

SOUTH AFRICA / JUDGMENT

Ntshalintshali and Others v Sekano and Others (2014/31317) [2015] ZAGPJHC 123 (12 June 2015)

[2015] ZAGPJHC 123

COURT

South Gauteng High Court, Johannesburg

BEFORE

R Hertenberger

CASE / FILE NUMBER

2014/31317

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

JUDGMENT

CASE NUMBER: 2014/31317

DATE: 12 JUNE 2015

In the matter between:-

NTSHALINTSHALI, SIPHO.....First Applicant

NTSHALINTSHALI, CORNELIUS.....Second Applicant

NTSHALINTSHALI, NCINELENI OLGA.....Third Applicant

And

SEKANO, TSHEPO EUGENE.....First Respondent

NTSHALINTSHALI, DINEO EVELYN.....Second Respondent

THE EXECUTOR IN THE ESTATE LATE.....Third Respondent

SHOSHOZILE ANDREW NTSHALINTSHALI

THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOUSING, GAUTENG

PROVINCE.....Fourth Respondent

THE MEC OF THE DEPARTMENT OF HOUSING,.....Fifth Respondent

GAUTENG PROVINCE

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY.....Sixth Respondent

THE REGISTRAR OF DEEDS (JOHANNESBURG).....Seventh Respondent

HEARD: 8 JUNE 2015

DELIVERED: 12 JUNE 2015

HERTENBERGER, AJ:

- [1] This is an application by the applicants to request this court to cancel a Title Deed number T22913/2012 in terms of which the immovable property known as Erf 768, Orlando East Township (“the property”) is held by the first respondent, and simultaneously therewith to cancel certificate of registered grant of leasehold number TL42572/04. Further the fourth respondent is then requested to hold an investigation and a hearing in terms of section 2 of The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 in order to determine who the rightful claimant to the property is. In considering this matter, the court was specifically asked to consider the terms of the Family House Rights Agreement (“the agreement”), which the members of the family had concluded in respect of the property.
- [2] It is common cause that the parties are before court as the second respondent, who was married in community of property to the applicants’ brother, who has since passed away sold the property to the first respondent. The applicant’s aver that the second respondent’s husband held the property merely as a custodian for the family and that no right by the second respondent (both in her capacity as spouse married in community of property to the applicant’s brother and in her capacity as the executor of his estate) existed to sell the property to any third party. The property at all times vested in the family, held by the custodian for the benefit of the entire family.
- [3] The application is opposed by the second respondent only, who avers that both she and her late husband were recorded on the certificate of leasehold and that this certificate bore no endorsement of any nature that might have limited their rights to deal with the property. Despite the fact that she had signed the Family House Rights Agreement, she says that she did so without knowledge of the content thereof and that she signed it simply because her husband asked her to.
- [4] The parties in their respective papers are at great pains to set out how the second respondent and her husband came to be the holders in respect of the certificate of leasehold. The bad blood between the family members is evident. The court must however leave aside the emotive elements contained in the papers and expressed in argument, as they do not take the matter further. What is of importance however is the intention of the family when they entered into the family rights agreement. The second respondent’s husband at the time was the eldest surviving son and it was on this basis that he was nominated by the others as the custodian of the property on behalf of the family. The

inclusion of the second respondent as co-custodian came into being by operation of the civil marriage in community of property.

- [5] The applicants attach an affidavit by Ronald Stevens who is the Deputy Director in the Asset Disposal and Regularization Directorate to their replying papers in which the deponent states:

“The title deed in respect of the property, being erf 768 Orlando East, was registered in 2004 in the names of Second and Third Respondents. The Second and Third Respondents were custodians of the property on behalf of the family. They were also aware of the family rights agreement but the Second Respondent still sold the property to the First Respondent without the consent of the family members. When the title deed was registered, the Housing Department should have, simultaneously with such registration, have endorsed the family rights agreement against the title deed.”

“The administrative error on the part of the Housing Department is the cause of the current dispute between the family members and the first respondent.”

- [6] It appears that the error in the offices of the Housing Department gave the second respondent an opportunity to sell a property that she was not entitled to sell. Had the family rights agreement been endorsed against the relevant deed, there would have been a restriction on the rights of the persons appearing on the deed to further deal with the property. The second respondent, who was no doubt fully aware of the existence of the family rights agreement, took advantage of the error and sold the property. The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 was amended in 1993 to provide for the conversion of rights to land into ownership. Given the manner in which the rights to land had been dealt with in the past, the act required the Director General for the Department of Housing to conduct an inquiry into the affected site and to identify the occupier of the relevant site. In this matter such an inquiry did not take place, thus implying that the historical facts of how it came to be that the property was registered in the name of the second respondent and her late husband was never investigated. This must necessarily lead to the conclusion that the registration of the property in the name of the first respondent is null and void. See *Khuzwayo v Representatives of the Executor in the Estate of the late Masilela* 2011 (2) ALL SA 599 SCA and also *Nzimande v Nzimande & Another* 2005 (1) SA 83. In this respect I align myself with the sentiments expressed in *Nzimande* above by Jajbhay J who in turn adopts the approach of Satchwell J in *Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council* 2000 (2) SA 455 (W) that the Director General is given a wide discretion in order “to guarantee a fair and impartial enquiry into the contentions of the contending parties, as to who would ultimately qualify to acquire ownership of the house”. In doing so the parties who lay claim to the property are afforded an opportunity to be heard.

- [8] Despite the best attempts by the applicant to illustrate that the second respondent had a malicious motive in her sale of the property, it appears that both the applicants and the second respondent still have an equal opportunity of arguing the matter before the Director General and thus it is equitable that each party bears its own costs in the matter.

In the result the following order is made:

- (1) The Registrar of Deeds, Johannesburg is ordered to cancel in terms of section 6 (1) of the Deeds Registries Act 47 of 1937, the title deed T22913/2012 over the immovable property known as Erf 768, Orlando East Township currently held by the first respondent;
- (2) An order cancelling the certificate of leasehold TL42572/2004 over Erf 768, Orlando East Township held by the second and third respondent;
- (3) As a result of orders (1) and (2), the property known as Erf 768 Orlando East Township revert to its original owner The City of Johannesburg Metropolitan Municipality;
- (4) The fourth respondent shall as soon as possible after orders (1), (2) and (3) have been effected, hold a hearing in terms of section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 as amended in 1993 for the purposes of determining who the rightful claimant in respect of Erf 768 Orlando East Township is;
- (5) Each party shall pay its own costs.

R HERTENBERGER

ACTING JUDGE OF THE HIGH COURT

1. Representation of Applicant : Gwensa Attorneys
2. Representation of Respondent: Madhlopa Incorporated
3. Date Heard : 08 June 2015
4. Date Judgment delivered : 12 June 2015

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