

SOUTH AFRICA / JUDGMENT

Oosthuizen N.O and Another v Kotze (UM171/2023) [2023] ZANWHC 179 (26 September 2023)

[2023] ZANWHC 179

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

UM171/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NUMBER: UM171/2023

Reportable:

NO

Circulate

to Judges:

NO

Circulate

to Magistrates:

NO

Circulate

to Regional Magistrates: NO

In

the matter between:

JACOBUS
JOHANNES CHRISTIAAN
FIRST
APPLICANT
OOSTHUIZEN
N.O.
JOHANNES
HENDRIK DELPORT
SECOND APPLICANT
and
TIELMAN
KOTZE
RESPONDENT

CORAM:

PETERSEN ADJP

Delivered:

This judgment was transmitted by way of email to the legal
representatives of the parties. The date and time of hand down is
deemed
to be 26 September 2023
at 14h00pm.
ORDER
The rule nisi
issued on 18 August 2023 is confirmed.

JUDGMENT

PETERSEN ADJP

Introduction

- [1] On 18 August 2023, the applicants' approached this Court on an urgent basis and were granted an order by Dewrance AJ, on ex parte basis, in the following terms:

"1. The non-compliance by the Applicants with the ordinary forms, processes and/or modes of notice and service provided for in the Rules of Court are condoned and this matter is heard as a matter of urgency in terms of the provisions of Uniform Rule 6(12)(a) on an ex parte basis.

2. A rule nisi is calling upon the Respondent to show cause (if any), on 19 October 2023 why an order in the following terms should not be made final with costs.
3. The First and Second Applicants, any employee and/or any authorised agent of the First and Second Applicants are:

3.1 Allowed access to the farm known as Portion 2 of the Farm Stonehenge 400, Registration Division IN, North West Province, measuring 856,5320 hectares held by deed of transfer No T[...] ("The Farm") except for the areas marked "D" and "E" on the map attached hereto as annexure "X".

3.2 Allowed free and undisturbed and exclusive use of the FARM, except for the areas marked “D” and “E” on the map attached hereto as annexure “X”.

4. To achieve access to the farm First and Second Applicants, any employee and/or any authorised agent of the First and Second Applicants are authorised to install a separate gate/s other than the current 4 (four) gates providing access to the farm.

5. The Respondent, any employee of the Respondent and any person acting on Respondent’s instructions be interdicted and restrained from:

5.1 prohibiting access of the First and Second Applicants, any employee and/or any authorised agent of the First and Second Applicants to the Farm except for the areas marked “D” and “E” on the map attached hereto as annexure “X”.

5.2 interfering with any activities of the First and Second Applicants, any employee and/or any authorised agent of the First and Second Applicants.

6. The Respondent and/or any person occupying the residences on the Farm are allowed to occupy the areas marked “D” and “E” on the map attached to this notice of motion as Annexure “X” pending the outcome of eviction proceedings to be instituted by the Applicants.

7. Prayers 3 to 6 shall be of immediate and interim force and effect pending the return date of this application.

8. The Respondent may anticipate the return date on 48-hour notice to the attorneys of record of the Applicants.

9. Costs of the application shall be reserved for determination by the Court hearing this matter on the return date.”

[2] The respondent anticipated the return date of 19 October 2023 on 48 hours’ notice to the applicants’ attorneys of record and enrolled the matter for hearing on Thursday, 14 September 2023, on an urgent basis. The applicants’ replying affidavit, was only filed on the morning of 14 September 2023, with no heads of argument.

[3] At the insistence of the legal representatives for the parties, this Court was urged to consider the application on the papers, with an indulgence to file the applicants’ heads of argument and the respondent’s supplementary heads of argument by Monday, 18 September 2023. Regrettably, and due to no fault on the part of the parties, the heads of argument were only furnished to me on 26 September 2023, upon my request to my new Registrar.

The parties

[4] The applicants’ are major male businessmen and trustees of a duly

registered Trust known as the Makesafe Family Trust (“the Trust”). The first applicant is further cited as being a

farmer. The respondent is cited as a major male businessman and farmer who currently resides on Portion 2 of the Farm Stonehenge 400, in Kagisano Molopo district in the North West Province.

Background

[5] The litigation in this matter is brought about by the sale of a farm at auction, which was owned by an entity DTL Boerdery CC (in final liquidation). The farm was registered in the name of the Trust during or about May

2023. Prior to the sale of the farm, the respondent unsuccessfully brought an application to stay the sale of the farm in execution pending a rescission application of the final liquidation order. On 20 July 2023 the application for rescission of the final liquidation order, brought by the respondent, an erstwhile member of DTL Boerdery CC, was dismissed by Dewrance AJ. The respondent has applied for leave to appeal the order of 20 July 2023.

[6] On 18 July 2023, two days before the rescission application was dismissed, the applicants' approached this Court on an urgent basis under

case number UM 146/2023, allegedly seeking the same or similar relief to the present application. That urgent application was dismissed on 18 July 2023 by Mfenyana J with costs. Reasons have been requested by the applicants' from Mfenyana J, which reasons are still outstanding and leaves this Court at a disadvantage to determine if the allegation that the relief sought is the same. Nonetheless, I propose to deal with the present application on its merits, with due regard to the fact that the order of 18 July 2023 precedes the dismissal of the final liquidation order of 20 July 2023, which order the respondent seeks to appeal.

Points in limine

[7] The respondent raises a number of points in limine predicated on, inter alia, lack of urgency, lack of locus standi and incompetent relief sought.

[8] On the lack of urgency, the respondent contends that the applicants misled this Court on urgency based on the nature of the application and the relief sought. To this end the respondent contends that there are outstanding or pending cases in this Court where there are disputes between the parties which renders this application not to be urgent. These pending applications maintains the respondent include the rescission application which was dismissed on 20 July 2023 under case number M506/19B, but which has been taken on appeal. Notably, only an application for leave to appeal is pending. The respondent further refers to an application for a final protection order pending in the Vryburg Magistrates Court under case number 31/2023, which has been postponed to 27 September 2023. The respondent further takes issue with the applicants' contention that they require access to the farm to attend to the risk of veldfires, maintaining that he has lived on the farm for almost 60 years and that the last veld fire on the farm was more or less 10 years ago. The last attack is based on the order of Mfenyana J on 18 July 2023, as already alluded to above at paragraph [6].

- [9] In respect of the locus standi point in limine the respondent contends that the applicants' do not have locus standi to bring this application as they have instituted the application in their personal names, whilst in their capacities as trustees, they have not cited the real applicant, The Makesafe Trust.
- [10] Lastly, in respect of the relief sought, as a point in limine, the respondent once again relies on what he refers to as "ample cases pending regarding the whole situation about the farm, access thereto and even the legality of the ownership thereof." The respondent alleges that he together with his employees are threatened by the applicants' and their employees who are heavily armed, in that, if any photographs are taken of them, their heads would be shot off. He further alleges that the applicants are damaging the farm irreparably and seek to have access to the farm without a proper eviction order under the guise of preventing veld fires and "other ridiculous excuses".

Discussion

- [11] The points in limine are inextricably linked when regard is had to the fact that the basis thereof is predicated on the same reasoning. These points in limine also speak to the merits of the application. I find no merit in the attack on the locus standi of the applicants who approach this Court in their capacity as trustees of the Trust and make it plain in the founding affidavit that the applicant is in fact the Trust.

- [12] The respondent relies heavily on what he refers to as the pending rescission application, which is on appeal. I do not propose to pre-empt the respondent's prospects of success on appeal against the dismissal of the rescission application, predicated in the main, on not being allowed to intervene and address the Court in the rescission application. The law in that regard is trite. See Attorney General v Blumenthal 1961 (4) SA 313 (T); Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others (1088/2020;1135/2020) [2022] ZASCA 66; [2022] 3 All SA 35 (SCA) ; 2022 (4) SA 529 (SCA) (10 May 2022) at paragraph 47.

- [13] I turn to what lies at the heart of the opposition by the respondent, i.e., the relief sought by the applicants. The respondent makes a sweeping statement regarding the legality of the ownership of the farm, without setting out facts on which this allegation is based, save to state that he will succeed on appeal, and he is advised that the sale and all transactions were illegal. The DTL Boerdery CC is in final liquidation. The farm was sold by the liquidators following the granting of the final liquidation order and an unsuccessful application by the respondent to stay the sale of the farm at auction. The farm has been registered in the name of the Trust of which the applicants are trustees. I re-iterate the high watermark of the respondent's case is what he refers to as the pending rescission application of the final liquidation order, which he says is on appeal. If the respondent were successful with the appeal, the provisional liquidation order of the Supreme Court of Appeal remains in place

and ownership of the farm does not revert to DTL Boerdery CC or vest any rights in the respondent who was a member of DTL Boerdery CC. The implication is simply that the Court will have to revisit the question whether or not the final order should be granted.

- [14] The Trust is a third party that purchased the farm at auction following the final liquidation of DTL Boerdery CC. It cannot be said that the Trust is a party to the litigation between the liquidators of DTL Boerdery and the liquidating creditor. It appears to be caught in the crossfire of litigation in which it was not and is not a party. In the absence of any facts controverting the ownership of the farm by the Trust, it must be accepted that the Trust presently is the owner of the farm and entitled to all rights of ownership.
- [15] If the respondent is successful in his bid to have the liquidation of DTL Boerdery set aside in its totality, he at most has a claim against the liquidators for the value of the farm, which does not detract from the ownership of the farm by the Trust.
- [16] The respondent contends that the applicants' presence on the farm under the guise of preparing fire breaks on the farm cannot be accepted as there has not been a fire on the farm for at least 10 years. Moving from the premise that the Trust is presently the owner of the farm, it has obligatory statutory obligations which it must comply with, irrespective of the ipse dixit of the respondent as aforesaid. Strangely, the respondent save for this statement, does not adduce any evidence to gainsay the allegation that there has been a lack of maintenance on the farm and non-compliance with the National Veld and Forest Fire Act 101 of 1998 ('the Act'). The notice issued by the Molopo Fire Protection Association demonstrates that neither the respondent nor DTL Boerdery has complied with the Act recently or ever for that matter. It ultimately cannot be gainsaid that the Trust as owner of the farm must comply with the Act.
- [17] In *Nieuco Properties 1005 and Another v Trustees for the time being of the Inkululeko Community Trust and Others* (872/2017) [2018] ZASCA 123 (21 September 2018), Van der Merwe JA (Cachalia, Saldulker, Dambuzza and Schippers JJA concurring), dealt with the proper interpretation of the definition of 'owner' in the Act:

"[14] The answer to this question depends on the proper interpretation of the definition of 'owner' in the Act, namely:

"owner" has its common law meaning and includes –

- (a) a lessee or other person who controls the land in question in terms of a contract, testamentary document, law or order of a High Court;
- (b) in relation to land controlled by a community, the executive body of the community in terms of its constitution or any law or custom;
- (c) in relation to State land not controlled by a person contemplated in paragraph (a) or a community –

(i) the Minister of the Government department or the member of the executive council of the provincial administration exercising control over the State land;

or

(ii) a person authorised by him or her; and

(d) in relation to a local authority, the chief executive officer of the local authority or a person authorised by him or her.’

...

[20] It is trite that the interpretation of the definition entails giving meaning to the words used within the context in which they were used, including the

purpose of the Act. As always, one has to start with the language.

[21] In this regard, the definition commences with a primary meaning of ‘owner’, namely its ‘common law meaning’. In terms of the common law ownership is the most extensive right that a person may have with regard to a corporeal thing. The content of ownership is not capable of exhaustive tabulation. Nevertheless, ownership is not absolute. Its full extent may be limited by public law or by the owner having granted private law rights over the property to a third party...”

[18] From the definition it is clear that the respondent does not fall within the ambit of the definition of ‘owner’ in the Act, whereas the Trust does, and as such the obligations in the Act fall to the Trust. In *Nieuco*, the Court emphasized the obligations on an owner as follows:

“[27] Thus, the definition of ‘owner’ does two things. First, it extends the categories of persons liable for the obligations in terms of the Act. Second, it enhances effectiveness by nominating the responsible body or persons in paras (b), (c) and (d).

[28] This accords with my understanding of the purpose of the Act. The judgment of the Constitutional Court in *Prinsloo v Van der Linde & another* 1997

(3) SA 1012 (CC) (which declared the predecessor of s 34 of the Act not to be unconstitutional) commences with the following:

‘Much of South Africa is tinder dry. Veld, forest and mountain fires sweep across the land, causing immense damage to property and destroying valuable forest, flora and fauna.’

The purpose of the Act is set out in s 1 thereof. It provides:

‘(1) The purpose of this Act is to prevent and combat veld, forest and mountain fires throughout the Republic.

(2) The Act provides for a variety of institutions, methods and practices for achieving the purpose.’

In my judgment, the Act seeks to fulfil its purpose of preventing enormous environmental and economical damage by veldfires by assigning the obligations in terms of Chapters 4 and 5 of the Act as widely and effectively as possible.”

(my emphasis)

[19] The Trust, as owner of the farm, must in terms of section 12 of the Act prepare and maintain a firebreak/s on his/her side of the boundary between his/her land and any adjoining land, if a veld fire may start or burn or spread from his/her farm. Section 13 of the Act, in particular provides that:

“An owner who is obliged to prepare and maintain a firebreak must ensure that, with due regard to the weather, climate, terrain and vegetation of the area -

- (a) it is wide enough and long enough to have a reasonable chance of preventing a veld fire from spreading to or from neighbouring land,
- (b) it does not cause soil erosion, and
- (c) it is reasonably free of inflammable material capable of carrying a veld fire across it.”

[20] Section 17 of the Act further provides that:

“every owner on whose land a veld fire may start or burn or from whose land it may spread must –

...Ensure that in his/her absence responsible persons are present on or near his/her land who, in the event of fire, will –

Extinguish the fire or assist in doing so; and

Take all reasonable steps to alert the owners of adjoining land and the relevant Fire Protection Association, if any.”

[21] Section 24 and 25 of the Act provide for criminal offences and sanctions for owners who fail to comply with their obligations, notwithstanding the civil liability which an owner may be susceptible to.

[22] The farm Stonehenge is situated in the Kagisano Molopo district in the North West Province. In a recent article published on the website of the North West Provincial Government[1] titled “North West Legislature Committee on Agriculture Concerned about Persistent Wildfires at Kagisano Molopo Municipality” dated 21 August 2023, the following comments attributed to the chairperson of the Portfolio Committee on Economic Development, Environmental and Tourism,

Agriculture and Rural Development, Honourable Bitsa Lenkopane, speak to devastating veld fires in the said district:

“The North West Provincial Legislature Portfolio Committee on Economic Development, Environment and Tourism, Agriculture and Rural

Development chaired by Hon. Bitsa Lenkopane has learned with great concern about devastating persistence of veld fires that has burned down over 90 000 hectares of grazing land in the Kagisano Molopo Local Municipality.

Areas affected by veld fires include PLAS farms, LRAD farms and Communal land. The information at the disposal of the committee indicates that these fires started on the night of 16 August 2023 and are to be contained.

“This is a serious drawback as the province is expected to contribute positively towards eradication of NDP triple challenges of Poverty; Unemployment and Inequalities within the province and ensure that Food Security & Nutrition programmes in contribution towards agrarian transformation” said Hon. Lenkopane. She said the wildfires started when a committee is in a process amending the National Veld and Fire Act, 1998, as the public Hearing will be held on 22 August 2023.

“Since the cause of fires are unknown, the committee is of the view that this is the right time to acknowledge that the climate change is upon us. Climate change is the greatest challenges to modern human civilization with large impacts on socioeconomic, environmental,

mining and development related sectors, including water resources, agriculture and food security, human health, ecosystems and

biodiversity,” said Hon. Lenkopane.

Hon. Lenkopane is appealing with the North West Provincial Government to move with speed in containing veld fires as this will result in an increased loss of agricultural produce; a reduced availability of food for both humans and animals; a reduced growth rate of vegetation and threatening livelihoods. “Most importantly the committee pleads with government and Civil Society to assist farmers with grass and food for livestock because most of farmers in the use grass to feed their livestock which has been affected by fire.

“Additionally, the Department of Agriculture must consider climate smart indicator the will result in reviewing farming methods (i.e Change of crops, review planting season, review the livestock) and Climate-smart agricultural practices applied by farmers throughout the province,” said Hon. Lenkopane.”

[23] The concerns of the Trust in respect of preparing fire breaks and the indisputable letter from the Molopo Fire Protection Association, is clearly echoed in the concerns raised by the Provincial Portfolio Committee. In that regard the urgency of compliance with the Act by the owner, being the Trust, is beyond dispute.

[24] The harassment complaint by the respondent is an issue best left for adjudication by the Vryburg Magistrates Court. At most, a reading of the papers demonstrates that the application in that matter implicates the father of the first applicant in his personal capacity.

[25] In the final analysis the interim order granted by Dewrance AJ, is formulated in such a manner that it is neither prejudicial to the respondent or the applicants. The respondent and anyone residing on the farm are allowed to reside on a portion of the farm, undisturbed by the applicants' and/or their employees and/or their duly authorised agents, with the corollary being that the respondent and/or his employees are not to engage in conduct which threatens or interferes with the activities of the applicants'.

Conclusion

[26] The applicant has made an overwhelming case for the grant of the final order, whilst the respondent has put up no cogent defence to the amicable relief sought by the applicants' whilst the respondent continues with his litigation against the liquidators and liquidating creditor of DTL Boerdery CC.

Costs

[27] The applicants are entitled to costs as the successful party. There is no basis not to award costs to the applicants.

Order

[28] Consequently, the following order is made:

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA, NORTH WEST DIVISION, MAHIKENG

APPEARANCES

FOR THE APPLICANTS': MR M. WESSELS Instructed by: Kotze Louw Swanepoel c/o Van Rooyen Thlapi Wessels 9 Proctor Road MAHIKENG FOR THE RESPONDENT: ADV D. SMIT Instructed by: Jan Kriel Attorneys c/o Smit Neethling Incorporated 29 Warren Street MAHIKENG Date Heard: 14 September 2023 Date Heads of Argument and Supplementary Heads filed: 18 September 2023 Date of Judgment: 26 September 2023

[1] North West Legislature Committee on Agriculture Concerned about Persistent Wildfires at Kagisano Molopo Municipality - nwpl.

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