

SOUTH AFRICA / JUDGMENT

Khanzi v Bhamjee and Others (26382/22) [2024] ZAGPPHC 1264 (3 December 2024)

[2024] ZAGPPHC 1264

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

26382/22

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO.:26382/22

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 3 December 2024

E van der Schyff

In

the matter between:

Sandile
Khanzi
Applicant
and
Huissen
Bhamjee
First Respondent
Unlawful
Occupiers of Plot 2[...]
B[...]
East, Thaba Ya Batho Agricultural
Holdings
Second Respondent
Moretele
Local Municipality
Third Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] The applicant seeks the eviction of the first respondent and those who occupy through him from an agricultural holding, Plot 2[...] B[...] East (Holding 330) Thaba Ya Batho Agricultural Holdings, Hammanskraal, Pretoria, Gauteng Province (the property).
- [2] In 2022 the applicant was ostensibly appointed as the executor of the estate of the late Khanzi Teteyi Kleinbooi, who passed away in 1999. The applicant is cited in this application in his personal capacity and not nomino officio in his capacity as executor of the estate late Khanzi Teteyi Kleinbooi, although he states in the founding paper that he has standing to institute this litigation in his personal capacity because he is the appointed executor.
- [3] The applicant avers that the first respondent, Mr. Bhamjee, occupies the said property without having signed a lease agreement with him. A verbal lease agreement was concluded between the late Mr. Kleinbooi and Mr. Bhamjee in 1999 in terms whereof Mr. Bhamjee leased the property and a shop located on the property. The applicant's sister took over the shop and was ostensibly assisted by Mr. Bhamjee. In 2021, his sister passed away, and the applicant and his family demanded their father's shop for their own use since Mr. Bhamjee refused to pay rent.
- [4] The first respondent, Mr. Bhamjee, alleges that he bought the property from the estate of the late Khanzi Teteyi Kleinbooi. He claims that the property referred to by the applicant was subdivided after the late Khanzi Teteyi Kleinbooi passed away.

Discussion

[5] For purposes of the order that stands to be granted, it suffices to state that this application is riddled with factual disputes.

[6] The applicant describes the property from which he seeks to evict the first respondent and those occupying through him as:

‘Holding 330 Thaba Yabatho Agricultural Holdings, Registration Division J.R, Province of North West

Measuring 3,4446 (Three Comma Four Four Four Six) hectares

As will more fully appear from the diagram SG NO. 3202/2011 and held by Deed of Transfer Number T[...].’

He attached Deed of Transfer T[...] as proof of the property description.

[7] The first respondent claims that the property where the shop in question is situated was sold to him in 2011 by the applicant’s sisters, who were the appointed executrixes in the estate of the late Khanzi Teteyi Kleinbooi. The first respondent claims that the property description of the property that forms the subject matter of this eviction application reads as follows:

‘Portion 30 (a portion of portion 28) of the Farm Boschplaats No. 9; Registration Division J.R., Province of North West.

Measuring 3161 (Three Thousand One Hundred and Sixty One) square metres;

As will appear from diagram S.G. NO. 2417/2012 annexed hereto and held by Deed of Transfer No. T[...].’

The first respondent attached T[...] as proof of the property description.

[8] It is trite that motion proceedings are inappropriate to resolve issues where material facts are in dispute. In *Da Mata v Otto* NO[1] the court cautioned against the determination of facts on affidavit where motion procedure is employed:

‘It is normal procedure to resort to motion proceedings as the more expeditious and less expensive course of proceedings in claiming

ejectment. But the permissibility of motion proceedings as opposed to trial action is not a question of any difference of character between the various kinds of claim which is being enforced, but a question of the proper method of determination in each case of the facts upon which any claim depends. If the dispute of fact is genuine, and is of such a nature that it cannot be satisfactorily determined without the advantages of a trial, which affords the opportunity of estimating the credibility of witnesses, and observing their demeanour, it is undesirable to attempt to settle disputes of fact solely on the probabilities disclosed by the affidavit evidence. In every case the Court must examine the alleged dispute and ascertain whether it is of the aforementioned kind and not fictitious.’

- [9] Motion proceedings are only appropriate for final relief where it is not foreseeable that there will be material disputes of fact in the affidavits.[2] The applicant was informed of the dispute regarding the first respondent's right to occupy the property before these proceedings commenced. The dispute between the papers cannot be adjudicated by motion proceedings.
- [10] Rule 6(5)(g) of the Uniform Rules of Court provides that where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In the circumstances of this application and the complexities which require evidence to be led, the application stands to be referred to trial. This will enable both parties to lead evidence and cross-examine each other's respective witnesses.

Miscellaneous

- [11] After considering the facts of the matter, the explanation tendered, and, in particular, the interest of justice, the late filing of the answering affidavit is condoned.

Costs

- [12] The applicant's decision to utilise motion proceedings resulted in wasted costs, and the applicant is to stand in for the costs. The issues before this court were not complicated, and the dispute of fact was glaring. It is fair and just to both parties to grant costs on scale A.

ORDER

In the result, the following order is granted:

1. The eviction application is referred to trial.
2. The notice of motion shall stand as a simple summons.
3. The notice of intention to oppose shall stand as a notice of intention to defend.
4. The applicant shall deliver a declaration before 31 January 2025.
5. Thereafter, the rules of court relating to actions shall apply.
6. The applicant must pay the first respondent's costs on scale A.

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant: C. Mopedi Instructed by: Mopedi C.S. Attorneys For the first respondent: Adv. M. Bester Instructed by: Jaffer Incorporated Attorneys Date of the hearing: 21 November 2024
Date of judgment: 3 December 2024

- [1] 1972

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- (3) SA 858 (A) 865G-H.
- [2] National Director of Public Prosecutions v Zuma
- [2009] ZASCA 1; 2009
- (2) SA 277 (SCA) at para [26].
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