



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NUMBER: C 261/17 and C 756/16

Reportable

In the matter between:

Siphiwe MAGODONGO

Applicant

and

//KHARA HAIS MUNICIPALITY

First respondent

GERALD JACOBS N.O.

Second respondent

SALGBC

Third respondent

Heard: 2 November 2017

Delivered: 14 November 2017

SUMMARY: Interlocutory application – rule 11 – points *in limine* raised in context of review application with regard to authority of deponent to founding affidavit and whether affidavit properly deposed to.

JUDGMENT

STEENKAMP J:

Introduction

[1] This interlocutory application arises in somewhat unusual circumstances. The applicant, Mr Siphiwe Magodongo, was dismissed by the first respondent, //Khara Hais Municipality, in Uptington. He referred an unfair

dismissal dispute to the South African Local Government Bargaining Council (the third respondent). Conciliation failed. He referred it to arbitration. The arbitrator, Mr Gerald Jacobs (the second respondent), found his dismissal to be unfair and ordered the Municipality to reinstate him. The Municipality brought an application to review that arbitration award under case number C756/2016 in this Court.

- [2] In the review application, Mr Magodongo is represented by his trade union, SAMWU. The union instructed Maenetja attorneys to act on his behalf. In turn, they briefed counsel.
- [3] SAMWU raised a point *in limine* that the Municipality had unduly delayed the review application and that it should be dismissed for that reason alone. Subsequently, Mr Magodongo – on his own accord and without the assistance of his union, attorneys or counsel – launched an application in terms of rule 11 of the Rules of this Court under case number C 261/2017. In that application, he raised two further preliminary points:
 - 3.1 The founding affidavit to the review application was not properly deposed to; and
 - 3.2 The decision to launch the review application was not that of the Municipal Council (i.e. the Municipality did not have the requisite authority to launch the review).
- [4] Both matters – the review application and the rule 11 application -- were set down to be heard on 2 November 2017.

The events of 2 November 2017

- [5] When the two matters were called on 2 November 2017, counsel for the Municipality (Mr *Venter*) and for SAMWU (Mr *Eastes*) informed the Court that they had reached agreement on the further conduct of the matter. Mr Magodongo was present in Court. He indicated his consent to the draft order proposed by counsel. The Court accordingly made the following order by agreement in case number C 756/2016:

- “1. The review application under case number C 756/16 is struck from the roll.

2. The applicant must serve an application for reinstatement of the matter within 15 days of the order.
3. The first respondent will answer to the abovementioned application in terms of the rules of court.
4. Costs are reserved."

- [6] Mr Magodongo, however, persisted in his application in terms of rule 11 to have the other two preliminary issues decided upon. His union, attorneys and counsel had no instructions in that regard. He proceeded to argue those two points; Mr *Venter* responded on behalf of the Municipality; and both parties submitted further written heads of argument.
- [7] I will now deal with each of the two preliminary points, apart from the issue of undue delay, which is to be heard (by agreement) together with the review application, should the application to dismiss the review on these two preliminary points be unsuccessful.

Founding affidavit not deposed to?

- [8] The deponent to the founding affidavit is Mr Dalixolo Ngxanga, the then municipal manager. The employee has raised the point that he did not properly depose to the affidavit.
- [9] The deponent initialled each page of the affidavit, including the last page. But he did not append his full signature to the last page. On that page, a commissioner of oaths affixed a SAPS stamp dated 9 November 2016 and certified that:

"I certify that this affidavit has been sworn to and signed before me at Upington on this 9th day of November 2016 by the abovementioned deponent who declared that he is acquainted with the contents of the affidavit and understands same, that he has no objection to taking the prescribed oath and further, that he considers the said oath as binding on his conscience, which oath was properly taken by me, as required by law."

[10] The convoluted language aside, the commissioner of oaths clearly applied the relevant regulations. The Regulations governing the administering of an oath or affirmation¹ read in relevant part:

"1. (1) An oath is administered by causing the deponent to utter the following words: "I swear that the contents of this declaration are true, so help me God".

2. (1) Before a commissioner of oaths administers to any person the oath or affirmation prescribed by regulation 1 he shall ask the deponent –

(a) whether he knows and understands the contents of the declaration;

(b) whether he has any objection to taking the prescribed oath; and

(c) whether he considers the prescribed oath to be binding on his conscience.

(2) If the deponent acknowledges that he knows and understands the contents of the declaration and informs the commissioner of oaths that he does not have any objection to taking the oath and that he considers it to be binding on his conscience the commissioner of oaths shall administer the oath prescribed by regulation 1(1).

3. (1) The deponent shall sign the declaration in the presence of the commissioner of oaths.

(2) If the deponent cannot write he shall in the presence of the commissioner of oaths affix his mark at the foot of the declaration: Provided that if the commissioner of oaths has any doubt as to the deponent's inability to write he shall require such inability to be certified at the foot of the declaration by some other trustworthy person.

4. (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.

(2) The commissioner of oaths shall –

(a) sign the declaration and print his full name and business address below his signature; and

¹ GN No R1648 of 21 July 1972, amended by GNR 1648 of 19 August 1977, GNR 1428 of 11 July 1980 and GNR 774 of 23 April 1982.

(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio.”

[11] In this case, the commissioner has stated that he had asked the deponent

(a) whether he knows and understands the contents of the declaration;

(b) whether he has any objection to taking the prescribed oath; and

(c) whether he considers the prescribed oath to be binding on his conscience.

[12] It appears that the affidavit complies with regulations 1 and 2. Does it comply with regulation 3, i.e. did the deponent “sign the declaration in the presence of the commissioner of oaths”?

[13] The commissioner says that he did. The only question is whether the deponent’s initials are sufficient to constitute him signing the declaration.

In *Cape Sheet Metal Works (Pty) Ltd v J J Calitz Builder (Pty) Ltd*² the court held that the provisions of the Regulation then in force are not peremptory:

“Dit moet aanvaar word dat die bepaalde voorskrif waaroor dit hier gaan nie gebiedend is nie maar slegs aanwysend...; dat nie-nakoming van die voorskrif ‘n beweerde beëdigde verklaring nie *per se* vernietig nie end at, afhangende van die aard van die nie-nakoming en omstandighede van die geval, ‘n Hof ‘n diskresie het om die verklaring òf as waardeloos te beskou òf as beëdigde verklaring te erken.”

And in *S v Kahn*³ the court stated that it has the discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with the regulations has been proved or not.

[14] In this case, I am satisfied that there has been substantial compliance with the Regulations. The deponent signed the declaration in the presence of the Commissioner who had administered the oath. And in *Harpur NO v*

² 1981 (1) SA 697 (O) at 699B.

³ 1963 (4) SA 897 (A) at 900C.

*Govindamall*⁴ the SCA accepted, in the context of a disputed will, that “the rationale for recognizing initials as a signature is that they are, or are in the nature of, a mark.”

[15] Mr Magodongo also referred the Court to *ABSA Bank Ltd v Botha NO*⁵. In that case, Kathree-Setiloane J confirmed⁶ that, “subject to whether there has been substantial compliance with the Regulations, the court has a discretion to refuse an affidavit which does not comply with the Regulations.” On the facts of that case, the Court held that the commissioner’s certification could not be relied upon as he had incorrectly identified a female deponent as “he”. In those circumstances, the Court was not prepared to give effect to the “presumption of regularity” for purposes of assuming that the declaration was sworn to and signed in the presence of the commissioner of oaths. But in the case before me it is clear that Mr Ngxanga did sign (albeit by way of his initials) in the presence of the commissioner of oaths. There has been substantial compliance and I exercise my discretion in favour of the presumption of regularity.

[16] The only remaining technical issue is that the deponent affixed his initials below the commissioner’s signature, whereas Regulation 4(1) states:⁷

“Below the deponent’s signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.”

[17] To interpret the provision literally would, in my view, elevate form over substance. The deponent initialled each page of the affidavit, including the last one. There is nothing to suggest that he did not do so in the evidence of the commissioner and that the commissioner did not administer the oath. The fact that Mr Ngxanga did sign it by way of his initials in the presence of the commissioner and after having taken the oath, is not

⁴ 1993 (4) SA 751 (AD); [1993] 2 All SA 582 (A).

⁵ 2013 (5) SA 563 (GNP).

⁶ At par 8.

⁷ My underlining.

disputed. It would serve no purpose to declare the affidavit a nullity merely because he affixed his signature (or initials or mark) below, rather than above, that of the commissioner in whose presence he did so.

[18] I am satisfied that there has been substantial compliance with the Regulations. The founding affidavit is allowed into evidence.

Was the Municipality authorised to launch the review application?

[19] The remaining preliminary point – other than the issue of undue delay, which will, by agreement, be decided if and when the review application is heard – is that of the Municipality's authority to launch the review application. Mr Magodongo has argued that the municipal manager who deposed to the founding affidavit did not have the authority to give those instructions. It is common cause that the Municipality did not place a resolution to that effect before Court; Mr Ngxanga, the municipal manager, says in his affidavit that he is *ex lege* entitled to depose to this affidavit as I am the accounting officer of the [Municipality].”

[20] Mr *Venter* countered that the municipal manager was, at that time, delegated with powers to act on behalf of the municipality.

[21] Section 59 of the Municipal Systems Act⁸ reads as follows:

“59. Delegations. – (1) A municipal council must develop a system of delegation that will maximize administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may-

(a) delegate appropriate powers, excluding a power mentioned in section 160(2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76(b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members;

⁸ Local Government: Municipal Systems Act (Act 32 of 2000).

(b) instruct any such political structure, political office bearer, councillor, or staff member to perform any of the municipality's duties; and

(c) withdraw any delegation or instruction.

[22] Section 55 of the Systems Act reads as follows:

“55. Municipal managers. – (1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for-

...

(f) the management, effective utilisation and training of staff;

(g) the maintenance of discipline of staff;

(h) the promotion of sound labour relations and compliance by the municipality with applicable labour legislation;”

[23] In one of the many cases involving the benighted Maquassi Hills Local Municipality, this Court has found that it is not a requirement that the Municipal Council must take a written resolution that a municipal manager may depose to an affidavit.⁹ In that judgment the Court also referred to the decision of the full bench in *ANC Umvoti Council Caucus v Umvoti Municipality*.¹⁰ Mr Magodongo also cited the *Umvoti* judgment in his argument; but insofar as the question of deposing to the affidavit goes, it helps rather than hinders him. In that case, as in *Maquassi Hills*, it was held that no resolution is needed for a municipal manager to depose to an affidavit. The further question – whether a separate resolution was nevertheless necessary in terms of the Systems Act to delegate the authority to litigate to the municipal manager – still needs to be answered in the case before me. And in *Umvoti*, it was held that it was necessary for the council to have delegated the power to institute legal proceedings to the municipal manager in writing; only absent such a delegation was a council resolution required to empower the official to institute court proceedings on behalf of the municipality.

⁹ *Lebu v Maquasi Hills Local Municipality (1)* (2012) 33 ILJ 642 (LC).

¹⁰ 2010 (3) SA 31 (KZP).

[24] Did the municipal manager have such delegated authority in this case, even absent a resolution by the council? Mr *Venter* argued that *ex lege* he did, by virtue of the provisions of the Systems Act quoted above; but the Municipality did not place any delegation in writing before the Court, other than the provisions of the Act itself (and other national legislation pertaining to municipalities).

[25] The SCA considered – but did not decide – the necessity of a council resolution to institute or defend legal proceedings in *Manana v King Sabata Dalindyebo Municipality*.¹¹ In that case, the municipal manager purported to oppose the execution of a resolution by the council relating to the upgrading of a post. Nugent JA commented – and his comments appear to me to be *obiter* --:

“There is no resolution of the municipal council authorising the opposition. Ms Zitumane [the municipal manager] relies instead upon a general delegation by the municipal manager to institute and defend legal proceedings. It is questionable whether that delegation is to be construed as authorising the municipal manager to challenge the validity of a resolution of the municipal council itself but we need not decide that question. She has purported to oppose the proceedings in the name of the municipality and I think the municipality must pay the costs.”

[26] In the light of those comments, it seems to me that Nugent JA accepted – at least in deciding the issue of costs – that the municipal manager could act on behalf of the municipality without the need for a further resolution. But in that case, there was a “general delegation” placed before the court; in this case, despite the challenge by Mr Magodongo, there was not.

[27] In *Kouga Municipality v S A Local Government Bargaining Council*¹² the court accepted that the municipal manager was properly delegated to institute proceedings on behalf of the municipality, even without a specific council resolution to that effect, but not that he had sub-delegated that authority to his subordinates.

¹¹ (2011) 32 *ILJ* 581 (SCA) par 25.

¹² (2010) 31 *ILJ* 1211 (LC) par 23.

- [28] The LAC accepted in *SAMWU v Kannaland Municipality*¹³ that a municipal manager has the power to initiate a retrenchment exercise; however, it did not deal with the question whether the municipal manager may institute legal proceedings without a council resolution.
- [29] The municipal manager is the accounting officer of a municipality.¹⁴ And the Constitutional Court has termed a municipal manager “a key structure of a municipality and not merely a personnel appointment as contemplated in section 160(1)(d) of the Constitution”.¹⁵ A municipal manager must discharge his or her duties without obstruction from a Municipal Council or its office bearers.¹⁶ But does that include the power to institute legal proceedings without a council resolution?
- [30] There is at least one decision of the High Court that held – in the context of the application of building regulations in terms of s 55(1)(p) of the Systems Act – that the municipal manager could not. Mr Magodongo relied in this regard on *Matjhabeng Local Municipality v Njilo* ¹⁷. In that case the court held:
- “If the municipal council intended to institute legal action, such a resolution should have been taken to empower the municipal manager to institute court proceedings on its behalf.”
- [31] In this case, the Municipality has placed no evidence before the Court that it has delegated the power – in writing – to the municipal manager to institute proceedings on its behalf. Returning to the judgment in *Umvoti*, then, I am satisfied that, as was stated in this case, the municipal manager did not need a council resolution to depose to the founding affidavit. But the question of authorisation to initiate the review proceedings goes further. There was no council resolution to that effect. In *Umvoti*, the court held that, absent such a resolution, the municipal manager had to satisfy

¹³ (2010) 31 ILJ 1819 (LAC) par 56-57.

¹⁴ Section 82(1) of the Municipal Structures Act and section 60 of the Municipal Finance Management Act; *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development* (1999) 2 BCLR 1360 (CC) par 107.

¹⁵ *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development* (1999) 2 BCLR 1360 (CC) par 109.

¹⁶ Municipal Finance Management Act, section 76.

¹⁷ (2014) ZAFSHC 219.

the court of a delegation in writing. But when Mr Magodongo squarely raised the issue, the Municipality simply replied by stating that he has the authority *ex lege*.

- [32] In summary, the Municipality has not placed anything before the Court to show that, absent a council resolution, the Municipality has delegated the power to institute the review application in case number C 756/2016. And even though I accept that, as in *Maquassie Hills*, the municipal manager had the authority to depose to the founding affidavit, I am not persuaded that the Council had delegated the authority to institute review proceedings to him.

Conclusion

- [33] Given my decision on the second point *in limine*, the application for review must be dismissed.
- [34] Mr Magodongo appeared for himself in this application in terms of rule 11 (under case number 261/17). In the review application (C 756/16) he was represented by his trade union, SAMWU. There is an ongoing relationship between the union and the Municipality. And the upshot of the dismissal of the review application is that Mr Magodongo is still employed by the Municipality. In law and fairness a costs award is not warranted.
- [35] The effect of the judgment is that Mr Magodongo must return to work. In terms of the arbitration award he had to do so by 1 November 2016. I intend to order that he now does so by 4 December 2017, just short of a month hence. That will give the Municipality enough time to make the necessary arrangements. It goes without saying that he has to be paid retrospectively to the date of dismissal, i.e. 8 December 2014.

Order

The application for review in case number C 756/2016 is dismissed.

Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: In person.

FIRST RESPONDENT: P Venter
Instructed by Adri Hechter.