


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG NORTH PROVINCIAL DIVISION**

DATE: ¹⁷~~20~~ June 2014

CASE NO:41762/13
CASE NO:41763/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
<u>10/6/2014</u> DATE	<u></u> SIGNATURE

In the matter between:

DAVID MDHULI

Applicant

and

LEGOGORU DANIEL KUTUMPA LEGOABE NO

First Respondent

MATIME ERNEST MOHLALA NO

Second Respondent

JOHANNES MMAMOGOBO NO

Third Respondent

KABISHI ISSAC KGAWANE NO	Fourth Respondent
SPILLIAM HEZEKIEL SIBANYONI NO	Fifth Respondent
PORTIA TEBOGO MAKWANA NO	Six Respondent
MBONI MARIA MWANZA NO	Seventh Respondent
CHAUKE NORMAN MABASA NO	Eight Respondent
APRIL KABINI NO	Ninth Respondent
BAHLASELE JOHANNES THULARE NO	Tenth Respondent
COMMISSION ON RESTITUTION OF LAND RIGHTS	Eleventh Respondent
MASTER OF THE NORTH GAUTENG HIGH COURT	Twelfth Respondent

JUDGMENT

HASSIM AJ

- [1] I heard two applications between the same parties on the same day, save that the Master of the High Court and the Commission on Restitution of Land rights are not parties to the application under case number 41763/13 (*“the Rental application”*). While there was no formal application for the consolidation of the two applications they

were argued as if they had been consolidated. The facts are common to both applications. It is therefore convenient to deal with both the applications in one judgment.

[2] I will refer to the first to tenth respondents in the Trust application collectively as "*the respondents*". Where I intend referring to a specific respondent, I will do so. Insofar as the application under case no. 41762/13 ("*the Trust application*") is concerned the eleventh respondent will be referred to as "*the Commission*" and the twelfth respondent as "*the Master*".

[3] In the Trust application the applicant seeks the deregistration¹ of the Masakaneng Community Trust ("*the Trust*"), alternatively the deletion of certain provisions thereof, the creation of a Communal Property Association and an order compelling the Master to report on the problems it has experienced with the Trust.

[4] In the Rental application the applicant seeks firstly an order interdicting the respondents from collecting rental in respect of "rooms" on the Land which belongs to the Trust and secondly, he seeks an order compelling the respondents to account for the rent collected and to pay such to him.

¹ Section 13 of the Trust Property Control Act, No. 57 of 1988, refers to an order terminating a trust. I accept that the applicant seeks to achieve this. I therefore read the word deregistration as "termination".

THE TRUST APPLICATION

- [5] The Trust application is based on the provisions of section 13 of the Trust Property Control Act, No. 57 of 1988 (*"the TPCA"*). Section 13 provides as follows:

"If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-

- "(a) hampers the achievement of the object of the founder; or*
- (b) prejudices the interest of beneficiaries; or*
- (c) is in conflict with the public interest;*

the court may, on application of the trustees or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust."

- [6] It is common cause that the Masakaneng Community (*"the Community"*) lodged a successful claim for restitution of land in terms of the Restitution of Land Rights Act, No 22 of 1994 (*"the Restitution Act"*). The claim was lodged was in respect of Farm 133, Groblersdal Location, Klipbank, in the Mpumalanga province. The applicant describes the farm as portion 69 of portion 2 Farm Klipbank 26 JS, District Groblersdal. The latter description is supported by the title deed. The parties are however *ad idem* as to the land which is the subject of dispute. I will henceforth refer to the farm in question as *"the Land"*.

- [7] It is common cause that the Land has been registered in the name of the Masakaneng Community Trust ("*the Trust*") which was registered by the Master on 18 November 2004. The Master appointed the respondents as the trustees. The trustees so appointed would have been "*the initial trustees*" contemplated in clause 13.5 of the Trust Deed.
- [8] In terms of clause 13.6 of the Trust Deed, trustees hold office for a period of three years from the date of their election until the third annual general meeting. The trustees (save, of course, for the initial trustees) have to be elected at an annual general meeting. The first annual general meeting had to be held within 12 months of the date of the registration of the Trust. Subsequent annual general meetings have to be held within three months of the end of each financial year ending on the last day of February each year.
- [9] The applicant alleges that the Trust was formed "*secretly by the respondents*". By this I understand the applicant to be saying that the respondents formed the Trust without the authority and/or approval of the Community. According to the applicant, after the Land had been restored, the Community took a decision that the Land should be held by a communal property association registered in terms of the Communal Property Associations Act, No. 28 of 1996 ("*the CPA Act*").
- [10] The respondents do not dispute that after the Land had been restored there were discussions surrounding the formation of a Communal

Property Association which was intended to be called the Masakaneng Communal Property Association ("*the MCPA*"). This is evidenced by a constitution signed by the first, second, fourth fifth and tenth respondents on 9 November 2012. It is not apparent from the papers whether a provisional communal property association contemplated in the CPA was registered or not. What is however clear is that no CPA was registered in terms of the CPA Act. The respondents aver that a decision had been taken in consultation with the government to register a trust instead of a CPA. The trust deed which was subsequently registered had been drafted by officials in the employment of the government.

- [11] Apart from the allegation that the respondents formed the Trust without the authority of the Community, the applicant alleges that respondents' term of office as trustees has expired and therefore they are no longer Trustees. The respondents concede that on the expiration of their term as trustees (3 years after the registration of the Trust) they had not been re-elected at an annual general meeting. They claim to have remained Trustees because the beneficiaries of the Trust had mandated them to continue so acting. I refrain from expressing a view as to whether the Trustees had been duly appointed or not. The respondents aver that on 14 August 2008 at a general meeting a decision was taken to extend their term of office. It is not clear from the papers whether they were

re-elected after this. Again I refrain from expressing a view as to the validity of their election or appointment.

[12] There is a strong suggestion by the applicant that the respondents are acting in their own interests and not in the interests of the Community.

[13] The respondents oppose the application on among other things the applicant's *locus standi* to seek an order in terms of section 13 of the TPCA. They contend that the applicant is not a person with interest in the trust property. They say this on the basis that the applicant is not a beneficiary of the Trust. In light of the view I have taken as to the fate of this application I am not required to determine whether the applicant has an interest of the kind that section 13 of the TPCA envisages.

[14] In my view this application can be disposed of on the question whether all interested parties have been joined in this application.

[15] On the applicant's own version, the Trust has no duly elected Trustees (because their term of office has expired). Moreover the Trustees are alleged to be furthering their own interests and not those of the Community and in any event the formation of the Trust was not with the consensus of the Community. If any of this allegations are true (I am not expressing a view thereon) then it seems to me that the Trustees are conflicted. In such circumstances it cannot be said with any degree of certainty that they represent the beneficiaries. If indeed the Trustees

have not been duly authorised to hold the office of trustee, there is no one that has the authority to act on behalf of the Trust.

[16] There is no dispute that a Trust has been registered and some 116 persons have been identified by the Regional Land Claims Commissioner: Limpopo ("*the RLCC*") as beneficiaries. If the Trustees are not recognised as such in law then they cannot represent these beneficiaries.

[17] The beneficiaries have an interest in the trust property. They are after all recognised as persons with "*a right in land*" as contemplated in the the Restitution Act. The termination of the Trust affects their rights² in the Land registered in the name of the Trust. After all restitution is made only to those persons who have a "right in land".

[18] Even if these beneficiaries confirm that the Trustees do represent them, the problem does not rest. It appears from a letter under the hand of the RLCC dated 19 January 2009 that the list of beneficiaries may be incomplete and in addition that there is a dispute as to whether the listed beneficiaries have any rights in or to the Land.

[19] This was a letter was addressed to the Municipal Manager of the Elias Motsoaledi Municipality, Groblersdal in the following terms:

² As defined in section 1 of the Restitution Act. This is confirmed by the restitution of the Land in terms of the Restitution Act.

"the... Regional Land Claims Commissioner... attaches the beneficiary list for the Masakaneng Trust. The RLCC: Limpopo would however like the Municipality to note the following:

- 1.1 That the Masakaneng Trust is currently experiencing conflicts which apparently led to the formation of the concerned group*
 - 1.2 That the RLCC: Limpopo is busy attempting to resolve the above-mentioned conflicts;*
 - 1.3 That the beneficiary list seem [sic] not accepted by all, and that the RLCC: Limpopo is yet to facilitate official adoption of the list by members of the Masakaneng Trust, which would still accommodate those who have not yet registered, but qualifies[sic] for registration in terms of section 2 of the Restitution of Land Rights Act, No 22 of 1994, as amended.*
- 2. Therefore, the Municipality is requested to handle the beneficiary list with the understanding of the above-hinted information in order to avoid expansion of conflicts around the attached beneficiary list."*

[20] Evidently there is on the one hand members of the Community who do not accept that all those who are reflected as beneficiaries are entitled to be beneficiaries. On the one hand, there are other members who assert that they ought to be listed as beneficiaries and have not been. To my mind it is beyond doubt that the members of the Community and beneficiaries of the Trust must be afforded an opportunity to participate in these proceedings.

[21] I am not satisfied that all parties with a direct and substantial interest are before me.

[22] I raised my concern as to the non joinder of interested parties with the applicant's counsel, Mr Kela. No postponement was sought to allow

the applicant to join all interested parties. To the contrary, the application was fully argued.

[23] I debated with Mr Kela whether a rule *nisi* calling upon all interested parties to show cause on the return date why an order should not be made as sought by the applicant would remedy the situation. Mr Kela submitted that it would. Mr Eastes, who appeared for the respondents contended on the other hand that if I were to find that all interested parties had not been joined, the application should be dismissed.

[24] I have a discretion to raise *mero motu* the non-joinder of parties where I am of the view that persons who are not parties to the litigation may be affected prejudicially by my order. The members of the Community and all beneficiaries of the Trust are such persons. They must be heard.

[25] How this can effectively be achieved is another thing. I also have to consider whether this application should be dismissed, postponed or whether a *rule nisi* should be issued.

[26] It is unlikely that this application can be served personally on each and every interested person. It seems to me inevitable that some sort of substituted service will have to occur. I do not have any information as to what manner of service would ensure that this application is brought to the attention of the interested parties . It seems to me that not all

members of the Community, who could qualify as beneficiaries reside on the Land.

[27] I have considered whether I should postpone this application, order the applicant to pay the wasted costs and to launch a substantive application for the joinder of all interested parties, together with a request for directions as to service of this application.

[28] This will however enure to the prejudice of the respondents. The application has been fully argued. Even if I am to couple the order of postponement with an order that the applicant must pay the wasted costs on an attorney own client scale, the respondents will still be out of pocket insofar as those costs which do not qualify as wasted costs are concerned. There is in my opinion no reason why the respondents should be burdened with any costs, more especially since they are sued in their representative capacities. Nor, is there a reason for the Trust to have to bear the costs.

[29] The applicant was at liberty to apply for a postponement when I first raised my concern. The order which I intend making will not preclude the applicant from in the future pursuing the relief in this application, when and after adequate and effective notice has been given to all interested parties.

[30] I am therefore inclined to dismiss the application for want of the joinder of necessary parties. In light of the order I intend making, it is not necessary for me to consider the merits of the application nor, the respondents' challenge to the applicant's *locus standi*.

[31] Insofar as costs are concerned there is no reason why they should not follow the result.

[32] Consequently, the application is dismissed with costs.

THE RENTAL APPLICATION

[33] The applicant alleges that he is owner of "rooms" situated on the Land, which he has let out. He claims that the respondents have "ordered" his tenants to pay to them the rent due which is due to him (in terms of a lease agreement).

[34] Apart from the allegations that the applicant is the owner of the rooms, let the rooms out, that he had been receiving rental in the past and that the rental is now being collected by the respondents, the affidavit is bare. I have considered this application against the facts in the "Trust" application. In any event the argument proceeded in this manner.

[35] The respondents deny that the applicant is the owner of the property and aver that the Trust is the registered owner thereof. In support of this they attach a copy of the title deed. They deny that the applicant is

entitled to occupy the rooms. They contend that the only persons who are entitled to occupy the premises (i.e. the Land owned by the Trust) are beneficiaries of the Trust. The respondents' case is that the applicant is unlawfully occupying the property.

[36] The respondents claim that the applicant is one of several individuals who invaded the Land and occupied it without the consent of the trustees (acting on behalf of the trust) and sold it to unsuspecting purchasers. The applicant disputes this.

[37] In response to an allegation by the respondents that the trustees intend bringing an application for the eviction of persons who unlawfully occupy the property, the applicant states that the respondents were not "entitled to have obtained my eviction order" and that an application for the rescission of that judgement is pending. From this I infer that the applicant has been evicted on the basis that he is in unlawful occupation and that a court has ordered him to vacate the property. The fact that an application for rescission is pending does not affect the applicant's status.

[38] The applicant has been found to be in unlawful occupation. It follows that the applicant has no right to let out the premises and has no right to collect "rent" from illegal occupiers. Even if I am wrong in this regard, the applicant has the onus to show that his occupation is lawful. This onus has not been discharged.

[39] I am not satisfied that the applicant has demonstrated that he has a right to occupy the premises. This being so the applicant is also not entitled to collect any rental. In the circumstances the applicant is not entitled to the relief he seeks.

[40] Consequently, the application is dismissed with costs.



S K HASSIM

Acting Judge: Gauteng North High Court

10 June 2014

Date of Hearing: 10 March 2014

Date of Judgment: 11 June 2014

For applicant: Adv DZ Kela.

For respondent: Adv Eastes