THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
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N'Wandlamharhi Communal Property Association and Another v Westcott and Others (401/2021)
[2022] ZASCA 129 (3 October 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding the appeal against the decision of the full court of the Mpumalanga Division of the High Court, Mbombela and reinstated the order of the court of first instance.

The issue before the SCA was whether the respondents had rights of access to and occupation of Charleston South and Charleston North (collectively the Charleston properties) that were enforceable against the appellants.

The first appellant, the N'Wandlamharhi Communal Property Association, is the registered owner of a number of immovable properties that comprise the MalaMala Private Game Reserve (MalaMala) in Mpumalanga. These properties include portion 1 of Charleston 378 KU (Charleston South) and the remaining extent of Charleston 378 KU (Charleston North). The second appellant, MalaMala Game Reserve (Pty) Ltd, operates MalaMala in terms of a lease agreement with the first appellant. The first respondent, Ms Helen Lynne Westcott, and the second respondent, Ms Caroline Clare Cormack, are sisters. The third respondent, Mr Rodrick Anton Beaumont, and the fourth respondent, Mr Michael Hemingford Beaumont, are brothers and first cousins of the first and second respondent.

The original farm Charleston belonged to Mr Frans Unger. During 1958 the original farm was subdivided into two equal portions, each approximately 1801 hectares in extent, thereby constituting the Charleston properties. Ms Nan Yvonne Trollip (previously Westcott) and Ms Phyllis Marie Beaumont were daughters of Mr Unger. Ms Trollip was the mother of the first and second respondent and Ms Beaumont the mother of the third and fourth respondent. During the mid-1950's Ms Trollip established a camp on the western bank of the Sand River, on what is now Charleston South (the Charleston South Camp). At about the same time, Ms Beaumont established a similar camp, on what is now Charleston North (the Charleston North Camp). During 1964 Ms Trollip became the registered owner of the Charleston South and Ms Beaumont that of Charleston North.

By 1986 Ms Trollip had caused the incorporation of a company named Charleston Farm (Pty) Ltd. All 300 of the issued shares in the company belonged to her. On 26 February 1986, Ms Trollip entered into a sale of shares agreement with Rattray Reserves (Pty) Ltd (Rattray Reserves), in terms of which she sold and transferred two thirds of the shares in Charleston Farm (Pty) Ltd to Rattray Reserves. The sale of shares agreement was subject to the execution of, first, an agreement of sale between Ms Trollip and Charleston Farm (Pty) Ltd for the sale of Charleston South and, second, a shareholders agreement between Ms Trollip and Rattray Reserves in respect of their shareholding in Charleston Farm (Pty) Ltd.

By 1986 Ms Beaumont had created a family trust, the Spulula Family Trust. The Spulula Family Trust held all the issued shares in a company called Charleston North (Pty) Ltd. On 8 September 1986, the Spulula Family Trust also entered into a sale of shares agreement and shareholders agreement with

Rattray Reserves. The terms and conditions of these agreements were virtually identical to those of the agreements between Ms Trollip and Rattray Reserves. The shareholders agreements provided for occupation and viewing rights of Ms Trollip, Ms Beaumont and the respondents in respect of the Charleston South Camp and the Charleston North Camp respectively.

During 1987, Rattray Reserves transferred its shares in the Charleston companies to a close corporation, MalaMala Ranch CC. That close corporation was later converted into a company named MalaMala Ranch (Pty) Ltd. As was envisaged in the shareholders agreement between Ms Trollip and Rattray Reserves, the former transferred her one third shareholding in Charleston Farm (Pty) Ltd to the Nan Trollip Trust during 1993.

Clause 9 of each shareholders agreement placed limitations on the disposal of shares in the Charleston companies to third parties. In essence, clause 9.2 provided that a shareholder may only dispose of shares to a third party if all the shares held by it are disposed of and the other shareholder did not accept an offer to purchase the shares at the same price and on the same terms than those offered by the third party.

In the meantime, a claim for the restitution of rights under the Restitution of Land Rights Act 22 of 1994 was instituted in respect of the properties comprising MalaMala. Eventually the Minister of Rural Development and Land Reform decided to restore these properties to the claimant community and made State funds available for the purchase of the land. The Department transferred the properties to the first appellant on 30 October 2013. Thus the first appellant became the registered owner of the properties comprising MalaMala, including of course the Charleston properties.

Soon after the second appellant took control of the management of MalaMala, however, it took the stance that the occupation and viewing rights had ceased to exist. It accordingly notified the respondents that they would not be granted access to MalaMala after 31 July 2016. That sparked the litigation that led to the present appeal.

The respondents launched an application in the high court for the enforcement of the occupation and viewing rights. Their principal contention was that clause 11.1 read with clause 11.6 of the shareholders agreements afforded them the right to the registration of servitudes against the title deeds of the Charleston properties

The SCA held that the shareholders agreements evinced no retention on the part of the Charleston companies to bind their successors in title to the occupation and viewing rights. The SCA also found that the shareholders agreements made provision for two categories of entrenchments. The first category imposed limitations on the disposal of the respective Charleston properties. The SCA found that parties to the shareholders agreements contemplated that the Charleston properties might be disposed of, but made no provision for the survival of the occupation and viewing rights in such an event. The second category imposed limitations on the sale of the shares in the Charleston companies to third parties, subject to detailed exceptions. Clause 11.6 explicitly stated that should the minority shareholding be sold to anyone other than Rattray Reserves or an ‘Affiliate’, the occupation and viewing rights would terminate. The SCA therefore concluded that the respondents were not afforded the right to have the occupation and viewing rights registered against the title deeds of the Charleston properties and that they in fact terminated when the Charleston properties were sold.

In the alternative, the respondents argued that even if they had no rights to obtain the registration of servitudes, the occupation and viewing rights should be enforced against the appellants under the doctrine of notice. The SCA held that for the simple reason that it held that the occupation and viewing rights had terminated when the Charleston companies disposed of the Charleston properties, nothing remained that could be protected under the doctrine of notice.

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