

SOUTH AFRICA / JUDGMENT

Mier Local Municipality v Kootjies and Others (2267/2015) [2016] ZANCHC 81 (16 September 2016) [2016] ZANCHC 81

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

2267/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Case

number: JA 78/10

Case

No : 2267 /2015

Heard

on: 22/06/2016

Delivered

on: 16/09/2016

In

the matter between:

MIER
LOCAL MUNICIPALITY
Applicant
And
JOHANNES
KOOTJIES
1st
Respondent
JAMES
MALGAS
2nd Respondent
DEPARTMENT
OF MINERAL RESOURCES
3rd Respondent
NORTHERN
CAPE PROVINCE

JUDGMENT

MAMOSEBO J

- [1] The applicant, Mier Local Municipality, has invoked the *rei vindicatio* remedy against the first and second respondents, Mr Johannes Kootjies and Mr James Malgas, respectively. It also sought the striking down of the respondents' supplementary answering affidavit as well as a cost order jointly and severally, the one paying the other to be absolved. No relief is sought against the third respondent, the Department of Mineral Resources, Northern Cape.

Preliminary

issues

- [2] The respondents raised the following points in limine: First, that the person acting on behalf of the Municipality has no *locus standi* to bring the application; secondly, whether the Municipality is the owner of Portion 0 of Erf [...] Mier, and whether the said property does in fact exist.

The authority of Mr Josef Willemse, to institute proceedings on behalf of the applicant.

- [3] Mr Josef Willemse, the Acting Municipal Manager, Mier Municipality, launched this application on behalf of the Municipality. He alleged that he is duly authorised to do so by virtue of the delegated powers vesting in him by his appointment. Ms Stanton,

counsel for the applicant, argued that Mr Willemse has delegated powers in terms of s 55 of the Local Government: Municipal Systems Act, 32 of 2000. The respondents state that there was no proper proof of authorisation to satisfy the Court that the Manager acted on a specific or general authorisation.

- [4] In *Manana v King Sabata Dalindyebo Municipality* [2011] 3 All SA 140 (SCA) at 145f-g (para 17) Nugent JA held:

‘[17] In my view s 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive authority –

which includes the authority to appoint staff – in the municipal council and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in the statute in that respect it must be construed to avoid that result”

- [5] The full bench in *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) at 36A – B (para 8) pronounced:

“It is clear that, where authority is challenged in the answering affidavit, it is permissible to make out a case in reply [Moosa and Cassim NNO v Community Development Board 1990 (3) SA 175 (A) at 180H – J]. It is further clear that, even if the authority was not in place when the litigation commenced, actions taken can be ratified subsequently. This was fully dealt with in Smith v KwaNonqubela Town Council [1999

- (4) SA 947 (SCA); [1999] 4 All SA 331 at para 11] where the following was stated:

‘It was further argued that, after an objection has been taken to the authority of a person to act on behalf of another, reliance may not be placed upon a ratification that did not exist when the objection was taken....Lest there be any future doubt about the matter, this judgment holds that the point is bad....’

The full bench continued to state the following at para 10E:

“[10]Since s 151(2) of the Constitution vests the executive and legislative authority of a municipality in its

municipal council, it was necessary for the council to have delegated the power to institute legal proceedings. Such a delegation must be in writing. Absent such a delegation, a council resolution was required to empower an official to institute court proceedings on its behalf.....”

- [6] The applicant had the opportunity to correct the objection taken in reply by filing a written delegated authority but has failed to do so. However, based on the correspondence by the Municipal Manager addressed to Mr Malgas dated 16 March 2015 outlining the requirements to be met as well as inviting the respondents to make submissions to the Standing Committee of the Council; the invitation of the respondents to make their submission before the Municipal Council on 15 September 2014; as well as the involvement of Mr Mienies, the Municipality’s Technical Manager, it is evident that the Municipal Manager was not on a frolic of his own and that the Municipal Council sanctioned what he had been doing and in fact by necessary implication subsequently ratified it. See also below paras 18 and 23.

Applicant has not proved that it is the owner of Portion 0 of Erf [...] Mier and that this property does in fact exist

- [7] The respondents maintained that after conducting searches not only in the Surveyor General's office but also in the Deeds Registry, they could not trace property known as Portion 0 of Erf [...] Mier. They therefore concluded that the property does not exist. Although the Municipality initially conceded that it may not be the registered owner of the said property it then submitted that there is a legal presumption that a municipality is deemed to be the owner of the land. The respondents contended that since the land was not surveyed the Municipality cannot claim with certainty that the respondents are indeed occupying Portion 0 of Erf [...] Mier or not.
- [8] The Municipality subsequently attached the Deeds Office Property copy obtained from the Vryburg Deeds Office on 04 May 2016 at 12h34 to its heads of argument and furnished a copy to the respondents' counsel. Discerned from the document is that the property is registered as a farm under the name Mier No [...] Portion No 0 under Diagram Deed T348/1989 in extent 5033.2613H. It also shows that Mier Local Municipality has been the sole owner thereof. The information on this document is, in my view, dispositive of the uncertainty whether the property known as Mier, [...], 0 (Remaining Extent) existed. Ironically, the respondents are mute as far as this copy, which was furnished to them prior to the matter being argued, is concerned. The points in limine raised by the respondents in this regard must therefore fail.

I therefore find that the applicant is the owner of Portion 0 of Mier [...], Northern Cape.

The additional affidavit (supplementary answering affidavit)

- [9] The respondents have filed a supplementary answering affidavit which the applicants applied for it to be struck out because no leave was sought from the Court. Ms Stanton submitted that allowing the additional affidavit would be prejudicial to the Municipality since it will have no opportunity to also file an additional set.
- [10] Mr Slabbert, counsel for the respondents, argued that it is within the discretion of the Court to depart from the Rules in the interests of Justice. Counsel submitted that should the court be inclined to disallow the additional affidavit, the respondents would suffer prejudice. Ms Stanton further argued that the motivation for allowing the additional affidavit should have been stated in an affidavit, particularly in that they are raising the mala fides of the attorney who may have ill-advised the respondents. Ms Stanton argued further that it was not acceptable for the respondents' counsel to try and make out a case from the bar or in the supplementary answering affidavit.
- [11] Rule 6(5) (e) of the Uniform Rules of Court stipulates:

"Within 10 days of the service upon him of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule

- (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.”

On this aspect Erasmus AJA made the following remarks in *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013

- (1) SA 161 (SCA) at para 11:

“[11] Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its

discretion in this regard where there is good reason for doing so.”

- [12] In *James Brown & Hamer (PTY) LTD (Previously Named Gilbert Hamer & Co LTD) v Simmons*, NO 1963 (4) SA 656 (A) at 660D – F Ogilvie Thompson JA made this authoritative pronouncements:

“It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received.”

- [13] It seems to me that the motivation for the respondents to file the additional affidavit was informed by the Municipality’s reply pertaining to the ownership and identification of the property. Although initially the Municipality used the phrase: “registered

owner of Portion 0 of Erf [...] Mier” but in its reply it then said “although the property is not registered in a Deeds

Office, it is deemed to be the property of the Municipality in which the immovable property is situated. The Municipality briefly relied on custom or a presumption for ownership it subsequently filed a document from the Deeds Registry that confirmed ownership of the said property to support the relief sought to evict the respondents. Ownership of the Mier property is now settled.

- [14] It remains unclear why the respondents failed to launch a substantive formal application for leave to file the additional affidavit. What is further significant is that they seem to have made out their case in the supplementary answering affidavit which runs from page 70 – 105 of the paginated papers. *Dlodlo J in Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) at para 13 said:

“Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as pro non scripto.”

- [15] Unlike a situation where a litigant is unrepresented and unaware of the rules and processes when seeking an indulgence, the respondents in this case were legally represented and have failed to adhere to the rules. I am satisfied that the admission of the further affidavit will indeed prejudice the Municipality. I therefore find the additional supplementary answering affidavit should be excluded.

Historical

background

- [16] Sometime in 2014, the first respondent, Mr Kootjies, applied in terms of s 27 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA), to the Department of Mineral Resources (DMR), Northern Cape, for a prospecting right on the property described as “certain piece of K. K. [...]” in the District of Gordonia. In response to the application, the acting Regional Manager: Mineral Regulation wrote him a letter dated 30 July 2014 in which the compliance issues were specified. Of significance is para 2.3 which required him to:

“notify in writing and consult with the landowner or lawful occupier and any other affected party and submit the result of such consultation to this office on or before the 10th September 2014.” (own emphasis)

- [17] On 27 August 2014 the respondents visited the office of the acting Municipal Manager, Mr Josef Willemse, who informed them that they have to submit a proposal in respect of their anticipated prospecting to the Standing Committee of the Municipality’s council on 15 September 2014. By means of a letter dated 04 September 2014 Mr Willemse confirmed their visit to the Municipality and the fact that they were notified that they should present their project to the Council. Mr Willemse averred that the respondents failed to attend the Council meeting on 15 September 2014. The respondents disputed this version.

- [18] During March 2015, the second respondent, Mr Malgas, approached Council of the Municipality and was referred to the requirements and procedures that had to be complied with prior to any further consideration of his application. On 16 March 2015 Mr Willemse

addressed the following letter to Mr Malgas:

“I/S: OPPERVLAK OOREENKOMS

Die Raad van Mier neem kennis van u skrywe en die volgende besluit was geneem.

Dat daar ‘n omgewingsimpakstudie gedoen word en moet ‘n omgewingsbestuursprogram vir goedkeuring in terme van artikel 39, en dat kennis gegee word binne 180 dae vanaf die datum van kennisgewing vir raadpleging aan alle belanghebbendes en geaffekteerde partye.

Die toekenning en die duur van mynregte is onderhewig aan subartikel (4) en moet die Minister 'n mynreg gee:

- (a) Dat die minerale optimaal in oorstemming met die mynbou werkprogram gemyn kan word;
- (b) Die aansoeker toegang het tot finansiële hulpbronne en die tegniese vermoë het om die voorgestelde mynbedrywigheede optimaal uit te voer.
- (c) Dat die finansiering plan verenigbaar is met die beoogde mynbedrywigheede en die duur daarvan.
- (d) Dat die mynbou nie sal lei tot onaanvaarbare besoedeling, ekologiese agteruitgang of skade aan die omgewing nie.
- (e) Die aansoeker finansiëel en andersins voorsiening gemaak het vir die voorgeskrewe maatskaplike en arbeidsplan.
- (f) Die aansoeker die vermoë het om te voldoen aan die toepaslike bepalings van die Wet op Myne en Veiligheid, 1996 (Wet No 29 van 1996).
- (g) Die aansoeker nie in stryd met 'n bepaling van hierdie Wet is nie; en
- (h) Die toestaan van sodanige reg sal verdere oogmerke bedoel in Seksie 2(d) en (f) en in ooreenstemming met die handves beoog in artikel 100 en die voorgeskrewe maatskaplike en arbeidsplan.

U moet egter eers die nodige dokumente, asook 'n voorlegging aan die Staande Komitee van die Raad kom voorlê by die volgende Staande Komitee vergadering.”

[19] The respondents failed to comply with the directive by the Municipal Council. On the contrary, they occupied the property and commenced with their prospecting and/or mining activities.

[20] On 24 July 2015 Mr Mienies, the Municipality's Technical Manager, visited the property with the respondents. They informed him that they are prospecting for diamonds as they are entitled to do by virtue of the prospecting permit No MP 12/2015 approved by DMR on 05 June 2015. Of significance is the last paragraph on the permit just above the Minister's signature where the following appears:

“This permit does not exempt the holder from the requirements of any provision of any other law or from any restrictive provisions or conditions contained in the title deed of the land concerned, nor does it encroach upon the rights of any person who may have an interest in the land concerned.”

[21] Mr Kootjies signed for the prospecting permit on 12 June 2016. The description of the land on the mining permit as earlier stated was “certain piece of K. K. [...]. The area under application was 1.7 Ha in extent and the corners in terms of latitude and longitude were described as follows:

Corners

Latitude

Longitude

A

-26.74543

20.03141

B

-26.74567

20.02996

C

-26.74665

20.03048

D

-26.74671

20.03171

[22] The Municipality searched its records and found that K. K. [...] is property registered in the name of Willem Adriaan Knoesen. The coordinates thereof, according to the Surveyor-General's plan LG F 3273/1972, are the following:

A 26.122134228° S

B 26.96446237° S

20.263694267° E

20.343091549° E

C 26.999846051° S

20.222703172° E

Mr Mienies informed the respondents that they are not occupying K. K. [...] but property belonging to the Municipality without its consent.

[23] On 13 August 2015 Mr P Bergh from the firm Becker Bergh & More Inc addressed this letter to the respondents, which was received by Mr Malgas:

“UITSETTING: RIETFontein Mining

Met verwysing na bostaande het ons opdrag van ons kliënt, Mier Munisipaliteit, ontvang om hierdie skrywe aan u te rig. Dit blyk dat u met prospekter en/of mynaktiwiteite besig is op Rietfontein naby die begraafplaas en die fontein (gedeelte 0 van Mier [...]). Ons instruksies is voorts dat u 'n kamp daar opgeslaan het. Hierdie kamp en mynaktiwiteite word gedoen op 'n gedeelte van die meentgrond van ons kliënt sonder dat u enige dokumente aan ons kliënt of hul gevolmagtigde verteenwoordiger, die Munisipale Bestuurder, oorhandig het.

Ons kliënt het dan hulle verteenwoordiger, die tegniese bestuurder, Mnr J Mienies op 24 Julie 2015 na u gestuur om die aangeleentheid te ondersoek. U was nie in staat om enige dokumentasie aan hom te voorsien nie, maar het meegedeel dat u wel 'n permit het om te mag myn en volgens u weergawe spesifiek by K. [...].

Ons instruksies is dat hierdie plaas in die private eiendom van Mnr W Knoesen is. Die plaas is verder ongeveer 30 km (dertig kilometer)

suid-oos vanaf die Mier gebied waar u tans is.

Ons instruksies is verder dat u gedurende September 2014 ons kliënt se waarnemende munisipale bestuurder genader het met die

verduideliking dat u toestemming vanaf die Departement Mineraal en Energiesake verkry het om in die Mier gebied te mag prospekter. By daardie geleentheid is u spesifiek versoek om 'n behoorlike voorlegging op 15 September 2014 aan die staande komitee van die Raad te kom dien. U het egter versuim om dit te doen.

Ons instruksies is dat gedurende Maart 2015 u Mnr Malgas die Raad genader het en dat u spesifiek daarvan ingelig was, dat daar verskeie

vereistes is wat deur u nagekom moet word alvorens u met hierdie bedrywighede sou kon voortgaan.

Dit het onder andere ingesluit 'n omgewing impakstudie, bewys van toekenning en duur van die mynreg, ens. U het ook geen dokumente

voorgelê of die Raad of staande komitee hiervoor kom toespreek nie.

U besit die grond onregmatig.

U word hiermee kennis gegee om die eiendom van ons kliënt te ontruim voor 12:00 middag op Maandag, 17 Augustus 2015, by versuim

waarvan daar 'n dringende aansoek in die Hoë Hof Kimberley gebring sal word vir u uitsetting.

Ongelukkig sal ons verplig wees om 'n gepaste kostebevel teen u te vra."

- [24] As stated earlier, the Municipality describes the land as Portion 0 of Erf [...] Mier. It is the applicant's averment that it never granted the respondents permission to occupy the land or to conduct prospecting or mining activities on its land. The respondents did not provide an environmental impact study. They continue to occupy the land even after being informed that they are occupying the incorrect piece of land and that the occupation is therefore illegal.
- [25] The fact that the respondents are prospecting within the municipal boundaries of Mier Municipality required them to consult with the Municipality and to ensure that its requirements are also met and adhered to. Being in possession of a mining permit did not give the respondents the carte blanche to erect a prospecting or mining site wherever they liked.
- [26] The Constitutional Court has dealt with the issue of consultation in *Bengwenyama Minerals v Genorah Resources* 2011 (4) SA 113 (CC) at 140D-F (para 67):
- "[67] The consultation process required by section 16(4)(b) of the Act thus requires that the applicant must: (a) inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the Regional Manager concerned; (b) inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land;*
- (c) consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and
- (d) submit the result of the consultation process to the Regional Manager within 30 days of receiving notification to consult."
- [27] What the respondents seem to have done was to approach Mr Willemse and notify him about their intention to apply for a prospecting permit. He confirmed the meeting in writing that they indeed visited the Municipality. Despite the fact that there was follow-up correspondence specifying what the Municipality required them to do the respondents nevertheless set up their machinery and commenced with their prospecting or mining activities. I am not convinced that consultation requirements were met.
- [28] The remarks by Froneman J at 128 para 38 in the *Bengwenyama Minerals* judgment (above) continues instructively:
- "[38] A prospecting right is a limited real right in respect of the mineral and the land to which it relates. Holders of prospecting rights may enter the land with their employees; they may bring any plant, machinery or equipment required*
- for the purpose of prospecting on to the land; and they may build, construct or lay down any surface or underground infrastructure

necessary for that purpose. They may prospect for the mineral on or under the land; may remove and dispose of it during the course of prospecting; may use water on the land subject only to the provisions of the National Water Act; and may carry out any other activity incidental to prospecting which does not contravene the provisions of the Act. These activities may not be done without notifying and consulting with the landowner or lawful occupier of the land. If the landowner or lawful occupier impedes holders of prospecting rights in the exercise of their rights, the holders must report this to the Regional Manager concerned. Owners or lawful occupiers of land on which prospecting will be conducted must similarly notify the Regional Manager of any loss suffered or likely to be suffered as a result of the prospecting operation. In both instances a process is then initiated which may, depending on the circumstances, result in payment of compensation to the landowner or lawful occupier or a prohibition on the commencement or continuation of prospecting activities.

[29] As already stated, the respondents have already commenced with the prospecting or mining activities. The respondents ought to have engaged the Municipality properly before acquiring the limited prospecting right. I could not discern from the papers, neither was it argued orally, that the respondents reported the “alleged impediment by the Municipality” to the Regional Manager nor did the Municipality or any of its lawful occupiers report any loss suffered or likely to be suffered as a result of this prospecting operation to the Regional Manager. I am of the view that the Municipality must be granted some form of protection or relief. The permit authorised the respondents to conduct business on a piece of land described as “K. K. [...]” and certainly not on Portion 0 of Erf [...], Mier. The Municipality has therefore made out a case for the relief sought.

[30] The question of costs remains. There is no reason why costs should not follow suite. The award of costs is wholly within the discretion of the Court. In *Fripp v Gibbon & Co* 1913 AD 354 at 363. In leaving the Magistrate or Judge a discretion:

“.....the law contemplates that he [or she] should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties. And if he [or she] does this, and brings his [or her] unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his [or her] discretion.”

[34] In the result, the following order is made:

Order

1. Any of the first (Mr Johannes Kootjies) and/or second (Mr James Malgas) respondents occupying any portion of the land known as Rietfontein, Portion 0 of Erf [...], Mier and identified by numerals "1" - "4" on Annexure "FA1" (the Mier immovable property) and anyone occupying the property through them are ordered to vacate the property with all his/her/their belongings, equipment and machinery and to demolish and remove such structures within 60 days of this order.
2. Should any of the first and/or second respondents and anyone occupying through them fail to comply with the order in paragraph 1 above, the Sheriff and where necessary assisted by the South African Police Services, is authorised and ordered to evict them from the described Mier immovable property and to demolish and remove such structures.
3. The first and second respondents are ordered to pay the costs of this application, jointly and severally, the one paying, the other to be absolved.

MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the applicant:

Adv A Stanton

Instructed by:

Haarhoffs Inc

For the 1st & 2nd respondent: Adv F Slabbert

Instructed by:

Rossouws, Lesie Inc

Duncan & Rothman Attorneys

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Prepared on 13 October 2026 · Esheria