

SOUTH AFRICA / JUDGMENT

Molokomme and Others v Fetakgomo Tubatse Local Municipality and Another (7127/2021)

[2024] ZALMPPHC 83 (2 August 2024)

[2024] ZALMPPHC 83**COURT**

Limpopo High Court, Polokwane

BEFORE

Gaisa

CASE / FILE NUMBER

7127/2021

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Source record**REPUBLIC OF SOUTH****AFRICA****IN THE HIGH COURT OF****SOUTH AFRICA****LIMPOPO DIVISION,****POLOKWANE****CASE NO: 7127/2021****(1) REPORTABLE: NO****(2) OF INTEREST TO THE****JUDGES: NO****(3) REVISED****DATE: 2/8/2024****SIGNATURE:****In the matter between:**

PHATHI

ELEX MOLOKOMME

First

Applicant

CINCINATIA

MASUPYANE KGAGARA

Second

Applicant

GERRESON

KODIBONA

Third

Applicant

And

FETAKGOMO

TUBATSE
LOCAL
MUNICIPALITY
First
Respondent
SHERIFF
OF THE COURT, PRAKTISEER
Second
Respondent

JUDGEMENT

GAISA AJ

INTRODUCTION

- [1] This is an application for the reconsideration and setting aside, alternatively variation, of an eviction order granted by the high court on 12 October 2021 under case number 7127/2021. The eviction order was obtained by the First Respondent (“the municipality”) against the Applicants and other occupiers of portions 9, 10 and 11 of the farm Aapiesdoorndraai 298 KT.
- [2] The Applicants contend that they were not served with the original eviction application and only became aware of the order when served with it on 30 January 2023. They argue that the order was erroneously granted in their absence and should be reconsidered in terms of Rule 6(12)(c) of the Uniform Rules of Court.
- [3] The First Respondent opposes the application, arguing that proper service was effected and that the Applicants have no valid defence to the eviction. This court appreciates both counsels for their insightful heads of argument which assisted this court.

BACKGROUND

- [4] The First Respondent obtained an eviction order on 12 October 2021 against the illegal occupiers of portions 9, 10, and 11 of farm Aapiesdoorndraai 298 KT. The Applicants were not specifically named in the order but fell under the description of “any other illegal occupant occupying portions 9, 10 and 11 of farm Aapiesdoorndraai 298 KT.”
- [5] The Applicants claim they only became aware of the eviction order when served with it on 30 January 2023. Subsequently, they brought an urgent application to stay the execution of the order pending this application for reconsideration. The stay order was granted on 28 February 2023.

[6] The Applicants contend they have Permission to Occupy (PTO) certificates from the Ba Bina Nare Ba Kgwete Traditional Council for portion 10 of the farm. The First Respondent disputes the validity of these PTOs.

[7] The key events in this matter occurred as follows:

7.1. 2021:

7.1.1. October 12, 2021: Fetakgomo Tubatse Local Municipality (First Respondent) obtains an eviction order granted by the high court, against illegal occupants of portions 9, 10 and 11 of Farm Aapiesdoorndraai 298 KT.

7.1.2. October 15, 2021: The Sheriff allegedly serves the eviction order by affixing copies to structures and billboards on the property.

7.2. 2023:

7.2.1. January 30, 2023: The applicants (Molokomme, Masupyane, and Kodibona) claim they were served with the eviction order for the first time.

7.2.2. February 3, 2023:

7.2.2.1. Applicants consult with their attorneys.

7.2.2.2. Applicants' attorneys contact the Sheriff's office requesting copies of the application.

7.2.2.3. Applicants' attorneys send a letter to First Respondent's attorneys requesting copies of all pleadings and an undertaking to stay execution of the order.

7.2.3. February 7, 2023: First Respondent's attorneys respond, providing an invoice for R8,481 for copies and stating they have no instructions to stay the execution.

7.2.4. February 20, 2023: The applicants file an urgent application to stay the execution of the eviction order (Part A) and for reconsideration of the order (Part B).

7.2.5. February 23, 2023: First Respondent files notice of intention to oppose.

7.2.6. February 24, 2023: First Respondent files answering affidavit and heads of argument.

7.2.7. February 28, 2023:

7.2.7.1. The matter was heard before the high court.

7.2.7.2. Court grants order staying execution of eviction order pending determination of Part B.

7.2.7.3. Costs reserved.

7.2.8. March 1, 2023: The original 30-day period for applicants to vacate given in the eviction order would have expired.

[8] This chronology highlights the key events rather than an exhaustive list and timeline of the case as presented in the court documents.

ISSUES FOR

DETERMINATION

[9] The main issues for determination are:

9.1. Whether the requirements for reconsideration under Rule 6(12)(c) have been met;

9.2. Whether the original eviction order was erroneously granted in the Applicants' absence;

9.3. Whether the First Respondent followed the correct procedure under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act);

9.4. Whether the municipal council properly authorized the eviction application;

9.5. Whether the Applicants have established a valid right to occupy the land.

[10] Rule 6(12)(c) of the Uniform Rules of Court provides that a person against whom an order was granted in their absence in an urgent application may, by notice, set down the matter for reconsideration of the order.

[11] Section 4 of the PIE Act sets out the procedure for eviction of unlawful occupiers, while Section 6 deals specifically with evictions by organs of state.

[12] The Municipal Systems Act 32 of 2000 requires municipal council decisions to be in writing and properly delegated.

ANALYSIS

[13] Reconsideration under Rule 6(12)(c)

13.1. For reconsideration under Rule 6(12)(c), the Applicants must show that the order was granted in their absence and that there are grounds to reconsider it. The Applicants claim they were not served with the original application. The First Respondent contends that service was effected by affixing notices to structures on the property on 15 October 2021.

13.2. There is a factual dispute regarding service that cannot be resolved on the papers. However, even if the Applicants were not personally served, the method of service employed by affixing notices was reasonably calculated to bring the proceedings to their attention as occupiers of the property.

13.3. Nevertheless, given the serious nature of an eviction order and the constitutional right to housing, I am inclined to grant reconsideration to ensure the matter is ventilated.

[14] Procedure under the PIE Act

14.1. The Applicants argue that the First Respondent improperly used Section 5 of the PIE Act (for urgent interim evictions) instead of Section 6 (for evictions by organs of state) to obtain a final eviction order.

14.2. This is a valid point. As an organ of state, the municipality should have proceeded under Section 6.

14.3. Section 6 requires, among other things, that the court consider:

14.3.1. The circumstances under which the unlawful occupier occupied the land;

14.3.2. The period the unlawful occupier and their family have resided on the land;

14.3.3. The availability of suitable alternative accommodation or land.

14.4. The original application did not adequately address these factors. This procedural defect is significant and warrants the setting aside of the eviction order.

[15] Authorisation of the eviction application

15.1. The Applicants contend that no municipal council resolution or delegation of authority authorising the eviction application was provided. The First Respondent has not directly addressed this point or provided evidence of proper authorisation.

15.2. This is a serious omission on the part of the First Respondent. Under the Municipal Systems Act, a decision to institute legal proceedings should be authorised by the municipal council or properly delegated. The failure to provide evidence of such authorisation is a further defect in the original proceedings.

15.3. The Supreme Court of Appeal ("SCA") in *Ganes and Another v Telecom Namibia Ltd*[1] emphasised the importance of proper authorisation for litigation brought on behalf of juristic persons.

15.4. In paragraph 19, the SCA stated:

"It is the institution of the proceedings and the prosecution thereof which must be authorised."

15.5. The court further held that where proceedings are instituted by attorneys purporting to act on behalf of a juristic person, there is a presumption that such proceedings are authorised, but this presumption can be rebutted (para 19).

15.6. However, in the present case, the eviction application was not brought by an attorney but rather by Ntshwane Walter Phala, who did not identify himself as an attorney in the founding affidavit.

15.7. The applicants argue that Phala failed to attach any Municipal Council resolution or delegation of powers authorising him to bring the application on behalf of the municipality. This raises serious questions about whether the eviction application was properly authorised.

15.8. The SCA in Ganes supra also clarified in the same paragraph 19 that Rule 7 of the Uniform Rules of Court provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. However, this procedure is not applicable in the present case, as an attorney did not bring the eviction application.

15.9. The municipality must prove that proper authorisation existed for bringing the eviction application. Based on the documents provided, the municipality does not appear to have done so. The applicants argue there is no evidence of a municipal council resolution or delegation of powers authorising the application, as required by the Municipal Systems Act. The municipality's deponent claims authority but does not provide supporting documentation.

15.10. Failure to prove proper authorisation could potentially nullify the entire eviction proceedings. The Ganes case established that the institution and prosecution of proceedings must be authorised, not just the deponent's authority to make an affidavit.

15.11. If the municipality cannot demonstrate the eviction application was properly authorised by council resolution or delegation, this could be grounds for the court to reconsider and set aside the original eviction order.

15.12. Despite numerous opportunities to provide the required proof, the municipality has failed to prove that a valid council resolution or delegation of powers properly authorised the eviction application. This failure renders the entire eviction proceedings null and void.

15.13. At the risk of repeating myself - because counsel for the municipality argued this point - I must give clarity that in the present matter, the applicants were not required to utilise Rule 7 of the Uniform Rules of Court to challenge Phala's authority to bring the original eviction application on behalf of the municipality. Rule 7 provides a procedure for challenging, inter alia, the authority of an attorney who has instituted proceedings on behalf of a party. However, Phala was not an attorney but rather a municipality employee and representative who deposed to the founding affidavit in the eviction application.

15.14. The applicants are instead raising a more fundamental challenge to whether the original eviction application was properly authorised by the municipal council, as required by the Municipal Systems Act.

15.15. This is a substantive challenge to the authority to institute the proceedings, not merely to the authority of a particular attorney. As such, the onus falls on the municipality to prove that a valid council resolution or delegation of powers properly authorised the eviction application. The applicants were correct in raising this issue directly rather than through the Rule 7 procedure, which is not applicable in these circumstances.

[16] Applicants' right to occupy

16.1. The Applicants claim a right to occupy based on PTO certificates from a traditional council. However, they acknowledge they are not the owners of the land. The First Respondent disputes the validity of these PTOs, arguing the traditional council had no authority to grant permission for municipal-owned land.

16.2. While the PTOs may have given the Applicants a subjective belief in their right to occupy, objectively, they do not establish a legal right against the municipality as the registered owner of the land. The traditional council's authority to grant such permissions has not been established.

CONCLUSION

- [17] The cumulative effect of the procedural defects in obtaining the original eviction order – namely, the use of the incorrect section of the PIE Act, the lack of evidence of proper municipal authorisation, and the dispute over service - leads me to conclude that the order should be reconsidered and set aside.
- [18] However, this does not mean that the Applicants have established a right to occupy the land. The First Respondent may still be entitled to evict the Applicants. Still, it must do so following the correct procedures under Section 6 of the PIE Act, with proper municipal authorisation, and ensuring adequate service and opportunity to oppose.

ORDER

- [19] Considering the above, the following order is made:

19.1. The eviction order granted on 12 October 2021 under case number 7127/2021 is hereby set aside.

19.2. The first respondent is ordered to pay the applicants' costs of this application (including both Parts A and B).

ACTING JUDGE OF THE HIGH COURT, POLOKWANE.

LIMPOPO DIVISION

APPEARANCES FOR APPLICANTS: ADV P MTHOMBENI INSTRUCTED BY: GILBERT MOTEDI ATTORNEYS INC. FOR 1ST RESPONDENT: ADV. M.M. RESKY INSTRUCTED BY: NOKO MAIMELA INCORPORATED ATTORNEYS DATE OF HEARING: 19 March 2024 DATE OF JUDGEMENT: 2 August 2024

[1] 2004

(3) SA 615 (SCA)

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Prepared on 14 October 2026 · Esheria