

SOUTH AFRICA / JUDGMENT

L.G v Ndzeneni and Others (1832/2025)

[2025] ZAECMHC 55 (15 May 2025)

[2025] ZAECMHC 55**COURT**

Eastern Cape High Court, Mthatha

BEFORE

M W Nobatana

CASE / FILE NUMBER

1832/2025

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN CAPE****DIVISION: MTHATHA)****Case****:1832/2025****In the matter between:**

L[...]

G[...]

First Applicant

And

ANELISA

NDZEKENI

First Respondent

UNKOWN PERSONS ACTING

IN HIS

STEAD

Second Respondent

STATION COMMANDER,

MTHATHA

POLICE

STATION

Third Respondent

JUDGMENT

NOBATANA AJ:

- [1] The applicant issued papers from this court on the 15th of April 2025, in which she sought relief on an urgent basis, interdicting and restraining the first and the second respondents from continuing with construction in the applicant's site, pending the finalization of pending proceedings between the parties regarding the same site, and other ancillary relief. Such proceedings were said by the applicant to be pending in the opposed motion court under case number 5390/2021. The pending proceedings have not yet been allocated a date of hearing.
- [2] The applicant also, in her notice of motion, provided a truncated time table within which the parties more specifically the respondents must file opposing papers. The notice of motion, provided that the respondents must file such papers no later than 12h00 on Wednesday the 16th of April 2025. On the 15th of April 2025, my sister Noncembu J issued the following directive regarding the conduct of the matter "Respondents to be served by tomorrow, 16 /05/25 by 11h00. Matter set down for hearing at 14h15 on the 16th of April 2025".
- [3] The first respondent was served with the notice of motion and the founding affidavit, including the annexures thereto by the sheriff, at 8h34 on the 16th of April 2025, on the same day the parties appeared before me at 14H15, the first respondent had only managed to file a notice of opposition, and wanted more time to file and answering affidavit. After some discussions the parties agreed that the matter will be postponed for argument for the 25th of April 2025, and the first respondent respondent will file answering affidavit on the 22nd of April 2025. The first respondent made an undertaking not to continue with construction on the disputed property pending the final determination of this application. The first respondent filed her answering affidavit in this application on the 22nd of April 2025.
- [4] The applicant alleges in her founding affidavit that she is an adult residing at Rosedale location in the district of Mthatha. She was allocated the site by the then sub headman of Highbury location, one Vuyani Nyingwa "Nyingwa", the site was meant to be a dwelling settlement for his family which includes her children, S[...] G[...]; A[...] G[...]; L[...] G[...] and X[...] B[...]. At the time when the site was allocated to her, as aforesaid Nyingwa, was a chairman of the committee, which was elected and charged by the community with the task of allocating sites.
- [5] After allocation of sites, which included the site of the applicant, the committee prepared a list of the allocated sites and submitted it to the local chief Ntabozuko Njemla, for his approval. The applicant in her founding affidavit does not state whether chief Ntabozuko Njemla approved of the list, and what the duty of the chief was in

the process of the allocation of the sites. Importantly Nyingwa states in his confirmatory affidavit to the founding affidavit at paragraph 4 thereof that “I wish to emphasise that I am the one who wrote the letter dated 09 December 2021 which was confirming the allocation of the site to L[...] G[...] (sic)(the applicant) and at the time it was my tenure of being the chairperson of the committee so elected and further I was the sub headman, I wish to further confirm that it was me who submitted the name list to the local chief Ntabozuko Njemla to confirm such allocation and this site belongs to L[...] G[...] not to Anelisa Dzikeneni as she claim in the pending case.” There is no confirmatory affidavit to the applicant’s founding affidavit from chief Ntabozuko Njemla.

- [6] The applicant further states in her founding affidavit that on the 19th of December 2021, she instituted motion proceedings in this court, on an urgent basis under case number 5390/2021 referred to above, in which she applied for an interdict, interdicting the same respondents from continuing to construct on her site at Highbury location in the district of Mthatha.
- [7] She states that there were some court orders granted in her favour interdicting the same respondents in Case No.5930/2021, and one of such orders was later challenged by the first respondent in an application for rescission. The rescission application was granted on the 23rd of January 2025, as a result of first respondent, was given leave to file answering papers to oppose the said proceedings in case number 5390/2021 as aforementioned. All the papers in those proceedings have been filed, and the parties are awaiting the allocation of the date for argument of that application. The applicant has not attached any of the court orders referred to in her founding affidavit, she has also not made the file under case number 5390/2021 available to the court, at the hearing of this application.
- [8] She further states in her founding affidavit to this application that on the 14th of April 2025 at about 07h50 in the morning, she noticed that there are people continuing with the construction in her site, she approached them and enquired as to who had employed them to do the construction on the property, she was told by said builders that it was the first respondent. She tried to call the first respondent her attempt to do so was unsuccessful. She asked her child A[...] to witness the construction, and they also took photographs of the construction. She decided to approach her present attorneys of record and instructed them to institute the present proceedings.
- [9] The grounds for urgency, as stated in the applicant’s founding affidavit in this application are that the respondents are proceeding with the construction, without a court order, and are thus taking the law into their own hands, and that the court must intervene to stop the harm. The applicant concedes that she might be compensated by the applicant if she is successful, the first respondent will not suffer any harm, if the interdict is granted as she is fully aware of the pending court proceedings.
- [10] She states on the same breath that she does not have alternative remedy, she has a clear right, as she was lawfully allocated the site, as aforesaid. The harm that she is suffering as a result of the ongoing building is continuing. She further submits that the balance of

convenience favours the bringing of this application. She is awaiting the hearing of the application that is pending in the opposed court under case number 5390/2021, and that the action of the first respondent would stop her from getting substantial redress in due course. She submits in her founding affidavit to this application that she has accordingly met the requirements for an urgent interdict.

- [11] The first respondent filed her answering affidavit in this application on the 22nd of April 2021 in which she states that in 2015 the applicant together with other residents of Rosedale location approached the committee that is responsible for the allocation of sites in Highbury location, and requested to be allocated sites for residential purposes, in an unoccupied land in Highbury location. The allocation committee consisted of seven members who are all residents of Highbury location and not Rosedale location, who are as follows: Mbuyiselo Dyalvane; (chairperson of the committee); Vuyani Nyingwa; Nondwe Flara; Thandeka Mtyali; Phumeza Mapanzela; Xoliswa Mdolomba, and Welile Mzimane. The said members of the allocation committee were elected by the residents of High Bury location, including the local headman.
- [12] The allocation committee, according to the first respondent, took a list of all the persons who wanted to be allocated land in High Burry location. The said list included the name of the applicant. There was a territorial dispute between the residents of Rosedale and Mpindweni locations over preference to be allocated residential sites. Each side claimed preference vis a vis the other by the committee.
- [13] In June 2017, according to the first respondent, it was resolved, by the allocation committee that the sites must be allocated to the youth of Highbury, including members of the allocation committee, as a result no residential sites were allocated to the applicant as she was a resident of Rosedale location and not a resident of Highbury location. The site which is at the heart of the dispute between the applicant and the first respondent in this application was, consequently allocated to one, Phumeza Mapanzela "Mapanzela", who was at the time a member of the allocation committee, although according to the first respondent, the name of the said Mapanzela

does not appear in the allocation list. Mapanzela was allocated the site, on the basis of the resolution of the allocation committee, as pointed out above since she was a member of the allocation committee.

- [14] Mapanzela, having acquired the site on basis as set out above, sold the vacant site to the first respondent, for an amount of R60 000,00 in October 2017. The first respondent paid the purchase price in three instalments, which were paid through the medium of three electronic fund transfers by the first respondent to Mapanzela. Upon the payment of the purchase price as aforesaid, the first respondent took occupation of the property and fenced it. She later commenced construction of a residential home on the property.

[15] On the 19th of December 2021 as pointed out above[1], the applicant issued an application on an urgent basis under case number 5390/2021 in which she sought relief, that the first respondent be interdicted from erecting dwellings on the applicants allocated site, located at High Bury location and further that the respondents in that application be interdicted from demarcating and sub-dividing the applicant's site located in High Bury location, and that the demarcation and subdivision and further allocation of the applicant's site located in Highbury location, be declared to be unlawful and of no force and effect.

[16] The matter was postponed a number of times, and on the 25th of January 2022 my brother Nhlangulela DJP issued an order that the matter is postponed to the 1st of February 2022 for settlement purposes, further ordered, importantly, at paragraph 2 of the order, that:

"2. The respondent shall not continue to work on site until the matter is settled or finalised "

[17] Costs were reserved, on the 1st of February 2022, the matter was removed from the roll and the parties were directed to file papers in terms of an agreed timetable. During the argument of this application, both parties indicated to the court that all the papers were filed in compliance with this order, and all that they are presently waiting for is the allocation of a date for argument of the opposed application in the case number 5390/2021[2].

[18] On the 1st of August 2023, the first respondent was served with a court order dated 4th of April 2022, in terms of which she was interdicted from constructing on the property.

[19] The members of the allocation committee were also cited as respondents in that application, they included Mapanzela. In October 2022 the first respondent instituted proceedings to have the order rescinded. On the 23th of January 2025, the order was rescinded, the applicant was granted leave to file an answering affidavit in case number 5390/2021.

[20] She states that upon the order being rescinded, she commenced with construction on the site, and on the 17th of February 2025 she delivered her answering affidavit in case number 5390/2021. In the answering affidavit in case number 5930/2021 which was served on the applicant, she stated as follows:

"... I demonstrated that the applicant is not the owner of the immovable property, which has given birth to the current litigation. In this regard I attached an affidavit of the member of the committee who was [at the time] responsible for the allocation of sites at High Bury Location, who confirmed that no site was allocated to the applicant at High Bury location between 2013 and 2017; and

....I intimated to the applicant that, following the recession of the court order issued by the Honourable Madam Rusi J on 04 April 2022 and my attainment of the immovable property, I had commenced with the building of a house for my family, which would be complete by December 2025..." (emphasis added).

- [21] These allegations are also contained in paragraph 23.15 of the first respondent's answering affidavit to this application, as pointed out above, both parties confirmed that they have filed all the papers in the main application (case number 5390/2021). The first respondent further states, in her answering affidavit to this application that the applicant filed her replying affidavit, in the main application in March 2025(case number 5390/2021). The applicant replied to the allegation of continuing construction, para-phrased in paragraph 20 of this judgement that "...sic)(the)...issue of completing construction ...is also illegal and it was for this reason that the court needed to intervene...". According to the first respondent, the applicant became aware of the continuing construction on 17th of February 2025 when she was served with the answering affidavit in case number 5390/2021 and not on the 14th of April 2025, as alluded by her in the founding affidavit to this application.
- [23] The first respondent opposes the applicants application on the following grounds, that applicant has failed to set out any reasons which render the application urgent, and has failed to establish that she will not obtain substantial redress in due course, further more, if there is any urgency, in the matter it is self created, secondly she did not satisfy the grounds for the granting of an interdict, the relief sought by the applicant in the notice of motion is in its terms incompetent, the relief sought against the police is also incompetent.
- [24] The legal representatives for the first respondent did not indicate during argument that they were instructed to act for the third respondent (the police), and accordingly any submission made by them on behalf of the third respondent have not been taken into account for the purposes of this judgment.
- [25] It is was also not in dispute between the parties, that the order of my brother Nhlangulela DJP, referred to above[3], still stands and has not be rescinded or in any way been challenged, all that was submitted by Mr Ntकिनca, on behalf of the applicant was that, the applicant has alternate remedy to enforce the order of Nhlangulela AJP.
- [26] In view of the decision that I have reached with respect to the question whether this application is urgent, and the impact of the order of Nhlangulela AJP, it will not be necessary for me to deal with the other grounds on which this application is being attacked by the first respondent.
- [27] It is also important to state at the outset that the applicant did not file a replying affidavit, in these proceedings. This was raised by the court pertinently with the Mr Mkhongozeli, the attorney for the applicant who appeared on her behalf. He stated that he did not find it necessary to file a replying affidavit as the first respondent made common cause with the applicant on the crucial issue, according to him, of whether she was allocated the site by the allocation committee.

- [28] It is trite that if applicant fails to file a replying affidavit, to put in issue the allegations stated in respondent's affidavit such allegation, by the first respondent in this case, will stand as uncontested against the applicant. This will be crucial to my finding in this application for the reason that will appear below.
- [29] With regard to urgency the first respondent contends that the applicant has failed to set out facts from which it can be found that the matter is urgent, and that the applicant cannot obtain substantial redress indue course, and that if there is urgency in the matter the application cannot be treated as urgent as the urgency is self-created.
- [30] The applicant on other had in reply to the contention by the first respondent that the application is not urgent, contends that the fact that the first respondent on the 16th of April 2025 made an undertaking not to continue building on the property pending the final determination of this application, amounted to a concession on the part of the first respondent that the application was urgent. The first respondent disputes this submission that is made on behalf of the respondent and in doing so relies on the dicta by Harms J A (as he then was) in Memory institute SA CC t/a Memory Institute V Hansen and others (253/02) [2003]ZASCA44 2004(2)SA630(SCA) at paragraph 10 of the judgment where the learned Judge of appeal (as he then was) says : ‘...interim orders and rule nisi are not to be had simply for the asking. Courts should satisfy themselves that a proper case has been made out...’
- [31] I am in agreement with Mr Ntikinca for the first respondent, the fact that the applicant made an undertaking, does not amount to a concession that the matter is urgent, nor is a provisional ruling in a directive in terms of the directives of this division, the undertaking was made before detailed instructions have been obtained by the legal representative from its client. This was to ensure that all the papers are filed in terms of the timelines truncated by the applicant, in ensuring that on the date of the hearing the dispute is properly ventilated and a proper decision was taken after considering all the relevant facts and circumstances of this application. The first respondent cannot be prejudiced by his act of accommodating the applicant in these circumstances.
- [32] Further when a directive is issued, directing that the matter be heard as urgent, it is issued only on the version of the appellant, the version of the respondent is not taken into account at that stage. The respondent cannot lose his right to have his say which, is a conner stone of our legal system that both parties must be heard before a decision is made. I am for these reasons prepared, and will hear the first respondents submissions on urgency
- [33] Having perused the papers which constitute the record in this matter and having heard submissions from the parties, I am of the view from the applicants founding affidavit that the applicant has set out facts that render the applicant to be sufficiently urgent to be heard in term of rule 6 (12), however, the enquiry whether the application should be heard as an urgent one in terms of the sub-rule does not end there, it is trite that in addition a more immediate reaction by

the litigant to remedy the situation is necessary to establish urgency .The longer the applicant takes from the date of being aware

of the event giving rise to the injury sought to be interdicted , the more the urgency is undermined, thus the urgency must not be self-created.

- [34] The position in relation to delay in bringing an application was put as follows by Waglay J (as he then was) in *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another* (C1173/01 [2001]ZALC223(7 December 2001) “...if the applicant seek this court to come to its assistance it must come to the court at the very first opportunity it cannot stand back and do nothing and some days latter seek the courts assistance as a matter of urgency”
- [35] This matter is a typical example of an urgency that is self-created, for the following reasons, the uncontested allegation of the first respondent is that in her answering affidavit, to the proceedings under case number 5390/2021, which was served and filed on the 17th of February 2025, she stated to the respondent that “... I intimated to the applicant that, following the rescission of the order by the Honourable Madam Russi J on 4th April 2022 and my attainment of immovable property, I had commenced with the building of the house for my family, which I will complete by December 2025.” (emphasis added). This allegation as stated above is contained in paragraph 23.15 of the first respondent’s answering affidavit in this application, to which there was no reply from the applicant. It is uncontested.
- [36] Accordingly, applicant knew as early as the 17th of February 2025 that the first respondent was continuing with the construction of the house in the property that is the subject matter of this dispute in this matter, which is a period of exactly, two months before those proceedings were instituted as these proceedings were instituted.
- [37] The applicant did not in his founding affidavit, take this court into his confidence and state anything regarding such knowledge, she also did not see it fit when she was served with the answering affidavit in this application which contained this express allegation at paragraph 23.15, to file a replying affidavit to deal with the allegation. In reply to this allegation in the main application that is pending before court under case number 5390 /2021 the applicant merely stated “...(sic)(the)...issue of completing construction ...is also illegal and it was for this reason that the court needed to intervene...” she does not even warn the first respondent of her intention to institute these proceedings at that stage.
- [38] For this reason I find that the applicant being aware that the first respondent was busy with construction on the site, delayed for a period of two months to bring this application. I further find that the allegation in applicants founding affidavit in these proceedings, at paragraph 14 of the applicants founding affidavit, which is the foundation for his allegation that this application is urgent, which reads as follows, “on the 14th of April 2025 at about 07h50 in the morning I noticed that there were people who were busy constructing on my site at High Bury location...” is not a true account of the state of affairs in relation urgency in this matter.

- [39] The applicant was informed by the first respondent that she was continuing with construction on the site as early as the 17th of February 2025, he chose to ignore such a warning from the first appellant and only went to inspect the site two months later, hence this belated urgent application. This court cannot under these circumstances come to the assistance of the applicant.
- [40] There is another reason why this application cannot succeed, during the hearing of this matter, and this fact is confirmed by one of the orders annexed to the answering affidavit of the first respondent marked “AA 7”, and it was common cause between the parties that there was an order that was granted by Nhlangulela AJP , on the 25th of January 202, which interdicts the respondent from continuing with construction on the site, this is the same relief that the applicant is seeking in these proceedings, there is accordingly no basis for the relief sought by the applicant in these proceedings, let alone on an urgent basis, as the applicant has already been granted relief by this honourable court. These proceedings are an attempt by the applicant to obtain a duplicate relief that was already granted to her on the 25th of January 2022, it is an abuse of the processes of this court, and for this further reason no order can be granted in favour of the applicant, in this application.

[41] In the circumstances the following order will issue:

1. The application is dismissed with costs.

M W NOBATANA

ACTING JUDGE OF THE HIGH COURT

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Date heard

: 25 April 2025

Judgment delivered on : 15 May 2025

[1] In paragraph 6 of this judgment.

[2] See paragraph 7 of this judgment.

[3] At paragraph 16 of this judgment.

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