

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A289/25

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE 30 APRIL 2026

SIGNATURE

In the matter between:

THANDO ZANDILE TOKWE

Appellant

And

LORRAINE FENNEL

ALL UNLAWFUL OCCUPANTS OF ERF 2[...] X[...]

1ST Respondent

SECTION TEMBISA

2ND Respondent

EKURHULENI METROPOLITAN MUNICIPALITY OF

TEMBISA

3RD Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG

4TH Respondent

Coram: **MOOKI J and KEKANA AJ**

Heard on: **12 FEBRUARY 2026**

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on Caselines. The date for hand down is deemed to be on **30 April 2026**.

JUDGMENT

KEKANA AJ (MOOKI J CONCURRING)

Introduction and background

- [1] This is an appeal against the judgment handed down by magistrate at the Tembisa magistrate court on 15 April 2025 in which the Appellant's application for an order for the eviction of the first and second respondents (the Respondents) was dismissed. Aggrieved by the decision of the court a quo, the Appellant filed a Notice of Appeal against the judgment of the court a quo on 30 May 2025. The Respondents only filed a Notice of intention to oppose.
- [2] The Appellant's case is as follows. The Appellant purchased from the executor of the estate late Regina Fennel an immovable property described as Erf 2[...] X[...] Section, Tembisa, Gauteng Province. After the conclusion of the sale agreement between the executor and the Appellant, the executor notified the first respondent that the property was sold, and that the new owner will occupy the property after the transfer of the property into her name.
- [3] After the property was transferred, the Respondents refused to vacate the property and the Appellant gave the first respondent a verbal notice of eviction

from the property. The Respondents refused to vacate the property, claiming that they are beneficiaries of the estate late Regina Fennel and that they have a right to occupy the property. The Appellant alleges that the Respondents are in unlawful occupation of the property.

Condonation

- [4] On 12 January 2026, the Appellant filed an application for condonation of the late filing of the appeal. In the condonation application the Appellant submits that after the judgment was handed down further consultations were held with the client and again a Notice to Request Reasons for judgment had to be filed terms of Rule 51(1) of the Rules Regulating the Conduct of Proceedings of Magistrate Court.
- [5] A Notice of Appeal was served on the Respondent's Attorneys of record on 3 June 2025, The Appellant alleges that from July to November 2025 she was waiting for the Attorneys of the Respondents to oppose the appeal. The Appellant further alleges that it was mentioned by the magistrate during the proceedings that the Respondents were indigent persons utilising Legal Aid services which mandate was later terminated, and that the long wait was to enable the Respondents to gather funds so they can pay their Attorneys of record, being Sibuyi Attorneys to proceed to oppose the appeal.
- [6] It is trite that condonation cannot be for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default¹. In a condonation application, what is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate prospects which are not strong.²

¹ *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 20.

² *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

- [7] There was a delay by the Appellant and though the explanation provided was disputed by the first and second Respondents in their opposition of the condonation, the court noted that the Respondents failed to allege any particular prejudice. The standard for considering an application for condonation is the interests of justice. What follows now is the interests of justice which is regarded as the standard for considering an application for condonation.³ Absent any prejudice shown on the part of the Respondent, I am of the view that it will be in the interests of justice for the condonation to be granted.

Submissions by Appellant

- [8] Appellant's submission can be summarised as follows:

- 8.1 that the Magistrate erred in accepting the first and second Respondents' version that the property was sold fraudulently without any documentary proof to support this version;
- 8.2 that the Magistrate erred in finding that the executor of the estate misrepresented himself at the office of the Master of the High Court in Johannesburg, when he informed the office of the Master that he is the only heir of the estate of his grandmother;
- 8.3 that the learned magistrate misdirected himself by assuming that the intention of the executor of the estate (Makhina Elias Fennel) was to make a quick money by selling the house;
- 8.4 that the magistrate erred by failing to consider that the immovable property in dispute has passed all the stages of a process for registration of immovable property at the Deeds Office;
- 8.5 that if based on the evidence before him, he was of the conclusion that there was dispute over the house the learned magistrate while not granting the Applicant an order for eviction of the First and Second

³ *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37 at para 22.

Respondents, he should have postponed the application of eviction of the First and Second Respondents sine die, so that the Applicant and the First and Second Respondents can resolve the issue of ownership of the estate property by using any legal procedure that is available to them.

- [9] The first and the second Respondents are not opposing the appeal but committed to abide by the decision of the Court.

Legal principle and analysis.

- [10] An application for eviction is by its very nature vindicatory and an applicant is required to prove its ownership of the property from which it seeks to evict the respondent.⁴ The onus is on the applicant to prove their ownership with clear and admissible evidence.

- [11] The Appellant presented in the court a quo a title deed and an unsigned deed of sale to prove ownership. It is concerning that the deed of sale lacks several essential aspects which are key to facilitate a complete transfer. It does not have the full details of the property to be sold, the town, the erf number and street address. No witnesses signed for an on behalf of the purchaser, and only one witness signed for the seller while two witnesses are required to sign. Details of Elias Makhina Fennel are completed on the part of the spouse of the purchaser and again Elias Makhina Fennel's details are completed as the seller, nowhere does the purchaser sign the deed of sale.

- [12] Since the deed of sale was one of the evidence presented before the court a quo the magistrate was therefore correct in accepting the invitation to consider its contents. In ***Nedbank Ltd v Mendelow and another NNO***⁵, the SCA held that it is trite that where registration of a transfer of immovable property is effected pursuant to fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Under the circumstances I find that the lack of those listed

⁴ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA (A) at para 82.

⁵ 2013 (6) SA 130 (SCA) at para 135.

essential aspects on the deed of sale makes the purported transfer questionable. The submission by the Appellant that the immovable property in dispute has passed all the stages of a process for registration of immovable property at the Deeds Office cannot be sustained.

- [13] Again, the Appellant attached a letter of executorship as evidence to prove that Elias Makhina Fennel is the appointed executor of the estate of the late Regina Fennel, however first Respondent in its answering affidavit contends that absent any family meeting appointing Elias Makhina Fennel as the executor of the late Regina Fennel, there must have been some misrepresentation on his part at the office of the Master of the High Court for him to be regarded as the only successor of the late Regina Fennel. Faced with this dispute, it was correct for the court a quo to consider the confirmatory affidavit by the son of the late Regina Fennel who is Willian Isaac Fennel and the 'certificate of appointment' appointing him to be the representative of the late Regina Fennel's estate.
- [14] Despite the change in the regime on how estates are to be dealt with, it is common cause that if William Isaac Fennel was appointed as a representative of the estate of the late Regina Fennel as stated in the certificate of appointment, the letter of executorship could not be issued years thereafter to another person by the office of the Master of the High Court, without of William Isaac Fennel being at least notified; especially as there has not been reasons to trigger his removal nor has he resigned from his position as representative of the estate of the late Regina Fennel.⁶
- [15] Upon discovering that Elias Makhina Fennel has been appointed an executor of the estate of the late Regina Fennel, the family arranged a meeting with the office of the Master of the High Court on 13 June 2022 to address the appointment of Elias Makhina Fennel. From the evidence before the court a quo, Elias Makhina Fennel did not avail himself and no excuse was provided for his non-attendance of the meeting by the office of the Master of the High Court. Again, there was a request by the family in terms of Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) and Promotion of Access to information Act, Act 2 of 2000 (PAIA) to the office of the Master of the High Court on 28

⁶ *Wolfaardt NO and Others v Sherriff NO and Others* (023949/24) [2025] ZAGPPHC 932.

September 2023 seeking reasons on the appointment of Elias Makhina Fennel as the executor of the late Regina Fennel.

- [16] It remains suspicious on how Elias Makhina Fennel was appointed executor of the late Regina Fennel absent any family meeting involving the first and second Respondents being aware of his appointment. There was no correspondence from the office of the Master of the High Court removing William Isaac Fennel even though he was appointed under a different regime (the old regime). The court a quo was correct to cast some suspicion on the appointment of Elias Mkhahina Fennel as the executor of the estate of the late Regina Fennel as he is not the only beneficiary of Regina Fennel.
- [17] Having found that there are other beneficiaries of the late Regina Fennel in existence; namely William Isaac Fennel (the son) and Lorraine Fennel (the granddaughter), it is clear that Elias Makhina Fennel is not the only heir of his grandmother. I find no error on the part of the magistrate in finding that Elias Makhina Fennel misrepresented himself at the office of the Master of the High Court in Johannesburg, when he informed the office of the Master that he is the only heir of the estate of his grandmother, indeed he is not the only heir of his grandmother, consequently this amounted to a misrepresentation. The 'certificate of appointment' appointing William Isaac Fennel is proof that Elias Makhina Fennel is not the only heir of the late Regina Fennel.
- [18] The submission by the Appellant that the first and second Respondents remain unlawful occupants of the property is found wanting in that they were lawful occupants of the property prior to the death of the late Regina Fennel and remain lawful occupants to the extent that there has not been any lawful termination of rights previously held. Carelse AJ in the case of **Davidan v Polovin N O and Others**⁷ held that the jurisdictional requirement to trigger an eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) is that the person sought to be evicted must be an unlawful occupier within the meaning of PIE at the time when the eviction proceedings were launched. It means that if the person was a lawful occupier

⁷ *Davidan v Polovin N O and Others* (167/2020) [2021] ZASCA 109 (5 August 2021).

with some rights, then the need exists for the lawful termination of that right first, it is only then that she becomes an unlawful occupier.

- [19] The notice to vacate served by the Appellant on the Respondents does not terminate the right to lawful occupation. Unless preceded by the termination of lawful occupation or the termination of the right to occupation, the notice to vacate alone becomes defective as it intends to vacate a lawful occupier and for that reason PIE Act is inapplicable, especially as the Respondents were lawful occupiers from *de novo*.
- [20] Regarding the Appellant's submission that the court a quo should have postponed the matter *sine die* so that the Appellant and the first and second Respondents can resolve the issue of ownership of the estate property by using any legal procedure that is available to them. I find as regards ownership of the property the Respondent's version to be plausible, and the lack of essential aspects referred to in paragraph 11 above to complete the transfer makes the Appellant's case to be fatally flawed. The onus rests on the Appellant to establish that it is the rightful owner of the property and is entitled to the order they seek.⁸ And having failed to do so the court a quo was correct in not postponing the proceedings *sine die* but to dismiss the application.

Conclusion

- [21] I find that Elias Makhina Fennel is not the only heir of the late Regina Fennel as there are other beneficiaries namely, Lorraine Fennel and William Isaac Fennel. His appointment as an executor without the knowledge of the other beneficiaries remains suspicious. This can only be achieved if he presented himself as the only heir of the late Regina Fennel, if so then this would amount to a misrepresentation on his part. He was given an opportunity to attend the meeting sanctioned by the office of the Master of the High Court which he did not honor.

⁸ *Motsile and Another v Motsile and Others* (2022/16361) [2025] ZAGPJHC 1245.

[22] There were serious issues missing on the deed of sale for the lawful transfer to be effected making the transfer of the property to be questionable in law. With those serious defects in the deed of sale there is no clear right to ownership of the property, the conclusion is strong that ownership of the property did not pass to the person in whose name the property is registered after the purported transfer.

[23] There was nothing erroneous in the findings of the court a quo in dismissing the eviction application.

Order

[24] In the premises, the following order is made:

1. The appeal is accordingly dismissed.

Heard: 12 February 2026

Delivered: 30 April 2026

Court

I agree

KEKANA AJ

Acting Judge of the High

MOOKI J

Judge of the High Court