

SOUTH AFRICA / JUDGMENT

Mochochoko v Mochochoko and Others (3647/2015) [2018] ZAFSHC 155 (18 October 2018)

[2018] ZAFSHC 155

COURT

Free State High Court, Bloemfontein

BEFORE

JP Daffue

CASE / FILE NUMBER

3647/2015

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 3647/2015

In

the matter between:

GLADYS
MORONGWENYANA MOCHOCHOKO Applicant
and
CECILY
THELE MOCHOCHOKO 1st
Respondent
SELBY
MOCHOCHOKO 2nd
Respondent
DINAH
MOCHOCHOKO 3rd
Respondent
GLADYS

MOCHOCHOKO 4th
Respondent
LESEDI
MOREI MALAHLELA 5th
Respondent
TUMELO
OFENTSE MOCHOCHOKO 6th
Respondent
DUMA
MHLONGO 7th
Respondent
CHARLOTTE
NALEDI MOCHOCHOKO 8th
Respondent
MITCHEL
MOCHOCHOKO 9th
Respondent
JOYCE
MOCHOCHOKO 10th
Respondent
THE
MASTER OF THE HIGH COURT 11th
Respondent
FREE
STATE DIVISION
THE
DEPARTMENT OF RURAL DEVELOPMENT 12th
Respondent
AND
LAND REFORM
HEARD
ON: 11
OCTOBER 2018

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 18 OCTOBER 2018

I

INTRODUCTION

- [1] A family feud involving a residential dwelling situated in Bochabella, Bloemfontein has culminated in an opposed application to be adjudicated by the court.

- [2] An interesting, but important legal issue, such as the effect of two spouses' joint will on the testamentary power of the surviving spouse to deal in a later will with property inherited by such spouse contrary to the joint will, has not been considered at all by any of the parties to this application, neither in the affidavits, nor in written heads of argument.

II THE PARTIES

- [3] Applicant is Me Gladys Morongwenyana Mochochoko, a [...] year old pensioner residing at [...] M Street, Bochabella (not Botshabela as incorrectly set out in the founding affidavit), Bloemfontein. She is represented by Stander and Green Attorneys who appointed Adv AP Berry to argue the application.
- [4] Twelve respondents have been cited. The first ten are members of the Mochochoko family who applicant believes may have a legal interest in the application. It is not necessary to name all these respondents as the application is opposed by first respondent only, she being Me Cecily Thele Mochochoko, a female educator residing at 4342 Mtyombile Street, Bochabella, Bloemfontein. She is applicant's sister-in law. 1st Respondent is the registered owner of Erf [...] Mangaung Extention 6, district Bloemfontein, also known as [...] M Street, Bochabella, Bloemfontein (hereinafter to be referred to as "the property"). Second and third respondents are the children of first respondent and her late husband, Mr Zwelethu Jeremiah Mochochoko (applicant's brother). The fourth

respondent is the widow of applicant's other brother, Frazer Lehlohonolo, who passed away earlier. Fifth and sixth

respondents are the children of this late brother. Seventh to tenth respondents are the children of applicant's other sibling, Alan Sechaba, who passed away as well.

- [5] The Master of the High Court is cited as 11th respondent. A report was received from the Master, dealing briefly with authorities relating to the acceptance and setting aside of wills. He does not oppose the application and abides by the court's decision. The Department of Rural Development and Land Reform is the 12th respondent. It does not oppose the application and also failed to shed any light on the process followed culminating in registration

of transfer of the property in 1st respondent's name.

- [6] I shall refer to the parties, the main protagonists, as applicant and respondent throughout this judgment and if I need to refer to any other party I shall properly identify such party.

III THE RELIEF CLAIMED

- [7] The following relief is claimed in the notice of motion which is quoted verbatim:

1.1 Declaring the joint Will of HARRY SELBY LEKHOANA MOCHOKO and DINTSEJANG DINAH MOCHOKO executed on 17 January 1978, not to be the last Will and Testament of the Testatrix.

1.2 Authorising the Master of the High Court of South Africa, Free State

Division, to accept a copy of the Will of DINTSEJANG DINAH MOCHOCHOKO executed on 05 January 1994, as the last Will and Testament of the Testatrix in terms of Sec 8(4) and /or 8(4)(B) of the Administration of Estates Act 66 of 1965.

1.3 Authorising the Master of the High Court of South Africa, Free State Division, to appoint the firm of attorneys, Stander & Partners, as executor of the Estate of the Testatrix.

1.4 Interdicting the First Respondent from dealing with the property situated at [...] M Street, Botshabela, Free State Province, or incurring any liability against the property.

1.5 Directing the First Respondent to sign all the documentation which may be needed to execute the Will of the Testatrix, within 14 days from the date she is requested to do so.

1.6 Authorising the Registrar of the High Court of South Africa, Free State Division, to sign all documentation which may be required

needed (sic) to execute the Will of the Testatrix, should the First Respondent fail to sign within 14 days from the date she is requested to do so.

1.7 Ordering any party who opposes this Application to pay the costs of this Application jointly and severally, the one paying the other to be absolved.

IV THE DISPUTES

[8] Respondent denies that applicant is entitled to any relief. She pointed out that various disputes of fact exist which are incapable of resolution on the papers. However, in her answering affidavit she focused on two crucial issues: (1) the Master has accepted the joint will of applicant's parents executed way back in 1978 in terms whereof applicant's mother, now the late Me Dintsejang Dinah Mochochoko, (hereinafter referred to as "DD Mochochoko") became the sole heir as surviving spouse upon her late husband's death and (2) the 1994 document is a copy only and the validity thereof is questionable in the absence of the original; furthermore applicant has done nothing over many years to approach the court to have it accepted as a valid will and has acquiesced in the Master's decision rejecting a copy of the will.

V MATERIAL FACTUAL BACKGROUND

[9] There are certain disputes appearing from the papers, but these are not serious. It is possible to adjudicate the application based on the common cause facts.

[10] The following is a chronological factual background of the material events:

1) Mr Harry Selby Lekhoana Mochochoko (referred to herein as "Lekhoana" without being disrespectful, but to avoid confusion) and DD Mochochoko, who were married to each other out of community of property, have been staying at stand 4390 Mtyombile Street,

Bochabella, Bloemfontein for many years. As long ago as on 17 January 1978 – 40 years ago – they executed a joint will to be referred to as “the joint will” herein later. The above immovable property was bequeathed in this will, an indication of how long they were in occupation thereof.

- 2) In terms of the joint will the survivor of them was appointed as the sole heir of the whole estate of the first-dying and they further directed that upon the death of the survivor of them “all his or her assets in his or her estate and nothing excepted, will devolve and accrue to two of our children born of our marriage as follows:-” Jeremia Zwelethu Mochochoko (“Zwelethu”), their one son would receive the property, three quarters of all investments, one vehicle and one half of the furniture. Applicant would receive one quarter of the investments, one vehicle (if there is more than one) and one half of the furniture.
- 3) Lekhoana passed away in 1985. Respondent avers that the Master accepted the joint will, but there is no proof hereof.

Unfortunately there is no indication whether, and if so, when the estate of Lekhoana was reported. There is no Master’s

reference number on record and there is no proof that the joint will was presented to the Master for acceptance and in fact accepted, save for respondent’s say-so. However, it is not applicant’s case that the joint will is not a valid will.

- 4) DD Mochochoko passed away on 29 January 2010, but prior to her death she allegedly executed two documents, in 1990 and 1994 respectively.

These are clearly intended to be wills. Mr Mosikili who practised as attorney, deposed to an affidavit, confirming that he

had prepared the last will which was executed and signed in his presence on 5 January 1994. This version is contested by

respondent without a proper factual foundation.

- 5) On 2 March 2010 applicant’s brother signed an undertaking and acceptance of Master’s directions in terms of s 18(3) of the Administration of Estates Act, 66 of 1965. This was in respect of the late DD Mochochoko’s estate. There was apparently no need for the appointment of an executor due to the size of the estate. Again, the Master’s reference number is not available and it is uncertain whether Zwelethu was indeed appointed by the Master. Applicant stated under oath that her attorney received the aforesaid undertaking, annexure “GM4”, to which the joint will was attached, from the Master’s office. There is no confirmatory affidavit from the attorney explaining what the Master’s reference number is and whether Zwelethu was indeed appointed as Master’s representative. I must accept that it was apparently not the case.

- 6) According to the applicant's version she could only locate a copy of her mother's will upon her death and that the Master refused to accept it, which decision she accepted at the time. The Master denies in his report of 20 January 2016 that copies of either the 1990 or 1994 wills were submitted to his office which on all probabilities confirm that DD Mochochoko's estate was never registered by the Master's office.
- 7) Zwelethu passed away in 2011. There is no indication whether his estate was reported with the Master and if so, whether he left a will and what transpired during the administration of the estate.
- 8) On 26 June 2012, two and a half years after her mother passed away, applicant requested the Law Society to assist in finding DD Mochochoko's file (not the will), but the Law Society failed to locate the file as is evident from the letter annexed as annexure "GM2".
- 9) On 19 August 2013 and in terms of Deed of Transfer TE 9006/2013 the property was registered in respondent's name, she having been granted ownership in terms of the provisions of s 4(1)(b) of the Conversion of Certain Rights into Leasehold or Ownership Act, 81 of 1988 ("the Conversion Act").
- 10) When applicant received municipal accounts in respect of the property addressed to respondent, she made enquiries whereupon her attorney obtained a copy of the particular Deed of Transfer. According to the respondent she became aware of arrear municipal accounts in her name in respect of the property during April 2015 whereupon she confronted applicant who denied liability as the property was not registered in her name, but in respondent's name. The parties are thus in dispute in respect of this issue.
- 11) There is no indication what caused the property to be registered in respondent's name and as applicant speculates, it probably occurred due to Zwelethu's entitlement to the property in terms of the joint will and respondent's right to inherit from her husband upon his death. There is no allegation that any fraud or misrepresentation was committed by respondent or anyone on her behalf.
- 12) Applicant issued the present application in March 2015, but due to difficulties with service of the papers on all respondents and other delays, the application was heard on 11 October 2018 only.
- 13) Applicant has been staying on the property with her parents ever since her childhood and she is still occupying the property at present. Respondent is the owner of a separate property across the street from the property in dispute and she has been occupying that property since 1991.

VI LEGISLATION AND AUTHORITIES PERTAINING TO WILLS AND ESTATES

- [11] It is important to consider s 2 of the Wills Act, 7 of 1953 and s 8 of the Administration of Estates Act, 66 of 1965 and some other principles in respect of succession before an evaluation of the dispute is undertaken.

[12] Section 2(1) of the Wills Act prescribes the formalities applicable to wills. There is no need to quote the subsection. Each page of a testator's will must be signed by the testator and two witnesses who must be in each other's presence at the time.

[13] Sections 2(3) and 2A were added to and inserted in the Wills Act during 1992 and since then several orders have been granted by our courts authorising the Master to accept documents not complying with

the statutory requirements, and even copies thereof, as wills in accordance with s 2(3) and s 2A. For ease of reference I quote s 2(3) and S 2A:

“(3) If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).

2A Power of court to declare a will to be revoked

If a court is satisfied that a testator has-

- (a) made a written indication on his will or before his death caused such indication to be made;
- (b) performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face of the will; or
- (c) drafted another document or before his death caused such document to be drafted,

by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked.

[14] In *Van der Merwe v The Master* 2010

- (6) SA 544 (SCA), Navsa JA, writing for a unanimous court, stated the following at para [14]: “By enacting s 2(3) of the Act, the legislature was intent on ensuring that failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators. It has rightly and repeatedly been said, that, once a court is satisfied that the document concerned meets the requirements of the subsection, a court has no discretion whether or not to grant an order envisaged therein. In other words, the provisions of s 2(3) are peremptory once the jurisdictional requirements have been satisfied.” (footnotes omitted and emphasis added). The learned judge proceeded as followed in para [15]: “Turning to the provisions of s 2 (3), the first question to be considered is whether the document in question was drafted or executed by the deceased. Following on this is the question whether the deceased intended it to be his will.” See also: *Van Wetten and another v Bosch and others* 2004 (1) SA 348 (SCA) at para [14]. In para [16] of *Van der Merwe* supra Navsa JA said that the “...very object of s 2(3) ... is to ameliorate the situation where

formalities have not been complied with, but where the true intention of the drafter of a document is self-evident.”

[15] Section 8 of the Administration of Estates Act reads as follows:

8 Transmission or delivery of wills to Master and registration thereof

- (1) Any person who has any document being or purporting to be a will in his possession at the time of or at any time after the death of any person who executed such document, shall, as soon as the death comes to his knowledge, transmit or deliver such document to the Master.
- (2)
- (3) Any such document which has been received by the Master, shall be registered by him in a register of estates, and he shall cause any such document which is closed to be opened for the purpose of such registration.
- (4) If it appears to the Master that any such document, being or purporting to be a will, is for any reason invalid, he may, notwithstanding

registration thereof in terms of subsection (3), refuse to accept it for the purposes of this Act until the validity thereof has been determined by the Court.

(4A) In taking a decision concerning the acceptance of a will for the purposes of this Act, the Master shall take into account the revocation of a will by a later will, but not the common law presumptions concerning the revocation of a will.

(4B) The Master may for the purposes of this Act also accept a duplicate original will. (emphasis added)

[16] In *Ex parte Erasmus NO: in re Erasmus Estate 1994*

- (2) SA 751 (CPD) at 755 the court correctly found that a “duplicate original will” includes a copy. This is the only reported authority on the subject and there is no reason to doubt the correctness thereof.

[17] Meyerowitz on Administration of Estates and their Taxation, 2010 ed at para 4.18 holds the view, under the heading “setting aside of wills”, that “the fact that the survivor adiated under the joint will, which effected a massing, may render a later will made by him ineffective if he has not after the death of the first-dying acquired a separate estate, but it does not invalidate it.” (emphasis added)

[18] Wille’s Principles of South African Law, 9th ed at 726 sets the law clear and straight as follows: “Either party to a mutual (joint) will may, while both are alive, revoke his or her share of the mutual will with or without communication to the other party. But after the death of one party the survivor may not revoke his or her share of the mutual will where both the following further conditions or circumstances occur: (a) the mutual will effects a “massing”, and (b) the survivor has accepted some benefit under the will.” Wille continues

on the same page to explain “massing”. The joint will in *casu* is a typical example in that the survivor inherited the first-dying’s estate, subject to a fideicommissum in favour of two of the children and on the basis that the property (the stand) shall go to Zwelethu. In this scenario the surviving spouse became the fiduciarius and Zwelethu the fideicommissarius. The survivor obtains a fiduciary interest only.

- [19] Wille continues at 727 – 728 to explain that the survivor always has an election whether to accept the joint will by way of adiation, or to reject it. If the survivor abides by the will and accepts benefits thereunder, he/she cannot later on revoke such joint will in a later will. He/she is under an obligation to allow the property to devolve in terms of the joint will.

VII EVALUATION OF THE AUTHORITIES AND SUBMISSIONS OF THE PARTIES

- [20] Section 2(3) requires the document in question to be intended by the testator to be her will. In *casu* we have the evidence of the testator’s former attorney who not only drafted the document on her instructions, but co-signed as witness. The document complies with all requirements of the Wills Act. In paragraph 2 of the document the testator revoked all previous wills made by her alone or jointly with any other person. In principle DD Mochochoko declared the 1994 document which must be accepted as a will, her last will and testament. It is another issue whether she could in law revoke the joint will executed by her and her late husband, Lekhoana. That will be considered shortly.

- [21] As mentioned, this court has not been informed that any of the estates, i.e. that of Lekhoana, DD Mochochoko or Zwelethu, have been registered by the Master in his register of estates held in terms of s 8(3). No Master’s reference number has been provided to the court in respect of anyone of these three estates. It is

clear from s 8(4A) that the Master shall, concerning the acceptance of a will, take into account the revocation of a will by a later will. The Master may also accept a duplicate original will.

- [22] It is repeated that the two page document dated 5 January 1994, presented to the court as a copy of DD Mochochoko’s will,

complies with all the formalities of a valid will, except that it is a copy and not the original will. There is no reason to doubt Mr Mosikili’s version that DD Mochochoko executed the will. A search for the original will was unsuccessful. Section 2(3) requires that the document in question must have been intended by the testator to be his/her will. The provisions of s 2(3) are intended to save a will that would otherwise be invalid due to a formal defect in its attestation. In *casu* there are no formal defects in the attestation of the 1994 will as it complies with s 2 of the Wills Act, the only issue being the unavailability of an original will. There is no evidence or suggestion that DD Mochochoko ever revoked this will by destroying the original. In fact, as Mr Mosikili pointed out, the will was still kept in the safe of his former employer when he left their services. It is common cause that the firm of attorneys closed down offices and it is not surprising that the original will could not be located.

- [23] Mr Berry argued that the 1994 document should be accepted as a valid will, and therefore initially argued that all prayers contained in the notice of motion should be granted. Mr Mphuloane did not really have any argument in this regard, save to state that sections 2(3) and 8(1) do not refer to copies and that a copy cannot be used to revoke a valid, accepted and original will. He also relied on the time that had expired and indications that applicant abided in the decision of the Master not to accept the 1994 will as a valid will. However, and although I accept that there must be finality, not only in litigation, but also in the administration of estates, I am compelled, being subject to the *stare decisis* principle, to follow the two SCA decisions in *Van der Merwe* and *Van Wetten* supra to grant prayer 2 of the notice of motion by authorising the Master to accept DD Mochochoko's 1994 will as a valid will. The fact that the 1994 will may be ineffective based on what I stated in this judgment and as mentioned by Meyerowitz supra, cannot stand in the way of granting the relief. The Master will eventually have to deal with the matter and if a further dispute arises, the court might be approached again.
- [24] I am not prepared to grant prayer 1 of the notice of motion. I referred to the authorities in respect of joint wills and massing of estates supra. There is insufficient information as to whether DD Mochochoko adiated or repudiated the joint will prior to the execution of the 1994 will. Her husband died in 1985. They were married out of community of property. I accept that the two deceased spouses merely had rights of occupation to the property and the improvements thereon as a consequence of the racially discriminating laws applicable at the time. Only their right, title and interest in the improvements and occupation of the property could have accrued to heirs. For purposes of this judgment I deal with such right as property capable of being bequeathed. I indicate infra, that by the time of the first-dying spouse's death a process had been started by the legislature to provide for ownership to previously disadvantaged persons.
- [25] My concern about revocation of the joint will is as follows. If DD Mochochoko adiated the joint will, massing of their separated estates would have taken place and after her death as the surviving spouse, effect should have been given to the joint will. A fideicommissum was created in respect of the property in favour of Zwelethu. Based on such proposition, the property would have accrued to Zwelethu and after his death to his heirs, testate or intestate. If the surviving spouse repudiated the joint will, she would have received nothing from her deceased husband's estate, but would have retained her own assets with the right to deal with that as she wished. On the probabilities DD Mochochoko adiated as she received some benefit insofar as she remained in occupation of the property for the next 25 years from Lekhoana's death in 1985 till 2010. Mr Berry argued in the same breath that the property (stand 4390) was not an asset in the estate of any of the parties when the 1978 joint will was executed, but that it was an asset in DD Mochochoko's estate allowing her to bequeath it in terms of the 1994 will. I do not agree. There is no proof that both these parties could be regarded as joint owners of the right, title and interest to occupation and improvements of the property, either as partners, or as if they were married in community of property which was not the case, or whether such right belonged exclusively to one of them.

- [26] If DD Mochochoko adiated, she and her executor would be bound by the terms of the joint will and she would not be capable to execute a later will in conflict with the terms of the joint will. If she repudiated, she did not inherit anything from her late husband. It is not good enough to argue, as her counsel did, that she revoked the joint will in the 1994 will. Her earlier adiation, if that was the case, would have prevented her in law to do so. In the circumstances the court is left in the dark as to what happened in casu. There is no justification, with the facts available, to declare that the joint will is not "... the last Will and Testament of the Testatrix" as contained in prayer 1.
- [27] Applicant seeks an order in terms whereof the court authorises the Master to appoint the firm of attorneys, Stander and partners, as executor in the estate of DD Mochochoko. Firstly, ex facie the documents before the court no such firm exists anymore and secondly, an executor shall be appointed by the Master after following the prescribed procedure set out in s 14 of the Administration of Estates Act. This court cannot interfere with that statutory procedure.
- [28] Insofar as the court is not prepared to grant orders directing respondent, alternatively the registrar, to sign documents for the transfer of the property – see prayers 1.5 and 1.6 of the notice of motion – for the reasons advanced infra, I am not prepared to grant an interdict as contained in prayer 1.4.
- [29] It is important to emphasise crucial aspects not dealt with fully or at all by the parties in the affidavits. Mr Berry decided to mention the provisions of the Conversion of Certain Rights into Leasehold or Ownership Act, 81 of 1988 ("the Conversion Act"), but failed to appreciate the consequences of registration of transfer of the property in respondent's name in terms of this Act.
- [30] I mentioned certain relevant conveyancing principles in M.J. v M.V Moloao, case no 4027/2016, an unreported judgment of the Free State High Court, delivered on 30 November 2017 and for ease of reference I quote the relevant passages:
- "[18] There must be a causa for registration of immovable property into the transferee's name. It may inter alia be a sale, a donation, an exchange, an inheritance or in terms of legislation.*
- [19] During the years of apartheid black people could not own immovable property in the majority of areas in South Africa which areas were reserved for people of the so-called white group only. However, urban black people were under certain conditions given the right to occupy land in areas allocated to them. They received so-called site permits.
- [20] Since 1984 black people could receive leasehold rights in respect of properties occupied by them in urban areas. Leasehold rights were granted to occupants in possession of site permits issued to them. I refer to the Black Communities Development Act, 62 of 1984. This Act was amended by Act 4 of 1986 to provide for full ownership rights. Applicant has not made out a case as to which legislation applies in casu and for that reason I have decided to mention Acts which might be applicable.

- [21] On 1 January 1989 the Conversion of Certain Rights into Leasehold or Ownership Act, 81 of 1988 (“the Conversion Act”) was promulgated to provide for the conversion of certain rights of occupation into leasehold or ownership. I do not intend to discuss the Act in any detail, but wish to reiterate the following. The legislature regarded the Black Communities Development Act as the principal Act for purposes of interpreting and applying the Conversion Act. In terms of s 2(1) of the Conversion Act the Director-General of a particular province shall conduct inquiries in respect of affected sites within that province in order to determine who shall be granted rights of leasehold, or where sites are situated in formalised townships for which township registers have been opened, ownership with regard to such sites.
- [22] In terms of s 5, and in the event of a declaration having been made by the Director-General, he/she shall lodge such declaration and every deed and other document necessary for registration of the right of leasehold if s 4(1)(a) is applicable. If s 4(1)(b) applies, the Director-General shall lodge his/her declaration and a deed of transfer with the registrar concerned. It is interesting to note that s 17(1) and (2) of the Deeds Registry Act, 47 of 1937 (“the Deeds Act”) shall not apply in respect of transfer of ownership in terms of the Conversion Act. See: s 5(1A)(g). I shall explain the effect of s 17 of the Deeds Act *infra*. It also appears as if s 14 of the Deeds Act mentioned *infra* may also not be applicable if s 2(3) of the Conversion Act is correctly understood. The provincial administrations must carry out the processes contained
- in the Conversion Act. However, it is not necessary to decide the issue in the light of the evidence and submissions presented to the court.
- [23]
- [24]
- [25] Registration of immovable property which would upon transfer thereof form part of a joint estate shall be registered in the name of the husband and the wife, unless that transfer takes place only in the name of a partnership and the husband or wife is involved herein only in the capacity of partner in that partnership. See s 17 of the Deeds Act. Section 14 of the Deeds Act provides for deeds to follow the sequence of their relative causes. This means that transfer of land shall follow the sequence of the successive transactions in pursuance of which they are made, save in certain exceptional cases..... Sections 14 and 17 must be regarded as the default position, but as mentioned *supra*, the Conversion Act apparently provides for exceptions.”
- [31] Although applicant attached to her founding affidavit a copy of Deed of Transfer no TE 9006/2013 in favour of respondent in respect of the property, she did not mention the Conversion Act and/or its aim and ambit in her founding affidavit, but speculated how respondent could have obtained transfer of the property. She did this notwithstanding the fact that the Deed of Transfer specifically stipulates that the transfer followed upon a declaration by the Director-General granting ownership to respondent in terms of s 4(1)(b).

At the end of her replying affidavit applicant for the first time referred to the authority of the Department of Human Settlement to transfer properties to “the rightful occupants”. She then alleged that as respondent was not residing on the property since 1991, it should never have been registered in her name.

[32] It is evident that his was not the usual transfer between private persons or between corporate bodies or the State and a private

person. The transfer was effected in terms of a particular Act, the Conversion Act, and it followed not upon a sale, exchange,

donation or inheritance (in the usual sense) which would have triggered for example s 14 of the Deeds Registry Act, 47 of 1937

(“the Deeds Act”), but a declaration by the Director-General in terms of s 4(1)(b) of the Conversion Act. This is clear from the wording of Deed of Transfer TE 9006/2013. Respondent was “declared ... to have been granted ownership in respect of the property” by the Director-General of the Free State Province in accordance with s 4(1)(b) of the Conversion Act.

[33] I stated the following at para [16] in Vermeulen NO v Rammile and others (A260/2017)

[2018] ZAFSHC 59 (10 May 2018), a full bench decision, where a similar factual situation occurred:

“We are not dealing with transfer of ownership in immovable property in the general sense of the word. In casu there is no underlying agreement, but a declaration by a senior official in the Free State Province – its Director-General – granting ownership to 1st respondent. The Conversion Act cannot be sidestepped in the process of adjudicating the appellant’s alleged right to

cancellation of the Deed of Transfer. The signing of the Deed of Transfer was done by Mr Van Niekerk, an employee in the office of the particular Departments following a declaration by the Director-General. A process was followed in accordance with the Conversion Act and to name one aspect, the documents were not and did not have to be prepared by a conveyancer as is the case with other documents filed for registration in the Deeds Registry. See also: Kuzwayo v Estate late Masilela (28/10)

[2010] ZASCA 167 (1 December 2010) at paragraph [28].”

[34] The Director-General did not file an affidavit and as applicant elected not to launch a review application, I do not know what were the reasons for the declaration in terms of s 4(1)(b) of the Conversion Act. See Kuzwayo v Estate late Masilela (28/10) [2010] ZASCA 167 (1 December 2010) at para [30], also referred to in Vermeulen supra. Mr Van Niekerk, who signed the Deed of Transfer on behalf of the transferor, apparently duly authorised in terms of a Delegation of Ministerial Powers as recorded in the first preamble of the Deed of Transfer, did not attest to an affidavit to enlighten the court and the same applies to responsible public servants in the employ of the Department of Human Settlement and/or the Department of Rural Development and Land Reform, the 12th respondent.

[35] Mr Berry's submission that there is no evidence of compliance with the Conversion Act and that if the 1994 document was accepted by the Master as a valid will, the property would have been transferred to applicant, does not hold any water for purposes of adjudicating the present application for the reason set out in the next paragraph.

[36] We are in the dark as to what information was considered in deciding to grant ownership to respondent. Her now deceased husband (applicant's brother) was taking care of their deceased mother's estate. Respondent cannot be accused of improper conduct in order to obtain transfer. In all probabilities, as applicant and her counsel also believe, a decision was taken by the Director-General based on the 1978 joint will and respondent's inheritance of her late husband's estate. As pointed out earlier a fideicommissum was created by the testators of the joint will in favour of Zwelethu, respondent's husband, in respect of the property.

Zwelethu, as fideicommissarius, was entitled to ownership in terms of the joint will, also bearing in mind the provisions of the Conversion Act, but his death made transfer to his estate unnecessary and consequently a direct transfer to his heir, the respondent, was in principle authorised in accordance with s 2(3)(b) of the Conversion Act. I reiterate that as a result of s 5(1A)(g) of the Conversion Act, ss 17(1) and

(2) of the Deeds Act do not apply as mentioned in the quotation supra; therefore an initial transfer to the Zwelethu's estate was not required, unlike what the case would be in the default position. It must be emphasised that this is not a review application and that we were not provided with reasons for the Director-General's

declaration.

[37] Mr Berry did not and could not argue with conviction that the Deed of Transfer should be cancelled. No case has been made out for such relief in the papers and no such relief is sought in the notice of motion. A court is entitled, if a proper case has been made out for relief, to cancel a Deed of Transfer as provided for in s 6(1) of the Deeds Act – see also *Kuzwayo supra* - but s 6(2) provides that upon such cancellation “the deed under which the 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.” No transfer or retransfer is ordered by the court in such instance. The property can also not be transferred to applicant or a third party or parties as applicant seeks the court to order in paragraphs 1.5 and 1.6 of the notice of motion. It is not indicated in the notice of motion to whom the transfer of property should be effected, but Mr Berry argued that the transferees would be applicant and the children of her deceased siblings. I do not agree that this would be the end result insofar as it cannot be accepted that the joint will could be revoked. Mr Berry has eventually conceded during argument that this court cannot order respondent to sign any transfer documents and thereby

effectively causing an expropriation without compensation, and as already found, no case has been made out for cancellation of the Deed of Transfer in accordance with s 6 of the Deeds Act.

[38] Mr Berry relied on paras [28] and [29] of Kuzwayo for his submission that a review application was not called for. He is wrong. The SCA emphasised that neither party to the dispute was aware of any inquiry that might have been conducted in terms of s 2 of the Conversion Act and therefore the court could not assume that a decision was made. I am convinced that it must be clear to any reader of the Deed of Transfer that a decision was made by the Director-General in terms of s 4(1)(b) of the Conversion Act and that respondent was granted ownership in terms thereof. That decision stands and whether or not it is the result of “bureaucratic bungling” as Lewis JA said in Kuzwayo supra is not for this court to consider at this stage. Applicant would be entitled to seek reasons for the decision and if dissatisfied, to approach the High Court for review and setting aside of the decision and to apply for cancellation of the Deed of Transfer in terms of s 6 of the Deeds Act.

XIII

CONCLUSION

[39] In conclusion, applicant is only entitled to relief in terms of prayer 2 of the notice of motion. It is recorded that the 1994 will is in my view ineffective insofar as it is in direct conflict with the joint will of 1978. No case has been made out for the remainder of the relief and the application regarding prayers 1.1, 1.3, 1.4, 1.5, 1.6 and 1.7 shall be dismissed. Applicant has achieved some success, but in my view failed in achieving what she really wants, i.e. to order respondent to sign documents to transfer the property out of her name to at this stage unknown persons and thereby relinquishing her ownership in the property. Consequently, and in fairness to both parties, they should be ordered to pay their own costs.

XIV

ORDERS

[40]

- 1) The Master of the High Court is authorised to accept a copy of the will of Dintsejang Dinah Mochochoko executed on 5 January 1994 as her last will and testament.
- 2) Save for the relief granted in paragraph 1, the application is dismissed.
- 3) Each party shall be liable for her own legal costs.

J P DAFFUE, J

On behalf of applicant: Adv A P Berry

Instructed by: Stander and Green

BLOEMFONTEIN

On behalf of the 1st respondent: Adv P S Mphuloane

Instructed by: Tshangana Attorneys

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