

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: 1991/2014

**DATE HEARD: 03/06/2015
DATE DELIVERED: 05/06/2015**

In the matter between:

**ALL PERSONS INTENDING OCCUPYING
ERVEN 14167 AND 14409, KATHU**

Applicant

and

GAMAGARA LOCAL MUNICIPALITY

Respondent

Coram: Olivier, J

JUDGMENT

Olivier J:

- [1.] In this matter the main application served before me on 6 February 2015 and on the same day, in an *ex tempore* judgment, I confirmed a *rule nisi* prohibiting the occupation of two erven in Kathu and granted an order authorising the eviction of those found to be occupying the erven by 6 March 2015.

- [2.] The applicant in that application was the Gamagara Local Municipality while the respondent, and more specifically the group of people occupying the property, was cited as *“All persons intending occupying erven 14167 and 14409, Kathu”*. For the sake of convenience I will in the present judgment continue to refer to the applicant and the respondent as described in the main application.
- [3.] On 26 February 2015 a request for the reasons for my judgment was filed. I requested a transcription of my judgment and on 9 March 2015, after having received the transcription of the judgment, I indicated that I had nothing to add to the reasons contained in my judgment.
- [4.] In the meantime, on 27 February 2015, the respondent had lodged an application for an order that the eviction process be stayed pending receipt of my reasons and pending the final determination of an application for leave to appeal. On 4 March 2015 an order was made in that application, by agreement between the parties, confirming that the respondent withdrew its application, ordering that the costs of that application would be costs in the anticipated appeal and that, should the respondent fail to prosecute such appeal within 10 (ten) days or fail in its application for leave to appeal, those costs would be paid by Ms Salvation Mogadile. Ms Mogadile had been the deponent to the answering affidavit in the main application, and she also deposed to an affidavit, again supposedly on behalf of the respondent, in the application of 27 February 2015.

- [5.] In the respondent's present application, which was lodged on 3 March 2015, the notice of motion contains only a prayer for an order condoning the respondent's failure to comply with the provisions of Uniform Rule 49(1)(b). In paragraph 16 of this founding affidavit, once again deposed to by Ms Mogadile and again supposedly on behalf of the respondent, the application is, however, referred to as one for leave to appeal.
- [6.] In my judgment in the main application, which was given *ex tempore* because of the urgency of the matter, I reserved the right to elaborate on the reasons furnished *ex tempore*, if necessary. In my view the respondent therefore was entitled to request "*full reasons*" as envisaged in the first proviso to Uniform Rule 49(1)(b). Put another way, the respondent would have had reason to believe that the reasons advanced in the *ex tempore* judgment may not have been the "*full reasons*".
- [7.] Uniform Rule 49(1)(c) provides that, in such a case, the request for reasons should be delivered within 10 (ten) days of the order or orders. The respondent's request for reasons was delivered outside the 10 (ten) day period. I nevertheless responded to the request. There has never been an application for the condonation of that failure, but nothing turns on this.
- [8.] It was only when my letter to the Registrar stated that I did not wish to furnish further reasons, that the respondent could for practical purposes be said to have been in possession of my full reasons, as

envisaged in the first proviso to Rule 49(1)(b). Before then the respondent would, in view of the qualification and reservation in my *ex tempore* judgment, have had no way of knowing what my full reasons would be. The respondent would therefore have been entitled, in my view, to apply for leave to appeal within 15 (fifteen) days after receipt of my response to its request for reasons, in other words within 15 (fifteen) days of 9 March 2015.

- [9.] This would mean that the premise of the present application for condonation, namely that the 15 (fifteen) day period began to run from the date of the *ex tempore* judgment, is misconceived and that the respondent in actual fact do not need the condonation prayed for. Had the 15 (fifteen) day period begun on the date of the *ex tempore* judgment, the position would have been different. Both counsel conceded that the application for condonation had not been necessary.
- [10.] It is therefore unnecessary to deal with the applicant's point *in limine* regarding whether the resolution relied upon by Ms Mogadile actually authorised her to bring the application for condonation.
- [11.] I will therefore proceed on the basis that the application for leave to appeal was filed timeously and will proceed to consider the grounds of appeal.
- [12.] The first ground of appeal in the notice is that the orders were granted on the basis of an erroneous finding that Ms Mogadile lacked the necessary authority. No such finding was made. Even

though I expressed my doubts in this regard I assumed in favour of the respondents that they had *locus standi* and I decided the application on its merits. This much is apparent from the transcription of my judgment.

[13.] It is furthermore stated that I had failed to make enquiries regarding the personal circumstances of the occupiers and of minor children. As appears from the papers in the main application, and from my judgment in that application, none of the actual occupiers were before Court. Ms Mogadile had in fact, when the sheriff attempted to serve papers at the erven, encouraged those present not to disclose their identities. The applicant had no particulars of the people who were invading the erven, and clearly in the circumstances had no way of obtaining such particulars. Counsel for the respondent at the hearing, Mr Schreuder, took pains to make it clear that the respondents, in other words Ms Mogadile, her alleged co-representatives and the people named in the so-called petition annexed to the answering affidavit in the main application, did not actually occupy the erven. He would therefore clearly not have been in a position to furnish the Court with particulars of who had in fact been occupying the erven at that stage.

[14.] Even at the hearing of this application Mr Khokho, counsel for the respondent, made it clear that Ms Mogadile and the people she claims to represent, in other words the people named in the so-called petition, are not the occupiers of these erven. They all live elsewhere in Kathu.

- [15.] In fact, Ms Mogadile in her answering affidavit in the main application denied on oath that anybody at all had been occupying or had invaded the erven. That is in complete contrast to what she now states, again on oath, in paragraph 7.6 of her founding affidavit, namely that at the time of the orders in the main application approximately 1 500 (one thousand five hundred) people had in fact been occupying the erven. If regard is had to the contents of what Ms Mogadile relies upon as a resolution in the application for condonation, the number of people occupying the erven had for some reason since then dwindled to only 400 (four hundred) people by 4 March 2015. This again contradicts her initial denial.
- [16.] Even now, however, Ms Mogadile does not even attempt to provide further particulars, like the composition of the families occupying the erven and whether there are minors or disabled people among them. It is clear why not. It is because she and the other so-called respondents do not live there and do not have those particulars. Insofar as people who had actually been occupying the erven at the time that the sheriff went there may have been able to supply such particulars, Ms Mogadile had encouraged them not even to disclose their identities, let alone such particulars.
- [17.] Although this is not contained in the grounds of appeal, Ms Mogadile now alleges that the actual occupiers of the erven “*are very destitute and don’t have any alternative land*”. The simple answer to this is that, even if it were to be assumed that the people whose names appear in the so-called petition did actually occupy

the erven at that stage, Ms Mogadile's answering affidavit in the main application did not contain averments like these. To the contrary, and as already mentioned, those papers made it clear that Ms Mogadile and the so-called respondents were not occupying the erven and were, in fact, staying elsewhere in Kathu.

[18.] Mr Khokho argued that the Court should in some way have made enquiries about the personal circumstances of those who had according to the applicant been occupying the erven. He did not explain how the Court was supposed to do this if the actual occupiers were not before Court and in effect never opposed the application.

[19.] Mr Khokho also made reference to the circumstances under which people are living in the Mapoteng area of Kathu. Those people are not the occupiers and the Mapoteng area is not where the two erven concerned here are situated.

[20.] A further ground of appeal is that the Court erred in not ordering the applicant to make alternative land available to the respondent. As already mentioned, insofar as the respondent as a group consisting of people whose names were in the so-called petition, and those who deposed to affidavits in opposition of the main application are concerned, they had addresses elsewhere in Kathu. None of them claimed to be destitute or not to have land to reside on. It was in any event on the papers very clear that the applicant did not in fact have land available, in other words land suitable for occupation by humans.

- [21.] The last ground of appeal is that it should have been found “*that the applicant’s cause of action offended against the Constitutional provisions envisaged in the Act*”. No particulars were provided as regards what provisions of what Act were referred to or as regards in what sense the applicant’s cause of action offended against those provisions.
- [22.] At the hearing of this application, Mr Khokho relied on the provisions of section 7 of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act**, 19 of 1998, and argued that the Court should in some way, and despite the fact that it would have been the prerogative of the particular Member of the Executive Council and despite the absence of any dispute between the applicant and the actual occupiers, have enforced mediation. There is no merit in this submission and I have already dealt with a more or less similar argument in my judgment. At the stage that the main application was lodged, there would clearly have been no sense in mediation. The occupiers, encouraged by Ms Mogadile, were intent on occupying the erven and they continued to do so even after the *rule nisi* was served.
- [23.] Mr Khokho also argued that the applicant had not, in bringing the main application on an urgent basis, complied with section 5 of the Act. It was only Part A of the notice of motion that was dealt with on an urgent basis, in other words the prayers for interdictory relief. The relief sought in Part B, in other words an order for eviction, was only sought and decided months later. Mr Khokho could in any

event not point out any specific non-compliance or any procedural prejudice suffered by the respondent.

[24.] There are simply no prospects of success with an appeal on any of the grounds advanced.

[25.] There is no reason why the applicant should be burdened with any of the respondent's costs of their ill-conceived application for condonation. On the other hand there had been no need for the applicant to oppose that application. In my view each of the parties should bear their own costs in the application for condonation.

[26.] There is no reason why the costs of the application for leave to appeal should not follow the result.

[27.] The costs of the application for leave to appeal would, in terms of the order of 4 March 2015, include the costs of the withdrawn application of 27 February 2015. As already indicated that order, which was made by agreement, was that Ms Salvation Mogadile would be personally liable to pay those costs.

[28.] Mr Louw, counsel for the applicant, argued that Mr Mogadile should also be ordered to pay the costs of the unsuccessful application for leave to appeal in her personal capacity. There would be no point in ordering the respondent, as cited, to pay those costs. It is not the people occupying the erven who applied for leave to appeal. That was done by Ms Mogadile, who claimed to have been authorised by so-called *"Executive Members and Representatives of the community occupying erven 14167 and*

14409, Kathu”, who were named in the resolution attached to the founding affidavit in the application for condonation as annexure “SM1”.

[29.] The resolution does not say that Ms Mogadile is authorised to apply for leave to appeal. There is also no explanation as to why they say that they represent people who actually occupy the erven. In paragraph 7.6 of this affidavit Ms Mogadile referred to the people named in the petition as the occupants of those erven, but it was clear from the papers in the main application and indeed confirmed by Mr Khokho that those people do not occupy the erven. They could therefore not be the occupants referred to in the resolution. Apart from the fact that the signatories to the resolution were never warned of the possibility of a costs order *de bonis propriis*, they have in any event not expressly authorised the application for leave to appeal. It is also important to keep in mind that most of the people who signed the so-called petition did so as long ago as 6 February 2014. The petition contained no indication that anybody would be authorised to apply for leave to appeal in the event of an eviction order being granted against other people who were, unlike them, unlawfully occupying land.

[30.] In his answering affidavit in the application for condonation the deponent for the applicant prayed that Ms Salvation Mogadile be ordered to pay those costs as well, *de bonis propriis*. Those costs have been dealt with, but in my view such an order would indeed, in view of the above, be suitable as regards the costs of the application for leave to appeal.

[31.] The following orders are therefore made:

1. **THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED.**
2. **THE PARTIES WILL EACH BEAR THEIR OWN COSTS OF THE APPLICATION FOR CONDONATION.**
3. **MS MOGADILE, IN HER PERSONAL CAPACITY, IS ORDERED TO PAY THE COSTS OF THE APPLICATION LODGED ON 27 FEBRUARY 2015 AND WITHDRAWN ON 4 MARCH 2015, AS WELL AS THE COSTS OF THE APPLICATION FOR LEAVE TO APPEAL.**

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

For the Appellant: Instructed by:	ADV. M C LOUW DUNCAN & ROTHMAN INC. (OBO PEYPER SESELE ATTORNEYS)
For the Respondent: Instructed by:	ADV. D KHOKHO MZUZU ATTORNEYS