



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

30/09/14  
DATE SIGNATURE

30/09/2014

CASE NUMBER: 50124/2010

In the matter between:

GABRIEL ORSIN MAGOPANE

FIRST APPLICANT

JULIA KHOHLIWE MABELANE

SECOND APPLICANT

AND

BUSHBUCKRIDGE MUNICIPALITY

FIRST RESPONDENT

MEC OF PUBLIC WORKS, ROADS AND TRANSPORT

SECOND RESPONDENT

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**JUDGMENT**

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LEPHOKO AJ

[1] The applicants approached this court for declaratory orders that they are the respective lawful possessors of stands 242 and 241, Dingleydale Trust, Bushbuckridge (the properties). The application is opposed by the first respondent.

[2] The first respondent raised a point *in limine*, being, *res judicata*.

[3] The applicants allege that the properties are owned by the Moreipuso Traditional Authority which granted them the right to occupy the properties during May 2000 and December 2000, respectively. The applicants each paid an amount of R105-00 for the rights and have since then continued to pay the yearly levy of R45-00 to the Traditional Authority. These allegations are confirmed by Kabin Phillion Mashiloane who has been the chairperson of the Traditional Authority since 2009.

[4] Applicants further state that during April 2002 an *ex parte* interim court order dated 15 March 2002 was served on the first applicant. The order was granted by the Magistrate Mapulaneng in favour of the first respondent against the applicants. The court order authorized the sheriff "*to evict the respondents from the land allocated to Public Works at Dingleydale Trust under the control of the applicant*". The order further authorized the sheriff to "*demolish all the structures that have been erected on the said occupied land*". The interim order was made final on 17 May 2002. An application brought by the applicants to rescind the final order was dismissed on 25 July 2002. The judgment of the court dismissing the application for rescission alerts the applicants of their right of appeal.

[5] As appears from the papers various orders were also obtained in related matters. On the 13 December 2006 Induna Mica Naison Mashego obtained a final court order that "*the Respondent and/or any of its officials are hereby restrained from erecting any*

*structure at the plot next to the Respondent's premises at Dingleydale Trust, district Mapulaneng". On 27 July 2007 the first respondent obtained a final order interdicting the applicants from inter alia "entering the "(Camp Site)" at Dingleydale". The first respondent based its point in limine on the final order of 25 July 2002.*

[6] The applicants submitted that the properties concerned were not properly described in the various court orders and until their specific location is noted and recorded by a surveyor, it will be impossible to decide the issue of ownership or lawful occupation of the properties. The applicants submitted reports by Pat Ngobeni Surveyors in which the properties allocated to them by the Traditional Authority are delineated.

[7] I will now deal with the point *in limine* taken by the first respondent. *Res judicata* is a plea or a defence that the point or issue in dispute has already been decided between the parties. The doctrine of *res judicata* is founded on the principle that there must be an end to litigation. For the defence of *res judicata* to succeed it has to be established that the judgment relied on was a final or definitive decision; it emanated from a competent court; the judgment was between the same persons; and the "cause of action" was the same not in the strict sense but in respect to the same matter having been in issue: see *MV Silvergate Tradax Ocean Transportation SA v MV Silvergate Properly Described As MV Astyanax And Others* 1999 (4) SA 405 (SCA) at paragraphs 53 and 54. See also *Horowitz v Brock* 1988 (2) SA 160 (AD) at 178H to 179C; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (AD) at 472; *Le Roux v Le*

*Roux* 1967 (1) SA 446 (AD) 463A-D. See also, *Garment Workers Union W.P v Industrial Registrar* 1967 (4) SA 316 (TPD).

[8] “Where the decision set up as *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without, at the same time, and in the same breath, so to speak, determining that question or issue in a particular way. Such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of that decision as effectively as if it had been made so in express terms; but beyond these limits there can be no such thing as *res judicata* by implication”: see *Liley v Johannesburg Turf Club* 1983 (4) 548 (WLD) at 552A; *Boshoff v Union Government* 1932 TPD 345 at 350; *Horowitz v Brock supra*.

[9] In order to determine whether the issue is indeed *res judicata* the court must *inter alia* consider the judgment and pleadings in the previous proceedings in which the issue in dispute in the present matter is alleged to have been finally determined: see *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 46A-47H; *Horowitz v Brock (supra)* at 180J-181A. The earlier proceedings concerning this matter were brought as motion proceedings. Ordinarily, the notice of motion sets out the relief that is sought whilst the founding affidavit and supporting documents set out the grounds for the relief sought. The court order sets out the relief as granted by the court.

[10] In the ex-parte application of 15 March 2002 the applicant (first respondent) seeks an order in the following terms:

- (a) *“authorizing the Sheriff of the Above Honourable Court to **evict** the Respondents from the open land at Camp Site **belonging to** the Department of Public Works”*  
(my emphasis).

The word “evict” implies or denotes deprivation of the right to occupy or possess the named property. The words “belonging to” imply or import ownership by the party referred to, i.e. the Department of Public Works.

[11] In his founding affidavit in support of the ex-parte application Enas Selowe states the following in paragraphs 3 and 4 thereof:

- (3) *“The Respondents are GARIEL MAGOPANE and JULIA MABELANE, squatters of the land belonging to the Department of Public Works, camp site, Dingleydale within the administrative jurisdiction of the municipality”.*
- (4) *“On the 31<sup>st</sup> January 2001 I received a written complaint from Mr S. L. Nyathi who is a supervisor of the Department of Works, Camp Site, Dingleydale, informing me as ward councilor that a community member of Dingleydale trust has illegally occupied site which belongs to the Department. He has further informed me that he has erected a tin shack and that he refuses to move despite his and the civic organisation’s request for him to do so....”*

[12] In his founding affidavit in support of the application for rescission, Gabriel Magopane (the first applicant in the present application), denies that he is illegally occupying the land. Alleges that the plot was officially allocated to him on in December 2000. He states that the plot that he occupies falls under the jurisdiction of the Moreipuso Tribal Authority which is the only body authorized to allocate the plot and evict him if he is occupying the land illegally. He disputes ownership by public works but does not put in issue that he is actually occupying the property at "Camp Site Dingleydale"

[13] Paragraph 1 of the court order of 26 June 2002 which was made final on 25 July 2002 reads as follows: It is ordered: (1) *"That the Sheriff of the Court evict the Respondents from the land allocated to Public Works at Dingleydale Trust under the control of the Applicant"*

[14] What is clear from the eviction and rescission applications is that the dispute or issue between the parties was the right of the applicants to occupy the land at Camp Site, Dingleydale, belonging to the Department of Public Works and that that dispute was finally determined by the court on 25 July 2002.

[15] Whether the Department of Public Works is the lawful owner of the property or the conclusion reached by the court was right or wrong is irrelevant to the application of the doctrine of *res judicata*. Our courts have stated that *"Because of the authority with which, in the public interest, judicial decisions are invested, effect must be given to a*

*final judgment, even if it is erroneous. In regard to res judicata the inquiry is not whether the judgment is right or wrong, but simply whether there is a judgment*": see; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (AD) at 564.B-D. Every judgment is presumed right, and can be challenge only on appeal or review: see *Makings v Makings* 1958 (1) SA 338 (A) at 349.

[16] In the current application the applicants seek declaratory orders that they be declared the respective lawful possessors of the properties situate at 242 and 241 Dingleydale Trust. On reading of the papers it is clear that the issue before this court is fundamentally the same issue in respect of which the final order of 25 July 2002 was made by the Magistrate, Mapulaneng. It is also without any doubt that the issue involves the same parties and that the relief sought is substantively the same as the one sought before the Magistrate, Mapulaneng in the year 2002. There is also no doubt that the order of 25 July 2002 was made by a court of competent jurisdiction and is definitive of the rights of the parties.

[17] A judgment of a court is presumed to be right, and can be challenge only on appeal or review: see *Makings v Makings* 1958 (1) SA 338 (A) at 349. It is common cause that the order of 25 July 2002 was not taken on appeal. Because no appeal is pending, the matter must be taken as having been finally determined and *res judicata*.

[18] I agree with the applicants that the property in respect of which the order applies is not adequately defined in the order. That by itself does not make the order unclear or

vague to the extent of rendering it unenforceable. Notwithstanding the poor description, the property referred to in the court order is ascertainable. It is common cause between the parties as appears from the various court applications that the property in issue and affected by the court order of xxx is the land allocated to Public Works at Dingleydale Trust, and more specifically the property occupied by the applicants. This is precisely the reason it was possible to give effect to the court order which led to the eviction of the applicants and demolition of the structures they had built on the property. In the circumstances, the point *in limine* must succeed.

**In the premises I would make the following order:**

1. The point *in limine* is upheld.
2. The application is dismissed.
3. The applicants are ordered to pay the costs of the application.



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A L C M LEPHOKO  
ACTING JUDGE OF THE HIGH COURT

Heard on: 30 July 2014.

Judgment delivered on: 30 September 2014

For the Appellant: Adv J Barnardt

Instructed by: Shabangu & Beauchamp Attorneys

For the Respondent: Adv T Seneke.

Instructed by: Mculu Incorporated.