

SOUTH AFRICA / JUDGMENT

Malatji and Others v IGWO Properties (Pty) Ltd (A65/2019) [2020] ZAGPPHC 447 (27 July 2020) [2020] ZAGPPHC 447

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhubele, Acting Judge

CASE / FILE NUMBER

A65/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A65/2019

In

the matter between:

GL
MALATJI
First Appellant
TMA
MALATJI
Second Appellant
F
MALATJI
Third Appellant
ALL

UNLAWFUL OCCUPANTS:

ERF
3894 DOORNPOORT EXT 34 TOWNSHIP
Fourth Appellant
and
IGWO
PROPERTIES (PTY) LTD
Respondent

JUDGMENT

MAKHUBELE J

Introduction

[1] This is an appeal against all the orders and the whole judgment of Additional Magistrate Ms Gouws - Botha in the Magistrate's Court for the district of Tshwane North held at Pretoria North (the Magistrate) dismissing the appellant's points in limine of res judicata and lack of Jurisdiction of the court in this regard. (the Magistrate) dismissing the appellant's points in limine of res judicata and lack of jurisdiction of the court in this regard.

[2] There is no written order with regard to the point in limine in the bundles before us. The relevant part of the transcribed record[1] reads as follows;

'It is clear from the judgment which was noted on 16 January 2019 that the merits were not finally addressed therefore taking into consideration, the points in limine which is raised today that of res judicata and lack of jurisdiction is dismissed since the second one lack of jurisdiction goes hand in glove with the first point in limine of res judicata.'

The eviction order itself does not refer to the point in limine probably because it was decided separately and before submissions were made on the merits of the eviction application.

[3] The order of the Magistrate on the res judicata issue emanate from an application launched by the respondent under case number 4765 /2018 for eviction of the respondents from the immovable property described as Erf 3894 Doornpoort Extension 34 Township, Registration Division JR Gauteng, also known as 128 Grewia Street. Doornpoort, Pretoria, Gauteng Province ('the property')

[4] The appellant raised a defence of res judica and contended that the same court had already dismissed the same application, issued under case number 719/ 18 seeking the same relief against the respondents in respect of the same property. The order under this case number, dated 13 June 2018, and issued by Magistrate Ramahanelo reads as follows:

„ Judgment;

Digitally recorded.

Application is dismissed .

Each party to pay its own costs".

The factual matrix

- [5] The first appellant, who I shall henceforth refer to as Mr Malatji was the registered owner of the property until it was transferred and registered in the name of the respondent on 12 January 2018. The respondent purchased the property in an auction on 30 June 2017 after the bondholder, First National Bank foreclosed on it.
- [6] The second and third appellants are members of his family ,with whom he is residing in the property. In his affidavit he described them as his daughter and elderly father.
- [7] Mr Malatji is an admitted and practising attorney of this court. This matter is conducted through his own law firm and it appears from the record of proceedings in the court a quo that he made appareances on his own, with the law firm as the attorneys of record. The respondent has never objected and even though there is no power of attorney, it chose not to object. There is nothing wrong when an attorney or legal pratitioner represents himself in a personal matter. The issue that this court raised with him was whether he was authorised to represent the other respondents without proper authorisation to the law firm. He accepted the court's concerns and was willing to argue the matter in his personal capacity as the first appellant. The respondent realised the consequences of the resultant order. which would not be binding on the other respondents who were not in court. The court was urged to exercise its discretion and to allow Mr Malatji to argue on behalf of the second and third respondents as he had done in the Magistrte 's court.
- [8] The respondent launched eviction proceedings against the appellants under case number 719/2018.
- [9] The appellants opposed the application. They filed an answering affidavit and raised procedural objections which have been summarized in the ex tempore judgment of Magistrate Ramahanelo dated 13 June 2018. I deem it necessary to reproduce the ex tempore[2] judgment because in my view whether or not the dispute between the parties has been finally decided (res judicata) should be considered

in the context of the findings that the Magistrate made and not just the order.

" COURT: This is a matter of eviction. The respondents's filed points in limine and we first had to deal with the points in limine.

•

The first point was about oath or affirmation, as well as a date and place where the affidavits were signed.

•

The second and third points in limine were abandoned.

•

The fourth point was about non-compliance with Rule 55/3.

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The fifth point was non-compliance with Section 42 of the PIE Act.

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The additional point in limine had to do with the supplementary affidavit which was filed to correct the errors on the first affidavits.

-

The respondents argued their case. The applicants also responded to the points in limine.

As the argument got heated the counsel for the applicants conceded that the affidavits did not comply where it pertains to the date and place as that was not on the affidavits, and when one considers the 4th point in limine about Rule 55/3 it is clear on the return of service that the documents were served on 13 March 2018, and what was served was the order and notice. The return of service does not state if the affidavits were attached, hence the respondents objected to that and raised a point in limine that they were not informed as to the reasons why the order was granted.

The fifth point in limine about service. The sheriff filed a return of service, on which the surname was misspelled and it is understandable if the sheriff is Afrikaans speaking "you" in Afrikaans is pronounced "u", so if he made a mistake pertaining to that, that is an obvious mistake which can be done by any other person.

When it comes to the supplementary affidavits the respondents argued that the applicants should have applied for condonation because the affidavit was filed out of time, and it is clear that it is for the Court to exercise its discretion whether to allow such affidavit or not, so it was incumbent on the applicants to have approached the court and applied for condonation to have the additional affidavits file.

As stated in the case of *Standard Bank of South Africa Ltd v Supersad and another* 2005 (4) SA 148 (C) where it stated that "The other party had to approach court for condonation".

It is clear from the version of the respondents that only the order and notice were served at the gate and there is no indication that the affidavits were attached. The respondents were not given notice as it is required in terms of Section 55(3) that where a matter is being approached in terms of motion the other party has to be informed.

I am satisfied with the return of service that the municipality was served, even though when one looks at the notice of set down the address of the municipality is not stated is not stated on the notice of setdown.

However, I am satisfied that the municipality was served.

Having indicated that the counsel for the applicants

conceded that the affidavits do not comply. the points in limine, (I}, (4}, and the additional one about condonation are upheld.

- The application is DISMISSED.
- Each party has to pay its own costs.

[10] The second and third points in limine that were abandoned were about the locus standi of the respondent whether the 'GhostConvey' search printout constitute evidence to prove title or a right to the property.

[11] The respondent launched another application on 16 August 2018 under case number 4765/2018 in which it sought the same relief in respect of the same property and against the same parties.

The judgment under appeal is in respect of this application.

[12] The respondents opposed the subsequent application. They filed an answering affidavit and raised two defences under a heading titled "Special defence /point in limine" . The first one is "res judicata" and the second is "lack of jurisdiction".

[13] With regard to the first point of 'res judicata'. the appellants relied on the judgment of Ramahanelo and argued that the dismissal of the points in limine that they had raised means that the matter has been finally decided and the respondent is precluded from litigating on the same issues. The argument with regard to jurisdiction is that the court does not have 'inherent jurisdiction' to hear the matter that is 'res judicata'.

[14] They did not address the allegations in the founding affidavit but they appear to believe that they did on the basis of the blanket statement to the effect that their answer under case number 719/2018 should be incorporated in the answering affidavit in the subsequent application. This is procedurally not correct because the court cannot trawl through the answering affidavit and match responses to allegations in the founding papers, *moreso*, under circumstances where the application was dismissed and not part of the record.

The proceedings in the court *a quo*

[15] The application came before Magistrate Botha on 10 December

2018. The parties addressed the court, each contending their respective views with regard to the effect of the judgment and order of Magistrate Ramahanelo.

[16] The transcript of the proceedings before Magistrate Ramahanelo were not before court at this stage. The appellants argued that the respondents failed to prove ownership of the property when the matter came before Ramahanelo and as such, the matter was not only dismissed on the basis of the procedural objection . but also on the merits. On the one hand the respondent disputed this contention and argued that the issue of ownership was not considered.

- [17] The Magistrate decided to adjourn the proceedings for purposes of listening to the audio recording of the proceedings before Ramahanelo. They all agreed to convene on 15 January 2019 to listen to the recording and to resume the proceedings on the next day, 16 January 2019.
- [18] Mr Malatji did not attend court on 15. On 16 January 2019 the respondent's representative addressed the court and explained their efforts to contact him and that he finally replied and told them that he was sick.
- [19] The Magistrate proceeded to listen to the audio recording and confirmed the judgment of Ramahanelo. She refused to finalize the matter in the absence of Mr Maltji. It was postponed to 28 January 2019 for his appearance. She ordered that the notice of setdown be served in the norm at way.
- [20] On 28 January 2019 Mr Ma latji made an appearance. He expressed his unhappiness about the short notice that he was given to attend court. He made an application that the matter be struck off the roll and be set down again properly. He refused to address the Magistrate on his reasons for non-appearance on 15 and 16 January and indicated that he was going to do so when the matter is properly before court. He insisted that the matter should have been setdown in terms of the Rules. The Magistrate disagreed because it was not a new setdown, but simply a re-enrolment to accommodate him as he was not present on a day that was expressly agreed on in court.

The record show many other instances where Mr Malatji appeared to defy the authority of the Magistrate. These issues were not addressed

before us and the reason I mention the little bit of it is because some of the grounds of appeal in the Notice of Appeal relate to the setdown of the matter on these specific days.

- [21] The matetr stood down to allow the Magistrate to consider the application to struck the matter off the roll . She dismissed the application and made a ruling that the matter was properly setdown. Mr Maltji requested to be recused from further attendance in the proceedings as he wanted to consider his options with regard to the ruling which he wanted to be set aside. The Magistrate warned him that she would proceed with the matter in his absence. He left the courtroom.
- [22] The Magistrate adjourned the court until in the afternoon as she wanted to consider the documents. The merits had already been placed on record. She handed down her judgment on the merits of the application. The appellant had not placed any evidence regarding the circumstances that the court should consider when issuing an eviction order. She nevertheless gave the appellants a period of 30 days to vacate the property because she wanted to 'err on the side of caution' and not give the 14 days that the respondent had requested. The compassion apperas to emanate from the fact that in the affidavit for condonation of filing of documents Mr Malatji had indicated that he was staying with his elderly father.

Grounds of appeal

- [23] There are two main grounds of appeal , namely,
- (a) that the Magistrate erred and misdirected herself by finding that the matter was not res judicata. (paragraphs a-i)
 - (b) that the Magistrate erred and misdirected herself in granting the order of eviction (paragraphs j- o); and
 - (c) that the Magistrate erred and misdirected herself by ruling against the respondents in their application to strike the matter off the roll and proceeding with the hearing on 28 January 2019 (paragraphs p and q)

Submissions

- [24] Counsel for the both parties filed extensive heads of argument and referred to various legal authorities on the principles of res judicoto.
- [25] The appellants' submissions are premised on the argument that the merits of the eviction application were considered in the first application that came before Magistrate Ramahanelo and that he dismissed the matter because the respondent failed to prove that it is the owner of the property, which is a requirement in eviction proceedings. This argument is developed around the question as to whether a printout of what is referred to as 'Ghost Convey' is sufficient proof of ownership of a property. The respondent supplement its affidavit and attached a title deed, however, the Magistrate upheld the appellants' objection that the supplementary affidavit should have been filed with leave of the court. He refused to allow it into the record because there was no application for condonation of late filing thereof.
- [26] The appellants contend that the upholding of the objections, particularly the one relating to proof of ownership of the property is a final decision which has an effect of res judicata. The rights of the respondent were disposed of by the first judgment and order.
- [27] It was further contended on behalf of the appellants that the respondent should have appealed the judgment of Magistrate Ramahanelo.
- [28] The respondent's counsel submitted that the dismissal of the first application was based on the upholding of three points in limine as it appears in the judgment. The merits of the matter were not considered. The efect of the judgment amount to an 'absolution from the instance' which is not a final order on the merits.
- [29] The arguments with regard to the remaining grounds of appeal relate to the hearing of the matter before Magistrate Botha on 28 January 2019 and circumstances under which the order of eviction was granted in the absence of the appellants.

Evaluation and conslusion

- [30] It is clear from a consideration of the transcript of the proceedings before Magistrate Ramahanelo that there is no merit in the submissions of the appellant.
- [31] The appellants acknowledge that the supplementary affidavit, which was intended to bring into the record proof that the respondent is the owner of the property was not accepted because there was no application for condonation. If ownership of the property was a decisive factor, clearly the Magistrate did not consider that because he refused to accept the supplementary affidavit, to which the respondent had attached the title deed and also corrected some shortcomings in the founding papers.
- [32] The arguments of the appellants aside. it is clear from a reading of the judgment that the application was dismissed on the basis of technical points, which can never be considered to be definitive of the rights of the parties to the property in question.
- [33] It would be an injustice and a travesty of justice if the respondent were to be prevented from submitting acceptable evidence to prove its ownership of the property in subsequent proceedings on the basis that it failed to do so in the first application.

In the second application, the respondent filed the title deed (which Magistrate Ramahanelo refused to accept) to prove ownership of the property.

- [34] Over the years courts have developed and relaxed the principles of res judicata to take into account the individual facts in each case and where appropriate to consider principles of fairness, justice and equity.
- [35] In the matter of *Moloudzi v S* [2015] ZACC 20, the Constitutional Court considered the origin and development of the principle of res judicata and how it has been applied in our jurisdiction as well as in international jurisdictions. The question was whether there is room to relax this principle and under which circumstances. The following paragraphs[3] are instructive in this regard.
- [32] Since res judicata is a common law principle, it follows that this Court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures.
- [33] This inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. This Court held in *South African Broadcasting Corp Ltd*:

"The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction."

[36] In the matter before us, the respondent has a 'adjectival or procedural right' to prove that it is the owner of the property. The application before Magistrate Ramahanelo was decided on technical points. The merits were not considered.

[37] It would not have been procedurally correct for the respondent to appeal the judgment of Magistrate Ramahanelo because the issues on which it was based are not definitive of the rights of the parties. The respondent accepted the shortcomings as it is clearly indicated in the

judgment

and it duly filed a new application and attended to those deficiencies.

[38] The ground of appeal relating to the final order of eviction has no merit because as I have clearly stated above, the appellants failed to deal with the merits of the application. Their representative aggravated the situation by walking out of the court and failed to heed the Magistrate's cautioning that she was going to proceed with the matter in his absence. It is clear from the record that she considered all relevant circumstances relating to the merits of the matter.

In any event, the correct remedy for the appellants would have been to apply for rescission of the judgment on the basis that it was granted in their absence.

[39] Similarly, the issues pertaining to the setdown of the matter do not belong to this appeal court. The appellants' legal representative correctly told the Magistrate that he was going to make an application to set aside her decision to refuse to strike off the matter from the roll.

That application cannot be made in these proceedings.

[40] The final issue is the condonation application. The appellants' appeal and record were filed out of time. There is a substantive application to condone this. The respondent did not object, and an order was duly issued before the hearing of the merits of the appeal.

[41] Under the circumstances, there is no merit in the appeal and it should be dismissed. There is no reason why the appellants should not pay the costs of the appeal. There is also no basis to interfere with the punitive cost order that was issued by the Magistrate on 28 January 2019.

Order

[42] The appeal is dismissed with costs.

TAN MAKHUBELE J

Judge of the High Court

I agree, and it is so ordered

Acting Judge of the High Court

APPEARANCES

APPELLANTS: MR GL MALATJI

Gilford Malatji Inc.

Doornpoort Pretoria

RESPONDENT: ADVOCATE KOK

Instructed by: Spies, Bester & Potgieter Colbyn

Pretoria

Heard on: 25 February 2020

Judgment:

27 July 2020

[1] Bundle 2, judgment, pp. 159 at line17 .23

[2] Transcribed record

[3] Footnote references have been omitted.

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