



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

**CASE NO:2088/2024
REPORTABLE**

In the matter between:

KING SABATHA DALINDYEBO MUNICIPALITY

Applicant

And

NELISA BHEKEZANTSI

Respondent

JUDGMENT

Mhambi AJ

INTRODUCTION

1. The Applicant instituted motion proceedings against the Respondent, in the main is seeking an order in the notice of motion which may be summarized as follows:
 - (a) interdicting the respondent from unlawfully invading the land and building and/or erecting an illegal structure at ERF 912 Portion 0;

- (b) Interdicting the respondent and anyone who intends to occupy the illegal structure;
- (c) The structure erected and developed by the respondent on ERF 912 Portion 0 to be declared unlawful; and
- (d) That the respondent be declared to demolish the said illegal building within 10 days from the court order.

THE PARTIES: -

- 2. The Applicant is King Sabatha Dalindyebo Municipality, a municipality duly established in terms of the Local Government: Municipal Structures Act¹. Its principal place of business is situated at Munitata Building 51, Sutherland Street, Mthatha. The Applicant will be referred to hereinafter as “**the Municipality**”.²
- 3. The Respondent is Nelisa Bhekezantsi, described as an adult male person employed as the law enforcement agent under the South African Police Services, PRD Building, Sutherland Street, Mthatha.³

THE APPLICATION

- 4. The orders sought by the Municipality are opposed by the Respondent.
- 5. In the course of the application, there were two interlocutory applications. In the first interlocutory application, the Municipality sought leave to supplement its founding affidavit in the main application. In the second interlocutory application, the Municipality sought for leave to amend its notice of motion.

¹ Act 117 of 1998

² See paragraph 5 of the founding affidavit

³ See paragraph 6 of the founding affidavit

6. The Respondent opposed both interlocutory applications. However, when this matter was heard on 18 October 2024, the Respondent consented to the orders sought by the Municipality in both interlocutory applications, I shall revert to this aspect in due course.
7. The crux of the matter is that in response to the main application, the two interlocutory applications, the Respondent challenged the authority of the Municipality to institute these proceedings and further challenged the authority of Jolwana Mgidlana Attorneys to act on behalf of the Municipality.
8. In its challenge, the Respondent delivered to the Municipality's attorneys, a notice in terms of Rule 7(1) of the Uniform Rules of Court. The notice was served on the Municipality's attorneys on 04 October 2024.
9. The architecture of Rule 7 has a specific intent. Rule 7(1) provides as follows: -

“POWER OF ATTORNEY”

- 1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of the party may, within 10 days after it has come to notice of a party that such person is so acting, or with the leave of the Court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the Court that he is authorized so to act, and to enable him to do so the Court may postpone the hearing of the action or application.
10. At this stage, it is opposite to mention the grounds elucidated in the Respondent's notice in terms of Rule 7(1).
11. It appears *ex facie* the Respondent's notice in terms of Rule 7(1) that the Respondent sought to be provided with documentary proof as follows: -

- a) A Council Resolution by the Municipal Council authorizing the Municipality as well as Jolwana Mgidlana Attorneys, to institute the current proceedings against the Respondent.
 - b) A power of attorney by the Municipal Council appointing Jolwana Mgidlana Attorneys as the Municipality's Attorney in the application.
 - c) Proof that Jolwana Mgidlana Attorneys had been properly appointed as a service provider by the Municipality in terms of the provisions of Section 217 of the Constitution, National Treasury Regulations and Supply Chain Management Policy of the Municipality.
12. The Municipality replied to the Rule 7(1) notice by attaching a letter signed by the Municipality's Legal Officer dated 18 December 2023.
13. It is necessary to indicate that the papers in the main application were issued on 14 May 2024.
14. On receipt of the Municipality's response to its Rule 7(1) notice, the Respondent raised a point of law in terms of Rule 6(5) (d) (iii) of this Court's Uniform Rules, the Respondent insists that at the hearing of the matter it will argue that the Municipality has not been authorized to institute and prosecute this application, the Respondent also raised other issues which are not a concern in this judgement.
15. The crystal issue the court is asked to determine is whether the Municipality has the requisite authority to institute these proceedings.

THE LEGAL NATURE OF THE MUNICIPALITY

16. It is necessary to emphasize the legal nature of the Municipality.
17. The legal nature, and the rights and duties of the Municipality are regulated by Section 2 of the Local Government, Municipal Systems Act⁴. Section 2 of the Systems Act provides as follows: -

“A MUNICIPALITY”

- a) is an organ of state within the local sphere of government exercising legislative and executive authority within the area determined in terms of the Local Government Municipal Demarcation Act, 1998;
 - b) Consists of
 - i) the political structures and administration of the Municipality, and
 - ii) the community of the Municipality
 - c) functions in its area in accordance with the political statutory and other relationships between its political structures, political office bearers and administration and its community; and
 - d) has a separate legal personality which excludes liability on the part of its community for the actions of the Municipality.
18. On this note, it is necessary to look at the relevant provisions of the Constitution as far as it relates to the issue before me.
19. **SECTION 151 OF THE CONSTITUTION PROVIDES THAT: -**

⁴ Act 32 of 2000

- (1) The Local spheres of government consists of Municipalities, which must be established for the whole of the territory of the Republic of South Africa.
 - (2) The executive and legislative authority of the Municipality is vested in its Municipal Council.⁵
20. Section 151(2) of the Constitution must be considered together with Section 160 of the Constitution. Section 160 clarifies the role and powers of the Municipal Council as follows: -
- 1) **A MUNICIPAL COUNCIL**
 - a) Makes decisions concerning the exercise of all the powers and performance of all the functions of the Municipality.
21. Regard being had be to Section 160(1) (a) of the Constitution, and Section 2(d) of the Municipal Structures Act, it is clear that the Municipality is clothed with a separate legal personality distinct only from it's community. The Municipality does not have a legal personality distinct or separate from its Council.
22. I agree with the reasoning by **Goosen J, in Nelson Mandela Bay Municipality and Others V Anele Qaba and Others**.⁶ He reasons as follows:-

“What Section 2 of the Systems Act does not contemplate is that ‘a Municipality’ is a separate incorporated entity to that of its ‘Council’. Such a notion would, in any event be absurd since it is the Council in which executive and legislative power and authority is vested.”

⁵ The Constitution of the Republic of South Africa, 1996.

⁶ 2022 ALL SA 239 (ECP) at para 26 of the judgment.

23. Clearly, the Municipality is nothing but the agent of its council. The Municipality is the body Corporate that acts as agent of its principal, that is its council, which in no way is by it'self a body Corporate, however the Constitution vests the Council with decision making powers, executive and legislative authority.
24. This is supported by **De Villiers and Others v Beaufort West Municipality**⁷, where Watermeyer J held that: -

“The Council therefore by statute is made the agent of the body Corporate, but the Council itself is not a body Corporate, it consists of a number of members whose acts are determined by the majority, and when they act collectively by resolution properly taken, they act as agents for the body corporate, the Municipality”.

25. I agree with the reasoning by **Goosen J in Nelson Mandela Bay Municipality**,⁸ that a Municipality acts and performs its functions through the agency of its Council.

AUTHORITY TO INSTITUTE LEGAL PROCEEDINGS AND POWER TO DEPOSE TO AN AFFIDAVIT

26. In **Ganes and Another V Telkom, Namibia**⁹, the Court held that:-

“It is irrelevant whether Henke had been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not to be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized”.

⁷ 1929 CPD 501 at 504

⁸ Ibid at para 27-28

⁹ 2004 (3) SA 614

27. This position was affirmed in number of authorities, inclusive of **First Rand Bank Limited V Michael Gary Hazon and Another**¹⁰.
28. The applicable remedy to challenge the authority of the party instituting an action remains Rule 7(1) of the Uniform Rules of Court.
29. The Supreme Court of Appeal in **Unlawful Occupiers, School Site V City of Johannesburg**¹¹, referring to the Judgment in **Eskom v Soweto City Council and Ganes**¹², held (per Brand JA) that:-
- “The import of the Judgment in Eskom is that the remedy of the Respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court.*
30. On this point, I find that the Respondent’s use of Rule 7(1) to challenge authority of the Municipality to prosecute these proceedings is correct in law.
31. During hearing of this matter, Mr Sihawu, Counsel for the Municipality, argued that the Respondent’s Rule 7(1) notice was filed out of time, with no application for condonation filed. He then referred to a Judgment in **Donald Gordon Ericksson V The Hollard Insurance Company Ltd**¹³. I am not persuaded to follow the reasoning in that case. The facts of this case are totally distinguishable from those in Donald. In **Donald**, the Applicant objected to the late filing of a notice in terms of Rule 7(1) by the Respondent. In this case the Applicant did not raise an objection of late filing, but simply replied to the notice dated 08 October 2024. In that way, even if late filing may be said to exist, the Municipality itself impliedly consented and agreed to that late filing. It was improper for the Municipality to only raise objections on argument. The Municipality is not entitled

¹⁰ See Unreported judgment of Southern Gauteng, 2013/47366 at paragraph 26 Of the judgment.

¹¹ See 2005 (4) SA 199 (SCA)

¹² 1992 (2) SA 703 (W)

¹³ See 2023 ZAGPN JHC 39, 24 January 2023

to argue a case it has not made out on its own papers. I therefore reject that objection.

32. The last issue for determination is whether the Municipality's reply to the Rule 7(1) notice is sufficient to satisfy the Court of its authority to institute these proceedings. The answer to that is in the negative. I deal with the reasons below.
33. The letter signed by the Municipality's Legal Adviser can never be sufficient to authorize the institution of proceedings by the Municipality. I have already demonstrated that the Municipality acts through the agency of Council.
34. Clearly, without the authority of the Council, in the form of a Municipal resolution, the Municipality lacks the power and the authority to institute these proceedings.
35. The powers of the Municipal Manager are clearly defined in Section 55 of the Systems Act when he/she act on behalf of the Municipality, he/she act on delegated authority in terms of Section 59 of the Systems Act, in the authority which vests on the Municipal Council to sue in the name of the Municipality, but to do that Municipal Manager needs to act on the resolution of the Council that gives him the delegated power to litigate in the name of the Municipality.
36. Consequently, the Respondent's challenge of the Municipality's authority to pursue these legal proceedings should succeed.
37. As I stated earlier, the Municipality in its interlocutory applications, sought the leave of this Court to amend its notice of motion, and to supplement its founding papers. Even though the Respondent opposed such amendments sought, at the hearing of this matter the amendments were sought by consent with the Respondent withdrawing its objection but seeking leave to attend to consequential amendments.

38. In my view, the basis for the Municipality to seek the leave of the Court for its attempt to supplement its founding affidavit is clear, and based on the principle that there are customarily three sets of affidavits in motion proceedings. But the Court has a wide discretion to allow the filing of further affidavits. In this regard see **James Brown and Harmer Pty Ltd V Simons**¹⁴.
39. On this aspect, **Goosen J in Nelson Mandela Bay (supra) refers to Merope Communications Pty Ltd V Verb Media Pty Ltd**¹⁵, I agree with the reasoning therein.
40. The court was satisfied that the Municipality had made a case for the filing of a supplementary founding affidavit, and further granted, the Applicant leave to amend its notice of motion. The Respondent conceded to not be prejudiced by the intended amendments.
41. On the basis that the Municipality was the party who sought the indulgence I deemed it fit to grant a costs order against the Municipality. Appropriate orders were granted during the hearing of this matter.

CONCLUSION

42. In **ANC Umvoti Caucus v Umvoti Municipality, 2009 ZAKZ PHC 47, 2010 3 SA31**, the court per Govern J held that:

“ Mr. Gojoo analyzed the relevant legislation and submitted that no legislation directly authorized the speaker or the manager of a municipality to act as an agent of a municipality to launch an application in court. I agree with this analysis. He submitted that, since S151 (2) of the Constitution of the Republic of South

¹⁴ 1963 (4) SA 656 at 660 E-G

¹⁵ at para 41

Africa, 1996 vests the executive and legislative authority of a Municipality in its municipal council, it was necessary for the council to have delegated the power to institute legal proceedings . Such delegation must be in writing. Absent such a delegation, a council resolution was required to empower an official to institute court proceedings on its behalf. These submissions are sound.”

43. Consequently, the Respondent’s challenge in terms of Rule 7(1) to the Municipal manager’s authority to institute these proceedings stands to be upheld.

ORDER

1. The Applicant is directed to satisfy the Respondent that it has the requisite authority to institute these proceedings.
2. The Application is postponed *sine die* subject to the Applicant satisfying the Respondent that it has the requisite authority to institute these proceedings.
3. The Applicant is directed to pay wasted costs only relating to the Respondent’s Rule 7(1) notice on Scale “A” of the amended Rule 67 A of the Uniform Rules of Court.
4. The main application is postponed sine die with costs in the cause.

M. MHAMBI

JUDGE OF THE HIGH COURT(ACTING)

APPEARANCES

Mr. Sihawu: Counsel for the Applicant
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Date heard: 18 October 2024
Date delivered: 24 October 2024