REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO	
(2)	OF INTEREST TO OTHER JUDGES:NO	
(3)	REVISED: YES	
		04/02/2021
…….		…….
SIGNATURE		DATE

CASE NO: A40/2020

In the matter between:

MAGHUBA SAMUEL MATHEBULA Appellant

and

DU TOIT SMUTS ATTORNEYS First Respondent

ROBIE KHOZA Second Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is an appeal against the whole of the judgment and order of Magistrate Khumalo sitting as a Court of first instance, which he handed down on 22 July 2020. The Court *a quo* had to decide on the application of the interpleader rule of

the magistrate's court, Rule 44. The appeal follows upon the Appellants' denunciation of the decision of the Court *a quo* to dismiss his case against the Respondent. The First Respondent derives its interest in the matter from three entities which are its clients. The entities are in turn lessees of Mpakeni-Mlegeni Communal Property Association ("the CPA"). All three entities have deposited rentals due to the CPA into the trust account of the First Respondent.

[2] The rental, which it is common cause belongs to the CPA, was being claimed by the Appellant and Second respondent in their representative capacity as chairpersons of the CPA. Not knowing who of the two parties was the legitimate chairperson of the CPA, the First Respondent commenced interpleader proceedings before the court a quo calling upon them to show which of the two putative 'adverse claims' was valid. The issues that the Court *a quo* had to determine remain unchanged before this Court. The appeal serves before this Court with leave of the Court *a quo*.

GROUNDS OF APPEAL

[3] The Appellant is attacking the judgment and order of the court a *quo* on a number of grounds and these are:

3.1 The factual finding of the court a *quo* that on considering the available evidence, it was satisfied that the Appellant had failed to prove on a balance of probabilities his instruction to the First Respondent where the money of the CPA had to be deposited. Having found that it was not necessary for the Court to decide on the validity of the meeting of 28 September 2019, it nonetheless concluded that the Second Respondent had authority in respect of the affairs of the CPA;

3.2 Finding that on a prima facie basis the Appellant had no authority while the Second Respondent did when this conclusion could not be made solely on the papers before the Court;

3.3 The court a *quo* concluded that the constitution of the CPA was the basis of authority but the finding notwithstanding the court decided that the Second Respondent was properly authorized while the Appellant was not. It is astounding that the court a *quo* based that decision on the meeting of 28 September 2019 the validity of which the court held was not required to decide.

[4] On the ruling of the court a *quo* on matters of law, the Appellant raised jurisdiction and non-joinder, specifically that:

4.1 The court a *quo* erred by deciding and pronouncing on the issues without any reference or applying the procedures provided for in sub-rule 44(5);

4.2 Insofar as jurisdiction is concerned, the approach of the court a quo was that the issue hovered around different instructions given to the First Respondent where the rentals of the CPA in the possession of the Appellant was to be paid;

4.3 Regarding non-joinder, the court a *quo* found that the parties did not lay claim for the rentals in their personal capacity but erred in holding that the CPA was not required to be joined because both the parties acted on behalf of the CPA.

4.4 The Appellant also maintains that the Court a *quo* erred in directing that the Appellant was to personally pay the costs of the First Respondent in circumstances where he has found that both parties acted on behalf of the CPA. The Appellant submitted that this is a grave misdirection warranting this Court's intervention ordering the CPA to pay the costs.

FACTUAL MATRIX

[5] The First Respondent is a law firm that represents three entities referred to above. The entities have jointly deposited an amount of R379 800.00 due and owing to the CPA as rental into its trust account. The rental is for the period, 1

August 2019 to 1 February 2020, and ought to have been paid by the three entities to the CPA. On 27 January 2020, Kruger and Partners Incorporated, on behalf of the Appellant, wrote a letter to the First Respondent claiming that the funds due to the CPA by the three entities be paid into its trust account.

[6] On 9 March 2020, the Second Respondent represented by M E Mazibuko Attorneys Incorporated also wrote to the First Respondent claiming that the rental in its trust must be paid into the banking account of the CPA. Accompanying the letter were a copy of the banking details of the CPA, Minutes of the CPA's Annual General Meeting ("AGM") where the Second Respondent was ostensibly elected as the new Chairperson of the CPA, verification list of the beneficiaries of the CPA, attendance register for the meeting and a letter from the Department of Rural Development and Land Reform (the Department) reflecting and confirming the changes made to the CPA's Executive Committee and reflecting the names of the newly elected Executive Committee of the CPA.

[7] The two instructions were demonstrably at variance. Confronted with these two manifestly conflicting instructions from the Appellant and Second Respondent, the First Respondent launched this Application as it could not decide who of the parties was authorized by the CPA to provide the First Respondent with a bank account into which the rentals were to be deposited. In doing so, the First Respondent called upon the two parties to show to the Court a *quo* who of them was entitled to the funds in its trust account.

ASSERTIONS OF THE PARTIES

[8] I do not expect a party in the position of the First Respondent in these proceedings to have interest that stretches beyond resolution of the matter either in favour of the one party or the other. Understandably, its stance will always be neutral in these kind of matters. That introductory remark leaves me to deal with the arguments of the Appellant and the Second Respondent.

[9] On the endorsement of the second Respondent as a chairperson of the CPA by the Department, the Second Respondent contends that his endorsement as chairperson is an administrative act. The Appellant was the Chairperson of the CPA having taken up the position on 7 July 2012. The trust deed of the CPA provides that the term of office of a chairperson shall be three years. With that provision in mind, it follows that the term of office of the Appellant as chairperson of the CPA ended on 6 July 2015. Had elections taken place then a new chairperson would have assumed office then until 2018.

[10] Elections were held in 2019 and the Second Respondent was declared the new chairperson of the CPA on 28 September 2019. The Second Respondent concludes that he has authority to act on behalf of the CPA. To this end, he refers to a letter from the Department under the rubric of "Annual Report in Terms of Regulation 8 read with Section 11 (1) of The Communal Property Association Act, (Act No. 28 of 1996) (Annual Report). This letter, contends the Second Respondent, is an administrative decision which cannot be disregarded without it being set aside by an appropriate forum.

[11] Furthermore, the letter from the Department is prima facie proof of the people constituting the Executive Committee of the CPA. The Second Respondent, so continues the argument, is making a claim for the rentals in his Official Capacity as the Chairperson of the CPA. The Second Respondent submits that the Appellant ought to launch an application to set aside the decision of the Department because, as an administrative decision, it persists until set aside by a court of law. If it is common cause that the Appellant became chairperson of the CPA in 2012, it ought to be a matter of course that his term as a chairperson expired in 2015.

[12] The Second Respondent is steadfast that the court a *quo* had jurisdiction to adjudicate this matter in terms of Rule 44. The words, instructions and claims, in the context of this matter have the same connotation. 'adverse claims' or 'adverse instructions' or 'competing claims or instructions or conflicting claims or

instructions' must all be understood to mean the same against the background of Rule 44. Doing so will leave very little doubt that this matter was correctly dealt with under Rule 44.

[13] Insofar as non-joinder is concerned, the Second Respondent's submission is that it is trite that parties are not joined to proceedings for convenience only but it must be shown that such a party has a direct and substantial interest, which if not done, will result in prejudice. Since the parties have both declared that they act on behalf of the CPA, joining it would have been convenient only and not strictly necessary.

ISSUES

[14] It is apparent that some of the key issues to be discerned from the above facts are:

14.1 Whether or not the Court a *quo* was correct in adjudicating the dispute between the parties in terms of Rule 44. This is what the Appellant has referred to as the jurisdiction of the Court a *quo*. That issue cannot be decided independently of the determination of the presence of 'adverse claims' as envisaged in Rule 44;

14.2 Whether or not the CPA being the party to which the funds in the trust account of the First Respondent belongs, had a direct and substantial interest sufficient to have warranted its joinder to the proceedings before the Court a *quo*;

14.3 The relevance of the ratification of the meeting of 28 September 2019 of the CPA during which the Second Respondent was elected as chairperson of the CPA.

LEGAL CONTEXT

[15] Central to this matter is whether or not Rule 44 was correctly invoked in the circumstances of this case. Accordingly, to put the matter in its proper perspective, it is pivotal to cite the Rule in full below:

> *"(1) (a) Where any third party (hereinafter in this sub-rule referred to as the "applicant") has in his or her custody or possession property to which two or more persons (hereinafter in this rule referred to as the "claimants") make adverse claims the applicant may sue out a summons in the form prescribed for that purpose in Annexure 1 calling upon the claimants to appear and state the nature and particulars of their claims and have such claims adjudicated upon."*

[16] The jurisdictional facts required to be present before Rule 44 or its equivalent in the High Court, Rule 58, were described by Nestade J in the matter of **Kamfer v Redhot Haulage (Pty) Ltd**[1] as follows:

> *"…What is clear, however, is that, essential to its operation, is that the applicant alleged that he is being or expects to be sued by two or more parties making adverse claims to property or money held by him."*

[17] In brief therefore the jurisdictional facts required are:

17.1 An applicant or a third party who divests himself of the dispute between the rival parties must be in possession of property; and

17.2 Two or more parties must make adverse claims to the property in the possession of the applicant or third party. The adverse claims mentioned in the second jurisdictional fact must be valid and enforceable. Without valid and enforceable claims, the employment of the Rule is irregular.

[18] Insofar as non-joinder is concerned, the Second Respondent has referred this Court to the case of **Bowring NO v Vrededorp Properties CC and Another**[2] where the following was stated:

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[1] **1979 (3) SA 1149 (W) 1152**

"…. the enquiry relating to non-joinder remains one of substance rather than the form of the claim. (See eg Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657.) The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder, has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Aquatur (Pty) Ltd v Sacks 1989 (1) SA 56 (A) at 62A-F; Transvaal Agricultural Union v Minister of Agriculture and Land Affairs 2005 (4) SA 212 (SCA) paras 64 66)."

[19] As is evident from the cases referred to in the Bowring judgment, the SCA was merely restating the principle as articulated by other cases decided earlier. The fact that the principle was echoed in Bowring does not make it relevant to the current facts confronting this Court. As a matter of fact, other than the restatement of the principle, it was not even applied in the Bowring case because the papers were subsequently amended thereby obviating the prejudice that could have ensued. This is manifest from the contents of Paragraphs 22 and 23 of the judgment.

EVALUATION

EMPLOYMENT OF RULE 44 IN THE CIRCUMSTANCES OF THIS MATTER

[20] The jurisdictional facts mentioned in the **Kamfer** case *supra* are the only means through which interpleader proceedings can be employed. Absence of any one of the two will be fatal to such a claim. In the circumstances, for this Court to decide this matter, it is critical to determine whether or not both these jurisdictional facts are present. The First Respondent who is not part of the dispute between the Appellant and Second Respondent is in possession of rentals due, payable and owing to the CPA. This much is common cause between the parties.

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[2] **2007 (5) SA 391 (SCA) para 21)**

TWO PARTIES MUST LAY VALID ADVERSE CLAIMS AGAINST THE PROPERTY IN POSSESSION OF THE THIRD PARTY

[21] The first jurisdictional fact is not contentious at all and so is the requirement that two parties must claim the property in the custody of the third party. Here we have the Appellant and the Second Respondent. However, it is the validity of the conflicting or competing or adverse instructions to the First Respondent that pose a challenge. The Court a *quo* characterized these instructions emanating from the Appellant and Second Respondent as adverse claims as contemplated in Rule 44. The Second Respondent asserts that the Court a *quo* was correct in doing so because there was no other means for the First Respondent to resolve the dispute.

[22] It is plain from the argument of the Second Respondent that he draws no distinction between 'adverse instructions' and 'adverse claims'. It is this conflation of meanings of the two that brought the Court a *quo* to this untenable conclusion. Once both parties agree that the rental belongs to the CPA then the notion of adverse claims ceases to exist. It is totally immaterial that each rival party has given instructions to the First Respondent to pay the rental into different trust accounts of attorneys of their respective choices alleging it to belong to the CPA.

[23] Adverse instructions denotes no dispute in the entitlement of the property in possession of the applicant or third party. This is akin to the situation in this matter. Both parties are claiming the rental for the same party – the CPA. This is not the understanding of 'adverse claims' as intended in Rule 44. Adverse therefore in the context of Rule 44 is that each party must claim the property as its own it being irrelevant whether the party so claiming does so on behalf of a principal or not.

[24] The basis on which each party gave instructions to the First Respondent bears no relevance to the party to which the rental belongs. The parties are always at liberty to fight over who of them has authority to represent the CPA but that does not give rise to the invocation of Rule 44 because that is no dispute that pertains

to ownership of the property in the possession of the First Respondent. Accordingly, I can find no excuse of the Court a quo to bring the claim under the auspices of Rule 44. The characterization of the claim as an interpleader was invalid, erroneous and irregular and the case ought to have been dismissed on that ground alone. This should be the end of the road for the Second Respondent but I deem it necessary to deal with the other issues raised by both parties at length.

NON-JOINDER OF THE CPA

[25] The approach of the Court a quo on this issue was that the joinder of the CPA was not strictly required as both parties have professed to be claiming the rental on behalf of the CPA. This is an unconcealed misdirection by the Court a quo for the test to determine whether or not a party should be joined depends on its substantial and direct interest in the matter, which if not observed, will result in it suffering prejudice. See, the Bowring case *supra.* The direct and substantial interest of the CPA in the matter is evident – the rental in the trust account of the First Respondent belongs to it. That on its own is satisfactory but the enquiry should go a step further. Will the CPA suffer any prejudice if not joined to these proceedings?

[26] Of course the answer to the question posed in the preceding paragraph is unquestionably in the affirmative. The fact that there are two parties each claiming to be acting on behalf of the CPA should raise concern to anyone. What will happen if the rental is paid to the wrong party and that such party utilizes the funds for purposes other than that designated in the Constitution of the CPA? The long and short of this is that the CPA has a direct and substantial interest in the matter, which will cause prejudice if disregarded. Accordingly, and contrary to what the Second Appellant would have this Court believe, its joinder is strictly required.

ADMINISTRATIVE ACTION OF THE DEPARTMENT

[27] In my opinion this point is completely ill-advised but for purposes of completeness, this Court ought to reflect on it briefly. The case authority and other related information to which the Second Respondent committed so much time discussing would have found pertinence in a matter dealing with a challenge to his authority to represent the CPA. This application has nothing to do with his authority but has everything to do with the appropriateness of the interpleader proceedings in the circumstances of this matter.

[28] The Second Respondent has expressed some despondence over his inability to claim the rental in the possession of the First Respondent if the interpleader proceedings are set aside. For what it is worth, this Court needs to reiterate that the employment of interpleading proceedings in this matter was improper. I deliberately choose not to suggest a solution to the parties lest the Court becomes a legal advisor of the parties. This brings me to the questions of who should bear the costs.

COSTS

[29] The interpleader proceedings were launched by the First Respondent as it believed it to be a means of resolving the dispute between the parties. Needless to state that its decision was miserably incorrect. That said, it should be noted that the First Respondent did not shove its views on how the two parties could have their dispute decided down their throats. They have always been at liberty to reject it but they chose to abide because they thought that was the right thing to do. If that is the case, how can they turn around and blame the First Respondent? Anyway, the point is that they both thought that they were legitimately acting on behalf of the CPA. It cannot be right under those circumstances that they should be made to pay the costs in their personal capacity. The CPA should, as suggested by the Appellant, be liable for the costs of this appeal including those of the proceedings before the Court a *quo.*

ORDER

[30] In the result, I propose the following order:

1. The appeal is upheld, the order of the Court *a quo* is set aside and is substituted for the following:

2. The application is dismissed;

3. The CPA is directed to pay the costs of the Rule 44 proceedings.

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B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

I agree,

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N R SHABANGU-MNDAWE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 04 February 2021 at 10:00.

APPEARANCES:

Counsel for the Appellant:	**Adv JH Roelofse**
Instructed by:	**Kruger & Partners Inc**
Counsel for the first Respondent:	**Mr SA Cilliers**
Instructed by:	**Du Toit Smuts Attorneys**
Counsel for the Second Respondent:	**Mr HT Manana**
Instructed by:	**ME Mazibuko Attorneys**

Date of Hearing:	**04 December 2020**
Date of Judgment:	**04 February 2021**