

SOUTH AFRICA / JUDGMENT

University of Venda v Mathivha and Others (684/2012) [2015] ZALMPTHC 6 (3 September 2015)

[2015] ZALMPTHC 6

COURT

Limpopo High Court, Thohoyandou

BEFORE

A Lamminga

CASE / FILE NUMBER

684/2012

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT, GAUTENG DIVISION PRETORIA

(functioning as LIMPOPO LOCAL DIVISION, THOHOYANDOU)

Casa NO.: 684/2012

DATE: 3 SEPTEMBER 2015

In the matter between

UNIVERSITY OF VENDA.....Applicant

And

MUTHUFELA MATHIVHA.....1st Respondent

VHO-THOVELE MIDYAVHATHU PRINCE.....2nd Respondent

KENNEDY TSHIVHASE

TSHIVHASE TRADITIONAL COUNCIL.....3 Respondent

TSHAVHASE ROYAL COUNCIL.....4th Respondent

JUDGMENT

LAMMINGA AJ

- [1] The Applicant applied on Notice of Motion on 24 October 2012 for an interdict restraining Respondent (now First Respondent) from occupying and developing the portion of land depicted in green on a map marked “PAMI” for that Respondent, and anyone who may occupy that piece of land through that respondent, to vacate said land within fourteen days from the order, to remove from that land any and all developments, buildings and/or structures erected by them on said land, and failing compliance with the aforesaid, the ejection of that Respondent and demolition and removal of all developments, and/or structures from that piece of land,
- [2] The Respondent filed his answering affidavit on 3 December 2012 and Applicant filed its replying affidavit on 7 January 2013.
- [3] Applicant proceeded with an urgent application for an interlocutory interdict, to restrain the Respondent from conducting and/or continuing with any building and/or construction work on the land being the subject matter of the dispute in the main application, pending the finalization of the main application. On 28 February Ebersohn AJ granted the Interim interdict.
- [4] The Respondent brought an application in terms of Rule 10, which application was granted by Webster J on 13 June 2013, to join Second, Third and Fourth Respondents, with him becoming First Respondent.
- [5] Second, Third and Fourth Respondents filed their answering affidavit on 23 August 2013 and Applicant filed its replying affidavit to that on 6 September 2013.
- [6] AH parties had filed their heads of argument by the time the matter was heard on 27 July 2015, however second, third and fourth Respondents were in default on that date. First Respondent argued that the matter could not be heard in the absence of the other Respondents and requested a postponement Applicant opposed the application and the court refused the application for postponement as there were no grounds to justify a further delay in the hearing of the application. The answering affidavit and heads of argument of Second, Third and Fourth Respondents were considered by this court.
- [7] On the papers various points in limine were raised. However, none of the parties persisted with the points in limine, therefor the court proceeded to hear arguments.
- [8] The applicant applies for a final prohibitory interdict, as well as a mandatory interdict and thus has to satisfy the following requirements, which are trite:
- [8.1] a clear right;
- [8.2] an injury actually committed or reasonably apprehended; and
- [8.3] the absence of similar protection by any other ordinary remedy.

[9] To determine whether the applicant has a clear right is a matter of substantive law and whether the right is clear is a matter of evidence. The applicant has to prove on a balance of probabilities facts which, in terms of substantive law, establish the right relied upon. (See *Diepsloot Residents & Landowners Association v Administrator*, Tvl1993 (3) SA 49 (T))

[10] In order to satisfy the second requirement the applicant has to prove on a balance of probabilities that an infringement of the right, which has been established, has occurred or is reasonably apprehended, as well as the resultant prejudice or potential prejudice. (See *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 (1) SA 252 (SCA); *VolkskasBpk v Barclays Bank (DC&O)* 1952 (3) SA 343 (A) at 351; *Capital Estate and General Agencies (Pty) Ltd v Holiday Inn Inc* 1977 (2) SA 916 (A))

[11] The third requirement is the absence of another adequate, ordinary, reasonable, legal remedy capable of affording similar protection. (*Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W) at 965H; and see *Chapman's Peak Hotel (Pty) Ltd v Jab and Annalene Restaurants CC t/a O'Hagans*)

[2001] 4 All SA 415 (C))

[12] Applicant in its founding affidavit stated that it is the “bona fide owner” of the land as indicated in PAM11 a portion of which is infringed upon by the first respondent. It is common cause that the land in question is not registered in the name of the Applicant. It follows that Applicant is not the owner of the land in question, but rather relies on its use and occupation of the land, allegedly donated to it and its right to transfer of the land based on that donation.

[13] On the papers the following issues are not in dispute between Applicant and

First respondent;

[13.1] A fence erected around the campus some years before, does not surround all the land the Applicant is expected to receive transfer of;

[13.2] Map PAM 1 indicates the extent of the land Applicant is entitled to receive transfer of, in red, and the piece of land the first respondent is occupying since June 2012, in green;

[13.3] Applicants representatives informed the First Respondent of his infringement, and their interest in the land in June 2012. First respondent then occupied another piece of land, which also fell within the extent of the land applicant had alleged it had an interest in and after he was again informed of his infringement, he returned to the first piece of land and continued his operation and construction on the first piece of land. It was confirmed by both Applicant and First Respondent that this first piece of land is the land indicated in green on PAM1;

[13.4] Land measuring 350 hectares in extent, belonged to the Department of Education in respect of the Diman! Secondary School. In 1979 the extent of the land was increased to 373.7932 hectares to comprise the red area on PAM1. This land was given to the applicant in 1982 by that Department;

[13.5] Due to technical difficulties, registration of the transfer never took place, but is currently being attended to by the State Land Unit;

[13.6] The piece of land occupied by the First Respondent is reflected in green on PAM1 and is situated mainly within the land given to Applicant;

[13.7] Subsequent changes to the extent of the land given to the Applicant, did not affect the portion occupied by the First respondent;

[13.8] The Applicant and the Second, Third and Fourth Respondents entered into an agreement on 19 April 2010 in respect of the land, which includes the piece of land occupied by the first respondent. This agreement stipulates the land as indicated in Annexure A to that agreement, is occupied by the Applicant and that land is to be formally transferred to the Applicant;

[13.9] The First Respondent has not been given any permission to occupy the land in question, but the Second, Third and Fourth Respondents gave a letter, addressed to no-one in particular and dated 6 June 2012, recommending the application for approval of 5000 square meter's business site at Ngovhela Village to MathivhaLuvhengo Maria, without describing the extent or location of said property.

[13.10] The parties tried to resolve the matter amicably, but were unable to up to date of this application.

[14]The First Respondent did raise disputes of the donation, extent of the property donated and the Constitutionality of the Applicant's occupation in his heads of argument. However, the facts not disputed as stated in [13] above were determined by the answering affidavit filed by the First Respondent and constitute facts either expressly admitted, bare denials or statements he simply denied knowledge of.

CLEAR RIGHT

[15]From the above it is already evident that, as far as the issues between Applicant and the First Respondent are concerned; the Applicant has proved that the land has been donated to it, although not yet transferred and that Applicant is entitled to transfer of the property. Further it has proved that it has been enjoying occupation and use of the land in question, and that the transfer process is being attended to. In *Smit v Saipem* 1974 (4) SA 918 (A) the Plaintiff had purchased land, not yet taken transfer but the risk in the property had passed to Plaintiff upon signature of the purchase agreement. It was held that in these circumstances the plaintiff had a substantive right to the property in question. Therefor the Applicant in this case similarly has proved a substantive right to the property as depicted in PAM 1 and thus satisfied the first requirement of a clear right.

[16]The Second, Third And Fourth Respondents disputed that the Applicant had any rights to the land in question, the donation of the land and the extent of the land allegedly donated to the Applicant. They alleged that the land was communal land in terms of customary law and allocated to the mother of the First Respondent by them in terms of customary law. Their

submissions, the relevant principles and legislative provisions are dealt with later in this judgment as this do not impact on the finding as to what is in dispute between the Applicant and the First Respondent.

INJURY

[17]In respect of the second requirement it is not disputed by the First Respondent that he took occupation of and started construction on a portion of the land donated to the Applicant in question. First Respondent denies that his occupation of the said land infringes on any rights of the Applicant and he relies on the allegation that Second, Third and Fourth Respondents had given his mother permission to occupy the piece of land. It is common cause that First Respondent was not given any permission by Second, Third and Fourth Respondents to occupy the relevant piece of land, First Respondent does not even allege that he is in occupation on behalf of or as an agent of his mother. He makes vague allegations that the family” made decisions regarding the land and what to do with it, but nothing is confirmed by confirmatory affidavits. It is clear that the First Respondent’s occupation of the land infringes on the established right of the Applicant and in the very least holds potential prejudice for the Applicant in that it is denied use of that part of the land- First Respondent alleges that he is in occupation of the land

pursuant to its allocation to his mother.

[18]The aforesaid renders it necessary to determine the question whether or not the Second* Third and Fourth Respondents had any authority to allocate the land in question*

[18.1] Traditional leadership, its authority and legislative recognition thereof:

[18.1.1] Regarding the recognition of traditional leadership the Constitution of South Africa, 1996 (No. 108 of 1996), in Section 211 provides:

“(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically

deals with customary law/

[18.1.2] Section 212(1) of that Act further provides for the enactment of national legislation to give effect to the recognition and role of traditional leadership at a local level. This constitutional imperative was recognised through the enactment of the Traditional Leadership and Governance Framework Act, 41 of 2003 (the TLGF) and the Limpopo Traditional Leadership and Institutions Act, 6 of 2005 (the Limpopo Act). These acts regulate the governance of traditional communities and provide processes for the recognition of structures of traditional leadership.

[18.1.3] Applicant contends that Second, Third and Fourth Respondents are not recognised in terms of the TLGF or the Limpopo Act and therefore have no authority to perform the functions provided for in terms of the customary law and applicable legislation. All the Respondents allege that the Second, Third and Fourth Respondents are recognized in terms of customary law and allocated the land in terms of customary law. There was an allegation by Second, Third and Fourth Respondents that they are recognized in terms of the TLGF and Limpopo Act, but no confirmation of such recognition was placed before the court. They rely solely on customary law for their authority to allocate land and not on official recognition in terms of the TLGF or Limpopo Act on application for such recognition, as provided for

[18.1.4] In *Pilane v Pilane* 2013 JDR 0295 (CC) the Constitutional Court stated at [44] that:

“The respondents have officially been recognised as the traditional leadership of the Traditional Community by statute to perform certain public functions, in accordance with the Constitution. Accordingly, they are organs of state. Their authority and power are devolved upon them as organs of state from the Constitution itself. However, given that statutory authority accorded to traditional leadership does not necessarily preclude or restrict the operation of customary leadership that has not been recognised by legislation, the position as it stands is far from clear.”

This, in my view simply confirms that recognition in terms of the relevant legislation is required to perform certain public functions in accordance with the Constitution and, if not recognized as stated above, customary leadership can still function within the customs of the particular community, insofar as it is not contrary to legislation and specifically, the Constitution,

[18.2] If we were to accept, for argument's sake, that they could indeed allocate and grant permission to occupy, then it appears they did allocate the land to the Applicant in 2010 in terms of the agreement PAM 6, which is not disputed. They did however state that the property allocated to the Applicant in terms of PAM 0 was fenced and the property outside the fence did not form part of the land allocated to it. They, however, did not dispute that in PAM 6 the “Designated land” which forms the subject of that agreement is defined as:

“the area of communal land allocated to and occupied by the University, measuring 250.9819 hectares as represented by a Surveyor-General diagram of which a copy is attached as Annexure A.”*

This annexure A indicates an area which corresponds with PAM1 excluding the area marked on PAM1 on the Remainder of BEUSTER 253-MT, which includes the portion of land occupied by the First Respondent.

From this it follows that the Second, Third and Fourth Respondents then allocated land to the Applicants 2010, a portion of which they then allocated to the mother of First Respondent.

Land tenure legislative framework:

[18.4] The entire issue of whether the land was allocated by the traditional leadership becomes irrelevant when one considers the question whether there was any provision or authority under which the Second, Third and Fourth Respondents could allocate land.

Legislation

[18.4.1] In the unfortunate history of our country land tenure of indigenous people in South Africa was traditionally divided into two categories namely Rural and Urban. This distinction is peculiar to the land dispensation of South Africa and the fact that land was set aside for occupation by black people. Rural land essentially applied to land governed by the Land Acts namely the Native Land Act, 1913 (Act 27 of 1913) (in terms of which areas were designated for exclusive occupation by Blacks) and the Development Trust and Land Act, 1936 (Act 18 of 1936) which was promulgated for the sole purpose of the acquisition of and occupation of the land by Blacks in the so called released areas. Urban land essentially related to areas whether rural or urban which were under the jurisdiction of the so called South African Development Trust (SADT). Rural areas were divided into three main categories, namely SADT land, self-governing territory land (Kangwane, KwaZulu and Qwaqwa) and TBVC land (Transkei, Bophutatswana, Venda and Ciskei),

Within the above categories there were further divisions of land into rural and urban.

[18.4.2] The Black Administration Act, 1927 (Act 38 of 1927) was the enabling legislation for the implementation of all policy regarding land administration in the above areas. It gave rise to various other legislation dealing with regulation of land tenure rights e.g. Proclamation R293 of 1962 (Regulations for the Administration and Control of Townships in Black Areas) or the so-called Urban

Proclamation, solely for urban tenure development and Proclamation R188 of 1969 (Black Areas Land Regulations) the Rural Proclamation

dealing with rural land tenure, providing for quitrent and permission to occupy (PTO) certificates. PTO's were originally issued in areas scheduled for Black Occupation in accordance with the Black Administration Act, 1927, the Native Land Act, 1913 and the Development Trust and Land Act, 1936.

[18.4.3] The Promotion of Bantu Self-government Act, 1959 (Act 46 of 1959) set aside areas which would in the future be declared independent homelands and in 1979 Parliament granted 'independence' to the Republic of Venda ("Venda") in terms of the Status of Venda Act, 1979 (Act 170 of 1979). The existing laws, including the Urban and Rural proclamations, were taken over by Venda.

[18.4.4] The Venda District and Territorial Councils Act, 1986 (Act 15 of

1986) organized the traditional leadership in Venda in Territorial and District Councils and the executive had to consult with these Councils in regard to certain land administration

issues.

[18.4.5] Venda Land Control Act, 1986 (Act 16 of 1986) provided for the acquisition of land, removal of restrictions on members of a particular race, reserved land for specific purposes* introduced measures to curtail misuse of land and established a Land Tenure Board. It applied to all State owned land, which included land held in trust on behalf of a tribe for the benefit of the tribe as well as any interest in land, it repealed, amongst a host of other acts, also the Native Land Act, 1913 and the Development Trust and Land Act,

1936. In terms of Section 3(4) the fact that any State owned land has been allocated or used by a tribe prior to coming into operation of the Act, shall not be regarded as an obligation or condition subject to which the State holds the land. No provision was made for the allocation of land by traditional authorities in terms of the Act.

[18.4.6] The Venda Land Affairs Proclamation, 1990 (Act 40 Of 1990) came into operation in 1991 and repealed the whole of the Rural Proclamation and a significant part of the Urban Proclamation. Regulation R17 (approved on 10 April 1992), R23 (approved on 4 September

1992) and R16 (approved on 10 April 1992) were also proclaimed to deal with PTOs, township establishment and registration of title in Venda, These proclamations provided for a Councillor who was vested with the authority to demarcate and allocate land. There was no provision for traditional leadership structures to demarcate and allocate land.

[18.4.7] The Upgrading of Land Tenure Rights Act, 1991 (Act 112 of 1991) (the “Upgrading Act”) came into operation in the Republic of South Africa in 1991. It provided for the conversion into full ownership of the fragile land rights which had been granted under the apartheid dispensation, but it was not applicable in the TBVC states,

[18.4.8] The Interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), specifically Schedule 7, repealed Status of Venda Act, 1979 (Act 140 of 1979), effectively reincorporating Venda into the Republic of South Africa, with effect from 27 April 1994. In terms of section 235(8) of the Interim Constitution the President assigned, amongst others, the administration of the provisions of Sections 6,7 and 14 to 19 of the Venda Land Affairs Proclamation to the Northern Province on 9 September 1994 by Proclamation 140 of 1994 (GG15951).

[18.4.9] The President, by Government Gazette 17753 of 31 January 1997, promulgated Proclamation R9 of 1997, The purpose was to amend and repeal national and provincial laws in order to rationalise the public administration with reference to land affairs. The laws relevant for purpose of this judgment, which were amended was the Regulation for the Administration and Control of Townships in Black Areas, Proclamation No. R. 293 of 1962 of the former Republic of Venda and the Venda Land Affairs Proclamation, 1990 (Proclamation No. 45 of 1990).

[18.4.10] The Constitution of the Republic of South Africa, 1996 (Act 108 of 1997) came into operation on 4 February 1997. Section 2 of Schedule 6 provides that:-

“

- (1) All law that was in force when the new Constitution took effect, continues in force, subject to-
 - (a) any amendment or repeal; and
 - (b) consistency with the new Constitution.
- (2) Old order legislation that continues in force in terms of subitem (1)-
 - (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
 - (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new

Constitution*"

The result of this is that, in the area which comprised the erstwhile Republic of Venda, the Venda Land Affairs Proclamation (LAP), 1990 is applicable. I found no confirmation during my research that Regulation R17, R16 and R23 were repealed so accept that these regulations still apply. In terms of LAP and R17, there is no provision for allotment of sites or granting of PTO's by traditional leadership in regards to any land, rural or urban, in the territory where it applies. Second Third and Fourth Respondents conceded that in terms of applicable legislation, they did not have the authority to allocate land or grant permissions to occupy. They rely on the customary law.

Customary Law

[18.5] It was submitted by the Respondents that the land in question is communal land in terms of customary law and was managed and allocated in terms of customary law and that the court should recognise the right of ownership of the Fourth Respondent in accordance with the provisions of section 25 and section 211 of the Constitution. Further that the Applicant's claim is

based on common law and statutory provisions based on the policy of apartheid and the homeland system. There was also reference to *Atexcor Ltd and Another v Rlchtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC) and *Tongoane and Others v National Commissioner for Agriculture and Land Affairs* 2010 (6) SA 214 (CC) in support for the submission that Fourth Respondent's tenure is protected and guaranteed. The court is not called upon by

any of the parties to adjudicate the question of the Fourth Respondent's ownership of the land in question, but rather whether the land could have been and indeed was allocated to First Respondent. Since the Respondents allege that the allocation was done

in terms of customary law, and customary law is recognized by the Constitution, I will deal with this issue and not the rights of Fourth Respondent to ownership to the land.

[18.5.1] Section 211 of the Constitution provides as follows:

"(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and Customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically

deals with customary law."

[18.5.2] The Law of Evidence Amendment Act, 1988 (Act 45

of 1988) provides in Section 1 that:-

"1 Judicial notice of law of foreign state and of indigenous law (1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

[18.5.3] The customary law pertaining to the allocation of land is not readily ascertainable with sufficient certainty, therefore the court cannot take judicial notice thereof and expert evidence is required. (See *S v Maluleke* 2008

- (1) SACR 49 (T) at par [15].) None of the respondents placed such evidence before the court regarding the following:
 - a. What is considered communal land in terms of the customary law applicable to the Thsivhase community?

b, How is the decision to allocate land to or to permit occupation of land made?

c" Is the allocation of (and or permission to occupy land transferable and if so, how is such transfer achieved under custom?

d. Is there any basis in customary law for the First Respondent to have occupation of the land in question?

[18.5.4] As already stated all the Respondents alleged that the First respondent's mother and not First Respondent, was given permission to occupy in terms of customary law, I am unable to determine whether this was indeed done in terms of the applicable customary law and, if so, whether the First Respondent is, in terms of customary law, entitled to occupy the land.

It follows that First Respondent is trespassing on the land in question, as alleged by the Applicant and therefor the Applicant has proved the second requirement of Injury to an established right.

NO OTHER REMEDY:

[19] Except for the submission that the Applicant should commit to negotiations to resolve the dispute amicably, there is no dispute

that there is no other adequate, ordinary, reasonable, legal remedy capable of affording similar protection.

[20] Therefor the applicant has succeeded In proving the requirements for final interdict against First Respondent. The application is only for relief against First Respondent and there is no prayer for relief against Second, Third and Fourth Respondents.

[21] Therefor following order is made:

[21.1] That the First Respondent is interdicted from occupying and developing the part of the land reflected in green on the map attached and marked PAM1, which overlaps with the land indicated in red on PAM1;

[21.2] That the First Respondent and everyone who may occupy through the First Respondent, vacate the said land within 14(Fourteen) days of service of this order upon them and remove from that land all developments, buildings and/or structures erected by them on the said land;

[21.3] Failing compliance with 1 and 2 above, that the sheriff, with the assistance of the police if necessary, be ordered to eject the First Respondent from that land, and further, once the First Respondent had been ejected, that the sheriff is authorized and directed to demolish all buildings, developments and/or structures on that land and remove all the materials from it;

[21.4] That First Respondent pays the costs of the application.

[21.5] No order is made as between Applicant and Second, Third and Fourth Respondents.

A LAMMINGA

ACTING JUDGE OF THE HIGH COURT

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