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

CASE No.: **5520/2021**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

MAFUMA CONSULTING (PTY) LTD

Applicant

And

BRANDFORT FORUM

First Respondent

INA BEUKES N.O.

Second Respondent

JOHAN ENGELBERTUS FOURIE N.O.

Third Respondent

MASILONYANA LOCAL MUNICIPALITY

Fourth Respondent

LEJWELEPUTSWA DISTRICT MUNICIPALITY

Fifth Respondent

FRANS BESTER PROSTHUMUS N.O.

Sixth Respondent

In re:

BRANDFORT FORUM N.O.

First Applicant

INA BEUKES N.O.

Second Applicant

JOHAN ENGELBERTUS FOURIE N.O.

Third Applicant

And

MASILONYANA LOCAL MUNICIPALITY

First Respondent

LEJWELEPUTSWA DISTRICT MUNICIPALITY

Second Respondent

MAFUMA CONSULTING (PTY) LTD

Third Respondent

JUDGMENT BY: VAN RHYN, J

HEARD ON: 27 JULY 2023

DELIVERED ON: 30 AUGUST 2023

[1] The question that arises with this opposed application is whether it is appropriate for this court to grant the relief sought by the applicant in its Notice of Motion which provides as follows:

- “1. That **FRANS BESTER PROSTHUMUS N.O.** be joined as the sixth respondent in the rescission application under case number 5520/2021;
2. That the headings in this matter henceforth reflect the sixth respondent as the sixth respondent;
3. Granting leave to the applicant to amend the headings of all of the documents filed of record in the rescission application to reflect the First Respondent as “Brandfort Forum” in order to reflect such joinder;
4. That all documents filed of record be served upon the party joined in terms of prayer 1, 2 and 3 within 10 (ten) days of the date of this order;

5. That the costs of the application shall be costs in the rescission application and in the event of any opposition from the parties intended to be joined or the respondents, that party or parties shall bear the costs occasioned by the opposition.”

[2] The parties to the present application have a long litigious history. The applicant is Mafuma Consulting (PTY) Ltd, a private company with its registered address and principal place of business at Rivonia, Gauteng. During September 2021 a service level agreement was concluded between Masilonyana Local Municipality, the fourth respondent and the applicant for the installation of prepaid electricity meters and the sale of electricity by means of the prepaid electricity metering within the area of the Masilonyana Local Municipality.

[3] Masilonyana Brandfort Forum (“Brandfort Forum”) is an association with perpetual succession which conducts its activities as the Masilonyana Brandfort Forum Trust with registration number IT0[...] (T) (the “Trust”). The trustees of the Trust, as per the Letter of Authority issued by the Master of the High Court on 13 August 2021, are Ina Beukes, Johan Engelbertus Fourie and Frans Bester Posthumus. The first respondent in this application is cited as Brandfort Forum. The second respondent is cited as Ina Beukes N.O. and the third respondent as Johan Engelbertus Fourie N.O.

[4] The fifth respondent is Lejweleputswa District Municipality, a municipality contemplated in section 2 of the Local Government: Municipal Systems Act operating under the care of the municipal manager with its offices situated at Welkom, Free State Province. The Sixth respondent, in the heading, is Frans Bester **Prosthumus** and, in paragraph 11 of the founding affidavit, is cited as Frans Bester Posthumus.

[5] On 5 November 2021 the applicant was restrained from continuing to install any further prepaid meters in said area subsequent to an interim interdict granted by this court on application by Brandfort Forum and the trustees of the Trust. On 21 November 2021 Brandfort Forum and the trustees of the Trust issued a review application under the above case number which served before court on an unopposed basis on 20 February 2023. On 10 March 2023 judgment in the review application was handed down. It is against the judgment on review, that the applicant issued its rescission application. The review

judgment granted the relief sought by Brandfort Forum and the trustees of the Trust, including Frans Bester Posthumus N.O.

[6] In its rescission application, applicant cited Ina Beukes N.O. as the first respondent and Johan Engelbertus Fourie N.O. as the second respondent. Due to an error the applicant failed to cite Frans Bester Posthumus N.O., the remaining trustee of the Trust, as a party to the application for rescission. The respondents filed their answering affidavit and raised a point of non-joinder of Frans Bester Posthumus and the fact that Brandfort Forum was not cited correctly.

[7] The opposition to the rescission application resulted in the present application for the joinder of Frans Bester **Prosthumus** N.O. as the sixth respondent and the amendment of description of the first respondent from Brandfort Forum N.O. to Brandfort Forum.

[8] The application for joinder is opposed by the first and second respondents on the basis that the trustees of the Trust were clearly and lucidly reflected in the review application, the court order in the review application as well as in the answering affidavit deposed to in opposition of the rescission application. Furthermore, the applicant already reflects the sixth respondent in the heading even though the sixth respondent has not been joined to the rescission application. The joinder of the third trustee of the Trust is opposed on the basis that no person by the name of Frans Bester **Prosthumus**, as indicated in prayer 1 of the applicant's Notice of Motion, is a trustee of the Trust.

[9] In paragraph 5.3 of the respondents answering affidavit it is contended that the applicant is solely responsible for the non-joinder of the third trustee of the Trust as well as the incorrect citation of the first respondent. Notwithstanding the applicant's contention that the reason for the non-joinder of Frans Bester Posthumus N.O. and the misnomer in respect of the Brandfort Forum are purely as a result of a clerical error, it in the replying affidavit, deny the contents of paragraph 5.3 made by the first and second respondents that the applicant is responsible for the errors which it now seeks to rectify.

[10] At the hearing of this application Ms Matome, on behalf of the applicant, and after being questioned whether an application for amendment of the notice of motion are moved for, replied that no such application will be made during the hearing of the matter. The

applicant will proceed with an application for an amendment of the third trustee's surname at a later stage.

[11] Mr. Snellenburg SC, counsel on behalf of the first and second respondents, replied that in light of the applicant's failure to request an amendment of the notice of motion, the application for joinder of Frans Bester **PROSTHUMUS N.O.** remains opposed on the basis that joinder can therefore not succeed vis-à-vis the sixth respondent as it will merely constitute a misjoinder and the non-joinder will remain. I agree.

[12] Subsequent to the hearing of the matter Ms Matome submitted, via email, case law regarding the amendment of an incorrectly cited party. I have perused the judgment in **Foxlake Investment (Pty) Ltd v Ultimate Raft Foundation Design**¹ which deals with an application to amend the citation of one of the parties and whether such amendment would amount to a substitution of a defendant or the correction of a misnomer and furthermore, whether the service of the original summons served to interrupted prescription. However, the issue in the application at hand remains the failure to amend the misnomer of the party to be joined by the applicant.

[13] Mistakes in pleadings and applications are a common phenomenon and where there is an error in the citation of a party, as in this matter regarding the failure to cite Frans Bester Posthumus N.O and the incorrect citation of Brandfort Forum, the solution is to apply for the joinder of the correct party coupled by an appropriate amendment. Frans Bester Posthumus N.O. is already represented and has been a party in the litigation preceding this application. It is common cause that the uncited trustee of the Trust should be joined, alternatively, that the heading should be amended to correctly reflect Frans Bester Posthumus N.O as a party in the rescission application.

[14] Regarding the costs of this application I take into account that subsequent to delivery of the joinder application the attorney acting on behalf of the respondents, Mr T O'Reilly of Symington De Kok Attorneys, addressed a letter to the attorneys acting on behalf of the applicant on the 18th of May 2023 indicating the following:

¹ (144/15) [2016] ZASCZ 54 (1 April 2016).

“However, in an attempt to curtail further unnecessary litigation costs, we hold instructions not to object to your client’s proposed amendment or to your client’s proposed application for joinder, subject thereto that your client tenders the costs occasioned by the proposed amendment as well as the proposed joinder application. We note that your client does not tender the costs occasioned by the proposed amendment.”

And further.

“In your client’s founding affidavit to the joinder application it is confirmed that your client agrees with the point in law of non- joinder. The aforesaid amendment as well as the joinder application is thus necessitated by your client’s failure to properly join all the relevant parties. Our clients had to properly consider the aforesaid notice to amend as well as the joinder application and insist that your client tenders the cost occasioned thereby.

We urgently await your written confirmation in this regard, failing which we hold instructions to formally oppose the application for joinder on this basis.

We confirm that this letter shall be made available to the Honourable Court in support of our clients’ position if necessary. However, we trust that this shall not be necessary.”

[15] The applicant did not tender costs where after the first and second respondents filed a notice to oppose as well as an answering affidavit. On behalf of the applicant it was argued that the provisions of Rule 10(4) (b) of the Uniform Rules of Court do not provide that an applicant should tender costs. Furthermore, the first and second respondents are, as contended in the replying affidavit, “... attempting to set an unprincipled precedent for any litigant to extort payment from the other party in order for the case to proceed unopposed”.

[16] Mr Snellenburg SC, with reference to **The Minister of Home Affairs v Ahmed and Others**² took issue with the insults directed at the first and second respondents and their

² (A102/17) [2019] ZAGPHC 19 (14 February 2019) at [39].

legal team. Examples of the accusations and insults contained in the papers ranged from “attempts to solicit money”, costs of perusal of the application are as a result of the “*mala fides* opposition” of the application, and the respondents to have “...opted to apply a pungent and unprofessional tactic in this application”.

I agree with the submissions made by Mr Snellenburg SC. There is no room for abuse or insults in court proceedings.

[17] I am of the view that had the joinder application sought to join the correct person and to alleviate the non-joinder, the applicant would still have been constrained to tender the first and second respondents’ costs for perusal and consideration of the joinder application. There is simply no justification for the cost of the joinder to be cost in the rescission application. In any event, the prayer for the joinder of Frans Bester **Prosthumus** N.O. has not been amended to reflect the joinder of Frans Bester Posthumus N.O. and as a result the application stands to fail.

[18] The relief prayed for in prayer 3 of the Notice of Motion regarding the amendment of the citation of the first respondent to read Brandfort Forum and not Brandfort Forum N.O is not opposed.

[19] **ORDER:**

Accordingly, it is ordered that:

1. The applicant is granted leave to amend the heading of all the documents filed of record in the rescission application under case number 5520/2021 to reflect the First Respondent as “Brandfort Forum”.
2. The application for the joinder of Frans Bester Prosthumus N.O., to be joined as the Sixth Respondent in the rescission application under case number 5520/2021 is dismissed.
3. The applicant shall pay the costs of the application.

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant:

ADV. M MATOME

Instructed by:

WEBBERS ATTORNEYS

BLOEMFONTEIN

On behalf of the 1ST 2ND Respondents:

ADV. N SNELLENBURG SC

Instructed by:

SYMINGTON DE KOK ATTORNEYS

BLOEMFONTEIN