



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG**

CASE NO: LCC 107/2020

Before: The Honourable Acting Judge President Meer

Delivered on: 02 October 2020

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| DELETE WHICHEVER IS NOT APPLICABLE | |
| (1) REPORTABLE: YES / NO | |
| (2) OF INTEREST TO OTHER JUDGES: YES / NO | |
| (3) REVISED: YES / NO | |
| 02/10/2020 DATE |  SIGNATURE |

In the matter between

BAKGATLA BA MMAKAU TRADITIONAL COUNCIL

Applicant

and

AMOS PHOPOLO MALOKA III

Respondent

JUDGMENT

MEER AJP

[1] This is an urgent application in which the Applicant seeks an order committing the Respondent to imprisonment for a period of three years for contempt of an order of this Court dated 1 August 2019, and for an order setting aside the sale and/or allocation of claimed land without complying with the Restitution of Land Rights Act, 22 of 1994 (“Restitution Act”). The application pertains to an order granted by agreement in case no. LCC97/2010 on 1 August 2019, between the Applicant before me, as the first respondent, the Respondent as the applicant and one other party, namely Princess Mokgoko, who is not a party to the proceedings before me. The order states as follows:

“1. The Applicant and/or the community of Bakgatla Ba Mocha Phopolo is hereby interdicted from allocation sites and or stand or land for any purpose on claimed lands without complying with the Restitution of Land Rights Act 22 of 1994.

2. The Respondents are hereby interdicted from allocation sites and or stand or land for purpose of claimed lands without complying with the Restitution of Land Rights Act 22 of 1994 (The ACT)

3. Any development on the claimed land currently taking place at the instance or with the permission of the Respondents and or Community of Bakgatla Ba Mocha Ba Phopolo shall be stopped forthwith pending compliance with the Act where the said party has complied with the Act.

4. No order as to costs.”

[2] It is undisputed that the Respondent was present at Court when the order was granted by consent and is thus aware of its existence. The Respondent has in fact referred to and attached the court order in a review application under case no.

LCC 72/2020. The founding affidavit of Mr Mokgoko states that despite the existence and his knowledge of the court order, the Respondent through his office proceeded to sell and allocate sites or stands on the claimed land to various persons for residential and business purposes. The claimed land sold, he states, is located at “Masakeng Section, New Stand Section, Mocha Section and Naphiri Section.” He states it was not possible to complete an inspection which commenced in July 2020, in order to determine how much of the land was sold and for what price, because of the large scale of land sold by the Respondent. During the inspection, various persons confirmed that they had bought land from the Respondent through his office, with the purchase prices varying from R500-00 to R1 500-00 (five hundred to one thousand five hundred Rand) depending on whether the land would be used for residential or business purposes. Mr Mokgoko states that while doing an audit of the land, he and others were abruptly stopped by members of the community of the Respondent before they could conclude their inspection. It is stated that some persons are reluctant to depose to confirmatory affidavits or to provide cash receipts to confirm the sales. One cash receipt was however provided by one Mr Mashaba for the sale of land for residential purposes in the amount of R1500-00 (one thousand five hundred Rand) on 15 January 2020. The receipt bears a stamp from the office of the Respondent. The Respondent’s answering affidavit confirms this sale adding that Mr Mashaba bought the land before the court order and that the receipt was for the balance of levies charged.

[3] Annexed to the founding affidavit as Annexures “DJ4” and “DJ5” is a list of persons who allegedly bought land from the Respondent through his office. It is pointed

out that the list does not represent all the stands sold by the Respondent as the audit was not completed. Also annexed to the founding affidavit are photographs of the stands bought. It is alleged that pieces of land ranging from 50x50metres to 10 hectares had been sold by the Respondent through his office. The founding affidavit states that from the audit it appeared that some of the stands were sold by persons other than the Respondent but that the latter, being the head or leader of his community, is bound by the actions of such persons. It is pointed out that the court order of 1 August 2019 is explicit that the Respondent and/or the community of Bakgatla Ba Mocha Ba Phopolo are interdicted from the allocation of sites or stands on claimed land. As leader of the community, it is contended that the Respondent had a duty to inform his community and office that they should immediately cease to sell the land and comply with the court order.

[4] In his answering affidavit the Respondent does not deny that he sold and allocated stands through his office, does not take issue with the list of individuals who bought the stands as recorded in Annexure “DJ4” to the founding affidavit, nor does he dispute the photographs attached thereto depicting the stands sold. He furthermore does not deny the Applicant’s allegations regarding the extent of land sold nor that he sold the land with knowledge of the court order. Also not denied is that he is the most senior person in the community and that as such he had a duty to instruct his community to stop selling land and comply with the court order, that he failed to instruct his community to stop selling land and that he is bound by the conduct of his community

members. The Respondent's failure to deny these allegations, as correctly submitted by the Applicant, permits their admission on a balance of probabilities.

[5] The Respondent instead raises the following defences –

5.1 The Applicant failed to attach confirmatory affidavits of the purchasers of the stands.

The Applicant has, as alluded to above, explained the difficulty in obtaining such affidavits. In the light of the undisputed list of purchases and the invoice attached as proof of sale, this defence cannot be sustained.

5.2 The applicant has not identified the land.

This defence too cannot be sustained. The allegations in the founding affidavit that land has been sold for residential and business purposes at Masakeng, New Stand, Mocha and Naphiri Sections are not disputed. Moreover as the Applicant contends, the Respondent does not say that the land sold falls outside the claimed land. It is noted that the court order of 1 August 2019 describes the land in question as "*claimed lands*" and the Respondent does not state that he or the parties do not know which land has been claimed.

5.3 The absence of *locus standi* of the Applicant.

The Respondent's defence that the Applicant does not have the requisite *locus standi* cannot be sustained. The Applicant, by virtue of being a party

to the matter in respect of which the court order was granted in case no. LCC 97/2019, has *locus standi*. As the Applicant aptly points out, the Respondent failed to raise *locus standi* during those proceedings, and consented to such order. It ill behoves the Respondent to raise *locus standi* now.

5.4 The Respondent's defence of *lis pendens* also cannot in my view be sustained, on the basis that the relief sought in this application was also sought in a counter-application in case no. LCC 58/2020. On instruction of the Registrar of this Court, the Applicant was notified that the counter-claim, being in respect of a different *lis* could not be entertained under case LCC58/2020. There is therefore no *lis* pending before the Court of the same nature.

5.5 The Respondent takes issue with the fact that the Regional Land Claims Commissioner was not joined. As no relief is being sought against the Regional Land Claims Commissioner, its joinder was not necessary in my view.

[6] In so far as the Respondent takes issue with the court order on the basis that it is vague and ambiguous and that it does not state which land it refers to, it must be noted that the Respondent himself consented to this order and never complained about its ambiguity. The court order prohibits the allocation of stands on the claimed land and as aforementioned, there is no evidence that the Respondent or any party does not know what the claimed land is. The court order, in keeping with the Restitution Act, prohibits,

inter alia, the allocation of sites and stands on claimed land without complying with the Restitution Act. The Respondent in his answering affidavit has not established that he has complied with section 11(7)(aA) of the Restitution Act, in that he gave the Regional Land Claims Commissioner one month's notice before selling the land. The letter attached by the Respondent to his answering affidavit to show that compliance with the Restitution Act dates back to 2017, before the date of the court order, and therefore does not pass muster. The Respondent in my view has failed to show that he has complied with the Restitution Act in the sale/allocation of the claimed land as required by the court order of 1 August 2019.

Contempt of Court

[7] In *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at paragraph 22 it was stated that the following elements had to be proved to establish contempt –

- (a) Existence of a court order;
- (b) The order must have been duly served upon or brought to the notice of the alleged violator;
- (c) There must have been non-compliance with the order;
- (d) The non-compliance must have been wilful or *mala fides*.

Proof beyond reasonable doubt of these elements is required where an applicant seeks a sanction of committal, but proof on a balance of probabilities only applies if a declarator or other civil remedies short of committal are sought. Once the applicant has

adduced sufficient evidence to prove requirements (a), (b) and (c), the respondent bears an evidentiary burden in respect of requirement (d). Failure by the respondent to adduce evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, will mean that the civil contempt has been established beyond reasonable doubt. See *Fakie* at paragraph 42. See also *Tasima (Pty) Ltd v Department of Transport* [2015] ZASCA 200 at paragraph 18.

[8] It is common cause that the court order exists and that the Respondent was aware of its existence. The Respondent consented to the order. It is trite that the order must be obeyed until set aside. The fact that the Respondent now takes issue with the order and how it was entered into or may wish to rescind it, does not detract from the fact that it exists and must be obeyed until set aside. As was said in *Eke v Parsons* [2015] ZACC 30 at paragraph 29:

“Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders.”

[9] The Respondent did not deny the averment that he and members of the community sold and allocated claimed land contrary to the court order. Non-compliance with the court order has thus been established. Absence of a denial of pertinent and relevant facts of non-compliance with the court order means that the Respondent has failed to dispel the requirement of non-compliance for a determination of contempt. The requisite elements of contempt referred to in (a) to (c) above have thus been established.

[10] On the requirement of wilfulness or *mala fide*, the Respondent has not adduced any evidence to establish a reasonable doubt that non-compliance was not wilful and *mala fides*. Nowhere in his answering affidavit does the Respondent provide such evidence.

[11] In view of the above, all the requisite elements for a finding that the Respondent is in contempt of the court order have been established. The Respondent is accordingly in contempt of court. I am of the view that the imposition of a fine as opposed to a prison sentence would be an appropriate sanction for the Respondent.

[12] The sale of claimed land contrary to the court order dated 1 August 2019, and contrary to section 11(7)(aA) of the Restitution Act stands, in all of the circumstances, to be set aside, as sought by the Applicant.

Costs

[13] Notwithstanding the practice of this Court to refrain from making cost orders, I am of the view that the circumstances of this case, encompassing the Respondent's contempt of a court order, warrant the Respondent being mulcted with the Applicant's costs. I am, however, of the view that an award of costs on the punitive scale as between attorney and client, as sought, is not warranted.

[14] In view of the above I accordingly order as follows:

1. The Respondent is in contempt of the court order granted in LCC 97/2019 dated 1 August 2019.
2. The Respondent is directed to pay a fine of R5000-00 (five thousand Rand) as a sanction for his contempt of the court order dated 1 August 2019.
3. The Respondent shall furnish the Applicant with a list of all persons (natural and legal) who were allocated stands/sites on the claimed land within ten (10) days of this date of this order.
4. The sale and/or alienation and/or allocation of sites/stands on the claimed land by the Respondent are set aside.
5. The Respondent shall pay the costs of the application on a scale as between party and party.



Y S MEER

Acting Judge President

Land Claims Court

APPEARENCES

For the Applicant: Mokgara Attorneys

For the Respondent: Noko Ramaboya Attorneys Inc.