

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO: 4654/2017

In the matter between:

DLAKAVU NANDIPHA N.O

Applicant

And

**IRFANI TRADERS CC t/a JABULANI
HARDWARE**

1st Respondent

MUHAMMED LATILCHISHTI

2nd Respondent

JUDGMENT

KUNJU AJ:

[1] On 5 October 2017 Brooks J issued an interim order (the interim order) in the following terms:

[1] That applicant's non – compliance with the provisions of Rule 6 of the Uniform Rules of Court be and is hereby condoned and that leave be granted to the applicant as a matter of urgency in terms of Rule 6 (12) of the Uniform Rules of Court.

[2] That a Rule Nisi do hereby issue calling upon respondents to show cause, if any, on Tuesday, the 24th November 2017 at

10h00 or so soon thereafter as the matter may be heard why an order in the following terms should not be made final:

- [2.1] that the respondents be interdicted and restrained from continuing with the construction of the cement block wall structure on the vacant property allotment 253 – B Makhaphetshwini district of Libode;
- [2.2] that the respondents or any person in occupation of the vacant immovable property allotment 253 – B, Makhaphetshwini, Libode be ordered and directed to demolish forthwith the cement block wall structure under construction in allotment 253 – B Makhaphetshwini, district of Libode;
- [2.3] That failing the respondents' compliance with paragraph 2.2 above, the applicant or her employees assisted by members of the South African Police Services as far as need be, is authorised to demolish the cement block wall structure under construction;
- [2.4] That respondents be ordered to pay costs of this application on an attorney and own client scale.

[3] That paragraph 2.1 shall operate as an interim interdict / mandamus pending the finalisation of this matter.

[2] When the interim order was granted respondents were not present nor represented in Court though they were properly served with papers that culminated in the issuing of the interim order.

[3] Dissatisfied with the terms of the interim order, the respondents launched an application for the reconsideration of the rule nisi (the

reconsideration application). Their main attack in the reconsideration application was the lack of legal standing of the applicant.

[4] The reconsideration application served before Jolwana J on 16 November 2017. After hearing the matter he dismissed the reconsideration application with costs and in turn extended the rule nisi. I say more about the reconsideration application later in this judgment.

[5] On 10 May 2018 the matter appeared before me for the confirmation of the interim order.

[6] The applicant describes the conduct of the respondents in paragraph 6 of the replying affidavit thus:

“The respondents strangely seek to impugn my title as an Estate representative of the Estate of late Citibunga Duddley Dlakavu to the allotment. Typical of the proverbial camel that sought shelter initially for just its head from the owner of the house, then asked for its shoulders to be allowed in and later full body, finally dispossessing the owner of his house”.

[7] I cannot agree more with the above description.

[8] As it will become clearer later in this judgment this matter throws into sharp focus the South African history of racist oppression and dispossession.

[9] Thorough reading of legislation such as Native Land Act of 1913 and its offsprings in the form of Proclamation no. 26 of 1936 (the proclamation) in issue, it becomes clear that the apartheid government systematically established and maintained a complex legal framework that effectively prohibited black people from legally owning land. Indeed,

the detailed system devised through the decades ensured that the degree of tenure security that black people were entitled to was more precarious than the tenure security to which white people were entitled. At its core, the approach to black people was that they would be perpetual tenants on their own land they occupied and used. The system meant that the land rights available to black people were permit based. The right to the land were generally subserviently permit based or held in trust by the government or the South African Development Trust.

[10] The contentious issue presented by this case is a reminder of the painful history depicted above.

[11] The legal instrument with which we are concerned in this application is the Proclamation.

[12] Applicant launched this application in her representative capacity contending in essence that her late father Citibunga Duddley Dlakavu passed on 12 September 1998. That, one of the properties he owned during his lifetime is an immovable property morefully described as allotment no. 253 – B, Makapetshwini, Libode (the property). She attached a permission to occupy (PTO) that was issued to her father in 1969 by the then the Government of the Republic of Transkei.

[13] The gist of the complaint of the applicant is that there are certain brick structures that are erected by the respondents on the property without her consent. She contends that the respondents have no right to occupy the property never mind erecting structures thereon. She states that there are eviction proceedings pending between the applicant and the respondents in this Court.

[14] The application is opposed by the respondents and as I could discern from the papers exchanged and submissions made, two main grounds of opposition are raised. The first is that the respondents had obtained a consent to build from a certain Zukile Dlakavu through a lease agreement. The second is that the applicant has no legal standing by virtue of Section 9 of the Proclamation.

[15] I must deal with the first ground of opposition. Zukile Dlakavu is not the executor of the Estate nor is there any indication that he was authorised to conclude a lease agreement on behalf of the applicant. Further, the lease agreement lapsed on 30 September 2017. In the circumstances the first ground of opposition must fail.

[16] I now deal with the question of locus standi. I have engaged with the affidavits and heads of argument which served before Jolwana J and established that the question of locus standi was central before him. Jolwana J dismissed the application. To me in that way he dismissed the question of locus standi that was mounted against the applicant.

[17] Jolwana J pertinently dealt with this question of law. His judgment was devoted mainly on this aspect. In paragraph 3 of his judgment he said:

“The merits or demerits of the main application were note before me for determination, the application for reconsideration being based on a single basis, namely, lack of locus standi. Therefore, any comments on the main application or any issue relevant thereto will be made only if necessary for the purposes of this application...”

[18] Further, in paragraph 4 he states:

“The alleged basis for applicant’s lack of locus standi is that when deceased died, his rights of occupation in terms of the relevant certificate of permission

to occupy were *ipso facto* cancelled in terms of Section 9 (2) of Proclamation no. 26 of 1936 (the proclamation) and allotment reverted to the commonage”.

[19] The learned Judge’s concluding remarks in paragraph 6 are captured below:

“Therefore applicant’s submission that “The allotment cannot be and is simply not – an asset in the estate of the deceased cannot be correct in my respectful opinion”.

[20] I am of the view that a competent Court of law has dealt with the same issue between the same parties and in turn dismissed the point of law raised. On this aspect of locus standi, it does not matter to me that it was dismissed at the level of interlocutory application, the point is that the question of law was argued and dismissed. The dismissal thereof is final in effect and cannot be revisited by the same court. The appropriate forum is an appeal. That being so it was improper for this issue to be raised again before me and in circumstances where there is no appeal pending against the Judgment of the learned Judge.

[21] In this regard there is a well known principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant/respondent by a multiplicity of actions and the possibility of conflicting decisions.

[22] In the circumstances, I am of the view that the issue of locus standi is *res judicata* and therefore stands to be dismissed.

[23] There are more grounds why this question cannot succeed. I advance them below.

[24] The relevant provisions of the proclamation that are in issue in these proceedings are sections 4 and 9.

[25] Section 4 (1) provides:

Subject to the provisions of the Transkei Agricultural Development Act, 1966 (Act 10 of 1966), of any soil conservation scheme in force under that Act and of Section 19 of these regulations, the magistrates may grant permission –

- (i) To any person to remain in occupation of such homestead and arable allotments as were in his lawful but unregistered occupation immediately prior to the commencement of the Transkei Land Amendment Act, 1968;
- (ii) To any person domiciled in the district, who has been duly authorised thereto by the tribal authority, to occupy in a residential area for domestic purposes or in an arable area for agricultural purposes, a homestead allotment or an arable allotment, as the case may be;
- (iii) To any missionary society duly authorised thereto by the tribal authority, to hold a homestead allotment in a residential area or an arable allotment in an arable area for occupation by any full time minister of religion, preacher or evangelist in its employ.

[26] Section 9 (2) (a) – (b) provides –

“9 (2)(a) Upon the death of an allotment holder his rights to occupy such allotment shall ipso facto be cancelled, subject to provisions of the Transkei Agricultural Development Act, 1966 and of any soil conservations scheme in force under that Act, such allotment shall become available for re – allotment to a widow or other member, including any other female member, of the previous holders family selected for the purpose by the tribal authority.

(b) In the absence of any such re – allotment, the allotment shall revert to commonage”.

[27] It is common cause between the parties that the farm in issue was allocated to the deceased on 2 January 1969 in terms of Section 4 (1) of the proclamation and that the deceased passed on 12 September 1998.

[28] On the basis of the provisions of Section 9 (2)(a) – (b) stated above the respondents contend that since the certificate holder had

passed on, the Estate representative does not have locus standi over the property.

[29] The respondents have called upon this Court to endorse and support the provisions of the proclamation captured above. That I cannot do.

[30] I deal with this important aspect of land below. This is a constitutional imperative and I find it compelling to add my voice to it.

[31] Section 25 (1), (5), (6) and (9) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) provides thus:

- “25 (1) no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (5) The state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament either to tenure which is legally secure or to comparable redress.
- (9) Parliament must enact the legislation referred to in subsection 6”.

[32] In order to comply with the above provisions of the Constitution the Parliament, enacted the Communal Land Rights Act 11 of 2004 (CLRA). The constitutional validity of the CLRA was successfully challenged in the North Gauteng High Court and later on confirmed by the Constitutional Court in the matter of Tonoane v Minister of Agriculture and Land Affairs 2010 (6) SA 214 (CC). Mr Botma relied on the provisions of Section 46 and Section 19 of the CLRA. I would assume that he was not aware that CLRA was set aside and declared unconstitutional. Consequently, I say less about his reliance on CLRA.

[33] Another legislation that was enacted in order to respond to the dictates of the Constitution is the Interim Protection of Informal Land Rights Act 31 of 1996 (the Interim Protection Act). The Interim Protection Act came into operation on 26 June 1996. In terms of Section 5 (2) thereof it gets extended every 12 months.

[34] The aim of the Interim Act is explained as follows:

“To provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law; and to provide for matters connected therewith”.

[35] Section 2 (1) of the Interim Protection Act provides:

“2. Deprivation of informal rights to land

(1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent”.

[36] The Interim Protection Act defines informal right to land as follows:

“informal right to land” means -

- (a) the use of, occupation of, or access to land in terms of -
 - (i) any tribal, customary or indigenous law or practice of a tribe;
 - (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in -
 - (aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);
 - (bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or
 - (cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;
- (b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;
- (c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or ...”

[37] Significantly the Act defines beneficial occupation as follows:

“means the occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner”

[38] The applicant has informal rights over the land in question which are protected by the Interim Protection Act.

[39] By way of Government Gazette no. 41270 dated 24 November 2017, the operation of the interim Protection Act has been extended by

the Minister for Rural Development and Land Reform until 31 December 2018.

[40] I am of the view that the applicant's legal standing in these proceedings is sourced from Sections 25 (1), (5) and (6) of the Constitution read together with Section 2 (1) of the Interim Protection Act. For the above reasons I am of the view that the applicant has locus standi in these proceedings.

[41] The merits of the matter are not strenuously opposed by the respondents. It was not argued before me that the application does not meet the requirements for the issuing of a final order as espoused in the leading case of *Setlogelo v Setlogelo* 1914 AD 221. Such requirements are:

- (a) a clear right on the part of the applicant;
- (b) an injury committed or reasonably apprehended; and
- (c) the absence of any other satisfactory remedy available to the applicant.

[42] The question of locus standi above has adequately dealt with the first requirement. Perhaps I should add that the applicant is entitled to approach this Court on behalf of the Estate and challenge any conduct that interferes with Estate assets unlawfully. This is such a case.

[43] The respondents do not dispute that they are erecting certain structure on the property, their main contention is that they are allowed to do so by virtue of a lease signed by a person who has no authority to represent the Estate. Above all, the alleged agreement is no more as it expired. Clearly, the conduct of the respondents is no more than unlawful interference with the property of the Estate.

[44] The respondents have not contended that the applicant could have resorted to some other remedy. I also do not think that there is any available.

[45] A costs order is sought on a punitive scale. I do not agree that such an order is warranted in this matter. The Constitutional Court in

Limpompo Legal Solutions and Others v Vhembe District Municipality 2017 (9) BCLR 1216 (CC) para 28 endorsed the principle that:

“The scale of attorney and client is an extra ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium”.

[46] Through my engagement with this matter few observations have occurred in me. The following are worth recording, namely:

- (a) It is concerning, if not disturbing, that the majority of Rural Communities are still not the owners of their land. Like the applicant they rely on the mercy of the Minister for Rural Development and Land Reform by signing the Interim Protection Act for them to remain in occupation of their land legally.
- (b) No doubt such Communities are not aware that they are not permanent owners of the land they occupy.
- (c) Interestingly the Provisions of Section 25 (5), (6) and (9) of the Constitution are there for the Parliament to correct the anomalies created by apartheid laws.

[47] For all the above reasons I grant the following order :

- (a) That sub – paragraphs 2.1, 2.2 and 2.3 of the order issued on 5 October 2017 are hereby confirmed.
- (b) That the Respondents pay costs of this application on party and party scale.

V. KUNJU

JUDGE OF THE HIGH COURT (ACTING)

Attorney for the Applicant : SL MGXAJI

Instructed by : MGXAJI AND CO. INC.
MTHATHA

Counsel for the Respondents : DC BOTMA
INSTRUCTED BY : J. A. LE ROUX ATTORNEYS
Mthatha

Matter heard on : 10 May 2018
Judgment delivered on : 21 August 2018