

SOUTH AFRICA / JUDGMENT

Hennop v Koen (12310/2014) [2021] ZAGPPHC 270 (25 March 2021)

[2021] ZAGPPHC 270**COURT**

North Gauteng High Court, Pretoria

BEFORE

Maumela

CASE / FILE NUMBER

12310/2014

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Source record**REPUBLIC OF SOUTH****AFRICA****IN THE HIGH COURT OF****SOUTH AFRICA****(NORTH GAUTENG HIGH****COURT, PRETORIA)****Case No: 12310/2014****REPORTABLE: YES/NO****OF INTEREST TO OTHER****JUDGES: YES/NO****REVISED****DATE: 25/03/2021****In**

the matter between:

Okker Jacobus

Hennop

Applicant

And

Christiaan

Johan

Koen

Respondent

JUDGMENT

Maumela J.

1. This matter came before court in the opposed motion roll. It entails interlocutory proceedings wherein the applicant, who is the Respondent in the main application, seeks four procedural orders granting him leave towards the following:

1.1. To file a supplementary affidavit.

1.2. To file a counter-application.

1.3. An order in terms of Section (1) (b) of the Superior Courts Act, that the application be removed from this Division, to the Limpopo Division of the High Court and

1.4. That the application be postponed sine die.

RE: FILING OF A SUPPLEMENTARY AFFIDAVIT.

2. The Applicant submits that in April 2018, he appointed new attorneys to represent him. Upon consulting Senior Counsel, he was advised that there are several defenses that are available at his disposal, which were not raised by his previous lawyers. See paginated page 8. Applicant submits that it would be patently unjust, much as it would not be in the interests of justice to close the doors of the Limpopo High Court in his face under the circumstances.

3. The Applicant also submits that it seems that in refusing to grant his reasonable request; the Respondent, who is the Applicant in the main application is seeking to gain tactical advantage to which he is not entitled. Advancing this argument, the applicant advances the following reasons:

3.1. That in Pretoria, this application was already issued. On the 24th of March 2014, it was opposed. This was more than four years before. The answering affidavit was filed on the 19th of May 2014. The Respondent filed his replying affidavit three years later on the 27th of November 2017.

3.2. As indicated in his replying affidavit, the Respondent knows fully well about the shortcomings of the Applicant's previous

attorneys. This is demonstrated where the Respondent states the following: "I also respectfully invite the Honourable Court's attention to the fact that the Respondent has not filed his counter application, much as he has not instituted summons for an order to transfer the property.

3.3. It is only in 2018 that the Respondent issued another application in the Limpopo High Court. The Applicant's answering affidavit in that matter seemed to have been filed shortly after the letter of the 28th of May 2018. In that answering affidavit, various new facts and defenses are raised.

3.4. The Respondent's attorney of record makes clear the Respondent's attitude in a letter dated the 4th of June 2018 wherein he stated: "The pleadings have closed and the matter should be adjudicated on the pleadings as it stands."

3.5. Knowing full well what the Applicant's counter application and defenses entail, and knowing that the relief sought by the Respondent would preclude the Applicant from raising the same in the Limpopo matter, the Respondent steamrolled ahead and enrolled this matter to be heard before this court.

4. The Applicant submits that he has made a clear case advancing reasons why he has to place his version before court. He has attached Annexure "X4" wherein he advances a full exposition of the facts and defenses he wishes to place before this court. Those include the following:

4.1. The terms of the oral agreement with specific reference to "a reasonable period."

4.2. The Applicant's claim for rectification of clause 4 of the written agreement.

4.3. The fact that there has never been any demand in terms of clause 7 of the agreement.

4.4. The Applicant's claim for specific performance, which is the main relief sought in the counter application.

4.5. The fact that there is a reciprocal duty on both parties to contribute in the signing of documents for purposes of transfer.

4.6. The fact that a contractual right to claim ownership is not a "debt" as meant in chapter 3, Section 10 and of the Prescription Act.

4.7. The Respondent's failure to elect to cancel the agreement constitutes an express, alternatively tacit acknowledgment of liability.

4.8. The Applicant's application that the common law should be extended with regard to the exceptio doli.

RE: THE ORDER FOR TRANSFER.

5. The Applicant seeks an order for this application to be transferred from the Pretoria High Court to the Limpopo Division where the Respondent has recently instituted an eviction application. In the application in Limpopo, the Respondent has filed his answering affidavit and counter-application, based on exactly the same facts as those applicable to the application in Pretoria.

6. Section 27 (1) (b) (i) of the Superior Courts Act 2013: (Act No 10 of

2013) grants the court a discretion to make such an order. In that regard, this section provides as follows:

“If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings -

(a). ...

(b). Would be more conveniently or more appropriately heard or determined -

(i). At another seat of that Division; or

(ii).

that court may, upon application by any party thereto, and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat as the case may be.”

7. The Applicant submits that the test is threefold as follows:

7.1. Firstly, the court making such an order must already have jurisdiction. In casu, the Respondent explains that when this application was launched, the Limpopo High Court was not yet in operation. This court then has jurisdiction only owing to the fact that the transitional provisions hold that as the application was launched prior to establishment of the Limpopo division, this court retains jurisdiction.

7.2. Secondly, the court to which the Applicant seeks transfer must also have jurisdiction. In casu, the Respondent already admits that the Limpopo division has jurisdiction as the immovable property is in the jurisdiction of the Limpopo Division[1].

7.3. The third enquiry is of convenience, both to the court and the administration of justice and to the parties. In this regard the following is apparent;

7.3.1. The property is situated in the Limpopo Division.

7.3.2. The Respondent is resident in the Limpopo Division, which means that it would be more convenient for all the witnesses (given the material disputes of fact) to travel to a closer division.

7.3.3. There is already an application pending in the Limpopo Division with:

7.3.3.1. Exactly the same parties.

7.3.3.2. Exactly the same evidence needing to be led.

7.3.3.3. Substantially in the relief sought there is only one true difference which shall be mentioned infra.

7.3.4. The costs of having the two matters heard simultaneously will be substantially less than having both matters proceed concurrently, especially in light of the material disputes of fact that will in all probability lead to oral evidence being lead.

7.3.5. Given that both applications are based upon the same questions of fact and law, the principle of legal certainty is promoted by avoiding the possibility of conflicting Judgments by different division of the High Court.

7.3.6. It is my submission also relevant here to consider the prejudice to the Applicant if the relief is refused. He will be precluded from placing his defence and counter application before this court and he will be precluded from persisting with his defence and counter application before the Limpopo Division owing to stare decisis.

THE APPLICATION FOR POSTPONEMENT.

8. On the basis of reasons already advanced, the applicant seeks for the main application to be postponed sine die. He explains that he has had to change his legal representative after consulting Senior Counsel.

COSTS.

9. The Applicant submits that the Respondent should be ordered to pay the costs of this application because he refused to grant a bona fide and reasonable request for him to consent to a procedural relief as communicated in a letter dated the 28th of May
2018. The Applicant argues that the Respondent should be ordered to pay the costs of both the interlocutory application and the wasted costs of the main application.
10. The Respondent explains that when this application was launched, the Limpopo High Court was not yet in operation. This court has jurisdiction only owing to the fact that the transitional provisions hold that as the application was launched prior to establishment of the Limpopo division, this court retains jurisdiction. Secondly the court to which the Applicant seeks transfer must also have jurisdiction. In casu the Respondent already admits that the Limpopo division has jurisdiction as the immovable property is in the jurisdiction of the Limpopo Division.
11. The third enquiry is then of convenience, both to the court and the administration of justice and to the parties. In this regard the following is apparent;
 - 11.1. The property is situated in the Limpopo Division.
 - 11.2. The Respondent is resident in the Limpopo Division, which means that it would be more convenient for all the witnesses, (given the material disputes of fact), to travel to a closer division.
 - 11.3. There is already an application pending in the Limpopo Division with:
 - 11.3.1. Exactly the same parties.
 - 11.3.2. Exactly the same evidence needing to be lead.
 - 11.3.3. Substantially the same relief sought.

12. The costs of having the two matters heard simultaneously will be substantially less than having both matters proceed concurrently, especially in light of the material disputes of fact that will lead to oral evidence being lead. Given the fact that both applications are based upon the same questions of fact and law, the principle of legal certainty can be promoted by avoiding the possibility of conflicting Judgments by different division of the High Court.
13. The court finds that prejudice shall be brought to bear in the event where the relief is refused in that the applicant will be precluded from placing his defence and counter application before this court and he will be precluded from persisting with his defence and counter application before the Limpopo Division owing to the stare decisis principle.
14. In this case, there is more than potential for prejudice to be brought to bear in the event where the application is refused. Possible advantages out of refusing the application does not justify such an outcome. Therefore, the court inclines towards granting it.
15. On the basis of the reasons outlined above, the application stands to be granted and the following order is made:

ORDER.

15.1. The Applicant is granted leave to file a supplementary affidavit.

15.2. The Applicant is granted leave to file a counter application.

15.3. In terms of section 27 (1) (b) of the Superior Courts Act, the court orders for this matter to be transferred to the Limpopo Division of the High Court.

15.4. The application is postponed sine die.

15.5. The Respondent is to pay the costs of this application.

T.A. Maumela.

Judge of the High Court of South Africa.

[1] Paragraph 2.28 of the answering affidavit on paginated page 62

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