

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

APPEAL No.: **A89/2021**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MATHOTSE RUTH MENYATSO

Appellant

and

PRINCE POGISHO SKOSANA

1st Respondent

MASECHABA ELIZABETH SKOSANA

2nd Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

3rd Respondent

CORAM: MATHEBULA J *et* LOUBSER J *et* VAN RHYN J

HEARD ON: 14 SEPTEMBER 2022

JUDGMENT BY: VAN RHYN J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 24 NOVEMBER 2022. The date and time for hand-down is deemed to be 24 NOVEMBER 2022 at 14H00.

[1] The appellant, Mrs Mathotse Ruth Menyatso, was granted leave to appeal to the Full Bench of this court by the Supreme Court of Appeal against the whole of the judgment and order delivered by Daniso J on 20 August 2020.

[2] The appellant sought leave to appeal, *inter alia* on the following grounds:

2.1 In respect of the court *a quo*'s dismissal of the appellant's application for condonation for the late filing of her replying affidavit:

- (i) That the test applied for establishing good cause was incorrectly applied;
- (ii) The court *a quo* failed to weigh the default committed against the prospects of success, and should have found that the appellant's prospects of success far outweigh the default;
- (iii) The court *a quo* is silent on crucial issues such as the dishonesty and untruthfulness displayed by the second respondent in her answering affidavit which furthermore contains serious contradictions;
- (iv) The court *a quo* failed to strike a balance between the prejudice to be suffered by the appellant, if the application for condonation is dismissed, and that of the second respondent, if the application for condonation is granted.

2.2 The grounds of appeal relied upon by the appellant in respect of the court *a quo*'s finding that the point in *limine* raised by the second respondent, namely that the appellant failed to join the executor appointed to the estate of the first respondent, who passed away on 18 January 2016, is upheld, are as follows:

- (i) The court *a quo* misdirected itself in not realising that, at the time when these proceedings were instituted, the property in question did not form part of

the deceased's estate. Therefore, there was no need for the appellant to cite the executor in the application.

(ii) The second respondent was the sole owner of the property and the executor in the deceased's estate had no direct and substantial interest in the relief claimed by the appellant.

[3] The appellant, as the applicant in the court *a quo*, issued an application for the following relief:

"1 That the Respondents be ordered to sign the transfer documents relating to house number 10141 Mangaung Location, Bloemfontein within ten (10) days from date of this order;

2 That in the event of the Respondents refused and/or fail to sign the transfer documents after the expiration of ten (10) days, the Registrar of the honourable court be authorised to sign the transfer documents relating to house number 10141 Mangaung Location, Bloemfontein on behalf of the Respondent (*sic*);

3. That the Respondents be ordered to pay the costs of this application, only if opposed"

[4] The application was issued on 27 November 2019. The founding affidavit is deposed to by the appellant, an adult female residing at number 10141 Phelindaba Location, Bloemfontein (the "property"). The founding affidavit consists of 5 pages and the relief prayed for is based upon the following facts:

4.1 On 10 October 2007 the appellant and the late Prince Pogisho Skosana, cited as the first respondent (the "deceased") as well as the second respondent, Mrs Masechaba Elizabeth Skosana "concluded a contract of purchase in terms of which the deceased sold their property situated at number 10141 Phelindaba, Bloemfontein to me".

4.2 The purchase price of the property was R50 000.00 (Fifty Thousand Rand). The appellant paid a deposit of R23 000.00 (Twenty-Three Thousand Rand) and thereafter paid the balance of R27 000 (Twenty- Seven Thousand Rand) in

monthly instalments of R1 000.00 (One Thousand Rand). The last payment was made on the 31st day of January 2010.

[5] The written agreement is appended to the founding affidavit as annexure "RM1". The agreement reads as follows:

"CONTRACT OF PURCHASE

I am Mr Prince Pogisho Skosana ID [...]

I sold my house to Ruth Menyatso ID [...]

House number [...] at M[...] Location, Bloemfontein.

The deposit of R23 000.00 is already paid to Mr Skosana. The house price is R50 000.00. The balance is R27 000.00.

The Buyer will pay R1000.00 every month from the end of November 2007 till the house is fully paid.

Mr Skosana will change everything from his name to Mrs Menyatso and the people who is now staying at the house will be out before 15th November 2007.

This house now belongs to Mathotse Ruth Menyatso from the 05th September 2007.

Special Conditions:

All repairs to be done by the purchaser.

Agreement signed at Bloemfontein on this day 10 of October 2007"

The agreement is signed by the deceased as the seller of the property, the appellant as the purchaser, a witness and a private investigator.

[6] The application was opposed by the second respondent, Mrs Skosana. The second respondent is a major female, currently almost 68 of age and residing at Batho Location, Bloemfontein. She and the deceased were married, in community of

property, on 13 January 1977. During 1995 the deceased left the communal home and the parties were divorced in 1996. The second respondent appended the decree of divorce granted on 15 August 1996 by the Magistrate's Court for the district of Bloemfontein in terms whereof the Deed of Settlement concluded between the parties was incorporated and made an order of court.

[7] No mention is made of any immovable property in the Deed of Settlement. The second respondent averred that she and the deceased were awarded the right of occupation of the property by the Mangaung Metropolitan Municipality, cited as the third respondent. The second respondent was unable to recall the exact date when they obtained the right to occupy the property. Later the deceased's mother, Mrs Monica Skosana occupied the property until the time of her passing on 4 December 2018.

[8] After the death of Mrs Monica Skosana the appellant and her mother (the appellant's mother) requested permission to lease the property from the second respondent. The second respondent appended a copy of the certificate issued by the third respondent on 10 May 2010, in terms whereof the second respondent and three of her children were granted the right of occupancy of the property. Two amendments were noted on the re-issued certificate. The first amendment is the deletion the name of one of the sons of the second respondent and the Deceased who had passed away. The second amendment is a note that the deceased's name is deleted as one of the occupiers of the property due to the fact that the second respondent and the deceased got divorced.

[9] The second respondent raised 5 points *in limine* with regards to the application. In her judgment, Daniso J upheld the 4th point *in limine* concerning the non- joinder of the executor appointed to the estate of the deceased. The basis for the finding was that the second and the third respondents were not involved in the sale of the property and the court cannot make an order against the deceased without the involvement of the deceased's executor. Thus, the application for an order to compel the respondents to sign the transfer documents relating to the property was dismissed with costs.

[10] During the hearing of the matter on the 20th of August 2020, the court *a quo*, furthermore, heard an application for condonation for the late filing of the appellant's replying affidavit. The second respondent filed her opposing affidavit on 24 February 2020 with the result that the appellant had to file her reply on or before 9 March 2020. The appellant filed her replying affidavit 5 days later, on the 16th of March 2020. The appellant failed to apply for condonation upon serving same. On 24 March 2020 the appellant brought an application for condonation for the failure to file her replying affidavit within the prescribed time period. The application for condonation was opposed by the second respondent.

[11] The reason proffered for the failure to file her replying affidavit in time, was due to appointments made for the appellant to attend a number of medico-legal examinations to be conducted at Johannesburg during the week starting from 9 March 2020 to the 13th of March 2020 as a result of injuries sustained by her in a motor vehicle accident. The medico-legal examinations were requested by the attorneys acting on behalf of the Road Accident Fund. The appellant indicated that she was in Johannesburg from 5 March 2020 to 13 March 2020. She returned to Bloemfontein on 13 March 2020 and consulted with her legal representatives on Saturday, 14 March 2020 where after the replying affidavit was filed on the 16th of March 2020. During argument appellant's counsel indicated that the wrong dates were mentioned in paragraphs 9 and 6 of the affidavit deposed to by the appellant. The correct dates were however mentioned in the rest of her affidavit.

[12] In her opposition to the application for condonation, the second respondent emphasized that the appellant incorrectly stated in her condonation application that she had to file her reply by the 9th of February 2022 and not the 9th of March 2022. The appellant failed to explain why she was unable to consult and to file her replying affidavit in the period between the 26th of February to the 5th of March prior to her leaving for Johannesburg. However, in her judgment, Daniso J, again referred to the incorrect dates for the filing of the replying affidavit as being the 9th of February 2020 where it should have been the 9th of March 2020.

[13] Daniso J held that the reasons for the delay and prejudice caused to the other party are some of the factors that the court will take into consideration when deciding

whether to apply its discretion in favour of an applicant to grant the requested condonation. The prospects of success on the merits is another factor to be considered. The court *a quo* held that in opposition to the application, the second respondent raised several points *in limine* to which the appellant in her answering affidavit merely contended that the points *in limine* are “baseless, unfounded and lack merits...”. Daniso J held that the appellant’s failure to challenge or respond to the second respondent’s points *in limine* casts doubts on the prospects of success on the merits and dismissed the application for condonation.

[14] One of the issues which this court is required to determine is whether the court *a quo* was correct in refusing to grant the appellant’s application for condonation for the late filing of her replying affidavit. Should this court find that the court *a quo* erred in refusing the appellant’s condonation application the issue of the second respondent’s application for condonation to file her response to the replying affidavit arises. Lastly the question whether the appellant’s application should be granted or dismissed on the merits has to be decided.

[15] It is trite that an applicant seeking condonation is required to fully set out the circumstances explaining the causes for the delay in order that the court may assess whether blame is to be attached to the applicant, his/her attorney, or some other party. It is likewise well established that condonation is not to be had for the mere asking and our courts, in the exercise of its discretion, must determine whether good cause has been established for the non-compliance with the rules¹. The appellant explained that she only learned that the replying affidavit had to be filed at the time when she had already reached Johannesburg, on 5 March 2020.

[16] I am of the view that the explanation by the appellant that her attorney neglected to inform her of the need to consult with the view of drafting her replying affidavit and only contacted her telephonically when she was already in Johannesburg, constitutes “good cause”. Her attorney did not take the blame for not complying with the Rules of Court upon himself and did not file an affidavit to explain why he did not contact his client timeously. Furthermore, the delay in filing the

¹ Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) 292 (SCA) at [6].

replying affidavit is not due to a lack of *bona fides* of the appellant but due to the failure of her attorney to diligently attend to her case within the time required by the Rules of Court.

[17] The application for condonation was clearly not made with the intention of delaying the appellant's own application or with the sole purpose of frustrating the second respondent's opposition thereof. The replying affidavit was delivered 5 days late. The degree of lateness, the explanation for the delay and the degree of non-compliance with the rules are not the only aspects to be considered. The importance of this case, the parties' interest in the finality of judgment on the merits and the avoidance of unnecessary delay in the administration of justice² are further factors which a court must consider when exercising its discretion whether to grant condonation for the late filing of a replying affidavit or not. The court *a quo*, in refusing the appellant's application for condonation, did not take into consideration the full spectrum of the factors mentioned above. I am of the view that the application for condonation for the late filing of the replying affidavit should have been granted by the court *a quo*.

[18] Condoning the late filing of the appellant's replying affidavit in return causes the next hurdle in the adjudication of this matter. The second respondent filed a conditional application to file a supplementary affidavit (triplication) in the event of the court condoning the late filing of the appellant's replying affidavit. In the alternative, the second respondent prayed for an order that the appellant's replying affidavit be struck in as far there is new evidence and/or information contained to which the second respondent could not respond to.

[19] In the replying affidavit the appellant contends that on the 8th of April 2010 the second respondent, cited as the first applicant and the appellant, cited as the second applicant brought an urgent application in the Magistrate's Court, Bloemfontein (with case number 24147/2010) for the eviction of the illegal and unlawful occupiers of the property (the "eviction application"). It is averred that the second respondent

² Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others [2013]

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All SA 251 (SCA) at [11].

deposed to an affidavit wherein she acknowledged that both herself and “her husband” had sold the property to the appellant and that the appellant “had fully complied with the terms of the agreement” and was the lawful owner of the property.

[20] A copy of the founding affidavit deposed to by the second respondent in the eviction application is appended to the appellant’s replying affidavit. It is furthermore contended that the second respondent’s opposing affidavit is therefore riddled with untruths and lies and is nothing else but an absurdity filed by the second respondent to deliberately and consciously mislead this court. In the founding affidavit to the eviction application the second respondent stated the following:

20.1 the second respondent is the “person in charge of erf [...] , Phelindaba, Bloemfontein”;

20.2 the second respondent is the “transferor of the said erf” to the second applicant (the appellant in the matter at hand);

20.3 the first respondent is Matshidiso Skosana, the sister of the “ex husband” of the second respondent, who is residing with unknown occupiers at the property;

20.4 that the property forms part of the immovable assets of the joint estate of the deceased and the second respondent;

20.5 that the deceased and the second respondent, after the dissolution of their marriage, “undertook to deal with our immovable assets at a later stage”;

20.6 that the second respondent “learnt” that on the 10th of October 2007 the deceased had entered into a deed of sale in terms whereof he sold the property to the appellant and that he subsequently requested her (the second respondent’s) “approval to proceed with the transfer of the property” to the appellant;

20.7 that at the time of the sale “of our communal property my ex husband did not consult with me at first, but when I heard it was sold to the Second Applicant who is well known to me I gave my blessing”;

20.8 that the deceased had already received more than R30 000.00 (thirty Thousand Rand) from the appellant. The second respondent did not receive her share of the purchase price of their property.

[21] An applicant is bound by the case made out in his or her founding affidavit. An applicant must stand or fall by the allegations contained in its founding affidavit and it is not allowed to make out its case in the replying affidavit. The replying affidavit filed by the appellant contained new material that was not included in her founding affidavit. The issue is whether the second respondent should be granted an opportunity to file a further affidavit to respond to the new allegations made in the replying affidavit. The filing of further affidavits in motion proceedings is permitted only with the indulgence of the court in the exercise of its discretion.³ In deciding upon the question whether to permit a party to file a further affidavit, the court will take into consideration all the facts of the matter, including the response to the new evidence and further consider what is fair to the parties.

[22] In **Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) Pty and Another**⁴ Broome J held as follows:

“The correct approach to the problem was enunciated clearly by Caney J in *Bayat and Others v Hansa and another* 1955 (3) SA 547 (N) at 553D: “...the principle which I think can be summarised as follows... that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits.’

[23] In certain circumstances the introduction of new material may be introduced despite objection in reply.⁵ In **Kleynhans v Van der Westhuizen NO**⁶ the court held

³ *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA).

⁴ 1980 (1) SA 313 (D & CLD) at 315 E-H and 316 A.

that, due to the ramifications of the respondent's affairs being extensive and complex, it was impossible for the applicant to have had all the facts at his disposal before he launched the sequestration proceedings and therefore authorised the applicant to introduce new material in reply.

[24] Counsel on behalf of the appellant argued that the appellant could not have foreseen that the very same person who deposed to the founding affidavit in the eviction application would, some 10 years later, deny any knowledge of the deed of sale concluded between the appellant and the deceased. The appellant therefore did not anticipate the second respondent's stance and therefore it cannot be expected from the appellant to have attached the founding affidavit deposed to by the second respondent in the eviction application, to the application in the current matter.

[25] This argument is unfounded and unsubstantiated. The reason for the appellant's application for the transfer of the property is solely on the basis that the deceased and the second respondent had since February 2010 refused to sign the necessary documents for the property to be transferred to the appellant. Furthermore, it can hardly be argued that it was impossible for the appellant to have known of the eviction application brought in 2010 by herself, cited as the second applicant, at the time when she launched the application that forms the subject of this appeal.

[26] In the supplementary affidavit (triplication), the second respondent denies any knowledge of the alleged affidavit deposed to by her during 2010 for an eviction application. During 2010 the second respondent and the deceased were still struggling with the aftermath of their failed marriage and the second respondent encountered immense difficulties in obtaining maintenance payments from the deceased.

[27] The second respondent has no recollection of deposing to an affidavit for an eviction application but can recall the deceased visiting her to explain that he will be making payments towards her for maintenance and that she will retain ownership of

⁵ Titty's Bar and Bottle Store (Pty) LTD v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 369A-B.

⁶ 1970 (1) SA 565 (O) at 568E.

another property located at Batho Location, Bloemfontein. While at the house at Batho Location, the deceased arrived with documents, purported to be an agreement containing his proposal to settle the maintenance issues and ownership of the property at Batho Location. She recalls that she signed the agreement and handed same to the deceased.

[28] The second respondent contends that she is not able to read English. Consequently, her attorney was obliged to translate the founding affidavit in the eviction application, annexed to the replying affidavit, to Afrikaans during their consultation subsequent to receiving the replying affidavit. A confirmatory affidavit deposed to by her attorney, Mr Peyper, who also appeared on her behalf during the hearing of this appeal, is appended to her supplementary affidavit. The second respondent does not deny that her signature appears on the affidavit in the eviction application. She however denies that she attended the offices of Mr T Hadebe, who is the attorney who supposedly acted on her behalf and on behalf of the appellant in the eviction application. She furthermore denies giving instructions to the said Mr Hadebe for such an application or an application of whatsoever nature on her behalf during 2010.

[29] A certain Mr Andile Charles Mlozana apparently commissioned the affidavit in the eviction application. He was employed at Nedbank at Second Avenue, Bloemfontein during 2010. The second respondent contends that she has never attended the Nedbank branch in Second Avenue for any purpose whatsoever. The same Mr Mlozana, now an attorney, also now commissioned the replying affidavit deposed to by the appellant. The second respondent noticed that the signature of the said Mr Mlozana seems different to the signature affixed to the replying affidavit as commissioner. She however concedes that this might be due to the lapse of time.

[30] The appellant furthermore appended the order granted by the Magistrate's Court on 13 November 2009 to her replying affidavit and stated under oath as follows:

“Subsequently, the Magistrate Court granted the interdict order as prayed in our notice of motion. For ease of reference I attach herein the said founding affidavit as well as the court order and related annexures marked herein as **annexure “A”**”

No case number appears on the court order. The parties to the case as it appears from the court order are not the second respondent and the appellant, as contended by the appellant, but a person with the name of Masechaba Prince Skosana (the “unknown person”), cited as the first applicant and the appellant cited as the second applicant. The order is an interim order with a return day on the 10th of December 2009 and provides as follows:

30.1 That Matshidiso Skosana be interdicted and restrained from making contact with the unknown person and the appellant as well as with any family members of the unknown person and the appellant;

30.2 That Matshidiso Skosana be interdicted and restrained from entering or being in the proximity of 100 meters from the unknown person’s and appellant’s place of residence;

30.3 That Matshidiso Skosana be interdicted and restrained from threatening, insulting, assaulting or having the safety of the unknown person and the appellant or any family members compromised;

30.4 That Matshidiso Skosana be interdicted and restrained from spreading untrue and unfounded rumours about the unknown person’s and the appellant’s lives either by word of mouth or publication in any form;

30.5 That Matshidiso Skosana be interdicted and restrained from locking the taps and switching off the electricity supply of the shared residence at 10141 at Phelindaba Location, Bloemfontein.

[31] It was not explained why the appellant appended an order granted in a different matter, between different parties and which order was already granted on 13 November 2009, being a date prior to the eviction application being instituted during

April 2010. The appellant's averments made under oath in her replying affidavit does not correspond with the contents of the interim order granted on 13 November 2009.

[32] The appellant deposed to an affidavit on 16 April 2021 in support of her application for leave to appeal to the Supreme Court of Appeal. The following averments are made in her affidavit:

32.1 the deceased and the second respondent jointly acquired the property;

32.2 since they were the joint owners of the property they each owned 50% of the property;

32.3 it is common cause that on the 10th of October 2007 both the deceased and second respondent concluded a written sale agreement of the said property with the appellant;

32.4 it is common cause that on the 8th of January 2009, in order to finalise the division of their joint estate, the second respondent paid to the deceased his 50% share of the joint estate in the amount of R15 000.00 (Fifteen Thousand Rand). The said amount was derived from the proceeds of the sale of the property.

[33] The second respondent opposed the application in the court *a quo* on the basis that she denies the validity of the agreement of sale relied upon by the appellant. The second respondent contends that no valid agreement of sale could have come into existence because she was not the owner of the property during 2007. She did not sign the agreement relied upon by the appellant and was not a party to the agreement. The second respondent did not receive any payment in respect of the property as alleged by the appellant.

[34] The Mangaung Metropolitan Municipality was the owner of the property at the time when the ostensible agreement of sale was concluded between the deceased and the appellant. The second respondent, the deceased and their children obtained the right to occupy the property in terms of a permit issued by the Mangaung Local Municipality, the predecessor of the Mangaung Metropolitan Municipality. In terms of

the Certificate of Occupation dated 10 May 2010 the deceased's right to occupy the property was terminated due to the divorce. The second respondent appended the Deed of Transfer TE 778/2013 to the answering affidavit in terms whereof the property was transferred from the Mangaung Metropolitan Municipality to the second respondent on 28 January 2013. Section 2 (1) of the Alienation of Land Act⁷ provides that:

“No alienation of land after the commencement of this section shall... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

[35] The appellant's case in the founding affidavit was that the deceased and the appellant concluded the agreement of sale of the property. These facts appear from the deed of sale appended to the founding affidavit. In **Northview shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC and Another**⁸ the Supreme Court of Appeal held that the object of section 2(1) of the Alienation of Land Act is to ensure certainty in respect of contracts for the sale of land.

[36] In the appellant's founding affidavit to her application for leave to appeal to the Supreme Court of Appeal the appellant alleges that it is “common cause” that the deceased and the second respondent were the joint owners of the property and both of them concluded a written agreement of sale in respect of the property. It has been denied by the second respondent that she and the deceased were the joint owners of the property. It was therefore incorrect to state that it is common cause that the property belonged to both the deceased and the second respondent. It is furthermore evident from the title deed to the property that the deceased was not the owner of the property as same was transferred directly from the Mangaung Metropolitan Municipality to the second respondent. It was dishonest to state that it is common cause that the property belonged to the deceased as a co-owner of the property. The appellant furthermore alleged that she fully paid the amount of R50 000.00 to the respondents on the 30th of August 2007. This was not her evidence in the founding affidavit.

⁷ Act No 68 of 1981.

⁸ 2010 (3) SA 630 (SCA) at [26].

[37] It is evident that the facts upon which the appellant relied in her initial founding affidavit has changed, obviously having regard to the grounds on which the relief was being opposed by the second respondent. The appellant now alleges that the agreement of sale was not only concluded between herself and the deceased but, somehow, also included the second respondent. I am unable to conclude that the agreement of sale on which the appellant rely as the basis for her claim, constitute a valid deed of alienation. The reason being that neither the deceased nor the second respondent was the owner of the property during 2007. The second respondent was not even a party to the agreement of sale upon which the appellant's cause of action rests. Furthermore, the second respondent argued that the claim for the transfer of the property to the appellant has prescribed on the basis that 13 years has passed since the alleged agreement of sale was concluded. I agree.

[38] The deceased was not entitled in law to transfer more rights to the appellant than the rights he possessed, which, unfortunately for the appellant was none in respect of the property. The deceased was not the owner of the property as stated in the agreement of sale. The deceased was not even the owner of 50% of the property as contended by the appellant. The second respondent became the owner of the property approximately 6 years after the appellant supposedly purchased the property from the deceased.

[39] I am of the view that the second respondent's application for leave to file her supplementary affidavit be condoned on the basis that new information was indeed contained in the replying affidavit filed by the appellant. The appellant to be responsible for the costs associated with the application for condonation for the filing of her supplementary affidavit. The second respondent disputed the facts alleged by the appellant pertaining to the sale of the property. A court should adjudicate factual disputes in application proceedings having regard to the principles laid down in the **Plascon-Evans Paints** case and approved and considered in more depth in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** ⁹. The court held as follows:

⁹ 2008 (3) SA 371 (SCA).

“[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C”

[40] I am of the view that a factual dispute was indeed foreseeable yet the appellant persisted with an application for the transfer of the property to be ordered by the court. The appellant failed to make out a case in her founding affidavit and did not succeed in making out a case for the relief prayed for in her replying affidavit. In fact, the applicant brought a totally defective application.

[41] I would thus make the following order:

1. The appeal is dismissed with costs.

I. VAN RHYN, J

I concur.

P.J. LOUBSER, J

I concur and it is so ordered.

M.A. MATHEBULA, J

On behalf of the Appellant:

Adv N D KHOKHO

Instructed by:

FIXANE ATTORNEYS

BLOEMFONTEIN

On behalf of the Second Respondent:

Mr P PEYPER

Instructed by:

PEYPER AUSTEN ATTORNEYS

BLOEMFONTEIN