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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: 274/2017

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

DATE...19/03/18... SIGNATURE:.....

In the matter between:

DEBORA MAGDALINA MOTSONANI

APPLICANT

And

THUTHANI ELIAS RIVISI AND TWO OTHERS

RESPONDENT

JUDGMENT

KGANYAGO J

[1] The applicant has brought an application against the Respondents seeking an order in the following terms:

1.1 “That it be declared that the applicant together with her children have the right to reside at the residential house situated at stand no.[...] X. village, Greater Giyani Municipality, Limpopo Province;

1.2 That the first and second Respondent be interdicted and/or restrained from preventing the Applicant and her children from residing at the residential house mentioned in paragraph 1 above;

1.3 That the first and second Respondent be interdicted from intimidating, threatening, assaulting and harassing the Applicant together with her children directly or indirectly and in whatever manner;

1.4 That the first Respondent be interdicted and /or restrained from disconnecting water and electricity from the residential house on the stand mentioned in paragraph 1 above;

1.5 That the second Respondent be restrained and/or interdicted from entering the residential house of the stand mentioned in paragraph 1 above;

1.6 That both Respondents be ordered to pay the costs of this application

1.7. Further and/or alternative relief.”

- [2] Accordingly to the applicant, she was married to the first respondent by customary union; however, the first respondent denies that allegation. The first and second respondents' are married to each other by civil union and copy of their marriage certificate has been attached to the first respondent's answering affidavit. The third respondent is a Traditional Authority which has been cited as an interested party and no costs order is sought against it.

- [3] The first respondent has raised two points *in limine* of non-joinder. The two points *in limine* read as follows:

3.1 “X. Village also falls under traditional leader and/or headman, one Khazamula Moses Mathebula and the Applicant failed to cite him as one of the Respondents.

3.2 *X. Village falls under Greater Giyani Local Municipality and the Applicant failed to cite Giyani Local Municipality as one of the Respondents.”*

[4] The applicant in reply to the first respondent’s points *in limine* has stated that the headman of X. Village is employed by and serves at the behest of the third respondent. She further stated that Greater Giyani Municipality does not have any interest in the allocation of sites on the land in question.

[5] It is trite that the test for joinder requires that a litigant has a direct and substantial interest in the subject matter of the litigation which he/she may be affected by the decision of the Court.

[6] In **Ex Parte Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA)** at 1238J – 1239 E Navsa JA said:

“It is a principle of our law that interested parties should be afforded an opportunity to be heard in the matters in which they have a direct and substantial interest. In Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 651 the following is stated:

‘ It was rather a subtle reasoning, which helped the court to do what it no doubt regarded as substantial justice in the peculiar circumstances of the case, while at the same time enable it to stand firm on two essential principles of law that had to be borne in mind, viz (1) that a judgement cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given, and (2) that the court should not make an order that may prejudice the rights of parties not before it.’

Later in the judgement (at 659-60) the following appears:

‘ Indeed it seems clear to me that the court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the admit of such a course, taking other adequate steps to ensure that its judgement will not prejudicially affect the party’s interests... it must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both.’

- [7] According to the applicant’s papers, she and the first respondent purchased a site at X. Village during 2015. X. village falls under Mabunda Traditional Council (the third respondent). Their local authority is Greater Giyani Municipality. On that site the applicant and the first respondent erected a house which is now the subject of the dispute.

- [8] It is common course that Khazamula Moses Mathebula is the headman of X. village which falls within the area of jurisdiction of the third respondent. Both parties are in agreement that when a site is allocated or sold, the headman will identify that site and allocate it to the relevant person. Thereafter the headman will recommend to the Traditional Council for approval. If the Traditional Council approves the headman's allocation, it will submit the approval to Greater Giyani Municipality for registration. The headman has no powers to approve the allocation of site, but he merely identifies and provisionally allocates. The final say in relation to the approval of the allocation lies with the third respondent.
- [9] Since the headman is identifying sites and provisionally allocating, he might be having an interest in the outcome of the litigation. However, the mere fact that he is having an interest in the outcome of the litigation, does not necessary warrant him to be joined. It must be shown that he is having direct and substantial interest to the order which the Court might make. In this case he is not the one who has taken a final decision of approving the site, but that is done by the third respondent. The order which the Court might make will affect the decision maker who is the third respondent and not the headman who has only made a recommendation.

[10]. Therefore, in my view, even though headman Mathebula has an interest in the outcome of this litigation, such interest is not direct and substantial. Therefore, the circumstance of this case does not warrant him to be joined to the pending litigation. On this point alone, the first respondent's first point *in limine* stands to fall.

[11] I now turn to the second point *in limine*, whether Greater Giyani Municipality should be joined to the pending litigation. It is common course that after the third respondent has approved the site, the approval will be sent to Greater Giyani Municipality for registration in order that the site should be properly serviced.

[12] In terms of section 73(1) of the Municipal Systems Act 32 of 2000, there is a general duty imposed on municipalities in respect of the provision of municipal services. The duty imposed on municipalities includes giving effect to the constitution by prioritizing the basic needs of the community, promoting the development of the community and ensuring that there is access to at least the minimum level of municipal services.

[13] In present case, the house in dispute has been registered at Greater Giyani Municipality and the parties residing in that house are receiving

basic services from that municipality. As per the applicant's version, she bought that site jointly with the first respondent. Now she is seeking an order that it be declared that she together with her children have a right to reside in that house. The first respondent on the other hand contends that the applicant is merely his ex-girlfriend and has no right to reside in that house. According to the first respondent, that house belongs to him and the second respondent.

- [14] If the Court is to find in favour of the applicant, the order of the Court will also have a direct bearing on Greater Giyani Municipality. Greater Giyani Municipality will be ordered to record in its records that the applicant has a right to reside in that house so that she can be able to receive the basic services from that municipality without any problems. In my view, Greater Giyani Municipality might be prejudiced if an order is made against them whilst they were not a party to the litigation. I am therefore satisfied that Greater Giyani Municipality has direct and substantial interest in any order which the Court might make. Therefore, it is appropriate to join them to the pending litigation. On that point alone the first respondent's point *in limine* stands to be upheld.

[15] I now turn to the issue of costs. It is trite that the award of costs is in the discretion of the Court, which discretion must be exercised judiciously, having regard to what is fair to both parties. In this case, the applicant has successfully opposed the first respondent's point *in limine*, whilst the first respondent was successful with his second point *in limine*. In my view both parties were partly successful and it will therefore be fair and just if a no cost order is made.

[16] **In the result I make the following order:**

16.1 The first respondent's first point *in limine* is dismissed.

16.2 The first respondent's second point *in limine* is upheld

16.3 The proceedings in this matter are held in an abeyance pending the joinder of Greater Giyani Municipality.

16.4 The applicant is ordered to bring a joinder application, should she be so advised, within 15 days of this order.

16.5 There is no order as to costs.

MF KGANYAGO J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE

Appearances

- | | | |
|------------------------|---|---------------------------|
| 1. For the applicant | : | |
| 2. Instructed by | : | Mpho Mashiloane Attorneys |
| 3. For the Respondents | : | |
| 4. Instructed by | : | Anton Raamano Attorneys |
| 5. Telephone numbers | : | 015 962 2232 |
| 6. Date of Argument | : | 26 February 2018 |
| 7. Date of Judgment | : | |

