

SOUTH AFRICA / JUDGMENT

Metsimaholo Local Municipality v Muller N.O and Others (2027/2020) [2021] ZAFSHC 33 (16 February 2021)

[2021] ZAFSHC 33

COURT

Free State High Court, Bloemfontein

BEFORE

Molitssoane, Opperman

CASE / FILE NUMBER

2027/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE PROVINCIAL DIVISION

Case

No.: 2027/2020

In

the matter between:

THE
METSIMAHOLO LOCAL MUNICIPALITY
Applicant[1]
and
HELGARDT
MULLER N.O.
1st
Respondent[2]
EHEILA
MARTINA HENDRIKA MULLER N.O.
2nd
Respondent
HELGARDT
MULLER N.O.
3rd
Respondent
THE
KRUGERSDORP BOEDELS EN TESTAMENT (PTY)LTD N.O.
4th
Respondent
REGISTRATION

NUMBER: 2015/168264/07
DULY REPRESENTED
BY MS CHANTE COETSEE
(The first to
fourth Respondents cited in their representative capacities
as the trustees
for the time being of the Lizelle Sake Trust with
IT No. 1342/1995)
THE
SHERIFF
SASOLBURG
5th
Respondent

Coram: Molitsoane,
J et
Opperman,
J
Date
of hearing: 1
February 2021

Delivered: The
judgment was handed down electronically by circulation to the
parties' legal representatives by email and released to
SAFLII
on 16 February 2021. The date and time for hand-down is deemed to 16
February 2021 at 15h00.

Summary: Review
– contract with municipality – joinder of provincial
executive and municipal manager
order
Having
considered the documents filed on record and having heard Counsel for

**the Applicant and the
Respondents:** IT

IS ORDERED THAT: 1.
Further
proceedings in the application are hereby stayed until the Applicant
have effected the joinder of the Member of the Executive

Council: Co-Operative Governance, Traditional Affairs and Human Settlements of
the Free State Province involved and the Municipal
Manager(s) at the
time the agreements were entered into and that are under review, as
Respondents in the application.
2.
Each
party will carry their own costs for the non-joinder proceedings.

JUDGMENT

INTRODUCTION

[1] The Applicant seeks a “self-review” or as was described by Counsel on their behalf;[3] a collateral, legality or reactive review. It wants to review and set aside its own decision and agreements[4] entered into between the Municipality and a Trust on the basis that the Municipality, as an organ of the State, can only act within the powers lawfully conferred on it.

[2] The embattled agreements were concluded in November 2013 and May 2015. The agreements were for the installation of engineering services in order to provide water and sewer systems to a township being developed that will bring much needed relief to thousands of people

deprived of this basic service.

[3] The matter is riddled with issues of law. The proceedings grinded to a halt at the issue of non-joinder that is intrinsically intertwined into the other issues. It is trite that the rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined.[5]

THE

ISSUES

[4] It is common cause that the agreements were concluded without a formal tender process in terms of the Supply Chain Policy of the Applicant and the subsequent amendment of the contract on 7 May 2015 was not done in compliance with the Municipal Management Act 56 of

2003. This was all done by the then Municipal Manager(s) and condoned by the Executive Authority of the Free State since the crux of the agreements were specifically incorporated into the proclamation of the Sasolburg Extension 81 Township: Proclamation 08 of 2015, Provincial Gazette 3 July 2015 as a condition of the establishment and execution of the townships.[6]

[5] The Notice of Motion prays for:

1. The condonation of the inordinate delay in bringing the matter on review;
2. Reviewing and setting aside the agreements concluded by the Applicant and the First to Fourth Respondents on 9 November 2013 and 7 May 2015;

3. Declaring the agreements in paragraph 2 invalid and ab initio void;
4. Directing the First to Fourth Respondents to repay all monies received by the Trust as result of the illegal contracts;
5. In the alternative to 4, declaring that the four Respondents are not entitled to receive further payment from the Applicant from the impugned contracts; and
6. Costs against the First to Fourth Respondents.

[6] The First to Fourth Respondents vehemently oppose the motion and in limine raised the point of non-joinder of the Executive of the Free State Province in their Heads of Argument.

[7] On the merits they attack the “extraordinary and shocking”

delay attendant on the institution of the review. They maintain that the agreements do not fall foul of the legality challenge given their genesis and context.

[8] Their further prayers are that should the court find merit in the legality challenge then the court should exercise its remedial powers under section 172(1)(b) of the Constitution and grant a just and equitable order by declaring the agreements invalid, the Trust to retain all payments under the interim arbitration award and the Trust’s counterclaim for unjustified enrichment be referred to trial, alternatively to be adjudicated in the existing arbitration proceedings coram Advocate Ploos van Amstel SC.

[9] The Applicant’s case stands and falls on the affidavit of one Mr Mathe[7] that was not present during the process that evolved into the agreements and is the attendance of Mr Molala (the then Municipal Manager) vital in the case. The hearsay-aspect of the Founding Affidavit is linked to the joinder issue.

[10] The agreements and subsequent project: Sasolburg Extension 81 was procured, approved and proclaimed in accordance with section 14(1) of the Orange Free State Township Ordinance 9 of 1969 by the MEC S.M Mlamleli.[8] The agreements derived their final force from the requirements embodied in the Ordinance and Regulations promulgated thereunder. The legality of the agreements had to be investigated by the Executive afore the promulgation; hence their crucial role, contribution and possible liability in the case. The development would have included 7000 residential units of which 3000 units would have been allocated for affordable housing.[9] The effect on the community is mammoth.

[11] The liability and condonation of the agreements circles bigger in that on 5 August 2016 an inauguration ceremony was held to proclaim the agreements and the services to the people that will follow. Present, among others, in condonation of the legality of the agreements were several dignitaries such as the Municipality’s Technical Director, the Municipality’s Executive Mayor, Mr Muller that represented the Trust, Mr J Vilakazi of Reyaakga Projects (Pty) Ltd and Mr Claassen from Ilifa that were subcontractors in the project. All and everybody were satisfied with the legality of the project. Mr Molala also attended and proclaimed the “illegal agreements” in public with much fanfare.

- [12] He as well as the Executive of the Free State Province are involved in one way or another in all the legal issues in casu. The initiation and consummation of the agreements, the delay in bringing of the review, the arbitration award, the alleged unjust enrichment, the repayment of monies; this to name but a few that links directly to the two parties. Any order by this court may become moot in their absence and adjudication almost impossible.

THE LAW

- [13] The audi alteram partem rule is a fundamental principle of our law which is enshrined under the Bill of Rights in the Constitution of the Republic of South Africa, 1996. Every entity involved in litigation is therefore entitled to be afforded a fair public hearing before a court if it has a dispute which can be resolved by the application of the law.

- [14] In Philippi Horticultural Area Food and Farming Campaign and Another v MEC for Local Government, Western Cape and Others 2020

- (3) SA 486 (WCC) it was stated that:

“[29] Our courts have also cautioned that an order ought not ordinarily to be granted where any other person's interests may be directly

affected without formal judicial notice of the proceedings having first been given to such other party. The reason for this, as was stated in Economic Freedom Fighters and Others v Speaker of the National Assembly and Others, is so that as a matter of fairness all substantially and directly interested parties may be heard before any order is made. Where an order may be binding on all parties whose interests its terms affect, and not just some of them, it may be mandatory for a party that institutes proceedings to join every other party that has a direct and substantial interest in the relief sought; and if the parties do not themselves raise a point of non-joinder when it is indicated, the court should do so mero motu” (Accentuation added)

- [15] In Economic Freedom Fighters and Others v Speaker of the National Assembly and Others (5554/2015)

- [2015] ZAWCHC 184; [2016] 1 All SA 520 (WCC) (8 December 2015) the obligation to safeguard justice was affirmed and the duty is on the court:

“[30]...It is thus mandatory for a party that institutes proceedings to join every other party that has what is called ‘a direct and substantial interest’ in the relief sought. If the parties do not themselves raise a point of non-joinder when it is indicated, the court should do so mero motu.” (Accentuation added)

- [16] It is not exceptional for non-joinder issues that are not at first realised to be raised at peculiar stages of a case and in non-conventional ways. The cases of Home Sites (Pty) Ltd v Senekal 1948 (3) SA 514 (A), Schroeder v Vakansieburo (Edms) Bpk 1970

- (3) SA 240 (T) and Toekies Butchery (Edms) Bpk en Andere v Stassen 1974 (4) SA 771 (T) are examples.

[17] The non-joinder of the Executive Authority of the Free State Province came to the fore in the Heads of Arguments of the First to Fourth Respondents and the joinder of the Municipal Manager, Mr Molala, was raised *mero moto* by the court during address by Counsel.

[18] The belated mention of the non-joinder was inevitable; if the Respondents did not do so the court was obliged to. Evidence adduced by the Applicant makes Mr Molala the central character and instigator of the agreements and the cause of action in the litigation. He, in fact, invited the First to Fourth Respondents to the contracts. The conduct by Mr Molala as alleged by the Applicant is of gross and severe maladministration when entering into the contracts and that “he was suspended by council and was investigated and brought before a disciplinary hearing for various counts of misconduct

including financial misconduct.”[10] He must be part of these proceedings and have his day in court. His absence leaves questions unanswered and the liability he faces is of some consequence. He, if the facts proffered by the Applicant is regarded, committed a constitutional crime; he is now the cause that thousands of people are and will be deprived of water and sewage services; basic human rights. He might be held liable for the damages suffered by the Respondents since their counter-claim is for unjustified enrichment.

[19] During August 2019 the Trust declared a dispute in terms of an arbitration award contained in the agreements. The Trust claimed from the Applicant an amount of R50 630 551.53. On 8 November 2019 an interim arbitration award was issued and signed and made an Order of this Court. The Applicant acknowledged its indebtedness to

the Trust for the water and sewer in the amount of R7 420 000.00 and to pay monthly instalments in the sum of R400 000.00. During February 2020 the Trust enforced the interim arbitration award and attached moveable assets of the Applicant for the payment of R7 420 000.00, hence the Sheriff, Sasolburg as the Fifth Respondent. Both the Municipal Manager(s) and the Executive Authority of the Free State in their condonation of the agreements and resultant arbitration stands to have an interest litigating the claim as it stands.

CONCLUSION

[20] The argument of Counsel for the Applicant that the non-joinder should have been pleaded and not raised in the Heads of Argument and the submission in court during the hearing that a court may not raise the issue of non-joinder *mero moto* is a fallacy and rejected. In holding that non-joinder must be pleaded, Counsel equated the plea of non-joinder to one of prescription. In so doing Counsel is not correct. The existing law above directs otherwise. While prescription must be specifically pleaded[11] *ex lege*, the same cannot be said of non-joinder as indicated above. Counsel for the First to Fourth Respondents wanted for the court to dismiss the application as a whole on the joinder conundrum. Such an order would be punitive rather than remedial. The proper administration of justice must prevail and the order be just and equitable.

[21] The parties will have to carry their own costs for the non-joinder debacle. The Respondents did not plea the issue timeously and the Applicant did not join the crucially relevant parties.

[22] ORDER

1. Further proceedings in the application are hereby stayed until the

Applicants have effected the joinder of the Member of the Executive Council: Co-Operative Governance, Traditional Affairs and Human

Settlements of the Free State Province involved and the Municipal Manager(s) at the time the agreements were entered into and that are under review, as Respondents in the application.

2. Each party will carry their own costs for the non-joinder proceedings.

M OPPERMAN, J

I concur

P MOLITSOANE, J

APPEARANCES

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ADVOCATE F BALOYI

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Ref: AJB/LM5398

- [1] A municipality established in terms of the Municipal Structures Act 117 of 1998 with its principal place of business in Sasolburg.
- [2] The Lizelle Business Trust referred to in the papers and with whom was contracted is represented by the First Respondent, Helgard Muller Senior N.O., E.M.H Muller N.O., Helgard Muller Junior N.O. and Chante Coetzee the Director of Krugersdorp Wills and Tax (Pty) Ltd (Previously known as Krugersdorp Boedels & Testamente (Pty) Ltd). The Fifth Respondent is the Sheriff, Sasolburg that did not join the litigation.
- [3] “Applicant’s Practise Note” at paragraph 4.
- [4] Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd [2019] ZACC 15.
- [5] Erasmus Superior Court Practice/Volume 2: Uniform Rules and Appendices/Part D Rules/D1 Uniform Rules of Court/Rules regulating the conduct of the proceedings of the several provincial and local divisions — GN R48 of 1965/Rules of court/10 Joinder of parties and causes of action at RS 1, 2016, D1123.
- [6] Annexure “L7” at page 129 (213) of the Court Bundle.
- [7] See “HEARSAY ASPECTS OF THE MUNICIPALITY’S FOUNDING AFFIDAVIT” from page 32(116) to page 35(119).
- [8] Court Bundle page 12(96) from paragraph 12.5 to 12.6.5.
- [9] Court Bundle page 18(102) paragraph 12.12.12.
- [10] Applicant’s Heads of Argument at paragraphs 43 and further.
- [11] Section 17 of the Prescription Act 68 of 1969: Prescription to be raised in Pleadings, Section “17(1) The Courts shall not of its own motion take notice of prescription; (2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.”
- [11] Section 17 of the Prescription Act 68 of 1969: Prescription to be raised in Pleadings,

Section “17(1) The Courts shall not of its own motion take notice of prescription;

- (2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.”
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