

SOUTH AFRICA / JUDGMENT

Khwashaba and Another v Ratshitanga and Others (27632/14) [2016] ZAGPJHC 70 (29 February 2016)

[2016] ZAGPJHC 70

COURT

South Gauteng High Court, Johannesburg

BEFORE

R Francis

CASE / FILE NUMBER

27632/14

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

number: 27632/14

DATE:

29 FEBRUARY 2016

In

the matter between:

KHWASHABA,
RATSHILUMELA

ROBERT.....1st

Applicant

KHWASHABA,
NELSON

AVHAPFANI.....2nd

Applicant

And

RATSHITANGA,
TSHILIDZI.....1st

Respondent

RATSHITANGA,
EVODIA

LUFUNO.....2nd

Respondent

GOLDEN

TRUST SERVICES (PTY)

LTD.....3rd

Respondent
CITY
OF JOBURG METROPOLITAN
MUNICIPALITY.....4th

Respondent
MEC

HOUSING :

GAUTENG
PROVINCE.....5th

Respondent
GAUTENG
PROVINCE
DIRECTOR-
GENERAL, HOUSING
PROVINCIAL.....6th

Respondent
GOVERNMENT
GAUTENG
DEEDS
OFFICE,
JOHANNESBURG.....7th
Respondent

JUDGMENT

FRANCIS, AJ:

- [1] The focus of the dispute is a Family House situated at [6.....] Zone 6 [M.....], in the Gauteng Province (the property). The applicants are brothers who dispute the right of claim to the property by the first and second respondents. The second respondent is the ex-spouse of the first applicant, who laid claim to the property as a joint owner causing the sale of the property to the first respondent. The validity of the second respondent's right to lay claim to it as a joint owner and the subsequent sale of the property is called into question.

Legislation governing 'black' urban areas

- [2] Properties in black urban areas including this property were subjected to a myriad of apartheid, patriarchal and colonialist discriminatory practices pertaining to land ownership and entitlement. Black land ownership was not allowed in the urban township areas. Site permits, residential permits and certificate of occupation were granted. These were granted in terms of Regulations Governing the Control and Supervision of an Urban Black Residential Area which was enacted by GN R 1036 on 14 June 1968. The judgment by Jajbhay, J in *Nzimande v Nzimande & Another* 2005 (1) SA 83 (W), contains a useful summary of the history of legislation governing land ownership in 'black' areas. I refer to this history to place the facts in casu in context.

- [3] In attempts to remedy the discriminatory practices of land ownership and entitlement, several legislations were enacted. In 1978 it became possible to register rights of 99-year leasehold over property in black urban areas. The following sections were introduced in the Blacks Urban Areas Consolidation Act No. 25 of 1945 (BUAC Act), 6A, 6B, 6C, 6D were black persons could acquire a registered real right in respect of the property owned by the state. However this scheme was unsatisfactory as it was viewed as an inferior right that continued unfair discrimination.
- [4] In 1986 the Black Communities Development Act no 4 of 1984 was amended to provide for full ownership rights for black persons in urban areas. To register ownership two requirements were necessary. Firstly the land had to be surveyed and a general plan registered. Secondly a township register had to be opened in terms of Section 46(4) of the Deeds Registries Act No 47 of 1937. The opening of a town register took many years to complete. Since it was not opened in all areas, at best only leaseholds could be registered. Leaseholds of 99 years, without payment of lease became attractive but remained an inadequate solution for black urban properties.
- [5] The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (Conversion Act) was legislated and commenced on 1 January 1989. The intention of this legislation was to formalise and confer leasehold or full ownership upon the beneficiaries. This Act repealed R1036 regulations and made the provinces responsible for the
- transfer of the occupational rights granted by regulation 6 and 8 permits into leasehold or ownership. The effect was regulation 7 permits (tenants) were abolished but the rights held by these permits were retained and protected by statute.
- [6] Ultimately the Upgrading of Land Tenure Rights Act 112 of 1991 (Upgrading Act) was promulgated to automatically convert all registered leaseholds into ownership when a Township Register was opened. The Registrar of Deeds endorsed these leaseholds into ownership free of charge. In other words the registrar would take the lease agreement and endorse same to confirm the leaseholder as owner when the township register is opened. Many of the family houses were

transferred in the name of single individuals. The transfer was subject to family agreements restricting the rights of owners. The holder of leasehold may then apply for a title deed to be issued in respect of that property in the holder's name. The practical effect was prior to about September 1991 black persons did not qualify to own property in these areas.

Background

and Facts

- [7] The applicants' father Samson Mashaba was issued with a regulation 8 certificate of occupation of the property on 9 September

1958. After his death in 1981 Vele Mashaba, applicants' mother would have become holder on the certificate of occupation had the discriminatory practices not persisted. To enable the first applicant to acquire a loan from his employer to construct additional accommodation for the family on the property, his employer had a condition that he was to head the occupational certificate. In this regard his mother Vele Mashaba agreed to the transfer of lease to enable the granting of the loan. The first applicant became holder with his mother as occupant on the certificate of occupation which was issued on 31 August 1984 and a lease was registered in the name of the first applicant which was issued on about 11 October 1988. The said registration of title referred to the purchase and sale of leasehold to be granted in terms of section 6A of (BUAC Act).
- [8] In 1984 the first applicant married the second respondent in community of property. During 1985 the second respondent was entered in the certificate of occupation under the first applicant's holdership. The names of the first applicant Robert, his mother Vele, the second respondent Evodiah and Faith, appear on the certificate of occupation marked Annexure 'RRK5. Later the marriage between the first applicant and second respondent was dissolved by a decree of divorce on 4 April 1991 wherein the second respondent laid claim to the property as a joint owner. A liquidator was appointed in July 2008 to divide the estate. The liquidator invited tenders whereby the first applicant tendered payment of R10 500.00 to purchase second respondent's half-share interest in the property. The liquidator ultimately sold the property to the first respondent for higher value. The first respondent took transfer of the property by registration of title deed on 20 December 2012 in the amount of R37
000. 00 and then sought an eviction order against the second applicant and those residing on the property.
- [9] The applicants maintain that the property is a family house and were never intended to be the exclusive property of the first applicant. The first applicant was only the de jure holder of leasehold on behalf of his mother and her family. On the housing permit the applicant replaced his father as the head of the family and his mother was reflected as an occupant under him. This marks the property as a family house and not as his private personal property entitling the second respondent to a half share of their joint estate.
- [10] A deed search conducted indicates registration of property on 3 March 1989 in the names of the first applicant and second respondent. What is critical is at that stage the property was still under leasehold and transfer of ownership from the state had not taken place. The right of leasehold in the property was subsequently converted to full ownership by the Upgrading of Land Tenure Rights Act No 112 of 1991 (Upgrading Act). This act commenced on 1 September 1991. This conversion was called the free transfer system which practically was possible only about 1 September 1991.
- [11] Section 2 of the Upgrading of Land Tenure Rights Act No 112 of 1991 reads as follows :
2. Conversion of land tenure rights mentioned in Schedule 1.—

- (1) Any land tenure right mentioned in Schedule 1 and which was granted in respect of—
- (a) any erf or any other piece of land in a formalized township for which a township register was already opened at the commencement of this Act, shall at such commencement be converted into ownership;
- (b) any erf or any other piece of land in a formalized township for which a township register is opened after the commencement of this Act, shall at the opening of the township register be converted into ownership;
- (c) any piece of land which is surveyed under a provision of any law and does not form part of a township, shall at the commencement of this Act be converted into ownership, and as from such conversion the ownership of such erf or piece of land shall vest exclusively in the person who, according to the register of land rights in which that land tenure right was registered in terms of a provision of any law, was the holder of that land tenure right immediately before the conversion.

(2)

- (a) In order to give effect to subsection (1), the registrar of deeds concerned shall make the necessary entries and endorsements in respect of his registers and other documents, as well as in respect of any relevant documents produced to him.
- (b) No transfer duty, stamp duty or other fees shall be payable in respect of any such entries and endorsements.
- (3) For the purposes of subsection (2), the registrar of deeds may supplement the township register of the township concerned in accordance with the entries in any relevant

register of land rights: Provided that if he is satisfied that any relevant register of land rights is suitable for use as part of the township register of the township concerned and he has endorsed the register of land rights on the obverse with words to that effect and so dated it, such register of land rights shall be deemed to form part of the township register of the township.

(4) For the purposes of subsection

- (1) (c) and section 6, any piece of land in respect of which a land tenure right referred to in item 2 of Schedule 1 has been granted, shall be deemed not to form part of a township irrespective of its position.

[12] Transfer of ownership was possible after the township register was opened. At the dissolution of the marriage of first applicant and the second respondent on 4 April 1991 what existed was a leasehold and not ownership. By virtue of their marriage in community of property the lease could qualify as an asset in their common estate with the consequence that the first applicant and second respondent had been in the position of joint lessees until their divorce. See *Toho v Diepmeadow City Council & Another* 1993 (3) SA 679 (W) and *Msila v Msila* 1999 JDR 0135 (SE) where this was followed. In the case of *Moremi v Moremi &*

Another 2000 (1) SA 936 (W), all the lessee's rights which derived from the lease undoubtedly became part of the joint estate. And both parties were

entitled to occupy the premises as their matrimonial home during the subsistence of the marriage. The lease continued to operate upon their divorce. However from then on it ceased to provide a matrimonial home for the parties and neither of them could insist

upon exclusive possession and occupation.

[13] The first applicant alleges that he was unaware of the registration of the property into his and the second respondent's name as he did not apply for such registration. In a similar matter in *Shai V Makena Family* 2013 JDR 0608 (GNP), the court found that after assessing evidence, legislation and the authorities, that Paulos was only the de jure holder of occupation on behalf of his mother and her family. Further, the court held that the officials had used section 2 of the Upgrading of Land Tenure Rights Act dizzily to transfer ownership to Paulos and Molly. Since the conversion took place without the knowledge of the other family members, the court found that neither Paulos nor Molly had acquired any rights of ownership. Therefore, neither of them had the authority to dispose of the property.

[14] In casu the first applicant maintains being a de jure holder of leasehold on behalf of his mother and her family. Upon the divorce of the first applicant and the second respondent there were no ownership rights that could be transferred. The registered lease held in the name of the first applicant did not confer ownership rights and the authority to dispose of the property. The owner of the property was the state. The second respondent could therefore not lay claim to the property as a joint-owner but possibly as a joint-lessee. If the second respondent became a joint lessee with the first applicant it cannot in my view be to the exclusion of all others entitled to the rights flowing from the leasehold of the family house. It cannot be ignored that the name of the applicants' mother was listed on the certificate of occupation and thereby gives rise to a possible claim in succession.

[15] Regardless if the upgrading from leasehold to ownership took place automatically, the basis of the transfer in the names of the first applicant and the second respondent occurred without a lawful basis and in the interests of justice it therefore cannot be ignored. See *Shai supra*. It follows that the division of the joint estate could not include ownership of the property, and the subsequent sale of the property by the liquidators, the third respondent became ultra vires. The seventh respondent who transferred the house in terms of the sale agreement entered into between first and third respondent, which agreement was vitiated by irregularities, stands to be set aside.

[16] The first, second and third respondents contend that the first applicant is estopped from maintaining that the property did not form part of the joint estate because he had expressly accepted and recognized that the property was validly and legally owned by himself and the second respondent in equal and undivided shares. They counter that there is no merit in the applicants claim that ownership of the property was irregularly registered in his and the second respondent's names. By their conduct, they have confirmed and acquiesced to the

validity of the transfer by entering into an agreement to purchase the joint half share of the 2nd respondent for R10 500, 00. And therefore he be estopped from alleging any invalidity of the transfer of the property to the first

respondent.

[17] The first applicant's response is that he always maintained that the property never belonged to him and therefore it did not form part of his and the second respondent's joint estate. This is acknowledged by the second respondent in her affidavit of 18 October 1993 at para 8.1. in her papers in case no B2005/90 by referring the court to the first applicant's resistance to divide the joint estate in respect of the property on the basis that property never belonged to him. It is common cause that there were attempts to settle this matter. The first applicant submits that in his attempt to settle the matter he paid R10 500, 00 to the third respondent to retain the property as a family home for his mother's family. However it is evident, that at the time of the dissolution of the marriage neither first applicant nor the second respondent could pass

ownership because neither of them were owners.

[18] In view of the upgrading taking place without the knowledge of the first applicant and any other family members the first applicant and second respondent could not acquire any rights of ownership. The occupants of the property, who lived there and still live there, ought to have been considered for ownership. In taking this into consideration it is evident that many of the family houses were transferred in the name of single individuals however the transfer was subject to family agreements restricting the rights of owners. In casu neither the first applicant nor the second respondent had the authority to dispose of the property. It follows that the defence

of estoppel cannot succeed and further it cannot be a defence to the second applicant's claim.

[19] The title deed registration of the leasehold was governed by government notice R1036 of 14 June 1968 Regulations governing the control and supervision of an Urban Black Residential area and related matters. Government Notice R1036 was repealed as at 31 December 1988 by the Conversion Act.

[20] The Conversion Act was assigned to the provinces with effect from 26 July 1996. In terms of a resolution signed by the Premier of the Gauteng Provincial Government on 28 August 1996, the member of the Executive Council: Housing and Land Affairs was designated as a competent authority for the administration of the Conversion Act in terms of s235 (c) (ii) of the Interim Constitution. This ultimately had the effect that the transfer of state residential properties to their rightful occupiers and adjudication of housing disputes in the transfer of residential properties project, including the property in question, will be managed by the Housing Bureaux falling under the supervision of the fourth, fifth and sixth respondents. It is an administrative function to carry out a transparent enquiry process for the resolution of housing disputes similar to that envisaged in section 2 of the Conversion Act.

[21] Section 2 of the Conversion Act reads as follows:-

Inquiry as to rights of leasehold

2.

- (1) Any secretary shall conduct an inquiry in the prescribed manner in respect of affected sites within development areas situated within his province, in order to determine who shall be declared to have been granted a right of leasehold with regard to such sites ' . . .
- (2) Before the commencement of such inquiry the secretary shall, after satisfying himself as to the identity of the affected site and of the person appearing from the records of the local authority concerned to be the occupier of that site, and, in respect of premises referred to in section 52 (5) of the principal Act, is in possession of an aerial photograph or plan of the premises concerned, certified as provided in section 52 (5) (a) of that Act, publish a notice indicating that such inquiry is to be conducted.

[22] The conversion Act must be further read with sections 24A and 24B of the Gauteng Housing Act No 6 of 1998. Section 24 A provides that:-

- (1) the Department is authorized to adjudicate on ...disputed cases that emerged from the transfer of residential properties in terms of the Conversion of Certain Rights into Leasehold or Ownership Act,
- (2) that the MEC shall ensure the transfer of residential properties to individuals determined to be lawful beneficiaries in terms of this Act.

[23] The 1st and 2nd respondents contend that Section 2 of the Conversion Act is not applicable because the property is not a 'affected site' as defined in the Conversion Act.

"Affected site" means a site which is or purports to be occupied by virtue of a site permit, a certificate, a trading site permit or a permit issued by the local authority concerned conferring upon the holder thereof rights which in the opinion of the Director-General concerned are similar to the rights which are held by the holder of a site permit, certificate or trading site permit.'

[24] They maintain that the property was no longer held by a site permit, certificate or trading site permit. Instead the registered leasehold was already held by the 1st applicant when the Conversion Act came into operation on 1 January 1989. It is however not in dispute that the property was previously occupied in terms of a regulation 8 certificate which falls within the scope of section 2 of the Conversion Act.

- [25] In considering the intention in the Conversion Act read with the Upgrading Act, Jajbhay, J in *Nzimande supra* fittingly held that ‘it was not intended to automatically convert rights held under the R1036 regulations to more effective common law rights of leasehold or ownership without considering the availability, or lack thereof of new houses in the area, the need for family members’ occupation rights to be recognized and protected and the need not to increase homelessness but to decrease it in the defined area.’ (my emphasis). The Upgrading Act came about and gave effect to improving the precarious position in which land tenure for black persons had been forced and therefore this Act should be read together with the Conversion Act to give contextual meaning to its proposed intention to consider the occupational rights of occupiers. Therefore it follows as the MEC is entrusted with the transfer of residential properties to individuals it will have to determine who the lawful beneficiaries are by using appropriate mechanisms in making its determination. The mechanisms provided by section 2 of the Conversion Act suitably address the precarious position of land tenure relating to leasehold and ownership.
- [26] The supreme court of appeal in *Kuzwayo v Estate Late Masilela*
- [2010] ZASCA 167 held that a holder of a site permit and occupier of a site is entitled to ask that the Director-General of Housing in the Province hold an enquiry in terms of Section 2 of the Conversion Act in order to determine to whom ownership should be granted. ‘The effect of all these provisions was and still is that an inquiry is held in which the history of, and documentation pertaining to, each affected site or property is considered, along with competing claims (and objections to claims) for the conferral of title.’ I agree with the above view of Dobson, AJ in *Moloi v Moloi and Others, Smith and Another v Mokgedi and Others* [2012] ZAGPJHC 275 on the relevance of the legislation applicable to the prevailing contextual issues. It is therefore most appropriate in the circumstances of this case that an enquiry in terms of section 2 of the Conversion Act is carried out.
- [27] I turn to the last issue for consideration that pertains to the delay in bringing this application. It is evident in this matter that the first applicant has been consistently challenging what was happening since the divorce proceedings. The second applicant has been forced to bring this application in light of the eviction order brought against him and those who reside on the property. The on-going litigation between the parties has persisted. Although the first, second and third respondents have set the matter down to expedite it, the basis being the first respondent’s urgency to effect the eviction order against the 2nd applicant and those who reside on the property. I find that there is no delay in bringing this application, it is within reasonable time in terms of its particular circumstances and it therefore does not impair the application of the applicants.
- [28] No order for costs is sought and as such no order for costs is made.
- [29] In the result the following orders are made:-

29.1 The first respondent is interdicted from executing the eviction order against the second applicant and those occupying the house with and under him, pending the finalization of this matter.

29.2 The sale agreement entered into between first respondent and third respondent be declared void and invalid and is accordingly set aside.

29.3 The second respondent's appointment of the third respondent is hereby declared void and invalid and is accordingly set aside.

29.4 The appointment of the third respondent as receiver and liquidator in the joint estate of first applicant and second respondent is cancelled and set aside.

29.5 The third respondent returns the R10 800.00 paid by the first applicant in pursuance of the settlement agreement between the first applicant and the second respondent.

29.6 The transfer by the Transvaal provincial Administration and the Meadowlands Township Office as well as the West Rand Administration Board – forerunners to and of which fourth respondent is successor in title, is declared void and invalid and accordingly set aside.

29.7 The fifth and sixth respondents ensure that an enquiry is conducted in respect of the House on Stand Number 682B Zone 6, Meadowlands Township in accordance with and in terms of Section 2 of Act 81 of 1988 or in terms of the procedures adopted for the resolution of housing disputes in the transfer of residential properties.

29.8 The seventh respondent revert the ownership of the house on Stand Number 682B Zone 6, Meadowlands Township to the Gauteng Provincial Department of Housing pending the decision in accordance with the enquiry as envisaged in 29.7 above.

R. FRANCIS, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

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Instructed by: D Nkabinde Attorneys

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Date of Judgment: 29 February 2016

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