

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

Case number: 5723/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MOEKETSI JOHN MOLAOA

1st Applicant

and

MOTLAGOMANG VIOLET MOLAOA

1st Respondent

THE MANGAUNG METROPOLITAN MUNICIPALITY

2nd Respondent

THE DIRECTOR-GENERAL OF THE FREE STATE
PROVINCE N.O

3rd Respondent

THE DEPUTY DIRECTOR: LAND TENURE
SUB-DIRECTORATE N.O

4th Respondent

THE MEC, FREE STATE DEPARTMENT OF
HUMAN SETTLEMENT N.O

5th Respondent

THE REGISTRAR OF DEEDS, BLOEMFONTEIN N.O

6th Respondent

CORAM:

MOLITSOANE, J

HEARD ON:

18 MAY 2023

JUDGMENT BY:

MOLITSOANE, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by released to SAFLII. The date and time for hand-down is deemed to be 12h30 on 26 May 2023

[1] The Applicant seeks an order in the following terms;

- a) That the second, third, and fifth respondents be found to be in contempt of the order of the court of Mhlambi, J granted on 28 April 2022 under case number 4373/2021;
- b) That the Municipal Manager of the respondents be imprisoned for a period of one month, alternatively, that this court impose upon them such sentence as it considers appropriate;
- c) Directing the respondents to pay the costs of this application, jointly and severally, the one to pay and the others to be absolved, on a scale as between attorney and client.

[2] Only the second respondent opposes the relief sought. The second respondent also raised various defences including, *in limine*, the non-joinder of the Municipal Manager

[3] I declined to adjudicate the merits of this application and only heard arguments on non-joinder of the Municipal Manager. For the purposes of the decision on non-joinder, it is unnecessary to discuss the merits of the application.

[4] The test to determine the question of non-joinder of a party is whether such a party has a direct and substantial interest in the outcome of the case before court.

[5] In *Matjhabeng Local Municipality vs Eskom Holdings Ltd and Others; Mkhonto and Others v Compensation Solutions (Pty)Ltd*¹ (*Matjhabeng*) the Court said:

“At common law, courts have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. A court could, *mero motu*, raise a question of joinder to safeguard the interests of a necessary party and decline to hear a matter until joinder has been effected. This is consistent with the Constitution.”

[6] It is contended on behalf of the second respondent that a committal order may only be granted in circumstances where one becomes a party to the proceedings and his side had been heard. The Second Respondent contends that it should be uncontentionous that the Municipal Manager is not a party to these proceedings. To this end, the second respondent seeks an order dismissing this Application with costs.

[7] On the other hand, the submission of the applicant is that the Municipal Manager, which includes the current Acting Municipal Manager in this case, is the accounting officer of the municipality. It is contended that in terms of section 55 of the Local Government: Municipal Systems Act 32 of 2000, the Municipal Manager is responsible and accountable for all income and expenditure of the municipality, the discharge of all liabilities and the proper and diligent compliance with the Municipal Finance Management Act. Counsel for the applicant contends that there can be no dispute that the the Municipal Manager is the accounting officer tasked with overseeing the implementation of the court orders granted against the municipality.

¹ 2018(1) SA1 (CC) at para 91.

[8] During the hearing of this application, both Counsels were asked to address this Court on whether this case is distinguishable from the case of *Matjhabeng* referred to above. Not much need be said on the submissions raised by the parties as in effect Counsels rehashed the submissions raised in the affidavits. Me Macakathi, for the applicants also contended that in the *Matjhabeng* matter, the functionaries were committed to imprisonment in a summary procedure.

[9] The blow to the applicant is the fact that no court can make a finding to any person's interest, without the said person first be being a party to the proceedings before it.² It is not in dispute that the Acting Municipal Manager is not a party to these proceedings. It is appropriate to refer to the following excerpt from *Matjhabeng* as it is dispositive of any argument by the applicants regarding non-joinder of the Municipal Manager. The court held thus:

“[103] Bearing in mind, that the persons targeted were the officials concerned – the Municipal Manager and Commissioner in their official capacities – the non-joinder in the circumstances of these cases, is thus fatal. Both Messrs Lepheana and Mkhonto should thus have been cited in their personal capacities – by name – and not in their nominal capacities. They were not informed, in their personal capacities, of the cases they were to face, especially when their committal to prison was in the offing. It is thus inconceivable how and to what extent Messrs Lepheana and Mkhonto could, in the circumstances, be said to have been in contempt and be committed to prison.”

[10] The failure to cite and join the Municipal Manager is fatal to the applicant's case. I accordingly decline to hear the merits of this case.

[11] There is no reason why the applicant should not be ordered to pay the costs of the Second Respondent. I accordingly make this order:

² *Matjhabeng*(supra) para 92.

ORDER

1. The application is removed from the roll pending the formal joinder of any functionary to be affected by the order;
2. The Applicant shall bear the costs of the Second Respondent on party and party scale;

P.E. MOLITSOANE, J

On behalf of the Applicants: Adv I. MACAKATI
Instructed by: McIntyre van der Post Attorneys
BLOEMFONTEIN.

On behalf of the Second Respondent: Adv. P.T MASIHLEHO
Instructed by: Phatshoane Henney Attorneys
BLOEMFONTEIN.