

SOUTH AFRICA / JUDGMENT

Gaqa and Others v Ingquza Hill Local Municipality and Others (3949/2024) [2025] ZAECMHC 27 (22 April 2025) [2025] ZAECMHC 27

COURT
Eastern Cape High Court, Mthatha

BEFORE
N.R Mtshabe

CASE / FILE NUMBER
3949/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE

DIVISION: MTHATHA)

CASE

NO.: 3949/2024

In the matter between:

SIBONGILE GAQA &
21 OTHERS
APPLICANTS
and
INGQUZA HILL LOCAL
MUNICIPALITY
RESPONDENTS
AND 2 OTHERS

JUDGMENT

MTSHABE AJ

A.

INTRODUCTION

[1] On 9th July 2024, the Honourable Mr Justice Brooks, granted an order along the following terms:

1. “The Respondents are hereby interdicted and restrained from demarcating, sub-dividing, developing, dealing, erect structures, (comprising shacks, makeshift dwellings/or houses) and selling portions of the land known as the remainder of ERF 4[...], Lusikisiski, Ingquza Hill Local Municipality, District of Lusikisiski, Province of the Eastern Cape and in extent of 1636 9655 (one thousand six hundred and thirty six, comma nine six five square meters (the land).
2. The Respondents are hereby directed to forth to vacate the land together with their personal property building materials, tools and utensils.
3. The Respondents are hereby directed to forthwith restore the Applicant vacant possession of the land.
4. The Respondents’ dispossession of the Applicant of the land and subsequent occupation thereof is hereby declared unlawful.
5. The Respondents are hereby directed to demolish any structures comprising of shacks, makeshift dwellings and/or houses that they

build on and/or erected within ten (10) days of this order.

6. In the event of the Respondents’ failure to comply with prayer No. 5 above and within ten (10) days of the lapse of the period referred herein, the sheriff of this Court, duly assisted by the members of South African Police Services, and the Applicant is

hereby directed to demolish any structures (comprising of shacks, makeshift dwellings and/or house that have been built and/or erected by the Respondents on the land.

7. There is no orders as to costs.”

[2] As I can be seen that the order of the Honourable Brooks J refers to 10 Respondents only. The Applicants, all of them were not included in that court order.

[3] It is common cause that ERF 4[...], Lusikisiski is a very big land and is also common cause that the Applicants are residents inside ERF4[...], Lusikisiki.

- [4] A declaratory order was granted by the Honourable Madam Acting Justice Monakali on 7 May 2024, where the Court held that the land within the boundaries of the remainder of ERF 4[...] is owned by the applicant (Igquza Hill Local Municipality). My underlining.
- [5] The Applicants are all residence of Mdikana Community, Lusikisiki. They were allocated sites at ERF 4[...] by their traditional leader Mr Maxabiso Cokoto, who filled a confirmatory affidavit in support of the application by the Applicants. It does not appear from the papers that Mr Cokoto was authorised to allocate sites to the Applicants by the Municipality, which is the owner of the proper. I can only mention that the decision by Mr Cokoto to allocate sites has not been

challenged. I shall leave that point.

- [6] I can also mention in passing that the applicants have not challenged their eviction in terms of Prevention of Illegal Eviction from and Unlawful Occupation of the Land, No. 19 of 1998, on the basis that before they were evicted, the Municipality should have complied with the above Act,
- [7] The Applicants who were absent when the Court Order of the Honourable Mr Justice Brooks was granted on 9 July 2024, and realised that they were affected by the Court Order, brought an urgent Application on 10 September 2024 along the following terms:

“1. That this application is heard as a matter of urgency in terms of Rule 6 (12) and that the rules relating to forms and services provided for in Rule 6 be dispensed with.

2. That delays in championing this application by the applicants be and is hereby condoned.
3. That a Rule Nisi do issue calling upon the Respondents to show caus, if any, before this Honourable Court on Tuesday, the 24th of September 2024 why an order in the following terms should not be confirmed and made final, namely:

3.1 that the Respondents be and are hereby interdicted and restrained from implementing the Court Order which was issued by the Honourable Mr Justice Brooks on the 9th July 2024, on the Applicant's and/or any of Mdikana Residents, Lusikisiki, pending the finalisation of this application.

3.2 declaring the Respondents' decision to implement the court order of 9th July 2024 referred to in paragraph 3.1, invalid, of no force and effect as far as Applicants and/or Mdikana Residents are concerned.

4. Ordering the Respondents to pay costs of this application on attorney and own client scale the one paying other to be up absolved.
5. That the terms of paragraph2, 2.1 and 2.2 supra be and are hereby granted interim interdict, mandamus and relief with immediate effect.” I am of the view that the typing of 2.1 and 2.2 was an error that should read 3.1 and 3.2. My emphasis.

B. ARGUMENTS OF THE PARTIES AND ANALYSIS

- [9] The papers are bulky running to more than 300 pages, whilst the issues are very crispy. They have been made narrower by the concessions made by Mr Mbiko, who appeared for the Applicants. Further, the issues were reduced more when Mr Mbiko could not point me to the “decision of the Respondents to implement the court order”.
- [9] Mr Mbiko, who appeared for the Applicants, correctly considered that paragraph 3.1 of the order sought by the Applicants cannot be granted. He agreed with his opponent Mr Maswazi it would not help the Applicant’s cause of action. Mr Maswazi, who appeared on behalf of the Respondent’s also agreed that paragraph 3.1 of the Applicant’s Notice of motion cannot be granted. So, the parties agreed that paragraph 3.1 of the Applicant's Notice of Motion should be dismissed.
- [10] Both Counsel during the argument agreed that the court order granted by Mr Justice Brooks on 9 July 2024 affects the Applicants.
- [11] During the argument I asked Mr Mbiko where the decision of the Respondents, to implement the court order of 9 July 2024, which must be declared invalid, of no force and effect as far as the Applicants and/or Mdikana Residents are concerned. There was a long debate on this issue, however no decision could not be produced by Mr Mbiko. The reason for such a request of a decision was that paragraph 3.2 of the notice of motion referred to above states that the respondents’ decision to implement the court order of 9 July 2024 must be declared invalid. I am of the view that the Court cannot declare a decision invalid if it is not attached to the papers.
- [12] The Honourable Madam Justice Monakali AJ, as I have indicated above, granted an order that the land in question (remainder of ERF 4[...], Lusikisiki) is owned by the First Respondent, that is, INgquza Hill Local Municipality. That order has not been appealed or rescinded/varied by the Applicants or any person. It, therefore, remains valid.
- [13] Mr Mbiko submitted that the Applicants where not part of the Respondents when the order of the Honourable Mr Justice Brooks was granted. That is correct and I also agree, however, the reason for the current proceedings by the Applicants is that they affected by the order, which was granted in their absent.
- [14] Rule 42(1)(a)[1] of the Uniform Rules of Court provides as follows:
- “(1) The court may, in addition to any other power it may have, mero motu or upon the application of any affected, rescind or vary:*
- (a) an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby”.

- [15] The Applicants are clearly affected by the order that was granted in their absence. In my view the Applicants ought to have followed the procedure in Rule 42 of the Uniform Rules of Court, to have the court order set aside, or common law.
- [16] The language of rule 42(1)(a) is clear and unambiguous, in that the rule is designed for those persons who are affected by the order that was granted in their absence. This in my view is what happened when the order of Brooks J was granted.
- [17] The Applicants in these proceedings are not seeking an order that the order granted by the Honourable Mr Justice Brooks should be set aside.
- [18] Mr Mbiko advanced an argument that the Applicants were not cited by their names in the order of Justice Brooks. In *Occupiers of Skurweplaas*[2] the court stated the following:
- “The people who intend invading the Remaining Extent of the Farm Skurweplaas 353, JR Tshwane Gauteng and the unknown people who invaded the Remaining Extent of the Farm Skurweplaas, 353, Tshwane Gauteng. This description of human beings is less than satisfactory and cannot pass without comment. It detracts from humanity of the occupiers, is emotive and judgemental, and comes close to criminalising the occupiers. This form of citation should not be resorted to. A more neutral appellation like “occupiers” might well be appropriate.”*
- [19] The argument of Mr Mbiko cannot carry the day, because the fifth respondent cited in the Order of the Honourable Mr Justice Brooks is “UNLAWFUL PARTIES DEMARCACTIN SUBDIVIDING, DEVELOPING, DEALING, ERECTING STRUCTURES ON THE REMAINDER OF ERF 4[...], LUSIKISIKI”. My view is that this refers to the unlawful Occupiers of the land, which are the applicants in the current proceedings.
- [20] It is trite that the court order remains valid until it is set aside by a competent court, even if the order was granted wrongfully. The Constitutional Court in *Municipal Manager O.R Tambo District Municipality and Another* [3] the court reaffirmed that a court order is binding until it is set aside by a competent court and that necessities compliance, regardless of whether the party against whom the order is granted believes it to be nullity or not. The court stated the following:

*“Trite, but necessary it is to emphasise this Court’s repeated exhortation that Constitutional rights and court orders must be respected. An appeal or review-the latter being an option in the case of an order from the Magistrate’s Court- would be proper process to contest an order. A court would not compel compliance with an order if that order be patently at odds with the rule of law. Notwithstanding, no one should be left with the impression that court orders-including flawed court orders- are not binding, or they can be flouted with impunity. This Court in *State Culture* reaffirmed that irrespective of their validity, under section 165(5) of the Constitution, court orders are binding until set aside. Similarly, *Tasima* held that wrongfully issued judicial orders are not nullities [4] they are not void or nothingness but exist in fact with possible legal consequences. If the Judges have the authority to make the*

decisions at the time that they made them, and those orders would be enforceable “.

- [21] Further, the Supreme Court of Appeal in MEC for the Department of Public Works, Eastern Cape and Another[5], the court developed the principle that an order of court of law stands until set aside by the court of competent jurisdiction. An order that it should not be put into effect is not competent without a case being made out that there are prospects that it would be set aside by recession or appeal. Until that is done, the court order must be obeyed even if it maybe wrong; there is a presumption that the judgment is correct.
- [20] It is unfortunately in this case that the Applicants did not seek an order that the court order granted by Monakali AJ and Justice Brooks should be set aside on the basis that orders were granted in their absence. Further, it is also unfortunately that the Counsel for the Applicant correctly considered that prayer 3.1 of the notice of motion could not be granted as that would have no effect of any assistance to the Applicants. Further, Mr Mbiko could not point me to the decision that was taken by the Municipality which must be declared invalid by this Honourable Court.
- [21] Unfortunately the relief sought by the Applicants cannot be granted.

C.

CONCLUSION

[22] Accordingly, I make following order:

1. The application is dismissed
2. There will be no order as to costs.

N.R MTSABE

ACTING JUDGE OF THE HIGH COURT

Applicant's Counsel: Mr B.N Mbiko

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Respondent's Counsel: Mr B Maswazi

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Date matter heard: 20 January 2025

Date Judgement delivered: 22 April 2025

- [1] Uniforms Rules of Court, D1, Erasmus Superior Court Practice
- [2] Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd 2012 (4) BCLR 382 (CC)
- [3] Municipal Manager O.R Tambo District Municipality and Another v Ndabeni 2023 (4) SA 421 (CC)
- [4] Department of Transport v Tasima (Pty) Ltd. 2017 (2) SA 622 (CC)
- [5] MEC for Department of Public Works, Eastern Cape and Another vs Ikamva Architect CC 2023 (2) SA 514 (SCA) para 34

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