

SOUTH AFRICA / JUDGMENT

Malgas and Another v Alexander and Others (21137/2017) [2022] ZAGPJHC 25 (13 January 2022) [2022] ZAGPJHC 25

COURT

South Gauteng High Court, Johannesburg

BEFORE

G Nel

CASE / FILE NUMBER

21137/2017

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21137/2017

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

[13 January 2022]

In the matter between:

STEVEN MALGAS

First Applicant

FAITH MICHELLE MALGAS

Second Applicant

and

CLEORESE ALEXANDER

First Respondent

DEEDS REGISTRY, JOHANNESBURG

Second Respondent

CITY OF JOHANNESBURG

Third Respondent

J U D G M E N T:

NEL AJ

[1] This is an opposed application in terms of which the Applicants seek, inter alia, the following relief:

[1.1] An order directing the Second Respondent (the Registrar of Deeds) to cancel the Title Deed held under Title Deed No. T[...] in respect of the immovable property described as Erf [...] Ennerdale Extension 5, situated at [...] Malagiet Crescent, Ennerdale Extension 5 (“the Immovable Property”), currently registered in the name of the First Respondent; and

[1.2] An order referring the decision as to who is the “most deserving beneficiary” of the Immovable Property back to the Department of Housing of the City of Johannesburg for a

determination.

THE RELEVANT BACKGROUND

[2] The First Applicant, who deposed to the Founding and Replying Affidavits in support of the Application, and on behalf of both Applicants, contends that the Applicants (and their family) have occupied the Immovable Property since 1999.

[3] The Applicants allege that occupation of the Immovable Property was granted to them in terms of an oral lease agreement concluded with Mr Enver Alexander (“Mr Alexander”), the deceased father of the First Respondent, who is the current registered owner of the Immovable Property.

[4] The First Respondent contends that Mr Alexander did not conclude the oral agreement with the Applicants, but that in his absence from the Immovable Property, an unknown person with whom he was living at the Immovable Property concluded the oral agreement with the Applicants. The dispute is however not relevant for the purpose of determining this Application.

[5] The Applicants allege that they made regular monthly payments of rental to Mr Alexander, to his ex-wife, and the First Respondent. There is a dispute as between the Applicants and the First Respondent as to whether the monthly rental payments were indeed made by the Applicants, but such dispute is entirely irrelevant for the purposes of this Application.

[6] It is however undisputed that the Applicants’ occupation of the Immovable Property arose as a result of a rental agreement.

- [7] The Applicants stopped paying rental during 2005, based on advice they received at a community meeting that rental should not be paid in respect of council housing. No detail is provided as to who gave such advice to the Applicants, but in the Replying Affidavit, the Applicants refer vaguely to the advice having emanated from “Council”.
- [8] The Applicants were also advised at the same time to commence the process of registering the Immovable Property into their own name.
- [9] During July 2005 an Agreement of Sale was allegedly concluded as between the City of Johannesburg and the Applicants in respect of the purchase of the Immovable Property. The document attached in support of such intended sale purports to be the first page of an Agreement of Sale in respect of the Immovable Property, but does not reflect any purchase price, and does not contain all of the terms and conditions as required in respect of the sale of immovable property.
- [10] The Applicants set out that an application for finance to purchase the Immovable Property was declined, and in the circumstances the Agreement of Sale was never given effect to.
- [11] The Applicants allege that during September 2005, the Department of Regularisation and Transfer of Ownership (“ReTro”) of the City of Johannesburg summoned the First Applicant and Mr Alexander to the Ennerdale Community Centre in respect of the dispute relating to the occupation of the Immovable Property. No details of the process followed by the Department of Regularisation and Transfer of Ownership (ReTrO) has been set out by the Applicants, and the First Applicant simply alleged that Mr Alexander did not attend at the Ennerdale Community Centre. The First Respondent stated that she was not aware of the process that was followed.
- [12] During January 2014, the Applicants were advised by the Housing Department of the City of Johannesburg that Mr Alexander was deemed to be the “deserving beneficiary” of the Immovable Property. It appears from the contents of the letter that the Applicants were aware of such determination before 16 January 2016.
- [13] In the letter referred to by the Applicants, the Applicants were advised that no further meetings would be held with regard to the dispute relating to the Immovable Property, and that the Applicants were at liberty to seek representation should they wish to proceed further with the dispute. The Applicants were also advised that should there be “no further developments in the matter” within a period of 6 months from 16 January 2014, the City of Johannesburg, would proceed with the transfer of the Immovable Property, presumably to Mr Alexander.
- [14] It is clear from the contents of the letter that the Applicants had already expressed their dissatisfaction with the determination by the City of Johannesburg to have found Mr Alexander to be the “more deserving beneficiary” in respect of the Immovable Property.

- [15] There is no information or evidence as to what occurred in respect of the dispute or the process followed during the period from September 2005 to January 2014, which is surprising, as this appears to be the period (more than 8 years) during which the process initiated by ReTrO in respect of the determination as to the Ownership of the Immovable Property was conducted.
- [16] It would certainly have been more helpful in determining this Application if the Applicants had set out what occurred during such period, in detail.
- [17] On 29 May 2014, the First Applicant addressed a letter to the Department of Housing of the City of Johannesburg, requesting the City of Johannesburg to allow the Applicants and their family to remain in the Immovable Property. In the letter, the First Applicant contended that the Immovable Property was sold to the Applicants by Mr Alexander for a purchase price of R15 000.00, but after payment of such amount, Mr Alexander did not effect transfer of the Immovable Property to the Applicants. Such allegation is curiously not set out in any of the affidavits deposed to by the First Applicant, and is not relied on as a basis for the Applicants' alleged entitlement to occupation of the Immovable Property.
- [18] The Applicants received no response, and on 13 September 2016 an e-mail was addressed to the City of Johannesburg, enquiring as to what motivated the Department of Housing to consider Mr Alexander as "the most deserving beneficiary" in respect of the Immovable Property, requesting any written documentation that supported the decision of the Department of Housing, and seeking the provision of copies of any written correspondence between the Department of Housing and the First Applicant between the years 2005 to 2015. It appears that the Department of Housing did not respond to such request, and the Applicants launched this Application on 14 June 2017.
- [19] The First Respondent alleged that Mr Alexander tried on numerous occasions to occupy the Immovable Property while the Applicants were in occupation of the Immovable Property but was unable to do so.
- [20] The First Respondent also alleged that attempts were made to obtain assistance from the South African Police Services, but that the Police refused to intervene.
- [21] The Applicants deny such allegations.
- [22] The First Respondent alleges that a dispute was then lodged in respect of the Immovable Property, which resulted in the involvement of ReTrO.
- [23] Mr Alexander passed away on 8 June 2015, and the Immovable Property was registered in the name of the First Respondent on 26 April 2017.
- [24] The First Respondent has been unable to occupy the Immovable Property, as the Applicants deny her access to the Immovable Property, and the First Respondent has instituted eviction proceedings, which presumably pre-empted the launching of this Application by the Applicants.

- [25] The First Respondent had to settle all outstanding utility bills in order to effect transfer of the Immovable Property, and remains liable to make payment of all municipal services.

IN LIMINE ASPECT

- [26] The First Respondent raised as an in limine point that the Application launched by the Applicants is a review application but that the Application does not meet any of the requirements of a review application.
- [27] The Notice of Motion is certainly not formulated as an application for the review and setting aside of an administrative decision.
- [28] I pertinently enquired from the First Applicant's counsel whether the Application was intended to be a review of the decision by the Department of Housing, and he advised me that it was not a review, but rather a "reconsideration", which reconsideration must be undertaken by the Court or the City of Johannesburg. Applicants' counsel advised me that the Applicants did not have the necessary facts available to them in order to bring a review application.
- [29] Applicants' counsel advised that the City of Johannesburg considers requests for accommodation and then makes awards relating to such requests, but that the Applicants are "not sure" whether the City of Johannesburg took proper steps in reaching the decision to find Mr Alexander to be "the most deserving beneficiary".
- [30] I enquired from the Applicants' counsel as to whether the appeal process as referred to by the First Applicant in paragraph 7.6 of the Founding Affidavit was followed. Applicants' counsel advised me that there was no appeal procedure, but simply an opportunity to make further representations. Applicants' counsel advised me that the use of the word "appeal" in the Founding Affidavit simply meant that the First Applicant was entitled to "escalate the matter".
- [31] I enquired from Applicants' counsel as to whether there were any specific procedures or municipal by-laws that regulated the decision-making process of the Department of Housing, or that set out the steps that should be followed, such as for subsequent internal remedies or appeals. Applicants' counsel advised me that he was not aware of any particular law, and did not know whether there were any applicable municipal by-laws to such effect.
- [32] In the Founding Affidavit it is clearly set out that the Application is an application launched in terms of Section 6(1) of the Deeds Registries Act, Number 47 of 1937, as amended ("the Deeds Registries Act"), for, inter alia, an order cancelling the Title Deed and ancillary relief.
- [33] In terms of Section 6(1) of the Deeds Registries Act, no registered Deed of Transfer shall be cancelled, except by way of a Court Order. It is accordingly clear that a Court has the power, as conferred by Section 6(1) of the Deeds Registries Act to cancel the registration of a Deed of Transfer, provided that there are proper and lawful grounds to do so.

- [34] I am satisfied that the Application was not intended to be a review application, but rather an application for the cancellation of the registration of a Deed of Transfer, together with the relief that would follow upon such cancellation. The basis for such cancellation is dealt with in greater detail below, in considering the relevant legal framework.
- [35] If I were wrong in such regard, and the Application was intended to be a review application, the Application does not meet the requirements of a review, in that, inter alia, the time limit applicable (180 days) was not complied with (and no condonation was sought), there does not appear to have been an exhaustion of all internal remedies, and no proper grounds on which the determination of the Department of Housing should be reviewed have been set out. It is the determination, and not the process that the Applicants have a difficulty with. If the Application was a review application, it would have had to be dismissed.

THE

LEGAL FRAMEWORK

- [36] In the Heads of Argument submitted by the attorney of the Applicants, no reference was made to any case law or specific provisions of any statutes that supported the Applicants' claims to the relief sought
- [37] Applicants' counsel simply referred in the Heads of Argument to certain provisions of the Constitution, without specifying or indicating why the specific sections entitled the Applicants to the relief sought.
- [38] Similarly, First Respondent's counsel did not refer in her Heads of Argument to any case law or statutes in support of the First Respondent's opposition.
- [39] I specifically enquired from Applicants' counsel which statute or authorities the Applicants rely on in support of the relief sought, and was advised that the Applicants do not "have" any specific law that they rely on, other than Section 33 of the Constitution.
- [40] Section 33 of the Constitution relates to just administrative action and the entitlement of every citizen to lawful, reasonable and procedurally fair administrative action. Section 33 of the Constitution does not however provide a specific basis for the relief sought in this application, particularly in circumstances where the Applicants are not seeking the review of the

determination

of the City of Johannesburg.

- [41] It is clear that if there was any impropriety or error in the registration of Mr Alexander, (and after his death, the First Respondent) as the owner of the Immovable Property, the registration could be set aside in terms of Section 6(1) of the Deeds Registries Act.

- [42] The Applicants do not allege that there was any impropriety or error in registering the Immovable Property into the name of Mr Alexander, thereby recording Mr Alexander as the owner of the Immovable Property.
- [43] There are no allegations that the Department of Housing of the City of Johannesburg, or the Department of Regularisation and Transfer of Ownership (ReTrO) of the City of Johannesburg acted improperly in reaching a decision finding Mr Alexander to be the “most deserving beneficiary” and ultimately the owner of the Immovable Property. There are simply no factual allegations relating to the steps taken by the relevant Departments of the City of Johannesburg, and despite requesting information, which was not provided, no steps were taken by the Applicants to compel the City of Johannesburg to provide the information necessary to obtain a record of the proceedings, or the

determination.

- [44] The only basis put forward by the Applicants in support of the relief sought is that it would be just and equitable for the registration of the Title Deed to be cancelled and the determination of the ownership of the Immovable Property to be referred back to the City of Johannesburg, on the basis of prejudice. The Applicants contend that the First Respondent's mother and grandmother have accommodation, and that therefore the First Respondent would not be prejudiced if the Immovable Property was awarded to the Applicants, whereas the Applicants would be prejudiced if the Immovable Property was not awarded to them, as they have no alternative accommodation for the Applicants and their extended family. This may be an aspect to be considered in the eviction proceedings, but cannot found a basis for the relief sought in this Application.
- [45] In July 1998 the Conversion of Certain Rights into Leasehold or Ownership Act, Number 81 of 1988 (“the Conversion Act”) was promulgated, in order to provide for the conversion of certain rights of occupation into leasehold rights.
- [46] The Conversion Act was amended by the Development Facilitation Act, Number 67 of 1995, in order to provide for the conversion of certain rights of occupation not only into leasehold rights, but also into ownership rights.
- [47] In terms of Section 2 of the Conversion Act, as amended, the Director General of the relevant Provincial Administration must conduct an inquiry in order to determine who should be granted a right of leasehold, or in the case of formalised townships, who should be granted ownership of immovable property.
- [48] At the conclusion of such inquiry, the Director General will determine the grant of the leasehold or ownership in respect of the immovable property.
- [49] The Director General is entitled, in terms of Section 10 of the Conversion Act, to delegate the powers conferred upon him to an officer in the provincial administration, or to any person appointed for the purpose of giving effect to the Conversion Act.

- [50] In terms of Section 9 of the Conversion Act regulations are to be passed as to the manner of the inquiry, the procedures to be followed and the manner of hearing of any appeal process.
- [51] Section 3 of the Conversion Act specifically entitles any person aggrieved by a determination relating to the conferring of a right of leasehold or ownership to appeal against that determination to the relevant administrator.
- [52] Whilst there is no reference in any of the correspondence emanating from the City of Johannesburg to the Conversion Act, it appears that the Department of Regularisation and Transfer of Ownership (ReTrO) of the City of Johannesburg was established in order to give effect to the Conversion Act.
- [53] It accordingly appears, in the absence of any evidence or allegations to the contrary, that the transfer of ownership of the Immovable Property to Mr Alexander and the subsequent registration of ownership of the Immovable Property into the name of Mr Alexander with the Registrar of Deeds was given effect to in terms of the Conversion Act.
- [54] In the matter of *Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council*[1] the Court held[2] as follows:
- “I am of the view that it is clear that the Conversion Act does not and cannot limit acquisition to dominium. The very purpose of the Conversion Act itself is precisely to deal with rights obtained by black persons which fell short of leasehold or ownership and through the mechanisms of the Act to provide for the upgrading of lesser rights.”*
- [55] It was also held by the Court[3] that the Director General has a wide discretion and is empowered to roam widely in the conduct of the Section 2(1) enquiry.
- [56] In the matter of *Nzimandi v Nzimandi and Another*[4] the Court confirmed that the Director General has a wide discretion, and specifically held that the Conversion Act was not intended

automatically to convert existing rights under the regulations into the rights of leasehold or ownership, and the Director General, after having investigated a dispute, exercised a discretion in his determination of who had acquired the right of leasehold or ownership in respect of the property. In reaching such determination, a variety of factors would have to be considered.[5]

- [57] In the unreported matter of *Disetsane and Others v Moganedi and Others*[6] the Full Bench considered an appeal relating to the registration of transfer of immovable property, in terms of which the appellant

sought an order cancelling a Title Deed, and an order directing the Director General of the Department of Housing for the Province of Gauteng, to hold a hearing in terms of the Conversion Act for the purpose of determining the rightful owner of a particular immovable property.

- [58] The Appeal Court set aside the registration of the Deed of Transfer, based on Section 6 of the Deeds Registries Act, on the basis that there was a clear error in the transfer of the immovable property to the respondent in that matter.
- [59] In the unreported matter of *Ntshalintshali and Others v Sekano and Others*[7]an application was launched to seek the cancellation of a Title Deed, as well as the institution of an inquiry in terms of Section 2 of the Conversion Act. In the *Ntshalintshali* matter there was an error in the offices of the Housing Department, which provided the Second Respondent in that application with an opportunity to sell the Immovable Property.
- [60] It appears that no inquiry was held by the Director General for the Department of Housing in the *Ntshalintshali* matter, and that in the absence of such an inquiry the registration of the immovable property into the name of the first respondent pursuant to the Conversion Act was null and void.
- [61] In the circumstances, the Court ordered the cancellation of the Title Deed, and ordered the Director General to hold a hearing in terms of Section 2 of the Conversion Act.
- [62] The legal basis for the relief sought by the Applicants must therefore clearly be found within the provisions and application of the Conversion Act.

CONDONATION

- [63] The First Respondent sought condonation for the late filing of her Answering Affidavit.
- [64] The explanation for the late filing of the Answering Affidavit clearly constituted good cause, and I was satisfied that the First Respondent should be granted condonation.
- [65] In the Replying Affidavit the Applicants conceded that the First Respondent should be granted condonation.

THE MERITS OF THIS APPLICATION

- [66] It appears from the allegations made in the various affidavits, and in particular the correspondence that passed between the Applicants and the relevant departments of the City of Johannesburg, that a procedure was initiated to determine the ownership of the Immovable Property, as a result of the dispute that had arisen between the Applicants and Mr Alexander as to the occupation of the Immovable Property. It is certainly not clear from the documentation or the affidavits what the nature of the inquiry was, and whether or not an inquiry was properly conducted as envisaged by Section 2 of the Conversion Act.
- [67] It is however clear that at the conclusion of the determination process, the relevant department of the City of Johannesburg determined that ownership of the Immovable Property should be granted to Mr Alexander.

- [68] The Applicants' complaint appears to relate not to the manner of the determination process, or whether there was compliance with the Conversion Act, but rather the determination itself, on the basis that the determination was not just and equitable.
- [69] In the absence of the details of the inquiry process, I am unable to conclude that no inquiry or a deficient inquiry was held.
- [70] As set out above, the Applicants contend that they will suffer prejudice if they (and their family) are not granted a right to occupy the Immovable Property. The Applicants contend that the First Respondent will not suffer prejudice as she can reside with her mother.
- [71] The First Respondent pointed out that she has two minor children, and that she, her spouse and her two minor children cannot reside with her mother. It is clear that the First Respondent will suffer prejudice if she is prevented from exercising her right of ownership.
- [72] Even having regard only to the allegations made by the Applicants, I am of the view that no proper basis has been set out to justify the granting of the relief as sought.
- [73] Whilst the Courts naturally have sympathy with the dilemma facing the Applicants (and all other citizens of the Republic of South Africa) in respect of accommodation and residential difficulties, the merits of the Applicants' case are insufficient to justify the granting of the relief sought.

THE ORDER

[74] In the circumstances, I make the following order:

[74.1] The late filing of the First Respondent's Answering Affidavit is condoned.

[74.2] The Application is dismissed.

[74.3] The Applicants are to pay the costs of the Application.

G NEL

[Acting Judge of the High Court,

Gauteng Local Division,

Johannesburg]

Date of Judgment: 13 January 2022

APPEARANCES

For the Applicants: Mr M W Sekgatja

Instructed by:

Sekgatja Attorneys

For the Respondent: Adv E Liebenberg

Instructed by

Coetzee Attorneys

- [1] 2000
 - (2) SA 455 (W).
 - [2] At 479A-B.
 - [3] At 478D-E.
 - [4] 2005
 - (1) SA 83 (W).
 - [5] At paragraphs 66 and 67.
 - [6] Case No. A910/2012 GD (Pretoria) 27 August 2014.
 - [7] Unreported judgment, case number 2014/31317 Gauteng Local Division, Johannesburg.
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