

SOUTH AFRICA / JUDGMENT

Nodangala and Others v Bradolf (Pty) Ltd and Others (1494/2020) [2022]

ZAECMKHC 107 (13 December 2022)

[2022] ZAECMKHC 107

COURT

Eastern Cape High Court, Makhanda

BEFORE

N G Beshe

CASE / FILE NUMBER

1494/2020

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, MAKHANDA)

Case

No: 1494/2020

In

the matter between:

SIBONGILE
NODANGALA
First Applicant
VUYOKAZI
NODANGALA
Second Applicant
NOLUNDI
NODANGALA
Third Applicant
PHINDILE
NODANGALA
Fourth Applicant
MZUVUKILE
LUDZIYA
Fifth Applicant
And
BRADOLF
(PTY)
LTD
First Respondent
MINISTER

OF AGRICULTURE AND RURAL
DEVELOPMENT
Second Respondent
IN

RE: BRADOLF
(PTY)
LTD
First Applicant
PERSONS
ATTEMPTING TO UNLAWFULLY OCCUPY
FARM
315,
NGQELENI
First Respondent
MINISTER
OF AGRICULTURE, LAND REFORM AND
RURAL
DEVELOPMENT
Second Respondent

JUDGMENT

BESHE J:

[1] At the instance of the first respondent in this matter a rule nisi was issued on the 18 August 2020 calling upon persons attempting to unlawfully occupy Farm 315, Ngqeleni (described as first respondent) and the Minister of Agriculture, Land Reform and Rural Development (second respondent) to show cause why the following order should not be made final:

“1. That a rule nisi do hereby issue calling upon the First Respondent and/ or any other interested party to show cause of Tuesday, 15 September 2020 at 09h30 why an order in the following terms should not be made final:

1.1 That the First Respondent be interdicted and restrained from entering upon Farm 315, Ngqeleni;

1.2 That the First Respondent be interdicted and restrained from erecting structures upon and/ or encroaching upon Farm 315, Ngqeleni;

1.3 That the First Respondent demolish and remove any structures erected by them upon and/ or encroaching upon Farm 315, Ngqeleni, within 10 (TEN) days of the date of the final order herein failing which the Applicant is authorised to demolish and remove the above structures;

1.4 That the costs of this application be paid by any party who opposes it.

2. That pending the finalisation of this application, paragraphs 1.1 and 1.2 above operate as an interim interdict.

3. That the Applicant be authorised to serve a copy of the interim order on the First Respondent in the following manner:
 - 3.1 By publication once in a newspaper circulating in the district of Ngqeleni;
 - 3.2 By displaying a copy thereof at a prominent place at Farm 315, Ngqeleni;
 - 3.3 By reading the order on three separate days by way of megaphone at Farm 315, Ngqeleni.
4. Further and/ or alternative relief.”
- [2] The rule was confirmed on the 15 September 2020. This time it was specifically directed at Ntetelelo Nodangala, Tyron Maritz and Phateka Stofile as well as the unnamed persons who are currently erecting structures on the farm in question. The five applicants are now seeking a rescission of this order.

The parties

- [3] The founding affidavit is deposed to by the first applicant Mr Sibongile Nodangala. He describes himself as an adult unmarried male person who resided at Mconco, Ndanya Administrative Area, Ngqeleni District. The second applicant is described as an adult unmarried female person. The third applicant is also described as an adult unmarried female person. Both second and third applicants reside in the same area as first applicant. The fourth applicant is described as an adult female person residing at Erf 254 Extension 1 in the Libode District. The fifth applicant is described as an adult male person residing at Misty Mount Administrative Area, Libode District. It is asserted that all five applicants fall under the banner of first respondent in the main application. First respondent in the main application is described as “persons attempting to unlawfully occupy farm 315 Ngqeleni”.
- [4] The first respondent is a private company with limited liability duly registered and incorporated in terms of company laws of the Republic of South Africa, with its registered address at 2 Jacaranda Avenue, Morrison, Mtubatuba, KwaZulu Natal.
- [5] The second respondent is the political head in the Department of Agriculture, Land Reform and Rural Development (DALRD / the department).
- [6] In the founding affidavit Mr Nodangala goes to town explaining how the applicants are claiming that they are the right possessors / owners of the piece of land in question. I take note of the history sketched therein in this regard to the extent that it suggests that the applicants are clothed with the necessary locus standi to apply for the rescission of the impugned order. And that they have a prima facie defence with a reasonable prospect of success. But these proceedings in my understanding are not designed to determine who is the rightful owner / possessor of the piece of land concerned. Briefly stated, the applicants’ case is that the land in question was allocated to their grandmother in the year 1960. She held a permission to occupy (PTO) same until her passing in 2003. During 2019 – 2020, Mr Nodangala’s family comprising of him, second and third applicants as well as other family members subdivided the piece of land and allocated it to both family and none family

members.

[7] It was on or about the 15 October 2020 that he was informed by second applicant that their building structures were being demolished on the piece of land concerned, presumably on the strength of the order of the 15 September 2020.

[8] The rescission of the order is sought to be rescinded in terms of Rule 42 (1) of the Uniform Rules of this court. On the basis that the order was erroneously sought or erroneously granted in the absence of the parties affected thereby.

[9] It is alleged that the judgment was erroneously sought or granted because:

1. The sheriff who dealt with the process by serving the papers of the first respondent in the main application did not have jurisdiction to do so in Ngqeleni where the property is situated being a Sheriff for the Libode district.

It is therefore applicants' case that had the court been aware of this, it would not have issued the order.

[10] Secondly, so the applicants assert, Mr Mkono who was purportedly appointed by the Development Trust lacked the locus standi to conclude a lease in respect of the property / land in question with the second respondent. This, because Mr Mkono's appointment was not made in writing by the Master as provided for by the Trust Properties Control Act. Applicants assert that had the judge who issued the order been aware of that, he would not have issued the order.

[11] Thirdly, the applicants contend that the order is rescindable on the basis that no lease was concluded between the first respondent and the so-called community trust at the time the application was launched. So, first respondent did not have locus standi to apply for the impugned order. First respondent sought to establish that he has locus standi in judicio by filing a further affidavit without seeking leave to do so from the court.

[12] According to the applicants, the interim order could not have been effectively served in the manner described thereon because no one resided on the farm in question (Farm 315). This is so because no one lives there. There are only building structures.

[13] Applicants also complain about the non-joinder of the chief of the area concerned, whose role amongst others is to protect the land under his jurisdiction.

[14] The application is opposed by both respondents.

First respondent's allegations

[15] The land in question is a newly unregistered state property. It was subdivided from Ndoniyeni Farm 127. First respondent approached the second respondent in 2015 with a view of concluding a long lease over the said land so as to develop a convenience centre. The deponent to the answering affidavit, Mr Andrew Bradley Payne who is the sole director of

first respondent sketches the process that was followed which culminated in first respondent being granted authority to submit a subdivision diagram by the relevant official. Same was to be submitted to the Surveyor-General. At paragraph 10.10 of answering affidavit Mr Payne alleges that Mr Msindiseni Nodangala, who is a sub-headman to the chief and uncle to the first and second respondents, as well as Cetyiswa Gladys Nodangala who is first applicant's aunt and mother to second applicant were part of the process. In that they voted in favour of the conclusion of the lease agreement in question. Further that the family of first to third applicants have been aware of, and fully

supported the process since 2015.

[16] In 2019, unknown persons started erecting structures on the land in question. Upon enquiring from Mr Msindiseni Nodangala, he was assured that pieces of land were being sold but that did not affect the land that was the subject of the lease agreement. It however turned out that the sale of pieces of land also encroached on the leased land. Around 2020, the erection of fencing increased, leading to first respondent's application. The interim order dated the 18 August 2020 was also displayed on a notice board erected on the piece of land in question. First applicant is reported to have been present and threatened the person

who was erecting the notice board. First applicant sent a copy of the interim order to Mr Mkono via WhatsApp, with a demand that the latter provides him with proof that he was the owner / custodian of the land in question.

[17] As far as the permission to occupy that was issued to applicants' grandmother, he was advised that it lapsed when the holder died. In any event, the permission to occupy was purportedly issued in 2020. Yet, according to the District Director of the department a moratorium was placed on issuing permission to occupy in 2011. Confirmation letter from the department in this regard attached. First respondent denies that the judgment sought to be rescinded was erroneously sought or granted. Having been aware of the final order on the 15 October 2020, they failed to apply for rescission within a reasonable period. The discrepancies regarding the issuing of the permission to occupy in 2020 was adequately explained by the applicants.

[18] Regarding the lack of jurisdiction on the part of the Sheriff, according to Mr Payne, the land in question is situated in Misty Mount which falls under the service area of the Libode Magisterial District. The trust was registered and letters of authority issued to the trustees prior to the conclusion of the lease agreement on 14 August 2020. The Master's letters of authority dated 8 July 2020 issued to the Ndanya Trust are also annexed to the answering affidavit by the first respondent, with its trustees being: Saziso Nkomo, Masixole Nodangala, VakalaMoyake, Tembile Jozana, Princess Mapipa and Ntombozuko Nodangala. So is a copy of the lease agreement dated 14 August

2020. Returns of service from the Sheriff for the district of Libode were filed in respect of Ntekelelo Nodangala, the displaying of the interim order on eight structures on Farm 315, on one Mr Tyron Maritz (personally) as well as one Pateka Stofile (personally).
- [19] The answering affidavit on behalf of second respondent is deposed to by Mr Zukile Pityi, Chief Director attached to the department in question. Mr Pityi explains that Portion 315 Ngqeleni was subdivided from farm Ndonyeni 127 Ngqeleni. It forms part of surveyed, unregistered land also known as unalienated land, communal land or state owned land. No title deed exists and such land is owned by the National Government of the Republic of South Africa. He proceeds to sketch the process that was followed in dealing with first respondent's application to develop the piece of land in question as a Convenience Centre. This process culminated in the approval by the Minister of the department of a long term lease as sought by the first respondent on 19 November 2019.
- [20] Applicants' locus standi to bring this application is assailed on the basis that: the right of the applicants' grandmother to occupy the said piece of land came to an end upon her passing. Reference in this regard is made to paragraph 8 of the Proclamation 26 of 1938. Asserting that at no stage after the applicants' grandmother's demise was the property re-allocated to the applicants. It could not have been allocated to any of the applicants in 2019 as they suggest due to the moratorium that was placed on allotments in 2011. As stated earlier, this issue had since been explained by the applicants. Namely that 2019 is when they sought a copy of their grandmother's permission to occupy.
- [21] In reply, the applicants seem to advance a different case or additional grounds. Namely, Section 25 (6) of the Constitution which in my view is irrelevant. In any event, as I stated earlier, I do not consider these proceedings to be concerned with the determination of who the rightful possessor of the piece of land is. But, with whether the assailed judgment / order was erroneously sought or erroneously issued in the absence of the applicants. They, however explain that the correct date for the permission to occupy is that of 1960 when it was issued to the applicants' grandmother. The later date appeared as a result of a mistake from the department's official and relates to the date he sought a copy of the permission to occupy. First applicant denies that he was in possession of the interim order as alleged by the first respondent.
- [22] Rule 42 (1) (a) of the Uniform Rules of this court provides that a court may rescind or vary an order or judgment erroneously granted in the absence of the party affected by it. Common law, on which the applicants rely in the alternative also envisages the setting aside of a judgment on the following grounds:
- (a) fraud;
 - (b) Justus error;
 - (c) in exceptional circumstances when new documents have been discovered;

- (d) where judgment has been granted by default; and
- (e) in the absence between the parties of a valid agreement on the grounds of *justa causa*.

Applicants do not state the basis upon which they contend the judgment falls to be rescinded on the basis of common law.[1] It is trite that the purpose of Rule 42 is to expeditiously correct an obviously wrong judgment or order. Trite also is the requirement that the application for such rescission or variation should be made within a reasonable time.[2] In this case, the rule nisi was issued on the 18 August 2020 and confirmed on the 15 September

2020. According to the applicants, this came to their attention on or about the 15 October 2020. The notice of motion in respect of this application is dated the 14 July 2021. No explanation is proffered as to why it took some nine months before the application for rescission was launched.

[23] In addition to the requirement that the application for rescission should be made within a reasonable time

after it become aware of the judgment, are three other requirements. Namely:

- (i) The applicant(s) must give a reasonable explanation for his default;
- (ii) He must show that his application is made in good faith; and
- (iii) Show that he has a bona fide defence which *prima facie* carries some prospect of success.[3]

[24] Applicants have not explained why after becoming aware of the issuing of the rule nisi they did not take any steps to oppose the confirmation thereof. It is not clear from the founding affidavit how the applicants could have missed the notices that were displayed on several parts of the farm in question, as per Sheriff's return. Curiously Mr Notshibongo who states that he was building a house on the said farm for third applicant only points out that they only build during the day and not at night. He does not say during what period, does not say there were no such signs displayed, namely of the Rule Nisi. Ntetelelo Nodangala does not depose to an affidavit to deny that he was called by the Sheriff in connection with the service of the rule nisi. Or Pateka Stofile who was served personally.

Attack on the Sheriff's jurisdiction

[25] The Sheriff being one for Libode district is said to have lacked jurisdiction to serve the court process in the Ngqeleni District. It being alleged that it is only the Ngqeleni and Mthatha Sheriffs who had the necessary jurisdiction. In support of this assertion, applicants attach computer printout which reflects that Mr Tonjeni's service areas under the Libode Magisterial Districts. However, the same Mr G Tonjeni is listed as Sheriff for other areas e.g. Bizana. According to first respondent, the land in question falls under Nyandeni Administrative

Area which forms part of Misty Mount and falls under service area of the Sheriff for the district of Libode. Misty Mount is listed under annexure SN10 to applicants' founding affidavit as falling under Libode Sheriff's service area. In the lease agreement purportedly concluded between first respondent and the trust, under Clause 1.2.1 Building is said to mean "the buildings and improvements to be erected by the lessee on the property, including specifically the Misty Mount Convenience Centre". Second respondent's answering affidavit also refers to a Misty Mount Convenience Centre. There can therefore be no merit to the submission that the order in question was erroneously issued in this regard by reason of the Sheriff lacking jurisdiction over the Ngqeleni district.

Lack of locus standi on the part of the first respondent

[26] The objection also lacks merit. The lease agreement was concluded on the 14 August 2020, the letters of

authorisation in respect of the trustees of the Ndanya Development Trust were issued on the 8 July 2020. Steps to lease the property had commenced in 2015.

[27] No case has been made for the non-joinder of the headman Mr Nkomo. Since 2018, the vesting of Ndonyeni Farm 127 was in second respondent. According to first respondent, the sub-headman as well as another member of the Nodangala family was involved in the process that led to the Farm vesting in the second respondent. Besides the sub-headman Mr Msindiseni Nodangala disavowed knowledge of persons who were selling portions of the land.

Prospects of success

[28] I do not propose to traverse the whole process of how the land ended up being leased to the first respondent. From the steps followed, it would seem to me that there are no prospects of success in impugning the process and protocols followed. The nub of applicants' case is that because the permission to occupy was held by their grandmother, her family cannot be deprived of the land in question. Yet, the law seems to be clear that upon the death of the permission to occupy holder, the right to occupy such an allotment shall ipso facto be cancelled. Even their invocation of the provisions Interim Protection of Informal Land Rights Act 31 of 1996 appears to be misplaced as they themselves assert that they were compensated for having been moved from the said land.

[29] I am therefor not persuaded that the applicants have shown sufficient cause for rescission to be granted nor am I persuaded that they have a bona fide defence which prima facie carries the prospects of success. The applicants have failed to make out a case for the rescission of the rule nisi that was confirmed on the 15 September 2020 be it in terms of Rule 42 of the Rules of this court or the common law.

[30] For all the reasons stated hereinabove, the application is dismissed with costs.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard

: 11 August 2022

Date Reserved

: 11 August 2022

Date Delivered

: 13 December 2022

- [1] See Erasmus Superior Court Practice Vol 2 Service 7, 2018 D1-563.
- [2] Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) SA 298 at 306 H.
- [3] See Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1.

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