

SOUTH AFRICA / JUDGMENT

Ingonyama Trust and Others v Umlalazi Municipality and Others (1421/2016)

[2016] ZAKZPHC 89 (10 October 2016)

[2016] ZAKZPHC 89

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mbatha

CASE / FILE NUMBER

1421/2016

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IN

HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO: 1421/2016

In the

matter between:

THE INGONYAMA
TRUST
FIRST APPLICANT
BONGANI
MOLEFE
SECOND
APPLICANT
NTOMBENHLE MOLEFE &
OTHERS
THIRD & FURTHER APPLICANT
and
UMLALAZI
MUNICIPALITY
FIRST

RESPONDENT
SILVER
BACK PROPERTIES (PTY) LTD
SECOND RESPONDENT
HBC
INVESTMENTS (PTY) LTD
THIRD
RESPONDENT

JUDGMENT

Date Delivered: 10 October 2016

MBATHA J:

- [1] The applicants seek an order interdicting the respondents from interfering with their use, enjoyment and occupation of the land known as Erven [...], [...] and [...] G., E. D., KwaZulu-Natal.
- [2] It is common cause that interim relief by way of a rule nisi was granted by Booyens AJ on 12 February 2016 in terms of paragraphs 1 and 2 of the Notice of Motion. The respondents seek that the rule nisi be discharged with costs. The first respondent is the local municipality, Umlalazi Local Municipality. The second respondent is a company that is interested in protecting its interests in the land purchased from the first respondent, which is the subject matter of this application. The third respondent acts as the project manager of the second respondent.
- [3] The second applicant and the other applicants are occupiers of the land which is registered in the name of the second respondent. The second respondent intends to develop the land for purposes of building a shopping centre. It had purchased the land from the local municipality, the first respondent herein.
- [4] The applicants claim occupancy of the land in question on the basis that they are part of the traditional community that has been in occupation of the land prior to the establishment of the former KwaZulu Government, a former self-governing state, which existed before the establishment of a new democratic government in South Africa. The applicants' contention is that since the 1890's their tribe was in occupation of the Erven [...], [...] and [...], Gezinsila A, under the chieftainship of Inkosi Zungu. They are subjects of the current Inkosi TW Zungu and fall under the jurisdiction of the KwaMondi Traditional Council. The land is administered in terms of Zulu Law Custom, Practice and Culture. Therefore they have what is termed 'informal rights to land' as contemplated in the Interim Protection of Informal Land Rights Act[1] (IPILRA).
- [5] The applicants also claim that the validity of the second respondent's title to the land is disputed as the Ingonyama

Trust claims not to have been properly divested of its title to the land, as a result thereof it remains the holder of the title to the property. This is supported by the Ingonyama Trust, which is the first applicant in this application.

[6] The relevant provisions of the IPILRA are as follows:

[6.1] the preamble of the IPILRA states that the Act was promulgated to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law and to provide for matters connected therewith;

[6.2] the IPILRA defines ‘beneficial occupation’ as any occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner;

[6.3] section 2 of IPILRA states that where land is held on a communal basis, a person may, subject to section 4, be deprived of such land and right in land in accordance with custom and usage of that community;

[6.4] section 2(3) states further that where a deprivation of a right in such land is caused by a disposal of land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal;

[6.5] section 3 states that any sale or disposition of any land shall be subject to any existing informal rights to that land; and

[6.6] it is to be noted that the provisions of the Act have been extended since 1997 and they are still applicable to date.

[7] The applicants approached the court on the basis that the second and third respondents intend to demolish their homes and by so doing evict them from the land they occupy. The respondents had already commenced to clear the land where the shopping complex is to be built, by destroying their fruit trees and other vegetation on which they depend on.

[8] The applicants view is that the respondents actions are unlawful and in breach of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[2] (PIE Act) and of their rights in terms of IPILRA were disregarded by the respondents.

[9] The first applicant also challenges the second respondent’s title to the land on the basis that it was not lawfully divested of its rights to the land. The contention raised by the applicants is that the land in question never formed part of the township and the municipality had no legal right to sell the property to the second respondent.

[10] It is the applicants’ case that the land that was to be transferred to the first respondent was the township of Gezinsila

under Proclamation R293/1962 and not the land occupied by them. The part of the land where the second applicant and others are in occupation should not have been transferred to the first respondent in 2001. At the time of the transfer there was no consultation with the traditional

community which enjoyed protection in terms of IPILRA. This view is supported by the first applicant, who intends to bring an application to court for a declaration order in respect of this contested land. The applicants contend that this land was formally vested in the name of the first applicant under the KwaZulu-Natal Ingonyama Trusts Act.[3]

- [11] The second respondent holds the two title deeds to the properties, Title Deeds No T26220/2015 and T26221/2015. It obtained transfer of these properties from the first respondent, Umlalazi Municipality.
- [12] The applicants had every reason to believe that they will be evicted by the respondents as in preparation for the building of the shopping complex on or about February 2016, the respondents removed the illegal squatters on the land without a court order. Subsequently thereafter, the first respondent proceeded to serve them with notices addressed to 'The Occupier', signed by the Municipal Manager, the deponent to the answering affidavit of the first respondent. It informed them that the site will be cleared for the establishment of the King Dinuzulu Shopping Centre and confirmed that Erven [...], [...], [...] and Rem of Erf [...] have been transferred to the developers. On behalf of the applicants, Collin Msizi Mnguni Attorneys addressed a letter to the Municipal Manager dated 08 January 2016 advising the Municipal Manager that they are in the process of bringing an application to reverse the transfer of the erven back to Ingonyama Trust as they were transferred in error to the municipality. It also warned against the unlawful eviction of the occupiers of the erven.
- [13] This was followed by another letter dated 11 February 2016 from Tomlinson Mnguni James Attorneys stating that they act for the first applicant and other applicants. This letter also warned against the unlawful eviction of the applicants from the land in question, after the applicants have been informed by those who represent the respondents that if they have not vacated the premises by 10 February 2016, the bulldozers will come and demolish their homes. This letter was forwarded to the respondents' attorneys Wynne & Wynne of Eshowe.
- [14] The applicants also stated that this was followed by a visit by the delegation from the first respondent's office which included the Municipality Manager and the Mayor, who visited the sites where the tree clearing operations were continuing. The third applicant was visited by the Project Manager of the respondents who informed them that they have until 11 February 2016 to vacate the place, after which they will come with bulldozers to demolish their homes.
- [15] The first respondent opposes the application on the basis that the land is neither owned by, nor falls under, the Ingonyama Trust administration. Furthermore, the applicants cannot seek protection from the provisions of the IPILRA as they are not in occupation of the land. They see the conduct of the applicants as only opportunistic. The Municipality Manager, representing the first respondent states that the land in question was not occupied, as the previous occupants were relocated and settled by the Sakhum Phakathi Property Developers. However, the aerial photographs filed by the applicants have disproved them as they show various homesteads on the land. Furthermore, there is no evidence presented by

the first respondent that the applicants migrated back to the area after being relocated by SakhumPhakathi. The photographs indicate that these are old homesteads and that people have lived there for quite a long time. There is also no explanation why he had to address letters to 'The Occupier' if the erven were not occupied and the illegal squatters had already been evicted from the properties.

- [16] He denies that the provisions of the PIE Act are applicable to the applicants, as they are not in occupation of the land. This has been disproved by the evidence of the applicants.
- [17] The applicants submit that the first respondent has disregarded the rights of the occupiers of the land by transferring the land to a developer, which is illegal and unconstitutional. In the light of the threatened evictions the appellants only seek an order to prevent the respondents from proceeding with the development and interfering with their bona fide possession and use of land pending the determination of the applicants' rights to the property.
- [18] The first respondent contends that a settlement was reached with the previous occupants, however, no evidence has been adduced by the first respondent that the award of the one-roomed RDP houses in 1996 to their late ancestors was a compensation of their rights to the land. According to the applicants those RDP houses were only allocated to the specific individuals who had applied for them and were not in compensation to their families. More so it could not be accepted as adequate compensation.
- [19] The style in which the respondents operated is reminiscent of the forced removals of black people from their land, without compensation and without due regard to their rights. The respondents have acted in a very undignified and unlawful way in pursuit of commercial agenda.
- [20] It is clear to this court that a declaratory order ought to be obtained from this court which will define the rights of the parties to the land, and, if necessary, correct what the first applicant alleges occurred in error.
- [21] The court will also be able to define whether the land forms part of Gezinsila Township or falls within the administration of the Ingonyama Trust Act or any other law.
- [22] The respondents contend that the applicants' application is based on a mandament van spolie. Counsel for the respondents submits that a mandament van spolie cannot be invoked to prohibit a threatened spoliation. As a result thereof the applicants have wrongly conflated the requirements of a mandament van spolie with that of a final interdict.
- [23] It is common cause that a mandament van spolie is a final order, often sought in an urgent matter, whereby the applicant must allege and prove that he/she was in peaceful and

undisturbed possession of the property or right. The applicant must allege and prove unlawful deprivation of possession by the other party. This would mean without consent or due legal process. On the other hand in *Setlogelo v Setlogelo*[4] the court sets out the requirements for a final interdict whereby the applicant has to establish a clear right, injury actually committed or a reasonable apprehension of harm and the absence of any other remedy.

[244] The applicants submit that a court can grant an interdict against a threatened spoliation. The threatened eviction and destruction of the vegetation and trees could not have been remedied by seeking a spoliation order.

[25] The applicants rely on *Aussenkehers Farms (Pty) Ltd v Walvis Bay Municipality*[5] where the court held that it would be a strange result if the applicant could not obtain an interdict prohibiting the respondent

from despoiling him, but then as soon as the respondent despoiled him, he could obtain a spoliation order and have his possession

restored. It went on further to say that the result of holding that the right which the applicant has to show in this case is any more than a right not to be despoiled would result in the respondent being given a licence to evict the applicant.

[26] The court subsequently held that where a person seeks a final interdict prohibiting spoliation by another of his occupation of a particular site, he does not have to prove a right to occupy the site on which he and/or his goods are, as he would have to do if he were seeking a declaratory order that he was entitled to occupy the site or to carry on business on that site. He has only to establish that he has a right not to be deprived unlawfully of his de facto possession.

[27] In *Aussenkehers Farms* the appellant had erected a tent on a particular site in Walvis Bay in order to sell fruit and vegetables to lower income groups at affordable prices. It was done with the approval of one of the municipality's officials, but it was later told to vacate the site. The municipality informed the applicant that he requires written approval for operating such a business venture, which he did not have. The respondent then threatened to involve the assistance of police to remove the applicant's tent. The applicant then brought an application for a final interdict restraining the respondent from evicting it, demolishing the tent and from interfering in anyway with the applicant's business activities. The court held that the applicant was entitled to an interdict protecting it against being deprived unlawfully of its de facto possession of the site, tent and paraphernalia, even if such possession was unlawful.

[28] A more persuasive and binding authority is found in *Maritzburg Sawing & Yoke Co Ltd v Piesold Sewing and Yoke Co*,[6] a decision by Wilson J.P. This was a case where a caretaker of a property sought an interdict against a person, who whatever his

rights, had certainly no right to take possession when he did. The court held that the interdict was rightly granted as it was clear that the person who had left the caretaker behind had never abandoned possession of the property. He remained in possession and it would have been wrong if he were to be disturbed in his legitimate possession.

[29] In *Tswelopele Non-profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*[7] the court held that the wanton destruction of the occupiers' dwellings violated the Constitution, that it violated the occupiers

fundamental right against unauthorised eviction, given the implicit menace with which the eviction was carried out, it infringed upon the occupiers right to personal security and their right to privacy. In this case about 100 people were evicted from their homes on a vacant piece of land in Pretoria. Their makeshift homes went up in smoke and as a result that they lost most of their rudimentary possessions.

[30] The court further held that this operation was carried out irrespective that the Constitution provides that 'no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances'

as stated in section 26(3) of the Bill of Rights. This was also against the provisions of section 8(1) of the PIE Act which states

that:

'No person may evict an unlawful occupier except on the authority of an order of a competent court.'

[31] The respondents rely on the unreported judgment of Boruchowitz J from the South? Gauteng Local Division in the case of *Outdoor Network Limited & Another v The Passengers Rail Agency of South Africa & Another*, case number 26064/2013 (30 May 2014) where the applicant sought a remedy to prevent a threatened spoliation.

[32] In this judgment the court held that the mandament van spolie cannot prohibit a threatened spoliation, it is only available to a de facto possessor who has been despoiled. Therefore the applicant for a final interdict must establish that it is a holder of a right which is recognised as a matter of substantive law. Boruchowitz J therefore holds the view that Aussenkehrs was wrongly decided, a view shared by authors Kleyn and Van der Walt.[8]

[33] It is therefore submitted that an application for a final interdict must not only establish a right to be unlawfully deprived, but also a legal right to possession (a *ius possidendi*). The respondents view is that no clear right has been established in the circumstances.

[34] I do not share the views expressed in the *Outdoor Network Limited* case on the basis that no one should be evicted without a legal process irrespective whether he is a de facto or de iure holder of rights. It is my view that a threatened spoliation need to be prohibited where it would result in the violation of human rights or would amount to an injustice.

- [35] There are a number of judgments which state that no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. There are various cases which state that no legislation may permit arbitrary evictions, amongst others, Government of the Republic of South Africa and Others v Grootboom and Others,[9] Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others. [10]
- [36] The municipality has a role to play in giving priority to the basic needs of the community, a role which is in line with the Constitution, a role which it should not have abandoned in favour of a commercial venture.
- [37] Besides the Constitution, Parliament has also put on safeguards by the promulgation of relevant legislation in protecting people against unlawful evictions. Evictions are governed in terms of the PIE Act and section 4 thereof provides that the courts may grant an order for eviction if it is just and equitable to do so after considering all the relevant circumstances. The discretion to evict is left with the courts. In this case the respondents did not even follow the PIE Act route. This is a well-known procedure even to the first respondent, as there is service to the municipality each time an eviction is sought in terms of the PIE Act.
- [38] In City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another,[11] the court stated that the South African constitutional order recognises the social and historical context of property and related rights. The protection against arbitrary deprivation of property in section 25 of the Constitution is balanced by the right of access to adequate housing in section 26(1) and a person should not to be evicted arbitrarily from one's home in section 26(3). I am referring to this case as it is borne of almost the same circumstances of the matter before me.
- [39] Had the matter been taken to court it would have been clear that their occupation of the place was old as the hills of Eshowe, it was a bona fide occupation, that the first respondent was aware of their occupation when it sold the property to the second respondent and that the first respondent, the municipality, still had a Constitutional duty to provide them with alternative accommodation.
- [40] In terms of section 9 of the Housing Act[12] the municipality is required to ensure access to adequate housing. The first respondent in this case tried to rely on one-bedroomed RDP houses allocated to a few deceased persons, which is of no relevance to this matter, as no settlement agreement has been made available to this court as proof of such an agreement. The first respondent failed in its duty as required in terms of section 9 of the Housing Act.
- [41] This duty is extended to the municipality even when it is the private company that is evicting the occupiers. (See City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd above)

[42] It is my view that the applicants have shown that they are entitled to the relief sought. The unlawful actions of the respondents'

stands out like a sore thumb and cannot be condoned, irrespective of the indeterminate state of the land in question.

[43] Accordingly, I make the following order:

- (a) The rule nisi is confirmed with costs.
- (b) The Ingonyama Trust is ordered to bring an application for a declaratory order regarding the status of erven [...], [...], [...] and [...] G., E. D., within a period of sixty (60) days from the date of the granting of this order.

MBATHA J

Date of hearing

: 31 August 2016

Date delivered

: 10 October 2016

Appearances:

For the Applicant

: Adv DP Crampton

Instructed by

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For the First Respondent : Adv AC Camp

Instructed by

: WYNNE & WYNNE ATTORNEYS

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For the Second Respondent : Adv AC Camp

Instructed by

: VENNS ATTORNEYS

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[1] Act 31 of 1996

[2] Act 19 of 1998

[3] Act 3 KZ of 1984

[4] 1914 AD 221

[5] 1996 (1) SA 180 (C)

[6] 1915 36 NLR 69

[7] 2007 (6) SA 511 (SCA)

[8] D Kleyn, “Mandament van Spolie and The Interdict: The confusion continues” 1996 De Jure 162; “Mandament van Spolie ‘n interdik?” AJ Van der Walt, De Rebus, October 1984 at 477; JC Sonnekus, “Sakereg Vonnisbundel” (2 ed) at 166; Silberberg & Schoeman’s “The Law of Property” (5 ed) Footnote 235 at 309; Van der Merwe, “Sakereg” (2 ed) at 149 Note 439

[9]2001

(1) SA 46 (CC)

[10]

[2004] ZACC 25; 2005 (2) SA 140; 2005 (1) BCLR 78 (CC)

[11] 2012 (2) BCLR 150; 2012 (2) SA 104 (CC)

[12] Act 107 of 1997

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