

SOUTH AFRICA / JUDGMENT

Nzimande and Another v Nzimande and Others (24490/12) [2012] ZAGPJHC 223 (11 September 2012) [2012] ZAGPJHC 223

COURT

South Gauteng High Court, Johannesburg

BEFORE

Kathree-Setiloane

CASE / FILE NUMBER

24490/12

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REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 24490/12

DATE:11/09/2012

In the matter between:

TULELENI ELIZABETH NDZIMANDE1st Applicant

SIBUSISO MADLALA.....2ND Applicant

and

MLONDOLOZI NDZIMANDE1st Respondent

DIRECTOR-GENERAL OF DEPARTMENT OF

HOUSING, GAUTENG PROVINCE2ND Respondent

THE MEC FOR THE DEPARTMENT OF HOUSING,

GAUTENG PROVINCE.....3RD Respondent

THE CITY OF JOHANNESBURG MUNICIPALITY.....4th Respondent

THE REGISTRAR OF DEEDS

(JOHANNESBURG).....5th Respondent

J U D G M E N T

KATHREE-SETILOANE, J:

- [1] The applicants Ms Elizabeth Ndzimande and Mr Sibusiso Madlala, are occupiers of the property described as Erf 8514 Pimville, Zone 6 Township, Soweto. Their grandmother the late Mrs Harriet Ndzimande (the deceased) was the holder of the certificate of occupation, which entitled her and her dependants, listed on the certificate, to use and occupation of the dwelling on site 8025A, Tshalo Street, Zone 6, Pimville, Soweto (Erf 8514 Pimville, Zone 6 Township, Soweto). The certificate of occupation was issued to the deceased on 13 August 1985. The first and second applicants were listed as the deceased dependants on the certificate.
- [2] The certificate of occupation was issued to the deceased in terms of regulation 8 of chapter 2 of the Regulations Governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters GN 1036, dated 14 June 1968. The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (“the Act”) was amended in 1993 so as to provide, inter alia, for the conversion of site permits (or other rights in land, such as use and occupation permits) into ownership where the affected site is situated on a formalised township – which Pimville is.
- [3] Section 4 of the Act provides for the Director-General to declare a person who has met certain requirements to be granted ownership of the property concerned, and section 5 provides for a transfer of property into the name of such person once a declaration has been made.
- [4] However, before a declaration can be made the Director-General is required, under section 2 of the Act, to conduct an enquiry into the affected site, and the identity of the occupier of the relevant site. Section 2 sets out in detail the enquiries to be made by the Director-General, and the steps to be followed. Essentially what has to be established is the identity of the person who is entitled to a site, and the rights that should be conferred on him or her.
- [5] Section 2 of the Act requires the Director-General to consider any claims to a site, or objections to claims, and then to make a determination as to whom to declare as the owner of the site in question. Such determination, as to whom to declare as the owner, and the fact that it is subject to appeal in terms of section 3 of the Act, must be published in the prescribed manner. Section 3 sets out the procedure for appeal by a person aggrieved at the determination.
- [6] Once the period in which an appeal maybe prosecuted has lapsed, the Director-General is required, to declare that ownership of the site shall vest in the person in favour of whom the determination has been made, and transfer then follows. It is of the essence of the inquiry that the Director-General establishes who, according to the records of the local authority, is in occupation of a site (*Khuzwayo v Estate of the late Masilela* (28/10) [2010] ZASCA 167 (1 December 2010)).

- [7] After the death of the deceased in 1994, her dependants including the applicants had continued to occupy the property. The property was initially allocated to Simon Ndzimande (it is not clear from the papers what his relationship to the deceased or her dependants was). He died in 1993, and the deceased was then allocated the property, and issued with a certificate of occupation in 1985 in terms of regulation 8.
- [8] The deceased died intestate. She had three children, Simon, Lucas and Jacob. The father of the applicants was Simon, he died before the deceased. When the deceased died her remaining two sons, Lucas and Jacob had already moved out of her house, and had homes of their own. Jacob is the father of the first respondent. The first respondent is listed as an occupant on Jacob's certificate of occupation.
- [9] The applicants have continued to occupy the deceased house in terms of the deceased certificate of occupation, in which they are listed as occupants or dependants. Their uncle Jacob demanded that they vacate the house. They resisted all Jacob's attempts to force them out of the house. However, and to their surprise, sometime in 2005, the first respondent presented to them a Title Deed, in terms of which the property was transferred to him, in March 2005, despite the fact that he was never an occupier of the property.
- [10] The first applicant made enquiries with the fourth respondent, the City of Johannesburg, as to how the property was transferred into the first respondent's name. The fourth respondent referred her to the Department of Housing, Gauteng Province, without providing her with a response.
- [11] On enquiring with the Department of Housing, the first applicant was advised that the first respondent was not entitled to the property, and that the transfer was irregular. The first applicant was, accordingly advised, by the Department of Housing to approach the High Court for the cancellation of transfer of the property to the first respondent.
- [12] The MEC for the Department of Housing: Gauteng Province and the Director-General, Department of Housing: Gauteng Province are joined as the second and third respondents, respectively. The City of Johannesburg is joined as the fourth respondent, and the Registrar of Deeds, Johannesburg is joined as the fifth respondent. The second to fifth respondent do not oppose the relief sought by the applicants for an order inter alia:
- (a) Cancelling the Title Deed which is in the name of the first respondent;
 - (b) Directing the Registrar of Deeds to transfer the property back to the City of Johannesburg
 - (c) Directing the Director-General to hold an enquiry in terms of section 2 of the Act for the purposes of determining who the rightful claimant of the property is.
- [13] In fact, the Adjudication Manager: ADARDI, Mr MJ Tohlang for the Department of Housing writes in a memorandum dated 16 May 2011:

"STAND NO: 8025A PIMVILLE ZONE 6

DATE: 16/05/2011

Background

The Property was initially allocated to Simon Ndzimande. He passed away and in 1983 Harriet Ndzimande was granted conditional alleviation. It is not clear whether Simon had purchased the property at that stage.

Harriet was then allocated the property and she was issued with a certificate of occupation in terms of regulation 8. Harriet passed away in 1994. at that time she had not lodged any claim for the property. The property was occupied by Rhoda, Elizabeth and Sibusiso. Rhoda is also deceased. Lucas Twala was appointed as an executor of the Estate of Harriet an affidavit was purportedly signed by Lucas and one Jasie Jacob Nzimande.

In terms of the said agreement. The property was to be registered in the name of Mlondolozzi Ndzimande. The person has never resided in this property. This was a regulation 8 property. In terms of the policies of the Department before transfer was affected there was an obligation on the Director-General to do a determination and that to be advertised. In this case transfer was done to a person who has never occupied the property. The people who are in occupation were never consulted.

I submit that the process followed in so far as this transfer was done is irregular. Mlondolozzi is not staying in the property and is in the process of evicting the occupants.

Recommendation

Institute process to set aside the title deed. If successful adjudicate”.

[14] The Department of Housing has, in fact, prohibited any further dealings with the property until an adjudication process has been held to determine the rightful owner of the property. The Report of the Registrar of Deeds, Johannesburg dated 27/07/2012, reads as follows:

“1. According to the records of this office:

Erf 8514 Pimville Zone 6 is registered in the name of Mlondolozzi Ndzimande, identity number 670217 5407 084 which registration took

place on 23rd of March 2005, the title reference is T15305/2005.

An interdict with the reference number I-6689/2011C is recorded against the property issued by the Department of Local Government and Housing, dated 21/09/2011. The Department prohibits any further dealings with the property until an adjudication process has been held to determine correct owner of the property.

2. Save for my remarks in paragraph 1, I have no objection to the granting of an Order as prayed.”

- [15] The first respondent contends that, in view of the failure of the deceased to apply to convert her rights of use and occupation of the property into ownership in terms of section 2 of the Act, on her death the property reverted to the City of Johannesburg, who is the owner of the property. The contention is that as the owner of the property, the City was entitled to sell it to the first respondent, which it did against payment of approximately R 1 772.66.
- [16] The first respondent, accordingly, contends that, in the absence of an application, by the deceased or her dependants, for the conversion of their rights of occupation into ownership in terms of the Act, the property reverted to the City of Johannesburg, who then transferred the property to him. He relies for this submission on the unreported case of *Fifane v Fifane*, Case No: 2361/2010, ECD, Port Elizabeth, 08 November 2011. I am of the view that the *Fifane* case is distinguishable from the present one. It is not clear from the *Fifane* case what right the applicants had to the property. The judgment is silent as to whether the applicants, in that case, had any rights of occupation and use of the property prior to, and after the deceased death. I take no issue with the finding that the deceased was not the owner of the property and therefore the property did not vest in the estate when she died. This notwithstanding, I am of the view that if the applicants were able to show that they had a right of use and occupation of the property as the deceased dependants, then the Director-General would have been obliged to call an enquiry in terms of section 2 of the Act, to determine which of the deceased's dependants had a right to ownership of the property.
- [17] In the current matter, the applicants had a right to occupation and use of the property in question in terms of regulation 8 of the Regulations. Accordingly, prior to the property having been sold and transferred to the first respondent, the Director-General was obliged to call an enquiry in terms of section 2 of the Act, for inter alia, purposes of identifying who is in occupation of the property. This was not done. Neither were the applicants consulted on the sale of the property, nor provided with an opportunity to make objections. The sale and transfer of the property is accordingly invalid, and falls to be cancelled.

In the result, I make the following order:

- (1) The Registrar of Deeds (Johannesburg) is ordered to cancel the title deed no 15305/2005 in respect of Erf 8514, Pimville, Zone 6 Township, Soweto and to cancel all rights accorded to the first respondent by virtue of the Title Deed.
- (2) The Director-General for the Department of Housing, Gauteng Province, is directed to hold an enquiry in respect of Erf 8514,

Pimville, Zone 6 Township, Soweto, in terms of section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, for purposes of determining who the rightful claimant in respect of Erf 8514, Pimville, Zone 6 Township, Soweto is.

- (3) The first respondent is ordered to pay the costs of the application

F KATHREE-SETILOANE

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

Counsel for the Plaintiff: Adv. L. Memela

Attorneys for the Plaintiff: Gcwensa Attorneys

Counsel for the Defendant: Mr. D. Lebethe

Attorneys for the Defendant: Ditan Attorneys c/o Ditheko Lebethe Attorneys

Date of Hearing: 29 August 2012

Date of Judgment: 11 September 2012

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