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IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

APPEAL CASE NO: HCA03/2025

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|-----|--|
| (1) | <u>REPORTABLE: YES/NO</u> |
| (2) | <u>OF INTEREST TO THE JUDGES: YES/NO</u> |
| (3) | <u>REVISED: YES/NO</u> |

SIGNATURE

DATE 02/02/2026

In the matter between:

MOREWANE ANTOUN PHOKANE

APPELLANT

AND

JIM MASHABELA

1ST RESPONDENT

LIPSON MASHABELA

2ND RESPONDENT

ROKA MASHISHI TRADITIONAL COUNCIL

3RD RESPONDENT

KGOSHI M.S. MASHISHI

4TH RESPONDENT

Delivered

: 02 FEBRUARY 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be 02 February 2026 at 14:00 am.

Date heard

: 07 NOVEMBER 2025

Coram

: Ngobeni J et Pillay AJ

JUDGMENT

NGOBENI J

[1] This is an appeal against the decision that was granted by Magistrate B.U. Mogashoa, sitting in the Magistrates' Court for the district of Tubatse, held at Praktiseer (court *a quo*) on 25 September 2024. There are four grounds of appeal raised by the appellant, and for the case to be well understood I will restate them although not verbatim. The grounds are as follows:

- (i) the learned magistrate erred in finding that she had the authority to allow the first and second respondents to raise a point of law during the hearing of the matter, when they did not raise it in their papers.

- (ii) the learned magistrate erred in finding that there was a contractual relationship between the appellant, the first and second respondents when such case was never made in their papers at all nor was it even argued by the first and second respondents' legal representative.
- (iii) the learned magistrate erred in finding that there was a contractual relationship between the appellant, the first and second respondents, thus the relief for interdict would amount to specific performance without a claim for damages, hence she had no jurisdiction.
- (iv) the learned magistrate erred in finding that she had no jurisdiction to grant the interdict as prayed for despite the first and second respondents effectively admitting jurisdiction by choosing to ignore that issue although it has been stated in the founding affidavit of the appellant.
- (v) the learned magistrate erred in finding that the appellant was seeking to protect possession which he did not have, even though the appellant enjoyed symbolic possession as the appellant was allocated the disputed stand by the third and fourth respondents.

[2] The appellant seeks no relief against the third and fourth respondents, as they just own the land in trust for the benefit of the Ga-Mashishi traditional community which is the land on which the stand in question is situated.

[3] This appeal emanates from a dispute between the appellant and the first and second respondents emanating from the acquisition and possession of stand number 6[...] Ga-Mashishi village, Mamphake section (property or stand). The allegation by the appellant is that he acquired the said stand from the father (Ramphelane James Mashabela or the deceased) of the first and second respondents in his lifetime against a full payment of the amount of four thousand rand (R4000 -00). The appellant further alleges that upon acquisition of the said stand he erected amongst others a fence to mark demarcation and size of the stand and a driving school ramp. The third and fourth respondents had, according to the appellant endorsed the transaction between the deceased and himself.

[4] The further allegation by the appellant is that during the year 2016 the first and second respondents encroached the stand in question by removing the fence that he erected and subdivided and sold the stand to other people without his permission. He was engaged in sale negotiations with the first and second respondents of the stand before they could encroach the stand, where he asked for an amount of R150 000-00 from them because of the improvements he allegedly made, which amount the first and second respondents failed to raise. The appellant approached the court *a quo* with an application which in the main sought restoration of possession of the stand.

[5] In response to the application, the first respondent deposed to an answering affidavit, which was confirmed by the second respondent, which raised a point *in limine* that the claim by the appellant had prescribed as according to his version he was disposed of the stand in question in the year 2016. In response to the merits of the application, the first respondent stated that it is not correct that the appellant purchased the stand from his father because the appellant failed to produce proof of purchase at a meeting that was held on 02 July 2016, which was a meeting for him to produce proof of purchase not a meeting to buy him out of the stand with R150 000-00 as he alleged.

[6] The first and second respondents deny that the appellant was in peaceful and undisturbed possession of the stand in question, because the appellant is the one who occupied, fenced and placed his container on the ploughing fields that are adjacent to the ploughing fields of the Mashabela family. The first and second respondents confirm that their father is indeed now deceased. For easy reference I will sometimes refer to the first and second respondents just as the respondents.

[7] At the hearing of the application on 17 July 2024 in the court *a quo*, it became apparent that the matter was before court on 28 February 2024, and on that particular day the appellant withdrew prayers A and B of its notice of motion. It now becomes necessary that I state the prayers in

the notice of motion that appeared before the court *a quo* for the sake of context, and they are as follows:

- (a) *"That the First and Second Respondents be ordered to immediately restore possession of stand number 6[...] situated at Ga-Mashishi, Mamphake section to Applicant;*
- (b) *That to give full effect to an order as in paragraph (a) above, the First and Second Respondents shall within 10 (ten) days of receiving an order in this matter and at their own costs, fully re-erect and install the fence on stand number 6[...] Ga-Mashishi, Mamphake section in the same fashion as they found it erected by Applicant;*
- (c) *That the First and Second respondents be interdicted from interfering either directly or indirectly and in any manner whatsoever with the Applicant's possession of stand 6[...] Ga-Mashishi village, Mamphake section;*
- (d) *That the First and Second Respondents be ordered to pay costs of this application jointly and severally, one paying the other to be absolved;*
- (e) *Further and or alternative relief".*

[8] In issue between the parties as clearly appears from the judgment of the court *a quo* is that because the appellant withdrew the *mandament van spolie* application (*spoliation*), the court could not deal with the application for a final interdict because the appellant was not in possession of the stand any longer,

and his application for a final interdict amounted to an application for specific performance which the court *a quo* alleged not to have jurisdiction to adjudicate on that. The further reasoning by the court *a quo* was that ownership is not a requirement for *spoliation*, but undisturbed possession is, and because the application dealing with undisturbed possession was withdrawn, then the appellant could not be able to interdict what he was not in possession of.

[9] It is trite that the requirements for a final interdict are a clear right which must be proven on a balance of probabilities, injury committed or reasonably apprehended which is not just physical injury but includes any interference with ones right and absence of another satisfactory remedy¹.

[10] The court *a quo* in dealing with the issues it had to decide referred mainly to the provisions of section 30(1) of the Magistrates' Courts Act² (MCA) and reads as follows:

30 Arrests and interdicts

"(1) Subject to the limits of jurisdiction prescribed by this Act, the court may grant against persons and things orders for attachments, interdicts and mandament van spolie,

(2) ..."

¹ Setlogelo v Setlogelo 1914 AD 221, National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC), Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (2) All SA 366 (A).

² 32 of 1944.

[11] Section 30(1) as quoted above was substituted by section 2(a) of the Judicial Matters Amendment Act 42 of 2013 which came into operation on 20 September 2010. The amendment in effect removed the words "*arrest tanquam suspectus de fuga*", which the court *a quo* still quoted. However, that oversight on the part of the court *a quo* will not influence the issues to be decided in this appeal, because the issue is about interdicts and *spoliation* orders. It is also important to note that sub-section 30(3) of the MCA was completely deleted.

[12] The court *a quo* in its judgment also relied on the provisions of section 46(2) of the MCA, which for the sake of completeness I will also restate which reads as follows:

46 Matters beyond the jurisdiction

"(1) ...

(2) *A court shall have no jurisdiction in matters-*

(a)...

(b)...

(c) *in which is sought specific performance without an alternative of payment of damages, except in-*

(i) *the rendering of an account in respect of which the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette,*

(ii) the delivery or transfer of property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette,

(iii) the delivery or transfer of property, movable or immovable, exceeding in value the amount determined by the Minister from time to time by notice in the Gazette, where the consent of the parties has been obtained in terms of section 45;

(d..."

[13] It appears from the transcribed record that paragraphs (a) and (b) (which I will for the sake of clear understanding also refer to them as prayers (a) and (b), were withdrawn by the appellant in the court *a quo* before the matter could be argued. That is evident from the following extract from the transcribed record of the court *a quo*:

"COURT: Right, you may then proceed.

MR MASHILE: Thank you. Your Worship, previously when the matter was before this Honourable Court, we, on behalf of the Applicant I indicated that we are [indistinct 09:26:55] number, on the paragraph A and B, on the notice of motion. And indicated that we only proceed with paragraph C and then [indistinct] paragraph, permission, to the issue of costs.

COURT: Yes

MR MASHILE: And just after finalising that issue my comment still are based the point that, since we are through those two paragraphs the Court, this Court no longer had jurisdiction. And then, I indicated that we are not prepared for that, sought indulgence from this Court that we all prepare [indistinct]-09:27:37] the issue of whether this Court, after we have proven our paragraphs A and B in the notice of motion still had jurisdiction to present with the matter. And we are here today. I am ready to proceed on the old and all merits in relation to paragraph C and succeeding paragraphs”.

[14] It is clear from the court *a quo*'s record as quoted above that after paragraphs (a) and (b) of the notice of motion were withdrawn the issue of jurisdiction came up, and both legal representatives were given an opportunity by the court *a quo* to prepare heads of argument on that aspect so that the court *a quo* could be addressed on that aspect. It is common cause that the issue of jurisdiction was never raised in the answering affidavit(s) of the respondents. The explanation that was given by the respondents is that the issue of jurisdiction arose when the appellant withdrew paragraphs (a) and (b) of the notice of motion.

[15] The appellant argues that the court *a quo* dealt with the issue pertaining to jurisdiction even though the first and second respondents failed to raise it in their papers. The appellant argues that the court *a quo* was not well

placed to raise it *mero motu*. If it was the first and second respondents who raised the issue of jurisdiction, they must have raised that in their papers, to an extent that they could have even invoked the provisions of Rule 55 of the Rules Regulating the Conduct of Proceedings in the Magistrates' Courts (MCR). That is evident from the following extract from the transcribed record of the 17 July 2024 of the said proceedings:

"MR MASHILE... I do not want to go to the merits of arguing that point, but it is important to know if they raised the issue of jurisdiction or the Court mero motu raised the issue. Because if it was them, they had missed the point then it is positive of their point if they raised the point at that time of hearing the matter. Because the Rule 55 tells you how you can raise the point of, it is either [indistinct] by the only notice that we have on the points of law or you include it in your answering affidavit..."

[16] In response to the question of who raised the issue of jurisdiction and also the fact that if it was raised by the first and second respondents, they failed to do that on notice or in their answering affidavits the legal representative of the first and second respondents responded as follows:

"MR TSHIDI: Whether jurisdiction was raised by us or the Court, the bottom line is, whether this Court has jurisdiction or not. Because this authority say, even if the parties can agree that they are going to proceed before a

Magistrate Court, if the Court is of the view that it does not have jurisdiction, that is the decision of the Court. It is Amen”.

[17] The court *a quo* at the end of the above-mentioned submissions, decided to proceed with the matter and hear submissions on both jurisdiction and the merits at the same time, which then led to the judgment that is challenged by the appellant. MCR 6(4) states that:

“(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

[18] In the case at hand I have already explained as to how it came about that the issue of jurisdiction was raised at that stage of the proceedings. The court *a quo* on page 3 of its judgment states that the issue pertaining to jurisdiction was raised by the respondents. I must point out that it is permitted for the court to raise issues *mero motu* if the adjudication of those issues is necessary to dispose of the matter as rightly submitted by the respondents quoting the case of *Booi v Amathole District Municipality and others*³.

³ (CCT119/20) [2021] ZACC 36; 2022 (3) BLLR 265 (CC) (19 October 2021).

[19] The Constitutional Court dealt with that aspect drawing from its earlier judgment of *CUSA v Tao Yang Metal Industries*⁴ and the Supreme Court of Appeal's decision of *Road Accident Fund v Mothupi*⁵. If the issue of jurisdiction was raised by the court *a quo* after seeing that it was important for the adjudication of the case, it was well and good because that is supported by even the Constitutional Court, and I would, based on the principle of precedence have no issue with that.

[20] The distinction between the case at hand and the *Booi* case, *supra*, which I have referred to in the preceding paragraph is that in the case at hand the issue of jurisdiction was raised by the respondents after the withdrawal by the applicant of the first two prayers in the notice of motion. The law is very clear that a party has a duty to allege in the pleadings the material facts upon which they rely, as it is impermissible for a trial court to rely on issues not raised in the pleadings⁶.

[21] The peculiarity in the case at hand is that although the issue pertaining to jurisdiction was not raised by the respondents in their pleadings, for the reasons that I have already mentioned as presented by the legal representative of the respondents, the court *a quo* gave the parties an

⁴ [2008] ZACC 15; 2009(2) SA 204 (CC).

⁵ [2000] ZASCA 27; 2000 (4) SA 38 (SCA).

⁶ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA), *Notyawa v Makana Municipality and Others* (CCT115/18) [2019] ZACC 43; 2020 (2) BCLR 136 (CC), *Moroka v Premier of the Free State Province and Others* [2022] ZASCA 34.

opportunity to go and prepare heads of argument on the issue of jurisdiction.

[22] The fundamental question under the circumstances would be whether the appellant suffered any prejudice because of the manner in which the proceedings were handled in that the procedure or process of amendment was usurped, but instead the court *a quo* chose a quicker process of just being addressed after heads of argument were prepared. I find no irregularity in the procedure that the court *a quo* opted for, because the appellant also withdrew some prayers in court which led to the issue of jurisdiction being raised, as that is also supported by the Constitutional Court, where in the case of *Eke v Parsons*⁷, on the strict adherence to the rules said the following:

"39 ... *That, however, does not mean that courts should be detained by the Rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said '(I)t is trite that the rules exist for the courts, and not the courts for the rules'*"

⁷ 2016 (3) SA 27 (CC).

[23] In my view even though there is a depart from the general applicable Rules as in the case at hand it should still be fundamental to investigate as to whether the other party suffered any prejudice because of the depart from normal forms and procedure, and whether the departure is in the interests of justice⁸. In my view the argument by the appellant that the court *a quo* dealt with an issue that was not in the papers of the respondents is flawed because they were both given an opportunity to prepare on that aspect and subsequently given an opportunity to address the court on that aspect of jurisdiction.

[24] The interests of justice would surely not be offended because of the way those proceedings were handled as no prejudice was suffered by any of the parties. In the result nothing can come out of the argument by the appellant that the court *a quo* dealt with the issue not in the papers, and I find no fault with the approach that the court *a quo* followed.

[25] The next issue that I have to deal with is as to whether the court *a quo* was correct in finding that it cannot deal with paragraph C of the notice of motion, as the view of the court *a quo* was that the appellant seeks an act of specific performance where there is no option for damages in the alternative. I have already stated as to what the requirements for a final interdict are. The provisions of section 46 of the MCA guides the

⁸ Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A), Maharaj v Barclays National Bank Ltd 1976 (1) SA 481 (A).

Magistrate dealing with an application for *mandament van spolie* and interdicts as to the value that the magistrate must consider in determining whether he/she has jurisdiction to hear the matter. It is not however stated as to how one determines the value of, for example the property dealt with if property is involved.

[26] The case of *Botha v Andrade*⁹ (*Botha* case) has been referred to as the leading case that gives guidance on matters that come before the Magistrates' Courts pertaining to interdicts. I refer to two cases of the High Courts in different Divisions, which followed the *Botha* case and rightly so as it is the decision of the Supreme Court of Appeal, and they are the cases of *NPE Construction (Pty) Ltd and Another v Mkhonto and Others*¹⁰ (NPE case) and *van Oordt and Another v Gilbert*¹¹, and they relied on the *Botha* case in determining the value of the matter in order for one to establish jurisdiction.

[27] The *Botha* judgment clarified that where the application or action that comes before a Magistrate is an interdict in terms of provisions of section 30 of the MCA, it cannot be determined without considering the provisions of section 29 as well of the very same MCA. I will for the sake of completeness quote what the Supreme Court of Appeal (SCA) in the *Botha* case, *supra*, regarding the question of interpretation on paragraphs

⁹ (2007/578) ZASCA 120 (26 September 2008).

¹⁰ (51/2023) [2025] ZAMPMBHC 26 (9 April 2025).

¹¹ (CA08/2019) [2019] ZAECHC 6 (6 August 2019).

13 and 14 of the said judgment as follows on sections 30 and 29 of the MCA:

"[13] *The wording of the two sections is clear and unambiguous and the ordinary meaning of the words ought to be given effect. ... The section provides that a magistrate may grant certain orders including interdicts, subject to the limits of jurisdiction prescribed by the Act. The search for the 'limits' referred to in s 30(1) leads inevitably to ss 28 and 29 of the Act and the conclusion is, to my mind, unavoidable that the qualification 'subject to the limits of jurisdiction prescribed' by the Act is a reference to s 29 (relating to the limits of jurisdiction in respect of matters referred to in the section).*

"[14] *... It seems to me the two sections (30 and 29) complement each other and where the limit of the magistrate's jurisdiction are required to be determined in interdict proceedings, in so far as the value of the matter in dispute is concerned, the two sections ought to be read together. Section 29 speaks to the value of the matter in dispute and s 30 limits the jurisdiction of the magistrate's court to the limit set out in s 29, ..."*

[28] The explanation of the application of sections 29 and 30 of the MCA can be clearly understood as explained further in the *Botha* case, *supra*, on paragraphs 15 and 16, where the SCA continued to say:

"[15] ... It follows that s 29(1)(g) is applicable to interdicts granted by the magistrate under s 30, and the section operates to set the jurisdictional limit of the value of the subject matter in dispute and other specific matters referred to in s 29."

"[16] The central question this case raises, however, is how to determine 'the value of the matter in dispute'. The issue in dispute between the parties is the alleged nuisance emanating from the respondents' unlawful activities. The abatement of the nuisance is capable of qualification and so the jurisdictional limits of the magistrates' court can be determined without difficulty. Although the court below correctly identified the issue as being the 'alleged nuisance', it attached value to the business rather than the subject matter in dispute, which was the abatement of the unlawful activities. In this regard the court erred. It is that conduct or the cost of the abatement of the unlawful activities to which value had to be attached and not the business per se. If the cost of abating the nuisance was in excess of R100 000 the magistrate would clearly have had no jurisdiction in the matter."

[29] The *Botha* judgment clarifies the fact that the value of the 'matter in dispute must be quantified', and that value of the matter that would have been quantified will then lead the magistrate to determine as to whether it has jurisdiction or not. It is clear that one has to get into the matter

and hear it to be able to follow the guidelines as set down in the *Botha* case, *supra*. The court did not clearly delve into the matter as required by the Botha judgment. It will only be fair that the matter be returned back to the court *a quo* so that the enquiry as set down in the *Botha* judgment be followed and thereafter the court *a quo* will then be able to determine if it has jurisdiction or not. The parties cannot be faulted for the manner in which the matter was dealt with in the court *a quo* and clarity had to be sought in this case, and therefore each party will have to bear its own costs.

[30] In the result the following order is made:

- (i) the appeal succeeds,
- (ii) the order of the court *a quo* granted on 25 September 2024 dismissing the application for lack of jurisdiction is set aside,
- (iii) the matter is remitted back to the court *a quo* to be properly dealt with, by a different magistrate,
- (iv) each party to bear its own costs.

J.T. NGOBENI
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO DIVISION,
POLOKWANE

I AGREE

**K.L. PILLAY AJ
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES

For the appellant:

Mr M.E. Mashile

Instructed by:

Malope D. Mahlaela Inc.

For the 1st and 2nd respondents:

Mr M. Chidi

For 3rd and 4th respondents:

No appearances

Instructed by:

Mammule Chidi Incorporated