

SOUTH AFRICA / JUDGMENT

Mangwane and Another v Gomba and Others (37830/16) [2019] ZAGPPHC 472 (20 August 2019)

[2019] ZAGPPHC 472

COURT

North Gauteng High Court, Pretoria

BEFORE

N N Bam

CASE / FILE NUMBER

37830/16

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Policy

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH
AFRICA

GAUTENG DIVISION, PRETORIA

1.

REPORTABLE: NO

/ YES

2.

OF INTEREST TO OTHER JUDGES: NO

/ YES

3.

REVISED

CASE

NO: 37830/16

DATE

OF HEARING: 11 August 2018

20/8/2019

In

the matter of:

JOSEPH
MAVABAZA MANGWANE
First Applicant
MARGARETH
TINTSWALO MANGWANE
Second Applicant
and
JANE
GOMBA
First Respondent
THE
REGISTRAR OF DEEDS, PRETORIA
Second Respondent
EKURHULENI
METROPOLITAN MUNICIPALITY
Third Respondent
DIRECTOR
GENERAL IN THE
OFFICE
OF THE PREMIER OF GAUTENG
Fourth Respondent
HEAD
OF DEPARTMENT OF HUMAN SETTLEMENT
Fifth Respondent

JUDGEMENT

N N Bam AJ

A.

Introduction

1. The dispute before this court involves two family members, namely, first applicant and first respondent whose mothers are siblings. At the heart of the dispute is the ownership of a home described in the papers as number [...] Gauteng. The application, it is said, is brought in terms of section 6 of the Deeds Registry Act[1], Save to state at the outset that applicant's reliance on this section is misplaced, I do not engage in a protracted discussion of the issue, in light of the view I take on this matter.
2. On 5 May 2019, first applicant, duly supported by the second applicant, deposed to an affidavit in support of application proceedings in which they sought a raft of orders. I record some of the prayers. They are:
 - (i) That the alleged registration of Title Deed No. TL58303/2002, registered under the name of JANE GOMBA (first respondent), be declared invalid and or set aside;

(ii) That the above transfer of the property known as [...] 'from the applicants to the 1st respondent' be declared invalid and or set aside';

(iii);

(iv);

(v);

(vi) That the first respondent and /or any other person in possession of the property be ordered to hand over possession thereof to the applicants within TEN (10) days from the date of receipt of this order;

(vii) That the sheriff and /or his deputy having jurisdiction over the area of the property is hereby authorized to assist the applicants to gain possession of the property;

(viii) That the commander of the police station of Tembisa is authorized to assist the sheriff, and/or his deputy, to enforce the court order herein.

B.

Background

3. First and second applicants are married to one another. They confirmed in their affidavits that they live apart due to lack of accommodation

and issues related to health. For ease of reading, I refer to both applicants as applicant. I state which applicant where necessary.

4. During 1981, at a time when first applicant was employed as a policeman at the South African Railway Services, he, together with second applicant, applied for the house described in the papers as [...] (the house). They claim that the house was allocated to them under the then prevailing conditions of tenancy for the duration of 99 years.

5. In 1986, during an uprising, applicants fled their home as the first applicant was accused of being a police informer and their house was torched. In about September of the same year, applicants found tenants to look after the house to protect it from vandals.

[Applicant's papers do not state whether the house was completely burnt down and subsequently rebuilt.] Nonetheless, applicants, in the same year, purchased a home by means of a home loan from the then Allied Bank and moved in during 1987.

6. In 1994, having been informed of his aunt's (first respondent's mother's) poor health and her living conditions, applicant decided

that the aunt would move into the house. He states that he had expressly made it clear to her that the house would remain his. Later on, the aunt was joined by her daughter, (the first respondent) along with first respondent's son. The aunt passed away during 1996 but first respondent continued to occupy the home with her son.

7. In 2001, applicants' son was sent to reside in [...] in order to attend school. It is applicant's averment that he would, from time to time, visit the house and purchase groceries to assist the first respondent. In 2004, first applicant was detained by members of South African Police Services (SAPS) following a complaint of abuse by the first respondent, leading to the former being banned from visiting the home. He claims that he produced evidence confirming that the house was his and only then was he released. I will shortly deal with the evidence of ownership.
8. In 2008, and upon making further enquiries about the house and its ownership, first applicant was referred to the Department of Housing in Pritchard Street, Johannesburg. Two years later, in 2010, applicant visited the department and was informed that the house belonged to the first respondent; and, that the department had issued notices to all occupants to register for Title Deeds. First applicant claims that he was informed at the department that first respondent had advised the department's officials that she had no knowledge of the whereabouts of the real owner of the house and accordingly sought registration in her own name. He further obtained proof from the Deeds Registry confirming that first respondent was registered as Lease or Grant Holder in terms of The Conversion of Certain Rights into Leasehold or Ownership Act[2] (the Conversion Act.)

C. Applicant's case

9. To demonstrate proof of ownership, applicants attached a document titled 'Aansoek Om Gesinshuisvesting in Tembisa' (Request for family residence in Tembisa) (JMM1[3]) depicting their names, the date of 24 July 1981, and signatures of an official with the rank of superintendent; and a copy of their marriage certificate.
10. Counsel for the applicant, after canvassing the background as already stated[4], submitted that the application was before the court in terms of section 6 of the Deeds Registry Act, in terms of which the court is asked to issue an order cancelling the Title Deed in the name of the wrong person, the first respondent. He submitted that the first respondent had deliberately made false representations to the fourth respondent, resulting in the latter incorrectly awarding the house to her, and, absent such false representations, the house would have remained in the first's and the second applicant's names.

D. First Respondent's case

11. Counsel for the first respondent raised a number of points in limine. They are:
 - (i) Locus standi
 - (ii) Failure to exhaust internal remedies and review in terms of Promotion of Administrative Justice Act[5], (PAJA)
 - (iii) Incorrect forum/remedy; and

(iv) That prayers 6,7, and 8 amount to circumventing the Prevention of Illegal Eviction Act and the Unlawful Occupation of Land Act[6].

12. Notwithstanding that the first point is dispositive of the case, I deal with the first three points in limine in the ensuing discussion.

(i) Locus standi

13. Counsel suggested that the applicants had placed no proof that they are owners of the property in question; that the document they presented, annexure JMMS, (the Aansoek) was nothing more than an application. She further suggested that the applicants, on their own version, had not occupied the property for more than 30 years. They resided in the bonded house in Hospital View and only when that home had been sold in an auction, 'under mysterious circumstances' as applicants claimed, did they decide to pursue their claim in respect of the house. She submitted that applicants' position would be severely weakened because of this issue alone in terms of pursuing their claim under the Conversion Act. Overall, counsel suggested that applicants had demonstrated no locus standi whatsoever.

14. Applicants' counsel submitted that to insist on anything more than what his clients had presented, namely, the 'Aansoek' note, was tantamount to denying or ignoring the history of black ownership of land in South Africa. He submitted that the 'Aansoek' was sufficient proof as there is no competing evidence that the property had been awarded to anyone else at that time. In addition, counsel submitted the applicants had been denied information by the first respondent regarding the calls to register for ownership rights.

15. The history of land ownership in townships during apartheid years is covered in Khwashaba, Ratshilumela Robert, & O, v Ratshitanga, Tshilidzi & 5 O[7]. A careful reading of the Conversion Act suggests that the legislature took into account the various challenges facing people who needed to lay claims against land in townships. In spite of those difficulties, the legislature saw it fit to prescribe that there be some form of proof as defined in section 1 of the Act. Such proof could come in the form of a permit, a trading permit, or certificate. Further, in terms of sections 2 (1) of the Conversion Act, it is stated:

16. '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'. Section 2. (3) 'For the purposes of the declaration under subsection (1) the secretary may-

(a) give effect to any agreement or transaction in relation to the rights of a holder contemplated in subsection

(4) (b) in respect of the site concerned,

(b) between such holder and any other person;

- (c) give effect to any such agreement or transaction ,or to any settlement or testamentary disposition in respect of such rights, entered into or made before the death of the last such holder;
- (d) give effect to any court order or sale in execution in relation to the site concerned, notwithstanding that such agreement, transaction,

settlement, ·testamentary 'dis- position or intestate succession could not by virtue only of the provisions of the regulations have been entered into or made or was entered into or made without the approval of any person whose approval would have been required under the regulations, and notwithstanding that the site permit, certificate or trading site permit concerned had lapsed upon the death of such holder: Provided that no person who is not a competent person shall be declared under section 4 to have been granted a right of leasehold. '

17. The difficulty facing the applicants is that they have no proof that the site was ever awarded to them following the application in 1981. The document evidences nothing more than a confirmation that the applicants had, on the day mentioned in the document, applied or requested to be allocated a family residence. The claim that the house was in their names prior to it being transferred to the first respondent is not borne out by the facts. The print from the Deeds Registry (JMM4[8]) annexed by the applicants in their papers is of no assistance to them in that, although the print confirms that the property was purchased for R1789, it does not state that it was purchased from the applicants. It follows that the applicants have no locus standi.

(ii) Failure to exhaust internal remedies/ Review Proceedings

18. In the second instance, counsel for the respondent pointed out that the first respondent had been awarded the rights to the property, as a Registered Leaseholder (JMM5[9]) by the fourth respondent, pursuant to an investigation conducted in terms of section 2 of the Conversion Act. In that case, the

applicant's correct recourse was an appeal directly to the department, which the applicant had not done.

19. Finally, given the applicant's disgruntlement with the decision made by the fourth respondent, their recourse lies in review proceedings in terms of PAJA. On this point, counsel submitted that the decision taken by the fourth respondent was an administrative decision and the applicants ought to have brought review proceedings to review that decision.
20. The submission by counsel in this regard is wholly incorrect in that there is no evidence to suggest that there was ever an investigation

regarding this property as mandated by the Conversion Act. The only proof of an investigation provided by the applicants in their papers was following a complaint laid by the first respondent, (JMM6[10]). It was not an investigation as envisaged in section 2 of the Conversion Act. It Is so as

because the author of the document in no way awards the title of a Grant Leaseholder to the first respondent. Rather, he/she confirms at the end of the note that the house is already registered in the name of first respondent. A further reason as to why there would have been no investigation is, between the applicants and the respondent, neither party could demonstrate that the house in question was an affected site. The Conversion Act defines an affected site as: '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 secretary concerned are similar to the rights which are held by the holder of a site permit, certificate or trading site permit'. (own underlining).

21. Based on the fact that neither the applicants, nor the respondent, held a permit or certificate or trading permit, there would not have been an investigation. The absence of such investigation would tend to indicate that the awarding of rights to the respondent as Registered Grant or Leaseholder was nothing more than a simple administrative act carried out by the officials within the fourth respondent, an act which, in my view, is not reviewable. I refer in this regard to the comments of the SCA in *Kuzwayo v Representative of the Executor in the Estate of the Late Masilela*[11]:

'The only administrative decision that could and should have been made was that of the Director-General or his delegate, after the inquiry mandated by s 2 of the Conversion Act. And that was the only decision that could be subject to review. The act of signing the declaration and the deed of transfer were but clerical acts that would have followed on a decision. Not every act of an official amounts to administrative action that is reviewable under PAJA or otherwise.'

22. In so far as the question of pursuing an appeal on the part of the applicants, the lapse of time alone suggests that such a remedy would not be available to them in any event.

(iii) Incorrect remedy

23. Counsel for the applicants emphasized that the applicants had made a clear case in which they demonstrated that they have locus standi to seek an order of cancellation of the title deed in the name of the 'wrong person' (first respondent) in terms of section 6 of the Deeds Registry Act[12]. Section 6 reads: 'Registered deeds not to be cancelled except upon an order of court:
 1. Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court.

2. Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.
25. The difficulty with the applicant's approach is that section 6 is not an empowering provision. It merely states the circumstances under which a registrar may cancel a deed. The section in no way assists the applicants with their case. See in this regard Khuzwayo[13].

E.

Conclusion

26. In the circumstances, it is proper that the application brought by the applicants be dismissed with an appropriate costs order.

F. Order

27. Applicants have no locus standi to bring this application. The application is accordingly dismissed with costs.

N N BAM

ACTING JUDGE OF THE HIGH

COURT, GAUTENG DIVISION,

PRETORIA

APPEARANCES

DATE OF HEARING

:12 August 2019

DATE OF JUDGMENT

: 20 AUGUST 2019

APPLICANT'S ATTORNEYS

: MAFUYEKA & ASSOCIATES

312 BOURKE STREET,

MUCKLENEUK,

FIRST RESPONDENT'S ATTORNEYS : L. MBANJWA INC.

6 MAKOU STREET, EXTENSION 2,

MONUMENT PARK,

[1] Act 47 of 1937

[2] Act 81 of 1998

[3] page 24 of the record

[4] paragraphs 3-8 supra

[5] Act 3 of 2000

[6] Act 10 of 1998

[7] ZAGPJHC, 2016/70 CASE NUMBER: 27632/14

[8] page 28 of the record

[9] page 30 of the record

[10] page 31 of the record

[11] (28/2010) (2010) ZASCA 167; (2011) 2 All SA 599 (SCA) (1 December 2010), para 28

[12] Act 47 of 1937

[13] Note 5 supra

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