IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: A31/2023

In the matter between:

THLORISO ANDRIES LEFETA Appellant

and

TANKI NEPHTALLY LEFETA 1st Respondent

MAMOKHOBO JACOBETH LEFETA 2nd Respondent

CORAM: LOUBSER, J *et* OPPERMAN, J

HEARD ON: 2 OCTOBER 2023

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 19 OCTOBER 2023

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[1] This is an appeal against an eviction order made by the Magistrate of Botshabelo against the appellant in motion proceedings that came before him towards the end of 2022. In the Notice of Motion the respondents sought final relief in the form of the eviction order against the appellant and any other unlawful occupants of the residential property situated at 1521 K Section, Botshabelo. The application was made in terms of the provisions of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.[1]

[1] **Act 19 of 1998**

[2] It appears from the founding papers filed by the respondents in the court *a quo* that they are the children of the late Tefo Johannes Lefeta, and they alleged that he is the registered owner of the property in question. In support of this contention, they attached a property enquiry to this effect. They further alleged that they have the necessary *locus standi* to make the application, since they are acting in their capacity as the Master's representatives in the estate of their late father. To this effect the respondents attached a Letter of Authority issued at the Botshabelo Magistrate's Court and dated 1 December 2008. The respondents alleged that they are consequently in charge or in control of the property, but that they are unable to deal with the property in terms of Section 18(3) of the Administration of Estates Act[2] while the appellant is still occupying the property.

[3] The respondents also alleged in their founding papers that the appellant had moved into the property immediately after the death of their father without the consent of the respondents and without any other right in law to do so. They alleged that the appellant later entered into a written agreement with the first respondent on 4 May 2009 to vacate the property by the end of June 2009, but that he has since neglected to do so. They attached a copy of the said agreement to the founding affidavit.

[4] In his answering affidavit the appellant vehemently opposed the application. He firstly expressed the view that the respondents failed to comply with the provisions of Act 19 of 1998, in that they had served the application upon him without the Court's approval. He further pointed out that the respondents had made two previous applications in the Magistrate's Court of Botshabelo to have him and his wife evicted from the property, but that both those applications were dismissed by the Court. The matter is therefore *res iudicata*, he contended.

[5] The appellant further denied the authenticity of the Letter of Authority attached by the respondents. He claimed that his attorney had made a thorough search

[2] **Act 66 of 1965**

for the record of the Letter, but that he could not find anything in that respect. If the Letter had in fact already existed in 2008, he would have expected the respondents to have finalized the estate long ago in terms of the instructions of the Master. The late father of the respondents was his brother, who had died on 29 September 1996, almost 26 years ago. He cannot imagine that his brother's estate had not been finalized by now, he contended.

[6] The appellant further denied that his late brother was the owner of the property at the time of the issuing of the alleged Letter of Authority. After his death, the widow of the deceased asked him and his wife whether they would reside in the property, which was in a very bad state at the time. They agreed to move in, and they paid the rates, taxes and water levies that were in arears. In addition, they improved the property over the years at a cost of more than R120 000.00, the appellant averred in his answering affidavit.

[7] The appellant went on to allege that he and his wife later purchased the property from the Free State Development Corporation, with the result that he is actually the rightful owner of the property. He further denied that he had ever entered into an agreement to vacate the property by the end of June 2009. He has been occupying the property for about 25 years now, he said

[8] In her response to the appellant's answering affidavit, the first respondent then filed an answering affidavit. In this affidavit she denied that the matter had become *res iudicata*. She pointed out that her first attempt to evict the appellant, was made when she applied for a protection order. At the time, she did not realise that she was following the wrong procedure, and her application for a protection order was consequently dismissed. Her second attempt to obtain an eviction order, never came to fruition, because her legal representative provided by Legal Aid left the offices of Legal Aid in Botshabelo before further steps could be taken.

[9] As for the remainder of the replying affidavit, the first respondent merely noted some of the allegations in the answering affidavit, while simply denying some of the other allegations made. She mainly confirmed her version as contained

in her founding affidavit. What is conspicuous, however, is that the issues of the Letter of Authority and the *locus standi* of the respondents, as raised in the answering affidavit, are not responded to in the replying affidavit.

[10] In its judgement, the court *a quo* regarded the version of the appellant that he and his wife were given permission by the widow of the deceased to occupy the property, as hearsay evidence. The Magistrate regarded it as such, because there was nothing before him supporting this version of the appellant. The denial of the appellant that he had entered into an agreement to vacate, was also regarded as without merit by the Magistrate, since the agreement was signed by T.A. Lefeta and T.W. Lefeta, he said in the judgement.

[11] Furthermore, the Magistrate dismissed the appellant's defence of *res iudicata* on the basis that no court order has been attached by the appellant to support a finding of *res iudicata*. In conclusion, the Magistrate found that, on the papers before him, the application complied with the provisions of Act 19 of 1998. He also found that the respondents had the necessary *locus standi* in the proceedings, because the Letter of Authority confirms that they are the Master's representatives in the administration of the deceased estate. He further dismissed the appellant's contention that he is the owner or the lawful occupier of the property.

[12] In his Notice of Appeal the appellant relies on the following grounds:

1. The Magistrate failed to apply the principles applicable to motion proceedings where final relief is sought.
2. The Magistrate should have upheld the defence of *res iudicata*.
3. The Magistrate should have found that no order of eviction could be granted in view of the appellant's improvement liens.
4. The Magistrate should have found that the authenticity of the documents annexed by the respondents were all in dispute and not proven at all. This specially pertains to the Letter of Authority and the documentation regarding ownership of the property.

5. The Magistrate erred in not finding that the applicants (now respondents) had failed to make out a case that they are either the owners or in control of the property and/or the executors of the estate of the deceased.
6. The Magistrate should have found that there was at least a serious dispute between the parties pertaining to the ownership of the property.

[13] Now as far as the first ground of appeal is concerned, it cannot be denied that the affidavits filed in the application revealed certain disputes of fact between the parties. It is also clear that final relief in the form of an eviction was sought in the application. The way in which a court should deal with an opposed application in such circumstances, has become trite in our law over many years: *"….*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."[3]

[14] This rule has the effect that factual disputes in motion proceedings should be dealt with on the basis that the version put up by the respondent should prevail. Chief Justice Langa, as he then was, confirmed this rule in **Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma vs National Director of Public Prosecutions and Others**[4] in the following words: "It is trite that factual disagreements in motion proceedings are to be dealt with in accordance with the rule in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** which stipulates that, subject to certain exceptions, a court should only rely on evidence given by the deponents for the respondents."[5]

[15] The "certain exceptions" referred to by the Chief Justice are explained in the Plascon-Evans case[6] to be, for example, where the allegations or denials of

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[3] **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) at 634 H-I**
[4] **2009 (1) SA 1 (CC)**
[5] **At par 8 on page 5 of the judgement in the Constitutional Court**
[6] **At C on page 635 (see citation in footnote 3)**

the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[16] In the present matter, it is clear from a reading of the judgement in the court *a quo* that the Magistrate has not referred to the rule at all and how it should be applied. It follows that this court is justified in finding that the Magistrate has erred by not applying the rule in the adjudication of the factual disputes on the papers before him.

[17] The next question, however, is whether this failure by the Magistrate had any effect on the final outcome of the application. This brings me to the second ground of appeal, namely the issue of *res iudicata*.

[18] The appellant's version was that the respondents made a second attempt to evict him during 2011 with the assistance of Legal Aid. At the time, he was represented by attorney Hennie Stander. Although he did not have any documentation in this respect, he could recall that the Magistrate, mr. Pienaar, dismissed that application as well. All that he could produce was a letter from Legal Aid dated 7 June 2011, demanding that he vacate the property within 30 days.

[19] In her replying affidavit, the first respondent denied the dismissal of the second application, and she stood by her version that the application was not proceeded with after a new legal representative was allocated to the case by Legal Aid.

[20] Clearly, had the Magistrate applied the rule discussed above, he would have relied only on the version presented by the appellant. Such an approach would have resulted in a finding of *res iudicata*.

[21] Furthermore, the appellant disputed the authenticity of the respondents' Letter of Authority in the court *a quo*. It was his version that, notwithstanding a thorough search by his attorney, no record of the Letter could be found. If the Letter had existed in 2018, as it purports to show, he would have expected the

respondents to have finalised the estate long ago. In their replying affidavit, the respondents did not deal at all with the appellant's version that the Letter was not authentic. Neither did they annex any response from the Master or an official of the Botshabelo Magistrate's Court in this regard.

[22] Again, had the Magistrate applied the rule discussed above, he would have relied only on the version presented by the appellant, and he would have found that the respondents failed to show their *locus standi* to approach the court for the relief sought, as contended in the fifth ground of appeal.

[23] The appeal must therefore succeed on the grounds referred to above. It is therefore not necessary for this court to consider the remaining grounds of appeal raised by the appellant.

[24] In the premises the following order is made:

1. The appeal succeeds with costs.
2. The orders made by the court *a quo* are set aside and substituted with the following:
   "The application for eviction is dismissed with costs"

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P. J. LOUBSER, J

I concur:

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M. OPPERMAN, J

On behalf of applicant:	Adv. S. J. Reinders
Instructed by:	Giorgi and Gerber Attorneys Inc. Bloemfontein
On behalf of respondents:	Mr. B. A. Monyamani
Instructed by:	Monyamani Attorneys, Bloemfontein

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