

SOUTH AFRICA / JUDGMENT

Zinvomax (Pty) Ltd and Others v Iga and Others (1160/21) [2024] ZANCHC 2 (19 January 2024)

[2024] ZANCHC 2

COURT

Northern Cape High Court, Kimberley

BEFORE

Lever

CASE / FILE NUMBER

1160/21

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IN

THE HIGH COURT OF SOUTH AFRICA
(NORTHERN
CAPE DIVISION, KIMBERLEY)

Case

No: 1160/21

Reportable:

YES / NO

Circulate

to Judges:

YES /

NO

Circulate

to Magistrates: YES /

NO

In

the matter between:

ZINVOMAX
(Pty)
Ltd
1st Applicant
GA-SEGONYANA
LOCAL
MUNICIPALITY
2nd Applicant
COPY
CENTRUM JOINT
VENTURE
3rd Applicant
BILY
PURUSHOTHAMAN
4th Applicant
BUILT-IT
GREEN CONSTRUCTION (Pty)
Ltd
5th Applicant
and
ISA
MOHAMMED
IGA
1st Respondent
CHRISTIAAN
MKUMBO
2nd Respondent
JOY
ANADI
3rd Respondent
MOSES
NDWALANG
4th Respondent
TAMATIE
AOBAKWE
5th Respondent
LEBO
KENANI
NASALI
6th Respondent
IPONENT
BELLA
MOSENEKE
7th Respondent
V
MAKHAZA
8th Respondent
DESIRE
KAPHINGA
9th Respondent
SIDDIQUE

ABUBAKER
MOHAMMED
10th Respondent
DIKELEDI
MOSAKO
11th Respondent
WIM
JACOBS
12th Respondent
DANA
MOTATIINA
13th Respondent
BLAISE
EMEDY
14th Respondent
KGALELO
SIKANENG
15th Respondent
MUHAMMAD
RIZWAN
16th Respondent
THAPELO
P
GAELEJWE
17th Respondent
THATOENG
KEHANG
18th Respondent
KHALIL-UR
REHMAN
19th Respondent
SAREL
JOHANNES
PIENAAR
20th Respondent
GAO
XIA
QIANG
21st Respondent
HUANG
FENG
22nd Respondent
MIKE
BESTER
23rd Respondent
UNLAWFUL
OCCUPIERS OF ERF 2564
KURUMAN
24th Respondent
Coram: Lever J

JUDGMENT

Lever J

1. This is an application for the eviction of the respondents from a commercial property known as erf 2[...] K[...] . The said property is currently owned by the Ga-Segonyana Local Municipality, the second applicant herein. The second applicant had purchased the said property from Transnet in 2011 for a purchase price of just under R8m (Eight Million Rand). The second applicant's ownership of the said property is not disputed.
2. The respondents occupy certain premises on the said property and run various businesses from such premises. There are 23 individually named respondents. The 24th respondent is a catch-all to cover all unlawful occupiers of the said property.
3. There are 5 individually named applicants who bring this application. In effect, there are only 3 substantive applicants. The third applicant won a tender to develop the said property on behalf of the second applicant. The third applicant is a joint venture made up of the fourth and fifth applicants.
4. In exchange for developing the said property, the third applicant was awarded a long-term lease of the property. The term of the said lease is for an initial period of 30 years with an automatic extension of 20 years.
5. Then the third applicant ceded such long-term lease to the first applicant with the agreement and participation of the second applicant.
6. This application was opposed by only 4 of the named respondents, being the twelfth, twenty-first, twenty-second and twenty-third respondents (the opposing respondents).
7. The present application for eviction was launched on 8 June 2021. The twenty-third respondent who deposed to the main answering affidavit in this matter, realised that he would have to review and set aside the decision of the second applicant to advertise and award the said tender. Consequently, the twenty-third respondent herein launched an application to review and set aside the decisions of the second applicant in advertising and awarding the said tender. This review application was launched in this court on 21 June 2022 under case number 316 of 2022.
8. This eviction application was then stayed pending the outcome of the said review application. The said review application was dismissed by my sister Mamosebo J and my brother Chwaro AJ on 10 March 2023.

9. As a direct consequence of the dismissal of the said review application, the only basis upon which the opposing respondents could continue to oppose the eviction application was on the question as to whether the three main respondents had locus standi to bring this application for eviction. Indeed, this was the only basis upon which the opposing respondents opposed the eviction application at the hearing hereof.
10. In respect of the opposing respondents, it is only the twenty-third respondent who filed a substantive affidavit. The other opposing respondents only filed short confirmatory affidavits confirming the twenty-third respondent's contentions insofar as it referred to them. The twenty-third respondent only referred to his own alleged lease, which on his own version expired many years before the application for eviction was launched. Therefore, none of the opposing respondents could rely on a pre-existing lease. At best the opposing respondents may have had a month-to-month lease, which was terminated by notice. None of the opposing respondents challenged the alleged termination by notice in an appropriate way.
11. As already set out above, the only basis for the opposing respondents to challenge the present eviction is on the basis of the 3 main applicants not having locus standi to launch this application.
12. Each of the 3 main applicants claims locus standi in their own right. In the present circumstances, where there is no substantive defence that survived the dismissal of the review application and the failure of each of the opposing respondents to establish a valid and existing lease agreement other than a possible month-to-month lease, it is only necessary for one of them to establish their locus standi for this court to award the eviction sought by the applicants collectively.
13. The second applicant is the registered owner of the relevant property and claims its authority to launch this application for eviction stems from that fact. The first applicant has taken cession of a long-term lease of the said property and claims authority to evict unlawful occupiers of the said property by virtue of such cession and the right to occupy the said property that flows from such cession. The third applicant, being the joint venture, claims authority and the obligation to launch the present application by virtue of the fact that it had been awarded a long-term lease which was registered against the title deed of the relevant property and the fact that it has ceded its long-term lease to the first applicant.
14. The opposing respondents challenge the authority of the second applicant to bring this eviction application on the basis that the Municipal Manager who signed the Special Power of Attorney to appoint the applicants' attorney to act in this application has not established his authority to act on behalf of the second applicant in signing the said power of attorney.

15. The opposing respondents challenge the authority of both the first and third applicants to launch the present application on the basis that the alleged cession of the long-term lease was prohibited by certain regulations that relate to management and control of municipal capital assets.

16. Turning now to the challenge to the second applicant's

authority to bring this application, the manner in which the opposing respondents have dealt with this question in their answering

affidavit is both instructive and decisive of this issue.

17. The deponent to the applicants' founding affidavit, in

paragraph 1.3 thereof, alleges that he is duly authorised to depose to the founding affidavit on behalf of all the applicants, by virtue of resolutions passed and the special powers of attorney furnished by the 3 entities who are the effective applicants in this application for eviction. The said deponent annexes all 3 special powers of attorney. Including annexure "FA2" which is the special power of attorney signed by the Municipal Manager of the second applicant.

18. In response to these contentions by the applicants, the opposing

respondents simply note the contents of the relevant paragraphs in the applicants' founding affidavit.

19. In paragraph 2.2 of the founding affidavit the deponent to that affidavit sets out the status of the second applicant. In response to this, at paragraph 5 of the answering affidavit, the opposing respondents state: "Save to note the non-existence of a Counsel (sic) Resolution that gives the Municipal Manager the authority to sign the Special Power of Attorney, Annexure 'FA2' on behalf of the Municipality, the rest of the contents hereof are noted."

20. This is insufficient to give the applicants and in particular the second applicant fair warning that its authority to bring the present application for eviction is being explicitly challenged. Such explicit challenge to the authority of the second applicant to launch the present application appears for the first time in the Heads of Argument filed on behalf of the opposing respondents.

21. The assertion, under oath, that the deponent to the founding

affidavit alleges he is authorised to depose to the founding affidavit by virtue of resolutions passed read together with the provisions of the Special Power of Attorney annexed as "FA2" to the founding affidavit is a positive assertion that the second applicant had properly authorised the launch of this eviction application. This positive assertion is not explicitly challenged in the answering affidavit filed on behalf of the opposing respondents.

22. In Rule 7(1) the Uniform Rules of Court (Rule or Rules depending on the context) provision is made for a process to challenge this alleged authority[1]. The opposing respondents did not avail themselves of this process.
23. The applicants in paragraph 1.3 of the founding affidavit have referred to “resolutions passed” in respect of their authority to launch the eviction application. In the light of the reference to such resolutions in the founding affidavit, the opposing respondents should have invoked the provisions of Rule 35(12), which would have ensured that the opposing respondents had access to the alleged resolutions to enable them to determine if such resolutions were properly adopted. Again, the opposing respondents did not avail themselves of this process.
24. Either of these two procedures provided by the Rules would have allowed the applicants and the opposing respondents a fair opportunity to deal with the underlying factual basis relating to the alleged authority of the applicants. In the present circumstances, the applicants have not had a fair opportunity to deal with this challenge to the authority of the second applicant.
25. In the light of the positive assertion under oath that such authority exists and the failure of the opposing respondents to challenge this explicitly in the answering affidavit filed on their behalf as well as their failure to follow the processes allowed by the Rules, the challenge to the authority of the second respondent to launch this application cannot be sustained and must be dismissed.
26. Turning now to the assertion by the opposing respondents that the first and third applicants have no locus standi to launch this eviction application. The basis of the objection to the locus standi of both the first and third applicants is that by virtue of the provisions of regulation 45(2)(a)(x)[2] which was promulgated under the provisions of section 168 of the Local Government: Municipal Finance Management Act[3]. The said regulation provides in substance that where the long term right to control a capital asset belonging to the relevant local government is involved that any contract awarding such right should at a minimum include: “(x) a clause disallowing the private sector party or organ of state to whom the right is granted from ceding or subcontracting the right to another person; ...”
27. On the first applicant’s own version, it obtained the lease by way of a cession of the third applicant’s long-term lease. The substance of this complaint was a matter for the decision of the Court that entertained the review application. The review application failed albeit on other grounds.
28. This question relating to the cession is currently raised in relation the locus standi of both the first and third applicants. In the context, even if the opposing respondents are correct, it does not show that the third applicant lacks locus standi and cannot claim legal standing to bring the eviction application by virtue of the long-term lease in its favour. The position of the first applicant, insofar as it’s locus standi is concerned, is somewhat more complex.

29. There are also, at least two other factors that need to be

considered. Firstly, the opposing respondents never raised this issue pertinently in the answering affidavit. Again, it was raised for the first time in the opposing respondents Heads of Argument. Secondly, there is in existence a notarial deed of cession registered against the title deed of the relevant property. This registered deed of cession gives the first applicant at least a prima facie right to occupy the relevant property.

30. Dealing with the first factor, the first applicant has not had an opportunity to investigate or deal with the substance of this complaint. The relevant regulation provides that the party who is favoured with the long-term right to manage the relevant capital asset may not cede or sublet such right. The papers in this matter establish that the municipality concerned was involved in the relevant cession. Whether this makes a difference was not argued before me. I am also not in a position to decide this question.

31. Whether under PAJA or under the principle of 'legality'

the only way this endorsement of the title deed with the notarial deed of cession can be set aside is on review. Until the said

endorsement of the cession of the long-term lease on the relevant title deed is cancelled or set aside, the first applicant has at least a prima facie right to occupy the property and hence a prima facie right to bring this application. The twenty third respondent failed in the review application.

32. It is fundamentally unfair to allow the opposing respondents to raise this issue without disclosing it in their answering affidavit. It is apparent from the facts before this court that such cession might be unlawful and thus invalid. If this had been pertinently set out in the opposing respondents' answering affidavit the applicants might have been able to set out facts that would have confirmed their authority to act on the said cession and the rights that flowed from it. However, I don't have to decide this question, as stated earlier, it is sufficient to evict the respondents if any one of the applicants can establish locus standi. I have found that the second applicant has the requisite locus standi and the eviction will be granted on this basis.

33. The opposing respondents on behalf of all the respondents sought a reasonable time to vacate their respective premises should this court grant an eviction. The opposing respondents asked this court to consider the length of occupation of some of the respondents as a factor to consider in asking this court to allow an equitable time for vacating of the relevant premises on the property concerned. The opposing respondents submit that a period of 6 months to vacate their respective premises would be reasonable in the circumstances.

34. This litigation has already had a long history, the relevant review was already dismissed in March 2023. The writing has been on the wall since that date. In these circumstances, I do not think it would be equitable to delay the eviction any further.

35. Finally, there remains the question of costs. Mr Venter who appeared for the applicants urged this court to award a punitive order of costs on an attorney and client scale. Mr Venter referred this court to the case of *Boost Sports v SA Breweries*[4] where the SCA quoted with approval the dictum of Gardiner JP in the matter of *In RE Alluvial Creek, Ltd*[5] which is to the effect that punitive cost orders are not confined to proceedings which are vexatious but may also be granted where one party has put the other party to unnecessary trouble and expense which they ought not to bear.
36. I have no difficulty with the said authorities and accept that a court may grant a punitive costs order in those circumstances. However, the question of costs is primarily within the discretion of the court that entertains the matter. A discretion that is to be exercised having regard to all the relevant circumstances of that particular case.
37. Having regard to the intertwined interests of the applicants and the fact that they had employed one firm of attorneys and one advocate to represent them collectively. I shall simply make an order of costs in favour of the applicants.
38. On the question of whether I should make a punitive costs order I have considered the circumstances of this case. The decision I have reached and the reason for such decision. The fact that the opposing respondents are small business people. The proceedings may have been ill-advised, but they were not vexatious. On balance in these circumstances, I do not believe a punitive costs order is appropriate. In the circumstances, the opposing respondents will be ordered to pay the taxed or agreed costs of the applicants on a party and party basis, jointly and severally, the one paying the others to be absolved.

Accordingly, the following order is made:

- 1) That the respondents and all persons or entities occupying through them, be evicted from Erf 2[...] K[...] , Northern Cape Province (the property) and the said respondents are ordered to immediately vacate the property.
- 2) In the event that the respondents, or any person occupying through them, fails or refuses to immediately vacate the property, that the Sheriff be directed, with the assistance of the South African Police Services (if necessary), to give effect to Order 1 above.
- 3) The twelfth, twenty first, twenty second and twenty third respondents are jointly and severally, the one paying the others to be absolved, ordered to pay the applicants party and party costs herein.

Lawrence Lever

Judge

Northern Cape

Provincial Division

Representation:

Applicants: Adv JA Venter oio Engelsman Magabane Inc Opposing respondents: Adv J Harmse oio Taylor Inc Date of hearing: 2 June 2023 Date of Judgment: 19 January 2024

[1] Ganes & Another v Telecom Namibia 2004 (3) SA 615 (SCA) at para [19].

[2] Published in GNR 878 of 22 August 2008.

[3] Act 56 of 2003.

[4] 2015 (5) SA 38 at para [27].

[5] 1929 CPD 532 at 535.

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