



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

Not reportable

Case no: 5224/2024

In the matter between

NOBELUNGU MOFU

APPLICANT

and

NALA LOCAL MUNICIPALITY

RESPONDENT

Neutral citation: *Mofu v Nala Local Municipality* (5224/2024) [2025] ZAFSHC 199 (26 June 2025)

Coram: Grobler AJ

Heard: 13 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 15:00 on 27 June 2025.

Summary: Leave to appeal – person acting on behalf of juristic or natural person – required to allege and prove authority to do so – question not one of *locus standi* but authority – authority to be challenged in terms of rule 7 of the Uniform Rules of Court thereafter – dispute of fact on papers – Plascon-Evans rule applied.

ORDER

- 1 The application for leave to appeal is dismissed.
 - 2 The applicant is ordered to pay the costs.
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JUDGMENT

Grobler AJ

Introduction

[1] The applicant, Ms Nobelunga Mofu (Ms Mofu), applied for an order declaring deductions effected by the respondent, Nala Local Municipality (the Municipality), from all of the stated applicants' salaries as being unlawful and invalid, consequential relief in the form of ordering the Municipality to refund all monies so deducted, and costs.

[2] The matter served before me as a fully-fledged opposed application on 13 February 2025.

[3] Ms Mofu launched the application. She identified 93 other applicants in her founding affidavit. No confirmatory affidavits were appended for those people, they were not properly identified (except to allege that they were also employees of the respondent) and Ms Mofu made no allegation that she has been authorised to so act on behalf of the other applicants. She sought an order declaring deductions effected by the Municipality from all of their salaries as being unlawful and invalid.

[4] The Municipality opposed the application. Aggrieved by the dismissal of their application before me, the applicants approached this court, on 13 March 2025, with an application for leave to appeal against the whole of the judgment and order of this court dated 20 February 2025.

The salient facts

[5] The Municipality employed Ms Mofu as a general worker. On 9 September 2024, she

deposed to a founding affidavit stating that, on 26 July 2024, the Municipality made seemingly indiscriminate, uncalculated deductions from all the applicants' salaries after they had embarked upon industrial action. She stated that the industrial action lasted for 20 days after which all of the applicants returned to work but, on resumption of their duties, the Municipality made the deductions. She also attaches a spreadsheet showing the total of individual deductions made from all of the applicants' salaries.

[6] She complained that this is unlawful in the sense that s 34 of the Basic Conditions of Employment Act 75 of 1997, only allow for deductions from an employee's remuneration in certain instances.¹ *En passant*, it is common cause that s 34 was not followed, and thus, if I am to find that what happened to the applicants amounted to a deduction for purposes of s 34 and otherwise, the Municipality's action would be unlawful.

[7] The Municipality contended that no deductions were made. It simply says that Ms Mofu and the other applicants did not work during the time of the industrial action. Thus, in terms of the labour law dispensation as it exists today, the applicants were not paid.

Grounds of appeal

[8] The salient grounds on which the applicants rely for leave to appeal are set out in their notice of application for leave to appeal and I summarise below.

[9] The court erred in finding that the applicants issued the application on behalf of the other applicants. The respondent contends that the applicant pleaded in her founding affidavit that she is deposing to the affidavit on behalf of the other applicants.

[10] The court erred in upholding the preliminary point raised by the respondent challenging the *locus standi* of Ms Mofu, the applicant, to bring the application on behalf of the other applicants when no procedure in terms of rule 7 of the Uniform Rules of Court was followed.

¹ Section 34(1) and (2) of the Basic Conditions of Employment Act 75 of 1997 states as follows:

'1 An employer may not make any deduction from an employee's remuneration unless –

(a) subject to subsection (2) and the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or

(b) deductions required or permitted in terms of a law, collective agreement, court order or arbitration award.

2 A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if –

(a) the loss or damage occurred in the course of employment and was due to the fault of the employee;

(b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;

(c) the total amount of the debt does not exceed the actual amount of the loss or damage; and

(d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one quart of the employee's remuneration in money.'

Consequently, the applicant asserts that the court misdirected itself and violated the established legal principle that no authority is required when deposing to an affidavit.

[11] Additionally, the court misdirected itself in holding that blame was not to be attributed to the Municipality for avoiding the rule 7 procedure. To this end, the applicant's failure to make an allegation in respect of her authority to institute the proceedings on behalf of the other applicants was neither here nor there because the rule applies to all cases where a litigant challenges authority and there should be no exceptions to this rule.

[12] The court misdirected itself in finding that the applicant simply approached the court for a claim on behalf of the other applicants, namely 'Second to Further Applicants'.

[13] The court misdirected itself in overemphasising the issue that confirmatory affidavits were required to be appended to the founding affidavit, as none were required, save to confirm the contents of an affidavit relating to each individual. The applicant further avers that the court was misplaced and misdirected in making the finding that the few confirmatory affidavits that were attached were wholly insufficient.

[14] The applicant raise a further challenge that 'the court over-looked the fact that the municipality challenged the authority to act though none existed and exempting the municipality despite that is misdirection and a miscarriage of justice'.

[15] The applicant, furthermore, contend that 'the court erred and misdirected itself in making the finding that the proceedings against the other applicants are unauthorized as there are no proceedings on behalf of other applicants in the present case'. I suppose the applicants' contention is based on the court's finding that no person may generally and without more institute legal proceedings on behalf of another.

[16] The court erred in finding that there were no deductions made by the Municipality and upholding the respondent's version and for finding that –

'a. The pay slips reflected the whole amounts that the employees earn and there was a reduction thereafter and if the employees did not earn the amounts such should have not reflected in the salary advices.

b. If any employee did not earn a salary, zero should have reflected on the salary slips.'

[17] On the above stated grounds, it is the applicant's case that another court would come

to a different conclusion.

Leave to appeal

[18] Before dealing with the merits of this application for leave to appeal, I first traverse the applicable requirements and test for an application for leave to appeal.

[19] The traditional test applied by our courts in considering applications for leave to appeal is whether there is a reasonable prospect that another court may come to a different conclusion to the one reached by the court of first instance.

[20] Section 17 of the Superior Courts Act 10 of 2013 now legislates the circumstances in which leave to appeal is to be sought and granted. Section 17(1) reads:

'17. Leave to appeal. — (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[21] In *Mont Chevaux Trust v Goosen and Others*,² the court had the following to say regarding the test for leave to appeal:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. *The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.*' (Emphasis added.)

[22] In *Valley of the Kings Thaba Motswere (Pty) Ltd v Al Mayya International*,³ Smith J stated the following:

'There can be little doubt that the use of the word "would" in section 17 (1)(a)(i) of the Superior Courts Act implies that the test for leave to appeal is now more onerous. The intention clearly being to avoid

² *Mont Chevaux Trust v Goosen and Others* [2014] ZALCC 20 para 5.

³ *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Mayya International* [2016] ZAECHC 137 para 4.

our courts of appeal being flooded with frivolous appeals that are doomed to fail. I am, however, of the respectful view that the "*measure of certainty*" standard propounded by the learned judge in *Mont Chevaux Trust (supra)* may be placing the bar too high. It would, in my respectful view, be unreasonably onerous to require an applicant for leave to appeal to convince a judge – who invariably would have provided extensive reasons for his or her findings and conclusions – that there is a "measure of certainty" that another court will upset those findings. It seems to me that a contextual construction of the phrase "reasonable prospect of success" still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party. I shall accordingly consider the arguments advanced on behalf of the applicants on this basis.' (Emphasis added.)

[23] In *Smith v S*,⁴ Plasket AJA, had occasion to consider what constituted reasonable prospects of success in s 17(1)(a)(i) and held:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. [11] In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[24] In this division, it was held as follows regarding the same test in *Ntsoereng and Another v Sebofi and Another; In re: Sebofi v Ntsoereng*:⁵

'Prior to the promulgation of Act 10 of 2013, the test was lower in that it merely required of an applicant to indicate that there is a reasonable possibility that another Court may come to a different finding. That is no longer the case, however. The new higher test now requires a reasonable prospect of success, not merely a possibility.'

[25] The Supreme Court of Appeal, however, in *MEC for Health, Eastern Cape v Mkhitha and Another*,⁶ dealt with the issue and stated that an applicant for leave to appeal must convince the Court on proper grounds that there is a reasonable prospect of the realistic chance of success on appeal. However, the Supreme Court of Appeal did not say that the bar has been raised by the provisions of the Superior Courts Act.

⁴ *Smith v S* 2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

⁵ *Ntsoereng and Another v Sebofi and Another; In re: Sebofi v Ntsoereng* [2016] ZAFSHC 153 para 38.

⁶ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176.

Analysis

[26] The grounds on which the first applicant relies for leave to appeal fall under three main themes:

- (a) The court ought to have found that the challenge to the first applicant's authority should have been raised through the mechanisms of Rule 7 (the rule 7 challenge).
- (b) The court misdirected itself in finding that the first applicant required authority from the remainder of the applicants to institute the proceedings. Instead, the court ought to have recognised that the first applicant does not need to be authorised to depose to the affidavit and as such the overemphasis on the confirmatory affidavits informed the court's decision to dismiss the application (the authority to institute proceedings).
- (c) The court ought to have found that the salary advices appended to the founding affidavit were indicative of the unlawful deductions effected by the Municipality from all of their salaries which deductions should be declared invalid (the invalidity of the deductions).

The rule 7 challenge and authority to institute proceedings

[27] It is so that the rules of court envisage that this court, in terms of rule 7(1), first make a determination on the challenge to the deponent's authority to act on behalf of the applicants before the merits of the matter can serve for consideration.

[28] The issue was not whether the deponent has the necessary authority to depose to the founding affidavit, but whether the institution of proceedings was authorised by the 'Second to further Applicants'. The *court a quo* recognised and agreed with Mr Feni that, any person may depose to an affidavit or present evidence to court on behalf of a litigating party. However, I stated that there must be some indication that the proceeding instituted is either with the authority of the actual applicant, or it is the applicant acting on his or her behalf. This is precisely the requirement that the applicant could not demonstrate to the court. There was no evidence attached to the founding papers to prove authority to institute proceedings on behalf of the 'Second to further Applicants'. It is the *institution of the proceedings and the prosecution thereof* that must be authorised.⁷ (Emphasis added.)

[29] A clear distinction is made in law between *locus standi*, authority to institute proceedings and the basis for deposing to an affidavit. When one has in mind, the purpose

⁷ *Ganes and Another v Telecom. Namibia Ltd* [2003] ZASCA 123; [2004] 2 All SA 609 (SCA); 2004 (3) SA 615 (SCA); (2004) 25 ILJ 995 (SCA) (*Telecom Namibia Ltd*) para 19.

of a power of attorney (and the reason for rule 7(1) requiring one to be lodged), which is to establish the mandate of the attorney concerned and to mitigate the risk of the person whose name is being used throughout the process from afterwards repudiating the process altogether and saying he had not given authority, and to prevent persons bringing an action in the name of a person who never authorized it.⁸

[30] It is the institution of the proceedings and the prosecution thereof which must be authorised. It is irrelevant whether the deponent had been authorised to depose to the founding affidavit.⁹ On this score alone, there is no merit to the ground of appeal as formulated. It conflates the principles pertaining to the requirements for instituting proceedings with those relating to a person deposing to an affidavit.

[31] The applicant sought relief against the Municipality on behalf of parties who are not properly identified and applicants who have not authorised the proceedings to be instituted on their behalf by the first applicant. In her founding affidavit, Ms Mofu said that she is the first applicant in the matter:

'... and this affidavit is deposed to on behalf of my co-applicants. Few confirmatory affidavits are attached as confirmation of such to avoid burdening the court file. Other confirmatory affidavits will be provided to the court during the hearing of this matter should a need arise.'¹⁰

[32] Following a challenge by the Municipality on the applicant's *locus standi*, this was her response in the replying affidavit:

'I deny that I brought an application on behalf of my co-applicants. I have been chosen, as First Applicant, to depose to the affidavit which also incorporates the case of my co-applicants. That I am bringing this application on behalf of my co-applicants is a misconception which should be rejected as false and a spurious preliminary point.'¹¹

The allegations in these two affidavits are diametrically opposed and do not assist the applicant's case.

[33] That challenge is not against the authority of a witness then, but against the authority to litigate for someone else. The impropriety in the manner in which these proceedings were

⁸ *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705E-F.

⁹ *Telecom Namibia Ltd* para 19; see also *Firststrand Bank Ltd v Fillis and Another* [2010] ZAECPHC 50; 2010 (6) SA 565 (ECP) para 13.

¹⁰ Para 4.1 of the Founding Affidavit also states:

'The Second to further Applicants are all male and female employees of the Respondent working at various sections and divisions of the Respondent and for purposes of this application and also (sic) assume the address of their attorneys as recorded in the Notice of Motion. The names of the Second and further Applicants are detailed in the document marked 'A' attached hereto.'

¹¹ See also: Replying Affidavit on p. 122, para 6.1 where Ms Mofu simply describes herself as a witness.

instituted cannot be overemphasised. A litigant cannot approach a court simply as a witness, claiming relief on behalf of another, without the claimant actually instituting the proceeding. The facts of this case strangely show that Ms Mofu, by her own description, is simply a witness on behalf of the other identified applicants. She expressly says she is not authorised to act on anyone else's behalf. The few confirmatory affidavits provided in reply simply confirm what Ms Mofu said in her *founding* affidavit, which says that Ms Mofu deposed to evidence on behalf of the other applicants. This of course is wholly insufficient.

[34] The applicant, cognisant of the abject deficiencies in its application, thereafter and with wanton disregard for the principles applicable to motion proceedings, sought to rectify these issues in its replying affidavit, by pleading a denial that the application is launched on behalf of her co-applicants but she has merely been chosen as a witness to depose to the affidavit.

The Invalidity of the Deductions

[35] The applicant alleges that the court erred in finding that there were no deductions made by the Municipality and for upholding the respondent's version that the principle of 'no-work-no- pay' applied to an unprotected industrial/ strike action.

[36] This finding is incorrect, the applicants contend based on the premise that the salary advices reflected the usual full amounts that the employees earn thereafter a reduction/ deduction thereafter. The applicants assert that the Municipality need not have done this, it was rather sensible to simply not reflect amounts that the employees did not earn. Thus, if an employee did not earn a salary, zero should have reflected on the applicant's salary advices.

[37] In respect of the relief sought relating to an order to direct the Municipality to immediately refund all monies deducted, the applicant – on paragraph 7.24 of in the founding affidavit requested the court to accept 10 samples of salary advices for both July and August 2024 to avoid burdening the court file. Yet the applicants seek an order that *all* monies deducted, be reimbursed without documentation supporting such an order, save for the populated spreadsheet attached as Annexure NOB01.

[38] In any event, the amounts that the applicants refer to as 'deductions' in the attached salary advices are in fact computed as 'short days'.

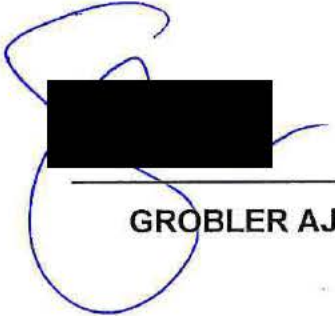
[39] The applicants, according to the Municipality, did earn salaries/wages in the relevant periods reflected in their respective salary advices as 'short days' and all the amounts that the applicants wish to have refunded represent the amounts which accrued on the days which they did not work and to which they are not entitled to be remunerated- based on the principle of 'no work, no pay'.

[40] The provision of s 34 has already been cited *supra* and I am of the view that the amounts reflected in annexure 'NOB 01' do not represent deductions as contemplated by s 34, and have not been reflected under deductions on the relevant applicants' salary advices because they do not constitute deductions.

Conclusion

[41] The application must fail and I make the following order:

- 1 The application for leave to appeal is dismissed with costs.
- 2 The applicant is ordered to pay the costs.



GROBLER AJ