

SOUTH AFRICA / JUDGMENT

Mhlaba and Others v Dywili (CA95/2022)

[2023] ZAECMHC 46 (5 September 2023)

[2023] ZAECMHC 46**COURT**

Eastern Cape High Court, Mthatha

BEFORE

N G Beshe, D O Potgieter, H Zilwa

CASE / FILE NUMBER

CA95/2022

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**IN THE HIGH COURT OF****SOUTH AFRICA****(EASTERN CAPE****DIVISION, MTHATHA)****Case No: CA95/2022****In**

the matter between:

ASANDA
MHLABA
First
Appellant
XOLISILE
MCUNUKELWA
Second
Appellant
MBUYISELI
GAGADU
Third
Appellant
MTHETHELELI
NOMANDELA
Fourth
Appellant
ZANDISILE
GEORGE
Fifth
Appellant
and
THABILE
DYWILI

Respondent

JUDGMENT

Beshe J

[1] In June 2018 the respondent herein launched an application against the five appellants together with six others. The bone of contention was a stretch of an arable allotment described as 47 Zitatele Administrative Area, Libode District, Eastern Cape Province. An order of eviction from the said piece of land was sought against first, second, third, fourth, fifth, sixth, seventh, eighth and ninth respondents in the matter. Interdictory orders were also sought against fourth, fifth, sixth, seventh, eighth and ninth respondents. Toni AJ found in favour of the respondent and granted the orders sought with costs. Aggrieved by this decision, the five appellants are appealing against the decision, leave to do so having been granted by the Supreme Court of Appeal.

[2] The case that was advanced by the respondent, briefly stated was as follows:

Pursuant to section 4(1) of Proclamation No. 26 of 1963, a permission to occupy allotment no. 47 was issued to her maternal grandmother one Ma-Maya Nqezo (Ma-Maya) on 3 September 1963. Her late mother was Ma-Maya's only child. She in turn had two children, respondent and one Nombini who passed away during 2005. By virtue of being the only surviving granddaughter to Ma-Maya, she is now the owner of the arable allotment in respect of which her grandmother was issued with a permission to occupy. From 2012, first, second, third, fourth, fifth, sixth, seventh, eighth and ninth respondents started occupying the piece of land described hereinabove. They premise their entitlement to the portions they occupy on the basis that they bought same from tenth respondent and the Community Board Committee, respectively. Tenth respondent is the fifth appellant in these proceedings. She asserted further that her entitlement to the piece of land was confirmed by the outcome of proceedings presided over by Chief Ndamase at the Hadini Great Place following a complaint that she had lodged in this regard. To this end, she referred the court to copies of attendance registers as well as minutes relating to meetings held at Hadini Great Place and Ncipizeni Sublocation. Also annexed thereto are a number of hand drawn sketches.

[3] The application was opposed essentially on the basis that it was ill-conceived in that it was based on a mistaken belief that the appellants were occupying allotment no. 47 when in fact they were occupying allotment no. 26. In respect of allotment no. 26, a permission to occupy was issued to fifth appellant's late father. The other defence that was raised by the appellants was that the respondent failed to prove that she had locus standi in judicio to apply for the eviction of the appellants from the piece of land described as allotment no. 47 Zitatele Administrative Area. This by failing to prove that she was the owner of land or alternatively that she was in charge of the piece of land in question.

- [4] The judge a quo identified the issues that arose for determination as being whether the respondent had a right over the land in question which would clothe her with the necessary locus standi in judicio. Secondly, whether the application complies with the provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 and satisfies the requirements of the Act. The court also acknowledged that the matter turned on a dispute as to whether the land in dispute is allotment no. 47 or 26. In my view, this dispute was indeed the nub of the matter and encompasses the point raised by the appellants regarding locus standi. This appeal in my view turns on this narrow point. Namely whether the application in view of this dispute of fact could be decided on the papers as they were.
- [5] The respondent was alerted to the existence, by the appellants of what they referred to as ‘a material and genuine dispute of fact which could only be resolved by expert evidence . . .’.
- [6] The dispute as to whether the land in question is allotment no. 47 or 26 was not raised for the first time in resistance of the application. It was the subject of dispute resolution proceedings before the local chief from circa 2012 until it was ‘resolved’ in favour of the respondent in 2018. A number of documents comprising, inter alia, of copies of attendance registers and what purports to be minutes of meetings in manuscript recorded in isiXhosa were annexed to respondent’s founding papers. The minutes are headed ‘NCIPIZENI SUBLOCATION ARABLE LAND ISSUE and MEETING HELD AT HADINI GREAT PLACE’ respectively and bear different dates. Also annexed were hand drawn sketches without any explanation of what was depicted therein or who drew them.
- [7] In reply, regarding the issue of the two allotments no. 47 and no. 26 respondent delved deeply into the proceedings or meetings that were held at the Hadini Great Place. Outlining what transpired there, who said and did what culminating in a decision in her favour. Mention is made in relation to these proceedings at the Hadini Great Place of a Mr Magadla and Ms Nompuku amongst others. The abovementioned persons did not depose to confirmatory affidavits. It is not clear who compiled the minutes. That person also did not depose to a confirmatory affidavit. The minutes were not authenticated, there being no indication of whether they were confirmed to be an accurate record of what took place.
- [8] After exploring the minutes of meetings held before the local authority at length, the court a quo remarked as follows:

‘[45] Upon assessment of all evidence I am not convinced that the appellant’s version is far-fetched or untenable or am I satisfied as to the “inherent credibility” of the tenth respondent’s factual averments on the disputed facts. In my view the applicant has proven on a balance of probabilities that the allotment in dispute that has been occupied by the respondents is allotment no. 47. I am not satisfied that the respondent’s denial of their occupation of allotment no. 47 is genuine. A probability has not been shown to exist that the applicant’s version is either mistaken or false.

[46] Mr Msindo further argued that the diagram annexed to the applicant's affidavit portends that a land surveyor should have been called and for that reason the relief sought cannot be granted. I once again disagree with Mr Msindo. The duty of an expert in any proceedings is to assist the court and not to usurp its functions. Where a court can resolve a dispute on the strength of available evidence without the aid of an expert, calling an expert would not be of necessity. In my

view this dispute turns out on the plaintiff's version and is resolvable without the aid of a diagram or land surveyor.'

[9] On appeal, one of the grounds raised is that the court a quo erred in finding that the dispute of fact could be resolved on the strength of available evidence which amounted to hearsay evidence

without the aid of an expert.

[10] A sizable portion of the court a quo's judgment deals with the legal framework that regulates land tenure in rural areas. This includes Proclamation 26 of 1936 in terms of which permission to occupy an allotment would be issued. Toni AJ's exposition of the legal framework in this regard including the constitutional imperatives is thorough and cannot be faulted.

[11] Appellants denied that they were occupying allotment no. 47 which was allocated to Ms Nqezo. In addition, thereto, they asserted that respondent failed to produce any document reflecting ownership thereof in her name but relies on a permission to occupy in respect of someone else. The judge a quo examined the manner in which land is acquired in rural areas and how it devolves from generation to generation. It is noteworthy that even the fifth appellant who asserts that he sold portions of allotment no. 26 to the other appellants and not the allotment 47 which was allocated to Ms Nqeto, also relies for his entitlement to allotment no. 26 on a permission to occupy that was issued to his father in 1968. There can be no merit in the appellants' assertion that respondent failed to prove her entitlement to land by means of a document bearing her name.

[12] Regarding the dispute of fact, the judge a quo held that the 'threadbare' denial by appellants that the occupied land is allotment no. 47 is untenable. To that end, the judge copiously referred to the deliberations that took place at the Hadini Great Place. He concluded that the undisputed evidence of the community members also points to the land in question being allotment no. 47 and that he has no reason to doubt them.

[13] It is trite that application proceedings are merely utilised where the dispute between the parties can be expeditiously determined on common cause facts upon the consideration of affidavits filed by the parties. As indicated earlier in this judgment, this matter turned on a dispute as to whether the land in question is allotment no. 47 or 26.

[14] Uniform rule 6(5)(g) provides that:

‘(g) 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 particular, but without affecting the generality of the foregoing, it may 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 appear personally or grant leave for such deponent 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.’

[15] In *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd*[1] the general rule where material facts are in dispute was held to be the following:

‘It seems to me that where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order.’

[16] In *Plascon Evans Paints v Van Riebeeck Paints*[2] this general rule was qualified as follows:

‘It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.’

[17] I have already alluded to the fact the court a quo characterised the dispute of fact in question as a ‘threadbare’ denial by the appellants that the land that they occupied is allotment no. 47 and not no. 26. And found same to be untenable. See paragraph [8] supra for an extract from Toni J’s judgment in this regard.

[18] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[3] the following was said as to what constitutes a real and genuine dispute of fact:

‘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.’

[19] Similarly in *National Director of Public Prosecutions v Zuma*[4] the court said the following:

‘It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s (Mr Zuma’s) affidavits, which have been admitted by the respondent (the NDPP), together with the

facts

alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[20] We know that the 'evidence' that the court a quo relied upon to reach the conclusion that the applicant's version is not far-fetched and that the fifth appellant's

factual averments on the disputed facts are not inherently credible, was to a large extent based on what transpired during the proceedings at the HADINI GREAT PLACE / NCIPIZWENI SUBLOCATION MEETINGS.

[21] It is trite that for documentary evidence to be admissible, the original document must be produced, and it must be authenticated. Which means simply that there must be evidence of who authored the document. In the case of minutes, confirmation/approval of same as to whether they are a true reflection of what transpired during the meeting. There is no indication of who took the minutes, or of whether they were confirmed. I have already stated that the minutes or notes are recorded in isiXhosa. This is despite respondent's assertion in the supporting affidavit,[5] that the original copy is written in isiXhosa and the converted version is written in English by her attorneys of record in order to assist the court. No translated copies were provided though. I say so mindful that isiXhosa is one of the official languages. That is not the only problem with the said annexures. It is not open to a party to merely annex documentation to his affidavit and request the court to have regard thereto without identifying parts thereof on which reliance is placed. See in this regard *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*. [6] In *Minister of Land Affairs and Agriculture v D & F Wevell Trust*, [7] it was stated that 'a party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained'.

[22] The meetings were held on different dates between 2017 and 2018. All the minutes have Chief M Ndamase's stamp and are all dated 4 February 2018 and bear a signature. A number of people appear to have at some stage shed light about the location of the arable allotment that was allocated to respondent's grandmother. Those being inter alia an Agricultural Officer; Mr Mbangwa, a Mr Ngqeleni and others. None of them have deposed to confirmatory affidavits. Even though it would seem there was some 'decision' made in favour of the respondent on the 13 June 2017, meetings about the same dispute continued to be held during the latter part of 2017 and in 2018. During these meetings submissions would be made. Whatever

the status of those proceedings may be, or whatever weight or reliance may be placed on them, one thing is clear, that there exists

a real dispute of fact between the parties. This is also apparent from an allegation made by the respondents in reply where at

paragraph 14, she states that according to a 'guiding' document obtained from the offices of the Department of Rural

Development and Agrarian Reform, it was revealed that tenth respondent's father's land is described as arable allotment no. 26 but in terms of the same department's diagram it appears as arable no. 46.

[23] In the circumstances, I cannot agree with the learned judge a quo that fifth appellant's denial that the land he sold to his co-appellants is from allotment no. 26 and not 47 is a 'threadbare' denial. In my view there was a genuine dispute of fact that was irresolvable on the papers. The court a quo placed a lot of reliance on what transpired before the Headman's Court to resolve the dispute of fact. That evidence is fraught with difficulties as pointed out earlier in this judgment. The court a quo misdirected itself by accepting what it termed or characterised as the 'undisputed evidence of the community members' as a basis for finding that the arable allotment in question is no. 47 and not 26. Reference was made to the 'evidence'

given by a number of people during various meetings that were held. However, seeing that these were meetings, none of the speakers gave evidence under oath, none of them deposed to affidavits confirming what they said during the meetings. The judge a quo seems to have also placed reliance on a pronouncement that was made at the conclusion of one of the meetings by the Chief. Namely, that Mr George (fifth appellant) is guilty of occupying respondent's allotment. It matters not in my view that fifth appellant did not dispute allegations relating to the meetings or the accuracy or authenticity of the minutes. This is so because the pronouncement by the Chief was irrelevant and therefore inadmissible because it is expressed on an issue the court a quo had to decide. I am inclined to agree with the appellants that the court a quo allowed proceedings before the Hadini Great Place to usurp its function in so far as the decision on the disputed fact was concerned. Had the dispute been raised for the first time as a defence to application, it would have smacked of being a spurious and mala fide one.

[24] I am therefore of the considered view that the fifth appellant's denial could not be dismissed as being untenable, it did not raise a fictitious dispute, it was not implausible or far-fetched. There was a genuine dispute of fact as consequence of which the matter was not capable of being resolved on the papers. The court a quo, with respect ought to have dismissed the application on that basis.

[25] In light of the foregoing, the following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following order:

'The application is dismissed with costs.'

N G BESHE

JUDGE OF THE HIGH COURT

POTGIETER J

I agree.

D O POTGIETER

ZILWA AJ

H ZILWA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES For the Appellants Adv: Msindo Instructed by VV MSINDO & ASSOCIATES 48 Wesley Street MTHATHA Ref: Mr Msindo Tel.: 047 – 532 2231 For the Respondent Adv: Mxotwa Instructed by MAKANGELA MTUNGANI INC. 50 Blakeway Road MTHATHA Ref: Mr Makangela Tel.: 047 – 531 4446 Date Heard 24 April 2023 Date Reserved 24 April 2023 Date Delivered 5 September 2023

- [1] Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235.
- [2] Plascon Evans Paints v Van Riebeeck Paints [1984] ZASCA 51; 1984
- (3) SA AD 623[1984] ZASCA 51; ; [1984] 2 All SA 366 (A) at 634G-H.
- [3] Wightman t/a JW Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008
- (3) SA 371; [2008] 2 All SA 512 (SCA) para 13.
- [4] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009
- (2) SA 277 SCA; 2009
- (4) BCLR 393 (SCA) at 290E-F.
- [5] Para 19, pages 13-14 of the papers.
- [6] Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999
- (2) SA 279 (T) at 324F-G.
- [7] Minister of Land Affairs and Agriculture v D & F Wevell Trust [2007] ZASCA 153; 2008
- (2) SA 184 SCA at 200 E.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECMHC/2023/46.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mhlaba-and-others-v-dywili-unknown-topic-aecmhc-2023>

Prepared on 12 October 2026 · Esheria