

SOUTH AFRICA / JUDGMENT

Moagi N.O. and others v Members of the Bapo Community and others (M685/2020) [2021] ZANWHC 25 (19 August 2021)

[2021] ZANWHC 25**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

M685/2020

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Source record**IN****THE NORTH WEST HIGH COURT, MAFIKENG****CASE****NO: M 685/2020****Reportable:**

YES / NO

Circulate

to Judges: YES / NO

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to Magistrates: YES / NO

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to Regional Magistrates: YES / NO

In

the matter between:

THAPELO

JOSEPH MOAGI N.O.

First Applicant

WESLEY

JOSIAH MOTSISI DIRE N.O.

Second Applicant

AMELIA

BAFEDILE PUTU

N.O.

Third Applicant

MATLHALE

TITUS DEDRICK MOTLHAMELA N.O.

Fourth

Applicant

SAMUEL

BOYBOY MOLETA N.O.

Fifth Applicant
MMAMUTLA
NELLIE MOKGETHI N.O.
Sixth Applicant
DIANA
LESEDI NTSIMANE
N.O.
Seventh Applicant
THABO
WILFRED MASELOANE N.O.
Eighth Applicant
RELEBOGILE
SYLVESTER NTSIMANE N.O.
Ninth Applicant
SIMON
SEGONE
N.O.
Tenth Applicant
OFENTSE
ANDREW NONG N.O.
Eleventh Applicant
ERIC
RAPULA MOKGOPA
N.O.
Twelfth Applicant
In
their capacity as trustees of the Bakwena Ba Modimosana Mmatau Trust
and
MEMBERS
OF THE BAPO COMMUNITY
First Respondent
MR
“RAMBO”
BILWANE
Second Respondent
DONNA
MTSHEGO
Third Respondent
MR
MABUKE
Fourth Respondent
MORAKE
FETSANG
Fifth Respondent
BOTSAKGOSI
MOGOROSI
Sixth Respondent
DARIOUS
MOGALE
Seventh Respondent
BOITUMELO

BOGATSU
Eighth Respondent
MOLIFI
BOIKANYO
Ninth Respondent
MR
RAPULA
Tenth Respondent
MR
MABYANE
Eleventh Respondent
LEBO
MOGALE
Twelfth Respondent
DATE
OF HEARING
:
06 AUGUST 2021
DATE
OF JUDGMENT
:
19 AUGUST 2021
FOR
THE PLAINTIFF
:
ADV. MAREE
FOR
THE DEFENDANT
:
MR. LEKABE

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 19 August 2021.

ORDER

- (i) The point in limine of lack of jurisdiction of this Court is dismissed.
- (ii) There is no order as to costs.

HENDRICKS DJP

[1] The applicants as trustees of the Bakwana Ba Modimosana Ba Mmatau Trust, who is the owner of certain agricultural land (property), launched this application to interdict the respondents from inter alia accessing the property and causing their livestock to graze on the property. This application is opposed by the respondents, who amongst others, raised in limine lack of jurisdiction of this Court to entertain this application. Arguments were advanced on the point in limine on 06th August 2021, whereupon judgment was reserved.

[2] In the Notice of Motion the following order is prayed for:

“TAKE NOTICE that the above-mentioned Applicants, in their nomine officio capacity as trustees of the BAKWENA BA MODIMOSANA BA MMATAU TRUST (hereinafter called "the Trust"), intend to make an application to this Court for an order:

1. That the Respondents and/or any person and/or entity through them are interdicted from accessing or allowing any person access to the Property of the Trust being Portion 2 of the Farm Blinkklippen number 201, Registration Division JP, Province of North West, measuring 728,8014 (seven hundred and twenty-eight comma eight zero one four) hectares, first registered by deed of partition number 19122/1939 with diagram annexed thereto and held by deed of transfer number T91828/2014 (hereinafter referred to as "the Property");
2. That the Respondents and/or any person and/or entity through it be interdicted from causing their livestock to enter onto and/or graze the above-mentioned Property of the Trust;
3. That all the Respondents and/or any person and/or entity through it, save for such persons claiming residential occupation of the Property, vacate the Property and/or remove all livestock belonging to them from the Property within five days from date of service of this order on the Bapo Tribal Offices;
4. That in the event thereof that the Respondents fail to remove all the unauthorised livestock from the said Property,
 - 4.1 the Sheriff of the above Honourable Court be authorised to remove the livestock from the Property and to hand the livestock over to the closest pound for purposes of impounding it;
 - 4.2 the Sheriff be ordered to notify the First Respondent, by notifying the Bapo Tribal Offices, of such livestock removed and impounded within 10 days from doing so.
5. That the Respondents jointly and severally, the one to pay the other to be absolved, pay,
 - 5.1 the cost of this application;
 - 5.2 all the costs occasioned by the Sheriff for the removal of the livestock from the Property and for impounding the said livestock.
6. Such further and/or alternative relief deemed appropriate.”

[3] It was contended on behalf of the respondents that section 22 of the Restitution of Lands Rights Act 22 of 1994 (the act) provides that the Land Claims Court has exclusive jurisdiction and finds application in this matter. Much as it is common cause and indisputable that the property is registered in the name of the applicants and as such is vested with a real right, that does not mean that his Court is clothed with the necessary jurisdiction to adjudicate this matter. The contention is that the real rights which the applicants have over the property (land) arises from the precepts of the act in particular their land claim lodged with that Regional Land Claim Commissioner.

[4] Whilst it is quite correct that section 22 of the act vest exclusive jurisdiction as far as land claims matters are concerned in the Land Claims Court, this is not a land claims dispute. It is common cause that the land claims dispute is already resolved; hence the registration of the property in the name of the Trust of which the applicants are the trustees. Reliance was placed by Mr. Lekabe, who appeared on behalf of the respondents, on the matter of Salem Party Club v Salem Community 2018 (3) SA 1 (CC) paragraphs [119] to [123] with particular emphasis on paragraph [123] thereof which states:

“[119] This approach proceeds from an assumption about the ideological and legal power of the historical credentials of the landowners’ title. I examine the difficulties it gives rise to shortly. But first two general points.

[120] The first is that our courts have long established that entitlements to land under the Restitution Act can exist simultaneously with title registered in another’s name. In Ndebele-Ndzundza, a traditional community occupied land whose registered title was conferred on another. The Supreme Court of Appeal held that the statute does not afford registered title “unblemished primacy”. Instead, it “recognises complexities” that arise from the existence of traditional rights in land co-existing with formal registered title “and attempts to create practical solutions

for them in its pursuit of equitable redress”.

[121] The Court in Ndebele-Ndzundza accordingly held that the community there had “established rights in the land that registered ownership neither extinguished nor precluded from arising”. This Court expressly endorsed Ndebele-Ndzundza. Any different approach would, it said, “elevate ownership notions of the common law to the detriment of indigenous law ownership for purposes of restitution of land rights”.

[122] Thirteen years ago this Court recognised that, in counterposing different aspects of the right to property and housing, “[t]he judicial function . . . is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership”. This was in an eviction case. But it applies just as well here. We must “balance” and “reconcile” rights “in

as just a manner as possible taking account of all the interests involved”.

[123] The second point is that this involves no mystery and no novelty. It flows from both the broadly generous, restitutionary purposes of the statute and from its detailed wording. The statute defines a “right in land” [143] with encompassing amplitude. And it spells out that the rights in land it recognises, with a view to restitution, may be “registered

or unregistered”. The fact that the statute recognises interests in land irrespective of registration suggests that registered title, on its own, while significant, is neither indefeasibly primary nor exclusionary. This is what Ndebele-Ndzundza and Goedgelegen held.”

(emphasis added)

See: • Prinsloo v Ndebele-Ndzundza Community 2005 (6) SA 144 (SCA).

• Department of Land Affairs and Others v Goedgelegen

Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007

(6) SA 199 (CC).

[5] ‘Right in land’ is defined in s 1 of the Restitution Act to mean – ‘any right in land whether registered or unregistered, and may include the interest of a labour-tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question’.

[6] I fully agree with the dictum in the Salem matter and align myself with it. The facts of the Salem matter is however distinguishable and quite different from the facts of this matter. Whilst the Salem matter concerned a land dispute, the current matter does not. To reiterate, the land dispute was already resolved and the land (property) is registered in the name of the Trust. The reliance on the Salem matter is with all due respect misplaced. In my view, this Court does have the necessary jurisdiction to entertain this matter. The point in limine of lack of jurisdiction should consequently be dismissed. Insofar as costs are concerned, I am of the view that it will be just and equitable that there be no order as to costs at this stage.

Order

[7] Resultantly, the following order is made:

(i) The point in limine of lack of jurisdiction of this Court is dismissed.

(ii) There is no order as to costs.

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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Prepared on 12 October 2026 · Esheria