

SOUTH AFRICA / JUDGMENT

Basfour 3327 (Pty) Ltd v Thwala and Others (Leave to Appeal) (LCC160/2017B) [2023] ZALCC 28 (11 September 2023)

[2023] ZALCC 28

COURT

Land Claims Court

BEFORE

Flatela Luleka

CASE / FILE NUMBER

LCC160/2017B

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IN THE LAND OF SOUTH AFRICA

HELD IN RANDBURG

CASE NO: LCC160/2017B

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

DATE:11/09/2023

SIGNATURE:

In the matter between:

BASFOUR 3327 (PTY) LTD

Applicant / Respondent

and

ROBERT THWALA

First Respondent

LUCY THWALA

Second Respondent

MINEWHLE MAHLANGU

Third Respondent

FEZEKA THOMO

Fourth Respondent

SOUTH AFRICAN POLICE SERVICES,

Fifth Respondent

VOLKSTRUST

DEPARTMENT OF AGRICULTURE, RURAL Sixth Respondent

DEVELOPMENT AND LAND REFORM

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

FLATELA J:

Introduction

[1] On 30th June 2023, I delivered a judgment dismissing the Applicant's application to have the construction of an unauthorized structure or dwelling by the Respondents be declared unlawful. The application also sought that the Respondents be ordered to demolish the

unlawfully constructed structure within 10 (ten) days from date of judgment. Furthermore, the respondents were to be ordered to remove all building materials for purposes of constructing the unlawful structure within 2 (two) weeks from date of judgment and in failure of the Respondents removing the building materials, then the Sheriff of the district be authorized to demolish the unlawfully constructed structure or dwelling and to also remove all building materials of the dwelling on the Applicant's farm. The Applicant's last prayer was that the Respondents be held to be in contempt of Judge Ncube's order under case number LCC160/2017 and dated 5 October 2022.

Background context

[2] The genesis of this application is comprehensively captured in the main judgment I delivered on 30th June 2023 under case number 160/2017B. I do not intend to be as comprehensive here seeing that this is a judgment on mere leave to appeal. However, a brief background context will suffice. On the 9th of June 2017 the Applicant approached this Court on an urgent basis seeking an order declaring a structure that the respondents were building on the Applicant's property without his consent unlawful. The Applicant also sought a prohibitory interdict against the Respondents from constructing a new structure without the express

written permission of the Applicant or the person in charge. The litigation dragged on for five years with several orders being

granted for the Applicant against the Respondents, or in attempt to have the subject issue of the litigation be resolved by the parties on their own amicably. Meaningful engagement failed between the parties and the Respondents continued to erect and build the structure without the Applicant's consent. The matter finally became settled by Judge Ncube on 5 October 2022 wherein he gave orders in favour of the Applicant, two are worth mentioning. The first was that the structure was declared unlawful, and the Respondents had to demolish the same within 10 (ten) days from the service of the order to them. The second was that the Respondent were prohibited and restrained from building entirely new dwellings or structures on the farm U[...] [...] his without the Applicant's or person in charge express written permission.

[3] On 13 April 2023, the Applicant noticed that a substantial amount of building materials, such as river sand and building blocks, were delivered to the Respondents' homestead. Upon inspection of the homestead, the Applicant found that the Respondents had started constructing an entirely new dwelling structure on the farm, with brick and mortar, without his consent. On 17 April 2023, the Applicant instituted contempt of court proceedings on an urgent basis under case number 160/2017B for inter alia, a declarator that the Respondents are in contempt of paragraph 2 of Judge Ncube's judgment. I granted an interim order interdicting the Respondents from continuing with the building of the structure till such time the matter is decided.

[4] The matter served before me on 17 April 2023 on an urgent basis. In the Applicant's main application as per his Notice of Motion, he sought the following orders:

Prayer 2: That it be declared that the construction of the unauthorized dwelling or structure by the Respondents on a portion of the farm Uitkyk 121 HS..., as depicted on annexures "A" and "B" hereto, unlawful.

Prayer 5: That the Respondents are ordered to demolish the unlawfully constructed building on the farm within 10 (ten) days from date of this order being granted.

Prayer 6: That the Respondents [be] ordered to remove all building material for purposes of constructing the unlawful building on the farm within 2 (two) weeks after the date of this order.

Prayer 7: That the Sheriff [of the district be] authorized to demolish the unlawfully constructed building and to remove all building material on the farm in the event the Respondents fail to comply with paragraphs 4 and 5 above.

Prayer 8: a declaratory order declaring that the Respondents are in contempt of [Judge Ncube's order dated 5 October 2022].

[5] I characterized the application as a contempt of court application and held that if I find that the Respondents are not guilty for the crime of being in civil contempt of court, the Applicant's prayers as put above but excluding prayer 8, fall away. I held that the Applicant's prayer 2, 5, 6, and 7 were contingent on I find for the Applicant in terms of prayer 8. Therefore, I approached these prayers as consequential relief to prayer 8. However, in the judgment I also held that even if I were to treat prayer 2 as independent relief sought from

the alleged contemptuous conduct of the Respondents, this Court would be nonsuited to grant the application because of the interest of justice, this I elaborated in the last paragraph 66 of the main

judgment.

The Applicant's arguments

[6] The Applicant now contends that to treat have treated his application as a contempt of court application was an incorrect understanding of the application in that the application was not a mere contempt of court application, but rather an application to have the new structure being constructed by the Respondents declared unlawful. The consequential relief therefrom, subject to the Court's

exercise of its discretion, was prayers 5, 6, 7. These prayers, so the Applicant contends, were independent from prayer 8 and should

have been dealt as such. Prayer 8 was but one of the orders sought by the Applicant but not the mainstay of his application. Therefore, so the Applicant contends, my finding that these prayers were contingent on a positive finding in favour of the Applicant in terms of prayer 8, that is, finding the Respondents in contempt of Judge Ncube's order of 5 October 2022, was incorrect. Instead, prayers 5, 6 and 7 were consequential relief piggybacked on prayer 2 of Ncube J's order. The Applicant contends that I should have determined prayewrs independently from prayer 8, where upon had I done so, then a decision on the consequential relief, i.e., a demolition order of the structure (prayers 5, 6 and 7) would have followed. The Applicant contends that this Court did not even reach this stage of deciding on the consequential relief because it understood the Application to be a contempt of court application rather than an application to have the new structure then being constructed by the Respondents be declared unlawful.

[7] The Applicant does not seek to appeal against my finding that the Respondents are not in contempt of Judge Ncube's order. They concede to the correctness of that decision. Reason for doing so is that they also concede that the Respondents could not have been in found to be in contempt of court as the element of willful intent and mala fides to disobey the Court's dignity, authority, and repute, was absent. Establishing the absence of mala fides on part of the Respondent was that the Respondents relied on Judge Ncube's obiter on paragraph 31 (below) for the construction of the new structure. The obiter on paragraph 31 says,

“[31] In casu, the existing mud structures are clearly old and have cracks on the walls. The corrugated is iron roof pressed down with rocks on top. Occupation of those structures is clearly not in harmony with the Respondents' right to human dignity. Had the Respondents demolished the mud structures, levelled the same site, and rebuilt the same, strong, and durable structure using concrete or cement blocks, they would have brought their structure within the meaning of improvements which render the structure habitable and concomitant with their right to human dignity. This they could do even without the consent of the Applicant or Mr Hatting, if after a meaningful engagement the Applicant, or Mr Hatting unreasonably withheld consent. The

Respondents, on the contrary, are building a totally new structure without the consent of the owner or person in charge. That is not allowed. It is therefore up to the Respondents what they intend doing, from now moving forward. What is clear is that the Respondents urgently need proper dwellings, the occupation of which will be in keeping with their right to human dignity.’

[8] In the Applicant’s Appeal heads of argument, the Applicant now contends that in open Court, counsel for the Applicant did not seriously press the issue of the Respondent’s contempt because,

‘In view of the explanation by the respondents that they acted on advice of their attorney and on their interpretation of paragraphs

[10] and

[31] of the judgment by the Honourable Ncube J, although that interpretation was clearly incorrect, it was improbable that a Court would find under those circumstances that the respondents acted in wilful contempt of the order of Ncube J by constructing a further building without the consent of or engaging the applicant. The applicant had to satisfy the Court that they have acted wilfully and in contempt of the order. Although incorrect, their explanation excluded a positive finding of wilfulness. Counsel however extensively argued the main relief with reliance on *Daniels v Scribante* 2017 (4) SA 341 (CC).’

[9] During the hearing, I expressly asked counsel for the applicant whether prayers 2, 5, 6 and 7 are premised on paragraph 2 of Judge Ncube’s order. The answer was in the affirmative. Therefore, it stands to reason that if these prayers are piggybacked on paragraph 2 of Judge Ncube’s order and read with the applicant’s papers that had seriously pressed the issue of contempt, the cause of action arising is that the Respondents are in contempt of the Court’s order. However, I do give it to the Applicant that indeed his counsel had left it to my discretion as to whether I find the Respondents in contempt in view of their defence that they had relied upon the advice of their attorneys and on paragraph 31 of Judge Ncube’s order. Therefore, the Applicant

may very well be correct in submitting that to have characterized the issue in the application as contempt did not reflect the

understanding that I had considered prayer 2 and the consequential relief flowing therefrom independently from the contempt issue.

However, what I cannot let stand in the Applicant’s Notice for leave to appeal is the submission that I did not consider at all his submissions to having the structure be declared unlawful.

The Applicant’s specific grounds for leave to appeal

[10] In addition to submitting that I had erred in treating the application as a contempt of court application, the Applicant submits that I overlooked its second primary relief being the prayer for confirmation of the Rule nisi calling for the Applicants demolish the structure on the property and to remove all building materials within 2 (two) weeks days of the judgment,

in failure of which, the Sheriff of the district be authorized to demolish the unlawfully erected structure. There is no such prayer in the rule Rule nisi I granted. The Rule nisi in the Applicant's first application called upon the Respondents to show cause why a declaratory order declaring the structure being constructed by the Respondents should not be declared unlawful. Furthermore, it was prohibitory and operating with immediate in interdicting the Respondents from further construction of the structure without the Applicant's express written permission. The relief for an order of demolishment of the structure was independent of the Rule nisi and in the Applicant's own version, it was consequential relief premised on the declarator order sought.

- [11] Paragraph 11 of the Applicant's replying affidavit and quoted in part in paragraph 53 of my judgment has the statement, "had [the Respondents] engaged me or requested to consent to improve their present dwelling, which they had not done, I could not have lawfully refused them such permission. I do not know whether they have improved their existing traditional structures in which they reside, as they should have done in view of the observations of the Court that those structures were uninhabitable".
- [12] From this statement I inferred that the impression given by the Applicant is that that the problem here is two-fold. Firstly, that the Respondents are erecting a whole new structure as improvements, but said structure not being the dwelling that they inhabited, uninhabitable as it was; and secondly, that had the case been the latter, that is that they were improving the dwelling that they inhabited, then there is an implication (from the Applicant's statement) that the Respondents could have done this without his consent.
- [13] The Applicant now submits I incorrectly inferred that there is an implication that Respondents could have erected a new mortar and brick dwelling without his consent. Nowhere in my judgment do I make infer such an implication. It was the Applicant's exact case that the Respondents could not have lawfully erected a new structure with new mortar and brick without his express written permission. However, had they improved their existing dwellings as they should have done (and those being the Applicant's words) without building a new structure (and here the Applicant went on to say that it is easy to improve traditional mud dwellings) then this they could have done without his consent. The inference that I did make from this statement is actually in paragraph 54 where I state that 'the Applicant contends that the improvements could have been done without building a new structure. He goes on to say that improving the traditional mud dwellings is relatively easy to make them habitable. However, in what structural engineering ways the Respondents could have done this to a rundown and dilapidated mud dwelling is not said by the Applicant.'
- [14] The Applicant further submits that I incorrectly held that it drew an arbitrary distinction between upgrading of a dwelling used for traditional purposes as opposed from one that the Respondents are habiting. In this regard, it says I misconstrued *Daniels v Scribante* and *Another* 2017 (4) SA 341 (CC) as Justice Madlanga held that the constitutional right protected was the right to human dignity which is infringed if a person must live in a dwelling that is

uninhabitable or not suitable for human habitation. This submission was made in the Applicant's papers and in argument before me. I dismissed it on the basis that whether the Respondents live in the structure being erected or that they use it for traditional purposes is neither here nor there and that 'it cannot be left to the Applicant to solely determine what is adequate and reasonable accommodation measures to be implemented by the Respondents for the safety of the roof over their heads'. The judgment made it clear that this was to include the traditional mud structure that the Respondents were using for traditional purposes.

- [15] The Applicant submits that I held the Respondents could construct an entirely new structure with building materials of brick and mortar without the consent of the Applicant. To the contrary, I made no such finding.
- [16] To the submission that the Applicant took issue with the construction of the structure but would not have objected if the mud houses were improved without the use of building brick cement and mortar, I stated in my Judgement that the Respondents could not have improved the traditional mud structure in any other way as the mud structures were delapidated as observed in the inspection in loco. Furthermore, the Applicant neither suggested the alternative means it preferred. The Applicant now contends that it had no such obligation for the relief sought in paragraphs 2, 5, 6 and 7. That may be correct but it should be borne in mind that in order to found for the relief sought in these prayers, the Applicant's issue was that over and above the fact that his consent was not sought, the structure was erected with cement brick and mortar.
- [17] The Applicant further submits that by failing to declare the unauthorized structure unlawful, the Court exposed the applicant to an order in terms of section 13(1) of the Extension of Security Act 62 of 1997 whereby the applicant could be ordered to compensate the Respondents upon eviction. This is to be read against the backdrop of the Applicant's submission, which I had dismissed of having no bearing to the application before me, that his attorneys have sent a notice of intention to terminate the right of residence upon the Respondents. I stand by the dismissal of this argument.
- [18] Furthermore, the Applicant submits that I should have held that the construction of the structure without buildings plans rendered the structure unlawful. This is a superficial argument. The basis of wanting to have the structure rendered unlawful was less the building plans but more that it had been built without the Applicant's consent.
- [19] Lastly, the Applicant submits that I interpreted Judge Ncube's obiter in paragraph 31 in contradiction with Scribante. I did not interpret the obiter in any manner save to say that it is this obiter which the Respondents relied on for the construction that exonerated them from the finding of contempt.

The test for Leave to Appeal

[20] An application for leave to appeal is regulated by s 17(1) of the Superior Courts Act 10 of 2013 which provides:

‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[21] Section 17(1) of the Superior Courts Act is to be read holistically with s17(1)(a) which further adds that a Court may only grant leave to appeal where it is satisfied that the Applicant has shown reasonable prospects of success to suggest that a different court would come to a different outcome. Therefore, if on the merits of the appeal it cannot be said that reasonable prospects of success exist

to suggest that a different court would come to a different outcome, the application must fail. The converse is also true, that if there should be such grounds that are shown to suggest that another court, reasonably, would find differently, then the application must succeed. Hereto see *The Mont Chevaux Trust v Tina Goosen & 18 Others*[1] where Bertelsmann J held as follows:

It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different

conclusion. See *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 342H. The use of the word “would” in the new statutes indicates a measure of certainty that another Court

will differ from the Court whose judgment is sought to be appealed against.”

[22] Plasket AJA, as he then was, in *S v Smith*[2] 2012

What the test of reasonable prospects of success postulates is a dispassionate decision, based on facts and the law that the Court of Appeal could reasonably arrive at the conclusion different to that of the Trial Court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success; that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

Discussion

[23] The Applicant's mainstay submission is that I did not decide on the consequential relief, let alone reach that stage, as I misconstrued the application as a contempt of court application, whereas it was not. He contends that the purpose of the application was to seek a declarator declaring the new structure being built by the Applicant's unlawful; and the consequential relief flowing therefrom, was a prayer for a demolition order or in the event that the Respondents fail to demolish the new structure, then the Sheriff of the Court be authorized to demolish the new structure and remove any building materials on the farm. In essence, the Applicant contends that I decided his case on a wrong footing. If had this been or is the case of the Applicant, then in my view, the Applicant should have prosecuted the matter as a whole new case altogether under a different case number and not piggybacked his application on the previous prohibitory order of Judge Ncube. That a prohibitory order existed and that the Respondents were in breach of it, whether contemptuously or not, would have been the background context of his application. However, this ground of appeal satisfies section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 in that it provides for some other compelling reason why the appeal should be heard. The Application for leave to Appeal to the Supreme Court of Appeal the portions of my judgment dismissing the Applicant's prayer 2, 5, 6 and 7 therefore succeeds.

Order

[24] In the result, I make the following order:

1. The Applicant's application for leave to appeal to the Supreme Court of Appeal, the portion of my judgment of 30th June 2023, dismissing the Applicant's prayers: 2, 5, 6, and 7, succeeds.
2. The costs of this application shall be costs in the appeal.

FLATELA LULEKA

JUDGE

LAND CLAIMS COURT

This Judgment was handed down electronically by circulation to the parties and/or their representatives by email. The date and time for the hand down is deemed to be 10H00 on this 11 September 2023.

Date of Hearing: 10 August 2023 Date of Judgment 11 September 2023 Counsel for Applicant: H.S. Havenga SC Instructed by Peet Grobbelaar Attorneys Attorneys for Respondent T. Ramollo Instructed by: Legal Aid South Africa

[1] The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2335 (LCC) at para 6.

[2] S v Smith 2012 (1) SACR 567, 570 para 7

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