

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

Case no: 2023 - 013876

DELETE WHICHEVER IS NOT APPLICABLE

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

.....
DATE

.....
SIGNATURE

In the matter between:

JACOB CHARLES MNISI
ID NO: [...]

FIRST APPLICANT

MENZI JOHN NYAMBI
ID NO: [...]

SECOND APPLICANT

MAHLEKISANE MOSA CHIRWA
ID NO: [...]

THIRD APPLICANT

PANYANA ENOCH BHEMBE
ID NO: [...]

FOURTH APPLICANT

and

**THE MASTER OF THE HIGH COURT OF
SOUTH AFRICA, GAUTENG DIVISION,
PRETORIA**

FIRST RESPONDENT

**SMILE ZANDILE NKOSI N.O.
ID NO: [...]**

SECOND RESPONDENT

**HLUPHEKA SALMINAH MOHALE N.O.
ID NO: [...]**

THIRD RESPONDENT

**RODAH LINDIWE MGWENYA N.O.
ID NO: [...]**

FOURTH RESPONDENT

**JOSIAH NDABAMBI MOKOENA N.O.
ID NO: [...]**

FIFTH RESPONDENT

**BONGANI KENNETH SHAKOANE N.O.
ID NO: [...]**

SIXTH RESPONDENT

**MAQUANDASHIELIAS MATHAIA N.O.
ID NO: [...]**

SEVENTH RESPONDENT

**ISAAC SITHOLE N.O.
ID NO: [...]**

EIGHTH RESPONDENT

**HENDRY SIPHO LAMOLA N.O.
ID NO: [...]**

NINTH RESPONDENT

**MOKWAZI THEM8EKA MDZINGASE NKAMBULE N.O.
ID NO: [...]**

TENTH RESPONDENT

**MAGOLIDI JIM MANDLAZI N.O.
ID NO: [...]**

ELEVENTH RESPONDENT

**ZULU SAMUEL CHIRWA N.O.
ID NO: [...]**

TWELFTH RESPONDENT

HENDRY NTININI MZIMBA N.O.
RESPONDENT
ID NO: [...]

THIRTEENTH

AGNES NTOMBIKAYISE MAVUSO N.O.
ID NO: [...]

FOURTEENTH RESPONDENT

**(In their capacity as Trustees of the
Libuyile Community Trust, IT No: 4939/06{T})**

<p style="text-align: center;">JUDGMENT</p>

*This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. This Judgment is made an Order of the Court by the Judge whose name is reflected herein and duly stamped by the Registrar of the Court. The judgment and order are accordingly published and distributed electronically. The date for hand-down is deemed to be **27 June 2023**.*

BADENHORST AJ

Introduction

- [1] The applicants launched an urgent application for interim relief in Part A of the application, prohibiting the second to fourteenth respondents from conducting business activities on behalf of the Trust, pending the outcome of Part B of the application.
- [2] Part B of the application seeks the removal of the second to fourteenth respondents as trustees of the Libuyile Community Trust for the reasons as set out in the founding papers.
- [3] The First Respondent, being the Master of the High Court, elected not to oppose the relief sought.

- [4] The urgent court was not seized with whether the said trustees are disqualified from holding positions of trustees in the Trust.
- [5] Part A of the application was heard in the urgent court on 28 March 2023 and 31 March 2023 by the Honourable Justice Kumalo and judgment was handed down on 4 April 2023.
- [6] In paragraph 19 of the judgment the Court held that the Court has no jurisdiction in so far as Part A of the application is concerned as both the applicants and the respondents are resident within the territorial area of High Court of Mpumalanga, including the Trust.
- [7] The *obiter dictum* in paragraph 26 of the judgment was that it may be that this court has jurisdiction in so far as Part B is concerned, it does not have the necessary jurisdiction to adjudicate on the interlocutory relief sought by the applicants.
- [8] The honourable Justice Kumalo dismissed the application for lack of jurisdiction and it was ordered that the applicants should pay the costs of the application.
- [9] On 17 April 2023 the second to fourteenth respondents served a notice of intention to oppose the relief sought in Part B of the applicants' application.
- [10] The second to fourteenth respondents filed their answering affidavit to Part B of the application dated 5 May 2023.

The present application

- [11] The application before me only relates to Part B of the notice of motion and is opposed by the second to fourteenth respondents.
- [12] In Part B the applicants seek a declaratory order that the second to fourteenth respondents were not duly elected as trustees for the trust and an order directing

the first respondent to cancel the letter of authority issued on 3 Nov 2022 in respect of the appointment of said trustees. The applicants also pray for an order directing the first respondent to appoint an interim board of trustees, pending the outcome of an elections of trustees.

- [13] The second to fourteenth respondents raised several defences to Part B of the applicants' claim.
- [14] The Master of the High Court, being the first respondent, did not oppose Part B of the application.
- [15] Mr. Klopper, counsel for the applicants, informed the court that the applicants filed a Notice of Intention to Amend paragraph 3 of the notice of motion pertaining to Part B of their application. This amendment was by agreement between the parties and Mr. van Vuren, counsel for the second to fourteenth respondents, confirmed same. The amendment was granted.
- [16] The applicants then informed the court, *in limine*, that they object to the respondents' answering affidavit to Part B of the application.
- [17] The applicants requested that this affidavit should be ignored by the court and declared as *pro non scripto* as the respondents did not obtain leave from the court to file a supplementary affidavit.
- [18] This objection came as a surprise to the respondents as no objection was raised when the Notice of Intention to Oppose or answering affidavit to Part B were filed.
- [19] The applicants' practice note, filed in terms of the court's practice directive, is silent on the objection raised *in limine*.
- [20] The applicants contend that Uniform Rule 6 makes provision for three affidavits and it is trite that a party who wish to file further affidavits, should obtain leave from the court.

[21] The applicants also argued that the respondents dealt with all the issues in its answering affidavit to Part A of the application and the answering affidavit to Part B, is unnecessary.

[22] It was further argued that should the court however allow the answering affidavit to Part B of the application, the court should grant the applicants leave to reply to said affidavit.

[23] The court was referred to Hano Trading CC v JR 209 Investments (Pty) Ltd and Another¹ where the court set out the test to be applied in filing further affidavits. In paragraph 11 it was held that Rule 6(5)(e) “establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.”

[24] Reference was also made to James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO²:

“It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received.”

[25] The court was also referred to Standard Bank of SA Ltd v Sewpersadh & another³: “The applicant is simply not allowed in law to take it upon himself and (to) file an additional affidavit and put same on record without even serving the other party with the said affidavit.”

¹ 2013 (1) SA 161 SCA

² 1963 (4) SA 656 (A) at 660D-H

³ 2005 (4) SA 148 (C) at paras 12-13

- [26] The applicants submit that the answering affidavit to Part B falls to be regarded as *pro non scripto*.
- [27] It is further submitted that should the court allow the said answering affidavit, then the application should be postponed allowing the applicants the opportunity to reply thereto.
- [28] The respondents submit that after the judgment was handed down by the honourable Justice Kumalo, the respondents filed their Notice of Intention to Oppose and answering affidavit to Part B of the claim, as per the directive in the applicants' Notice of Motion.
- [29] The respondents further argue that this answering affidavit to Part B *is not a supplementary affidavit* and the respondents did not need to ask the court for leave to file same. It is argued that it was specifically requested by the applicants in their notice of motion Part B 'that if the respondents wish to oppose Part B of the application, they should deliver their answering affidavit.'
- [30] The respondents contend that the applicants did not exercise their remedies in terms of Rule 30 to say it is an irregular step to file a further Notice of Intention to Oppose or a further answering affidavit. It is submitted that the applicants also did not launch an application to strike out the answering affidavit to Part B of the application.
- [31] The respondents pointed out that on perusal of the applicants' practice note no mention is made of the objection that will be raised to the answering affidavit to Part B of the claim. This objection was in fact never raised prior to the date of enrolment.
- [32] According to the respondents the answering affidavit to Part B contains other averments and defences which were not raised in the answering affidavit to Part A. The respondents referred the court to their defence of *res judicata* and that this court does not have the necessary jurisdiction to hear the matter. The respondents based the latter defence on the judgment by the honourable Justice

Kumalo granting an Order that the entire application is dismissed due to a lack of jurisdiction.

- [33] The respondents further stipulated that they have complied with every directive in the applicants' notice of motion.
- [34] The applicants challenge these averments and argue that this is one application with one set of facts. The timelines in Part B of the notice of motion are to be read as part of the timelines set out in Part A of the notice of motion. The timelines stipulated in Part B are not additional timelines as interpreted by the respondents, as it is only one application.
- [35] The applicants referred to the court to sub paragraph (a) in Part B of the notice of motion reading "within fifteen [15] days" and allege that this was only a typographical error as it should read "five [5] days".
- [36] The applicants argue that the respondents are taking 'a second bite at the cherry' so to speak and the respondents are trying to fill the gaps by placing new information before court which is *ex post facto*.

Consideration the Applicants' objection/point *in limine*:

- [37] In essence, what the parties are asking the court is to interpret the notice of motion and consider the case law referred to from the bar during argument of the point *in limine*.
- [38] A notice of motion sets out the relief that the applicant seeks and it gives a directive to a respondent as to when and where the application is to be heard and what it should do to oppose, if it wishes to do so.
- [39] The respondents' case is that the answering affidavit to Part B of the application is not a supplementary affidavit and leave to file same is not sought by the respondents. The reason being, the wording and directives in the applicants' notice of motion directed the respondents to file a second Notice of Intention to Oppose and a second answering affidavit to Part B of the application.

[40] The notice of motion reads as follows:

PART A:

1. Dispensing, insofar as is necessary, with the forms and service provided for in the Rules of Court and directing that the matter be heard as a matter of urgency;

2. Interdicting and restraining the Second to Fourteenth Respondents from taking any decisions on behalf of the Trust relating to any of the following pending the outcome of the relief sought in Part B of the application, including any appeal to any court against the grant and/or refusal of such relief;
 - 2.1. The appointment of any further Trustees;
 - 2.2. The approval of any financial transactions on behalf of the Trust;
 - 2.3. The conclusion of any business transaction, including but not limited to:
 - 2.3.1. Entering into any joint venture, partnership or similar relationship on behalf of the Trust;
 - 2.3.2. The cancellation of any existing business relationships and/or contracts on behalf of the Trust;
 - 2.3.3. Entering into any agreement and/or obligation on behalf of the Trust, which may have an influence on the financial status of the Trust;

3. Directing that the Second to Fourteenth Respondents pay the costs of Part A jointly and severally;

4. Granting further and/or alternative relief.

TAKE NOTICE FURTHER that should any of the Respondents intend opposing the relief sought in **Part A** of this application, they are required to:

- (a) Notify the Applicants attorneys in writing within five (5) days of the service of this notice, of their intention to oppose this application;
- (b) To appoint, in such notification, and address referred to in Rule 6(5)(d) at which they will accept notice and service of all documents in these proceedings; and
- (c) To deliver their answering affidavit, if any, within fifteen (15) days of notification of their intention to oppose.

TAKE NOTICE FURTHER to the extent that any answering affidavit is delivered timeously, the Applicants will file their replying affidavit within five (5) days of receipt of the answering affidavit.

PART B

1. A declaratory order, that:
 - 1.1. The Second to Fourteenth Respondents were not duly elected as Trustees of the Trust at a proper constituted annual general meeting of Trustees;
 - 1.2. The annual general meeting held on 13 July 2022, was not duly constituted as same did not comply with the provisions of clauses 16 to 21 of the Trust Deed;
 - 1.3. The Second to Fourteenth Respondents are not eligible to be elected and appointed as Trustees or the Trust as they are no longer permanently resident on the Trust property as defined in

clauses 37 and 3.8 of the Trust Deed and in accordance with the provisions of clause 15 of the Trust Deed.

2. An Order directing the First Respondent to cancel, alternatively withdraw the letter of authority issued on 3 November 2022 in respect of the appointment of Trustees of the Libuyile Community Trust, it Number 4939/06(T).
3. An order directing the First Respondent to appoint the Applicants as Trustees of the Trust together with an Independent Trustee to be nominated by the First Respondent to act in such capacity, pending the election of Trustees for the Trust at a duly constituted general meeting to be held within thirty (30) days from date of this order.
4. Directing that the Second to Fourteenth Respondent's to pay the costs of Part B jointly and severally.
5. Granting further and/or alternative relief.

TAKE NOTICE the affidavit of JACOB CHARLES MNISI together with annexures thereto, will be used in support of this application.

TAKE NOTICE FUTHER that any Respondent who wish to oppose the relief sought in relation to **Part B** is required:

- (a) Within fifteen [15] days of receipt of this notice of motion, to deliver a notice to the Applicants attorneys that such Respondents intend to oppose the application;
- (b) To appoint an address within fifteen km of the office of the Registrar at which the Respondents will accept notice and service of all processes in such proceedings; and

- (c) To deliver their answering affidavit, if any, within fifteen [15] days of notification of their intention to oppose.”

[41] By plain reading of Part A of the notice of motion the applicants:

[40.1] stated when Part A will be heard;

[40.2] the relief sought in Part A;

[40.3] give a directive as to what the respondents should do when opposing Part A and the timelines are stipulated;

[42] By plain reading of Part B of the notice of motion the applicants:

[42.1] stated the relief sought in Part B;

[42.2] give a directive as to what the respondents should do when opposing Part B and the timelines within which the respondents should act.

Interpretation of the Notice of Motion

[43] In terms of rule 6(5) an applicant must give directive to a respondent –

[43.1] of the timelines to files a Notice of Intention to oppose;

[43.2] of the timelines to file an answering affidavit, should it choose to do so;

[43.3] the date on which the matter will be heard should no answering affidavit be filed;

[43.4] give an address where applicant will accept service of above pleadings.

[44] Rule 6(5)(b)(iii) reads: “set forth a day, ***not less than 5 days after service***

thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application.”

- [45] It seems that the Rule permits an applicant to allow a longer period for the respondent to file its notice of intention to oppose. This seems to be the case in the matter at hand. The notice of motion before me gave the respondents fifteen days in Part B, to file its notice of intention to oppose Part B. This timeline differs from the timeline set out in Part A to the notice of motion.
- [46] The respondents are clearly informed to deliver their Notice of Intention to Oppose within fifteen days and to deliver their answering affidavit within fifteen days thereafter.
- [47] By the plain reading of the notice of motion, the applicants chose the normal set of affidavits in Part A and then give the respondents the opportunity to file another answering affidavit in Part B. The applicants, however, chose to file only one founding affidavit pertaining to Part A and Part B of the application.
- [48] The relief sought and the processes in Part A and Part B seem to be separate from each other, although partially operating at the same time.
- [49] The applicants did not amend their notice of motion, nor did they file an application in terms of Rule 30 to object to the further Notice of Intention to Oppose and further answering affidavit.
- [50] I do not see any justification for the applicants to argue that the filing of a further affidavit is not allowed and should be regarded as *pro non scripto*.
- [51] Although the notice of motion is not a contract, the issue before this court is the interpretation of the language and words used. In doing so, the court revisits the trite principles applicable to the interpretation of contracts, with reference to the following judgments:

- [52] In *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* ⁴ the Supreme Court of Appeal held that one is firstly to consider the language used, which must be given its ordinary grammatic and grammatical meaning unless this results in absurdity, repugnancy, or inconsistency with the rest of the agreement.
- [53] Supreme Court of Appeal in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality Natal Joint Municipal Pension Fund v Endumeni Municipality* ⁵ pronounced that interpretation is the process of attributing meaning to the words used, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence... The process is objective, not subjective.... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.
- [54] *Macingwane v Masekwameng and Others* ⁶ said the following as to how approach the interpretation of the words used in a document:

"[21] The proper approach to statutory interpretation is well-known, following the judgment of this Court in Natal Joint Municipal Pension Fund v Endumeni Municipality Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; [2012] 2 All SA 262 (SCA) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation.

[22] What this means in the context of this case, is that one considers the language used, which must be given its ordinary grammatical meaning unless this results in absurdity, repugnancy, or inconsistency with the rest of the document. The language used must be understood

⁴ 2005 (5) SA 276 (SCA) 281 par [21]

⁵ 2012 (4) SA 593 (SCA) par [18]

⁶ (Case no 626/2021) [2022] ZASCA 174 (7 December 2022)

in the context in which it is used and having regard to the purpose of the provision of the document.”

- [55] The applicants' proposed interpretation that the timelines stipulated in Part B of their notice of motion and the timelines stipulated under Part A of said notice of motion should be read together, cannot be correct if one considers the language used, which must be given its ordinary grammatical meaning in the context in which it is used.
- [56] The notice of motion in Part A gives directives to the respondents and then gives separate directives in Part B thereof. For example, Part A and Part B separately direct the respondents to “appoint and address within fifteen km of the office of the Registrar at which the respondents will accept notice and service of all processes in such proceedings.” The relief sought in Part B also differs from the relief sought in Part A. By plain reading of the notice of motion, these examples confirm the respondents' argument that they understood the directives in Part B of the notice of motion as separate to Part A and that a further answering affidavit should be filed to Part B.
- [57] It is my view that the applicants, being the authors of the notice of motion, should stand or fall by their notice and the directives contained therein.
- [58] The court was referred to *Olgar v Minister of Safety and Security and Another*⁷ where it was held that a Notice filed out of time was an irregular step and, although the applicant in that matter, did not seek condonation in respect to such late filing, the first respondent could simply not have ignored the notice, but should have brought an application to set it aside.
- [59] In *Gibson & Jones (Pty) Ltd v Smith*⁸ the court held that the late delivery of a Notice of Intention to Oppose was an irregular proceeding which the plaintiff was not entitled to treat as a nullity. The correct procedure was first to set aside the irregular proceedings.

⁷ 2012 (4) SA 127 ECG

⁸ 1952 (4) SA 37 (T)//1952 (4) TPD 87

- [60] By applying the same principle to the matter before me, the applicants should not have ignored the second Notice of Intention to Oppose and second answering affidavit filed by the respondents and then only object thereto on the day of the proceedings. The Notice of Intention to Oppose to Part B was served on 17 April 2023 and the applicants elected to except same.
- [61] Mr. Klopper submitted that should the court accept the answering affidavit to Part B then the application will have to be postponed enabling the applicants the opportunity to reply thereto.
- [62] For proper adjudication of the matter and in the interest of the parties, I am inclined to allow the further answering affidavit filed, subject to the applicants' replicating thereto.
- [63] The court requested short heads of argument and case law on the objection in *in limine* raised by the applicants. The respondents added to its heads of argument firstly, that this court does not have the jurisdiction to hear the application considering the judgment granted by the honourable Justice Kumalo dismissing the entire application. Secondly, given the judgment referred to, this application has been finalised and is *res judicata*.
- [64] I do not intend to deal with the merits of Part B of this application as the court was not addressed on the merits. The applicants and respondents addressed the court only on the objection raised by the applicants, which I have dealt with *supra*.
- [65] All that remains is the issue of costs.
- [66] The postponement of the relief sought in Part B of this application is the result of an objection raised *in limine* by the applicants.

[67] In my view, the applicants were the primary cause of the matter having to be postponed and therefore have to pay the costs occasioned as a result of the postponement.

ORDER:

[68] In the result the following order is made:

1. The relief sought in **Part B** of the application is postponed *sine die*;
2. The respondents' answering affidavit dated 5 May 2023, opposing the relief sought in Part B of the application, is hereby allowed;
3. The applicants are granted leave to file their replying affidavit to the respondents' answering affidavit referred to in paragraph 2 above, within 15 days of date of this order;
4. The applicants are ordered to pay the respondents' costs occasioned by the postponement.

L BADENHORST

Acting Judge of the High Court
Gauteng Division, Pretoria

Counsel for applicants: Adv JA Klopper
Instructed by: Cavanagh & Richards Inc

Counsel for 2nd to 14th respondents: Adv SM van Vuren
Instructed by: Neethling & Vosloo Inc

Date of Hearing: 23 May 2023

Judgment delivered: 27 June 2023