



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 382/20

In the matter between:

MAPATLE KGATLA

APPLICANT

and

MASEDI RONNY MASHALA

RESPONDENT

Neutral citation: *Mapatle Kgatla v Masedi Ronny Mashala* (382/20) [2021]
ZASCA 154 (29 October 2021)

Coram: MOCUMIE, MOKGOHLOA, MOTHLE AND MABINDLA-
BOQWANA JJA and UNTERHALTER AJA

Heard: 02 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 29 October 2021.

Summary: Interdict – final order sought – no real disputes of fact shown – special leave to appeal dismissed with costs

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Semenya J with Ledwaba AJ, sitting as the court of appeal):

Special leave to appeal is dismissed with costs.

JUDGMENT

Mokgohloa JA (Mocumie, Mothle, and Mabindla-Boqwana JJA and Unterhalter AJA concurring)

[1] This is an application in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) for special leave to appeal the judgment and order of the Limpopo Division of the High Court, Polokwane (the high court), with Semanya J and Ledwaba AJ sitting as a full bench (the full bench). In terms of its judgment, the full bench upheld, with costs, the respondent's appeal against the judgment of the Letaba Magistrate's Court (the magistrate's court), which was granted in favour of the applicant.

[2] The application, which is opposed, was set down pursuant to an order issued by this Court (Petse DP and Matojane AJA) on 7 August 2020. The application was referred for oral argument in terms s 17(2)(d) of the Superior Courts Act. The parties were also forewarned in the same order, to be prepared to address this Court on the merits if called upon to do so.

[3] At the core of the dispute between the parties was the complaint by Mr Mashala that Mr Kgatla had erected a fence and off-loaded building material on the stand allocated to Mr Mashala by the Modjadji Traditional Council (the traditional council).

[4] It is necessary to set out the background and facts against which the dispute arose and the trajectory of the litigation up to this point. The applicant is the headman of the traditional council. The respondent, Mr Masedi Ronny Mashala (Mr Mashala), is a resident of Ga-Molai village, which falls under the administration of the traditional council. In his answering affidavit, in opposition to Mr Mashala's application for an interdict to stop him from continuing to fence off the piece of land, Mr Kgatla alleged that sometime in 2018, acting as headman, he started to coordinate endeavours by the traditional council to construct a community hall on a particular piece of land set aside for that purpose. He identified that piece of land as Stand Number 000. To commence this project, he offloaded building material on this stand and started to fence it off.

[5] In his founding affidavit, Mr Mashala alleged that he was granted permission to occupy the piece of land on which Mr Kgatla had offloaded building material and was in the process of fencing off. He attached to his founding affidavit the permission to occupy (PTO), issued by the Modjadji Royal Nation. Subsequently, he brought an urgent application in the magistrates' court to interdict Mr Kgatla from erecting a fence and off-loading building material on that stand. Mr Kgatla opposed the application and raised three points *in limine*: (a) *locus standi*: contending that Stand 915 belonged to one Silvia Mohale, and therefore Mr Mashala had no *locus standi*; (b) non-joinder: that Mr Mashala had failed to join the traditional council as an interested party in whom the land vested; and (c) appeal: that the dispute had already been adjudicated by the Modjadji Traditional Court (the traditional court).

[6] The magistrate upheld the points *in limine*, without deciding the merits, and dismissed Mr Mashala's application with costs. Dissatisfied with this order, Mr Mashala appealed to the full bench. The full bench upheld the appeal, set aside the magistrate's decision and substituted it with an order interdicting Mr Kgatla, as sought by Mr Mashala.

[7] I turn to deal with the points *in limine* raised by Mr Kgatla. First, the point *in limine* of non-joinder. Mr Kgatla is cited in the papers as the headman of the traditional council. In his answering affidavit, Mr Kgatla confirmed that he was appointed as the headman under the traditional council. Although not interrogated in both the magistrate's court and the full bench; and without any demur from the traditional council or any other member thereof on this picture Mr Kgatla painted ie that he was acting on behalf of the traditional council, this Court and so too the courts below, were bound to accept that Mr Kgatla represented the traditional council in his capacity as its appointee. It follows therefore, that there was no need to join the traditional council in the proceedings instituted by Mr Mashala in the magistrate's court.

[8] The second point *in limine* relied upon by Mr Kgatla was that the dispute that Mr Mashala had raised in the magistrate's court had already been adjudicated upon in the traditional court at the instance of the respondent's brother, Mr Isaac Mashala. The outcome of that decision was never contested. In his replying affidavit, Mr Mashala explained that he was initially not aware of the traditional court's decision. He averred however that the document referenced by Mr Kgatla as constituting the decision of the traditional court, related to a dispute between Mr Isaac Mashala and Mr Kgatla concerning the allocation of a site by a certain Mr Baloyi, who was identified as the then secretary of the former headman (the applicant's sister) Ms Selaelo Kgatla. Since Mr Mashala was not a party to that dispute, he could not have appealed the decision of the traditional court. The submission is correct. *Res judicata*¹ cannot be invoked when Mr Mashala was not a party to the dispute that was decided by the traditional court. Nor could he have had recourse to any right of appeal from the traditional court when he was not a party to those proceedings. In any event, the decision of the traditional court does not state the stand number in dispute. It is therefore impossible to ascertain with

¹ In terms of the principle of *res judicata*, when a matter has been adjudicated by a competent court, it cannot be readjudicated by the same parties in a different forum.

certainty whether the traditional court's decision related to the stand in dispute or to any other stand under the traditional council's authority. The full bench correctly dismissed this point *in limine*.

[9] The third point *in limine, locus standi*. As to the contention that Mr Mashala lacked standing to seek an interdict, the magistrate failed to distinguish a challenge to the standing of Mr Mashala and the separate question as to whether he had established a right to occupy the stand in respect of which he sought protection. Standing is determined by assuming that Mr Mashala can establish the right he relied upon and then asking whether he has an interest in that right.² Once the question of standing is properly posed, the answer is plain. If Mr Mashala established the right to occupy stand 915, he clearly has an interest in the protection he sought by way of an interdict.

[10] As I have found that the points *in limine* lacked merit, the question is whether the full bench was correct to grant the interdict. The full bench reasoned that on the merits, the disputes of fact were limited and that it was in a position to find for Mr Mashala and granted the interdict. Whether the full bench was correct in doing so is the matter to which I now turn.

[11] Mr Mashala approached the magistrate's court on the basis that he enjoyed the permission to occupy stand number 915. He adduced evidence of his right to occupy as follows. In 2002, his mother secured stand number 915 in the village and paid the levy as evidenced by two receipts, which he attached to his founding affidavit. He also attached the PTO issued by the Modjadji Royal Nation. The PTO reflects that Mr Mashala was allotted stand 915 to occupy on 28 January 2003.

[12] In his answering affidavit, Mr Kgatla stated that the PTO that Mr Mashala relied on did not relate to the stand where he was off-loading building material and

² *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (AD; [1991] 2 All SA 25 (A).

which he intended to fence-off. He asserted that the stand he intended to fence off was Stand No 000, an empty stand without a number because it was not allocated for residential purposes. Furthermore, to show that this particular stand was not the same as the one Mr Mashala alleged was his, he averred that ordinarily the average size of residential stands measures 30m x 30m whereas the stand in question measures 80m x 43m and it is situated next to the traditional court. In addition, he averred that Stand Number 915 belonged to a certain Ms Sylvia Mohale (Ms Mohale). For this reason, he appended a handwritten document marked as annexure C, which he alleged was an extract from the traditional council's records, reflecting a list of names of persons purported to be of those allotted different pieces of land by the traditional council, including Stand Number 915.

[13] According to him, if Mr Mashala was the owner of Stand Number 915, which (according to his records) belonged to Ms Mohale, then he must have obtained the PTO fraudulently. In any event, so he contended, the question of the contentious ownership of the stand came before the traditional court on 16 July 2018 (in the matter between him and Mr Isaac Mashala) and the traditional court ruled that the stand belonged to the Molai village. As a result, Mr Mashala did not have the right to occupy either Stand Number 000 or 915.

[14] How Mr Kgatla came to make this record and based on what facts is wholly unexplained. Nor is there any confirmatory affidavit provided by Ms Mohale, or indeed from anyone who might provide evidence to confirm that Ms Mohale enjoys the right of occupation attaching to Stand 915. Nothing is said as to when Ms Mohale acquired these rights, how she did so, or from whom.

[15] In my view, on the papers, Mr Mashala established his right to occupy Stand 915. Mr Kgatla failed to provide evidence to dispute Mr Mashala's right beyond his mere assertion. Therefore there is no real dispute of fact. In consequence, Mr Mashala was entitled to seek the protection of his right from unlawful interference.

[16] The question that remains is whether Mr Mashala's right to occupy Stand number 915 was threatened by Mr Kgatla. Mr Kgatla does not claim that he or, through him, the traditional council has the right to occupy Stand number 915. Rather, Mr Kgatla claims that Stand Number 000 belongs to the Molai Village. He explains in his answering affidavit that it is Stand Number 000 where he wishes to construct a community hall. And it is on Stand Number 000 that he erected the fence and not on Stand Number 915.

[17] Mr Kgatla, being the headman, within whom the knowledge and possession of relevant documents vests, failed to provide any documentary proof that Stand Number 000 is different from Stand Number 915. I am therefore not satisfied that he has done enough to create a real dispute of fact on this issue.

[18] Finally, during argument before this Court, the applicant's counsel raised the validity of the PTO for want of compliance with the regulations that were of application at the time that the PTO was granted. That issue was not raised on the papers and cannot randomly be raised on appeal since it is not a pure question of law.

[19] Consequently, I find that no special circumstances exist to grant leave to appeal.

[20] In the result the following order issues.

Special leave to appeal is dismissed with costs.

F E MOKGOHLOA
JUDGE OF APPEAL

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