

SOUTH AFRICA / JUDGMENT

Akanmbi v Mavusi N.O and Others (1347/2022) [2023] ZAMPMHC 3 (19 January 2023) [2023] ZAMPMHC 3

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

1347/2022

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IN THE HIGH COURT OF
SOUTH AFRICA

MPUMALANGA DIVISION

(MIDDELBURG LOCAL SEAT)

CASE NO: 1347/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

19/01/2023

In

the matter between:

DR
AYOKUNLE ABOYOMI AKANMBI APPLICANT
And
MAGISTRATE
MG MAVUSI N.O. FIRST
RESPONDENT
MINISTER
OF JUSTICE SECOND
RESPONDENT
AND
CORRECTIONAL
SERVICES
VICTOR
ISAAC MASANGO
THIRD RESPONDENT

JUDGMENT

LANGA J:

- [1] This is an application for the reviewing and setting aside of the judgment and order granted by the First Respondent, Magistrate MG Mavuso, of KwaMhlanga Magistrates Court. In the judgment the Magistrate, after having upheld a plea of non-joinder raised by the applicant, still ordered the trial to proceed. The Magistrate further referred the matter between the applicant and the Third Respondent to oral evidence after having made a finding that there was a dispute of fact. The applicant contends that these decisions are irregularities which impair the legal validity of the proceedings or trial.
- [2] The facts in brief are that in February 2000 the Applicant leased from the Third Respondent a property situated at 0[...] P[...] Park, Farm E[...], 2[...] JR. K[...], measuring 30x30. The Applicant leased this property for the purpose of running his medical practice therefrom. The Applicant contended that when the lease agreement lapsed in 2001, he successfully negotiated the sale of the said property with the Third Respondent and ultimately bought the property from the Third Respondent for the agreed amount of R60 0000.00. It was further agreed that the title deed in respect of the property would be secured by the Third Respondent and transferred to the Applicant immediately.
- [3] It is common cause that the Applicant made some improvements on the said property and continued practicing therefrom for a substantial period. The Applicant stated that after struggling to get hold of the Third Respondent for the purposes of finalizing the transfer of the title deed as agreed, he started making inquiries about the property and the land on which it is situated. He discovered that the property belonged to the local Traditional Authority. When he contacted the Local Traditional Authority he was informed that he needed to obtain permission from the Traditional Authority in order to continue occupying the land. After negotiations the Local Traditional Authority granted him the Permission to

Occupy the property.

- [4] However, in 2018 he was approached by J Mabena Attorneys acting on behalf of the Third Respondent who informed him that the Third Respondent is the owner of the property and that the Applicant and the Third Respondent had entered into a verbal agreement in terms of which the Applicant would make improvements on the property and use it for a period of ten years rent free in order to recover the monies spent on the improvements. The attorneys further informed the Applicant that the Third Respondent was claiming ownership of the said property and demanded rental of R5 000 per month from January 2018.
- [5] It is common cause that when the Applicant disputed the claims by the Third Respondent, the latter instituted an action against the Applicant for the eviction of the Applicant from the property. The Third Respondent further issued an application for the eviction of the Applicant in October 2020 which application the Applicant also opposed. The matter was eventually heard and argued before the First Respondent in November 2021 where the Applicant raised the issue of non-joinder and dispute of fact.
- [6] The contention by the Applicant on the non-joinder was simply that the Local Traditional Authority was an interested party in the proceedings as it was the authority which gave the Applicant the permission to occupy the said property. He argued therefore that the Third Respondent should not have proceeded with the application without joining and citing the Traditional Local Authority. The Applicant argued therefore that this amounted to a non-joinder. While the Magistrate agreed and in my view correctly found that it amounted to non-joinder, he nevertheless for inexplicable reasons condoned the non-joinder and ordered that the matter proceed despite the non-joinder.
- [7] Regarding the contentious dispute of fact, the Applicant argued that there was a foreseeable dispute of fact which could not be resolved without the hearing of evidence. The Applicant contended that the dispute is around the ownership of the property and that the court could not make a determination without the hearing of oral evidence. On this point the Magistrate agreed and made a finding that there was indeed a dispute of fact and referred the matter to oral evidence.
- [8] Meanwhile, in February 2022 the Third Respondent informed the Applicant that he intended rectifying the non-joinder by joining the Traditional Authority as a party to the proceedings and requested that the matter be postponed for that purpose. However, in March 2022 the Third Respondent recapitulated and decided not to proceed with the joinder of the Traditional Authority as a party to the proceedings as he had earlier indicated. This prompted the Applicant to launch this review application in terms of Rule 53 of the Uniform Rules of Court. In it the Applicant essentially challenges the decision by the Magistrate to order the hearing to proceed despite having found that there as a non-joinder.

- [9] When this matter was heard the Applicant's counsel filed heads of argument and argued the point relating to the non-joinder. The Third Respondent's counsel Mr Letswalo, who did not file any heads of argument, conceded that there was a dispute of fact and essentially agreed with the submissions made by Mr Thumbathi for the Applicant. The Third Respondent's submissions amounted to a concession on the points in limine raised by the Applicant a quo.
- [10] It is trite that where there is non-joinder the court ought to order the joinder of the party not joined. In this case after conceding that the failure to cite the Traditional Authority as a party amounted to a non-joinder, the Magistrate decided to condone the non-joinder and ordered the matter to proceed with the Traditional Authority not having been joined as a party. When considering existing authority on the matter it becomes very clear that the Magistrate did not have the discretionary powers to condone the non-joinder where joinder was necessary.
- [11] In this case it is common cause that the Traditional Authority has a direct interest in the matter as not only as it controls the land on which the property is located but also because it carries the responsibility to allocate such land. In this matter it is not disputed that the Traditional Authority has in fact granted the Applicant the permission to occupy the disputed land. As was stated in *Khumalo v Wilson* 1972 (4) SA 470 (N), once the court finds that the party is a necessary party in the proceedings such party must be joined. Given the facts which are common cause, the Magistrate clearly committed an irregularity in condoning the non-joinder of the Traditional Authority. On this ground alone the application for the setting aside of the judgment and order of the Magistrate ought to be granted.
- [12] Regarding the dispute of fact, the Third Respondent's counsel conceded that there was indeed a dispute of fact and he could not offer any submission thereon either. In fact, the Magistrate made a finding that there was a dispute of fact and referred that matter to oral evidence. While this would have been the correct approach to a dispute of fact, the problem in this matter is that the decision is vitiated by the irregularity in condoning the non-joinder of the Traditional Authority. The matter could not therefore proceed to oral evidence in circumstances where there was a non-joinder.
- [13] In conclusion, in the light of the irregularity referred to above I am satisfied that the Applicant has made out a case for the reviewing and setting aside of the judgement and order made by the Magistrate. The proceedings should therefore be set aside and ordered to proceed de novo before another Magistrate.
- [14] In the result I make the following order:

The judgment and consequent order of Magistrate MG Mavuso made on 5 December 2021 condoning the non-joinder of the Ndebele Kingdom Traditional Authority and referring the matter to oral evidence is hereby reviewed and set aside;

It is ordered that the matter proceed de novo before another Magistrate;

The third Respondent is ordered to pay the costs of the application.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv.

Thumbathi

Instructed by: JM

Masombuka Attorneys

For the First and Second Respondents: The State Attorney

For the Third Respondents:

Adv. SR Letswalo

Instructed by: Nkome

Incorporated Attorneys

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 19 January 2023 at 10h00.

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Prepared on 10 October 2026 · Esheria