

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA39/2023

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO

Naude – Odendaal J

SIGNATURE

DATE

23/07/2024

In the matter between:

MANDLA MATHEBULA

APPELLANT

and

TRYPHINA BOSHIWE SIMANGO

RESPONDENT

JUDGMENT

NAUDE-ODENDAAL J:

- [1] The Respondent launched an application in the court *a quo* for an interdict against the Appellant and the Nkuna Traditional Authority in the following terms:-
- 1.1 That the Appellant (1st Respondent in the court *a quo*) or any other person acting under his direct or indirect instruction be interdicted from entering, occupying and erecting buildings or structures on the Respondent's (Applicant in the court *a quo*) site or land known as Simango Farm situated along the Mariveni to Nkowankowa Road, within the Mohlaba's location 576LT, Nkwowankowa, Limpopo Province.
 - 1.2 That the Nkuna Traditional Authority (2nd Respondent in the court *a quo*) or any other person acting under the 2nd Respondent's direct, or indirect instruction be interdicted from demarcating the Respondent's (Applicant in the court *a quo*) site or allocating any land rights to the Appellant or any other person on the Respondent's site or land known as Simango Farm situated along Mariveni to Nkowankowa Road, within farm Mohlaba's location 567LT, Nkowankowa, Limpopo Province (herein after referred to as "the property")
 - 1.3 That the Appellant (1st Respondent in the court *a quo*) be directed to remove the building material or structure or rubble which he placed or erected on the Respondent's (Applicant in the court *a quo*) site, on the property, within 7 days from date of a final order.
- [2] The court *a quo* granted an order as prayed for in the notice of motion by the Respondent. It is against this order that the appeal lies. The Appellant's grounds of appeal are as per the Notice of Appeal, which will not be quoted at length herein, but in summary are briefly as follows:-

- 2.1 The court *a quo* erred in finding that the mere occupation of the property by the Respondent and her late husband since 1998 satisfies the clear right element of a final interdict, whereas the court *a quo* ought to have found that the remedy against the disturbance of possession or illicit deprivation of possession is *Mandament van Spolie* and accordingly the application should have been dismissed. It was contended that the Respondent failed to establish a clear right.
- 2.2 The court *a quo* erred in allowing new evidence to be introduced by the Respondent in her replying affidavit and to admit a document, identified as a "*Permission to Occupy in terms of Proclamation R188 of 1969 and 45 of 1990*".
- 2.3 The court *a quo* erred in relying on Annexure "TS2" and "TS4" to the Respondent's founding affidavit when *prima facie*, Annexure "TS2" appears to be spurious.
- 2.4 The court *a quo* erred in granting the interdict and incidental relief sought in the Respondent's notice of motion, instead of finding that the Respondent did not establish the requirements for a final interdict.
- 2.5 The court *a quo* erred in deciding the application on papers when a slew of disputes of facts were palpable *ex facie* the pleadings before court.

RESPONDENT'S SUBMISSIONS IN THE COURT A QUO:

- [3] The Respondent submitted that the property, four hectares (4ha) in extent, was allocated to her late husband, William Nyimpimuni Simango in 1998 by the Nkuna Traditional Authority for the purpose of conducting dry farming. She referred the

court a quo to a permission to occupy issued to her late husband in terms of Article 6(1) of Proclamation 188 of 1969 on 2 February 1998, and which was attached to her founding affidavit as an annexure. The property is commonly known as Simango Farm.

- [4] After the permission to occupy was obtained, she and her late husband approached the Northern Province Department of Agriculture and applied that the site be demarcated. The property was indeed demarcated by the Northern Province Department of Agriculture, together with the Greater Tzaneen Municipality's land committee, which included representatives of the Nkuna Traditional Authority. Thereafter, the Respondent and her husband approached the local Magistrate wherein the Permission to Occupy was signed by Magistrate SWT Machumela and stamped on the 3rd of November 1998.
- [5] Her husband passed away on 6 January 2006 whereafter she applied on 26 July 2006, for the transfer of the land rights to her in respect of the property. The application was approved by the Nkuna Traditional Authority and consequently she was allocated the site. She then approached the Magistrate's Office at Ritavi to endorse the transfer and same was done by the former head of office Magistrate Mr. SWT Machumela. The transfer of land rights was also endorsed by the Land Use Board of the Greater Tzaneen Municipality, as well as the Nkuna Traditional Authority.

- [6] During 2018, the Respondent applied for a rezoning of 2 (two) hectares of the property after consultations with the Greater Tzaneen Municipality and the Nkuna Traditional Authority. The application for rezoning was also lodged with the Greater Tzaneen Municipality and the Nkuna Traditional Authority on 14 May 2018. The Nkuna Traditional Authority approved the application on 6 June 2018, whereafter the Respondent proceeded to apply for the official rezoning of the two hectares and appointed town planners Jaques Du Toit & Associates to do the rezoning. The necessary adverts were done on 27 July 2018 and all authorities were notified. No objection was received against the application to rezone.
- [7] The Nkuna Traditional Authority has however for reasons unknown to her unlawfully demarcated and allocated a portion of her property to the Appellant. As a result, the Appellant unlawfully enters her site by cutting the fence, damaging the mango orchards by amongst others removing some with a TLB and constructing illegal structures on her property.
- [8] During July 2020, the Respondent discovered an unknown person cutting her fence and damaging her mango plantations. She approached the SAPS without any success. The fence was repaired. On 21 May 2021, she discovered a person on her property busy bulldozing her mango orchards with a TLB. The person informed her that he was hired by the Appellant.
- [9] The Respondent immediately confronted the Appellant and also went to the Ritavi SAPS to report the matter. The Appellant was summoned to the Ritavi Police

Station. Members of the SAPS then took the Respondent and the Appellant to the Nkuna Traditional Authority's offices to resolve the matter. Some representatives of the Nkuna Traditional Authority informed the Respondent that they have decided to demarcate and give her property to the Appellant because he had paid them.

- [10] The Appellant then proceeded to build a two roomed building on site. The Respondent went to the officials of the Department of Cooperative Governance and Traditional Affairs in Polokwane to lay a complaint. The Appellant stopped with all building activities on the property.
- [11] The Appellant returned to the property on 19 January 2021 and once again damaged the Respondent's fence and removed some more mango trees. The Respondent immediately, once again, approached the SAPS at Ritavi and a case was opened.
- [12] The Appellant then again returned to the Respondents property on 26 February 2022 and once again cut the Respondent's fence whereafter the Respondent proceed to instruct attorneys to bring an application to interdict the Appellant and Nkuna Traditional Authority.
- [13] The Respondent submitted that the Nkuna Traditional Authority's conduct of allocating her site to the Appellant was unlawful, illegal, arbitrary and was motivated by greed and disdain. The Respondent further submitted that the Appellant's unlawful conduct is causing her unbearable harm in that her property is be3ing taken

away from her unlawfully and her rights are being violated. It was submitted by the Respondent that she has spent a considerable amount of money and time with her late husband to erect and develop the property and mango orchards.

- [14] The Respondent submitted that the harm and prejudice she suffers will not be repaired in any manner if this illegal conduct by the Appellant and Nkuna Traditional Authority is allowed to continue. She has attempted to resolve the matter amicably with the Appellant and Nkuna Traditional Authority, without any success. She has approached the SAPS and the Greater Tzaneen Municipality as well, without the matter being resolved and in the result she has no other remedy than to bring an application for an interdict.

THE APPELLANT'S SUBMISSIONS IN THE COURT A QUO:

- [15] The Appellant submitted that the property was lawfully allocated to him by the Nkuna Traditional Authority. He approached the Nkuna Traditional Authority during November 2012 and was informed by Headman Risenga that the land was not allocated to anyone.
- [16] The Appellant made an application to the Nkuna Traditional Authority on 21 November 2012 for a business site to be allocated to him. His application was accompanied by an original letter of recommendation by Headman Risenga.
- [17] The Appellant submitted that the Nkuna Traditional Authority acted within the scope of its authority when allocating the disputed piece of land to him. When the property

was allocated to him, the Nkuna Traditional Authority was exercising public powers or performing a public function in terms of the Koi-San and Traditional Leadership Act, 3 of 2019, customary law and Section 18 of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005. The Appellant submitted that the appropriate relief was for the Respondent to bring a review application against the Nkuna Traditional Authority as provided for in the Promotion of Administrative Justice Act, 3 of 2000.

- [18] The Appellant further submitted that his occupation of the piece of land under dispute is pursuant to a right bestowed to him by the Nkuna Traditional Authority. It was submitted that the Respondent, on her own version, stated that she was informed by the Nkuna Traditional Authority that they have decided to demarcate and give her site to the Appellant. The Appellant submitted that until the allocation by the Nkuna Traditional Authority is set aside, he is lawfully entitled to occupy the property and the application ought to be dismissed.

THE LAW AND APPLICATION OF THE LAW:

- [19] In order for the Respondent to have succeeded in obtaining a final interdict, the Respondent had to prove the following requirements for a final interdict:-

- (a) a clear right;
- (b) an injury actually committed or reasonably apprehended; and
- (c) the lack of an adequate alternative remedy. (See **Setlogelo v Setlogelo** 1914 AD 221 at 227)

[20] The clear right to be proved is a right to which, if not protected by an interdict, irreparable harm would ensue. Quite apart from the right to an interdict the Respondent had to demonstrate a right that is threatened by an impending or imminent irreparable harm. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not past. The second requirement depends on the first, and an evaluation of the third requirement follows after the first two requirements have been established.

[21] The principles applicable to the determination of the relevant facts when final relief is sought on motion were set out in **Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** and **Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957(4) SA 234 (C)** at 235 –G as follows:-

"...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order...

Where it is clear that the facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

[22] In certain instances the denial by a Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem.

- [23] Having carefully perused the papers and after having considered the nature and extent of the factual disputes between the Appellant and the Respondent arising from the affidavits, this court has come to the conclusion that it was appropriate for the court *a quo* to decide the dispute without referring it to oral evidence.
- [24] This court is further of the view that the court *a quo* has not misdirected itself in granting the final interdict against the Appellant in respect of prayers 1, 2, 3, 5, 6 and 8 of the Notice of Motion. The Respondent managed to successfully allege and prove that she has a clear right in that she is the registered occupier of the property, there was an injury actually committed and a reasonable apprehension exists that an injury will be committed in future in that it is not in dispute that the Appellant entered the property and started clearing the area and construct structures on the property.
- [25] Furthermore, the Respondent managed to allege and prove that she does not have an adequate alternative remedy and has exhausted all her alternatives and attempted to resolve the issue at hand through other means – the court was approached as a last resort.
- [26] This court is however of the view that the court *a quo* misdirected itself from granting prayer 4 of the Notice of Motion where it relates to the 1st Respondent, which reads as follows:-
- “That the 2nd Respondent or any other person acting under the 2nd Respondent’s direct, or indirect instruction be interdicted from demarcating the Applicant’s site or allocating any land rights to the 1st Respondent or any other person on the*

Applicant's site or land known as Simango Farm situated along Mariveni to Nkowankowa Road, within farm Mohlaba's Location 567LT, Nkowankowa, Limpopo Province."

- [27] It is common cause between the parties that the Nkuna Traditional Authority has already granted and allocated rights of occupation to the Appellant during, or about the year 2012. Although this court is of the view that the Nkuna Traditional Authority acted wrongfully in doing so, the action has already been taken. As stated here above, an interdict is meant to prevent future conduct and not past conduct. The Nkuna Traditional Authority's future conduct of allocating rights to occupy on the Respondent's property could have been interdicted, but not the allocation that was already made to the Appellant as the rights have already been allocated and is therefore a past action or conduct.
- [28] This court is in agreement with the Appellant insofar as Prayer 4 relates to him only, that the correct remedy would have been for the Respondent to have the decision of the Nkuna Traditional Authority to allocate rights of occupation to the Appellant, reviewed and set aside.
- [29] In the result the appeal stands to be dismissed on all other grounds, except for prayer 4 of the Notice of Motion. The appeal succeeds partially in respect of Prayer 4 of the Notice of Motion, only.

COSTS:

[30] The only issue remaining is the issue of costs. In this court's view, both parties were equally successful in that the appeal only succeeded partially in respect of prayer 4 only. Therefore, it would be just for each party to pay his or her own costs.

ORDER:-

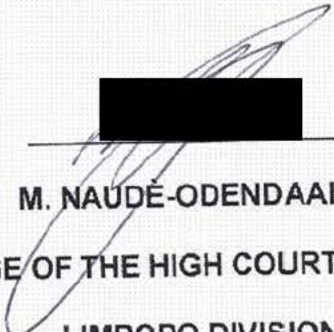
[31] In the result, the following order is made:-

1. The appeal in respect of the final Orders (prayers of the Notice of Motion) 1, 2, 3, 5, 6 and 8, made, is dismissed.

2. The appeal in respect of the final order 4 (prayer 4 of the Notice of Motion) is upheld and is substituted with the following order:-

"4. The 2nd Respondent (Nkuna Traditional Authority) or any other person acting under the 2nd Respondent's direct, or indirect instruction is interdicted from demarcating the Applicant's site or allocating any land rights to any person, on the Applicant's site or land known as Simango Farm situated along Mariveni to Nkowankowa Road, within farm Mohlaba's Location 567 LT, Nkowankowa, Limpopo Province."

3. Each party to pay his/her own legal costs.


[REDACTED]
M. NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

I AGREE:


[REDACTED]
DEANE AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION.
POLOKWANE

APPEARANCES:

HEARD ON : 8 MARCH 2024

JUDGMENT DELIVERED ON : 23 JULY 2024.

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 23 JULY 2024 at 10h00

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