IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 24398/22

1) Reportable: No
2) of interest to other judges: No
3) Revised: yes

[redacted] 29 August 2024

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Johanna Leso Date

In the matter between:

REMEMBER SIPHO MAFUYEKA **1st Applicant**

RENDANI TAKALANI MAFUYEKA **2nd Applicant**

And

MULALO BRIDGET NETSHITOMBONI **1st Respondent**

MASHUDU NETSHITOMBONI **2nd Respondent**

RWP CRECHE NPC **3rd Respondent**

AUBREY MAFUYEKA **4th Respondent**

IN RE:

MULALO BRIDGET NETSHITOMBONI **1st Applicant**

MASHUDU NETSHITOMBONI **2nd Applicant**

And

REMEMBER SIPHO MAFUYEKA	**1st Respondent**
RENDANI TAKALANI MAFUYEKA	**2nd Respondent**
RWP CRECHE NPC	**3rd Respondent**
AUBREY MAFUYEKA	**4th Respondent**
COMPANIES INTELLECTUAL PROPERTIES COMMISSION OF SOUTH AFRICA	**5th Respondent**

JUDGMENT

LESO AJ:

INTRODUCTION

1. The applicants brought two applications before this court. In the first application, the applicant seeks an order to compel the respondents to furnish security of R800 000 in the pending action instituted by the respondents against the applicant. I will discuss the pending application later.

2. The second application is an interlocutory application to join Space Securitization (Pty) Ltd as the sixth respondent. In this application the applicants sought an order to amend the parties' citation and join Space Securitization (Pty) Ltd as the sixth respondent. The respondents opposed both applications.

BACKGROUND

3. The first applicant, Sipho Mafuyeka and the first respondent Mulalo Netshitomboni are the executive directors with equal shares in the third

respondent, RWP Crèche NPC. Mulalo Netshitomboni is the founder of the crèche and the Sipho Mafuyeka is the investor in the RWP Creche NPC. The second applicant, Rendani Mafuyeka is also an executive director in the RWP Crèche NPC and a wife to Sipho Mafuyeka and the second respondent, Mashudu Netshitomboni is the no-executive director in the RWP Creche NPC and a husband to the first applicant.

4. On 20 April 2021 the respondents brought an urgent application under case number:17469/2 wherein they sought an order among others that the settlement agreement in which she and the second respondent are removed as the directors of RWP crèche NPC be reviewed and set aside, to be declared null and void and cancelled. The settlement agreement dated 29 March 2021 and the partnership agreement concluded by the parties on 25 September 2017 formed part of the dispute.

5. The respondents proceeded to set the matter down to be heard on merits however the applicants challenged the matter based on irregular steps because the above respondents added the other party and expanded their cause of action. The respondents withdrew the application after the applicants brought the rule 30[1] application.

6. The respondents have now filed another application with thirteen (13) prayers. In brief, the respondents expanded the previous application by adding the following orders:

   6.1 The partnership agreement between the parties be re-instated.

   6.2 The resolution was taken by the applicants to remove the respondents as the directors of the crèche and the dismissal of the first respondent be declared unlawful and invalid and reinstatement of the first respondent on the same terms and conditions.

   6.3 Restoration of the rights of the RWP crèche NPC.

[1] See the Rule 30 Uniform Rules of the High Court.

6.4 CIPC to be ordered to remove or cancel membership of the fourth respondent Aubrey Mafuyeka, respondent from the RWP crèche NPC.

6.5 Various Interdicts against the applicants in their dealings with the RWP crèche NPC.

THE MERITS

Applicants case

7. In the application to join Space Securitization (Pty) Ltd as the sixth respondent the applicants relied on rule 10(3)[2] and contents that the joinder application is justified because Space Securitization (RF) PTY Ltd has a direct and substantial interest in the matter and any outcome from this application because Space Securitization (RF) PTY Ltd entered into the lease agreement with the first respondent without the knowledge of the first applicant.

8. The merit of the second application of security for costs the applicants' case lies in the current application which was filed after the respondents withdrew their application under case no; 17469/21. The applicants contend that the current application brought by the respondents is vexatious, reckless and amounts to abuse of the court process because on 20 April 2021 the respondents brought an urgent application against the applicants under case number 17469/21 which was dismissed the same day.

9. The applicants argued that the respondents' main claim lacks merit and is vexatious or frivolous because the respondents are claiming shares in the applicants' investments and assets as the investors in the development of the RWP crèche NPC while knowing that they are not entitled to any share in crèche due to breach of a partnership agreement and general conduct rules. The applicants accused the respondents of attempting to benefit from their work and efforts and contended that the respondent did not make any contributions or investments in the whole project other than defrauding the applicant and the business of its financial resources. According to the applicants, both respondents were part of the settlement agreement which the second

[2] See Rule 10(3) Uniform Rules of the High Court.

respondent signed as a witness after he pleaded for the first respondent to be granted a second chance to continue working with the applicant in the project.

10. The applicants complained that the respondents sought a declaratory order for the revival of the partnership agreement which the respondents breached. According to the applicants, the settlement agreement was concluded after the partnership agreement was terminated.

11. The applicants argued that the current application is poorly formulated and bad in law with no prospect of success because the respondents decided to jointly proceed with the application that was struck off the roll under case 17469/2021, attempting to proceed in the normal way by joining the 2nd to 5th respondents as parties into the proceedings. The applicants indicated that they filed and served the respondents with a notice to comply with rule 30(2)(b) however the respondent refused to comply, subsequently the applicants brought an application in terms of rule 30(1) seeking an order to struck off and respondents claim with costs but the respondents withdrew the application without providing any reasons. The applicants argued that the respondents have now approached the court on the same cause of action with the same papers cited as in the withdrawn application using a different case number despite the pending costs orders. In the event that the respondents proceed with the action, the plaintiff intends to raise a point in *limine* of *res judicata* in that the matter has been finalized.

12. In conclusion, the applicants argued that the costs for the urgent application and withdrawn application are both pending and they doubt that the respondents will be able to pay costs should the court order them with the first respondent being unemployed and the second respondent being employed as a civil servant.

Respondents arguments

13. The basis of the respondent's objection in the application for joinder is that the application is irregular and is irrelevant for the purpose of this proceeding.

According to the respondent the plaintiff is trying to force Space Securitization (Pty) Ltd to cede the agreement which it has concluded with the first respondent, Bridget Netshitomboni to the plaintiffs and the respondents contend that it was not necessary to join the Space Securitization because the lease agreement is between the first respondent agreement and Space Securitization and the applicant has no business with the Space Securitization.

14. The respondents argued that the plaintiffs' claims or averments are scandalous, vexatious and irrelevant because the applicants applied to join the sixth respondent instead of filing the answering affidavit and the application is aimed at tarnishing his reputation. The first respondent stated that the applicants are trying all the tricks including this application to take the crèche which she started alone with the second respondent who is her husband.

15. The respondents contend after the urgent application under case number 17469/2021 was dismissed the respondent brought the same application having added other parties and additional cause of action however the application was withdrawn after the applicant brought an application for irregular steps. The respondent indicates that there was no judgment on the matter because the matter was not heard. According to the respondents, the taxed bill that the applicants complain about was paid in full and they deny that there is an outstanding taxed bill. In conclusion, the respondents argued that the court should not consider the applicant's answering affidavit which is 17 months late because there was no application for condonation for its late filing.

ISSUES TO BE DETERMINED

16. whether a respondent in an application can bring a counter-application and then join a party that is not yet a party to the application,

17. whether the application by the respondent is vexatious or frivolous and reckless and whether compelling security for costs is justified to protect the respondent from potential expenses resulting from litigation by the respondent.

DISCUSSION AND APPLICABLE LAW

18. I will first deal with the interlocutory application for joinder of Space Securitization(RF) Proprietary Limited which was brought by the applicants.

19. The law that deals with the joinder of parties in litigation is found in rule 10(3) which provides as follows:
"*Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action"*. The essential issue to be dealt with is whether Space Securitization has a direct and substantial interest in the subject matter because it is the owner of the land that is part of the dispute. The lease agreement concluded by Space Securitization(RF) Proprietary Ltd forms the main basis of the dispute to be adjudicated by the court and therefore Space Securitization is liable to be joined. This position is confirmed by rule 12 which provides that: "*Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant"*.

20. It is common cause that the applicant who is now the respondent in this application refutes the liability of the Space Securitization to be joined in the main proceedings however this will not be in the interest of justice to exclude them. It was said in *Morgan & another v Salisbury Municipality*[3], that "*the courts have the discretion to allow joinder based on convenience*". It is clear from the facts of the case that a joinder of Securitization is necessary.

21. On the issue of security for costs, the law dealing with the security for costs in pending litigation provides that the court may make an order for the provision of costs if there is reason to believe that the plaintiff/applicant will be unable to pay the defendants/respondents' costs if ordered to do so, or if the plaintiff/applicants' claim is considered frivolous, vexatious, or otherwise lacking

[3] See *Morgan & another v Salisbury Municipality 1935 AD 167 at 17.*

in merit. There are substantive rules in terms of the common law and other statutory provisions dealing with the provision of security. Rule 47(1)[4] prescribes the procedure for demanding and furnishing security for costs from another as follows:

21.1 "Shall as soon as practicable after the commencement of the proceedings deliver a notice (letter of demand);

21.2 The notice shall set the grounds upon which such security is claimed (my emphasis); and

21.3 *The notice shall set the amount claimed*."

22. It is clear from the above provision that the demand for security for costs starts with the notice. I instantly point out that there is no notice of demand for security in the bundle of documents filed by the parties and no submissions were made as to why the notice was not delivered to the respondents. It is clear from the provision of rule 47(1) that the word "*shall*" is mandatory despite its ambiguity compared to the word "must", and that the application to the court for an order against the respondents must be preceded by the notice to demand security, this notice must form part of the papers before the court.

23. The applicants approached the court without warning the respondents or allowing the respondents to respond to their demands as required by rule 47(3). The requirement for the notice to precede the application or motion follows from the above rule as it stipulates that '*if the party from which the security is demanded contest his liability to give security or if he fails or refuses to furnish security in the amount demanded of amount fixed by the registrar within 10 days of the demand or the registrar's decision, the other party may apply to court on notice for an order that security be given and that the proceedings be stayed until such order is compiled with*'. The court has considered the merits of the application despite the above irregularities for the sake of good administration

[4] See Rule 47(1) of the Uniform Rules of the High Court.

of justice. I find that this application lacks merits and the attempt by the applicants to use the affidavit or answering affidavit he filed in an urgent application and rule 30 application is bad in law. It is trite that the applicant must make out their case of the founding papers. The affidavits filed in different cases relate to that particular application. The applicants did not file an answering affidavit in the main application, instead, they filed a rule 47 application seeking the order that the Netshitomboni(s) set up security for their costs.

24. The applicants' averments that the litigation by the respondents is vexatious and frivolous has no merit. On the contrary, it is the applicants who have approached the court with a bad case. The applicants' arguments that similar claims by the respondents have been dismissed in the past is denied by the respondents and there is no evidence that the urgent application by the respondents was dismissed on merit. The applicants' claim that the above urgent application was struck off and dismissed on merits is not reconcilable with the law nor the facts of the case.

25. The applicants complained about the financial position of the respondents as one of the reasons for filing this application. In *Blastrite(Pty)Ltd v Genpaco Ltd*[5] the court considered fairness and equity in the light of the circumstances of the case and it held that "*The court in fact retained a discretion whether or not to order security, to be exercised on the basis of the particular circumstances of the case and considerations of fairness and equity to both parties*' (my emphasis). There are also other factors to be considered, such as the strength of the plaintiff's case and the conduct of the parties during the litigation. In the main, fairness and equity should be exercised. Although in *Blastrite* the court held that '*the practice relating to security for costs thus had the effect of restoring a measure of equality between the parties*', the circumstances of the case and the financial position of the respondents' dictate that the costs order against the respondents will put the parties in unequal footing. I have no reason not to believe the respondent that they paid the taxed bill in full.

[5] See *Blastrite(Pty)Ltd v Genpaco Ltd (2015) ZAWCHC 76.*

26. From the affidavits deposed by the parties in this application there are controversial legal issues that need ventilation before court. It will not be in the interest of justice to shut doors on the respondents because of their financial position. It is clear from the issues raised by both parties that the matter deserves an audience and no party should be hampered to get the court's attention.

CONCLUSION

20. The order for the joinder of Space Securitization (Pty) Ltd would help to further the administration of justice.

21. The applicants' application for security of costs is irregular due to non-compliance with rule 47(1) and the claim has no merit. Both parties must take responsibility for prolonged litigation in this matter.

21. In conclusion, it is necessary that I should commend on application before this court. Firstly, it was difficult to trace the documents in this matter because there are many different sections for different applications and the applicants did not paginate and index the file. Secondly, the court had to restructure the citation for better reading. Thirdly, facts relating to the urgent application under case number 17469/2021 are inconsistent or confusing facts. In the same application, the applicant relied on rule 10(3) to seek relief to amend the citation of the parties to reflect Space Securitization(RF)Proprietary Limited in the main application as the sixth respondent however the applicant has already cited Space Securitization as the fourth respondent in most of their papers.

THEREFORE, I MAKE THE ORDER AS FOLLOWS:

ORDER

1. Application to join Space Securitization (Pty) Ltd as the sixth respondent is granted

2. Application to set security for R800 000.00 is dismissed.

3. No order as to costs.

The judgment was handed down electronically, circulated to the parties/ legal representatives by e-mail and uploaded to Caseline. The date of hand-down is the date when the judgment was signed.

[redacted]

Johann Leso
ACTING JUDGE OF THE HIGH COURT,
SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

Date of Hearing: 26 February 2024

Date of Judgment: 29 August 2024

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