

SOUTH AFRICA / JUDGMENT

Zeelie v Unknown Trespassers of Farm Impala Boerdery 231, JU, Mpumalanga (3359/2020) [2022] ZAMPMBHC 11 (9 March 2022)

[2022] ZAMPMBHC 11

COURT

Mbombela High Court, Mpumalanga

BEFORE

B A Mashile

CASE / FILE NUMBER

3359/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED: YES

DATE: 09/03/2022

CASE NO: 3359/2020

In the matter between:

PETRUS ZEELIE

Applicant

(IN HIS CAPACITY AS INTERIM ADMINISTRATOR

OF THE MJEJANE TRUST [IT 6335/04])

and

THE UNKNOWN TRESPASSERS OF

First Respondent

FARM IMPALA BOERDERY 231, JU,

MPUMALANGA

WALTER HLONGWANE Second Respondent

TIKI LAZARUS ZITHA

Third Respondent

WALLY ELVIS NGOMANE

Fourth Respondent

THE NKOMAZI LOCAL MUNICIPALITY

Fifth Respondent

SASOL GAS LIMITED

Sixth Respondent

RCL FOODS SUGAR AND MILLING (PTY) LTD

Seventh Respondent

CROCODILE RIVER MAJOR IRRIGATION BOARD Eighth Respondent

ESKOM SOC

Ninth Respondent

THE MINISTER OF POLICE

Tenth Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

^[1] On 8 December 2020, the Applicant (“Zeelie”), in his capacity as the interim administrator of the Mjejane Trust bearing Registration Number IT6335/04 (“the Trust”) launched an urgent application seeking relief in the following terms:

“1 ...

2 That a rule nisi be issued with a return date of _____, at 10:00 or at soon thereafter as the parties may be heard, in the following terms:

2.1 That the Second, Third and Fourth respondents, and any person acting upon their instruction, be interdicted and restrained from selling and/or allocating any land forming part of the property known as the Farm Impala Boerdery 231, JU, Mpumalanga for any purpose whatsoever to any person;

2.2 That the unknown trespassers of the property known as the Farm Impala Boerdery 231, JU, Mpumalanga be interdicted and restrained from entering onto the property without the Applicant's consent;

2.3 That the unknown trespassers be interdicted and restrained from clearing or preparing any land forming part of the property known as the Farm Impala Boerdery 231, JU, Mpumalanga for any purpose whatsoever, including but not limited to the purpose of constructing or erecting any structure or dwelling thereon;

2.4 That all current construction and/or development on the property known as the Farm Impala Boerdery 231, JU, Mpumalanga by any person be interdicted and restrained, unless expressly authorised in writing by the Applicant;

2.5 That the unknown trespassers be interdicted and restrained from utilising and/or damaging the irrigation canals on the property;

2.6 That the boom and security at the entrance to the property known as the Farm Impala Boerdery 231, JU, Mpumalanga on the Transnet servitude road be removed, alternatively demolished forthwith;

2.7 That the Ninth Respondent be interdicted and restrained from executing any new installations of electricity supply to the property without the Applicant's prior written consent;

2.8 That the Sheriff and/or the South African Police Service be directed to ensure compliance with the relief granted in terms of prayers 2.1 to 2.7 above when called upon to do so by the Applicant; and

2.9 That the Fifth Respondent take such steps as may be necessary to prevent and/or remedy unauthorised land use on the property known as the Farm Impala Boerdery 231, JU, Mpumalanga in contravention of the Spatial Planning and Land Use Management Act or any other legislation applicable to its area of jurisdiction in relation to land use rights;

2.10 That the Second, Third and Fourth Respondents pay the costs of the application, jointly and severally, and together with any further party who opposes the matter.

3 That the relief granted in terms of prayer 2 above operate as interim relief, enforceable with immediate effect pending the return date.

4 That the application, together with any order granted ex parte be served by the Sheriff on the First Respondent and the Second Respondent by affixing a copy thereof to notice boards displayed and accessible at all entrances to the property known as the Farm Impala Boerdery 231, JU, Mpumalanga, within 5 days of such order.

5 That the application, together with any order granted ex parte be served by the Sheriff on the Third, Fourth, Fifth, Sixth, Seventh and Eighth Respondents in terms of Uniform Rule 4 within 10 days of such

order.

6 “

- [2] Following argument, the court granted the relief returnable on 22 January 2021. in the interim, the matter became opposed by the Second to Fourth Respondents (“the Respondents”). I shall refer to the Respondents individually as either the Second or Third or Fourth Respondent where context demands, otherwise they will be mentioned as a collective. On 22 January 2021, the rule nisi was extended to 6 May 2021. Subsequent to hearing argument between the parties on 6 May 2021, the court allowed a further extension to 12 August 2021. Central to the controversy between the parties is therefore whether or not to confirm or discharge the Rule.

FACTUAL MATRIX

- [3] In terms of the Restitution of the Land Rights Act 22 of 1994 certain immovable properties in this province, amongst them, Farms Ludwiclust 162 JU, Mpumalanga, Tenbosch 162 JU and Impala Boerdery 231, JU, situated in Mpumalanga [“the Trust properties”], were restored to their rightful owners, the Mjejane tribe. In consequence, the Trust was established in 2004 to acquire, hold and manage the Trust properties on behalf of and for the benefit of its beneficiaries.
- [4] To avoid admitting bogus beneficiaries into the restored farms, which was a distinct possibility especially having regard to the period over which the dispossession had occurred, approximately 60 years, a verification process for beneficiaries was conceived and later incorporated into the Trust Deed and entrenched by a court order dated 12 December 2008. Notwithstanding That 16 years has lapsed, the verification process of beneficiaries process remains unresolved. As such, until now none of the beneficiaries of the trust has been formally identified for purposes of receiving benefits from the Trust.
- [5] The interim suspended trustees who were in office prior to Zeelie taking over in his current position were there merely to act as custodians of the trust properties and its assets pending completion of the verification process. Zeelie’s position is not different to those trustees. Zeelie was only appointed on 11 August 2020 as substitution for the suspended interim trustees, Meshack Thembinkosi Silinda, Simeon Ngomane and Tiki Lazarus Zitha.
- [6] Additionally, Zeelie obtained extended powers in respect of the Trust on 11 November 2020 following an application in the Gauteng Division, including but not limited to the power to:
- 6.1 Investigate and ascertain the nature and extent of the Trust’s assets, liabilities and interests;
- 6.2 Manage, control, recover and retain for the benefit of the Trust all assets of whatever nature, belonging to the Trust or to which the Trust is entitled;
- 6.3 Institute and/ or defend legal proceedings in the interest of the Trust and the protection or recovery of the Trust’s assets.

- [7] Zeelie alleges that the purpose of this application is to preserve trust property that is intended for the benefit of the unverified beneficiaries. The Trust property, it is claimed, is being unlawfully eroded by the unauthorised and unlawful sale and/or allocation of land on the Trust property to third parties.
- [8] These third parties who collectively make up the first respondent are purchasing, clearing, preparing and constructing structures on parts of the Trust property which they have bought from the respondents. These third parties are unknown to the Trust hence they are referred to as ‘the Unknown Trespassers’. It is the alleged conduct described aforesaid of the Unknown Trespassers that this application is intended to interdict and restrain.
- [9] The subject matter of this application is described as the Farm Impala Boerdery 231, JU, Mpumalanga [“the property”] and the Trust is the registered owner. It is situated in the territorial jurisdiction of the Nkomazi Local Municipality [“the Municipality”], which is within the Mpumalanga Province.
- [10] The Municipality is cited herein as the Fifth Respondent. The Seventh Respondent (“RCL”) is leasing the property from the Trust for agricultural purposes. The Sixth Respondent (“Sasol Gas”) has registered a servitude in its favour for purposes of a gas pipeline (“pipeline”). The pipeline cuts across the property. The pipeline is owned by a third party, Rompco.
- [11] It is a dispassionate demonstrable fact that there exist legal limitations that concern the ability of any person to transact with or encumber the property emanating from the trust deed and the court order of December 2008. To begin then with the former, Clause 13.1 prescribes vis-à-vis the trustees’ powers in respect of the trust and trust properties that:

“The Trustees shall have the following powers:

13.1 To acquire and hold for the Trust, by purchase, lease, donation, bequest, in exchange or in any lawful manner whatsoever, any property, (whether movable or immovable) provided that the Trustees shall not:

13.1.1 alienate, let or mortgage any immovable property of the Trust, unless this is done with the full knowledge and consent of 75% (seventy-five percent) of the total number of Beneficiaries present at a General Meeting called for that purpose in terms of paragraph 19 hereof; or

13.1.2 permit or condone the rent free occupation of any land or building owned by the Trust from time to time by persons or Associations of Persons, save for purposes which are to the benefit of the Beneficiaries and consistent with the objections of the Trust.”

- [12] Turning to the court order of 12 December 2008. Paragraph 11 of the aforesaid order is unmistakable in its specificity. It provides that:

“no further fixed property belonging to the applicant be allocated or sold or leased to any person for residential or any other purposes or otherwise encumbered until such time as the identities of the beneficiaries of the applicant have been ratified by the court as contemplated in terms of paragraph 9 above.”

ASSERTIONS OF THE PARTIES

[12] Firstly, the Respondents are adamant that there was no justification for the Applicant to approach this Court seeking relief on ex parte basis. They then outline situations that are suitable for ex parte applications and these are as described in Uniform Rule of Court 6(4):

12.1 The Applicant is the only person who is interested in the relief which is being claimed;

12.2 The relief sought is a preliminary step in the proceedings such as, applications to sue by edictal citation, for substituted service, to attach to found or confirm jurisdiction; and

12.3 The nature of the relief sought is such that the giving of notice may defeat the purpose of the application, such as the Anton Pillar type order.

[13] It appears that the Respondents also assert that this matter should not have been entertained as an urgent matter by the court that first granted the rule nisi. In this regard they argue that the Applicants version is that the impugned conduct by the alleged unknown persons and the Second to Fourth Respondents began in 2016. The offending conduct of the aforesaid parties having begun five years thereafter, it is staggering that this matter was characterized as urgent. Perceived in this matter, conclude the Respondents, the urgency, if any, was self-created.

[14] The Respondents explain that the trustees for the time being in 2009 authorised the Third Respondent to develop portion 9 of the property. They further clarify that the Third Respondent initially intended to develop a tourist attraction but subsequently decided to develop a residential area on the property following recognition for need for a residential place closer to town.

[15] All the persons residing on the property are beneficiaries of the Trust. It is the Respondents' further assertion that no stands are being sold. Instead, claim the Respondents, stands are allocated to qualifying beneficiaries in exchange for a contribution fee which is then used for services. In any event, the settlement referred to is not taking place on a portion of the property leased to RCL.

[16] The settlement is not encroaching upon the gas pipeline servitude. No harm is being caused to the interests of the Trust or Sasol Gas, RCL and the Eighth Respondent (“the Board”). Lastly, they maintain that the interdicts sought are not competent against unidentified persons.

- [17] Another assertion brought forward by the Respondents is that insofar as the court order of 12 December 2008 prohibiting allocation or sale or lease of the Trust property to any person for residential or any other purpose is concerned, Zeelie is blowing hot and cold air. Notwithstanding this prohibition contained in the court order, contend the Respondents, Zeelie has not challenged this apparent violation by the Trust and RCL brought about by their conclusion of a lease agreement in 2016.
- [18] Zeelie's terse response to the first two assertions is that the 'horses have bolted'. On the balance of the arguments, Zeelie's counter is that having regard to the limitations imposed by the trust deed together with the court order, the activities by the Respondents and the consequences that flow directly therefrom are simply illegal. The conduct of the Respondents and/or people claiming to have been authorised by them ought to be stopped.

ISSUES

- [19] The issue is whether the Trust has made a case for the confirmation of the rule nisi granted on 8 December 2020 or not. Needless to state that if it has, the rule nisi will be confirmed. A finding to the contrary will necessarily require a discharge.

LEGAL FRAMEWORK AND ANALYSIS

INAPPROPRIATENESS OF AN EX PARTE APPLICATION

- [20] The three instances described by the Respondents on when a party can approach a court on ex parte basis are trite. The source is of course the Uniform Rule of Court 6(4) to which the Respondents have so aptly referred. While the Respondents might have a valid point, it is raised somewhat belatedly because they have failed to anticipate its hearing as envisaged in Uniform Rule of Court 6(8). For completion's sake, the Rule provides that any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than twenty-four hours' notice.
- [21] To date there is no answering affidavit addressing the inappropriateness of the ex parte relief. As such, the court order of 8 December 2020 is still extant. Besides, Uniform Rule of Court 6(12)(C) deals with reconsideration and it provides that a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order. It is evident that the Respondents did not take advantage of the provisions of the aforesaid Rule.
- [22] At the risk of sounding like this Court is advising the Respondents, this point should have been raised as soon as they learnt of the court order granting relief on ex parte basis. Their failure to used either Rules 6(8) or 6(12)(C) HAS SHUT THE DOOR FOR THEM and they must live with that fact.

URGENCY

[23] I do not think it wise to deal with urgency because it was considered on the day when the matter came before court for the first time, 8 December 2020. Having assessed all the facts, the court was satisfied and, using its discretion, thought it proper to declare that the matter was sufficiently urgent warranting immediate hearing. In other words, this Court agrees with the Trust that the question of urgency is moot. It will thus be improper to revisit the decision of the court on that matter.

[24] In justification of why this Court ought to revisit the decision of the court that considered and concluded that the matter be dealt as one of urgency, the Respondents referred me to the case of *Farmers Trust V Competition 2020*

(4) SA 541 (GP) at paragraph 13. To cut all the verbiage, the truth is that the Respondents did not bring a reconsideration application as contemplated in Uniform Rule of Court 6(12)(C) hence they have missed the boat. Of course this Court would have been obliged to consider urgency had a

reconsideration application been brought. This is a return day for a rule nisi and urgency has been decided.

AUTHORITY TO DEVELOP THE TRUST PROPERTY GIVEN TO THE THIRD RESPONDENT

[25] This contention by the Respondents is completely misguided. The provisions of Paragraph 13 of the trust Deed and the court order of the 12th of December 2008 are unambiguous. Perhaps it is worth reiterating that the Respondents and any other person are prohibited to:

“13.1.1 alienate, let or mortgage any immovable property of the Trust, unless this is done with the full knowledge and consent of 75% (seventy-five percent) of the total number of Beneficiaries present at a General Meeting called for that purpose in terms of paragraph 19 hereof; or

[26] In the absence of proof that the Respondents have complied with the provisions of Paragraph 13, their explanation that the trustees of the time being in 2009 mandated the Third Respondent to develop the Trust property in this manner stands to be rejected. Besides, their actions are in direct contravention of the court order of 12 December 2008 because beneficiary verification process is still ongoing.

[27] The protestations of the Respondents that the court order is not applicable anymore notwithstanding, it remains in full force and effect until set aside by an appeal court. Similarly, the prohibitions described in the trust deed remain in force unless it is shown that the Respondents have complied with the requirements set out therein or that the Trust was validly changed. These limitations imposed by the trust deed as well as the court order cannot simply be wished away as the Respondents would have this Court believe.

NO SALE OF LAND TO BENEFICIARIES HAS TAKEN PLACE

[28] Here the contention is that the Respondents are not selling land to the beneficiaries instead, the beneficiaries, who it must be accepted have not been verified as there is no proof of such, are being allocated land in return for a contribution fee that is used for the provision of services. Again, in the absence of evidence that this conduct was performed subsequent to the beneficiary verification process and as such, in compliance with the court order of 12 December 2008, this argument is unproductive and should not be entertained at all.

THE SETTLEMENT IS NOT OCCURRING ON PART OF THE PROPERTY LET TO RCL

[29] It is common cause that RCL and the Trust have entered into a lease agreement and that such lease agreement incorporates Portion 9 of the Trust property. The Second Respondent confesses that allocation of stands to the unknown trespassers is happening on Portion 9, which belongs to the Trust. The admission of allocation taking place on Portion 9 by the Second Respondent manifestly negates the assertion that no settlement is occurring on land let to RCL. The settlement is therefore also burgeoning on leased land, which has a direct negative bearing on the contractual rights enjoyed by the lessee under the lease agreement.

THE SETTLEMENT IS NOT CAUSING HARM TO THE SIXTH TO EIGHTH RESPONDENTS

[30] Here the contention is that if this were the case, the Sixth to Eighth Respondents would have been part of the controversy. Zeelie explains that these parties complained to the Trust about the advancement of the settlement in a manner that threatens their interests. The point is the gas pipeline cuts across the property on which the settlement is mushrooming. The Trust has had to preserve and protect its ownership of the property and its actions are not mutually exclusive with those of the parties. Accordingly, the argument of the Respondents must be rejected as devoid of any merit.

ZEELIE IS 'BLOWING HOT AND COLD AIR' ON THE PROHIBITION IMPOSED BY THE COURT ORDER OF DECEMBER 2008

[31] The shortest answer to this argument is that the current proceedings do not concern the lease agreement between the Trust and RCL. If the Respondents wish to make their complaint a controversy, they are at liberty to do so but this Court cannot countenance clouding of issues in this manner. In other words, whether or not their point is valid is neither here nor there for purposes of resolving the parties' dispute. The relief sought is described in the notice of motion of the Trust to which there is no counterclaim. In the circumstances, it is rejected as being out-of-place.

THE INTERDICTS SOUGHT ARE NOT COMPETENT AGAINST UNIDENTIFIED PERSONS.

[32] The Respondents raise the argument that the reliefs sought against the unknown Respondents are not fit because Zeelie has failed to identify the persons constituting the group. The basis of this assertion, quite evidently, derives from the case of *City of Cape Town v Yaya* [2004] 2 All SA 281 (C) 2 All SA 281 (C), which on closer scrutiny turns out not to be not as 'on all fours' as the Respondents would have this Court believe. I find myself in agreement with the Trust that the difference between the case in *casu* and *Yaya supra* are

profound.

- [33] The Trust could not do more than to cite the Unknown Trespassers as described because it had no means of eliciting that information from them unless of course the Respondents had offered to volunteer it to the Trust. It will be recalled that it is the Second Respondent's assertion that all the individuals constituting the Unknown Trespassers are beneficiaries of the Trust. By implication, this inexorably means that the beneficiaries are in fact known to the Respondents.
- [34] That said, it soon became manifest that the contention was unsustainable because none of the Respondents could supply proof of a list of verified beneficiaries. It is trite that the Trust had no right in law to demand information from unlawful occupiers. See in this regard the case of *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) at para [46].
- [35] It is clear that the Unknown Trespassers are, as it was found in the Yaya case supra, an ascertainable group, committing distinct acts on the property, notwithstanding that their names might not be known. In fact, it is clear from both the Yaya case supra and *Rhodes University V Student Representative Council of Rhodes University* [2017] 1 All SA 617 (ECG) that whether or not a party can sue a group of unnamed persons ought to depend on a consideration of circumstances surrounding each case. These cases are no authority that a party cannot sue a group of unnamed persons regardless that their identity as a specific group has been established.
- [36] To bring it closer to home, the Unknown Trespassers is that group of persons that purchases or is allocated land by the Respondents in violation of the provisions of Paragraph 13 of the trust deed and the court order dated 12 December 2008. The Unknown Trespassers' citation as an unidentified but ascertainable group, on the facts of this matter, is appropriate and is countenanced. The blanket approach adopted by the Respondents that it is impermissible to sue a group for as long as it is unidentified is fallacious and as such, rejected.

THE REQUIREMENTS OF A FINAL INTERDICT

CLEAR RIGHT

- [37] The Trust is the owner of the property. By virtue of that fact it has a right to protect its ownership of it.

IMMINENT HARM

- [38] To the extent that the Unknown Trespassers have settled on the property and that others continue to purchase or are allocated stands is an encroachment on the right of ownership enjoyed by the Trust. The right ought to be protected. Similarly, the rights of the Sixth to Eighth Respondents, as has been shown supra, also require protection because the settlement constitutes an invasion of their different rights.

NO ADEQUATE ALTERNATIVE REMEDY

[39] The Trust seeks to stop any further development of the settlement. It was made clear during argument in court that there is no prayer that seeks to evict any of those Unknown Trespassers who have since settled on the property. A final interdict in the manner proposed is in fact an appropriate remedy as there exists no sufficient alternative remedy to address the situation.

CONCLUSION

[40] In the circumstances, I am constrained to grant relief in the terms proposed by Zeelie.

ORDER

[41] I grant an order in the following terms:

1. The Rule Nisi issued against the Respondents on 8 December 2020 under case number 3359/2020 is confirmed.
2. The above-named Eleventh to Thirty-First Respondents are joined to the proceedings as such.
3. The unknown trespassers of the property known as the Farm Impala Boerdery 231, JU, Mpumalanga, comprising the First Respondent, together with the Eleventh to Thirty-First Respondents, are interdicted and restrained from entering onto the property without the Applicant's consent.
4. The unknown trespassers, comprising the First Respondent, together with the Eleventh to Thirty-First Respondents, are interdicted and restrained from clearing or preparing any land forming part of the property known as the Farm Impala Boerdery 231, JU, Mpumalanga for any purpose whatsoever, including but not limited to the purpose of constructing or erecting any structure or dwelling thereon.
5. The unknown trespassers, comprising the First Respondent, together with the Eleventh to Thirty-First Respondents, are interdicted and restrained from utilising and/or damaging the irrigation canals on the property known as the Farm Impala Boerdery 231, JU, Mpumalanga.
6. The Sheriff and/or the South African Police Service are directed to ensure compliance with the relief granted herein and the order of 8 December 2020 when called upon to do so by the Applicant.
7. The Second, Third and Fourth Respondents are directed to pay the costs of the application.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 09 March 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant:

Adv GR Egan

Instructed by: Du

Toit-Smuts & Partners

Counsel for the Respondents:

Adv TS Ngwenya

Instructed by: Cronje,

De Waal-Skhosana Inc

Date of Judgment: 09

March 2022

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