

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2022/010418

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

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SIGNATURE

DATE 13 November 2023

In the matter between:

TRACY MATHUDING KGWETE

First Applicant

and

DINEO ENNICA MAKONKO

First Respondent

**ALL OCCUPANTS OF THE PROPERTY
SITUATED AT 2 DIONE STREET, 157 TSEPO
SECTION, TEMBISA**

Second Respondent

**THE CITY OF EKURHULENI
METROPOLITAN MUNICIPALITY**

Third Respondent

JUDGMENT

MAHON AJ:

- [1] This is an application for leave to appeal against my judgment of 8 August 2023 in which I granted an eviction order. In this judgment, I will refer to the various parties as I did in my judgment in the eviction application.
- [2] The grounds of appeal relied upon in the application for leave to appeal are somewhat difficult to understand but, during argument, counsel for the first and second respondents indicated that the basis for the application, broadly speaking, was that:
- [2.1] the applicant's ownership of the property concerned and, thus, her *locus standi*, had not been established; and
- [2.2] the history of the changes in ownership of the property warranted a referral of the matter to trial to consider whether any fraud had taken place; and
- [2.3] I therefore erred by failing to dismiss the application or refer the matter to trial.
- [3] The application is made in terms of section 17(1)(a) of the Superior Courts Act 10 of 2013 ("the Act"), which provides that leave to appeal may be given where the appeal would have a reasonable prospect of success or where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
- [4] The basis of the attack on the applicant's *locus standi* is that the deed of transfer which was relied upon by the applicant did not purport to transfer

rights of ownership but was confined to rights of leasehold. The first observation to be made in this regard is that this argument was not raised in the first and second respondents' answering affidavit or in argument during the hearing of the eviction application. Be that as it may, I do not believe that there is any merit in this argument for the following reasons:

- [4.1] firstly, if the applicant was merely the holder of leasehold rights over the property, those rights would nonetheless include the right to seek the eviction of any unlawful occupiers of the property;
- [4.2] secondly, on the first and second respondents' own version, the property was transferred from Rephos Makonko to the deceased, pursuant to an agreement which was concluded between Johannes Makonko and the deceased. In my judgment in the eviction application, I explained why such an agreement could not be relied upon by the second and third respondents as a defence to the eviction but I nonetheless point out that even if this version is accepted, the fact that the transfer may have been effected pursuant to an agreement with which the deceased did not comply, is not something which would affect the validity of the transfer. At best, a claim for re-transfer of the property might have arisen but until this had happened, the applicant remained the registered owner of the property.
- [4.3] thirdly, the Windeed search report attached to the founding affidavit reflects that the applicant is the owner of the property. Save for a

bald denial, its contents were not placed in dispute by the first or second respondent in their answering affidavit. Although the best evidence of the ownership of immovable property is the title deed to it,¹ the best evidence rule applies only when the content of a document is directly in issue.² The Windeed search report constitutes *prima facie* proof of ownership and no facts were put up by the first or second respondents which in any way suggested that its content was not an accurate reflection of the records of the Deeds Office.

[5] As for the property's transfer history, there was no admissible evidence of any fraudulent transfer. The only person who could have confirmed that the property was transferred to the deceased without her consent was Ms Rephos Makonko. As I indicated in my judgment in the eviction application, no affidavit by Ms Makonko was provided, nor was there any reason proffered as to why such an affidavit could not be obtained. It would not be in the interests of justice to refuse the eviction merely for purposes of investigating the transfer history of the property where the inference of fraud which is sought to be drawn, is based on nothing more than speculation and is unsupported by any direct evidence.

[6] Section 17 of the Act provides as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

¹ Gemeenskapsontwikkelingsraad v Williams (1) 1977 (2) SA 692 (W) at 696 H

² LH Hoffman et al: The South African Law of Evidence (4th Ed) at p392

- (a) (i) *the appeal would have a reasonable prospect of success;*
or
- (ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration”.*

[7] I am mindful of the judgments considering whether the use of the word “would” as opposed to “could” in section 17(1)(a) of the Act means that the threshold for granting leave to appeal has been raised. On any construction, however, the enquiry requires a dispassionate consideration of whether a court of appeal could reasonably arrive at a conclusion different to that of the court *a quo*.

[8] I do not believe that the first or second respondents have met that threshold and no compelling reasons have been advanced as to why the appeal should succeed.

[9] In the result, the application for leave to appeal must fail.

[10] I accordingly make the following order:

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

D MAHON
Acting Judge of the High Court
Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 13 November 2023.

APPEARANCES:

For the Applicant: Ms M Laurent

Instructed by: SSLR Inc

For the First and

Second Respondents: Adv R Van Dyk

Instructed by: Zamisa Shisinga Attorneys

For the Third Respondent: No appearance

Date of hearing: 9 November 2023

Date of judgment: 13 November 2023