

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2018/20993

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|-----|---|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED: NO |

20 April 2026

DATE

SIGNATURE

In the matter between:

CITY OF EKURHULENI METROPOLITAN COUNCIL

First Applicant

**UNKNOWN JOHANNESBURG METROPOLITAN
POLICE OFFICER**

Second Applicant

and

DLALISA LERATO

First Respondent

NTSIBANDE VIKA REGGIE

Second Respondent

NTSIBANDE NOSIFISO PERSEVERENCE

Third Respondent

In re:

DLALISA LERATO

First Applicant

NTSIBANDE VIKA REGGIE

Second Applicant

NTSIBANDE NOSIFISO PERSEVERENCE

Third Applicant

and

CITY OF EKURHULENI METROPOLITAN COUNCIL

First Respondent

**UNKNOWN JOHANNESBURG METROPOLITAN
POLICE OFFICER**

Second Respondent

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on Caselines. The date for hand down is deemed to be on **20 April 2026**.

ORDER

1. Leave to appeal is dismissed.
2. The applicants to pay the cost of this application on a scale of attorney and client.

JUDGMENT

KEKANA AJ

Introduction

- [1] This is an application for leave to appeal brought by the applicants against the judgment and order granted by the court a *quo* on 28 October 2025. The

applicants wish to appeal the judgment. The applicants' grounds of appeal are set out in their Notice of Application for Leave to Appeal (Notice). The respondents opposed the application.

[2] The grounds may be summarised thus:

- a. that the court a quo erred in holding that there was late submission of an unsigned affidavit;
- b. that the court a quo erred in holding that there was no compliance with the Rule 35 (3) notice and that the respondents were within their rights to proceed with the relief sought;
- c. that the court a quo misdirected itself by holding that the late filing of the signed replying affidavit cannot be seen as compliance with the court order of 11 April 2023, in circumstances where that signed replying affidavit was filed in response to the respondents' Rule 35 (3) notice;
- d. that the court a quo erred in holding that there was no court order to comply with when the replying affidavit was filed and that it would be misplaced for the first respondent to use or rely on the late filing of the signed replying affidavit on 11 April 2023 as compliance with the court order granted on 11 April 2023, when a signed affidavit had been filed;
- e. that the court a quo erred in stating and holding that the signed replying affidavit "is not worth the paper written on, in that the person deposing affidavit does not state his or her identity, it is not clear whether he or she is male or female, neither does he or she state his or her position in the municipality".

Legal principles and analysis

[3] Applications for leave to appeal are governed by section 17 (1) (a) (i) and (ii) of the Superior Court's Act, Act 10 of 2013. The subsections state that "leave to appeal may only be granted where the judge or judges are of the view that the appeal would have prospects of success or where there are some other

compelling reasons as to why the appeal should be heard. A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes¹. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.²

- [4] It remains undisputed that the unsigned affidavit was brought to the attention of Keightley J. To the extent that the applicants do not dispute the version submitted by the respondents, that version remains uncontested and consequently accepted to be correct. During arguments, the applicants conceded that the unsigned affidavit cannot be regarded as compliance in circumstances where it is not signed. Its existence is not relevant to determining compliance with the Rule 35 (3) notice.
- [5] The applicants further conceded that the signed affidavit was uploaded on the morning of the day Keightley J granted an order against the applicants. It remains to be repeated that the signed replying affidavit cannot be said to be in compliance with a court order, as there was no court order to comply with. If it was loaded on caselines, but despite it being uploaded, Keightley J still granted the order, then again it cannot be said that there was compliance with the order.
- [6] I will now turn to the character of the signed replying affidavit. It was said in the court *a quo* that it is not worth the paper written on, in that the person deposing the affidavit does not state his or her identity, it is not clear whether he or she is male or female, nor does he or she state his or her position in the municipality. It is only when one states his or her position that one can accept that the deponent would have knowledge of the facts and therefore be duly authorised to depose such an affidavit. To be repeated is that nowhere does the deponent state that he or she is employed by the municipality; there is nothing that links the deponent with the municipality. It is not for the court to investigate and find

¹ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA).

² *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176.

in some part of the papers as to who is the deponent and how is he or she linked to the municipality.

- [7] An affidavit is evidence, for the court to accept it as such, it must be of the level of admissible evidence. It is trite that a party who depose an affidavit must at least state his/her position and his/her links with the entity in this case, the municipality, and at least explain how she or he became conversant with facts, this must be clear from the affidavit itself.
- [8] What was relevant and central for the court a quo to arrive at its conclusion that the applicants have not complied with the order, was the inadequacies in the so-called signed affidavit which according to the applicants' counsel Mr Dyke's own admission, is not crafted in the form of an affidavit. What was analysed by the court a quo was the unsigned affidavit (which lacks legal standing) and the signed affidavit (which is adumbrated by multiple inadequacies).
- [9] Any comment made by the court a quo on the applicants' position about whether there are circumstances in which the whereabouts of the requested documents or recordings may genuinely be unknown was said as *dictum* and was not central to the conclusions made by the court a quo on the issue of non-compliance with the order by Keightley J to determine the striking out of the defence.
- [10] An attack by the court a quo on the so-called signed affidavit was justified, and this was also conceded by counsel for the applicant. The court a quo, in saying it is not worth the paper it is written on, means it is rejected. An attack on this affidavit is an attack on its contents. The issue of whether the whereabouts of the items are known or unknown, as said in the rejected affidavit, becomes irrelevant immediately such an attack is made against it.
- [11] As regards the applicants' contention that a striking out will deprive them of participating in the legal process is incorrect. The effect of the order striking out the defence was explained by the court in *Motala N.O v Road Accident Fund*³

³ [2023] ZAGPJHC 1323 at [17].

particularly as to why the defendant is entitled to be represented at the hearing, despite the defendant's defence having been struck out, as follows:

"The striking out of a defendant's defence constitutes no more than a bar to the defendant tendering evidence which had been pleaded in its plea. The defendant's position is conceptually analogous to that of a respondent who has filed a notice in terms of Rule 6(5)(d)(iii) that it intends to oppose the applicant's application on a question of law only."

[12] In *Stevens and Another v Road Accident Fund*⁴ it was held by the court that:

"...the striking out of the defence of the defendant does not in itself bar the defendant from participating in the proceedings. The defendant is entitled to participate in the proceedings, but his participation is restricted in the sense that it cannot raise the defence that had been struck out by an order of Court."

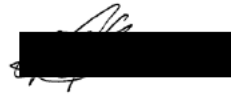
[13] The applicants can still participate in the proceedings.

Conclusion

[14] The applicants did not comply with court order and central to this conclusion was the so-called affidavit. It is clear from the reasoning that the main attack was on the character of the so-called affidavit, the court a *quo* went at length with the inadequacies in it and that position remains unchanged. The knowledge of facts or conversant with facts becomes purely academic once it is agreed that the affidavit itself is below the standard required for admissible evidence. Again, once it is agreed that the so-called affidavit is below standard of admissible evidence, it is purely academic on whether the whereabouts of the requested documents or recordings may genuinely be known or unknown, since this was not the main reason for the court in reaching a conclusion.

[15] I am of the view that the applicants' application for Leave to Appeal falls short of the minimum test or requirements for an Application for Leave to Appeal in terms of Section 17 of the Superior Court's Act. No case was made out for Leave to Appeal to be granted. I am of the view that no other court would come to a different conclusion on the character of this so-called affidavit.

⁴ [2022] ZAGP JHC 864 at [11].



ND KEKANA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 12 March 2026

Date of Judgment: 20 April 2026

Appearances:

For the Applicants: Adv BC Dyke SC with Adv M Mpakanyane

Instructed by: Norton Rose Fulbright South Africa Inc

For the Respondents: Adv BM Khumalo

Instructed by: HC Makhubele Incorporated