IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case No.: 1150/2024

In the matter between:

HLANO FINACIAL SERVICES (PTY) LIMITED APPLICANT

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS, FREE STATE RESPONDENT

Coram: **Van Rhyn J**

Heard: **21 November 2024**

Delivered: **14 January 2025**

ORDER

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1. The first point *in limine* of non-joinder of the National Government is upheld.

2. Further proceedings in the application are hereby stayed until the Applicant has effected the joinder of the Ministry of Human Settlements and the Ministry of Housing as further respondents in the application.

3. The applicant shall pay the costs in respect of the adjudication of the point *in limine* regarding non-joinder, which costs shall include the costs of two counsel on Scale C and Scale A, respectively.

JUDGMENT

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[1] The applicant, Hlano Financial Services (Pty) Ltd issued an application on 27 February 2024 against the Member of the Executive Council for Human Settlements, Free State, the respondent, for payment of the amount of R429 226 178.74, a declarator and further ancillary relief emanating from, *inter alia*, an undertaking by the respondent. Subsequent to a notice to oppose the application, the respondent filed an answering affidavit and raised non-joinder as well as prescription of the applicant's claim as points *in limine*. The court is called upon to adjudicate, firstly, the issue of non-joinder. The merits and further aspects to stand over for later adjudication.

[2] The applicant's predecessor, Khayalethu Home Loans (Pty) Limited ('KHL'), at the time during 1988, and Nu-Way (Pty) Limited were a hundred percent owned subsidiaries of the South African Housing Trust Limited ('SAHT'), The applicant's business entails the provision of financial services as a registered credit provider. SAHT was established to promote and facilitate the provision of affordable shelter and security of tenure of the lower income earning communities of South Africa. During the period 1992-1994 it became apparent that the SAHT initiative had failed due to payment boycotts. Foreclosure actions were instituted against defaulters which resulted in increased payment boycotts and KHL becoming the owner of numerous properties. The claimed properties could not be sold by KHL due to insurmountable issues to evict the previous owners.

[3] After the 1994 elections the Record of Understanding ('ROU') was concluded between the National Government of South Africa ('National Government'), represented by the National Department of Housing and the banking sector. The objectives were to achieve stability in the housing market by setting significant housing targets and mortgage lenders to restart lending into the affordable housing market. A further objective was to ensure that homeowners, who previously participated in mortgage payment boycotts in support of political objectives, were not deprived of their housing security. The introduction of Relocation Assistance sought to create a mechanism, which under certain conditions, contractual borrowers no longer had an obligation to pay mortgage lenders, such as the applicant, as the relevant provincial department would relocate the contractual borrower to a right sized property ('RDP house'). Once so relocated, the mortgage lender could sell the property it had as security without the need to go through the legal process. However, the Relocation Assistance presented with some issues in that contractual borrowers often refused to move from their homes to RDP houses.

[4] Further initiatives were implemented over a period of many years to provide solutions for the housing of lower income members of the society. By 1998, the SAHT and its subsidiaries were in financial difficulty and were no longer viable entities. During March 1998, Cabinet finally resolved to disestablish the SAHT. On 1 April 1998 the Housing Act 107 of 1997 ('Housing Act') came into effect. National, provincial and local spheres of government were to, *inter alia*, give priority to the needs of the poor in respect of housing development and to ensure that housing development would provide as wide a choice of housing and tenure options to individuals and communities and be economically, socially and financially affordable and sustainable. The Banking Association of South Africa, formed during 1998, concluded the Revised ROU with the National Government which became effective simultaneously with the Housing Act on 1 April 1998. Revised ROU is identical to the ROU except that it introduced an Extended Date Criterion, which entailed that the qualification date be extended from 31 May 1995 to 31 August 1997. The 2000 Code incorporated terms of ROU and Revised ROU and provided further solutions for contractual borrowers pertaining to Relocation Assistance in that once National Government has paid the Relocation Assistance to assist the contractual borrower to relocate to a new property, the mortgage lender was empowered to sell the existing property to recoup the

outstanding amount due by the contractual borrower or, if the contractual borrower reached the age of 65 and National Government had not yet paid the Relocation Assistance, then the contractual borrower's obligation will be paid by the relevant province directly to the mortgage lender.

[5] The applicant contends that the Relocation Assistance had failed and National Government was required to settle its obligations to the relevant mortgage lenders in terms of in-situ Relocation Assistance. By 2007 the National Government, in what became known as the Servcon Deal, settled the ROU portfolios of the various members of the Banking Council, and thereby giving free and unencumbered home ownership to thousands of beneficiaries of the ROU. However, the applicant was not a member of the Banking Association and not a party to the Servcon Deal. Because of the exclusion of the applicant from the Servcon Deal, its contractual borrowers did not obtain the same benefit. Because of the applicant's limited financial resources, the applicant commenced with legal proceedings against the Gauteng Provincial Department which culminated in a finding in its favour. The Gauteng Department, supported by the National Department, were unsuccessful in the opposition of the applicant's claims.

[6] On behalf of the applicant it is averred that, as at date of this application there remains three thousand two hundred and ninety contractual borrowers whose obligations have not been paid by the respondent. During July 2020 a meeting was held between the applicant and representatives of the respondent regarding progress of the outstanding portfolio. The respondent claimed that a directive is required from the National Department.

[7] The respondent contends that the relief sought by the applicant stems from the ROU entered into and between the National Government, represented by the National Department of Housing and the banking sector. The National Government was a party to the original agreement and not the Provincial Department of Human Settlements. Furthermore, the applicant seeks a declaratory order that the Extended Data Criteria also applies to the applicant and that 480 Contractual Borrowers can benefit from the extension of the ROU qualification date from 31 May 1995 to 31 August 1997. In the event that the applicant is successful in obtaining the declaratory order, a further

payment in the amount of R48 032 565.90 is sought. The respondent therefore argues that the Extended Date Criteria emanates from the Revised ROU which the National Minister and the Banking Council of South Africa entered into. The Revised ROU was furthermore incorporated in the Housing Policy of 2000 (Chapter 7) which was issued by the Minister.

[8] It is contended that what the applicant is seeking is that the Revised ROU, as incorporated in the Housing Policy of 2000 (Chapter 7), should be amended to the extent that the Extended Date Criteria is also applicable to the applicant. In seeking such extension, the Minister responsible for the issuing of the policy or its administration must be joined. The respondent has raised the issue of non-joinder in his answering affidavit, yet the applicant has failed to take any step to join the National Government in these proceedings. As a result, the respondent is seeking the dismissal of the application with costs.

[9] The objection of non-joinder may be raised where the point is taken that a party, who should be before the court, has not been joined or given judicial notice of the proceedings. Where a party has a direct and substantial interest in any order a court may issue, or if such order cannot be sustained or carried into effect without prejudicing that party, the joinder of that party is necessary unless the court is satisfied that the party waived his or her right to be joined or agreed to be bound by the order.[1] The court has the inherent power to order the joinder of further parties in an action which has already begun in order to ensure that a person's interest in the subject matter of the dispute, and whose rights may be affected by the judgment, are before court. In *Judicial Services Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) the Court held as follows: 'It has now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience - if that party has a direct and substantial interests which may be affected prejudicially by the judgment of the court in the proceedings concerned.'[2]

[10] Section 85 of the Constitution provides that the executive authority of the Republic is vested in the President who exercises the executive authority together with the other members of the Cabinet, by —

[1] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659.
[2] Ibid at [12].

'(1)(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) ...

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) ...'

[11] As to the State's responsibility to legislate, Part A of Schedule 4 of the Constitution lists housing as one of the functional areas of concurrent national and provincial legislative competence. The principal instruments enacted to give effect to the constitutional obligations of the various organs of State in relation to housing are the Housing Act and the National Housing Code. The aim is to provide for the facilitation of a sustainable housing development process and to define the functions of national, provincial and local governments in respect of housing development. Section 9 of the Housing Act obliges municipalities, as part of the process of integrated development planning, to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure, amongst other things, that the inhabitants of their respective areas have access to adequate housing. Section 23(1) of the Housing Act places an obligation on municipalities to 'undertake developmentally-oriented planning' in order to ensure that they achieve the objects of local government in s 152 of the Constitution, give effect to their developmental duties in s 153 of the Constitution, and '<u>together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections . . . 25 [and] 26 . . . of the Constitution.</u>' (Emphasis added) The National Housing Code was enacted under section 4 of the Housing Act. It contains the <u>national housing policy and sets out the principles, guidelines and standards that apply to the various programmes effected by the State in relation to housing</u>. (Emphasis added). These provisions must be read with Chapter 3 of the Constitution. It enshrines the principle of co-operative government.[3]

[3] Section 40 provides:

"(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides."

[12] From the above legislative framework it is clear that Cabinet is the national executive authority which discharges its duty through the President and the Ministers. Regarding the Provincial Government, the provincial executive authority lies with the Premier together with the MECs jointly. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) the issues concerned the eviction of occupiers and the need of emergency housing. The obligation of the Johannesburg Metropolitan Municipality to realise the right of access to adequate housing, the implications of the constitutional protection against arbitrary deprivation of property and the financial obligations of the provincial government were discussed.[4] The Constitutional Court held that the joinder of the provincial and national government were not necessary because only the relevant municipality's obligations were at issue and the province did not have any direct and substantial interest in any order that may have been made. The Constitutional Court held as follows:

'The duty regarding housing in section 26 of the Constitution falls on all three spheres of government – local, provincial and national – which are obliged to co-operate. In *Grootboom* this Court made it clear that "a co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other . . . Each sphere of government must accept responsibility for the implementation of particular parts of the program"'.[5] And further at [45]:

'In view of the intertwined responsibilities of the national, provincial and local spheres of government with regard to housing, it would generally be preferable for all of them to be involved in complex legal proceedings regarding eviction and access to adequate housing. Indeed, joinder might often be essential and a failure to join fatal. Whether it is necessary to join a sphere in legal proceedings will however depend on the circumstances and nature of the dispute in every specific case. In this matter the absence of the provincial government is not fatal.' (Emphasis added)

[13] To adjudicate the aspect of non-joinder raised by the respondent it is necessary to consider the nature, the manner in which and the extent to which, the order of a court hearing the main application may affect the interests of the National Government,

[4] Ibid at para [45].
[5] Ibid at para [42].

more particularly the Ministry of Housing. Taking into consideration the provisions of the National Housing Act, the ROU and the Revised ROU, all of which the respondent contends were implemented and entered into without any input by the respondent, as well as the allegations made by the respondent pertaining to budget constraints and directives required from the National Department, I am of the view that the point of non-joinder is well taken. The respondent furthermore raised a dispute regarding the obligation to pay the contractual obligations that flowed from the ROU directly by the relevant province to the mortgage lender. I am of the view that the National Government has a direct and substantial interest in the subject-matter of the litigation and therefore joinder of the Ministry of Housing and the Ministry of Human Settlements are necessary.

[14] The respondent is successful regarding the point *in limine* raised pertaining to non-joinder of the National Government in these proceedings. Therefore, a cost order is warranted against the applicant.

ORDER

[15] Accordingly, the following order is made:

1. The first point *in limine* of non-joinder of the National Government is upheld.

2. Further proceedings in the application are hereby stayed until the Applicant has affected the joinder of the responsible Ministry of Human Settlements and the Ministry of Housing as further respondents in the application.

3. The applicant shall pay the costs in respect of the adjudication of the point *in limine* regarding non-joinder, which costs shall include the costs of two counsel on Scale C and Scale A, respectively.

[redacted]

I VAN RHYN

JUDGE OF THE HIGH COURT,

FREE STATE DIVISION, BLOEMFONTEIN

Appearances

On behalf of the Applicant:	Adv N Snellenberg SC
Instructed by:	Van der Merwe & Sorour Attorneys Bloemfontein
On behalf of the Respondent:	Adv B S Mene SC Adv N M Phakama
Instructed by:	State Attorneys, Bloemfontein