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

CASE NUMBER: 10273/2015

In the matter between:

MANDENI MUNICIPALITY

APPLICANT

and

**THE INDEPENDENT ETHIOPIAN
CHURCH OF SOUTH AFRICA**

FIRST RESPONDENT

ZAMA MASIKANE

SECOND RESPONDENT

ORDER

I make the following order:

The application for leave to appeal is dismissed with costs on Scale B.

JUDGMENT

Mahabeer AJ

[1] This is an application for leave to appeal against the whole of the judgment where I dismissed the application with costs on scale B.

[2] The applicant claimed the eviction of the respondents from two properties in the Mandeni municipal area. For the sake of brevity, the properties were referred to as Erf 1[...] and the Farm Amanda. Ancillary to the eviction order, the applicant sought an order authorising the demolition of a partly erected structure which straddles both properties. It is common cause that the first respondent undertook those building works without the prior written approval of the applicant, in violation of the National Building Regulations and Building Standards Act 103 of 1977.

[3] According to the application for leave to appeal, as amplified by the applicant's counsel's heads of argument, the grounds for the applicant to seek leave to appeal may be summarised as follows:

- (a) That I exhibited bias in favour of the respondents by dismissing the application with costs;
- (b) That I was misdirected in my analysis of the applicant's rights to the eviction order. In relation to Erf 1[...], the applicant argued that I was misdirected in dismissing a right of ownership claimed by the applicant in terms of s 4A(4)(a) of the Ingonyama Trust Act 3 of 1994. And in relation to the right claimed by the applicant over the Farm Amanda, the applicant argued that I was misdirected in failing to make a finding on the validity of a Permission to Occupy (PTO) which the respondents asserted;
- (c) That I was *mala fide* and misdirected in finding that there was a challenge to the plaintiff's ownership of Erf 1[...], when in fact there was not.

[4] *Chetty v Naidoo*¹ is the general authority for the proposition that the onus is on an applicant to establish a right over a property to justify an eviction order. I

¹ *Chetty v Naidoo* 1974 (3) SA 13 (A).

accordingly examined the applicant's claim in relation to each property separately in order to determine whether the applicant had indeed discharged the onus.

[5] In relation to Erf 1[...], it is not disputed that this property vests in the applicant under a directive which constitutes annexure "LMH3" to the founding affidavit. However, the respondents dispute the applicant's right to claim the respondents' eviction when the same document constitutes an interdict which expressly records that the properties listed in the document, including Erf 1[...], are "*not to be dealt with in any manner*". The applicant advanced no answer to this and thus did not discharge the onus upon it.

[6] I am accordingly satisfied that there is no reasonable prospect that a Court of appeal will reach a different conclusion on the point that the right claimed by the applicant to evict the respondents from Erf 1[...] was not established.

[7] With regard to the Farm Amanda, the applicant alleges that it applied to the Ingonyama Trust for a right of tenure by virtue of a lease agreement and that the Ingonyama Trust consented thereto. No evidence is provided in support of these allegations however. The respondents, in turn, not only deny the existence of a lease agreement but additionally assert the PTO in favour of the first respondent to found their right to this property. In my view, it is not necessary to interrogate the validity of the PTO when the applicant fails on the facts to establish a right in relation to the Farm Amanda. Nor is there a "*shifting of the onus*" as argued by counsel for the applicant - the onus is on an applicant to make out its case in its founding papers and the applicant failed in this matter discharge the onus.

[8] Therefore in relation to the Farm Amanda as well, the applicant did not establish a right to an eviction order, and there is no prospect that an appeal court will reach a different conclusion in relation to this aspect of the dispute.

[9] Turning to the grounds that the Court was misdirected, conducted itself *mala fide* and displayed bias in favour of the respondents, these are serious accusations

to level against any Court. In *Umgeni Water v Hollis N.O.*,² this Court highlighted that the onus of proving a lack of partiality by a presiding officer is on the party making the allegation.

[10] It is material to point out that no application for recusal was made at the hearing of this matter, as one would expect of the applicant if its representatives apprehended bias by the Court in favour of the respondents. Indeed, at the hearing of the present application counsel for the applicant was directed to the specific paragraphs in the heads of argument and application for leave to appeal wherein reference to these claims were expressed, and invited to refer me to evidence of the misconduct alluded to. She could do no more than concede that the Court's finding in favour of the respondents on the merits informed this as a ground for the application for leave to appeal.

[11] Therefore, drawing on various authorities, including the recent decision of *Transnet National Ports Authority v Umhlathuze General Sales and Services (Pty) Ltd t/a KZN Sales and Services and Others*,³ the allegations of mala fide and bias as grounds for leave to appeal are bad and must be rejected.

[12] I find that there is no reasonable prospect that a Court of appeal would arrive at a different conclusion in this dispute and that there are no compelling reasons to grant the application for leave to appeal.

Order

[13] In the circumstances, I make the following order:

The application for leave to appeal is dismissed with costs on Scale B.

² *Umgeni Water v Hollis N.O.* [2012] ZAKZDHC 10, 2012 (3) SA 475 (KZD).

³ *Transnet National Ports Authority v Umhlathuze General Sales and Services (Pty) Ltd t/a KZN Sales and Services and Others* [2024] ZAKZDHC 85.

MAHABEER AJ

DATE JUDGMENT RESERVED : 06 MAY 2025

DATE JUDGMENT HANDED DOWN: 04 JUNE 2025

Appearances:

For the Applicant: ADV N BHAGWANDEEN

Instructed by: TKN INCORPORATED

For the Respondent: ADV PEDERSEN

Instructed by: VICTOR VALENKOSI MDLETSHI