

SOUTH AFRICA / JUDGMENT

Somo and Others v Thonts Properties (Pty) Ltd and Others (2023-114895) [2025] ZAGPPHC 88 (10 February 2025) [2025] ZAGPPHC 88

COURT

North Gauteng High Court, Pretoria

BEFORE

GN Moshwana

CASE / FILE NUMBER

2023-114895

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case

Number: 2023-114895

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE

SIGNATURE

In the matter between:

NOMATHEMBA

ADOLPHINA SOMO

First Applicant

SEBINA

LINDIWE SILINGA

Second Applicant

SIBUSISO

PHAKATHI

Third Applicant

THANDIWE

JABULILE PHAKATHI

Fourth Applicant

and

THONTS

PROPERTIES (PTY) LTD

First Respondent

NGOMANE

SIZWE JAMES

Second Respondent

MANZINI

PATRICIA THANDY

Third Respondent

EKURHULENI

METROPOLITAN MUNICIPALITY

Fourth Respondent

Summary: Urgent application to stay
ejectment pending the outcome of a rescission application. The
applicant who is properly before
Court is not to be harmed by the
ejectment and lacks the necessary legal standing to launch an
application. Other than being cited,
the parties to be harmed are not
before Court. The applicant is an appointed executrix to the estate
of the late. The property
from which the affected are to be ejected
was not part of the estate of the late. The powers of the applicant
in terms of section
26 of the Administration of Estates Act is
limited to properties falling under the estate of the deceased.
Accordingly, no substantial
injustice is to be suffered by the
applicant before Court. Held: (1) The application is heard as one of
urgency. Held: (2) The
application for a stay is dismissed. Held: (3)
The first applicant must pay the costs on a party and party scale
taxable at scale
B.

JUDGMENT

MOSHOANA, J

Introduction

- [1] The first respondent, Thonts Properties (Pty) Ltd (Thonts) is the registered owner of Erf 1[...] of Xubene situated at 1[...] B[...] M[...] Drive, Xubene (“the property”). Thonts acquired ownership of the property since 13 August 2021. Since acquisition, Thonts never enjoyed use and occupation of the property. The property was unlawfully occupied by unknown unlawful occupiers. In order to vindicate its rights of ownership, Thonts obtained an ejectment order on 07 October 2024.
- [2] In an attempt to thwart the operation of the ejectment order, the applicants on 05 December 2024 launched an application seeking to rescind the ejectment order. It is at the back of the rescission application that the applicants now seek an urgent stay (interim interdict) pending the outcome of the rescission application.
- [3] Accordingly, this judgment deals with the stay application. The stay application is opposed by Thonts. In opposing the present application, Thonts also raised a legal challenge regarding the legal standing of the applicants to obtain the relief of a stay. The question whether the application should be entertained as one of urgency was also demurred to by Thonts.

Background factual matrix

- [4] As indicated above on 07 October 2024, this Court per Vorster AJ, issued an order ejecting the unlawful occupiers from the property. The first applicant, Ms Nomathemba Adolphina Somo, is the only deponent in support of the present application. She mentions other applicants (Ms Sebina Lindiwe Silinga, Mr Sibusiso Phakathi and Ms Thandiwe Jabulile Phakathi), however none of them deposed to confirmatory affidavits in support of her application.
- [5] The first applicant alleges that after gaining knowledge of the Vorster AJ order, she together with the other applicants, on an unspecified date and time, approached an attorney and instructed that attorney to launch a rescission application. Howbeit, the rescission application was served on the respondents before it was issued in Court on 05 December 2024. Being aware that the launching of the rescission application does not stay the execution of the ejectment, due to financial difficulties, it is alleged, the launch of the stay application receded to the background and priority was given to the rescission application.

- [6] On 20 January 2025, the sheriff of this Court, armed with a warrant of ejectment issued on 06 December 2024, arrived at the property in order to execute the warrant of ejectment. There is no evidence as to whether the warrant was executed on this day. However, it is clear that the ejectment never happened, hence the present application seeking to stay the ejectment.
- [7] With regard to the occupation of the property, the first applicant alleges that since her birth she together with her siblings occupied the property living with their parents. The property was bonded to Nedbank and also insured by it. Both their parents are deceased. Of essence, their father, the late Mr James Steven Phakathi predeceased their mother, the late Mrs Komane Evelyn Phakathi, who only passed on 11 November 2005. The deceased were married to each other in community of property. It was only after the passing of the late Mrs Komane Evelyn Phakathi that the first applicant was issued with a letter of authority by the Master of the High Court.
- [8] Of significance, the letter was issued on or about 02 February 2006 and in respect of the estate of the late Mrs Komane Evelyn Phakathi. It is apparent that at some stage the bond repayments to Nedbank fell into arrears. On 12 February 2004, Nedbank obtained a judgment against the estate of the late Mr Phakathi and Mrs Komane Evelyn Phakathi. Pursuant to that judgment, the property was sold on public auction to Nedbank, as a result of which, estate of the late Mr Phakathi and Mrs Komane Evelyn Phakathi lost title over the property effective 29 April 2004. At the time, Thonts acquired ownership of the property, in 2021, the estate of the late Komane Evelyn Phakathi was divested of the ownership of the property almost 17 years ago.

Evaluation

- [9] Thonts raised a number of preliminary legal points. One of such points relates to the legal standing of the applicants, particularly the first applicant. In order for this Court to adjudicate on any of the legal points, it must first cross the hurdle of urgency. Thonts strongly argued that the urgency alleged by the first applicant is a self-created one, as such, this Court must strike the matter off the roll for lack of urgency. On the other hand, the applicants argued that the trigger for urgency was the imminent ejectment, which first presented itself to the unlawful occupiers in January 2025. The question whether a matter should be entertained as one of urgency, involves an exercise of judicious discretion. Accepting that the trigger for urgency manifested itself in January 2025, this Court, in the exercise of its judicious discretion, entertained the application as one of urgency.
- [10] The relief of a stay of execution is in effect an interim interdict remedy. What guides a Court in an application of a stay is presence

of real and substantial injustice that shall visit an applicant once the disputed underlying cause is removed. Counsel for Thonts argued that, a Court faced with an application of this nature, must also consider the substantial injustice that visits a legal owner. In this specific matter, for a period of four years, Thonts was deprived of the usage and enjoyment of its property. This, counsel submits, amounts to a substantial injustice. It is indeed correct that section 25 of the Constitution

protects ownership rights of Thonts[1]. Unfortunately, the real and substantial injustice relevant to matters of this nature is one to be suffered by a party who successfully

disputes the underlying cause. A Court does not necessarily involve itself in the balancing act in this regard. This is so, because the merits of the underlying cause do not form part of the enquiry. However, a Court must be satisfied that an irreparable harm will result if the stay is not granted, in the circumstances where an applicant ultimately succeeds in establishing a clear right.[2] The order of Vorster AJ is directed and ejects unlawful occupiers of the property. The first applicant on her own version, resides at No. 4[...] U[...] Section, Tembisa. Therefore, the operation of Vorster AJ's order shall not harm her. Where a harm does not happen or would not happen, the issue of the legal standing to bring an application to stay is implicated.

[11] As correctly alleged by Thonts, the first applicant does not have the necessary legal standing to launch the present application for various valid reasons. Recently, the Supreme Court of Appeal (SCA) in *Kangra Coal (Pty) Ltd v The Trustees of the Time Being of the Corneels Greyling Trust and Others (Kangra)*[3] expressed thus: -

"[20] Despite my finding that the respondent has legal standing in terms of s 32 of NEMA, the issue of 'apprehended harm' is directly linked to the issue of legal standing... They, however, admitted that they did not plead this legal standing in their founding papers and sought to impress upon this Court to accept that even if they did not do so expressly, from a reading of the pleadings, the facts show that they have legal standing. This is not how pleadings are drafted, or a case is pleaded.

[12] Before me, in an attempt to defeat the legal standing challenge mounted by Thonts, counsel for the applicants argued that because the other applicants financially depend on the first applicant, once evicted, they shall become a financial burden to her. Nowhere in the founding affidavit, does the first applicant plead such a case. The Constitutional Court in *Pilane and Another v Pilane and Another (Pilane)*[4], clearly expressed that an applicant must stand or fall by its founding affidavit. In *Kangra*, the SCA interpreted the statement of the Constitutional Court to mean that an applicant must set out its case in the founding affidavit in order not to ambush a respondent.

[13] In the circumstances, this Court unwaveringly concludes that the first applicant, due to failure to demonstrate apprehended harm, lacks the necessary legal standing to launch the present application. It was also submitted by counsel for the applicants that in her capacity as an executrix of the estate late Komane Evelyn Phakathi, the first applicant has an interest in protecting the assets of the estate as such she has legal standing. There is no merit in this submission. In the letter of authority, the property was listed as an asset of the estate. This cannot be correct in law. In 2004 already, long before the estate late was registered

with the office of the Master of the High Court, the surviving Mrs Komane Evelyn Phakathi was divested of the ownership of the property. That being the case, the property is incapable of forming part of the estate to which the first applicant was appointed an executrix.

[14] Section 26(1) of the Administration of Estates Act[5] is very lucid and clear. It provides that immediately after letters of executorship have been granted to an executrix, she shall take into her custody and control all the property in the estate. In respect of the first applicant, this perspicuous legal position only obtained for her in 2006. In law, an estate comprises of the possessions or property of a person or the assets and liabilities

left by a person at death. As at the time of the death of the late Mrs Komane Evelyn Phakathi, the property had long left her legal

possession. In light of the above, the first applicant has no interest in a property that was not left in the estate of the deceased to whose estate she was appointed an executrix. Differently put, after 2006 she could not, in law, take custody or control of the

property for a simple reason that the property is not part of the estate.

[15] During oral submissions, counsel for the applicants attempted to make a case, not made in the pleadings, that the property was improperly divested and the first applicant, in her capacity as the executrix, is minded to unscramble the egg, as it were, by mounting a legal challenge against the divestment. Even if that minded legal challenge succeeds, for present purposes, on the undisputable facts, the property has been divested and does not and never formed, at the relevant time, part of the estate of the late Mrs Komane Evelyn Phakathi.

[16] I now turn to the situation appertaining the other applicants. All the siblings of the first applicant are majors endowed with full legal capacity. As such, in law, the first applicant has no legal standing to launch an application on their behalf. They have a legal standing to launch an application of this nature in their own rights. On the unconfirmed version of the first applicant, Ms Sebina Lindiwe Silinga resides at 7[...] I[...] Section Tembisa. This version suggests that even if she was properly before Court, the operation of the order of Vorster AJ shall not visit her with any harm, let alone an irreparable one. On the strength of Kangra, she would be without a legal standing as well.

[17] On the unconfirmed version of the first applicant, Sibusiso and Jabulile Phakathi ("the occupiers") are the unlawful occupiers of the property. Allowing an operation of the order of Vorster AJ would see them being ejected from the property. Differently put, they shall suffer some harm if there is evidence that they shall be rendered homeless. However, they are not properly before Court. Their names were simply listed by the first applicant as applicants. There is no confirmation by them that they are indeed applicants. They are not applicants before this Court. The first applicant does not have a legal standing to bring an application on their behalf. Section 38(1) of the Constitution makes it abundantly perspicuous that anyone listed in the section has the right to approach a competent Court. Listed in subsection (1)(b) is anyone acting on behalf of another person who cannot act on their own. In terms of section 17 of the Children's Act[6], at 18 years' age of majority is achieved. On the available evidence the occupiers can act on their own.

- [18] The above notwithstanding, the occupiers have not disputed the underlying cause (the judgment of Vorster AJ) as suggested in the Gois judgment. The rescission application launched on 5 December 2024 was launched by the first applicant and she does not have the legal standing to do so on behalf of the occupiers. In almost similar fashion, the first applicant simply listed the occupiers in the rescission application and alleged that they are applicants. The occupiers did not even confirm her allegations.
- [19] As this Court concludes, the legal point of lack of legal standing is good in law and it ought to be upheld. Lack of legal standing is fatal to any application launched in a Court of law. Thus, the present application falls to be dismissed. The remaining issue is that of costs. When it comes to costs, a Court possesses a wide discretion. To my mind, there is nothing to suggest that costs must not follow the results. Counsel for Thonts submitted that punitive costs order is warranted. This Court disagrees. What obtains here is dearth of legal acumen as opposed to presence of opprobrium or frivolity and vexatiousness on the part of the first applicant and her chosen legal team.

Order

[20] For all the above reasons, I make the following order:

1. The application is entertained as one of urgency.
2. The application is dismissed.
3. The first applicant is to pay the costs of this application on a party and party scale taxable or to be settled at scale B.

GN MOSHOANA

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10 February 2025.

APPEARANCES:

For the Applicants: Mr F Richards Instructed by: M Mahlabane Attorneys, Tembisa
For the Respondent: Mr ZE Mahomed Instructed by: Malherbe Ross Attorneys, Fourways
Date of the hearing: 06 February 2025
Date of judgment: 10 February 2025

- [1] See *Sandile Percival Msibi v The Occupiers of Unit 67 Cedar Creek Trefnant Road, Ormonde* Ext 28 and another (A181/2024) dated 5 February 2025.
- [2] *Gois t/a Shakespeare's Pub v Van Zyl and others (Gois)* 2011
- (1) SA 148 (LC) at para 37.

[3] (1052/2023)

[2025] ZASCA 9 (6 February 2025).

[4] 2013

(4) BCLR 431 (CC).

[5] Act 66 of 1965 as amended.

[6] Act 38 of 2005 as amended.

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Prepared on 10 October 2026 · Esheria