

SOUTH AFRICA / JUDGMENT

Manzini v Mushwana and Others (44075/2021) [2021] ZAGPPHC 673 (14 October 2021) [2021] ZAGPPHC 673

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

44075/2021

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IN THE

HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)
REPUBLIC

OF SOUTH AFRICA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE: 14 OCTOBER 2021
Case
Number: 44075/2021
MAMAILA
ELSIE MANZINI
Applicant
And
RECKSON
MAFEMANI MUSHWANA
First
Respondent
THULANI
INOCENT MOGOROSI
Second
Respondent
THE
REGISTRAR OF DEEDS
Third
Respondent
CITY
OF TSHWANE MUNICIPALITY
Fourth
Respondents
PM
MOSITSA INCORPORATED ATTORNEYS
Fifth
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant, in her capacity as the widow of the late Ngazi Jackson

Mushana (previously Manase) who passed away on 5 September 2018 (“the deceased”), seeks the following relief:

- “1. The First Respondent shall sign all the necessary documents to reverse transfer and registration of [...], Measuring 320 (Three Hundred and Twenty) Square Metres, Diagram Deed [...], Title Deed [...] (“the property”) into the name of the deceased (NGAZI JACKSON MANASI) as it was before and when lawfully required to do so.*
2. In the event of the First Respondent not complying with the order in paragraph 1 above the Sheriff or his lawfully appointed deputy is authorised and directed to sign all the necessary documents that are required to effect the transfer of the property.
3. Declaring that the sale of [...] between the first and the second respondent null and void as the First Respondent was not the lawful owner of the Property.”

[2] The application is only opposed by the second respondent.

INTRODUCTION

[3] [...] (“the property”) fell within the ambit of the Upgrading of Land Tenure Rights Act, 112 of 1991 (“the Act”). The Act makes provision for the conversion into ownership of certain rights granted in respect of land.

[4] The rights in question are referred to in the Act as a “land tenure rights” and defined as “any leasehold, deed of grant, quitrent or any other right to the occupation of land”.

[5] The issue in casu pertains to the person who held land tenure rights in respect of the property.

FACTS

[6] The applicant avers that the property “belonged” to deceased’s father, one Joe Fikizole Manase, who gave the property to the deceased. In confirmation of the aforesaid, the applicant attached an affidavit by the deceased’s sister, Gavaza Betty Manganyi.

[7] The deceased built two “shacks” on the property which he rented out to enable him to pay the municipal account in respect of the property. The aforesaid averment by the applicant is confirmed by two affidavits of previous tenants of the deceased, to wit:

7.1 Mjajai Elisabeth Vykeya, who confirmed that she was a tenant of the deceased from 1972 to 1987; and

7.2 Herbert Govekile Mhlare, who confirmed that he was a tenant of the deceased from 1975 to 1995.

[8] The applicant, furthermore, attached a municipal account issued on 10 May 2018 in the name of the deceased to her affidavit.

[9] During 1988 and due to work commitments, the deceased vacated the property and left the first respondent, his half-brother, in charge of the property.

[10] The first respondent received the monthly rent paid by the tenants which had to be utilised to pay the municipal account.

[11] The applicant explained that she could not obtain documentary proof of the deceased’s right, title and interest to the property due to the fact that all documents pertaining to the period in question were lost during a fire at the offices of the City of Tshwane Metropolitan Municipality (“the Municipality”).

- [12] Subsequent to the deceased's death, the applicant discovered that the first respondent "changed" the Title Deed of the property to reflect himself as the owner of the property. This is in fact not correct. The property was transferred on 10 October 2002 by the Municipality, in terms of the provisions of section 13(1) of the Act, to the first respondent.
- [13] Be that as it may, the applicant stated that she immediately convened a family meeting to discuss the issue. At the family meeting the first respondent undertook to rectify the Title Deed to reflect the deceased as the owner of the property. This the first respondent failed to do.
- [14] The applicant stated that the deceased never passed ownership of the house to the first respondent and in confirmation of the aforesaid she attached the deceased's will dated the 30th of September 1999.
- [15] Upon investigation by her attorney, it was discovered that the first respondent sold the property for an amount of R 320 000, 00 to the second respondent. A copy of the Deed of Transfer executed on 5 September 2018, is attached to the founding affidavit.
- [16] The applicant maintained that the first respondent acted in bad faith and falsely presented to the second respondent that he was the owner of the property.
- [17] As stated aforesaid, the first respondent did not oppose the application and the allegations contained in the applicant's founding affidavit are unchallenged.
- [18] The second respondent opposed the application on the basis that he is the registered owner of the property. This, according to the second respondent, was fatal to the relief claimed by the applicant.
- [19] Subsequent to the exchange of correspondence between the respective attorneys of applicant and the second respondent, the applicant on or about 11 August 2021 withdrew the application against the second respondent and indicated that she only seeks relief against the first respondent.
- [20] Needless to say the second respondent, having a material and direct interest in the relief claimed, insisted on addressing the court.

DISCUSSION

Locus standi

- [21] Although not raised by the second respondent, the applicant's locus standi to claim the relief herein is a cause for concern. The applicant failed to state whether an administrator or executor has been appointed in the late estate of the deceased. The administrator or executor would have had the necessary locus standi to launch the application.

- [22] It is also unclear whether the deceased's estate has been wound, which creates a further obstacle for the relief claimed by the applicant. The deceased's will is in a language that is not an official court language and it is therefore impossible to determine who the heir/s is/are.
- [23] I am of the view that the applicant has not established that she has the necessary locus standi to seek the relief claimed herein.
- [24] I do, however, deem it necessary for the sake of clarity and finality to deal with the merits of the relief claimed herein.

Merits

- [25] The applicant relies on the judgment in *Kuzwayo v Estate late Masilela* (28/10) [2010] ZASCA 167 (1 December 2010) for the relief claimed herein. The Supreme Court of Appeal confirmed in the *Kuzwayo* matter that the holder of a site permit in respect of a property is entitled to have the permit converted into ownership in terms of the Conversion of Certain Rights in Leasehold or Ownership Act, 81 of 1988. Due to bureaucratic bungling the property in question was transferred into the name of the wrong person, namely *Kuzwayo*.
- [26] The site was previously allocated to *Kuzwayo*, but when she could not afford to pay the charges in respect of the property, she returned the site. On 23 January 1987 the site was allocated to the late Mr Masilela. Mr Masilela paid all the necessary charges, built a house on the site, paid the municipal account and resided on the site for some 22 years. At the time of the hearing of the matter his children were still occupying the property.
- [27] From the facts it was thus clear that the estate of the late Mr M. Masilela should have been the beneficiary of the transfer. In the result the Court ordered the Registrar of Deeds to cancel the transfer of the property into the name of *Kuzwayo* and directed the Director-General for the Department of Housing, Gauteng Province to hold an inquiry in terms of section 2 of the Conversion of Certain Rights in Leasehold or Ownership Act, 81 of 1988 to determine and declare who the holder of the site permit is.
- [28] In casu the property has already been transferred to the third respondent. The abstract theory of transfer thus applies, which theory was explained in *Legator McKenna Inc v Shea* 2010 (1) SA 35 SCA paragraph [22] as follows:

“[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property, is effected by registration of transfer in the Deeds Office – coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein 1980

- (3) SA 917 (A) at 922E-F; Dreyer and Another NNO v AXZS Industries (Pty) Ltd (supra) para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement (see eg Preller v Jordaan 1956
- (1) SA 483 (A) 496; Klerck NO v Van Zyl and Maritz NNO (supra) 274A-B; Silberberg and Schoeman op cit, 79-80).”
- [29] The applicant contends that ownership from the Municipality to the first respondent could not pass because the transfer was occasioned by a fraudulent misrepresentation which resulted in a defect in the real agreement.
- [30] In the result ownership did not pass to the first respondent and the first respondent was not in a position to pass ownership to the second respondent.
- [31] The position is, however, somewhat different where the rights of an innocent third party comes into play.
- [32] The position of an innocent third party was discussed in Dalrymple, Frank and Feinstein v Friedman and Another (2) 1954 (2) SA 649 (W) at 664 as follows:
- “Where as in that case there was no consent on the part of the owner to the passing of the property to the person who obtained it by fraud. The transaction is void ab initio and the ownership of the property remains in the person defrauded. But if the owner consents to the passing of the property although his consent was obtained by means of fraudulent misrepresentation the transaction is voidable only. In such case ownership passes to the fraudulent party. In this regard ... where the fraud is such that the transaction is void ab initio ownership of the property fraudulently taken or obtained remains in the owner who had had been vindicated in the hands of an innocent third party. Where the transaction is voidable only an innocent third party can acquire good title.”*
- [33] It is evident from the Title Deed in respect of the transfer of the property from the Municipality to the first respondent that the Municipality consented to the transfer, albeit that the consent was obtained by means of a fraudulent misrepresentation by the first respondent.
- [34] In line with the Dalrymple decision this would entail that the transaction is voidable only and the second respondent acquired “good title” to the property.

COSTS

- [35] The second respondent seeks a de bonis propriis cost order against the attorney of the applicant. The second respondent contended that his attorney, in numerous letters, warned the applicant’s attorney that the application is fatally flawed and that such an order will be sought in the event that the application is persisted with.

[36] The stance of the second respondent's attorney is misguided. De bonis propriis cost orders are only granted in instances where an attorney is guilty of serious misconduct.

[37] In persisting with an application in which the legal principles applicable to the facts are complex, is a far cry from "serious misconduct" and I decline to make such an order.

ORDER

[38] In the premises, I grant the following order:

The application is dismissed with costs.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 1 September 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 14 October 2021

APPEARANCES

Counsel for the Applicant

Mr Mabaso (with right of appearance)

Instructed by:

Nozuko Nxusani Incorporated

Counsel for the Second Respondent:

Advocate F.D. Keet and

Advocate J. Scheepers

Instructed by:

Chantel van Heerden Attorneys

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