REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 20175/2010

In the matter between:

PHAKAMISA MICHAEL MOLOI Applicant

and

ELIZABETH MOLOI First Respondent

SINDISWE MOLOI Second Respondent

REGISTRAR OF DEEDS Third Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR HOUSING AND LOCAL GOVERNMENT: GAUTENG PROVINCE Fourth Respondent

CASE NO: 14628/2012

In the matter between:

DAVID SMITH First Applicant

CHARLOTTE MOJABENG SMITH Second Applicant

and

MOTLALEPULA MARTHA MOKGEDI First Respondent

THE DIRECTOR-GENERAL OF DEPARTMENT

OF HOUSING, GAUTENG PROVINCE	Second Respondent
THE MEC FOR THE DEPARTMENT OF HOUSING, GAUTENG PROVINCE	Third Respondent
CITY OF JOHANNESBURG MUNICIPALITY	Fourth Respondent
REGISTRAR OF DEEDS (JOHANNESBURG)	Fifth Respondent

JUDGMENT

Dodson AJ:

Introduction

[1] Colonial and apartheid era land laws discriminated against Africans in various ways. In the cities, Africans were not only confined to satellite townships on the periphery but were also prevented from obtaining title which guaranteed them security of tenure.[1]

[2] The impact of the racially discriminatory spatial planning of South African cities is a legacy which will take years to remedy. Addressing discrimination in relation to title and security of tenure is complex but, at least in the cities, potentially capable of more rapid repair. An early but unsatisfactory attempt at repair, at least in its original form, was the Conversion of Certain Rights to Leasehold Act No. 81 of 1988. The Act was part of the apartheid government's attempts to reform its influx control policy when it was forced to recognise that Africans could not perpetually be relegated to the status of temporary sojourners in South Africa's cities.

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[1] Murray and O'Regan (eds) *No Place to Rest: Forced Removals and the Law in SA* 1990 (Oxford Universtiy Press) and the chapter by M Robertson *An Introduction to Apartheid Land Law* p122ff; AJ Christopher *Atlas of Apartheid* 1994.

[3] The Conversion of Certain Rights to Leasehold Act allowed for rights of occupation under the racially discriminatory regulations which controlled the occupation of African townships[2] ("the Urban Area regulations") to be converted into 99 year leasehold. The 99 year leasehold was recognised as a form of title which was registrable in the Deeds Registry. It was capable of transfer. However racial discrimination persisted insofar as it did not accord recognition of full ownership to its intended beneficiaries.[3] The determination of who would be entitled to the leasehold rights would in terms of section 2 of the Act be determined at an administrative inquiry.

[4] In 1993 the Act was substantially amended. The name of the Act was changed to the Conversion of Certain Rights into Leasehold or Ownership Act No. 81 of 1988.[4] I will refer to it as the "Conversion Act". As the name change suggests, provision was now made for the conferral not only of leasehold but also of ownership where the affected property was situated in a formalised township for which a township register had been opened. The procedure for determination of the person entitled to leasehold or ownership pursuant to an inquiry was retained.

[5] By way of Proclamation No. 41 of 1996 dated 26 July 1996[5] the administration of the Conversion Act was assigned to the provinces in terms of section 235(8) of the Constitution of the Republic of South Africa, Act No. 200 of 1993 and

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2 Government Notice R1036 of 14 June 1968 Regulations Governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters as amended on numerous occasions, the last such amendment having been effected by Government Notice 2733 of 17 December 1982.

3 Section 17, 18, 19 and 20 of the General Law Second Amendment Act No. 108 of 1993.

4 Section 24 of the General Law Second Amendment Act No. 108 of 1993.

5 Government Gazette No. 17320.

section 2(2) of the Land Administration Act No. 2 of 1995. The Gauteng Province has effected subsequent amendments to the Conversion Act[6] which, save to the extent mentioned below, do not impact on this matter.

[6] Two disputes arising from the implementation of the provisions of the Conversion Act were heard before me in the same motion court week. I deal with both matters in this judgment.

Factual background in the Moloi matter

[7] This dispute pertains to Erf 2774A, Zone 2, Pimville, Soweto, Johannesburg. The applicant apparently resides at Erf 2774B, Zone 2, Pimville, Soweto, Johannesburg. Numerically, it would appear to be the neighbouring property.

[8] The applicant is a pensioner and the brother-in-law of the first respondent. The first respondent was married to the applicant's late brother, Henry Moloi. The applicant and Henry's mother was Mrs Violet Moloi. It is common cause that Violet Moloi was granted a residential permit in terms of the Urban Area regulations in respect of Erf 2774A.

[9] Violet Moloi passed away on 16 May 1991. By this time the applicant was living at 2774B and his late brother and the first respondent were living at 2807A. On 6 June 1991, not long after their mother's death, various family members including the applicant attended a meeting at the *"Soweto Council"*. A brief minute of the meeting records as follows:

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[6] Gauteng Conversion of Certain Rights into Leasehold or Ownership Amendment Act No. 7 of 2000; Gauteng General Law Amendment Act No 4 of 2005.

> *"All family members unanimously agree that Henry Moloi be considered for the tenancy of house 2774A, Zone 2, Pimville, and be regarded as a family house.*
>
> *1. LM Mdlala*
>
> *2. Nellie Moage*
>
> *3. Michael Moloi*
>
> *4. Johannes Motaung."*

[10] The minute records further that a nephew Matthews was "*against the decision to consider Henry for the house"*. It was then ruled that the Housing Committee would decide as to who was to assume tenancy of the house. The document does not indicate what the ultimate decision of the Housing Committee was, but a later document referred to below does.

[11] During 1994, the applicant was arrested for armed robbery and sentenced to 15 years imprisonment at Leeukop Medium C Prison. He was released from prison on 13 December 2004 and upon coming home discovered that Erf 2774A and the house on it had been transferred to and registered in the name of his late brother and the first respondent. He had been excluded. Living in the house on Erf 2774A he found the second respondent who is the disabled daughter of his late brother. She lives there together with her brother who is also disabled.

[12] The applicant therefore sought the intervention of the South African National Civil Organisation ("SANCO"). Later he lodged a complaint with the Provincial Department of Housing. He complains that he was never told about the inquiry process under the Conversion Act and could not have known about it because he was incarcerated in prison.

[13] On 21 August 2008, the applicant received a response from the Provincial Department of Housing. It reads as follows:

> *"This letter serves to inform you about the outcome of the investigation conducted as a result of a complaint lodged on the 18th March 2008.*
>
> *Your complaint was investigated and the Anti-Fraud and Corruption Unit established that:*
>
> - *Stand No. 2774A was allocated to Ms Violet Moloi and her family on the 24th April 1979.*
> - *After Violet Moloi's death on 16th May 1991, the Housing Committee of the Soweto City Council resolved on 18th June 1991 that the tenancy of Stand No. 2774A be transferred to Thabo Hendry Moloi. This resolution was taken in line with the recommendation made by members of the Moloi's family.*
> - *In 1998 an adjudication hearing was conducted and the dispute was between Thabo Hendry Moloi and Matthews Moloi. The decision of the adjudicator was in favour of Thabo Hendry Moloi.*
>
> ***Please note the following***
>
> - *If the matter has been adjudicated, the property registered with the Deeds Office, there is no way in which the Department of Housing can reverse the verdict. The only way is for the prejudiced party or the party which is not satisfied with the verdict to lodge an appeal with the High Court because it is the only forum which has jurisdiction to reverse the verdict."*

[14] It is this which prompted the present application. Although this is not alleged in the founding affidavit, the applicant asks the court to infer that the first respondent and her late husband fraudulently omitted to disclose the existence of the applicant at the time of the relevant inquiry under the Conversion Act.

[15] On the above grounds, the applicant seeks an order as follows:

> *"1. That the immovable property situated at Erf No. 2774A Zone 2, Pimville, should be registered as a family house.*

2. *That the first respondent is hereby ordered to do everything in her powers including signing of necessary documentation to have the aforementioned property so registered.*
3. *That the second respondent is ordered to give unhindered access to the applicant over the immovable property situated at Erf No. 2774A, Zone 2, Pimville.*
4. *That the third respondent should as soon as the second respondent has signed all the necessary documentation register the immovable property situated at Erf 2774A, Zone 2, Pimville, as a family house.*
5. *Condoning the late filing of this application."*

[16] The first respondent's answer to the applicant's claim is that the process envisaged by the Conversion Act was properly followed. It was a disputed process and the matter was fully and finally adjudicated in their favour. Consequent upon that, the property was transferred into the name of herself and her late husband.

[17] She points out further that neither the statutory appeal remedy provided for in section 3 of the Conversion Act nor any judicial review proceedings have been pursued by the applicant or anyone else to upset that decision. Given that the present application is not framed as a review, the first respondent concludes that the applicant has *"followed the wrong procedure"* and is *"hopelessly out of time"*.

[18] She goes on to point out that the applicant is the owner of the property which he currently occupies, Erf 2774B, and has no valid reason to challenge her title to the property. She also points out that it is her intention at a later stage to transfer Erf 2774A to the disabled children of her late husband who currently occupy the property. She accordingly askes that the application be dismissed.

Factual background in the Smith matter

[19] The applicants in this matter are husband and wife. The first applicant alleges that in 1969 his late parents, Joseph and Audrey Smith *"entered into an agreement with the late Mr Ernest Mpshe to the effect that they should move into [Erf 2279, Pimville, Zone 2, Soweto, Johannesburg], since he was leaving Johannesburg and going to stay in Evaton."*

[20] He avers that he and his parents then moved into the vacant property which, at the time, consisted of a small, shabby, four-roomed house. They proceeded to substantially renovate the property and extend the house. They remained in peaceful and undisturbed possession of the house until 1997 when they learned that the Johannesburg City Council was calling on persons occupying houses in the area to lodge claims for the transfer of the houses into their own names. His mother, Audrey, lodged a claim and upon doing so learned that the first respondent had lodged a similar claim in respect of the property. The tribunal then conducted a hearing where the competing claims were considered and the matter was decided in favour of his late mother.

[21] The first respondent then appealed but later withdrew her appeal and the matter was struck off the roll. The family then awaited implementation of the tribunal's decision and continued in occupation of the property. To the family's surprise, in 2002 they learned that a title deed had been issued two years earlier in 2000 in favour of the first respondent, despite the outcome of the tribunal hearing in Audrey's favour.

[22] They duly lodged a complaint with the provincial department of housing. The provincial department of housing took years to deal with the complaint. On 11 July 2011, they eventually received the following response:

> *"The property was allocated to Ernest Mpshe and Mr Smith alleges that there was an agreement between Mpshe and his family in terms of which the Smith family took occupation of the property from 1969. Mpshe moved out of the property and stayed in Evaton.*
>
> *The permit remained in his name. Ernest Mpshe enumerated his sister and nephews on the permit. They did not stay in the property as it was occupied by Smith's family. Martha Mpshe lodged a claim in respect of the property. Mrs Smith also lodged a claim. The matter was adjudicated and Adjudicator Elliot gave a ruling in terms of which he pronounced that the Smith family has an indefinite lease over the property. An appeal was lodged by Martha Mpshe. The matter was struck off the roll and the appeal withdrawn. There is no clear basis for this decision.*
>
> *Martha Mokgedi could not legitimately benefit on this house as she has already benefitted in that she has been allocated property No. 3245 Chiawelo Ext. 2. I am of the view that she has benefitted twice and this is not permissible.*
>
> *ACTION*
>
> 1. *Cancel title deed in respect of house No. 2279 Zone 2 Pimville and refer matter back to adjudication.*
> 2. *There is likelihood that Ms Mokgedi would not cooperate and if that is the case the attorney instructed on this matter should approach the court.*
> 3. *Ms Mokgedi is not young so it is important to take action urgently as she is also in the process of evicting the Smith's family."*

[23] On this basis, the applicant seeks an order directing the Registrar of Deeds to cancel the relevant title deed in favour of the first respondent and directing the second respondent, the Director-General of the Department of Housing in the Gauteng Province, to convene an inquiry in terms of section 2 of the Conversion Act.

[24] The first respondent avers that she is the sister of the Late Ernest Mpshe and that she and her brother were raised in the house by their late father. She

avers that she took responsibility for the property at the request of her late brother when he moved to Evaton. Because she was not living in the property at the time, she asked the first applicant's late mother to keep an eye on the property. She approached her because the families knew each other well and had been neighbours and their children had grown up together. She denies any agreement having been entered into between the applicant's late parents and her late brother. She further alleges that the improvements to the property were effected without her consent. She points to the permit issued under regulation 1036 of 14 June 1968 where Ernest is reflected as the "*holder"* in respect of the property and she and her children are listed as his dependants.

[25] In regard to the tribunal hearing she says the following:

> *"It is common cause that the matter was referred to the tribunal and it ruled in favour of the applicant's mother hence the appeal that I lodged (sic). The adjudicator only listened to one side of the evidence. It was presented by the applicant's mother without hearing my side. I withdrew my appeal on the basis that the adjudicator appeared biased and the matter was later struck off the roll."*

[26] She gives no explanation as to how, notwithstanding the tribunal proceedings having been resolved against her, the property was nonetheless registered in her name in the year 2000.

Statutory Background

[27] The adjudications referred to in both the Moloi and Smith matters appear to have taken place before the amendments brought about by the Gauteng provincial legislature[7] (although nothing would turn on this).

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[7] See footnote 6 above.

[28] Section 2 of the Conversion Act would, without the amendments effected by the Gauteng provincial legislature, have read as follows:

> ***"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 situate in a formalised township for which a township register has been opened, ownership with regard to such sites.*
>
> *(2) Before the commencement of such inquiry the Director-General 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.*
>
> *(3) For the purposes of the declaration under subsection (1) the Director-General may-*
>
> *(a) give effect to any agreement or transaction in relation to the rights of a holder contemplated in subsection (4) (a) or (b) in respect of the site concerned, between such holder and any other person;*
>
> *(b) give effect to any such agreement or transaction, or to any settlement or testamentary disposition in respect of such rights, entered into or made before the death of the last such holder;*
>
> *(c) consider any intestate heir of the last such holder to have been granted a right of leasehold or, in the case where that site is situate in a formalised township for which a township register has been opened, ownership in respect of the site concerned;*
>
> *(d) give effect to any court order or sale in execution in relation to the site concerned, notwithstanding that such agreement, transaction, settlement, testamentary disposition or intestate succession could not by virtue only of the provisions of the regulations have been entered into or made or was entered into or made without the approval of any person whose approval would have been required under the regulations, and notwithstanding that the site permit, certificate or trading site permit concerned had lapsed upon the death of such holder.*
>
> *(4) At the conclusion of the inquiry and after having considered any relevant claim or objection, the Director-General shall, if he is satisfied that the person concerned is, subject to the provisions of subsection (3), in respect of the site concerned-*
>
> *(a) the holder of a site permit, certificate or trading site permit; or*

(b) the holder of rights which in the opinion of the Director-General are similar to the rights of the holder of a site permit, certificate or trading site permit,

determine whom he intends to declare to have been granted a right of leasehold or, in the case where that site is situate in a formalised township for which a township register has been opened, ownership in respect of the site concerned.

(5) Whenever he has made a determination as contemplated in subsection (4), the Director-General shall publish a notice stating-

(a) that such a determination has been made in respect of the site stated in the notice;

(b) that the prescribed particulars of that determination are open to inspection for a period of 14 days as from the date of the publication of the notice at the prescribed place;

(c) that that determination shall be subject to appeal to the Administrator concerned in the prescribed manner; and

(d) that, subject to any decision of the Administrator concerned on appeal, the person concerned shall be declared to have been granted a right of leasehold or, in the case where that site is situate in a formalised township for which a township register has been opened, ownership in respect of the site concerned."

[29] Section 3 dealing with appeals then provides as follows:

"3 Appeals

(1) Any person who considers himself aggrieved by any determination contemplated in section 2 (4) may, within such period and in such manner as may be prescribed, appeal against that determination to the Administrator concerned, who may, after investigation of the appeal and with due regard to the provisions of section 2 (3) and (4), confirm, set aside or vary the determination or make such other determination as in his opinion should have been made.

(2) Any person who feels aggrieved by a decision of the Administrator under subsection (1), may within a period of 30 days from the date upon which he has been informed of the Administrator's decision, appeal to a competent court against that decision by lodging with the registrar of that court a notice of appeal setting out in full his grounds of appeal.

(3) Any person who appeals in terms of subsection (2) shall, when lodging such notice of appeal, deposit with the registrar concerned an amount of R200 as security for the costs of the appeal and shall on the same day deliver or send to the Director-General a copy of the notice of appeal.

(4) The Director-General shall, within a period of 30 days from the date upon which he has received the notice of appeal referred to in subsection (2), send to the registrar referred to in that subsection in respect of the inquiry concerned-

(a) the documentary evidence admitted at the inquiry;

(b) a statement of the decision of the Administrator and the reasons for such decision;

(c) any observations which the Administrator may wish to make.

(5) An appeal in terms of subsection (2) shall be prosecuted as if it were an appeal from a judgment of a magistrate's court in a civil matter, and all rules applicable to the hearing of such appeal shall mutatis mutandis apply to an appeal under this section.

(6) The court hearing an appeal under this section may confirm or set aside the decision or make such other determination as in its opinion should have been made by the Administrator.

(7) The registrar shall without delay furnish the Director-General with a copy of the order of the court."

[30] Sections 4 and 5 then provide for the implementation of the decision taken in the inquiry process as follows:

"4 Granting of leasehold or ownership

(1) The Director-General shall upon the expiry of the period specified for appeal under section 3 (1) or, in the case of such appeal, on the confirmation, variation or substitution of the determination referred to in section 2 (4), in the prescribed manner declare the person concerned to have been granted-

(a) a right of leasehold in respect of the affected site concerned under section 52 (1) of the principal Act, whereupon that person shall be deemed for all purposes to have been granted a right of leasehold under the said section 52 (1); or

(b) in the case where the affected site is situate in a formalised township for which a township register has been opened, ownership in respect of the affected site concerned.

(2) The provisions of section 52 (4) of the principal Act shall not apply in respect of any leasehold contemplated in subsection (1).

5 Registration of leasehold or transfer of ownership

(1) Whenever the Director-General has made a declaration-

(a) in terms of section 4 (1) (a), he shall lodge such declaration and every deed and other document necessary for the registration of the right of leasehold concerned with the registrar concerned, who shall-

(i) for the purposes of registration, accept that the particulars contained in the declaration are correct; and

(ii) without the production of any certificate to the effect that the levies or charges in respect of the affected site concerned have been paid to the local authority, register the right of leasehold in favour of the person mentioned in the declaration;

(b) in terms of section 4 (1) (b), he shall lodge such declaration and a deed of transfer, on the form prescribed for that purpose under the Deeds Registries Act, 1937 (Act 47 of 1937), and made out in the name of the person mentioned in the declaration, with the registrar concerned.

(1A) (a) A deed of transfer referred to in subsection (1) (b) shall be prepared by-

(i) a conveyancer; or

(ii) if the owner of the affected site is the State or any local government body, any officer in the public service or person in the employ of such local government body, as the case may be, who has been designated for the purpose by the Minister of Land Affairs, a Premier or a local government body, as the case may be.

(b) A deed of transfer referred to in subsection (1) (b) shall be in the form prescribed under the Deeds Registries Act, 1937, and shall be signed by the owner of the affected site or his or her duly authorised agent in the presence of a conveyancer referred to in paragraph (a) (i) or officer or person referred to in paragraph (a) (ii) in the manner prescribed under that Act.

(c) An officer or person referred to in paragraph (a) (ii)-

(i) shall disclose the fact that the deed of transfer referred to in subsection (1) (b), or any power of attorney, application or consent, which may be required by the registrar for the purposes of the registration of the transfer was prepared by him or her, by signing an endorsement to that effect on the deed of transfer, power of attorney, application or consent, as the case may be, and by virtue of such signing accepts, mutatis mutandis, in terms of section 15A (1) and (2) of the Deeds Registries Act, 1937, responsibility for the correctness of the facts stated in any such document; and

(ii) may, despite anything to the contrary contained in any other law, perform all of the functions of a conveyancer in relation to the registration of a deed of transfer as contemplated in this section.

(d) A conveyancer, officer or person referred to in paragraph (a) shall lodge the deed of transfer together with the necessary

supporting documents at a deeds registry in the manner prescribed under the Deeds Registries Act, 1937.

(e) The registrar shall deal with a deed of transfer and the other documents referred to in paragraph (d) as if such deed of transfer were executed in the presence of the registrar in terms of section 20 of the Deeds Registries Act, 1937.

(f) Ownership of the affected site shall be deemed to have been transferred on the date of registration by the registrar of a deed of transfer referred to in subsection (1) (b).

(g) Section 17 (1) and (2) of the Deeds Registries Act, 1937, shall not apply to and no transfer duty or stamp duty shall by[sic] payable in respect of the transfer of ownership of the affected site in terms of this section.

(h) Sections 4 (2) and 5 (1) (a) (ii) shall mutatis mutandis apply in respect of a deed of transfer referred to in subsection (1) (b).

(2) If the occupier of a site is not the holder of the right of leasehold or the owner in respect of it, the Director-General shall not act in terms of subsection (1) unless he is satisfied that the amount of any bona fide improvements on the site that have been effected by that occupier has been assessed in the prescribed manner and paid to that occupier, or that security to the satisfaction of the Director-General has been furnished for the payment of that amount.

(3)(a) Sections 10 (1) (q) and 16A of the Deeds Registries Act, 1937, shall apply in respect of the said right of leasehold as if it were a right of leasehold referred to in those sections.

(b) .....

(4) The Director-General shall for the purposes of any registration in terms of this section be deemed to be the duly authorized representative of the local authority concerned."

[31] The administration of the Conversion Act having been assigned to the provinces, these provisions would however have to be read with sections 24A and 24B of the Gauteng Housing Act No. 6 of 1998 which provided as follows:

*"**24A Transfer of residential properties***

(1) The Department is authorised to adjudicate on … disputed cases that emerged from the transfer of residential properties in terms of the Conversion of Certain Rights into Leasehold or Ownership Act, 1988 (Act 81 of 1988).

(2) The MEC shall ensure the transfer of residential properties to individuals determined to be lawful beneficiaries in terms of this Act.

(3) The Department shall deal with disputed cases through adjudication and appeal panels established in terms of section 24B.

(4) The adjudication and appeal panels shall be abolished once all disputed cases have been disposed of.

24B Establishment and composition of adjudication and appeal panels

(1) There are hereby established an adjudication panel and an appeal panel.

(2) The MEC appoints so many adjudicators as the MEC deems necessary to adjudicate on disputed cases in order to determine the lawful beneficiary to whom a residential property must be transferred.

(3) The adjudication panel comprises of persons drawn from the following categories:

(a) practicing advocates and attorneys; and

(b) other legal professionals (lecturers, legal advisors, etc.)

(4) …

(5) The appeal adjudicators shall be selected by the MEC from the panel of adjudicators, and shall only deal with appeal adjudications."

[32] The effect of all these provisions was and still is that an inquiry is held in which the history of, and documentation pertaining to, each affected site or property is considered, along with competing claims (and objections to claims) for the conferral of title. The effect of the Gauteng Housing Act of 1998 is that, instead of the director-general, an adjudicator from a panel presides over the hearing. Although sections 24A and 24B of that Act were only introduced into the Gauteng Housing Act in 2000, the fact that they were made retrospective to 1 September 1998 and the reference in the official documentation in the Moloi

case to “adjudicators”, suggests that the adjudicative and appeal powers in sections 2 and 3 of the Conversion Act had been delegated to such adjudicators at an earlier stage. (Whether the adjudicative powers in the two matters before me were exercised by the director-general, or an adjudicator with delegated powers or statutorily-conferred powers to do so, I will for the sake of consistency refer to the decision-maker under section 2 as “the adjudicator”.)

[33] After enquiring into the facts, considering the claims and objections and applying the criteria in sections 2(3)(a) to (d) and 2(4)(a) and (b) of the Conversion Act, the adjudicator *“determines whom he [or she] intends to declare to have been granted a right of leasehold or … ownership”* in terms of section 2(1) and (4). That decision-making process is plainly administrative action as contemplated in section 33 of the Constitution and, from 30 November 2000, administrative action as defined in section 1 of the Promotion of Administrative Justice Act No. 3 of 2000.

[34] In terms of section 2(5) a notice must then be published announcing the determination, stating that it is open for inspection and that it is subject to appeal in the prescribed manner of appeal.

[35] Section 3 then provides an administrative appeal to any party who is aggrieved by the decision of the adjudicator. In terms of the Gauteng Housing Act of 1998 the appeal is considered by appeal adjudicators from the appeal panel. That

appellate decision-making process is also administrative action. The prescribed period for the bringing of an appeal[8] is 30 days.

[36] Any party aggrieved by the outcome of the administrative appeal then has a further 30 days within which to bring an appeal to a "competent court". "Competent court" refers to a high court with jurisdiction, having regard to the reference to "the registrar" and the requirement that the appeal be prosecuted as if it is an appeal from a magistrate's court in a civil matter.

[37] Once the adjudicative and appeal processes have run their course, the official who has been assigned the powers and duties of the director-general, is obliged to declare the person who was successful in the inquiry to have been granted leasehold or ownership, as the case may be. Section 5 then requires him or her to ensure that a deed of transfer is prepared and, together with the declaration, lodged at a deeds registry. The registrar of deeds is then required to execute the transfer.

Application of the law in the Moloi case

[38] There are a number of difficulties with the case sought to be made out by the applicant. The transfer of the property to his late brother and his sister-in-law was consequent upon an inquiry and an administrative decision taken by an adjudicator in terms of section 2 of the Conversion Act. No attempt was made by the applicant to follow the administrative or the court appeal processes in

[8] In terms of regulation 5 of the regulations promulgated in terms of the Conversion Act in Government Notice R1109 of 25 May 1990 contained in *Govt Gazette* No. 12484.

respect of that decision and the time periods for doing so have long since passed. The adjudicator who presided over the inquiry is *functus officio* and the decision must be taken as valid until it is set aside on review.[9]

[39] The application before court is certainly not cast in the form of a review application. The consequence of this is that the decision-maker has not been provided with any opportunity to provide the record of the decision-making process or the full reasons for the decision. This creates an immediate and obvious impediment to undoing the outcome of the administrative decision-making process.

[40] Even if I assume in favour of the applicant that the application is to be treated as a review there are further difficulties. The failure to exhaust internal remedies can be overlooked on account of the applicant's having been incarcerated at the time of the relevant decision.

[41] However, a review must still be brought within a reasonable time.[10] In this regard, the applicant has included a *"founding affidavit condoning the late filing of the notice of motion"*. In it he ascribes his delay in bringing the application to his incarceration and his attempts to resolve the matter through seeking the intervention of SANCO and thereafter by lodging a complaint with the provincial Department of Housing. The delay occasioned by his incarceration is understandable. However, he was released from jail on 13 December 2004.

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[9] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) (Also reported at [2004] 3 All SA 1) at para [27].

[10] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A). As the adjudicator's decision was taken in 1998, PAJA and the time limits for review contained in it do not apply.

On his own version he waited for more than a year until 30 February 2006 before seeking the intervention of the civic body. Their endeavour to resolve the matter appears to have ended around 30 May 2007. There was then a delay of more than a year until August 2008 before the applicant lodged a complaint with the Department of Housing.

[42] The Department of Housing responded promptly on 21 August 2008. They pointed out the need for court action if the decision of the adjudicator was to be disturbed. Yet the applicant waited for almost two years until June 2010 before launching his application. He ascribes this delay to the Legal Aid Board's refusal to give legal aid for civil matters. However he provides no detail in this regard about when he approached the Legal Aid Board and why he was ultimately able to bring proceedings in June 2010, but not before then.

[43] In the circumstances, I find that the applicant failed to bring his application within a reasonable time.

[44] Even if the delay is overlooked, there are further difficulties. The applicant asks this Court to infer that there was a fraudulent non-disclosure by the first respondent and his late brother at the inquiry. The applicant asserts the non-disclosure on the basis that if his family members had mentioned his existence at the inquiry, the decision to award the house to the applicant's late brother as the sole intestate heir, would not have been made.

[45] However, this reasoning is based on a misconception of the decision-making process envisaged by section 2 of the Conversion Act. Section 2 does not

simply create a right to take ownership or leasehold on the basis of the law of succession. It interposes the exercise of an administrative discretion by an adjudicator. That discretion is a broad one in which criteria are provided for consideration by the adjudicator to determine who should be awarded title. These are criteria, not fixed rules.

[46] The most important criterion appears from sections 2(4) and 2(2) to be the determination of who the holder of a site permit (or rights equivalent to those held under a site permit) under the Urban Area regulations was in respect of the property. In this regard, the family including the applicant (but excluding the nephew, Matthews) agreed at the meeting on 6 June 1991 at the Soweto Council that the applicant's late brother should be the holder of the site permit and this was confirmed by the Council when it resolved on 19 June 1991, pursuant to the family's recommendation, to recognise the applicant's late brother as the holder of the site permit and associated tenancy.

[47] However, section 2(3) expressly allows for consideration to be given to awarding the leasehold or ownership to a party other than the site permit holder, on the basis of any of the criteria mentioned there. These include agreements which might have been concluded between the site permit holder and other parties and testamentary dispositions of a deceased site permit holder.

[48] Section 2(3)(c) provides, by way of another discretionary alternative, that the adjudicator *"may … consider any intestate heir of the last such holder to have been granted a right of leasehold or … ownership."* (emphasis added) Clearly

this does not contemplate an obligatory transfer to all the intestate heirs. It may, in the adjudicator's discretion, be any one of them or it may be none of them.

[49] In any event, the "last such holder" was on the applicant's own version his brother and not his mother, following the meeting at the Soweto Council on 6 June 1991. His late brother's heirs on intestacy are his children (who currently occupy the property) and his wife, not the applicant.

[50] The brief reasons for the adjudicator's decision which the applicant attaches to his papers bear out the discretionary nature of the decision-making process. They read as follows:

> *"The claim of Henry Moloi succeeds:*
>
> 1. *Has a legal permit granted by the council.*
> 2. *In terms of intestate succession he inherits the rights belonging to his parents and his mother was the permit holder to the property."*

[51] This in my view represents an entirely legitimate exercise of the discretionary decision-making power in sections 2(3) and 2(4) of the Conversion Act.

[52] In the circumstances, there is no room for inferring the fraudulent non-disclosure or misrepresentation alleged. Indeed, it is likely that if regard is had to the presence of the applicant's name on one of the old site permits as a dependant, his existence was disclosed and discussed at the inquiry.

[53] In those circumstances, I am not satisfied that the applicant in the Moloi matter has made out a case for the relief which he seeks and the application stands to be dismissed with costs.

Application of the law in the Smith case

[54] In the Smith case, it is common cause that the inquiry conducted in terms of section 2 of the Conversion Act was decided in favour of the first applicant's mother. It is also common cause that the first respondent abandoned her appeal against the decision. Once again, the administrative decision-making process was complete and the adjudicator was *functus officio*.

[55] Once that had taken place, the transfer of ownership of the property to the first applicant's mother ought to have followed automatically in terms of sections 4 and 5 of the Conversion Act. Once she died, the property ought to have formed part of her deceased estate and dealt with accordingly.

[56] Instead, the property was transferred to the first respondent. In this instance it is indeed possible to infer that there was, at the very least, a clerical or administrative error when the property was transferred to the first respondent in direct conflict with the decision of the adjudicator in terms of section 2 of the Conversion Act.[11] No other evidence has been put up by the first respondent to suggest any lawful basis for the transfer of the property into her name.

[11] See *Kuzwayo v Representative of the Executor in the Estate of the late Masilela* [2011] 2 All SA 599 (SCA). Here the Court inferred an error when the property was transferred into the name of the appellant despite the fact that it was proven that she had foregone her site permit on account of non-payment of rent and had agreed in writing that she was handing the site back to the relevant council.

[57] The question which then arises is what the appropriate relief is. The provincial Department of Housing in a letter dated 15 July 2011 "instructed" the applicants to apply to Court for an order setting aside the title deed in favour of the first respondent. They stipulated further that once the title deed had been set aside *"the matter must be sent back to adjudication"*. The applicant's relief is formulated accordingly. This was also the form which the relief took in *Kuzwayo v Representative of the Executor in the Estate of the late Masilela*.[12]

[58] The difficulty with this proposal is that the adjudication process is complete and no review proceedings have been brought to upset it. It is therefore not open to this Court or the provincial Department of Housing to order a fresh inquiry in terms of section 2. In *Kuzwayo*, there was no evidence that any inquiry in terms of section 2 of the Conversion Act had taken place and accordingly it was open to the Court to order that such an inquiry be convened.[13]

[59] This suggests that I should rather set aside the transfer to the first respondent and order the transfer of the property to the applicants, because transfer ought to have followed automatically upon the adjudicator's decision in favour of their family member. Although the applicants did not seek to amend the notice of motion, they urged the grant of such relief when the matter was argued. The first respondent, on the other hand, argued that because of the failure to seek transfer into the applicants' names, the entire relief was incompetent and the application ought to be dismissed. The latter argument cannot be correct as

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[12] Above at para 33.

[13] Above at para 29.

the applicants have at least shown that the transfer of the property to the first respondent was fundamentally flawed.

[60] Apart from the fact that relief in the form of transfer of the property in their favour was not expressly sought, the further difficulty with doing so is that the executor of the first applicant's late mother's estate was not joined and we have no information in regard to the administration of that estate. It is the first applicant's late mother who was the successful party in the inquiry. That suggests that transfer, at least initially, should be in favour of her estate.

[61] In the circumstances, I am of the view that I must order the cancellation of the title deed in favour of the first respondent and allow the matter to be dealt with further by the authorities on the basis of the steps dictated by sections 4 and 5 of the Conversion Act. The executor of the deceased estate of the first applicant's late mother will have to be involved in that process. If there is no executor, one will have to be appointed.

[62] Neither party pressed for a costs order in the Smith matter.

Orders

[63] I make the following order in the Moloi case, case no. 20175/2010:

[63.1] The application is dismissed with costs.

[64] I make the following order in the Smith case, case no. 14628/2012:

[64.1] The Registrar of Deeds (Johannesburg) is ordered to cancel deed of transfer no T11155/2000 dated 2 February 2000 in respect of Erf 2279, Pimville Zone 2 Township, Registration Division IQ and to cancel all the rights accorded to the first respondent by virtue of the deed.

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AC DODSON AJ

CASE NO:20175/2010
Heard: 11 October 2012
Judgment Delivered: 26/10/12

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CASE NO: 14628/2012
Heard: 12 October 2012
Judgment Delivered: 26/10/12

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