. Mr Finger informed the applicant's Provincial Chair that he was instructed to induct the appointed respondents but that he had no knowledge of their employment prior to receiving the instruction to oversee the induction. Mr Finger further indicated that he also questioned the procedure in appointing the employees, but that he was told not to concern himself with that and to do the induction. Mr Alexandra told the Provincial Chair that he was surprised by the appointments as the positions had not been advertised and no interview or selection process was followed. Despite an undertaking in paragraph 32 that a confirmatory affidavit by the Provincial Chair will be filed as soon as reasonably possible, no such affidavit has been forthcoming.

[15] I will later deal with the correspondence addressed on behalf of the applicant.

The answering affidavit on the issue of authority:

[16] In the answering affidavit, under the heading pertaining to the point *in limine* regarding authority, the third respondent stated as follows on behalf of himself and the first respondent:

"58. The applicant as a trade union has its own head office in Johannesburg.

59. The deponent alleges that he is the Provincial Secretary, presumably

for the Free State Province.

60. The constitution of the applicant does not confer the Provincial Secretary with the power and authority to launch legal proceedings in the name of the applicant; alternatively, the authority alleged by the deponent is not supported by any form of proof that these legal proceedings were authorised by the applicant.

61. I ask the court to dismiss this application with costs just on this point."

[17] In paragraph 83 of the answering affidavit the third respondent referred to the fact that a confirmatory affidavit of Mr Tseko Mokoena had not been filed and that the allegations pertaining to the conversation between him and Mr Finger, are denied and stand to be struck.

[18] The third respondent further indicated that he spoke to Mr Finger who advised him that he did in fact receive a call from the Provincial Chair of the applicant, Mr Tseko Mokoena, who asked him about the appointment of the General Workers, but without discussing the details thereof, Mr Finger referred the Provincial Chair of the applicant to the first respondent's Executive Manager: Corporate Services, Mr Pitso Mokoena, advising the Provincial Chair that anything involving human resources, must be addressed to the last-mentioned Mr Mokoena. Subsequent to the short conversation, Mr Finger received a WhatsApp message from the Provincial Chair of the applicant in which he asked for the names of the General Workers, which request Mr Finger did not comply with. Mr Finger's confirmatory affidavit was attached to the answering affidavit as annexure "AA4".

[19] In response to the allegations in the founding affidavit pertaining to the conversation of the Provincial Chair of the applicant with Mr Alexandra of the first respondent, the third respondent indicated that the allegations are denied and again requested that in the absence of a confirmatory affidavit by the Provincial Chair, the allegations should be struck. The third respondent, however, stated that he spoke to Mr Alexandra, who confirmed that he received a telephone call from the Provincial Chair, but that he denies the contents thereof as alleged on behalf of the applicant.

Mr Alexandra informed the third respondent that he has been engaged in the process that led to the enlistment of the appointed respondents by Mr Pitso Mokoena, until the decision was made on the Friday of that week to halt the process. Mr Alexandra was surprised the next Monday when the enlistment was proceeded with. He never expressed to the Provincial Chair that he was surprised by the appointments as alleged. A confirmatory affidavit of Mr Alexander was attached to the answering affidavit as annexure "AAS".

The replying affidavit of the applicant on the issue of authority:

[20] In paragraphs 9 to 12 of the replying affidavit Mr Mahlatsi, the Provincial Secretary of the applicant, dealt with the applicant's *locus standi*.

[21] Although incorrectly numbered, it appears that the Provincial Secretary of the applicant meant to deal with the applicant's alleged lack of authority as contained in paragraphs 58 to 61 of the answering affidavit, in paragraph 26 of the replying affidavit. In the said paragraph 26 of the replying affidavit the Mr Mahlatsi responded as follows on behalf of the applicant:

"26.1 The application was launched by the applicant and not by me.

26.2 I am advised that there are certain procedures which the respondents may follow if the mandate of the applicant's attorney of record to lodge these proceedings is challenged."

Rule 7-notice:

[22] On 28 October 2022, after the filing of the founding affidavit and prior to the filing of the answering affidavit, the first and third respondents filed a notice in terms of Rule 7(1), which reads as follows:

"Kindly take notice that the first and third respondents dispute the authority of Kramer Weihmann Attorneys to act on behalf of the applicant.

Take notice further that Kramer Weihmann Attorneys may no longer act for the applicant until such time as the attorneys have satisfied the Court that they are so authorised."

[23] On 1 November 2022, after the filing of the answering affidavit and prior to the filing of the replying affidavit, an e-mail was sent from Kramer Weihmann Attorneys to the attorney of record of the first and third respondents. The "subject" of the e-mail refers to the parties in the application *in casu* and also records the case number. The contents thereof read as follows:

"Dear Sir

We refer to the abovementioned matter and your clients' notice in terms of Rule 7(1) of the Uniform Rules of Court.

We append hereto the authorisation letter from our client, in terms of which our mandate is confirmed.

Please confirm if same is in order, in the alternative, please contact our offices if any further information is required.

Kind regards.

KRAMER WEIHMANN ATTORNEYS"

[24] I will in due course deal with the letter which was attached to the aforesaid reply to the Rule 7(1)-notice.

Applicable legal principles and consideration of the arguments:

[25] Mr Grobler appeared on behalf of the applicant and Mr Masihleho appeared on behalf of the first and third respondents. Both of them fully addressed me on all the points *in limine* and the merits of the application, but for present purposes I will deal with their arguments on the issue of authority.

[26] In my view and based on the arguments on behalf of the respective parties, it is not in dispute that it was the intention that the national entity, SAMWU, and not the Free State provincial structure of SAMWU, was intended to be the applicant and has indeed been cited as such.

[27] I was not placed in possession of the reply by the applicant's attorneys of record in response to the first and third respondent's' notice in terms of Rule 7 prior to the hearing of the application. I, consequently, at the end of Mr Grobler's address, enquired from him whether such a reply had in fact been filed by the applicant's attorneys of record. Mr Grobler indicated that he enquired from his attorney regarding the filing of such reply immediately before the commencement of the hearing. The e-mail of 1 November 2022 to which I referred earlier, with the letter attached thereto, were consequently handed to me at that stage of the hearing. I enquired from Mr Masihleho whether his instructing attorney had received same, which he confirmed.

[28] In his argument, Mr Masihleho pointed out that considering that the deponent to the founding affidavit is the Provincial Secretary of the applicant, it is evident that although the national entity, SAMWU, was cited as the applicant, the proceedings were actually launched by the provincial structure of the national entity.

[29] Mr Masihleho referred to the fact that the first and third respondents specifically and pertinently challenged the authority of the Provincial Secretary of the applicant to have launched the proceedings in the name of the applicant, as stated in paragraph 60 of the answering affidavit quoted herein earlier. Despite this direct and pertinent challenge of the Provincial Secretary's authority in terms of the constitution of the applicant to have launched the proceedings in the name of the applicant, the Provincial Secretary did not respond in the replying affidavit by attaching and/or referring to the relevant clauses of the constitution of the applicant in support of the Provincial Secretary's alleged authority. Mr Masihleho consequently submitted that in the absence of any such authorisation in terms of the constitution of the applicant, it cannot be found that the Provincial Secretary had the necessary authority to have instituted the application on behalf of the applicant against the respondents.

[30] I now return to the letters of demand which were sent on behalf of the applicant, to which I referred earlier. The following are evident from those letters:

1. The initial letter of demand which, according to the applicant, *"the applicant directed ...to the first respondent"*, attached to the founding affidavit as annexure "FA2", was written on a letterhead which reads:

"South African Municipal Workers' Union
Free State Province"

On the same letterhead the address of the SAMWU Free State Provincial Office, being an address in Bloemfontein, is reflected, as well as Bloemfontein landline telephone numbers. At the bottom of the letterhead the names of the Provincial Chairperson, the Deputy Provincial Chairperson, the Provincial Treasurer, the Provincial Secretary and the Deputy Provincial Secretary appear. (My emphasis) There is consequently no reference to or indication of the national structure of SAMWU on the said letterhead. Despite this, the first sentence of the letter reads as follows:

"The above-mentioned recognized national union (SAMWU) is hereby gravely aggrieved about the continues unlawful, illegal and disrespect to hard earned negotiated approved policies, collective agreements and laws of our country. We have learned and observed today morning with great disappointment about the unlawful recruitment of employees outside the provisions of the Recruitment, Selection and Appointment Policy of MAP Water."

2. Without dealing with the further contents of the letter, it is to be noted that the letter, although not signed, was concluded with the following:

"SAMWU FREE STATE
PROVINCIAL CHAIRPERSON
MAP WATER CONSTITUANCY
SHOPSTEWART

TD MOKOENA"

3. In the subsequent letter of demand addressed to, *inter alia*, the first and third respondents, by the applicant's attorneys of record, dated 14 October 2022, the following was stated in paragraph 1 thereof, which seems to be a reference to the national structure of SAMWU:

"We refer to the abovementioned matter and confirm that we have received instructions from the South African Municipal Workers' Union (SAMWU) to write this letter on their behalf."

The Rule 7-reply:

[31] In the reply by the applicant's attorneys of record to the Rule 7(1) notice, it was stated in the relevant e-mail, which I have already referred to earlier, that *"[W]e append hereto the authorisation letter from our client in terms of which our mandate is confirmed"*.

[32] When the letter itself is considered, it once again reflects the same letterhead described above of the **"South African Municipal Workers' Union, Free State Province"**, the provincial office address, Bloemfontein landline telephone numbers, with the names of the Provincial Office Bearers reflected at the bottom of the said letterhead.

[33] The said letter is dated 1 November 2022 (after the application had already been launched), it is addressed to the applicant's attorney of record and the contents thereof read as follows:

"RE: Authorisation letter: SAMWU obo Members/Maluti a Phofung Water (Soc) Ltd

The South African Municipal Workers' Union, Free State Province, hereby appoints you to pursue the matter of SAMWU obo Members and Maluti a Phofung Water (Soc) Limited on unlawful appointments of general workers.

(My emphasis)

You are appointed to review and set aside the said unlawful appointment/recruitment of the eleven (11) General Workers outside the recruitment policy of the entity.

Hope you find the above in order.

Yours

[Signed]

Tiisetso Mahlatsi

Provincial Secretary"

[34] The aforesaid letter was consequently signed by the very same person who is the deponent to the founding and replying affidavits.

[35] From the aforesaid it is evident that the Free State provincial structure of the applicant purportedly "*authorised*" the institution of the application on behalf of the national entity, SAMWU, but the Provincial Secretary completely failed to indicate any basis upon which it can be accepted that the Provincial Secretary and/or the provincial structure of the applicant had the authority to and/or had been duly authorised to have instructed Kramer Weihmann Attorneys to act on behalf of the applicant and/or to institute the application on behalf of the applicant. The same lack of authority is applicable with regard to the Provincial Secretary's and/or the provincial structures authority to act on behalf of the applicant and/or to have instituted the application on behalf of the applicant.

[36] In **Eskom V Soweto City Council** 1992 (2) SA 703 (W) at 705 E - H the following applicable principles were enunciated:

"The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to

litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. (Compare *Vi/joen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 7520-F and the authorities there quoted.)

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions."

See also **Ganes v Telecom Namibia Limited** 2004 (3) SA 615 (SCA) at para [19].

[37] In the circumstances I am not satisfied that Kramer Weihmann Attorneys are properly authorised to act on behalf of the applicant and/or to have instituted and prosecuted the application on behalf of the applicant. I am *mutatis mutandis* not satisfied that the Provincial Secretary and/or the Free State provincial structure of the applicant is properly authorised to act on behalf of the applicant and/or to have instituted and prosecuted the application on behalf of the applicant.

[38] Although I am mindful of the fact that Rule 7(1) enables the court to

postpone the application in order to enable the said attorneys to satisfy the court that they are properly authorised to act, I do not consider such an order appropriate in the circumstances. Both the applicant's attorneys and the applicant and/or the Free State provincial structure of the applicant has been given ample opportunity to have done so, which they failed to do.

[39] In the circumstances the application is to be struck from the roll.

[40] I consequently deem it unnecessary to deal with the other points raised by the first and third respondents and/or the merits of the application.

Costs:

[41] There is no reason why costs should not follow the outcome of the application, which costs are to include the reserved costs of 10 October 2022.

Order:

1. The application is struck from the roll.
2. The applicant is ordered to pay the costs of the application, including the costs of 10 October 2022.

C. VAN ZYL, J

On behalf of the applicant:

Adv S Grabler SC

Instructed by:

Kramer Weihmann Attorneys

BLOEMFONTEIN

On behalf of the first and
third respondents:

Adv P.T. Masihlehlo

Instructed by:

Phatshoane Henney Inc.
BLOEMFONTEIN

On behalf of the fourth
respondent (Notice to Abide):

Mr GP Chauke
Instructed by:
Office of the State Attorney
BLOEMFONTEIN