



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

NOT REPORTABLE

Case No: 159/2014

In the matter between:

RED DUNES OF AFRICA CC

APPELLANT

and

**MASINGITA PROPERTY INVESTMENT
HOLDINGS (PTY) LTD**

1ST RESPONDENT

ZEBEDIELA NDEBELE TRIBAL COUNCIL

2ND RESPONDENT

**THE MINISTER, RURAL DEVELOPMENT
AND LAND REFORM**

3RD RESPONDENT

**MEC LIMPOPO PROVINCIAL DEPARTMENT
OF ECONOMIC DEVELOPMENT, ENVIRONMENT
AND TOURISM**

4TH RESPONDENT

LEPELLE-NKUMPI LOCAL MUNICIPALITY

5TH RESPONDENT

In the matter between:

RED DUNES OF AFRICA CC

APPELLANT

and

**MASINGITA PROPERTY INVESTMENT
HOLDINGS (PTY) LTD**

1ST RESPONDENT

**MASINGITA VLAMING CONSTRUCTION
(PTY) LTD**

2ND RESPONDENT

MONICA LEOLO

3RD RESPONDENT

Neutral citation: *Red Dunes of Africa v Masingita Property Investment Holdings* (159/2014) [2015] ZASCA 99 (1 June 2015)

Coram: Ponnan, Shongwe and Pillay JJA and Fourie and Gorven AJJA

Heard: **25 May 2015**

Delivered: **1 June 2015**

Summary: Right to develop property — appellant relying on an agreement containing suspensive conditions — cannot be relied upon to found any rights where there is no averment that the suspensive conditions were fulfilled or waived — appellant also relying on resolution purporting to transfer a Permission to Occupy — no actual transfer — even if transfer took place, no right to develop founded — appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kganyago AJ sitting as court of first instance)

The appeal is dismissed with costs, including those occasioned by the employment of two counsel where applicable.

JUDGMENT

Gorven AJA (Ponnan, Shongwe, Pillay JJA and Fourie AJA concurring):

[1] The use of property for commercial purposes is often hotly contested. This appeal arises from just such a contestation. It relates to two properties. Both nominally vest in the third respondent, the Minister for Rural Development and Land Reform. Both fall under the jurisdiction and control of the Zebediela Ndebele Tribal Council (the Council). The first respondent, Masingita Property Investment Holdings (Pty) Ltd (Masingita), claims that it has a right to construct a community shopping mall on one property (the mall property). The appellant, Red Dunes of Africa CC (Red Dunes), claims that it has a right to construct a shopping centre on the other property (the café property).

[2] In the court below, Masingita launched an application against the Council, as the first respondent, and Red Dunes, as the second respondent. Masingita sought to enforce an agreement which it alleged it had with the Council to develop the mall property and to interdict Red Dunes from

continuing with construction which it had commenced during September or October 2012 (the main application). The basis of the main application was that the construction in question was located at least partly on the mall property. Red Dunes opposed that application and itself brought an application, claiming spoliatory relief and reinstatement to possession of what it said was the café property (the spoliation application). The Council opposed the main application and the appeal but was not a party to the spoliation application. The other parties did not enter the fray at any stage.

[3] The matters were heard together in the Gauteng Division of the High Court, Pretoria before Kganyago AJ. The court below made no order relating to the spoliation application, holding that the outcome of the main application had rendered it moot. Masingita did not persist in the relief sought against the Council. This was because the Council demonstrated in its answering affidavit that it had not breached the agreement relied upon by Masingita and made common cause with Masingita in respect of the relief sought against Red Dunes. The court below granted relief in favour of Masingita against Red Dunes as follows: (a) an interdict from constructing any development on the mall property; (b) a declaration that any development by Red Dunes on the mall property was unlawful; (c) an order directing Red Dunes to demolish any structures on the mall property; and (d) an order that Red Dunes pay the costs of the application and counter-application, including those of two counsel.

[4] Red Dunes was granted leave to appeal by the court below against the dismissal of the spoliation application and the grant of relief under the main application. Red Dunes has abandoned the appeal against the outcome of the spoliation application and tendered any associated wasted costs. Nothing further need be said in this regard. The appeal before us, accordingly, lies only against

the relief granted in favour of Masingita against Red Dunes in the main application.

[5] The issue on appeal is whether the court below correctly granted the relief. Both in the court below and in this court Red Dunes raised two issues. First, whether Masingita proved that it has a clear right. This resolves itself in essence into the question whether Masingita proved a right to develop the mall property and the concomitant finding that Red Dunes did not prove a prior right of development. Secondly, whether the construction of Red Dunes encroached on the mall property.

[6] I shall begin with the second of these. Despite its assertion to the contrary, Red Dunes itself claimed that there was ‘incontrovertible proof that the [café] property was . . . included in the mall property’. In addition, when Masingita asserted that the inclusion of the café property contributed to the extent of the mall property increasing from 5,0969 hectares to 5,2695 hectares, this was not denied. Finally, each party put up a survey diagram of the property to which that party claimed rights, containing the usual references to fixed points. The mall property has an approved sub-divisional diagram in which it is described as Portion 3 of the farm Zebedielas Location No. 123 registration division KS Province of Limpopo, in extent 5,4300 hectares. The café property does not have an approved sub-divisional diagram or property description. The diagram put up by Red Dunes comprises all the properties referred to in the resolution of the Council of 11 May 2007, of which the café property forms a part. I shall return to the resolution later. In reply, Masingita put up a diagram, drafted by a land surveyor, which superimposed the diagram co-ordinates of that property onto those of the mall property. This clearly shows that all but an insignificant portion of the entire property and the whole of the café property falls within the mall property. In addition, the foundations of the building which

Red Dunes began constructing were superimposed on a concept sub-divisional diagram put up by Masingita. The foundations clearly fall inside the mall property. The issue concerning encroachment must therefore be decided in favour of Masingita.

[7] The remaining issue concerns the identity of the party with rights to develop the mall property. The case of Red Dunes is that Masingita does not have any such rights because a prior right was granted to Red Dunes to develop a shopping centre on the café property. This right has not been revoked and therefore the council was not able to grant Masingita rights over property which included the café property. Red Dunes accepted that its defence to the interdict application depended on its proving this prior right. Apart from asserting its prior right, Red Dunes does not seriously contest the right asserted by Masingita to develop the mall property. As a result, I do not propose to deal in any detail with the right asserted by Masingita. Suffice it to say that, in my view, this was adequately demonstrated on the papers. The only issue is whether Red Dunes proved a prior right to develop the café property.

[8] Red Dunes traces its right to the transfer of a Permission to Occupy (the PTO) the café property. It says that it obtained these rights in the following manner. The PTO was issued in 1990 to Mr Samuel Mathibana Mamabolo to operate a café business. On 7 December 2004, Mr Mamabolo sold the café business, known as Sams Café, to Mr Alfred Lesibana Tlomatsana for R120 000. On 29 May 2007 a recordal was made by Mr Mamabolo to the effect that he had sold the business and his rights in the café property to Mr Tlomatsana and been paid in full by him. The recordal by Mr Mamabola concludes with the words: ‘I am aware that [Mr Tlomatsana] has now decided to sell to Red Dunes of Africa CC and have no objection thereto.’ This recordal was signed by Mr Mamabolo. It was also signed by Mr Tlomatsana above the

words ‘Purchaser (1)’ and by a representative of Red Dunes above the words ‘Purchaser (2)’. A written agreement, headed ‘Land Sale Agreement’, was concluded between Mr Tlomatsana and Red Dunes on the same day. The agreement provided for the sale of the café property by Mr Tlomatsana to Red Dunes for the sum of R180 000. A resolution was taken by the Council on 11 May 2007 and was signed on 25 May 2007. Red Dunes contended that these documents link to each other to form a chain proving its right to develop the café property. This contention must therefore be evaluated.

[9] In the papers, Red Dunes based its case squarely on the sale agreement concluded with Mr Tlomatsana. This much was also conceded in argument. The answering affidavit of Red Dunes makes this clear. The deponent says, variously:

- The property to which Masingita lays claim was increased ‘to include the separate property that I purchased . . .’
- ‘Clause 3 of this agreement refers to the conversion of the PTO . . .’
- ‘Annexure “A” to the . . . agreement is a drawing of the property . . .’
- ‘[T]he property that Red Dunes acquired was initially not valued . . .’
- ‘This is incontrovertible proof that the property was acquired by Red Dunes . . .’
- ‘. . . Red Dunes acquired the property in 2007 for R180 000.’
- ‘The agreement referred to was concluded in 2007 . . .’
- ‘[T]he agreement that Red Dunes concluded was in 2007 . . .’
- ‘The property had [the rights to erect a shopping centre] when Red Dunes concluded the agreement.’

[10] The agreement contains a number of suspensive conditions. One of these provides that the sale is subject to the conversion of the PTO certificate to a

Title Deed under the provisions of the Upgrading of Land Tenure Rights Act 112 of 1991. The agreement is also made subject to the approval of the sale of the land in the Title Deed by the Minister of Land Affairs, which itself requires approval by the Council and the community at large. Once the PTO has been converted to ownership, further suspensive conditions require the property to be subdivided and consolidated as a separate erf by the cut-off date, the property to be rezoned (along with the requirement that all the relevant processes for the amendment of the town planning scheme are followed and completed) and all the relevant approvals to be obtained by the cut-off date.

[11] There is no averment on the papers that any of these suspensive conditions was met. In fact, it was candidly conceded that none had been fulfilled. The law is clear that, in those circumstances, a party cannot enforce any rights arising from the agreement.¹ Red Dunes initially submitted that it was unnecessary to fulfil any of the suspensive conditions because it had elected not to convert the PTO to ownership. This was not, however, the only suspensive condition. Also, the broader terms of the agreement make it clear that this was not an election open to Red Dunes. One example which demonstrates this is that the agreement sets the date of registration of a Deed of Grant as the time that various actions must be performed, not least the payment of the balance of the purchase price and the acquiring of possession and the right to occupy. Without the registration of a Deed of Grant, the agreement does not provide a date for payment of the purchase price and effect cannot be given to it. This shows that conversion of the PTO to ownership is integral to the agreement. It was finally conceded that at least certain of the suspensive conditions had to be fulfilled. As long ago as *Corondimas v Badat*,² it was held that when a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and

¹ *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 644G-H.

² *Corondimas v Badat* 1946 AD 548.

until the condition is fulfilled. Accordingly, and agreement of sale subject to a suspensive condition cannot, pending fulfilment of the condition, be regarded as a sale.³ As a result, it was also conceded in argument that Red Dunes could not found any right to develop the café property on the agreement.

[12] In argument, Red Dunes then switched focus to rely on the resolution of the Council taken on 11 May 2007. This reads, in its material parts, as follows:

‘We, Zebedelia-Ndebele Tribal Authority . . . resolved in the Traditional Council meeting dated 11 May 2007, that . . . Red Dunes . . . be allocated land as applied for next to Moletlane Taxi Rank (Mr Tlomatsana’s Sam’s Restaurant and a stand behind the restaurant, Mrs Maria Kekana’s stand behind Mr Huma’s shop, the stand behind the Post Office and a 10m road from the tar road which will be in between the fence of the Post Office and the Soccer Ground to the Erf behind the Post Office, as entrenched in the diagram emphasising proper co-ordinates in the company’s application document submitted to our Tribal Authority).

The land will be utilised for the execution of business activities in the form of a Shopping Centre.

The move above automatically transfers the P.T.O. previously held by Samuel Mamabolo (for the operation of Sam’s Restaurant) into the name of Red Dunes of Africa CC.

The Tribal Authority will assist and have no objection if the applicant in future wishes to upgrade the status of its occupation.’

[13] This resolution, it was submitted, transferred the PTO from Mr Mamabolo to Red Dunes. The PTO was initially given to Mr Mamabolo under apartheid era land regulations.⁴ A PTO is defined in the regulations to mean a ‘permission in writing granted or deemed to have been granted in the prescribed form to any person to occupy a *specified* area of Trust land for a *specified* purpose’.⁵ It is required to be a formal document ‘in the prescribed form and be

³ *Geue v Van Der Lith* 2004 (3) SA 333 (SCA) para 8.

⁴ Bantu Areas Land Regulations, 1969 (Proclamation R.188 of 1969) promulgated under the Black (Native) Administration Act 38 of 1927.

⁵ My emphasis.

registered . . . in [an] allotments register'.⁶ According to the PTO issued to Mr Mamabolo, the café property was to be determined and beaconed by the Magistrate, could not exceed 0,5 hectares in extent and could be occupied for the sole purpose of conducting a cafe business and a rental was to be paid for it annually in advance. The café property could not be sub-let, nor could the right of occupation be ceded, leased or transferred without the written consent of the authority concerned. The café property had to be personally occupied and the business personally conducted by the holder of the PTO unless the person appointed to do so was approved by the authority concerned.

[14] It is common ground that the PTO was not transferred to Mr Tlomatsana, nor was a fresh one issued to him. No averment was made in the papers that he obtained any written consent to occupy it nor was it averred that when the business was sold to Mr Tlomatsana, the trustee approved his occupation of the café property or his conduct of the business. The Council, in its affidavit in the spoliation application which was included by reference in the main application, averred that no rights arising from the PTO had been transferred to Mr Tlomatsana. This averment was not challenged. It is doubtless for this reason that the recordal of 29 May 2007 was made and the resolution of 11 May 2007 was said to ‘automatically’ transfer the PTO held by Mr Mamabola, rather than Mr Tlomatsana, to Red Dunes.

[15] However, Red Dunes did not found its case on the transfer of the PTO. As mentioned, it founded its case on the agreement which gave rise to the resolution. In addition, in argument Red Dunes expressly disavowed any reliance on the resolution as a stand-alone basis for the acquisition of rights in the café property.

⁶ Regulation 47(3).

[16] This disavowal was clearly appropriate. The resolution, purporting to transfer rights accorded to Mr Mamabolo, is at best the last link in the chain of documents relied on by Red Dunes. The recordal by Mr Mamabolo pertinently referred to the decision of Mr Tlomatsana to sell to Red Dunes. Without the link of the agreement, the chain leading to the transfer, and thus the right asserted by Red Dunes is incomplete.

[17] There are other reasons why no right to develop arise from the resolution. First, the regulations governing PTOs are still operative. These require the issue of a formal document and the recordal of the holder in an official register. This was not said to have been done and, accordingly, Red Dunes failed to prove that it is the holder of a PTO for the café property. Secondly, even if it can be said that a transfer of the PTO took place by way of the resolution, the PTO was not amended and its terms remain those of the PTO which was transferred. These do not permit of any development of the café property by the holder. Thirdly, in its affidavit the Council set out the customary law procedure governing the obtaining of rights to develop a property. This requires a number of steps to be taken, many of which mirror the suspensive conditions appearing in the agreement. These averments were dealt with in reply in the spoliation application by Red Dunes and were not challenged. It is common cause that none of the required steps has been taken by Red Dunes. Even if the resolution gave rise to the transfer of the PTO, which is at best doubtful, this does not accord to Red Dunes a right to develop the café property.

[18] Red Dunes accordingly failed to make out a case that it had a prior right to develop any part of the mall property. As such, since the right of Masingita was impugned on that basis, the court below correctly granted the orders, even though the judgment does not engage with the issues dealt with above.

[19] Masingita proved that it had a clear right to develop the mall property. It is also clear that the construction by Red Dunes committed an injury to Masingita. Since Red Dunes refused to remove the encroachment, Masingita had no alternative but to approach the court below for interdictory and consequential relief. The three components of a final interdict were accordingly proved.⁷

[20] The following order issues:

The appeal is dismissed with costs, including those occasioned by the employment of two counsel where applicable.

T R Gorven
Acting Judge of Appeal

⁷ *Setlogelo v Setlogelo* 1914 AD 221.

Appearances

For Appellant: MC Erasmus SC (with him J Rust)
Instructed by: Morne Mostert Inc, Pretoria
Phatshoane Henney Inc, Bloemfontein

For 1st Respondent: AR Bhana SC (with him JJ Meiring)
Instructed by: Nam-Ford Inc, Pretoria
Claude Reid Inc, Bloemfontein

For 2nd Respondent: D Watson
Instructed by: Abba Parak Inc, Johannesburg
Webbers Attorneys, Bloemfontein