IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

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Case no: A2022-041835

In the matter between:

NTOMBELIZWE SOTOMELA Appellant

And

HARMONY GOLD COMPANY LTD
(REG NO. 1950/038232/06) First Respondent

MERAFONG CITY LOCAL MUNICIPALITY Second Respondent

JUDGMENT

<u>DELIVERED:</u> This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 12h00 on 7 February 2024.

GOODMAN, AJ (DIPPENAAR J, CONCURRING):

INTRODUCTION

1. On 5 August 2022, the Merafong Magistrates Court ("the court *a quo*") granted an application brought by the first respondent, Harmony Gold, in terms of the Prevention of Illegal Eviction and Unlawful Occupation Act, 1998 ("PIE") to evict the appellant, Mrs Sotomela, from the property situated at Block 7, Room 9, Khayalethu Residence, Carleltonville ("the property"). The second respondent, the Municipality, was directed, by 30 September 2022, to provide land within the local informal settlement to which the appellant and her household could move, and she and her household were afforded until 15 December 2022 to vacate the property, failing which the Sheriff was authorized to execute her eviction.

2. The appellant noted an appeal on 30 August 2022.[1] The notice of appeal sets of wide-ranging grounds of appeal. In written and oral argument, these crystallised into a complaint that the court *a quo* had placed undue emphasis on the respondent's ownership of the property, on the one hand, and had paid insufficient regard to the appellant's personal circumstances, on the other. That, it was submitted, resulted in the court *a quo* granting an eviction where it was not just and equitable for it to do so. The appropriateness of the grant of an eviction order was the central issue canvassed in the parties' respective heads of argument.

3. Two court days before the hearing of the matter, supplementary written submissions were filed on behalf of the appellant, which addressed three additional points:

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[1] The appellant initially filed an incomplete record, which triggered an objection by the respondent that the appeal had lapsed. On 4 May 2023, this Court, per Windell J and Senyatsi J, condoned the appellant's non-compliance with the Rules and gave directions for the further filing of the record. The lapsing point has been determined.

3.1. First, that the court *a quo* had erred in accepting that the respondent had authorized the eviction application, when no resolution had been put up in support of that claim;

3.2. Second, that the court *a quo* had erred in granting an eviction application when the respondent had failed to establish, on the papers, that (*a*) it in fact owned the property at issue, and (*b*) it had validly cancelled the lease agreement in terms of which the appellant occupied the property at the time the eviction application was launched. It meant, according to the appellant, that the respondent had not established its entitlement to an eviction order under PIE; and

3.3. Third, the eviction application was based on hearsay evidence which the court *a quo* should not have had regard to.

4. The respondent objected that the additional points were impermissibly raised and should not be entertained by the Court.

5. To avoid a piecemeal hearing of the matter, we directed the parties to address argument on the objection, and on the merits of each point. We deal with the objection first.

THE OBJECTION TO THE ADDITIONAL GROUNDS

6. The nub of the respondent's objection was that the additional grounds had not been raised in the notice of appeal, and consequently the court *a quo* was deprived of the opportunity to formulate its reasons in light thereof, and the respondent and this Court were not properly informed of the case to be made.[2] By raising the supplementary submissions, the appellant had also sought to place in issue matters that had not been canvassed before the court *a quo*, and had rendered the preparatory steps (for example, the preparation of a joint practice note) moot and unhelpful.

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[2] See in this regard Jones & Buckle Civil Practice of the Magistrates' Courts in South Africa (Juta & Co, 10ed, 2023), RS29 p 51-8.

7. Mr Mbana for the appellant submitted, in response, that the additional grounds concerned points of law arising from the pleadings. Referring to *Alexkor v Richtersveld,*[3] he pointed out that a legal concession can be withdrawn, and an abandoned legal contention revived, on appeal. There was, he submitted, consequently no impediment to the appellant raising the additional points at this stage and they ought to be entertained.[4]

8. It is so that new or abandoned points of law can be raised on appeal – but only if "*the contention is covered by the pleadings and the evidence and if its consideration involve no unfairness"* to the counterparty.[5] If the issue raised in fact seeks to re-open a question of fact or otherwise prejudices the respondent, it cannot permissibly be traversed in the appeal.

9. In the present case:

    9.1. The issue of authority was raised in the papers before the court *a quo*, as well as in the appellant's notice of appeal. It is properly an issue in the appeal before this Court.

    9.2. The adequacy of the pleadings and evidence before the court *a quo*, and the consequent competence of its order, is a legal issue that is permissibly raised on appeal. But it must be determined on the pleadings and evidence as they stand. We deal with the implications of this distinction below.

10. The hearsay objection stands on different footing. Objections to the admissibility of evidence must be raised timeously, to enable the parties to know what evidence serves before the court and to advance their case accordingly.[6] If an objection to the admission of evidence were to be raised and upheld for the first time on appeal, that would change the evidence that serves

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[3] *Alexkor Ltd and Another v the Richtersveld Community and Others* 2004 (5) SA 460 (CC) paras 43-44.

[4] See Erasmus Superior Courts Practice (Juta and Co, 3ed, 2023) at D-667, citing *Van Rensburg v Van Rensburg* 1963 (1) SA 505 (A) at 510A–B and *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA) at 330C–F, among others.

[5] *Alexcor* para 43, citing *Cole v Government of the Union of South Africa* 1910 AD 263 at 272.

[6] *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA) para 24.

before court at a time when the respondent cannot remedy its position – to its obvious prejudice. By contrast, the appellant was apprised of the evidence to be relied upon against her at a time when she was already legally represented, and she has had the opportunity to refute it. She suffers no disadvantage if the Court declines to engage with her hearsay objection at this stage.[7]

11. We consequently engage with the first two additional points raised by the appellant, but uphold the respondent's objection in relation to the third.

THE MERITS OF THE APPEAL

Authority

12. The appellant's first ground of appeal related to the issue of authority. Her submission was that:

    12.1. The appellant had placed in issue whether the eviction application had been properly authorized by the appellant by stating, in paragraphs 69 to 70 of her founding affidavit,

    > "*I ask that my affidavit be drawn to the attention of the board of directors of Harmony Gold, to ensure that my situation is properly understood, and this matter is not just dealt with as a run of the mill eviction or collections matter. I am confident that they will have regard to my situation if afforded the chance to do so.*
    >
    > *Until that is done, I dispute that Katleho Maeko [the respondent's deponent] has authority to proceed with this matter."*

    12.2. The respondent properly understood this to be an authority challenge because, in answer, Mr Maeko purported to put up a resolution authorizing him to depose to the answering affidavit.

    12.3. But what was attached was not a resolution. It was a delegation of authority that permitted Mr Maeko to negotiate and sign "*legal action and all interdicts and matters requiring relief*" as well as "*affidavits on*

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[7] See, by analogy, *Competition Commission of South Africa v Senwes Ltd* 2012 (7) BCLR 667 (CC) para 51 finding that a party faced with evidence that had been objected to, but in respect of which no ruling was made, had an opportunity to refute the evidence against it and was consequently not prejudiced.

behalf of the group". It pre-dated the respondent's acquisition of the property in question. On either basis, it failed to confirm Mr Maeko's authority to pursue the present application on behalf of the respondent.

12.4. The court erroneously found that the authority point had not been raised in the affidavits and had been dealt with for the first time in heads. It consequently refused to deal with it, on an inappropriate basis.

13. The respondent's response was two-fold:

13.1. First, the court *a quo* was correct that the authority challenge had not been properly raised. That was both because an objection to authority had to be taken through the mechanism provided by Magistrates' Court Rule 52(2), and because the objection raised in the founding affidavit was not, on its terms, an authority challenge. Rather, it was a complaint that an eviction should not be permitted until the respondent's board had considered her personal circumstances.

13.2. Second and in any event, the delegation permits Mr Maeko to bring proceedings and to sign affidavits in respect thereof. It remains valid until revoked or replaced by the respondent. It consequently shows that Mr Maeko had the requisite authority to institute the proceedings.

14. The Supreme Court of Appeal has repeatedly confirmed that, under the Rules as they currently stand, an application issued by an attorney is presumed, in the absence of a successful challenge, to be that of the applicant. There is no need for the deponent, or anyone else, to be authorized to bring the application, or to confirm that he is. A challenge to the authority to institute proceedings can only be brought in terms of the applicable Rule, and cannot be raised in the substantive affidavits of an opposed application:[8]

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[8] *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA); [2004] 2 All SA 609 (SCA) para 19; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA); [2005] 2 All SA 108 (SCA) paras 14-16, both relying on *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705E-H. See also the analysis in *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) paras 14-23.

> "*[N]ow that the new Rule 7(1)*[9] *remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides."*[10]

15. In the present case, the appellant did not raise an authority challenge in terms of Rule 52, and she was not permitted to mount one based solely on the wording of the affidavits. The court *a quo* was consequently correct to reject the authority complaint, and it must similarly fail on appeal.

The competence of the respondent's case

16. The appellant's next ground of appeal was that the respondent's founding papers in the eviction application did not make out a proper case for the grant of an eviction order. That, it was submitted, was because the respondent had failed to prove either that it was the owner of the property, or that the lease in terms of which the appellant occupied had been validly cancelled, both of which are jurisdictional prerequisites to the grant of relief under PIE.

17. As far ownership is concerned:

    17.1. Mr Mbana recorded that the respondent had put up a sale agreement and a SENS announcement confirming that the respondent had acquired certain assets from AngloGold Ashanti Ltd, but that those documents did not identify the property as among those assets. The respondent had consequently failed to establish its ownership of the property and thus its entitlement to evict.

    17.2. Mr van der Merwe submitted, to the contrary, that the respondent had expressly pleaded that it is the registered owner of the property, and that the property "*forms part of a comprehensive portfolio of assets which the Applicant acquired from AngloGold Ashanti Limited*", in terms

[9] Rule 52 is the equivalent Magistrates' Court Rule.

[10] *Unlawful Occupiers, School Site* para 16.

of the attached sale agreement. The appellant had pleaded, in response, that she did not have personal knowledge of the respondent's ownership but that she did not dispute it. The remainder of her affidavit, as well as the supplementary affidavit and heads of argument filed on her behalf in the court *a quo* and in this Court, were all premised on an acceptance of the respondent's ownership of the property in question. Having conceded that factual issue, she could not now seek to place ownership in issue.

18. As set out above, the appellant is entitled, on appeal, to take issue with whether the respondent (applicant *a quo*) made out a competent case for the relief it sought. But she must do so based on the evidence that served before the court *a quo*. The appellant chose not to take issue with the respondent's positive claim to ownership of the property – with the result that such issue was not in dispute. Having done so, she cannot now impugn, on appeal, the adequacy of evidence put up by the respondent to establish its claim to ownership. The respondent's allegations were accepted by her, and stand as sufficient evidence on that score. They are dispositive of the issue of ownership.

19. In relation to unlawful occupation:

19.1. The appellant points out that to qualify as an unlawful occupier liable to eviction, a person must occupy the property in question without express or tacit consent. In the appellant's case, she initially occupied the property in terms of a lease agreement, which the respondent pleaded had lapsed by the effluxion of time. Elsewhere, the respondent alleged that the appellant's right of occupation had been cancelled for breach – but without providing any evidence of such cancellation. That was significant, Mr Mbana submitted, because the respondent's conduct (in permitting the appellant to remain in occupation so long after the lease period), and that of its predecessor in title, AngloGold (both in bringing her to Johannesburg for work and in undertaking to re-employ her if positions became available) suggested that the appellant had tacit

consent to remain in occupation. As in *Tebeka*,[11] the respondent had to put the appellant on notice, and then cancel, in order to bring such tacit consent to an end.

19.2. The respondent sought to distinguish *Tebeka*. The occupier in that case occupied the property in terms of an agreement that did not contain a forfeiture clause; that is why notice of cancellation and proof of cancellation had to be furnished. In this case, the appellant's lease agreement contained a termination date of 15 May 2018. She was also served with a notice to vacate the property by no later than 15 May 2018. In those circumstances, no further notice of cancellation was necessary – nor was any consent to occupy apparent from the papers.

20. We agree that there was sufficient information, on the papers before the court *a quo*, for it to have been satisfied that the appellant was in unlawful occupation of the property. The respondent had put up the prevailing lease agreement and the notice to vacate, and had pleaded that the lease had terminated by effluxion of time, and that the appellant was in breach of the notice to vacate. Because those documents specified a termination date for the lease (in contrast to that in *Tebeka*), there was no need for any further notice of cancellation to be served.[12] The appellant, in response, did not plead either that the respondent had failed to terminate the lease agreement with her or that it had tacitly consented to her continued occupation of the property. On the contrary, she stated expressly that she was in unlawful occupation. That entails both a factual and a legal concession, which cannot be withdrawn on appeal. It meant that the issue of unlawful occupation was never in dispute.

21. In the circumstances, the court *a quo* cannot be faulted for finding that either of these jurisdictional facts to eviction were present. Although courts have a duty to be proactive in protecting occupiers' rights in eviction proceedings,[13] they are not required – or even entitled – to go behind the pleadings of a represented

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[11] *Transnet Ltd v Tebeka and Others* (35/12) [2012] ZASCA 197 (30 November 2012) para 22.

[12] See *Da Silva v Razak* 1953 (1) SA 146 (C) at 149B-E, citing *Bok Street Bottle Store v Kahn* 1948 (1) SA 1068 (W) at 1072.

[13] See, for example, *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) para 39, 66.

litigant.[14] These prerequisites to eviction were dealt with in the founding papers, and were never placed in issue by the appellant in response. The court *a quo* was entitled to accept that they were common cause. This ground of appeal must thus also fail.

Just and equitable eviction

22. Finally, the appellant submitted that the order granted by the court *a quo* was not equitable because it did not pay sufficient heed to the personal circumstances of the appellant – including, in particular, her employment history on the mine and her continued hope and expectation of being re-employed – and the lack of alternative accommodation provided to her.

23. In argument, Mr Mbana particularly emphasized that it was apparent from the Municipality's report that the only alternative accommodation available was space in an informal settlement with access to water and electricity. That, he submitted, was self-evidently inadequate and the court *a quo* ought to have required further interrogation of the Municipality's available resources and sought to ensure that appropriate alternative accommodation would be made available to the appellant, before granting any eviction order.

24. Once PIE's jurisdictional pre-requisites to eviction have been established, the court exercises a broad discretion in determining whether to grant an eviction order and, if so, on what terms.[15] An appeal court can only interfere with the exercise of such discretion if it appears that the court operated under a misapprehension as to the proper facts or law.

25. In this case, the court *a quo* set out and considered the evidence put up by the appellant concerning her and her family's personal circumstances.[16] It also directed the filing of a report by the Municipality and duly considered its

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[14] See *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) paras 29-30, holding that the ordinary approach to evidence and onus pertains in eviction proceedings.

[15] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) ([2002] 4 All SA 384) para 18; *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension* 5 - 2014 (3) SA 23 (SCA) para 20.

[16] See judgment, paras 59-86.

contents.[17] It found, on balance, that the appellant had not established that she faced the risk of homelessness, if she were to be evicted from the property. We cannot fault that finding. Despite being called upon to do so by the respondent, the appellant did not disclose her or her household's monthly income, nor provide any evidence as to the cost and/or availability of alternative accommodation. She further made bald and unsubstantiated allegations pertaining to various issues, including that certain of her family members were "*disabled*", without providing any particularity thereof. She indicated in her papers that she intended to supplement the evidence of her personal circumstances – but never in fact did so. Indeed, the claim that she will be rendered homeless if evicted is made for the first time in heads of argument – rather than in either the founding or supplementary founding affidavits.

26. The Municipality's and the Court's duty to interrogate the availability of alternative accommodation is triggered only where a proposed eviction places the respondent at risk of homelessness.[18] Since the appellant did not put up sufficient evidence to establish this risk, the court *a quo* was not obliged to call for more information from the Municipality, nor to engage with the adequacy of the alternative accommodation identified by it. Moreover, the invitation extended to the appellant to engage with the Municipality regarding her personal circumstances, was declined.

27. In the circumstances, there is no basis for interfering with the discretion exercised by the court *a quo*, nor with the order that it gave.

COSTS

28. Both counsel accepted that costs should follow the result.

29. Mr van der Merwe sought a punitive costs award in the respondent's favour, on the basis that the appeal and/or the raising of the additional grounds was an

[17] See judgment, paras 96-103.

[18] See, for example, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*) para 96

abuse of process. It cannot be concluded that either was improperly pursued, and we are not persuaded that a punitive costs award is warranted.

ORDER

30. In the result, the following order is granted:

The appeal is dismissed, with costs.

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I GOODMAN, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION JOHANNESBURG

APPEARANCES

DATE OF HEARING :	29 January 2024
DATE OF JUDGMENT :	7 February 2024
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