

SOUTH AFRICA / JUDGMENT

Tlang Ka Phulo Farming Project and Others v Minister of Agriculture, Land Reform and Rural Development and Others (UM 82/23) [2023] ZANWHC 75 (7 June 2023)

[2023] ZANWHC 75

COURT

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

UM 82/23

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG

CASE NO: UM 82/23

Reportable: YES / NO

Circulate to Judges: YES
/ NO

Circulate to Magistrates: YES / NO
Circulate to Regional
Magistrates: YES / NO

In the matter between: TLANG
KA PHULO FARMING PROJECT
1st
Applicant
KEOGOLANG
KEGAKILWE
2nd
Applicant
NEO
LEGALAMITLWA
3rd
Applicant
KABELO
MANGWEKEA

4th
Applicant
KEAOBAKA
MMUSI
5th
Applicant
KELEBOGILE
MAROPE
6th
Applicant
OPLEE
MARITE 7th
Applicant
OGOPOLENG
KAMORE
8th
Applicant
DITEKO
STINKANE
9th
Applicant
MMEREKI
LECHOLO
10th
Applicant
AMBROSE
SEITSANG
11th
Applicant
FREDDY
MARUPING
12th
Applicant
REBAONE
MOKGARA
13th
Applicant
MMEREKI
LECHOLO
14th
Applicant
ETLHAETSE
MAKOBO
15th
Applicant
OATILE
MOLALE
16th
Applicant
LEOTO
HORONG

17th
Applicant
KABELO
MANGWEKAE
18th
Applicant
ISAAC
OKHA
19th
Applicant
SEGOLAGOLA
MEREYOTLHE
20th
Applicant
OATILE
MOLALE
21st
Applicant
DEGMA
MATSEPE
22nd
Applicant
THUSOOTSI
MOKHUTSANE
23rd
Applicant
MESHACK
MONGWAKETSI
24th
Applicant
MMEREKI
RAMOSIDI
25th
Applicant
DANIEL
MOKOTO
26th
Applicant
OLEBILE
KHWELE
27th
Applicant
MODISE
MATSIME
28th
Applicant
MATSHEGO
SEITSANG
29th
Applicant
ROADBLOCK

KHWELE
30th
Applicant
OTLATHUSA
TLHOLO
GODFREY
PEBANE
KAGO
LETLHOGILE
GEORGE
VORI
ALBERT
VORI
STONE
MALEKE
TEFO
SMITH
LEBOGANG
MOIRELENG
GAEBONWE
LEGALAMITLWA
KGOSIETSILE
KEGAKILWE
LOETO
KEGAKILWE
and
THE
MINISTER OF AGRICULTURE,
LAND
REFORM AND RURAL DEVELOPMENT
1st
Respondent
THE
NORTH WEST DEPARTMENT OF
AGRICULTURE
AND RURAL DEVELOPMENT
2nd Respondent
THE
MEC FOR THE DEPARTMENT OF
AGRICULTURE
AND RURAL

DEVELOPMENT: DESBO MOHONO
3rd
Respondent
ADV
SCHOLTZ
4th
Respondent
THE
PROVINCIAL COMMANDER OF POLICE,
NORTH
WEST PROVINCE
5th
Respondent
THE

STATION COMMANDER: GANYESA
POLICE STATION
6th
Respondent
REVILO
POLICE STATION
7th
Respondent
VORSTERSHOOP
POLICE STATION
8th
Respondent
SHERIFF
FOR THE VRYBURG DISTRICT
9th
Respondent
AND
DATE OF
HEARING
25 APRIL 2023
DATE OF

JUDGMENT

07 JUNE 2023

REASONS

FOR JUDGMENT

Reddy AJ

Introduction

- [1] A number of farms were purchased by the National Government from existing commercial farmers and placed under the control of the first respondent (“the Minister of Agriculture, Land Reform and Rural Development”)-the “owner” of the farms. For the purposes of this ruling the precise description and physical location of these farms is not necessary. The land forming part of these farms was held in reserve for redistribution to qualifying emerging farmers duly approved by the first respondent.
- [2] The intended land distribution process was stifled by the actions of some of the respondents, which impelled, the first respondent to bring an application on an urgent ex parte basis, on 13 August
2019. Ultimately, final interdictory relief was granted, against some of whom are applicants in the current application. The heart of the final relief interdicted the respondents from:
- (i) residing on the identified farms, and or erecting any structures thereon;
 - (ii) inciting any other person to enter the farm properties;
 - (iii) grazing any livestock or permitting any third party to graze any livestock on the farms,
 - (iv) removing, cutting or damaging any existing infrastructure, trees and boundary fences and;
 - (v) Interfering with the allocation process of land to third parties by the applicant.
- [3] On 14 April 2023, the Full Court of this Division, upheld an appeal against the orders as set out supra. It is against this backdrop that the respondents seek urgent relief before the urgent court to restore the status quo ante as regards their occupation of the identified farms.
- [4] The relief as framed in the notice of motion is disjointed and framed in legally unsustainable language. For that reason, I delineate the relief sought verbatim as per the notice of motion:
- [1] That this application be heard as an urgent application in accordance with the provisions of Rule 6 (12) of the Uniform Rules of court and that the non con compliance the rules relating form and service be dispensed with and/or condoned.
- [2] It declared that whole judgment and orders of Gura J case number: UM131/2019 are suspended as envisaged by the provisions of Section 18
- (1) of the Superior Courts Act 10 of 2018.
- [3] It is declared that on or about the respondents acted irrationally, unlawfully and unconstitutionally

when they (through their officials), visited the farms in or around Tlakgameng Village, in Ganyesa, for the purpose of evicting the applicants and their families from the farms.

[4] It is declared that the respondents acted unlawfully, irrationally and unconstitutionally by removing the applicants' livestock from the farms whilst the appeal is pending.

[5] It is declared that the respondents acted unlawfully and unconstitutionally when they refused

the applicants opportunity to be heard during the operation to evict the applicants, their families and livestock.

[6] It is declared the enforcement of the Gura Judgment and orders granted under case number UM131/2019 has an effect of an eviction order and such an order can only be enforced in manner consistent with the provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act of 1998.

[7] The First to Third respondents are directed, within Twenty-Four (24) Hours of receiving this order, to:

7.1 Restore the applicants' access to all farms they occupied on or before 31st March 2023 and/or 02nd April 2023, which are they dates of their unlawful evictions.

7.2 At their costs, to return all of the applicants' livestock removed from the farms they occupied on or before 31st March 2023 to 02nd April 2023.

[8] The respondents are ordered to immediately, allow the applicants access to the pound where their cattle are kept, for the purposes of identifying their cattle.

[9] The respondents are ordered to immediately, allow the applicants access to the pound where their cattle are kept, for the purposes of identifying their cattle.

[10] The members of the South African Police Services are ordered to ensure this order is complied with.

[11] The first to the third respondents are ordered to pay the costs of this application on attorney-client scale.

The Parties

[5] A proper introduction of the parties, would make for easy reading and establish the legal nexus between them. The first applicant is, Tlang Ka Phulo Farming Project, a registered

company in terms of the statutory company laws of South Africa. The second applicant, is Keogolang Kegakilwe a member of the first

applicant who deposed to the founding affidavit, as the Treasurer of the first applicant and in her personal capacity. All other cited applicants are members of the first applicant.

- [6] In terms of the designation of the various respondents, I paraphrase largely from the applicants founding affidavit. The first respondent, is the National Department, an organ of State as defined in section 239 of the Constitution.
- [7] The second respondent, is the Provincial Department of Agriculture and Rural Development, an organ of the State in terms of section 239 the Constitution of the Republic, Act 198 of 1996. (the Constitution)
- [8] The third respondent, is the MEC, for the Department of Agriculture and Rural Development in the North West Province the Executive Authority of the second respondent.
- [9] The fourth respondent, is Advocate Scholtz, cited merely as a possible interested party.
- [10] The fifth to eighth respondents, are members of the South African Police Service, enjoined by the Constitution, to ensure that the rule of law is maintained and court orders are given effect to.
- [11] The ninth respondent is the Sheriff for the Vryburg District. The latter has been cited by the applicants as an interested party. The Sheriff of the Vryburg District has a duty to ensure that court orders are given effect to.
- [12] The first, second and third respondents oppose the relief sought. The fourth respondent Advocate Scholtz, filing an affidavit not opposing the application and abides by the decision of this Court relating to the merits and relief claimed, but addressed the various allegations levelled against him, in his capacity as an Advocate.

Urgency

- [13] The law on urgency is trite. Urgency must be considered within the legal framework of Rule 6(12) of the Uniform Rules of Court, in conjunction with the Practice Directives of this Division. Rule 6(12) provides as follows:

(12)

- (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure(which shall as far as practicable be in terms of these rules) as it deems fit.
- (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that the applicant could not be afforded substantial redress at hearing in due course.
- (c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.

[14] It is incumbent on the applicant to persuade this Court on a balance of probabilities that the non-compliance with the Rules of Court and the extent thereof is justified on the basis of urgency. The applicants are obliged to demonstrate that they will suffer real loss or damage were they to rely on normal procedure. See: *Republikeinse Publikasies v Afrikaanse Pers Publikasies* 1972

(1) SA 773 (A) at 782 A-G, *Luna Meubel Vervaardigers v Makin & another* 1977

(4) SA 135 (W) and *Sikwe v SA Mutual Fire & General Insurance* 1977

(3) SA 438 (W) at 440 G- 441 A, *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767)

[2011] ZAGPJHC 196 (23 September 2011)

[15] The corollary is that a respondent faced with an urgent application, and to avoid the risk of judgment being given against it by default, is obliged provisionally to accept the truncated time lines set by applicants, lest they wish to suffer a default order being granted and then, when the matter is heard, make its objections thereto, if any. See: *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE). In re: *Several Matters on the Urgent Roll* [2012] 4 All SA 570 (GSJ) [15]

[16] Rule 6(12) is clear-cut and peremptory. The applicants must unequivocally demonstrate what influences urgency and in so doing, justify the abridgement of the Rules and time frames. Significantly, the applicants are duty bound indicate that absence of substantial redress at a further hearing.

[17] The respondents contend that the applicants, bar, the regurgitation of the salutary prerequisites of Rule 6(12) of the Rules of Court, have not furnished facts which render the application urgent and have not demonstrated why they cannot obtain substantial redress at a hearing in due course.

[18] The applicants contend, that the incidences of the unlawful removal of their livestock and evictions occurred on 30 March 2023. Paragraphs [53], [54] and [55] of the applicants founding affidavit is pertinent regarding urgency:

[53] At the outset, I wish to state that it was not the first time the government attempted to evict her and confiscate our livestock while the appeal was pending. In the past we were afforded opportunity to be heard and the issues were resolved. In other instances, we went to the pound. Where our livestock were kept, upon finding it, we presented our case and the livestock would be released to us.

[54] We employed the same mechanism in this case. We visited all the pounds known to us within the province and we did not find our livestock. We pleaded with the government involved to disclose the whereabouts of the cattle but they refused to let us. Then we received information that our cattle were taken to the Free State Province, upon arrival, we found some but not all the livestock. We were then told that some of the livestock was taken to Klerksdorp. We visited all the pounds known to us in Klerksdorp but we found none.

[55] We then realised that we have no option but to approach this court for an urgent relief. We did all we could to avoid this litigation and we were unsuccessful. May it please this court to hear this matter as an urgent application.

[19] The applicants contend that the unlawful removal of livestock had been an occurrence which they had been previously succumbed to, which eventually resulted in a mediated outcome and the release of their livestock. What the applicants fail to set out in explicit detail is a time line, since the unlawful removal of livestock and evictions occurred since 30 March 2023.

[20] In the case of *Mogalakwena Local Municipality vs The Provincial Executive Council, Limpopo and Others* (2014) JOL 32103 (GP) at para [63] – [64] the Court confirmed that:

“It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded

substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent’s and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency.”

[21] The applicants duly advised, intentionally made an informed decision not to set out a full time line to pass the muster of the threshold of urgency. Factors pertinently dealing with urgency are sparse and the applicants fail to establish urgency satisfactorily. It is generally accepted that when an applicant does not approach the urgent court at the earliest occasion after the need for an urgent court application arose, any urgency that follows, is regarded as self-created urgency. Courts are generally not inclined to come to the aid of litigants who approach the court on a basis of urgency but fails to make out a case of urgency. On the applicants own version, the unlawful removal of the livestock and evictions occurred between the periods 30 March 2023 and 2 April 2023.

[22] The time line thereafter is not explicitly enunciated. In order to establish a time line this Court had to embark upon the cumbersome task of trawling through the various affidavits. The applicants referred to an urgent letter of demand, the contents of which is to be read as if specifically traversed within the fulcrum of this application. The letter relied on is not

annexed to the founding affidavit, resultantly the contents of the demand nor, crucially the time lines remained entirely in limbo. The founding affidavit was signed by the first applicant on 14 April 2023. It was delivered to the first, second and third respondents on 17 April 2023 and at the High Court on 18 April 2023. By a liberal calculation there appears to be a period of approximately two weeks that is unaccounted for which is fatal to the applicants averment of urgency. Rule 12 (b)

compels the applicants to explicitly set forth the circumstances which render the application urgent. An unexplained period of the lapse of about two weeks, dispels any urgency. Our jurisprudence regards the conduct of the applicants as self-created urgency. I echo these sentiments and so find that the threshold of urgency has not been met. It axiomatically follows that the question of substantial redress subsumed within Rule 12(b) need not detain this Court.

Procedural Deficiencies

[23] Given the entire conspectus of this application, it would be remiss of me

not to make certain observations regarding the conjunctive application before this Court. Notwithstanding procedural, factual and legal shortcomings, the applicants petitioned the urgent court on an urgent basis for relief as per the notice of motion. Whilst each urgent application is adjudicated on its own idiosyncrasies and exigencies, an enrolment of an application in urgent court is no immunity to the flagrant disregarding of the law, procedural nuances and the Practice Directives of this Division. I turn to address some of these shortcomings.

No proper index and pagination of application

[24] English District Judge Paul Waterworth stated that: ‘A good bundle cannot win a bad case, but a bad bundle can damage a good case’ (District Judge Paul Waterworth ‘Trial bundles: Why are they important and how to get them right’ The Law Society Gazette, 28-1-2010).

[25] The application was not properly indexed and pagination, contrary to the Practice Directives of this Division. It was a burdensome exercise to follow the proceedings given the disorganized presentation and labelling of annexures. I quote a few examples.

[26] In paragraph [2] of the founding affidavit, reference is made to a copy of the first applicant’s registration certificate as annexure “MK1”. This annexure is not attached as averred. The following annexure is said to be “KK1”, an authorising resolution in favour of the second applicant to institute proceedings. The odd sequence of the alphabet is no doubt disruptive to the referencing of annexures.

[27] In paragraph [7] of the founding affidavit the following is proffered:

[7] All the applicants are members of the first applicant. To avoid any confusion, I annex hereto a list of all the members I represent in these proceedings marked “KK2” I annex hereto copies of the confirmatory affidavits by the co applicants which I mark annexures “KK3” to KK__”

[28] The original founding affidavit numerically ceases at Applicant 30, who is Mr. Roadblock Khwele, thereafter a further eleven names (11) are included without any indication as to the legal standing or interest of these individuals in the application before this Court. This no doubt impacts the legal principle of locus standi. The notices that follow then go on to cite 41(forty-one) applicants, how this effects the resolution of the first applicant and the resulting confirmatory affidavits is a plunge into the unknown.

[29] Two confirmatory affidavits are only attached, that of the third (3rd) and eighteenth (18th) applicants. Astonishingly, the preamble to both these confirmatory affidavits now cite forty-one respondents. Reference is made to incomplete annexures at paragraph [8] as “AA1-AA__”

[30] At paragraph [13] of the founding affidavit the following crucial averment is made:

“We decided to institute these urgent proceedings, after having exhausted all possible, non-litigious avenues to get the matter resolved

amicably between the parties. So far, we have not succeeded, consequently and in my attempt to avoid litigating against the first

respondent, our attorneys of record, dispatched an urgent letter of demand for the first to the third respondents’ urgent

attention. See annexure “B”, I plead that the contents of this annexure to be read as if they have been specifically transversed herein.” The annexure “B” which reference is made to as already alluded to, has not been attached.

[31] In *Grootboom v National Prosecuting Authority and Another* 2014

(2) SA 68 (CC) at para [32] the apex court explained the objective of the rules and court directions in the following terms:

"I need to remind practitioners and litigants that the Rules and Court directions serve a necessary purpose. Their primary aim is to ensure that the business of our Courts is run effectively and efficiently. Invariably this will lead to the orderly management of our Courts' rolls which in turn will bring about the expeditious disposal of cases in the most cost –effective manner. This is particularly important given the ever increasing cost of litigation, which if left unchecked will make access to justice too expensive." I align myself with these sentiments. It is not for the urgent court to separate the wheat from the chaff.

The failure of the applicant to file practice notes and heads of argument timeously

[32] The parties were to file their respective short heads of argument and practice notes on Monday 24 April 2023 by 17h00. At 13h55 on 25 April 2023, literally five (minutes) before the hearing of the application, the applicant emailed same to my secretary. The respondents expressed a similar challenge. I have taken due cognizance of the applicants challenges as ventilated at the time of the hearing of the application, notwithstanding this, such practices must be deprecated.

Non- compliance with Rule 41A (2) (a)

[33] Rule 41A(2)(a) prescribes that in every new action or application proceeding, “the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation”. As a result, the so-called “Rule 41A Notice” has become commonplace and somewhat formulaic in practice. The applicants have not complied.

[34] In the unreported case of *Koetsioe and Others v Minister of Defence and Military Veterans and Others* (12096/2021), the court illustrated that:

“[Rule 41A] not only requires a notice but clearly contemplated that a party must have considered the issue earnestly prior to exercising its election. This is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated.”

Non Joinder

[35] The applicants go on a tangent about a number of parties who appear to have direct and substantial interest in the motion proceedings, but elected not to join the same.

[36] Given the dissimilarity in the relief pursued in the notion of motion and the founding affidavit, I required clarity on whether there was to be an amended notice of motion and the effect of the Full Court judgment on the initial relief sought, I was informed by counsel for the applicant, no amended notice of motion was to be introduced. In the notice of motion, the following relief is at paragraph [9]

[9] The respondents are ordered to immediately, allow the applicants access to the pound where the cattle are kept, for the purposes of identifying their cattle.

[37] Conflicting relief is encapsulated in paragraph 32.6 of the founding affidavit, wherein the following is stated:

[32.6] that the pound master who has been granted permission to temporarily keep the applicant’s cattle be directed forthwith to release that applicant’s cattle and everything they unlawfully removed from the farms.

[38] Notably, the applicants have failed to join the lessees (and the pound Master) to the identified farms who have been lawfully allocated the farms in terms of a lease agreement with the first respondent, in terms of the land distribution process.

[39] The test for non-joinder is set out by the Supreme Court of Appeal in *Absa Bank Ltd v Naude NO*, [2015] ZASCA 97 in the following terms:

“[10] 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 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.”

[40] In *Judicial Service Commission and Another v Cape Bar Council and Another* 2013

(1) SA 170 (SCA) at par [12], the Court held that:

“[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC 2007

(5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.”

[41] The failure to join these two parties who have a direct and substantial interest in the application should have been fatal and could have led to the dismissal of the application.

Failure to replying affidavits in the main and counter application

[42] It is settled law that there are normally three sets of affidavits in motion proceedings. In terms of Rule 6(5) (e) the court may in its discretion permit the filing of further affidavits. Whilst affidavits in motion proceedings each serve a specific purpose, the purpose of the replying affidavit is to put up evidence to controvert the case made by the respondents in their answering affidavit. The applicants elected not to file same in the main application. There is no underscoring that there existed a factual dispute on the papers. See: *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* (53/84) [1984] ZASCA 51.

Counter application

[43] The respondents apply for an interdict to prohibit the applicants from entering the farms and grazing their livestock therein, pending the appeal that is to be prosecuted. Failing which, the applicants will continue to damage the farms and the order obtained will be futile or a brutum fulmen. The counter application is stillborn. There is no basis for the counter application in its current form, notwithstanding the respondents' intention to appeal the orders of the Full Court handed down on 14 April 2023.

[44] In the premises I reiterate the order handed on 4 May 2023 for the reasons advanced, supra.

The main and counter applications are struck from the roll. Each party to pay its own costs.

A REDDY

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG

APPEARANCES

Counsel for the Applicant: ADV L Mokone Attorney for Applicant: J L RAPHIRI ATTORNEYS C/O
KGOMO ATTORNEYS 56 SHIPPARD STREET MAHIKENG Tell: 012 4722 0150 Counsel for
Respondent: ADV O DIBETSO Attorney for Respondent: STATE ATTORNEY MEGA CITY COMPLEX
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