REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

1/11/2013

CASE NO: 29987/2011

(1) REPORTABLE: ~~YES~~ / (NO)
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/(NO)
(3) REVISED.

01/11/2013
DATE

SIGNATURE

In the matter between:

MAYINGELE DOCTOR SIBUYI Applicant

and

NKAMBENI TRIBAL AUTHORITY 1st Respondent

EPHRAIM MHAULE 2nd Respondent

PETRUS MABUZA 3rd Respondent

WAIT RAY BKEKISISA MHLANGA 4th Respondent

JUDGMENT

MAGARDIE AJ

1. In this matter the Applicant seeks to restore undisturbed possession of a certain piece of land. On 25 October 2010, exactly three years ago, Van Der Byl AJ granted an order in terms of which, *inter alia,* the First and Second Respondents were ordered to restore possession and occupation of the land in question to the Applicant.

2. The First and Second Respondents sought to rescind the order made by Van Der Byl AJ. However, the application for rescission was dismissed. After the dismissal of the rescission application, the First and Second Respondents intimated that they would apply for leave to appeal, which they did not do. Despite the dismissal of the rescission application, the First and Second Respondents did not perform in terms of the court order; that is to restore the Applicant's possession of the land.

3. On or about 20 July 1997 the Applicant approached the First Respondent with a request for allocation of communal land in order to

build a college styled Mpumalanga Business College and to promote youth tourism. At that stage, the chief of the First Respondent was one Mr George Mhaule. Chief Mhaule died during 2004.

4. It appears that after the demise of the late chief, the successor, being the Second Respondent herein, started to allocate the Applicant's land to the Third and Fourth Respondents. The Third and Fourth Respondents also started to allocate some portions of land to other people. The Third and Fourth Respondents, and/or their associates, blocked the entrance leading to the Applicant's property thereby preventing the Applicant from having access to his property.

5. In his papers the Applicant stated that after speaking to the late chief, he was allocated the land that is the subject matter of this application. However, on the same day, the chief also opined that the land could not be given to a close corporation, instead the allocation was made to the Applicant personally.

6. The Applicant amended his Notice of Motion and also joined the Third and Fourth Respondents to the proceedings. The amendment and joinder application were not contested.

7. The Respondents did not contest the Applicant's version of the events; as such the averments in the founding papers should be accepted as they are.

8. The strand of the Third and Fourth Respondents case is that the Applicant lacks the requisite *locus standi* to make the application. The argument appears to be founded on the purported liquidation of the Mpumalanga Business College CC. The apparent existence of the liquidation was disclosed by the Applicant in his founding papers. However, there was no sufficient clarity as to the true state of such liquidation. Some computer printout was annexed in the papers depicting that the close corporation was in the process of voluntary liquidation. The Applicant categorically stated that he was not aware of the liquidation. Such being the case, it boggles the mind as to how the close corporation would be in voluntary liquidation without the knowledge of the sole member thereof.

9. The nub of the Third and Fourth Respondents' argument was that the land was not allocated to the Applicant as a person, but to the college as a close corporation. It followed, so the argument proceeded, that the Applicant had no required *locus standi* to institute proceedings on behalf of the close corporation.

10. It was common cause that the Applicant was the sole member of the very close corporation. After the resignation of a certain Mr Barry Cadle, the Applicant became the sole member of the close corporation. It may be said that the close corporation was the Applicant's alter ego.

11. What is also clear is that the chief attested to a confirmatory affidavit, to the effect that the late chief allocated the land in question to the Applicant to use same for the development of a college, vegetation and accommodation. Clearly the chief's affidavit has cleared any uncertainty about the exact person to whom the land was allocated.

12. The issue of whether Mr Cadle had interest in the land in question irrespective of his resignation as a member of the close corporation does not arise. The bottom-line is that, in his affidavit, the chief stated that he allocated the land to the Applicant and that the Applicant is the only one who holds the right of occupation.

13. I was baffled by the submissions made by the legal representative of the Third and Fourth Respondents. Firstly their point of departure was that the Applicant lacked *locus standi*. During argument, there was a veiled suggestion made that the land allocated to the Applicant might not have been done so correctly, following proper procedure. However, when the legal representative was taxed with the absence of any averments either in the answering papers or heads of argument, he simply tended to steer back to the point of lack of *locus standi.*

14. The Third and Fourth Respondents also argued that there was a dispute of fact that could not be addressed on papers. The basis of the submission that a dispute of fact exists is unfathomable when regard is had to the fact that the Third and Fourth Respondents did not file

answering papers. In **John Cecil Wightman t/a JW Construction v Headfour Pty Ltd & Another**[1], the following was said:

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

15. In order to succeed, the Third and Fourth Respondents should have presented facts, which are within their personal knowledge, to counter the Applicant's version. The Third and Fourth Respondent's failure to do so means that the court can proceed to accept the Applicant's version.

16. The foregoing being the case, it stands to reason that the dismissal of the Third and Fourth Respondents' point of lack of *locus standi* is fatal to their case. Except for having presented argument on lack of *locus*

[1] (66/2007) [2008] ZASCA 6 (10 March 2008); See also National Scrap Metal Cape Town & Another v Murray & Roberts Ltd & Another (809/2011) [2012] ZASCA 47 (29 march 2012).

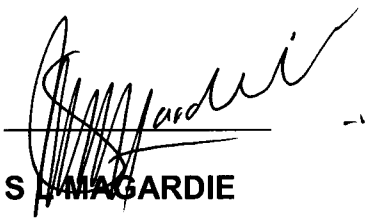
standi, there was no version to gainsay that of the Applicant. The Third and Fourth Respondents chose to rely on the answering papers in the spoliation proceedings. Unfortunately such was not the version herein.

17. The question that is left to be decided is whether the Applicant has succeeded in presenting sufficient facts entitling him to the relief prayed for. I am of the considered view that the Applicant has indeed made out a case for the relief sought herein. The Applicant has been able to demonstrate that he has a clear right and that there is fear of irreparable harm that is being occasioned by the Respondents' continued activities on the land if the relief is not granted. There is also no alternative remedy that the Applicant can resort to in order to protect his interest in the land in question.

18. As it is eminently evident, the Applicant attempted on more than one occasion to stop the activities of the Respondents by making applications for interdictory relief. After succeeding with the application, the First and Second Respondents decided to make application for rescission of the order. The application for rescission was made; however, the application was dismissed. The First and Second Respondents intimated that they would appeal the dismissal of the rescission application. However, the First and Second Respondents neither appealed nor restored the Applicant's possession of the land.

19. In the result, I am of the considered view that the application should succeed. I make the following order:

19.1 That prayers 1, 2, 3, 4, 5, 6, 7 and 9 of the amended notice of motion are granted.



S J MAGARDIE

ACTING JUDGE OF THE HIGH COURT

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