

SOUTH AFRICA / JUDGMENT

Ndouvhada v Machaka Traditional Council and Others (50832/14) [2015] ZAGPPHC 862 (14 August 2015) [2015] ZAGPPHC 862

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

50832/14

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 50832/14

DATE: 14 August 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

AUBREY NDOUVHADA Applicant

v

THE MACHAKA TRADITIONAL COUNCIL First

Respondent

MATOME VINCENT MAMABOLO Second

Respondent

THE PROVINCIAL DEPARTMENT OF RURAL

DEVELOPMENT AND LAND REFORM,

LIMPOPO PROVINCE Third

Respondent

THE NATIONAL DEPARTMENT OF RURAL

DEVELOPMENT AND LAND REFORM Fourth

Respondent

MOLEMOLE MUNICIPALITY Fifth

Respondent

JUDGMENT

MABUSE J:

- [1] On 29 July 2014 the applicant brought an urgent application against the respondents. The purpose of the said application was to secure an interim interdict against the first respondent, a tribal authority with its tribal offices situated at Machaka Tribal Office, Mphakane, Botlokwa, Matoks in the province of Limpopo and, the second respondent, who is described as an adult business man of stand no. 1134 Mphakane Village, Botlokwa, also in the Limpopo Province, in terms of which the third respondents were prohibited from continuing with illegal construction activities on a portion of the remaining extent of portion 1 of the Farm De Kaffersdrift 510 LS situated adjacent to Road 01356 behind Matoks Complex ("the property").
- [2] After hearing the matter the Court granted the interim order and postponed certain prayers of the notice of motion to the opposed roll.
- [3] This matter is therefore before this Court for the consideration of the interim interdict and whether such interdict should be made final. It is also before this Court for the consideration of prayers 3, 4 and 5 of the notice of motion. Now in prayer 3 to 5 of the notice of motion, this is what the applicant seeks:

"3. A declaratory order declaring the resolution taken by the first respondent on the 16th of October 2013 to be void, invalid and of no force or effect,·

4. An order declaring the resolution taken on the 21st of May 2012, by the first respondent, to be valid and binding upon the first respondent,
5. That the third and fourth respondents be instructed and authorised to give effect to the resolution taken on the 27th of May 2012 and do whatever may be necessary to affect the transfer of the property mentioned in paragraph 2 above to the applicant subject to the conditions recorded in the lastmentioned resolution. "

In terms of prayer 6 the applicant asks for an order in terms whereof the first and second respondents are ordered to pay the costs of the application jointly and severally, the one paying and the other to be absolved.

- [4] The issues before the Court relate to two resolutions, one taken on 27 May 2012 and the other on 16 October 2013. Both purported to have been taken by the first respondent.
- [5] It is only apposite, at this stage, that I narrate the genesis of the two resolutions. The applicant had plans to run a business of a filling station in the aforementioned village. In order to establish that business in that village he needed a piece of land. He himself did not have any such piece of land but the first respondent did. He then made a formal application to the first respondent for a piece of land. During 2008 he engaged the first respondent regarding the development of the filling station on the property and the first respondent on 28 January 2008, and after the applicant had paid an amount of R15 000,00 to the first respondent recorded its recommendation relating to the application for a filling station on the property to the Department of Trade and Industry as well as the fifth respondent. Such recommendation is evidenced by a copy of a letter dated 28 January 2008 which the first respondent wrote to the Trade and Industry Molemole Municipality, Molemole. It reads as follows:

"The Machaka Traditional Council has recommended Ndouvhada A to erect Ndouvhada filling station. The site is along Ramokgopa Road, next to Modau Fruit and Vegetables.

Your cooperation in this matter will be appreciated

Thanks"

It was signed by the secretary, the Khoshi and two counsellors.

- [6] As the applicant was at this stage not in any financial position to establish the filling station himself, he concluded a partnership agreement with the second respondent on or about 18 June 2012 in terms of which it was agreed between them that the second respondent would finance the project of developing the filling station on the aforementioned property as the Ndouvhada Filling Station and it was furthermore agreed that the applicant should obtain the necessary approvals, authorisations and business plans in order to facilitate the development of the filling station. A copy of the aforementioned partnership agreement was attached to the application as Annexure 'N2'.
- [7] After the conclusion of the aforementioned partnership agreement the applicant proceeded with the necessary applications for environmental authorisation, an application for a site and retail license in terms of the Petroleum Product Act, and engaged with consultants to conduct a traffic assessment, caused the necessary SD diagrams and site development plans to be drawn and also instructed the design and layout of the proposed filling station to be done. It is clear from the foregoing that a substantial amount of time and effort was spent on obtaining all the necessary approvals and documentation which culminated in a letter received from Shell South Africa (Pty) Ltd on 17 August 2011 which confirmed that the applicant had been appointed by Shell as a retailer. The aforementioned appointment was subject to certain conditions.

[8] The applicant then engaged the first respondent in order to purchase the property where he had planned to establish the filling station on the first respondent. He had envisaged that the transfer of ownership of the property would take a considerable long time in view of the fact that a State property was involved. As a consequence of engaging with the first respondent a meeting of the members of the first respondent was convened for the 27th of May 2012. In order for this meeting to go ahead as planned and as it involved an issue that related to the property of the tribe the first respondent could only dispose of the tribal property if it complied with the statutory prescriptions and obtained the consent from the third and fourth respondents. As required by legislation the details of the said tribal meeting were published 21 days before the meeting could be held. The said meeting was advertised in the local newspapers, as indicated, it was advertised and published for 27 May 2012. On the said date the meeting was attended by, among others, Mr. Malatjie T.I. in his capacity as appointed investigating official for the third respondent to ensure that the meeting was properly constituted and a valid reason was taken.

[9] At the said meeting, which was also attended by the applicant personally, it was resolved that the property be disposed of in favour of the applicant for an amount of R123 100.00 and that the first respondent would receive 10% profit share in the development with the first option to purchase an additional 20% share in the development. That such a resolution was taken is evidenced by Annexure 'N10' to the application.

[10] Paragraph 1 of the said resolution states as follows:

"1. At the meeting of Batlokwa Machaka Land Rights Holders at Batlokwa, Machaka Tribal Offices, district of Capricorn, Province of Limpopo on the 27th day of May 2012, before councillors, community leaders and representatives, Land Rights Holders present.

2. The PURPOSE of the meeting being

The signing of a community resolution in terms of the interim procedures governing Land Development for the development of a filling station on a portion of Portion 1 of The Farm De Kaffersdrift 510 LS.

3. That the Land Rights Holders were informed of the meeting 21 days prior thereof, through the following CHANNELS OF COMMUNICATION

Newspaper publication (Capricorn Voice)

Public Notices

Tribal meetings

4. By means of

Newspaper Publication (Capricorn Voice)

Tribal Meetings

5. That the Land Rights Holders consists of approximately 116 members. Of which 74 adult males and 42 adult females attended the meeting.
6. That 116 of the members who attended the meeting voted in favour of the above resolution and 0 voted against it
7. That I am satisfied that the majority of the adult members present at the meeting were in favour of the above resolution.
8. The Land Rights Holders=Statement of Resolution. holders/community have resolved that

The community agrees to alienate/dispose a portion of portion 1 of the Farm De Kaffersdrift 510LS, measuring 2562 square metres in extent to Mr. A Ndouvhada for the development of a filling station.

The community will receive a market related value of R123 100.00 as compensation for the disposal of the subject property.

The community will receive 10% profit shares from the development and have first option to acquire a further 20% shares using its own capital.

All the money will be deposited into the community trust account and should be used for the benefit of the entire community.

9. It was further RESOLVED that
9. 1 The following signatories will sign the agreement taken by the community on their behalf to give effect to the decision to

alienate/develop the land

9. 1. 1 Name Kgwadu Ratlou Machaka Capacity Kgosi

Signature, Date 27/05/2012

Then several other people signed and also indicated their capacities."

[11] On 23 August 2012 the applicant received a letter from the third respondent in which he was informed that his application for the approval of the disposal of the property had been forwarded to the Minister of Rural Developments and Land Reform for approval. During November 2013 he contacted the fourth respondent personally and spoke to the chief director, one Mr. Mogwenwe to make enquiries regarding the progress in the approval of the alienation of the property. The said Mr. Mogwenwe informed him that although the initial application and the resolution was validly taken and that the fourth respondent had no difficulty to approve the application the fourth respondent, subsequent to having received the resolution dated 27 May 2012, received a letter from the first respondent purporting to be a further resolution in terms of which it was resolved not to proceed with the alienation of not only the property in issue but also another property. He requested the said Mr. Mogwenwe to furnish him with a copy of the said resolution but Mr. Mogwenwe refused.

Only during April 2014 did he obtain a copy of such new resolution from his attorney of record. The attorney had

obtained it from the fourth respondent. A copy thereof was annexed to the papers as Annexure 'N12'. I will only quote the relevant sections of the letter. Firstly, it came from Machaka Traditional Authority and one Sikwaila M.B. was involved in it. It is headed:

"RESOLUTIONS TAKEN BY THE MACHAKA TRADITIONAL COUNCIL

1. As the Batlokwa Ba Machaka community took a Resolution in terms of the Community Interim Procedures Governing Land Development on 14 September 2008 to sell portions of the Farms Dekaffersdrift 510LS and Klipbok 767LS to Herarce Senoamadi and Aubrey Ndouvhoda.
2. The Batlokwa Ba Machaka community after being informed of certain irregularities
3. Now resolves that:
 - 3.1. All process regarding the application and transfer of land and or issuing of title deeds relating to these 2 applicants be stopped with immediate effect.
 - 3.2. That the 2 portions stated above will no longer be sold.
 - 3.3. That said portions will be allocated as development area, and that these portions of land will only be made available to Developers on a lease basis.
 - 3.4. The Batlokwa Ba Machaka Community will enter into a long lease with the company/entity trading for profit on the said portion of land.

Dated at Botlokwa on this the 16th October 2013.

COUNCIL: 1 MB. Sekwaila Signature

Name K.D. Machaka

KGOSHI MACHAKA II

This will be called the 16 October 2013 resolution.

- [12] The applicant contends that there are a number of disconcerting issues about the aforementioned resolution. In the first place he contends that the aforementioned resolution incorrectly refers to a resolution taken on 14 September 2015 to dispose of such properties and makes very little reference to the resolution taken on 27 May 2015. Secondly, he contends that the said resolution constitutes nothing less than a fabrication and fraudulent document and he submitted that no such resolution was ever taken by the members of the first respondent. Thirdly, he contends that he personally attended a meeting on 16 October 2013 and that meeting was convened strictly for the workers and contractors attending to the construction of work on Road 01356. According to him the sole purpose of

the meeting was to discuss the salaries of such workers with the contractors and managers of the road construction

project. The members of the third respondent, who attended the meeting and refused to continue to work, were all employed by the

road contractors and such contractors were obliged to make use of local labour in the construction activities. He contends that he personally attended the entire meeting and confirms that the disposal of the property was not even mentioned at such meeting. Fourthly, he contends that although the attendance register indicated that the aforementioned meeting was attended by 252 members of the first respondent, it contains several duplications of such members and should moreover be pointed out that such meeting was attended by numerous family relatives. Fifthly, it is contended by the applicant that he and several members of his family did not even sign the attendance register that is attached to the said resolution. Sixthly he contends that the first respondent did not comply with any statutory provisions convening such a meeting and that the said meeting was not attended by any representative of the third respondent. In this regard he wants this Court to make a comparative analysis between what preceded the meeting that was held on 27 May 2012 and what preceded the meeting of October 2013. It will be recalled that the meeting of 27 May 2012 where the resolution of same date was taken was preceded by advertisement or publication of the meeting in the local newspapers and also at the Tribal Offices. There is no such procedure that was followed in respect of the resolution that was taken on 16 October 2013.

[13] For that reason he contends that the resolution of 16 October 2013 was a fabrication and it was directly influenced by the second respondent. For that reason furthermore he contends that the resolution of 16 October 2013 was null and void and of no force and effect.

[14] The applicant's application was opposed only by the first and second respondents. The third and fourth respondents chose not to file any papers but instead decided to abide by the decision of this Court. No papers whatsoever were filed on behalf of Khumo Lemolele Municipality, the fifth respondent. Basically the application is opposed by the first respondent through Delton Machaka, Khoshi of the Machaka Traditional Authority. He contends that he is a chief of the Machaka Community and he approaches this Court as a leader and a member and in the interest of the Machaka Community, a group or a class of persons contemplated in

s. 38(c) of the Constitution of the Republic of South Africa Act 108 of 1996. Khoshi Machaka admits in his answering affidavit that a resolution was taken on 27 May 2012. He concedes that the community approved of the development and alienation of the land on the terms and conditions indicated in the resolution.

[15] The first respondent only responded to paragraph 4.1 of the founding affidavit at paragraph 11.16.1 of the answering affidavit after testifying about irrelevant issues. In paragraph 11.16.1 of the answering affidavit the respondents admits the contents of paragraph 4.1 of the founding affidavit and confirmed that an amount of R15 000.00 was payable in terms of

the customs and usage of the community and that only R300.00 of it was paid. Despite the contents of the resolution he persists with his allegations that had nothing to do with alienation of land. For the following reasons the first respondent seems to have reneged on the resolution of 27 May

2012. Firstly, he complains that in the past people who had bought land from the first respondent on the promise that they would give the first respondent 10% interest in their ventures failed to do so. According to Mr. Diamond, who appeared for the first and second respondents, the applicant had also not paid the 10% interest referred to in the 27 May 2012 resolution. In my view this reason has no substance. It was never taken up with the applicant that he failed

to pay the said 10%. Secondly, the resolution did not constitute an agreement between the applicant and the tribal council, and thirdly the application had not commenced with his business operations.

[16] The second reason for reneging on the resolution of 27 May 2012 was that, so it is contended by the first respondent, shortly after the meeting of 27 May 2012, the first respondent noticed that the applicant presented two other individuals as investors of the project. It would appear that the second respondent did not approve of these two investors.

[17] Behind the back of the applicant, the first respondent wrote letters to the third and fourth respondents in which he demanded that transfer of the property referred to in the resolution of 27 May 2012, be stopped. For inexplicable reasons, they kept the applicant in the dark. When Mr. Diamond was asked to explain why the first respondent took no steps to advise the applicant about their communication with the third and fourth respondents, he answered that the land belonged to the State.

[18] The principal reason a community meeting was held on 16 October 2013 was the difference between the 27 May 2012 resolution indicated the applicant would pay for the property and the valuation of the same piece of land by Mr. Goosen. Although this matter was taken up with the said Mr. Malatjie, so it was contended by the first respondent, the applicant was never informed about it nor was it ever taken up with him. He was again kept in the dark despite an erroneous perception that the first respondent had realised that individuals enriched themselves at the expense of the interests of the community.

[19] The first and second respondents admitted that the meeting that was held on 27 May 2012 was properly published, as stated by the applicant. For inexplicable reasons they contend, though, that the intention of the first respondent and of the Machaka community had always been that the development of the property should take place by way of a joint venture between the applicant and the second respondent. This cannot be true because the resolution of 27 May 2012 does not mention the second respondent whatsoever, nor does it mention any joint venture between the second respondent and the applicant. The first respondent states that the meeting of 16 October 2013 was well published but provides no proof of such publication. The applicant specifically mentioned that he was

present at the meeting of 16 October 2013 which was convened for the workers and contractors attending to contract work on the road 01356. He specifically stated that the sole purpose of that meeting was to discuss the salaries of such workers with the contractors and managers of the road construction project. On the other hand the first respondent states that the applicant was not at that meeting of 16 October 2013. He goes further and states that there were at the same time two meetings which were held on 16 October

20913. It is not very clear what the relevance of these other two meetings were. In support of his allegation that the meeting of 16 October 2013 indeed took place he furnished an affidavit by one Mokgadi Malatjie. There is no other affidavit that he furnished in support of the contention. The same Mokgadi Malatjie made another confirmatory affidavit, this time in support of the applicant's case. She admitted that she indeed signed the Annexure 'K15' which is the affidavit that the first respondent used in support of its contention that a meeting was held on 16 October 2013. She explained furthermore that it was the first and second respondents who mislead her and she only understood this after the contents thereof were explained to her by counsel on behalf of the applicant. She said that during the middle of July 2014 she was approached by Mr. MB Sekwaila and the second respondent. Mr. Sekwaila explained to her that she had to depose to an affidavit, the purpose of which was to ensure that only members of the Machaka community would be employed by the Machaka Traditional Council. Furthermore Mr. Sekwaila indicated that he should sign the affidavit if he wanted the employment and should approach the traditional council. The second respondent approached her at her residence at stand 1855 in Sefene where two pages of the document were handed to her for her signature based on what Mr. Sekwaila indicated to her. She contends furthermore that she is illiterate. She signed the document but it was not in the presence of a commissioner of oath. She made it clear that the sole purpose of the meeting of 16 October 2013 was to discuss salaries of the workers attending to the

construction work on Road 01356 in terms of the expanded public works program. In this manner she corroborated to the evidence of the applicant. This also shows the extent to which the first respondent had dealt with this matter.

[20] The applicant provided this Court with several affidavits for some of the people who attended the meeting on 16 October 2013. It is of supreme importance to point out that in all their affidavits they confirm that the purpose of the meeting of the 16th of October 2013 had nothing to do with the resolution that the first and second respondents rely on. They are adamant that that meeting had only to do with the salaries of those who were employed at the road side.

[21] For the following reasons I must find therefore that the resolution dated 16 October 2013 is null and void and of no force and effect. Firstly, there was no such resolutions taken by the members of the third respondent on the said date and this fact has been confirmed by the confirmatory affidavits attached to the applicant's replying affidavit. Secondly, the attendance register annexed to such resolution did not relate to the alleged resolution but

relates to a meeting that was held for the workers and contractors attending to the construction of Road 01356. Thirdly, the meeting was not preceded by compliance with the peremptory statutory requirements provided for, in other words, the meeting was not advertised as it was the case with the 27 May 2012 meeting.

[22] In their attempts to create an impression that a proper resolution had been taken on 16 October 2013, the first and second respondents unduly influenced and mislead one of the first respondent's members to sign a confirmatory affidavit annexed to the answering affidavit. I already have referred to that affidavit of Mokgadi Malatjie which is attached as annexure 'KMS' to the answering affidavit. The purpose of submitting a false affidavit before this Court was clearly to mislead this Court. This must be visited with a proper order of costs.

[23] Mr. Diamond brought a sheet entitled "FIRST AND SECOND RESPONDENTS' ENROLLMENT OF THE ORDER OF JUSTICE MAKGOBA DATED 29 JULY 2014

FOR RECONSIDERATION IN TERMS OF RULE 6(12)(c)". In my view it was a poor attempt to reconsider the order of 29 July 2014, and merited no attention.

[24] I am of the view that the applicant has made out a good case herein, accordingly the following order is made:

1. The interim interdict of 29 July 2014 is hereby confirmed;
2. A resolution purportedly taken on 16 October 2013 by the first respondent is hereby declared to be void, invalid and of no force or effect;
3. It is hereby declared that the resolution taken on 27 May 2012 by the first respondent is valid and binding upon the first respondent;
4. The third and fourth respondents are hereby instructed and authorised to give effect to the resolution taken on 27 May 2012 and do whatever may be necessary to effect the transfer of the property known as a Portion of the Remaining Extent of Portion 1 of the Farm De Kaffersdrift 510 LS, which property measures 2562 square metres in extent and situated adjacent to Road D1356, behind the Matoks shopping complex to the applicant, subject to the conditions recorded in the lastmentioned resolution;
5. The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying and the other to be absolved on an attorney and client scale.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv. J.A. Venter

Instructed by: Weavind & Weavind Attorneys

Counsel for the 1st & 2nd respondents: Adv. G.J. Diamond

Instructed by: Diamond Hamman & Associates

Date Heard: 13 August 2015

Date of Judgment: 14 August 2015

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