

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1633/2015

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
	<u>REVISED.</u>
DATE.....	SIGNATURE.....

IN THE MATTER BETWEEN

BLOCK 17, GA-SEAPHOLE COMMUNITY

DEVELOPMENT COMMITTEE

: 1ST APPLICANT

BLOCK 17, GA-SEAPHOLE CONCERNED

COMMUNITY RESIDENTS: Individuals

Listed in annexure "a" 13th to 272nd Applicants : 2nd APPLICANTS

And

P.M.E BUSINESS ENTERPRISE

T/A MAAKE FARMING

(CK NO. 2002/042830/23)

: 1ST RESPONDENT

MOHALE EVANS MAAKE

: 2ND RESPONDENT

HEADMAN: MICHAEL MOROPENE

: 3RD RESPONDEND

MODJADJI TRADITIONAL COUNCIL

: 4TH RESPONDENT

GREATER LETABA LOCAL MUNICIPALITY

: 5TH RESPONDENT

DEPARTMENT OF CO-OPORATIVE

GOVERNMENT, HUMAN SETTLEMENTS

AND TRADITIONAL AFFAIRS-LIMPOPO

PROVINCE

: 6TH RESPONDENT

JUDGMENT

SEMENYA J:

1. The 1st applicant is a structure referred to as Community Development Committee (CDC) comprising of eleven members elected by the residents of Block 17, Ga-Seaphole village in Modjadji area. This structure is tasked with the responsibility of overseeing development within the community and land issues within the village. The 2nd applicant is the chairperson of the CDC. The 3rd to 13th and the remaining applicants are its office bearers and additional members.
2. The 1st and 2nd respondents (the respondents) are the occupiers of a piece of land which is situated at Ga-Seaphole village. The 3rd respondent is a headman of Ga-Seaphole village. The 4th respondent is the Royal Council which, according to the applicants, is the guardian of the land in question in this matter. Mohale Evans Maake deposed to the answering affidavit on behalf of the 1st to the 4th respondents. The 5th and 6th respondents are joined as government authorities responsible for overseeing the issuing of Permission to Occupy land in rural areas (PTO).
3. The applicants seek an order in terms of which the 1st and 2nd respondents are evicted from the land and further that they should be interdicted from farming on it.

4. It is common cause that the respondents have erected a fence around the land which, according to the applicants, belongs to the community of Ga-Seaphole. The respondents are conducting farming activities on this land. The respondents have initially claimed that they are occupying the land on the strength of a PTO which was issued to them with permission from the 3rd and 4th respondents. The deponent to the answering affidavit subsequently conceded that the PTO was not properly issued and was therefore *null and void*.
5. In a supplementary affidavit, the 2nd respondent alleges that the land was the property of his father on which the latter has been farming. The applicants regard this fact as the respondents' third defence. The applicants argued that the land in question belongs to the community and cannot be inherited. The argument is that, once the original occupier dies or vacate the land, it will simply revert back to the community. It was submitted that the 2nd respondent's father had stopped to farm on the land, as such he cannot claim that the land still belong to his family.
6. In response to the applicant's contention, the respondents argued that there are other members of the community, among others, one Mr Mawasha, who are farming the land that belonged to their fathers and also without permits. It

was submitted that there is an established custom within the community in terms of which members would approach the 3rd and 4th respondents whenever they require land for farming purposes. The respondents argue that the applicants do not have issues with these other members, which in essence, it was argued, is confirmation of the existence of that culture. It was further argued that the 3rd and 4th respondents have also confirmed this culture in their confirmatory affidavits.

7. It was argued on behalf of the applicants that the only way the respondents can raise the issue of Mr Mawasha is by taking him to court. It was submitted that the applicants are not aware that Mr Mawasha and other farmers are farming illegally on the land in question.
8. The applicants' contention in respect of Mr Mawasha cannot be entirely correct. Mr Mawasha is the 265th applicant in this application. As a party to the proceedings, he is expected to be in a better position to either refute or admit the allegations leveled against him. I am inclined to accept the respondents' submission in the absence of such denial. Furthermore, the applicants failed to refer the court to authority in support of the argument that the land will revert back to the community after the death of the original owner. On the contrary, it is their evidence that piece of land that belongs to the community was allotted to families and not to individuals.

9. The applicants concede that certain families were allotted land for subsistence farming within the area. The respondents argued that this is a concession that land can be inherited by the decedents of those who have been allotted land in the past. It was submitted by the respondents that they cannot be faulted for continuing to farm on the land that once belonged to his father, as does other members of the community. The respondents' contention is that they too deserves the protection afforded by the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), and cannot, on that basis, be deprived of his father's land without following proper procedures.
10. It is common cause that the applicants have addressed a letter to the 2nd respondent dated the 3rd January 2015, in which the respondents are ordered to leave the land save for that on which his father has been farming in the past. I therefore find that on the basis of this statement alone, it is evident that there is no dispute in as far as that piece of land is concerned. It is opportunistic for the applicants to dispute this fact.

11. Section 2 of IPILRA, on which both parties rely provides as follows:

“(1) Subject to 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.

(2) Where land is held on a communal basis, any person may, subject to subsection (4), be deprived of such land or rights in land in accordance with the custom or usage of the community.

(3) Where the deprivation of a right in land in terms of subsection (2) is caused by the disposal of a land or right in the land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.

(4) For the purposes of this section, the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.”

12. With regard to the remaining portion, the 2nd respondent alleges that anyone who is interested in acquiring land within the village must request it by attending Kgoro. He further states that, should that person require an extension of that land, he should approach the headman and his committee for permission to occupy that land. The community and the Modjadji Royal Kraal would have to be informed about this fact.
13. Whilst in agreement with the procedure to be followed for the extension of the land as outlined by the respondents, the applicants however contend that the respondents have not followed this procedure. The 1st and 2nd respondents allege that the 3rd and 4th respondents have granted them permission to extend the land. The 3rd and 4th respondents filed confirmatory affidavits in this regard. It is however not disputed that the community was not consulted when the land was so extended.
14. The extension of the respondent's land was done without proper consultation with the community at a properly convened meeting. It was therefor done in contravention of IPILRA. Reliance on the acquisition of land extension in a similar manner by other members of the community is misplaced. The

respondents cannot claim the right to equality to justify their unlawful deeds.

The applicants are urged to take similar action against all other farmers who have acquired the land in an unlawful manner.

15. The respondents contended that the applicants' failure to launch similar applications against other members of the community who have occupied land is in itself discriminatory. It was submitted that this discrimination goes against the ethos of right to equality as envisaged in section 9 of the Constitution. It was further contended that the applicants' conduct goes against the provisions of section 25 of the Constitution. The respondents submitted that the applicants cannot arbitrarily evict them from the land that belonged to their father and their family. I agree with this contention to the extent that it refers to that land that was owned by the 2nd respondent's father only. I however do not agree with the land that has been extended.

16. The respondents places reliance on **IPILRA** and the unreported decision of **The Ingonyama Trust and Others v Umlalazi Municipality and Others (1421/2016) [2016] ZAKZPHC 89 (10 October 2016)** (Umlalazi) and argued the land was not occupied at the time of the extension. The court in Umlalazi rejected the argument that the land in question in that case was unoccupied

when it was acquired on the basis that the pictures which were tendered as evidence depicted old house on the land. In the instant matter, although there were no houses on the land, the evidence proved that the land was used by the community for communal livestock grazing and subsistence farming.

17. It was argued on behalf of the respondents that the extent of the land that belonged to the 2nd respondent's father is in dispute. It was submitted that the court should, on that basis, refer the matter for oral evidence. I do not agree. The fact that part of the respondent's farm consist of land that belonged to his father is not in dispute. The applicants also allowed the respondents to continue to farm on that land. The extent of that land will have to be determined on the basis of the respondents' version in line with the **Plascon-Evans Rule**.

18. The applicants do not define the land that belonged to the 2nd respondent's father. On the other hand, the 2nd respondent clearly described the said farm. I have no reason to decide against the 2nd respondent in that regard.

19. The 2nd respondent alleges that he has lodged a claim from the land that belonged to his father with the land Claim Commission. It was argued on behalf of the applicants that the respondents are contradicting themselves. The basis of this contention is that the respondents cannot on the one hand claim that the land belonged to his father while at the same time claim the very same land, which already belong to him. Counsel for the applicants loses sight of the statement made by the respondents that the reason for the lodging of a claim is to enable the Land Claim Commission to resolve their issues through investigations.

20. I cannot fault the stands adopted by the respondents in this regard. There is a need for certainty in order to settle the issues between the parties. The claim was put on hold in view of the Constitutional Court decision in **Land Access Movement of South Africa and Others v Chairperson of the National Council Of Provinces (CCT40/15) ZACC 22 (28 July 2016)**. In this case the Restitution Amendment Act 15 of 2014 was declared invalid on the basis that there was no proper consultation and allowed the parliament to craft legislation which opens restitution of land within 24 months.

21. I am satisfied that the applicants have made out a case for a final interdict in relation to the extended land. The requirements laid down in **Setlogelo v**

Setlogelo 1914 AD 221 have been satisfied. The applicants have a clear right to the communal land. It is the land used by the community for grazing their livestock among other things. The land is protected by the IPILRA. The extension of the respondents' farm has the effect of depriving the applicants of their right to land. The extension was carried out in an unlawful manner. There is no other remedy other than the one sought by the applicants.

22. There is no provision in IPILRA for compensation in a case such as this. The only provision is where it is the community that deprives the individual of his/her land. The community should compensate the individual under those circumstances. The applicants are partly entitled to the order sought.

23. I do not agree that the respondents acquired the PTO in a fraudulent manner.

The respondents allege that the reason why they approached the magistrate for the PTO was because they needed a loan from the bank and they were advised to secure this document. I further find that the respondents were misled by the magistrate and the 3rd and 4th respondent. It is for this reason that I find that it will not be proper to order the 1st and 2nd respondents to pay the costs on an attorney and client scale.

24. With regard to the issue of the costs incurred during on the 2 November 2017, it is undisputed that the applicants failed to file their opposing affidavit and that the delay was further occasioned by the applicants as their papers were not in order. It is appropriate that the applicant should be pay the costs of that date.
25. With regard to the costs of the main application, I find that an appropriate order should be that each party is to pay its/ his own costs. This is so in that the applicants have partially succeeded in their claim. The respondents on the other hand have succeeded in proving that they are entitled to farm on a portion of the land that they are occupying.
26. It is ordered:
- i. The Permission to Occupy land issued to the 1st and 2nd respondents by a magistrate is declared *null and void*;
 - ii. The 1st and 2nd respondents are ordered to remove the fence on the land other than that which belonged to his father and or Maake family within a period of eight months;
 - iii. In the event that the 1st and 2nd respondents fail to or refuse to remove the fence, the sheriff of the court or his lawfully appointed deputy is authorized and directed to remove the fence;

- iv. The 1st and 2nd respondents are interdicted from continuing to farm on communal land;
- v. The applicants are ordered to pay the costs of the 2 November 2017.
- vi. Each party shall pay its own costs of the main application.


M.V SEMENYA
JUDGE OF THE HIGH COURT; LIMPOPO
DIVISION.

APPEARANCES

ATTORNEYS FOR THE APPLICANTS : SEHUNANE ATT
COUNSEL FOR THE APPLICANTS : MR. SEHUNANE
ATTORNEY FOR THE RESPONDENTS: NOVENI EDDY KUBAYI INC.
COUNSEL FOR THE RESPONDENTS : MR. E KUBAYI
RESERVED ON : 12 MAY 2018
JUDGMENT DELIVERED ON : 03 SEPTEMBER 2018