
SOUTH AFRICA / JUDGMENT

Ngcobo and Others v Mathonsi and Others (685/2017) [2019] ZAKZDHC 32 (16 May 2019) [2019] ZAKZDHC 32

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Radebe

CASE / FILE NUMBER

685/2017

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

REPORTABLE

CASE

NO: 685/2017

In

the matter between:

THANDI
FLORENTINE NGCOBO
FIRST APPLICANT
MAYVIS
THEMBI MATHONSI
SECOND
APPLICANT
FRIEDA
THEMBI MATHONSI
THIRD
APPLICANT
and
ANGEL
BONGIWE MATHONSI
FIRST RESPONDENT
ETHEKWINI
MUNICIPALITY
SECOND
RESPONDENT
THE
REGISTRAR OF DEEDS FOR
THE
PROVINCE OF KWAZULU-NATAL
THIRD
RESPONDENT
MASTER OF THE HIGH
COURT
FOURTH RESPONDENT

JUDGMENT

DATE DELIVERED: 16 MAY 2019

RADEBE J

Introduction

[1] This is an application whereby the three applicants seek the following order:

‘1.1. that the transfer of property described as [...] N. Road, KwaMashu, KWAZULU-NATAL (“the property”) into the name of the First Respondent, which was effected by the Second Respondent and/or the Third Respondent be cancelled and set aside;

1.2. that the First Respondent is forthwith interdicted and restrained from selling, alienating and or causing the property to be transferred into the names of any other person pending finalisation of this application;

1.3. that the Fourth Respondent registers the property into the name of the Estate Alois Mathonsi (“the deceased’s estate”);

1.4. that the Second, Third and Fourth Respondents are directed to do all that is necessary to give effect to paragraph 1 and 2 above;

1.5. that the First Respondent be ordered to pay the costs of this application;

1.6. Further and /or alternative relief.’

In effect, the issue is the lawfulness of the transfer, with reference to the provisions of s 2 of the Conversion of Certain Rights into Leasehold or Ownership Act No. 81 of 1988 (‘the Act’).

[2] The first respondent opposed the application. The second respondent is not opposing the application and has recorded that the transfer was done without the consent of other family members.

Background

of the Matter

[3] The first applicant and the first respondent are biological sisters. The second applicant was, what would be loosely referred to as, the foster child of the Late Alois Mathonsi (‘the deceased’) and his predeceased wife. During his lifetime and in 1966, the deceased acquired the property and was granted permission in terms of the Proclamation R293 of 1962, which entitled him to a Certificate of Occupation (the certificate) in respect of the property, where he resided with all his children, including the applicants and the first defendant. The certificate was issued on 18 September 1966. Other additional children were introduced and added onto the certificate. The deceased died intestate on 9 March 1990 before he could convert the Permission to Occupy into a Title Deed. He was survived by his six children and three grandchildren all of whom are listed in the certificate. As at the time of the launching of this application, the only surviving biological children of the deceased seem to be the first applicant as well as the first respondent. The deceased’s estate was not reported to the Master of the High Court (the fourth respondent). As to who the correct next-of-kin is, can be determined by the Master of the High Court once the estate of the deceased is dealt with at the proper forum.

[4] As at 2009, the first respondent was the occupant of the property. She alleges that as a result of the fact that she was the person responsible for the upkeep of the property, and the payment of rates and taxes, she advised the second respondent accordingly. She then ‘acquired’ the property on this basis.

[5] The Deed of Grant reflects that during about 2008, the first and second respondents entered into a private Purchase and Sale

agreement, the subject matter of which was the property, with the sale price being a sum of R3890. At that time, the first respondent

was residing at the property after going through a divorce. Transfer of the property was effected by the third respondent on 27 July 2009, by virtue of the Deed of Grant No. TG 027408/09.[1] The first respondent did nothing to inform the applicants that she was then the 'owner' of the property. She hid this fact from them.

[6] It was only in 2016 that the applicants, fortuitously, discovered that the first respondent had caused the property to be transferred

into her name as the sole owner. This set on a series of events, which included family meetings as well as with the second

respondent.

[7] On 7 January 2017, a follow-up family meeting was held with a view to enquiring as to how the first respondent got the property transferred into her name but the latter denied any knowledge of such transfer and she insisted that the property belonged to her. On 20 January 2017, the second respondent convened another meeting on the same issue. However, the first respondent refused to attend. The official representing the second respondent was one Sipho Ngema of the Housing Department. The meeting proceeded without the first respondent.

[8] The outcome of the investigations is encapsulated in the email dated 20 June 2018, wherein the second respondent confirmed that the transaction resulting in the transfer of the property was done without the consent of other family members.[2]

Evaluation

[9] Section 2 (1) of the Act provides:

'2. Inquiry as to rights of Leasehold:-

(1) The Director-General shall conduct an inquiry in the prescribed manner in respect of affected sites within his province in order to determine who shall be declared to have been granted a right of leasehold or in the case where the affected sites are situated in a formalised township for which a township register has been opened, ownership with regard to such sites.'

The prescribed manner of substitution upon the death of the deceased is detailed in what is called 'PROCEDURE NOTES' attached as SP1 to the Replying Affidavit, which prescribes that in the case where the permit holder and the spouse are both deceased, then the property is to be transferred to the deceased's estate.

[10] The deceased was granted permission to reside on the property by virtue of a certificate of occupation. His biological children

include the first and third applicants as well as the first respondent. When the deceased died, the conversion of the property into ownership had not yet taken place. Somehow, after the deceased's death, the first respondent managed to get the

ownership of the property registered into her own name instead of the name of the deceased's estate. This was done without the knowledge of any of the other interested parties listed in the certificate of occupation, who include the applicants.

- [11] The first respondent's ground of opposition was that she is, and was, the only person residing on the property since 2007, and that she pays rates and taxes, and that the applicants have never shown interest in the property. She does not say how exactly it can be said that she complied with the second respondent's policy guidelines.
- [12] Whether other members of the family showed interest or paid rates is not the issue which s 2 of the Act focuses on. The aforesaid section requires that the Director-General identify the person who is in occupation of the property and after holding an inquiry, declare the right of ownership. (my emphasis)
- [13] In *Khuzwayo v Representative of the Executor in the Estate of the late Masilela*[3] it was held that the Act requires such inquiry to be conducted before a declaration is made that a site permit (such as the one held by the deceased) is converted into ownership, before transfer is affected to the occupier.
- [14] It is common cause that the first respondent was never at any stage of her life a holder of a site permit in respect of the property; nor was she a holder of the certificate of occupation in relation to the property, and that no inquiry as envisaged in s 2 of the Act was ever held by the Director-General.
- [15] In *Nzimande v Nzimande & another*[4] it was held that holding such inquiry guarantees a fair and an impartial process in determining who of the contesting parties as to who of the persons listed in the Certificate of Occupation qualify to acquire the ownership of the property. In that case the Court held that:
- [48] . . . Until the certificate is set aside by a Court in proceedings for judicial review. It exists in fact and it has legal review, it has legal consequences that simply cannot be overlooked.'
- [16] In this matter, the certificate has never been set aside by a court in proceedings for judicial review. It remains valid and the legal consequences flowing from it cannot be simply ignored. It is the underlying document upon which this application is premised. It is the duty of the Director-General to consider all the contentions of the parties (who are the applicants and the first respondent).
- [17] In the absence of such inquiry and of the participation of the applicants, it cannot be said that the ownership of the property was lawfully awarded to the first respondent.

- [18] The first respondent was at no stage the holder of the certificate, of which the deceased remained the holder. Even if it were to be said that she is an heir of the deceased, she is not the sole heir and her rights to inheritance do not supersede those of the co-heirs and of those that are entitled to inherit per stirpes.
- [19] Counsel for the first respondent concedes that s 2 of the Act requires that an inquiry be held in order to determine who should be granted ownership. Such grant of ownership can only flow from interstate succession and not from the so-called Purchase and Sale Agreement reflected in the Deed of Grant.
- [20] Section 2 of the Act requires an inquiry to be conducted by the Director-General before a declaration is made that a permit is converted to full ownership. The second respondent appears to have simply 'sold' the property to the first respondent. The certificate reflects names of several beneficiaries and not only the name of the first respondent. There is no basis for the second respondent to have preferred the first respondent as the person entitled to the property and to 'sell' same to her without having first complied with the Act.
- [21] It is my view that the deceased's estate is probably entitled to acquire ownership, but then only after a proper inquiry has been held and a declaration is made by the Director-General, converting the certificate to occupy into full ownership. Thereafter the process of intestate succession under the direction of the fourth respondent be followed to determine who the intestate heirs entitled to succeed the deceased are. Only then can the third respondent effect registration of transfer of the property.

Costs

- [22] In the premises, the first respondent has no right to the ownership of the property. She knows, as evidence shows, that she wrongfully acquired ownership of the property. Therefore she ought not to have even opposed this application. Her conduct resulted in costly litigation. She therefore has to bear the costs of this application. The applicants have, however, not asked for punitive costs. It follows that party and party costs are in order.

Conclusion

- [23] I therefore come to the conclusion that an order, which is slightly different from the order prayed in the Notice of Motion, is made as follows:

(a) The transfer to the First Respondent of the property described as:

ERF [...] KWAMASHU – G

REGISTRATION DIVISION FT

PROVINCE OF KWAZULU-NATAL

IN EXTENT 327 (THREE HUNDRED AND

TWENTY-SEVEN) SQUARE METRES

As indicated on General Plan SG NO. 1110/1997 which land is held by the Grantor by virtue of Certificate of Consolidated Title No.TG10077/06; (“the immovable property”) is hereby set aside;

- (b) The third respondent is ordered to cancel the Deed of Grant No. TG027408/09 in respect the immovable property.
- (c) The Director-General for the Department of Housing, KwaZulu-Natal Province, is directed to hold an inquiry in respect of the immovable property, pursuant to the provisions of s 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81, of 1988, and to declare that the holder of the certificate of occupation in respect of the immovable property is the owner thereof.
- (d) The fourth respondent is directed to finalise the opening of a deceased’s estate file with a view to determining the rightful heir(s) of the Estate Late Alois Mathonsi.
- (e) The first respondent is ordered to pay costs of the application.

RADEBE J.

DATE OF HEARING: 14 MARCH 2019

DATE OF JUDGEMENT: 16 MAY 2019

COUNSEL FOR APPLICANT: ADV. E. S. CELE

INSTRUCTED BY: VUMASE SS INC.

COUNSEL FOR THE RESPONDENT: ADV. L. MAUNUTLALA

INSTRUCTED BY: KEKANA HLATSHWAYO RADEBE ATT.

- [1] Indexed Record, 23 p. 14 & 15 Founding Affidavit paragraph 23 and p. 23 Annexure P003 (Deed of Grant).
- [2] Indexed Record, p. 73 Annexure “RL2” to the Applicant’s Replying Affidavit.
- [3] Khuzwayo v Representative of the Executor in the Estate of the late Masilela [2011] 2 ALL SA 599 (SCA).
- [4] Nzimande v Nzimande & another 2005 (1) SA 83 (WLD) at 97A.

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