

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 49025/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 04 APRIL 2023

SIGNATURE:

In the matter between:

NORMAN M MONGAE

APPLICANT

and

THE CHAIRPERSON, FIREARMS APPEAL BOARD S.A.P.S.

RESPONDENT

SUMMARY: *Notice of Motion- Judicial Review- Rule 53 of the Uniform Rules- The requirements for judicial review- Point in limine of non-joinder- Test for non-joinder.*

ORDER

HELD: The point in limine of non-joinder is upheld.

HELD: The application for review is dismissed with costs including costs of Counsel.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This is an opposed applications in which the applicant is seeking the following relief-

'1. That the Respondent hereby be summoned to give reasons, if any,

1.1 Why the declaration of unfitness in terms of section 102 of the Firearms Control Act 60 of 2000 should not be reviewed and set aside because of an irregularity committed by the Respondent.

2. That the Respondent be ordered to pay the costs of this application.

3. That such further and or alternative relief be granted to Applicant as the Court may deem fit.'

[2] The applicant is Mr Norman Mongae who is represented by Adv. Engelbrecht and the respondent the Chairperson of Firearms Appeal Board who is represented by Adv. Nemukula.

FACTUAL BACKGROUND:

[3] During the month of June 2019 the applicant's 9mm pistol went missing from underneath a pillow when he went to the bathroom which prompted him to open a case of the loss of the firearm at Mmabatho Police Station. The applicant was then charged for the contravention of section 102 (1) (d) of the Firearms Controls Act 60 of 2000 (FCA). Let/Col Manxusa instituted a section 102 inquiry against the applicant. The purpose of the inquiry was to determine whether the applicant failed to take the prescribed steps for the safekeeping of the 9mm firearm.

[4] On 19 December 2019 the applicant was found guilty of contravening section 102 (1) (d) of the FCA and declared him unfit to possess a firearm for a period of five years. Aggrieved by the decision of unfitness, the applicant lodged an appeal on 1 March 2021 with the Respondent which appeal was duly considered and dismissed on 5 May 2021. The dismissal of the appeal gave rise to the present

application for review.

ISSUES FOR DETERMINATION:

[5] The issues for determination are- (a) whether there is non-joinder of the Chairperson of the Firearms Board Inquiry and (b) whether the decision taken by the respondent to declare the applicant unfit in terms of section 102 of the Firearms Control Act 60 of 2000 (FCA) should be reviewed under the provision of Rule 53 of the Uniform Rules and (c) whether the applicant contravened the provisions of section 102(d) of the FCA.

POINT IN LIMINE:

[6] The respondent has raised a *point in limine* in the heads of argument of non-joinder of Let/Col Manxusa to the proceedings on whose decision the unfitness is based. The point in limine is intertwined with the issues for determination in the application for purposes of convenience I propose to determine together.

SUBMISSIONS:

[7] In the written heads of argument the contention on behalf of the applicant is that the ex-wife of the applicant was served as an interested party but did not respond. It is argued that the steps taken by the applicant to place the firearm under his pillow were reasonable and makes reference to case law on the test for reasonableness¹. Counsel for the applicant in his oral submission argues that the respondent is wrong to say the Chairperson should have been joined and submits that there is no merit to the point in limine. The submission is that the applicant is entitled to utilize Rule 53 for review proceedings which goes together with Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[8] Counsel for the respondent submits that the application is fatally flawed for failure to join the Let/Col Manxusa. The submission further is that this court does not have jurisdiction and or cannot review the decision of the respondent when the decision was appealed against. It is submitted that the appeal decision is binding. The contention is that the applicant seeks to review the Chairperson of the Appeal

¹ *S v Nundhahl* 1984(4) SA 264 (N); *S v Robson* ; *S v Hattiingh* 1991(3)SA 322 (W); *S v Nicodemus* 2019 JDR 1441 (Nm).

Board which makes the Chairperson an interested party on the basis that the application is entirely against him. The contention is that the court order can only be carried out by the Chairperson. It is further argued that the review cannot be in terms of Rule 53 on the basis that the applicant has not made out a case. The contention is that review should be in terms of section 6 of PAJA.

APPLICANT'S CASE:

[9] In his founding affidavit the applicant avers the following material facts-

[9.1] He is the license holder of 308 Winchester rifle; 0.22 rifle; 9mm pistol which were seized by the police which led to the order declaring him unfit to possess firearm for five years on 19 December 2019r

[9.2] An appeal was lodged with the firearms appeal board SAPS which was also dismissed.

[9.3] He concedes that he did not have the handgun in his possession when he went to the toilet however avers that the presiding officer of the inquiry erred in the following respects-

[9.3.1] by making a finding that the handgun was not in his direct control when he went to the toilet;

[9.3.2] by failing to consider that on 26 April 2017 when the interim protection order was served on him the members of SAPS did not demand the hands over the other two firearms. He avers this was indicative that the police were satisfied that he was not a danger to his ex-wife;

[9.3.3] by failing in his duty of care to consider that the evidence of his ex-wife contained falsehood because of the acrimonious divorce between them;

[9.3.4] by not considering that he has a right to life and security of his person;

[9.3.5] by failing to recognise that by the mere fact that the firearm was in the

bedroom he was in direct control of the firearm;

[9.3.6] by failing to acknowledge that he needs firearms for the protection of his property.

[10] The applicant filed a supplementary affidavit in which he avers that the review proceedings was served on Lizzy Poppy Mongae as an interested party and denies the allegations made by her that he has an angry temperament. He also denies that he abused her, threatened her with a firearm, threatened to shoot her with a gun, that he became aggressive during an argument, obtained the services of a hit man to kill her and became angry when the divorce was discussed. He avers that he has no intention to kill her.

RESPONDENT'S CASE:

[11] In opposition the respondent, Adv Lungelwa Carol Shandu who is the Chairperson of the Firearms Appeals Board avers that the facts are within her personal knowledge. She avers that the applicant made allegations against the presiding officer Let/Col Manxusa but is not joined in the proceedings. She avers that the application must be dismissed for failure to join the presiding officer. She states that the relief that the applicant seeks is not against her or the Appeal Board and this court does not have the jurisdiction to deal with the matter because the appeal has been noted and dismissed. She avers that the Appeal Board considered the evidence that was presented at the initial inquiry and found that the concession by the applicant that he was not in direct control of the firearm had no choice but to confirm the decision reached by the presiding officer. She states that the dispute was about safekeeping of a firearm and had little to do with the fact that the applicant is a businessman.

[12] The respondent avers that the applicant abuse the privilege of ownership of a firearm by failing to safe keep it. The applicant as a person trained in safe keeping of firearm should have taken care to keep the firearm under his direct control when he went to the toilet. She denies that Lizzy Mongae is an interested party and states that she was a witness and the supplementary affidavit is an abuse of court process. She prays that the applicant should pay costs on party and party scale including

costs of Counsel

APPLICABLE LEGAL PRINCIPLES:

[13] The current application is in terms of rule 53 of the Uniform Rules which provides –

‘(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi –judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer, or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) Calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and

(b) Calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.’

[14] Under Rule 53(1) the role of the Court is to ensure that the decision –maker has performed the function with which he was entrusted. In **MEC for Environmental Affairs and Development Planning v Clairison ‘s CC 2013 (6) SA 235 (SCA) (31 May 2013)** para [22] it was held ‘The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere.’

[15] The test for non-joinder was set out in **ABSA Bank Ltd v Naude No and Others 2016 (6) SA 540 (SCA) (1 June 2015)** para[10] which held ‘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'. It is now settled law that the joinder of a party is only required as a matter of necessity as opposed to a matter of convenience.²

[16] A person has a direct and substantial interest in an order that is sought in the proceedings if the order would directly affect such a person's rights or interests, such a person should be joined.³

EVALUATION:

[17] The applicant avers in his founding affidavit '*I submit that the presiding officer erred in finding.*' The reference to the phrase 'erred' utilising the trite principles of interpretation⁴ denotes that the applicant is challenging the correctness of the decision. In the circumstances he has utilised an incorrect proceedings for the relief.

[18] I deem it appropriate to reiterate the distinction between an appeal and review.⁵ An appeal in the wide sense is a complete re hearing and fresh determination on the merits and the only determination is whether the decision was right or wrong. A review is not to determine whether the decision was correct but whether the exercise of power and discretion was done properly. A review is directed at whether a decision is lawful and the process regular. It follows that the applicant seeks relief by utilising an incorrect process. In ***ABSA Bank Ltd v De Villiers [2010]2 All SA 99 (SCA) (17 November 2009)*** para [27] It was held 'As a rule, where the complaint is against the result of the proceedings rather than the method, the proper remedy is by way of appeal rather than review.'

[19] The notice of motion indicates that the applicant seeks to review the

² See *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) para [12].

³ See *Snyders and Others v De Jager (Joinder)* 2017 (5) BCLR 604 (CC) (21 December 2016) para[9]

⁴ See *Natal Joint Municipal Pension Fund v Endumeni Municipal* 2012 (4) SA 593 (SCA) para [18].

⁵ See *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T).

decision of the respondent, who is the Chairperson of the Firearms Board due to an irregularity. Yet in the founding affidavit, the applicant makes averments against the party who is not before this court. On the merit of the application the applicant fails to make out a case against the present respondent. Based on the founding affidavit either a wrong party has been brought before the court or the applicant has failed to make out a case against the respondent. The argument by the counsel for the applicant that it there is no merit to the point in limine is with respect incorrect. The notice of motion and affidavit must establish what the claim the applicant is seeking. In motion proceedings the affidavits not only serve to place evidence before the court but also define the issues between the parties.⁶ On the facts of this matter, I am unable to decipher whether the applicant seeks an order against the respondent in which case a correct party is before this court or he seeks an order against Let/ Col Manxusa in which case an order if issued by this court will be directed against a different party.

[20] The assessment as reflected above shows that the Let/ Col Manxusa has a legal interest to the proceedings. It is trite that no court may make an order against anyone without giving that person the opportunity to be heard. It follows that there is non-compliance of Rule 53 (1) with reference to '*to all other parties affected*'. Applying ***ABSA Bank Ltd v Naude No and Others 2016 (6) SA 540 (SCA) (1 June 2015)*** to the facts, I am of the view that there is merit to the point in limine. In the absence of the functionary whose decision is the subject of this application, I find that the application is flawed. Under the circumstances it is unnecessary to apply the provisions of Promotion of Administrative Justice Act 3 of 2000.

[21] The respondent before the court mere confirmed the decision of the initial inquiry and the founding affidavit do not make out a case on the irregularities against the present respondent committed. The founding affidavit does not reflect which order is the applicant seeking to review- was is the order dated 19 December 2019 or 5 May 2021. There is ambiguity and it is not for this court to try and decipher and make out a case for litigants.

⁶ See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the republic of South Africa 1999 (2) SA 279 (T) at 323G*.

[22] On the averment whether or not this court has jurisdiction to pronounce on the matter and grant the relief, I opt not to make a finding based on the fact that the application is fatally flawed by virtue of non-joinder. I have deemed it not necessary to pronounce on whether the decision taken by the respondent to declare the applicant unfit in terms of section 102 of the Firearms Control Act 60 of 2000 (FCA) and whether the applicant contravened the provisions of section 102(d) of the FCA.

CONCLUSION:

[23] In conclusion, I find that on the papers envisages an appeal procedure rather than a review thereby creating an ambiguity. In the event that my interpretation is incorrect, the application stands to fail on the non-joinder of the interested to wit the presiding officer Let/Col Manxusa, I find that there has been non-joinder on the basis that he has a direct interest in the order of this court. Based on these grounds it follows that the point in limine stands to be upheld. Consequently the application for review must fail.

COSTS:

[24] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the court which must be exercised judicially. I find that a just cost order is that the applicant must pay costs on party and party scale.

Order:

[26] In the circumstances the following order is made:

5The point in limine is upheld.

1. The application for review is dismissed with costs including costs of Counsel.

**MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances:

On behalf of the Applicant : Adv. J. Engelbrecht Instructed by : Kgomo
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On behalf of the Respondent : Adv. N. Nemukula Instructed by : State
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Date of Judgment : 04 April 2023