

SOUTH AFRICA / JUDGMENT

Leopont 461 CC and Another v Ringane and Others (3633/2021) [2021] ZALMPPHC 51 (1 July 2021)

[2021] ZALMPPHC 51

COURT

Limpopo High Court, Polokwane

BEFORE

M V Semanya

CASE / FILE NUMBER

3633/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: CASE NO: 3633/2021

REPORTABLE:

YES/NO

OF

INTEREST TO THE JUDGES: YES/NO

REVISED.

In

the matter between:

LEOPONT

461 CC

:

1ST APPLICANT

(Registration

number: 2010/05451/23)

ANDREW

IVAN COCKS

:

2ND APPLICANT

And

DR

LINDIWE RINGANE

:
1ST RESPONDENT
INZUVECT
(PTY) LTD
:
2ND RESPONDENT
ABSA
BANK LIMITED
:
3RD RESPONDENT
(Registration
number 1986/004794/06)
THE
SHERIFF OF THE HIGH COURT,
:
4TH RESPONDENT
POLOKWANE

JUDGMENT

SEMENYA ADJP:

[1] The applicants launched this application in two parts. In Part A, the applicants seek the immediate restoration of two properties, namely:

PORTION 1 OF THE FARM [.....],

REGISTRATION DIVISION LS, LIMPOPO PROVINCE,

IN EXTENT 17, 1306 HECTARES

And

THE FARM [.....],

REGISTRATION DIVISION LS, LIMPOPO PROVINCE

IN EXTENT 67,3206 HECTERES

The applicants further seek an order in terms of which the respondent are interdicted from trespassing the two properties in any manner, directly or indirectly. There are other further ancillary orders sought by the applicants, which includes the order that the 3rd respondent is to immediately freeze a total of an amount of R165 000.00 (ONE HUNDRED AND SIXTY-FIVE THOUSAND RAND). The application in Part A is to be heard pending the determination of the issues raised in Part B.

[2] This application initially served before the Regional Court Tzaneen on an urgent basis on the 20 May 2021. The matter was struck off the roll on the 26 May 2021 after the Regional Court upheld the 1st and 2nd respondents' point in limine of the court's lack of jurisdiction.

Pursuant to that, the applicants approached this Court, again on an urgent basis, as the Court which has jurisdiction to hear the matter. The deponent to the founding affidavit is Daniel Petrus Uys Coetzer who alleges that he is a lawful agent of the applicants in terms of the General Power of Attorney given to him by Andrew Ivan Cocks, in his

personal capacity, as well as his capacity as sole member of the 1st applicant. The said power of attorney is registered in the Deeds Office, Pretoria under PA 179/2020. He attaches proof of these averments as Annexure “A”.

- [3] The 1st and 2nd respondents’ (who shall hereinafter be referred to as the respondents) unopposed application for condonation for the late filing of the answering affidavit is granted. The reasons advanced in that regard are accepted. The respondents raised four points in limine to the applicants’ affidavit. Firstly, the respondents contended that the application stands to fail on account of misdescription involving citation of the applicants. The respondents aver that CIPC search revealed that there is no entity known as Leopont 461 CC with Registration Number 2010/054514/23 and Leopont 461 (Pty) Ltd, Registration Number 2010/054514/23. The respondents aver that the CIPC revealed the entity known as Leopont 461 Properties (Pty) with registration numbers 2002/021268/07. It is further stated that the directors of Leopont 461 (Pty) Ltd 2002/021268/07 are Lynne Cocks and Rosaline Frances van Wyk and that neither of the two has been cited as a party to these proceedings. In support of this contention the respondents have attached CIPC search report as annexure “AA4” to the answering affidavit.
- [4] The applicant contended that the first point in limine is without merit. On Annexure “AA4,” Leopont 461 Properties is registered under Registration Number 2010/054514/23, which is similar to the registration number which is reflected in the founding affidavit. Furthermore, it is indicated on Annexure “AA4” that Leopont 461 was initially registered as a company but was later converted into a Close Corporation, with Cocks, Andrew Ivan as its Representative Trustee. The word “Properties” as they appear in Annexure “AA4” has been omitted in the heading and paragraph 3.1 of the founding affidavit and the heading thereto. The applicants have however conceded that the citation of the applicant is therefore erroneous, but submitted that misdiscreption does not render the application a nullity.
- [5] Counsel for the applicants referred this court to the decision in *HUV CAPE SPICE v HOT SPICE SAUCES CC* (Western Cape Division unreported case No. 22227/2010 (10 May 2011) at [12] in which Louw J said the following:

*“In my view the contentions on behalf of the respondent is based on a fallacy. The description of a party to a suit does not immutably determine the nature and identity if a party. The law reports are replete with instances where the incorrect description of a party was allowed, in the absence of prejudice to other parties involved, to be changed to reflect the true state of affairs. See for instance, *Four Tower Investments (Pty) Ltd v Andre’s Motors* 2005 (3) SA 39 (NPD). In an action in a magistrates’ court which went on appeal to the High Court, the plaintiff was cited in the summons as a company. Shortly before the hearing of the appeal, it was established that the plaintiff was in fact a close corporation. The plaintiff then asked for an amendment on appeal to change the citation of the plaintiff from that of a*

company, to a close corporation. The defendant resisted the application for the amendment on the basis that since the plaintiff as cited was a non-existent entity, the summons was a nullity and that in any event, the service of the summons, not having been issued and served at the instance of the plaintiff as a close corporation, even if the summons were not a nullity, did not interrupt prescription. On the evidence which showed that it was a close corporation which had acted throughout, and that the citation was in fact nothing but a misdescription of the plaintiff, the amendment was allowed. At 47E it was held that:

[29]...if the citation of a party is nothing more than a misdescription, it should not matter whether the incorrect citation happens on the face of it to refer to a non-existing entity or indeed to an existing but uninvolved entity.”

- [6] It appears clearly from the answering affidavit that the respondents are not denying that they have entered into agreements which forms part of the subject matter of this application. By way of an example, the respondents have stated in paragraph 13.3 of the answering affidavit that the applicants have consented to the felling of the timber and have attached a letter written by the applicant’s attorneys, Charl Naudé, in confirmation thereof. The respondents furthermore contend that they have the right to be on the properties and that they have continued to do business on the properties. Counsel for the applicants contended that the assets, rights, liabilities and obligations of the Leopont 461 Properties company vested in the close corporation upon conversion as envisaged in section 27(5)(a) of the Close Corporation Act No. 69 of 1984. In line with the decision in HUV Cape above, I find that the respondents will in no way be prejudiced by the misdescription of the applicants on the basis of the common cause facts between the parties. This point in limine stands to be dismissed.
- [7] The second point in limine is that deponent to the founding affidavit has no locus standi. The applicants correctly stated that the proper way to challenge a person’s authority to act is as prescribed in Rule 7. The respondent s chose to ignore this procedure. Furthermore, as already stated, it appears from the General Power of Attorney that it is Andrew Ivan Cocks who has nominated, constituted and appointed the deponent to the founding and replying affidavit as his lawful agent. Andrew Ivan Cocks is the Representative Trustee of Leopont 461 CC. This point in limine stands to be dismissed.
- [8] In the third point in limine, the respondents contended that the applicant failed to make out a cause of action in the application. The respondents contend that the applicants failed to state how they became owners of the properties as well as the timber thereon. The respondents contended that the applicants failed to disclose the relationship between the applicants and Leopont 461 (Properties) CC, Leopont 461 (Properties) (Pty) Ltd and Mikelbe Cocks Family Trust. The applicants explained the contents of Annexure “AA4” attached to the answering affidavit in relation to section 27 of the Close Corporation Act in their replying affidavit. explains the issues raised in this point in limine. The explanation was accepted by this Court in the preceding paragraphs. Furthermore, the applicants’ submission that the respondents do not deny that they have entered into the agreements with the applicants.

This point in limine is therefore dismissed.

- [9] On the point in limine of lack of urgency, the respondents correctly stated that the applicants failed to succinctly state the reasons why this matter deserved to be heard as a matter of urgency. It would appear that the Regional Court magistrate did not deal with this aspect. The application in that Court was struck off the roll for want of jurisdiction. The applicants in this Court reiterated that the matter is urgent in that on the 11 May 2021 the respondents continued to sell timber to an entity known as Diggers Rest Timbers without the 2nd applicant's consent and despite the alleged cancellation of the agreements that existed between the parties (more of this will appear later in this judgment). The respondents contended that the timber was sold with Charl Naudé's consent as expressed in a letter dated the 19 November 2020. The applicants contended that the letter predated the cancellation of the agreement between the parties. I agree that the respondent had no right to fell the trees as at the 11 May 2021 and I have for that reason, and for the prejudice that may result should the respondents persist in their conduct, agreed to attend to the matter on the urgent basis.
- [10] On the merits of this application, it is common cause that on the 19 November 2020, the 1st applicant and the 1st respondents entered into a written Deed of Sale of Members interest in the 1st applicant, being the owner of the properties mentioned in paragraph 1 above. The said deed of sale is attached to the founding affidavit as Annexure "D". Attached to Annexure "D", as Annexure "A", is a Lease Agreement entered into by the 1st applicant and the 1st respondent in respect of the same properties. The terms of the agreement were, among others, that the 1st respondent will rent the properties from the applicant with effect from 1 November 2020 in terms of the Lease Agreement attached to the Sale Agreement. The 1st respondent was required to pay a non-refundable deposit of R1 000 000.00 into the trust account of Charl Naudé Attorneys within three months from the date of signature of the sale agreement.
- [11] In terms of the lease agreement, the 1st respondent is allowed to utilise all residential properties to her own benefit and is entitled to all income deriving therefrom. All vacant and unused portions of the properties were made available to the 1st respondent for the purposes of grazing cattle, growing of cash crop and development of properties for the production of avocado and/or macadamia nut inclusive of installation of infrastructure of whatever nature required for such activities. The 1st respondent was however prohibited from harvesting any of the trees which were currently on the properties.
- [12] On the same date (19 November 2020), the 2nd applicant and 2nd respondent, duly represented by the 1st respondent entered into an agreement of Sale of Standing Timber for the purchase price of R2 800 000.00. The 2nd applicant retained ownership of the property and the timber thereon. As in the lease agreement, the 2nd respondent is prohibited from harvesting standing timber on the property without the written consent by the 2nd applicant. All proceeds of the sale of the standing timber felled with the 2nd applicant's consent will have to be paid into the trust account of Charl Naudé Attorneys Trust account,

to the benefit of the 2nd applicant in the reduction of the purchase price. The 2nd respondent was prohibited from selling, ceding, assigning, transferring, pledging the standing timber or from allowing it to become subject to lien of whatsoever nature or to deliver possession thereof to any other person while any other portion of the purchase price remains unpaid.

- [13] The applicants aver that the 1st respondent breached the agreement in that she paid only R500 000.00 towards the deposit instead of paying R1 000 000.00. In view of this breach, the 1st applicant informed the 1st respondent on the 24 March 2021 that the agreement has been cancelled. The 1st applicant demanded the return of the properties pursuant thereto. The cancellation letter followed on the 7 April 2021. The applicants aver that the 1st respondent is further in breach of the lease agreement in that she failed to pay the rental in the amount of R29 000.00 per month for the month of February, March, April and May 2021, as agreed upon as well as municipal and electricity charges. The 1st applicant have subsequently cancelled the lease agreement.
- [14] With regard to the sale of Standing Timber Agreement, the 2nd applicant avers that the respondents breached the agreement by entering into an agreement with FNR Timber in terms of which FNR

Timber was to fell two hectares of trees in compartment LF007 without consent and by receiving a deposit of R150 000.00 in cash from Fritz Sontag of FNR Timbers and failed to transfer the amounts received from FNR Timbers into the Trust account of Charl Naudé Attorneys despite demand. The 2nd applicant subsequently cancelled/terminated the agreement by way of a letter dated the 24 March 2021. The 1st and 2nd respondents remains on the property despite the alleged cancellation of the agreement.

- [15] In spite of the cancellation of the agreements, the 1st, alternatively 2nd respondents did, on the 27 April 2021, enter into an agreement to sell the standing timber on the properties described as LF004 to an entity known as Diggers Rest Timber company without the 2nd applicant's consent. 1st, alternatively 2nd respondents have also sold timber to Selati Timbers without the applicants' consent. In a letter dated the 21 April 2021, the attorney for the 1st and 2nd respondents addressed a letter to the applicants in which they are informed that they are not accepting the cancellation of the agreements and will not handover the keys. In an email from the 1st respondent dated the 6 April 2021 and addressed to the 2nd applicant, the 1st respondent concedes that things have not been going well from her side and that she has been unable to fulfill her expected financial

commitments and promised to pay rental to Mr Naude. She further promised to sort out the issue of the felling of trees. She acknowledged that she failed to fulfill the terms of the agreement in the last two months and to settle the purchase price.

- [16] The applicants aver that the launch of this application on an urgent basis was triggered by the information received on the 11 May 2021 that the respondents were selling standing timber to Diggers Rest Timbers Company. It is further stated that attempts to resolve the

issue by, among others, sending a letter to the respondents on the 12 May 2021, did not yield any success. In response to the letter requiring an assurance from the respondents that no further felling or selling of timber will take place, the respondents referred the applicants to the letter dated the 19 November 2020, referred to above, which authorised the respondents to fell the trees. The respondents further indicated that they will vigorously

oppose any application the applicants may intend to launch.

[17] The applicants contend that the respondents are selling timber which is not yet ready for the market, thereby diminishing the value of the properties to the detriment of the applicants. Apart from the sale and felling of trees, the applicants contends that the application is urgent in that the 2nd applicant has learnt on the 24 May 2021 that the 1st respondent, alternatively the 2nd respondent have unlawfully sold a Toyota Land Cruiser to Jacque Nel. The said Jacque Nel has deposed to a confirmatory affidavit. I however agree with the 1st respondent that there is no description of the motor vehicle which was allegedly sold to Mr Nel on the documents filed in support of the allegations. I therefore reject the allegation that the respondents sold the Toyota Land Cruiser to Mr Nel.

[18] The respondent s contended that the balance of convenience favours the dismissal of the application in that the respondents have already entered into agreements with certain developmental institutions, among others, University of Venda, in relation to the properties. The respondents failed to attach confirmatory affidavits of the said institutions in that regard. It is not clear what irreparable harm the respondents will suffer if the application is granted. The agreements between the parties have been cancelled already. On the issue of relief in due cause, the applicants contended that the continuance of felling of trees which are younger than 25 years old will cause more harm to the applicants and therefore the court should grant the remedy as prayed for now rather than later. I am satisfied that the applicants have established the requirements for an interim interdict as laid down in *Setlogelo v Setlogelo* 1914 AD 221 and are entitled to the relief sought in terms of the notice of motion.

[19] It is therefore ordered:

1. The applicants' non-compliance with the rules of this Court is condoned and the matter is heard as urgent in terms of Rule 6(12) of the Uniform Rules of Court;
2. Pending the determination of the application for the relief in Part B hereof, an interim interdict is issued, in the following terms: -

2.1 The 1st applicant's possession of the farms known as:

PORTION 1 OF THE FARM [.....],

IN EXTENT 17. 1306 HECTARES

THE FARM [.....],

IN EXTENT 67.3206 HECTARES

(herein after referred to as “the properties”)

be restored immediately;

2.2 The 1st and 2nd respondents are interdicted from trespassing the properties, in any manner, directly or indirectly;

2.3 The 1st and/or 2nd respondents are interdicted from removing and/or damaging the properties, the tree plantation, the any other trees, the buildings and/or the fence on the properties and/or erected on and around the properties;

2.4 The 1st and/or 2nd respondents are interdicted from burning and/or damaging and/or hunting any livestock and/or wild game, and/or letting any of the 1st respondent livestock and/or wild animals graze on or enter the property;

2.5 The sheriff of the High Court of South Africa, Polokwane (4th respondent), is authorized to immediately serve this court order on the 1st and 2nd respondents;

2.6 The 4th respondent is authorized to immediately serve this court order on the 1st and 2nd respondents by handing the 1st respondent a copy of the order and/or affixing a copy of the order to the main entrance of the property, as well as by serving a copy of this order on the 1st and/or 2nd respondent's Polokwane correspondent Attorneys of record;

2.7 The 4th respondent is authorized to see to the removal and/or return of any movable property removed from the said properties and/or on the said properties, as well as the removal of the 1st respondent and/or the 1st and/or 2nd respondent's agents or any such person acting under the instruction of the 1st respondent found to be on the properties;

2.8 The 3rd respondent is ordered and directed to freeze a total amount of R165 000.00 (One Hundred and Sixty-Five Thousand Rand) for safe keeping, held in the bank account of the 1st and 2nd respondents with the following details: -

Dr L RINGANE

ABSA Bank Savings Account

Account Number: [.....]

Branch Code: 632005

Alternatively

LINDIWE RINGANE

ABSA Bank Credit Account

Account number: [.....]

2.9 In the event the 3rd respondent not being able to freeze an amount of R165 000.00 (One Thousand Hundred and Sixty-Five Thousand Rand) in the abovementioned bank accounts, the 3rd respondent is interdicted from paying any amount of money from the 1st and/or 2nd respondent's bank accounts as stated here above in 2.8 and be authorized to freeze whatever amounts the 1st and/or 2nd respondent do have in any other and/or 2nd respondent to the maximum monetary value of R165 000.00 (One Hundred and Sixty-Five Thousand Rand) in total with immediate effect;

2.10 The 3rd respondent is interdicted from effecting payment of an amount of R165 000.00 (One Hundred and Sixty-Five Thousand Rand) from the abovementioned bank accounts in 2.8 to the 1st and 2nd respondents or any other bank account so elected by and on instructions of the 1st respondent, with immediate effect;

2.11 The 3rd respondent is ordered and authorized to immediately stop and reverse all payments pending to be made from the 1st respondent's bank accounts as stated in 2.8 here above.

2.12 The 3rd respondent is ordered and authorized to immediately effect payment of any and all amounts currently frozen by the 3rd respondent in the bank accounts of the 1st and/or 2nd respondents into the applicant's attorneys Trust bank account, CHARL NAUDEATTORNEYS, NEDBANK, Bank account Number 1[...],

Branch Code 198765 for safe keeping;

2.13 The 3rd respondent is ordered and authorized to keep the 1st and/or 2nd respondent's bank accounts frozen to the value of R165 000.00 (One Hundred and Sixty-Five Rand) pending the investigation and finalization of an action to be instituted against the 1st and/or 2nd respondents within 30 days from the date of this order in the above Honourable Court;

2.14 The 1st and 2nd respondents are authorized to immediately approach the above Honourable Court for a variation and/or alternative relief on the same application and order before court, if necessary;

2.15 The 1st respondent is ordered to pay the costs of the application on party and party scale

3. The sheriff is authorized to immediately serve this court order on the respondents;

4 Prayers 2, 2.1 to 2.15 above will be in the form of a rule nisi with immediate effect and with a return date on _____ at 10:00 on which date the respondents must show cause why the rule nisi must not be confirmed.

M.V SEMENYA

ACTING DEPUTY JUDGE PRESIDENT OF

THE HIGH COURT; LIMPOPO DIVISION.

APPEARANCES ATTORNEYS FOR THE APPLICANT : CHARL NAUDE ATTORNEYS COUNSEL FOR
THE APPLICANT : ADV. DIAMOND ATTORNEY FOR THE RESPONDANT : PHOSA LOOTS INC.
COUNSEL FOR THE RESPONDENT : ADV. RESERVED ON : 10 JUNE 2021

JUDGMENT

DELIVERED ON : 01 JULY 2021

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