

SOUTH AFRICA / JUDGMENT

Ndaba v Thonga and Others (18674/2019) [2020] ZAGPJHC 404 (23 November 2020)

[2020] ZAGPJHC 404

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vukeya

CASE / FILE NUMBER

18674/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE NO: 18674/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

Date: 23/11/2020

In the matter between:

THOBILE RONALD

NDABA

APPLICANT

And

ZWELIBANGO LAWRIK THONGA

1ST RESPONDENT

THE REGISTRAR OF DEEDS

JOHANNESBURG

2ND RESPONDENT

THE DIRECTOR GENERAL- GAUTENG HOUSING

PROVINCE

3RD RESPONDENT

THE MEC FOR GAUTENG DEPARTMENT,

HOUSING

4TH RESPONDENT

JUDGMENT

Vukeya AJ

Introduction

[1] In this application, the applicant prays for an order against the respondents as follows:

[1.1] For the second respondent to cancel the deed of transfer in respect of property situated at Erf 2039 Jabulani Township, Soweto Gauteng Province;

[1.2] That the third respondent conducts an inquiry in terms of the provisions of section 2 of the Conversion of Certain Rights and Leasehold or Ownership Act 81 of 1988 for purpose of determining the rightful claimants of the above property; and;

[1.3] For the first respondent to pay the costs of this application.

[2] The second, third and fourth respondents did not oppose the application and will be bound by the order of this court. When the application was heard the court granted condonation for the late filing of the answering affidavit and replying affidavits because there was no prejudice to any of the parties.

[3] The following facts are either common cause or they have not been placed in dispute by the parties:

[3.1] the property in question was the subject of a 'permit to occupy' issued to Maud Tetiwe Somdaka, the applicant's grandmother who was also the first respondent's mother-in-law;

[3.2] the permit to occupy was later issued to the first respondent's wife and the first respondent after Ms Somdaka's passing on;

[3.3] Rights of ownership were transferred in 1999 to the first respondent and his wife Catherine (the applicant's mother) in terms of the Upgrading of Land Tenure Rights Act 112 of 1991

Background

[4] Ms Maud Tetiwe Somdaka was issued with a permit to occupy the above named property during 1966 and she occupied it with her children, namely, Zingiswa Catherine Ndaba; Thembisa Euginia Ndaba; Nomsa Ndaba; and Ntsikelelo Ndaba. During December 1977 the applicant's mother, Zingiswa Catherine Ndaba, married the 1st respondent in community of property and in 1979 the 1st respondent moved in with his wife's family in the property in question. The applicant's grandmother Ms Somdaka passed on during May 1983 and according to the 1st respondent a permit to occupy the house in Jabulani was issued to him during November 1983.

- [5] The 1st respondent got a “Transnet” house in Protea North in 1986 and states that the applicant’s mother took the applicant and his two siblings and moved in with him in the “Transnet” property. The “Transnet” property was transferred in the names of the 1st respondent and his wife during June 1991.
- [6] During 1994 Zingiswa Catherine Thonga (nee Ndaba) passed away. The leasehold rights to the property in question (at Jabulani Township) were transferred into the names of the 1st respondent and the status was later upgraded to ownership. The applicant contends that the 2nd respondent proceeded to transfer ownership to the 1st respondent without holding an inquiry in terms of section 2 of Act 81 of 1988 in that none of the family members were called to attend a proper inquiry before the said property was transferred into the 2nd respondent’s names.
- [7] It is the version of the applicant that when they visited the Housing Offices in Zola, Soweto, they discovered that the 1st respondent had alleged in the papers that the applicant and all the other members of the family had died and according to the applicant this information was also confirmed by the Gauteng Provincial Office. The applicant further alleges that during April 2018 when he visited the Zola office to obtain documents to pursue legal action against the 1st respondent he discovered that the documents were no longer in the file. It is the version of the applicant that apart from the property in question, the 1st respondent owns the house situated in Protea North (The Transnet House) and avers that in terms of the Gauteng Housing Act, he is not allowed to benefit from the housing scheme when he already owns property.
- [8] According to the applicant the 1st respondent misrepresented himself to the Zola Housing Office by alleging that all the members of the family had passed on and had the property transferred into his names. The 1st respondent disputes this averment and alleges that before the right to occupy status was converted to ownership status, he was called to a hearing in which it was inquired from him who was residing at the property in Jabulani. He alleges to have reported that Cynthia (his step-daughter) and Lawrence (his son) were residing at the property. When asked what the status of Ms Maud Somdaka and Zingiswa his wife was; he confirmed that they had passed away. He stated in his answering affidavit that according to him an inquiry was held and during this inquiry he answered questions to the best of his knowledge.

Issues

for determination

- [9] The following issues are for determination in this application:

[9.1] Whether the transfer of the property in issue is valid if done without an inquiry in terms of section 2 of Act 81 of 1988;

[9.2] Whether cancellation and reversal of the deed of transfer should be ordered to allow an inquiry in terms of section 2 of Act 81 of 1988 to be held;

A brief history of land ownership in SA before 1994

- [10] Before 1910 land would be registered in the name of the Secretary of Native Affairs to entitle Africans to occupy and use it. In 1913 The Native Land Act was promulgated which prohibited Africans from owning land and only a few black people could own certain designated land. The purpose of the Native Land Act was to deprive black people of their freedom to acquire more land in their own right and formalised limitations on black land ownership leaving black people with very little farming land and providing a big portion of land to the white community.
- [11] The Native Urban Areas Act 21 of 1923 was promulgated to control the movement and influx of black people in urban areas and brought about the establishment of townships for black people. This law prohibited black people from acquiring land and residing in urban areas occupied by white people. Because of the large number of people who left rural areas to work in the cities, informal settlements were created and the then government was forced to build houses in townships which would be occupied on rental by township dwellers. Black land ownership was not allowed in the urban township areas and the people were only allowed to possess site permits, residential permits and certificates of occupation granted by local authorities.
- [12] The Group Areas Act came into being in 1950 and it created an even bigger gap between the different racial groups. Separate residential areas were created and black people in the so-called townships were still not allowed to own immovable property but had to obtain permits and rent the houses they resided in. Others, as early as 1978, were issued with permits granting them occupational rights to the houses without any rights of ownership to the land on which the houses were built. These permits were granted in terms of Regulations governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters of 1968. Regulation 7 was specifically for people renting a dwelling from a local authority for residential purposes.
- [13] A selected few black people were granted leasehold rights to the houses in terms of the Black Communities Act 4 of 1984 which came into operation in 1986 provided that the land had been surveyed and the general plan registered. This Act was flawed as it took the local authorities a lot of time to open town registers in terms of the Deeds Registries Act No 47 of 1937.
- [14] In 1989 the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 came into operation to allow for the conversion of certain rights like occupational and leasehold rights into the right of ownership. When the Upgrading of Land Tenure Rights Act 112 of 1991 was promulgated it meant that all registered leaseholds were automatically converted into ownership and the Registrar of Deeds endorsed these leaseholds into ownership. The registrar would take the lease agreements and confirm the leaseholder as the owner. The

holder of the leasehold could then apply for a title deed to be issued in respect of that property in the holder's name.

- [15] After ownership rights were conferred upon the old generation of occupiers a new challenge manifested itself. As the old generation of land owners passed on, a new generation of beneficiaries or owners, as the case may be, took over. In some families when the permit holder or owner passed on they appointed the next person to become the new owner and in some they preferred to keep the property as a "family house".

The Law

- [16] The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (herein after referred to as "The Act") was legislated and commenced on 1 January 1989; it was however amended in 1993 to regulate the conversion of use and occupation permits and various rights in land, into ownership particularly in townships. The whole purpose of the Act was to formalise and confer leasehold or full ownership upon the beneficiaries.
- [17] In terms of this Act and specifically section 2 an inquiry as to rights of leasehold has to be conducted. The section reads as follows:-
- (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 ' . . .
 - (2) Before the commencement of such inquiry the secretary shall, after satisfying himself as to the identity of the affected site and of the person appearing from the records of the local authority concerned to be the occupier of that site, and, in respect of premises referred to in section 52 (5) of the principal Act, is in possession of an aerial photograph or plan of the premises concerned, certified as provided in section 52 (5)
- (a) of that Act, publish a notice indicating that such inquiry is to be conducted.

The Review Process

- [18] Ms Maud Somdaka had already passed on when the Conversion Act came into operation and the respondent and his wife were granted occupational rights to the property here in question. It is the conversion of the second respondent's rights from occupational rights to ownership that brings about the application in consideration.
- [19] The respondent submits that the applicant has followed an incorrect procedure and process in bringing this application and that the applicant should have actually sought a review of the decision to transfer the property into the names of the first respondent. Counsel for the first respondent referred the court to the case of *Nzimande v Nzimande and another* 2005 (1) SA 83 (WLD) at paragraphs [48] and [49] at 97A and C wherein the Judge referred to the decision in *Oudekraal Estates Pty Ltd v Cape Town and others* 2004 (6) SA222 (SCA) in which it was held that where any legal act depends for its validity upon some official or administrative prior act, such as a certification or an adjudication, then, if one wishes to

attack the legal act itself for having been unlawfully procured or committed, one is obliged first to have the administrative act upon which its validity depends set aside on review, and one cannot simply ask a court to declare the legal act void or invalid without reviewing and setting aside the underlying administrative act.

- [20] In order to countervail the first respondent's argument the applicant relied on the case of *Rahube v Rahube* 2019 (1) BCLR 125 (CC) to show that it was not necessary to bring an application for review of the decision to transfer the property into the first respondent's name because it was not an administrative action. In the above case (*Rahube*) the court stated as follows in paragraph 54:

"We are not convinced that section 2(1) of the Upgrading Act violates section 33 of the Constitution. It is clear that the upgrading takes place automatically and therefore by operation of law. Thus, no decision is taken by an administrator and no administrative action has occurred. The legislative functions of Parliament are explicitly excluded from the definition of administrative action by section 1(b) (dd) of the Promotion of Administrative Justice Act⁵⁷ (PAJA)"

- [21] Ownership of the property in question was transferred into the first respondent's names in terms of the Upgrading Act of Land Tenure Rights which provides in section 2 that:

"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) any erf or any other piece of land in a formalised township for which a township register is opened after the commencement of this Act, shall at the opening of the township register be converted into ownership;
- (c) any piece of land which is surveyed under a provision of any law and does not form part of a township, shall at the commencement of this Act be converted into ownership,

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

- [22] It is clear that in terms of the Upgrading Act, no administration process had to take place but the conversion/

upgrading happened automatically as long as the person seeking a conversion was a holder of the permit immediately before the conversion. It is common cause that the first respondent was the holder of a leasehold right issued in terms of the Conversion Act and therefore conversion into ownership had to happen in terms of the Upgrading Act.

[23] This Act however and specifically section 2(1) does not provide for a review remedy and even section 24D

(10) (a) of the Upgrading Act in terms of which a person who is aggrieved by an entry made in a register of land rights may appeal to the Minister within 30 days of becoming aware of the entry, but not more than one year after the entry was made does not fully protect an aggrieved party. This because it may take many years before an interested person discovers that leasehold rights have been converted into ownership as this process happens automatically.

[24] In the Rahube case (supra) Judge Goliath remarks as follows:

“It is not uncommon for pieces of legislation that allow for the review of decisions or procedures to contain time-bar clauses such as this one. Section 24D does not, however, allow for the condonation of the late filing of an appeal. This initial injustice is compounded by the fact that the section does not establish any procedure by which affected parties are notified of the automatic upgrading of the right. Resultantly, parties who have interests in property may only discover years later that the ownership of that property has been registered in the name of the holder of a deed of grant. As is evident in the case before us, these parties cannot then rely on section 24D to protect their rights because they are barred from bringing appeals more than a year after the right was registered.

[59] It is further worth noting that section 24D only makes provision for an appeal after the right has been registered in the applicable registry. In the case before us, counsel for the applicant stated that there was no evidence that the right had been registered. However, registration is not a prerequisite upon which the validity of the right to ownership is premised. Instead, in terms of section 2(2) of the Upgrading Act, registration simply gives effect to the right that was automatically created by section 2(1). It seems likely that there may be cases like this one, in which the registration of the right cannot be located in

the registry. Here, the “protections” in section 24D would be of little assistance as the appeal procedure is only against an entry made in a register, and not against the automatic upgrading of the initial right”.

[25] Similarly, in the case in consideration, the affected parties were not notified of the conversion from leasehold

rights to ownership and when they finally discovered, the rights had already been automatically transferred to the first respondent. The review process could not come as a remedy because the upgrade happened automatically. I am inclined to agree with the applicant’s

submissions that the review process is not applicable in terms of this procedure.

[26] It should be noted from the first respondent's affidavit that regarding what may have transpired when the section 2 inquiry was done, he alone was called to a hearing in which it was inquired from him who was residing in the Jabulani property, although he mentioned that Cynthia, Lawrence and the applicant were residing at the property, this was disregarded and they were not called, can it be said that a proper inquiry was conducted for which the applicant should seek to review?

[27] In my view, what the first respondent describes does not qualify as a proper inquiry. Immediately upon discovering

that there are other people residing in the property, the officials should have stopped and inquired into their status in relation to the property and thus notified them of the section 2 inquiry. This was not done. I find that an inquiry was not conducted and that the applicant does not have to seek a review of or an appeal against the decision because it was not an administrative process but a process which happened automatically in terms of the Upgrading Act.

Locus standi

[28] The first respondent submits that the applicant does not have the necessary locus standi to prosecute this application. According to the first respondent, any right that the applicant may have had was always and at all times under and through him and his wife and the applicant had long left the property in question. The applicant disputes that he has no locus standi and submits that he was a beneficiary by virtue of a permit issued in terms of the Conversion Act; he was so listed in the permit and was residing in the property when the alleged inquiry was conducted.

[29] The question whether the applicant has the necessary locus standi to prosecute this application should be determined with reference to the kind of relief he seeks from this application namely; that the second respondent be ordered to cancel the deed of transfer in respect of property situated at Erf 2039 Jabulani Township, Soweto Gauteng Province; and that the third respondent be ordered to conduct an inquiry in terms of the provisions of section 2 of the Conversion of Certain Rights and Leasehold or Ownership Act 81 of 1988 for purpose of determining the rightful claimants of the above property. The applicant believes that he is a beneficiary and a claimant in the property and therefore has an interest in the outcome of the relief sought in this particular application as well as in the outcome of the inquiry to be conducted.

[30] The nature of the interest one has in a matter should accord fully with the reasoning in the matter of *Ahmadiyya Anjuman Ishaati-Islam Lahore (SA) and another v Muslim Judicial Council and others* 1983 (4) 855 (C) at 863H – 864A wherein Tebbutt J explained the concept in the following terms:

“it is clear that in our law a person who sues must have an interest in the subject matter of the suit and that such interest must be direct one”. For a similar view see also United Watch and Diamond Company (Pty) Ltd & Others v Disa Hotels Ltd 7 Another 1972

(4) SA 409 (C).

[31] It is clear from the facts in this matter that the applicant has a direct and substantial interest in the outcome of this application. This because, by the nature of the process followed when the property was transferred into the names of the first respondent he and other members of his family did not have a recourse in terms of the Upgrading Act to dispute the transfer or the conversion of the leasehold rights into ownership because it happened automatically. The applicant was also directly affected by the conversion because he was an occupant of the property in question when the transfer took place.

[32] I therefore find that the transfer of the property in issue is invalid because it was done without an inquiry in terms of section 2 of Act 81 of 1988 and that cancellation and reversal of the deed of transfer be ordered to allow an inquiry in terms of section 2 of Act 81 of 1988 to be held.

[33] Accordingly I make the following order:

[33.1] The second respondent is ordered to cancel the deed of transfer in respect of property situated at Erf 2039 Jabulani Township, Soweto Gauteng Province;

[33.2] That the third respondent is ordered to conduct an inquiry in terms of the provisions of section 2 of the Conversion of Certain Rights and Leasehold or Ownership Act 81 of 1988 involving all the living occupants listed in the permit granted on 15/11/1983 for purpose of determining the rightful claimants of the above property; and;

[33.3] The first respondent is ordered to pay the costs of this application.

VUKEYA AJ

Acting Judge of the High Court:

Gauteng Local Division Johannesburg

Date of hearing:

25/08/2020

Date of delivery:

23/11/2020

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