

SOUTH AFRICA / JUDGMENT

Masweneng v Rakololo and Others (70173/2013) [2019] ZAGPPHC 458 (15 August 2019)

[2019] ZAGPPHC 458

COURT

North Gauteng High Court, Pretoria

BEFORE

Strydom

CASE / FILE NUMBER

70173/2013

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE

NO: 70173/2013

15/8/2019

In

the matter between:

ELSIE
MMELA MASWENENG
Applicant
and
ME
RAKOLOLO
First Respondent
ALL
OCCUPIERS OF ERF 14993 MAMELODI
Second Respondent
CITY
OF TSHWANE METROPOLITAN MUNICIPALITY
Third
Respondent

JUDGMENT

STRYDOM AJ

- [1] This is an application for the eviction of the first and second respondents from the property situated at Erf 14993, Mamelodi Township, Gauteng (hereinafter referred to as "the property").
- [2] This matter came before me as an opposed motion but after hearing counsel for the parties, the court formed the view that there were certain factual disputes between the respective versions of the parties that could not be decided on the affidavits filed. Further, the affidavits filed on behalf of the parties were lacking sufficient information to provide the court with a full picture pertaining to how the applicant became the registered owner and title deed holder of the property.
- [3] On 24 February 2019, the court made the following order:
- 3.1. The matter is referred to the hearing of oral evidence by the deponents of the affidavits filed in this matter.
- 3.2. Should any party wish to call any other witnesses, such party may apply to court at the hearing of the matter to allow the evidence.
- 3.3. If any party wants to introduce any further documents, not part of the application, then the party must, seven days before the trial, cause this document to be delivered to the opposing party.
- 3.4. The date of the hearing will be on 26 and 27 June 2019.
- [4] On 26 June 2019, the matter proceeded before me for the hearing of oral evidence. The applicant (hereinafter referred to as "Ms

Masweneng") testified as well as the first respondent (hereinafter referred to as "Ms Rakololo"). A further witness testified on behalf of the first respondent, to wit, Mokgaetsi Anna Mokonyama ("Ms Mokonyama").

[5] When the evidence of Ms Masweneng is considered, the following factual background emerges:

5.1 During or about 2000 to 2001, she moved into the property after she was informed by a lady named Ellen who she worked with, that the property was not owned by anyone. She was informed that the property belonged to the City of Tshwane Municipality ("the Municipality") and that the property was occupied by minors who were also not the owners nor lawful occupiers of the property.

5.2. When she went to the property she found a lady by the name of Sandra and her younger sister and enquired from them if they were the owners of the property. She was informed that they were not and they were merely staying there because there was no owner. She then asked Sandra if she could move in with them and she agreed.

5.3. Ms Masweneng never paid any rental to the Municipality. After a while Sandra and her younger sister left the premises without informing her. She continued to stay in the property with her two children.

5.4. During or about 2005, the Municipality invited all occupants of houses that belonged to the Municipality to apply to have the houses registered in their names.

5.5. On or about 17 May 2005 Ms Masweneng filled in an application to convert her occupation into ownership. A Form 3 was completed but on perusal of this form no detail is provided as to the merits of her application. This form has been attached to her founding affidavit marked "SL2". Pursuant to her application, on or about 24 August 2005 all the names of the people who had applied for registration of the houses into their names were published in the Daily Sun, a newspaper circulating within the jurisdiction of the Municipality. An extract of this newspaper has been attached to the papers and indicates the name of Ms Masweneng in relation to this property. This newspaper's extract evidences that all or any persons who considered themselves to be aggrieved by such

determination

(being the award of the property to Ms Masweneng) were invited to give notice about their objection to the Municipality before a certain date.

5.6. The notice which was given in the Daily Sun referred to the Conversion of Certain Rights into Leasehold or Ownership Act, 1988 (Act No. 81 of 1988). ("the 1988 Conversion Act"). The purpose of the notice was to notify the public that a determination had been made by the Director General: Gauteng Provincial Government in which persons should be granted the rights to leasehold or ownership in relation to mentioned properties. It was further highlighted that if there are any persons who are or felt aggrieved by such determination, they may lodge an appeal.

5.7. Given there were no appeals lodged, the Municipality proceeded to register the property into the name of Ms Masweneng. This was followed by a transfer of this property into the name of Ms Masweneng on 28 June

2006. The Deed of Transfer T76382/2006 has been attached to the papers.

5.8. Prior to this Ms Masweneng had stayed in the property for approximately 5 to 6 years.

5.9. During or about 2006, a vehicle arrived at the house with approximately 5 to 6 people. Among these people was Ms Rakololo, accompanied by a legal adviser and another whom Ms Masweneng believed was a councillor. Ms Rakololo informed Ms Masweneng that she was the owner of the property and therefore instructed her to vacate the property. It is at this point that Ms Masweneng then brought to Ms Rakololo's attention that she was the registered owner of the property and was the holder of a title deed in respect of the property in question. She further mentioned that for about five to six years she has been staying in this property and nobody ever came to claim ownership thereof.

5.10. Pursuant thereto, Ms Masweneng went to the Municipality where she had previously applied for an RDP house. She was informed that she no longer qualified for a RDP house as the property was now registered in her name.

5.11. She testified that various forms of pressure were thereafter exerted on her which ultimately scared her and she therefore vacated the property and went to stay in Soshanguwe where she rented a place.

5.12. From 2006 onwards she went to the police, and to various lawyers appointed by Scorpion Legal Insurance. She has experienced huge difficulties in advancing her case but ultimately, approximately seven years later during 2013, this application for eviction of Ms Rakololo was filed.

[6] On behalf of Ms Rakololo, Ms Mokonyama was called, as a witness, to give the factual background pertaining to this property. She testified as follows:

6.1. According to her identification document she was born on 1 January 1935 and she was 84 years old when she testified.

6.2. Previously she and her husband Alpheus Mokonyama had been staying in a place called Lady Selbourne. At the time they had one child called Francina also known as Fati.

6.3. They had to move to Mamelodi as a result of the forced removals.

6.4. On 9 September 1965, the Municipality provided them with a municipal house. Subsequently, a permit was issued in the name of Alpheus

Mokonyama to occupy the property. On this permit, as annexed to Ms Rakololo's opposing affidavit, the names of Alpheus, Ms Mokonyama and Fati appear as occupiers of the property. There is also a reference to a son called David which Ms Mokonyama said was never their son.

6.5. This permit also indicates that Alpheus Mokonyama died on 24 August 1988. Pursuant to his death, a permit pertaining to this property was issued in the name of Ms Mokonyama by the Town Council of Mamelodi on 16 January 1989.

6.6. Before the death of Ms Mokonyama's husband, they had already moved out of this property to Hammanskraal which she referred to as her current home address. They moved to this address together with their daughter, Fati, and they continued to stay in Hammanskraal even after the death of her husband.

6.7. She testified that she lost interest in the Mamelodi property as she now had her own house.

6.8. After she left the property with her husband, a certain Frans Halane, a family member of the Mokonyamas, went to stay in the property until he died. After his death she had no knowledge of who was staying in the property which at that stage was now registered in her name.

6.9. She testified that various tenants came in and out of that property but no rental was paid to her.

6.10. During or about 2005, Ms Rakololo, a family member of Ms Mokonyama came to see her and asked her if she could stay in the house. Being the permit holder since 1989 she told Ms Rakololo that she can occupy the house.

6.11. She did not know Ms Masweneng who in the meantime occupied the property.

6.12. Neither was she aware of the notice in the Daily Sun and in any event she is illiterate and could not read.

6.13. She testified further that Ms Rakololo is not her daughterinlaw as previously indicated in her affidavit. She never read the affidavit. She is however a distant family member.

[7] Ms Rakololo also deposed to an affidavit and testified as follows:

7.1. She is now 65 years of age and has stayed in the property since about 2005/2006.

7.2. She has been aware of this property which was previously occupied by the Mokonyama family and she also knew that when they vacated the property, the late Mr Halane eventually moved into the property and stayed there until he passed away. She was also aware that Ms Masweneng moved into the property with other people.

7.3. She approached Ms Mokonyama seeking permission to stay in the property and it was granted.

7.4. She never became aware of the notice in the Daily Sun and in any event, she also could not read.

7.5. She went with other people to the property where she met Ms Masweneng. She then informed Ms Masweneng that she has been granted permission to stay in the house and therefore convinced her to move out. In her testimony, she denies that she ever exerted any undue pressure on her to vacate the property.

7.6. According to her affidavit she approached the Municipality and lodged her claim for the property. In terms of the form attached to her affidavit, marked as "Annexure G" and dated 2 February 2006, the Municipality undertook to investigate the claim. If the claim was to be valid then the Council would have completed the agreement of sale, advised her and proceeded with the transfer at no cost of the property into her name. However this never happened and she testified that, to this date, she does not know what has transpired pertaining to this claim.

7.7. She testified further that since 2006 to date, she has been staying in the property with her three, now major, children and a grandchild.

7.8. She testified that she gets a SASSA pension and has no other place to stay if the court should order her eviction from the property.

7.9. The municipal account for the property has since 2006 been in her name and this situation still prevails.

[8] Considering the evidence in totality, Ms Masweneng is the registered title holder of the property. She occupied the property at a stage when it appeared to her that the property was abandoned and no person claimed a right to reside therein. After she stayed in that property for approximately five to six years, the Municipality invited occupants of houses in the township to apply to become registered owners. Pursuant to this invitation she duly applied and became the registered owner of the property. It is on the strength of this right to ownership that Ms Masweneng is claiming for the eviction of Ms Rakololo.

[9] Ms Rakololo's right to occupation is founded in the permission she received from the long standing permit holder of the property, Ms Mokonyama. It is her version that Ms Masweneng occupied the premises without permission of the permit holder and therefore should not have applied for registration of the property into her name. Ms Rakololo applied for ownership supported by an affidavit from Ms Mokonyama. Nothing came of this application.

[10] The court must now decide these conflicting rights to occupy the property. The facts are to a large extent undisputed. The only disputed issue is whether Ms Masweneng left the property freely and voluntarily during 2006. She testified that undue pressure was used to force her out of the property. Ms Rokololo testified that after Ms Masweneng was informed about the history of the property and the permit in the name of Ms Mokonyama, she freely vacated the property.

- [11] In light of the above evidence, I am of the view that the probabilities favour the version of Ms Masweneng. She had a title deed and it would be improbable that she would have abandoned her rights without resistance. In fact, the court accepts her version that she immediately after she left the property started getting legal assistance to enforce her rights and engaged the services of various legal advisors. She was let down by many such advisors over a long period but eventually succeeded during 2013 to file an eviction application.
- [12] Ms Masweneng bases her claim on her title deed which, so it was argued, provides proof of ownership. In *Cunning v Cunning*[1] it was decided that a title deed and/or the registration thereof at the deeds office simply raises a presumption in favour of the holder of the title deed. This is not conclusive and can be rebutted. In this case the question lies on whether Ms Masweneng had a right to apply for the conversion of her occupation into ownership. Apart from this issue the court must consider whether Ms Rakololo is an "unlawful occupier" and still be satisfied that she is an "unlawful occupier". On behalf of Ms Rakololo it was argued that she is not in unlawful occupation. She challenged the validity of the Title Deed in the name of Ms Masweneng.
- [13] In the context of an eviction application in *Dlamini v Lipholo and Another*,[2] the court found as follows:

"A deed of transfer, just like a title deed, is prima facie proof of ownership and the Act (PIE) defines the owner of property as the registered owner. The phrase 'registered owner' means a legally registered owner. Mere production of a deed of transfer in circumstances such as in this matter does not justify the finding that the respondents are 'true owners of this property' as the court a quo found. The courts must be careful in making decisions that may lead to injustice by neglecting to exercise their discretion judicially, by making assumptions and ignoring the real issues to be considered."

And further that:

"Both the PIE Act and the Constitution puts (sic) emphasis on the process of eviction being just and equitable in the opinion of the court. A deed of transfer is prima facie proof of ownership and where its validity is challenged it is the duty of the court to determine its validity and legality in order to make a ruling that is just and equitable. Mere production of the deed of transfer may justify the inference of ownership unless challenged and on reasonable grounds. It is important to note that only a legally valid deed of transfer confers ownership to the property. Equally it must be proved conclusively that occupation of the property is unlawful in that it has not been authorised by the consent of the owner or by any other right entitling the occupier to be on the property. Where it is likely the occupier has a right or might have a right to occupy the property, the unlawfulness of his/her occupation shall not have been proved. Both these aspects require conclusive proof to entitle the court to order eviction that it just and equitable."

[14] This application for the eviction of Ms Rakololo and other occupiers of the property is governed by the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 ("PIE"). Ms Masweneng brought this application on the strength of her ownership of the property.

Section 4(7) of PIE stipulates as follows:

"If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, where the land has been made available or can reasonably be made available by a municipality or other organ of state or other land owner for the relocation of the unlawful occupier and including the rights and needs of the elderly, children, disabled persons and households headed by a woman."

[15] "Unlawful occupier" is defined in terms of section 1 of PIE as to mean

"A person who occupies land without the express or tacit consent of the owner or persons in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights, 1996 (Act 31 of 1996)."

[16] Section 4(8) of PIE then provides as follows:

"If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."

[17] Subsection 4(9) states that:

"In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question."

[18] Considering the terms of PIE the first question to be decided is whether Ms Rakololo is an "unlawful occupier". To decide this, the court will have to consider the rights of the erstwhile permit holder, Ms Mokonyama, and if she could, during or about 2005, have provided lawful permission to Ms Rakololo to occupy the property. The evidence indicates that this permission was granted at a time when the property was not yet transferred into the name of Ms Masweneng. The parties are not always certain about the exact dates when events took

place. This is understandable considering the effluxion of time and the memory loss of the witnesses. According to the municipal account in the name of Ms Rakololo pertaining to the property she already paid a deposit to the Municipality on or about 17 August

2005. On the probabilities this would only have happened after she obtained permission from Ms Mokonyama to occupy the property.
- [19] Accordingly, when Ms Rakololo occupied the property she did so with permission of the permit holder at the time and therefore did not occupy the property unlawfully. But this raises the further question of whether the permission lapsed when Ms Masweneng obtained her title deed, which in effect would have ended the permit regime?
- [20] To consider this the court will have to decide if Ms Masweneng was legally entitled to have applied for the property to be registered in her name. Of importance here is that she occupied the property without permission of the Municipality, the owner at the time, and also without permission of Ms Mokonyama, the permit holder at the same time. Was she legally entitled to have applied for leasehold or ownership?
- [21] In terms of the 1988 Conversion Act an inquiry had to be held to establish whether the person claiming the conversion of her right to occupation into leasehold or ownership was "a competent person" as defined in the act. A "competent person" is defined as a person as defined in section 1 of the Black Communities Development Act, No 4 of 1984. (Now repealed). Section 52(2) of this Act stipulated the persons which would have been competent persons to qualify for rights to leasehold. I do not intend mentioning all the categories of persons suffice to say that Ms Masweneng, being an occupier without permission before she applied for a conversion, would not fallen in any such category. Doubt is created whether Ms Masweneng was a competent person to have applied for a conversion of her "right" into leasehold or ownership. Section 4 of the 1988 Conversion Act further required the claimant to be a holder of a site permit or the holder of rights similar to the rights of the holder of a site permit. None of these rights attached to Ms Masweneng. Moreover, on the evidence before this court it is not known if an inquiry was made as required by section 2 of the 1988 Conversion Act.
- [22] In terms of the Upgrading of Land Tenure Rights Act 112 of 1991, section 2 provides for the conversion of land tenure rights mentioned in Schedule 1.
- [23] Section 2 reads as follows:
- "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 formalised township for which a township register was already opened at the commencement of this Act, shall at such commencement be converted into ownership;
- (b) ...

(c) ...

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 the provision of any law, was the holder of that land tenure right immediately before the conversion."

[24] In terms of section 2(2), the Registrar of Deeds was obligated to make the necessary entries and endorsements in respect of his registers and other documents to give effect to the conversion.

[25] Ms Mokonyama was the person whom, in terms of the Upgrading of Land Tenure Rights Act, became entitled to ownership although the property was never transferred into her name in the Deeds Office. Although she had lost interest in the property, she was however willing to give permission to her aunt's daughter to "take over" the property. This happened at a time before Ms Masweneng became the titled holder.

[26] I am of the view that Ms Masweneng never became entitled to apply for conversion of her mere occupation of the property into ownership. Consequently, there is a question mark over her title deed despite the fact that the owner of the property, the Municipality, was willing to transfer the property into her name. It is not known to this court whether Ms Masweneng made a full disclosure to the Municipality that she never obtained permission from the permit holder and merely occupied the property on the basis that it was vacant and no person claimed ownership. The fact that the Municipality advertised the proposed transfer to Ms Masweneng is not taking the matter any further. Both Ms Mokonyama and Ms Rakololo testified that they are illiterate and cannot read. In such circumstances the court can accept that they were totally unaware of the notice in the Daily Sun newspaper.

[27] This court must decide, as required in terms of section 4(7) of the PIE, whether it is just and equitable to evict an "unlawful occupier" after considering all relevant circumstances. First, I am not convinced that Ms Rakololo is an unlawful occupier as she obtained permission from her family member who was the person entitled to have her right of tenure be converted into ownership.

Second, the evidence has shown that Ms Masweneng was in unlawful occupation at the time when she applied for ownership and a title

deed. She occupied the property without any legal right and permission. Although she became the registered owner her right to have the property transferred into her name is questionable. The court must consider this to determine if it would be just and equitable to evict Ms Rakololo who has been living in the property the last 13 years with no place to move to if evicted. She is elderly and live from the small amount she receives as a social grant.

- [28] Section 26(3) of the Constitution of the Republic of South Africa Act no 108 of 1996 states that no one may be deprived from their home without an order of court considering all circumstances. The court has considered all the circumstances and is of the view that the applicant has failed to prove on a balance of probabilities her right to obtain an order to evict Ms Rakololo from the property.
- [29] This application was not aimed at resolving the dispute pertaining to the title deed and the possible cancellation thereof. A substantive application would be required in this regard. Unless this is done the dispute around the ownership and occupation of this property will perpetuate itself.
- [30] Besides the fact that the Municipality transferred its property to Ms Masweneng it remains unclear what has happen to Ms Rakololo's claim for conversion supported by the affidavit of Ms Mokonyama. The Municipality is the third respondent in this application and the court is of a view that the Municipality should consider the rights of the parties afresh in light of this judgment and report to the parties its findings. Particularly, the Municipality must investigate and consider whether Ms Masweneng could have applied for a conversion of her occupation, without permission, into ownership. A copy of this application together with its annexures, the judgment and order should be served on the Municipality. I do not intend to make an order in this regard as this was not part of the relief contained in the notice of motion served on the Municipality
- [31] Whether Ms Rakololo wants to apply to court for a cancellation of the Deed of Transfer will be her choice. Legal certainty will only be obtained if this is done. If the Municipality report on the rights of the parties after an investigation it would assist both parties to obtain legal certainty.
- [32] As far as cost are concerned, I am of the view that both parties had an arguable case and that the parties had a genuine desire to resolve the matter. The parties are poor and both had to incur legal costs to obtain legal certainty which, apart from the eviction issue, has not finally been resolved. Add to this, the fact that the legal uncertainty was brought about by a property rights regime which was unfair, arbitrary and uncertain, depriving people the right to ownership over many years, it would be unfair to burden a party seeking clarity pertaining to ownership with a cost order. I intend ordering that each party should bear their own costs.
- [33] The following order is made:
- 33.1. The application for eviction is dismissed.
- 33.2. The second respondent is ordered to serve a copy of this application, a copy of this judgment and order, on the third respondent.
- 33.3. No order as to costs.

Strydom AJ.

Acting Judge, Gauteng

Division of the High Court

of South Africa, Pretoria

Date of hearing:

26 June 2019

Date of judgment:

15 August 2019

Appearances:

Counsel for the applicant:

Adv Moteno

Counsel for the respondent:

Adv Makamu

[1] 1984 (4) SA 585(T) at 589

[2]

[2010] JOL 26038 (FB) at paras 11 and 15.

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