

SOUTH AFRICA / JUDGMENT

Dara Properties (Pty) Ltd and Another v Top Tech Feeds (Pty) Ltd and Another (2229/2021) [2021] ZAGPPHC 757 (15 November 2021)

[2021] ZAGPPHC 757

COURT

North Gauteng High Court, Pretoria

BEFORE

Joubert

CASE / FILE NUMBER

2229/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

(3)

REVISED.

15

November 2021

Case

Number: 2229/2021

In

the matter between:

DARA
PROPERTIES (PTY) LTD
First Applicant
TAKSASTO
(PTY) LTD
Second Applicant
and
TOP
TECH FEEDS (PTY) LTD
First Respondent
AGRELA
PAULO
JOSE
Second Respondent

JUDGMENT

JOUBERT AJ

- [1] The first applicant, Dara Properties (Pty) Ltd (“Dara”), previously owned immovable properties known as Portions 255, 256 and 260 of the Farm Honingnestkrans, 269, Registration Division J.R., Gauteng Province. These immovable properties were sold to the second respondent.
- [2] The second applicant is the registered owner of Portion 257 of the Farm Honingnestkrans, 269, Registration Division J.R., Gauteng Province. The second respondent’s property is situated close to Portions 255 and 256 of the Farm Honingsnestkrans.
- [3] The first respondent also loaned to the first respondent, the purchase price of Portion 260. This loan was secured by a covering mortgage bond, registered over Portion 260.
- [4] The second respondent, Mr Jose, is the only shareholder and managing director of the first respondent.

[5] The applicants allege that on 18 January 2021:

5.1 the second respondent erected a pine Wendy-house type structure next to the road on Portion 255 with a notice board stating “Sales Offers”;

5.2 the second respondent started inviting people to purchase portions of land, being smaller parts of Portion 255 and 256 that, it is alleged, the second respondent sub-divided himself;

5.3 the second respondent obtained a TLB tractor and started scraping roads between these smaller portions of land on Portions 255 and 256 to make his own housing development. It is claimed that the smaller plots were demarcated by stakes, “just like a proper residential development”.

- [6] The deponent to the applicants' founding affidavit, Mr Douw Gerbrandt van der Merwe ("Mr van der Merwe"), also alleges that, on the same day, 18 January 2021, about 10 (ten) people were milling around on the property (stated by the deponent to be "obviously homeless" and "previous disadvantaged"), who indicated that they were selecting plots to build houses on. Mr van der Merwe also alleges that some of these people indicated that Mr Jose had told them that they could have the plots for free.
- [7] The applicants further allege that "these unnamed individuals became aggressive when they were informed that the second applicant could not allow them to build houses on the property as it would be unlawful".
- [8] The applicants claim that these actions were in contravention of the terms of the title deed pertaining to Portion 255. The title deeds in respect of all three portions, acquired by the first respondent, contain the following restrictions:
- 8.1 "the main dispute pertaining to this application relates to portion 255 and 256 and their respective Title Deeds are identical regarding the conditions and restrictions contained therein";
- 8.2 "the property may only be used for residential and agricultural purposes. Only one residential house will be allowed on the property, together with other buildings that is used in conjunction with the main residential house as well as other buildings that is necessary for agricultural purposes.";
- 8.3 "A second residential house is prohibited without the consent of the municipality.' Part F of the Title Deed", and
- 8.4 "The owner of the successor in title may not effect any development on the property prior to compliance of the geological conditions as imposed by the municipality.' Part G of the Title Deed".
- [9] The applicants further claim that the first respondent has defaulted on the loan agreement to repay the purchase price in respect of Portion 260 to the first applicant and was, at the time that the application was instituted, in arrears in excess of R500,000.00. The first applicant has launched a liquidation application during November 2020 against the first respondent under a separate case number in this Division. That application is being opposed and has not yet been adjudicated. (The respondents have pointed out that the repayments were made to Mr van der Merwe himself and not the first applicant. On this basis, the respondents seek to content that the first applicant is merely a shell and does not have the necessary locus standi to bring this application. It is, however, not disputed that the first applicant instituted the liquidation application against the first respondent. Based on that fact, I am satisfied that the first applicant has sufficient interest in the subject matter of this application to vest it with locus standi.)
- [10] The applicants approach this Court for the following relief:

"2. That the two respondents be ordered to immediately:

2.1 Refrain from effecting any development, including subdividing, selling or giving away portions of land to third parties and scraping of roads, prior to the compliance of the geological conditions as imposed by the City of Tshwane Metropolitan Municipality on the immovable property known as portion 255 and 256 of the Farm Honingsnestkrans 269, Registration Division J.R., Gauteng Province [Hereinafter referred to as ‘the properties’] that are in conflict with the Title Deeds of the properties.

2.2 Refrain from erecting or allowing third parties to erect additional residential houses or structures on the properties prior to the permission of the City of Tshwane Metropolitan Municipality and in conflict with the Title Deeds of the properties.

2.3 Eject prospective purchasers or squatters from the properties and remove all structures that are in the process of being erected or were erected, subject to the approval of the City of Tshwane Metropolitan Municipality in compliance of the Title Deeds of the properties.

2.4 Refrain from allowing prospective purchasers or squatters to reside on the properties in structures other than the residential house already erected, subject to the approval of a development or additional residential housing by the City of Tshwane Metropolitan Municipality and in compliance of the Title Deeds of the properties.

3. In the event of the court not granting the relief sought in prayer 2 above, in the alternative, the court will be requested to grant prayer 2, pending the finalisation of the liquidation application instituted under case number 60790/20 of this court.

4. That the respondents be ordered to pay the cost of the application on the scale as between attorney and client, jointly and severally the one to pay the other to be absolved....”

[11] As proof of the respondent’s conduct, the applicants attached to their founding affidavit photographs stating to be of (a) people walking on the property choosing plots, (b) the “for sale sign” and (c) the TLB.

[12] Additionally, the applicants produced a WhatsApp conversation taken from the WhatsApp chat group of the community where the properties are located. This conversation is set out below:

“[19/01, 21:51] Cobie van Rensburg: We cannot comment on his behalf, the problem is the squatter camp is on its way, and that is a problem for everybody.

[19/01, 22:14] Jose Plot 44: Douw was the owner, then I bought it from him. I have sold it to Khutso which is the new owner. There are no court issues regarding that plot between me and Douw.

[19/01: 22:15] Jose Plot 44: Not

[19/01, 22:31] Elaine Bure: Thank you Jose for your input.”

[13] That is the extent of the factual allegations made on behalf of the applicants.

[14] The application was initially brought as one of urgency, brought on less than a few hours' notice. Honourable Justice Collis made the following order in this regard on 20 January 2021:

"1. It is recorded that the Respondents provide the undertaking that they will not permit and allow, as far as they can control, any unlawful occupation or unauthorised development of the properties known as Portions 255 and Portions 256 of the Farm Heuningnestkrans 269, JR, and that such undertaking will be kept until final adjudication of this application, or any formal agreement thereto being entered into between the parties;

2. That the application is postponed sine die;

3. That all aspects of this application, including specifically the issues of urgency and locus standi, remains reserved for decision;

4. Costs are reserved."

[15] The respondents oppose the application and the relief sought. Mr Jose, who deposed to the answering affidavit on his own behalf and that of the first respondent, denies the allegations made by Mr van der Merwe as to the respondents' alleged conduct.

[16] The respondents describe, in some detail, the history of the disputes, the detail of which is not relevant here, between them and Mr van der Merwe. Mr Jose states:

"10.4 The unresolved disputes, mainly created by the conduct of Van der Merwe personally and most possibly extrapolated by the inability of Van der Merwe and the entities under his control to obtain or produce the finances required to perform what Van der Merwe proposed to and agreed to be a settlement between Van der Merwe and his entities on the one hand, and the First Respondent on the other, now caused Van der Merwe to embark on a series of litigation that can only be described as vexatious litigious conduct by Van der Merwe personally."

and further

"11. The aforesaid clearly demonstrate some of the true history, and also that Van der Merwe fails to fully disclose the existing disputes between Van der Merwe personally (as representative of the Applicants), and the First Respondent. The true history and existence of the disputes between Van der Merwe and the First Respondent, of course play no insignificant part in the conduct of Van der Merwe to launch this attempted application. I believe the disputes, and the fact that Van der Merwe is unable to bully the First Respondent and its representatives together with Van der Merwe's personal agenda, is the real motivation for this fatally defective application being attempted by Van der Merwe."

[17] The respondents deny any of the conduct forming the basis of the applicants' application to this court:

17.1 Mr Jose provides as an annexure to his affidavit, an aerial map of the land to which this application relates, being Portions 255 and 256 of the Farm Honingsnestkrans 269;

17.2 Mr Jose then illustrates, with reference to that map, that there is no permanent structure erected on either Portions 255 or 256, and

17.3 Mr Jose proceeds to demonstrate, with reference to the aerial map and the presence and specific location of certain landmarks and characteristics of the parcels of land and comparing photographs attached to Mr van der Merwe's founding affidavit and those taken by Mr Jose on the relevant properties and also annexed to his affidavit.

[18] Mr Jose then states the following:

"26.14 To further clarify, I attach hereto further photographs I personally took demonstrating the Lucerne crop of the First Respondent's land relevant hereto, Portion 255 of the Farm Honingsnestkrans 269, as respectively Annexure AA25 and Annexure AA26 to demonstrate. On the photographs I took the Lucerne is clearly visible. On these photographs the new fence erected by Van der Merwe (as demonstrated E to F on Annexure AA19) is visible in the Lucerne presently farmed by the First Respondent on the relevant hereto land.

26.15 I personally took the photographs I refer to herein above and whereof I attach copies to this affidavit on the instruction of the attorney of record of the First Respondent and I, I personally took the photographs on Friday 22 January 2021 after I consulted with our attorney, and was advised to do so.

26.16 I must refer to the photographs attached to the founding affidavit deposed to by Van der Merwe as respectively DM9, DM10 and DM11. I explain:

26.16.1 The content of the photograph attached as DM9 demonstrate the same wooden store as depicted on the photograph I took whereof a copy is already attached as Annexure AA20, simply from a different angle. The photograph is not clear, but I can say it seems to depict workers of the First Respondent, or even from adjacent farms crossing, although unclear.

26.16.2 The content of both photographs attached as DM10 and DM11, which are also unclear, but depict approximately 5 persons which I am not able to identify following from the photographs only taken from a distance, could very well be of workers employed by the First Respondent, but it is difficult to say.

26.16.3 What is very clear from the three photographs, is that none depict anything vaguely similar to what Van der Merwe alleges. Nowhere on the photographs is there any sign that the persons are busy to build informal houses, or is putting up fences of stands as is alleged by Van der Merwe.

26.16.4 What is also very clear from the three photographs, is that there are no sign of any roads being cleared as is alleged by Van der Merwe.

26.16.5 What is also very clear from the three photographs is that there are also no signs at all of any stands / plots being demarcated or pegged as is alleged by Van der Merwe.

26.16.6 What is demonstrated by the three photographs is that there is absolutely no proof whatsoever visible on the photographs to support the wild and unfounded speculation inserted in the founding affidavit deposed to by Van der Merwe.

26.16.7 As a matter of fact, the content of what is depicted in the photographs marked DM10 and DM11 seems to indicate workers walking in the general vicinity where Lucerne was cut.

26.16.8 What is of extreme importance is that none of the photographs depict a TLB-tractor, or a TLB-tractor to scrape roads. Similarly, nor does any of the photographs depict any stakes being put in the ground that could possibly be interpreted as Van der Merwe seems to allege as demonstrating the demarcation of stands / points. The attempt by Van der Merwe to make this allegation, is patently false.

26.17 By comparison it is extremely clear from the content of the photographs that I personally took on 22 January 2021, as referred to here above, that the First Respondent's Lucerne is being grown on the First Respondent's land relevant thereto, Portion 255 of the Farm Honingnestkrans 269 and Portion 256 of the Farm Honingnestkrans 269.

26.18 Similarly the same photographs I personally took on 22 January 2021 clearly demonstrate that there is no roads scraped on the First Respondent's relevant hereto land, and that there are no plots / stands demarcated on the First Respondent's land. The content of the photographs and the visual content depicted therein, clearly demonstrate that the allegations by Van der Merwe in his founding affidavit about the development of any informal settlement or squatter camp, are patently false.

26.19 The allegations by Van der Merwe about me, on behalf of the First Respondent, making arrangements for a squatter camp to be developed on the First Respondent's relevant hereto property, is false and without any basis." (sic)

[19] Mr Jose then proceeds to deny in specific terms the allegations made against them by Mr van der Merwe on behalf of the applicants.

[20] In his replying affidavit, in seeking to contradict the evidence given by Mr Jose, Mr van der Merwe states:

"22.

I wish to confirm that I personally saw the 'Stands for Sale' notice board next to the wooden shed depicted in photograph 'DM9' annexed to the founding papers. I saw the workers and the TLB tractor clearing roads in the lucerne field, workers putting stakes in the ground to demarcate portions of land to be sold. What I saw was verbally confirmed to me by the other neighbours residing around portion 255 and 256. These neighbours are the ones that also supplied me with photographs, confirming applicant's version as set out in the founding papers. After reading the allegations in the answering affidavit, I proceeded to contact all the neighbours in the area to ascertain if they could confirm anything regarding the respondents actions. They did. Therefore it cannot just be me that is speculating, it must also be all the neighbours as well that are dreaming up the same story. Their confirmatory affidavits are attached hereto and discussed below."

[21] Mr van der Merwe relies on a letter dated 5 March 2021, addressed to the respondents' attorney which, according to him "placed on record the version of the respective parties that were involved in the incident". The letter dated 5 March 2021 contains allegations to the following effect:

"25.1 Mr. Willie de Beer rented his TLB tractor and a driver to the respondents and it was on site during 18 January 2021 and it was used to clear roads for the proposed housing development that the second respondent now denies;

25.2 Mrs. Donna Vorster, confronted the respondents workers who were putting stakes in the ground to demarcate stand to be sold. She also confronted the TLB tractor's driver and basically chased him away and took photographs of the TLB, the road it scraped and some of the stakes that were placed on the ground to divide the property.

25.3 Mrs. Rebeca Monchisi, the EFF counsellor, who engaged with the people and explained that they cannot proceed with the unlawful behaviour. She also consulted with the second respondent during 21 January 2021 and he confirmed to her that he gave permission for the people to build houses on the property.

25.4 Mr. Gé Bruitenbach, the DA counsellor, who confirms that he contacted the Metro Police Land Invasion Unit, to stop this unlawful action and that he has had similar problems with the second respondent in the past.

25.5 Mr. Da Cal who also confronted the second respondent to stop with his unlawful action and who also attended the site."

[22] The applicants also filed, with their answering evidence, confirmatory affidavits deposed to by Mr Nick Els, Mrs Donna Vorster, Mr Jaoa Da Cal and Mr Gé Bruitenbach. Mr van der Merwe states that Mr Willie de Beer, the person who the applicants claim rented his TLB tractor and a driver to the respondents, declined to depose to an affidavit. The applicants have not provided any supporting affidavits from any of the members of the public who they alleged, were offered a stand on the property.

[23] No explanation has been provided why the applicants only tendered the additional evidence in reply and not as part of their founding evidence. There is also no indication as to why Mr van der Merwe chose not to state, specifically and unequivocally, in his founding affidavit that he himself had witnessed the conduct complained of on the side of the respondents and why he only states this in reply. His statements in the founding affidavit are stated in the third person and are unspecific to say the least. One would have expected clearer language from a deponent who is also

an attorney.

- [24] In dealing with the additional allegations made by the applicants in their replying evidence, the respondents filed a supplementary affidavit alleging the replying evidence to contain new facts which ought to be struck out, alternatively that the remainder of the supplementary affidavit, which seeks to address the evidence now relied on by the applicants, be taken into account.
- [25] The respondents then proceed to dispute, again with reference to photographic evidence, the allegations made by the applicants and their deponents. The evidence of the respondents certainly served to cast doubt on the case presented by the applicants.
- [26] The applicants seek final interdictory relief in this application.
- [27] It is trite that, in order to qualify for such relief, the applicants should show, inter alia, that any injury was actually committed or reasonably apprehended.
- [28] From what I have set out above, it is clear that a dispute of fact exists between the parties as to whether there has been any injury actually committed or whether such injury is reasonably apprehended.
- [29] It is further trite that, where in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order may be granted if those facts averred in the applicants' affidavits which has been admitted by the respondents, together with the facts alleged by the respondents, justify such an order.
- [30] I am satisfied that the respondents' denial of the facts put forward by the applicants are not mere bald denials, but arise herein as a result of the respondents' seriously and unambiguously addressing the disputed facts.[1]
- [31] Despite having been confronted with the respondents' answering affidavit, the applicants chose not, at that stage, to seek a referral of the matter to oral evidence. They also failed to do so at any time prior to the hearing of this application. It was only in argument before me, and then only in response to the argument

presented by Mr Klopper, that Mr Lubbe (and at best half-heartedly) indicated that the applicants wished to apply for the referral of the matter to oral evidence. No argument was presented as to why such an application was not properly brought at an earlier stage and why it should be allowed at this stage.

- [32] I am therefore not convinced that the applicants have made out a case for the relief sought and I make the following order:

The application is dismissed with costs, including the reserved costs of 20 January 2021.

I JOUBERT

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: A.A. Lubbe Instructed by: D. van der Merwe Counsel for the Respondents: J.C. Klopper Instructed by: J.W. Wessels Date heard: 28 July 2021 Date of judgment: 15 November 2021

[1] Wightman t/a JW Construction v Hedfour [2008] ZASCA 6; 2008 (3) SA 371 (SCA).

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