[1] **IN THE HIGH COURT OF SOUTH AFRICA**

[2] **NORTHWEST DIVISION, MAHIKENG**

[3]

[4]

[5] **CASE NO: CIV APP MG 07/23**

Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

DATE **SIGNATURE**

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[14] **In the application between:**

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[17] **MMAKOENA MALVEN PHAHO** **APPELLANT**

[18]

[19] **and**

[20]

[21] **MATOME GIVEN SUPE** **FIRST RESPONDENT**

[22] **ALL UNKNOWN ILLEGAL OCCUPANTS** **SECOND RESPONDENT**

[23] **TSHWANE LOCAL MUNICIPALITY** **THIRD RESPONDENT**

[24]

[25] **Neutral Citation:** *Mmakoena Malven Phaho v Matome Given Supe* (Civ App MAG 07/23) [2023] ZANWHC (22 January 2024)

[26]

[27] **Coram:** MFENYANA J and MORGAN AJ

[28] **Heard:** 08 September 2023

[29] **Delivered:** 22 January 2024

[30] **Summary:** Civil appeal from District Court to the High Court in terms of Rule 51 of the Magistrates' Court Rules –deceased estate – immovable property dispute - eviction application- application removed from the roll with costs twice- issuance of erroneous Letter of Authority by the Master of the High Court- orders granted by Magistrate not competent- orders set aside and substituted with an order dismissing application with costs.

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[33] **ORDER**

[34]

[35] **On appeal from**: Madibeng District Court, Ga-Rankuwa (Magistrate JR Jantjies sitting as a court of first instance):

[36]

1. The appeal is upheld.
2. The orders of the Magistrate removing the matter from the roll in both the first and second judgments respectively, are set aside.
3. The order granted in the first judgment is substituted with the following order:

"The application is dismissed with costs."

4. There will be no order as to costs in the appeal before this Court.

[37]

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[39] This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time of hand-down are deemed to be 10:00 am on 22 January 2024.

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JUDGMENT

MORGAN AJ:

INTRODUCTION

[1] This is an appeal against the whole judgment and order from the Madibeng District Court, per Magistrate Jantjies ('the Magistrate') delivered on 30 January 2023, in which the appellant instituted an eviction application a quo in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1] ("PIE Act") against the first and second respondents (the respondents).

[2] This matter arose from the appellant seeking to evict the respondents from an immovable property she claims she has rights over, stemming from a Letter of Authority issued to her by the Master of the High Court, Limpopo.

[3] The application was opposed by the respondents who raised points *in limine* at the hearing before the Magistrate on 14 December 2020. They argued that, first, the Letter of Authority that was issued by the Master of the High Court, Limpopo was

1 No 19 of 1998.

flawed and secondly, that the appellant lacked authority to bring the application; and that the immovable property referred to in the Letter of Authority is not the property from which the appellant was seeking to evict the respondents.

[4] In the court a quo, the Magistrate upheld the respondents' points *in limine* and held that the Letter of Authority issued by the Master of the High Court, Limpopo was erroneous and not competent (invalid), as the immovable property in dispute fell under the jurisdiction of the Master of the High Court, Gauteng and not the Master of the High Court, Limpopo. The court a quo further held that the immovable property under dispute was incorrectly referred to as the Letter of Authority issued by the Master of the High Court, Limpopo referenced the property in dispute to have been situated in Soshanguve, whereas it was situated in Ga-Rankuwa.

[5] In those proceedings, the appellant supplemented her founding papers with the amended Letters of Authority and documentation in an attempt to prove that the property in dispute had subsequently been given to her by the owner of the land.

[6] This resulted in an order in the following terms:

1. *The point in limine is upheld;*
2. *The application for eviction is removed from the roll;*
3. *The applicant [appellant] is ordered to pay costs on party and party scale.* (first judgment)

[7] After the above order, specifically removing the matter from the roll, the appellant supplemented her founding papers with additional information and re-enrolled the matter. The matter came before the same presiding officer in December 2022, whereafter, a judgment was delivered on 20 January 2022. The order granted in the second judgment states that:

1. *The application is removed from the roll;*
2. *The application may not be enrolled unless the issue pertaining to the*

Letter of Authority is addressed or if the initial judgment is successfully reviewed or appealed.

3. *The applicant [appellant] is ordered to pay the costs on party and party scale.*

(second judgment)

[8] Pursuant to the order in the second judgment, the appellant brings an appeal to this Court in terms of Rule 51 of the Magistrates' Court Rules, seeking to appeal the whole judgment and order of the second judgment. The appeal was unopposed before us.

[9] On the date of the hearing of the appeal, the appellant's representative requested that this Court consider and decide the appeal on the papers as it was the only party in attendance, notwithstanding the fact that the matter was properly set down and enrolled for hearing before us. Having considered that the matter was unopposed and that no prejudice would occur to any of the parties, we granted the request.

[42]

[43] **GROUNDS OF APPEAL**

[44]

[10] Before this Court, nine grounds of appeal were advanced. The grounds raised are that the Magistrate:

[45] a. erred in failing to consider the application for his recusal and / or recusing himself *mero motu*;

[46] b. erred in removing the matter from the roll;

[47] c. erred in ordering that the 'application may not be enrolled unless the issue pertaining to the Letter of Authority is addressed or if the initial judgment is successfully review to appealed;

[48] d. erred in raising *mero motu* the doctrine of *functus officio*;

[49] e. erred in finding that the doctrine of *functus officio* is applicable when in fact and in law same was not applicable;

[50] f. erred in finding that the appellant has no *locus standi* in the eviction application;

[51] g. misdirected himself by probing if the Master of the High Court Limpopo had jurisdiction to issue Letter of Authority to the appellant and further by finding that the same Master had no jurisdiction to issue the Letter of Authority to her;

[52] h. erred in failing to consider other evidence presented relating to the locus standi of the appellant which evidence points to the ownership of the immovable property in dispute and / or the owner of the immovable property; and

[53] i. erred in failing to consider the eviction application as a whole and as supplemented unopposed.

[54]

[11] While the notice of appeal sets out numerous grounds of appeal, as set out above, the issues that stand to be determined before us are quite narrow, and can be summed up as follows: whether the Magistrate erred in removing the eviction application from the roll; whether the court a quo became *functus officio*; whether the Magistrate erred in finding that the appellant had no locus standi; and whether the eviction application ought to have been granted.

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[12] I will now deal with each of the grounds of appeal raised by the appellant.

[57]

[58] ***The Magistrate erred in failing to consider the application for his recusal and / or recusing himself mero motu.***

[13] In considering the appellant's submission regarding the Magistrate's failure to consider the application for recusal, it is imperative to refer to the principles outlined in the landmark case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.[2] In this case, the Constitutional Court held that the test for recusal is one of reasonable apprehension of bias. The question is not whether the judicial officer is biased but whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judicial officer has

2*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059.

not or will not bring an impartial mind to bear on the adjudication of the case.[3] In the present matter, the Magistrate's decision not to recuse himself must be scrutinised against this backdrop.

[14] The appellant submits that an application for recusal was made and argued before the Magistrate, who undertook to consider it. However, the application for recusal, it is argued, was not considered at all. It is further submitted that had the Magistrate considered the application for his recusal, he would have recused himself since he held the view that he was *functus officio* in a circumstance where the main application for eviction was removed from the roll and subsequently enrolled after the appellant had supplemented the evidence. In this regard, the appellant referred to a decision of the Kwa Zulu Natal Division in *S v Zuma*[4] to support his contention.

[15] The authority referred to in respect of this ground is, in my view, not applicable and is distinguishable to the facts of the present matter. Moreso, this ground raised was absent of any finding on credibility by the presiding officer. There was therefore no reason for the Magistrate to recuse himself.

[59] ***The grounds of appeal relating to the Magistrate being functus officio and removal of the matter from the roll.***

[16] In relation to the Magistrate's decision to remove the matter from the roll, it is necessary to invoke the principles governing the doctrine of *functus officio*. The doctrine, as explained in the case of *Firestone South Africa (Pty) Ltd v Genticuro AG*, establishes that once a court has duly pronounced a final judgment or order, it cannot thereafter correct, alter or supplement such judgment or order.[5]

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3 Ibid at paras 26-39.

4 (CCD 30/2018P) [2023] ZAKZPHC 10; 2023 (1) SACR 621(KZP) (30 January 2023) at para 44.

5 *Firestone South Africa (Pty) Ltd v Genticuro* AG 1977 (4) SA 298 (A).

[17] However, it is essential to distinguish between a court's authority to revisit its final decisions on substantive matters and its procedural discretion to manage its roll. In the current case, the Magistrate's act of removing the matter from the roll in the second judgment, while declaring to be *functus officio* on the substantive legal issues, does not inherently conflict but requires careful examination of the procedural context within which this decision was made.

[18] The appellant contends that the Magistrate's finding that he had become *functus officio* is at odds with his order that the application be removed from the roll. This is not correct. As indicated above, the Magistrate's order removing the application was made after he had pronounced on the application upholding the point in limine. There can thus be no contradiction in a later finding that he had become *functus officio*. He further ordered that the application may not be enrolled unless the issue pertaining to the Letter of Authority is addressed or if the initial judgment is successfully reviewed or appealed.

[19] The appellant's submission is to me illogical and not clear. The appellant seems to conflate the court's substantive ruling with its procedural directive. A court may become *functus officio* with respect to the substantive issues in a case, yet still retain the administrative capacity to issue directives regarding the procedural management of that case. The removal of a matter from the roll does not, in itself, indicate that the court is reconsidering its final decision on the substantive issues; rather, it is an acknowledgement that, for whatever reason—be it the need for clarity on the Letter of Authority or the possibility of review or appeal—the case is not currently in a state where it can be progressed.

[20] In assessing the appellant's submission, it is important to distinguish between the concept of a court becoming *functus officio* and the administrative act of removing a matter from the roll. The principle of *functus officio* implies that once a court has fulfilled its duty by giving a final decision on a matter, it has no further authority to re-examine that decision. This is a doctrine rooted in finality and certainty of legal

proceedings; once a judgment has been rendered, the issues therein are conclusively resolved and cannot be re-litigated in the same forum.

[21] The Magistrate's decision to remove the matter from the roll in the second judgment should be viewed in this light. The Magistrate, in declaring himself *functus officio*, did not preclude the appellant from re-enrolling the application before another presiding officer — he merely affirmed that his role in adjudicating the substantive matters before him had reached its terminus.

[22] Accordingly, there is no inherent contradiction in the Magistrate's actions. The contention that the court has become *functus officio* relates solely to its authority to alter the substantive legal findings of the case, not to its ongoing role in managing the procedural aspects of the litigation. The directive to remove the case from the roll is therefore not at odds with the principle of *functus officio*, but it is rather a logical consequence of the situation presented. The Magistrate's actions are consistent with the principle of *functus officio* and do not exhibit the purported contradiction.

[23] The appellant submits that the record of proceedings shows that both legal representatives were in agreement that the Court had no authority to entertain the second re-enrolled application as they were of the view that the Magistrate had become *functus officio*. The submission cannot be correct in law as it is not for the parties to determine whether a court has become *functus officio*. This is a matter which only the court can decide or determine objectively depending on the facts of each case.[6] Further, nowhere in the record of the proceedings is it indicative of the fact that the legal representatives agreed on that score.

[24] In any event, even if they agreed, their views or agreement is not binding to the Court. This is because courts are not bound by the parties' legal concessions,

6*De Wet and Another v Khammissa and Others* [2021] ZASCA 70 and *Labonte 5 (Pty) Ltd v The Minister of the Department of Mineral Resources and Energy and Others* (31458/2020) [2022] ZAGPPHC 612.

especially if such a concession is wrong in law.[7] The court must make its own determination based on the facts before it. There is, therefore, no merit to this ground.

[60] ***Whether the Magistrate erred in finding that the appellant had no locus standi.***

[61]

[25] The appellant submits that the first judgment (14 December 2020), which upheld the points *in limine* raised, on the issue of *locus standi*, did not decide the eviction application on the merits and/or have the effect of dismissing the eviction application. Further, it is asserted that the first judgment did not dismiss the eviction application but merely removed it from the roll.

[26] Regarding the appellant's locus standi, it is pertinent to refer to the constitutional principles enshrined in the case of *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*, which reiterate that standing under the new constitutional law dispensation is not unduly restrictive. In assessing whether the appellant has *locus standi* in the eviction application, it is crucial to consider whether her interest in the matter is direct and substantial, as opposed to being abstract or academic. The object of the standing requirement is that courts should not be required to deal with abstract or hypothetical issues and should devote its scarce resources to issues that are properly before it. This inquiry necessitates a detailed examination of the amended Letters of Authority provided by the appellant.

[27] The appellant submits that the second judgment shows that the application was duly supplemented, resulting in the Letter of Authority being corrected the court a quo ought to have found that the appellant proved locus standi and that the immovable property had been awarded to her by the people or entities in charge of the land. On

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7*Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 16 and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) at para 67.

this score, I find that the appellant had the requisite locus standi to bring the eviction application as the Letters of Authority were issued in her name, however, she failed to make out a proper case for the relief sought in the eviction application.

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[63] ***The Magistrate misdirected himself by finding that the same Master had no jurisdiction to issue the Letter of Authority to her; and erred in failing to consider other evidence presented.***

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[28] The appellant submits that the Magistrate acted ultra vires in determining the question whether or not the Master of the High Court, Limpopo had jurisdiction because the issue was not before him. She further submits that even if the Letter of Authority was erroneously issued by the Master of the High Court, Limpopo instead of the Master of the High Court, Gauteng the Magistrate was duty bound to accept it by virtue of the *Oudekraal*[8] principle which states that 'until the Administrator's decision is set aside by the court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked', particularly in view of the fact that the authenticity or the admissibility of the Letter of Authority was never placed in dispute. The appellant therefore contends that for this reason the court a quo ought to have accepted the Letter of Authority as presented.

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[29] It is clear that the appellant's contention is premised on a misunderstanding and misapplication of the principle in *Oudekraal*. *Oudekraal* is no authority that a court must overlook an irregularity. What it connotes is that the decision is binding inter partes. A court is not bound by an unlawful decision. Thus, it cannot turn a blind eye on a glaring irregularity and in itself issue an unlawful and unenforceable order.

[66]

[30] While the appellant contends that the court lacks jurisdiction to scrutinize or question the validity of the Letter of Authority, I dissent from this position. My perspective is grounded in the principle that should the court choose to overlook and enforce a Letter of Authority that is potentially fraudulent or contains errors, it would,

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8 Ibid.

in effect, be endorsing an illegality. It is a well-established tenet within our legal system that courts cannot sanction or support any form of illegal act. Therefore, it is both necessary and appropriate for the court to examine the legality of the Letter of Authority in question and not rubber stamp a clearly unlawful decision so as to uphold the integrity of the legal process and ensure that the administration of justice is carried out without condoning unlawful activities.

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[68] ***The Magistrate erred in failing to consider the eviction application as a whole and as supplemented unopposed.***

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[31] In this regard, the appellant submits that the Magistrate ought to have considered the eviction application in its entirety. There is no merit to this submission. In granting the first order, the Magistrate pronounced on the points *in limine*, and removed the application from the roll. In the second judgment, which forms the basis of this appeal, the Magistrate ruled that he was *functus officio* and thus declined to pronounce further on the matter. He further ordered that the matter may not be enrolled, until the matter had been taken on appeal or review. Having made that pronouncement, it was not open to the Magistrate to entertain the application any further. We have already found that once the Magistrate had considered that the points *in limine* had merit, he ought to have dismissed the application, yet he dismissed the application, and later directed the appellant to file a supplementary affidavit. It was clear at that stage, that the presiding Magistrate considered the matter to be one which warranted further probing.

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[71] **CONCLUSION**

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[32] From the above passages relating to the grounds of appeal, it is abundantly clear that most of the appellant's grounds of appeal have been poorly articulated. The other grounds individually and collectively are in itself are so weak as not warrant a full discussion by this Court.

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[33] In conclusion, the Magistrate erred in removing the application from the roll notwithstanding the finding and upholding of the points *in limine* raised by the respondents. Considering the acceptance of the points *in limine,* the Magistrate ought to have dismissed the application in the first judgment for reasons in addition to the upheld points *in limine*, that the appellant had failed to make out a proper case for the relief sought.

[75]

[34] For all the reasons stated, I am of the view that the Magistrate erred and misdirected himself by removing the matter from the roll in the first and second judgments, thus giving an incompetent order, where the facts and circumstances of the matter before him did not justify so. Had he dismissed it in the first instance then the re-enrolment of the application (even on supplemented papers) by the appellant would not have been possible.

[76]

[77] **ORDER**

[78]

In the premise, the following order is made:

1. The appeal is upheld.
2. The orders of the Magistrate removing the matter from the roll in both the first and second judgments respectively, are set aside.
3. The order granted in the first judgment is substituted with the following order:

   "The application is dismissed with costs."
4. There will be no order as to costs in the appeal before this Court.

_____

LM MORGAN

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree and it is so ordered.

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S MFENYANA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

PARTIES REPRESENTATIVES

For the Appellant:

NL Motshabi instructed by
NFEFE MOTSHABI ATTORNEYS
C/O NTSAMAI ATTORNEYS.

For Respondents:
NO APPEARANCE.