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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1) NOT REPORTABLE

(2) REVISED

CASE NUMBER: A409/11

15/3/2018

In the matter between:

FLORA KHETIVWE DLAMINI

FIRST APPELLANT

SIKHOVA PRE-SCHOOL

SECOND APPELLANT

and

ALBERT MTHETWA

FIRST RESPONDENT

ELSIE MAPIYEYE

SECOND RESPONDENT

ALBERT NXUMALO

THIRD RESPONDENT

MARGARET NXUMALO

FOURTH RESPONDENT

ALBINAH LUBISI

FIFTH RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The appellant appeals the decision of the Magistrate sitting at

Thulamahashe, dismissing an application by the appellants concerning the second appellant from being being operated as a preschool.

- [2] The appellants approached the court for an interim order to seize a certificate of registration of a Non-Profit Organization which certificate was issued in the name of the second appellant and, to stop the respondents from also operating another pre- school going by the same name. Furthermore, that it be ordered that the pre-school and the children enrolled by the respondents be moved to a building adjacent to the Floraphophe Higher Primary School and that respondents and the community be interdicted from taking part in the running of a pre-school inside the premises of Floraphophe. The application was opposed.
- [3] At the commencement of the proceedings the Court requested counsel for the appellants, who was the only one present to address certain problems relating to the state of the file, the application for condonation; that certain attachments referred to by the respondents in the answering affidavit were not annexed and the reason why a constitution dated 2009 of the non-profit organization which was alleged to have been registered by the applicant was for the first time annexed to his heads of argument.

CONDONATION APPLICATION

- [4] There was an application for condonation for the late filing of the amended notice of appeal and for prosecution of the appeal. The newly appointed instructing attorney for the appellant's Mr Makhafola deposed to the founding affidavit. No application for condonation had been filed by the previous attorneys for the late filing of the appeal, as a result the matter was struck off the roll due to the non-appearance of the appellant's attorneys at a previous hearing and after their withdrawal as attorneys of record. The appellants contended that they had prospects of success because (a) in Case Number 61391/2013 in a separate application the Minister of Social Development had been interdicted from making payment to the respondents of any grants into a bank account controlled by the above respondents held with Standard Bank under account number [...]

(b) there were prospects that the certificate NPO number 025-592 would be returned to the second appellant. The application was not opposed and despite the problems above condonation was granted.

FACTUAL BACKGROUND

- [5] The first appellant ('Ms Dlamini') averred that the second applicant, Sikhova Pre- school, ('pre-school') was established in 2003 and that she had launched the application in her capacity as founder and chairperson of the second applicant. She annexed annexure A being a letter dated 22/12/2008 from the Department of Social Development and, annexure B the certificate NPO 025-592 dated 24 April 2003. In a letter from the Department of Social Development dated 4 June 2009 the recognized office bearers including Ms Dlamini were stated as AN Makhubele, PB Minisi, Ms L Hlatshwayo, Ms D Mkhantshwa, Ms Moagi and Ms A Manzini. Ms Dlamini contended that the pre-school was a body corporate which had its own constitution. She referred to the respondents as the 'so called new office bearers' of the second applicant.
- [6] The pre-school initially operated from somebody's house in 2003 and during 2004 they were given a class room to use temporarily at the Floraphophe H P School. Funds were applied for, for the building of a proper pre-school on a stand adjacent to Floraphophe, and there was a feeding scheme funded by the Department of Social Development , (*the Department.*)
- [7] On 20 January 2009 the appellants received a letter from the principal at Floraphophe to vacate the school premises, annexure D was annexed. An extension of time was given to them and on 18 March 2009 they were given up to 20 March 2009 to vacate. Ms Dlamini averred that after one classroom had been built she requested Floraphophe to release the children to attend the newly built pre-school. It was only then that she discovered that a new committee, the first to the fourth respondents had been appointed to run the pre-school. The latter committee was using the same certificate issued to her as a chairperson. She annexed a letter from

the Department of Social Development dated 4 June 2009. She contended that she was being hindered from reporting as she was required to do from time to time to the Director of the department concerned.

- [8] The respondents raised two points *in limine*. They contended that (a) Ms Dlamini lacked *locus standi* to bring the application as she had not been authorised by Power of Attorney to do so on behalf of the second applicant, alternatively, she was not the chairperson or a committee member of the second applicant; (b) there were factual disputes and the first applicant should have instituted an action against the respondents.
- [9] According to the respondents the need for a preschool was identified by the the Floraphophe community and a pre-school was established during 2001 by Tainor Mthethwa, the second respondent. the first applicant and Winnie Mthetwa. The community organised a group of women and an interim committee was appointed made up of the first applicant as chairperson, the second respondent as secretary and Winnie Methethwa as treasurer and the pre-school operated from the house of one Judas Sibuyi. The school was named after headman Sikhova Nxumalo after the interim committee had approached the family who agreed to the use of his name.
- [10] A site was applied for and the local headman Mr Mayinga had consultations which were held with the Amashanghana Tribal Authority and a site was allocated adjacent to the Floraphophe H P School. The interim committee was responsible for the registration of the pre-school with the Department. A certificate of registration of a non-profit organization no: 025-592NPO was issued.
- [11] The Department allocated a grant and deposited an amount of R58 870.00 for the running of the pre-school into a bank account which was opened by Ms Dlamini, Ms Winnie Mthethwa and the second respondent. The Department suggested that the children be accommodated at the Floraphophe H P School due to health reasons and the community and local headman agreed and they were welcomed at the school. A building was erected on the adjacent site with money allocated by Government.

- [12] The conflict revolves around the pre-school operating from the Floraphophe H P School and the one now being run by Ms Dlamini from the site that was allocated to the pre-school. Furthermore, although Ms Dlamini was a founder member problems started when she was not re-elected to the new committee during 2008. The respondents contend the pre-school was a community project. The certificate was issued and the money allocated for the purpose of a community project and was never meant to belong to Ms Dlamini in her personal capacity. They contend further that the pre-school run by Ms Dlamini was illegal.
- [13] The new committee elected in 2008 consisted of P Ndlovu (chairperson), ZA Mthethwa (Vice-Chair), E Manzini (Secretary), U Khensani (Vice-Secretary), L Makhubele (Treasurer), S Ngwenya and S Nxumalo as additional members. The respondents contend that these members were properly elected in the presence of the local headman, counsellor, and stakeholders. Another election was held during 2009 in the presence of the local headman, ward councillor and community stakeholders and the Department. Ms Dlamini was also present at such elections, she allegedly refused to sign the attendance register and, the election minutes of the 3 June 2009 were annexed as J and she was not re-elected again.
- [14] The respondents contended that the contents of the letter from the Department annexure A to the founding affidavit were contrary to annexure Q dated 4 June 2009 also from the Department which identified who the office bearers were. According to them none of the individuals mentioned in annexure A were elected at any meeting of the community and there was no confirmation from them annexed to the founding papers. It was contended that the certificate annexed as annexure B was clear indication that it was not issued to Ms Dlamini in her personal capacity and cannot be used by her for her own private school.
- [15] It was only the fourth respondent who was an office bearer, occupying the position of chairperson and being the one who had locus standi on behalf of the second applicant. The first, second, third and fifth respondents were not office bearers of the second applicant neither were all the seven

individuals mentioned the founding affidavit. The respondents contend that having regard to the content of annexure C it was in response to a request to confirm the office bearers which letter was written to the Department a day after the elections were held on 3 June 2009. They contend that this was an attempt by Ms Dlamini to mislead the Department after attending a meeting at which she was not elected.

- [16] Except for confirming that the second applicant was registered as a non-profit organization with a constitution it was denied that the second applicant was a body corporate. It was averred that the community also contributed financially towards the building now occupied by Ms Dlamini. The second applicant is still run as a community pre-school run from the premises of Floraphophe H P School and is recognized by the Department, the local headman, the Bushbuckridge Municipality and the social worker who frequently pays visits to pre-school. The respondents contend that an interdict against the '*community at large*' was not appropriate except that it is indication that the community does not agree with the conduct of the first applicant.

GROUND OF APPEAL

- [17] The main ground of appeal was that the Magistrate had overlooked the fact that Ms Dlamini was the founder of the pre-school and rightful owner of the certificate which fact was confirmed by the Department in their letter of 11 January 2010. Furthermore, Ms Dlamini and her office bearers were not present at a meeting where she was allegedly not re-elected chairperson. Another ground was that the Magistrate had allowed oral evidence to be heard and had placed too much reliance on the evidence of Mr Mainga to arrive at a decision to dismiss the application.

THE LAW

- [18] What needs to be dealt with first in this appeal relates to the conduct of the proceedings before the Magistrate. During the hearing of the application the Magistrate called for the viva voce evidence of Mr Mainga the

headman and partly relied on his evidence to arrive at his decision. Since those were motion proceedings the court was obliged to rely only on the three affidavits presented which constituted the entire evidence of the parties. The evidence of Mr Mainga should not have been called for or even considered and falls to be struck out in its entirety.

- [19] The Magistrate dismissed the application basing his decision on the fact that it was not competent to grant an order removing the children attending pre-school at Flora Phophe H P School to the one operated by Ms Dlamini. The parents had the freedom to choose their preferred pre-school and, that such an order would be tantamount to directing closure of the pre-school. He also stated that it would not be competent to give an order against the community. The Magistrate having determined that there was in-fighting among the parties, in my view what should have been raised by the respondents and by the court was that interested parties had not been joined being, the individual parents of the children and the members of the community involved. Their input was crucial to the determination of the issues.
- [20] Furthermore, the judgment failed to deal with pertinent issues that arose on the papers, firstly that there were material disputes of fact and, secondly, that the applicant raised new facts in reply. The fact that these aspects were not dealt with gives reason for this court to revisit the issues afresh.

THE PROCEDURE TO BE ADOPTED

- [21] In considering which process to follow it is important to determine between actions and applications. Where *bona fide* disputes of fact are anticipated a litigant should rather proceed by way of action because in applications the dispute is resolved by the court confining itself to the evidence on paper. Where there are material *bona fide* and anticipated disputes of facts the litigant runs the risk of the application being dismissed because of the impossibility of resolving such disputes on paper, *Room Hire Co (Pty) Ltd v Jeppee Street Mansions Ltd* 1949 (3) SA 1155(T).
- [22] In the answering affidavit the respondents contended that there were

disputes of fact, however, they did not call for a referral to oral evidence. It was common cause that Ms Dlamini sought final relief against the respondents. Where there were factual disputes of fact and where final relief was sought the matter could not simply be determined according to a balance of probabilities as argued by counsel for the appellant. It is trite that in those circumstances the matter had to be decided with reference to the Plascon- Evans Rule, which laid down that the matter had to be determined on the facts as stated by the respondents together with those admitted or not denied by the applicant, unless, where the Court found that the disputes were not real, in that the version of the respondents was far fetched or untenable. the court would be justified in rejecting the version of the respondents in its entirety merely on the papers; *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A).

[23] The papers are replete with disputes of fact as seen from the answering affidavit. In my view these happen to be material and give reason for application to be dismissed. Only those disputes I consider to be important shall be mentioned below:

- Ms Dlamini has cited the respondents as the 'so called' new members of the second applicant. Except for the fourth respondent, the rest of the respondents deny being members of the second applicant. I shall return to this aspect when discussing new matter brought in reply.
- There is a dispute relating to how the second applicant was established. The respondents contend it was established as a community project and that initially Ms Dlamini was the chairperson until she was not re-elected at a meeting convened during 2008 and again in 2009. The respondents stated that she was present at the 2009 meeting convened for electing a new committee and that all interested parties were present at such meeting. They contend that she declined to sign the attendance register; Ms Dlamini denies being present at such meeting. If indeed a new committee was elected then respondents would be

correct to challenge the *locus standi* of Ms Dlamini to launch the application.

- The respondents question the authenticity of the letter dated 4 June 2009 from the Department listing the names of the committee members of the second applicant. The respondents contend that no elections were ever held for the election of the individuals mentioned in such letter, and that they were not on the committee of the second applicant. The respondents point out to the difference in members appearing in annexure A to the founding affidavit and annexure Q and, they contend that Ms Dlamini must have misled the Department into writing the letter because none of the individuals appearing in Annexure A ever attended or were elected at any community meeting. No confirmatory affidavit from them is attached to the founding papers. However it seems from the record that when the matter was argued further documents from the applicant were presented which did not form part of the three affidavits and annexures to the papers, which documents allude to a meeting being held to nominate the members who were queried.
- Ms Dlamini and the respondents refer to a constitution of the second applicant which was used in the registration of the non-profit organization, none of the parties annexed a copy to any of the affidavits. In terms of the Non-Profit Organization Act 71 of 1997 the founding constitution is a requirement for registration. In argument mention was made to a 2005 constitution and applicant's counsel annexed a copy of a constitution dated 2009 to his heads of argument.
- Both the parties seem to rely on the same certificate of registration of the non-profit organization. The certificate does not state that it was issued to Ms Dlamini nor does it reflect her status as chairperson and founder of the second applicant. Counsel for the applicant contended that the constitution which

was not attached to the founding affidavit, provided for the continuation of Ms Dlamini as a chairperson of the second appellant. There was no mention of such fact in the founding affidavit, which constitution was apparently the one annexed to the Heads of Argument.

- It was conceded in argument by the counsel that there were disputes of fact, which in my view were foreseeable by the first appellant.

NEW MATTER IN THE REPLYING AFFIDAVIT

[24] The first appellant for the first time raised new matter in her replying affidavit. It was argued by counsel for the appellant that the facts were a response to what was raised in the answering affidavit and did not constitute new matter. An applicant is expected to make out his/her case in the founding affidavit and not in reply unless there exists special circumstances, *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) Pty and Another* 1980 (1) SA 313 (OLD) confirmed in *Faber Lola V Nazerian Rimon* 2013 ZAGPJHC 65 at paragraph 22 and 23:

“[22] *The general rule which is well established in our law is that in motion proceedings, the applicant is required to make his or her case in the founding affidavit and not in the replying affidavit. The rule is also based on the procedural requirement of the motion proceedings which requires that the applicant should set out the cause of action in the notice of motion and supporting affidavit. The notice and founding affidavit form part of both the pleadings and the evidence. The basic requirement is also that the relief sought has to be in the evidence supported by the facts set out in the founding affidavit.*

[24] *In considering whether to allow new materialthe Court has a judicial discretion to exercise.....The new issues in reply will generally be allowed in circumstances where the applicant could not have known of such issues at the time of deposing to*

the founding affidavit

[25] It came out for the first time during reply that the reason for citing the respondents was because of a document received from the Department of Education in which the respondents had described themselves as a committee which sought registration of the second appellant. Ms Dlamini contended that the said documents was the reason which prompted the launch of the application. Furthermore, there was an attempt in argument to bring in new documents to explain the list of names on the letter of 4 June 2009. Also annexed to counsels heads of argument was a 2009 constitution. It is my view that this new information was within the knowledge of the first appellant when the application was launched and should have been dealt with in the founding affidavit in order to give the respondent opportunity to deal with it in answer. This constitutes a second reason why the appeal should be dismissed.

[26] In the result the following order is given:

1. The appeal is dismissed with costs.

TLHAPI VV
(JUDGE OF THE HIGH COURT)

I agree,

MOTEPE JA
(ACTING JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	11 NOVEMBER 2016
JUDGMENT RESERVED ON	:	11 NOVEMBER 2016
ATTORNEYS FOR THE APPELLANTS	:	
ATTORNEYS FOR THE RESPONDENTS	:	