

SOUTH AFRICA / JUDGMENT

Mapungubwe Game Reserve and Another v Small (7861/2020) [2021] ZALMPPHC 37 (2 February 2021)

[2021] ZALMPPHC 37

COURT

Limpopo High Court, Polokwane

BEFORE

E M Makgoba

CASE / FILE NUMBER

7861/2020

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: 7861/2020

In

the matter between:

MAPUNGUBWE
GAME RESERVE
FIRST
APPLICANT
(Registration
Number 200[...])
LEIF
ERIC RAHMQVIST
SECOND
APPLICANT
and
EUGENE
SMALL
RESPONDENT
(Identity
Number: 6[...])

JUDGMENT

MAKGOBA JP

- [1] The Applicant brought an urgent application against the Respondent for an order in the following terms:
1. The application is dealt with in accordance with the provisions of Rule 6 (12) as urgent, thus dispensing of the normal time limits as provided for in Rule 6 of the Uniform Rules of Court:
 2. Pending finalisation of an action in this Court with case number 5016/2019 between First Applicant and Respondent, alternatively the lapsing of a disputed lease agreement (and its addenda) between the First Applicant and Respondent on 31 May 2022, whichever comes first
 - 2.1. The Respondent is ordered NOT to interfere (in any manner whatsoever) with any of Second Applicant's right pertaining to hunting activities, inspection and visitation of and to the First Applicant's game farms in Limpopo Province, Alldays District, to wit Modina, Pindrift, Onrust, Kruidfontein, Vergenoed, Wildpan, Parma, Princess Royal, Montrow and Sommerville
 - 2.2. The Respondent is ordered, as and when necessary, to accommodate and safely co-ordinate Second Applicant's and / or guests' hunting trips, inspections and visitation to the First Applicant's farms.
 3. That the Respondent be ordered to pay the costs of the application on a scale as between attorney and client, including the cost consequent upon the employment of both junior and senior Counsel.
 4. Further and / or alternative relief.

- [2] The purpose of this urgent application is essentially to obtain urgent interim interdictory relief in terms whereof the Respondent is ordered NOT to interfere with any of Second Applicant's hunting activities, inspection and visitation of and to the game farm, pending finalization of a pending action in this Court with case number 5016/2019, between First Applicant and Respondent, alternatively the lapsing of an agreement between the First Applicant and Respondent on 31 May 2022, whichever comes first. The Second Applicant seeks, pending the finalization of the main action, an interim interdict giving him the right to partake in recreational hunting on the properties which have been leased to the Respondent.
- [3] The urgent relief is premised on the fact that Applicants will not attain redress in the normal course of events in the opposed motion Court before March / April 2021. The Applicants allege that the Respondent was properly notified of such reserved time period but Respondent bluntly denied any rights of Second Applicant to hunt or inspect First Applicant's game farm.
- [4] It is common cause that in June 2012 the First Applicant entered into a lease agreement in terms whereof the First Applicant let to the Respondent game farms for a period of 9 (nine) years and 11 (eleven) months commencing from 1 July 2012 and coming to an end on 31 May 2022.
- [5] A dispute has arisen between the parties where the Second Applicant states that he has hunting rights on the leased game farm and on the other hand the Respondent disputes such hunting rights and avers that he has in the past only granted the Second Applicant an indulgence to hunt on the game farm. That the Second Applicant has no right in terms of the lease agreement to hunt on the game farm.

There is no dispute that the Respondent has at all times relevant hereto allowed the Second Applicant to enter the game farm for visitation with the purpose of inspecting the leased farms as stipulated in the lease agreement.

- [6] In essence, this Court must decide two issues;

6.1. Whether this application is urgent; and

6.2. Whether the lease agreement permits the Second Applicant, his friends, family, clients and business associates and that of his companies to hunt upon the leased game farms.

- [7] In opposing the application the Respondent contends that the application is not urgent and it does not justify that it be heard on such an extremely urgent basis. That there is no "blood on the wall" nor has irreparable harm been illustrated – on the contrary the dispute appears to have come over a number of years. The Respondent contends further that the Founding Affidavit does not even contain a proper inference of facts which would amount to true urgency.

The contention of the Respondent is further that the Applicants have alternative remedies and that the balance of convenience is against them.

See *Sikwe v SA Mutual Fire & General Insurance Co Ltd* 1977 (3) SA 438 (W) at 440

The Respondent contends that the application can, for present purposes, be disposed of on the point in limine raised by the Respondent in respect of the lack of urgency.

[8] I proceed to deal with the issue of urgency, and only in the event of my finding that the application is urgent, I shall proceed to deal with the merits of the case.

[9] First and foremost it is appropriate to introduce the relevant parties to this matter and their respective roles in this matter:

9.1. The First Applicant is a juristic person (a company) that is the owner of various portions of land situated in the Limpopo province, constituting approximately 25 000 hectares of game farm property.

9.2. The Second Applicant is the sole director of and 100 % shareholder in the First Applicant, a businessman residing in Europe (Sweden) with various business associates from European based companies.

9.3. The Respondents cites himself as an adult businessman, registered as a professional hunter and hunting outfitter. It is further common cause between the parties that at this stage the Respondent resides and conduct his business as professional hunter and hunting outfitter on the game farm property owned by the First Applicant.

The legal nexus between the parties arises from a lease agreement that was concluded in June 2012, amended in April 2015 and again in January 2016. In essence, the lease agreement stipulated the terms of use of the game farm property on part of the Respondent (commercial hunting and ancillary use associates therewith) and the concomitant remuneration that the Respondent must pay to the First Applicant for said use. Respondent's hunting was, however limited to a quota of various types of wild animals and a specific number at a price.

[10] As a basis for urgency the Applicants rely on a letter dated 17 November 2020 from Respondent's attorneys, which letter they refer to as a "trigger event". The said letter was received in reaction to a letter from the Applicants' attorneys in respect of the hunting rights and occupancy rights arising from the lease agreement.

The responding letter from Respondent's attorneys dated 17 November 2020 stated that

".....our clients instructions are and always have been that your client was accommodated by our client and that, even though your client had no right to hunt on the properties, our client allowed him to do so on due notice and on dates that would not affect our client's

hunting activities. However, since your client's various repudiations of the agreement, our client is no longer prepared to tolerate any further hunting by your client..... your client has no right to hunt on the properties".

[11] The Second Applicant states that it is the said indication that the Second Applicant had no right to hunt on the game farm property which prompted the institution of the present urgent application. The present urgent application was instituted on 14 December 2020. Irrespective of the "trigger event" on 17 November 2020, the institution of the urgent application was delayed by a full month. The Respondent contends that this demonstrates that the application is not urgent or that the urgency is self created.

[12] The Respondent has countered the allegation that the letter of 17 November 2020 was a "trigger event". The Respondent contends that the statement that he has exclusive right to hunt was made already as far back as in his attorneys letters of 1 October 2019 (attached as annexure AA7 to the answering affidavit) and of 17 June 2020(attached as annexure AA14 to the answering affidavit). Therefore, the alleged "trigger event" occurred more than a year before the present application. The repeat of the statement on 17 November 2020 does not again give rise to any contorted form of urgency.

[13] The contents of annexures "AA7" and "AA14" are as follows.

On 1 October 2019 in a letter (Annexure AA7) Respondent's attorneys stated that

"Once again we wish to stress that all hunting rights on the property have been ceded(sic) to our property and that our client conducts safari operations thereon"

On 17 June 2020 (Annexure "AA14") it was again stated:

"Our client has the exclusive right to hunt on the property and any attempt by your client to interfere with our clients business shall be met with an interdict"

This is more than a year before this application was instituted on 14 December 2020.

[14] Between the versions of Applicants that the trigger event is the letter dated 17 November 2020 and the Respondent's version that the statement that he has exclusive right to hunt was made already as far back as on 1 October 2019, and 17 June 2020, I accept the version of the Respondent. The Respondent's version is cogent and acceptable moreso that it is supported by the two letters attached as annexure to the answering affidavit.

It is abundantly clear from the correspondence exchanged between the parties and in fact from the Applicants' own version that the disputes have been in existence for a very long period of time.

- [15] On the Applicants' own version that the "trigger" to the present application is a letter dated as far back as 1 November 2020 and also on the version of the Respondent regarding the letters dated 1 October 2019 and 17 June 2020, I come to a conclusion that this matter is not urgent, regard being had to the fact that the Applicants instituted the present proceedings on 14 December 2020.
- [16] The Second Applicant states that he wishes to exercise his hunting rights and has planned to hunt during March/ April 2021. The second basis of urgency is stated in paragraph 18.7 of the founding affidavit where the Second Applicant stated that he is 78 years old and "although fit and medically healthy" he is "acutely aware that I may not have many opportunities left to exercise all my ownership rights in respect of the game farms ".

The loss of a hunting opportunity on the leased premises can never be said to amount to true urgency or to the suffering of irreparable harm.

Even the loss of some sort of recreational activity can hardly be said as being urgent.

- [17] The Second Applicant wants to hunt in March/April 2021. According to him if this application waits he will be inconvenienced as the matter may not be heard in time for him to make arrangements. The urgency is based upon the inconvenience which the Second Applicant may suffer if he has to wait for the normal opposed roll to enforce his right to hunt on the farms which the First Applicant leased to the Respondent. In my view what is at best inconvenience can never amount to urgency.
- [18] The highwater mark of urgency in this matter is that the Second Applicant does not want to wait for the finalisation of this application on the normal roll as it may interfere with his hunting trip which he plans for March/April 2021. The Second Applicant creates a false impression that he needs to have clarity to apply for a visa, but is caught out as already having a valid visa. This militates against this Court granting any indulgence concerning urgency in the matter. In any event, the relief sought by the Applicants in this matter is not necessary to be able to apply or obtain tourism visa's. The Second Applicant is simply creating a false impression of some spectre of urgency existing when there is none.

- [19] Rule 6 (12)(b) of the Uniform Rules of Court provides:

"In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth

explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded

substantial redress at a hearing in due Course".

Upon perusing the Applicants' Founding Affidavit, my view is that same does not contain explicit circumstances which they aver render the matter urgent or a proper inference of facts which amount to true urgency. The importance of the provisions in Rule 6(12)(b) is that the procedure set out in Rule 6(12) is not there for the mere taking.

[20] Notshe AJ said in *East Rock Trading 7(Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 as follows:

"[6] The import thereof is that the procedure set out in rule 6(12) is not there for the taking. An Applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in a application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

[21] The present application is not urgent and it does not justify that it be heard on an urgent basis. The matter falls to be struck off the roll.

I have not dealt with the merits of the case.

The Applicants are at liberty, if so advised, to proceed with the matter at a hearing in due course in the opposed motion roll.

[22] The application is struck off the roll with costs on party and party scale.

E M MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES For the Plaintiff : Adv. J Roux SC Adv. CGVO Sevenster Instructed by : Erwee Incorporated c/o DDKK Attorneys For Defendant : Adv. RJ Groenewald Instructed by : Joubert & May c/o Kampherbeek & Pogrand Attorneys Heard on : 26 January 2021

Judgment

delivered on : 2 February 2021

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