

SOUTH AFRICA / JUDGMENT

Mokoene and Another v Banda and Others (2025/048842) [2025] ZAGPJHC 413 (23 April 2025)

[2025] ZAGPJHC 413

COURT

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

2025/048842

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2025 - 048842

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

In

the matter between: LILLIAN
NONHLANHLA MOKOENA
First Applicant
SARAH
DANISILE MTHETWA
Second Applicant
and
PHILLIP
BANDA
First Respondent
REGISTRAR
OF DEEDS, JOHANNESBURG
Second Respondent
DIRECTOR
GENERAL- GAUTENG DEPARTMENT
OF
HUMAN SETTLEMENTS
Third Respondent

MEC: GAUTENG DEPARTMENT
OF
HUMAN SETTLEMENTS
Fourth Respondent
THE
CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY
Fifth Respondent

JUDGMENT

Noko, J

Introduction

- [1] The applicants instituted an urgent application for a relief crafted in two parts. Part A is for an interim interdict restraining the first respondent from, inter alia, transferring the property, to wit, Erf 9[...], O[...] W[...] Township, held under Deed of Transfer T[...] (“the property”) to any third party until determination of Part B of the application. Part B is for various declaratory orders. The application is proceeding on unopposed basis as the first respondent did not serve the notice to oppose or attend Court to oppose the application.

The parties

- [2] The first applicant Lillian Nonhlanhla Mokoena an adult female resident at 1[...] D[...] K[...] Street, C[...] J[...], Soweto, Johannesburg.
- [3] The second applicant is Sarah Denisile Mthethwa, an adult female resident at 2[...] M[...] P[...], K[...] Extension 6, Johannesburg.

- [4] The first respondent is Phillip Banda, an adult male resident at 9[...] O[...] W[...], Soweto, Johannesburg.
- [5] The second respondent is the Registrar of Deeds, Johannesburg, carrying business at cnr V[...] W[...] and R[...] M[...] Street, Johannesburg.
- [6] The third respondent is the Director General – Gauteng Department of Human Settlement, Johannesburg. The third respondent is cited in his capacity as a functionary responsible for the administration and implementation of the Conversion of Certain Rights into Leasehold or Ownership Act[1] (“Conversion Act”) and the Gauteng Housing Act. [2]
- [7] The fourth respondent is the MEC: Gauteng Department of Human Settlement cited in her capacity as the executive responsible for the Human Settlement Department.
- [8] The third and fourth respondents are carrying government business for the Gauteng Province at 1[...] D[...] street, M[...], Johannesburg.
- [9] The fifth respondent is the City of Johannesburg Metropolitan Municipality, a municipality established in terms of Local Government: Municipal Structures Act[3] with its business address at 1[...] C[...] B[...], B[...], Johannesburg.

Background.

- [10] The dispute between the parties relates to the property which was previously allocated to the late John Banda (“Mr Banda”) and his wife Lilly Salimson Banda (“Ms L Banda”), who were married in community of the property. A residential permit was issued on 10 February 1968 by the Office of the Superintendent: Non-European Affairs Department in terms of Section 5(a) of Chapter 1 of the Johannesburg Location Regulations. The permit provides that Mr George Mokoena, (Mr Banda’s stepson) is a dependent and entitled to reside on the property while he remain unmarried. Mr J Banda died on 11 July 1985[4], Ms L Banda died on 24 November 2003 and Mr Mokoena died on 1 August 2011.
- [11] The property is currently registered in the names of the first respondent under Deed of Transfer T[...] issued in terms of section 2 of Upgrading of Land Tenure Act (“ULTRA”)[5].

Applicants’ version.

Urgency

- [12] The applicants stated that they have heard recently that the first respondent intends relocating to his father’s property in Soweto and intends to sell the property. First Applicant was taken by surprise as the property was hers together with the second applicant but she established after the inquiry with the municipal offices that it is registered in the names of the first respondent. This discovery triggered their keenness to immediately launch an urgent application.

[13] Having listened to the submissions made by the first applicant which are not being challenged and noting that if the property is sold to a third party there would be complications to reverse the title, I was persuaded that the matter deserves of the audience of the urgent court and application was accordingly granted.

Merits

[14] The first applicant stated that the second applicant and herself were children of the late Mr Mokoena. During their investigation they approached the office of the fifth respondent in Soweto and accessed records relating to the property. The record revealed that Ms L Banda approached Soweto Council in 1987 and applied for the applicants to be added on the permit issued in respect of the property. The entries to this effect are on the document titled "House File" record sheet (entries between 28 July 1987 and 1 December 1990) and is attached to the applicants' founding affidavit marked BLS 13.

[15] The first applicant avers that after the death of both grandparents and her father she took occupation of the property and stayed with Mr J Banda's brother, Mr Saimon Banda (1[...]) ("Mr S Banda") who had his own immovable property elsewhere in Soweto. The copy of Mr S Banda shows that he was born in Malawi.

[16] She subsequently relocated temporarily to Pretoria for work and during her temporary absence in 2004 Mr S Banda surreptitiously

approached Greater Johannesburg Transitional Metropolitan Council Housing Transfer Bureau ("Soweto Council") and applied

for the property to be registered into the names of his son, Phillip Banda, the first respondent. Mr S Banda submitted an affidavit to the Council where he stated that he cedes all his rights and interest over the property to the first respondent. As it is stated in the documents attached to the founding affidavit it does not appear anywhere that Mr S Banda had any right over the property which was capable of cession to Mr Phillip Banda. To this end the view is that the cession was incompetent.

[17] It is stated further in the affidavit that both Messrs Saimon and Phillip Banda completed the claim forms with the Council to register the property into Phillip Banda's names. The claim form[6] requires in para 6.2.2. that an investigation "... into the possibility of some form of family title for the benefit of the members of the immediate family residing on the property" should be undertaken. No such investigation was undertaken by the Council.

[18] The applicants contend that during 1998 the Council conducted an investigation in terms of section 2 of the Conversion Act after which a decision was conveyed that the property is allocated the applicants. That notwithstanding, the records indicated that the

first respondent approached council in 2004 to acquire the property. The decision of the council, she argues, to allocate the property to the first respondent is administrative decision as envisaged in the Promotion of Administrative Justice Act[7] and is accordingly reviewable.

[19] In addition, it is the version of the applicants that the process in terms of the Conversion Act is intended to ensure that the informal rights of the citizens are converted into formal rights. The first respondent had never acquired the informal rights and as such the decision taken to register the property in the name of the first respondent is not correct and unlawful.

[20] Legal principle and analysis.

Ownership of Land

[21] It is trite that the ownership of land by the Blacks[8] has been precarious until 1988[9] with the promulgation of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (Conversion Act). In terms of this legislation the Commissioner was authorised to, inter alia, make determinations in respect of permits, leaseholds and ownership rights of land by African people. This is set out in section 2[10] of the Conversion Act which requires that an inquiry be conducted to determine as to who should be allocated the property.

[22] The administration and the implementation of the Conversion Act was assigned to Provinces with effect from 26 July 1996 in terms of Proclamation 41 of 1996, Government Gazette 17230 of 26 July 1996. On 28 August 1996, a resolution was signed by the Premier of the Gauteng Provincial Government designating the Member of Executive Council: Housing and Land Affairs as a competent authority for the administration of the Conversion Act.

[23] The Gauteng Provincial government promulgated the Gauteng Housing Act 6 of 1998 which provided for the mechanism to adjudicate over housing disputes. The Gauteng Province further promulgated the Gauteng Housing Amendment Act of 2000 with regulations relating to the adjudication procedure.

[24] Section 2(1) of the Upgrading of Land Tenure Right Act ("ULTRA")[11] which was promulgated after the Conversion Act intended to provide security of Tenure enjoins the Department of Human Settlement to conduct an enquiry in order "... to determine who shall be declared to have been granted a right of leasehold with regards to such sites". The records presented by the applicants do not set out that an inquiry was conducted before the Deed of Transfer was issued in favour of the first respondent.

[25] As it noted above the provisions of the Conversion Act are crafted in pre-emptory terms and non-compliance thereof may amount to nullity for any conduct inconsistent therewith. During the discussion with the applicants, they were agreeable to the proposition that the matter may rather be referred to the Department of Human Settlement for consideration in accordance with the provisions of the Conversion Act. The aforesaid is in sync with the provisions of section 2 of the ULTRA which is also crafted in pre-emptory terms which may nullify the decision if there was non-compliance with the Act.

Analysis.

- [26] The background set out by the applicants seem to suggest that there was an investigation which was conducted in terms of the Conversion Act. This version is not supported by the facts presented and the documentation which the applicants obtained from the offices of the fifth respondent. If an investigation was conducted the documents would have included the advertisements as envisaged in terms of the Conversion Act inviting interested parties to attend the said inquiry. There would have been a title deed issued after the inquiry and not one only issued in 2005 subsequent to the property having been claimed by the first respondent as supported by his father.
- [27] The documents obtained from the offices of the Council confirms that the property was allocated to the applicants' grandparents and later to their grandmother after the death of the grandfather. There is no indication that the property was ever allocated to the applicants' father. There is however a confusion as it appears that the grandmother requested that the property be allocated to the applicants in 1987 as her children whereas in fact, they are grandchildren and not children. At this time Mr Mokoena was still alive. Strangely the property was allocated by the Soweto City Council to the grandmother in 1990. On the other hand, seven years earlier in 1983, the permit was issued only in the names of the applicants. Notwithstanding the foregoing confusion the property was never allocated to the first respondent or his father and as such they held no informal rights which could have entitled them to benefit from the Conversion Act or be upgraded as contemplated in Upgrading of Land Tenure Act.
- [28] The crafting of the application is chaotic. Amongst others, the applicants seek for an order declaring unconstitutional the customary

law rules, Black Administration Act, section 1(4)(b) of the Intestate Succession Act, and without this Court making a comprehensive

pronouncement, the papers are not backed up by any proper factual presentation or sound legal basis. Ordinarily the parties do make submissions of what are the legal issues for the court to determine but ultimately it is for the court based on the facts presented to make a determination of the issues to be adjudicated upon.[12] This would have to be done without making out a case for the parties and disregarding authorities which clearly states that decision

should be within the province of the case presented by the parties.[13] During the engagement with the first applicant it became apparent that the gripe is how the matter was handled by the Gauteng Department of Human Settlement and the appropriate course to take is to refer the dispute back to that office for the necessary inquiry.

- [29] Ordinarily the failure by the Department of Human Settlement to conduct an inquiry would lead to the pronouncement that the decision taken by the department and the issuing of the title deed should be set aside and re-instating the residential permit granted to the applicants. However, in this instance the first respondent would need to be granted an opportunity to address the court, if he so wishes,[14] before the finalisation of the matter.
- [30] The facts presented by the applicants clearly shows that they have a clear rights alternatively prima facie rights emanating from the residential permit which could have been transformed into a secured tenure in terms of Conversion Act alternatively ULTRA. The allegations that the first respondent threatened to sell the property and the fact that Deed of Transfer has been issued remain a harm visiting the applicants without any appropriate redress being available. Denial of property should be in accordance with the Constitution as it also enhances the right to dignity. The balance of convenience favour the granting of the order and the first respondent would not suffer any prejudice. To this end it can be concluded that the requirements for interim interdict have been met.

Conclusion.

- [31] In the result I find that a proper case has been made for an interim relief, pending the investigation by the Gauteng Department of Human Settlement, for an order restraining the second respondent to transfer the property to any party and the Gauteng Department of Human Settlement is directed to conduct an investigation as envisaged in terms of the Conversion Act alternatively ULTRA and file a report with the court and the first respondent. The final report would provide a cue whether the property was properly allocated to the first respondent and if not, the registration of the property to the first respondent may have to be set aside.

Costs

- [32] In view of the change in the order sought and the first respondent having not been given an opportunity to address the court costs should be reserved until the final determination of the lis.

Order

- [33] In the premises I make this order:

1. Interim interdict is issued restraining The Registrar of Deeds (Johannesburg) from registering transfer of Erf 9[...] O[...] W[...] T[...], held by Deed of Transfer Number T[...] to any party pending investigation an envisaged in section 2 of the Conversion Act alternatively section 2 of the ULTRA.
2. The first respondent is interdicted from selling and /or passing transfer of Erf 9[...] O[...] W[...] T[...] to any party pending the investigation envisaged in 1above.

3. The Director-General: Department of Housing, Gauteng Province or the relevant functionary is directed to institute an inquiry as contemplated in terms of the Conversion of Certain Rights to Leasehold Act 81 of 1988 alternatively Upgrading of Land Tenure

Rights Act 112 of 1991.

4. Costs are reserved.

M V NOKO

Judge of the High Court,

Gauteng Division, Johannesburg.

This judgement was prepared and authored by Noko J and is handed down electronically by circulation to the parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 23 April 2025.

Dates:

Hearing:

14 April 2025.

Judgment:

23 April 2025.

Appearances

For the Applicants:

Lillian Nonhlanhla Mokoena and

Sarah Danisile Mthethwa.

In person

For the Respondents:

No Appearance.

[1] Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988.

[2] Gauteng Housing Act 8 of 1998.

[3] Local Government: Municipal Structures Act 117 of 1998.

[4] See annexure BLS 2.

- [5] Upgrading of Land Tenure Act 112 of 1991. This Act was passed to upgrade and convert certain tenure rights (Leaseholds, Deeds of Grant and Quitrents) into full ownership. In contrast the Conversion Act was intended to convert occupational rights into leasehold whereas the ULTRA in addition catered for transfer of tribal lands.
- [6] See Annexure BLS 9 attached to the Applicant's Founding Affidavit at CL 01-45.
- [7] PAJ Act 3 of 2000.
- [8] See Native Land Act 27 of 1913, Native Urban Areas Land Act 21 of 1023, Group Areas Act, regulations governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters of 1968, Black Communities Act 4 of 1984.
- [9] Schabort J having held in *Moremi v Moremi and Another* 2001 SA 936 (W) at 939I that [T]he conversion of rights brought about by the 1988 Act formed part of the legislative process aimed at delivering society from the tenurial fetters of the years of racial segregation...". See also judicial pronouncements in the Conversion Act... [9] *Nzimande v Nzimande* 2005 (1) SA 83 (W), *Phasha v Southern Metropolitan Local Council*
- [2000] 1 ALL SA 451 (W), *Kuzwayo v Estate Late Masilela*
- [2010] ZASCA 167 (1 December 2010), unreported judgment in *Ndaba v Thonga and Others* (18674/20199 [2020], (23 November 2020) (Gauteng Local Division).
- [10] Section 2 provides that: "(1) 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"
- [11] Act 112 of 1991.
- [12] This principle was aptly explained in *Fischer and Another v Ramahlele and Others*
- [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA in which the following was stated: There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.
- [13] See Constitutional Court in *Molusi v Voges* NO 2016 (3) SA 370 (CC) at 381H-382B that the court should adjudicate and make a decision upon the disputes as are presented before it. See also SCA in *The Road Accident Fund and Others v Hlatswayo and Others* ZASCA [2025] 17 at para 42.

[14] See Western Cape Education Department and Another v George 1998 (3) SA 77 SCA at 84E where the court held '... it is desirable that any judgment of this Court be the product of thorough consideration of, inter alia, forensically tested argument from both sides on questions that are necessary for the decision.' This judgment is referred to on the basis of parity of reasoning.

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