

SOUTH AFRICA / JUDGMENT

Nyandeni Local municipality v Ndamase and Others (1937/2012) [2013] ZAECMHC 38 (12 December 2013) [2013] ZAECMHC 38

COURT
Eastern Cape High Court, Mthatha

BEFORE
Griffiths

CASE / FILE NUMBER
1937/2012

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IN THE HIGH
COURT OF SOUTH AFRICA
EASTERN
CAPE DIVISION
: MTHATHA
CASE NO. 1937/2012
In the

matter between:

NYANDENI
LOCAL
MUNICIPALITY
Applicant
And
MTHAWELANGA
NDAMASE
1st Respondent
ZANELE
MZIMVUBU
2nd
Respondent
THAMSANQA
NGEBHA 3rd
Respondent
MTSHAVULA
BHADUZA 4th
Respondent
ZOLANI
BHODOZA 5th
Respondent

NTSHEVULA
KHANU 6th
Respondent
THE STATION
COMMISSIONER,
LIBODE
POLICE
STATION 7th
Respondent

JUDGMENT

GRIFFITHS, J.:

- [1] On 14 September 2012 this Court issued a rule nisi in the applicant's favour on an urgent basis in terms of which the respondents were called upon to show cause as to why they should not be interdicted and restrained from demarcating or allocating land falling within the area described as "Remainder of Erf 90, Libode ("the property"), from erecting structures thereon and as to why they should not restore full possession of the property to the applicant. The applicant was also granted interim relief. The matter was opposed by the first, second and fifth respondents (to whom I shall, in the balance of this judgment, refer to as "the respondents") and the necessary papers were duly filed. The remaining respondents, having been duly served, did not oppose.
- [2] When the matter came before me as an opposed motion, there were two applications pending. The first of these was an interlocutory application for revival of the aforementioned rule nisi and the second was the main application in terms of which the applicant seeks confirmation of that rule nisi.
- [3] It will be convenient to deal at the outset with the application for a revival of the rule nisi. The applicant launched a formal application in this regard which was, once again, opposed by the respondents. Because I intend in this judgment to decide the main application *pari passu* with the interlocutory application, the question of the revival of the rule nisi becomes academic and the sole remaining question in this regard is that of costs.
- [4] It seems from the papers that the causes of the lapsing of the rule nisi were multilateral. The matter was adjourned, and the rule nisi duly extended, to an arranged opposed motion date, that being 28 March 2013. This date had been arranged with the registrar who did not, at the time, have his diary for 2013 with him. He accordingly mistakenly set the matter down on the first Tuesday during the first court recess. In due course, and when the registrar realized his mistake, he timeously notified the applicant thereof. In consequence, the applicant filed a notice to have the matter removed from the roll on 28 March 2013 and, on that date, there

was no appearance. It is clear therefore that on 28 March 2013, the date to which the rule had been extended, the rule nisi lapsed.

- [5] The respondents, represented by Mr. Mtshabe, argued, as I understood the argument, that rule 27(4) which entitles a party to revive a rule nisi which has been discharged by default of appearance by the applicant, precludes the applicant from obtaining its relief in this regard. His first argument in this regard, again as I understood it, was that the applicant was not in "default of appearance" by virtue of the fact that it had previously filed a notice of removal. There is little merit in this suggestion. The second submission was that the respondents might suffer prejudice were the rule nisi to be revived. Because, as I have said, the only reason as to why I am considering the merits of the application for revival is that it impinges on the question of costs, I do not see that this can be an issue. In any event, if the applicant's contentions are correct that the respondents were invading its land, such actions are unlawful and subject to an interdict.
- [6] In the final analysis, it seems to me that the applicant was dilatory in allowing the rule nisi to lapse as it could have been extended by the judge doing duty during recess, and in not applying forthwith for revival of the rule. In the circumstances, the applicant has sought an indulgence from the court and should thus pay the costs of, at least, an unopposed application of this nature. However, because of the reasons I have expressed, I am of the view that the respondents' opposition to the interlocutory application was unnecessary and, if they were not indeed invading the land, interim relief relating thereto could not have had any effect on them. Accordingly, I believe that they should be put to the costs of such opposition.
- [7] With regard to the main application, a number of technical defences were raised by the respondents relating to locus standi, authority and the question of successive title. However, when Mr. Mtshabe appeared before me, he indicated that the main thrust of their defence would be that the applicant no longer has effective title to the land to prevent the respondents from utilizing the land, or to evict the respondents therefrom.
- [8] The respondents have, in effect, denied that the applicant remains the owner of the property, despite the fact that the applicant has placed before the court a title deed which prima facie indicates its title thereto. This denial is based upon a settlement agreement which was concluded pursuant to a land claim of the

Mdlankomo - Moyeni community. This agreement was entered into between the Department of Land Affairs, The Regional Land Claims Commission for Eastern Cape and the aforementioned two communities. The agreement deals with the settlement of restitution claims which were made on behalf of a number of households from the aforementioned communities and was settled on the basis that a portion of the land claim would be restored to the communities whilst the remainder which could not for one reason or another be so transferred, would be the subject of financial restitution. Regarding that portion of the land which was to be restored, the agreement provides that a legal entity to be known as the "Communal Property

Association" ("CPA") was to be formed and that this property is to be transferred to the CPA for the purposes of the members of these communities. It is indeed, common cause that the CPA has been formed but that the property concerned has not yet been transferred to it. Accordingly, the property which is apparently the subject of the land invasion still remains registered in the name of the applicant.

- [9] Mr. Zono, who appeared on behalf of the applicant, has submitted that whilst the property remains registered in the name of the applicant, the applicant remains owner of the property and the respondents have no right thereto. As the respondents have not established any further right to possession of the property, it seems that this submission by Mr. Zono has to be correct. Unless and until such transfer takes place, the respondents cannot, in my view, make use of the land for any purpose whatsoever as they have no title thereto.
- [10] Whilst preparing this judgment a further aspect to my attention. That is the question as to whether or not the applicant has established that the land invasion indeed took place. Because I had some concern in this regard I called for further, supplementary, heads of argument to deal with this point. Mr. Zono has in this regard pointed me to a number of allegations made by the first respondent in the answering affidavit deposed to by him on behalf of himself and on behalf of the other two respondents who have opposed the application. These allegations make it quite clear that the land invasion had indeed taken place. The first respondent maintained in the answering affidavit that he had been instrumental in preventing "the people" from building the various structures on the property concerned until such time as they had consulted their lawyers on the question of ownership of the property. However, whilst the land invasion may well have occurred, the respondents themselves have denied explicitly that they were involved in the land invasion itself or that they were involved in the allocation of any plot. It is clear therefore that there is a marked dispute of fact in this regard which cannot be resolved on the papers. It is not, as submitted by Mr. Zono, a dispute of fact which is so far fetched or untenable that it can be resolved on the papers in favour of the applicant without the hearing of oral evidence. In this regard he has submitted that it is palpably improbable that the first respondent as the traditional leader with traditional authority over the land in question can do nothing about the demarcation of the land under his traditional authority. This may well be so but it is also so that he was directly involved in the question of resolving this issue. His denial that he, the second and fifth respondents were involved in the allocation of plots to various people cannot, in my view and in the circumstances, be regarded as being so far fetched or clearly untenable that I would be justified in rejecting such denial merely on the papers. Mr. Zono has not requested this court to refer this issue to oral evidence in terms of rule 6(5)(g) and this dispute must accordingly be resolved, for the purposes of this application, in favour of the respondents[1].
- [11] As I have indicated, it was only the first, second and fifth respondents who opposed this application. Accordingly, the applicant

is entitled to an order against the third and fourth and sixth respondents, they having been properly served.

In the circumstances, I make the following order:

1. The Rule Nisi which was incorporated as paragraph 2 in an order granted by this court on 14 September 2012 is hereby revived;
2. The Rule Nisi is confirmed with regard to the third, fourth and sixth respondents;
3. The Rule Nisi is discharged with regard to the first, second and fifth respondents;
4. The third and fourth and sixth respondents are ordered to pay the costs of the main application on an unopposed basis;
5. The first, second and fifth respondents are ordered to pay any costs occasioned by their opposition to the application for revival of the Rule Nisi;
6. The applicant is ordered to pay the costs of the first, second and fifth respondents in opposing the main application.

JUDGE OF THE HIGH COURT

HEARD ON :

22 OCTOBER 2013

DELIVERED ON : 12 DECEMBER 2013

COUNSEL FOR APPLICANT : Mr Zono

INSTRUCTED BY

: A. S. Zono & Associates

COUNSEL FOR RESPONDENTS : Mr Mtshabe

INSTRUCTED BY

: N. Z. Mtshabe Inc.

[1] Plascon Evans Paints limited v Van Riebeeck Paints PTY limited [1984] ZASCA 51; 1984 (3) SA 623 (AD) at pages 634 -635

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