

**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



CASE NO: 5054//2013

DATE OF HEARING: 14 MAY 2015

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>

.....
DATE

.....
SIGNATURE

In the matter between:

JOHANNES BOTHA SOLANI MASELESELE N.O.

Plaintiff

and

GREATER GIYANI MUNICIPALITY

First Defendant

REFORMED CHURCH SA (LOWVELD)

Second Defendant

THE TRUSTEES OF THE SAKINA

PROPERTY TRUST

Third Defendant/Excipient

THE TRUSTEES OF THE

EKSON NGOBENI TRUST

Fourth Defendant

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION AND FACTS

1. Arising from disputes about the ownership of certain properties in the Limpopo Province (“the land”), the plaintiff issued summons on 15 November 2013 claiming the following relief:
 - 1.1 A declaratory order in terms of which it is declared that the plaintiff is entitled to have its informal rights in “the land” upgraded to ownership.
 - 1.2 That the plaintiff may make application in terms of the provisions of the Upgrading Of Land Tenure Act, 112 of 1991 to give effect to prayer 1.
 - 1.3 That “the land” be transferred to and registered in the name of the plaintiff
 - 1.4 Costs of suit.
2. The plaintiff alleges in paragraph 7 of his particulars of claim that the dispute exists between the plaintiff and the first and second defendants with regard to which of these parties has the right to claim ownership in and to the land.

3. The plaintiff cited the third and fourth defendants as “interested and affected parties” in that two of the erven making up the land have respectively been transferred to, and registered in the names of the third and fourth defendants.
4. On 9 January 2014 the third defendant filed an exception on the basis that the plaintiff’s particulars of claim lack averments which are necessary to sustain an action upon which the plaintiff filed a notice of intention to amend on 28 July 2014. The third defendant objected to the proposed amendment and the plaintiff did not pursue the amendment. The particulars of claim remained as they currently stand.
5. The plaintiff has accordingly set the exception down for hearing. Strange as it may sound the plaintiff failed to file a practice note and heads of argument and moreover failed to appear in court on the day the exception was argued.

THE EXCEPTION

6. The plaintiff alleges in paragraph 10 of the particulars of claim, in respect of with regard to the land that:

“The Plaintiff and its family/ancestors have since the 1950’s openly and with permission to do so occupied the land and due to it being tribal land as well as previously inflicted apartheid’s legislation, been refused title in and to the land.”

7. In paragraph 11 of the particulars of claim, the following averment is made:

“The Plaintiff, in terms of the provisions of the Upgrading of Land Tenure Act, Act 112 of 1991 is entitled to have its informal rights in the land upgraded to ownership.”

8. Although not expressly so alleged in paragraph 11 the third defendant argued that it is implied in paragraphs 10 and 11 that the plaintiff bases his entitlement to have the land upgraded on the reasons contained in paragraph 10.
9. The third defendant argued that in order to have an interest or title in land upgraded to ownership the plaintiff could only do so by showing that he is entitled to full ownership by virtue of either section 2 or 3 of the Upgrading of Land Tenure Rights Act, 1991, Act No. 112 of 1991 (“the “Act”).
10. Section 2 of the Act stipulates as follows:

“2 Conversion of land tenure rights mentioned in Schedule 1

(1) Any land tenure right mentioned in Schedule 1 and which was granted in respect of-

(a) any erf or any other piece of land in a formalized township for which a township register was already opened at the commencement of this Act, shall at such commencement be converted into ownership;

- (b) *any erf or any other piece of land in a formalized township for which a township register is opened after the commencement of this Act, shall at the opening of the township register be converted into ownership;*
- (c) *any piece of land which is surveyed under a provision of any law and does not form part of a township, shall at the commencement of this Act be converted into ownership, and as from such conversion the ownership of such erf or piece of land shall vest exclusively in the person who, according to the register of land rights in which that land tenure right was registered in terms of a provision of any law, was the holder of that land tenure right immediately before the conversion.”*

11. Section 3 of the Act stipulates as follows:

“3 *Conversion of land tenure rights mentioned in Schedule 2*

- (1) *Subject to subsection (1B), any land tenure right mentioned in Schedule 2 and which was granted in respect of any erf or other piece of surveyed land shall, upon the submission by the owner of such erf or piece of land at the deeds registry of a deed of transfer on the form prescribed for that purpose under the Deeds Act and made out in the name of the person who is the holder of the relevant land tenure right, be converted into ownership by the registrar of deeds by the registration of such erf or piece of land in the name of such person: Provided that-*

- (a) *where the State is the owner of an erf or piece of land situated outside a formalised township, the relevant land tenure right need not be converted into ownership, and a deed of transfer shall not be submitted unless-*

 - (i) *the Minister is satisfied, on the basis of a report by a person assigned or appointed by him or her, that the rights or interests of putative holders are being protected; and*
 - (ii) *where such land is lawfully occupied or has been allocated for the use of a tribe or community a tribal or community resolution has been obtained;*
- (b) *where a tribe is the owner of the land, the decision to convert the relevant land tenure right into ownership shall be taken by way of a tribal resolution.*
- (1A) *For the purposes of an investigation referred to in subsection (1) (a), the designated or appointed person shall have all the rights and duties referred to in section 24D (7).*
- (1B) *If an owner of an erf or piece of land is requested to submit a deed of transfer of land in terms of subsection(1), the Minister may on request of such owner, or if the State is the owner of such land, of his or her own accord-*

- (i) *impose conditions in respect of the use of such land, but if the State is the owner of such land and it is lawfully occupied by or has been allocated for the use of a tribe or community, in consultation with such tribe or community;*
 - (ii) *from moneys appropriated by Parliament or at the cost of an affected person and on such conditions as he or she may determine, cause such land to be surveyed;*
 - (iii) *order that an amount to be determined by him or her be paid by an affected person to the owner of the erf or other piece of land, or if the erf or other piece of land falls within an area lawfully occupied or allocated for use by a tribe or community, to the tribe or community concerned;*
 - (iv) *provide for a method for determining the amount to be paid in terms of paragraph (iii).*
- (2) *A deed of transfer referred to in subsection (1) shall be prepared by-*
 - (a) *a conveyancer; or*
 - (b) *if the owner of the erf or piece of land is the State or any local government body, any officer in the public service or person in the employ of such local government body, as the case may be, who has been designated for the purpose by the Minister, a Premier or a local government body, as the case may be.*

(3) *A deed of transfer referred to in subsection (1) shall be in the form prescribed under the Deeds Act and shall be signed by the owner of the erf or piece of land or his or her duly authorised agent in the presence of a conveyancer referred to in subsection (2) (a) or an officer or person referred to in subsection (2) (b) in the manner prescribed under that Act.”*

12. The third defendant argued that it axiomatically follows that a plaintiff who wishes to enforce rights that he believes to have has in terms of the Act will have to make it clear in the particulars of claim that he relies on either section 2 or section 3.
13. Furthermore a plaintiff relying on section 2 of the Act must allege and prove that the property in respect of which the ownership is claimed is firstly property contemplated in Schedule 1 of the Act; *and if so* is also a property which complies with the provisos set out in subsections 2 (1) (a) (b) and (c).
14. Should a plaintiff, on the other hand rely on section 3 of the Act in claiming ownership, the plaintiff would have to allege and prove that the property is firstly property contemplated in Schedule 2 of the Act; *AND IF SO* is also a property which complies with the proviso set out in subsections 3 (1) of the Act.

15. Schedule 1 to the Act enumerates the following land tenure rights:

15.1 Any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas, 1962 (Proclamation R293 of 1962).

15.2 Any quitrent title as defined in regulation 1 of the Black Areas Land Regulations, 1969 (Proclamation R188 of 1969).

15.3 Any right of leasehold as defined in section 1 (1) of the Black Communities Development Act, 1984 (Act 4 of 1984).

15.4 Any right of leasehold within the meaning of the Conversion of Certain Rights to Leasehold Act, 1988 (Act 81 of 1988).

15.5 Deed of grant rights or rights of leasehold as defined in regulation 1 (1) of the Regulations concerning Land Tenure in Towns, 1988 (Proclamation R29 of 1988).

15.6 Deed of grant rights or rights of leasehold within the meaning of the Regulations for the Disposal of Trust Land in Towns, 1988 (Government Notice R402 of 1988).

16. Schedule 2 to the Act enumerates the following land tenure rights:
 - 16.1 Any permission granted in terms of regulation 5 (1) of the Irrigation Schemes Control Regulations, 1963 (Proclamation R5 of 1963), to occupy any irrigation and residential allotment.
 - 16.2 Any permission to occupy any allotment within the meaning of the Black Areas Land Regulations, 1969 (Proclamation R188 of 1969).
 - 16.3 Any right of occupation granted to any registered occupier as defined in section 1 of the Rural Areas Act (House of Representatives), 1987 (Act 9 of 1987).
 - 16.4 Any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question.
17. The plaintiff has failed to identify any of the properties as being properties contemplated above.
18. Even if it is assumed for argument in favour of the plaintiff that the properties are indeed properties contemplated in schedule 2 and will be alleged to be so, more particularly that such properties will be alleged to be those listed in paragraph 16 above, the plaintiff would have to allege that *the plaintiff has a right of occupation, of tribal land, granted under the indigenous law or customs, of the tribe in question.*

19. The third defendant argued that what the plaintiff alleges in paragraph 10 of his particulars of claim is by no stretch of the imagination tantamount to what is actually required. Paragraph 10 of the particulars of claim states that *plaintiff and its family/ancestors have since the 1950's, openly and with the permission to do so, occupied the land, and due to it being tribal land as well as previously inflicted apartheid's legislation, been refused title in and to the land.*
20. It is consequently clear that what the Act intends, is to formalise the ownership to the land of any person who had at some stage been granted rights of occupation in terms of the system of indigenous law of a tribe. What the plaintiff however alleges that it has openly and with permission to do so, occupied the properties.
21. Only when it is clear that the plaintiff has a land tenure right contemplated in Schedule 2, such a right had to be granted in respect of any erf or other piece of surveyed land. See section 3 (1) of the Act.
22. The third defendant submitted that, at the very least, the plaintiff must make the allegation that at the time of the granting of the occupation of land in terms of the rules of a system of indigenous law of by the tribe, the formal granting of the rights of occupation had, and that stage, been done in respect of the properties which were at that stage erven or surveyed land.

23. Although the properties are identified by the maps attached to the particulars of claim as “JBSM2” it is clear that these maps were only drafted by registered professional land surveyor during October 2011 and it is clear that the maps did not exist in the 1950’s.
24. Furthermore, even if it is assumed for the purpose of the argument in favour of the plaintiff that he intends to rely on section 3, schedule 2, and paragraph 4 thereof to claim an upgrading of land title, the third defendant submitted that the following further allegations would be necessary in order to sustain the cause of action:
 - 24.1 The identity of the tribe to which the plaintiff refers and that it was a community living and existence like a tribe or any part of a tribe living and existing as a separate entity; and
 - 24.2 That the properties in question were tribal land, in that such properties were either land in respect of which the tribe was the owner or which was held in trust on behalf of the tribe or which has been allocated for the use of the tribe to the tribe by the State or the South African Development Trust in section 4 of the Development Trust and Land Act, 1936, Act No. 18 of 1936; and
 - 24.3 The fact that the granting of the rights was done under indigenous law or customs of the particular tribe in question, and, due to the stipulations of the Law Of Evidence Amendment Act, 1988, Act No. 45

of 1988, more particularly section 1(1) thereof, allege what the particular rules of this system of indigenous law of the tribe were, from which allegations it will be clear whether the court will be in a position to take judicial notice of the content of the rules (something which will be highly unlikely given the nature of the allegations made) or whether the plaintiff will have to lead expert evidence on the content of the rules of the tribe.

25. The third defendant consequently argued that the particulars of claim fall short of the minimum allegations that are required to sustain a cause of action in terms of the Act. Consequently, the third defendant, as excipient, requested that the particulars of claim be struck *alternatively* that the exception be upheld and that the plaintiff be granted leave to amend his particulars of claim within 14 of the date of the order.

26. Lastly the third defendant submitted that the particulars of claim are also excipiable in one or more of the following:

26.1 the citation of the parties is incorrect in that the trustees ought to have been cited in their representative capacities instead of the trusts (See Du Toit v Vermeulen 1972 (3) SA 848 (A) and Clarkson N.O. v Gelb 1981 (1) SA 288 (W); and

- 26.2 It is not clear from paragraph 7 of the particulars of claim to which parties' reference is made when alleging a dispute and which of these parties has the right to claim ownership in and to the properties.
27. I have considered all the submissions of the third defendant and am inclined to agree that the particulars of claim are indeed excipiable for the reasons submitted.
28. Consequently, I make the following order:
- 28.1 The exception is upheld.
- 28.2 The plaintiff is granted leave to amend his particulars of claim within a period of (14) fourteen days.
- 28.3 The plaintiff is ordered to pay the costs of this application.

AVVAKOUMIDES, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Representation for Plaintiff:

Counsel No appearance

Instructed by:

Representation for the First Defendant:

Counsel No appearance

Instructed by

Representation for the Second Defendant:

Counsel No appearance

Instructed by

Representation for the Third Defendant/Excipient:

Counsel Adv. G. J. Diamond

Instructed by Booyens Du Preez & Boshoff

Representation for the Fourth Defendant:

Counsel No appearance

Instructed by