

SOUTH AFRICA / JUDGMENT

Baphalane Communal Property Association v Lebethe and Others (12657/2022) [2022] ZALMPPHC 64 (29 November 2022) [2022] ZALMPPHC 64

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

12657/2022

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
CASE
NO: 12657/2022
REPORTABLE: YES/NO
OF INTEREST TO THE
JUDGES: YES/NO
REVISED.

In

the matter between:

BAPHALANE
COMMUNAL PROPERTY ASSOCIATION
APPLICANT
And
GODFREY
TELL LEBETHE
FIRST RESPONDENT
THE
PROVINCIAL COMMISSIONER OF POLICE,
LIMPOPO
PROVINCE
SECOND RESPONDENT
THE
STATION COMMANDER NORTHAM

POLICE
STATION
THIRD RESPONDENT
TSHEGOFATSO
AGRI (PTY) LTD
FOURTH RESPONDENT

JUDGMENT

KGANYAGO J

- [1] The applicant and the fourth respondent have entered into a lease agreement in terms of which the fourth respondent had hired the arable land, irrigation infrastructure and improvements for farming activities from the applicant. In terms of clause 7 of the lease agreement, the applicant shall ensure that the fourth respondent shall have a safe working environment with free and undisturbed access and occupation of the arable land. The applicant shall further at their sole cost and expense evict all illegal occupants occupying the properties of gaining access to the arable land.
- [2] On 17th November 2022 the fourth respondent through its attorneys wrote a letter of complaint to the applicant, complaining that on the same date the first respondent and a few others between 14h00 and 14h30 approached their employees and threatened them, and insisting that he be given a load of wheat, failing which the fourth respondent will not be allowed to harvest further. Thereafter the first respondent forcefully took a load of wheat off the tractor to the value of R240 000.00 and also the keys of the tractor and left with them. In that letter the fourth respondent further notified the applicant that it was still having wheat to the value of R1 million which needed to be harvested within a short space of time as it will be damaged by rain. The fourth respondent requested the applicant to take immediate necessary steps to fulfil their obligations as recorded in the lease agreement.
- [3] That led to the applicant instituting an urgent application seeking an interdict against the first respondent and any other interested party associated with the first respondent. According to the applicant, on being notified of the incident of the 17th November 2022, it immediately sent two of its representatives to the farm. The applicant alleges on arrival at the farm, its representatives were confronted by a very angry and aggressive first respondent who demanded to know the reasons for their presence. The first respondent is one of the beneficiaries of the applicant. The applicant further alleges that an argument ensued between its representatives and the first respondent, and that the first respondent was seen approaching his vehicle, and placing a firearm on the front seat.
- [4] The applicant's representatives felt that the situation was unsafe to engage the first respondent and decided to call the drivers of the tractor and the transport truck and went to Northam SAPS with the intention to open a criminal case. The applicant alleges that the SAPS refused to open a criminal case and had told its representatives that the issues they

were complaining about were civil in nature. The applicant alleges that the first respondent had sold the load of wheat that he had stolen from the fourth respondent at AFGRI Grain Management in Brits. Further that they were able to identify the registration number of the truck that was used by the first respondent.

- [5] The first respondent is opposing the applicant's application. The first respondent in his answering affidavit has raised four points in limine. The first being that of non-commissioned and unsigned confirmatory affidavit of Hendrik Jacobus du Preez; the second being incomplete/incorrect citation of third respondent; the third being that the averments of the applicant are vague and embarrassing; and the fourth being that the relief sought by the applicant is bad in law.
- [6] On the merits of the application, the first respondent has stated that without a resolution by the executive committee of Baphalane Communal Property Association, duly authorising the applicant in this application to depose to the founding affidavit, the averments made by the applicant in the founding affidavit are hearsay, and further that the applicant has no locus standi to bring this application or to depose the founding affidavit. The first respondent denied the allegations levelled against him, and state that they are baseless and fabricated by the applicant. Further that the applicant has failed to cite all the group that the first respondent allegedly led. The applicant stated that he resides in one of the properties leased to the fourth respondent.
- [7] The applicant in its replying affidavit has attached the signed and commissioned confirmatory affidavit of Mr du Preez and has stated that the affidavit was not available at the time of the filing of the application. The applicant has further stated that the first respondent is currently the de facto occupier of one of its properties, and that he has not been granted any rights or authority by the applicant or any other person to conduct farming activities on the farms.
- [8] The first respondent's point in limine relates to the non-commissioned and unsigned confirmatory affidavit of Hendrik Jacobus du Preez. The applicant had conceded that when it issued the application on 21st November 2022 it had attached an unsigned confirmatory affidavit of Mr du Preez, and that it was as a result of the fact that the confirmatory affidavit was not available at the time of the filing of the application. The confirmatory affidavit of Mr du Preez which is attached to the applicant's replying affidavit has been signed and commissioned on the same date the application was issued. It was not signed and commissioned after the application was issued. It can therefore not be said that Mr du Preez did not have sight of the applicant's founding affidavit before his confirmatory affidavit was signed and commissioned. Even

though that confirmatory affidavit was filed after the application was issued, it had cured the defect. Therefore, the first point in limine has no merit and stands to be dismissed.

- [9] The second point in limine is that of incomplete/incorrect citation of the third respondent. The first respondent did not state how the third respondent should have been cited. The third respondent did file any opposing papers, and the applicant is not seeking any relief against the third respondent, but has been cited as an interested party in the matter. This point in limine should have raised by the third respondent, and the first respondent had no mandate to represent the third respondent. Therefore, the second point in limine has no merit and stands to be dismissed.
- [10] The third point in limine is that the averments of the applicant are vague and embarrassing. The fourth point in limine is that the relief sought by the applicant is bad in law. The third point in limine sound like an exception which is available to action proceedings and not motion proceedings. For the fourth point in limine, if the applicant is unable to substantiate the orders it is seeking, the application will simply be dismissed. That can therefore not be raised as a point in limine, but goes to the merits of the case. The two points in limine have therefore no merit and will dealt with the merits of the application.
- [11] In his answering affidavit the first respondent has submitted that without a resolution by the executive committee of Baphalane Communal Property Association authorising the applicant to depose the founding affidavit, the averments made by the applicant in the founding affidavit are hearsay, and the applicant had no locus standi to bring the application or depose the founding affidavit. The deponent of the applicant's founding affidavit has stated that he was authorised to depose the affidavit and institute the proceedings on behalf of the applicant by virtue of his position as the chairperson, and further that the facts contained in the affidavit were within his personal knowledge.
- [12] In *Ganes and Another v Telecom Namibia LTD*[1] Streicher JA said:
- "...In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In the answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to a founding 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. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705 C-J.)"*

- [13] The deponent of the founding affidavit has stated under oath that he was duly authorised to depose the affidavit and to institute the proceedings on behalf of the applicant. Should the first respondent doubt that and wanted to challenge it, his remedy was to evoke the procedure provided for in Rule 7, but has failed to avail himself of that procedure. It must therefore be accepted that the institution of the proceedings has been authorised.
- [14] What must now be determined is whether the applicant had satisfied the requirements for a final interdict. It is trite that the requirements for the grant of a final interdict are (a) a clear right; (b) unlawful interference with that right, actually committed or reasonably or apprehended; and (c) the absence of any other satisfactory remedy. (See *van Deventer v Ivory Sun Trading* 77[2]).
- [15] The first respondent in his answering affidavit had conceded that the applicant is the owner of the property where the alleged incident took place. This is the property which the applicant had leased it to the fourth respondent. In terms of the lease agreement, it is the applicant's responsibility to ensure that the fourth respondent remain in peaceful and undisturbed possession of the leased property. The court is therefore satisfied that the applicant had established the existence of a clear right.
- [16] In relation to the allegations that the first respondent together with his unknown accomplices, interrupted and disturbed the fourth respondent's farming activities, the first respondent had merely submitted a bare denial without refuting the substance of the allegations in the applicant's founding affidavit. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[3] Heher JA said:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare 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 contents, inadequate as they be, and will only in 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 no surprise that the court takes a robust view of the matter."

- [17] The first respondent does not dispute that on the date of the incident he was present at the farm. He simply denies and put the applicant to proof. The applicant in its founding affidavit has given in detail the role the first respondent played and what he did. Instead of engaging those allegations against him, the first respondent just provide a general bare denial without appropriately answering the central case made by the applicant against him. In view, the applicant's version of the incident of the 17th November 2022 has not been seriously challenged by the first respondent. Therefore, the applicant had satisfied the second requirement for the grant of a final interdict.
- [18] According to the applicant, after the incident they went to the SAPS Northam where they wanted to open a criminal case, but warrant officer Mashile told them that their case was a civil matter, and the police refused to intervene. The first respondent did not dispute the allegations by the applicant that at the police station the police refused to intervene. Since the SAPS had refused to intervene and come to the applicant's rescue, there is no other satisfactory remedy that will address the applicant's issues. This court is therefore satisfied that the applicant has satisfied the third requirement for the grant of a final interdict. The court is satisfied that the applicant has made out a case for the relief it is seeking.
- [19] In the result the following order is made:
- 19.1 The first respondent's points in limine are dismissed.
- 19.2 The first respondent and/or any other person on his instruction or on his behalf is interdicted and restrained from:
- 19.2.1 any activity on the properties owned by the applicant, as per annexure "X" hereto (hereinafter "the applicant's properties"), save for residential purposes currently being used by the first respondent on the remaining extent of portion 7, Nooitgedacht 136 JQ;
- 19.2.2 preventing the applicant and/or the fourth respondent's employees, clients, representatives or authorised persons from movement and access to and from the applicant's properties;
- 19.2.3 any unlawful acts on the applicant's properties, including but not limited to harassing, threatening, assaulting and intimidating the applicant and the fourth respondent's employees, clients, suppliers, service providers and/or any other authorised visitor to the properties of the applicant;
- 19.2.4 attaching or removing any immovable property or goods, including but not limited to farming equipment, crops or produce from the applicant's properties;
- 19.3 The second and third respondents are ordered and directed to make available members of the South African Police Service to assist in enforcing the interdictory relief in paragraph 9.2 above.

19.4 The first respondent is ordered to pay the costs of this application, including the costs reserved for 22nd November 2022.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the applicant

: Adv SM van Vuren

Instructed by

: Strydom Bredenkamp Attorneys

Counsel for the first respondent : Adv TM Khama

Instructed by

: KM Maredi Attorneys

Date heard

: 24th November 2022

Electronically circulated on

: 29th November 2022

[1] 2004

(3) SA 615 (SCA) at para 19

[2] 2015

(3) SA 532 (SCA) at para 26

[3]

[2008] ZASCA 6; 2008

(3) SA 371 (SCA) at para 13

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