

SOUTH AFRICA / JUDGMENT

Netshivhulana v Mulaudzi (1005/2020) [2021] ZALMPTHC 8 (30 September 2021)

[2021] ZALMPTHC 8**COURT**

Limpopo High Court, Thohoyandou

BEFORE

M V Semenya

CASE / FILE NUMBER

1005/2020

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Source record**IN****THE HIGH COURT****OF SOUTH****AFRICA;****LIMPOPO****LOCAL DIVISION; THOHOYANDOU.****CASE****NO:1005/2020****In**

the matter between:

DAVHANA

ELIAS

NETSHIVHULANA APPLICANT

and

NKHANGWELENI

PRUDENCE

MULAUDZI RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and release on SAFLII. The date and time of the hand-down is deemed to be the 30 September 2021 at 10:00.

SEMENYA DJP.

- [1] The applicant in this matter filed and served the respondent with a notice of motion and a founding affidavit (the main application) seeking the order declaring that he was the lawful occupier of Erf Number: 210 Vuwani Location (property) prior to him being divorced from the respondent. He further sought compensation in the amount of R1 280 00 for the improvements that he had allegedly effected on the property on the grounds of undue enrichment.
- [2] The respondent filed her notice of intention to oppose and answering affidavit on the 17 and 27 August 2020 respectively. The respondent opposes the main application both on merits and has further raised points in limine. The first point in limine raised is that the relief sought by the applicant is of such a nature that it can only be determined by way of action proceedings. The second point in limine is that the applicant should have known better that a dispute of fact would arise. In the third instance, the respondent avers that it is common cause that the applicant is a partner in a polygamous marriage and that the applicant's three wives have direct and substantial interest in the outcome of the application and should have been joined as parties to the application.
- [3] In reply, the applicant conceded that the answering affidavit raised a serious dispute of fact. He has however denied that the said dispute of fact was foreseeable in view of the issues which were raised during divorce proceedings. In the present interlocutory application, the applicant seeks an order in terms of which the factual dispute as to whether the applicant has constructed the double story building on the respondent's property as a gift to the respondent is referred for oral evidence. Two of the points in limine raised in the interlocutory application by the respondent, namely that the notice of motion was not signed by the attorney or the applicant and that of [unprocedural] application was abandoned during argument. The arguments proceeded on the non-joinder of the applicant's three wives.
- [4] The three wives filed confirmatory affidavits in the main application in which they stated that they are aware of the application. All three wives confirmed that they were consulted, and have consented to the erection of the property. Each of the wives had a bedroom in the property and chose the curtains for those bedrooms. Having made their interests in the property clear, the three wives concluded by stating that they will abide by the decision of the court.
- [5] It is a well-established principle of law that a party who has, or may have a direct and substantial interest in any order the court might make in the proceedings or if such order cannot be carried into effect or sustained without prejudicing that party, that party should be joined to the proceedings, unless the court is satisfied that such right to be joined has been waived- see *Amalgamated Engineering Union v Minister of Labour*[1]. Both parties agree that the applicant's wives have a direct and substantial interest in the order that this court may make. This fact appears evidently and unequivocally in their confirmatory affidavit.

- [6] The question that remains to be answered is whether the wives have waived their rights to be joined as parties. It was contended on behalf of the applicant that each wife has expressly waived her right to be joined in the proceedings by stating that she will abide by the decision of this court. It was however argued on behalf of the respondent that the fact that the wives did not simply state that they will abide by the court's decision, but have instead went further to specify the interests which each hold in the property, is a clear indication that such rights have not been waived. It was held in *8TH Water Treatment (Pty) Ltd v Leslie*[2] that joinder can be ignored only if the interested party has unequivocally waived the right to be joined to the proceedings and has undertaken to be bound by the decision of the court.
- [7] The argument that the wives did not unequivocally waive their right to be joined is without merit. The words used by the wives, and upon which the respondent, were clearly intended to indicate the particular interest which each had in the property. Having done so, the wives proceeded to state that, despite the existence of that right, they are willing to abide by whatever decision this court will or may make without the necessity of joining the proceedings.
- [8] I am satisfied that the applicant's wives, though interested parties, have unequivocally waived their rights to join the proceedings. In the premises I make the following order:
- i. The point of law of non-joinder is dismissed with costs.

M V SEMENYA DEPUTY JUDGE PRESIDENT;

LIMPOPO LOCAL DIVISION;

THOHOYANDOU.

For the applicant: MATHIVHA

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Date heard: 14 September 2021

Date delivered: 30 September 2021.

[1] 1949

(3) SA 637 (A); *The Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA).

[2] 1993 (1) SA 47 (W)

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Prepared on 23 October 2026 · Esheria