



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

CASE NO: 762/2017

In the matter between:

ORMIN COAL (PTY) LTD

APPLICANT

and

NIEMCOR AFRICA (PTY) LTD

FIRST RESPONDENT

(in liquidation)

JOHANN NIEMOLLER

SECOND RESPONDENT

ALFRED MALEBA

THIRD RESPONDENT

PATRICK LIGHTFOOT

FOURTH RESPONDENT

**DEPARTMENT OF MINERAL
RESOURCES**

FIFTH RESPONDENT

SAPS BURGERSFORT

SIXTH RESPONDENT

RICHARD KEAY POLLOCK NO

SEVENTH RESPONDENT

RALPH FARREL LUTCHMAN NO

EIGHTH RESPONDENT

HILLARY ANNE PLAATJIES NO

NINETH RESPONDENT

JUDGMENT

N F KGOMO J

INTRODUCTION

[1] On the 7 February 2017 the applicant caused a notice of motion herein to be issued, calling upon the respondents to answer to the following allegations:

1.1 Part A thereof:

1.1.1. That the applicant's non-compliance with the rules of this Court in respect of service and the hearing of this application, be condoned and that this matter be regarded as urgent in keeping or in terms of Rule 6(12) of the Uniform Rules of Court.

1.1.2. That the respondents or anyone acting through them be interdicted from interfering with the operations of and the access of the 1st applicant (sic) to the property described as Dump 5, The Farm Twyfelaar 119, Sekhukhune, Limpopo, pending the outcome of the determination of the application for the relief sought in Part B of this application.

1.1.3. That the 2nd, 3rd and 4th Respondents be ordered to pay the costs of Part A of this application.

1.1.4. For further and/or alternative relief.

[2] At the hearing of Part A of this application it became common cause that argument and submissions in Part A may also dispose of issues raised in Part B of this application. This Court then ordered the counsel for both sides to tailor their argument in such a way that Part B issues are also ventilated. However, there was a rider: should that need arise, this Court may only determine Part A whereafter time-lines may or would be set out relating to the filing of further affidavits necessary for the determination of issues pertaining to Part B.

[3] For the above reasons, it is necessary to set out the terms and prayers of Part B of this application. These are:-

3.1. An order declaring that the applicant is entitled to remove or in any way or fashion deal with the dumps found on the farm Twyfelaar 119, Sekhukhune, Limpopo.

3.2. An Order that 1st to 6th respondents be ordered to pay the costs of the application on attorney and client scale, and

3.3 Further and/or alternative relief.

[4] It deserves mention here that Part B relates to or talk about the entirety of the Farm Twyfelaar, 119, Sekhukhune, Limpopo whereas Part A only relates to Dump 5.

History of this matter prior to High Court Set down

[5] It is so that the applicant instituted urgent proceedings in the Magistrates Court Tubatse, district Burgersfort for a spoliation order asking for orders against the only respondent thereat, Niemeor Africa (Pty) Ltd (the First Respondent in our present application) in the following terms:

- 5.1. To restore possession of and access to Dump 5, Twyfelaar Farm to the applicant;
- 5.2. Directing or instructing or ordering the Sheriff of Tubatse and his deputies to restore the applicant's possession of and access to Dump 5, Twyfelaar Farm, Limpopo;

- 5.3. Mandating the Sheriff to ask for assistance of or from the SA Police Services (“SAPS”) at Tubatse and/or Moroke Police Station when so executing the Court order;
- 5.4. Interdicting the respondent from depriving the applicants of possession of same;
- 5.5. That a rule nisi be issued calling upon the respondent and all interested parties to show cause why this order should not be made final on the return date, being 7 February 2017 at 09h00 or so soon thereafter as counsel may be heard;
- 5.6. That the rule nisi operate as an interim interdict;
- 5.7. Costs of suit; and
- 5.8. Further and/or alternative relief.

[6] In that application, an entity called Bakgalaka ba Selala Development Trust was cited as the 2nd applicant.

[7] The application was opposed by the respondent there-at. It filed an answering affidavit and the applicants filed a replying affidavit.

- [8] It also deserves mention here that the 2nd applicants in the Tubatse application did not play any active role in the application. That entity is not cited as a party in the application before this High Court. It is referred to in the papers in the High Court application, not as Bakgalaka –ba-Selala Development Trust, but as Bakgatla-ba-Selala Development Trust.
- [9] The Tubatse application was finalized on 25 January 2017 when the Magistrate ruled that the Magistrates Court did not have jurisdiction to hear it as the value in issue exceeded the permitted limit for Magistrates Courts.
- [10]. Hence the applicant, this time alone, instituted the present proceedings in this Court against, not one, but nine (9) respondents. The 7th , 8th and 9th respondents are the appointed joint liquidators of the 1st respondent.
- [11] The 5th to 9th respondents have not opposed the application, which is understandable because they were cited as affected or interested parties, only even though the applicant did not explicitly say so.

First to Fourth Respondent's opposition

[12] The 1st to 4th respondents raised three *points in limine*, namely, lack of urgency, reliance on an invalid founding affidavit that was not attested to or attested to as required by law, and lack of *locus standi* to institute the proceedings.

Applicant's affidavit

[13] The respondents alleged that the applicant's Founding Affidavit was not a proper affidavit as it did not comply with the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

[14] The commissioning officer attesting that affidavit stated that the deponent of the applicant's Founding Affidavit, Mr. Ian Gerrit Van der Walt is a female person which is incorrect because he is a male. This brings up serious uncertainty about the person who presented himself or herself before the Commissioner of Oaths to commission the Founding Affidavit.

[15] The respondents submitted that this was a fatal defect that vitiated the application. The applicant argued that this was an innocent typographical error.

[16] It is so that if the deponent is a male but the certification says she is female, that deponent's statement will have a problem of being accepted. If the document has a "he" and a "she" alongside each other but one was not scratched out, that may be accepted to be a mere innocent omission. In such circumstances the affidavit is accepted.

See Absa Bank v Botha No and Others 2013 ZAGPPHC 163

[17] Furthermore, the applicant's "affidavit's" deponent did not mention his or her designation. Regulation 4(2)(b) issued subject to the Justices of the Peace and Commissioner of Oaths Act (supra) decrees that the attesting officer's designation is an important part of the equation under those circumstances.

[18] On this ground alone the respondents also ask that this application be dismissed.

Applicant's case

[19] The high-water mark of the applicant's case is that –

19.1. They were lawfully in possession of Dump 5 when they were forcibly removed by the Sheriff and the police;

19.2. The dump are movable assets capable of being lawfully occupied irrespective of whether the State may be the owner;

19.3. The first respondent, as a finally liquidated entity, is not capable of continuing to work on the dumps; and

19.4. There is sufficient urgency for this matter to be heard on an urgent basis in terms of Rule 6 (12) of the Uniform Rules of Court.

Respondent's Case

[20] According to the respondent, among others-

20.1 The applicants are relying on non-existent authority to work on Dump 5 as the Selala Development Trust, be it called Bakgalakaba-Selala Development Trust or Bakgatla-ba-Selala Development Trust, disavowed and/or distanced themselves from any agreement with it (Applicant).

20.2. The 1st respondent has validly issued permits to work on Dump 5.

20.3. Despite the fact that 1st respondent was liquidated in 2012, its joint liquidators still have authority and powers to continue its business affairs, more so that the Department of Minerals and Energy Affairs, in its letter dated 19 August 2013, intimated that since the applications to renew expired permits were still under consideration, the expired permits remain in force until a decision had been taken. Such decision has not yet been taken.

20.4. The applicant(s) were not evicted or removed from the Dump by the 1st respondent but by the owner thereof, the Department of Minerals and Energy Affairs (“DMRS”) acting in terms of the Minerals and Petroleum Resources Development Act (“DMPRA”) 28 of 2002 and/or the police duly mandated.

Evaluation

[21] The respondents raised two points *in limine* to the application, namely:

21.1. Lack of jurisdiction on the basis that both the applicant and the 1st respondents’ registered addresses of business are situated in Gauteng, not Limpopo, and that-

21.2. In the event of the applicant relying on the fact of the whole cause of action having arisen within this Court’s jurisdiction as its claim to jurisdiction, then this Court should find that the applicant(s) have failed to advance grounds or aver in the papers as required by the Rules of Court, that this is the case.

- [22] The first issue to be decided is whether or not the applicant(s) hold or have valid permits to mine or deal with Dump 5, Twyfelaar, Sekhukhune.
- [23] They do not have those. They rely on some agreement they allegedly have with a Selala tribe's development trust. As already alluded to, Selala Development Trust put it on record that they have dissolved the Trustees of the Trust because some or all of them engaged in unauthorized dealings with the applicant(s) in their names. They also stated that they never mandated or authorized any engagement in legal proceedings including these ones we are dealing with.
- [24] It is common cause that at this stage, the first respondent is in possession of Dump 5, Twyfelaar Farm, Sekhukhune District. That they do so by authority of mining permits 52/2009 (LP 39/5/1/2/956) is also not in dispute.
- [25] Consequently, the applicant's contention that it was in peaceful and undisturbed possession of Dump 5 when it instituted these proceedings cannot be correct.

[26] The applicant does not have any valid permit to mine or deal with Dump 5, Farm Twyfelaar, Sekhukhune.

[27] Ownership of Dump 5 on the Farm Twyfelaar, Sekhukhune vest in the State in keeping with the law. The Selala tribe may be situated next to it or on the land in question. However, that does not without more make them the owners. As such, they cannot validly enter into mining or related environmental activities without the knowledge and permission or authorization from “DMR” (Department of Mineral Resources). The fact that the Bakgalaka or Bakgatla-ba-Selala Development Trust distance themselves from the applicant nullifies the latter’s claim to legitimacy of possession in these circumstances.

[28] The above militates against the applicant’s application to be placed urgently in possession of the disputed property or land.

[29] This Court accepts that the issues raises herein require urgent attention. As such the matter was correctly enrolled in the urgent Court.

[30] It also deserves mention here that the applicant had earlier on instituted the same proceedings, styled spoliation proceedings, in the Tubatse Magistrate Court, Burgersfort. The case was discharged in that Court as the Magistrate ruled that that Court did not have the jurisdiction to deal with it.

[31] In its replying affidavit the applicant submitted that the liquidation of the 1st respondent deprives its directors and/or employees to act on its behalf. That may be partly true. However, it is also true that three joint liquidators have been appointed to administer the affairs of the 1st respondent. As such, in spite of the liquidation of the 1st respondent, the management of its affairs, including the activities on or in Dump 5, Twyfelaar Farm, Limpopo still validly vest in its joint liquidators.

[32] It is also correct that in terms of Section 56(d) of the Insolvency Act mining and/or mineral rights held by a company prior to liquidation should lapse. However, in this instance, the existing permits held by or on behalf of the 1st respondent moved to its joint liquidators.

- [33] Counsel for the applicant relied on several judgments of the Courts in support of its contentions. However, those decisions cannot avail the applicant as the applicant has proved no right to be in possession of or working on Dump 5, Twyfelaar 119, Limpopo.
- [34] Counsel for the respondents relied on several judgments of the Courts in support of its contention that the applicant's founding affidavit was not properly commissioned. That may have substance. ***Ex facie*** that document it is not clear whether a man or a woman is involved. The commissioning official's designation is not clearly set out there-at. On that ground the applicant's founding affidavit stands to be adversely affected. That also impacts on its acceptability and/or use-ability in these proceedings.
- [35] The fact whether Dump 5 is a movable or immovable asset is of academic interests when the totality of circumstances herein are considered.

Conclusion

[36] In the circumstances, the question to be answered is whether or not the ***rule nisi*** issued on 20 January 2017 should be upheld or whether the applicant has made out a case for the grant of the orders sought when regard is had to the fact that the Tubatse Court proceedings are quashed.

ORDER

[37] The following order is made:

37.1. The application is dismissed with costs.

N F KGOMO J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE

Appearances

1. For the applicant : Adv. M Schenehager
2. Instructed by : Zwiegers Attorneys
C/o Espag Magwai
Polokwane
3. Telephone Number : 015 – 297 5374/9
4. For the Respondents : Adv. C.R Van Heerden
5. Instructed by : DRSM Attorneys
C/o Mashao Attorneys
Polokwane
6. Telephone numbers : 015-291 5729
7. Date of Argument : 09 February 2017
8. Date of Judgment : 17 February 2017

