IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: 3425/2012

In the matter between:

GLADYS PHINDILE NGUBO NO **Applicant**

And

ALLISON MUSA NDLOVU **Respondent**

ITHALA DEVELOPMENT CORPORATION LTD **Intervening Party**

Coram: Gorven J

Heard: 15 February 2016

Delivered: 19 February 2016

ORDER

The application is dismissed with costs on the scale as between attorney and client.

JUDGMENT

Gorven J:

[1] This application relates to property described as 'Remainder Zwartkop Location 4669 situated in the District of Vulindlela' (the property). The property is a trading allotment and is registered in the name of the Ingonyama Trust (the Trust). The Trust is established and empowered by the KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994 (the Act). It operates through a Board. At least some of the land registered in its name is occupied by virtue of documents described as Permissions To Occupy (PTOs).

[2] It is common cause that the respondent was granted a PTO in 1983 in respect of the property. The permission given was to trade on the allotment by way of a weaving factory and shoe shop. It is the applicant's case that this PTO has been transferred to the applicant. Based on this contention, the applicant approached this court on 26 April 2012, by way of an urgent application, without notice to the respondent, and obtained the following relief:

'1. That a *rule nisi* do hereby issue calling upon the Respondent to show cause, if any, before this Court on the 22nd day of May 2012 at 09h30 or so soon thereafter as Counsel may be heard as to why an order should not be made in the following terms:

1.1 That the Respondent be interdicted and restrained from entering and occupying the property . . .

1.2 That the Applicant is entitled to the right, title and interest in and to the permission to occupy in respect of the property.

1.3 That the order for eviction granted by the Magistrates' Court, Pietermaritzburg under case number 11902/11 be stayed until final determination of this matter.

1.4 That the Respondent pay the costs of this application on an Attorney and own client scale.

2 That paragraph 1.1, 1.2 and 1.3 hereof shall serve as interim relief pending the finalisation of this application.'

[3] At that stage the applicant was Mikion Thembatutu Ngubo. After this order was granted, the applicant died. The present nominal applicant, who is his executrix and widow to whom he was married in community of property, was substituted as a result. When reference is made in this judgment to the applicant, that reference is to Mikion Thembatutu Ngubo unless the context makes it clear that the nominal applicant is referred to. The respondent put up an answering affidavit after the nominal applicant was substituted. Approximately a year thereafter, the intervening party sought and was granted permission to intervene and supported the applicant. The respondent answered the intervening party's affidavit and neither the applicant nor the intervening party delivered a replying affidavit.

[4] The applicant seeks confirmation of the *rule nisi* granted in paragraphs 1.1, 1.2 and 1.4. Paragraph 1.1 relates to interdictory relief. The other relief flows from that. It is trite that an applicant for a final interdict must prove a 'clear right, injury actually committed or reasonably apprehended, and the absence of any other ordinary remedy' available to the applicant.[1] In the present matter, it is the clear right which is in issue. The clear right resolves itself into whether the applicant or the respondent is the present holder of a PTO in relation to the property.

[5] The case which the applicant seeks to make out in its founding affidavit is extremely unclear. The notion of ownership of the property and the right to

[1] Per Innes JA in *Setlogelo v Setlogelo* 1914 AD 221 at 227.

occupy at are used interchangeably. Put at its clearest, the averments of the applicant can be summarised as follows. The intervening party lent and advanced money to the respondent. As security for this indebtedness, the respondent ceded its right, title and interest in and to the PTO to the intervening party. The intervening party obtained default judgment against the respondent in respect of the loan on 25 September 2001. The right, title and interest in and to the PTO was attached and sold in execution to the intervening party on 3 March 2004. Pursuant to the sale in execution, the right, title and interest in and to the PTO was transferred to the intervening party in March 2004. The intervening party sold the right, title and interest in and to the PTO to the joint estate of the deceased and the applicant along with one Steven Thembinkosi Ngubo by virtue of a written sale agreement concluded on 1 September 2004.[2] The applicant and his family took occupation of the property in June 2004 pursuant to the agreement. The respondent launched an application for the applicant's eviction from the property on 2 September 2011. After delivering a notice of intention to oppose the application, the applicant did not put up an answering affidavit and his attorney did not appear on the adjourned date. As a result, an order for his eviction was granted on 21 October 2011 in his absence. On 4 January 2012, the Magistrates' Court stayed the order for eviction. He brought an application for rescission of the order which application was pending before the Magistrates' Court at the time this application was launched in April 2012.

[6] Much of this version is disputed by the respondent. He admits having taken a loan from the intervening party, not having met the instalments due under it and that default judgment was taken against him by the intervening party. In the first place, however, he contends that the purported cession of his right, title and interest in and to the PTO is invalid. The schedule to the PTO

[2] It bears mention that no issue was made of the fact that three persons signed as purchaser. I therefore do not propose to deal with this.

was put up by the intervening party. This contains conditions to which the PTO is subject. Paragraph 3 of the conditions reads as follows:

'The rights of the holder in or to the allotment or any improvements thereon shall not be transferred, mortgaged, ceded, leased, sublet or otherwise disposed of except in accordance with such prior approval, in writing, and in such manner as is or may be lawfully prescribed.'

It is common cause that, at the time the cession was said to have been executed, no prior written permission had been obtained. The respondent also submits that, at the time the application was launched, no evidence was put up of the prior written consent having been given to the transfer of the PTO to the intervening party let alone to the applicant.

[7] Secondly, he contends that the intervening party was not entitled to execute against his right, title and interest in and to the PTO. He relies for this submission on paragraph 5 of the conditions to which the PTO is subject. This provides:

'The rights of the holder in or to an allotment shall not be liable to execution for any debt other than a debt due under a duly registered mortgage bond or a debt due to the South African Development Trust or other statutory body which has been granted administrative control of the land.'

It is common cause that the intervening party is not 'a statutory body which has been granted administrative control of the land'. Nor does it claim to be one. I shall return to these points later.

[8] Thirdly, the respondent contends that the intervening party is not capable of possessing the right, title and interest in and to the PTO. He makes the point that the Act requires the Trust to administer land registered in its name 'for the benefit, material welfare and social well-being of the tribes and communities . . . and the residents' referred to in the schedule to the Act. The intervening party, as a juristic person, is not a member of any of those tribes or

communities and cannot be said to be such a resident. I do not regard it as necessary to decide this point.

[9] What the applicant does not disclose in the founding affidavit is that, after the order for his eviction was granted, he concluded what was termed a settlement agreement with the respondent. This much is common cause. The respondent submits that this was a material non-disclosure warranting the dismissal of the application on this ground alone.

[10] The respondent's version of how the settlement agreement was concluded is uncontested. On 5 December 2011, the sheriff went to the property to evict the occupants. As a result, that day the applicant went to the offices of the respondent's attorney. The attorney informed the applicant that he was not able to discuss the matter with him since he was represented by a firm of attorneys. The applicant's response was that he had terminated the mandate of his attorney. He stated that he wanted to settle the matter himself. The respondent's attorney asked the applicant to accompany him to the High Court where he had matters to attend to. On their arrival, the respondent's attorney contacted the respondent and asked him to meet him at the High Court. The respondent's attorney requested an advocate from the Pietermaritzburg Justice Centre to join them so that the applicant could repeat his statement that he had dispensed with the assistance of his attorney and wished to act for himself, which he confirmed in the presence of that advocate. The applicant said that he agreed to vacate the property but just wished to be allowed time in which to arrange this because his wife (the present nominal applicant) had recently given birth to a child. He also indicated that he had had enough as regards the property and wanted to settle the matter directly with the respondent and intended taking action against the intervening party. The attorney of the respondent then reduced the settlement to

writing after which both the applicant and the respondent signed it in the presence of other witnesses. The agreement reads as follows:

'Agreement between AM Ndlovu and T Ngubo

1 A meeting was held between the parties on 5 December 2011 at the High Court, Pietermaritzburg.

2 The parties AM Ndlovu and T Ngubo have agreed that:

2.1 The ejectment of T Ngubo by the sheriff under case No. 11902/11 is stayed.

2.2 T Ngubo agrees to vacate the immovable property … on or before 5 January 2012.

2.3 T Ngubo agrees to pay the legal costs incurred as taxed or agreed.

3 T Ngubo confirms that the mandate he gave to his attorneys Ngcobo, Poyo has been withdrawn and he has entered into this agreement freely and voluntarily.'

[11] An application to rescind the eviction order was served on the respondent's attorney the day the settlement agreement was concluded. Since this had been issued on 29 November 2011, the respondent and his attorney assumed that this was being served by the erstwhile attorneys of the applicant without knowledge of the settlement agreement. The rescission application was set down for hearing on 4 January 2012 and the respondent's attorney undertook to attend court that day to ensure that the matter was struck off the roll, removed from the roll or withdrawn. On that day, the respondent's attorney went to the Magistrates' Court and encountered an attorney representing the applicant. He brought the settlement agreement to the notice of that attorney but was told that he was instructed by the applicant that the respondent's attorney had forced him to sign the settlement agreement and that he had signed it under duress. The facts concerning the settlement agreement were put up in an affidavit opposing the rescission application. The respondent was ultimately advised to consent to the rescission application since the eviction order had been made in the absence of the applicant and it was felt likely that the court would rescind the order. As I

have said, none of this version of events was contested by the applicant in the papers before me.

[12] Before me, the applicant sought to argue that the settlement agreement had fallen away as a result of the order rescinding the eviction order. This, it was submitted, is why no mention was made of it in the papers of the applicant. This argument simply does not wash. What the applicant did is to repudiate the settlement agreement by refusing to perform his part of the bargain. A spurious ground of duress was raised. It was not submitted before me that the settlement agreement was vitiated by duress. Even if this was alleged in the papers, the test for setting aside an agreement on that basis is a stringent one and was summarised by Corbett J, in *Arend & another v Astra Furnishers (Pty) Ltd*,[3] as follows:

'Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established:

(i) The fear must be a reasonable one.

(ii) It must be caused by the threat of some considerable evil to the person concerned or his family.

(iii) It must be the threat of an imminent or inevitable evil.

(iv) The threat or intimidation must be unlawful or *contra bonos mores*.

(v) The moral pressure used must have caused damage.'

Even taking what was communicated to the respondent's attorney on 4 January 2012 at face value, this case is not made out. However, this version is not even before me because the applicant has not dealt at all with the settlement agreement. The respondent is clearly entitled to rely on the undertaking in the settlement agreement to vacate the propety, regardless of the outcome of the eviction application or its rescission.

[3] *Arend & another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306A-C.

[13] The consequence of the failure of the applicant to bring the existence of the settlement agreement and the facts surrounding it to the attention of the Judge who heard the application for interim relief must be evaluated. In the matter of *Estate Logie v Priest*,[4] Solomon JA said the following:

'It cannot, I think, be too strongly insisted upon that in *ex parte* applications it is the duty of the applicant to lay all the relevant facts before the Court, so that it may have full knowledge of the circumstances of the case before making its order.'

If these facts might have influenced the decision of the Judge who made the order, a court has a discretion to set the order aside on the ground of non-disclosure. This is so even if the non-disclosure was not *mala fide* or wilful but only negligent.[5] I have little doubt that if the applicant had disclosed the settlement agreement, no interim relief would have been granted. This is because, in the settlement agreement, the applicant relinquished any right to occupy that he might have had at the time, barely four months before approaching this court by way of this application. Further, it is clear that the applicant instructed his attorney to apply on 4 January 2012 for the rescission of the eviction order. This was a day before he had agreed to vacate. He did not inform that court of the settlement agreement either. On the probabilities he sought that order so as to avoid his obligation to vacate the following day. When the rescission application was not finalised on that date, he repudiated the agreement by refusing to vacate the property on 5 January 2012. In the absence of any explanation by the applicant for this conduct, it seems to me that the most probable inference to draw is that he signed the settlement agreement so as to buy time to remain in occupation, knowing (and not disclosing to the respondent or his attorney) that he had launched an application for rescission. In my view, the failure to disclose these facts or, indeed, to deal with them when

[4] *Estate Logie v Priest* 1926 AD 312 at 323.
[5] *Bankorp Ltd v Ridl & another* 1993 (4) SA 276 (D) at 277B-C; *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348F-349B.

raised in this application, warrants the dismissal of the application. It also warrants a punitive costs order against him.

[14] In case I am wrong in this, it is as well to deal with the merits of the case advanced by the applicant. It is first necessary to dispose of a further basis for the relief sought which was raised only in argument. It was submitted that the respondent left the property in 1990 and thus abandoned his right, title and interest in and to the PTO. No factual foundation was laid for this submission. Nor was even an assertion made in his affidavit to this effect. It is trite law that an applicant's case must be made out in the founding papers. The affidavit of the intervening party was also silent in this regard and no facts were set out in it which could lead to such an inference. In any event, the respondent gave clear evidence as to why he ceased occupying the property. He feared for his life during civil unrest. The applicant subsequently told him that Inkosi Zondi had allocated the property to him. He feared confronting a traditional leader who purported to deal with the property without any lawful basis until he launched the eviction application mentioned above. This evidence of the respondent is not so untenable that it can be rejected out of hand. Even if there were a factual dispute in this regard, and there is not, it could not be resolved in favour of the applicant or intervening party except by way of oral evidence. Since the applicant and the intervening party sought to argue the matter on the papers, the version of the respondent would in any event prevail.[6] There is therefore no basis on which to uphold this submission.

[15] The affidavit of the intervening party sets out to support the relief sought by the applicant. In other words, it seeks to show that the applicant has a clear right to occupy the property. It is important to note that there is no prayer accompanying the affidavit of the intervening party. It does not itself seek relief.

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G-H.

It contents itself with submitting that the respondent has failed to raise a valid defence to the relief sought by the applicant and to submit that the application should be granted. This is important in that there is no contention on the part of the intervening party that the respondent should be interdicted by virtue of any right vesting in the intervening party.

[16] But its affidavit in fact undermines the right contended for by the applicant. The intervening party makes it clear that, because the applicant has not paid the full purchase price under the written sale agreement, the right, title and interest in and to the PTO has not, even now, been transferred to the applicant. Neither could the applicant demand that it be so transferred. The applicant, on this version, does not have any rights to the PTO and has therefore not shown a clear right. This supports the contentions referred to above of the respondent. It also undermines the declaratory relief sought by the applicant that he is entitled to the right, title and interest in and to the PTO.

[17] It remains to determine whether the case made out by the intervening party supports the application in any other way. The intervening party claims to hold the right title and interest in and to the PTO. A concomitant of this is that the respondent no longer has any right, title and interest in and to the PTO. The intervening party puts up a document headed ‘Consent to transfer’. This is dated 26 March 2012 and purports to transfer the right, title and interest to the PTO from the intervening party to the applicant on that date. However, it also puts up what it says are two endorsements to the PTO. These are both dated 16 May 2012 and are framed in the present tense. The first records that the right, title and interest is ‘hereby ceded’ by the respondent to the intervening party in terms of the deed of cession dated 29 October 1990. The second records that the right, title and interest of the respondent are ‘hereby transferred’ to the intervening party. It is clear that paragraph 3 of the conditions to which the PTO

is subject requires prior written consent for any cession or transfer. Neither could therefore have taken place prior to 16 May 2012. At best for the applicant, the earliest possible date that it could be contended that either the cession or the transfer of the right, title and interest in and to the PTO from the respondent to the intervening party could have taken place is 16 May 2012. On any version, accordingly, this means that, since the intervening party was not the holder of any right, title and interest to the PTO on 26 March 2012, no transfer to the applicant took place then.

[18] As was pointed out by the respondent, no case is made out that either a cession or transfer of the right, title and interest in and to the PTO had taken place on the date the eviction application or the rescission application were launched. Nor does the applicant show that he had a lawful right to occupy the property since 2004 as he contends. Even on the date the applicant approached this court and obtained interim relief, neither he nor the intervening party was the holder of the right, title and interest in and to the PTO.

[19] The applicant and intervening party have even further difficulties. They claim the right to the PTO by virtue of a sale in execution of the right, interest and title in and to the PTO of the respondent for the debt owed by him to the intervening party. But the intervening party is barred by paragraph 5 of the conditions governing PTOs from executing against the PTO. This much is clear and, what is more, was not even contradicted by legal argument, let alone in a replying affidavit. No basis is therefore set out on which the intervening party obtained the right, title and interest in and to the PTO. Since this is a necessary substratum for the case of the applicant, the edifice erected on it collapses. Even the purported endorsements can have no legal basis since the only one relied on by the applicant and the intervening party is the acquisition by way of the sale in execution.

[20] Further, in answer to the founding affidavit of the applicant, the respondent stated that his attorney had approached the Sheriff whose signature is said by the applicant to appear on a certificate confirming that the intervening party purchased the right, title and interest in and to the PTO of the respondent at a sale in execution held on 3 March 2004 and a document purporting to give consent to transfer it to the intervening party. He asked the Sheriff to produce for him the documents and records relating to the alleged sale. The Sheriff in question indicated to the respondent's attorney that she had no records. Despite this having been set out in this affidavit, the intervening party did not deal with these averments in its affidavit or produce any such documents. The very fact of such sale having taken place has therefore not been established.

[21] Finally, even further doubt is cast on the validity of the case of the applicant and the intervening party by correspondence entered into between the respondent's attorney and the Trust. By letter dated 8 May 2012, the attorney referred to the dispute concerning the PTO. He also referred to a document purporting consent on the part of the Mpumuza Traditional Council to an application by the applicant to acquire rights to the property. He also referred to the disputes between the parties and indicated that the respondent had not been notified of any application by the applicant, was entitled to notice of any such application and objected to it. The Trust responded by letter dated 24 January 2013. It said that the application by the applicant had been withdrawn on the basis that he had presented to the Trust 'the unendorsed Permission to Occupy over the land. To the Board of Ingonyama Trust this indicated that the Traditional Council was doubly allocating the site as the Permission to Occupy has not been withdrawn'. The letter concluded with an indication that the Trust recognised the PTO of the respondent. Once again, none of these averments was replied to by the applicant or the intervening party. This correspondence took place after the interim order had been granted and, indeed, after the supposed

endorsement had been made on the PTO. Once again, since the application is to be decided on the papers, the respondent's version, not being clearly untenable, must prevail.

[22] In the result, on the date on which the application was brought and the interim relief granted, the applicant was guilty of the material nondisclosure of the settlement agreement which, in my view, must result in the application being dismissed with costs on a punitive scale. In any event, the applicant has not shown on these papers that he has obtained and now possesses the right, title and interest in and to the PTO. This means that, on the present papers, no case has been made out by the applicant or the intervening party that the applicant has a clear right to occupy the property.

In the result the application is dismissed with costs on the scale as between attorney and client.

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GORVEN J

DATE OF HEARING:	15 February 2016
DATE OF JUDGMENT:	19 February 2016
FOR THE APPLICANT and INTERVENING PARTY:	VG Sibeko, instructed by: Ngcobo Poyo and Diedericks Inc, Pietermaritzburg, KwaZulu-Natal (for the applicant) and Ndwandwe & Associates, c/o Lowe & Wills, Pietermaritzburg (for the intervening party).
FOR THE RESPONDENT:	PJ Blomkamp, instructed by Compton Attorneys, Pietermaritzburg, KwaZulu-Natal.