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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 07965/2013

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

.....

DATE

.....

SIGNATURE

In the matter between:-

MALESELA DONALD KALE
(Identity No: [6.....])

Applicant

and

CARLETONVILLE UNITED TAXI ASSOCIATION

Respondent

JUDGMENT

CORAM: CRUTCHFIELD AJ

[1] This application for final interdictory relief came before me during the course of the opposed motion roll of the week commencing 25 January 2016.

[2] At the commencement of the proceedings, the respondent raised an issue of non-joinder as a point *in limine*, in respect of which I heard full argument from both counsel. I reserved my decision in respect of the non-joinder issue.

[3] Subsequently, I granted the applicant condonation for the late filing of the replying affidavit delivered on 14 August 2013, and the supplementary replying affidavit delivered on 9 May 2014.

[4] The respondent objected to the condonation of the applicant's affidavits, alleging prejudice pursuant to the "*new matter*" contained therein. I granted the respondent ten (10) days to deliver its further affidavit to the replying and supplementary replying affidavits, insofar as new matter only is raised in the applicant's affidavits.

[5] The balance of the issues was postponed *sine die*.

[6] Given that approximately one (1) hour of court time was utilised to argue the non-joinder issue, and that it was a crisp self-contained point on the papers, I was not inclined to postpone it to be dealt with yet again by another court, as and when the necessity for a postponement of the balance of the issues arose. I considered it appropriate and in the interests of justice that I determine the point *in limine*, rather than postponing it along with the remaining issues.

[7] I reserved my decision in respect of the wasted costs of the postponement, to be handed down simultaneously with my determination regarding the non-joinder issue, which I deal with hereunder.

[8] This matter incepted during February 2013, almost three (3) years prior to the hearing before me. I was concerned at the long delay in finalising the matter. More especially, given that the litigants are not moneyed people, and the delay in bringing this application to finality is resulting in the rights of the applicant in particular, being held in abeyance and prejudiced accordingly.

[9] The importance of this matter to the litigants was demonstrated by the presence of both the applicant and various representatives of the respondent, in court for the hearing. I add, however, that both parties were represented by counsel.

[10] The applicant claimed:

10.1 Final introductory relief against the respondent and anyone acting under its authority and authorisation, from interfering with, preventing and stopping the applicant from operating within its area of jurisdiction/operation, alternatively within the Magisterial District of Carletonville, without disturbance;

10.2 An order compelling the respondent to furnish the applicant with all the relevant documentation given to all its other members for purposes of operating within his area of jurisdiction; and

10.3 Costs of suit.

[11] The respondent furnished supplementary heads of argument alleging 'that a party must of necessity be joined in proceedings if that party has a substantial direct and legal interest in those particular proceedings'.¹

[12] The factual allegations relevant to the determination of the non-joinder issue are set out hereunder.

[13] The applicant is the holder of a licence in respect of a vehicle, as envisaged in the National Land Transport Act, 22 of 2000 (*'the Act'*), which operating licence pertains to

¹ Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 627 (A) at 659

a 13-seater CAM Amandla vehicle (*'licence'*) having operating licence number [LG.....]. A copy of the licence was attached to the founding papers as annexure 'MDK1'.

[14] On 13 September 2012, the then secretary general of the respondent, furnished the applicant with a letter confirming the applicant's membership of the respondent, and recommending the applicant's application for credit in respect of a new vehicle to be purchased by the applicant ('the applicant's credit application').

[15] The applicant's credit application was duly approved and the CAM Amandla vehicle was purchased and financed by First Rand Bank Ltd (*"the bank"*).

[16] Thereafter, during November 2012, the applicant advised the respondent that he intended to utilise the licence referred to afore (annexure 'MDK1'), in respect of the new vehicle. The authenticity of 'MDK1' was then challenged by the respondent.

[17] Despite the applicant's tender to the respondent to have the operating permit verified, the respondent has not sought to do so.

[18] The applicant alleged that various additional problems were raised by the respondent, and notwithstanding the applicant's attempts to finalise the dispute regarding the veracity of the permit, the matter has not been resolved.

[19] Moreover, the alleged 'disciplinary proceedings' to which the respondent sought to subject the applicant, have not taken place and the applicant's rights are obviously being prejudiced as a result.

[20] On 25 October 2012, the applicant procured the replacement of the Toyota Quantum (the applicant's previous vehicle), with the new CAM Amandla vehicle aforementioned, on the permit (annexure 'MDK1'), previously issued to him.

[21] The applicant alleged that the entire replacement procedure was done as per the receipt of payment, annexure 'MDK4' ('MDK4'), issued by the Gauteng Department of Transport, Randfontein ('GDT').

[22] The GDT, in terms of section 73 of the Act, is the sole entity authorised to issue, amend or transfer, an operating licence, and, in terms of section 79 of the Act, the sole entity authorised to withdraw, suspend or amend an operating licence or permit.

[23] The respondent referred to a document entitled '*AGREEMENT OF THE SALE OF A USED MOTOR VEHICLE TAXI PERMIT*' ('the agreement'), which agreement was allegedly concluded by the applicant as the seller, and one Mathew Ngwako Senyolo, in respect of the sale of the applicant's licence to the purchaser, on various terms.

[24] Paragraph 4 of the agreement provides, in respect of 'risk and transfer of vehicle', as follows:

'The purchaser will in order to use the public permit register his vehicle (Toyota Quantum) into the name of the Seller and the parties hereby agree that the vehicle remained the property of the Purchaser. The risk in the said vehicle shall remain with the Purchaser who shall remain liable for the maintenance and insurance of the vehicle.'

[25] The applicant conceded that he entered into the agreement but alleged that it failed to come to fruition.

[26] 'MGK4' reflects *inter alia* '*OL REPLACEMENT (FROM [V.....] TO [CB.....])*'. The applicant is reflected on 'MDK4' as the applicant in respect of the replacement of the operating licence.

[27] However, vehicle [VM.....], the Toyota Quantum, is, as I understood the respondent's argument, not the vehicle used by the applicant, but is utilised at all relevant times by one Elisa Tseko Khumoeng ('*Khumoeng*'), whom, the respondent alleged, claims the rights to the operating licence, it allegedly being her 'undisputed testimony (according to the respondent), that the Toyota Quantum registration number [V.....] belongs to her and that she is also the legitimate title holder of the operating licence'.

[28] The respondent argued that rather than it being the applicant who is earning an income from the operating licence/vehicle in dispute, it is Khumoeng who is doing so

and accordingly, she will be prejudiced should the court proceed with the application absent Khumoeng's joinder.

[29] According to the respondent, Khumoeng has rights under and in terms of the permit. In the event that the relief sought by the applicant were to be granted, it would cause irreparable prejudice to Khumoeng. This according to the respondent is in itself, sufficient to dismiss the application.

[30] Regard being had to the contents of the applicant's supplementary replying affidavit as they refer to Khumoeng, absent a determination of the non-joinder issue in favour of the respondent, Khumoeng will be deprived of an opportunity to answer to such allegations.

[31] The respondent alleged that a 'direct and substantial interest'² refers to an interest in the right which is the subject matter of the litigation and not merely a financial interest. Hence the respondent argued, Khumoeng has a substantial direct and legal interest in the proceedings, and it would be unfair to proceed with the application in her absence as her rights will be adversely affected.

[32] The court in the *Henri Viljoen* case, *supra*, analysed the concept of "*direct and substantial interest*" and concluded that it refers to an interest in the right which is the subject matter of the litigation and not merely a financial interest.

[33] The applicant denies that Khumoeng has a *direct and substantial interest* in the right which is the subject matter of the litigation (as opposed to merely a financial interest), and denies that Khumoeng would be prejudiced or that it would be unfair to her, were the court to proceed with the application and grant the relief claimed by the applicant.

[34] The respondent informed me from the bar that in the event that the matter was dismissed pursuant to the non-joinder, the respondent undertook to hold the disciplinary enquiry referred to afore.

² *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O); *Standard Bank of South Africa Ltd v Swartland Municipality & Others* 2011 (5) SA 257 (SCA) at [9]

[35] In short, the respondent's case was that there are two (2) vehicles operating under the same permit, these being Khumoeng's vehicle and the applicant's new CAM Amandla.

[36] The applicant objected to the point *in limine*, arguing *inter alia* that it must fail pursuant to the respondent's failure to allege the legal conclusion arising from the point *in limine*, which must be stated in the papers.³ Absent such a statement, the point cannot succeed.

[37] The applicant stated that the relief claimed in the notice of motion does not impact upon Khumoeng. As a result, the issue raised by the respondent regarding the alleged interest of Khumoeng, does not qualify as the subject matter of the litigation.

[38] The applicant referred to the *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴ in respect of the interpretation of the court order which would follow if the relief claimed by the applicant was granted, and that the alleged rights of Khumoeng would not be impacted in any manner whatsoever by an order in terms of prayers 1 and 2 of the notice of motion.

[39] Furthermore, the respondent could not demonstrate that Khumoeng has a valid operating licence in her name. In this regard, Khumoeng requires a permit to be sourced from the statutory entity referred to aforementioned, which is not evident on the papers.

[40] Section 77 of the Act provides that:

40.1 An operating licence or permit may not be ceded or otherwise alienated by the holder, except in terms of a transfer under section 58, and no person may be a party to such a cession or alienation;⁵

40.2 or be hired out by the holder or be hired by any other person.

³ The National Director of Public Prosecutions v Zuma 2009 (2) SA 263 (SCA)

⁴ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [17]

⁵ Section 77(1)(a)

40.3 A transaction concluded in contravention of (paragraph 41.1) is invalid and has no legal force.

[41] Accordingly, insofar as the respondent sought to rely upon the alleged agreement aforementioned providing for the sale/transfer of the disputed operating permit, over and above the alleged forgery, the transaction purportedly recorded in the agreement of sale is invalid and without legal force, pursuant to the absence of a transfer in terms of section 58 of the Act.

[42] Section 58 of the Act provides for the *renewal, amendment or transfer of operating licence or permit* and stipulates the procedure to be adopted in respect thereof.

[43] To my mind, it is self-evident from the content of prayers 1 and 2 of the notice of motion, that this court is not called upon to determine the alleged dispute which is the subject matter of the disciplinary proceedings, more particularly, the rights of Khumoeng. Hence, there is no purpose to the joinder of Khumoeng to this application.

[44] Khumoeng's alleged interest in this matter, does not qualify as a *direct and substantial interest*, as envisaged in *Henri Viljoen supra*.

[45] Accordingly, it appears to me that the applicant's point *in limine* in respect of the non-joinder of Khumoeng, lacks merit and must fail.

[46] I turn at this stage to the issue of the wasted costs pursuant to the postponement.

[47] As stated above, the applicant's replying and supplementary replying affidavits were delivered on 14 August 2013, and 9 May 2014 respectively, since when they have been in the respondent's possession. Notwithstanding that a significant period of time has passed in the interim, the respondent did not see fit to prepare or file an affidavit to be used in the event that the replying and supplementary replying affidavits were allowed.

[48] Instead, the respondent was satisfied to seek a postponement of the matter, in order to deal with the alleged new matter, rather than facilitate the finalisation of the matter expeditiously, by having the affidavit ready and available for use at the hearing.

[49] It is the policy of these courts⁶ that parties be allowed to articulate their arguments and the facts upon which they rely, fully, thereby preventing piecemeal determination of the litigation and delay.

[50] Notwithstanding the applicant inviting the respondent in the course of correspondence between the respective attorneys of record, to deal with the further affidavit in the interim, the respondent failed to take any steps whatsoever in respect thereof, causing the postponement of the application as a result.

[51] Nor did the respondent utilise the remedies in terms of Rule 30 (or Rule 30A), to have the irregular filing of the applicant's affidavits set aside.

[52] In effect, the respondent was content to do nothing, thus forcing a postponement in the context of proceedings which commenced just short of three (3) years ago and are yet to be finalised. The interests of justice would have been served by the respondent having prepared and filed whatever affidavit(s) it considered necessary pursuant to the applicant's replying affidavits.

[53] Practitioners operating in this court are under a continuous obligation to narrow the disputes between them, and work towards finalising matters as quickly as possible, which the respondent failed to do.

[54] The respondent's purported reliance upon the cost implications arising from its preparation of such further affidavit(s) in advance, is misplaced in the light of the respondent having to incur the costs of the postponement as a result of its failure.

[55] In the circumstances, it is my view that the respondent sought to procure the further postponement of the matter by failing to prepare the affidavit(s) aforementioned,

⁶ Pangbourne Properties Ltd v Pulse Moving CC & Another 2013 (3) SA 140 (GSJ)

in advance, such that the matter could have been dealt with in its entirety at the hearing before me.

[56] Accordingly, the respondent should bear the wasted costs pursuant to the postponement.

[57] I make the following the order:

57.1 The point *in limine* in respect of non-joinder is dismissed with costs.

57.2 The respondent is ordered to pay the wasted costs of the postponement on 29 January 2016.

A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT

INSTRUCTED BY

COUNSEL FOR RESPONDENT

INSTRUCTED BY

DATE OF HEARING

DATE OF JUDGMENT

? FEBRUARY 2016