



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No.: CA06/25

Reportable	YES/NO
-------------------	---------------

In the matter between:

EASTERN CAPE DEVELOPMENT CORPORATION

Appellant

NONTSHAYELO ESLINA DLAMINI
Respondent

1st

THULANI DLAMINI

2nd Respondent

JUDGMENT ON APPEAL

Cengani-Mbakaza AJ

[1] On 23 November 2023, the respondents approached the regional court sitting in Butterworth by way of an *ex parte* notice of motion, seeking a *rule nisi* returnable on 16 February 2024. The order sought was to remove the property known as Erf No 3[...] situated at 2[...] F[...] Drive in Butterworth (the

property) from the list of properties to be auctioned by the appellant that very day.

[2] The respondents further sought to interdict the appellant from selling the property pending its transfer to them. According to the notice of motion, the order was sought on an urgent basis and was to operate as an interim interdict pending the finalisation of the application. The presiding magistrate granted an interim order on 23 November 2023. The appellant filed opposing papers on 13 February 2024. In a judgment delivered on 1 October 2024 the magistrate granted the respondents an order in favour of final relief.

[3] The appellant appeals against the granting of that order. The grounds of appeal are outlined in the notice of appeal dated 25 October 2024. Without detailing each ground *seriatim*, the appellant highlights the following key issues: Firstly, the regional magistrate lacked jurisdiction due to the value of the property exceeding R400 000. Alternatively, the appellant argues that the matter should have been heard in East London and not within the jurisdictional area of Butterworth.

[4] Additionally, the appellant contends that the regional magistrate erred in not considering that the deed of sale relied upon by the respondents was not signed by the appellant or an agent acting under written authority. Alternatively, it is contended that the regional magistrate failed to consider clauses 4.1, 4.2 and 4.4, which stipulate that failure to pay the purchase price or provide a bank guarantee within 60 days of signing the deed of sale would render the agreement null and void. Furthermore, in granting final relief, the regional magistrate did so by considering the requirements for interim relief and consequently he erred in that approach.

[5] The respondents oppose the appeal. They assert that they have a clear right to the property which they have occupied for over 20 years. Regarding jurisdiction, the respondents argue that when the agreement was concluded, the property was valued at R340 000, an amount within the regional court's jurisdiction. The respondents further contend that the order granted by the regional magistrate on 1 October 2024 was interim in nature, and therefore the regional magistrate correctly considered the requirements of an interim interdict rather than those of a final interdict.

[6] I now deal with the background facts. The respondents, a couple, have occupied the property for over 20 years, but the basis of the occupation is disputed. The respondents claimed a verbal lease agreement with the appellant, which is denied by the appellant.

[7] It is common cause that the appellant intended to sell the property. This culminated in the conclusion of a written agreement between the parties. Although the respondents signed the agreement, the appellant and its witnesses did not. Nonetheless, the first respondent proceeded to make payments totaling at R24 000 and R340 000 which she considered as part of the purchase price. It is undisputed that these amounts were paid outside the stipulated period of 60 days.

[8] The respondents' case hinges, *inter alia*, on the fact that despite the payments made, the transfer of the property did not materialise. Neither did they receive a deed of transfer. The appellant acknowledges receipt of R340 000 from the respondents but asserts that this payment was not for the purchase price. Instead, it was to halt eviction proceedings due to substantial arrears, pursuant to a previous court order.

[9] In its heads of argument, the appellant criticised the regional magistrate for granting the relief on an urgent basis when in fact the matter should have been struck off the roll for want of urgency. Let me say from the outset that this argument should not form the basis of the issues before the appeal court. It is well-established that the discretion to grant an interim order on an urgent basis lies with the court seized of the matter and is not appealable. The reason, clearly, is that an interim order does not have the characteristics of a final order. Therefore, I will focus on the issues raised in the notice of appeal, which I find apposite for purposes of determining the issues on appeal.

[10] It is axiomatic that the power of a court of appeal to interfere with the factual findings of the court a quo are limited. In *Kunz v Swart and Others*¹, the court appositely had this to say: ‘... to rehear the case and to form our conclusion on the facts as well as on the law. And if we are satisfied that the Judge in the Court below came to a wrong conclusion on the facts, we should not shrink from overruling him. But before doing so, we must be quite satisfied that he was wrong; if we merely have a reasonable doubt as to whether he was right, then I do not think we should be justified in reversing his decision.’

[11] Pursuant to s 9(d) of the Superior Courts Act², a court exercising appellate jurisdiction may, in addition to any power specifically provided for in other legislation, confirm, amend or set aside the decision under appeal and render any decision that the circumstances may require.

[12] The learned author Van Loggerenberg comments that: ‘A court of appeal is not entitled to set aside the decision of the lower court, granted in the exercise of a strong or true discretion, merely because the court of appeal would itself have to come to a different conclusion on the facts of the matter before the lower court. The court of appeal may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it

¹ 1924 AD 618 at p 655.

² 10 of 2013.

was influenced by wrong principles or a misdirection on the facts, or that it had reached a decision that could not reasonably have been made by a court properly directing itself to all relevant facts and principles.’³

[13] In the matter under consideration, scrutiny of the jurisdiction issue is essential to determine whether the regional court magistrate had the authority to hear the matter. The jurisdiction of the latter court is challenged on two grounds: firstly, monetary jurisdiction: and secondly, the location or territorial reach of the court.

[14] The appellant’s argument raises a crucial issue: if there is no valid agreement, then it potentially undermines the basis for determining jurisdiction based on the purchase price of the property. This creates a “chicken and egg” situation, where this court must first determine the existence and validity of the agreement before deciding the issue.

[15] Chapter 1, in particular, s 2 of the Alienation of Land Act 68 of 1981 is couched in peremptory terms and it provides:

“2(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is signed by the parties thereto or by their agents acting on their written authority.”

[16] The legal principle as set out in *Steward & Lloyds v Croydon Engineering and Others*⁴ (*Steward & Lloyds*) is that a party relying on a contract bears the onus of proving that the formalities required by statute have been complied with. Although the court in *Steward and Lloyds* addressed the issue of onus in relation suretyship, this principle remains relevant in the context of the present

³ Extract from Erasmus Superior Court Practice, Third Edition, Van Loggerenberg Vol 1, D-146 [ORIGINAL SERVICE , 2023].

⁴ 1981 (1) SA 305 (W) at 309E-F.

matter which concerns compliance with the legislated prerequisites for a valid agreement for the sale of immovable property.

[17] Section 2(1) of the Alienation of Land Act is interpreted to mean that a valid transfer of land requires a written deed of alienation which must be signed by the parties involved or by their authorised agents with written authority. Without a signed deed, an agreement to transfer land is not enforceable. In the context of this case, this means that without a signed deed of alienation, the alleged agreement between the appellant and the respondents may not be considered valid or enforceable.

[18] Section 28 of the Alienation of Land Act which forms the basis of the respondents' defence to the appellant's argument underscores the relief for the parties who have partially or fully performed under an invalid land alienation agreement. The relevant provisions provide:

“28 (1) Subject to the provisions of subsection 2, any person who has performed partially or fully in terms of the alienation of land which is no force and effect in terms of section 2 (1) or a contract which has been declared void in terms of the provisions of section 24 (1) (c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under alienation or contract, and-

- (a) the aliens may in addition recover from the alienator-
 - (i) interest at the prescribed rate on any payment to the date of recovery;
 - (ii) a reasonable compensation for-
 - (aa) necessary expenditure that he has incurred, with or without the authority or the owner or alienator of the land, or any improvement thereon; or
 - (bb) any improvement which enhances the market value of the land and was effected by him on the land with express or implied consent of the said owner or alienator; and

- (b) the alienator may in addition recover from the alienee-
 - (i) a reasonable compensation for the occupation, use and enjoyment the alienee may have had of the land;
 - (ii) compensation for any damages caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.”

[19] In terms of s 28(2) of the Alienation of Land Act, any alienation that does not comply with s 2(1) is deemed valid *ab initio* in all respects, provided the alienee has fully performed in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.

[20] In this matter, the fact that a memorandum of agreement for sale was entered into is incontrovertible. Furthermore, evident from the contents of a letter titled ‘Offer to purchase’ is the confirmation of the intention to sell the property. However, considering non-compliance with the peremptory requirements of s 2(1) of the Act, it is logical to conclude that the purported deed of alienation is that it is void *ab initio*.

[21] Similarly, the purported deed of alienation does not comply with s 28(2) of the Act, as the respondents failed to fulfil their stipulated obligations and for that reason the property was not transferred to them. Specifically, the respondents’ failure to pay the monies within the 60-day period stipulated in the purported deed of alienation constitutes non-compliance, as the payments were made outside of this time frame. Therefore, the respondents’ reliance on s 28(2) is misplaced.

[22] Absent a valid contract, there is no basis for determining that the purchase price or market value of the property was R340 000, as contended by the respondents in their papers. The appellant’s answering affidavit which remains undisputed at this point, establishes that the market value of the

property is R700 000 and this amount exceeds the regional court's monetary jurisdictional limit.

[23] Notwithstanding the potential finding that the monetary jurisdiction may have been exceeded, the issue of monetary jurisdiction is not the sole determining factor of the regional court's jurisdiction. Although the provisions of s 28 of the Magistrates Court Act 32 of 1944 (the Magistrates Court Act) were not canvassed in the appellant's heads of argument, it is pertinent to deal with this issue as it is raised in the appellant's answering affidavit.

[24] It is contended in the answering affidavit of the appellant that the Butterworth regional court does not have jurisdiction over the person of the appellant in terms of s 28 of the Magistrates Court Act. It is asserted that the court that enjoys jurisdiction over the appellant is the Magistrate's court in East London. The basis for this proposition lies in the fact that the appellant's principal place of business is in East London.

[25] On the basis of this argument, it is significant to revisit the provisions of s 28 of the Magistrates Court Act. The relevant provisions provides:

- “(1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other:
- (a) any person who resides, carries on business and is employed within the district or regional division;
 - (b) ...
 - (c) ...
 - (d) any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division...”

[26] It is worth noting that s 28 of the Magistrates Court Act was substituted by s 6 of the Jurisdiction of Regional Courts Amendment Act 31 of 2008. The amendment expands jurisdiction by inserting the phrase ‘or regional division’ after the words ‘within the district’, allowing courts to hear cases involving persons in both district and regional divisions. Therefore, there is no basis to conclude that the regional magistrate had no jurisdiction to hear the case, considering the fact that the cause of action arose in Butterworth which is within the jurisdiction of the relevant regional division.

[27] As set out in the notice, this appeal extends beyond the issue of jurisdiction. In my opinion, the argument positing that this was an interim order is ill-conceived, as the notice of motion explicitly states that the order sought on 23 November 2023 would operate as an interim order pending the finalisation of the application. Consequently, the subsequent order made by the magistrate on 1 October 2024 was, by its nature, intended to operate as a final order. In any event, as already noted interim orders of this nature are not appealable. It would therefore be futile to bring the matter on appeal if it was indeed interim in nature.

[28] Gleaning from the magistrate’s judgment of 1 October 2024, it is evident that the regional magistrate erred by infusing the requirements of an interim interdict into his analysis, when in fact the matter fell to be determined on the basis of whether the requirements for a final interdict were met.

[29] It is a well-established principle that there are three requirements of a final interdict. These requirements must all be established on a balance of probabilities. These are: (a) a clear right; (b) an injury committed or reasonably apprehended and; (c) the absence of any other satisfactory remedy. In terms of the law, a party seeking to establish a clear right to justify a final interdict is

required to establish on a balance of probabilities facts and evidence which must prove that he/she has a definite right in terms of the substantive law.⁵ The legal principle is that the court has a discretion to refuse the final interdict, if other remedies are applicable.⁶

[30] In terms of the requirements of a final interdict, a clear right must exist in law and must encompass a broader range of rights recognised by both common law and statute. In this instance, the regional magistrate's findings of a clear right based on the respondents' occupation of the property for over 20 years constitutes a misdirection. Furthermore, the deed of alienation relied upon by the respondents' counsel, which does not conform with the requirements set out in the Alienation of Land Act, does not establish a clear right in terms of the statute. Therefore, there were no facts or evidence presented before the regional magistrate to establish a clear right as required by the law.

[31] It is noted that the actual or reasonable apprehension of injury extends beyond physical harm or financial loss. The regional magistrate misdirected himself by asserting that if the property were to be sold at auction, ownership would pass to the highest bidder. This conclusion is inconsistent with the facts, as it presupposes that the respondents are owners or have clear right over the property, which was not established.

[32] Finally, the conclusion that the respondents lacked other remedies was an error on the part of the regional magistrate. Although this may sound repetitive, the rights of the respondents as set out in s 28 (2) of the Act constitutes an

⁵ *Edrei Investment 9 (Pty) Ltd (in liquidation) v Dis-Chem Pharmacies (Pty) Ltd* 2012 (2) SA 553 (ECP) at page 556 B-C, see also *Sohail v Mokushane and Others (Sohail)* (1158/2025) [2025] ZAECHMHC 56 (11 March 2025) at para 17.

⁶ *Erasmus v Afrikaner Proprietary Mines Ltd* 1976 (1) SA 950 (W) at 965H; see also *Sohail* fn 5 (supra) at para 17.

alternative remedy, thereby indicating a failure to prove the third requirement of a final interdict. Consequently, the appeal must succeed and the following order issues.

Order

1. The appeal succeeds.
2. The order of the regional court is set aside and replaced with the following order:
 - (i) The rule nisi granted on 23 November 2024, is hereby discharged.
 - (ii) The applicants shall pay costs on party and party scale, jointly and severally the one paying the other to be absolved.
3. The respondents shall pay costs of this appeal on Scale A as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of court, jointly and severally the one paying the other to be absolved.

N. CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

I agree

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant : Adv Botma
Instructed by : GRAVETT SCHOEMAN INCORPORATED
EAST LONDON

c/o : DRAKE FLEMMER & ORSMOND INC
MTHATHA

For the Respondent : Mr Tshutshane
Instructed by : SONAMZI ATTORNEYS INC.
BUTTERWORTH
REF: D SONAMZI
c/o : TL LUZIPHO ATTORNEYS
MTHATHA

Date heard : 08 August 2025

Date of delivery : 06 November 2025