IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D5291/2022

In the matter between:

ETHEKWINI MUNICIPALITY	**APPLICANT**
and	
MSIZI SECURITY CC	**FIRST RESPONDENT**
MXHAKAZA GENERAL TRADING AND PROJECTS CC	**SECOND RESPONDENT**
JUSTICE JABULANI MAPHUMULO	**THIRD RESPONDENT**
THE TRUSTEES FOR THE TIME BEING OF INGONYAMA TRUST	**FOURTH RESPONDENT**
THE INGONYAMA TRUST	**FIFTH RESPONDENT**

JUDGMENT

SIPUNZI AJ

Introduction

[1] This is an urgent application in which the applicant is seeking an interdict restraining the first, second and third respondents (the respondents) from carrying out any construction works and to demolish and/or remove any works relating to the construction within a specified property that is in the Mpumalanga Township, Hammersdale, Durban for purposes of the commercial interests of the third respondent.

[2] The property in issue is located at Portion 28 of the Farm Mpumalanga No. 1[...] in extent 38113 hectares, as well as portion B, in extent 9872 square metres and Portion C, in extent 1,2345 hectares, both being portions of the Farm Lot [...] S[...] S[...] No. 1[...] (the property). It is a portion of land that falls within the demarcated area under the custodianship of the Embo/Langa Traditional Council. This council was responsible for the allocation and alienation of land to residents for social and economic activities under the stewardship of the fourth and fifth respondents, who were collectively responsible for the administration of land that fell within the trust land in terms of the KwaZulu-Natal Ingonyama Trust Act, No. 3 of 1994(Ingonyama Trust Act).

[3] In the event that the respondents failed to do so, the applicant seeks an order that entitled the applicant to appoint and acquire services of its own constructors to demolish or remove the works/materials relating to the construction within the property. The applicant is further seeking a final interdict in the terms that are set out in the notice of motion below:

> ‘1. That this matter is heard as one of urgency and the ordinary forms of service are dispensed with in terms of the Uniform rule 6(12).
>
> 2. that the rule nisi do hereby issue calling upon the first – third respondents to show cause if any why an order in the following should not be granted:
>
> 2.1. that the first to third respondents are interdicted and restrained from conducting any works within the premises more especially those works or activities related to the running of either a trailer hiring business or any other

commercial business on the premises of the property, until final determination of the matter.

2.2. that the first to third respondents are directed to remove all trailers that are housed within the fence at the property and other structures that had been placed within the property.

2.3. that in the failure of the first to the third respondents to remove the trailers and other structures that are within the property, the applicant be entitled to acquire the services of its own contractors to remove same; store them in a safe place, alternatively place them in the possession of the first to third respondents.

2.4. cost of the application.

3. that relief sought in paragraphs 2.1 and 2.2 shall apply as interim relief with immediate effect.

4. Further and /or alternative relief.'

[4] The first, second and third respondents opposed the application. The fourth, fifth and sixth respondents did not participate in the proceedings. The main basis for opposing the application is that the third respondent obtained written consent to occupy the land on 03 November 2020. The first, second and the third respondents will collectively be referred to as 'the respondents', unless the context requires otherwise.

[5] The applicant is the eThekwini Municipality, established in terms of the Provincial Gazette (KwaZulu) Natal), No. 6847 dated 13 August 2001, which in terms of section 10 of the Proclamation 342 of 2002, Kwa Zulu Natal, issued in terms of the Government Municipal Structures Act, 1998, which has its Legal Services department at [...]th Floor, Embassy Building, 2[...] A[...] L[...] Street, Durban, 4001.

[6] T he first respondent is Msizi Security CC, and the second respondent, Mxhakaza General and Projects CC, are incorporated in terms of the relevant company laws of the Republic of South Africa. They are owned and run by the third respondent, Justice Jabulani Maphumulo, who is a businessman.

[7] The fourth respondent are the trustees for the time being of the Ingonyama Trust, a corporate body established in terms of section 2(1) of the Ingonyama Trust Act. The sole trustee is the Ingonyama, the Zulu King.

[8] The fifth respondent is The Ingonyama Trust Board, established under section 2A of the Ingonyama Trust Act. It administers the affairs of the fourth respondent and the trust-held land, who are cited for their statutory duties in the administration of the trust-held land.

[9] The sixth respondent, is the Embo/Langa Traditional Council Authority (the council).

[10] The matter first served on an urgent basis before the urgent court on 10 October 2022, but did not proceed. When the matter served before court again on 26 May 2023, the parties took an order by consent. Specific issues were referred for the hearing of oral evidence. The order issued on 26 May 2023 was in the following terms:

> ‘1. this matter is referred for the hearing of oral evidence on the following issues:
>
> 1.1. whether the Traditional Consent form (PTO), annexure MS1, attached to the affidavit, is valid or whether it is invalid because it was forged and or was not legitimately issued by the Embo/Langa Traditional Council.
>
> 1.2. whether the applicant has the right to the use and occupation of the property by virtue of the sale agreement on which it relies.

1.3. Whether the First to Third respondents have the right to the use and occupation of the property by virtue of the said form PTO and the conduct of the fourth and or fifth and or sixth respondents.

2. Whilst the provisions of Uniform Rules 35, 36 and 37 shall *mutantis mutandis* apply generally, the parties agree as follows, and the same is incorporated in this order:

2.1. Both the applicant on the one hand and the first to third respondents, on the other, shall make discovery as contemplated in Rule 35 of the Uniform Rules of this Honourable Court, within ten (10) days of granting of this order.

2.2. the applicant and the first to third respondents shall be entitled to call for the holding of pre-trial conference immediately after the period of ten (10) days allocated for discovery in terms of paragraph 2.1 above has lapsed. This pre-trial conference shall be held within a period of ten (10) days after the lapse of the period of ten (10) days allocated for discovery in terms of paragraph 2.1 above.

3. all the persons who have deposed to affidavits in this matter shall be called to give evidence at the hearing.

4. the applicant and first to third respondents are authorised to subpoena, including per subpoena *duces tecum*, the office bearers and or members of the fifth respondent.

5. The costs of this application shall be reserved for determination by the court hearing the oral evidence.

6. The matter is adjourned to a date to be arranged on a preferential basis by the Senior Civil Judge.'

[11] At the commencement of the proceeding for the hearing of oral evidence, as per the order of 26 May 2023, the legal representatives of the parties confirmed that

there had been compliance with the balance of the order to the extent that it directed discovery, the inspection of documents, and the holding of the pre- trial conferences. An application for the joinder of the sixth respondent was made. This application was not opposed. It was accordingly granted with no order as to costs.

[12] In the hearing of oral evidence, Messrs Peter Gilmore, Peter Jefferies Warner, and Ms. Masande Ntshanga testified in the applicant's case. On the other hand, the third respondent, Ms. Fikile Gloria Sibiya, Messrs Bhekamakhomo Khomo, Petros Gwala, Jacobs Bheka Sosibo, and Inkosi Duke Vulindlela Mkhize testified.

Summary of facts

The applicant's case

[13] According to the applicant, it planned and resolved to pursue the development of the Sizakala Centre, Business Hive and Fire Station within the territorial land of Embo/Ilanga Traditional Authority (the Council). During 2011, Mr. Gilmore, as the employee of the applicant was responsible to facilitate the discussions and the implementation of the plans of the applicant to the council. Among others, he would liaise with the late Inkosi Mkhize who was the chairperson of the council. Unfortunately, Inkosi Mkhize passed away during the Covid- 19 pandemic.

[14] To this end, on 13 May 2011 the applicant obtained a written consent to occupy the property from the council of the traditional authority, under a lease. The written consent was in the prescribed 'FORM ITB2' (the consent form), populated in manuscript and typed in information. According to Mr. Gilmore, it was on the instructions of the chairperson that he inserted the description of the property by typing into the form. This was done in order to ensure that the property was correctly described. Thereafter, on 18 May 2011 and as it appears on the fax cover page, he faxed the form back to the office of the council. The said consent form bears the signatures of the chairperson, two councilmembers and the secretary.

[15] Although the initial plan was to use the property on the basis of a lease agreement, upon recommendations that were made, on 31 October 2011, the applicant's council resolved to acquire the property by way of purchasing it from the

fifth respondent. This was followed by an assessment of the market value of the property, upon which the subsequent purchase agreement was concluded.[1]

[16] Mr. Warner, a retired employee of the fifth respondent testified that he was the property asset manager. He was the custodian of the assets register and the title deeds of alienated and leased properties that were subject to the administration of the fifth respondent. When he had satisfied himself that the applicant had obtained the consent from the council that was under the chairmanship of the late Inkosi Mkhize; that a deed of sale agreement had been concluded between the applicant and the Fourth respondent, he authorised the applicant to conduct an environmental impact assessment on the property. It was on that basis that on 12 May 2021, he completed and signed the "Consent From The Landowner/Person In Control Of The Land, On Which The Activity Is To Be Undertaken"[2] form. On 30 June 2021, a purchase and sale agreement of the property was concluded between the fifth respondent and the applicant.

[17] Ms. Ntshanga was employed by the applicant since 2018, as the project manager in the development of the property. According to her, the project was part of the development of a one stop shop community service centre. The plan would cater for the local, provincial and national government services precinct. The Sizakala centre and the Business hive would house variety of municipal services and a fire station for the benefit of the Mpumalanga Community. Her role was to facilitate and formulate agreements with service providers for purposes engineering and construction. She was the liaison between various appointed service providers and the applicant. She reached a stage where she advertised the contracts.

[18] During 2018, and in approval of the applicant's project, the National Treasury allocated funding in excess of some hundred million rand. As part of the preparation for the construction, engineers, land surveyors, and architect consultants had to be contracted to conduct a construction assessment on the property. Ms. Ntshanga testified that during 2021, the public participation process had to also commence, so

[1] Updated index to pleadings- volume 2 of 2, page 181, Annexure RA5(a)- (b)- extract of the council meeting of 31 October 2011, para 1.10 and 1.10.3

[2] Updated index to pleadings- volume 2 of 2, page 181 (RA 4(a), Consent from The Landowner/Person in Control of The Land, On Which the Activity Is to Be Undertaken.

she visited the ward councillor, Mr. Sikhakhane Among others, she also needed to enquire why the top soil had been removed on the property. The ward councillor provided Ms. Nshanga with an undertaking to investigate the matter.

[19] Together with other stakeholders who had various roles and interests on the property, Ms. Ntshanga visited the traditional council. Among others, they presented the plan; the contract list and emphasised the objectives of the town precinct. It was during these visits that they were informed that the Inkosi Mkhize who was their original point of contact, and privy to the processes had succumbed to COVID 19. Acting Inkosi Duke Mkhize informed them that he did not have much knowledge about the planned or the unfolding processes that were presented. For that reason, it was resolved that Ms. Ntshanga and other stakeholders who were in her company would contact the fourth respondent. The meeting was accordingly held with the chairperson of the fourth respondent, and Mr. Gilmore was also in attendance. The chairperson of the reiterated that the property was se aside for the planned development.

[20] On 08 December 2021, it was discovered that the third respondent was in occupation of the property and had been issued with a written consent to occupy on the prescribed consent form[3]. It became common cause that such consent was issued by the acting Inkosi Duke Mkhize on 04 November 2020. It had the signatures of the acting Inkosi, two members of the council and the secretary. The third respondent had already commenced with earthworks, construction and occupation of the property.

[21] These developments meant that the applicant could not continue in its plans on the property because a dispute had arisen. According to the applicant, the delay in the commencement of the construction deprived the community of realization benefits of the intended development and provision of municipal and government services. The funding that had been allocated by the national treasury for the construction of the Sizakala Centre, business hive and the fire station had to be withheld until the dispute over the property had been resolved. The applicant also

[3] This is Form ITB2, as stated above.

highlighted that the delay in the development of the property was detrimental to the Mpumalanga community. The national treasury could not allocate funding for other related projects meant for the Mpumalanga community, pending the resolving of the dispute over the property.

[22] The applicant claimed that it was in lawful possession of the property as it had concluded a sale agreement with the fourth respondent, and it continued to pay occupational rent, pending the transfer of ownership.

The respondents' case

[23] The respondents' case finds its substance on the claims that the applicant lacked *locus standi* over the property. The respondents dispute that the applicant was issued with a valid consent to occupy the property. They alleged that the written authority presented by the applicant was a forgery, and that the purchase agreement, which the applicant concluded with the fourth respondent, was invalid. The respondents contend that they have a valid title over the property and that their written consent was proved to be authentic and genuine, as opposed to the applicant's.

[24] Inkosi Duke Mkhize testified that he became the acting Inkosi after the passing of Inkosi ETB Mkhize (the Late Inkosi Mkhize). He confirmed that on 3 November 2020, he signed the prescribed consent form as the chairperson of the council when it was issued to the third respondent. However, notably, the late Inkosi Mkhize had not passed away when the consent form was issued to the third respondent and signed by the acting Inkosi Duke Mkhize. The third respondent had observed due process; hence he was allocated the property. His version was confirmed by Messrs Khomo and Sosibo who were the members of the council at the time.

[25] According to acting Nkosi Duke Mkhize, during 2011, he was the member of the council. He did not know about the allocation of the property to the applicant. His evidence that the third respondent approached the council and was duly granted the relevant consent form for the property was uncontested. Mr. Khomo corroborated his version of how they were approached by the third respondent and his motivation to

the council. He was however at pains to admit that in terms of paragraph 4 of the consent form, the third respondent ought to have waited for communication from the fourth respondent before he took occupation of the property. According to him, the fact that the officials of the fourth respondent came to inspect and demarcate the property, was an indication that permission was granted.

[26] Ms. Sibiya who was the secretary to the council testified that all documents and forms completed for purposes of their processes were in manuscript. They did not own or use typing facilities for completion of their prescribed forms. She did not know anything about the consent form dated 13 May 2011. She however recognised her signature on the form.

[27] She confirmed that the consent form dated 3 November 2020 was processed and completed with her knowledge. She confirmed that she had appended her signature on the said document and that it was issued by the council to the third respondent.

[28] The third respondent, and as the sole proprietor of the second and the third respondents approached the traditional council on 7 October 2020 to request allocation of a business site. His presentation was made to the council that was chaired by Inkosi Duke Mkhize. His application was approved and he was issued with the prescribed consent[4] form. He was aware that subsequent processes would be dealt with by the fourth respondent. Before he received a written approval from the fourth respondent, he understood that he could take occupation of the property. This was also with the approval of the chairperson of the council.

The dispute

[29] The applicant claims that it had followed due process in pursuance of their plan to develop the community service centre at the Mpumalanga township. The applicant also contends that on 13 May 2011 it was allocated the property by the council during the tenure of the late Inkosi Mkhize of the Embo/Ilanga Traditional Authority, who passed away on during 2021. The applicant further stated that

[4] Put differently, he was issued with a consent on Form ITB2

pursuant to its decision to purchase the property, all due processes were followed, including the approval of the National Treasury for the allocation of funds in support of the development. Therefore, the applicant insists that it is legally entitled to continue with its development plans for the benefit of the Mpumalanga community.

[30] The applicant associated their challenges to the entitlement to the property and the emergence of competing interests over the property to the death of Inkosi Mkhize and subsequent allocation of the property to the third respondent.

[31] The respondents insisted that the allocation of the property by the incumbent acting Inkosi should take precedent to that of the applicant. According to them, the applicant was not allocated the property and any claim in the contrary is based on invalid and or forged documents. On this aspect, the applicant bears the onus of proof. Expressed differently, the glaring question is whether the applicant's claim to the impugned land was fraudulently acquired as suggested by the respondents.

Arguments of the applicant

[32] On behalf of the applicant, it was submitted that the acquisition of the property was for provision of government services to the community of the Mpumalanga Township. The applicant complied with the processes and duly obtained the consent from the traditional council for purposes of lease of the property. On realization that it would be economical to purchase the property, it approached the fifth respondents who was the legal custodian of the property, in terms is section 2(5) of the Ingonyama Trust Act 3 of 1994 and that resulted in the conclusion of the purchase agreement.

[33] On behalf of the applicant, it was further argued that the respondents' occupation of the property was unlawful, on the basis that it had not obtained the consent or approval of the fifth and/or fourth respondent, which was the legally recognised custodian of the property. In this regard, the applicant relied on the applicant relied on *Ingonyama Trust v Radebe*[5]. It was highlighted that, 'In respect of the trust and land connected to a particular tribe or traditional authority the act

[5] Ingonyama Trust v Radebe and Others [2012] 2 All SA 212 (KZP) para 43

enjoins the Trust to exercise any of the incidents of ownership in respect of such land with the concurrence of the traditional authority concerned. Likewise, the traditional authority concerned is not entitled to alienate the trust land without the permission of the trust. If the land has been alienated by the traditional authority concerned, for such an act to become complete legal, the trust must have given permission.'

[34] It was their further argument that the circumstances at hand were distinguishable from the *CASSAC v Ingonyama Trust*[6]. This is where the court said that the fourth and fifth respondents acted unlawfully when they concluded lease agreements with people that occupied the trust held land for residential purposes. The court also ordered refunds to those residents who had already paid in terms of the lease agreements. There was a comparison to the facts at hand, to the extent that the subject matter related to land that was alienated for commercial and development purposes. It was argued that it dealt with residential land that was leased to the citizen that sought use of the Trust within land that was under the administration of the fourth and the fifth respondent.

[35] It was also argued that the development of a business hive on Trust-held land, had the potential of advancing the material welfare and social-wellbeing of the community of Mpumalanga Township. It was argued that, in line with *Setlogelo v Setlogelo*[7], the acquisition of the property was for provision of government services to the community of Mpumalanga Township, the applicant had no alternative remedy, and the deprivation of its use of the property continued until the court's determination.

Argument of the respondents

[36] In their rejection of the consent form and the purchase agreement of the applicant, it was argued that these documents did not meet the requirements of admissibility. They were copies, the applicant failed to produce the originals, without any explanation and therefore, not admissible. It was contended that, on that basis,

[6] Council for the Advancement of South African Constitution v Ingonyama Trust and Others [2021] 3 All SA (KZP) paragraphs 20-24; 135; 151-153
[7] Setlogelo v Setlogelo 1914 AD 221

it should be found that the applicant failed to discharge its onus in answering the question whether its consent form was not invalid because it was forgery and was not legitimately issued by the Embo/Langa Traditional Council. On this reason alone, it was submitted that the application should be dismissed.

[37] It was also argued that the applicant had failed to establish that it had the right to the use and occupation of the property.

[38] With reference to *CASAC* v Ingonyama Trust and sections 2(1) and 3 of the Ingonyama Trust Act, it was also argued the Ingonyama Trust Board was not the owner of the land and not empowered to sell the land without the informed consent of the traditional authority. This was argued even though the acting Inkosi Mkhize admitted that after the third respondent was issued with the prescribed consent form, his application was referred to the fourth respondent for further processing.

The issue

[39] The main questions that required determination in the hearing of oral evidence can be summarised in two, namely:

1. whether it was the applicant, by virtue of the consent form and the sale agreement or the respondents, by virtue of the consent form and conduct of fourth, fifth and sixth respondents that was entitled to occupy or the use of the property; and

2. whether the consent form upon which the applicant relied was not legitimately issued by the council and/or invalid because it was forged.

[40] In addition to these questions, in the end the ultimate questions would be whether the applicant had a right of occupation and or use of the property; the authenticity of the council's consent and whether the sale agreement was valid.

[41] Whether the applicant is entitled to the relief sought in the notice of motion and as a final interdict. In other words, whether the requirements in Setlogelo v Setlogelo[8] have been established.

[42] Lastly, whether the fifth respondent was entitled to conclude the purchase agreement with the applicant.

The law

[43] The requirements for a final interdict are set out in the *locus classicus* case, *Setlogelo v Setlogelo* (supra) wherein the applicant is required to satisfy three requirements. Those requirements are that the applicant has a clear right to use and occupy the property; that there was a real threat of breach of such right and the applicant had no other remedy to redress that breach. Below is the specific passage that is often referred in many interdict matters:

> 'the requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. Now, the right of the applicant is perfectly clear. He is a possessor, he is in actual occupation of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly outs him from such possession. True, the law does not allow him to buy land, or lease it, or to take transfer of it. But it does not forbid him from occupying it, more especially as it would seem to have devolved upon him by way of inheritance. It would indeed be a remarkable state of things if a native could be deprived of his right of occupation of land which he had honestly come by at the of any person who took a fancy of it, merely because he was not and could not become the registered owner. And yet that would be the result of the order appealed from if it were allowed to stand.'

[44] As part of determining whether the applicant had a clear right, it will be apposite to consider the various principles in *CASAC v Ingonyama Trust*[9] This will be

[8] Setlogelo v Setlogelo 1914 AD 221

mainly applicable on the question of either the validity or invalidity of the purchase agreement between the applicant and the fifth respondent. Further thereto, would be whether the consent form was issued to the applicant on 13 May 2011.

[45] For the purposes of the alleged continuous breach, see *NCSPCA V Openshaw*[10], where the Supreme Court of Appeal (SCA) emphasised that 'an interdict is not remedy for past invasion of rights but concerned with present, continuing and future infringements. It is appropriate only where future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.' (reference omitted)

[46] In *Hots v UCT*[11], the SCA stated that: 'the existence of another remedy will only preclude the granting of an interdict if the available alternative affords the applicant similar protection against the apprehension. That is why in some cases, it will be necessary to weigh up if an award for damages will be adequate to compensate the injured party for any harm it may suffer.'

[47] To the extent that there is also the challenge to the admissibility of the consent form dated 13 May 2011and the purchase agreements that form part of the applicant's case, it will be necessary to reflect of the principles of evidence. The general rule on the admissibility of documentary evidence is that, "no evidence is ordinarily admissible to prove the content of the document except the original document itself."[12] Having said that, it must also be borne in mind that, "secondary evidence may be exceptionally used to prove the contents of a document if the document is lost or destroyed, or the document is in possession of the opposing party, or it is impossible or inconvenient to produce the original, and or if it is permitted by statute."[13]

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[9] Council for the Advancement of South African Constitution v Ingonyama Trust and Others [2021] 3 All SA (KZP) paragraphs 20-24; 135; 151-153
[10] NCSPCA v Openshaw 2008 (5) SA 339 SCA , paragraph 20
[11] Hots v UCT 2017(2) SA 485 SCA , paragraph 36
[12] DT Zeffert el al, The South African Law of Evidence, 2nd edition, Lexis Nexis, page 829
[13] PJ Schwikkard and TB Mosaka (eds) Principles of evidence 5ed (2023), Chapter 20

Evaluation

[48] The crux of this matter is whether it is the applicant or the third respondent that has the right to the occupation and the use of the property. Put simply, given their competing interests they each exhibited in the evidence over the property, who should have the exclusive use and occupation of the property.

[49] From the outset, the applicant did not contest the evidence that the third respondent obtained the consent form from the council on 3 November 2020. The applicant also did not deny that the said consent was granted by the acting Inkosi Duke Mkhize who succeeded the late Inkosi Mkhize. All the witnesses in the respondents' case were not able to shed any light on the nature of activities between applicant; the late Inkosi Mkhize as well as with the fourth and fifth respondents in relation to the property from 2011 until the purchase agreement was concluded in June 2021. The applicant's challenge remains that they were allocated the property long before the third respondent approached the council, and therefore have a right to the property.

Admissibility of the ITB2 Form dated 13 May 2011

[50] It is common cause that the applicant handed in the copy of the purchase agreement, signed on 21 June 2021 and a copy of the consent form 13 May 2011. The consent form has the signatures of the late chairperson of the council; Ms. Sibiya who was the secretary of the council and two members of the council. Although Ms. Sibiya denied any knowledge of the form, she recognised her signature. She confirmed that such forms were used when the council granted consent to those who sought to be allocated land within its jurisdiction. She also suspected that the form was forged, as she protested that some of the information that was added was typed into the consent form, yet in their office they did not possess such facilities.

[51] Mr. Gilmore testified that he personally populated the form by typing in the description of the property, as was instructed by the late Inkosi Mkhize. He also explained that, this was done to ensure that correct description of the property was inserted before the consent form was processed to the fifth respondent. He further explained that he could not have the original because he faxed through the same

consent form to the office of the council, as also reflected on the fax cover that was attached to the form.

[52] In light of the basic principle that a document must be an original and its authenticity proved in order to be admitted as evidence, the glaring question would be whether in the given form (being copies) the consent form and sale agreement should be admitted as evidence, in the absence of an originals.

[53] Since 2011, it appears that there were various activities between the applicant and various relevant stakeholders, to the extent that of up to R100 Million funding was availed by the National Treasury in 2018. It is highly improbable that all these processes unfolded in a vacuum, without having followed the due processes, including obtaining the consent of the relevant council and facilitation with the fourth and fifth respondents.

[54] Although the respondents sought to allege that the form was invalid for it was a forgery, they did not provide any sound basis upon which these allegations were founded. As pointed out earlier, Ms. Sibiya, the secretary failed to substantiate her assertions that the applicant's form was forged. Firstly, she was not an expert in identification of documents, nor was she a handwriting expert. Although she was inclined to share her opinion on the authenticity or veracity of the content of this form, such could not be permissible as she possessed no expertise on identification of documents and or that she was not academically trained to do so. She recognised her signature on the document and her bold denial of having appended her signature on the form finds no logical basis. Perhaps, the fact that she may have signed it in 2011 and no longer recalls each and every document that she signed, due to the fallibility of human memory, would be understandable. Secondly, one finds no logical explanation how she would vividly recalled when she signed the respondents' form, in 2020 and not recall signing that of the applicant. Although these signings were a lengthy time apart, it is ironical that she recalled what she did in 2020, as it is equally a long time ago. Ms. Sibiya's hesitance in acknowledging her signature, can only be described as an act of blatant dishonesty.

[55] Indeed the production of documentary evidence must be subject to the general rule that, no evidence is ordinarily admissible to prove the content of the document except the original document itself."[14]In this instance, Mr. Gilmore who had filled in the description of the property testified that the copy was a correct reflection of the original consent form. Mr. Gilmore also explained that he faxed the document to the council after he filled in the property description. Furthermore, Ms. Sibiya also recognised her signature as it appeared on the copy. Lastly, there is no dispute that the consent forms were issued from the office of the council. When compared to the consent form that was issued to the third respondent, the documents are identical, save for the information that had to be subject matter specific. On a closer look at the copy, it also bears the stamp of the office of the council. Mr. Gilmore also explained that the original would have been in the possession of the council.

[56] The age of the respective documents, namely, 2011 and 2018, should also be a subject of consideration. In such circumstances, risk of losing the original documents, particularly when they are subject to exchange between various officials should not be viewed with suspicion. Furthermore, the fact that a document is a copy does not necessarily mean that it was forged. Especially in this case because the witness who signed the consent form, Ms Sibiya is still alive. Though she distanced herself from it she could not give a plausible explanation how her signature appears in the applicant's documents. Her version in fact corroborates the version of the applicant. It may the handwritten, but it is a consent form that gave occupation to the applicant. Of substance, is that a consent form was issued to the applicant.

[57] The evidence of Gilmore, coupled with the highlighted features have been examined closely to determine if it should be permissible to accept copies of the consent form dated 13 May 2011 and the purchase agreement, in the absence of the originals. Having engaged in that determination, I am satisfied that the copies furnished by Mr. Gilmore are conclusive proof that the consent form dated 13 May 2011 and the purchase agreement satisfy the requirements of admissibility in the absence of the originals. The copies produced by the applicant sufficed for the

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[14] DT Zeffert el al, The South African Law of Evidence, 2nd edition, Lexis Nexis, page 829

purposes of establishing their existence and purposes.[15]When further regard is had to the content of these documents, there were no factors that suggested that they may have been subjected to some alterations or forgery. There has been no evidence adduced in support of Miss Sibiya's suspicion that the consent form, for instance, is not what it purported to be. With authority and legal precedent on the admissibility of both documents, I am satisfied that they meet the requirements for admissibility. There is no doubt in their veracity and accordingly must be accepted as true copies of the original.

The Ingonyama Trust Board

[58] Among others, the respondents argued that, after all, the board was not the owner of the land and not empowered to sell the property without the consent of the traditional authority. This must be approached in the context of section 2(2) of the Ingonyama Trust Act, to the extent that it provides that, "the board must administer the trust land for the benefit, material welfare and social well-being of the members of the tribes and communities by the board. This brings one to the *CASAC v Ingonyama Trust*[16] as referred to by the respondents.

[59] They made a point that even the purchase agreement should be found to be invalid, for the reason that it was without the consent of the tribal authority. This contention has to be viewed in context to the underlying reasons that caused *CASAC v Ingonyama Trust*, a civic organisation and some individual community members to approach the court. It was the administrative and the executive conduct of the consent form which the applicants sought to have declared unlawful, unconstitutional and invalid.[17]

[60] In *CASAC v Ingonyama Trust*, 'the applicants' contention was that the Trust and the board's conclusion of leases with beneficiaries and residents of Trust-held land, who were the true and ultimate owners of such land, had the effect of depriving the beneficiaries and residents of their customary law rights and/or informal rights and interests in the land in question. It was on that basis that court declared the

[15] PJ Schwikkard and TB Mosaka (eds) Principles of evidence 5ed (2023), Chapter 20
[16] Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others [2021] 3 All SA 437 (KZP)
[17] CASAC and Others v Ingonyama Trust and Others (12745/2018P), paragraph 27

conduct of the board to be unconstitutional and unlawful.[18]The court was critical of the board for signing residential lease agreements with individuals who were legitimate owners of the land under the customary law and for financial gain.

[61] In the case at hand, it should be borne in mind that the applicant's purpose for seeking an allocation of the property was for the rendering of its constitutional legislated duties to the community of Mpumalanga Township. This project was a means to achieve the applicant's development objectives which are exclusive obligations of the applicant. The efforts of the applicant were a classic case where the applicant sought to ensure provision of services to communities in a sustainable manner, wherein the Mpumalanga community would receive services efficiently and with little effort.[19] In the case of the third respondent, it was for advancement of business and or commercial purposes, as an indigenous inhabitant and resident within the council, and not for residential use. Furthermore, the conclusion of the purchase agreement in June 2018 was preceded by the consent form, which was obtained from the council on 13 May 2011. The consent form, its content and purpose were in recognition of the role and the responsibility of the council to its residents and who were also real owners of the land. Lastly, after further consideration, the applicant also sought to purchase the property and not for lease purposes, as it was the case with the respondents.

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[18] CASAC and Others v Ingonyama Trust and Others (12745/2018P), paragraph 28

[19] Section 152(1)(b) of the Constitution of the Republic of South Africa, "(b) The objects of local government are to ensure the provision of services to the communities in a sustainable manner; (c) to promote social and economic development. And in terms of s73 of the Local Government: Municipal Systems Act 32 of 2000, " the municipality must give effect to the provisions of the Constitution and give priority to the basic needs of the local community; promote the development of the local community and ensure that all members of the local community have access to at least the minimum level of basic municipality services

2. that the rule nisi do hereby issue calling upon the first – third respondents to show cause if any why an order in the following should not be granted:

2.1. that the first to third respondents are interdicted and restrained from conducting any works within the premises more especially those works or activities related to the running of either a trailer hiring business or any other commercial business on the premises of the property, until final determination of the matter.

2.2. that the first to third respondents are directed to remove all trailers that are housed within the fence at the property and other structures that had been placed within thin the property.

2.3. that in the failure of the first to the fifth respondents to remove the trailers and other structures that are within the property, the applicant be entitled to acquire the services of its own contractors to remove same; store them in a safe place, alternatively place them in the possession of the first to third respondents.

[62] In my view, the respondents' reliance of *CASAC v Ingonyama Trust* and their submission that the Ingonyama Trust board had not sought the consent or involvement of the council or the residents cannot be sustained. The obtaining of the consent form served as conclusive evidence that the consent to occupy the property was duly obtained. It was only unfortunate for the applicant that late Inkosi Mkhize had passed away when the dispute arose. When regard was had to the documents that were placed on record, particularly the consent form that was also signed by Ms Sibiya and partially populated by Mr Gilmore, it is abundantly clear that the property was duly leased and subsequently sold to the applicants.

[63] The fourth respondent continues to derive its powers and legislative purpose in terms of section 2A of the Ingonyama Trust Act, which includes the administering the affairs of the fifth respondent and the Trust held land. This was reaffirmed in *Ingonyama Trust v Radebe,*[20] when the court held that in respect of trust land and land connected to a tribe, or traditional authority, the traditional authority concerned is not entitled to alienate the trust land without the permission of the trust. It would follow that Mr. Warner who was then employed by the fifth respondent had authorised that an environmental assessment be done on the property, and was in constant communication with other employees of the fourth respondent, in the facilitation of the processes that followed the conclusion of the purchase agreement. It also remained undisputed that the motivation of the applicant in all the processes it followed was for the benefit, material welfare and social well-being of the community of Mpumalanga Community, which were the beneficiaries and residents of the trust-held land and as envisaged in the Ingonyama Trust Act and the Local Government: Municipal Structures Act 117 of 1998.

A clear right

[64] From the discussion above, the reality of the situation becomes that both parties were the holders of the consent form issued by the council under different chairpersons. In the case of the applicant, the consent form was issued in May 2011 and by late Inkosi Mkhize who died during the Covid 19 period. There is also the third respondent, whose consent form was issued on 3 November 2020, by the

[20] *Supra*

current acting Inkosi Duke Mkhize. But the one issued in 2011 surely invalidates the 2020 consent form, unless it can be shown that the 2011 was fraudulent or that the person who issued it had no authority. That has not been the case in this matter, save for the unfounded and unsupported allegation of fraud and forgery.

[65] In the case of the applicant, it goes without saying its efforts were in pursuance of its duties to the community of Mpumalanga Township. The applicant's officials and those of the fifth respondent were hard at work between various stakeholders, in order to make good the plans of the applicant. The Sizakala centre, the Business hive and the fire station would have brought the municipal and or government services closer to this community for the benefit of the residents in various forms. The applicant was also duty bound, in terms of its constitutional and legislative imperatives to live up to its purpose and objectives.[21] On the other hand, the third respondent was mainly pursuing his economic and business interests as the resident and indigenous inhabitant under the council.

[66] It is rather unfortunate that the processes that the applicant had to follow and comply with had to unfold over a long time, and until the third respondent also developed interest over the property. That said, the applicant obtained the property first. Certainly, the two consent forms in issue, issued to two different parties for the same property, cannot be both valid. In the given circumstances, the consent form issued by the acting Inkosi Duke Mkhize in 2020 should fall away. The applicant has established that the respondents were not entitled to the occupation and the use of the property that belonged to the applicant.

[67] The respondents' reliance on *Ingonyama Trust v Radebe and Others* in their argument that the fourth respondent had no right to conclude the sale agreement with the applicant cannot be sustained. The respondents' argument failed to take into account that the court also held that 'likewise, the traditional authority concerned is not entitled to alienate the trust land without the permission of the trust'. If the land had been alienated by the traditional authority concerned, for such an act to become completely legal, the trust must have given permission.' So, if the acting Inkosi Duke

[21] Section 152 and 153 of the Constitution , supra

Mkhize contended that the fourth and or fifth respondents were not entitled to conclude the purchase agreement with the applicant. The same argument equally applies to the Acting Nkosi Mkhize's concession that when the third respondent was allowed to take occupation of the property, there had been no written consent obtained from the fourth and/or the fifth respondent. As said above, this version/ argument cannot fly and falls to be rejected.

[68] It is imperative to also reflect on the type of interdict sought by the applicant in this instance. This is apparent in sub-paragraphs 2.1 to 2.3 of the notice of motion.[22] Gleaning on these sub-paragraphs, it is apparent that the applicant seeks to prohibit a specified conduct by the respondents. The applicant also seeks to compel the respondents acting in a particular way, namely to remove and refrain from encouraging its employees or anyone working on their behalf to continue working and occupation of the property. Therefore, this part can be safely regarded as mandatory and a prohibitory interdict.

[69] In a sense, the interdict sought herein bears the characteristics of a mandatory and prohibitory forms. In establishing their clear right to the property, the applicant relied on the consent form and purchase agreement. With the application of *CASAC v Ingonyama Trust* principle thereto, I am satisfied that the applicant has established a clear right to prohibit and equally mandate specified conduct of anyone who lacks such right over the property. Much as it must be acknowledged that it remained within the rights of the third respondent to practice his trade and earn a living within his community. However, the intended purpose and objectives of the applicant would, if they developed the property, make it possible Mpumalanga Township community to get services with less effort, thereby improving the quality of life both on welfare and economic levels. It is incontestable that even the third

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[22] 2. that the rule nisi do hereby issue calling upon the first – third respondents to show cause if any why an order in the following should not be granted:
2.1. that the first to third respondents are interdicted and restrained from conducting any works within the premises more especially those works or activities related to the running of either a trailer hiring business or any other commercial business on the premises of the property, until final determination of the matter.
2.2. that the first to third respondents are directed to remove all trailers that are housed within the fence at the property and other structures that had been placed within thin the property.
2.3. that in the failure of the first to the fifth respondents to remove the trailers and other structures that are within the property, the applicant be entitled to acquire the services of its own contractors to remove same; store them in a safe place, alternatively place them in the possession of the first to third respondents.

respondent, who was also from that community would benefit from such development.

[70] The consideration of the evidence in its entirety established that the applicant, in compliance with section 2(5) of the Ingonyama Trust Act, obtained the prior consent of the council of Embo/Langa Traditional Authority in pursuit of its plans to meet the duties that were imposed by the Constitution[23] and as given effect by the Municipal Structures Act. The applicant duly acquired a clear right over the property. Indeed, since May 2011, when the applicant was granted consent to occupy until the intervention of the acting Nkosi Mkhize, it was in a peaceful and undisturbed possession of the property. The respondents have no right to use and occupy the property or disturb the applicant's title over the property.

Apprehension of irreparable harm if the relief not granted

[71] As pointed out above, in its quest to provide an easier access to services to the community of Mpumalanga Township, the applicant resolved to develop the property in close proximity to the residents of the community. Ms. Ntshanga testified that since she started to work on the project, funding was sought and approved by the national department of treasury. Other government departments, which had similar interest in the planned development showed a keen interest for the development and also advanced their respective mandates. Her uncontested evidence was that due to the dispute that arose in 2021, the National Treasury had to withhold the funding allocated.

[72] The impasse had an impact of putting on hold all other related projects, pending the resolution of the dispute. In evaluation of this element in an interdict, it ought to be borne in mind that substantial resources that may have been available in pursuit of other constructive functions of the applicant were redirected in order for the applicant to enforce its claim before it proceeded with the planned development, including the litigation process. Among others, these included occupational rent that the applicant continued to disburse on the property and also in safeguarding the property pending the determination of the dispute. Upon reflection on *NCSPCA V*

[23] Section 152 of the Constitution and Section 75 of the Municipal Structures Act

Openshaw[24] , the applicant continues to suffer irreparable harm due to its inability to take purposive possession of the property. Clearly, from the factors outlined above, the applicant's loss of possession of the property cause it to suffer irreparable harm, not only to the applicant but to community of Mpumalanga township, on whose behalf the applicant sought to develop the property.

[73] In my view, if the relief sought by the applicant over the property is not granted, the community of Mpumalanga Township who are the intended beneficiaries of the planned development of a Sizakala centre, the business hive and the fire station will be negatively affected.

No Alternative remedy

[74] Guided by *Hots v UCT*[25]*,*close examination of the facts and the context within which the dispute arose, the applicant did not appear to have an alternative remedy to the harm that continued. The applicant was justified in approaching this court on an urgent basis to vindicate its rights and those of the Mpumalanga Township Community.

Balance of convenience

[75] In determining the balance of convenience, the court must assess the harm that the respondents may suffer if the interim order is granted with the prejudice the applicant will face if it is refused. (See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 47.

[76] One need not restate that the efforts of the applicant were meant to benefit the greater community of Mpumalanga Township. The welfare and socio- economic interests of the greater public should take precedence over those of an individual, in pursuit of business or commercial interests, let alone that the applicant had established that it had clear right over the property. As it was held in *Van Greunen and Another v Govern*[26]*,* in the event of conflict between two competing rights, a balancing act has to be exercised. From the conspectus of all the evidence

[24] National Council of Societies for the Prevention of Cruelty to animals v Openshaw [2008] ZASCA 78, 2008 (5) SA 339 (SCA)
[25] Hots v UCT 2017 (2) SA 485 SCA para 36
[26] Van Greunen and Another v Govern [2023] ZAFSHC 104 at para 19

approached holistically, I am of the firm view that the planned development will ensure that services are brought closer to the Mpumalanga Township community. In the circumstances, the balance of scales favours the applicant.

Costs

[77] From the conduct of both parties since the inception of the application does not warrant the departure from the norm that costs should follow the results. I am not persuaded that costs on a punitive scale should be granted. However, if regard is had to the nature and complexity of the matter, I am of the view that costs, including costs of counsel were justified.

Order

[78] The following order is made:

1. That the first to third respondents are interdicted and restrained from conducting any works within the premises more especially those works or activities related to the running of either a trailer hiring business or any other commercial business on the premises of the property, Portion 28 of the Farm Mpumalanga No. 1[...] in extent 38113 hectares, as well as portion B, in extent 9872 square metres and Portion C, in extent 1,2345 hectares, both being portions of the Farm Lot [...] S[...] S[...] No. 1[...] until final determination of the matter.

2. That the first to third respondents are directed to remove all trailers that are housed within the fence at the Portion 28 of the Farm Mpumalanga No. 1[...] in extent 38113 hectares, as well as portion B, in extent 9872 square metres and Portion C, in extent 1,2345 hectares, both being portions of the Farm Lot [...] S[...] S[...] No. 1[...]and other structures that had been placed within thin the property.

3. That in the failure of the first to the third respondents to remove the trailers and other structures that are within the Portion 28 of the Farm Mpumalanga No. 1[...] in extent 38113 hectares, as well as portion B, in extent 9872 square metres and Portion C, in extent 1,2345 hectares, both being portions of the Farm Lot [...] S[...] S[...] No. 1[...], the applicant be entitled to acquire the services of its own contractors

to remove same; store them in a safe place, alternatively place them in the possession of the first to third respondents.

4. The first to third respondents are to pay the costs of this application, including the costs of counsel.

Sipunzi AJ

Date of hearing	:	27 March 2024
Date of judgment	:	10 June 2024

Appearances

Applicant	:	Adv B Mthethwa
Instructed by	:	Linda Mazibuko & Associates 231 – 233 Matthews Meyiwa (Stanford Hill) Road Morningside Durban
1st – 3rd Respondents	:	Adv M Naidoo SC Adv S Govender
Instructed by	:	Cebisa Attorneys 3rd Floor, Suite 350A Mansion House 12 Joe Slovo (Field) Street Durban