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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRIC

LIMPOPO DIVISION, POLOKWANE

CASE NO: HCA 58/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED

DATE: 6/8/2024

SIGNATURE:

In the matter between:

SEKEDI SARAH MOKUMO	**Appellant**
and	
MATOME PAUL RAMALEPE	Respondent

JUDGEMENT

GAISA AJ

INTRODUCTION

[1] This is an appeal against the judgment and order of the Magistrate's Court for the District of Letaba, held at Ga-Kgapane ("court *a quo"),* delivered on 12 October 2023. The court *a quo* dismissed the appellant's application for rescission of an eviction order granted on 11 July 2023 in favour of the respondent.

[2] The central issues in this appeal are whether the eviction order was correctly granted, considering the appellant's claims of fraud in the property transfer, and whether the court *a quo* erred in dismissing the application for rescission.

BACKGROUND

[3] The property in question is Erf 1[...], Ga-Kgapane-A Township, Limpopo Province ("property"). The appellant was the registered owner of this property, inherited from her late husband, Botana Simon Mathye, who passed away on 2 September 2009.

[4] On 19 December 2019, a deed of sale was purportedly signed between the appellant as seller and the respondent as purchaser for R330,000. The property was transferred to the respondent's name on 2 September 2021.

[5] The appellant claims that she never intended to sell the property and alleges that her son, Thapelo Innocent Mathye, fraudulently signed the deed of sale and other transfer documents without her knowledge or consent.

[6] When the appellant failed to vacate the property, the respondent initiated eviction proceedings in the Magistrate's Court. On 11 July 2023, the Magistrate granted an eviction order against the appellant.

[7] The appellant subsequently applied for rescission of the eviction order, which

was dismissed by the court *a quo* on 12 October 2023.

ISSUES ON APPEAL

[8] The appellant's grounds of appeal can be summarised as follows:

8.1. The eviction order was erroneously granted in her absence;

8.2. Her answering affidavit was not properly before the court;

8.3. The deed of sale was fraudulent and should be declared void;

8.4. The Magistrate failed to consider the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act);

8.5. The eviction order was not just and equitable in the circumstances.

POWERS OF THIS COURT AS THE APPEAL COURT

[9] It is trite law that a court of appeal will not interfere with the trial court's decision unless it finds that the trial court misdirected itself as regards its finding or the law. To succeed on appeal, the appellant needs to convince this court on adequate grounds that the trial court misdirected itself in accepting the evidence from the other side and rejecting his version. There are well-established principles governing the hearing of appeals against findings of fact. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[1]

[1] S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f. See also: S v Monyane and Others

ANALYSIS

[10] Procedural Irregularities

10.1. The record shows that the appellant was not in attendance at court when the eviction order was granted on 11 July 2023. However, it is clear from the court *a quo's* reasons that the appellant's answering affidavit was before the court and was considered. The Magistrate noted that the appellant's answering affidavit did not disclose a defence.

10.2. Was the appellant absent, in the legal sense, when the eviction order was granted on 11 July 2023? Fortunately, this question has already been answered by the full court's appeal decision of this division, which held in **Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm**[2] that

> *"[10] The Court a quo decided that the judgment was not a judgment taken on default of appearance by the Appellant. It did so on the basis that the Appellant's Counsel was present in Court when the Order was made. The Court a quo erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and/or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court.*

2008 (l) SACR 543 (SCA) at para 15; S v Francis 199 l (l) SACR 198 (A) at 204e.

[2] (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017)

[11] In my view where opposing papers have not been filed there is a "default" even if the Respondent in the matter or his legal representative is present in Court. See: ***Morris v Autoquip (Pty) Ltd*** ***<u>1985 (4) SA 398</u>*** ***(WLD); First National Bank of SA Ltd v Myburgh and Another*** ***<u>2002 (4) SA 176</u>*** ***(CPD).***

[12] The question of what is meant by "default" was considered in ***Katritsis v De Macedo*** ***<u>1966 (1) SA 613</u>*** ***(A).*** *In this matter the Appellate Division (as it then was) held that "default" which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. In casu the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a "default judgment" even if it was not a default in the sense of the absence of the party."*

10.3. Her Ladyship Naude-Odendaal J held in **Minister of Mineral Water and Sanitation and Others v Fourie and Others**[3] that:

"[24] In the present case, the Applicants were only in default in the sense that legal representation failed to appear on their behalf and advance oral argument at the hearing of the matter. It is common cause that an answering affidavit was filed in the main application, as well as heads of argument and a practice note on behalf of the Applicants.... Having regard to what was stated in ***Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm supra,*** *it therefore cannot be found that the judgment and order by Phatudi J on 15 April 2021 constitutes a default judgment ... The application for rescission of judgment therefore stands to be dismissed."*

[3] (6437/2019) [2023] ZALMPPHC 79 (30 August 2023)

10.4. The appellant was absent from the courtroom when the eviction order was granted on July 11, 2023. The court record indicates that she was called in both Court A and Court B but was not present. The appellant claims she was at the court building that day but was in the bathroom when the matter was called as not credible given her previous appearances.

10.5. The appellant's answering affidavit was filed on November 21, 2022, well before the eviction hearing on July 11, 2023. This affidavit was filed by her previous attorney, Messrs Hlungwani A Attorneys, within six working days of the court granting leave to file it. While the appellant claims in her appeal that this affidavit was filed out of time and not properly before the court, the magistrate's court stated in its reasons that it had considered the appellant's answering affidavit when making its decision on the eviction order.

10.6. According to the respondent's arguments and the court's findings, the appellant's answering affidavit contained only a *"bare denial'* without presenting a substantive defence.

10.7. The magistrate's court, in granting the eviction order, stated that the *"Respondent's (Appellant herein) opposing affidavit does not disclose* a *defence and Applicant (Respondent herein) has made out* a *proper case*."

10.8. This lack of a substantive defence in the original answering affidavit is a crucial point of contention in the appeal.

10.9. The principles governing rescission applications are well established. In Chetty v Law Society, Transvaal 1985 (2) SA 756 (A), it was held that for a rescission application to succeed, the applicant must show good cause, which includes a reasonable explanation for the default, bona fides, and a bona fide defence which prima facie has some prospect of success.

10.10. In this case, the appellant's explanation for her absence on 11 July 2023 is not convincing. She had appeared in court on multiple occasions and was aware of the proceedings. Her claim of being in the bathroom when the matter was called is insufficient to explain her absence. The magistrate considered her affidavit.

[11] <u>Raising a new defence (of fraud in property transfer) after the eviction application</u>:

11.1. The respondent contends that the appellant only attempted to raise a defence when she launched her application for rescission of judgment after the eviction order had already been granted.

11.2. The respondent argues that if the court had entertained the appellant's new defence as contained in her founding affidavit for the rescission application, it would have, in effect, allowed the appellant a "second bite at the cherry," which would be irregular and prejudicial.

11.3. On the other hand, the appellant claims that her answering affidavit was filed out of time and was not properly before the court when the eviction order was granted. She argues that she could not present her case or apply for condonation for late filing.

11.4. The appellant is now seeking to introduce what she claims is her substantive defence in the appeal, arguing that the sale of the property was fraudulent and that she never intended to sell her home.

11.5. The respondent argues that parties in motion proceedings must stand and fall by their papers and that allowing new defences at the appeal stage would be improper.

11.6. I agree with this argument. However, the appeal court can allow new evidence under limited circumstances, typically referred to as "fresh evidence" or "further evidence" on appeal.

11.7. In terms of the provisions of s 19 (b) of the **Superior Courts Act** 1o of 2013 this court is seized with jurisdiction to adjudicate an appellant's application to introduce further evidence. In deciding whether to allow further evidence on appeal, the appeal court will be guided by the principles that have evolved in decided cases over many years, and which are summarised in **Herbstein and Van Winsen**[4] as follows:

> *"(a) it is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces, he should not (later) be allowed to adduce further evidence, unless the circumstances are exceptional.*
>
> *(b) The party who makes the application must show that the fact that he has not brought further evidence forward was not attributable to any remissness on his part. He must satisfy the court that he could not have procured the evidence in question by the exercise of reasonable diligence.*
>
> *(c) The evidence tendered must be weighty material, and presumably worthy of belief, and must be such that, if adduced, it will*

[4] See: Herbstein &Van Winsesen: The Civil Practice Of The Supreme Court Of South Africa, 4th Ed at 909; *Colman v Dunbar* **1933 AD 161** (A); and *Rail Commuters Action Group and Others v Transnet Ltd tla Metrorail and Others* **2005 (4) SA 359** at para 41.

be practically conclusive.

(d) If conditions have so changed that the fresh evidence would prejudice the opposite party, the court will not grant the application, for example if the witnesses for the opposite party have been scattered and cannot be brought back to refute the fresh evidence."

11.8. The appellant's allegation of fraud in the property transfer is a serious one. However, this claim is contradicted by several pieces of evidence:

11.8.1. The conveyancer, Elana Goosen, confirmed under oath that the appellant signed the transfer documents in her presence on 29 January 2020.

11.8.2. The appellant's signatures on the deed of sale and transfer documents match her signatures on court affidavits.

11.8.3. The appellant admits to receiving funds in her bank account, claiming it was not the entire purchase price.

11.8.4. The appellant has not provided expert evidence to support her forged signature claim.

11.8.5. It is trite law that fraud vitiates every transaction known to the law. However, the onus of proving fraud rests on the party alleging it. In this case, the appellant has not discharged this burden of proof.

11.9. These pieces of evidence work against the appellant and do not establish exceptional circumstances to entitle this court to allow the admission of further evidence in the appellant's favour.

11.10. If the allegations of fraud were established, the appellant would still need to convince this court that the fact that she has not brought further evidence forward in her affidavit at the eviction application was not attributable to any remissness on her part. She would need to satisfy this court that she could not have procured the evidence in question by the exercise of reasonable diligence.

11.11. On the available and the other factors summarized in **Herbstein and Van Winsen**, this court finds that the appellant's allegation of fraud cannot be sustained.

[12] Compliance with the PIE Act

12.1. Section 4(6) of the PIE Act requires a court to consider all relevant circumstances, including the rights and needs of vulnerable persons, before granting an eviction order.

12.2. While the court *a quo's* reasons do not explicitly state that these factors were considered, it is clear from the record that the Magistrate was aware of the appellant's circumstances.

12.3. The appellant had multiple opportunities to present her case and was granted numerous postponements. The eviction proceedings spanned over a year, during which time the appellant was aware of the potential consequences.

[13] Just and Equitable Considerations

13.1. The Constitution of the Republic of South Africa, 1996, in section

26(3), provides that no one may be evicted from their home without an order of court made after considering all the relevant circumstances. The court must be satisfied that the eviction is just and equitable.

13.2. In this case, several factors weigh in favour of the eviction order:

13.2.1. The respondent is the registered owner of the property, having paid the purchase price and completed the transfer process.

13.2.2. The appellant received funds from the sale, which she has not offered to repay.

13.2.3. The appellant was given ample opportunity to present her case and seek legal representation.

13.2.4. The appellant's conduct throughout the proceedings suggests an attempt to delay the matter rather than present a *bona fide* defence.

CONCLUSION

[14] After carefully considering the evidence and arguments presented, I find that the court *a quo* did not err in granting the eviction order or dismissing the application for rescission.

[15] The appellant has not demonstrated good cause for rescission of the eviction order. Her claims of fraud are not supported by credible evidence, and she has not provided a satisfactory explanation for her absence when the order was granted.

[16] While the court is sympathetic to the appellant's situation, the law must be applied fairly and consistently. The respondent has established his rights as the

registered owner of the property, and the eviction order was granted after due consideration of the relevant circumstances.

[17] The appellant was not able to show that trial court misdirected itself as regards its finding or the law. The appellant has not convinced this court that the court *a quo* misdirected itself in accepting the evidence from the other side and rejecting his version. All the appellant's evidence available to the magistrate was taken into consideration. The appellant did not show any misdirection by the court *a quo,* consequently the court *a quo's* findings of fact are presumed to be correct and will not be disregarded by this court.

ORDER

[18] In the result, the following order is made:

1. The appeal is dismissed.

2. The eviction order granted by the Magistrate's Court for the District of Letaba on 11 July 2023 is upheld.

3. The appellant is ordered to vacate the property at Erf or stand 1[...], Ga-Kgapane-A Township, Limpopo Province, within 30 days of this order.

4. Should the appellant fail to vacate the property as per paragraph 3, the Sheriff is authorised to evict the appellant and all persons occupying through her.

5. The appellant is to pay the costs of this appeal.

GAISA AJ

ACTING JUDGE: HIGH COURT
POLOKWANE: LIMPOPO DIVISION

I concur

NAUDE-ODENDAAL J
JUDGE OF THE HIGH COURT
POLOKWANE: LIMPOPO DIVISION

APPEARANCES

FOR THE APPELLANT:	**ADV PR SESHAI**
INSTRUCTED BY;	**F. SEKGOBELA ATTORNEYS**
FOR THE RESPONDENT:	**ADV C MARAIS**
INSTRUCTED BY;	**JOUBERT & MAY ATTORNEYS**
DATE OF HEARING:	**10 MAY 2024**
DATE OF JUDGEMENT:	**5 AUGUST 2024**