

SOUTH AFRICA / JUDGMENT

Mamakoko v Mnisi and Others (A67/2024) [2025] ZAMPMHC 12 (11 March 2025) [2025] ZAMPMHC 12

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa, Roelofse

CASE / FILE NUMBER

A67/2024

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA,

MPUMALANGA DIVISION

(LOCAL SEAT)

Case Number: A67/2024

1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE 10/03/2025

SIGNATURE

In

the matter between:

THABISO
HAROLD MAMAKOKO

Appellant
and

KELETSO
QUEEN MNISI
First Respondent

KEDIBONE
ENNIE MAMAKOKO
Second Respondent

ELIAS
MOTSOLEDI LOCAL
MUNICIPALITY

Third

Respondent

This judgment will be
handed down by circulation to the parties through email and by
publication on the SAFLII website. The judgment
shall be deemed to
being delivered on 11 March at 11:00.

JUDGMENT

CORAM: LANGA J et ROELOFSE AJ:

Roelofse AJ

[1] On 16 May 2024, the Magistrate of Mdutjana granted an order evicting the appellant from a dwelling he has been occupying virtually for the whole of his life (“the order”). The appellant is dissatisfied with the order. Before us is an application for condonation “... of late launching of the appeal [sic][1]; an application to introduce further evidence on appeal; and the appeal of the order.

[2] The first and second respondents (“the respondents”) are the biological daughters of the late Mr. Mputana Jack Mamakoko and the late Ms. Monica Mamakoko. Ms. Mamakoko predeceased Mr. Mamakoko. I shall refer to the late Mr. and Ms. Makoko as “the Mamakokos”. The first respondent is the appointed executor of the estate of the late Mr. Mamakoko. The Mamakoko’s had another daughter, Ms. Louisa Masana Mamakoko. (“Masana”)[2]. Masana filed a confirmatory affidavit for the appellant wherein she confirms that he is the Mamakokos’ son. The second respondent

filed a confirmatory affidavit wherein she confirms the content of the first respondent’s affidavit. More particularly, she

confirms that the appellant is not the son of the Mamakokos.

Application for condonation

[3] The appellant does not concede that he has launched the appeal late. The application is conditional upon the court finding that the appeal was indeed instituted out of time. No opposing papers were filed in the application for condonation. The respondents argued before us that condonation ought not to be granted.

[4] The judgment was delivered on 16 May

2024. The appellant filed his notice of appeal on 4 July 2024. Rule 51(3) of the Magistrates' Rules ("the Rules") provide:

"An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer."

[5] Twenty days elapsed on 17 June 2024. However, notwithstanding that the Learned Magistrate's gave an ex-tempore judgment on 16 May 2024, the appellant requested written reasons on 30 May 2024. This was within the period prescribed in Rule 51(1) of the Rules[3]. There is no mention in the papers that written reasons were furnished, perhaps because the Learned Magistrate gave an ex-tempore

judgment.

[6] In applying the provisions of Rule 51(3) of the Rules, 20 days would have elapsed on 9 July 2024, even if reasons were given on the day of their request namely on 30 May 2024. Then the appeal would have been noted 2 days late. Because we are unaware when the reasons were given (if any), I am unable to find whether the appeal was indeed noted late. If it was, the delay was trivial. For this reason, condonation must be granted.

Introduction of further evidence on appeal

[7] The main dispute between the parties is the appellant's paternity. The new evidence seeks to introduce the appellant's unabridged birth certificate. The appellant opposed the application on the basis that he is the Mamakokos' son and therefore not in unlawful occupation of the late Mr. Mamakoko's dwelling. The respondents deny that the appellant is the Mamakokos' son and that he is therefore in unlawful occupation of the dwelling. On their part, the respondents rely on the evidence of Ms. Joyce Mashabela who alleges that the appellant is her son. Nothing in the papers (as they stand) shows who the appellant's father is. The appellant relies on Masana's evidence, who alleges that the appellant is the Mamakokos' son and also her and the respondents' biological brother.

[8] The gist of the appellant's application to introduce further evidence on appeal is the Learned Magistrate's refusal to accept evidence over the appellant's birth certificate on the day of the hearing. When the appellant's legal advisor wanted to introduce the appellant's birth certificate on the day of the hearing, the Learned Magistrate said the following:[4]

“Counsel I have been around I think you have been around. This is an application it is done on papers. You stand you fall by your papers. You know that for a fact and that is the reason why I asked madam as to are your papers in orders in order she said yes, are your papers in order you said yes. So you are not going to lead evidence from the bar.”

- [9] The appellant’s alleged birth certificate does not form part of the papers before us. The alleged birth certificate is also not attached to the application to introduce further evidence.
- [10] In *Ibex RSA Holdco Limited and Another v Tiso Blackstar Group (Pty) Ltd and Others*[5], the Supreme Court of Appeal reaffirmed that “[It is]only in exceptional circumstances that evidence may be admitted on appeal. As was held in *Coleman*, an applicant must furnish a suitable explanation for the failure to adduce the evidence in the court below; and demonstrate that the evidence is reliable, weighty and material and presumably to be believed’ (endnotes omitted) .
- [11] The reason for this rule is unassailable. The trial court must decide the dispute upon evidence properly before it. The evidence must be admissible and reliable. Evidence is reliable if it is open to being tested (in the case of a trial through cross examination or, in the case of applications, having regard to the principles laid down in *Plascon*,[6] or properly corroborated). If evidence is admitted on appeal, this benefit is lost. In addition, the other party may be ambushed if such evidence is admitted. There is simply no place to allow evidence on appeal beyond the scope of *Ibex RSA Holdco Limited and Another*. [7]
- [12] The appellant had the birth certificate already on 15 August 2023. The eviction application was heard and decided on 15 May 2024. This delay is not properly explained notwithstanding the appellant alleging in the founding affidavit to the application to introduce further evidence that he did not perceive it necessary to prove that the Mamakokos were his biological parents.
- [13] In addition, this court is unable to determine whether the evidence to be introduced is reliable because the alleged birth certificate is not before us.
- [14] The application to introduce further evidence in this appeal must be dismissed.

Appropriateness of the eviction order

- [15] The Learned Magistrate summarily dismissed the request that the appellant’s birth certificate be introduced in the proceedings.[8] The Learned Magistrate was clearly fixated on the pleadings as they stood. The Learned Magistrate erred for eviction proceedings require an approach that may well extend beyond the pleadings of the eviction application. This is what was said in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*[9]

“[26] In order to discharge its function, the court must be possessed of information regarding all relevant factors that bear upon its decision. Judges have been told that they are:

‘... called upon to go beyond [their] normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which [the court] must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make.’

[16] Despite being aware that from the existing pleadings, the appellant had lived in the Mamakokos’ dwelling for the greatest part of his life, the existence of a material dispute over the appellant’s paternity and conflicting evidence in this regard, the Learned Magistrate missed an opportunity to allow evidence material to the main dispute between the parties. This failure constitutes a material misdirection.

[17] The Learned Magistrate did not make any finding regarding the unlawfulness of the appellant’s occupation. Perhaps the Learned Magistrate saw it as a *fait accompli* after having found that the appellant is not the Late Mr. and Ms. Mamakoko’s son. This finding is squarely challenged in the notice of appeal and consequently also that the appellant is therefore in unlawful occupation of the late Mr. Mamakokos’ dwelling.

[18] The basis upon which the first and second respondents sought to approach court is set out in the first respondent’s letter of demand.[10] The letter records that:

“.....

We hold instructions that you are the residing on the above-mentioned address and due to your unlawful conduct our client wishes that you would vacate the property.

.....

We advise that our client is the holder of the rights to use or alienate the said property and not any third party as aforesaid. It follows then that no third party had the right to alienate the property at any given time either than our client.”

[19] No particulars whatsoever are set out to sustain the view that the appellant is in unlawful occupation of the dwelling.

[20] It is common cause that the appellant had the late Mr. Mamakoko’s express permission to occupy the dwelling, and that the late Mr. Mamakoko died intestate. Consequently, Mr. Mamakoko’s heirs would be his children in terms of section 1(1)(b) of the Intestate Succession Act 81 of 1987.

[21] Section 11(1)(c) of the Administration of Estates Act 66 of 1965 seeks to retain the status quo in respect of property of deceased estates pending the distribution thereof in terms of section 35(12) of the Act 66 of 1965.

[22] In this instance, the status quo is that the appellant is in occupation of the dwelling and only upon distribution of the deceased estate, this status quo may have to change. Before the distribution of the deceased estate, it is premature to decide over the lawfulness of the appellant's

occupation. If he is not the Mamakokos' son, he will not be entitled to inherit and his right to occupy the dwelling may then be terminated by the first respondent. If he is the Mamakokos' son, as he alleges, the appellant will be entitled to one third of the dwelling including the late Mr. Mamakoko's other assets and may then be liable for eviction so that the estate may be properly distributed.

[23] The appellant challenged the respondents' locus standi to approach court during argument on his behalf in the court a quo.[11] The Learned Magistrate found the respondents had standing to approach court. This finding was correct as the first respondent is the appointed executor and the second respondent has an interest as heir in the intestate estate.

[24] In the notice of appeal, the challenge is that the respondents were not entitled to approach court because they are not the owners of the property. To be entitled to approach court, i.e. have locus standi, is one thing - to be entitled to the relief that is sought, is another. "The issue of locus standi is generally decided without reference to the merits. As Hoexter and Penfold put it: 'In common with the doctrines of ripeness and mootness, the question of standing is traditionally a liminal enquiry divorced from the substance of the case.' This is because, as explained in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*, quoting with approval what was said in *Wade Administrative Law*: 'The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances.'(Footnotes omitted)[12].

[25] There may be no disjoint between the party seeking relief and the relief that is sought. In this matter the disjoint is clearly apparent. The respondents may approach the court, but they were not entitled to an eviction order because, prior to the distribution of the estate, the eviction order is premature. Any finding that the appellant is in unlawful occupation of the dwelling will be premature before the deceased estate is distributed.

[26] In the premises, the appeal must succeed.

Costs

Cost must follow the result.

[27] In the premises, I made the following order:

- (a) Condonation for the late noting of the appeal is granted.
- (b) The application to introduce further evidence on appeal is dismissed.
- (c) The appeal is upheld.

- (d) The first and second respondents are ordered to pay the appellant's costs, Counsel's fees to be taxed in accordance with Scale A, jointly and severally, the one paying the other to be absolved.

Acting Judge of the High Court

I agree, and it is so ordered.

Langa J

Judge of the High Court

DATE OF HEARING: 28 February 2025 DATE OF JUDGMENT: 10 March 2025

APPEARANCES

FOR THE APPELLANT:

MR F MASWENING

ON INSTRUCTIONS OF JT LESO ATTORNEYS INC

FOR THE FIRST AND SECOND RESPONDENTS:

MR SB MABENA

ON INSTRUCTIONS OF SB MABENA AND ASSOCIATES

Instructed by _____

- [1] Paragraph 2.1 of the founding affidavit in the application for condonation. The notice of motion in the application for condonation, in paragraph one thereof, seeks the following relief: "Condoning the late application of the stay execution on eviction order of the judgment of the Learned Magistrate". Of course, this is not the relief that is intended to sought. We gave the benefit to the appellant and considers what is indeed

sought is condonation.

- [2] Annexure "KM5" to the founding affidavit.
- [3] Ruel 51(1) provides: "Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing which shall become part of the record showing..."
- [4] Page 168, lines 4 to 11.
- [5] [2024] ZASCA 166 (4 December 2024).
- [6] Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623.
- [7] See para. 10 *ibid*.
- [8] See para. 8 *ibid*.

[9] [2013] 1 All SA 8 (SCA). (SCA) [2012] ZASCA 116; 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA); [2013] 1 All SA 8 (SCA) (14 September

2012) at para. 16.

[10] Annexure “KQM8” to the founding affidavit.

[11] Page 166 at lines 17 to 21.

[12] Goldrush Group (Pty) Ltd v Northwest Gambling Board and Others (648/2021)

[2022] ZASCA 164 (28 November 2022) at para. 14.

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Prepared on 13 October 2026 · Esheria