

SOUTH AFRICA / JUDGMENT

Kgwete v Makonko and Others (2022/010418) [2023] ZAGPJHC 885 (8 August 2023) [2023] ZAGPJHC 885

COURT

South Gauteng High Court, Johannesburg

BEFORE

D Mahon

CASE / FILE NUMBER

2022/010418

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO:

2022/010418

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

08/08/23

In the matter between: TRACY
MATHUDING KGWETE
First Applicant
and
DINEO
ENNICA MAKONKO
First Respondent
ALL
OCCUPANTS OF THE PROPERTY
SITUATED
AT [...] , TEMBISA
Second
Respondent
THE
CITY OF EKURHULENI
METROPOLITAN
MUNICIPALITY
Third Respondent

JUDGMENT

MAHON AJ:

- [1] This is an application for the eviction of the first and second respondents and all those who reside through or under them, from the property commonly known as [...], Tembisa (“the property”). An order authorising service of the notice in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (“the PIE Act”), was granted by Louw AJ on 15 June 2023.
- [2] The first and second respondents have counter-applied for a referral to evidence and have also brought an application in terms of Rule 30 of the Uniform Rules of Court. I will deal with the counter-application and the application in terms of Rule 30, in due course.
- [3] The third respondent has not opposed the eviction application and I shall accordingly hereinafter refer to the first and second respondents as “the respondents”.
- [4] The property was previously owned jointly by the applicant’s deceased father, Abram Nkete Mathabatha (“the deceased”) and Ms Winnie Prisca Mathabatha (“Ms Mathabatha”).
- [5] The deceased died intestate and, upon his death, the property was transferred into the applicant's name by virtue of Section 1(1)(c)(ii) of the Intestate Succession Act No.81 of 1987, as evidenced by the Deed of Transfer annexed to the founding affidavit.

- [6] The applicant now seeks to assert her rights as owner of the property. The respondents refuse to vacate.
- [7] The respondents contend in limine that the matter is *lis alibi pendens* in that eviction proceedings were instituted by the applicant against the respondents in the Tembisa Magistrates Court under case number 950/2020.
- [8] However, it is common cause between the parties that those proceedings were withdrawn by the applicant. There does appear to be some confusion as to the point at which the applicants' erstwhile attorneys of record withdrew as attorneys of record in the matter but their position was conveyed to the respondents by way of a notice of withdrawal of the proceedings which is annexed to the answering affidavit marked "DEM1".
- [9] Nonetheless, even if there was some procedural deficiency in the withdrawal of the Magistrate's court proceedings, it is clear that the applicants have no intention of pursuing those proceedings in that court and this was made clear to the respondents when the notice of withdrawal of the proceedings was delivered. If there are some residual issues in those proceedings relating to costs and the like, then they may be pursued but they are not presently before me. I would therefore hear the current matter in the exercise of my discretion, even if the Magistrate's court proceedings were still pending on the basis of a procedural technicality.
- [10] The respondents also contend that the present proceedings are irregular, in that they were commenced prior to the authorisation of the section 4(2) notice by Louw AJ. The respondents have delivered an application in terms of rule 30, contending that the delivery of the notice of motion in the present eviction proceedings ought to have been preceded by the delivery of a notice in terms of section 4(2) of the PIE Act. There is no merit in this point. The procedure contemplated in section 4(2) of the PIE Act is designed to afford the respondents additional notice of the application, after the delivery of the notice of motion in the eviction proceedings in accordance with the normal rules of court relating to service. The applicant has acted in

accordance with the appropriate procedure, as explained in *Cape Killarney Property Inv (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA), by serving its application in accordance with the rules of court and by making application for authorisation to deliver its section 4(2) notice after the delivery of the answering and replying affidavits herein.

- [11] The rule 30 application accordingly falls to be dismissed with costs.
- [12] As to the merits of the matter, the respondents attack the legitimacy of the transfer of the property, not to the applicant from the deceased *per se*, but rather, to the deceased from the erstwhile property owner, Ms Rephos Makonko. The Windeed Property Search Report annexed to the founding affidavit marked "B", reflects that in 2009 the property was transferred from Ms Rephos Makonko to the deceased and Ms Mathabatha, jointly.

[13] The respondents' attack is characterised thus:

"... there was no proper transfer from Makonko Rephos Ngwanatau, no amount has been reflected to indicate the purchase price, further documents that were signed by the aforesaid Makonko Rephos Ngwanatau are requested to comply with Section 14 of the Deed Registries Act 47 of 1937.

It is surprising if not impossible as to how the property was transferred from Petros Makonko to the applicant. Since there was no Transfer from Petros Makonko to Rephos Makonko, the transfer seemed to have been defrauded."

[14] Not only are these allegations difficult to understand, but the allegations of fraudulent conduct appear to be based on pure speculation.

[15] Mr Johannes Makonko deposed to an affidavit referring to an oral agreement entered into between him and the applicant's deceased

mother in terms of which the property would be sold for a consideration of the sum of R 150 000.00 in cash and six Mercedes Benz tipper trucks. Mr Makonko says that he received the amount of R150 000.00 but not the six tipper trucks. It is not clear what the

relevance of these allegations are as Mr Makonko did not own the property and was not in a position to effect transfer thereof, either to the applicant or to the applicant's mother or to the deceased. The connection between the existence of this agreement and the transfer of the property from Ms Rephos to the deceased is not explained and cannot legitimately serve as a basis to infer fraud. Whether or not the provisions of the alleged agreement between Mr Makonko and the deceased's late mother was complied with or not, is of no relevance.

[16] Moreover, it does not lie in the mouth of the respondents to question the legitimacy of a transfer in which they had no interest or involvement. It is not suggested by the respondents that Ms Rephos Makonko questions the validity of the transfer from her to the deceased, in any way. No affidavit in support of the wild allegation of fraud is provided by Ms Makonko – the one person who would be in a position to confirm or deny that the transfer had in fact taken place with her consent.

[17] If the legitimacy of the transfer from Ms Makonko to the deceased was to be placed in issue, one would have expected the respondents either to have provided an affidavit by Ms Makonko, or to have explained why they were unable to do so.

[18] The respondents now seek a referral to evidence in order to have Ms Makonko called as a witness. However, before a referral to evidence

may be granted, a bona fide material dispute of fact must exist on the papers. One does not order a referral to evidence on the basis that a dispute of fact might arise during the hearing of oral evidence.

- [19] In the absence of an affidavit by Ms Makonko or, at the very least, some explanation from the respondent as to why her evidence could not have been secured by means of an affidavit, there is simply no bona fide material dispute of fact which is raised and there is therefore no basis for a referral to evidence.
- [20] Given that the respondents have tendered payment of an amount of R150 000 for the property, I am satisfied that they are of sufficient means so as not to be rendered homeless by their eviction.
- [21] I accordingly make the following order:
1. The first and second respondents' application in terms of rule 30 is dismissed with costs;
 2. The first respondent, currently residing at the property situated at Erf Number: [...] Portion Number: [...] which is more commonly known as [...], Tembisa (hereinafter referred to as the "property"), and all other occupants residing on the property through and under her, including the Second Respondent, are evicted from the property in terms of Section 4(1) read with Section 6(1) of Act 19 of 1998;
 3. The first and second respondents are directed to vacate the property within 30 calendar days from the granting of this order;
 4. The eviction order may be carried out by the Sheriff or his deputy with the assistance of the South African Police Service or a Private Security Company, if the first respondent and all persons occupying through and under her, including the second respondent have not vacated the property within 30 calendar days of the granting of this order;
 5. The first and second respondents' counter-application for a referral to evidence is dismissed with costs;
 6. The first and second respondents shall pay the applicant's costs of the application on the party and party scale.

D MAHON

Acting Judge of the High Court

Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 7 August 2023.

APPEARANCES:

For the Applicant:

Ms M Laurent

Instructed by:

SSLR Inc

For the First and Second Respondents:

Mr Z P Shisinga

Zamisa Shisinga Attorneys

For the Third Respondent:

No appearance

Date of hearing: 1 August 2023

Date of judgment: 8 August 2023

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