

SOUTH AFRICA / JUDGMENT

Zeus Shuttles and Coaches (Pty) Ltd and Another v Mangaung Metropolitan Municipality (5090/2023) [2024] ZAFSHC 156 (23 May 2024) [2024] ZAFSHC 156

COURT

Free State High Court, Bloemfontein

BEFORE

Van Rhyn

CASE / FILE NUMBER

5090/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

CASE

No.:5090/2023

In

the matter between:

ZEUS

SHUTTLES AND COACHES (PTY) LTD

First

Applicant

LUNGI

AND SONS SERVICES (PTY) LIMITED

Second

applicant

and

MANGAUNG

METROPOLITAN

MUNICIPALITY

Respondent

JUDGMENT

BY: VAN RHYN, J

HEARD ON:

9 MAY 2024

DELIVERED ON: 23 MAY 2024

[1] This is an interlocutory application for the joinder of the respondent, Mangaung Metropolitan Municipality ("the Municipality") as the fourth respondent to the main pending proceedings (the "review proceedings"). The first applicant is Zeus Coaches (Pty) Ltd, a private company of Bloemfontein. The second applicant is Lungi and Sons Services (Pty) Limited, a company with its main place of business at Heidedal, Bloemfontein.

[2] In the review proceedings the applicants seek an order that the continued use by the Member of the Executive Council: Free State

Provincial Government: Department of Police, Roads and Transport (the "Department"), cited as the first respondent, of Interstate Bus Lines, cited as the second respondent, for the provision of subsidised road transport services to commuters in the Free State Province be declared unlawful in terms of the provisions of the Promotion of Administrative Justice Act[1] ("PAJA"). The applicants furthermore seeks and order that any existing contract concluded between the Department and Interstate Bus Lines for such services be struck down in terms of the provisions of section 8 of PAJA.

[3] Further declaratory relief, inter alia, compliance with section 2 and 3 of the Public Finance Management Act[2], read with section 2 of the Preferential Procurement Policy Framework Act[3] and section 217 of the Constitution, to facilitate an open tender process for the provision of subsidised road transportation services in the Free State Province, is sought by the applicants in the review proceedings. The review and setting aside of the existing contract is based on the contention that the Department has, for at least the last 23 years, concluded such agreements with only one service provider, Interstate Bus Lines.

[4] In summarising of the background facts, I make no finding in respect of the merits of the review application against the Department, Interstate Bus Lines, the Minister of Transport (cited as the third respondent) and the Minister of Finance (cited as the fourth respondent). It is solely stated in order to indicate the subject matter of the dispute between the applicants and the Municipality as well as the Department.

[5] The applicants each provides public transport services in the Free State Province. On 12 January 2023 the applicants addressed a letter (per email) to the Department with a request to implement the provisions of section 41 of the National Land Transport Act[4] (the "NLTA") which empowers contracting authorities to conclude negotiated contracts for purposes of economic empowerment of small operators

and/or previously disadvantaged persons. The applicants contend that they are registered, licenced and 100% black owned public transport service providers. However, notwithstanding the endeavour to phase out the previous system regarding public bus transportation in South Africa and the agreement to enter into interim contracts that would preserve operations with minimal disruption of commuter services, no competitive bidding processes have been embarked upon, at least within Bloemfontein.

[6] The applicants did not receive any reply to their request sent during January 2023 and subsequently instituted the review proceedings in an endeavour to obtain the Record of Decision ("ROD") the Department has to file in terms of Rule 53 of the Uniform Rules of Court. The applicants anticipated that the contents of the ROD would enable them to peruse the procurement processes followed by the Department, if any, since the interim contracts came to an end. Depending on what is revealed by perusing the ROD, the applicants would then reconsider and possibly supplement their grounds for review.

[7] The Department has since filed the ROD as it was compelled to do in terms of Rule 53. The Department has not provided the reasons for which Rule 53 caters and as yet it is unclear to the applicants what exactly the Department's reasons are for not awarding subsidised bus transportation contracts, compliant with section 217 of the Constitution and subservient legislation.

[8] According to the applicants, the ROD, revealed a stance on the part of the Department, and ostensibly the Minister of Transport as well, that they might be of the view that the fundamental reason why there has not been any compliance with the procurement legislation governing the awarding of State contracts is because of the Municipality's inaction.

[9] The applicants contend that the NLTA does not grant the Provincial Government the power to conclude new subsidised contracts as was the case with the Transitional Legislation. The NLTA provide for the national land transport system initiated by the National Land Transport Transition Act[5]. Section 40 of the NLTA (Chapter 5) which regulates the "Contracting of Public Transport Services", requires provinces and 'planning authorities' (a municipality is a planning authority in relation to planning functions) to take steps, as soon as possible after commencement of the NLTA, to 'integrate services subject to contracts in their areas' into the larger transport system.

[10] The municipal sphere of government has certain responsibilities pertaining to the development of a land transport policy and strategy

within its area based upon national and provincial guidelines, preparing transport plans, ensuring the implementation thereof,

monitoring its performance in achieving its goals and objectives and concluding subsidised service contracts, commercial service contracts and negotiated contracts contemplated in section 41(1) of the NLTA with operators for services within their areas.[6]

[11] In terms of the provisions of section 11(2) of the NLTA, the Minister of Transport may assign any function contemplated in subsection (1)(a) to a province or municipality (subject to certain provisions) and the MEC may assign any function contemplated in subsection (1)(b) to a municipality (subject to certain provisions). Any municipality may request the Minister or MEC to assign a function contemplated in subsection (1)(a) or (b) to it, subject to certain provisions, where such municipality has an acceptable integrated transport plan.

[12] The application for joinder is opposed by the Municipality on the basis that the relief sought by the applicant in the review proceedings concerns a declaration of unlawfulness of the contract between the Department and Interstate Bus Lines of which the Municipality is not a party to. It is contended that the Municipality has played no role in the decision to procure the services of Interstate Bus Lines and therefore has no direct and/or substantial interest in any order a court may make in the review proceedings. It is furthermore contended by the Municipality that even if it were to be accepted that, sometime in the unknown future, the Municipality may be the contracting authority for, inter alia, subsidised service contracts, such a future uncertain interest remains contingent upon the Minister assigning the contracting authority

function, in terms of the NLTA, to the Municipality.

[13] Where a party has a direct and substantial interest in any order a court may issue, or if such order cannot be sustained or carried into effect without prejudicing that party, the joinder of that party is necessary unless the court is satisfied that the party waived his or her right to be joined or agreed to be bound by the order.[7] The court has the inherent power to order the joinder of further parties in an action which has already begun in order to ensure that person's interest in the subject matter of the dispute, and whose rights may be affected by the judgment, are before court.

[14] What the ROD disclose is that on 9 March 2018 the Department informed Interstate Bus Lines that its vision is to fully restructure the bus transportation network and integrate the public transport as a whole by, inter alia, providing opportunities to smaller and emerging public transport operators. Reference is made to a "transformation process" which would commence on 1 April 2018 and Interstate Bus Lines was called upon to participate in whatever process the Department embarked upon.

[15] In further correspondence the Department informed Interstate Bus Lines and with reference to section 12(1) of the NLTA that "... in preparation of the introduction of new bus service (sic) which will be in partnership with Municipalities within your area of operation,

the Department is provisionally extending your contract for a period of 12 months with effect from 1 November 2018 ... ". On 1 October 2019 the Department again informed Interstate Bus Lines that the Municipality is in the process of finalising the development of an integrated public transport network and intends to implement Phase 1 during November 2019. Pursuant to the finalisation of the development of the proposed network for public transport, the Department was inclined to devolve the contracting service to the Municipality as prescribed by the Public Operations Grant Framework 2019/2020.

- [16] Appended to the Municipality's answering affidavit is a letter by the Minister of Transport, dated 8 February 2023 addressed to the MEC of the Department wherein reference is made to the implementation process and the necessity to comply with the prevailing legislation and support the overarching public transport policy. The Department is furthermore referred to the provisions of section 11(1)(c)(xxvi) of the NLTA which confers the powers to conclude new subsidised contracts to municipalities and the possibility that the Department may enter into an agreement with the Municipality for the joint exercise or performance of these powers and functions.
- [17] The correspondence between the Department and the Minister of Transport contained in the ROD indicates that the Department has been extending the current bus transport contracts with Interstate Bus Lines on a month- to- month basis since 1 November 2019, the reason being, the inaction on the part of the municipalities. It is incorrect that the review application merely concerns the agreement already concluded between the Department and Interstate Bus Lines. Apart from the declaratory relief that is sought and the striking down of any contract, the applicants furthermore seek an order in terms of which the Department is to embark upon a procurement process that is compliant with the relevant legislation.
- [18] The Department has not as yet revealed its stance in respect of main review application but based upon the contents of the documents contained in the ROD, the Department may very well indicate that it is now the responsibility of the Municipality to conclude such contracts, subject to a proper procurement process in future. In the event that the Department lays the blame for the inaction at the door of the Municipality, which at this stage seems quite possible, the Municipality ought to explain what its contribution to the implementation of the NLTA has been, where the process is currently, what still stands in the way of the transition and exactly what its response is to the finger pointing by the Minister and/or the Department regarding the delays caused by municipalities (in general) and whether any such delays can be attributed to the Municipality.
- [19] To adjudicate this matter it is necessary to consider the nature, the manner in which and the extent to which, the order of a court hearing the review application may affect the interests of the Municipality. Taking into consideration the provisions of the NLTA, the allegations made by the Minister of Transport, who has filed a notice to abide by the decision of the court in the review application, and the Department have raised regarding the failure of municipalities to contribute or adequately contribute to the implementation of all or certain of the provisions of the relevant legislation, I am of the view that the joinder of the

Municipality is necessary.

[20] Consequently, because the rights of the Municipality might be affected by the declaratory order of the court in the review proceedings, I am of the view that the Municipality has a direct and substantial interest in the result of the review proceedings. It is not desirable that a decision should be given on the implementation of the provisions of the NLTA vis-a-vis the applicants without an opportunity having been given to the Municipality to respond. The Municipality has a 'legal interest' in the subject matter of the litigation between the parties[8] The possibility of such an interest is sufficient and it is not necessary for this court to determine that it in fact exists. The Municipality has not communicated its intention to abide by the order to be given by the court hearing the review application nor has it waived the right to participate in the proceedings.

[21] It follows that the joinder application must succeed. The applicants did not seek an order of costs and sought an order that the costs of this application be costs in the main review proceedings. The applicants obviously did not anticipate that the application for joinder would be opposed having regard to the obligations imposed upon municipalities in terms of the provisions of the NLTA and the stance by the Department. However, given the opposition by the Municipality for its joinder the applicants seek costs against the Municipality on scale B. There is no reason why costs should not follow the result.

[22] ORDER:

1. The Respondent is joined as the Fifth Respondent in the main review proceedings under Case No 5090/2023.
2. The Applicants shall serve all affidavits and pleadings (which include the Record of Decision already filed) upon the Respondent, within 10 days from the date of this order.
3. The Respondent shall furthermore provide to the Applicants all such documents and reasons as it deems necessary, in amplification of the existing Record of Decision filed by the First Respondent in the main review proceedings, on or before 24 June 2024.
4. The Respondent shall file an opposing affidavit, if any, to the main review proceedings under the above case number, on or before 15 July 2024.
5. The respondent shall pay the costs of this joinder application on scale B.

I VAN RHYN

JUDGE OF THE HIGH COURT,

On behalf of the Applicants: ADV. S GROBLER SC Instructed by: PEYPER ATTORNEYS
BLOEMFONTEIN On behalf of the Respondent: ADV.PT MASIHLEHO Instructed by:
PHATSHOANE HENNEY ATTORNEYS BLOEMFONTEIN

[1] Act 3 of 2000.

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- [2] Act 1 of 1999.
- [3] Act 5 of 2000.
- [4] Act 5 of 2009.
- [5] Act 22 of 2000.
- [6] Section 11(c)(i) and (xxvi).
- [7] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659; Aquatur (Pty) Ltd v Sacks and Others 1989 (1) SA 56 (A) at 62.
- [8] Henri Viljoen (Pty) Ltd v Awerbach Brothers 1953 {2} SA 151 (O) at 169 and 170.
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Prepared on 11 October 2026 · Esheria