



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

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **A56/2024**

In the matter between:

MATJHABENG LOCAL MUNICIPALITY

1st Appellant

ADV RONALD NGOQO N.O.

2nd Appellant

DAVID KHALIPHA N.O.

3rd Appellant

and

JOSEPH NDAYI N.O.

Respondent

(PHF KINDERTRUST IT 292/95)

In re:

JOSEPH NDAYI N.O.

Applicant

(PHF KINDERTRUST IT 292/95)

and

MATJHABENG LOCAL MUNICIPALITY

1st Respondent

ADV RONALD NGOQO N.O.

2nd Respondent

DAVID KHALIPHA N.O.

3rd Respondent

Coram: DAFFUE, VAN RHYN JJ and DE KOCK AJ

Heard: 24 JANUARY 2025

Delivered: 24 JANUARY 2025

Summary: The court *a quo* convicted the Matjhabeng Municipality, its Municipal Manager and Executive Mayor for contempt of court. Leave to appeal having been granted, the full court upheld the appeal, set aside the court *a quo*'s order and substituted it with an order dismissing the application with costs. The full court held that the court *a quo* misdirected itself in respect of several issues, most importantly, in

accepting that the applicant in the court *a quo* (the respondent on appeal) had the necessary *locus standi* as he alleged to be acting on behalf of a trust without indicating his authority and/or identifying the trustees of the trust who should have brought the application *qua* trustees. The court *a quo* did not consider the evidence in the answering affidavit at all, but incorrectly relied on hearsay evidence from the bar in finding that the Municipal parties had transgressed an order of court.

ORDER

1. The appeal succeeds with costs, the costs of counsel to be taxed on scale B.
 2. The order of the court *a quo* dated 10 November 2023 is set aside and replaced with the following:
'The application is dismissed with costs.'
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JUDGMENT

Daffue J (Van Rhyn J and De Kock AJ concurring)

Introduction

[1] This appeal emanates from contempt of court proceedings which were initiated after obtaining an interim order in spoliation proceedings, but prior to finalisation of the spoliation proceedings. The three respondents in the spoliation proceedings were eventually convicted of contempt of court by the court *a quo* and two of them sentenced to imprisonment wholly suspended on certain conditions.

[2] In the absence of the acting judge who held the respondents guilty of contempt of court, their application for leave to appeal was heard by Buys AJ who granted leave to appeal to the full bench of this division.

The parties

[3] The appellants in this application, cited as respondents in the court *a quo*, are the Matjhabeng Local Municipality, Adv Ronald Ngoqo in his capacity as Municipal Manager and Mr Thanduxolo David Khalipha in his capacity as Executive Mayor. (I shall herein later refer to the appellants in this appeal as the Municipal parties).

[4] The respondent is Mr Joseph Ndayi. He cited himself as Joseph Ndayi N.O. (PHF Kindertrust IT 292/95) in the heading of the spoliation and contempt of court proceedings, but also referred to himself as an adult male farmer trading as PHF Kindertrust in the founding affidavit. I shall herein later refer to him as Mr Ndayi.

The spoliation proceedings

[5] On 30 October 2023 Mr Ndayi caused a notice of motion to be served on the Matjhabeng Municipality, its Municipal Manager and Executive Mayor. In terms thereof Mr Ndayi gave less than 24 hours' notice of his intention to apply for an order to be restored his peaceful and undisturbed possession of utility services, *inter alia* prepaid electricity supply. The Municipal parties did not file any answering affidavits, but instructed a legal representative to appear on 31 October 2023. By agreement Mhlambi J made the following order:

'1. Pending finalization of this application, it is ordered that:

1.1 The Respondents are directed to restore the Applicant's utility services referred to as prepaid electricity at 100 Nobel Street, Saaiplaas, Virginia, 9460, within 2 hours of service of this order;

1.2 The Respondents are directed to return any property seized by the 1st Respondent's employees on the 24th October 2023, at the premises stated above, an inventory of which is attached hereto as Annexure "JN3";

1.3 The Respondents are directed to file their answering Affidavit if any, on or before 7 November 2023;

1.4 The applicant is directed to file its Replying Affidavit if any, on or before 14 November 2023;

1.5 The parties are to file their respective Heads of Argument as per practice directives;

1.6 The matter is postponed to 23 November 2023.

2. The Respondents are ordered to pay, jointly and severally, the Applicant's wasted costs occasioned by the postponement.'

[6] Answering and replying affidavits were indeed filed as ordered. The Municipal parties in the application sought leave to file a supplementary affidavit. On 23 November 2023 the spoliation application came before Zietsman AJ who granted leave to the Municipal parties to file their supplementary answering affidavit with leave to Mr Ndayi to file a supplementary replying affidavit within 10 court days. The spoliation application was postponed *sine die* and Mr Ndayi was ordered to pay the wasted costs. In their affidavit the Municipal parties alleged, relying on Letters of Authority issued by the Master of the High Court, that Petrus Hermanus Frans Potgieter, Johan Diederik van Wyk and Hester Cathrina Potgieter were the trustees of the PHF Kindertrust. This matter was enrolled more than once hereafter. As recently as 29 August 2024 it was removed from the roll by Van Zyl J, the wasted costs to stand

over for later adjudication. Having perused the contents of the file, it is apparent that Mr Ndayi failed to file a supplementary replying affidavit.

Contempt of court application

[7] On 7 November 2023 Mr Ndayi as *nomine officii* on behalf of the PHF Kindertrust IT 292/95 brought his contempt of court application. It is not certain when this application was served on the Municipal parties, but it is indicated in the notice of motion that Mr Ndayi intended to approach the court on 10 November 2023. The Municipal parties were expected to file their answering affidavit(s) on 8 November 2023, again with less than 24 hours' notice. The Municipal parties filed their answering affidavits on 8 November 2023 as directed, whereupon Mr Ndayi filed a replying affidavit.

[8] It should be noted that the contempt of court application was issued under the same case number as the spoliation application, to wit case number 5795/2023. When the court *a quo* heard the parties on 10 November 2023, there was total confusion. Firstly, the contempt of court application was not paginated and/or bound. Secondly, the court *a quo* received the file with the two answering affidavits, in respect of the spoliation and the contempt of court applications, a few minutes before the hearing. Thirdly, it does not appear as if the court *a quo* considered these and the replying affidavit in the contempt of court application, but it was obviously not interested to consider the answering affidavits in the spoliation application which were referred to.

The court a quo's order in the contempt of court application

[9] Immediately upon the parties' oral argument, the court *a quo* made the following order without providing reasons at the time:

'1. This application is heard as one of urgency in accordance with Rule 6(12), the requirements of the Rules of Court in respect of notice, service and time periods being dispensed with and Applicant's departure therefrom is condoned.

2. The 1st Respondent, **Matjhabeng Local Municipality**, the 2nd Respondent, **Advocate Ronald Ngoqo**, and the 3rd Respondent, **Thanduxolo David Kalipha**, are in contempt of paragraph 1.1 of this Court's order dated **31st October 2023** under **Case No 5795/2023**.

3. The 2nd and 3rd Respondents are to be imprisoned for a period of 30 days, suspended for 30 days on condition that they comply with para 1.1 of the order of Mhlambi J granted on 31 October 2023.

4. The 1st and 2nd and 3rd Respondents shall bear the costs of this application, jointly and severally, on the attorney and client scale.'

[10] On 1 December 2023 the court *a quo* gave reasons for the order as requested. The submissions of the parties and the application as such have been dealt with in one paragraph, to wit paragraph 3.1.¹ I do not intend to quote this paragraph, but there is no doubt that the court *a quo* did not at all consider the affidavits presented to her. It relied solely on submissions and/or hearsay evidence tendered from the bar. Buys AJ who considered the application for leave to appeal correctly pointed out that the court *a quo* totally ignored the evidence presented in the answering affidavit and in particular the uncontested paragraph 5 thereof which reads as follows:²

'The First Respondent in fact bent backward to comply with the court order by overriding its computer system to grant the applicant an access to the purchase of electricity. This is done despite that it is fraught with the danger of a fire outbreak. The Applicant after having utilised the free electricity units in the installed prepaid metre installed on his property have been making electricity coupon purchases since 01 November 2023. I attach hereto a copy of the transactions and marked it as Annexure "CC2".'

Annexure CC2 relied upon serves as corroboration for the averment. Notwithstanding this clear evidence, Mr Ndayi did not deal with this at all in the replying affidavit. Mr Ndayi's counsel referred to this particular paragraph in her oral argument, but elected to read the first sentence only and argued that on the Municipal parties' own version in their answering affidavits, they only gave 'the applicant an access to purchase'.³

[11] The court *a quo* did not consider the answering affidavit in context and clearly failed to consider the more detailed answering affidavit in the spoliation application which was placed before her. This it did, notwithstanding the fact that the Municipal parties made it clear in the contempt of court proceedings that they rely on the evidence in the answering affidavit in the spoliation application and the court *a quo* was 'requested to read same into this affidavit *mutatis mutandis*.' It is alleged in the answering affidavit in the spoliation application that Mr Ndayi lied to officials of the Municipal parties when the physical installation of the pre-paid meter was undertaken. Mr Ndayi indicated that he had paid R37 000,00 which he agreed to. The service was not activated because the Municipal parties realised that Mr Ndayi did not comply with

¹ Record: p 104.

² Record: p 56.

³ Record: p 162 / 4-7.

the conditions referred to in the answering affidavit in the spoliation application.⁴ The court *a quo*'s failure to consider this evidence is a misdirection.

[12] The most important paragraph in response to the contempt of court application is paragraph 5 of the answering affidavit referred to above. Particular emphasis is placed on the last two sentences of the paragraph. It is apparent from annexure CC2 that Mr Ndayi bought electricity in the amount of R200 on 2 November 2023, just after the order by consent and two days later in the amount of R500.

Evaluation

[13] I have already indicated that the court *a quo* allowed submissions and hearsay evidence from the bar in order to establish the factual situation, instead of relying on the affidavits and in particular the answering affidavits of the Municipal parties. This is a serious misdirection. In the process it did not at all consider these two answering affidavits and failed to properly evaluate the disputes based on the well-known Plascon-Evans test.

[14] It is also apparent that the court *a quo* failed to consider Mr Greyling's submissions on behalf of the Municipal parties pertaining to urgency and Mr Ndayi's lack of *local standi*. I do not intend to dwell on the urgency issue, but there can be no doubt that this is one of those cases that presents proof that presiding officers should be well aware that mistakes may creep in easily in considering urgent applications. When Mr Greyling tried to convince the court *a quo* to consider the answering affidavit in the spoliation application, it refused to do so and that court was in fact supported by Mr Ndayi's legal representative who submitted that the Municipal parties wished to raise issues that ought to have been raised in the spoliation application. It was also contended that the court order of Mhlambi J was made by agreement. This missed the point. The order made by agreement pre-dated proper consultation with the Municipal parties and the drafting of their answering affidavits. The issues that Mr Greyling tried to raise do in fact appear in the answering affidavits, but the court *a quo* neglected to consider that.

[15] In the answering affidavits in the contempt of court proceedings the Municipal parties made the point that Mr Ndayi is indicated in the heading of the notice of motion

⁴ Record: para 4.8, p 52&53. See also para 4.8(iii).

to act *nomine officii* and no doubt on behalf of the PHF Kindertrust IT 292/95.⁵ The court *a quo* incorrectly mentioned during oral argument that the reference to '*nomine officio* (sic) means that he [Mr Ndayi] is acting here in his personal capacity.'⁶ It is trite that if a person acts *nomine officii*, it means that that person is acting in an official capacity. Mr Ndayi indicated in his papers that he was acting on behalf of the PHF Kindertrust. This aspect was not even addressed at all by Mr Ndayi in his replying affidavit. It is also trite that all the trustees of a trust must be joined in proceedings instituted by or against such a trust.⁷ The court *a quo*'s acceptance of Mr Ndayi's *locus standi* is a misdirection.

[16] In my view, and even if the application was unopposed, the presiding officer should have enquired as to Mr Ndayi's *locus standi*, especially insofar as reference is made to a registered trust with a registration number. The Municipal parties' supplementary answering affidavit was eventually filed as ordered by Zietsman AJ as mentioned above. Although it was filed after the order was granted in the contempt of court proceedings, this document should have been available to the court *a quo* for consideration before the reasons were filed on 1 December 2023. I repeat that both applications were filed under the same case number. This should have necessitated the court *a quo* to call upon the parties to present argument as to why the order of 10 November 2023 should not be rescinded in terms of rule 42, it having been erroneously sought and/or erroneously granted. The lack of *locus standi* should have been the death knell for the application.

[17] An applicant in a contempt of court application where committal to imprisonment is sought has to prove its case beyond reasonable doubt, *i.e.* on the criminal standard.⁸ Even if Mr Ndayi's *locus standi* has been proven, which is not the case, only the first two requirements have been met, to wit the existence of the order and the fact that it came to the knowledge of the Municipal parties. The third requirement, to wit non-compliance with the order, has not been proven beyond reasonable doubt. This should have been held to be the case based on the evidence presented to the court and without considering the hearsay evidence from the bar as the court *a quo* did. It is accepted that once the first three requirements have been

⁵ Record: answering affidavit para 2.2. p 50.

⁶ Record: p 118 / 3&4.

⁷ *Land and Agricultural Development Bank of South Africa v Parker* 2005 (2) SA 77 (SCA).

⁸ See *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) paras 64 & 73.

met, an onus would be cast on the Municipal parties to show that they were not wilful and mala fide. I am satisfied that the court *a quo* could not come to such a finding, especially bearing in mind the lack of proper adjudication of the application pertaining to the facts in dispute. This is so, bearing in mind the clear wording of paragraph 5 of the answering affidavit referred to above and the contents of annexure CC2 relied upon.

[18] As mentioned, Mr Ndayi not only did not deal with the aforesaid allegations at all in his replying affidavit and did not insist therein that his electricity supply was still not restored. The court *a quo* incorrectly accepted the hearsay version of his counsel from the bar which is a serious misdirection.

[19] It should be noted that the spoliation application is yet to be adjudicated. Mr Ndayi has probably lost any interest in the matter as he failed to set down the spoliation application for hearing and to ensure that heads of argument be filed on his behalf in the proceedings before us.

Conclusion

[20] In conclusion I am satisfied that the court *a quo* made several misdirections as mentioned above and therefore the appeal should succeed with costs.

Order

[21] The following order is made:

1. The appeal succeeds with costs, the costs of counsel to be taxed on scale B.
2. The order of the court *a quo* dated 10 November 2023 is set aside and replaced with the following:

'The application is dismissed with costs.'

Concur

Concur

JP DAFFUE J

VAN RHYN

D DE KOCK AJ

Appearances

For appellants:	Adv P du P Greyling
Instructed by:	Kemi Akinbouhun Attorneys c/o Tshangana and Associates Inc Bloemfontein
For respondent:	No Appearance