IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:2021/52237

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

19.12.2022
DATE

SIGNATURE

In the matter between:

MOFOKENG: JEREMIAH LETSHELA Applicant

and

DIPHOLO ELIJAH LETSELA N.O. First Respondent

EMFULENI LOCAL MUNICIPALITY Second Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, Jeremiah Letshela Mofokeng, brought this application in two parts. Whilst part A formally came before me the applicant argued that the entire application was to be determined by me. The first respondent, Dipholo Elijah Letsela N.O, cited in the heading of the notice of motion in his capacity as executor but in his personal capacity in the founding papers, opposed the application. The second respondent, Emfuleni Local Municipality, played no role in the application proceedings and no relief was sought against it.

[2] The deceased estate to which the first respondent was appointed as executor was that of his father, the late Radipholo Jeremiah Letsela, ('the late Letsela'), who passed away on 20 September 2020.

[3] The applicant, in part A of the application, sought restoration of possession of the business premises situated at 2C Adams Road, Everton, trading as Maphodi Drankwinkel, under licence number GAU300057C, by the first respondent, interdictory relief preventing the first respondent from disrupting the applicant's operations and/or selling the liquor by public auction or in any other manner and costs of the application.

[4] The applicant claimed a rule *nisi* and a final interdict preventing the first respondent from interfering in the business in part B of the application,

[5] The applicant relied on a *rei vindicatio*, alleging that he was the owner of the immovable property housing the bottle store and bar, Maphodi Drankwinkel, together with its contents. The applicant's averments of ownership and his claim for vindicatory relief however, did not correlate with many of his allegations made in the founding affidavit that related to spoliation proceedings, not to vindicatory relief.

[6] Contrary to the applicant's alleged ownership of the immovable property housing the bar and bottle store, the applicant contended that the premises belonged to the second respondent, that the applicant had a right to occupy and operate a bottle store on the premises, and that the applicant had a first right of refusal to purchase the premises.

[7] Furthermore, the applicant alleged that he owned the bottle store, that he was in possession thereof as at 6 October 2021, trading peacefully, that the first respondent unlawfully deprived him of peaceful possession thereof, which the applicant sought to restore.

[8] The first respondent alleged that the proceedings were *res judicata,* the applicant having brought spoliation proceedings in the Sebokeng Magistrates' Court that were dismissed, *inter alia*, because the applicant did not hold a valid liquor licence at that time. The applicant's reply to the allegation of *res judicata* was that the proceedings before me were for a rei vindicatio, seeking to prove ownership of the property housing the bottle store, whereas the proceedings in the Magistrates' Court were for a spoliation order.

[9] The judgment of the Magistrates' Court reflects that whilst those proceedings were based on the same facts as the matter before me, the parties were not the same as the second respondent was not cited as a party in the Magistrates' Court proceedings. Thus there is no basis for a plea of *res judicata.*

[10] *Rei vindicatio* relief entitles the owner of property to reclaim possession of that property. Thus, in order to find success, the applicant before me had to allege and prove ownership of the property claimed and possession by the respondent at the time that the applicant instituted the proceedings. Spoliation proceedings, however, protect

factual possession against unlawful depravation thereof. The allegations upon which the applicant placed reliance in support of the vindicatory relief before me failed to differentiate between ownership of the business of the bottle store and ownership of the immovable property housing the premises from which the bottle store traded.

[11] The applicant alleged that the business was handed over to him during 2006 or thereabouts by the late Letsela, and that the alleged handing over entitled him to ownership of the immovable property housing the bottle store.

[12] In support thereof, the applicant relied in reply, upon two affidavits of family members allegedly having knowledge of what transpired in respect of the business prior to the death of the late Letsela as well as the allegedly poor relationship between the late Letsela and the first respondent. The relevant affidavits however, did not support the applicant's allegation of an entitlement to ownership of the bottle store. The affidavit of Mr Mabaso in particular referred to the late Letsela's intention to 'appoint the applicant to run and take over the business', not to the business being sold or donated to the applicant or owned by the applicant.

[13] The applicant himself referred to the application before me being an attempt to settle the ownership of the immovable property housing the bottle store, "once and for all". The immovable property, however, was owned by the second respondent. The latter rented it out to the late Letsela who occupied the premises running the bottle store, prior to his death. The first respondent alleged that the applicant was a trusted employee and akin to family of the late Letsela prior to his death.

[14] Accordingly, the second respondent owns the premises from which Maphodi Drankwinkel traded. No basis was alleged for the applicant to claim ownership of the premises comprising the immovable property housing the bottle store. The applicant did

not show payment of a purchase price or an agreement of sale or bring any additional documentary evidencing ownership of the premises.

[15] As to ownership of the business trading as Maphodi Drankwinkel, the applicant failed to demonstrate that he owned the business and the first respondent denied that he owned it. The confirmatory affidavits furnished by the applicant in reply did not support the applicant's alleged ownership of the business. Proof of purchase or payment for the business was not demonstrated by the applicant. Unsubstantiated averments of the business being handed over to the applicant by the late Letsela prior to his death, did not make out a case for the relief sought by the applicant.

[16] Additionally, the applicant failed to demonstrate ownership of the business stock, particularly the alcohol, utilised in the business. No proof of purchase or payment of the liquor stock was placed before this Court. In addition, the applicant failed to provide proof of the renewal of the liquor licence to date of inception of the application. Nor was there any confirmation of the applicant's ownership of the business from the accounting officer of the business.

[17] In addition, no proof of the first respondent's dispossession of the premises from the applicant was placed before me. The applicant failed to provide any confirmatory affidavits in respect of the alleged dispossession from employees or customers in the business at the relevant time.

[18] In the circumstances, the application stands to be dismissed and the appropriate order will follow hereunder. There is no reason why the costs of this application should not follow the order on the merits.

[19] In the circumstances, the application is dismissed with costs.

A A CRUTCHFIELD
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 19 December 2022.

ATTORNEYS FOR THE APPLICANT:
Gwala Dlamini Msane Inc.
ATTORNEYS FOR THE FIRST RESPONDENT:
Mukovhanama Tshilidzi Attorneys.
DATE OF THE HEARING:
30 August 2022.
DATE OF JUDGMENT:
19 December 2022.