IN THE HIGH OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU

Appeal Case Number: MCA01/2023

REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

KHAMUSI SHONISANI MUDAU MAMODE Appellant

And

VHUHWAVHO DENGE Respondent

Coram Nemutandani AJ et Phatudi J

JUDGMENT

NEMUTANDANI, AJ

INTRODUCTION

[1] This is an appeal against the judgment and order of Sibasa Regional Court, "the court a quo", which dismissed with costs the Appellant's application for referral to oral evidence. The referral application was in respect of the disputed facts, which will be detailed *infra*.

[2] The Appellant instituted an eviction application against the Respondent from certain premises described as Erf 7[…] T[…] v[…], also known as, T[…] M[…]Home, (the premises).

[3] The Respondent opposed the Application and in his defence, alleged that he is not an unlawful occupier but rather an owner who bought the said premises from one Ms Salome Ngwana for an amount of R 350 000.00 around May 2017.

FACTUAL MATRIX

[4] The Appellant contended in his founding Affidavit that he entered into a five-year verbal lease agreement with Ms Ngwana in January 2003 in respect of the premises. The agreed monthly rental was an amount of R 3 500.00. He contends further that Ms Ngwana made an upfront rental payment of R 200 000.00. At the expiry of the five-year term, i.e. in 2008, the contract renewed itself automatically on a month-to-month basis.

[5] To his surprise, around 2019, he discovered that Ms Ngwana is no longer in occupation but the Respondent who is conducting accommodation business thereat. The Appellant then caused an eviction letter to the Respondent and the eviction application ensued.

[6] In opposing the eviction application, the Respondent contended that he is the owner of the premises. In his answering affidavit, he attached a sale agreement between himself and Ms Ngwana. He contended further that to his knowledge, Ms Ngwana and the Appellant entered into a sale agreement which sale agreement was facilitated by one Mr Ndikundiswani Jimmy Mushadu, in his capacity as an estate agent. The alleged sale consideration was an amount of R 220 000.00 inclusive of R20 000.00 estate Agent commission. Mr Mushadu filed a confirmatory affidavit to that effect.

[7] In his replying affidavit, the Appellant reiterated that he entered into a verbal lease agreement and not a sale agreement with Ms Ngwana.

[8] At the commencement of the eviction application hearing, the Appellant's counsel applied from the bar for referral of the disputed facts to oral evidence. The referral request was opposed. The application for referral was dismissed with costs. The hearing on merits followed and it was equally dismissed with costs.

THE ISSUE

[9] The appeal is only in respect of the dismissal with costs of the referral application. The issue to be decided is whether the court a quo exercised its discretion judiciously in dismissing the referral application. The parties' contesting versions as contained in the pleadings reveal two material disputes of fact on the papers,

9.1 Whether the Applicant sold or leased the premises to Ms Ngwana; and
9.2 Whether the Respondent is an unlawful occupier.

THE LAW

[10] Magistrates' Court Rule 55(1) (k) states as follows:

"(i) *Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision.*
(ii) The court may in particular, but without affecting the generality of subparagraph (i) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for that person or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

APPLICATION OF THE LAW AND EVALUATION

[11] The general rule is that, final relief in motion proceedings may only be granted if those facts as stated by the Respondent, together with those facts stated by the Appellant that are admitted by the Respondent, justify the granting of the application, unless it can be said that the denial by the Respondent of the facts alleged by the Appellant is not such as to raise a real, genuine or *bona fide* dispute of fact.[1]

[12] In assessing whether a dispute of fact on the papers has been raised genuinely, the court does not go into the merits of a Respondent's defence. It merely considers whether the Respondent's averments, if they were to be established in a trial, would make out a defence to the Applicant's claim. It also assesses whether the Respondent's averments making out a prima facie defence are made bona fide. The Respondent's bona fides are usually assessed with regard to the verisimilitude of the Respondent's case on paper, something ordinarily demonstrated by the deponent seriously and unambiguously engaging with the issues sought to be placed in dispute.[2]

[13] In the circumstances of this case, the Respondent did raise a bona fide defence on the papers. He has provided an explanation on why he is not an unlawful occupier.

[14] The import of rule 55(1)(k) is that where there is a material and *bona fide* dispute of fact that cannot be decided on the papers, a court is faced with three alternatives: it may dismiss the application, or direct that oral evidence be heard on specified issues, or refer the matter to trial. A court is not restricted to the listed remedies and may make any order it deems fit and which is directed at ensuring a just and expeditious decision. The response of the court a quo was to dismiss the application instead of referring it to oral evidence.

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[1] ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1964 (3) SA 623 (A)** at 634 E-I and 635 A-C.

[2] **cf *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*** **2008 (3) SA 371 (SCA)** at para 13.

[15] The question that arises is what is the nature of the discretionary power exercised by a court when making a determination under rule 55 (1) (k) and to what extent, if any, may an appeal court validly interfere with the exercise of such a discretion on appeal. It must be borne in mind that Magistrates court rule 51(1) (k) mirrors Rule 6(5) (g) of the Uniform Rules of this Court. Our courts dealt with this discretionary power with reference to rule 6(5) (g) of the Uniform Rules of this Court.

[16] In ***Trencon Construction***[3], Khampepe J, writing for a unanimous Constitutional Court, noted that two types of discretion have emerged in our case law in determining the standard of interference that an appellate court is justified in applying when considering the exercise of discretion by a court of first instance. The two types of discretion are often referred to as "*a discretion in the strict/narrow/true sense and a discretion in the broad/wide/loose sense*"[4].

[17] The distinction between a true discretion and a loose discretion is not merely one of semantics for the type of discretion will dictate the standard of interference that an appellant court must apply. It is thus critical for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in a true sense or whether it was a discretion in a loose sense[5].

[18] In ***Media and Allied Workers Association of South Africa***[6], EM Grosskopf JA explained that a "*truly discretionary power is characterised by the fact that a number of courses are available to the repository of power".* Thus, where the discretion contemplates that the court may choose from a range of options, it is a discretion in the strict or true sense[7]. This type of discretion is said to be "true" in that the lower court has an election of which option it will

[3] ***Trencon Construction v Industrial Development Corporation*** **2015 (5) SA 245 (CC)** at para [83].
[4] Id at footnote [85].
[5] Id at para [83].
[6] ***Media Workers Association of South Africa and Others v Press Corporation of SA Ltd*** **1992 (4) SA 791 (A)** at 800 D-E.
[7] See, ***Giddey NO v JC Barnard & Partners*** **2007 (5) SA 525 (CC)** at para [19].

apply and any option chosen can never be said to be wrong, as each is entirely permissible[8]. If the court of first instance followed any one of the available courses, it would be acting within its powers and the exercise of this type of discretionary power could not be set aside merely because an appellate court would have preferred the court below to follow a different course amongst those available to it[9]. The rationale for the appellate court's restraint when faced with the exercise of a true discretion by a court of first instance is that the "*principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making*" ***[10]***.

[19] An appellate court may nonetheless interfere with the exercise of a discretion in a true sense if it finds that the court of first instance did not act judicially. The courts have over time identified various grounds for interfering with the exercise of this type of discretion. These would include instances where the first instance court exercised its discretionary power capriciously, or exercised its discretion upon a wrong principle or on an incorrect interpretation of the facts, or has not brought its unbiased judgment to bear on the question, or it has not acted for substantial reasons[11], or reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles[12], or the choice of option by the court below does not lead to a just and expeditious decision[13].

[20] In contrast, a court exercising a discretion in a loose sense does not necessarily have a choice between equally permissible options. In ***Knox D'Arcy***[14], EM Grosskopf JA described the exercise of a discretion in the loose sense to mean, "*no more than that the court is entitled to have regard to a*

[8] ***Trencon*** above n 3 at para [85].
[9] ***Media Workers Association of South Africa and Others*** above n 6 at 800E.
[10] Comment of Moseneke DCJ in ***Florence v Government of the Republic of South Africa*** **2014 (6) SA 456 (CC)** at para 113.
[11] ***Ferris v First Rand Bank*** **2014 (3) SA 39 (CC)** at para 28.
[12] ***National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*** **2000 (2) SA 1 (CC)** at para [11].
[13] ***Lombaard v Droprop*** **2010 (5) SA 1 (SCA) at** para [29].
[14] ***Knox D'Arcy Ltd and Others v Jamieson and Others*** **1996 (4) SA 348 (A)**.

number of disparate and incommensurable features in coming to a decision"[15].

[21] In ***Ploughman NO***[16] and ***Red Coral Investments 117 (Pty)***[17], the court expressed the view that referral to oral evidence vests a court with "wide discretion" in applications in which disputes of fact arise that cannot be resolved on the papers. One may add, too, that in ***Mamadi***[18], Theron J also stated that a court is vested with a "wide discretion" in applications in which disputes of fact arise on the papers. In my view, the use of the term "wide" in the context of those cases means no more than that a court has wide decision-making powers in relation to the range of options available to it.

[22] I now return to the reasons proffered by the court below for not referring this matter to oral evidence. As noted,[19] the court a quo reasoned that a proper and formal application should have been made with respect to referral application setting out which evidence is lacking in credibility and how the referral will resolve the matter.

[23] The court a quo further reasoned that the material dispute of fact was foreseeable having regard to the answering affidavit and that the Applicant should have applied then that the matter be referred for oral evidence. Further, that the Appellant should have foreseen that a material dispute of fact has arisen that could not be resolved on the papers.

[24] The court a quo further reasoned[20] that the Appellant has not advanced any reasons on papers or arguments that the scale will tip in his favour. Accordingly, the court a quo held that there are no reasons why the matter should not be finalised on papers filed on record and held that the Appellant

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[15] Id at 361 I.
[16] ***Ploughman NO v Pauw and Another*** **2006 (6) SA 334 (CPD)** at 340 H-I.
[17] ***Red Coral Investments 117 (Pty) Ltd v Bayas Logistics (Pty) Ltd*** **(D6595/2018) [2020] ZAKZDHC 56 (5 November 2020)** at para [22].
[18] ***Mamadi*** above n 16 at para [3] citing with approval ***Lombaard*** above n 13 at para [25].
[19] Page 55 of appeal bundle
[20] Page 59 of appeal bundle

cannot be allowed to remedy his defective conduct by referral to oral evidence.

[25] **In paragraph 16 of the founding affidavit, the Appellant contends that "[I]n the event the Respondent claim ownership of the property through sale agreement between him and Salome Ngwana, I respectfully submit that Salome Ngwana did not have the powers to sell my premises…"** This contention is indicative of the fact that the Respondent was either alive to ownership claim by the Respondent or that he foresaw the possibility of the Respondent claiming ownership of the premises. Because of the above foreseeability, the Applicant out to have realised or anticipated prior to the launch of the application that a serious dispute of fact was bound to develop. Furthermore, when the Respondent filed his answering affidavit alleging ownership over the premises, the Appellant ought to have made his application for referral soon thereafter.

[26] It seems to me that a court faced with a Rule 55(1)(k) application should ask the following questions:

(i) is there a genuine dispute of facts on the papers?

(ii) if there is, then the next question is: ought the Applicant to have anticipated these disputes of facts when launching the application? If yes then- ordinarily the court would dismiss the application

(iii) if the Applicant cannot have anticipated that dispute of facts would arise, the court will then ask whether it is in the interest of justice for the matter to be referred to trial or referral to oral evidence in respect of a discrete topic to be made.

As I have already stated, this will depend on the facts of each case.

[27] It is indeed, so that an application for referral to oral evidence must be made in limine. Whether it is made from the bar or on substantive application is immaterial. The court a quo dismissed the referral application and correctly reasoned that there are no reasons or arguments advanced that the scale will tip in favour of the Applicant.

[28] A court faced with an application for referral has to have regard to a number disparate and incommensurable features in coming to an appropriate decision in terms of rule 55 (1)(k) viz: (i) the foreseeability of the dispute, (ii) the degree of blameworthiness, if any, in the circumstances of the given case of the applicant having proceeded in the face of a foreseeable dispute, (iii) the nature and ambit of the dispute in question, (iv) its amenability to convenient determination by a reference to oral evidence on defined issues, as distinct from in action proceedings to be commenced *de novo*, (v) the probabilities as they appear on the papers (if those are against the applicant, the court will be less inclined to send the dispute for oral evidence) (vi) the interests of justice, and (vii) the effect of any other feature that might be relevant in the circumstances of the given case.

[29] I agree with the ruling of the *court a quo* for dismissing the referral application but for three different reasons. Firstly, from the papers, it would appear that the dispute relates to ownership of the premises. This ownership dispute revolves around Ms Salome Ngwana who is not a party to the proceedings. The determination of ownership would not have been convenient in the absence of Ms Salome Ngwana.

[30] Secondly, the *court a quo* was not seized with an application for declaration of who is the owner. The court *a quo* was not invited to set aside the sale as alleged by the Respondent.

[31] Thirdly, if the court a quo was to make a finding and/or ruling on ownership and setting aside of the alleged sale by the Respondent, monetary jurisdictional limits of the court a quo would come into play through the market value of the premises. In the absence of contentions regarding the value of the premises, the court *a quo* might not have been empowered to deal with the said application or dispute.

For the above three further reasons, referral for oral evidence could not have assisted the court *a quo* to resolve the eviction dispute.

[32] I am accordingly not persuaded that the court a quo exercised its discretionary power capriciously, or exercised its discretion upon a wrong principle or on an incorrect interpretation of the facts or that it has not acted for substantial reasons or reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

[33] The circumstances of this case to wit, the nature and ambit of the dispute in question, the probabilities as they appear on papers and the pleaded case do not instruct the overturning of the court a quo's decision for dismissing the referral application.

[34] Having considered the pleadings and arguments advanced, I have come to the conclusion that the appeal should not be allowed and the order of the court a quo must not be overturned.

COSTS

[35] It is an established principle of our law that costs are within the court's discretion, which discretion must be exercised judiciously. The general rule that costs will follow the cause fits well in this matter and I find no reason to deviate from this general principle.

ORDER

[36] In the result, I would make the following order:

36.1 The appeal is dismissed with costs

FS NEMUTANDANI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO LOCAL DIVISION, THOHOYANDOU

I agree and it is so ordered.:

AML PHATUDI
JUDGE OF THE HIGH COURT
LIMPOPO LOCAL DIVISION, THOHOYANDOU

For the Appellant : Mr. Mathivha V

Instructed by : Mathivha Attorneys

For the Respondent : Adv Musetha M

Instructed by : Netshilema Attorneys

Matter was heard on 11 December 2023.

The judgment was handed down on 15 March 2023.