

SOUTH AFRICA / JUDGMENT

Mashiyane and Others v Kekana and Others (2021/8960) [2025] ZAGPJHC 715 (28 March 2025) [2025] ZAGPJHC 715

COURT

South Gauteng High Court, Johannesburg

BEFORE

WJ du Plessis

CASE / FILE NUMBER

2021/8960

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THE

HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

no: 2021/8960

(1)

REPORTABLE: No

(2)

OF INTEREST TO OTHER JUDGES: No

(3)

REVISED: Yes

28

March 2025

In

the matter between:

MAMOKETI
ELDAH MASHIYANE
First Applicant
ISABEL
LOUISA MALOKA
Second Applicant
IVAN
MOLOI
Third Applicant
and
LINDIWE
MARIA KEKANA NO
First Respondent
THE
DIRECTOR GENERAL OF THE DEPARTMENT
Second Respondent
OF
HOUSING GAUTENG PROVINCE
THE
MEC OF HUMAN SETTLEMENTS
Third Respondent
DEPARTMENT
GAUTENG PROVINCE
THE
CITY OF JOHANNESBURG METROPOLITAN
Fourth Respondent
MUNICIPALITY
THE
REGISTRAR OF DEEDS JOHANNESBURG
Fifth Respondent

JUDGMENT

DU PLESSIS J

Introduction

- [1] This is an application for the cancellation of a title deed and a declaratory order that the property in question should devolve in terms of the Conversion of Certain Rights into Leasehold or Ownership Act[1] ("the Conversion Act") read with section 1(1) of the Intestate Succession Act[2] so that it remains part of the estate of the late Shardrack Moloi and Jacobeth Moloi. The first respondent filed an affidavit but did not file heads of argument, and there was no appearance for the respondent on the day of the hearing.

- [2] The first to third applicants are siblings. They seek to invoke the Intestate Succession Act to ensure that the property, a family home, is preserved for the benefit of all Moloi family members. The first applicant deposed an affidavit on behalf of the other two siblings. No confirmatory affidavits were filed for the other two applicants.
- [3] Jacobeth and Shardrack Moloi were the applicants' parents. They had eleven children, of whom only five are still alive. The first respondent's mother was one of their children. Jacobeth passed away on 17 November 1985, and Shardrack on 4 April 1988. Both died intestate, and their estate was never reported to the Master of the High Court, Johannesburg.
- [4] The Moloi parents were allocated the property on 16 March 1983 in terms of Regulation 8 of Chapter 2 of the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters^[3] ("the regulations"). They occupied it pursuant to a Certificate of Occupation (regulation 8). This certificate had not yet been converted into a full title deed at the time of their passing.
- [5] Upon marriage, the first applicant left the family home. The second and third applicants still reside there. The other siblings have not involved themselves in the dispute.
- [6] The applicants state that they discovered only in 2020 that the property had been registered in the name of Irma Moloi (the mother of the first respondent), one of their siblings, who passed away on 6 January 2018. The applicants state that "[t]he property should remain as a family house and not belong to an individual."
- [7] The applicants contend that the property should not have been registered in Irma's name, alleging that the transfer occurred without proper authority or the consent of all family members. Although their founding papers suggest the transfer was irregular or unauthorised, they do not bring a review application. Instead, they seek interdictory relief in imprecise framed terms. The precise nature and legal basis of the relief sought remain unclear.
- [8] The applicants contend that they were never informed of any adjudication process relating to the property transfer, nor were they notified when the title was changed. They further submit that upon the death of their parents intestate, the occupation rights held under the Certificate of Occupation formed part of their deceased estate and ought to have devolved equally upon all heirs.
- [9] The first respondent opposes the application and contends that the applicants have misconceived the nature of their claim. She clarifies that she does not intend to evict anyone residing on the property and merely seeks to protect her rights as the registered owner. She emphasises that she has no intention of selling the property, which has been her home since birth.

- [10] She states that the first applicant seeks to evict her and has initiated this litigation in retaliation for tensions within the household. According to the first respondent, the property was lawfully transferred into Irma Moloi's name in 1998 in terms of the Conversion of Certain Rights into Leasehold or Ownership Act, following a family process facilitated by Pule Moloi, a brother of Jacobeth Moloi. She attaches correspondence indicating that the family was informed of the process, including a letter dated 1995.
- [11] She raises several points in limine, including:
- a. That the application should have been brought as a review of the administrative decision to transfer ownership under the Conversion Act, which the applicants have failed to do.
 - b. That the first applicant lacks locus standi, as she is not listed on the Certificate of Occupation, no confirmatory affidavits are provided by her co-applicants, and she does not reside on the property.
 - c. That the matter involves material disputes of fact not capable of resolution on the papers.
 - d. That there was non-compliance with Uniform Rule 41A regarding mediation.
- [12] She maintains that the registration into Irma's name was not fraudulent and challenges the factual basis of the applicants' case.

The law

- [13] The applicants seek to challenge the registration of the property in the name of Irma Moloi and to prevent the first respondent from dealing with the property. While they do not expressly seek to review the administrative decision that led to the registration, the substance of their claim amounts to such a challenge. They allege that the transfer was effected without proper process or the consent of family members and that it was fraudulent or erroneous.
- [14] This Court is familiar with these types of cases, where in a growing number of disputes, family members seek to contest past transfers of property effected in terms of the Conversion Act. While the statutory scheme was enacted to facilitate the regularisation of tenure following the end of racially discriminatory systems of occupation, it prescribes a clear process, including an administrative inquiry and determination under section 2. Where such a process has led to the registration of title in one person's name, the correct remedy, in my view, would be for an aggrieved party is to challenge that administrative act by way of review. This is well-established in authority, including *Kuzwayo v Masilela*[4] where it was clearly stated that

"Section 6 is not an empowering provision, however. It provides only that the Registrar of Deeds may not cancel any deed of transfer except upon an order of Court. *Kuzwayo* argued that an application could not be brought under s 6: there must be some other cause of action."

- [15] And later[5]

"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. [...] It would undoubtedly have been best for the Estate, had it been made aware of a decision of the Director-General, and of the declaration and transfer that would follow, to take the Director-General on review. [...] The Conversion Act requires an inquiry to be conducted by the Director-General pursuant to s 2 before a declaration is made that a site permit be converted to full ownership, and before transfer is effected to the occupier. The high Court erred in directing transfer by the Gauteng Provincial Government to the Estate in the absence of such an inquiry. In my view, although the Estate is probably entitled to acquire ownership, an inquiry should be held.

[16] The Court may not grant declaratory or interdictory relief that has the effect of usurping or bypassing the Director-General's

administrative powers under the Conversion Act. If the applicants were dissatisfied with how ownership was determined or transferred,

their remedy was a review, not this application.

[17] Similarly, in *Moloi v Moloi*,^[6] the Court declined to interfere, absent a proper review.

[18] The applicants seek to prevent the registered owner from exercising her ownership rights but fail to engage with the administrative decision that led to registration. The notice of motion does not seek the review or setting aside of any administrative decision. In effect, the applicants ask the Court to undo the consequences of an administrative process without invoking the correct legal remedy. That is impermissible.

[19] The legal framework governing the transfer of rights under the Conversion Act anticipates that disputes about entitlement to ownership will arise and provides a mechanism, by way of an administrative inquiry followed, where necessary, by judicial review,

for resolving them. Where parties believe that such a transfer was effected irregularly or to the exclusion of legitimate beneficiaries,

they are required to approach the matter through those established channels. What is before this Court is not such a challenge. Instead, it is an application that seeks to undo the effect of a registered title without engaging in the process that gave rise to it. Whatever the broader context or personal history may be, the relief sought cannot be granted outside the bounds of the statutory scheme.

[20] In the absence of a proper review, and in light of the relief being ineloquently framed and legally uncertain, the application cannot succeed. The point in limine, that the applicants have pursued the incorrect legal remedy, is upheld.

Conclusion

- [21] Disputes of this nature often involve competing claims to family homes, where there are long shared and overlapping histories of occupation. The disputes surrounding who has what rights to the family home are increasingly common in our courts. The facts are often complex and intense emotions are frequently involved.
- [22] Still, the law requires clarity in the form and framing of the relief sought. Applicants who wish to challenge how property was transferred in terms of the Conversion Act must do so through review proceedings. Courts are not unsympathetic to the hardship faced by families navigating the bureaucratic legacy of apartheid-era land tenure systems. However, a court cannot grant relief where the wrong legal mechanism is employed.

Order

[23] The following order is made:

1. The application is dismissed, which costs are to be taxed on scale B.

WJ du Plessis

Judge of the High Court

Gauteng Division, Johannesburg

Date of hearing;: 12 February 2025 Date of judgment: 28 March 2025 For the applicant: BB Ntsimane instructed by Shibambo Attorneys For the respondent: L Mtshiyo instructed by Cuzen Randeree Dyasi Incorporated (who withdrew of attorneys of record on 22/01/2025).

- [1] 81 of 1988.
- [2] 81 of 1987.
- [3] Government Notice R1036 of 14 June 1968.
- [4] 2010
- (1) SA 277 (SCA) para 25.
- [5] At paras 28 and 29.
- [6] Moloi v Moloi, Smith v Mokgedi [2012] ZAGPJHC 275 para 38.

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