

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 6795/2022

In the matter between:

DIOCESE OF MARIANHILL OF THE ROMAN

CATHOLIC CHURCH

APPLICANT

And

JABULANI DUMA

RESPONDENT

JUDGMENT

BEZUIDENHOUT J:

[1] On 31 May 2022 Applicant brought an urgent application against Respondent and an order was granted on the same day in the following terms:

- “1. The rule *nisi* is issued calling upon the Respondent to show cause, if any, at **09h30** on the **14th JUNE 2022**, why an order should not be confirmed on the following terms:-

- 1.1 The Respondent and any persons acting in concert with or at the behest of the Respondent are to return peaceful and undisturbed possession of the Applicant's immovable property more fully described as Portion 2 of the Farm B No 5787, Registration Division FS, Diagram SG No 2550/2002, Registered Title No T19294, Province of KwaZulu-Natal, in extent 78, 6209 (SEVENTY EIGHT COMMA SIX TWO NAUGHT NINE) by:
 - 1.1 Removing all the cattle grazing in the Applicant's Immovable Property without the permission of the Applicant;
 - 1.2 Not allowing his own cattle from grazing in the Applicant's Immovable Property.
 - 1.3 Not inciting any other person to graze his/her cattle in the Applicant's Immovable Property; and
 - 1.4 Refraining from removing the Applicant's fence and installing new fence on the Applicant's Immovable Property.
2. The Respondent is to pay the costs of this application in the event of its opposition to the grant of this order.
3. The Respondent is directed to file his answering affidavit by no later than **3 June 2022**.
4. The Applicant is directed to file its replying affidavit, if any, by no later than **8 June 2022**."

[2] On the return day of the rule *nisi* 14 June 2022 Respondent had filed his answering affidavit and Applicant its replying affidavit and the matter was then adjourned to the opposed roll on 20 October 2022 and the rule extended and the costs to be costs in the cause.

[3] Both Applicant and Respondent applied for condonation for the late filing of their heads of argument. This was granted.

[4] Applicant is seeking confirmation of the rule *nisi*. It was submitted that it has been shown that Applicant is the registered owner of the immovable property described as portion 2 of Farm B of No 5797. On behalf of Applicant I was referred to the Title Deed of the property which is attached to the founding affidavit as well as a subdivisional diagram which indicates the property of Applicant. It was submitted that Respondent has failed to provide any proof that the land is his. It was submitted that Applicant already allows Respondent and others to utilise a portion of the property as a grazing camp. There had been a meeting with the Department of Agriculture and the ownership of the land by Applicant was confirmed. It was further submitted that a farmer who had been using the said immovable property for grazing purposes on an informal basis had been hounded by Respondent and the Priest from the said Parish was informed not to get involved therein and to confine himself to his mission. It was submitted that in a letter from Respondent's attorney at pages 43 and 44 of the papers Respondent does not dispute that it is grazing cattle on the land but it was contended

that the land belongs to the Duma Chiefdom who was unlawfully deprived of the possession of the land.

[5] In his answering affidavit Respondent raised two points in *limine* firstly one of urgency and secondly one of non-joinder. It was submitted that urgency was no longer an issue as the rule *nisi* had been issued but that the issue of non-joinder remained an issue. There were a group of people and not only Respondent that were grazing cattle on the said land. It was submitted that Applicant had to join these other people as Respondents. If this was not done the order would be ineffective. It was further submitted that there was a dispute of fact on the papers as to who is allowed to graze cattle on the land and that it should be referred for the hearing of oral evidence.

[6] In response thereto it was submitted on behalf of Applicant that there was no dispute of fact and that the order as it was granted was sufficient as Respondent was the person in control and also the one that was instigating the said conduct as set out in their affidavit.

[7] In the answering affidavit of Respondent on the merits of the case there were various averments that if a person was not a member of First Respondent he/she would lose their place of residence and that the views of the community were not taken into account when the land was transferred. It was further contended that it has been a period of eight years that the land has been used for grazing.

[8] It was submitted that this land had been used for grazing of cattle for more than eight years. It was submitted that Applicant did not make out a case when it was first used for such purpose and there are faceless Respondents before court as there are people whose cattle graze the land who are not before court. The land be transferred to a committee and it would be appropriate for an order that Applicant joins and identifies the other people who are using the said land. There is thus a dispute of fact and that the matter should accordingly be referred for the hearing of oral evidence and Applicant be granted leave to join the other Respondents and that costs be reserved.

[9] In reply it was submitted on behalf of Applicant that there is no dispute of fact. That no proof has been provided to substantiate that the cattle has been grazing for a period of eight years. I was once again referred to the conduct of Respondent towards the Parish Priest when he wished to intervene in the dispute with the local farmer. It was submitted that the Department of Agriculture at the meeting reported that everything was done correctly. As set out in paragraph 22 on page 13 of the papers a group of people have taken over the grazing camp, had removed the fence, installed a new fence, changed the gates and then used the camp to graze their cattle. The fence was moved from its original position. It was submitted that only Respondent knows who these other persons are and that a final order should therefore be granted.

[10] I was referred by counsel for Respondent to the decision of *Kayamandi Town Committee v Mkhwasa and Others* 1991 (2) SA 630 (CPD) where it was held that a failure to identify defendants or respondents would appear to be destructive of the motion that a court order operated only *inter partes* and that an order against respondents not identified by name in the process commencing action or on the record would have the generalised effect typical of legislation it would be a decree and not a court order at all. It was therefore submitted that any order that was granted here would only be applicable against Respondent. I was also referred to the decision in *Illegal Occupiers v Monwood Investment* 2002 (1) ALL SA 115 (CPD) where it concerned the eviction of certain people and it was held that the respondents did not have the appellants particulars, did not take adequate measures to establish them and the appellants could not have been regarded as having been properly brought before court.

[11] In the present matter Respondent is the only respondent and no particulars of any other person, whose cattle may be grazing on the said property, are provided nor are they joined as respondents. It is merely stated in the order that Respondent and any persons acting in concert with or at the behest of Respondent are to remove the cattle. In my view the non-joinder of the other people is not fatal to Applicant in the present matter but will have the effect that if there is noncompliance that Applicant would have to prove whose cattle it is, and if not that of Respondent that they there were grazing at his behest.

[12] It has indeed been proved that Applicant is, in terms of the Title Deed, the owner of the said land in question. The Title Deed also indicate that Applicant during 2002 transferred portions of its land to the Enhlanhleni Community Property Association. There is a grazing camp which Applicant utilises. It is further on the papers not disputed by Respondent that the grazing camp of Applicant has been taken over and that cattle are grazing thereon and that the fencing and gates have been changed. In paragraph 12.12 of the answering affidavit at page 67 of the indexed papers Respondent admits that the cattle do graze on the said land but contends that it has been so for a period of eight years. In the said answering affidavit it is not disputed that their cattle graze on the land. There is a portion which was transferred to the community property association where their cattle can graze.

[13] Counsel for Respondent did not in argument pursue the various averments in the affidavit of Respondent of having to be a member of the church to be buried there which has no relevance to the issue in the present matter. There has been no evidence placed before Court by Respondent that he is entitled to occupy the said land for grazing or to have erected the said fence. On behalf of Respondent the argument was confined to the points *in limine* as set out above and that there is a dispute of fact.

[14] In my view there is no material dispute of fact in that the Title Deed together with the diagram indicate that the land in question belongs to Applicant. There are only bold allegations by Respondent to the contrary but not disputing the occupation of the land.

Therefore there is no material dispute of fact on this issue. Also it is not contended on behalf of Respondent that he was entitled to graze his cattle on the said land nor is any other valid ground of occupation mentioned in Respondent's papers. In the circumstances I am satisfied that the rule *nisi* must be confirmed.

[15] On 14 June 2022 the return date when the matter was adjourned to be placed on the opposed roll an order was made that the costs of that day had to be costs in the cause. The only other costs relate to when the rule *nisi* was granted on 31 May 2022 and the opposed hearing on 20 October 2022. These costs are dealt with in the rule *nisi*.

Accordingly the following order is made.

1. The rule *nisi* issued on 31 May 2022 is confirmed.

BEZUIDENHOUT J.

JUDGMENT RESERVED ON: 20 OCTOBER 2022

JUDGMENT HANDED DOWN ON: 25 OCTOBER 2022

COUNSEL FOR APPLICANT: N T L NTULI

Instructed by: Luthuli Sithole Attorneys

Durban

Tel: 031 312 2327

Ref: D0074/TS/CJ

c/o Austen Smith Attorneys

Pietermaritzburg

Tel: 033 392 0500

COUNSEL FOR RESPONDENT: S NGCAMU

Instructed by: Borman Duma Zitha Attorneys

Randburg

Ref: DD3157/A V DUMA/NDZALAMA

Tel: 011 0886 4628

c/o Ngcamu Attorneys Incorporated

Pietermaritzburg

Tel: 08 094 9284 / 083 439 8380