

SOUTH AFRICA / JUDGMENT

Kungwini Estate (PTY) LTD v Kungwini Manor Homeowner's Association (24144/2010) [2017] ZAGPPHC 1297 (19 September 2017) [2017] ZAGPPHC 1297

COURT

North Gauteng High Court, Pretoria

BEFORE

M M Mokadikoa-Chauke

CASE / FILE NUMBER

24144/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

No: 24144/2010

In

the matter between:

KUNGWINI
ESTATE (PTY)
LTD
Applicant
and
KUNGWINI
MANOR; HOMEOWNER'S ASSOCIATION
Respondent
In

re:

KUNGWINI
MANORE HOMEOWNER'S ASSOCIATION
Applicant
KUNGWINI
ESTATE (PTY)
LTD
Respondent

JUDGMENT

MOKADIKOA-CHAUKE AJ:

[1] This is an application for determination of costs. The Applicant brought this application for Court to determine costs order based on an earlier application brought under Case No: 24144/2010 . Prior to this application, the Respondent, Kungwini Manor Homeowners Association brought an urgent application, inter alia, for interdicting Kungwini Estate (Pty) Ltd from disrupting or disconnecting the water and electricity to Manor.

[2] Based on this application, on the 23rd September 2010 , the learned Judge Legodi J made an order in the following terms:

2.1 That an application for strike out is dismissed.

2.2 That the Respondent is hereby interdicted from disrupting or disconnecting in anyway, the water and electricity to Kungwini Manor Estate pending the finalisation of the dispute between the parties in the main application.

2.3 That delivery of the fourth affidavit by the Respondent, such an affidavit to be delivered within fourteen

(14) days from date of the order and pending the finalisation of the dispute between the parties in the main

application.

2.4 That the main application is postponed sine die.

2.5 That the costs of 14 September 2010 are to be costs in the cause of the main application and costs of 11 May 2010 remain reserved.

2.6 That the Respondent pays the costs of the striking application for the 15th and 15th September 2010.

[3] There was a subsequent application before Polson AJ, heard on 15 August 2012. Polson AJ heard the application brought before him and made the following order:

3.1 That the Respondent shall not be entitled to discontinue with the delivery of electricity and water to the Applicant pending finalisation of the action to be instituted by the Applicant in this Court within thirty (30) days of date of this order, in terms whereof they must seek to resolve and make the necessary allegations to show that the right set out in the notarial deeds of servitude registered against the properties owned by Kungwini Estate (Pty) Ltd, all sold to individual purchasers and members of the public to determine whether right to cancel exists, the right to give six (6) months notice of the intent to cancel and not to deliver water and electricity to the various individual owners exist and secondly, if there is an allegation that such a right does exist, as to the constitutionality thereof.

3.2 That should such an action not be instituted within thirty (30) days, then interim interdict will fall away and the parties will have to resort to their right as they stand.

3.3 That the costs as set out in the order made by Legodi J, remains reserved until such time it can be adjudicated by the Court who will hear the action which must be instituted within thirty (30) days of this order.

3.4 That the costs to today be paid by the Respondent.

[4] In terms of this Court application for determination of costs, the Applicant is seeking costs because it believes that the Respondent did not comply with the terms and conditions as set out in Polson AJ's order.

4.1 The first question is whether thirty (30) days for institution of an action has been complied with.

4.2 The second question for determination is whether they must seek to resolve and make the necessary allegations to show that the right set out in the notarial deed of servitudes against registered against the properties owned by Kungwini.

[5] As for compliance on this point;

5.1 It is difficult to determine but Uniform Rules of Court gives guidance on a specific computation of Court days. Court day shall mean, any day other than Saturdays, Sundays and Public holidays and only Court days prescribed by these rules of as fixed by any order of Court.

See: Hoban v ABSA Bank Ltd [1999] 2 All SA (A).

5.2 Considering the fact that an order was granted on the 1st August 2012, and the Respondents were expected to bring an action within thirty (30) days of the order, the 30 day would have expired on the 12th September 2012, the stamp on the summons and the return of service confirms that the documents were filed on the 30th day, which is correctly within the time specified in the order. There was timely institution of the action as per Court order. This point is final and the Court is satisfied that 30 days has been complied with.

SECOND QUESTION ON RIGHTS OF NOTARIAL DEED OF SERVITUTES REGISTERED:

[6] That the right set out in the notarial deeds of servitude registered against the properties owned by Kungwini Estate (Pty) Ltd, all sold to individual purchasers and members of the public to determine whether right to cancel exists, the right to give six (6) months notice of the intent to cancel and not to deliver water and electricity to the various individual owners exist.

6.1 This question can only be determined by the trial Court. This Court is unable to make a finding in this regard because there were no detailed submissions by both parties to the application although parties did make certain submissions; it is not enough for this Court to make a determination at this point.

6.2 In determining the second question, the Court will have to be privy to all pleadings by both parties and listen to argument presented relating to this matter. The Court only heard portion of the argument and is not satisfied that it is competent to make a determination on this point at this stage.

[7] It is unfortunate that as it stands, this Court is not the Court to determine merits of the case as anticipated by Polson AJ. This Court is entrusted with a duty to determine as to which party is entitled to a costs order.

[8] Merits of the matter under Case No: 53219/2012 are still pending and yet to be determined by the trial Court.

- The Court is not adjudicating the action as anticipated by the above Court orders;
- The Court is merely entrusted with a costs determination.

[9] Having heard Counsel for the parties and having read the documents,

IT IS ORDERED:

1. That costs of 11 May 2010 made by Legodi J, remains reserved until such time it can be adjudicated by the Court which will hear the action.
2. That the costs occasioned by this application are also reserved on the same grounds until such time it can be adjudicated by the trial Court.

M. M. MOKADIKOA-CHAUKE AJ

[Acting Judge of the High Court of

South Africa,

Gauteng Division, Pretoria]

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