

SOUTH AFRICA / JUDGMENT

Madia v B.M.R (HCA33/2022)

[2023] ZALMPPHC 27 (26 May 2023)

[2023] ZALMPPHC 27**COURT**

Limpopo High Court, Polokwane

BEFORE

Naude-Odendaal, M.G. Phatudi

CASE / FILE NUMBER

HCA33/2022

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SAFLII**Policy****IN****THE HIGH COURT OF SOUTH AFRICA****LIMPOPO****DIVISION, POLOKWANE****CASE****NO: HCA33/2022****REPORTABLE: YES/NO****OF****INTEREST TO OTHER JUDGES: YES/NO****REVISED****DATE:**

26/05/2023

In

the matter between

MOKGADI

MADIA

APPELLANT

and

B[...]

M[...] R[...]

RESPONDENT

JUDGMENT

NAUDE-ODENDAAL J:

- [1] This is an appeal against the whole judgment of Magistrate Z. Moosa delivered in the Magistrate's Court for the sub-district of Tzaneen, held at L[...] on the 28th of July 2022.
- [2] In summary of the background facts, the Respondent brought an application for an interdict in the court a quo, inter alia interdicting, restraining and/or prohibiting the Appellant from entering, locking, unlocking and/or coming near the Respondent's house as well as telling the Respondent's children that the House at 1[...]9 L[...], District of Tzaneen, Limpopo Province belongs to her father.
- [3] The Respondent later brought the above mentioned application on an urgent basis by filing an amended notice of motion after her furniture was thrown out of the house by the Appellant.
- [4] The Respondent averred that she entered into an offer to purchase agreement with Mapula Maria Ramatseba to purchase a house situated at number 1[...]9 L[...], District of Tzaneen, Limpopo. The Respondent consequently took possession of the house during December 2013. During 2015, she started having problems with the Appellant when the Appellant started harassing her and her children.
- [5] The Appellant on the other hand, averred that she did not interfere with the Respondent's rights as she stays at House 1[...]7 and further that the Respondent cited a wrong person in her papers. The Appellant submitted that, while not denying the conduct attributed to her by the Respondent, she denied ever having interfered with the Respondent in respect of house/erf 1[...]9, but that she rather interfered in respect of house/erf 1[...]7 because the latter erf/house belonged to her late father.
- [6] Several points in limine were raised by both parties in their answering and replying affidavits, respectively. The points in limine raised by the Appellant were that of mis-joinder and non-joinder in that the person residing at House Number 1[...]9 was not joined and that the Appellant resides at House Number 1[...]7. The Appellant also raised the points in limine of non-compliance with the rules of court in that motion proceedings relating to the service of the application and lastly, lack of urgency.
- [7] The Respondent in turn, raised three points in limine in her replying affidavit. The first being one of non-compliance with the Justices of Peace and Commissioner of Oaths Act, 16 of 1963 in that the Commissioner of Oaths failed to print his full names, business address and area of designation under his signature. The second and third points in limine raised by the Respondent was of non-joinder of a one Mr. Ngwako Albert Ramohale and non-joinder of Mrs. Sabina Madiya.

[8] All the points in limine were, and correctly so, dismissed by the court a quo. The court a quo further ordered that the matter be referred to trial due to a material dispute of facts on the papers.

[9] In *Wightman tla JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) where Heher JA set out a useful guide to be employed in determining whether there exists a real, genuine and bona fide dispute of fact. The Court said the following:

"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* {1984} ZASCA 51 [1984] ZASCA 51; ; 1984 (3) SA 623 (A) at 634E – 635C...

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally"

because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.'

[10] In terms of Rule 55(1)(k)(i) and (ii) of the Magistrate's Court Rules, 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. The court may in particular, but without affecting the generality of

subparagraph (i) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to personally appear or grant leave for that person or any other person to be subpoenaed to appear and be examined and cross-examined as a witness, or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

[11] After the court a quo referred the matter to trial, and correctly so in the present instance, normal exchange of documents and pleadings took place whereafter the matter was set down for trial.

- [12] The question the court a quo had to answer was whether House Number 1[...]7 and Erf 1[...]9 were one and the same place and then whether the requirements for an interdict had been met in order to grant an interdict against the Appellant.
- [13] The Appellant submitted that the court a quo misdirected itself and erred in finding that the residential unit/house 1[...]7 and Erf 1[...]9 refer to one and the same property, failed in finding that the Respondent had satisfied the requirements for a final interdict and further erred in granting the Respondent relief which was not claimed by the Respondent in that the court a quo ordered the Appellant to vacate Erf 1[...]9 or House Number 1[...]7 within 14 days from date of the order and return the keys to the Respondent. From the argument advanced by the Appellant's counsel, Adv. Shai, it transpired that the only issue in respect of the order by the court a quo was in fact the fact that the order also referred to House Number 1[...]7, instead of only referring to Erf 1[...]9, L[...].
- [14] During the trial proceedings, the Respondent testified that she bought the House situated at Stand 1[...]7 from a one Mapula Maria Ramatseba. The Respondent was given the deed of grant and all other relevant documentation in order to acquire the house. The Respondent testified that House Number 1[...]7 and Erf Number 1[...]9 were one and the same place. The Appellant threw her, together with her belongings out of House Number 1[...]7, which is situated on Erf Number 1[...]9.
- [15] The Respondent called Mrs. Mapula Maria Ramatseba, as her second witness. Mrs. Ramatseba confirmed that the Respondent bought House Number 1[...]7 from her, which is also known as Erf Number 1[...]9. Mrs. Ramatseba further testified that House Number 1[...]7/Erf Number 1[...]9 was still registered in her late husband's name, Sethemane Johannes Ramatseba and that they were married in community of property.
- [16] Mr. Hendry Aleck Nkuna, the Acting Municipal Manager, employed by the Greater Tzaneen Municipality, who was later joined as the 2nd Defendant to the action proceedings, has deposed to an explanatory affidavit in an attempt to assist the court and also came to testify during the trial proceedings.
- [17] Mr. Nkuna confirmed that Erf 1[...]9 L[...] Township was still registered in the name of Setemane Johannes Ramatseba. According to the Deeds Office records, Erf 1[...]9 was transferred from Mr. Johannes Madia to Mr. Johannes Sethamane by endorsement by the Registrar of Deeds during or about 1998. It is however not clear whether the property was sold by Mr. Johannes Madia to Mr. Setemane Ramatseba, but what is indeed clear is that the property was transferred from Mr. Madia to Mr. Sethamane.
- [18] Mr. Nkuna further confirmed that House Number 1[...]7 and Erf Number 1[...]9 L[...] was one and the same place. The Erf Number, being Erf Number 1[...]9 is however used for identification purposes by the Municipality.

- [19] The Appellant testified that she changed the locks of House No 1[...]7, which belonged to her father. She further testified that the House the Respondent referred to and the house she referred to are not one and the same place.
- [20] The court a quo conducted an inspection at the house in dispute. The court a quo noted that the house number 1[...]7 appeared on the gate, as well as the house, but however according to the deed of grant it reflected that it was Erf 1[...]9.
- [21] From a reading of the documents filed it is clear that the correct property in question is indeed Erf 1[...]9, L[...]. Whether Erf 1[...]9 has a house on it with the number 1[...]7, or whatever number, is neither here nor there. The property in question is described in the Registry of Deeds as Erf 1[...]9, L[...], 533 square meters in extent. Erf 1[...]9 once belonged to Mr. Madia, but was legally transferred and the transfer was registered in the name of Mr. R[...], which in turn was sold to the Applicant as per the written Offer to Purchase Agreement.
- [22] In this court's view, the Appellant is confusing the two very distinct concepts of a House No and an Erf No with each other. A property might have a certain house number, but a totally different erf number. In this instance, there can be however no doubt about it that the property in question is indeed the property described as Erf 1[...]9, L[...].
- [23] The court a quo correctly granted an interdict in respect of Erf 1[...]9, L[...] in favour of the Respondent as the Respondent has shown that she has a clear right. The Respondent managed to prove on a balance of probabilities that she is the new owner of Erf 1[...]9, L[...] through documentary evidence, as well as oral evidence. The fact that Erf 1[...]9 was not registered in her name yet, does not deprive her of the fact that she has become the new owner of the property.
- [24] Secondly, the Respondent proved that there is an injury actually committed. The Appellant on her own version confirmed that she interfered with the Respondent's rights in respect of House Number 1[...]7 and confirmed that she threw the Respondent's belongings out and changed the locks to House Number 1[...]7. (It was confirmed during trial proceedings that House Number 1[...]7 is situated at Erf 1[...]9 and refers to one and the same property.)
- [25] Lastly, the Respondent proved that there is no other satisfactory remedy available to her. The court a quo has therefore not misdirected itself or erred in granting the final relief.
- [26] The court a quo however erred in granting an interdict in respect of the relief as claimed for. The amended Notice of Motion states that the Respondent applied that the Appellant be interdicted, restrained and/or prohibited from removing the Respondent's furniture from house 1[...]9 L[...], District of Tzaneen, Limpopo Province. From a reading of this description it seems to refer to House Number 1[...]9, instead of Erf Number 1[...]9, L[...]. The order should have read with specific reference to Erf Number 1[...]9 only. The cross-over reference between House Number 1[...]9 and Erf Number 1[...]9 creates confusion.

- [27] This error in the description could however easily have been cured *mero motu* by the court a quo, alternatively the Appellant or Respondent could have approached the court a quo in terms of Rule 49(7) of the Magistrates Court Rules on notice to all parties, supported by an affidavit setting out the grounds on which the Appellant seeks the variation of the order in respect of the precise property description. There was no need to bring the matter on appeal for clarification.
- [28] In light of the above, the appeal stands to fail on the merits in that the court a quo correctly granted the order and interdict against the Appellant, however, this court needs to interfere with the wording of the order in respect of the property description as contained in the order, in that the possible ambiguity contained in the order with the interchangeable reference to House Number and Erf Number as reference to the property in its description, needs to be clarified.
- [29] During the hearing of the Appeal, the Appellant's counsel, Adv. Seshai conceded that the Appellant would not have had any issue with the court order of the court a quo had the order referred simply to Erf 1[...]9, L[...]. It is not in the interest of justice that the matter be referred back to the court a quo for a clarification as it can easily be done and disposed of by this court. There is no uncertainty that the correct property in question is Erf 1[...]9, L[...], and in this court's view, the order should plainly read accordingly.
- [30] It is for the above reasons that the following order is made:-
1. The appeal is dismissed with costs.
 2. The order of the court a quo is clarified and substituted as follows:-
"1. The Respondent is interdicted, restrained and/or prohibited from removing the Applicant's furniture from the house situated at Erf 1[...]9 L[...], District of Tzaneen, Limpopo Province into the street.
2. The Respondent is interdicted, restrained and/or prohibited from entering, locking, unlocking and/or coming near the Applicant's house situated at Erf 1[...]9 L[...], District of Tzaneen, Limpopo Province.
3. The Respondent is interdicted and ordered to refrain from contacting, threatening, intimidating the Applicant, as well as her children and any of the Applicant's dependents residing at the house situated at Erf 1[...]9, L[...], in any manner.
4. The Respondent is interdicted and ordered to refrain from demanding, requesting and/or ordering the Applicant and any of the Applicant's dependents, to move out of the house situated at Erf 1[...]9 L[...].
5. The Respondent is interdicted and ordered to refrain from telling the Applicant and her children that the house situated at Erf 1[...]9, L[...], belongs to her father.

6. The Respondent is ordered to vacate the house situated at Erf 1[...]9 within 14 days from date of this order and to return the keys to the Applicant.
7. The Respondent is ordered to pay the costs of the application on a party and party scale, which costs are to be taxed."

M. NAUDÈ-ODENDAAL

HIGH COURT OF SOUTH AFRICA,

I AGREE:

M.G. PHATUDI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

APPEARANCES:

HEARD ON: 3 FEBRUARY 2023

JUDGMENT

DELIVERED ON: 05/26/23 For the Appellant: Adv. Ponele R. Seshai Instructed by: Makgoba Ramawela Attorneys Inc Clo Mokobane Attorneys. Polokwane For the Respondent: Mr. P.A. Mokhobi Instructed by: Modjadji Raphesu Attorneys Clo Nethononda Inc. Attorneys Polokwane

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