

SOUTH AFRICA / JUDGMENT

Nkondlwana v Letsaba and Others (Appeal) (CA14/2024) [2024] ZAECMHC 79 (15 October 2024) [2024] ZAECMHC 79

COURT

Eastern Cape High Court, Mthatha

BEFORE

Rugunanan, M Makaula, M Gwala

CASE / FILE NUMBER

CA 14/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO. CA 14/2024

In the matter between:

JANE NTOMBESITHATHU NKONDLWANA

APPELLANT

and

EPHRAIM LETSABA

FIRST RESPONDENT

MARATLALI LETSABA

SECOND RESPONDENT

UNIDENTIFIED OCCUPANTS OF

THEREMAINDER OF THE PORTION

OF ERF 3[...]

THIRD RESPONDENT

UMZIMVUBU LOCAL MUNICIPALITY

FOURTH RESPONDENT

JUDGMENT ON APPEAL

Rugunanan J

- [1] The substantial issue for decision in this appeal is whether the appellant is entitled to an order evicting the first, second and third respondents as unlawful occupiers of a fenced-off portion of fixed residential property known as Erf 3[...], KwaBhaca (formerly Mount Frere), of which they are currently in occupation.
- [2] The basis for the appellant's contention that the respondents are unlawful occupiers stems from her cancellation of an alleged oral lease agreement between her deceased husband and the first respondent, as also the first respondent's failure to provide a deed of alienation as contemplated in section 2(1) of the Alienation of Land Act[1].
- [3] Beshe J decided the issue against the appellant (as applicant in the court a quo) and dismissed with costs her application brought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[2] for eviction of the respondents.
- [4] Ancillary to that dismissal was an order in favour of a counter-application by the first and second respondents, respectively husband and wife, who claimed that the property was sold to them by the deceased. Relying on the doctrine of notice, they were granted relief inter alia declaring them to be joint owners of a fenced portion of the property and directing the appellant to do all things necessary to facilitate the subdivision and registration of transfer of the occupied portion to the first and second respondents.
- [5] Save for the first respondent (hereinafter, the respondent) the remaining parties have no involvement in the appeal namely; (a) the second respondent, albeit that she deposed to a supporting confirmatory affidavit to that of the respondent, (b) the third respondent, who are persons residing on the property at the instance of the respondent, and (c) the fourth respondent which is the local municipality, having indicated that it abides the decision of this court.
- [6] The appeal to this court lies with leave being granted on petition to the Supreme Court of Appeal and is against the entire judgment and order of Beshe J. Problematic are the grounds of appeal. They present difficulty in engaging with the simplicity of a reasoned judgment and are nebulous, imprecise in their formulation, and wanting in eloquence and clarity.
- [7] The appellant's heads of argument and oral submissions on her behalf suffered the same deficits and were rightfully condemned by opposing counsel in argument.
- [8] In finding that there was a clear dispute of fact between the parties on whether or not the respondent and the appellant's husband, with the appellant's knowledge, previously entered into a sale agreement for an unsurveyed portion the property, the court a quo decided the

matter on acceptance of the respondent's version, absent a referral to oral evidence. The court a quo considered that the dispute raised in the counter-application was material to the relief sought by the appellant in the main application.[3] Applying the Plascon-Evans test[4] it decided the matter – both in the main application and in the counter-application – in favour of the respondent on the basis that his version was inherently credible.

[9] The finding by the court a quo trails straightforwardly to the crux of the issue on appeal. Put otherwise, the finding that there was a sale agreement between the deceased and the respondent, and of which the appellant had knowledge, defeats her contention that he is an unlawful occupier following her purported cancellation of a lease agreement.

[10] On the facts, the applicability of the doctrine of notice stems from the appellant's knowledge. The doctrine relied upon in the counter-application was explained by the Supreme Court of Appeal in *Meridian Bay Restaurant v Mitchell*[5] as follows:

'Under the doctrine of notice, someone who acquires an asset with notice of a personal right to it which his predecessor in title has granted to another, may be held bound to give effect thereto. Thus a purchaser who knows that the merx has been sold to another, may, in spite of having obtained transfer of delivery, be forced to hand it over to the prior purchaser. Reverting to my earlier example: If C had purchased with knowledge of the prior sale to B, B would be entitled to claim that the transfer to C be set aside and that transfer be effected from A to B, or B may perhaps even claim directly from C.'

[11] We are at the outset not persuaded that there is merit in departing from the approach adopted by the court a quo and what follows hereafter accentuates this sentiment by advancing reasons for the concluding order on appeal.

[12] According to the appellant, the abovementioned lease agreement is alleged to have been entered into between the respondent and her husband during 1990 or 1991 when her husband was the registered owner of the property prior to his death in 2016. She alleges that the agreement was terminated by her on written notice to the respondent on 20 June 2019. Except for complaining that no rent has been paid to date, she volunteers no detail of the amount of rental payable by the respondent. At the time of terminating the agreement, the appellant was the registered owner of the property, having purchased it in 1994 from her husband to ease his financial distress. At present, she avers that the municipality has billed her for unpaid services amounting to R45 878.26 and attaches a tax invoice in confirmation of the amount. It may as well be mentioned that the billing is not to be accounted for in her name and is against the AFM Moving Gospel Ministry, a church led by the respondent.

[13] The version of the respondent is that in 1991 he requested the deceased to permit him to utilise a portion of the property on which there was a makeshift structure that the respondent intended to utilise for conducting church services. The respondent avers that there was never a lease agreement between him and the deceased. There was an arrangement that emanated from a friendship that developed against the backdrop of the respondent, a qualified electrician, who performed favours for the deceased by servicing the

machinery of a dry cleaning business owned by the deceased.

- [14] The deceased also operated a business hiring out trucks and carting building material.
- [15] During October 1991 the deceased, accompanied by the appellant, approached the respondent and offered to sell him the portion of the property being utilised to conduct church services. The offer was made because the deceased was experiencing financial difficulties. Negotiations culminated in an agreed purchase price of R40 000 payable by the respondent in monthly instalments of R2 500. The deceased introduced the respondent to an attorney, Mr Bam, who drafted a deed of sale. The deed was signed by the deceased and the respondent, the deceased having made it clear that registration of transfer would only take place once the property was subdivided – a process which the deceased undertook to initiate. Because the deed of sale was prepared with a manual typewriter directly in the presence of the parties, and the difficulty in making copies directly, the respondent avers that he did not immediately request a copy but considers that the deceased did, at a subsequent stage, obtain a copy from the attorney. Despite the respondent's best efforts to obtain a copy, these have come to naught because Mr Bam has long since passed away and his office files going back many decades to 1991 are untraceable by his successor in practise. The respondent nonetheless believes that the appellant has the deceased's copy of the deed considering that she is the executrix of his estate.
- [16] As soon as the deed of sale was concluded, and with effect from 1 November 1991, the respondent commenced making monthly payments, as agreed, until the purchase price was fully paid on 16 March 1993. The respondent's wife would accompany him and the payments were made in the presence of the appellant. Upon each payment the deceased issued the respondent a signed receipt indicating the amount receipted with its purpose noted down as 'part payment for portion of Erf 3[...]', and the balance due.
- [17] The sequence of receipts are attached to the respondent's papers and, in sum, accord with the purchase price of R40 000. The appellant's complaint about the amount not corresponding with a schedule of payments in the sum of R43 500 set out in a letter from the respondent's attorneys is unsustainable since the letter is hearsay and does not constitute evidence under oath.
- [18] Tellingly, she does not deny that the payments were made in her presence.
- [19] She avers instead that the signatures appearing on the receipts differ with the deceased's signature in the deed of sale in respect the sale of the property to her in
1994. Cognisant that it is within the realm of ordinary human experience that a person's signature would not be identical at all times, and that the appellant does not categorically aver that the signatures on the receipts are not those of the deceased, the court a quo could not detect any discernible difference without expert input. Nor can we.

- [20] Over the course of time, and to the knowledge of the appellant, the deceased assisted the respondent to transport building material onto the property. With the consent of the deceased and in full view of the appellant, the respondent modified other existing structures on the property into a church building, a nine-roomed house in which he resides together with his family, and a flatlet comprising of seven rooms for securing rental income. All the while the respondent maintained that he prevailed on the deceased to have the property subdivided but the deceased pleaded for patience and moaned that it would be a costly exercise due to his financial woes.
- [21] In 2017, a year subsequent to the passing of the deceased in a motor vehicle accident, the respondent was served with court process in which the appellant sought an order interdicting his activities on the property and that the structures erected thereon be demolished. It was then that the respondent learnt of the sale of the property to the appellant in 1994.
- [22] Following a meeting between the parties during April 2017 at which the appellant's son Bonginkosi was present, the latter deposed to a police affidavit in which he declared the following (all sic):
- 'On the 23-04-2017, I ... and my mother Mrs Jane N Nkondlwane gave assurity to Mr E Letsabe & family that there will be no demolishing of their structures until the sub-division is done.'
- [23] Objectively considered, the affidavit does not imply that a deed of sale was concluded. Apart from the assurance that the property be subdivided, the affidavit merely confirmed that there will be no demolishing of structures (notwithstanding it being common cause that the respondent did not oppose the interdict proceedings).
- [24] Against this factual setting, the case presented by the appellant is posited on section 2(1) of the Alienation of Land Act[6] which, in essence, lays down that no alienation of land shall be effective unless it is recorded in a deed of alienation signed by the parties.
- [25] Relying both on the failure by the respondent to produce a deed of sale and the purported cancellation of the lease, the appellant contends that she is entitled to an eviction order since the respondent (as with the others) is an unlawful occupier of the property of which she is the registered owner.
- [26] The judgment of the court a quo (including the judgment refusing leave to appeal) dealt with these issues. In bringing closure to this matter, and salient for our purposes, the succinct reasoning of the learned judge when she refused leave to appeal is quoted:
- 'If one party says that there was a lease agreement in place and the other asserts that they bought the piece of land, I do not see how that can be viewed in any other way but to see that as a dispute of fact. I do not wish to repeat the basis on which I dealt with the dispute of fact [in] applying the Plascon-Evans[7] rule and NDPP v Zuma[8] ...'

‘... [And] in so far as compliance with section 2(1) is concerned, I decided the matter on the version that was presented by the respondents in the main application, namely that the deed of alienation was executed before an attorney. That attempts as were detailed by the first respondent were made to get hold of a copy of the deed of alienation were in vain. As well as the endeavours to have the property subdivided for purposes of transferring portion thereof to the first and second respondents. I found respondents’ version to be inherently credible and gave reasons for my finding in this regard. Granted that the requirement that a contract should be in writing is an important one and one that is designed to eliminate disputes about the said contract. I also listed a number of factors that weighed in favour of there having been such a contract of sale of the piece of land in question. Those being inter alia: The invoices that first respondent alleges were issued by the [appellant’s] husband being in respect of monthly payments the former made towards the purchase of the piece of land in question; the apparent non-payment of rent by the first respondent for many years; evidence about the apparent agreement to attend to the subdivision of the Erf in question; the fact that the first respondent has, dating back to the ‘90s developed the portion of Erf 3[...] by building a 9 roomed house and 7 rental flats. Hence I dismissed the main application and found in favour of the first and second respondents in respect of their counter-application.’

[27] The reasoning employed by the court a quo informs the orders granted against the appellant in the main application and constitutes the logical and lawful conclusion of the court’s rejection of her version. The orders in the counter-application similarly constitute the court’s lawful and logical conclusion of its acceptance of the respondent’s version. The facts clearly indicate that the elements of the doctrine of notice were met and in that regard the court a quo correctly granted an order compelling the appellant to transfer the occupied portion of the property to the respondent and his wife.

[28] We are not persuaded that the learned judge in the court a quo misdirected herself in law, or that she erred in her evaluation of the material before her. She correctly concluded that it was

appropriate in the circumstances of this case to reject the version presented by the appellant.

[29] Interference on appeal is therefore not warranted.

Order:

The appeal is dismissed with costs.

S RUGUNANAN

JUDGE OF THE HIGH COURT

I agree.

M MAKAULA

I agree.

M GWALA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: L W Qina of L W Qina Inc., Mthatha, (Ref L W Qina), Tel: 047-531 1789.

For the First Respondent: A Msindo, instructed by V V Msindo & Associates Inc., Mthatha (Ref Mr Msindo), Tel: 047-532 2231.

Date heard: 05 August 2024

Date delivered: 15 October 2024

[1] Act 68 of 1981.

[2] Act 19 of 1998.

[3] Judgment in application for leave to appeal.

[4] Set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (AD) at 634E-635C.

[5]

[2011] ZASCA 30 para 14.

[6] Act 68 of 1981.

[7] Fn 4 supra.

[8]

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

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