

SOUTH AFRICA / JUDGMENT

Maloko and Another v Mosimane and Others (1843/2011) [2013] ZANWHC 8 (31 January 2013) [2013] ZANWHC 8

COURT

North West High Court, Mafikeng

BEFORE

Gura

CASE / FILE NUMBER

1843/2011

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NORTH WEST HIGH COURT, MAFIKENG

CASE NO.: 1843/2011

In the matter between:-

KEELEDITSE MARTHA MALOKOFIRST APPELLANT

BAROLONG BOO TLOU TAU

TRADITIONAL COUNCILSECOND APPELLANT

And

TEBOGO MOSIMANEFIRST RESPONDENT

TSIETSO PIET DIRAPEDISECOND RESPONDENT

LAZARUS MOSIMANETHIRD RESPONDENT

JUDGMENT

GURA J

Introduction

[1] The appellant seeks an order as set out below:

“1.1. Declaring that the oral agreement purportedly entered into between the First Applicant, the First Respondent and Mand is invalid, unenforceable and of no force and effect:

- 1.2. Declaring that the First Respondent is not entitled to occupy House 2650A, Complex Section, Ganyesa ("the property");
- 1.3. Directing the First Respondent to vacate the property within 10 (ten) days from the date on which the order sought herein is granted;
- 1.4. That if the First Respondent does not vacate the property as aforesaid, the Sheriff for the district of Vryburg be and is hereby authorized and directed to take such steps as may be necessary to remove the First Respondent from the property;
- 1.5. That the costs of this application be paid by the First Respondent and in the event where any of the Respondents oppose this application, costs be paid jointly and severally, the one paying the other be absolved;
- 1.6 ---“

[2] All the parties (except the second applicant) are residents of Ganyesa, a rural village within the Ganyesa district. The second applicant is the Traditional Council of Ganyesa village duly constituted in accordance with the North West Traditional Leadership and Governance Act, No. 2 of 2005. Its seat of governance is situated at the Traditional Council offices, Ganyesa, North West province.

Factual Background

- [3] The version of the first applicant is as follows: She is the registered occupant and user of site No.2650A, Complex Section, Ganyesa. This is a residential site and her house is situated thereon. She inherited this site (and the house) from her late mother and the second applicant granted her the necessary authority to stay there.
- [4] Around 3 July 2010, the second respondent, who is the first applicant's nephew, arrived at the house in question with the first respondent. The two respondents then informed the first applicant that the first respondent wanted to take ownership over the property so that he could construct a business thereon. The first applicant refused to enter into those discussions because she knew that she was the sole owner of the property over which she paid yearly levies at the Traditional Council office.
- [5] The subsequent day, 11 July 2010, the two respondents came again and started to measure part of this site insisting that they were demarcating the portion on which the first respondent would erect a structure for business purposes.
- [6] On 14 July 2010, the third respondent summoned the first applicant and her brother, Samson Maloko, to the Magistrate office of Ganyesa. Upon their arrival there, they were informed that she (first applicant) had to sign a document for the renewal of her

old age pension. She was accordingly given a document which she signed. She realised only later that the document which she had

signed, had nothing to do with the renewal of pension benefits but was a sale agreement of her own residential property to first

respondent. Samson Maloko (Samson) also signed a similar document on that day. The two documents are entitled annexures C1 and C2 respectively.

[7] The contents of the two annexures are similar. I quote the relevant parts of Annexure C1 and C2.

“We have an agreement with Mr Isaac Tebogo Mosimane, ID No. 660707 5938080 that I sell part of my site no. 2650 A which is situated complex section at an amount of R6 000-00 which he has already paid. That is all I can say without any alteration.”

It appears that the second respondent also signed a similar affidavit wherein he purports to confirm the property sale agreement between the first applicant and the first respondent. The second respondent has no right to sell the property in question as he

has his own site.

[8] When she realised that she had been misled into signing annexure C1, the first applicant reported to the second applicant (the Traditional Council). During September 2010, the first respondent started digging the foundation on the site of the first applicant with a view to building a business structure. She reported this development also to the Traditional Council. The latter issued a

letter on 20 September 2010 to the first respondent directing him to stop any proposed construction on the first applicant’s yard pending the decision in the case which had been lodged at the office against the second respondent for allegedly selling the site in issue illegally.

[9] On 27 September 2010, the first respondent’s attorneys responded to the second applicant’s letter (of 20 September

2010) as follows:

“Our instructions are that our client entered into three different agreements with Moshweu Samson Malokwe, Tsietso Piet Dirapedi and Keeeditse Martha Maloko. In terms of the agreements the said three persons sold a certain portion of Site Number 2650A, situated at Complex Section Ganyesa for the amount of R6 000-00 to our client. The purchase price has already been paid. The portion that our client bought has already been fenced and he wants to proceed to build there. He is of the opinion that he may be in a position doing business during the beginning of December 2010.

In the meantime our client received a letter from yourself dated 20 September 2010 in which you requested him not to proceed with any building activities at the premises. Our client is not satisfied with the position as put by you, because he will be losing money if he can not proceed to immediately start building on the premises. All the building materials are already there and our client is ready to build.

We would like to receive your written confirmation within 7 (seven) days of date hereof that our client may proceed to erect the building as contemplated. By failure thereof we will have no other option as to approach the Court in this regard which we hope

would not be necessary.

We attached herewith copies of your letter dated 20 September 2010 as well as the three agreements for your ease of reference.

We await your urgent reply herein.”

[10] The first applicant is illiterate and can neither read nor write except to write her own name. When she signed annexure C1, no one explained to her what the actual contents of the document were. She admits however, that the first respondent’s brother,

Lazarus, handed

“over two amounts of R500–00 to Moshweu Samson Maloko, who is my brother and I respectively. I have never used such amount of money and it is still in my possession to date.”

The founding affidavit was deposed to on 15 August 2011.

[11] The first applicant stated that any member of the tribe who wishes to sell his/her fixed property shall do so only with the permission of the second applicant as custodian of tribal land. Any agreement for the disposal of land or fixed property which is not done in accordance with the customs of the Barolong Boo Tlou le Tau Ba ga Letlhogile is a nullity and unenforceable.

[12] The first respondent has put up a business building on the site in question and is now busy with the construction of the second structure. The effect thereof is that she (first applicant) has been totally deprived of the use and enjoyment of her site.

[13] The acting Kgosi of the tribe, who is also the chairman of the Traditional Council deposed to an affidavit confirming the version of the first applicant in so far as the procedure of disposal of land or fixed property in a tribal area is concerned.

[14] In his answering affidavit, the first respondent denies that the first applicant is the registered occupant of the property or that she has been granted the sole right to occupy the site for residential or any other purpose. The first applicant’s

mother, (who was also the mother to Samson Malokwe) was the rightful occupant of the property situated on site 2650A Ganyesa, until she died in 2005. For convenience, the latter will be referred to as the deceased.

[15] During her (the deceased) life time, the second respondent erected a house on that property (of the deceased). She then pronounced that the second respondent was the one who had to inherit her site since he was already resident there. Before her death, she formally handed the property over to the second respondent. The first applicant as well as Samson Malokwe

were all aware that the property belonged to the second respondent. The first respondent bought the property from three people namely the first applicant, Samson Malokwe (these two being the senior occupants of the property) and the second respondent (the rightful owner of the property). The portion which he bought is less than half of the whole site.

- [16] During 2009 the first applicant sold the property in dispute to a Chinese for R1 000-00. This transaction was subsequently disapproved by the second applicant who directed her to obtain the concurrence of the second respondent to the transaction. The second respondent refused to give such permission. The purported sale was then cancelled and the first applicant had to pay the

purchase price back to the buyer.

- [17] On 3 July 2010 the following people held a meeting at the said site: the first applicant, all respondents as well as Samson Malokwe, who is the brother to third respondent. In that meeting the parties discussed the sale to the first respondent of the very part of the site which she had previously purported to sell to the Chinese. The property which was subject to the discussion was not the whole site but less than half thereof. The five people agreed in that meeting that the first respondent would purchase the property at a cost price of R6 000-00. The first respondent paid the R6 000-00 purchase price which was shared between the first applicant, the second respondent and Samson Malokwe. When this money was paid over to the three, the third respondent was also present.
- [18] Subsequent to the meeting of 3 July 2010, the parties met again on the site which was then measured. The first applicant, second respondent, Samson Malokwe and first respondent were present. First applicant is the one who indicated where the boundaries of the sub-divided site had to be.
- [19] The first respondent denies that the third respondent summoned the first applicant and Samson Malokwe to Ganyesa magistrates office on 14 July 2010, for the alleged purpose of renewing her old age pension. On 5 July 2010 the first respondent took the second respondent to the magistrates office Ganyesa, for the purpose of confirmation of the sale agreement in writing and under oath. The only reason why only these two went to the Magistrates office is because the first applicant and Samson Malokwe were unavailable.
- [20] On 21 July 2010 the first applicant, Samson Malokwe and the three respondents again went to the Magistrates office to confirm the agreement in writing. The first respondent and Samson Malokwe each deposed to an affidavit confirming the sale and payment of R6 000-00. The said affidavits appear on paragraph 7 of this judgment. When these documents were signed, the five people were

present, the sixth was the Commissioner of Oaths, Mr John Mosebi. The latter explained the contents of the documents to the first applicant and Samson Malokwe in Setswana. The affidavits were taken down by Mosebi, and, after reading the contents over to them (translating them into Setswana) they each signed and took an oath.

[21] The first respondent admits that he received a letter dated 20 September 2010 from the second applicant which directed him to cease all construction and related activities on the property. The first respondent admits further that the second applicant has to confirm any purported sale agreement of a site or a house, but, he says, the administration of the second applicant's

office is not functioning properly to administer such a process. This was admitted by representatives of the second respondent in a meeting of 9 February 2011 at the office of the attorneys of the first respondent.

[22] Around 1996 the first respondent acquired a piece of land at Ganyesa next to where shoprite is situated. He constructed buildings which house eleven business premises. For him to acquire that site he never got any permission from the second applicant. He was granted that permission only six years after commencing business. It is common practice that people sub-divide land and erect business

premises within the residential area as there is no place which has been demarcated for businesses in Ganyesa.

[23] The first respondent avers that the reason why the two applicants want him evicted from the premises is because she (first applicant) told him initially when they met that there were many people who were interested in buying the particular portion of

the site. Some of these prospective buyers of the site were members of the second applicant. The first respondent has already spent about R700 000-00 on improvements on the property.

[24] The second and third respondents as well as Samson Malokwe filed affidavits wherein each confirms the allegations made by the first respondent in as far as it relates to them.

The Issues

[25] The dispute revolves around three areas:

1. Whether the first applicant was misled in order to induce her unduly to enter into the purported agreement;
2. Whether an agreement of sale, disposal or sub-devision of land in a tribal communal area is valid without the authority of the Traditional Council; and
3. Whether the applicants have made out a case for eviction.

Misrepresentation or undue influence

[26] Cloete JA made the following observations in *Brink v Humphries & Jewel (Pty)Ltd* 2005 (2) SA 419 (SCA) at 421 F-G:

“The law recognises that it would be unconscionable for a person to enforce the terms of the document where he misled the signatory, whether intentionally or not. Where such a misrepresentation is material, the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth.”

In *George v Fairmead (Pty)Ltd* 1958(2) SA 465 (A) at 472A Fagan CJ stated that:

“--- the party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was signifying his assent. That must, in each case, be a question of fact, to be decided on all the evidence led in that particular case.”

[27] Although the first applicant is illiterate and old, I am satisfied that she knew fully well what she was doing when she signed annexure C1. She intended to sell that property and she did sell it to first respondent for R6000-00. She received R500-00 from

the first respondent's brother (according to her) which she did not use and kept for more than one year because she did not know what the payment was for. In my view, this is a wilful perversion of the truth. She would not have received R500-00 and her brother also R500-00 for renewing her old age pension. In her own words, that was not the pension payout day. What is surprising is that all people who witnessed this “fraudulent” sale have all of a sudden turned against her. Even her own brother, Samson Malokwe/Maloko confirms the version of the first respondent.

[28] The evidence which points to the first applicant as a willing party to the proposed land sale transaction is overwhelming. There was therefore an agreement of sale between the parties and each party (first applicant and first respondent), performed her/his part of the agreement. Public policy demands that one who enters into an agreement with his/her eyes wide open should not be allowed to avoid his/her obligations in terms of the agreement. The Court accordingly finds that no misrepresentation induced the first applicant to sell part of her site to the first respondent.

Sale, disposal or sub-division of land in tribal communal areas.

[29] Mr Chwaro, for the two applicants, submitted that even if the purported agreement is upheld by the Court but the sale agreement has to be nullified because there was non-compliance with the tradition, custom and customary law of the Barolong Boo Tlou le Tau in regard to the procedure for the disposal of communal tribal land. Mr Strydom, for the respondents, submitted that the first applicant should have resorted to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No.19 of 1998 (PIE) in order to evict the first respondent. In my view, PIE has no application in this situation.

[30] In Section 211 of the Constitution of the Republic of South Africa Act, No. 108 of 1996, the institution, the status and the role of traditional leadership is recognised. Section 4(1) (l) of the Traditional Leadership and Governance Frame Work Act, No. 41 of 2003 provides that the Traditional Council must perform the functions conferred by customary law, custom and statutory law consistent with the constitution. The above provision is further

emphasised in section 9 (1)(a) of the North West Traditional Leadership and Governance Act, No. 2 of 2005. In *Alexkor and Another v The Richtersveld Community and Others*

[2003] ZACC 18; 2004 (5) SA 460 (CC) at par. 51 the court clarified the position as follows:

“While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the constitution. The courts are obliged by Section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law.”

[31] Langa DCJ (as he then was), in *Bhe and Others v Magistrate, Khayelitsha and Others* [2004] ZACC 17; 2005 (1) BCLR 1 (CC) at 16E – 17A confirmed what was stated in *Alexkor* about the status of customary law as follows:

“This approach avoids the mistakes which were committed in the past and which were partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of the common law or other systems of law. That approach also led in part to the fossilisation and codification of customary law which in turn led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances. This no doubt contributed to a situation where, in words of Mokgoro J

‘customary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community.’

[32] Tribal communal land is not subject to private ownership by an individual, because it (land) is jointly owned by all members of that community/tribe. Therefore, the system of private land ownership in traditional customary law is unknown. Not only does

this custom apply to Barolong Boo Tlou le Tau but it is common to most areas across the Republic. The Traditional Council, under the chairmanship of the Kgosi, has a primary responsibility to monitor and authorise disposal of land, for whatever purpose. Any purported transfer or sub-division of land would be void if it is not done with the approval of the Traditional Council. To hold otherwise would be tantamount to dethroning the system of traditional leadership. How else is any government in charge if it has no say over the disposal of land in its own area of jurisdiction? See Bennett TW, *Customary Law in South Africa*, 2004 especially at 378 to 383.

[33] The first applicant exercised a right of use over her site but this is not equivalent to a right of ownership. She had no power to sub-divide it and to sell it to the first applicant unless the Traditional Council authorised the sale agreement. The purported agreement between the parties is therefore void.

Eviction

- [34] I must emphasise that the fact that the Traditional Council or Bogosi of any tribe is semi paralysed does not render tribal communal land to be a free-for-all commodity. Even in that situation communal tribal land is and still remains the property of the tribe. In situations such as these, the relevant provincial government department must see to it that service delivery is not compromised. It is unacceptable that sellers and prospective buyers who intend to dispose of their land/sites should be kept waiting for years, whilst the people who are supposed to govern are at each other's throats about who is the rightful kgosi/member of the Traditional Council.
- [35] The first respondent has made serious averments about the inefficiency of the Traditional Council. In one instance he got the authority to operate business some six years after he acquired the site. This is poor administration on the part of the second applicant. None of all these disparaging allegations made against the second applicant has been denied. I accept therefore that

the second applicant is almost dysfunctional. However, in the present case, the first respondent and the first applicant never approached the second applicant for the necessary authority. When he was busy digging the foundation of the building in order to start the construction, the first respondent was warned by the second applicant that he needed its authority to do so. He ignored the letter. He missed his earliest chance when he would have obtained the necessary authority. He cannot complain therefore that he was not given chance by the Traditional Council to exercise his right to be heard. With that knowledge, the first respondent continued to put up a structure with an estimated value of R700 000-00.

- [36] The problem which I have in evicting the first respondent is that restitution appears almost impossible. He paid R6000-00 for the site. There is no tender from the first applicant or any undertaking that what he has paid for the site will be repaid to him if he is evicted. As at the time of the hearing of this application, the first applicant had unfortunately passed on. At the time of her demise, she was an old age pensioner. The executor of her estate was joined in this matter to represent her estate. There is a probability that the estate of the first applicant will not be able to meet any claim from the first respondent. If no restitution is possible, the estate of the first applicant will have been unduly enriched. What is worse is that she (the first applicant) is as guilty as the first respondent – both of them failed to notify the authorities about the proposed transfer of land. Clearly, the first respondent cannot be expected to bear the brunt of this improper sale of land alone.
- [37] The first respondent has stated that there are many such improper land transactions but that he has been singled out because some members of the second respondent have an interest in the sale of this site. Again there is no denial of this serious averment.

The court will therefore approach the matter on the basis that improper land transactions are the order of the day at Ganyesa. It would be unfair, in my view, to single out the first respondent especially that this matter first came to the attention of the second applicant through the report by the first applicant which was based on lies. The second applicant never on its own approached Court to evict him. All it did was to join in the application as the second respondent.

[38] Another aspect which militates against eviction is that the first applicant is not a stranger in Ganyesa. He is an established businessman who already serves the very same community with six businesses. He appears to be part and parcel of the Barolong Boo Tlou le Tau. Eviction, in my view, would serve as an unjust recompense for the necessary services which he is already rendering

to the community.

[39] There is one last point which is very important. From the papers before me, it seems that the first applicant was not the only rightful owner of the site. Samson Moshweu Malokwe refers to this piece of ground as “my stand”. The second respondent

also refers to the very same site as “my stand”. See Annexures C2 and C3 in that regard. Incidentally, the last two

“owners” (Malokwe and second respondent) are happy about the sale of this site to the first respondent. They expressed their wish that he should remain on the site. These last two people are close blood relatives of the first applicant and they may be possible heirs to her estate.

[40] Taking into account all these facts and the circumstances of the case, it would be unjust and unfair to evict the first respondent.

Costs

[41] Although the first applicant did not approach court with clean hands, she is partly successful because the transaction falls to be nullified. Her dishonesty to Court however, had the result that the papers became prolific. If she had not denied, falsely, that she was a willing seller, the first respondent’s answering affidavit would have been crisp and short. Under the circumstances, I think it would be proper that she should be deprived of costs which she normally would have been entitled to. As regards the second applicant, it is also successful because the said sale is void. However, the second applicant’s ineffective administration is one major reason why its subjects are not taking it seriously. Clearly, the second applicant cannot benefit from its own inaptitude. To award costs in favour of the second applicant under these circumstances may lead others to think that the game is worth a candle. All the respondents opposed this application and they have lost, no valid land sale agreement was reached. None of them is entitled to an order of costs in his favour.

[42] Consequently, the following order is made:

1. The sale agreement of site No. 2650A, Complex Section, Ganyesa to the first respondent is void and unenforceable; and

Each partly is to pay its own costs.

SAMKELO GURA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING: 18 OCTOBER 2012

DATE OF JUDGMENT: 31 JANUARY 2013

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ATTORNEYS FOR RESPONDENTS: SMIT STANTON INC.

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