

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

Case number.: 2537/2015

In the matter between:

**SELLO MOSES LEPOTA**

Applicant

and

**LYDIA MAMPAI MOKEKI**

Respondent

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**HEARD:** 10 SEPTEMBER 2015

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**JUDGMENT BY:** MOCUMIE, J

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**DELIVERED ON:** 10 SEPTEMBER 2015

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**MOCUMIE, J**

- [1] The applicant applies to the court for a mandatory interdict ordering the respondent to sign and deliver to the office of the applicant's attorney an application for a permit (form VSPV/FSPT-10) in order to transfer operator licence LFL2KB32811/1 (the operating licence) from the respondent to the applicant, in the format contained in annexure 'A' to the Notice of Motion. The applicant also seeks an order that the respondent take all the necessary steps which might be necessary in order to transfer the operating licence to him and an order that the registrar of this court is authorised to sign the application permit and take steps if the respondent fails to comply with the order.

The application is opposed.

- [2] The respondent raises one point in *limine*, pertaining to non-joinder in that the applicant failed to join the Minister and or MEC and his and or delegated officials and or entities, namely the Provincial Board amongst others, as the custodians of the relevant forms and processes for the application of operating licences in terms of the National Land Transport Act 5 of 2009 and the Public Transport Act 4, 2005.
- [3] The respondent alleges that the aforementioned officials and or entities have an interest in the matter and they should have been joined as parties.
- [4] The substantial test for where the objection of non-joinder is raised 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.<sup>1</sup> An order of joinder has always been limited to cases in which a joinder is necessary. Generally, courts refuse to grant such order where there was no material before it to establish any direct or indirect interest in the relief sought.<sup>2</sup>
- [5] In this case, the respondent has placed no material whatsoever before this court to establish any direct or indirect interest in the relief sought. The point in *limine* must accordingly fail.
- [6] The salient facts of this case which are common cause are as follows. Sometime in 2012 the applicant and respondent concluded an agreement in which the respondent undertook to sell an operating licence to the applicant at R28 000.00. The respondent paid the amount in April 2012 to the applicant. Upon receipt of the amount, the respondent made an affidavit in which she confirmed that she was willing to transfer the operating licence permit to the applicant. The affidavit was submitted to the Chairperson of the Greater Bloemfontein Taxi Association (GBTA) but found to be older

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<sup>1</sup> *Bowring NO v Vrededorp Properties* 2007 (5) SA 391 (SCA) para [21]; *Aquatour (Pty) Ltd v Sacks* 1989 (1) SA 56 (A) at 62A-E; *Transvaal Agriculture Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) para 64-66.

<sup>2</sup> *Harms et al: Civil Procedure in the Superior Courts* B6.42.

than a year. This compelled the respondent to fill in another affidavit and submit same with the necessary authorities and gave same to the applicant.

- [7] The applicant thereafter faxed all the papers to the respondent for her to complete and sign to formalise the transfer. The respondent delayed to do so. A reminder was sent to her followed by a request of sign the affidavit and the offer to transfer the operating licence, through the respondent's erstwhile attorney, Mr Nico Naude, who subsequently withdrew as the respondent's attorney.
- [8] In the heads of argument and her Replying Affidavit the respondent admits the conclusion of the agreement and payment of the R28 000 to the applicant. But alleges that on an unspecified date and at an undisclosed place she and the applicant approached the Board to complete the necessary forms for the transfer. They were together when they were informed by an unnamed person or member of the Board that to transfer her operating licence to someone else was illegal. So, the argument is made, she and the applicant agreed to cancel the agreement and that she should refund the applicant. The applicant accepted the cancellation and to be reimbursed.
- [9] She alleges that, consequently when the applicant approached her for the second time to sign the papers she could not sign them based on the attitude of the Board i.e. it was illegal to sell her operating licence to someone else. It is the applicant that reneged on the agreement to cancel when he refused to accept the money.
- [10] Section 51 of the Free State Public Transport Act 4, 2005 authorizes the transfer of an operating licence by one person to another. The applicable form must, for such purpose, be signed by both the transferor and the transferee. It goes without saying that once the form is submitted duly signed by both parties the relevant authorities will then give same attention and apply other requirement to determine whether the transferee qualified or not.

- [11] It is not in dispute between the parties that an agreement was concluded between the parties as aforesaid and that the applicant has paid the respondent R28 000 as the purchase price. The applicant's case is simply that had the Board not refused that she signs off the relevant affidavit, the transfer would have materialised. She would not have cancelled the sale and offered to refund the applicant.
- [12] The applicant in his answering affidavit denied that he and the respondent ever visited the offices of the Road Transportation Board in 2012 after the respondent accepted his money in conclusion of a sale agreement of the respondent's operating licence between them. He denied that there was any cancellation or offer to refund the money. If there was any such cancellation, Mr Louw submitted, such cancellation was not supported by the respondent's own version and admissions on the papers. The communication between the parties from the time Mr Naude, the respondent's erstwhile attorney, was on board, bears no resemblance of a cancellation of the agreement. To the contrary the communications indicate a common understanding that the operating licence was sold but due to unknown reasons the respondent delayed to sign off the papers. That is why the applicant's attorney put pressure on her to do so. At no stage did the respondent rely on a cancellation of the agreement until late in her Replying Affidavit. Which the applicant vehemently denies. To date the respondent has still not paid him the R28 000 she alleges she offered to repay.
- [13] Mr Khang, for the respondent, submitted that on the issue of non-joinder and whether the agreement was cancelled or not there is a dispute on the facts which the applicant should have foreseen and not proceeded on Motion.
- [14] To the contrary. Mr Louw submitted that from the admitted facts there was no cancellation of the agreement. There is no indication where and when the purported cancellation and proposed refund were made. Nor the purported refusal by the applicant to accept the refund. These are just bare denials which can never amount to a genuine dispute of facts. These denials which

do not tally with the circumstances of the case are to create a fictitious dispute which is not supported by the facts.

[15] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. If notwithstanding that there are facts in dispute on the papers the court is satisfied that the applicant is entitled to relief in view of the facts stated by the respondent together with the facts in the applicant's affidavits which are admitted or have not been denied, it will make an order giving effect to such finding [deal with the application on the undisputed facts].<sup>3</sup> It is generally undesirable to endeavour to decide an application upon affidavit where material facts are in dispute. It is equally undesirable for a court to take all disputes of fact at their face value. If this were done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant.<sup>4</sup>

[16] In line with the *Plascon Evans*<sup>5</sup> test, I have considered the respondent's Replying Affidavit and communication between the parties on the agreement concluded between the parties. In my view, the respondent's version consists of bald denials which make the version palpably implausible, farfetched and clearly untenable. In one breath she admits the agreement without any reference to the purported cancellation. In the next, she makes the unsubstantiated allegations only in her Replying Affidavit that the agreement was cancelled. In truth there is no real and genuine dispute between the parties. There is no way that the agreement could have been cancelled as the respondent desperately tried to portray. The respondent's version is rejected outright.

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<sup>3</sup> *Roomhire Co (Pty) v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

<sup>4</sup> *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428.

<sup>5</sup> In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the test is set out as follows: Where in motion proceedings a dispute of fact arises on the affidavit, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

- [17] Having said that, the only remedy available under the circumstances to the applicant is an order from this court that the respondent must sign the entire necessary document to effect transfer of the operating licence to the applicant. The Road Transportation Board will either approve or not approve. But that cannot be done until the respondent has carried out her end of the bargain.
- [18] I am satisfied that the applicant has made out a proper case and has met the requirements for a final interdict.<sup>6</sup>
- [19] In the result, an order is granted in terms of paragraphs 1, 2, 3, 4 and 5 of the Notice of Motion.

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**B. C. MOCUMIE, J**

On behalf of the applicant:  
Instructed by:

Adv. M.C. Louw  
Honey Attorneys  
BLOEMFONTEIN

On behalf of the respondent:

Mr Mphafi Khang Inc.  
BLOEMFONTEIN

/PC

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<sup>6</sup> *Setlogelo v Setlogelo* 1914 AD 221 at 227.