IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA

CASE NO: 6060/2013

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.
01/11/13 ....
DATE   **SIGNATURE**

In the matter between:

MASINGITA PROPERTY INVESTMENT HOLDINGS (PTY) LTD	Applicant
and	
ZEBEDIELA NDEBELE TRIBAL AUTHORITY	First Respondent
RED DUNES OF AFRICA CC	Second Respondent
THE MINISTER: RURAL DEVELOPMENT AND LAND FORUM	Third Respondent
THE MEC, LIMPOPO PROVINCIAL DEPARTMENT	Forth Respondent
OF ECONOMIC DEVELOPMENT, ENVIROMENT AND TOURISM	Fifth Respondent

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JUDGMENT

KGANYAGO AJ:

[1] This application came by way of a special allocation. It consists of a main application and a counter application. In the main application the applicant seeks an order in the following terms:

1.1 That the respondent is interdicted and restrained from constructing a shopping centre or any other development on the property.

1.2 That the development of a shopping centre or any other development on the property by the second respondent be declared unlawful.

1.3 That the second respondent is ordered to demolish all structure(s) on the property is erected, failing which the Sheriff of the High Court be authorized to carry out such demolition, for the costs of which second respondent is reliable.

1.4 That the costs of this application on the scale of attorney and client be borne by the second respondent.

[2] In the counter application the second respondent is the applicant, and the applicant is the respondent. In the counter application the second respondent seeks an order in the following terms:

2.1 That the applicant be ordered to restore the second respondent's possession of the property described as the portion of the farm Zebediela's location No 123-KS,Province of Limpopo as indicated on attachment AS4 ("the property").

2.2 That pending the final determination of the application in case number 6060/13 in the North Gauteng High Court, the applicant be interdicted from:

2.2.1 Trespassing on the property

2.2.2 Preventing the respondent and its employees and its contractors from accessing the property.

2.2.3 Interfering with any of the second respondents, its employees or its contractor's activities on the property.

2.2.4 Damaging, destroying or removing any of the second respondent, employees or contractor's property.

2.3 That the applicant be ordered to pay costs of the application on the attorney and client scale in case of opposition.

[3] The first respondent in the main application is Zebediela Ndebele Tribal Authority. The first respondent was not a party in the counter application. However, the first respondent intervened in the counter application and supported the applicant in all material respect.

[4] The DJP Ledwaba ordered that both applications be consolidated and be heard together under Case No 6060/2013.

BACKGROUND:

[5] During 1990 Mr Mamabolo obtained permission from the Lebowa Government to occupy a property for the purpose of a café on a piece of land not exceeding 0,5 hectares in extent, together with the improvements. Mr Mamabolo transferred his rights in terms of permission to occupy to Mr Tlomatsana.

[6] On the 25th May 2007 the first respondent issued the second respondent with a permission to occupy P.T.O on the land which was previously allocated to Mr Mamabolo for the conducting of Sam's restaurant. At the time when the P.T.O was transferred to the second respondent, it was operated by Alfred Tlomatsana.In terms of the P.T.O, the land allocated to the second respondent, was to be used to build a shopping centre.

[7] On the 29th May 2007, the second respondent concluded a deed of sale with Mr Tlomatsana for the purchase of the land which he was operating the café.

[8] On the 25th July 2007, the first respondent issued the applicant with a permission to occupy. The P.T.O issued to the applicant was for the development of a Shopping Centre. The land allocated to the applicant, was overlapping into the land that was allocated to the second respondent.

[9] The applicant acquired the said land from the first respondent for the purchase Price of R500 000-00.

[10] On the 28th January 2009, the first respondent adopted a resolution wherein they approved the sale of a portion of the communal land measuring 5, 0969 hectares in extent to the applicant for R500 000-00

[11] After the resolution was adopted, the applicant and first respondent approached the third respondent ("minister: Rural Development and Land Reform") seeking their consent and approval to the transaction.

[12] The third respondent did not approve the transaction. However, the third respondent recommended that the transaction should be changed from a sale to a

long lease.

[13] The development of the applicant was going to affect certain families who were occupying the sites where the applicant was supposed to construct the shopping mall. The affected families were compensated. Mrs Tlomatsa the wife of Alfred Tlomatsa who has since passed away, is one of the affected families who are supposed to be compensated.

[14] In compliance with the third respondent's recommendations, the first respondent as a lessor concluded a notarial long lease of the immovable with the applicant on 24th June 2010.The third responded recommended that the lease period should be for fifty years.

[15] On the 30th August 2012, a community meeting was held wherein a resolution was adopted in favour of the applicant. In terms of the resolution, the community agreed to lease the remaining extent of the farm 123KS, measuring 5, 2695

hectares in extent to the applicant. At that meeting, the third respondent was also represented. The representative of the third respondent signed a certificate confirming the adoption of the resolution by the community adopted. The first respondent has submitted the resolution to the third respondent for approval.

[16] The applicant and first respondent proceeded to conclude a profit sharing agreement.

[17] During September 2012, the second respondent commenced with the construction of their shopping centre.

[18] On the 4th October 2012, it came to the applicant's attention that the second respondent has commenced with the construction of their shopping centre. The applicant requested the first respondent to stop the activities of the second respondent. The applicant did not get a response from the first respondent; hence they initiated the present application.

[19] In the process the structure that the second respondent has already started with, what was demolished. The second respondent brought a spoliation application

application against the applicant on urgent basis. The first respondent joined the spoliation application as an intervening party.

[20] According to the first respondent, they admit that they issued a permission to occupy to the second respondent. However, the first respondent states that the second respondent did not show any commitment and seriousness to develop a shopping centre, hence they issued another permission to occupy to the applicant.

[21] The first respondent admits that they are the one who have dismantled the structure that the second respondent has started to construct, and that they have kept the steel structures at their premises for storage and safe keeping.

APPLICABLE LAW:

[22] For a party to obtain a final interdict, that party must show that:

22.1 the right which they seek to protect through a final interdict is a clear right.

22.2 there is an injury committed or reasonably apprehended; and

22.3 the party complaining has no other satisfactory remedy.

[23] In an application for *mandament van spolie* the applicant has to prove two requirements. The first is that the applicant was in possession of the spoliated thing. The second is the wrongful deprivation of possession.

EVALUATION:

[24] The second respondent launched the spoliation application on urgent basis. The purposes of the spoliation application were for second respondent to get an interim relief pending the determination of the main application. The determination of the merits of the main application renders the spoliation application to be moot. The main issue in this case is about competing rights.

[25] It is not in dispute that during May 2007 the first respondent has issued a P.T.O to the second respondent. It is not in dispute that during July 2007 the first respondent issued a P.T.O to the applicant. The P.T.O issued to both the applicant and the second respondent is in respect of land that overlaps into each other's allocated property. The fact that initially the applicant was allocated the communal land measuring 5, 0969 and

later increased to 5, 2695 is immaterial. The fact of the matter is that at the time when the dispute arose, the applicant was allocated communal land to the extent of 5, 2695 which has overlapped into the second respondent allocated land. That is the subject of the dispute.

[26] According to the first respondent, they have withdrawn and/or revoked the P.T.O issued to the second respondent at the time when they issued the P.T.O to the applicant. Whether the first respondent has validly withdrawn and/or revoked the P.T.O issued to the second respondent, is not an issue that I am called upon to decide on it.

[27] The first respondent when they issued the PTO, their action amounted to administrative action. The second respondent in paragraph 65.2 of their answering affidavit dispute the validity and authenticity of the P.T.O that was issued by the first respondent to the applicant on the 12th July 2007.It is trite law that an invalid administration act will remain valid and legally binding until it is set aside on review or appeal.

[28] In the case of **Lester v Ndlambe Municipality (514/12) [2013] ZASCA 95** Judge Majiedt JA at paragraph 28 said the following:

"All administrative actions such as the unanimous resolution of Ndlambe's Full Council on 5 December 2010 not to approve the final revised plans remain valid and legally binding until set aside on reviews or appeal. Absent any challenge on appeal, internally in terms of Section 9 of the Act to a review, or on review in terms of PAJA to competent court, that resolution had legal consequences. In **Camps Bay Ratepayers' Association and another v Harrison** and **The Municipality of Cape Town**, the Constitutional Court in referring with approval to **Oudekraal Estates (PTY) LTD v City Of Cape Town** said that:

"[A]dministrative decisions are often built on the supposition that the previous decisions were validly taken and unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence. Applied to the present facts it meant that the approval, that decision must likewise be accepted as a fact unless and until its validly challenged and set aside!

See also: **Member of the Extensive Council for Health, Eastern Cape v Kirland Investment "**

[29] The applicant and the first respondent have signed a profit sharing agreement on the 13th September 2010.Clause 5 of that agreement reads as follows:

"In entering into this agreement, Zebediela hereby undertakes that it shall not lease any other land portion or premises under its jurisdiction, in whole or in part, to a third party or allow any other land portion on premises under its jurisdiction to be used, in whole or in part, by a third party for purpose of the existence of this profit sharing Agreement as provided in clause 3 here above."

[30] Whether this exclusivity clause is valid or not, is not an issue that I am called upon to decide and will remain valid and legally binding unless set aside on review or appeal.

[31] Clause 5 of the P.T.O issued to the applicant on the 25th July 2007 reads as follows:

" We further confirm that all other consent that might have been issued by the Tribal Authority is no longer valid due to the non-compliance of the previous developers and that the permission for the development of a shopping centre at Zebediela is only given to Masingita Group of Companies."

[32] The first respondent was aware that during May 2007 they issued a P.T.O to the second respondent. However, they made an undertaking to the applicant that all other consents that were previously issued are no longer valid. Whether the previous consents were validly cancelled, or whether it was reasonable for the first respondent to have

cancelled the P.T.O issued to the second respondent within a period of two months, is not an issue that I am called upon to decide. The proper remedy for the second respondent was to initiate a review application. It was not sufficient to merely state in their paragraph 65.2 of their answering affidavit that they dispute the validity and /or authenticity of the resolution. The right remedy must be properly set out in their papers to enable the court to determine it.

[33] In the case of **Wightman tla JW Construction Head four (pty) Ltd and Another (66/2007) [2008] ZASCA 6 at paragraph 13** the learned Judge Heher JA said the following:

"A litigant may not necessarily recognize or understand the nuances of a bare denial or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its content, inadequate as they may be, and will in actual exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should not come as a surprise that the court takes a robust view of the matter".

[34] The second respondent contends that they were not aware that the P.T.O that was issued to them during May 2007 has been revoked and/or withdrawn. However, when the applicant initiated this application, they became aware that their P.T.O has been allegedly revoked, but they did nothing. There was nothing preventing them to challenge the validity of the decision of the first respondent to revoke the P.T.O issued to them.

[35] Applying the Wightman judgment to the present case, the applicant has raised serious allegations against the second respondent in their founding affidavit, but the second respondent elected not to deal with them accurately and fully in their answering affidavit. The second respondent has failed to challenge the decision of the first respondent to grant the applicant P.T.O in their answering affidavit. The second respondent is therefore bound by its papers. The court cannot grant an order which has not been prayed for.

[36] It is immaterial at this stage to raise the issue that their property is adjacent to that of the applicant, or that the applicant was initially allocated land to the extent of 5,0966 hectares and it has now mysteriously increased to 5,2695 hectares. The first respondent is contending that they have revoked the P.T.O issued to them. That is the decision which the second respondent should be challenging.

FINDINGS:

[37] In my view, it is clear that the applicant is the holder of the land allocated to them by the first respondent and is entitled to be protected against any person who might try to oust them from possession. The applicant has satisfied the requisite to claim a final interdict.

[38] As I have already held in paragraph 24 above that the spoliation application had been rendered moot, there is no need for me to deal with it.

[39] The following order is made:

39.1 The second respondent is interdicted and restrained from constructing a shopping centre or any other development on the property known as portion 3 of the remaining extent of the farm Zebediela Location no 123 registration division K.S Province of Limpopo measuring 5,4300 hectares;

39.2 The development of a shopping Centre or any other development on the property by the second respondent is declared unlawful;

39.3 The second respondent is ordered to demolish all structure (s) on the property (portion 3 of the remaining extent of the farm. Zebediela Location no 123, registration division K.S. Province of Limpopo, measuring 5,4300 hectares) within one month of the order, failing which the sheriff of the High Court is authorized to carry out such demolition, for the costs of which the second respondent is to be liable;

39.4 The costs of this application including the spoliation application to be borne by the second respondent, and such costs include costs consequent upon the employment of two counsel.

MF KGANYAGO
ACTING JUDGE OF THE HIGH COURT