IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40390/2020

DATE: 2022-09-23

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: / NO.
(3) REVISED.
DATE 13 October 2022
SIGNATURE

In the matter between

HLANO FINANCIAL SERVICES Applicant

and

MEC HUMAN SETTLEMENT GAUTENG Respondent

J U D G M E N T

LEAVE TO APPEAL

VICTOR AJ: This is an extraordinary application for leave to appeal. Essentially a new case is presented on appeal. It is correct that en passant in the answering affidavit the applicant mentioned that the process agreement was not valid, because the Minister did not sign it. I will deal with the factual situation shortly. The basis of the application for the leave to appeal of the judgment dated 19 May 2022

includes the following.

The court failed to *mero motu raise* the non-joinder of the Minister of Human Settlements and the court found that the National Department of Human Settlements approved the process agreement and such finding could not be made in the absence of the Minister or those in the National Department of Human Settlements who had authority to do so.

In terms of the Housing Act 107/1997, a further basis for the leave to appeal is that the court found that the process agreement superseded the National Housing Codes of 2000 and 2009.

The court also erred in the absence of a confirmatory affidavit by Ms Van der Westhuizen that there were no errors in the list and the court rejected her finding because of the absence of a confirmatory affidavit.

The further ground of appeal is that the court found that the National Department of Human Settlements had approved the process agreement and did not object to the Hlano Claims.

In addition, it was only the Minister who could determine national policy in respect of housing and that Department that allocates funds. The court also erred because it failed to find that the process agreement was unlawfully entered into. Because the National Department

of Human Settlements had a substantial interest in the subject matter and this was a contravention of Section 100 of the Constitution.

The first point to be made is that it is not for the court to make a case for the litigants. The particular point of the unlawfulness of the agreement as indicated was really referred to in passing. Whilst there are circumstances where it is appropriate for the court to *mero motu* order a joinder it must only do so where it is material and where the safeguard of an interest of an interested party is not adjoined.

In the case of *Madibeng Local Municipality v Eskom Holdings Ltd and others* 2018 (1) SA 1 (CC) it is trite that at common law, (91) have an inherent power to order joinder of parties where it is necessary to do so. Even where there is no substantive application for joinder.

A court could *mero motu* raises a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been affected. This is consistent with the constitution.

The law on joinder is well settled. No court can make findings adverse to a person's interest without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaints so that they can enlist

counsel and gather evidence in support of their position and, prepare themselves adequately in the knowledge that there are personal consequences. All of these entitlements are fundamental to ensuring that potential rights to freedom and security of the person are in the end not arbitrarily deprived.

The applicant in this matter brought an application for condonation for the late service and filing of its application for leave to appeal. It is not persuaded that it is necessary but does ex abudante cautela.

The application for condonation arises pursuant to a notice in terms of Uniform Rule 30 (2) (b) launched by the Respondent in this appeal.

It being an irregular step by not complying to the requirements as set out in Uniform Rule 49 (1) (b) when it delivered a notice of application for leave to appeal under the abovementioned case number after the time period as recorded in Rule 49 (1) (b) had elapsed.

The applicant sets out in great detail why it was late. In essence the applicant's case is that the failure of a signed written judgment with the reasons meant that the applicant could not prepare properly nor launch an appeal. The applicant for condonation sets out the various attempts that it made to follow up with Judge Victor's secretary.

About the signed written judgment. It is trite that

an appeal lies against an order and not the reasons for a judgment. But be that as it may it seems that the applicant was under a misunderstanding that it had to wait for signed reasons before it could launch an appeal.

It did not see the necessity to even launch the appeal against the order and then state in that notice of appeal that once the written reasons, signed written reasons have been made available it will seek leave to amplify the appeal.

It must be born in mind that at the time that the judgment was handed down full reasons were given. I think the judgment took approximately an hour or thereabouts and it would seem that the applicant was not satisfied that it had the reasons.

The applicant submits that its prospects of success is another reason why the court should grant condonation. In particular, the court erred in relation to the non-joinder and lack of authority point in relation to the Process Agreement.

In its condonation application it then repeats the grounds of appeal with some amplification. In the heads of arguments in support of the condonation counsel Mr Ram SC submitted short heads and stated that in the matter of *Strategic Liquor Services v Mvumbi NO and others* 2010 (2) SA 92 (SC) that the written reasons are indispensable in the

appeal process. Well having perused that case the facts in this case are completely different and distinguishable. The applicant also relied on the fact that it had made every endeavour to obtain the written judgment and referred to a number of cases it is including *Amalgamated Engineering Union vs minister of Labour* 1949 (3) SA 637 (A) 659 and a number of other cases. None of the cases referred to are on point of condonation in relation to the facts in this case.

The submission is that the judgment erred to the extent that the prospects of success on appeal are so high that the court should grant condonation. I have considered the arguments by Mr Eloff SC and Mr Ram SC and it is clear to me that in dealing with the reason for the delay it could be that the applicant was under a misapprehension as to what its duties were and there is no exact case in point where a condonation application can succeed simply because the signed written reasons were not available, despite the fact that full reasons were given at the time that the oral judgment was handed down. I have considered the submissions and I am going to grant condonation because this matter must come to an end. But not on the basis of the prospects of success. But on the basis that there might have been a misapprehension on the part of the applicant's legal team that one had to wait for written reasons. It is clear from the cases that were proffered by the applicant

that there is no such law in point. The case of *Strategic Liquor services* is completely distinguishable.

Now, in relation to the reasons for leave to appeal I have already referred to them in full. I now deal with the facts. In the answering affidavit and this as submitted by Mr Eloff shows the contradiction in the applicant's case if one has regard to the affidavit, the answering affidavit and it also stood as the founding affidavit in the counter application.

The deponent states very clearly that Ms Pundile Mbanjswa is duly authorised to oppose the application for the Department of Human settlements, and she is the head of the Department.

She states that the applicant persists in its contention that the Expert's award should be set aside. In addition, the award should not be declared final and binding as contemplated in Clause 7.7.1 of the Process Agreement.

She basis this on what she describes as a manifest error arising from the default ruling. She states that the First Respondent is amenable to engaging the applicant on returning to the dispute resolution process under the process agreement. This could mean that the matter is referred either to the Second Respondent or they can agree, a new appointment of a new expert. She sets out a history of this matter and nowhere does she seek to rectify

the process agreement or ask the court to set aside the process agreement.

Despite the fact that the applicant now argues that the process agreement is completely unlawful because of the non-joinder and essentially that the court has interfered with the housing policy.

The background history in brief describes that in the early 1990's there was an increase in the number of home loan defaulters.

This was a direct result of the political situation prevailing at the time and in order to ameliorate and normalise the house and credit market the national Department of Human Settlements with Minister Slovo at the time concluded a Record of Understanding (ROU) with the erstwhile association of mortgage lenders, the predecessor to the banking association of South Africa. So clearly the ROU was done and concluded at the instance of the minister.

In 1995 the ROU constituted joint and simultaneous action by the parties in the public sector. The State negotiated with the Association of Bankers to resume loan activities. At the time there were at least 30 000 loans on mortgageable properties. The impact of the first ROU was to entitle certain consumers to the relocation assistance

and later it began to appear that it was necessary to revise the ROU and in 1998 it was revised and referred to as the New Deal. Where the lenders were not part of the banking counsel the Minister at that time also took into account that the situation should be ameliorated for those lenders outside the Banking Association.

The import of the New Deal made it clear that the originally agreed ROU dated 1995 still applied to those lenders and borrowers such as Hlano.

In terms of the 2000 Housing Code, which incorporated the 1995 ROU and its predecessor Kayalethu a company which changed its name to Hlano Financial Services Pty Ltd.

The Minister made it clear that Hlano would be treated in as all the other lenders to protect their interests and to stabilise the housing market. Hlano then approached the National Department of Human Settlements to intervene.

The National Department of Human Settlements has also not opposed Gauteng Province from finalising the ring fenced claims of Hlano. To facilitate this the Gauteng Department of Human settlements concluded the Process Agreement with Hlano in 2017.

Policy was discussed and it was assented to by the MEC. It was a special dispensation to Hlano to benefit the disestablished South African Housing Trust Fund who were

borrowers that held loans with Hlano and the policy was attached and there were some urging by MECs Matshitele and Maila to intervene to ensure the granting of the relocation assistance in respect of the Hlano portfolio.

Throughout the history that I have referred to the applicant now argues that the Process Agreement was not agreed to by the National Minister.

In that answering affidavit it was simply a reference in passing but is clear that the applicant accepted that there was a proper process agreement in place and it was lawful.

But it disputed the default order that was granted by the expert. I have already dealt with the fact in the main judgment that the applicant simply did not turn up to the Expert's hearing hence the reason for the default order. In addition, I take into account that after the grant of the default order the applicant was granted another two weeks in which to dispute the award and the documentation made available to the Expert by the respondent. It turned out that the applicant was less than frank about their staff availability to attend the meetings and this was evident from the blind copy sent to the respondent by the applicant's staff member.

The applicant now asserts that the amount claimed is not due and payable and of course that there were major problems with the List and therefore the court should not

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uphold the order granted by the Expert.

In the answering affidavit to the counter application the respondent states at Paragraph 166 in response to Paragraph 50, which states that the National Department of Housing has also not opposed to the Province finalising the ring-fenced claims of Hlano an conceded that to facilitate this, the Gauteng Department concluded the Process Agreement. In response the Respondent states that the applicant really admits that the process agreement was concluded with the approval of the National Department two years after it received the original List.

The respondent also states that the National Department approved the process agreement and it is self-evident that it also satisfied itself with the content of the Hlano claims. This is corroborated by the National Department making a further budget allocation of R200 000 000.00 available to the Department and the National Department must have accepted that situation by making further monies available.

It does not behove the applicant to now state that the Process Agreement is completely unlawful. In relation to the allegations made in the applicant's paragraph 51 to 53, in those paragraphs it is where the applicant refers to the fact that the special dispensation was granted to Hlano because of the disestablishment of the South African

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Housing Trust Fund.

In response the Respondent states that the applicant admits the policy directive, although it purports to half-heartedly dispute its legal efficacy.

It now alleges that the permission of the Minister or the National Department was required. This particular aspect now forms an important basis of the appeal.

The respondent states in the affidavit that the 2000 Housing Code imposed a statutory obligation on the applicant and it afforded two corollary rights to both the applicant and the borrowers. Borrowers were given security of housing as they were given the right to a right-size their property to be within their means. It is quite clear that the Gauteng Department had the right to assess that and the respondent was given the right to be paid by the applicant if it failed to provide a right sized house to a borrower by his or her 65th birthday. This introduced the age limitation in respect of which the elderly could not be evicted.

In Chapter 7.4.4 of the 2000 housing code the MEC policy was enacted during 1 December 2017 under the name of Special Gauteng Department of Human Settlements and Special Dispensation to benefit victims of the disestablished South African Housing Trust Fund.

The age criteria deviation criterion was entrenched by the amended MEC policy conceded that it would not be

able to provide right- sizing properties to the borrowers and that this would no longer be a requirement.

The age criteria were not a requirement for the Banking Association deal. The Respondent therefore claimed that it was entitled to payment of all borrowers' obligations for the relocation assistance benefits without the need to wait for their 65th birthday.

This legal point which has now been raised that the MEC of Gauteng that it had no authority to enter into the Process Agreement must be assessed against the legislative framework.

In terms of the Housing Act 107 of 1997 the general principle applicable to housing development is provided for in Section 2 (1) (e) (iv). The State deemed it necessary for the effective functioning of the housing market it had to level the playing fields in order to achieve equitable access for all in the market. It was also aimed at prohibiting unfair discrimination on the various grounds. In terms of Section 3 of the Housing Act it is clear that the Minister pursuant to the duties imposed upon him in subsections (1) and (2) that he may allocate funds for national housing to provide to provincial governance.

This included funds for national housing programs and that also included municipalities. The Minister was also empowered to take any steps reasonably necessary to

create an environment conducive to enabling provincial and local governments, the private sector, communities and individuals to achieve their respective goals in respect of housing development in order to ensure the effective functioning of the housing market.

In terms of Section (3) (7) every provincial government and Municipality must in accordance with the procedure determined by the Minister furnish such reports, returns and other information as the Minister requires for the purposes of this Act.

This is a corroborative fact that the Provincial government was obliged to render proper reports. In those reports it would have been clear that the MEC would have raised the question of the Hlano litigation and the applicant's current assertion that the Process Agreement was unlawfully concluded.

The powers of the Provincial Government do not end there. It has to, in terms of Section 7 of the Act consult with various organisations, to ensure that there is proper provision for housing and to strengthen the capacities of the Province to provide such housing.

The further relevant legal framework is found in Section 12. The Minister may allocate money out of the fund for the purposes of financing the implementation in a Province of any national housing program and any

Provincial housing program which is consistent with National Housing Policies.

In terms of Section 12 (2) (c) and (d) there must be accountability, including reporting by such officer in the provincial legislature on all matters affecting such funds.

This includes the manner in which the accounts and records of such funds are to be kept and detailed annual statements. Now nowhere did the Applicant put up those reports that it sent to the Minister. It must follow that nowhere in those reports does the applicant submit to the Minister as now does that the entire Process Agreement is unlawful. If it had done so then those reports and he Minister's response would have been on record.

It also bears mention that there is provision in Section 14 regarding the assets and liabilities of the National Housing Board. Whilst not being exactly in point, but relevant the Minister made provision that the rights, liabilities and obligations of the former board rising out of any contract in connection with such project or scheme passes to the provincial housing development board. So if regard is had to the Housing Act the promulgation of the ROU and in particular that the rights of the respondent were fully reserved and nothing changed for them when the New Deal came into effect.

The respondent also relied on Section 7.4.4 of

Chapter 7 of the Housing Subsidy Scheme. Where it is made clear that the Provincial Board shall in its sole and absolute discretion determine which rules it will make relocation assistance available.

That is that another statutory indication that the Provincial Housing Human Settlements Department had the necessary authority and power to enter into the Process Agreements.

Despite the repeated submission in the application on the grounds for leave to appeal it is clear to me that the Gauteng Human Settlements Department had the authority to conclude the Process Agreement. This is not a case where the powers of the National Department of Human settlements and the Minister were usurped. In addition, in my view another court will not come to a different conclusion and in the result the application for leave to appeal is dismissed with costs. As regards the condonation application that part was granted but it is unnecessary for me to make a separate cost order on that. The respondent has been substantially successful in opposing the application for leave to appeal.

ORDER

1. The application for leave to appeal is refused.
2. The applicant shall pay the costs of this

application.

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VICTOR J

JUDGE OF THE HIGH COURT

Counsel for Applicant	Adv Ram SC
Counsel for Respondent	Adv C Eloff SC

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