

SOUTH AFRICA / JUDGMENT

Hartley v Cortley and Others (21/21064) [2023] ZAGPJHC 763 (5 July 2023)

[2023] ZAGPJHC 763**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Francis

CASE / FILE NUMBER

21/21064

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG LOCAL****DIVISION, JOHANNESBURG****CASE NO: 21/21064****NOT REPORTABLE****NOT OF INTEREST TO OTHER****JUDGES****NOT REVISED****In the matter between:**

HARTLEY,
PAUL NICHOLAS
Applicant
and
CORTLEY,
LINDSAY
First
Respondent
CORLETT,
HUGH MARK ANTHONY
Second
Respondent
HARTLEY,

MARK RICHARD

Third

Respondent

HARTLEY,

NICOLE JOY

Fourth

Respondent

JUDGMENT

FRANCIS J

1. The applicant brought a mandament van spolie application against the first and second respondents (the respondents) to restore his undisturbed quasi-possession in the form of a right of way via a driveway leading to his property being Portion 5[...] of the original Portion 2[...] of the Farm Rietfontein
189. He also sought an interim interdict pending the outcome of an application under case number 12470/12, restraining the respondents, from interfering or causing to be interfered with his peaceful, undisturbed quasi-possession in the form of a right of way via a driveway leading to his property. Alternatively, he sought an interdict preventing the respondents from taking the law into their own hands and compelling them to follow due legal process.
2. The applicant has cited the third and fourth respondents who happens to be his children but stated that no relief was being sought against them and that they were cited as interested parties.
3. The application was opposed by the respondents on the grounds that there is a material dispute of fact and the applicant's failure to have joined Mogale City Local Municipality (Mogale City) as a party to the proceedings. They dispute that the applicant was unlawfully disposed of his quasi-possession of the illegal driveway and that he has since 2017 been in peaceful undisturbed possession of the illegal driveway and that there is any matter pending under case number 12470/14 in the Gauteng Division, Pretoria High court. It was contended that Mogale City had resolved the dispute and has not been taken on review and since it has not been joined in these proceedings its decision cannot be overruled by this court without having been heard.
4. The applicant's case is that he has been in peaceful and undisturbed possession since 2017 which he contends has not been disputed. The respondents do not specifically deny that since 2017 he has been using the driveway peacefully and in undisturbed manner i.e. that the applicant has been in physical quasi-possession since 2017. The respondents admitted that they took possession of the property without a court order. Therefore, the respondents have dispossessed him of possession or without his consent or without due legal process and the dispossession is unlawful.

5. The following facts are undisputed:

5.1 On 6 November 2006 Mogale City consented to a subdivision of Portion 200 (a portion of Portion 60) of the Farm Rietfontein 189 IQ into Portions 5[...], 592 and 5[...] with a legal right of way servitude over Portion 592 in favour of Portion 5[...] as per the Surveyor General diagrams.

5.2 On 1 October 2007 the applicant took transfer of Portions 5[...], 592 and 5[...].

5.3 On 6 June 2008 the applicant obtained certificates of registered title in respect of Portions 592 and 5[...] without causing a caveat to be noted in respect of the legal right of way servitude over Portion 592 in favour of Portion 5[...].

5.4 On 31 March 2009 the second respondent and the applicant entered into a sale agreement of Portion 5[...].

5.5 On 18 December 2010 the first and second respondents took occupation of Portion 5[...] and built boundary walls on the incorrect boundary lines as pointed out by the applicant.

5.6 On 14 March 2011 the applicant entered into a second sale agreement with the first respondent.

5.7 On 4 May 2012 the respondents realised that the applicant had pointed out the incorrect boundary lines of Portion 5[...] which had resulted in the boundary walls being built on the incorrect lines.

5.8 On 13 August 2012 a third sale agreement was entered into between the applicant and the first respondent and the first respondent became aware of the correct boundary lines of Portion 5[...].

5.9 On 12 August 2013 Portion 5[...] was transferred into the name of the first respondent: property correctly described as per the Surveyor General diagram.

5.10 During September 2013 the respondents met with the applicant who consented to vacate the illegal driveway over Portion 5[...].

5.11 On 9 October 2013 the applicant requested an extension for the applicant to vacate the illegal driveway and the extension was granted on 27 October 2013.

5.12 On 29 October 2013 the applicant failed to restore possession of the illegal driveway as consented to, to lock out the first respondent from her own property, preventing her from taking possession of her property.

5.13 On 1 November 2013 the applicant obtained an ex parte spoliation order against the second respondent alleging that the second respondent spoliated him from the legal servitude over Portion 592 as per the Surveyor General diagram but failed to inform the court of his consent.

5.14 In May 2014 the first respondent launched vindicatory proceedings in the Pretoria High Court under case number 2014/12470 against the applicant seeking an order declaring the illegal driveway to be part of her property. The applicant admitted the illegal driveway property of the first respondent but counter-applied for an order that the first respondent sell the illegal driveway to him.

5.15 In 2016 after postponements at the behest of the applicant, the applicant amended his counterclaim seeking rectification of the purchase agreement on the basis that the property was incorrectly described in the contract of sale (without having joined Mogale City who had to amend its subdivision authorisation or the Surveyor General who would have to amend his diagram) and years after having entered into the sale agreement at a time when both parties were in possession of the diagram and surveyors report depicting the correct boundary lines of Portions 5[...], 592 and 5[...].

5.16 On 24 May 2017 on the day that the transfer of Portion 592 into the names of the applicant's children came up for preparation in the Deeds Office, the applicant's attorney signed a notice setting the applicant's counterclaim down for a hearing.

5.17 On 26 May 2017 the applicant transferred Portion 592 (the major encroaching property) to his children namely the third and fourth respondents, without registering the legal servitude over Portion 592 in favour of Portion 5[...], without Mogale City's permission and without informing the first respondent's legal representatives.

5.18 On 20 October 2017 the applicant's spoliation application against the first respondent was dismissed in the Krugersdorp Magistrate's court under case number 5119/2017. It was discovered during the proceedings that the applicant had divested himself of Portion 592.

5.19 On 6 November 2017 the High Court application in Pretoria was referred to trial and the third and fourth respondents were joined in the proceedings as the first respondent's vindicatory relief against the applicant would have been of no force or effect since the applicant had divested himself of the property.

5.20 On 3 April 2018 the first respondent's amended her declaration and the applicant's children were cited as second and third defendants.

5.21 On 25 April 2018 the applicant and the third and fourth respondents filed their plea without a counterclaim merely raising a plea of rectification of the contract.

5.22 Between 10 and 21 May 2018 the attorneys who had transferred Portion 592 from the applicant confirmed that the applicant had not informed them of the legal servitude over portion 592 which had to be registered over Portion 592 in favour of Portion 5[...]. Mogale City had ordered the applicant and the third and fourth respondents to do so.

5.23 On 13 December 2018 the applicant laid a complaint against the first respondent with Mogale City about the first respondent's boundary wall which he knew was encroaching on the Vleipad as he had indicated the wrong boundary lines to the second respondent on 31 March 2009, and also represented to Mogale City that he was the owner of Portion 592.

5.24 On 3 March 2019 the first respondent laid a counter complaint with Mogale City about the encroachment of Portions 592 and 5[...] on Portion 5[...] (the illegal driveway).

5.25 On 7 August 2019 after an investigation by Mogale City initiated by the applicant, the owners of all three portions were ordered to discontinue their illegal conduct.

5.26 In September 2019 the only objection raised by the Applicant against the demand of Mogale City was seeking for an extension to comply was that on the grounds that there was a matter pending in the High Court.

5.27 On 27 May 2020 the first respondent consequently withdrew her action in the Pretoria High court to address the only objection raised by the applicant with regard to the order received from Mogale City.

5.28 On 3 July 2020 there was a follow up inspection by Mogale City and the first respondent complied but there was no compliance by the applicant and third and fourth respondents.

5.29 On 15 July 2020 the Mogale City in a follow-up report recorded that the applicant had requested an extension to remove his power box on the illegal driveway and arrange for his evacuation of the illegal driveway also recording that there would be no issue with the first respondent now taking possession of the illegal driveway.

5.30 On 18 July 2020 the first respondent took possession of the illegal driveway by virtue of the outcome of the Mogale City proceedings.

5.31 On 20 July 2020 the applicant withdrew his spoliation application against the second respondent indicating an acquiescence in Mogale's City's order (or the first respondent taking possession of the illegal driveway).

5.32 On 20 November 2020 the applicant launched a harassment application against the second respondent in the Krugersdorp Magistrate's Court.

5.33 On 5 May 2021 the applicant served this application.

6. The applicant contended that the respondents have unlawfully taken possession and control of the driveway leading to the applicant's property during the period July 2020 through to date by various unlawful acts. The respondents are preventing the applicant, his staff, family members and guests, visiting a guesthouse on the applicant's property from accessing the driveway leading to the applicant's property.

7. The applicant contended further that the issue of legality does not arise in a spoliation application which needs to be determined separately. A person deprived unlawfully of his or her quasi-possession of a servitude right or a right which is incidental of the possession or control of property has recourse in the form of a mandament van spolie. The acts of spoliation occurred in July 2020. These acts goes directly against the clear principle of our law which

is to prevent persons taking the law into their own hands.

8. The first issue that needs to be determined is whether Mogale City should have been joined as a respondent in this application.
9. The applicant contended that Mogale City need not be joined in the spoliation application since it does not have a direct and substantial application interest in this application. Further that Mogale City has no jurisdiction to act without a court order. It will only have a direct and substantial interest when the rightful owner of the driveway was determined in separate proceedings. It was also not party to the dispossession.
10. The applicant contended further that Mogale City does not have the authority to spoliolate or the power to authorise spoliation by the respondents without duly following legal procedure, that is to say a court procedure. The compliance notice itself does not authorise the Mogale City or any other person to resort to self-help. The compliance notice must issue a warning to the effect that the person must comply with the notice or the person may be required by an order of court to demolish, remove or alter any building, structure or work illegally erected or constructed or to cease with the illegal activity and rehabilitate the land concerned.
11. It is common cause that Mogale City was not cited as a party by the applicant. It had made a ruling in this matter and the applicant has not taken that ruling on review. I do not deem it necessary to deal with the issues raised by the applicant about what the powers of Mogale City are whether it had acted beyond its powers since the arguments raised by the applicant does not deal address the issue of substantial interest and bearing in mind that this court is not sitting as a review court. It is of no moment to state that the ruling made by Mogale City was not supported in law. The fact of the matter is that the dispute was referred to it by the applicant and that a ruling was made rightly or wrongly.
12. The test for non-joinder is set out by the Supreme Court of Appeal in *Absa Bank Ltd v Naude NO* (20264/2014)[2015] ZASCA 97 (1 June 2015) as follows:

“[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In Gordon v Department of Health, Kwazulu-Natal it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined.”

13. In Judicial Service Commission and Another v Cape Bar Council and Another 2013

(1) SA 170 SCA at para 12:

“[12] It has been by now become settled law that the joinder of a party only is required as a matter of necessity – as opposed to a matter of convenience if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA PARA 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.”

14. Mogale City had already on 6 November 2006 consented to a subdivision of Portion 2[...] (a portion of Portion 6[...]) of the Farm Rietfontein 189 IQ into Portions 5[...], 5[...] and 5[...] with a legal right of way servitude over Portion 592 in favour of Portion 5[...] as per the Surveyor General diagrams. I have already set out the role that Mogale City played in the issue of the boundaries. The applicant had referred the issue of the boundaries to Mogale City which conducted an investigation and made a ruling in the matter. The applicant had sought some time to comply with the ruling made by Mogale City and thereafter launched this application. The position would have been different had the applicant not referred this issue to Mogale City.

15. But since the issue was referred by the applicant to Mogale City and applying the test referred to above I am of the view that the issue raised by the respondents bears merit. The facts of this matter and the involvement of Mogale City made it necessary for Mogale City to have been joined as a party in these proceedings. It made ruling which is binding to the parties and that ruling has not been set aside on review.

16. The application stands to be dismissed for failure to have joined Mogale City as a party in this application.

17. There is no reason why costs should not follow the result.

18. In the circumstances I make the following order:

18.1 The application is dismissed with costs on a party and party scale.

JUDGE OF THE HIGH COURT

FOR APPLICANT D GINTNER INSTRUCTED BY CRAWFORD LEGAL PRACTITIONERS FOR 1 AND 2 RESPONDENTS S KOLBE SC INSTRUCTED BY FIONA MARCANDONATOS INC

DATE OF HEARING : 9 NOVEMBER 2022

DATE OF JUDGMENT : 05 JULY 2023

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