

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case Number: 4194/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

JOHANNES HERMANUS VAN DER HEEVER

Applicant

and

THE MATJHABENG LOCAL MUNICIPALITY

Respondent

In re:

Case Number: 4194/2022

THE MATJHABENG LOCAL MUNICIPALITY

Applicant

And

JOHANNES HERMANUS VAN DER HEEVER

Respondent

JUDGMENT BY: C REINDERS, J

HEARD ON: 20 APRIL 2023

DELIVERED ON: 14 JULY 2023

This judgment was handed down in open court and on even date circulated to the parties' representatives by electronic mail communication.

- [1] The Matjabeng Local Municipality on 1 September 2022 issued an application seeking a declarator that an agreement ostensibly signed on their behalf on or about 29 July 2021 (hereafter "the agreement"), be reviewed and set aside on the basis that it was unlawful. According to the affidavit annexed to the Notice

of Motion it is averred that the representative of the municipality was legally not entitled to make the decision it did, as such a decision could only be made by the council of the municipality. For ease of convenience the aforementioned application will be referred to as “the main application.”

- [2] The main application has not been adjudicated, nor am I required to do so, save to mention that it would appear to be a self-review on the basis as set out in *Merafong City v Anglo Gold Ashanti Ltd.*¹
- [3] Mr van der Heever opposes the main application. He has not yet filed his opposing papers therein. He seeks relief that the Municipality (hereinafter the respondent) be directed to file the record of the decision that it intends to have reviewed and set aside within 15 days of the court order and that relief be granted to him to serve his answering affidavit in the main application within 30 days after receipt of the record.
- [4] In the affidavit in support of the relief sought in the main application, mention is made that it is not brought in terms of Uniform Court Rule 53 but rather an application in terms of Rule 6. The applicant confirms having no objection thereto as long as a “fair opportunity” is granted to him to oppose the main application. He complains that the respondent has failed to provide “any record which would allow the applicant to consider what exactly the case is that the respondent intends to make in the absence of vital and relevant documentation...” It is noteworthy that applicant contends that it would be impossible for the court ultimately to consider whether to review and set aside the agreement in the absence of such a record. It is averred that prior to the agreement which is sought to be impugned, correspondence was exchanged between the various legal representatives and an affidavit (under application number 2059/2022) is attached as examples of documentation considered by the applicant to be vital for consideration in the main application, and which the applicant contends should form part of the relevant “record” to be filed. The applicant in his affidavit suggests vital documentation should at least

¹ 2017 (2) SA 211 (CC).

See also: *Khumalo and Another v MEC for Education, KwaZulu Natal* 2014 (5) SA 579 (cc)

include the respondent's debt collection and credit control policies, the complete extract of the written and signed delegation of powers reserved for the municipal council and delegated powers from the municipal council and the chief financial officer, the respondent's write off policy (if it exists), the respondent's property rates policies, respondent's relevant annual and/or mid-term reports to Provincial and/or National Treasury in respect of revenue and instructions issued to its erstwhile attorney to settle rates arrears with other rate payers.

- [5] The respondent filed an opposing affidavit. It avers prayer 1 of the Notice of Motion to be ambiguous and vague in that the respondent is uncertain what relief is sought. It avers that applicant seeks an order which boils down to discovery as is envisaged by Rule 35 (13). It is ultimately stated that there is simply no record in existence for the reason that the council never considered the conclusion of the agreement. There is therefore no relevant documentation in existence which was considered by council.
- [6] In the replying affidavit the applicant confirms that he does not require the filing of irrelevant documents but reiterates the importance of the documents referred to in his founding papers as set out in para [4] herein above. He reiterates that in the absence of all the relevant documentation the applicant would be restricted and hampered in its opposition.
- [7] I do not find much merit in this application. Many of the arguments raised in the affidavits by the applicant are aspects which stands to be adjudicated in the main application. It does not avail the applicant to concern himself about how the court hearing the main application would be able to do so in the absence of certain documentation – after all, in the event that such court finds it difficult (as averred) that court might find that the applicant has not made out a proper case for the relief it seeks and, to the advantage of the herein applicant, dismiss the main application. The Notice of Motion requires the applicant to file the record of the decision that it intends to have reviewed. It does not require the discovery of what applicant considers to be “relevant documentation”. The discovery of documents in application proceedings are

regulated by Rule 35(13)² and is subject to the court directing so.³ Discovery in terms of motion proceedings will be granted only in exceptional circumstances but in any event as a general Rule, only after all the affidavits have been filed.⁴ As is evident from the Notice of Motion herein, this is not the relief sought by the applicant and in any event, no opposing or replying papers have been filed yet in the main application. In terms of Rule 35 (12) documents referred to in affidavits may be requested for inspection and copied. However, that route has not been chosen by applicant.

[8] The respondent unequivocally states that it does not have a record of the decisions for the simple reason (according to respondent) that the council never considered the alleged impugned document nor made any decisions in respect thereof – resulting therein that no record exist. It would in my view be futile to attempt to order the respondent to file a record of proceedings which does not exist. The existence of a record is in any event not a prerequisite to review proceedings.⁵ Where a party is unable to produce a document, the court will not attempt to compel it to do so.⁶

[9] This application is not an application to compel discovery, but even if it was, I would for the aforementioned reasons not have been able to assist the applicant. It is not clear on what legal basis the applicant considers at this stage of the proceedings how he is entitled to the relief he seeks. I was referred to Regulation 2 (3) of the Administrative Review Rules published in terms of Government Notice No. 1284 of 4 October 2019 read with the Promotion of Administrative Justice Act (PAJA)⁷. The respondent submitted

² Rule 35(13) reads: “The provisions of this rule relating to discovery shall *mutatis mutandis* apply, insofar as the Court may direct, to applications.”

³ See: **Afrisun Mpumalanga (Pty) Ltd v Kunene N.O.** 1999 (2) SA 599 at 611 G.

⁴ See: **STT Sales (Pty) Ltd v Fourie** 2010 (6) SA 272 (GSJ) at 276d-277e.

⁵ See: **Secretary for the Interior v Scholtz** 1971 (1) SA 633 (C) at 637 A-D.

⁶ See: **Moulded Components and Roto Moulding SA (Pty) Ltd Coucourakis** 1979 (2) SA 457 (W) at 461 D-E.

⁷ Regulation 2(3) of the Administrative Review Rules in terms of the provisions of PAJA determines as follows:

“2(3) Where an application has been brought in terms of Rule 6 of the High Court Rules –

(a) the applicant shall make any portion of the record of proceedings with which it may previously have been furnished by the administrative available to every respondent who opposes the application within 10 days of receipt of a notice of opposition from such respondent and the time

the regulation not to be applicable to self-review applications by Organs of State (like the Municipality *in casu*) and reliance was placed on ***State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd***⁸. I agree with the respondent's point of view.

[10] It follows that the application cannot succeed. Costs should follow the event. Although both parties employed two counsel, I do not grant the cost of two counsel herein.

[11] Accordingly I make the following order:

1. The application is dismissed with costs.
2. Applicant is granted 20 (twenty) days from date of this order to file his opposing affidavit (if any) in the main application under case number 4194/2022.

C. REINDERS, J

On behalf of the applicant:

Adv M.C. Louw

Adv J.S. Rautenbach

Instructed by:

Neumann van Rooyen Attorneys

c/o Phatshoane Henney Inc.

BLOEMFONTEIN

On behalf of the respondents:

Adv L. le R. Pohl SC

allowed by Rule 6 of the High Court Rules for a respondent to deliver an answering affidavit shall be reckoned from the date on which the record of proceedings is provided to such respondent; and

(b)..."

⁸ 2018 (2) SA 23 (CC).

Adv P. du P. Greyling

Instructed by:

Kemi Akinbohun Attorneys

c/o Tshangana & Associates Inc.

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