IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 08560/13

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED
5/8/2013
DATE
SIGNATURE

SEBATANA, GORDON	Applicant
and	
MANGENA, MICHAEL	First Respondent
MANGENA, BRENDA JABULILE	Second Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Third Respondent
THE DIRECTOR-GENERAL FOR THE DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING, PROVINCE OF GAUTENG	Fourth Respondent
THE MEC FOR THE DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING, PROVINCE OF GAUTENG	Fifth Respondent
REGISTRAR OF DEEDS (JOHANNESBURG)	Sixth Respondent

JUDGMENT

SNYCKERS A J (HEARING 25 JULY 2013; JUDGMENT 6 AUGUST 2013)

[1] This application concerns a contested transfer of residential property, namely house number 1687A Naledi Township, Soweto, Johannesburg, identified in the Transfer Deed as Erf 2800 Naledi Township, Registration Division I Q, Province of Gauteng ("the Property").

[2] The immediate subject of the application is a Deed of Transfer No. T23347/2001, stating itself to be effected in terms of the provisions of section 13(1) of the Upgrading of Land Tenure Rights Act 1991 (Act No. 112 of 1991), registered on 24 April 2001, and executed on 13 December 2000, by the transferor, who declared himself to be duly authorised to do so by the (then) Southern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council. The transferor in this Deed declared that the Substructure "did on 13 December 2000 truly and legally sell the Property for the sum of R1 175.82." The transferor proceeded in the Deed to state: "Now, therefore, I hereby cede and transfer all rights and title in full and free property, State, however reserving its rights, to and on behalf of, Michael Mangena [the first respondent] and Brenda Jabulile Mangena [the second respondent] married in community of property to each other."

[3] It is this Title Deed, in the names of the first and second respondents, that the applicant seeks to have cancelled as envisaged in section 6 of the Deeds Registries Act 47 of 1937. The applicant, Gordon Sebatana, is the uncle of the first respondent.

[4] On the papers, there is an apparent dispute about the extent to which house 1687A Naledi Township and Erf 2800 Naledi are one and the same property. In paragraph 5 of the Answering Affidavit at page 47, having just referred to "the property known as 1687A Naledi Township", and having just defined it as "the Property", the first respondent states: "I deny that the property is also known as 2800 Naledi Township".

[5] Furthermore, after dealing with the status of the first and second respondents as the holders of the Deed with respect to Erf 2800 Naledi Township, and after having

identified this property as being the same as house number 1687A Naledi Township, the applicant in the founding papers proceeds to allege that enquiries from the Deeds Registries Office revealed that the first respondent had also acquired ownership of "the house neighbouring our property, it being house number 1687B", and in this regard the results of a "Windeed" enquiry are attached to the papers, which indicate the first and second respondents to be the two owners of Erf 1687 Naledi, the Title Deed number of which is TE23977/1994. Also attached to the founding papers in this regard is a "Certificate of Ownership" executed on 20 July 1993 with the Title Number: TE 23977/1994, which certifies the first and second respondents, also in terms of section 13 of Act 112 of 1991, as the owners of Erf 1687 Naledi Township, held by Deed of Transfer T43958/91.

[6] It may be noted that the Deed of Transfer Title number on the second page of the Certificate of Ownership in relation to Erf 1687 Naledi is the same Title number as that which relates to the Transfer Deed executed in 2000 and registered in 2001 with respect to Erf 2800 Naledi.

[7] The Answering Affidavit for its part responds to the allegations that the 1993 Certificate relates to the "neighbouring property" by denying this and by stating as follows in paragraph 26.2 on page 53: "I deny that I have ownership of the neighbouring property being 1687B and wish to point out that Annexure "GS4" is an exact replication of Annexure "GS3", which demonstrate [sic] I am the owner of 1687A only. I annexure [sic] a plan of the street layout to demonstrate 1687A enclosed marked **"JJ".**" This Annexure "JJ", which appears on page 82 of the papers, on the face of it suggests that Erf 1687 is adjacent to Erf 2800 and that the two are roughly the same size, thereby compounding the potential confusion.

[8] In the rest of the answering papers, and when read together with the replying papers, it is tolerably clear, however, that it is common cause that the Property, namely house 1687A to which the residential permits of the applicant's late mother (discussed in detail below) relate, is in fact the Property in respect of which the first and second respondents obtained a Deed of Transfer registered in April 2001 and referred to above, with respect to 2800 Naledi.

[9] Furthermore, the Answering Affidavit makes it clear that the version of the first and second respondents is that the Certificate of Ownership executed on the 20th July 1993 and apparently registered on the 1st June 1994 with respect to Erf 1687 Naledi Township relates to one and the same property, namely house 1687A Naledi, the Property, the subject matter of the dispute between the parties. It may also be noted that the Form 3 claim form dated 24 January 2000, which the respondents say preceded the execution of the Deed of Transfer in 2000, refers to a property identified as "New Stand 2800" and "House No. 1687A", Naledi.

[10] Mr *Mnyandu*, who appeared for the applicant, and Mr Essop, who appeared for the first and second respondents, were *ad idem* before me that there was one property only at issue, and that was house 1687A Naledi, Stand 2800 Naledi, to which all the documentation in the papers must be taken to relate, in particular the permits that specifically refer to house 1687A, the Certificate of Ownership that refers to Erf 1687 Naledi (executed in 1993) and the Title Deed of Transfer executed in 2000 and registered in 2001 that refers to Erf 2800 Naledi.

[11] It is disconcerting that the allegations in the papers (especially the answering papers) create far more confusion than elucidation with respect to the factual position, particularly as regards the documentary facts and the administrative history with respect to the Property in question. The founding papers comprise a degree of understandable speculation about what occurred behind the scenes with respect to such documents the first respondent appears to have obtained with respect to the Property, and allege that a fraud must have occurred, whereas the answering papers contain a remarkable degree of paucity of information, generality, vagueness and at times contradiction with regard to the critical facts.

[12] Despite citation of the various state entities as respondents, and service upon them by means of returns of service from the sheriff, which to my scrutiny appear to suggest proper service upon responsible people at the relevant State respondents, there has been no response from any of these respondents to the proceedings at all. The third respondent is the City of Johannesburg Metropolitan Municipality, its alleged status as successor to the transferor in the 1993 Certificate and the 2000 Deed not being placed in issue, and apparently correctly so. The fourth respondent is the Director-General for the Department of Local Government and Housing, Province of Gauteng and the fifth respondent the MEC for the Department of Local Government and Housing, Province of Gauteng, whose alleged status as the entities charged with the administration of the relevant (assigned) legislation is also not in issue, again apparently correctly so. The sixth respondent is the Registrar of Deeds (Johannesburg), charged with the custody and administration of the Title Deeds at issue in this application.

[13] The Answering Affidavit contains the following statements in paragraph 33: "I am certain that the Director-General then lodged with the Sixth Respondent being the Registrar of Deeds all the necessary documents for registration purposes. I have no doubt the Sixth Respondent would be filing the their affidavits [sic]. In the event the Sixth Respondent does not file any papers I seek the leave of the court to supplement this affidavit which I am presently deposing to".

[14] There was no suggestion from Mr Essop that any supplementing was desired and the parties were *ad idem* before me that I could accept that the relevant State respondents had been properly served and notified and were simply abiding the outcome of the application. I refer henceforth to the first and second respondents as "the respondents", save where identification of the State respondents is necessary.

[15] I should also note that Mr Essop made it clear that the attitude of the respondents was that a referral to trial of the application would be inappropriate, and that if there were factual disputes that could not be resolved on the papers, and I were not inclined to dismiss the application as a result, then a referral to an "inquiry" such as demanded by the applicant (about which I say more below) would be more appropriate than a referral to trial. This was also the attitude adopted by Mr *Mnyandu* for the applicant.

[16] Whether and to what extent the kind of "inquiry" demanded by the applicant is competent or appropriate in the present circumstances is dealt with below. Suffice it to say that I am left with the evidence on the affidavits, applying the principles applicable to motion proceedings, supplemented and at times qualified by what the

parties were content to make common cause between them in argument before me, as the basis upon which to adjudicate the matter.

[17] I mention this specifically because it became clear to me in preparing this judgment that the whole premise of the debate in the papers, and of the debate as it developed in argument before me, ably as such argument was certainly conducted, was flawed in a material respect. The problem relates to the applicability of section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988.

[18] The papers address the matter as one relating to the proper application of that section to the Property, and the debate before me revolved around the extent to which that section was properly applied to the Property (as contended for by the respondents) or was applied improperly, or unfairly, and ought still to be applied, now properly and fairly (as contended for by the applicant). The problem is that the section is not applicable to the permits that formed the foundation of the debate in the papers and before me, as expounded below.

[19] The first paragraph in the Notice of Motion seeks interdictory relief against the respondents relating to dealing with the Property in any way, or evicting occupiers of the Property. Before me, Mr *Mnyandu* conceded that no case was made out in the papers for interdictory relief and submitted that the need for the interdictory relief envisaged in the papers was no longer present, so that the applicant was not persisting with seeking interdictory relief.

[20] I must point out that if the main relief sought by the applicant, namely the cancellation of the Title Deed with respect to the Property, were to be granted, it

would of course follow that the respondents would not be in a position to dispose of the Property.

[21] The main relief sought by the applicant is the cancellation of the Title Deed (as envisaged in section 6 of the Deeds Registries Act). The consequential relief sought by the applicant is stated as follows in paragraph 3 of the Notice of Motion: "That the fourth respondent be directed to hold an inquiry in terms of section 2(1) of the Conversion Act [81 of 1988] as to the identity of the rightful transferee under whose name the said property should be registered".

[22] At this point it may be apposite to note that the Answering Affidavit, submitted in resistance to the relief sought in the application, concludes with the following rather enigmatic prayer, or at least conclusion, in paragraph 48 on page 59: "In the premises I submit that this application is without basis and submit that a proper inquiry should be instituted which inquiry will indicate that I am the true and lawfully [sic] owner of the aforementioned premises".

[23] Mr Essop submitted that this conclusion or prayer should not be taken literally and should not be taken to render it common cause between the parties that the proper order to grant in this application would be a referral of the matter to "a proper inquiry", since that would amount to not opposing at the least the consequential relief sought by the applicant. I shall not attach any decisive significance to this conclusion or prayer and approach the matter on the basis that if the applicant failed to prove a case for any of the relief he seeks, I should dismiss the application or consider referring it to trial despite the attitude adopted by the parties in this regard.

THE CASE ON THE PAPERS AND AS ARGUED

[24] It is important to distinguish two components of the applicant's case:

a. The applicant contends that the Transfer Deed was unlawfully executed and ought to be cancelled; and

b. The applicant asserts an entitlement on his part to be included in the application to the Property of the inquiry process dictated by section 2 of Act 81 of 1988 ("the Conversion Act").

[25] The cogency of the first aspect of the applicant's case is not necessarily fatally vitiated by the flaw that affects the second aspect of the applicant's case.

[26] I proceed to set out the applicant's case.

[27] In 1973, the applicant's mother, Tryphina Sebatana ("Tryphina"), by then a widow and the head of the household comprising Tryphina, the applicant, the applicant's sister, Lydia, and the applicant's half-sister Grace, was issued with a residential permit by The City of Johannesburg. This permit was granted in terms of Regulation 7 of Chapter 2 of the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters GN No. 1036, 14 June 1968. This permit appears at page 27 of the papers and its issue to Tryphina is not in dispute. These regulations formed part of a mind-numbingly complex array of provisions through which the apartheid state regulated and decreed the kinds of tenure rights afforded to people of this country classified as "Black", or in the

language of the regulations as "Bantu". The Conversion Act was an important step towards converting various categories of tenure into more meaningful forms of title, first in the form of leasehold and thereafter, upon the amendment of the Conversion Act in 1993, in the form of full registered title.

[28] A very useful discussion of some of the important legislative history surrounding the Conversion Act and the categories of tenure it regulates can be found in *Nzimande v Nzimande & Another* 2005 (1) SA 83 (W) ("*Nzimande*"). An important discussion in particular of the specific residence rights created by Regulation 7 and the treatment of such rights in the Conversion Act can be found in *Toho v Diepmeadow City Council & Another* 1993 (3) SA 679 (W) ("*Toho*"). A case on which the applicant strongly relied is *Kuzwayo v Representative of the Executor in the Estate of the Late Masilela* [2011] 2 All SA 599 (SCA) ("*Kuzwayo*").

[29] The Regulation 7 residential permit was issued to Tryphina as "holder" and conferred upon her "and his dependants" the right to occupy the dwelling on the site. The occupants were then listed in the permit with their dates of birth as Tryphina and "Gordon" – the latter being a reference to the applicant who was then 19 years old.

[30] The applicant's case is that, upon the coming into effect of the Conversion Act on the 1st of January 1989, this residential permit became eligible for conversion into leasehold tenure, subject to the holding of an inquiry by the Director-General in terms of section 2 of the Conversion Act. The applicant's case was further that Tryphina passed away on the 19th of April 1991 (and the death certificate is attached on page 28 of the papers – this is common cause). It is the applicant's contention

that, when Tryphina passed away, the Regulation 7 right, which had not yet been converted as no inquiry had yet been held in terms of section 2, passed into her estate. The applicant alleges that Tryphina died intestate and that he, that is the applicant, is one of her intestate heirs. I may note that the fact that Tryphina died intestate, and that the applicant is one of her intestate heirs, is not disputed by the respondents and Mr Essop made it clear that this could be regarded as common cause.

[31] The applicant alleges that the section dealing with an inquiry to convert the Regulation 7 right into a leasehold right, read with the regulations that deal with how the inquiries are to be held, required that the applicant be identified as the actual occupier of the Property, and that he ought to have been part of an inquiry to determine whether the rights in question should have been converted to a leasehold right or, as the applicant suggested, after the coming into effect of the Upgrading of Land Tenure Rights Act 112 of 1991 ("the Upgrading Act"), on 1 September 1991, into full ownership rights, and to whom such leasehold right or full ownership rights ought to have been granted.

[32] The applicant's case continues that no such inquiry was ever held with respect to the permit held by Tryphina, but that instead the first respondent managed to achieve a conversion that led to the ultimate transfer of title to him and to the second respondent without any proper inquiry as required by section 2 of the Conversion Act ever having been held.

[33] As, according to the applicant, the respondents were never the "actual occupiers" of the Property, and as only the intestate heirs of Tryphina were the rightful successors

to her Regulation 7 rights, the acquisition by the respondents without a proper inquiry having been held must be taken to have occurred unlawfully, and, the applicant suggests, probably fraudulently.

[34] The applicant further alleges that he and Lydia's daughter, Matapa, have been in continuous occupation of the Property since the death of Tryphina, with Lydia passing away in 1997. Grace, the mother of the first respondent, "had long moved out of the house to her own house with her family".

[35] The applicant then alleges that the first he and Matapa had any inkling of the possibility that the first respondent had obtained some form of official recognition of title with respect to the Property was when in January 2013 the applicant and Matapa noticed that the municipal account statement was addressed in the name of the first respondent, which surprised them "because the first respondent does not stay on the property and has never stayed on the property" (Founding Affidavit paragraph 20, page 16).

[36] The applicant then says that enquiries directed to the Department of Housing of Gauteng revealed to his utmost shock and surprise that the Property was registered in the names of the respondents and that this had occurred in terms of the provisions of section 13 of the Upgrading Act.

[37] The Applicant also alleges that enquiries at the Master's office revealed that there were no records relating to the distribution of Tryphina's estate and there was therefore no indication at all that the Property had ever been dealt with as something

that deserved an inquiry in terms of section 2 of the Conversion Act. This was the case made out in the founding papers.

[38] The case in answer is extremely difficult to decipher and in this regard I can but rely on what the evidence alleges and what Mr Essop made of it before me. The first respondent attaches another Regulation 7 permit, dated 1975, also issued to Tryphina as holder, and listing Tryphina and "Michael Mangena" as occupants – this appears at page 62 of the papers.

[39] Mr *Mnyandu* made much of the fact that the handwriting recording the first respondent's name on the permit clearly differs substantially from the rest of the handwriting on the permit. Be that undeniable fact as it may, the first respondent would have been 13 years old at the time of the permit attached to his papers bearing Tryphina's name and his name as occupants. As with the 1973 permit, this permit designated Tryphina the holder of the permit and granted the rights "to the holder and his dependants".

[40] It was common cause before me that, irrespective of the genuineness of the entry of the first respondent's name on the 1975 permit, both the 1973 permit and the 1975 permit were issued to Tryphina as the holder and that she would be the party who had the relevant tenure rights enjoyed with her "dependants".

[41] The respondents also rely upon and attach a document dated 21 April 1993 purporting to be a site permit issued in terms of Regulation 6 of Chapter 2 of the GN 1036 regulations referred to above, with respect to the Property, and to the first

respondent as holder, noting "Brenda" and "Nqobile" as other occupants (page 85 of the papers).

[42] The first respondent alleges in paragraph 28 (page 54): "An inquiry was held by the Director-General who sent a notice to myself and he satisfied himself as to my identity." One is also told in paragraph 31 that "the Director-General gave effect to the agreement between Grandmother and myself". The treatment of "an agreement" between the grandmother (Tryphina) and the first respondent in the answering papers is highly unsatisfactory. One is told in paragraph 22.3 (page 52): "The reason my late grandmother transferred the right occupation of the property to myself [sic] was because of the fact that the Applicant was constantly leaving for a long period of time and as a results [sic] my grandmother did not trust that the property be put onto his name". And in paragraph 38.6 the following narrative appears: "After having taken over the property in 1975 and due to the Applicant's erratic behaviour, abuse of alcohol, constant fighting with my late grandmother, she removed him as the occupier of the premises as set out above, and abandonment of her. Although the document was dated 1975 my Grandmother had taken me as a child with her to the offices of the West Rand Administration Board and had included me since 1975 as an occupier of the aforementioned property".

[43] It was difficult for Mr Essop to articulate precisely what the agreement was that the first respondent relied upon in the papers. Suffice it to say that the high water mark of this agreement alleged in the papers appears to be the grandmother's alleged resolve to record the 13 year old first respondent as an occupant with her on her permit rather than the applicant.

[44] The first respondent alleges that the Director-General did hold an inquiry. He seems to allege, although this is not stated and one must imply this from the allegations, that this occurred after notification was sent in 1992 by means of a document attached to the Answering Affidavit. The document calls upon Mr Mangena to report to the Soweto Council chambers to be interviewed by the Housing Committee and is dated the 1st of October 1992.

[45] It is by no means clear that this document must be regarded as an invitation to an inquiry contemplated in section 2 of the Conversion Act. It was, however, common cause before me that this is exactly what it was.

[46] What the first respondent also relies on in the Answering Affidavit is the site permit issued to him as holder dated 1993. This, Mr Essop conceded, was the first document chronologically that designated the first respondent as the holder (rather than Tryphina). It is also, significantly from what follows below, a permit purportedly granted in terms of Regulation 6, rather than Regulation 7. The significance of the difference lies in the triggering of section 2 of the Conversion Act.

[47] It seems tolerably clear from the allegations in the Answering Affidavit that the respondents rely in the papers on that permit issued in April 1993 as the basis upon which, after an inquiry that was apparently called for before that permit was issued, the Certificate of Ownership was granted, which was dated 20 July 1993, and was granted, in its terms "in terms of the provisions of section 13 of Act No. 112 of 1991".

[48] The first respondent then alleges that the Director-General had concluded his enquiry and had published the requisite notice after such enquiry and "I was granted the ownership of the property in respect of stand 1687A by the Director-General" (paragraph 33.9, page 55).

[49] One then finds the following in paragraphs 39 and 40 of the Answering Affidavit: "I submit at some stage the City Council had published the notice for persons to apply Title Deeds, which I applied for in 24 January 2000. I filled out the application form that was in the newspaper and submitted to the City Council. A copy of the report is marked "RR". Subsequently I was issued a Title Deeds reflected I am there [sic] true and lawfully [sic] owner of the aforementioned premises." It is that Title Deed that is the subject matter of the application.

[50] The invitation or claim form submitted in 2000 is a form from the Housing Transfer Bureau of the Greater Johannesburg Transitional Metropolitan Council filled in on 24 January 2000 claiming an entitlement to purchase the property described as New Stand 2800, house number 1687A Naledi and marking the type of claim as a claim in terms of the discount benefit scheme.

[51] The debate before me developed on the basis of this material as follows: Mr *Mnyandu* contended that the Regulation 6 site permit on which the respondents relied had to be regarded as a nullity as, even if it were purportedly issued by the Council, it was issued after the regulations on the strength of which it purported to be issued had been repealed by the Conversion Act and therefore could not competently confer any rights upon any person. In this regard he relied upon the *Toho* decision, and correctly so, in my view. I deal with this further below.

[52] Mr Essop disavowed any reliance on the 1993 permit and instead argued that a conversion inquiry in terms of section 2 of the Conversion Act had properly occurred in relation to the 1975 permit that had been issued to Tryphina and that the rights granted to the respondents flowed from a conversion of the 1975 permit, pursuant to such an inquiry.

[53] The debate before me then was whether the applicant ought to have been part of this inquiry, and it was accepted by Mr Essop that there was no effective dispute on the papers of the applicant's status as occupier who had a right to be part of such an inquiry, and that his exclusion from the inquiry ought never to have happened. The focus of Mr Essop's argument was on allegations relating to the extent to which the applicant must be taken to have been aware of the first respondent's assertions of ownership and on the contention that his failure to exercise the appeal processes provided for with respect to such inquiries should preclude him from being afforded any relief in these proceedings.

[54] There was no suggestion from Mr Essop that the Certificate dated 1993 (registered in 1994) or the Title Deed executed in 2000 (registered in 2001) was lawfully granted to the first respondent by virtue of the provisions of the Upgrading Act other than as an implementation of the conversion of Tryphina's Regulation 7 rights, as determined by the inquiry alleged to have occurred in terms of section 2 of the Conversion Act.

[55] It is undeniable that the Answering Affidavit (confusing and sketchy though it be) founds the respondents' entitlement to have had the Certificate issued to the

respondents in 1993 and the Transfer Deed executed in 2000 squarely upon the exercise by the Director-General of rights in terms of section 2 of the Conversion Act with respect to either Tryphina's 1975 permit or the First Respondent's 1993 purported permit, or a combination of the two. The Answering Affidavit clearly relies heavily on the 1993 purported permit as the basis of the respondents' rights. There is no suggestion in the answering papers that the 1993 Certificate and the 2000 Deed were lawfully executed based on the conditions for such execution set out in the Upgrading Act independently of any rights that may flow from Tryphina's permit or from the 1993 purported Regulation 6 permit.

[56] As for the applicant's assertion of an absence of knowledge, the respondents rely in the answering papers on the following to contest this –

a. There is an allegation that the Applicant ought to have responded to the publication in the newspapers in 2000 inviting "applications for title", to which the applicant responds that he was illiterate and did not see any such advertisement; and

b. There is an oblique reference to a letter of demand dated 13 January 2000, addressed to one Immaculate Matsihitse, alleging that the first respondent was the owner of the property and that Ms Matsihitse was occupying the property illegally and should vacate the premises, and a letter addressed to the applicant, also on 13 January 2000, not claiming ownership, but threatening eviction on the basis that the applicant was abusing the property by his landlord activities. I deal with this in further detail below.

c. There is a suggestion that, had the applicant taken steps to wind up the estate of his mother, he would have discovered the true facts.

[57] Such were the terms of the dispute in the papers, and as crystallised in argument before me.

THE LEGAL POSITION

[58] As I have already noted, the debate in the papers and the case as argued before me were premised on the misconception that section 2 of the Conversion Act applied.

[59] The Conversion Act draws a clear distinction between, on the one hand, those rights granted under the GN 1036 regulations of 1968 ("the Apartheid Regulations") that render the sites to which the rights related "affected sites" for the purposes of the Act, and, on the other hand, residential permits granted in terms of Regulation 7 of the Apartheid Regulations. This distinction is confirmed by the decisions in *Nzimande* and *Toho* referred to above.

[60] So-called "site permits" granted under Regulation 6 of the Apartheid Regulations and "Certificates of Occupation" granted under Regulation 8 of the Apartheid Regulations, as well as "trading site permits" granted under the Apartheid Regulations, were rights that rendered the sites to which they related "affected sites" for the purposes of the Act. A Regulation 7 residential permit, such as that granted to Tryphina, did not render the site in question an "affected site" for the purposes of the Act.

[61] The rights relating to "affected sites" were subject to conversion into formalised leasehold rights. The conversion of these rights into leasehold rights occurred pursuant to the process envisaged in section 2 of the Conversion Act. The Upgrading Act, which commenced on the 1st of September 1991, stipulated in section 2 that, with respect to any piece of land in a formalised township for which a township register was already opened at the commencement of the Upgrading Act, a leasehold right granted in terms of the Conversion Act "shall at such commencement be converted into ownership". The Upgrading Act also provided for the recognition of various other forms of tenure in formalised townships as flowering into full ownership and, in section 13(1), allowed a township owner who intended to transfer ownership "in respect of any erf or any other piece of land in respect of which no land tenure right has been granted" to do so by lodging a Deed of Transfer on the prescribed form under the Deeds Registries Act.

[62] It may be noted that in 1993 the Conversion Act was amended, with effect from 1 August 1993, to provide for the conversion of the rights relating to "affected sites" into full ownership rights, rather than mere formal leasehold rights.

[63] Regulation 7 residential permits were not subject to conversion into formal leasehold or ownership under the Conversion Act. As noted by Jajbhay J in *Nzimande* in para 10: "With the promulgation of the Conversion Act and the consequent repeal of the R 1036 regulations, the residential permit (Reg. 7) was abolished. Rights conferred by these permits were, however, retained and are protected by statute."

[64] The statutory protection referred to in *Nzimande* is that conferred by section 6 of the Conversion Act. Section 6 of the Conversion Act provided that the holder of such a

residential permit shall from the commencement of the Act "be the lessee, and the municipality concerned shall be the lessor, of the site ... concerned". The Conversion Act accordingly transformed Regulation 7 residential permits into statutory leases between the holder of the permit and the relevant municipality. These leases were made subject to the provisions of section 6(2). Section 6(2) rendered the leases "subject to any by-laws relating to letting that may apply to the site or accommodation concerned". There was no evidence before me of any such by-laws and I note that the position at least in 1993 enunciated in *Toho* was that no such by-laws had been passed by then.

[65] Section 6(2)(a) and (b) provided that the statutory lease in question:

a. may be terminated by the lessee on three months' written notice;

b. shall be subject to the payment of rental by the lessee to the lessor in an amount equal to the amount paid by the lessee immediately before the commencement of this Act in respect of the site or accommodation concerned unless such amount is varied by agreement.

[66] Before I consider the assignment of the Conversion Act to the Province of Gauteng and later amendments to the Act in Gauteng, the following must be noted. Unlike the rights envisaged to be created by section 2 of the Conversion Act, the statutory lease rights created by section 6 were conferred *ex lege*. They were not the result of, or determined by, an inquiry. This certainly was the position at least until the amendment of the Conversion Act in Gauteng by Act 7 of 2000 (Gauteng) which commenced on 6 November 2000.

[67] The Conversion Act was assigned to the Provinces in 1996. An amendment was effected to section 6(2) of the Conversion Act in Gauteng, by Act 7 of 2000 of Gauteng. That amendment, effective 6 November 2000, inserted paragraph (c) into section 6(2) to read as follows: "A residential permit holder's rights are deemed to have been cancelled if it is found through the adjudication process that such holder has abandoned his or her rights in respect of the residential property concerned or has entered into a transaction in terms of which such rights have been ceded, sold or disposed of in any other way".

[68] The reference to "the adjudication process" in section 6(2)(c) is enigmatic. The Gauteng Housing Act 6 of 1998 was amended by the First Gauteng Housing Amendment Act 6 of 2000, which was assented to on 27 October 2000, but deemed to have come into operation on the 1st September 1998. These amendments to the Gauteng Housing Act introduced sections 24A, 24B, 24C and 24D in terms of which the Housing Department was authorised "to adjudicate on disputed cases that emerged from Housing Bureaux established for the transfer of residential properties ... and disputed cases that emerged from the transfer of residential properties in terms of the [Conversion Act]". Section 24B established adjudication and appeal panels and section 24C provided for regulations to be made by the MEC in relation to the transfer of residential properties. Such regulations were in fact promulgated in April 2001.

[69] Section 4(2) of the First Gauteng Housing Amendment Act 6 of 2000 provided as follows: "Every investigation, adjudication or appeal in relation to transfer of

residential properties undertaken before the adoption of this Act shall be deemed to be lawful." I revert to this below.

[70] The definition "transfer of residential properties" was inserted into the Gauteng Housing Act by Act 6 of 2000 to mean the following: "The transfer of state-financed residential properties, which were first occupied before 1 July 1993 and units or erven contracted for by 30 June 1993, if allocated to individuals by 15 March 1994, and in certain instances is applicable to the discount benefit scheme at the discretion of the Board".

[71] "State-financed residential properties" also had a statutory definition inserted, namely "residential properties that were financed with funds or loans made available by the state, a government body or local authority".

[72] The reference to the "Board" was deleted by another amendment effected in 2002, which provided for an MEC advisory panel, but the reference to the "Board" and its discretion in the definition of "transfer of residential properties" was not amended.

[73] It is entirely unclear from these provisions how the adjudication of disputes arising out of the Conversion Act affects the *ex lege* statutory lease rights created by the Conversion Act, which themselves did not envisage any enquiry to establish them.

[74] It is clear from the National Housing Code cited in *Nzimande* in paragraph 16, as it stood in March 2000, that the following position obtained then: "For Reg. 7 "Council tenant" cases, no similar statutory provision [as that providing for

conversion inquiries] is provided for identification and inquiry procedures. It is desirable that municipalities should apply similar disciplines".

[75] No doubt an inquiry into a conversion under the Conversion Act could yield interactions with claims relating to Regulation 7 residential permits and such claims would then be taken into account when determination was made in the inquiry. But there was no statutory provision for the statutory lease created by section 6 of the Conversion Act to be recognised, or, more importantly, to be created – this, as already noted, occurred *ex lege.*

[76] The reference to the possibility of deeming such a lease right to be cancelled if an abandonment or cession or transfer appeared to have occurred arising from "the adjudication process" could in the instant case only have had any possible application after November 2000 and with respect to the execution of the Title Deed in December 2000 (which was subsequently registered in April 2001).

[77] However, as noted above, the respondents' version is that there was a section 2 "Director-General" inquiry somewhere between October 1992 and July 1993 and that it was on the strength of this inquiry that the Certificate of Ownership was granted in 1993, and that the Transfer Deed executed in December 2000 and registered in 2001 was simply a formalisation of the same certificate of ownership registered in 1994. There is no suggestion that there was any adjudication process with respect to a statutory tenancy in December 2000.

[78] The position is therefore that Tryphina became a statutory lessee on the 1st of January 1989, without the need for any inquiry to be held.

[79] I pause to note that there is no evidence in the papers of any rental that was payable or paid by Tryphina or by any of the parties to the Municipality as provided for in section 6(2)(b). The rental that would have been payable would have been such amount as was paid by Tryphina immediately before the commencement of the Conversion Act, i.e. as at 1 January 1989. If this amount were zero, then the tenancy would presumably be free of rental. If the amount were any other amount, then the continuation of the tenancy would be "subject" to the payment of such rental.

[80] In *Toho,* what was at issue was a dispute between the applicant, who was claiming to exercise rights in terms of a statutory lease under section 6, and the relevant municipality, which was contending for the valid cancellation by it of such lease. At 702H-J Stegmann J held as follows:

> "However, as I indicated above, when dealing with the terms of the statutory leases created by section 6 of the Conversion to Leasehold Act 1988, I hold that section 6(2) did not and does not imply that a failure to pay the rental on due date would *ipso jure* result in the automatic termination of the statutory lease. On the contrary, the opening words of section 6(2) indicate that the Legislature expressly contemplated that local authorities would duly adopt by-laws determining the circumstances in which a statutory lease would become terminable at the instance of the local authority; and that until such by-laws have been adopted the local authority could not terminate a statutory lease for any reason other than for non-payment of rental, and even then only after such reasonable notice as would serve to place the lessee in *mora* if the rental

remained unpaid and as would afford the lessor a right of cancellation on that basis".

[81] Since the respondents were content to rely on the Regulation 7 permit as the basis for their rights, and the relevant municipality, cited as the third respondent, did not participate in the process, there is no evidence upon which I can find that the statutory lease had been terminated as a result of any non-payment of rental.

Succession in respect to statutory lease rights

[82] The next question to ask is what the effect on the statutory lease was of the death of Tryphina in 1991. Mr *Mnyandu* submitted that Tryphina's rights under the permit passed into her deceased estate, and for this he relied on *Toho* at 685J to 686A where the following was said:

> "The applicant and the second respondent were married in community of property. As a matter of law the applicant's right of occupation of house 7525A was an asset which became an asset in the joint estate of the applicant and the second respondent, even if the permit from which such right derived remained in the name of the applicant alone. Compare *Persad v Persad & Another* 1989 (4) SA 685 (D)."

[83] Mr *Mnyandu* also relied on *Nzimande*, which had held a Certificate of Occupation (which was subject to conversion under section 2 of the Conversion Act) to have embodied rights that passed to a deceased estate.

[84] It is dangerous to assume an equivalence, for the purposes of transmissibility on death, between those rights that the Conversion Act regarded as subject to conversion into leasehold and then ownership, on the one hand, and, on the other hand, the statutory tenancies created by section 6. But the equivalence between the joint estate arising from community of property at issue in *Toho* and transmissibility into a deceased estate, both with respect to the section 6 tenancy, is compelling. Furthermore, the conclusion in *Toho* was endorsed by Schabort J in *Moremi v Moremi & Another* 2001 SA 936 (W) at 939I to 940F, and in the process Schabort J said the following at 940C-F:

> "The conversion of rights brought about by the 1988 Act formed part of the legislative process aimed at delivering society from the tenurial fetters of the era of racial segregation and I do not think that the future dispensation contemplated in the 1988 Act envisaged the retention of any possible restrictive notions concerning spouses and occupancy derived from that past – such as those possibly encapsulated in the 1945 Act and the regulations (bearing in mind that it has already been decided that even thereunder spouses married in community of property were in the position of joint lessees" – see the *Toho* case ...). I would, therefore, think that the statutory lease was not intended to create a right personal to the Applicant only, falling outside the joint estate ... a construction to the contrary could hardly serve the policy of the 1988 Act".

[85] Again, although these observations related to the extent to which the statutory lease right fell into a joint estate, rather than the extent to which it survived the death of

the lessee, they would certainly be powerful reasons for holding such a right to be transmissible upon death.

[86] There is, however, some authority that would support a conclusion that such rights do not fall into a deceased estate. In *Nkwana v Hirsch* 1956 (4) SA 450 (A) the question was whether an apartheid occupancy right was capable of attachment, and in arguing that it was not, some reliance was placed on authority to the effect that such rights did not get transferred to the executor on the death of the holder. It appeared that the Appellate Division accepted that rights of this kind were generally not regarded as transmissible, with reference for example to cases such as *Makue v Makue's Trustee* 1923 TPD 163 at 166, but held that these considerations in the circumstances did not preclude it from holding the right to be subject to attachment, based on features of the right that were specifically legislated in the relevant regulations.

[87] One of the decisions relied upon by the appellant in *Mkwana* for the proposition that statutory tenancies were not transferred to a deceased estate was *Tudor Estates Limited v Estate Kirchner* 1946 TPD 522 at 524-5. This decision dealt with the War Measure Act 89 of 1942. That Act allowed a tenant, deemed a "lessee", to remain in occupation despite the expiry of the lease as long as he continued to pay the rental. In this case the relevant tenant died almost simultaneously with the expiry of the lease and his executors on behalf of the estate sought to claim the benefits of the statutory tenancy. It was held that such benefits did not pass into the estate.

[88] Here it is important to note that the main reason for finding the tenancy right created by the War Measure Act 89 of 1942 to have been so personal as not to be

transmissible was the fact that the statute specifically defined a widow also as a "lessee", which indicated an intention not to transfer the statutory right to the estate, otherwise such a definition would have been otiose. Furthermore, special provisions in the 1942 statute relating to when the lessee was a soldier made it clear that that statute did not intend anything other than a very personal tenancy right.

[89] *Toho* and *Moremi* both held the statutory tenancy in section 6 to be subject to the common law of lease, apart from the statutory features codified for the tenancy. With respect to a common law lease, the position is that the right to occupation of the lessee passes to the estate, should the lessee die before the expiry of the lease – see A J Kerr, *The Law of Sale and Lease* (Third Edition) at 492, with reference to *Lorentz v Melle* 1978 (3) SA 1044 (T) at 1058C.

[90] Yet a lease that is indefinite and capable of being brought to an end on notice by either party has been held not to fall into the deceased estate: see *Ebrahim v Pretoria Stadsraad* 1980 (4) SA 10 (T). *Ebrahim* was a full court decision. This decision confirmed that, with respect to a lease for a definite period, the right of the lessee passed into his deceased estate if he died before the expiry of the lease. But the lessee's rights under a lease for an indefinite period, terminable on notice by either party, did not pass into the deceased estate.

[91] I am of course bound by the full court decision in *Ebrahim* to the extent that it is applicable to the case before me. I do not believe it to be.

[92] The statutory tenancy created by section 6 is indeed indefinite and it is subject to termination on notice, but only by the lessee. As confirmed in *Toho,* the rights

endure in perpetuity, for as long as the lessee pays the rental and subject to any by-laws that the municipality may promulgate regulating such leases.

[93] I am satisfied that the authority of *Toho* and *Moremi*, and the degree to which a finding to the contrary would clearly undermine the legislative purpose in enacting the Conversion Act, are sufficiently compelling reasons to hold that the statutory tenancy under section 6 of the Conversion Act falls into the deceased estate upon the death of the holder.

The applicant's position

[94] This means that, upon Tryphina's death in 1991, her statutory tenancy right in terms of section 6 of the Conversion Act fell into her estate. Tryphina died intestate. It seems clear from the papers that her estate was never reported to the Master and no executor was ever appointed.

[95] It must be pointed out that until the decision of the Constitutional Court in *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), the administration of intestate deceased estates of those persons unfortunate enough to be governed by the Black Administration Act 38 of 1927 did not fall within the jurisdiction of the Master and was instead subject to the directions of the local magistrate.

[96] That the applicant is an heir in the intestate estate of Tryphina is not in dispute. But the applicant is not the executor, the proper plaintiff or applicant to sue on behalf of the estate. It seems to me that the parties find themselves in a position similar to that occupied by the heirs in *Mvusi v Mvusi & Others* 1995 (4) SA 994 (TkS). In *Mvusi* an intestate deceased estate subject to the provisions of the Black Administration Act

38 of 1927 entailed the appointment by the local magistrate of a representative (the equivalent of an executor), given that the estate held immovable property. The representative was the son of the deceased and the immovable property (a farm) was first transferred into the representative's name. This was done on the basis that the son claimed to be the sole intestate heir and transferred the property to himself as such. Thereafter, despite claims by other intestate heirs that this ought not to have happened, the son sold and transferred the farm to a third party who was held to have been aware of the claims by the heirs. The heirs then brought an action to have the transfers set aside and they were indeed set aside at the instance of the heirs.

[97] In *Mvusi,* the heirs claimed an (ultimate) entitlement as heirs to the property that had been transferred. They did not purport to act on behalf of the estate, but they also did not claim, and were not granted, an order for transfer to them as heirs as the estate still had to be administered (before *Moseneke* without the jurisdiction of the Master). There was no difficulty in *Mvusi* with recognising the *locus standi* of the heirs to obtain the setting aside of the relevant Transfer Deeds.

[98] In the instant case the applicant is also not claiming a declaration conferring any ownership upon him, nor is he asking for any order recognising any title on his part. This Mr *Myandu* stressed before me. He does assert, however, that Tryphina's rights were subject to being converted to ownership in terms of section 2 of the Conversion Act and that the same ownership at issue is that which was transferred under the Deed under attack, giving him as an heir a direct basis for *locus standi* equivalent to that of the heirs in *Mvusi.* But, as has been noted, the right that passed into Tryphina's estate was not any title subject to conversion to ownership, but the statutory lease created by section 6.

[99] It is not immediately apparent that the transfer of ownership from the Municipality (the predecessor of the third respondent Municipality) to the first and second respondents is necessarily in conflict with the statutory lease right. It is by no means clear to what extent section 6 is compatible with a sale and transfer of the relevant site by the municipality to a third party for the statutory lease to continue on the application of the principle *huur gaat voor koop.*

[100] I must say that it does not appear to me to have been envisaged that a site subject to a section 6 tenancy should be sold and transferred to a third party on the basis that the statutory tenancy was then between the lessee and the third party on the application of the principle *huur gaat voor koop.*

[101] In my view, if the applicant has made out a sufficient case for the invalidity of the transfer, then he has *locus standi* to seek to have such transfer set aside and it is not an obstacle to this potential outcome that the rights the applicant may assert, ultimately through the estate of Tryphina, are not necessarily co-extensive with the rights conferred upon the respondents by the registration of transfer.

SHOULD THE CHALLENGE TO THE TRANSFER SUCCEED?

[102] As noted above, the version of the respondents in the papers and pressed before me was that the transfer occurred pursuant to a determination by the Director-General after an inquiry in terms of section 2 of the Conversion Act. Reliance is placed on the notice dated 6 October 1992, the purported site permit dated 21 April 1993, and

a Certificate of Ownership purportedly registered in terms of section 13 of the Upgrading Act executed in July 1993.

[103] As already noted, the 1993 site permit could have no legal effect as it was granted, on the face of it, at a time when the Apartheid Regulations had already been repealed by the Conversion Act. In this regard, Mr *Mnyandu* correctly relied on the following finding by Stegmann J in *Toho* at 699 to 700:

> "On 23 May 1989 the first respondent's Township Manager purported to issue a residential permit to house 7525A to the second respondent in terms of Regulation 7 of Chapter 2 of the repealed 1968 Residential Area Regulations. There is a copy of this document at page 52 of the record. By reason of the repeal of the Regulations this step was of no legal effect. It was, moreover, inconsistent with the statutory lease which had come into effect on 1 January 1989, which was an asset in the common estate of the applicant and the respondent and which remained to be divided in consequence with the divorce order".

[104] I asked Mr Essop what I should make of the 1993 site permit. Mr Essop did not contend that the document should be seen as anything other than a purported site permit issued in terms of Regulation 6 of the by then repealed Apartheid Regulations. Mr Essop was also at a loss to explain how the notice to attend the inquiry dated 6 October 1992, which the parties accepted was a notice to attend an inquiry in terms of section 2 of the Conversion Act, came to be addressed to the first respondent in his own name if the only document suggesting the first respondent was the holder of any right in his own name was the 1993 site permit which post-

dated the notice. It should be pointed out that the site permit purportedly issued in 1993 was indeed the kind of permit that would have created a right that was subject to conversion upon inquiry under section 2 of the Conversion Act; it was, in other words, a different right altogether from that actually held by Tryphina, which hardened into a statutory lease and passed into her estate.

[105] There was also no explanation of how the Certificate of Ownership issued shortly after the date of the purported site permit came about and why it invoked section 13 of the Upgrading Act. It may be noted that section 13 of the Upgrading Act relates to an intention to pass ownership "in respect of any erf or any other piece of land in respect of which no land tenure right has been granted", with "land tenure right" being defined broadly enough to include "any right to the occupation of land created by or under any law".

[106] Clearly, on anybody's version, a land tenure right had been granted in relation to the property by the time the Certificate of Ownership was executed in July 1993 – there was the residential permit issued to Tryphina in 1973, there was the apparent endorsement of such permit issued in 1975, and there was apparently the purported site permit issued to the first respondent in his own name in 1993 under the repealed regulations.

[107] It is to be noted that the Upgrading Act provided for the transfer of ownership in relation to sites that had already been converted into leasehold in terms of the Conversion Act, but there was no indication whatsoever that this had already occurred in respect of the Property when the Certificate was issued. Certainly, Mr

Essop did not seek to contend for any such case, nor is any trace of any such case to be found in the Answering Affidavit.

[108] The same can be said for the Transfer of Title executed in 2000 and registered in 2001 – the only basis suggested for this in the papers and by Mr Essop was an inquiry by the Director-General under section 2 of the Conversion Act on the strength of Tryphina's permit, and not some independent basis to be found in any of the schedules in the Upgrading Act.

[109] Mr Essop accepted that the purported site permit issued in 1993 was of no legal effect and did not seek in argument to place any reliance upon it, but instead sought to rely on the 1975 residential permit issued to Tryphina as the basis upon which the inquiry must have proceeded.

[110] It is however certainly the impression created by the answering papers that the "inquiry" so vaguely referred to and the grant by the Director-General alleged to have occurred, happened on the strength of the 1993 purported site permit, or at least that the purported site permit played an important role in the rights asserted by the respondents as the basis upon which they achieved transfer.

[111] There is another fundamental difficulty with the version in the Answering Affidavit. It is alleged that "the Director-General" held an inquiry in terms of section 2 and that "the Director-General" finalised the inquiry and granted a conversion to the respondents. The official that was charged with section 2 inquiries in terms of the Conversion Act was at first the "Secretary". The substitution for the Secretary of the Director-General occurred only by virtue of the amendment of the Conversion Act in

1993, effective 1 September 1993. By then, on the extremely sketchy case sworn to in the Answering Affidavit, the "inquiry" by the "Director-General" had already occurred.

[112] It is possible that the Answering Affidavit contains an error in relation to the reference to the Director-General. But since no factual allegations are offered at all about the inquiry, not even when it was held, and since the only factual assertions relating to the inquiry, and to the rights upon which the inquiry is alleged to have occurred, either make no sense or were legal impossibilities (not to mention factual ones), it seems to me that the allegations in relation to the holding of a section 2 inquiry in the Answering Affidavit do not amount to evidence which, applying the rules relating to motion proceedings, I should accept as established before me in this application.

[113] In any event, there could never have been, on the facts set out in this application, a lawful inquiry in terms of section 2 of the Conversion Act in relation to the Property. Either such inquiry was premised upon the site permit which was of no legal effect, if such inquiry occurred after the purported issue of the site permit, or there was a purported "conversion inquiry" in relation to a right, namely a residence permit, that was not subject to such an inquiry and that conferred *ex lege* statutory tenancy rights upon the holder on 1 January 1989.

[114] There was no suggestion by the respondents that there was some further inquiry or adjudication process in 2000 when the transfer was granted on the strength of the 1993 certificate that was alleged to have been the product of the inquiry.

[115] On the evidence on these papers in this application, such as it be, I can only conclude that the certification in 1993 and the transfer in 2000 of ownership with respect to the Property to the first and second respondents occurred without a lawful basis.

[116] It remains to decide whether, on the application brought by the applicant, I must as a result order the cancellation of the Deed of Transfer, as envisaged in section 6 of the Deeds Registries Act.

[117] There was no specific prayer addressed specifically to the Certificate of Ownership dated 1993.

[118] It seems clear to me that if the 2000 Transfer Deed falls to be set aside then the 1993 Certificate of Ownership likewise falls to be set aside. I take this to be implicit in what the applicant seeks and note that the respondents did not contend for any independent cogency to be afforded to the 1993 Certificate. I believe it would be unduly formalistic, should I come to the conclusion that the Deed of Transfer ought to be cancelled, not to read the applicant's case as aimed at both registrations of the first and second respondents' ownership with respect to the property in question, namely that registered in 2001, and that registered in 1994.

[119] The natural consequence of the above would be to cancel the Deed as sought (and with it the 1993 certification), as an exercise of "the inherent power, implicit in section 6 of the Deeds Registries Act, to order cancellation of rights registered in the Deeds Register" (*Kuzwayo,* para 26).

[120] There are two obstacles in the way of such an order.

[121] The first obstacle is an issue I debated with Mr *Mnyandu,* namely whether it was not necessary to review the underlying administrative action upon which the execution of the Transfer Deed was based, instead of simply cancelling the Transfer Deed, essentially ignoring the underlying administrative conduct.

[122] Mr *Mnyandu* placed reliance on *Kuzwayo* and a similar question that was debated in *Kuzwayo* and urged me to find that, as in *Kuzwayo,* there was no identifiable administrative decision that was capable of being reviewed. I was referred specifically to paragraph 28 in *Kuzwayo* in which the Supreme Court of Appeal observed as follows:

> "Kuzwayo argued that the proper course of action for Van der Merwe to have followed would have been to review the "decision" in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). But her counsel was hard put to explain what decision it was that could be reviewed. He submitted that it was the "decision" of the official who signed the declaration and the Deed of Transfer. That cannot be so. The only administrative decision that could and should have been made was that of the Director-General or his delegate, after the inquiry mandated by section 2 of the Conversion Act. And that was the only decision that could be subject to review. The act of signing the declaration and the Deed of Transfer were but clerical acts that would have followed on a decision. Not every act of an official amounts to administrative action that is reviewable under PAJA or otherwise."

[123] In *Kuzwayo* it was found that there was no evidence of any inquiry that had been held under section 2 and therefore there was, on the reasoning adopted by the court, nothing to review. In the instant case there is an allegation by the respondents that an inquiry under section 2 had been conducted and that the certification and transfer at issue were executed on the strength of the outcome of such an inquiry. I have dealt with the difficulty of accepting the allegations in the Answering Affidavit as amounting to acceptable evidence that such an inquiry was ever held or such determination ever issued. If it were held, it could only have been held without any legal foundation, as noted above.

[124] The principle that requires review of underlying administrative conduct when challenging legal rights based upon such conduct (such as the transfer and certification in the instant case) was well captured in *Oudekraal Estates (Pty) Limited v City of Cape Town & Others* 2004 (6) SA 222 (SCA). In terms of the principles discussed in *Oudekraal,* 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. Once the administrative conduct is set aside, it would follow that the legal act based on such conduct would be set aside as a consequence of the review – see *Seale v Van Rooyen NO & Others; Provincial Government, North West Province v Van Rooyen NO & Others* 2008 (4) SA 43 (SCA).

[125] This principle was applied in the unreported decision of Joffe J in this division in *Lucas South Africa Pension Fund & Others v Soundprops 178 (Pty) Limited,* (unreported WLD Case No: 06/21258, 26 June 2008). In this matter, the applicants brought liquidation proceedings against the respondent on the basis that, given that the purported transfer of the business of a pension fund in terms of section 14 of the Pension Funds Act 24 of 1956 had been procured by fraud, this transfer should be regarded as null and void and the consequence was the undeniable existence of a debt owing to the applicants by the respondent as the subject of the liquidation application. Joffe J held that the section 14 certificate, which was issued by the Registrar of Pension Funds in terms of the Act, and which was an administrative prerequisite for the transfer, stood as valid until set aside on review and that he could not, in the liquidation proceedings as between the parties to the liquidation, ignore the certificate, even if he found that it had been fraudulently obtained.

[126] It is important to note that part of the reasoning in the *Soundprops* judgment was based on the fact that the Registrar who had issued the certificate was not a party to the proceedings and by no stretch of the imagination could the liquidation proceedings be regarded as in essence a review of the Registrar's certificate.

[127] In the instant case, all the relevant statutory bodies have been cited as respondents with respect to the relief sought. To the extent that it be so that there was indeed underlying administrative action on the part either of the "secretary" or of the Director-General, purportedly acting in terms of section 2 of the Conversion Act, and to the extent that what the Supreme Court of Appeal termed the "clerical acts" entailed by the certification and transfers at issue were executed on the strength of such action, the relevant successors in title have been cited in this application. Not

only the Municipality, which is the successor in title to the municipal structure that executed the 1993 Certificate and the 2000 Deed of Transfer, but also the Gauteng Director-General for the Department of Local Government and Housing and the MEC for that Department were cited as respondents. The application is a direct attack on the "clerical acts" that would have implemented, on the hypothesis set out above, administrative conduct now falling under the auspices of these respondents.

[128] In *Mnisi v Chauke & Others; Chauke v Provincial Secretary, Transvaal, & Others* 1994 (4) SA 715 (T), an application for eviction was based upon a Certificate of Ownership that had been granted in terms of section 13 of the Upgrading Act on the strength of a leasehold right that had been granted in terms of the Conversion Act. In that case there was no doubt about the fact that a leasehold right had been granted and, as we have seen, the Upgrading Act provided for conversion into ownership of all such leasehold rights that had been granted in terms of the Conversion Act. There was a counter-application challenging the grant of the leasehold right and seeking the setting aside as null and void of the Certificate of Ownership and the Deed of Transfer that had been based on the leasehold right. Goldstein J at 719G held the counter-application to be "essentially one of review". He was inclined to dismiss the review application for delay, based on the principle that operated at common law, before the coming into effect of PAJA, enunciated in *Wolgroeiers Afslaers (Edms) Beperk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A). This finding, on the delay issue I consider below, was rendered *obiter* by the fact that the subsequent transfer of the property into the name of the applicant led Goldstein J to find that he could no longer attack the transfers by virtue of a defect in the *causa* which gave rise to the original transfer, on the strength of *Brits & Another v Eaton N O & Others* 1984 (4) SA 728 (T) at 734-5 (*Mnisi* at 720D-E).

[129] In the instant case, there is no question of a subsequent transfer and one is still dealing with the "clerical acts" that resulted in the initial transfer, which is the subject of attack and which oc curred without legal foundation. But for present purposes, it may be noted that the instant application may also, to the extent necessary, be regarded as in essence a review of the underlying administrative action, to the extent that there was any on the part of the relevant respondents.

[130] In all the circumstances of this case, I am of the view that this court should find itself able to act on its finding that the certification and transfer occurred without lawful basis and that such a finding should extend also to any underlying administrative action upon which the certification and transfer might have been based. This, however, is subject to the overriding question of delay, which requires consideration.

[131] I agree with Mr *Myandu* that there can be no question, even if the matter were to be regarded as one concerned with a section 2 determination, of now regarding an appeal of such a determination as an applicable internal remedy. The Deeds of Title stand in the way of the exercise of any powers in relation to conversion that precede such Deeds. And, in any event, as the whole notion of a section 2 conversion inquiry is simply inapposite to the tenancy rights created by section 6, so would be an appeal conversion inquiry.

DELAY

[132] The second obstacle to acting on the finding that the transfers occurred without lawful basis is the question of delay. This question can be viewed either under the

rubric of prescription, or as a matter of interfering with the results of official conduct after many years.

[133] Mr Essop argued that any claim the Applicant may have had must have "prescribed" by now. He conceded that the question of prescription was nowhere raised in the answering papers, and that the issue of delay was addressed only through those allegations that suggested the applicant had knowledge of the assertion by the first respondent of ownership rights as far back as 2000, and the assertion that he ought to have taken steps to wind up the estate of Tryphina.

[134] The question of "prescription" is not an easy one in this matter. First of all, it is difficult to identify the "debt" that would be the subject of prescription as, in essence, it is the estate that is entitled to complain that the certification of ownership and transfer of ownership to the first and second respondents violated the statutory lease rights held by the estate at the time the unlawful application and transfer occurred. Whether, assuming prescription to apply, one should regard this as a matter of a single event of a wrongful transfer of ownership such as in *Radebe v Government of the RSA & Others* 1995 (3) SA 787 (N), or as a case of a "continuing wrong" as in *Barnett & Others v Minister of Land Affairs & Others* 2007 (6) SA 313 (SCA), it is important to note that it appears that the Prescription Act 68 of 1969 would in any event in the instant case have interrupted prescription in terms of section 13(1)(h), where the debtor or the creditor is a deceased person who has not yet had an executor appointed in his estate.

[135] In *Mvusi's* case, despite the passing of many years, the issue of prescription did not arise and it may well have been because of the operation of that section. One may

object that such reliance on that section cannot be invoked by the heir in relation to his own claim (or "debt") for cancellation – to the extent that his *locus standi* is recognised. But it does appear to me that an heir in the position of the heirs in *Mvusi* and the applicant in this case is in some meaningful sense pursuing a derivative claim on behalf of the estate – as the estate is the sole direct beneficiary of the claim in respect of the statutory tenancy asserted by the heir (allowing for the fact that the result of the claim asserted for the estate would not be to vest any ownership in the Property in the estate, a feature that distinguishes the *Mvusi* case).

[136] I am not persuaded that prescription under the Prescription Act is an appropriate rubric for the consideration of the Applicant's application to have the Transfer Deed set aside. If it were, it would have been incumbent upon the respondents to set out and prove when the "debt" in question arose, including when the applicant became aware of the material facts or could by the exercise of reasonable care have become so aware, and the oblique challenges to the absence of knowledge on the part of the applicant in the papers cannot be elevated into a full-blown prescription defence. To the extent that it is appropriate to imply a prescription defence into these allegations, it would be equally appropriate to find the application of section 13(1)(h) of the Act on the facts set out in the papers, or even more appositely, powerful evidence supporting the application of section 12(2), which provides: "If the debtor wilfully prevents the creditor from coming to know of the existence the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt."

[137] The applicant's complaints that the first respondent failed to advise him of any of the interactions with the State that led to the acquisition of ownership in respect of the

Property which he had occupied since birth was met with the following assertion in answer:

> "There was no reason to contact the Applicant as he did not have any fettle [sic] and Matapa was never on the premises" (par. 35, p56).

[138] I confess to an inability to fathom what this was intended to mean, as regards the applicant. I pressed Mr Essop for a theory, but he had none to offer. The applicant states in reply that it is important that the first respondent studiously refrained from broaching the subject of the advertisements, or of any interactions with officialdom about the Property with him, and laments with some persuasion:

> "It would have made a remarkable difference in this matter had he inquired from me about whether he could apply for the ownership of the property and I in turn acquiesced [in] or even ignored his engagement" (Replying Affidavit, para 12, p101).

[139] The issue of delay must be considered, however, not only from the point of view of prescription, but also in the context of the review that may be taken to be entailed by this application.

[140] Mr *Mnyandu* impressed on me the expedition with which the applicant acted since, on his version on the papers, he became aware in January 2013 of the fact that there appeared to be official recognition of some sort of the first respondent as the owner of the Property. I have no doubt that if it can be accepted that the trigger for expedition were to have been only in January 2013, then there can be no question of

an unreasonable delay, whether one applies the common law *Wolgroeiers* standard or the 180-day time frame set down in PAJA.

[141] It is to be noted that the PAJA time frame operates in terms of section 7(1)(b) from the date "on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons".

[142] As noted above there is nothing to gainsay the Applicant's evidence that he and Matapa were completely unaware of the fact that first respondent had procured some form of formal certification of ownership rights until he noticed in January 2013 that municipal accounts reflected the name of the first respondent. The Answering Affidavit does not contend that there were other accounts prior to January 2013 or any other official communication or interaction with respect to the Property that ought to have put the applicant on guard. Had that been the case, one would have expected this to have been asserted in the Answering Affidavit. Instead, specific reliance is placed only on the correspondence in January 2000 addressed to Matsihitse and to the applicant, the former alleging ownership and demanding that Matsihitse vacate the premises, and the latter complaining about the applicant's conduct as the landlord of the premises and threatening an application for ejectment, but without any assertion as to ownership.

[143] The Replying Affidavit deals with these allegations, and also with the allegation that the first respondent had effected certain improvements to the Property, as follows in paragraph 10 and following on page 100:

"The first respondent concealed at great lengths his wayward actions of acquiring ownership of the property. The annexure attached as "SS" upon which the first respondent seeks to prove my knowledge of his alleged ownership of the Property, regrettably, does not state that he is the owner of the Property. It is correct that had the said letter hinted on that allegation [sic], I would have certainly taken steps at that stage to reverse the improper acquisition of the property. I would have done this solely on the basis that I have always lived on my parents' premises and that the property is the only home I've ever known since childhood."

[144] And then in paragraph 11:

"The first respondent, as I have alluded to in my founding affidavit, is my nephew. It is not an unusual thing in our culture to have a successful learned child improving and developing a place where his/her mother stayed and grew up. Having said that, such a gesture of goodwill among family members does not entitle a child to appropriate the assets of his/her elders on the basis that she/he contributed in improving it."

[145] The letter addressed to the applicant does not allege ownership but the letter addressed to Matsihitse does. It is not alleged in the Answering Affidavit that the letter addressed to Matsihitse came to the attention of the Applicant. It is alleged, however, that the applicant's present attorney responded to the respondent's letter on behalf of Matsihitse (paragraph 38.3, page 57), and this allegation is dealt with purely by way of a general denial in paragraph 34 of the reply (page 107).

[146] Even if the first respondent had been acting as if he held ownership rights in relation to the Property and referred to himself in formal correspondence by his attorney to a third party as the owner, while declining to do so in formal correspondence addressed to the applicant, this is hardly a sufficient basis upon which to conclude that the applicant should have known that, somewhere in 1993, the respondent had procured first the issue to him of an invalid site permit, contrary to the residential permit that had been held by Tryphina, and then certification of ownership. The transfer process in 2000 occurred only in December 2000, long after the correspondence relied upon by the respondents.

[147] It is also passing strange for the respondents to rely only on these two documents as suggesting that the first respondent in any way acted towards his uncle on the basis that he, that is the first respondent, had acquired formal recognition of ownership rights to the Property. Had there been a more solid foundation for saying that the first respondent acted towards the applicant as the owner and claimed ownership in the property, it would have been an easy matter to have alleged this in the Answering Affidavit, rather than to rely squarely on a letter that does not allege ownership and obliquely or by implication on a letter addressed to a third party that alleges ownership.

[148] As for the allegation that at some stage in 2000 there was a newspaper advertisement calling upon people to apply for Title Deeds, it is not clear on what basis this is alleged to have brought anything in relation to the respondents' recorded rights to the attention of the applicant. The respondents also say that the applicant had taken no steps himself, neither with respect to his mother's estate, nor with respect to formalising his occupation of the Property and that, accordingly, he should be non-

suited in relation to setting aside official conduct that occurred, in the one instance 20 years ago and in the other, 13 years ago.

[149] I do not believe, in all the circumstances, that the mere failure on the part of the heirs to have taken steps to wind up Tryphina's estate should non-suit the applicant in relation to the surreptitious acquisition by the respondents of official title to the Property. The applicant continued to exercise the occupation right he had exercised as Tryphina's dependant since the grant to her of the residence permit in 1973. It is true that the state of affairs with respect to the respondents' rights might have been uncovered had the applicant taken steps to have Tryphina's residency right formalised. Such a formalisation would, it appears, have been the only compelling reason for taking steps to have his mother's intestate estate wound up. Yet, can he be blamed for failing to do so where, at law, his mother's right in any event hardened into a statutory tenancy which devolved upon the estate in respect of which there was no reason to suggest he ultimately stood to benefit in any way other than as he had been all along – by continuing to live on the property? I do not think so.

[150] I am mindful of the fact that mere excusable ignorance of the unlawful purported creation of rights is a rather tenuous basis for entertaining conduct challenging such rights so many years after the rights were conferred. Yet both the law of prescription and the principle of unreasonable delay with respect to administrative reviews, as now embodied in PAJA, allow ignorance, as long as it is reasonable, to be invoked as a basis for obtaining redress even many years after the illegality being challenged.

[151] The mere fact that the right has stood for so long is not by itself a decisive reason to render it immune from challenge. The mere fact of the passing of a very long period

of time (several decades) was no obstacle to the recognition by the Supreme Court of Appeal of a delictual claim for sexual assault brought by a plaintiff whose actual knowledge was held to have been psychologically ineffective knowledge, in *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) (before such an exception was then crafted into section 12(4) of the Prescription Act in 2007). I do not suggest any particular analogy between the obstacle that faced the plaintiff's knowledge in *Van Zijl* and the obstacles that prevented the applicant from acquiring knowledge in this case. I merely find comfort in the fact that this court need not baulk at overturning unlawful conduct merely because it has stood for many years.

[152] It is true that the more time that has passed after official acts have created results, the more those results have been allowed to spread their effects, and to have been relied upon as entrenched realities by various parties. This is one reason why courts should be more reluctant to upset the results of official acts after long periods of time than to interfere with private legal effects, which tend, issues such as waiver and estoppel aside, to be governed by the law of prescription only. But there is no suggestion in the instant case of any third party reliance on the official acts in question, or any sphere of influence of these acts beyond the contest about the Property as between the heirs (and candidate heirs) to Tryphina's estate.

[153] In the present circumstances, as already noted, it also certainly seems as though there is much merit in the applicant's complaint that the first respondent deliberately concealed from him and from Matapa what the first respondent had achieved with respect to the registration of rights relating to the Property, in circumstances where it is not effectively disputed that the applicant has been living in this property as his

home for his whole life, and that the first respondent and second respondent live elsewhere.

[154] There is one further issue I must consider in this regard. As noted above, section 4(2) of the First Gauteng Housing Amendment Act No. 6 of 2000 provided as follows: "Every investigation, adjudication or appeal in relation to transfer of residential properties undertaken before the adoption of this Act shall be deemed to be lawful."

[155] It is not clear what is meant by this subsection. The Act is deemed to have come into operation retrospectively on the 1st of September 1998. At first blush this subsection looks like an ouster clause precluding challenge to the legality of any investigation, adjudication or appeal in relation to the relevant transfers occurring before 27 October 2000 when the Act was "adopted". But such an ouster would be severely problematic from the point of view of section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). I do not believe that this subsection is to be read as such an ouster. To the extent that it can be read as not providing for such an ouster, it must be so read, given the dictates of section 39 of the Constitution.

[156] I believe that the subsection simply has the effect, given the creation by that amendment to the Act of adjudication and appeal panels, of deeming prior adjudications and appeals and determinations to have occurred as provided for in terms of the processes envisaged by the Act, rather than as purporting to oust any challenge to the legality of any such adjudications or processes by their own lights.

[157] The respondents did not seek to invoke this subsection. I may also note that the phrase "transfer of residential properties" is a defined term introduced by that amendment, as noted above, and relates specifically to "state-financed residential properties" which in turn is also a defined term meaning "residential properties that were financed with funds or loans made available by the state, a government body or local authority".

[158] There was, because the respondents did not invoke this subsection, no suggestion or evidence of the extent to which the Property must be regarded as having been "financed with funds or loans made available by the State, a government body or local authority". It would not be appropriate to take any judicial notice in this regard of the extent to which this description may be said to apply to the types of dwellings such as those occupied by Tryphina in 1973. At face value, it does not, and evidence that it does would be required for holding thus.

[159] On the papers as they stand, I therefore in any event cannot conclude that the type of transfer to which section 4(2) of the relevant amendment relates was at issue in this matter. I therefore do not regard the provisions of that subsection as an obstacle to granting proper redress in the instant application.

[160] I can, of course, not order an inquiry to be conducted in terms of section 2, as section 2 is simply not applicable to the Property. The estate of Tryphina should be administered and an executor be appointed to administer the statutory tenancy that passed into that estate on 1 January 1989. Whether and to what extent the provisions of the Regulations passed under section 24C of the Gauteng Housing Act in 2001 could or should then be applied, for the purposes of investigating or giving effect to

statutory tenancy rights, is not something upon which it is appropriate for this court to pronounce.

[161] Despite the fact that the application was founded on an incorrect premise with respect to the type of right that was at issue, the applicant was substantially successful in achieving the main relief sought, and I can see no reason not to award him his costs.

[162] In the event I make the following order:

1. The Registrar of Deeds (Johannesburg) (the sixth respondent) is ordered to cancel the Deed of Transfer T23347/2001 in relation to Erf 2800 Naledi Township, Registration Division I Q, Province of Gauteng, held by Certificate of Township Title Number: T43958/1991.

2. The Registrar of Deeds (Johannesburg) (the sixth respondent) is ordered to cancel the Certificate of Ownership TE23977/1994 held by Deed of Transfer T43958/91 in relation to Erf 1687 Naledi Township.

3. It is declared that Tryphina Sebatana (nee Moore) became a lessee as envisaged in section 6 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, with respect to house number 1687A Naledi Township, on 1 January 1989, that her rights as lessee devolved upon her deceased estate upon her death on 19 April 1991, when she died intestate, and that her estate falls to be administered in terms of the provisions of the Intestate Succession Act 81 of 1987.

4. The first and second respondents are directed to pay the Applicant's costs jointly and severally, the one paying the other to be absolved.

Frank Snyckers
Acting Judge
South Gauteng High Court
6 August 2013

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