THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG LOCAL SEAT

CASE NO. A18 / 2019

ERCC NO. 45 / 2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: **07 January 2024**

SIGNATURE

In the matter between:

GILLIAN JANE TEBOHO MHLANGA **FIRST APPELLANT**

UNLAWFUL OCCUPIERS OF ERF1[...] L[...], EMALAHLENI **SECOND APPELLANT**

And

THANDI MARTHA SHABANGU **FIRST RESPONDENT**

ISAWULA ESTATE AGENCIES CC **SECOND RESPONDENT**

J U D G M E N T

Langa J

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 14H00 on 07 January 2024.

Introduction and facts

[1] This is an appeal against a judgment and order granted against the Appellants in favour of the Respondents by the Magistrate's Court sitting in Witbank (court *a quo*), on 22 January 2019. The appeal is against the findings of fact and rulings of law as set out in the grounds of appeal. In the court *a quo* the Appellants were the Respondents while the Respondents were the Applicants. I will for convenience refer to the parties as cited in the court *a quo.*

[2] In terms of the notice of motion the Applicants sought the eviction of the Respondents from the property in dispute, namely, 1[...] T[...] Street, L[...], Emalahleni, which I will hereinafter refer to as the property. It is common cause that the First Respondent is still the holder of the title deed over the said immovable property. On 11 February 2009 the First Respondent and the First Applicant entered into standard sale agreement in terms of which the First Respondent would sell this property to the First Applicant for an amount of R120 000.00. It is common cause that the First Applicant did not pay the First Respondent the purchase price in terms of the deed of sale.

[3] The First Applicant alleges that subsequent to the sale agreement, on the same date she and the First Respondent entered into written cession agreement. In terms of the said agreement the Second Applicant would help the First Respondent to raise an amount of R120 000.00 in order to assist the First Respondent to pay Eskom Finance Company, ('Eskom'), in respect of the First Respondent's other property situated at Erf 4[...] A[...], which was under threat of seizure and execution by Eskom, ostensibly due to outstanding payments. In return the First Respondent would be obliged to cede her rights in the property (Erf 1[...] L[...]) to the First Applicant as a thank you gesture for the fundraising service provided to her by the Second Applicant. (my emphasis).

[4] I must pause to mention at this stage that the purported one page unparagraphed cession agreement relied on by the Applicants, which does not reflect good draughtsmanship, is, apart from only having been initialled, also unsigned and undated.

[5] It is further common cause from the papers that on 1 April 2009 the First Respondent and the First Applicant also entered into a lease agreement in terms of which the former would lease the same immovable property to the latter against the payment of R600.00 monthly rental. Further, it is common cause that the First Applicant later sold the property to one Paul Masango and his wife ('the Masangos') for R265, 000.00, which amount was paid to the First Applicant.

[6] It is evident from the founding affidavit that the First Applicant relies on the cession to evict the Respondents from the property. In paragraph 6 of the founding affidavit the First Applicant states that it concluded a sale agreement with the First Respondent as well as a cession agreement in terms of which the latter is obliged to cede the property to the Second Respondent. It is clear therefore that the claim is based on the cession agreement.

[7] The First Respondent denies that a cession agreement was entered into between her and the First Applicant and further that even if such a cession agreement was entered into, the terms and conditions thereof were not fulfilled as the agreed purchase price in terms of the sale agreement was not paid by the First Applicant. The First Respondent contended that the First Applicant did not have any possessory rights originating from the purported cession agreement

The issues and the Order of the court *a quo*

[8] In the main, the issues for determination before the court *a quo* were *inter alia* whether the First Respondent was an unlawful occupier and whether there was a valid cession agreement as alleged by the Applicants. The issue of the payment of R137 115,76 relied on by the First Applicant also formed part of the matrix of the issues before court. The court *a quo* made a finding that the parties concluded a cession agreement and that was based on the fact that the First Applicant proved that she paid R137 000.00 to Eskom in favour of the First Respondent. The court

further concluded that the First Respondent had the onus to prove that she did not enter into the cession agreement and that she failed to do so. The learned Magistrate relied in this respect on *Hippo Quarries (TVL) v Eardly* 1992 (1) SA 867. The Magistrate concluded therefore that it had been proven on a balance of probabilities that the property was ceded to the Second Respondent.

Grounds of Appeal

[9] The Appellants' grounds of appeal can be summed as follows:

1. The court *a quo* erred in its conclusion that the First Applicant made the payment of R137 115.76 to Eskom;
2. The court further erred in concluding that the parties entered into a cession agreement in terms of which the First Respondent ceded her right to the property;
3. The Learned Magistrate failed to consider the requirements of an eviction as fully outlined in Section 4 (7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 more particularly to consider whether granting an order for eviction was just and equitable under the circumstances;

Evaluation and analysis

[10] It is trite that the powers of the appeal court to interfere with the trial court's findings of fact are limited. In *S v Monyane and others* 2008 (1) SACR 543 (SCA) at paragraph [15] the Supreme Court of Appeal stated the following in this regard*: "This court's powers to interfere on appeal with the findings of fact of a trial court are limited. ... 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 (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e – f)."* With this in mind I will proceed to deal with the issues at play in this matter.

[11] At issue in this appeal is whether the Applicants are the owners of the property forming the subject matter of this appeal. As stated above, the Applicants' claim in the property is based on the cession purportedly entered into by the parties on the same date as the sale agreement. Although the Applicants also refer to the sale

agreement entered into by the parties, it is, however, clear that they are not relying thereon for their claim. The claim is based entirely on the cession which I will deal with in the following paragraphs. In any event it is not alleged in the papers that the Applicants paid the purchase price in line with the sale agreement. Thus, it is not surprising that the Applicants are not anchoring their claim on the sale agreement. The cession was thus an essential link in the Applicants' case against the Respondents. I now turn to the cession.

Cession

[12] In order to prove the authenticity of the cession, the Applicants produced a document which as I stated above is not an example good draughtsmanship. Although it was a written cession it was, however, only initialled but not signed. I do not agree with the court *a quo* that the evidentiary burden shifted to the Respondents to show that the document in reality was not what it seemed to be. The reliance by the learned Magistrate on *Hippo Quarries (TVL) v Eardly, supra,* is with due respect misplaces. In that case the plaintiff had produced an apparently regular and valid written cession signed on behalf of the cessionary and the cedent. The court then concluded that the onus then shifted on the defendant to prove that the document was not what it purported to be. In this case the Applicants produced an unsigned cession document and therefore bore the onus to prove that it was a valid cession signed by the First Respondent.

[13] Cession, it is trite, is a particular method of transferring a right and the transfer is effected by means of agreement. The agreement consists of a concurrence between the cedent's *animus transferendi* of the right and the cessionary's corresponding *animus acquirendi*. See *Hippo Quarry* above. Although there are no formalities for a cession, in this case, the Applicant, whose document it was, chose to reduce it to writing. Therefore, the Applicants are relying on the written instrument to establish their claim. In this case it is clear that the agreement relied on by the parties had to be signed and this was not done. Despite this the court *a quo* made a finding that the parties concluded and signed the cession agreement.

[14] The conclusion that the parties signed the cession agreement is problematic. It is clear *ex facie* the document that it was not signed as it does not show the

signatures of the parties and in particular that of the cedent, the First Respondent. The document only appears to have been initialled by two persons on the margin thereof but there are no signatures appended to the document showing that it was signed by the parties. The Applicants are essentially relying on an unsigned document. There is no explanation why the document was not signed. The Applicants in my view have failed to prove the authenticity of the document that they are relying upon. The Applicants have therefore failed to establish, on a preponderance of probabilities, that the First Respondent concluded the alleged cession in terms of which she transferred her rights in the property to the Applicants.

[15] In the result, considering that the First Respondent denied having entered into the alleged cession agreement, the mere fact that it has not been signed, the purported cession cannot be said to be valid. This defect alone sounds a death knell for the Applicants' claim and, on the basis thereof, the claim ought to have been dismissed by the trial court.

[16] However, in addition I also find the Applicants' subsequent conduct not to be consistent with the contention that the First Respondent ceded her rights to the Applicants. It is common cause that subsequent to the sale and cession agreements, the First Applicant leased the same property from the First Respondent on 1 April 2009. The lease agreement signed by the First Applicant is a standard agreement which in paragraph 1.1 states that the lessor, the First Respondent, <u>is the owner of the property.</u> If one accepts the purported cession agreement, the effect of the lease agreement is that the Applicants leased their own property from the First Respondent. This would not make sense. (my emphasis).

[17] In its judgment, the court *a quo* picked this up and correctly found it to be 'amazing', 'surprising' and 'confusing' that the Applicant signed a lease agreement renting property from the First Respondent despite the latter having already ceded the property to the former. The learned Magistrate further stated that he is not convinced that the lease agreement was enforceable. However, and surprisingly, despite having raised all these issues the court *a quo* still ruled that there was a valid cession agreement. This anomaly should have been another reason for the court *a quo* to reject the validity of the cession.

[18] The last issue I turn to deal with is the alleged payment of R137 115,76 which the Applicants claim to have paid to Eskom on behalf of the First Respondent in accordance with the terms of the cession agreement. The Respondents challenged this assertion and contended that the money was paid by an occupier of the property one Mr Mpe. They also produced proof in the form of bank statements showing that it is Mr Mpe who paid the money. The Applicant did not proffer any explanation about Mr Mpe's involvement in the saga.

[19] Despite these contentions and there being no evidence and proof that the First Applicant paid this amount, the learned Magistrate nonetheless concluded that this amount was paid by the First Applicant. However, according to the undisputed evidence, which was allowed by the Magistrate, this amount of money was clearly not paid by the Applicants. The First Applicant therefore did not make this payment on which the cession is premised. The learned Magistrate therefore also misdirected himself in this respect by concluding in the judgment that the First Applicant proved that she paid R137 115.76 to Eskom on behalf of the First Respondent. This constitutes another misdirection which entitles this court to interfere with the findings made by the court *a quo*.

Conclusion

[20] In the light of the above, the Applicants in my view failed to establish the validity of the cession relied on in this case. Contrary to the trial court's conclusion, there is no evidence that the First Respondent signed the cession document. The Magistrate incorrectly concluded that the cession was signed by the parties as this is factually incorrect. The fact that the cession is not signed by the parties, or at the most by the First Respondent, constitutes a fatal defect based on which the cession is invalid and therefore unenforceable. Thus, the reliance by the Applicants on the cession agreement cannot be upheld. The Magistrates' misdirection in this respect warrants interference by this court. Consequently, I find that the First Appellant has made out a case for the setting aside of the order of the court *a quo.* The judgment and order of the court *a quo* therefore stands to be set aside. As regards costs the general rule is that the costs should follow the result. In this matter there is no reason for deviation with this rule.

Order

[21] For the aforesaid reasons, I propose the following order:

1. The appeal is upheld with costs;
2. The judgment and order of the court *a quo* is set aside and substituted with the following:

   The application is dismissed with costs.

MBG LANGA
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION

I agree and it is so ordered,

K.F PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA LOCAL SEAT

Date Heard: 01 December 2023
Date delivered: 07 February 2024