

SOUTH AFRICA / JUDGMENT

Khuis Communal Property Association v Gaotsenwe (77/2011) [2011] ZANCHC 26 (9 September 2011) [2011] ZANCHC 26

COURT

Northern Cape High Court, Kimberley

BEFORE

C J Olivier

CASE / FILE NUMBER

77/2011

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**IN THE
HIGH COURT OF SOUTH AFRICA
(Northern
Cape High Court, Kimberley)**

Case Nr:	77/2011
	Case
	Heard: 09/09/2011
	Date
	delivered: /09/2011
	In
the matter between:	Khuis
	Communal Property Association
	Applicant
	and
	Obiditse
	John Gaotsenwe
	RESPONDENT

JUDGMENT

Olivier J:

The applicant is the Khuis Communal Property Association, an association registered in terms of section 8 of the Communal Property Associations Act, 28 of 1996. The respondent, mr Obiditse John Goatsenwe, is a member of the applicant.

The main relief claimed by the applicant in its notice of motion is for the termination of the respondent's membership and certain ancillary relief. In the alternative thereto, the applicant claims relief aimed at the enforcement of a decision by the applicant to allow the respondent to farm in the Stokwana Camp of farm property owned by the applicant, compelling the respondent to remove his livestock from the Garona Camp on the property interdicting the respondent from interfering in or interrupting the activities of the applicant and from disrupting meetings of the applicant and an order that the respondent pay the costs of the application. At this stage the applicant is only persisting with the relief claimed in the alternative.

The property referred to was awarded to the members of the applicant in terms of a land settlement agreement. It includes the farms called Khuis 181 and Police 180 on which, respectively, the Stokwana and Garona Camps are situated. The applicant was established for the purposes of, inter alia, managing the property. In terms of the applicant's constitution this function, and other day to day activities, are performed by a committee established in terms of the constitution.

For these purposes the applicant's committee subdivided the land into camps like Stokwana and Garona and laid down rules, which are applicable to all members.

It is common cause that the committee has the power to allocate the use of the land, and more specifically of the individual camps, to members, and that members need the permission of the committee to farm in any such camp.

During 2006 the use of the Stokwana Camp was allocated to the respondent, in other words permission was granted to the respondent to farm in that particular camp.

The use of the Garona Camp was allocated to other members of the applicant.

During July 2007 the respondent moved livestock into the Garona camp and started farming there. It is common cause that he did not have the permission of the committee itself to do so. It is also common cause that the respondent was thereafter requested more than once to remove his livestock from the Garona camp, and that he at one stage indicated that he would need three months to do so. He nevertheless did not remove his livestock from the Garona camp, and he is now refusing to do so.

The respondent has, however, in the meantime applied to the committee for permission to farm, together with other members, in the Garona camp.

The respondent contended in limine that the applicant lacks capacity to act in this matter, because of the fact that its committee, and the chairperson of the committee, had not been validly elected and appointed.

Mr Botha, counsel for the respondent, did not pursue this, and in my view wisely so. I will therefore not deal with it at this state.

The constitution of the applicant limits the term of office of such a committee to three years. It is not disputed that the term of office of the last elected committee expired in September 2007.

In terms of the applicant's constitution the members of such a committee must be elected at an annual general meeting of the members of the applicant.

In his founding affidavit on behalf of the applicant the deponent, mr Isaac Moeti Leboko, states that he is the chairperson of what he refers to as the interim committee of the applicant. The deponent states that the interim committee was established at a general meeting which took place on 17 November 2010. The deponent further states, also in his founding affidavit, that the interim committee then took a decision, on 23 November 2010, to authorise this application.

It was the respondent's contention that the chairperson and the interim committee were not properly elected and appointed. In this regard the respondent said, with reference to the meeting of 17 November 2010, the following:

The respondent referred to clause 15.6 of the constitution and stated that the required quorum for a general meeting was 33 % of the registered members, and that those present had not constituted such a quorum.

It was furthermore the respondent's contention that , in terms of clause 15.4 of the constitution, decisions at a general meeting should be taken by means of voting, and that no voting took place at the meeting of 17 November 2010. He challenged the applicant to produce the minutes of the meeting.

In reply the deponent for the applicant stated that a general meeting had initially been convened for 3 November 2010. He stated that the number of members present at that meeting had, however, not constituted a quorum, and that the meeting had then been adjourned to 17 November 2010 in accordance with the provisions of clause 15.7 of the constitution. He went on to state that the number of members who attended the meeting of 17 November 2010 had, with reference to the provisions of clause 15,7, indeed then constituted a quorum at that stage.

In terms of clause 15.6 of the constitution "a quorum for any decision to be taken at a General Meeting, unless stated otherwise, is 33 % of the registered Members of the Association". It is quite clear that the requirement of a 33 % quorum is qualified by the words "unless stated otherwise".

This is where, clearly, the provisions of clause 15.7 come in. They provide that, should the required quorum not be achieved at such a meeting, the meeting may be adjourned and that, at the later meeting, the members present will constitute a quorum.

It is not disputed that the meeting of 17 November 2010 was such a later meeting as envisaged in clause 15.7. The applicant has, in answer to the respondent's challenge, in reply produced the attendance register for that meeting, as well as a typed version of the minutes. From the register and minutes it appears that 63 members signed the attendance register, that a mr Olyn proposed that the previous committee, of which the term of office had expired, should "remain", that this motion was seconded by 3 members, that it was further proposed that the term of office of the interim committee be 2 years and "The meeting (community) accepted the motion that the committee be reinstated as it is". It was also recorded that "No one was against this point", which would mean that this decision had been taken unanimously.

In my view it is clear that the previous committee was indeed for all purposes properly reinstated at the meeting of 17 November 2010.

It is in any event not clear at all why the respondent, if he was indeed of the view that there is at the moment no properly elected and appointed committee, took the trouble of now applying for permission to farm in the Garona camp. I will revert to his application at a later stage.

In his opposing affidavit the respondent also took the point that, since a labourer of his is at present living in the Garona camp, the applicant is not entitled to his "ejection from the farm" until the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, have been complied with. In reply the deponent for the applicant agrees that the respondent's son is indeed living in the Garona camp at the moment.

There is absolutely no merit in this point and the short answer to it is that the relief claimed in the alternative by the applicant is not aimed at the eviction of either the respondent or his son, but merely at the removal of the respondent's livestock from the Garona camp. Obviously only a "person" can be an "unlawful occupier" as envisaged and defined in section 1 of this Act. The case of *Ndlovu v Ngcobo, Bekker and Another v Jika* 2004 (1) SA 113 (SCA), referred to by mr Botha, does not support this argument. The fact remains that, although I would not recommend it, the relief in alternative prayers 1 and 2 would not prevent the respondent's son from staying on in the Garona Camp.

As regards the relief claimed in prayers 3 and 4 in the alternative, the applicant has not in my view made out any case at all that it has a right which is being infringed or threatened. The deponent for the applicant refers to "obstructive conduct" on the part of the respondent which prevented "a constructive annual general meeting for the purposes of electing new committee members". This allegation is completely vague and undetailed and is not substantiated in any way. Insofar as the deponent for the applicant may have been referring, in this regard, to the meeting of 3 November 2010, it should be kept in mind that the allegation in reply is simply that that meeting had failed because of insufficient attendance; not because of any obstructive conduct on the part of the respondent.

The deponent for the applicant also makes the allegation that the addition by the respondent of his small livestock to the other

members' stock in Garona Camp resulted in the permissible number of small livestock in that camp being exceeded and his

alleged refusal to pay amounts due by him, set an example to others to do the same. He does not, however, make specific mention of any other cases where the permissible number of small livestock was exceeded or where amounts due were not paid, and where this was the result of the alleged example set by the respondent.

As far as the relief claimed in prayers 1 and 2 of the alternative part the notice of motion is concerned, the respondent alleges that the chairperson of the committee granted him permission to move his small livestock to the Garona camp. He does not say when this happened.

The deponent for the applicant who, as already mentioned, is – and was in 2007 - also the chairperson of the committee, denies having granted such permission to the respondent.

Apart from the fact that the respondent has chosen not to provide any details of when and where the alleged discussion between himself and the deponent for the applicant took place, it is also so that there is no evidence that he at any stage raised the alleged permission when he was requested to remove his stock from the Garona Camp. As already mentioned, it is common cause that he was more than once requested to remove his livestock, and that he at one stage even agreed to do so, but requested 3 months' time. Why did he not then make mention of the permission alleged granted to him by the chairperson? In fact, in paragraph 58 of the opposing affidavit the respondent admits to having at that stage refused to remove his livestock, and advances, as a reason for his refusal, the fact that the portion of land allocated to him for farming purposes is not suited for small livestock farming. He does not advance the alleged permission as a basis for his refusal, and he does not say that he at any stage mentioned the alleged permission to anybody.

The question also arises why the applicant has, in the meantime, applied for the committee's permission to keep his small livestock in the Garona Camp. If he was satisfied that he has proper permission to do so, granted by the chairperson, he would not have applied for the committee's permission. Also he apparently did not, in his letter of application, make any mention of having already been granted permission by the chairperson before. Instead he motivated his application by stating that one of the other members had removed his stock from the Garona Camp, and that there was therefore space and grazing for his own small livestock.

The respondent's contention that he had the chairperson's permission is so untenable that I have no hesitation to reject it on the papers (see *National Director of Public Prosecutions v Zuma*

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) para [26])

It is in any event quite clear that the chairperson would not have had the authority or power to grant such permission to the respondent. The allegation on behalf of the applicant that it is the committee that subdivided the land into camps and that is responsible for applying the rules in respect thereof, has not been challenged. There is no provision in the constitution which could be interpreted to grant the chairperson the power to grant such permission. To the contrary, clause 10.2 of the constitution makes it clear that the “allocation of specific sites for the exclusive occupation of members” and the “allocation of land for purposes other than residential use”, as well as “disposal or encumbrance of any immovable property or any right or interest in and to movable or immovable property”, would constitute “special business”, which would have had to have been approved by special resolution passed at a special general meeting by 75 % majority by all members present (see clause 10.1.1 of the constitution). A mere discussion with the chairperson and his verbal permission would not have sufficed.

As far as the relief claimed in prayers 1 and 2 in the alternative part of the notice of motion is concerned, therefore, I am of the view that the applicant has made out a case that it has a clear right to protect the land by means of the camps, and by the allocation and control of their use by the members. The applicant has a duty to protect the interests of members, in general, in the land. This can obviously only be done if members adhere to the rules regarding the allocation of the use of camps. The respondent’s conduct in farming in a camp in respect of which such right was not granted to him constitutes a clear invasion of the applicant’s rights in this regard and it is equally obvious that, should the applicant not take steps to guard against such self-help, and to protect its land, complete chaos may follow.

It was argued on behalf of the respondent that the respondent’s averment that no other member complained about his behaviour was left uncontested, and that the provisions of clause 18 of the constitution provide an alternative remedy which was available to the applicant, and which the applicant failed to exhaust.

This is not a dispute between members, as envisaged in clause 18.1, that could be settled by the committee acting as a mediator.

Clause 18.2 does provide for mediation of disputes between members and the committee, by “The chief and his council”, but there is not a shred of evidence that such a chief or a council is at present in place in this case.

I am in any event of the view that a process of mediation would not have afforded the applicant protection similar to that now being sought.

Even if it could be said that the provisions of the constitution, which provide for mediation, provided an alternative remedy for the applicant, I am of the view that the applicant has made out such a clear case that its rights are being infringed as far as the respondent’s use of the Garona Camp is concerned that I would, in the exercise of my discretion, nevertheless have granted the relief in alternative prayers 1 and 2 of the notice of motion (see *Interdicts and Related Orders*, Meyer, page 76 and *Commissioner for Inland Revenue, Transkei, and Another, v JALC Holdings (SA) (Pty) Ltd and Another* 1991 (4) SA 646 (TkGD) 654G-H).

Mr Botha argued on behalf of the respondent that the committee is in all probability going to grant the respondent's application to farm in the Garona Camp and that it would therefore be senseless to order the respondent at this stage to remove his livestock from the Garona Camp. This argument is based on conjecture. The fact that the applicant has not stated that there are other competing applications in respect of the Garona Camp, does not exclude such a possibility. Even if there are no such other applications the committee may nevertheless have other grounds for refusing the respondent's application. It may, for example, be of the view that, even now that one member has removed his stock, the state of the grazing in the Garona Camp would be insufficient to accommodate the respondent's stock. Another possible basis for refusing the application of the respondent may be the fact that he has in the past, not adhered to the rules applicable to the use of land, by farming where he had no permission to do so and by falling behind with payments. One can only speculate.

The respondent has also not applied for a postponement of this matter until after the committee has decided on his application.

It follows that I am of the view that the applicant is entitled to the relief set out in alternative prayers 1 and 2, but not to the relief set out in the alternative prayers 3 and 4. Even so the applicant would still have achieved substantive success in its application and would be entitled to its costs. No reason was advanced why costs should not follow such a result.

As regards alternative prayer 1, the decision by the applicant's committee would of course not have been as set out in prayer 1, but simply that the respondent was granted permission to farm in the Stokwana Camp. There is no evidence that it was, at the same time, specifically decided that the respondent would not be entitled to farm in the Garona Camp. Such a decision would not have been necessary. As regards alternative prayer 2, I see no reason to compel the respondent to move the livestock from the Garona Camp to the Stokwana Ccamp. The applicant is only entitled to an order that respondent remove his livestock from the Garona Camp. What he does with it then, is his own affair.

I therefore make the following orders:

The respondent shall adhere to a decision taken by the applicant whereby he was allowed to farm in the Stokwana Camp of the farm Khuis 181.

The respondent shall remove his livestock from the Garona Camp of the farm Police 180 within 30 days of this order.

The respondent shall pay the costs of the application.

C J OLIVIER

JUDGE

NORTHERN CAPE DIVISION

For the Applicant: Adv A D Olivier

Instructed by: Job Attorneys

KIMBERLEY

For the Respondent: Adv C H Botha

Instructed by: Duncan & Rothman

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