

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO. 47769/08

30/7/2010

In the matter between:

THULAMELA MUNICIPALITY

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES /NO
(2) OF INTEREST TO OTHER JUDGES	YES /NO
(3) REVISED	✓
DATE	28/07/10
	
SIGNATURE	

MADONSI TRADITIONAL COUNCIL

First Respondent

HLONGWANI, WISANI EVANS

Second Respondent

CHAUKE, ABEL

Third Respondent

MEMBER OF EXECUTIVE, LOCAL
GOVERNMENT & HOUSING, PROVINCIAL
GOVERNMENT OF LIMPOPO

Fourth Respondent

JUDGEMENT

GOODEY AJ:

[1] **INTRODUCTION:**

This is an **application** by the Applicant for an Order in the following terms:

- “
- 1.1 *Interdicting and restraining the First and Second Respondents from allocating, granting, donating, demarcating or purporting to allocate, grant, donate or demarcate any land or portions of land within the area defined and set apart as the township of Malamulele in terms of Government Notice No. 29 of 1993 published in the Official Gazette of the Gazankulu Government, Republic of South Africa, on 23 July 1993 (“the proclaimed area”), alternatively, within the portion of land defined as Portion 19 of the farm Malamulele 234-LT in terms of the consolidation diagram approved by the Surveyor-General on 5 April 2006, under reference SG No 1367/2006, a copy of which, certified as correct by the Surveyor-General, is attached to the founding affidavit (“portion 19”), to any subjects of the First and Second Respondents, or do to any other persons.*

- 1.2** *Interdicting and restraining the First and Second Respondents from permitting or purporting to permit any of their subjects, or any other persons, to occupy any land, or a portion of land, within the proclaimed area, alternatively, within Portion 19.*
- 1.3** *Declaring the allocation by the First and/or Second Respondents to the Third Respondent of a portion of land within Portion 19 to have been unlawful and of no legal force.*
- 1.4** *Interdicting and restraining the Third Respondent from carrying out any building work, erecting any structure and proceeding with any building operations on the portion of land allocated to him located on Portion 19.*
- 1.5** *Interdicting and restraining the Third Respondent from occupying any land or portion of land on Portion 19.*
- 1.6** *Interdicting and restraining the First and Second Respondents from informing, advising or communicating to their subjects or any other persons that they are authorised or empowered to*

allocate land or any portion of land within the proclaimed area, alternatively, within Portion 19.

1.7 *Interdicting and restraining the First and Second Respondents from purporting to authorise or permit any building work, construction work or development work on Portion 19.*

1.8 *Interdicting and restraining the First, Second and Respondents from carrying out any building work, construction work or development on the land identified as Portion 19.*

1.9 *Directing the First, Second and Third Respondents to pay the costs of this application, jointly and severally."*

[2] BACKGROUND:

2.1 The township of Malamulele

2.1.1 During 1972 the Gazankulu Government, the government of one of the self-governing territories of

that time, issued a proclamation defining and setting aside an area of land for the establishment of a township, to be known as Malamulele.

- 2.1.2 That proclamation was amended on 23 July 1993 and an area of land for the establishment of the township of Malamulele was defined and it included four farms, one of them being the farm Boltman (which by that time had been sub-divided into Portion 1 and the Remaining Extent of the farm Boltman 211 LT).
- 2.1.3 At that time the four farms were registered in the name of the National Government of the Republic of South Africa. The farms were consolidated in terms of the Surveyor-General's diagram, Annexure "FA4".
- 2.1.4 On the same date that the consolidated title was registered, and following immediately upon the registration of title in the name of the National

Government of the Republic of South Africa, certain portions of the farm Malamulele 234 LT, being Portions 5, 6, 7 and 10, were sub-divided from the farm and registered in the name of the Provincial Government of Limpopo.

- 2.1.5 Portions 5, 6 and 7 have been fully developed and the applicant now seeks to proceed with a further development as a result of a demand for residential erven by the communities residing in and around the Malamulele area. There is no real dispute concerning these matters.

2.2 The proposed development

- 2.2.1 The proposed development is to take place on a portion of land adjacent to Portion 6; which has been fully developed. The Applicant has procured the necessary funding from the provincial government and a portion of land, Portion 19, had been identified, surveyed and approved for this purpose.

2.2.2 Portion 19 is clearly depicted on the sketch, Annexure "FA1317" and in the consolidation diagram, Annexe "FA11".

2.2.3 It is pertinent that Portion 19 is not located on the farm Boltman (neither on Portion 1 nor on the Remaining Extent). This emerges clearly from the diagram, Annexure "FA4". On page 35 of the papers the farm Boltman is depicted as the figure BCDQ, whereas the farm Jerome is depicted as ABQHJK. Portion 19 sits adjacent to Portion 6, to the northwest of Portion 6. Thus, it is plain that it is not located on the farm Boltman.

2.3 The Respondent's case

2.3.1 The fundamental basis for the Respondents' opposition is that the land in question was donated by one Joao Albasini ("Albasini") to a forefather of the Second Respondent and that the Second

Respondent and his community acquired ownership of the land, it seems, either on the basis of a donation or by prescription.

2.3.2 Thus, the Respondents contend that the applicant is not entitled to proceed with its development and that the First and Second Respondents are entitled to allocate the land to their subjects and to develop it as they deem fit. There is a number of answers to these contentions.

2.3.3 Firstly, the land over which the First and Second Respondents claim ownership is vaguely described and it is impossible to determine from the papers what their contention is; save that they contend that it was the farm Boltman that was donated to the Second Respondent's forefather. The same contention was advanced in the urgent application.

2.3.4 If the land claimed by the First and Second Respondents, is the farm Boltman, then there is no defence to a proposed development on Portion 19 of the farm Malamulele.

2.3.5 Secondly, the First and Second Respondents were unable to acquire derivative ownership from Albasini without having the land registered in their names. To the extent that they assert a claim to ownership by prescription, they are confronted by the fact that the land in question has been registered, from time to time, in the names of other parties, viz the National Government of the Republic of South Africa, the Provincial Government and, later, the Applicant. Portions 5, 6, 7 and 10 of the farm Malamulele 234 LT are registered in the name of the Applicant.

In view of the foregoing, I find no case made out on the merits by the Respondents.

[3] **POINTS IN LIMINE:**

The Respondents have, apart from the papers, raised a number of points *in limine* and the argument on their behalf was almost exclusively confined thereto. The points *in limine* were set out by counsel on behalf of the Respondents and as follows:

"

3.1 **First point in limine no resolution**

The Municipality (the Applicant) is a creature of statute and its actions and intentions are evidenced by the resolution passed in order to mandate its intentions into action through its employees. Furthermore the Deponent to the Applicant's founding papers is not an executive municipal manager and therefore is required by law to be authorised each time he acts on behalf of the Applicant. Annexure "FA1" on page 22 of the Applicant's founding papers is exactly the authorising instrument specifically authored by the Municipal Council for the purpose of the urgent application which was subsequently abandoned and on that basis the extrapolation of this authorising instrument in the current application is irregular and on that basis alone this litigation before this Honourable Court is unsanctioned and therefore unlawful."

3.2. **Second point in limine non joinder of other tenants**

It is common cause that to date over 300 families are occupiers and residents of the farm in question which is the subject matter of this application which families have not be joined to the proceeding nor have they been served with the papers and of interest is that these families have a substantial and material interest in the adjudication of this matter and this doctrine enjoins the Applicant with a duty to have both joined and served the tenants as interested parties in these proceedings."

3.3. **Third point in limine spoliation**

The effect of the Applicant's application albeit it be conjured in an interdictory form the effect thereof is that the spoliation at least against the Third Respondent as well as any other occupier in his position."

3.4. **Fourth point in limine no locus standi**

The Applicant if it purports to represent the national government as is espoused in its founding papers, requires the necessary authority to do so and same is not attached as an authorising instrument mandating

the Applicant to act on behalf of the national government and as a result failure to attach same renders the papers materially defective."

"
3.5. **Fifth point in limine: dispute of facts**

It is clear from the papers that this application riddled with a litany of disputes of facts and as such a motion application is not a conducive application to have followed since the above Honourable Court will not be able adjudicate these disputes on paper. Applicant made an election and such dictates that the above Honourable Court holds the Applicant to its choice."

"
3.6. **Sixth point in limine: Prescription**

It is common cause that the tribal authority has been the custodian and as well have exercised control and possession of land rights on the portion in question which is the entire Boltman Farm inclusive of portions 5, 6, 7 and 10 as its communal tribal land for a period of not less than 150 years. It is also common cause that the very portions of land which are a subject of dispute before the above Honourable Court have for more than 50 years been used as grazing land for the tribal community's livestock."

[4] **DEALING WITH THE POINTS IN LIMINE:**

4.1 **Ad: First Point**

The authority of the Municipal Manager is challenged. It is clear from Rule 7 and the founding affidavit that his authority is beyond doubt. In this regard Herbstein & Van Winsen (Civil Practice) says the following at 268:

"Thus, when authority to act on behalf of a juristic person is challenged, the usual manner in which authority is established is by production of an affidavit by an office-bearer of the juristic person and a copy of a resolution conferring authority."

4.2 **Ad: Second Point**

This point is not raised in the papers and consequently there is no evidence before me in this regard.

4.3 **Ad: Third Point**

This point turns on alleged spoliation. Fact of the matter is that the land claimed by First and Second Respondents pertained to the farm Boltman and not to Portion 19 of the farm Malamulele (where the proposed development is to take place).

4.4 **Ad: Fourth Point**

The applicant is a local municipality. The land in question falls within its area of jurisdiction. It is located within Ward 11, a ward within the Applicant's area of jurisdiction.

In terms of section 151(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"), the Applicant, as a municipality, has the right to govern, on its own initiative, the local affairs of its community, subject to national and provincial legislation. The objects of local government are set out in section 152 of the Constitution and the powers and functions of municipalities in section 156. The applicant has executive authority in respect of, and has the right to administer, the local government

matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. Building regulations, municipal planning, storm water management systems and water and sanitation services are matters listed in Part B of Schedule 4. Municipal roads, municipal parks and local amenities fall within Part B of Schedule 5. Moreover, a local authority is defined in the National Building Regulations & Standards Act, 103 of 1977, and the role of a local municipality is set out in that Act as well as in the regulations promulgated under it.

By virtue of the foregoing, it is clear that the applicant has the requisite *locus standi* to launch this application and the requisite jurisdiction over the proposed development, traversed in the founding affidavit. The powers, functions and duties of the Applicant are not in dispute.

4.5 **Ad: Fifth Point**

I have not been persuaded that any real dispute of fact exists.

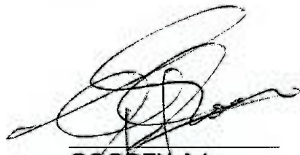
4.6 **Ad: Sixth Point**

If the First and Second Respondents were to endeavour to assert a claim to ownership based upon prescription, they would be met by an estoppel, in view of them having stood by all these years and allowed successive registrations of title. In the meantime, as indicated above, various portions of the township have been fully developed.

Consequently, I find no merits in any of the points *in limine*.

I therefore make the following order:

Prayers 1 to 9 (with the exception of prayer 5) of the notice of motion are granted.


GOODEY AJ