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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **9888/2023P**

In the matter between:

MONGEZI GIBSON DADA

FIRST APPLICANT

and

COMMISSION OF RESTITUTION OF LAND RIGHTS

FIRST RESPONDENT

SIFISO NDLOVU

SECOND RESPONDENT

PHAKAMANI ZULU

THIRD RESPONDENT

FODO MIRRIMAN DADA

FOURTH RESPONDENT

Coram: Mossop J

Heard: 1 August 2024

Delivered: 1 August 2024

ORDER

The following order is granted:

1. The application is adjourned sine die to permit service of the application on the fourth respondent.

2. Upon the fourth respondent being properly served, he shall be entitled to deliver an answering affidavit within the time period provided for in the Uniform Rules of Court.

3. In the event of an answering affidavit being delivered by the fourth respondent, the applicant shall be entitled to deliver a further replying affidavit dealing with the allegations raised in the fourth respondent's answering affidavit within the time period contemplated by the Uniform Rules of Court.

4. Today's costs are reserved for later determination.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] The applicant seeks a rule nisi that the nomination of the fourth respondent as the representative of the Dada family (the Dada family) be set aside and that the fourth respondent's subsequent election as the representative of the family be declared invalid. The setting aside of the nomination is to operate as an interim order pending the return date of the rule sought.

[3] The application was brought as an urgent application to be heard on 16 October 2023. From the founding papers, the first respondent is the Commission for the Restitution of Land Rights and the second and third respondents are its employees. The fourth respondent is the person whose nomination and election is sought to be set aside.

[4] The application has its origin in a relatively ancient land claim instituted by a Mr Mzongwana Walker Wallace Dada on behalf of the Dada family in December 1998. In opposing this application, the first to third respondents have objected to the jurisdiction of this court and submit that this application should have served before the Land Claims Court, which has exclusive jurisdiction on land claims matters. For the reasons that follow, I do not believe that I should enter into that debate at the moment.

[5] The Dada family land claim has been accepted as valid by the first respondent. It appears that the Dada family elected to receive financial compensation rather than the restoration of the land to which the restitution claim itself related. That being the case, one may wonder what this application is all about, for the land claim has been successful and is about to be paid out.

[6] The pay-out is the problem. The problem is money. The applicant contends that on an undisclosed date in the past, the first respondent (the precise identity of the person who made the statement to him is not disclosed) allegedly said to the applicant that the value of the land for which compensation would be paid was approximately R9 million. Nothing in this regard, however, was reduced to writing. When the first respondent ultimately delivered a written offer to the Dada family, it offered compensation in the amount of R2,9 million. The applicant was dissatisfied with this offer based upon what he had allegedly been told in the past and commenced this application.

[7] It appears that the applicant is the only member of the Dada family dissatisfied with the formal offer made by the first respondent, for he is the only applicant in this application, despite referring to himself in the heading to the application papers as the 'first applicant'. Indeed, whilst it is not in doubt that at some stage the applicant was the duly nominated and appointed Dada family representative, that appears to have changed. Shortly prior to this application being brought, the Dada family decided to elect a different family representative to represent it. The fourth respondent was the person chosen to replace the applicant. That decision is recorded in a series of documents, before this court, that tends to establish that

proposition. The applicant, however, does not acknowledge the correctness of his replacement as Dada family representative by the fourth respondent.

[8] The Dada family appears to be content with the financial offer made by the first respondent and wishes to accept it and receive payment. The applicant opposes such payment.

[9] At various places in the replying affidavit, the applicant states, in differently worded forms, the following proposition:

‘There is no order that the Applicant is seeking against the first to third Respondents.’

From this it is clear that the focus of this application is solely upon the fourth respondent.

[10] That notwithstanding, the first to third respondents have opposed the application and have delivered an answering affidavit. The fourth respondent has, strangely, remained mute throughout this application. He did not enter an appearance to defend nor did he deliver an answering affidavit. Because of this, the applicant submits that he is entitled to his order against the fourth respondent by default because, on his own version, he does not seek any relief against the other respondents and their opposition is therefore irrelevant.

[11] The muteness of the fourth respondent is explained by the fact that there is no objective evidence of the fact that he ever received notice of this application. This is how the issue of service on the fourth respondent is dealt with by the applicant in the founding affidavit:

‘On or about 06 September, I wish to state to this honourable court that the 4th respondent was contacted on 0[...] XXX XXXX [number redacted] as my attorneys on record (sic) wanted to serve the 4th respondent via email and that his address is not clear and because of time (sic) to file this application, my attorneys on record could not trace the whereabouts of the 4th respondent to be able to serve him, and

the only option to serve the 4th respondent is via email. During the call made on the 06 September 2023 to the 4th respondent he confirmed that he does not have any email address and that we should email the application to the 3rd respondent.'

[12] I have a number of issues with this statement:

(a) Firstly, sight must not be lost of the fact that the fourth respondent is not a stranger to the applicant: he is his family member. They share the same surname. If the applicant did not know where the fourth respondent lived, he could easily have acquired details about his address from other family members had he wished to properly serve him;

(b) Secondly, there is no objective evidence that the cellular telephone number mentioned by the applicant is that of the fourth respondent. It might be his number but it might not be. Nothing objective has been put up to establish that this is the case;

(c) Thirdly, while there is an averment that the applicant's attorneys were unable to trace the fourth respondent, no proof of the steps taken to trace him have been put up. There are no tracing reports in the papers showing that the fourth respondent was untraceable.

(d) Fourthly, it is not entirely clear who allegedly made the telephone call to the fourth respondent on 6 September 2023 referred to in the extract above. It appears to be someone from the applicant's attorney's offices but there is no outright statement that Mr Nhlabathi, the applicant's legal representative, personally made that call. This morning, Mr Nhlabathi confirmed he did not make the telephone call and stated that a colleague of his was the person that made the call. Thus, whatever was allegedly said during that call is hearsay in its nature in the absence of a confirmatory affidavit from the person making the call. While Mr Nhlabathi has put up a brief confirmatory affidavit, that is of no assistance with regard to this issue as he did not make the call;

(e) Fifthly, I have difficulty in accepting that the fourth respondent would have appointed the third respondent to receive service of the application papers on his behalf. The third respondent is an employee of the first respondent. There appears to be no connection between the fourth respondent and the third respondent. That such an instruction should have been given is improbable in my view. I cannot therefore on what is before me accept at this stage that the fourth respondent gave instructions that the third respondent should be served in his stead.

[13] A fundamental legal principle is at play here. I accept that urgent applications may be brought on short notice. They may even be brought without notice where the circumstances justify a lack of service. But this is not one of those instances where no notice may be given. A civilised legal system such as ours requires that parties who are to be subjected to legal proceedings receive notification of the commencement of those legal proceedings. Citizens who are at risk of having substantive orders granted against them, including costs orders, must be advised that such orders will be sought. If one wishes to enter the lists, one must give notice of that intention to allow the party against whom the relief is sought an opportunity to express his views on the relief sought.

[14] In my view that has not occurred in this instance. There appears to have been no attempt whatsoever at service on the fourth respondent, who clearly has a direct and substantial interest in an application which seeks to upset his election as the representative of the Dada family.

[15] Without even considering the merits of the matter, I am satisfied that no relief can be granted until such time as there has been proper and effective service on the fourth respondent.

[16] On the issue of costs, Ms Cele, who appears for the first to third respondents, very fairly agreed with Mr Nhlabathi's proposal that today's costs be reserved. I might not have agreed to such a proposal, but Ms Cele indicated that she would be content with such an order.

[17] In the circumstances, I intend adjourning the matter sine die to permit effective service on the fourth respondent to occur and to allow him to fully participate in this application.

[18] Accordingly, I grant the following order:

1. The application is adjourned sine die to permit service of the application on the fourth respondent.
2. Upon the fourth respondent being properly served, he shall be entitled to deliver an answering affidavit within the time period provided for in the Uniform Rules of Court.
3. In the event of an answering affidavit being delivered by the fourth respondent, the applicant shall be entitled to deliver a further replying affidavit dealing with the allegations raised in the fourth respondent's answering affidavit within the time period contemplated by the Uniform Rules of Court.
4. Today's costs are reserved for later determination.

MOSSOP J

APPEARANCES

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