

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MTHATHA]**

Case no. 3167/2018

In the matter between:

NONICA ESTATES CC

Registration No.[...]

Applicant

and

**ALL ILLEGAL OCCUPIERS, INVADERS
AND ANY PERSON HOLDING RESIDENCE
UNDER SUCH ILLEGAL OCCUPIERS
AND INVADERS OF THE IMMOVABLE
PROPERTY KNOWN AS ERVENS
(sic) [...] AND [...] GCUWA**

1st Respondent

MNQUMA MUNICIPALITY

2nd Respondent

**MINISTER OF HUMAN SETTLEMENT
DEPARTMENT OF RURAL DEVELOPMENT
AND AGRARIAN REFORM**

3rd Respondent

JUDGMENT

HINANA AJ:

Introduction

[1] This is an application for the eviction of the first respondent from the property known as Erven [...] Gcuwa and Erven [...] Gcuwa.

[2] The applicant is a Closed Corporation duly registered in terms of the Company Laws of the Republic of South Africa. Attached to the founding affidavit are two different Permissions to Occupy (the PTOs) issued in favour of Siyolo Solombela erven [...] Gcuwa and Tobile Ndwandwa in respect of erven[...]. The two erfs are situated at Zazulwana Butterworth. The PTOs was granted on 01 October 2010 in respect of Siyolo Solombela and on 17 June 2004 in respect of Tobile Ndwandwa.

[3] The pieces of land referred to above were allocated for the development of a fuel station.

[4] The first respondents are cited as illegal land invaders and occupiers¹because the first respondent's full and further particulars are unknown to the applicant. The first respondents are not local to the Zazulwana Community and arrived at the end of 2017 claiming that the land had been sold to them.

[5] In paragraph 6 of the founding affidavit, applicant states:

“Save for about 3 of the first respondents, the first respondents have not taken up permanent residence on the immovable property; however, they have began building structures on the immovable known erfs.”

[6] In order to fully follow the sequence of events, I deem it fit to refer to court orders previously granted against the first respondents in the manner set out below:

6.1. On 17 August 2018, this Court notice granted the applicant a notice in terms of section 4 (2) of the Prevention of Illegal Eviction from Unlawful Occupation of the Land Act No. 19 of 1998.

6.2 The respondents were notified in terms of section 4 (1) of Act 19 of 1998 that this matter will be heard on 04 September 2018.

6.3. This Court order was served to the respondents who were represented by Nontandazelo Kwababa.

6.4 On 20 July 2020, this Court granted both part A and part B of the Notice of Motion.

6.5 The order referred to above in paragraph 6.4 was rescinded on 28 July 2020. The first respondent was granted leave to oppose the main application.

The opposition

[7] The only person who deposed to the answering affidavit is Lebohang Dukada. He raised two points *in limine* i.e. condonation and *locus standi* of the deponent to the founding affidavit.

[8] In respect of condonation, Lebohang Dukada alleges that the answering was filed out of time and the reason for the late filing of the answering affidavit is that:

“he was unavailable and unreachable to his legal representative to assist in the compiling of this affidavit due to my pressures of my employment.”

[9] In this Court, there was no argument submitted by either side on condonation.

[10] The replying affidavit was deposed to by Pinki Solombela who is cited as a major female business woman of Zazulwana Administrative Area, in the District of Butterworth and is a member of the applicant. She states that:

“I depose to this replying affidavit as a member of the applicant in my capacity as the Estate Representative of the late Siyolo Solombela.”

[11] When answering to the two points *in limine*, Pinky Solombela states that:
“(a) there are no plausible grounds pleaded by the respondents for the late filing of the answering affidavit and as such, the affidavit should be rejected.”

[12] In so far the authorization is concerned, Pinki Solombela alleges that:

“The launching of the application is itself authorised over and above the power to depose granted to Ms Zanele George to the founding affidavit in support of this application. I refer this Honourable court to annexures “S - I” hereto.”

[13] Annexure S-1² is a document titled:

“SUB-DELEGATION OF AUTHORITY” which state

I, the undersigned

Monica B Solombela 5308.....088

employed as a Director at

Nonica Estates CC (Reg No.[...])

*duly empowered to, hereby confirmed that our attorney or agent referred to in this certificate **Zanele George***

is authorised to depose to all affidavits on behalf of Nonica Estates CC (Registration No.[...])

in so far as they relate to the application for an interdict and eviction in the following matter

Case number 3167/18 in Mthatha High Court.”

Analysis

[14] The respondent of the founding affidavit is an attorney representing the applicant. The sub delegation attached to the replying affidavit states that:

² Page 148.

“...Zanele George is authorised to depose to all affidavits on behalf of Nonica Estates CC (Registration No.[...]) in so far as they relate to the application for an interdict and evidence in the following matter Case No. 3162/18 in Mthatha High Court.”

[15] The first respondents have denied that the deponent of the founding affidavit is authorised.

[16] I do not understand the first respondents to be denying that Zanele George is an attorney representing the applicant. The denial relates to the authority of Zanele George in instituting and prosecuting these proceedings

The law

[17] In *Ganes and Another v Telecom Namibia Ltd*³ the Supreme Court of Appeal had this to say:

“The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.”⁴

[18] Rule 7 (1) ⁵ provides that:

‘Subject to the provisions of sub rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.’

³ 2004 (3) SA 615 (SCA).

⁴ Ibid at para 19.

⁵ Uniform Rules of Court.

[19] In *Eskom v Soweto City Council*⁶ Flemming DJP expressed himself as follows:
“The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority.”

[20] In cases where an artificial person or co-operatives were involved and where there is an objection to the authority of the person bringing the proceedings, Watermeyer J in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk*⁷ eloquently expressed himself as follows:

“There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example *Lurie Brothers Ltd v Arcache* 1927 NPD 139, and the other cases mentioned in Herbstein & Van Winsen, Civil Practice of the Superior Court in South Africa at pp 37-38). This seems to me to be a salutary rule and one which should also apply to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purported to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of

⁶ 1992 (2) SA 703 (W) at p 705.

⁷ 1957 (2) SA 347 (CPD).

the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf.”⁸

[21] In my view, the deponent of the founding affidavit could only bring these proceedings after having been duly authorised to institute and to prosecute the application. This seems not to be the case. Even the sub delegation attached to the replying affidavit deposed to by Pinki Solombela does not refer to the institution and prosecution of these proceedings.

[22] In this matter, the institution and prosecution of these proceedings has not been shown. As indicated earlier, the founding affidavit was deposed to by Zanele George with an authority to institute and prosecute these proceedings and the replying affidavit was deposed to by Pinki Solombela. It is not clear why the replying affidavit was deposed to by Pinki Solombela who did not depose to the founding affidavit.

[23] It has never been explained why the founding affidavit was deposed to by Zanele George without having annexed the authority envisaged in rule 7 (1) and the replying affidavit is deposed to by Pinki Solombela.

[24] In his heads of argument, counsel for the first respondent submitted that:

“The concept of locus standi is used, in this context of this matter, in the sense of capacity to bring the proceedings which, is not necessarily the same sense as authority to act.”⁹

I note the authority referred therein but it is distinguishable from the facts of this case.

Conclusion

⁸ Ibid at pp 352-2.

⁹ Paragraph 20.8 page 12.

[25] In my view, the application must fail due lack of authority to institute and prosecute these proceedings.

[26] In the result, the following order is made.

The application is dismissed with costs.

HINANA AJ
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

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		MTHATHA
Attorney for the First Respondent	:	Mr Ceza
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Date Heard		25 April 2024
Date delivered		28 May 2024