

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 405/2022

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

Signature

Date

In the matter between:

NICHOLAS TSHEPO LEGODI

FIRST APPLICANT

And THREE OTHER APPLICANTS

and

CHRISTOPHER SEFARA

FIRST RESPONDENT

And EIGHT OTHER RESPONDENTS

JUDGMENT

MANGENA AJ

- [1] Bakgatla ba Kgafela is a community owning vast tracts of land in the North West Province and some parts of Limpopo. Their land is endowed with mineral underneath the surface and is a home to the wild animals located in the Pilansburg game and nature reserve. The community has been plagued by infighting between its members and the chief and there does not seem to be an end in sight. As the fight continues over the control, access and benefits due to the community, others stand ready to exploit the situation and benefit from their land. Chinua Achebe could have had them in mind when he wrote in the Arrow of God that: When brothers fight to death, a stranger inherits their father's estate.
- [2] On the 18 January 2022, applicants brought an urgent application against respondents in which they sought amongst others, the following orders:-
- (a) Condonation for non-compliance with the normal rules of service and that it be heard as one of urgency on an ex parte basis.
 - (b) That a rule nisi be issue calling upon the respondent and all interested persons to show cause on 10 March 2022 or soon thereafter as the matter may be heard, why the following orders should not be made final.

- (i) That the respondents be ordered and directed to immediately restore to the applicants peaceful and undisturbed possession, use and enjoyment, for crop farming purposes, of the following farms:
- The Farm Frankfort, KP 219 Portion 1, Thabazimbi
 - The Farm Rustenburg- Koppies, KP 205 Portion 1, Thabazimbi.
 - The Farm Wintersveld, kp 220, Portion O, Thabazimbi
 - The Portion of the Farm Middelburg 206, Thabazimbi.
 - Farm Leydenburg 203 KP, Portion O.
- (ii) That the respondents be ordered and directed to immediately cease any and all farming activities undertaken by them at the above mentioned farms and vacate the farms to allow access there to, for farming purpose, by the applicants.
- (iii) That the two orders above operate as interim orders with immediate effect pending the final outcome of the application on the return date.

[3] The first respondent, Mr Sefara, anticipated the application and filed an answering affidavit in which he challenged the applicant's entitlement to the relief. He took issue with fact that the applicants approached the court on an ex parte basis in circumstances where it was not justified.

- [4] In the answering affidavit several points in limine were raised and Adv Venter, appearing for him argued them during the oral submissions. I intend to deal with each point sequentially as they appear in the answering affidavit.

MATERIAL NON-JOINDER

- [5] The respondent vers that the properties forming the subject of this application are registered and owned by various companies. The details of the owners are reflected in the deed searches attached to the affidavit. It was contended that the respective companies owning the individual farms as well as Bakgatla ba Kgafela-Communal Property Association have a direct and substantial interest in the outcome of the proceedings and should have been joined.
- [6] The principles governing joinder of a party to the proceedings are well established. The principle was expounded lucidly in the **Judicial Service Commission v Cape Bar Council, 2013 (1) SA 170 (SCA)** follows:-

*“[12] It has by 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 interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (See eg **Bowing NO V Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) PARA 21**). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the*

objection that other parties should have been joined to the proceedings, has thus been held to be a limited one”

- [7] The party raising non-joinder need to set –out facts clearly showing not only the direct and substantial interest of the party not before court, but also how the judgment or order sought if granted will materially prejudice that party. It is therefore not sufficient to allege in broad terms as the first respondent did in the answering affidavit without showing the prejudice likely to be suffered by the companies and Bakgatla ba Kgafela-CPA. The respondent has failed the test in this regard and the point in limine is dismissed.

IRREGULAR EX PARTE PROCEEDINGS AND MATERIAL NON-DISCLOSURES

- [8] As indicated earlier, the respondent takes umbrage at the ex parte procedure taken by the applicants in circumstances where according to him it was legally unjustified. The respondent contends that spoliation does not fall within the categories of the matters which may be brought ex-parte. The respondent further avers that the applicants suppressed material information which had the court known about it, the interim order would not have been granted. During oral submissions, Adv Venter pointed out that the applicants, in particular, Mr Simpson should have disclosed that he had entered into an agreement with the fourth respondent regarding the use of a portion of a farm. The applicants should have also disclosed to the court that the respondents have been farming on the property since 2018. There were also

submissions made regarding ownership disputes taking place in Mahikeng High Court which information it was contended should have been disclosed.

- [9] Relying on **Schlesinger v Schlesinger, 1979 (4) SA 342**, Adv Venter submitted forcefully that the interim order granted on 18 January 2022 should be discharged with a punitive costs order made against the applicants as a mark of displeasure. Indeed, Schlesinger makes it clear that in ex-parte applications all material facts must be disclosed which might influence a court into coming to a decision, the non-disclosure or suppression of facts need not be willful or made fide to incur the penalty of rescission and that the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.
- [10] The facts relied upon by Adv Venter in support of his submissions regarding non-disclosure are not material to the issue at hand, namely spoliation. To the extent that they may have some semblance of materiality, they are not, in my view, of such a nature that they could have disturbed the orders I granted on the 18 January 2022. To demonstrate the point I make, the issue of the agreement between Mr Simpson and the fourth respondent have no relevance to the question whether the first and second applicants were dispossessed of their possession with regard to Farm Lydenburg Rustenburg and Middelburg respectively. The same goes to the allegation that there is an ownership dispute taking place in Mahikeng. As correctly argued by Adv Schenehager, ownership is irrelevant in a spoliation dispute.

- [11] If I am correct in my view as I believe I am, this point should equally fail. In this regard Fabricius J had an occasion to say something on this principle in the matter of **Multi-links telecommunications V Africa Prepaid, 2014 (3) SA 265 (GP)** and said.

“[33] it is of course true that full disclosure of every material fact need to be made in ex parte applications, but the real question is whether any undisclosed facts were related to those which “might influence the court into coming to a decision: They do not relate to all conceivable matters that may be relevant to the subject matter of the ex parte application. The sanction for non-disclosure of such facts is that the ex-parte order is set aside, but that is also not even an automatic consequence”

- [12] Consequently I am unable to agree with Adv Venter that the facts relied upon to upset the interim order are materially relevant or connected to the issue at hand. Failure by the applicants to disclose them does not warrant the censure prayed for by the respondents. This point in limine is dismissed.

- [13] Having disposed of the hurdles, what remains is the determination of the merits. The applicants pegged their case for spoliation on the interim order granted by this court in favour of the fourth applicant in case number 7276/2020. The court order effectively placed possession of the Farm Frankfort KP 219 Portion 1 Thabazimbi, Rustenburg KP 205 Portion 1, Thabazimbi, Winterveld KP 220, Portion O, Thabazimbi, Farm Middleburg 206, Thabazimbi, until the matter is finalized and /or the interim order discharged, the fourth applicant remains the only person entitled to deal with the farm

portions. The interim order is still operative and the document relied on by the fourth respondent does not support the contention by the respondents that Mr Simpson has given access to the fourth respondent.

Was there spoliation

- [14] The general principles underlying spoliation are settled. The court explained the concept and its purpose in **Ivanon v North West Gambling Board, 2012 (6) SA 67 (SCA)**. In this regard I can do no better than to borrow gratuitously from the words of Mhlantla JA (as she then was) where she said: Spoliation is the wrongful deprivation of another's right of possession. The aim thereof is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant-that is why possession by a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute.
- [15] The applicants contend that on the authority of the court order under case number 7276/2020 granted on 17 November 2020 the fourth applicant satisfies the requirement of spoliation in that he was in possession of the respective farm portions except Lydenburg. They argue further that he was deprived of his possession by the respondents who commenced forming operations on the farms. For the above reasons, it is submitted that they are entitled to a final order in that they have satisfied

all the requirements of an interdict. They further submit that the respondents have not adduced any evidence demonstrating a defence to the claim.

- [16] The respondents acknowledge the existence of the court order under case number 7276/2020 and that it is valid until set aside by the court. The first and fourth respondents who are participants in this proceedings mounted a spirited challenge and argued that they have been in possession of certain portions of the land since 04 November 2021. They had some interaction with the fourth applicant regarding the work they were performing on the farms and he told them that he has an interdict (court order). Since they started working on the properties, they have spent money in excess of a million to prepare land and should the order be confirmed, their investment will go to a waste.
- [17] The submissions by the respondents are unsustainable. It goes against all the tenets of a good social order. The respondents on their own version were aware of the court order granted in 2020 placing the farm portion under the fourth applicant pending final determination. For them to now argue that they have invested a substantial amount of money on the properties and should therefore be allowed to retain them offends the principles of the rule of law. The rule of law requires that court orders be respected and given effect to. To the extent that they will suffer damages as a result of the confirmation of the interim order they have themselves to blame. They are the authors of their own misfortune and this court cannot come to their rescue.

COSTS

[18] Each of the counsel submitted that costs should follow suit. There is no reason why the court should depart from this principle. Through counsel requested for costs on a punitive scale, no case has been made out to justify such an order. I therefore exercise my discretion and award costs on the ordinary scale of party and party.

[19] In the premises, it is ordered as follows:-

1. The rule nisi issued on the 18 January 2022 is confirmed.
2. The first and fourth respondents are ordered to pay the applicant's costs jointly and severally, the one paying the others to be absolved.


MANGENA AJ
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For the Applicant: Adv Schenehager

For Respondent: Adv Venter