IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No. **2723/2022**

In the matter between:

TSHIRELETSO KHUSELO YANNICK MLOZANA Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY Respondent

CORAM:	DAFFUE, J et MOLITSOANE, J
HEARD ON:	13 MAY 2024
JUDGMENT BY:	MOLITSOANE, J
DELIVERED ON:	14 JUNE 2024

[1] In his notice of motion the applicant initially sought an order 'reviewing and setting aside the decision of the respondent not to grant [him] a Title Deed at [redacted], Bobo Square, Mangaung, Bloemfontein' and an order compelling the respondent to grant such title deed. When confronted with the impossibility of granting such relief, an amendment of the notice of motion was sought during oral argument, which was not opposed, whereupon the words 'title deed' were replaced by 'site permit'. The application will therefore be adjudicated on the basis that the applicant seeks an order to review and set aside the decision of the respondent not to grant him a site permit (herein later referred to as a PTO, to wit a permit to occupy) in respect of the property [redacted] and an order to compel the respondent to grant him a PTO for the said property. This property

is also referred to as erf [redacted] Bobo Square Bloemfontein (erf [redacted]). The prayer to compel 'the respondent to connect the applicant to the basic services … of the settlement' was abandoned.

[2] The respondent opposes the application on the following grounds: (1) that the applicant has failed to join Mr Simphiwe Mvotho (Mvotho), the current permit holder of erf [redacted], in these proceedings; (2) that, in respect of the merits of the application, the applicant did not in terms of the respondent's housing policy and the applicable By-Laws qualify for a PTO in respect of erf [redacted] on the basis that he did not reside on the site in question.

[3] It is common cause that a few years ago, erf 47844 was illegally invaded and an informal settlement was established which came to be known as Bobo Square. There is a dispute between the parties as to when the said informal settlement was established, but nothing turns on this issue. This informal settlement was later recognized as a legal settlement. The rights to occupy the land were also allocated to various occupants and in different phases of the informal settlement. According to the respondent, each site in the informal settlement was provided with an individual number allocated to the beneficiary who was given a PTO for the site. It is common cause that the applicant was not allocated a PTO, hence these review proceedings.

[4] It is contended on behalf of the respondent that the applicant ought to have joined Mvotho in these proceedings. The reason for this contention is that the erf to which the applicant claims entitlement has been allocated to Mvotho. For this reason alone, so it is submitted, Mvotho ought to have been joined. The further submission of the respondent is that the relief sought by the applicant, if granted, would compel the respondent to grant permission to occupy erf [redacted] to the applicant to the prejudice of Mvotho. The respondent thus contends that Mvotho has a direct and substantial interest in any order this court might make in these proceedings.

[5] The applicant submits that the joinder of Mvotho is not required. According to the applicant, he pursues this application in his own interests. He contends in

reply that his quest to be issued with a PTO has nothing to do with any other person and that he did not 'place Mvotho's permit at issue.'

[6] During the submissions before us, counsel for the applicant took us through the answering affidavit to attack the process followed by the respondent in an attempt to illustrate that the record furnished in terms of Rule 53(3) of the Uniform Rules of Court was lacking in detail and information and did not enable the applicant to decide whether to join Mvotho, or not. It was submitted that the applicant did not seek to evict Mvotho from the site and consequently, it was not necessary to join him. Counsel for the applicant submitted that due to the inadequacy of the record furnished, the applicant was in no position to know how Mvotho would have a direct and substantial interest in these proceedings, hence the applicant saw no need to join him.

[7] The court in *Absa Bank Ltd v Naude NO*[1] set out the test for non-joinder as follows:

'The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, KwaZulu-Natal* it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined.' (Footnote omitted).

[8] In *Judicial Service Commission and Another v Cape Bar Council and Another*[2] the court held as follows:

'It has now become settled law that the joinder of a party is only required as a matter of necessity - as opposed to a matter of convenience - if that party has direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see *eg Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.'

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[1] (20264/2014) [2015] ZASCA 97; 2016 (6) SA 540 (SCA) (1 June 2015) para 10.
[2] 2013 (1) SA 170 (SCA) para 12.

[9] When the applicant launched this application, he was aware that erf [redacted] had been allocated to Mvotho,[3] stating that 'my permit was given to a person with the name of Simphiwe Mvotho.' It is indeed so that a PTO does not confer real rights to people to whom sites are allocated, but same confers personal rights which are enforceable against the municipality. Once a resolution is taken by the municipality to upgrade the informal settlement to a township, a person granted a PTO would have a right to enforce his rights to obtain ownership in terms of the Upgrading of Land Tenure Rights Act 112 of 1991. This fact would thus be reason enough that Mvotho ought to have been joined in these proceedings.

[10] In these proceedings, the applicant does not attack the decision to allocate the PTO to Mvotho. No relief is sought in the notice of motion in this regard. As mentioned, the applicant seeks a PTO in respect of the very same site to whom a PTO was issued to Mvotho. In my view, for as long as the decision to grant Mvotho the PTO has not been reviewed and set aside by a court of law, such decision remains extant.[4] Even if one were to consider this application as also encompassing an indirect review of the decision to grant the PTO to Mvotho, that not being the case before us, it would certainly also have necessitated his joinder. If we were to grant the order sought by the applicant, the effect thereof would be to effectively impugn the decision to grant the PTO to Mvotho and thus impermissibly set it aside, or at worst, would have the effect of granting two PTO's to two different individuals in respect of one site with disastrous consequences. The stance taken by the applicant ignores the personal rights of Mvotho and seems to suggest that the permit granted to Mvotho is of no consequence and has nothing to do with him. This stance is unfortunate.

[11] Counsel for the applicant referred us to the case of *Snyders and Others v De Jager (Joinder)*[5] and submitted with reference to that decision, that the joinder of Mvotho was not necessary. Reliance on this decision is misplaced. *Snyders* involved the eviction of a party who resided on the premises, but was not joined

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[3] Para 5.4 of the Founding Affidavit.
[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 para 26.
[5] CCT 186/15 [2016] ZACC; 2017 (5) BCLR 604 (CC) (21 December 2016).

in the eviction proceedings between the landlord and the previous occupant. The majority held that the joinder of the current occupant in that case should be effected notwithstanding the fact that they obtained occupation of the dwelling only after the Supreme Court of Appeal judgment had been handed down.[6]

[12] Writing for the majority,[7] Zondo J said the following on the issue of joinder:

'[9] A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.

[10] in the context of eviction proceedings a court may not competently make an order that either directly or indirectly requires someone to be evicted without that person having been joined in the proceedings and heard. To do otherwise would mean that a court may in effect directly or indirectly order someone's eviction without the person having been given an opportunity to be heard. Indeed, that would mean that the court would be making an eviction order against someone without it having heard from that person in regard to all his or her circumstances that the court is enjoined by section 26(3) of the Constitution to consider. That is where the eviction order relates to someone's home.'

[13] By parity of reasoning, I am of the considered view that the sentiments expressed in the above quoted paragraphs apply equally to instances where rights have been conferred by the granting of the PTO. Such rights, also implicate access to housing of holders of the said rights. Fairness dictate that the permits granted to them should not be taken from them without having given them the opportunity to be heard. In the absence of different authority of the same court and on the same issue, we are bound by the decision of the majority in terms of the *stare decisis* doctrine.

[14] The applicant was aware of the fact that the respondent had granted a PTO to Mvotho when these proceedings were instituted, but elected not to join him.

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[6] *Ibid* para 26 for the dissenting judgment of Froneman J.
[7] *Ibid* paras 9 & 10.

This justifies the dismissal of this application on this point alone, instead of pending these proceedings while allowing the applicant permission to bring a joinder application. Failure to join Mvotho in these proceedings is thus fatal to the applicant's case. Contrary to what was suggested by the applicant's counsel, it was not the respondent's duty to invite Mvotho to make submissions and/or to join him.

[15] The invasion of land poses a great challenge to government and especially to municipalities which are constitutionally obliged to provide basic services to communities, including those in informal settlements. Regulatory framework is thus indispensable in order to formalize informal settlements which came about as a result of such land invasions. Dealing with land invasions may take the form of evicting the informal dwellers from the land invaded, or formalize the informal settlements in their original location. The Mangaung Metropolitan Municipality By-Laws relating to Informal Settlements promulgated in the Provincial Gazette No 60 of 25 October 2013 (the By-Laws) and the Mangaung Local Municipality Housing Policy approved by Council on 15 December 2005 (the Housing Policy) deal with informal settlements.

[16] The applicant seeks to attack what he calls the failure of the respondent to grant him a PTO on various grounds as set out in section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). These are that the action taken by the respondent was (a) for a reason not authorized by the empowering legislation; (b) the decision was taken for an ulterior purpose or motive; (c) irrelevant considerations were taken into account while relevant considerations were not considered; (d) the decision was taken because of the unauthorized or unwarranted dictates of another person or body; (e) the decision was taken in bad faith, or (f) arbitrarily or capriciously.

[17] The essence of the applicant's case is that he resided at the Bobo informal settlement on erf [redacted] with his parents since 2014. When his parents left the said settlement to live at his grandmother's place, he took over the site and has been residing there. He took up employment in Krugersdorp (in Gauteng) and left the site in possession of one Tshediso Maseloa. He later learnt that a PTO had

been issued to Mvotho, but does not know what informed the decision to grant the PTO to Mvotho. Nowhere in the founding affidavit was any issue taken with the process adopted to grant the PTO to Mvotho.

[18] The opposition to the application is anchored on the ground that the applicant did not reside in the informal settlement when the PTO's were issued and further, that the shack on erf [redacted] was burnt down as it was used as a drug den. The case of the respondent is that another shack was built on this said erf and an unauthorized person is currently occupying the said erf.

[19] The respondent contends that it complied with its legislative and policy requirements by holding meetings as required by its By-Laws and also put measures in place to monitor the occupancy of the settlement area. According to the respondent questionnaires were completed and submitted by inhabitants to the Sub-Directorate: Housing for compilation of a site register of the informal settlement. The applicant does not dispute that the respondent implemented measures to manage and monitor the occupancy of the residents in the settlement area,[8] but avers that the respondent 'abused its authority.' In making this averment, he relies on a bold statement and failing to back this assertion with evidence. The applicant contends that he had left people on the site and should have been granted a PTO. In circumstances where there are disputes of fact, the version of the respondent must be preferred on the basis of the principles set out in *Plascon-Evans*.

[20] In so far as the respondent contends that the applicant did not reside on erf [redacted] at the relevant time, the following can be gleaned from the papers. On the applicant's own version, in the founding affidavit, he is and was employed outside the Free State Province and had left one Tshediso Maseloa in occupation of the premises as the crime rate was high in the area. This contradicts the averment made by the applicant in his replying affidavit that the site was left in the care of his brother. He refers therein to annexure A annexed to the founding affidavit, allegedly evidencing that the site had been left in

[8] Replying affidavit para 4.7, p 47.

possession with his brother. This annexure, however, only serves to throw another spanner in the works in that the said annexure refers to one Miss Gloria Mlozana, who clearly appears to be female. Save for the several inconsistencies in the replying affidavit and the contradictions between those allegations and that contained in the founding affidavit as the record will reflect, the applicant eventually mentions in reply that he is staying at his mother's house and regarded himself as more vulnerable than the preferred beneficiaries mentioned by him.[9] Notwithstanding this admission, the applicant confirms that erf [redacted] – which is not one of the 18 properties in the lay-out plan - is his parental home, but contradicts himself, stating that he is not staying there, but at erf [redacted].[10]

[21] According to the respondent the implemented measures in terms of its By-Laws were geared towards ensuring that only households and individuals residing in the informal settlement would qualify to be considered for the allocation of erven. At the end of the day, it is unclear if the applicant had left Maseloa, his brother, or Gloria on the premises. It is undisputed that the Informal Settlements Sub-directorate constituted in terms of the By-Laws, together with the ward committee responsible for the area, had implemented measures to manage and monitor the occupancy of residents in the settlement area. If the applicant had resided on erf [redacted], his details could and would have been verified as monitoring took place.

[22] What exacerbates the plight of the applicant is the allegation by the respondent that the '…vacant shack that was originally on erf [redacted] burnt down as it was used by so called 'Nyaope boys' who used the shack as their drug den. Another shack was later constructed on the erf and is currently occupied by an unauthorized person.' (My emphasis).

The applicant does not deny that the initial shack burnt down and that another shack had been constructed again as alleged by the respondent.

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[9] Replying affidavit paras 4.69-4.71.
[10] Replying affidavit paras 8.2 & 8.3 in response to para 13.2 of the answering affidavit.

[23] The denial that ward committee meetings were held and questionnaires disseminated is without merit. On his own version, the applicant worked in Gauteng. His absence from this Province explains why he was unaware of the meetings. He chose not to attach affidavits of the people he claims to have been placed by him in occupation of erf [redacted] in order to dispute that meetings were held. In as much as the applicant sought to introduce the issue of the applicant's legitimate expectation in the heads of argument only, such argument was correctly not pursued before us and nothing needs to be said further on it, save for the following. The applicant seeks substantive rather than procedural redress. He seeks to enforce substantial rights, *ie* an entitlement to a PTO and not any procedural rights. In oral argument the applicant's counsel submitted unambiguously that the matter should not be referred back to the decision-maker for reconsideration based on procedural irregularities. No facts have been presented in order to assist the applicant, bearing in mind several authorities.[11] I could not find any reason to interfere with the action taken by the respondent not to grant the applicant a PTO. In my view the applicant did not at the time and does not now reside on the premises in question. He has been excluded in accordance with the By-Laws and Policy of the respondent.

[24] The replying affidavit is replete with instances where it is alleged that the respondent has failed to furnish a full record.[12] Rule 53(1)(b) enjoins the decision-maker, when called upon to dispatch the record of proceedings sought to be corrected or set aside to the registrar, to present the record together with such reasons the decision-maker is by law required or desires to give or make and to notify the applicant accordingly. The purpose of furnishing the record was explained as follows by the Constitutional Court in *Turnbull-Jackson v Hibiscus Coast Municipality and Others*:[13]

'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not

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[11] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 305 & 306; *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) para 15.
[12] Paras 4.5; 4.14; 4.16; 4.17; 4.21-4.26; 4.31-4.35; 4.37; 4.57-4.58 and 4.60.
[13] 2014 (6) SA 592 (CC) para 37.

fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function.'

[25] In *Helen Suzman Foundation v Judicial Service Commission*[14] the court observed as follows:

'The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.'

Bearing in mind that Rule 53(1)(b) has been enacted for the benefit of the applicant in the review proceedings, the applicant may, where the record furnished appears to be incomplete, waive the requirements of the said Rule.[15]

[26] After the record was dispatched by the respondent to the registrar, the applicant chose not to compel the applicant to file what he perceived to be portions of the record which according to him ought to have been filed. In my view, his conduct is indicative of a waiver of any other portions of the record he deemed the respondent to have withheld. His stance can be seen from the notice termed 'Notice of Motion in terms of Rule 53(4)' stating that 'the applicant stands by its notice of motion and the founding affidavit thereto.'[16] In confirmation of this stance, the applicant annexed a copy of his founding affidavit, without any amendments, to this notice. I cannot therefore foul the respondent herein as the applicant made his choice.

[27] In my view, the respondent's decision not to grant the applicant a PTO in respect of erf [redacted] cannot be assailed on the available evidence. The applicant has failed to show that he was resident on the site as required by the respondent's By-Laws and Policy. I accordingly find that the applicant has not made out a case for the relief sought.

[28] The applicant's counsel submitted that if the court was not prepared to grant an order in favour of the applicant, the *Biowatch*-principle should be applied as the

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[14] 2018 (4) SA 1 (CC) at para 13.
[15] *Motaung v Mukubela and Another, NN.O.; Motaung v Mothiba N.O.* 1975 (1) SA 618 at 625 H.
[16] Record p 134.

dispute relates to the applicant's constitutional rights. Consequently, he should not be burdened with a costs order in such a case. The respondent's counsel submitted that merely labelling the litigation as constitutional is not enough to invoke the *Biowatch*-principle. He submitted that the applicant did not raise a constitutional issue, alternatively the general rule shall not be applied in so far as the application was frivolous and/or manifestly inappropriate. I agree that the costs should follow the result.

[29] Accordingly, the following order is made:

1. The application is dismissed with costs.

[redacted]

P.E. MOLITSOANE, J

I concur

[redacted]

J.P. DAFFUE, J

[redacted]

For the Applicant: Adv. L Bomela
Instructed by: Bomela Attorneys
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For the Respondent: Adv. LJB Moeng
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