

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2023/00352

In the matter between:

MARTHA MITA PAULA HAWANGA

FIRST APPLICANT

**IMANUEL HAWANGA
APPLICANT**

SECOND

and

**THE MUNICIPAL COUNCIL FOR
THE CITY OF WINDHOEK**

RESPONDENT

Neutral citation: *Hawanga v The Municipal Council for the City of Windhoek*
(HC-MD-CIV-MOT-GEN-2023/00352) [2024] NAHCMD 2
(12 January 2024)

Coram: SCHIMMING-CHASE J

Heard: 5 December 2023

Delivered: 12 January 2024

Flynote: Practice – Applications – Return date of Rule Nisi issued

pendente lite – Purpose to enable applicant to institute proceedings – Delay by applicant in instituting proceedings leading to rule nisi granted pendente lite being discharged.

Practice – Applications – Authority – Institution or opposition of application to be authorised – Distinction drawn between where authority is alleged in the papers, but challenged, and where no allegation whatsoever is made regarding authority – Whether a dispute is authorised before court is a serious matter – Respondent failed to make any averment that the deponent is duly authorised – The applicants' point in limine upheld.

Summary: The applicants who are married to each other, applied to this court on an urgent basis seeking a rule nisi to operate as an interim interdict, essentially restoring electricity and water supply, and prohibiting the respondent from disconnecting water and electricity supply pending finalisation of an action to be instituted by the applicants against the respondent. The rule nisi was granted on 7 August 2023 and extended to enable further filing of papers. This is the return date of the rule nisi.

The applicants raised a point in limine that the deponent to the respondent's answering papers failed to allege and prove authority to oppose the relief sought. The respondent argued that by virtue of its legal practitioner entering an appearance, authority is derived from such opposition.

The respondent also raised a point in limine arguing that the applicants failed to institute any form of action or proceeding, and as a result, the relief sought was incompetent.

Held that, it is the institution (or opposition of proceedings) that must be authorised. Where a deponent deposes to an affidavit on behalf of an artificial person, such deponent must state that he or she has the necessary authority to bring (or oppose) the application, which would constitute the minimum proof of authorisation, and should there be any doubt of such authorisation, a resolution

may be attached by means of an affidavit, which resolution may be taken retrospectively.

Held further that, the issue regarding authority is a serious matter and the court must know, before it lends its processes, that the proceedings before it are properly authorised. The respondent failed, despite same being pertinently raised, to file any form of documentation or resolution showing authority to oppose the application. Respondent's answering affidavit is accordingly struck.

Held further that, inherent in an order granted pendente lite is that an applicant shows its bona fides by instituting action as soon as possible. There is no reason proffered by the applicants as to why these proceedings have not been instituted.

Held further that, the rule nisi issued on 7 August 2023 is discharged.

ORDER

1. The rule nisi issued on 7 August 2023 is hereby discharged.
 2. Each party must pay their own costs.
 3. The matter is removed from the roll and regarded as finalised.
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JUDGMENT

SCHIMMING-CHASE J:

[1] This is the return date of a rule nisi, operating as an interim interdict.

[2] On 7 August 2023, this court made an order hearing the applicants' case as urgent, and called upon the respondent to show cause why, pending the institution and finalisation of an action to be instituted by the applicants against the respondent with respect to recalculation and rectification of the applicants' rates and taxes as reflected on their accounts/ statements for the immovable property: Erf No 869 37A Garibes Street ("the property"), the following order should not be granted:

2.1 that the respondent be ordered to immediately restore/reconnect or cause to be restored/reconnected electricity to the applicants' electric metre at the property;

2.2 that the respondent be ordered to immediately restore/reconnect water supply to the applicants' property;

2.3 that the respondent be interdicted and restrained from disconnecting the water and or electricity supply;

2.4 that the respondent be ordered to cease and desist from demanding payment of rates and taxes in respect of the applicants' account number 1277568;

2.5 that the respondent pay the applicant's costs of suit on a scale as between attorney and client.

(The orders set out above operated as an interim interdict pending the return date).

[3] After hearing this matter as one of urgency on 7 August 2023, the court granted the rule nisi and directed the parties to exchange affidavits and deliver heads of argument in respect of the rule nisi return date. The rule nisi issued on 7 August 2023 was extended to 16 October 2023, and then to 5 December

2023, due to the respondent not filing papers on time. Condonation for the late filing of the answering and replying papers was granted for these purposes.

[4] The applicants are Martha and Imanuel Hawanga, who are married to each other and who reside at the property which is the subject-matter of this application.

[5] The respondent is the Municipal Council for the City of Windhoek, which is responsible for, inter alia, the determination and regulation of the property rates and taxes, charges, fees and other moneys payable in respect of services as set out in the Local Authorities Act, No 23 of 1992. For ease of reference, I will refer to the respondent as 'the City of Windhoek'.

[6] On 4 August 2023, the applicants lodged an application on an urgent basis, seeking inter alia the rule nisi that was eventually issued.

[7] In support of the application, the first applicant, Mrs Hawanga, deposed to the founding affidavit on behalf of the applicants. In giving a factual background of the dispute, Mrs Hawanga averred that the property was initially owned as one undivided property registered under scheme name Hafeni Village Court, but was divided, after a participation quota was sought in 2019, into two separate units, namely, units 37A and 37B.

[8] During 2019, the property (unit 37A) was sold to the applicants, which they took possession of in August 2019. It appears that unit 37B is being occupied by third parties, who have not been joined to these proceedings, and despite the separation of the units 37A and 37B, it is alleged by the applicants that charges on the rates and taxes account have not been separated by the City of Windhoek, resulting in the aforesaid account being availed to both units and charges being credited to the aforesaid account for both units.

[9] It is the applicants' case that because their rates and taxes are charged together with that of their neighbours' of unit 37B, the amounts so charged for the applicants are unascertainable and until the separation is made and the applicants can ascertain their rates and taxes as per their property, they cannot make payment thereon.

[10] What gave rise to the urgent proceedings, is that on 3 August 2023, Mrs Hawanga allegedly awoke to the electricity and water supply to the property being cut off by the City of Windhoek, which appears to be a regular occurrence since 2021. Mrs Hawanga stated that during 2021 she received a statement of account from the City of Windhoek wherein it reflected that there is an arrears amount on the rates and taxes account in the sum of N\$170 000, and by November 2022 the amount had apparently increased to N\$183 087,85, which had been backdated to a period prior to the purchase of the property in 2019. According to Mrs Hawanga, the apparent arrears amount also included the rates and taxes of unit 37B.

[11] She requested a rectification and recalculation of the rates and taxes before she made any payment arrangements as she could not agree to make payments on 'incorrect' amounts. The reason for this is because Mrs Hawanga had been making payments on the rates and taxes account and these payments were apparently not reflected on the statement issued by the City of Windhoek. I hasten to add that the applicants made it categorically clear that they have no intention to evade their payment obligations, but merely that they would make payment as soon as they are able to ascertain their portion to be paid on the rates and taxes account.

[12] It was intimated by Mrs Hawanga that since January 2022, she has corresponded with the City of Windhoek to address this issue to no avail, but she remains steadfast that the arrear rates and taxes account does not reflect the correct balance, which is currently at the balance of N\$66 207,53.

[13] Notwithstanding the applicants' payments, it was Mrs Hawanga's evidence that given that the rates and taxes account of the two units are not separated and given that her neighbours at unit 37B apparently do not make any payment consistently, the unpaid amounts reflected on the rates and taxes account are exorbitant. She stated that this prejudices the applicants as they are unable to ascertain their portion of the moneys owing to the City of Windhoek, who fails to take any action to rectify the same, save for regularly disconnecting the applicants' water and electricity supply at the property.

[14] I pause here to observe that Mrs Hawanga made bold assertions regarding her neighbours' apparent failure to make payment on the rates and taxes account without firstly, providing the neighbours an opportunity to be granted audi having failed to join them to these proceedings and, secondly, failing to provide this court with any evidence to that effect. I say no further on this point.

[15] The City of Windhoek delivered answering papers, and the applicants replying papers. The applicants take the point in limine that the deponent on behalf of the City of Windhoek, does not have the necessary authority to oppose the applicants' relief. I deal with this point in limine.

[16] The answering affidavit by the City of Windhoek was deposed to at length by its purported acting Chief Executive Officer, Mr Faniel Ilukena Maanda. As regards his authority to oppose the applicants' relief, Mr Maanda stated that he was appointed as the acting Chief Executive Officer of the City of Windhoek under s 27(1)(a)(i) of the Local Authorities Act 23 of 1992 and, further, stated that he deposed to the affidavit, seemingly, by virtue of his aforesaid appointment. No further allegations were made in respect of his authority to depose to the affidavit, or, more importantly, his authority to oppose the relief sought on behalf of the City of Windhoek.

[17] In reply, the applicants took issue that Mr Maanda did not have the

necessary authority to oppose the relief sought by the applicants and it was contended that he failed to make the necessary averments to establish authority and to provide proof thereof.

[18] Ms Kahengombe, appearing for the City of Windhoek, argued that the deponent does not require authority to depose to an affidavit due to his position as CEO. She further advanced an argument that authority is established by the mere fact that she – the City of Windhoek’s legal practitioner – entered an appearance on its behalf. No authority was cited to this court for the aforementioned proposition.

[19] The issue of authority has been tried and tested by our courts and the principles related thereto are now trite. It is the institution (or opposition) of proceedings that must be authorised.¹

[20] In *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*² the issue was discussed and it was held that where a natural person is the applicant and a notice of motion is issued in the name of such natural person purported to be signed by an attorney, the court will presume that the attorney is duly authorised to institute the proceedings, in the absence of anything to show that the application is not in fact authorised. The court had to consider whether the deponent to the papers had the necessary authority to do so on behalf of an artificial person and held at 351G-352A as follows:

‘There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so ... This seems to me to be a salutary rule and one which should apply also

¹ *Minister of Safety and Security v Inyemba* (HC-MD-CIV-MOT-GEN-2019/00247) [2020] NAHCMD 170 (13 May 2020) paras 16 and 18-29.

² *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) 351H-352C cited with approval in *Agricultural Bank of Namibia v Kapolo* (HC-MD-LAB-MOT-2023/00140) [2023] NALCMD 29 (6 July 2023).

to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant is duly resolved to institute the proceedings and that the proceedings are instituted at this instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution, but I do not consider that that form is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf.’ (Emphasis added.)

[21] The court in *Mall (Cape)* found that the applicant had placed sufficient evidence before it as regards authority, given that the deponent averred that he was ‘duly authorised to make this affidavit’. The court agreed with counsel that the word ‘duly’ conferred authority upon the deponent, notwithstanding, that the issue of authority had not been raised by the respondent, on the papers.

[22] Damaseb JP in *Purity Manganese (Pty) Ltd v Otjozundu Mining (Pty) Ltd*³ held that –

‘It is now trite that the applicant need not do more in the founding affidavit than allege that authorisation has been granted. Where that is alleged, it is open to the respondent to challenge the averments regarding authorisation. When the challenge to the authority is a weak one, a minimum of evidence will suffice to establish such authority.’

[23] To my mind, Ms Kahengombe’s submission that the City of Windhoek had the necessary authority to oppose the relief sought by the mere fact that she entered an appearance on behalf of the City of Windhoek, stands to be rejected. I say so on the basis that where a deponent makes an affidavit on behalf of an artificial person, such deponent must state that he or she has the

³ *Purity Manganese (Pty) Ltd v Otjozundu Mining (Pty) Ltd* 2011 NR 289 (HC).

necessary authority to bring (or oppose) the application, which would constitute the minimum proof of authority, and should there be any doubt of such authority, a resolution may be attached by means of an affidavit, which resolution may be taken retrospectively.⁴ No application was made to deliver a further affidavit dealing with this issue.

[24] Prinsloo J in *Boabab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd*⁵ held that a distinction must be drawn between matters where authority to launch the application is averred in the founding papers and objected to by the opposing party and the matters whereby no allegations were made whatsoever regarding authority. In this regard, the learned Judge placed reliance on the dictum by Masuku J in *Standard Bank Namibia Limited v Nekwaya*⁶ where it was held that

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[11] It is a matter of note that the applicant did not address this issue at all in its founding affidavit and thus could not, in reply, place proof of the authority as no authority whatsoever, was alleged. It is a trite principle of law that a party stands or falls on its founding affidavit. In the instant case, the applicant did not make out a case for the authority in the founding papers, nor did or could it do so in reply as that opportunity never came.' (Emphasis supplied.)

[25] It was further held at paras 19-20 that:

[19] Once this is not stated in the founding affidavit, the only conclusion that may be reached is that the proceedings are not properly authorised and that inevitably, is the applicant's fate in these proceedings. It is accordingly unnecessary to consider the other issues raised by the 1st respondent in his notice.

⁴ *Namibia Protection Services (Pty) Ltd v Hainghumbi* (HC-MD-LAB APP-AAA-2021/00046) [2022] NALCMD 15 (23 March 2022) at par 24 and 29.

⁵ *Boabab Capital (Pty) Ltd v Shaziza Auto One (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/02613) [2020] NAHCMD 290 (10 July 2020) para 55.

⁶ *Standard Bank Namibia Limited v Nekwaya* (HC-MD-MOT-GEN-2020/00089) [2020] NAHCMD 122 (26 March 2020) para 11.

[20] The learned authors Herbstein & Van Winsen⁷ say, ‘The necessary allegations must appear in the supporting affidavits, for the court will not, save in exceptional circumstances, allow the applicant to make or supplement a case in a replying affidavit and will order any matter appearing in it that should have been in the supporting affidavits to be struck out.’ This is the law even in this Republic as propounded in what has become known as the *Stipp* principle.’

[26] The present instance falls squarely within the four corners of what is expressed by the learned Judge in the *Nekwaya* matter in that Mr Maanda failed to make any averment that he has the necessary authority to oppose the application by the applicants. It must not be forgotten that an issue regarding authority is a serious matter and ‘the court must know, before it lends its processes, that the proceedings before it are properly authorised. This is done by a statement on oath, where applicable, with evidence thereof that the person who institutes or defends the proceedings is properly authorised and is not on a reckless, self-serving frolic of his or her own.’⁸

[27] In the end, I am bound to uphold the applicants’ point in limine that Mr Maanda has failed to evince that he has the necessary authority to oppose the relief sought and as such, the City of Windhoek’s answering affidavit filed on 22 September 2023 is accordingly struck.

[28] I now proceed to consider the applicants’ founding and replying affidavits and the legal arguments presented by both parties in determining this matter.

[29] I am alive to the fact that this court is only burdened to either confirm or discharge the rule nisi issued on 7 August 2023 and that the City of Windhoek is burdened to show cause why the aforesaid rule nisi should not be made final.⁹

⁷ Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5th ed vol 1 Juta & Co 2009 at 439-440.

⁸ *Supra* fn 6.

⁹ *Theron v The Village Council of Stampriet* (HC-MD-CIV-MOT-GEN-2020/00028) [2020] NAHCMD 129 (22 April 2020) para 2.

[30] Ms Kahengombe raised a legal point and submitted that the applicants' relief sought is incompetent given that the applicants have failed to institute any proceeding either as part B to this application, or by means of action proceedings, that would inter alia deal with the recalculation and rectification of the applicant's rates and taxes as reflected in their statements. In this regard, it was submitted that the relief sought cannot stand alone without there being an action or motion proceeding before this court dealing with the merits of the case.

[31] Ms Amupolo on behalf of the applicants submitted 'there is nothing in law preventing this [c]ourt from granting an order for the relief sought merely on the grounds that the proceedings intended to be instituted in respect of the applicants' rates and taxes account have yet to be instituted.' It was submitted further that the court enjoys discretion to grant an order limiting the operation of the interdict and that such an order can be made by this court, thereby allowing the applicants to institute these proceedings.

[32] If I understand Ms Amupolo's argument correctly, it appears that the applicants contend that regardless of whether an action or proceeding is instituted or not, the court has discretion to confirm the rule nisi and to place a time limit when the applicants should institute the action.

[33] To consider the applicants' argument, I consider that the rule nisi issued on 7 August 2023 (which was extended and heard eventually on 5 December 2023), granted interim relief pending the return date of the rule nisi for purposes of instituting action against the City. Some four months have passed and absolutely nothing has been done by the applicants.

[34] The motivation for granting the rule nisi was that proceedings would be instituted for the recalculation and rectification of the applicants' rates and taxes as reflected on their account statements in relation to the property. 'Inherent in

an order granted *pendente lite* is that an applicant show[s] its *bona fides* by instituting action as soon as possible.¹⁰ Presently, there are no reasons proffered by the applicants as to why these proceedings have not been instituted.

[35] In *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd*¹¹ the court granted an interdict *pendente lite* and despite the lapse of some five months, the applicant had failed to issue summons to institute the action. The court discharged the rule nisi and held that 'there is such a thing as the tyranny of litigation and a [c]ourt of law should not allow a party to drag out proceedings unduly ... an interdict *pendente lite* which from its very nature, requires the maximum expedition on the part of an applicant.'

[36] It cannot be gainsaid that the dictum in *Juta* supra is applicable in this instance. The applicants sought this court's assistance to hear their plea on an urgent basis and this court came to their assistance. In the premises, it is my considered view that the rule nisi cannot be confirmed and must accordingly be discharged.

[37] Before I conclude, it would be remiss of me not to mention what I deem to be unbecoming conduct of the legal practitioners for the parties as officers of this court. It is trite that legal practitioners are duty bound to act, at all times, in the best interest of justice and to assist the court.

[38] Neither counsel for the applicants nor the City of Windhoek presented the court with any authority in respect of the points in limine raised by the City of Windhoek, specifically that the relief sought by the applicants cannot stand alone without the institution of an action before this court. Thus, leaving it up to this court to hunt and gather relevant authority to assist it in determining this

¹⁰ *Jantjies v Jantjies and Others* 2001 NR 26 (HC) para 30.

¹¹ *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C) cited with approval in *Jantjies* supra fn 10.

matter. I concur with the remarks made in *Development Bank of Namibia v Vero Group CC*¹² wherein Masuku J succinctly stated –

‘To leave the court in the dense forest of authority to hunt and find the relevant ones is clearly irresponsible and is to be deprecated. In future, where this scenario repeats itself, I will send the matter back to the legal practitioners involved for them to perform their legal and ethical duty to the court.’

[39] Albeit in a different context where counsel withheld presenting authority from the court, I find the dictum by the Supreme Court in *Gariseb v Ulimite Safaris (Pty) Ltd*¹³ quite fitting in the present instance, which dictum reads as follows:

‘Counsel has a duty both to the client and the court. The latter duty compels him to cite to the court all authorities that are relevant to the dispute – both those that favour his client and those that favour the opponent. In the present case, counsel failed in his duty to the court, resulting in an erroneous judgment being entered against the appellant. Anyone who takes the trouble to monitor the daily rolls published by the Registrar of the High Court on e-justice will notice that judges in the action stream on average manage not less than 200 cases and that the volume of interlocutory activity is frightfully high. Legal practitioners must therefore offer assistance to the managing judges by citing all relevant authorities. In the present case the failure to do so has resulted in costs being unnecessarily incurred and finalisation of the matter being duly prolonged.’ (Emphasis added)

[40] As regards costs, the applicants submitted that should they be successful, an order for costs should be made in their favour. Should the applicants not be successful, it was submitted that each party must pay their own costs. No submissions were made on behalf of City of Windhoek in respect of costs.

¹² *Development Bank of Namibia v Vero Group CC* (HC-MD-CIV-CON-2021/02716) [2022] NAHCMD 50 (11 February 2022) para 21.

¹³ *Gariseb v Ulimite Safaris (Pty) Ltd* 2020 (3) NR 786 (SC) at 791.

[41] The principles relating to costs are trite and denote that the successful litigant must be indemnified with costs to the discretion of the court. As both parties are essentially equally successful in upholding their respective points in limine, I do not see the need for either of the parties to be indemnified for their costs and I do not see the need for either of the parties to be burdened with a cost order. Therefore, each party shall pay its own costs in this matter.

[42] For the foregoing reasons, the following order is made:

1. The rule nisi issued on 7 August 2023 is hereby discharged.
2. Each party must pay their own costs.
3. The matter is removed from the roll and regarded as finalised.

E M SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANTS: M Amupolo
Of Jacobs Amupolo Lawyers & Conveyancers,
Windhoek

RESPONDENT: S Kahengombe
Of Kahengombe Law Chambers, Windhoek