



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: yes/no
Circulate to other Judges: yes/no
Circulate to Magistrates: yes/no

Case Number: 4751/2022

In the matter between:

BONGA PAUL MASEKO

1st Applicant

JAPPY JACOBS MASANGANI

2nd Applicant

and

TEBOHO CLEMENT KHEPENG

1st Respondent

KHEPENG TRADING (PTY) LTD

2nd Respondent

In re:

TEBOHO CLEMENT KHEPENG

1st Applicant

KHEPENG TRADING (PTYD) LTD

2nd Applicant

and

-

BONGA PAUL MASEKO

1st Respondent

JAPPY JACOBS MASANGANI

2nd Respondent

HEARD ON: 15 MAY 2023

CORAM: BERRY AJ

DELIVERED ON: 30 JANUARY 2024

INTRODUCTION

[1] The 1st and 2nd Applicants in the main Application are the 1st and 2nd Respondents in this Application for leave to appeal an order handed down by this Court on 13 April 2023.

[2] The parties agreed that the appeal should be dealt with on Heads of Argument.

- [3] The Respondents brought an Application that the Applicants should be interdicted from spoliating their undisturbed possession of a business property and its content known as House Phola Restaurant, situated at 1707, Petsana Reitz.
- [4] This Court ordered that the Respondents must be placed in the undisturbed possession of the premises and its content on 13 April 2023.
- [5] The matter has a long history where several contracts were concluded between various parties which show that there was some confusion as to who is the actual owner of the property.

- [6] Several lease agreements were concluded between various parties, each replacing the previous agreement.
- [7] The 1st Applicant claims to be the rightful owner of the property and concluded a lease agreement with the 1st Respondent during March 2020 for a period of three years, commencing on 01 April 2020.
- [8] The 1st Applicant's attorney gave notice to cancel the agreement on 16 November 2020. The exact date when the Respondents had to vacate the premises are not clear, but the Respondents remained in occupation of the premises.
- [9] A Mr. JM Mokoena approached the 1st Respondent during April 2021, and indicated that he purchased the property from the 1st Applicant. The 1st Respondent then entered into a lease agreement with Mr Mokoena, representing Mokoepa Mokoena

Eiendomme (PTY) Ltd on 20 May 2021, for a period of six months with the first option of renewal.

[10] During May 2022, Lorraine and Precious Mahamotsa, who claimed to be the lawful owners of the property, as they inherited it from their mother approached the 1st Respondent.

[11] The Mahamotsa's provided the 1st Respondent with a Tittle Deed showing that their parents (Ale Petrus Mahamotsa and Anna Mahamotsa) were the owners of the property, copies of their Death Certificates and a copy of the Letter of Authority from the Master, wherein Anna Mokoena is appointed as Executrix of the Estate of Ale Petrus Mokoena on 20 February 2003. Mrs Anna Mokoena was the wife of the then late Ale Petrus Mokoena.

- [12] Mrs. Anna Mokoena passed away and Lorraine and Precious Mahamotsa were appointed as Executrix's of the Estate of Mrs Anna Mahamotsa on 10 November 2015.
- [13] The 1st Respondent, Mr Mokoena with whom the lease agreement was concluded during April 2021 and Lorraine and Precious Mahamotsa then met, and it was agreed that the lease agreement with Mr Mokoena should be cancelled.
- [14] Lorraine and Precious Mahamotsa advised the 1st Respondent that they never sold the property to the 1st Applicant.

- [15] The 1st Respondent then concluded a lease agreement with Lorraine and Precious Mahamotsa on 2 June 2022, which the 1st Respondent alleges are still valid.
- [16] The lease agreement was not provided, but the averment is supported by a Confirmatory Affidavit of Mrs. Precious Mahamotsa.
- [17] The 1st Respondent received a letter from an Attorney representing the 1st Applicant on 02 June 2022, wherein it advised the 1st Respondent that the lease agreement was cancelled and that the 1st Respondent had to vacate the premises by 08 June 2022.

- [18] In this letter the 1st Applicant's attorney advised that the 1st Respondent would bring a Spoliation Application against the 1st Respondent, should the 1st Respondent fail to vacate the premises by 08 June 2022.
- [19] This resulted in several letters written between the Attorneys representing the parties which resulted in an ultimatum that the Respondents must vacate the premises by 12 July 2022.
- [20] The 1st Respondent found the premises to be locked on 15 June 2022. He broke the lock and found that the restaurant's equipment was removed from the premises.

[21] It is undisputed that the 1st Applicant placed the locks on the business premises.

[22] This 1st Respondent then broke the lock and took possession of the property of the property he rented since 01 April 2020.

[23] The 1st Applicant's case has always been that he counter spoliated the unlawful possession of the property from the 1st Respondent and further that there were no proof that the 1st Respondent was in undisturbed possession of the property on 15 July 2022.

ANALYSIS

[24] The 1st Respondent acted reasonable when he accepted the evidence presented by Lorraine and Precious Mahamotsa that they were the duly appointed to function as Executrix's for the estate of their late mother and that the property was still registered in their parents' names.

[25] This resulted in the conclusion of the lease agreement between the 1st Respondent and Lorraine and Precious Mahamotsa, concluded on 2 June 2022.

[26] The letter from the 1st Applicant's attorney dated 09 July 2022 advising the 1st Respondent to remove the equipment from the restaurant before 13 July 2022 and the conduct of the 1st Applicant to remove the equipment from the premises on 15 July 2022, indicate that the 1st Respondent was in undisturbed occupation, thus possession, of the leased premises on 15 July 2022.

GROUND OF APPEAL

[27] The main grounds of appeal are that the Court *a quo* erred in finding that the 1st Respondent was not in undisturbed possession of the property on 15 July 2022. The date the 1st Applicant replaced the locks to the premises.

[28] The evidence show that the 1st Respondent was in undisturbed possession of the property and had no reason to doubt the

bona fides of Lorraine and Precious Mahamotsa, when he concluded the lease agreement on 2 June 2022.

[29] Section 17(1) of the Superior Court's Act 10 of 2013 provides that leave to appeal may only be granted if the judge concerned is of the opinion that:

1. The appeal would have a reasonable prospect of success or if there are some compelling reasons why leave should be granted.
2. The decision sought on appeal does not fall within the ambit of s16(2)(a) of the Act.
3. Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[30] In **Matoto v Free State Gambling and Liquor Authority and Others**¹ the Court held:

"There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word 'would' indicate a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

¹ (4629/2015) [2017] ZAFSHC 80 (8 June 2017)

[31] In **S v Smith**² the Court dealt with the question of what constitutes reasonable prospects of success as follows:

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial Court. To succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[32] In **MEC for Health, Eastern Cape v Mkhitha and Another**³ the Court held:

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Court Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[33] The 1st Respondent has shown that it was in undisturbed possession of the property on 15 July 2022.

[34] The Appeal does not have reasonable prospects of success.

[35] **ORDER**

The following order is made:

² 2012(1) SACR 567 (SCA) par [7]

³ (1221/2015[2015] ZASCA 176(25 November 2016)

1. The Application for leave to appeal is dismissed with costs.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

AP BERRY, AJ

For the Applicants:

Adv Mnguni

Instructed by

MC Radebe Attorneys

For the Respondents:

BONOLO Wesi Attorneys INC