



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

**IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, THOHOYANDOU**

**CASE NUMBER: 1055/2020**

**18/2/2020**

<b>MUDZANANI NDITSHENI NELSON</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>MUDZANANI THINAWANGA CHRISTINAH</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>MUDZANANI TAKALANI JUSTICE</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>AND</b>	
<b>MINISTER OF EDUCATION</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>MEMBERS OF THE EXECUTIVE COUNCIL (MEC) LIMPOPO PROVINCIAL DEPARTMENT OF EDUCATION</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>SGB (SCHOOL GOVERNING BODY) LUVHENGO SECONDARY SCHOOL</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>RAVHUENZWO THIFHELIMBILU FLORENCE</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>LUVHENGO SECONDARY SCHOOL</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>LIMPOPO PROVINCIAL DEPARTMENT OF EDUCATION</b>	<b>6<sup>TH</sup> RESPONDENT</b>

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**JUDGMENT**

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## **AML PHATUDI J**

[1] The applicant seeks an order on an extremely urgent basis to find the Minister of Education (first respondent), MEC Limpopo Local Provincial Department of Education (second respondent) and Ravhuanzwo Thifhelimbilu Florence (fourth respondent) guilty of contempt of court and they be imprisoned for a period of 6 six months.

[2] The respondents, through the office of the state attorney, opposes the application. In the answering affidavit deposed to by Dr Nthambeleni Gerson Rambiyana (Rambiyana), indicates that he/she deposes to the affidavit on behalf of the first, second, fourth, fifth and sixth Respondents.

[3] At the commencement of the hearing, the respondents applied from the bar condonation for the late filing of their answering affidavit. The applicants did not oppose the application but for costs. I granted condonation for the late filing of the respondents' answering affidavit with costs. Subsequent thereto, the applicants sought postponement to afford them time to file their replying affidavit. By agreement between the parties, periods for filing certain documents, coupled with the hearing date, were set and ordered. I rescheduled the hearing of the application to 04 February 2020.

[4] On the hearing day, the applicants raised certain points *in limine*. The parties agreed that the points raised be dealt with first. The points in limine are: (i) no confirmatory affidavit filed by 1, 2 and 4 respondents or the power of attorney confirming the authority of the deponent; (ii) reference to 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents in the answering affidavit and yet not being legally represented by State Attorney and (iii) non-compliance with Regulation 4(1) of the Justices of the Peace and

Commissioners of Oaths Act (Act 16 of 1963). I now deal with the points in limine:

**Lack of confirmatory affidavit or power of attorney by 1, 2 and 4 respondents.**

[5] The applicants contends that the 1, 2 and 4 respondents did not associate themselves with the averments alluded to by the deponent. Counsel submits that the deponent's appointments as the District Director at Department of Education, Vhembe East District does not give him authority or entitlement to depose to the answering affidavit on behalf of the first, second and fourth respondents respectively. He further submits that the deponent attaches nothing to support his alleged authority.

[6] The applicants' counsel submits further that the deponent cannot be duly authorised by virtue of his position at the District Director as the Department of Education because the first and second respondents are Government institutions.

[7] The respondents' counsel submits that such authority is not required. The state attorney has such authority. The power of attorney and/or authority to depose to the affidavit and/or confirmatory affidavit confirming the correctness of the answering affidavit is not required.

[8] The first and second respondents are the Departments of Education headed by the Minister (National) and MEC (provincial) respectively. The State Attorney represents the government departments in all their litigious work. These government offices need not file powers of attorney when instructing State attorney. The fourth respondent is the principal of the school. He/she is the employee of the Department of Education and enjoys the immunity the government officials enjoy. The Minister and

MEC are not cited in their personal capacity. There are no averments of the contempt of court in the applicants' founding affidavit of the minister or MEC in their personal capacities.

[9] The Supreme Court of Appeal in *Ganes and Another v Telekom Namibia LTD* 2004 (3) SA 615 (SCA) held that

"The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised".

In *Eskom v Soweto City Council* 1992 (2) SA 703 (W), the court held that

"There is no need that any other person, whether he/she be a witnesses or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether the attorney acts with authority.

[10] The state attorney is authorised to represent all matters brought against the government departments, including officers occupying offices of authority. The defence proceedings and its prosecution by the State Attorney need not be authorised by the ministers and or MECs responsible for Government Departments concerned nor file any confirmatory affidavit in relation to the founding affidavit deposed to on its behalf. This point in limine has no merit and falls to be dismissed.

**(ii) Reference to 3, 5 and 6 respondents in the answering affidavit and yet not being legally represented by State Attorney**

[11] The applicants contend that the state does not hold instructions to represent 3, 5 and 6 respondents. Counsel for the respondents concedes that he does not have instructions to represent the third and fifth respondents. This point needs no further determination due to the respondents' legal representative's concession safe to mention that there is no order sought against them. In the absence of the applicants

seeking any order of contempt of court against these respondents, bothers one as to why raise this *point in limine*. It is moot. This *point in limine* falls to be struck off.

**Non-compliant with Regulation 4(1) of the Justices of the Peace and Commissioners of Oaths Act (Act 16 of 1963).**

[12] The applicants contend that the respondents' answering affidavit falls short of compliance with Regulation 4(1) in that there is no date and place where the affidavit was commissioned in the commissioner's certificate. The applicant's counsel refers to the regulation and its stipulation. It reads "Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledge that the he knows and understand that contents of the declaration and shall state the manner, place and date of taking the declaration."

[13] Let me first indicate that the commissioner of oaths who commissioned the affidavit is an attorney at law practicing as such under the name and style: Shadrack Mpandeli Attorneys. The attorney wrote his full names, business address, his designation and the place in manuscript. The commissioner affixed a rubber stamp depicting both the physical and postal addresses his/her office. The rubber stamp has a date.

[14] The commissioner's certificate reads:

"I hereby certify that the deponent has acknowledged that he knows and understand the contents of this affidavit, that he has no objection to the taking of the prescribed oath and that he considers this oath to be binding on his conscience and after he uttered the following words "I swear that the contents of this declaration are true, so help me God".

[15] The respondents' counsel submits that such authority is not required. The state attorney has such authority. The power of attorney and/or authority to depose to the affidavit and/or confirmatory affidavit confirming the correctness of the answering affidavit is not required.

[16] In *Lohrman v Vaal Ontwikkeling* 1979 (3) SA 391 (T), a full bench of the then Transvaal Provincial Division (now Gauteng Division- Pretoria) dealt with the question of substantial compliance with the regulations governing attestation of affidavits. Nestadt J penned that "I should have mentioned that the commissioner is described as being a practising attorney ... it seems to me that where an attorney (who is an officer of this Court) describes the statement as being a "beedigde verklaring", it can and must be accepted that it was sworn to on oath. To require that, in addition to these words, there should again, in conjunction with "geteken", be added the word "beedig", would be to insist on an unnecessary duplication of allegations. The law is settled on the requirements as contained in regulations 1, 2, 3 and 4 are not peremptory but merely directory. (Emphasis added). The Court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proven or not.

[17] In *Ladybrand Hotels v Stellenbosch Farmers* 1974 (1) SA 490 (O) at 493C, the admissibility of an affidavit was attacked on the basis that the certification did not state that the deponent had signed it in the presence of the commissioner of oaths. The court held that the maxim *omnia praesumuntur rite essa acta* applied. In any event, the court held that if the affidavit was defective, it should be condoned. Of importance is whether there has been substantial compliance or not."

[18] In *ABSA Bank Limited v Botha NO and Others* 2013 (5) SA 563 (GNP), where an objection was lodged in terms of rule 30 of the Uniform Rules of Court, to the use of the incorrect pronoun "he or she" by a commissioner of oaths when attesting a founding affidavit in a summary judgment application. In that application, it was submitted that "specific provision is made in the affidavit for an election between "he/she". In the founding affidavit, the deponent specifically declared that she is an adult female whilst the attestation clause omits to identify the gender of the deponent. It was submitted that this omission casts serious doubt on whether or not the document was commissioned properly in the presence of a Commissioner of Oaths in compliance with the relevant legislation and regulations. The commissioner was not an attorney. Kathree-Setiloane J exercised her judicial discretion in refusing to allow the affidavit, which in her view, did not comply with the Regulations for Commissioners of Oaths. She penned:

"... Subject to whether there has been substantial compliance with the Regulations, the court has a discretion to refuse an affidavit, which does not comply with the Regulations. Should a commissioner of oaths not certify that the affidavit had been sworn to or affirmed by the deponent, the court will be reluctant to apply the maxim *omnia praesumuntur rite essa acta donec probetur in contrarium*, also known as the 'presumption of regularity'.

[19] In this matter, there is no evidence that the founding affidavit was not sworn to properly before a commissioner except for an allegation that the omission in indicating the place and date of taking the declaration renders the answering affidavit inadmissible. An attorney who is the officer of this court, commissioned the deponent's affidavit. The rubber stamp that bears the attorney's name, office address (both

physical and postal) and date upon which the affidavit was commissioned, appears clearly under the attestation of the commissioner.

[20] It is clear, from the authorities cited above, that the affidavit commissioned by an attorney should be condoned unless there is evidence of transgression of the Act that cannot be condoned.

[21] The commissioner complied with the provisions of the Act and regulations to the letter. The attorney's stamp shows the date and place where the affidavit was commissioned. In my view, the shortfalls of not including the date and place where the affidavit was commissioned at in the certificate cannot nullify the affidavit. In casu, the attorney's stamp bears the date and place where the commissioner commissioned the affidavit. The settled law stipulate: The Court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proven or not. The commissioner, in my view, complied substantially with the Act and Regulations to the letter. This *point in limine* as well falls to be dismissed.

[22] Based on the principle set out in Biowatch case, the applicants, 1, 2 and 3 are natural persons trying to enforce their Children's rights to basic education, being the right entrenched in the Bill of Rights. Mulcting them with costs may instil a chilling effect to litigation.

[23] I, in the result, make the following order

### **Order**

23.1 Condonation for the late filing of the replying affidavit is upheld with no order as to costs

23.2 First point in limine is dismissed with no order as to costs

23.3 Second point in limine is struck off the roll with no order as to costs

23.4 Third point in limine is dismissed with no order as to costs

23.5 The matter is postponed sine die.

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**AML PHATUDI**

**JUDGE OF THE HIGH COURT**