

SOUTH AFRICA / JUDGMENT

Mafube Coal Mining Proprietary
Limited v Buta and Others (LCC40/2024)
[2024] ZALCC 23 (18 July 2024)
[2024] ZALCC 23

COURT
Land Claims Court

CASE / FILE NUMBER
LCC40/2024

BEFORE
Ncube

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IN
THE LAND COURT OF SOUTH AFRICA
HELD
AT RANDBURG
CASE
NO: LCC40/2024

BEFORE:	HONOURABLE NCUBE J
	1.
	REPORTABLE: YES
	2.
	OF INTEREST TO OTHER JUDGES: NO
	3.
	REVISED. NO
	In
the matter between :	MAFUBE
	COAL MINING PROPRIETARY LIMITED
	and
	SOPHIE
	DLAMANGA BUTA
	ROSE
	BUTA
	THEMBI
	BUTA
	THEMBINKOSI
	BUTA
	AARON
	BUTA

JULIA
MENGAYI BUTA
JOHN
BUTA
JOSEPH
BUTA
ANY
UNKNOWN PERSONS HOLDING
OCCUPATION
UNDER THE LATE SIMON VELAPHI BUTA
ON
THE BUTA FAMILY HOMESTEAD
LOCATED
ON THE REMAINING EXTENT
OF
PORTION 4 OF THE FARM
NOOITGEDACHT NO. 417 JS
Applicant
First
Respondent
Second
Respondent
Third
Respondent
Fourth
Respondent
Fifth
Respondent
Sixth
Respondent
Seventh
Respondent
Eighth
Respondent
Ninth
Respondent

Heard:**Delivered:**

This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail. The date and time for hand-down is deemed to 18 July 2024 at 13h00.

JUDGMENT

Ncube J

Introduction

[1] This is opposed application in which the Applicant in its Amended Notice of Motion seeks the following relief:

1.1 THAT the Rule Nisi issued on 15 March 2024 be confirmed

1.2. THAT it be declared that the first to ninth Respondents are in contempt of paragraphs 3.1 to 3.4 of the interim interdict handed

down on 14 March 2024.

1.3. THAT it be declared that the burial of Mr Simon Buta at the Buta homestead located on the Farm Nooitgedacht 417 is unlawful and or illegal.

1.4. THAT thirteen Respondent and or the first to ninth Respondents are authorised and directed to take all steps that may be required to exhume the remains of Mr Simon Buta from the grave at the Buta Homestead and to reinter the remains at the New Graveyard or another suitable cemetery as may be agreed between the parties or directed by the court.

1.5 THAT the exhumation directed in paragraph 4 of the Amended Notice of Motion should be executed within 60 days of this court order

Condonation

[2] On 22 March 2024, Counsel for the applicant indicated that they will be amending their Notice of Motion and file a Supplementary Affidavit. I granted an order extending the Rule Nisi to 29 April 2024 and gave timelines for the filling of further papers. The applicant was ordered to file its supplementary papers by no later than the 8th of April 2024. The applicant failed to file its supplementary affidavit on 08 April 2024, hence this condonation application. The respondents contend that condonation should not be allowed since, while the delay is not inordinate, the reasons for the delay are lousy, unacceptable and self-fabricated.

[3] It is trite that in its determination of the condonation application the court will look at certain factors like:

- a) the degree of lateness
- b) the explanation therefore
- c) the prospects of success and
- d) the importance of the case[1]

In addition to the above-mentioned factors, the Constitutional Court has emphasised the interest of justice as the main consideration. In *Van Wyk v Unitas Hospital and Another*[2] the court held:

“This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of Justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the appeal and the prospects of success.”

- [4] The respondents concede that the delay in this case was inordinate. The explanation given for the delay is that the applicant was trying to have this matter settled out of court. Regrettably the respondents were not keen to have out of court settlement, they did not even heed the request from the applicant to be given an extension of time to file its supplementary affidavit. The applicant’s explanation is reasonable. Litigation is expensive and time consuming, not only to the parties but also to the court. If there is a way of settling a dispute out of court, that is a right direction to take. I would then grant the application for condonation of late filing of the applicant’s supplementary affidavit.

Facts

- [5] The applicant is the owner of the farm Nooitgedacht No 417 JS (“the farm”). The applicant has a mining right for coal on the farm having been granted such right on 30 August 2013 in terms of the Mineral and Petroleum Resources Development Act 28 of 2008. The farm in question was registered at the Deeds Office, in the name of the applicant on 09 November 2017. The applicant is an open- cast coal operation, producing seaborne traded thermal coal company at the Mafube Collery in the Mpumalanga Province.
- [6] The first to the ninth respondents (“the Buta family”)reside on the farm at the Buta homestead. The first respondent is the widow of the late Simon Velaphi Buta (“the deceased”) who passed away on 12 March 2024. The deceased was a labour tenant on the farm, for the purpose of the Land Reform (Labour tenant) Act, 3 of 1996 (“ the LTA”). The first to the ninth respondents all hold occupation on the farm as being members of the Buta family residing at the Buta homestead. For purposes of the LTA, therefore, the first to the ninth respondents are the associates of the labour tenant, the deceased.
- [7] There is an informal grave yard on the farm. The applicant refers to that graveyard as Grave yard 1. Some of the departed members of the Buta family and certain of their relatives, are buried in Grave yard 1. That graveyard is in the vicinity of the applicant’s active blasting operations. The distance between the applicant’s blasting operation and Graveyard 1 is 157. 2 meters. There are negotiations between the applicant and all families in the vicinity of the active blasting operation to relocate the families. The graves in Graveyard 1 are also being exhumed and relocated to another burial site. Many other families have relocated, except

the Buta family.

- [8] When the deceased passed away, the Buta family asked for permission to bury him on Graveyard 1. Permission was not granted but they were told by the applicants' representatives to bury at the new graveyard identified by the applicant. The meeting was held at the Buta family homestead and it was attended by representatives of the Buta Family, firm of attorneys for both the Buta Family, being Marweshe Attorneys and Werkmans Attorneys for the applicant. Mr Tony Mathe ("Mr Mathe"), a paralegal at Marweshe represented the Marweshe Attorneys at the meeting. The applicant offered to contribute R15 000.00 towards the funeral costs. The Buta Family rejected the offer of R15000.00 and rejected the proposal to bury the deceased at the New Graveyard. Instead, the Buta Family demanded a payment of sixteen million rand to the owner of the new farm where they chose to relocate to, so that the deceased could be buried on that farm. The applicant did not accede to that demand.
- [9] The applicant approached this court on urgent basis at about 15h46 on Friday 15 March 2024, seeking interim interdict preventing the burial of the deceased on graveyard 1. The application was electronically served on Marweshe Attorneys. Mabulenyana Marwashe acknowledged receipt of the application and indicated to the Registrar of this court, Mr Maqala, that his instruction was to oppose the application and that the respondents were going to file their answering affidavit on Sunday the 17th of March 2024.
- [10] I received the papers from the Registrar, Having read papers I, in terms of Rule 34(1) of the Rules of this court, dispensed with compliance with the Rules relating to form, service and time limits and treated the matter as urgent. I granted the interim interdict sought in the Notice of Motion and issued directives with regard to the filing of further documents. On Friday 15 March 2024, at 21:48, my Registrar ("Miss Mthembu") transmitted the interim court order to the applicant's attorneys. The said court order was not signed by the Registrar as he was no longer in the office. Miss Mthembu confirmed that a signed court order would be made available to the parties the following day which was Saturday the 16th of March 2024. The unsigned order was transmitted to Marweshe Attorney and was acknowledged by Mr Mathe at 21h40. The members of
- the SAPS also attended to Buta Family and informed them of the court order. On Saturday 16 March 2024, Miss Mthembu transmitted a signed but not stamped court order to the applicant's attorneys.
- [11] The applicant's attorneys transmitted the signed order to Marweshe Attorneys at 9:35 on 16 March 2024. The Buta Family took issue at the facts that the order was not stamped. This, despite the fact that I had condoned non compliance with the Rules relating to form[3] service and time limits. A signed and stamped order was transmitted to the applicant's Attorneys on Monday the 18th March 2024, which was subsequently transmitted to Marweshe Attorneys. Marweshe Attorneys informed Werkmans Attorneys that the burial had taken place despite the interim interdict prohibiting the burial. The deceased was burial

at the Buta homestead, which is in itself on the applicant's farm and without consent from the applicant.

- [12] The burial which took place at the Buta Homestead, compelled the applicant to amend its Notice of Motion and file a supplementary affidavit seeking an order of contempt of court and exhumation of the body of the deceased.

Issues

- [13] The first issue for determination is whether the Rule Nisi should be confirmed despite the fact that the burial has taken place. The second issue is whether the respondents did not comply with the court order. The final issue is whether the court should grant the exhumation of the body of the deceased.

Discussion

- [14] Both parties involved in this case seem to have some difficulties. The difficulty facing the respondents is that they did not file an answering affidavit to the applicants' original founding affidavit, they filed an answering affidavit to the applicant's supplementary affidavit. Consequently all the allegations made by the applicant in its founding affidavit, remain unchallenged. The second difficulty facing the respondents is that there is no connection between their answering affidavit, Heads of Argument and Mr Marweshe's oral argument in court. Many issues raised in the answering affidavit have been abandoned by Mr Marweshe

in his written Heads of Argument and in his oral submission in court. The issue of lack of jurisdiction, issue of Mr Mathe not authorised to accept orders on behalf of Mr Marweshe, the issue of Mr Marweshe not working over weekend and the issue of unsigned and unstamped court order. All these issues have been abandoned. The problem with this sudden unexpected abandonment is that the applicant prepared its replying affidavit in accordance with the answering affidavit and prepared to meet in court the argument which had been abandoned.

- [15] The difficulty facing the applicant is that the applicant amended its Notice of Motion but in the process the applicant, in so-called amended Notice of Motion, sought a completely new relief of contempt of court and exhumation. The so-called supplementary affidavit does not supplement anything in the original founding affidavit except to support the new relief sought in the amended Notice of Motion. They should have withdrawn the first application and bring a new one, seeking contempt of court and exhumation. Be that as it may, the respondents in their answering affidavit were able to respond to some, but not all the allegations raised by the applicant in the supplementary affidavit. As mentioned earlier in this judgment, allegations like lack of consent from the applicant, to bury the deceased at graveyard 1 and the right conferred by section 25(1) of the Constitution to the applicant, raised in the original founding affidavit, remain unchallenged as the respondents did not file an answering affidavit to the original founding affidavit.

[16] I turn now to deal with the question of whether the Rule Nisi should be confirmed or discharged. Mr Majozi, Counsel for the applicant persists that the Rule Nisi should be Confirmed and final interdict be granted. Mr Marweshe, Counsel for the respondents, contends that the matter is now moot since the burial has already taken place at the Buta homestead, therefore, the interdict in that regard, Mr Marweshe argued, will be rendered useless.

[17] The courts are not in the habit of granting orders which are brutum fulmen[4] In *N & Others v Government of South Africa & Others*[5] Nichol森 J spoke of a brutum fulmen being a 'useless thunderbolt. It is trite law that in order to obtain final interdict, there must be a continuing injury or a reasonable apprehension of future harm occurring. The purpose of an interdict is to protect an existing right, it is not a remedy for a past invasion of rights[6] In *NCSPCA v Openshaw*[7] Mhlantla AJA expressed himself in the following terms:

“ 20: An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate

only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing

nature or there must be a reasonable apprehension that it will be repeated.....

21:.....

22: If the injury complained of is one that prima facie appears to have occurred once and for all, and finished and done with, then the applicant should allege facts justifying a reasonable apprehension that the harm is likely to be repeated”

From the above, it is clear that the burial of the deceased has taken place. It will therefore serve no purpose at this stage to confirm the Rule Nisi.

[18] I now look at the question of contempt of court. I must hasten to mention that the applicant, in its supplementary affidavit, did not deal with the requirements for the contempt of court. The rule of law is one of the founding values of the Constitution. The rule of law demands that the dignity and authority of the courts, together with their capacity to carry out their functions, should be maintained[8]

[19] The following are the requirements for contempt of court to succeed.

- a) The existence of the court order
- b) The court order must be served or brought to the notice of the contemnor
- c) There must have been non-compliance with the court order
- d) The non-compliance with the court order must have been wilful or mala-fide

[20] It is common cause that the evening on the 15th of March 2024 this court granted an interim order interdicting the respondents from burying the deceased at Graveyard 1 or any other graveyard or any other properties owned by the applicant. The said court order, unsigned and unstamped as it was, as it was granted outside court hours was served on Mr Mathe a paralegal at Marweshe Attorneys. Nothing turns on the fact that the order was not signed and stamped. The matter was urgent. Non compliance with the Rules relating to form, service and time limits had been condoned.

[21] The second requirement is that the order should have been served or brought to the attention of the respondents. As mentioned before in this judgement, the order was served on Mr Mathe of Marweshe Attorneys. On Saturday 16 March 2024, the police also brought the order to the attention of the respondents at the Buta family Homestead. The Saturday order was signed but not stamped. That

Saturday order was also transmitted by the applicant's attorneys to Marweshe Attorneys. It is telling that the respondents

did not proceed with the burial on graveyard 1 despite the fact that they had prepared the grave there. Instead, they opted to bury the deceased at the Buta Homestead.

[22] However, for the respondents to be found to be in contempt of the court order, there must be evidence of non compliance with the court order. Restrictively interpreted, the court order did not prohibit the burial of the deceased on the Buta homestead. The interim interdict only related to Graveyard 1 "or any other graveyards on any other properties owned by the applicant". Therefore, on restrictive interpretation, the respondents did not contravene the court order. However, I am mindful of the fact that the burial at the Buta Homestead was without the consent of the applicant being the owner of the fam on which the Buta homestead is established. Having come to the conclusion that the requirement of non compliance with the court order has not been proved, there is no need to go further and look at the wilfulness and mala-fide requirements.

[23] I turn now to the question of exhumation. There is no dispute that the applicant is the owner of the farm on which the Buta Homestead is established. The respondents do not own the piece of land on which the deceased is buried. Although the applicant alleges in its founding affidavit that the deceased was a labour tenant, there is no evidence before this court that any Portion of the farm

is registered in the name of the deceased, as a labour tenant. The burial of the deceased on the Buta Homestead was without the consent of the applicant as the owner of the farm and there was no established practice of burying the remains of the deceased family members on the homesteads. Residence of farm occupiers and labour tenants on farms belonging to other persons is subject to terms and conditions set up by the landowner unless the court determines otherwise. The main consideration with regard to the use of land by occupiers and labour tenants is the consent of the landowner.

[24] The burial of the deceased on the farm without consent deprives the applicant of the use and enjoyment of its property. Section 25(1) of the Constitution[9] provides that no one may be deprived of his property except in terms of law of general application and that no law may permit arbitrary

deprivation of property. In paragraph 55 of its founding affidavit, the applicant states;

“ As demonstrated Mafube is the land owner of Nooitgedacht and enjoys the right not to be arbitrarily deprived of the use and enjoyment of its property as entrenchment in Section 25(1) of the Constitution of the Republic of South Africa, 1996”

There is no response to the above allegation from the respondents.

[25] In paragraphs 31, 32, 33.3 and 37 of its supplementary affidavit, the applicant alludes to the fact that the burial of the deceased at Buta Homestead was without its consent. The respondents in their answering affidavit, do not specifically address the question of lack of consent which is raised by the applicant. In my view, the lack of consent itself, without looking at other pieces of legislation and by-laws, renders the burial at Buta Homestead unlawful entitling the applicant to the exhumation relief. The applicant kindly offered to assist with payment of exhumation and reburial expenses.

Costs

[26] Neither party asked for an order of costs. In any event, the general practice in this court is not to make cost orders unless there are exceptional circumstances which warrant an award of costs. There is none in this case.

Order

[27] in the result, I make the following order:

1. The Rule Nisi issued in this court on 15 March 2024 is hereby discharged.
2. It is declared that the burial of Mr Simon Buta at the Buta Homestead located on the Farm Nooitgedacht 417 is unlawful.
3. The Thirteenth and first to ninth respondents are jointly and severally one acting the other to be absolved, ordered to take all steps that may be required to exhume the remains of Mr Simon Buta from the grave at the Buta Homestead and rebury such remains at the New Grave yard or any other suitable cemetery or site as agreed between the parties, or as identified by the applicant.
4. The exhumation order in paragraph 3 above, shall be executed sixty (60) days from the date of service of this order on the respondents.
5. The applicant is directed to render financial assistance with regard to exhumation and reburial expenses

6. There is no order as to costs

T Ncube

Judge of the Land Claims Court

Date of hearing: 29 April 2024 Date of judgment: 18 July 2024 For the Applicants: Adv Majozi
Instructed by Werkmans Attorneys Johannesburg For Respondents: Mr Marweshe Marweshe
Attorneys Sandton Johannesburg

[1] Melane v Santam Insurance C Ltd 1962 (4) SA 531 (A) at 532 B-E

[2] 2008(2) SA 472 (CC) Par 20

[3] My own emphasis

[4] A brutum fulum, is an empty threat, something that is ineffectual, a harmless thunder bolt.
Something that appears powerful or

threatening but is actually ineffective or meaningless. See Bryan A Garner (ed) Black's Legal
Dictionary (8ed).

[5] 2006

(6) SA 575 (D) Para 32.

[6] Phillip Morris Inc & another v Maribore Shirt Co. SA Ltd & Another 1991 (2) SA 720(A) at
735B

[7]

[2008] ZASCA 78; 2008

(5) SA 339 (SCA) at 347 C-F

[8] See Coetzee v Government of the republic of South Africa [1995] ZACC 7; 1995 (4) SA 631 (CC)
para 61.

[9] Act 108 of 1996

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