

SOUTH AFRICA / JUDGMENT

Ngwasheng v Kgomo and Others (4419/2019) [2021] ZALMPPHC 52 (24 August 2021)

[2021] ZALMPPHC 52

COURT

Limpopo High Court, Polokwane

BEFORE

M V Semanya

CASE / FILE NUMBER

4419/2019

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Source record**LIMPOPO****DIVISION OF THE HIGH COURT;****POLOKWANE****CASE****NO: 4419/2019**

REPORTABLE:

YES/NO

OF

INTEREST TO THE JUDGES: YES/NO

REVISED.

In

the matter between:

MATSOBANE

NEHEMIAH NGWASHENG:

APPLICANT

And

DANIEL

KGOMO

FIRST

RESPONDENT

MOKOPANE

TRADITIONAL COUNCIL:

SECOND

RESPONDENT

LIMPOPO

PROVINCIAL GOVERNMENT:	THIRD RESPONDENT DEPARTMENT OF CO-OPERATIVE, GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS MOGALAKWENA
LOCAL MUNICIPALITY:	FOURTH RESPONDENT SURVAYER GENERAL, LIMPOPO FIFTH RESPONDENT EVELYN
MABATHO MOHANGO:	SIXTH RESPONDENT

JUDGMENT

SEMENYA DJP:

- [1] The applicant in this matter launched an application in which the following order is sought:
- i. Declaring that the piece of land where the first respondent operates a business known as Dan's Scrapyard under PTO in stand number 1866, Ga-Mitchel, falls under the boundaries of stand number 8977, Ga- Mitchel, Sekgagapeng as per Surveyor General N0. 8977/1999;
 - ii. Declaring the Permission to Occupy (PTO) dated 09 July 2012 under stand number 1865 and issued to or in favour of the first respondent by the second respondent fatally flawed, null and void ab initio;
 - iii. Declaring that the allocation of stand No. 1865, at Ga-Mitchel, Sekgagapeng by the second respondent to the first respondent is unlawful and ultra vires;
 - iv. Costs of the suit.
- [2] The applicant served the first respondent with the notice of motion on the 23 July 2019. The first respondent filed notice to oppose the application on the 5 August 2018. In terms of the Rules of this Court, the first respondent was required to file the answering affidavit by the 27 August 2019. The application was set down for hearing on the 10 October 2019. On that date the matter was removed from the roll and the first respondent was ordered to file the answering affidavit by the 28 October 2019. The matter was again enrolled for the 4 June 2020 and served before Kganyago J who postponed the application and ordered the first and second respondents to file their opposing papers within a specified period.

[3] In the application for condonation for the late filing of the answering affidavit, the first respondent explains that his erstwhile

attorney who represented him in a number of cases instituted against him by the applicant in Mahwelereng Magistrate Court², and who therefore had a better understanding of the issues between them, died in 2015. He thereafter sought legal assistance from the office of Makgoba Kgomo Makgaleng Incorporated. The matter was allocated to a Mr Ntene who filed notice of intention to oppose the matter but left the practice of Makgoba Kgomo Makgaleng Inc before the answering affidavit was filed. Mr Makgaleng had to take over the matter from Mr Ntene. Having studied the file, Mr Makgaleng informed the first respondent that he is of the opinion that the longstanding issues between the parties can be resolved by engaging the services of a qualified land surveyor who will define the boundaries between the two properties which forms part of the subject matter of the litigation between the parties. The lawyers of the applicant failed to respond to the correspondence addressed to them by Mr Makgaleng with a view of securing the services of a land surveyor. It is further alleged that proper consultation between the first respondent and the lawyers was delayed by the onset of Covid 19 and the resultant hard lockdown.

[4] The applicant argued that the first respondent failed to account for his failure to file the answering affidavit between the 27 August and the 10 October 2019. The applicant contended that the first respondent failed to have regard to the sentiments made in *Uitenhage Transitional Local Council v South African Revenue Services*[1] in which it was stated that “condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility.”

[5] I am of the view that it would be unreasonable for this court to divide the explanation furnished by the first respondent into

compartments and to single out specific periods during which failed to file the answering affidavit. It is indeed so that the current

lawyer had to approach the then Law Society of the Northern Province and to request the files related to this matter so that he can appraise himself with the history of the longstanding litigation between the parties. Mr Makgaleng further sought corporation with the attorneys of the applicant with a view of bringing finality to this series of litigation. I find that the first respondent accounted for the entire period during which he failed to file his answering affidavit. Condonation for the late filing of the answering affidavit is therefore granted.

[6] The first respondent raised the following points in limine:

- a) That the issues between the parties had already been adjudicated upon by the Mokopane Traditional Council;
- b) that the applicant is not approaching the court with clean hands;
- c) that there is a dispute of fact;

d) non-joinder of Matsobane Ngwasheng Family Trust (the Trust) and the Department of Rural Development and Land Reform (the Department).

[7] The applicant has correctly argued that the point in limine referred to in b) above cannot be regarded as a point of law. This point raises factual as opposed to legal issues. It is dismissed on that basis. In *Golden Dividend and Another v Absa Bank* [2] it was held that:

“The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the

litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal* [2008] ZASCA 99; 2008

(6) SA 522 (SCA) it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. That is the position here. If the creditors are not joined their position would be prejudicially affected: A business rescue plan that they had voted for would be set aside; money that they had anticipated they would receive for the following ten years to extinguish debts owing to them, would not be paid; the money that they had received, for a period of thirty months, would have to be repaid; and according to the adopted business rescue plan the benefit that concurrent creditors would have received namely a proposed dividend of 100 per cent of the debts owing to them, might be slashed to a 5,5 per cent dividend if the company is liquidated.’

[8] The applicant argued that the relief sought, if granted, will not in any way prejudice the interests of the Department and those of the Trust. It is indeed so that the Trust and the Department’s interests will not be adversely affected should this court declare Permission to Occupy (the PTO) stand number 1866 held by the first respondent null and void. On the contrary, the Trust will benefit from the declaration sought by the applicant. It is my view that the rights of the Department as the trustee of the land on which stand number 1866 is situated will not be affected by the granting of the orders sought. The Department will remain the trustee irrespective of who the holder of the PTO is. This point in limine also stands to be dismissed.

[9] On the issue of the resolution of the dispute between the parties by the Mokopane Tribal Council, the applicant contended that the Council lacks the necessary jurisdiction to decide on the prayers sought in this matter. I agree with this submission. The applicant seeks, in the main, an order that the stand from which the first respondent is operating his business of a scrapyard falls within the stand that was allocated to him and that the PTO of the first respondent held over the same stand be declared invalid. The Tribal Council has no authority to grant the order of this nature. The High Court on the other hand derives its powers from section 21 (1) (c) of the Superior Courts Act 10 of 2013. Mokopane Traditional Council was joined as second respondent and filed their notice to oppose. Its erstwhile attorneys withdrew as attorneys of record. On the date of the hearing of the matter, representatives of the second respondent appeared in person and indicated that they are not

opposing the order sought by the applicant. The first respondent also failed to annex the alleged Tribal Council order to the answering affidavit. There is no reason why this court can uphold the point in limine. Like the other point in limine, it is dismissed.

- [10] On the facts, the applicant avers that he applied for Permission to Occupy stand number 1866 for business purposes in the rural area of Ga-Mitchel, Moshate, Sekgakgapeng from the second respondent. Mokopane Traditional Council approved the application on the 29 August 2014. On the 18 August 2005 Limpopo Provincial Government granted its approval under Proclamation R188 of 1969. The applicant alleges that he established a business of a General Dealer and a fuel filling station on the stand. The applicant further alleges that he entered into an oral lease agreement with regard to a portion of the stand with the first respondent in January 2011. He avers that the lease was approved by the second respondent. The applicant stated that on the 9 July 2012, the second respondent unlawfully, and without consulting with him, issued a PTO to the first respondent for the very same portion that he had let to the first respondent. It is this PTO that the applicant is seeking an order that it be declared invalid.
- [11] The first respondent admitted that he is running a business of a scrapyards from stand number 1866 Ga-Mitchel, Sekgakgapeng which was allocated to him by the second respondent. He avers that the official who pointed the stand informed him that the number of the stand is 1865 and not 1866. It is of note that the headwoman of the second respondent deposed to an affidavit in which she denies that the stand was lawfully allocated to the second respondent. The first respondent contended that the applicant was allocated only 0,2 hectares and has unlawfully built the General Dealer on stand number 1858 instead of on number 1866. The allegations that the applicant is occupying more land than the one he was allocated by the second respondent cannot serve as a defence. I agree with the applicant that the first and second respondent are at liberty to approach the correct forum if they are not satisfied with the applicant's occupation of the stand rather than to resort to self-help.
- [12] The first respondent further denies that he has entered into a lease agreement with the applicant. He argues that it appears clearly from the PTO attached to the applicant's affidavit that the stand was allocated to applicant on condition that it shall not be sublet or ceded to another person. The allegations that the applicant and the first respondent entered into a lease agreement are confirmed by the headwoman of the second respondent whose approval was, according to the version of the applicant, sought before the agreement was entered into. The first respondent is relying on clause 3 of the PTO granted by Limpopo Government which prohibits the sub-letting of the stand. This court is in any event not called upon to determine the validity of the lease agreement. The applicant was simply explaining the reason why the first respondent came to be on the stand.
- [13] It appears clearly from Annexure MN6 to the founding affidavit that the first respondent was allocated stand number 1865. He has however occupied stand number 1866, which is the site that was already allocated to the applicant as far back as 2005. It is for this reason that the applicant is alleging that the second respondent unlawfully and fraudulently allocated the

site to the first respondent. The applicant contended that the site referred to in the PTO of the first respondent, namely, 1865 is already allocated to one Evelyn Mabatho Mohango who is the sixth respondent in this application. She confirmed that she 'inherited' stand number 1865 from her father. The first respondent attached an affidavit deposed to by a land surveyor who stated that the scrapyard business is wholly within stand number 1866. The first respondent's contention that the stand was erroneously duplicated is without merit. More so in that stand number 1865 is in existence and occupied.

[13] Section 21 (1) (c) of the Superior Courts Act[3] confers the High Court with the power to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. The court will consider whether or not to grant a declaratory order only if it is satisfied that the applicant has an interest in an existing, future or contingent right or obligation-see *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*[4]. The applicant is an interested party in that he has an existing right in stand number 1866 Ga-Mitchel, Sekgagapeng, Mokopane. The stand has been allocated to him by Mokopane Tribal Council and Limpopo Government. Secondly, there is a longstanding dispute between the applicant and the first respondent with regard to the first respondent's right to occupy the said stand. The first respondent avers that his lawyer informed him that the issue can be best dealt with by the engagement of a qualified land surveyor. That has already been done. The applicant has attached the report of the Surveyor General 8977/1999 to the founding affidavit. Furthermore, the first respondent admitted that he is in occupation of stand number 1866 on the basis of an impugned PTO. The PTO of the first respondent was issued long after that of the applicant. It is for this reason that I agree with the applicant that the order will have practical effect in that the nullification of the second PTO will bring certainty regarding the issues between the applicant, the first respondent and the second respondent. I am satisfied that the applicant is entitled to the order sought in the notice of motion.

[16] The general rule is that costs are in the discretion of the court and that generally, the successful party is entitled thereto. I have no reason to deviate from the general rule. The applicant as the winning party is entitled to costs.

[14] In the results I grant the following order:

- i. It is declared that the piece of land from which the first respondent operates a business known as Dan's Scrapyard under PTO in stand number 1865 falls within the boundaries of stand number 1866, Ga-Mitchel, Sekgagapeng as per Surveyor General No: 8977/1999;
- ii. It is declared that PTO dated the 9 July 2012 under Stand number 1865 and issued to or in favour of the first respondent by the second respondent is fatally flawed, and is of no force and effect;
- iii. It is declared that the allocation of stand number 1865, Ga-Mitchel, Sekgagapeng by the second respondent to the first respondent is unlawful; and

iv. The first respondent is ordered to pay the costs of the application.

M V SEMENYA

DEPUTY JUDGE PRESIDENT

LIMPOPO DIVISION;

APPEARANCE: For the applicant: K MOKWENA Instructed by: MATOTOLA TSELENG
ATTORNEYS For the first respondent: ADVOCATE TD SIBIYA Instructed by: MAKGOBA KGOMO
MAKGALENG ATTORNEYS. Date of hearing: 27 May 2021 Delivered on: 24 August 2021

[1] 2004

(1) SA 292 (SCA) at par 6.

[2] (569/2015)

[2016] ZASCA 78 (30May 2016) at [10]

[3] 10 of 2013

[4] 1 All SA 103 (SCA)

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