



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 20421/2024

In the matter between:

STONEHILL PROPERTY FUND PROPRIETARY LIMITED

Applicant

and

ANDILE SHONGWE

First Respondent

KRAVITOUCH (PTY) LTD

Second Respondent

Date heard: 10 October 2024

**JUDGMENT DELIVERED ELECTRONICALLY
WEDNESDAY, 16 OCTOBER 2024**

NZIWENI, J

- [1] The applicant brought this opposed application on an urgent basis seeking an interdict against the first and the second respondents. In respect of the first respondent, the applicant also seeks a mandatory interdict [otherwise *mandamus* relief], directing the first respondent to disclose the identities of seven individuals who he had formed a consortium in respect of transactions relating to the Pullman Hotel.

[2] The order sought by the applicant *inter alia*, is couched in the following terms:

“1 . . .

2 The first and second respondents are interdicted from organizing, fomenting, promoting, attending or otherwise participating in any march, demonstration, gathering, concourse, petition, assembly or picket to, or directed toward the protesting of, the Pullman Hotel located at . . . including the march scheduled for 18 October 2024.

3 To the extent that the Court holds that the applicant has established an entitlement only to an interim, and not a final, then it is ordered that action proceedings shall be instituted against the first and second respondents within 30 days of grant of this order failing which the interdict shall lapse, and the interdict shall operate pending the final determination of the action . . .”

[3] The respondents' response to the application raised, *inter alia*, three preliminary points, namely, non-joinder of necessary parties, misjoinder of the second respondent and lack of urgency. I then directed that we deal first with the preliminary point dealing with joinder as it may render the determination on urgency and merits unnecessary. The essence of this challenge is whether the applicant has joined a party that should not have been joined and did not join parties that should have been joined. In respect of the non-joinder preliminary point, the relevant question that begs is whether the parties mentioned in the respondents' draft order can be said to be necessary parties.

Parties' positions

- [4] In essence, the respondents submit that in light of the averments made in the founding affidavit the applicant should have foreseen that it was necessary to join the parties mentioned in the respondent's draft order.
- [5] The essentials of Mr Ka-Siboto argument on respondents' behalf, as set out in his heads argument and developed orally, were as follows. It is the respondents' position that if the court is inclined to grant the order sought by the applicant, then the political parties that involve themselves in the demonstrations to the applicant's hotel would be liable for contempt to the extent they cooperate with the first respondent. Mr Ka-Siboto developed these submissions during his argument. Accordingly, he submitted that there is a live threat to the political parties who are not cited if they ignore the order. He further stated that the very existence of the threat has a chilling effect on a fundamental right contained in sections 16,17, 18, and 19 of the Constitution. It is further asserted on respondent's behalf that the relief sought by the applicant is broad.
- [6] Accordingly, Mr Ka- Siboto submitted that, the applicant in its founding affidavit pertinently identifies who started and organized the protests. And none of the parties mentioned in the founding affidavit are before this Court, yet an order that has an impact on their rights in so far as they associate themselves with the first respondent. It is further submitted on respondents' behalf that the allegations made in the founding affidavit, in relations to the political parties, are important factual claims that are determinative of the outcome of this application. As such, it is not competent for this Court to make an order in their

[various political parties] absence. The respondents request that this court should strike the matter from the roll.

- [7] The joinder issue is vehemently opposed by the applicant. Ms Goodman SC asserts that the respondents say the applicant should bring to this Court anyone who has an interest in these marches. According to applicant's counsel, the respondents seek a joinder of people who participated in the march and the people who have an interest in taking part in the march.
- [8] It is further submitted that on applicant's behalf that if the respondents persist with the issue of non-joinder, they should identify the list of persons to be joined or otherwise, the applicant will not know who to join. It is argued on applicant's behalf that if this court is inclined to uphold the preliminary point of non-joinder, it is not competent for the court to strike the matter from the roll, on basis of non-joinder. According to the applicant, the matter should be postponed sine die to afford the applicant an opportunity to join the parties the Court orders them to join in this application.
- [9] It is also the assertion of the applicant that should this Court grant the order for joinder, that order should be coupled with an order for the disclosure of the persons who were involved in the acquisition deal with the first respondent, so that they can be joined in these proceedings. As such, the applicant would persist with the *mandamus* application. According to the applicant's counsel, the people who have an interest in the protests are the people who take part in them and the people for whose benefit are being pursued.

- [10] It is argued on applicant's behalf that if this Court is inclined to uphold the preliminary point of non-joinder, it is not competent for the court to strike the matter from the roll-on basis of non, joinder. According to the applicant, the matter should be postponed sine die for the joinder.

Evaluation

Non-Joinder

- [11] It is the applicant's contention that the relief sought is only against the respondents. It is further the applicant's contention that the applicant does not seek an open-ended order that there are to be no protests to the Pullman Hotel. According to the applicant's argument, the applicant is not required to join persons against whom it seeks no relief.
- [12] The essence of the applicant's argument is that, if an order is granted on exactly the terms sought by the applicant, nothing in it would prevent the EFF, the ANC Youth League and other third parties from lawfully organizing marches or protests in accordance with the requirements of the Gatherings Act. The difficulty with the applicant's assertion springs from the fact that, the applicant further asserts the following.

"Of course, those with the knowledge of any order against Mr Shongwe and Kravitch who then nevertheless cooperate with them in the organization of future marches, or who organise marches at their instigation, could conceivably be guilty of contempt of court, but that is a matter for the future."

- [13] A fair reading of the above extract compels the conclusion that it features the implicit allegation that those who are aware of an order against the respondents and cooperate with them in the organisation of future marches may make themselves guilty of contempt of court. That, of course, is a serious contention. Whilst it is untenable that the applicant should join all demonstrators, I am of the view that the remedy sought by the applicant in paragraph two of the notice of motion, casts a very wide net. Hence, in the circumstances of this case, the argument that the respondents seek a joinder of people who participated in the march and the people who have an interest in taking part in the march, has significantly less force.
- [14] Furthermore, viewed in the light of the above extract, it is evident that the political parties that might organise marches and protests in future may face legal consequences stemming from these proceedings. Of particular importance, the applicant in the founding affidavit asserts that the respondents are politically connected, and corralled to their cause several political parties, who have since led marches and protests to the applicant's hotel on three separate occasions. A further march is planned for 18 October 2024. It is also pertinent to note that the applicant also states in the founding affidavit that these marches and protests have caused harm in the past and if they continue, they threaten to cause further significant harm to the applicant and its hotel business at the property.
- [15] Of particular interest is that the applicant's papers pinpoint that the political parties have corralled to the respondents' cause to lead marches and protests

that cause harm to the applicant and a further march is planned. The corollary of this is that the applicant asserts that the conduct of the respondents and the various political parties are inextricably intertwined. By a parity of reasoning, therefore, it follows that the applicant alleges that the respondents organised the marches and protests to the applicant's hotels in cohorts with the political parties. And *inter alia*, those marches, they include the one that is scheduled for 18 October 2024.

[16] In my mind, the corollary of this above extract in the replying affidavit is that, as far as the demonstrations to the applicant's hotel are concerned, the political parties and the respondents share a common goal. On applicant's own version, it is clear that the applicant has linked the political parties that were involved in the past marches and protests and the impending march. I consider that, fundamentally, there is an inextricable link between the order sought in paragraph two of the notice of motion and the various marches to the applicant's hotels.

[17] There is evidence in this matter that reveals that certain persons responsible for the arrangement of the demonstrations or gatherings from various political parties ['convenors'] that are listed in the respondents' draft order; would go to Pullman hotel and give notice of their intention to stage a gathering. The political party 'representative' would also give information about the purpose of the demonstration. Therefore, it is not difficult to fathom that the political parties involved in the demonstrations to the applicant's hotel have a direct and substantial interest or involvement in the matters being discussed.

- [18] Everyone has a constitutional right to express a grievance through a protest and marches. This right includes the right to organise the demonstrations.

Herbstein & Van Winsen 'The Civil Practice of the High Courts of South Africa' 5 ed (2009) at page 208, the following is stated:

"Apart from considerations of convenience, however there are circumstances in which it is essential to join a party because of the interest that party has in the matter. When such an interest becomes apparent the court has no discretion and will not allow the matter to proceed without joinder or the giving of judicial notice of the proceedings to that party. The reason for this is that it is a principle of our law that interested parties should be afforded an opportunity to be heard in matters that they have a direct and substantial interest. . .

A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings. . .

A 'direct and substantial interest' has been held to be 'an interest in the right which is the subject – matter of litigation and not merely a financial interest in such litigation. It is a 'legal interest' in the subject - matter of the litigation, excluding an indirect commercial interest only. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that in fact it exists. For a joinder to be essential, the parties to be joined must have a direct and substantial interest not only in the subject matter of litigation, but also in the outcome of it.

It is important to remember that a constitutionally protected right is legally enforceable and give rise to a legal interest which may require joinder. Thus, whenever an order which may be made may infringe upon the constitutional rights of any persons, those persons should be joined or given judicial notice of the proceedings". Foot notes excluded and emphasis added.

- [19] In *Amalganated Engineering Union v Minister of Labour* 1949 (3) SA 637 A at 659, the following is stated:

"Indeed, it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without

either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests"

[20] In that regard, it should be observed that it is important to remember that when a court pronounces a judgment it should do so without prejudice to the rights and interests of persons who were not parties before it. In that context, it is peremptory that the issue of prejudice must be considered in the determination of necessary non-joinder.

[21] Of course, this begs the question as to why then these proceedings were launched only against the two respondents. As a matter of fact, in this matter, we have a situation where allegations of instigation of marches and protests involve parties beyond the respondents, certainly it is indispensable that some of the individuals mentioned needed to be joined to the proceedings to ensure their interests and rights are protected. Particularly, if they may face allegations of contempt of court in future. It is my view that this factor weighs in favour of joining a party.

[22] In every case, a necessary party is a party whose rights will be affected by the outcome of a proceeding. That may be a right to organise a march or protest. Such parties are certainly entitled to join the proceedings and come before the court and present their position. As a matter of logic, I do not mean for a moment to suggest that anyone who participated in the marches or protests is entitled to join in these proceedings. Certainly, it would be a jump in legal logic to suggest that.

- [23] The applicant would like the court to believe that because the relief is only sought against the respondents, it was unnecessary to join other parties. The importance of including all interested parties, with a direct and substantial interest in a case is not only confined to the question of the person against whom relief is sought. It is dependent on the facts and circumstances of the case.
- [24] All of the above considered, I tend to agree fully with the assertion made by Mr Ka Siboto that the relief sought in paragraph two of the Notice of Motion may have a consequential component to it for parties that are not currently before this Court. In view of the gravity of that potential interference with the right to demonstrate and to protest enshrined in the Constitution and of the importance of those rights; it seems undesirable that such an order should be granted in the absence of a party that could be affected by the order.
- [25] That being so, I am satisfied that it was incumbent upon the applicant to have joined the political parties that arranged marches and protest in the past and the political party that arranged the march of 18 October 2024. In my view, they are necessary parties in these proceedings. Joinder of relevant parties allow fair, balanced and comprehensive resolution of disputes. The purpose of joining necessary parties is to ensure that they are present in hearing. Similarly, joinder of necessary parties allows the court to evaluate the issues properly. Hence, I cannot quite understand why the political parties were not joined. Accordingly, I reject the submission that it was not necessary to join any other party in its entirety.

[26] I turn to the order that this Court ought to grant, list of persons to be joined and *mandamus*.

Should the matter be struck off the roll or postponed sine die?

[27] In *Turner and Another v Ntintelo and Another* (A 248/22) [2023] ZAWCHC 51 (8 March 2023) at paragraph 62, Lekhuleni J et Adams AJ stated the following:

“The difference between striking a matter off the roll and dismissal is that in the case of dismissal, the matter is disposed of and can no longer be set down on the roll again. If the applicant wishes to proceed with the matter, he would have to start the matter *de novo*. While on the other hand, striking of a matter off the roll has nothing to do with the merits of the case. It is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for reinstatement. *Skhosana and Others v Roos t/a Roos se Oord and Others* 2000 (4) SA 561 (LCC) at para 19.”

In the first place, the non-joinder of a necessary party is a defect in a pleading that can simply be remedied by a joinder. Accordingly, a deficiency in pleadings has nothing to do with merits but is related to procedure. Put differently, a non-joinder cannot defeat the merits, as it may be reversible error dependent of course, upon circumstances. To hold otherwise would be to extend the scope of and effect of a non-joinder. In the circumstance, it seems entirely reasonable to suppose that, in an application, if the court finds that there is a non-joinder of a necessary party, it is competent for the court to strike the matter off the roll.

[28] In any event, nothing prevents this Court from striking this matter from the roll, due to non-joinder. This is even more the case as this matter is not an action but an application. In this matter, it is however significant to note that the

respondents are not applying for joining of parties, but they are rather objecting to the non-joinder of parties.

Furthermore, and significantly, it is important to remember that in this application the applicant hurried to this Court and wanted to be heard in the fast lane. Moreover, it is a point worth considering that the application was brought on truncated timelines.

Ms Goodman SC, to bolster her submission that the matter should be postponed sine die until the proper party is joined relied on the authority of *Peacock v Marley* 1934 AD,1. It is so that in the *Peacock* matter, the court held that when a plea of non-joinder is upheld the action is not dismissed but is stayed until the proper party has been joined.

- [29] As is already apparent, I readily accept that in an action the situation is different. Hence, I believe that the authority relied on by Ms Goodman SC is readily distinguishable. For the foregoing reasons, even though Ms Goodman SC developed her argument clearly and cogently, but I do not accept it.

Misjoinder

- [30] Regarding the misjoinder, the respondents argues that the second respondent ought not to have been joined as a respondent in this application

Further and significantly, it is clear in the applicant's founding affidavit that the averments made against the first respondent also apply to the second respondent. Moreso, if regard is had to paragraph 18 of the founding affidavit. Lastly, it should be recalled that, paragraph 18 of the founding affidavit alleges

that both respondents are politically connected, and corralled to their cause several political parties, who have since led marches and protests to the applicant's hotel on three separate occasions.

- [31] Thus, if regard is had to the facts giving rise to this application, it becomes evident that the second respondent is correctly joined herein in its capacity. Therefore, the preliminary point of misjoinder is misplaced.

Mandamus

- [32] Surely, the fact that this court finds that there is a non-joinder does not imply that a *mandamus* is a possible form of relief this Court can grant. There are certain requirements to be met before a *mandamus* relief can be granted. None of those requirements were met when the preliminary points were argued. Consequently, it is premature to consider that relief now. Thus, it is not for this Court to deal with such an issue at this time.

List of non-joined parties.

- [33] The starting point, of course, is that in this matter there are necessary parties that were not joined. As I have already mentioned, this is a defect in the applicant's pleadings that calls for striking off, of the matter from the roll. Consequently, I do not see the need to state which parties ought to be joined. As far as this aspect is concerned, I do not accept the applicant's argument.
- [34] For that matter, a fair reading of the applicant's founding affidavit and this judgement compels the conclusion as to which parties should have been added

to these proceedings. There are thus sufficient implicit allegations that point to the parties that ought to be joined.

Costs

[35] The respondents are substantially successful in these proceedings. Therefore, they are entitled to be awarded costs. Parties agreed that the costs should be on scale C.

In the circumstances, I make the following order:

ORDER:

1. Matter is struck from the roll.
2. The applicant is to pay the respondents' costs on scale C. Costs to include two counsels so employed.


CN NZIWENI J
JUDGE OF THE HIGH COURT

Appearances**Counsel for the Applicant:**

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