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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

Case number: 13282/16

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES / NO
- (3) REVISED.

24/8/17
DATE

.....
SIGNATURE

In the matter between:

MAIMELA, MOKGADI ANGELINA

1st Applicant

and

MAIMELA, RICHARD

1st Respondent

MAIMELA, RAISIBE BETTY

2nd Respondent

**DIRECTOR- GENERAL, HUMAN SETTLEMENTS
DEPARTMENT, GAUTENG PROVINCE**

3rd Respondent

**MEC OF HUMAN SETTLEMENTS DEPARTMENT,
GAUTENG PROVINCE**

4th Respondent

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

5th Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

6th Respondent

JUDGMENT

R. FRANCIS, AJ:

[1] The applicant seeks a declaratory order to cancel the names registered in the title deed of the property claimed to be a family house. The relief is claimed on the basis that the property was registered into the names of the first and second respondents, her brother and his wife, without the required process being followed to establish ownership and succession rights. As this house is situated in a black urban area the process to effect transfer of these properties from the status of permit holder to leasehold or ownership is regulated by the **Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988** (Conversion Act) as amended in 1993.

[2] The applicant's and first respondent's mother (the deceased) was a residential permit holder in the property in terms of Regulation 7 of Chapter 2 of the Regulations Governing the Control and Supervision of Urban Black Residential Area and Relevant Matters of GN 1036 dated 14 June 1968. The applicant is also listed as an occupant on the residential permit dated 2 May 1985. In 1995 the deceased was invited to apply for ownership of the property. She filled out

the required forms and awaited the outcome of her application. On 31 January 1996 she died without knowing the outcome of her application.

- [3] In 2014 the applicant became aware for the first time that the first and second respondents hold a title deed of the property of the deceased. The applicant maintains that the title deed should never have been issued to the first and second respondents as the deceased died intestate and was still awaiting the outcome of her application for conversion from permit holder to ownership. The deceased estate has not been finally wound up.
- [4] A lodger's permit was issued in 1995 in the names of the first and second respondents in terms of the provisions of Regulation 20 of Chapter 2 of the Governing Regulations. The first and second respondent enjoyed a right of occupancy on this property for a period of 21 years where they lived with their children. The first and second respondents were married in community of property and are currently in the process of a divorce. This application is opposed by the second respondent only.
- [5] The second respondent alleges that the deceased had intended that the said property be left to her and the first respondent. The deceased had indicated her intention when she instructed the first and second respondents to come back to live in the property in question and to take over ownership. She intended giving ownership of the property in Modjadjiskloof to the applicant and it was for that reason that the applicant was not included in the lodger's permit. The entire allegation is disputed by the applicant as well as by the first respondent. At the hearing counsel for the second respondent, Mr Du Plessis, confirmed that no proof of this allegation can be submitted by the second respondent.

- [6] In addition the first respondent has attested to an affidavit confirming that the replying affidavit of the applicant is true and correct and that he never applied for the title deed of the house in question and was surprised when he first saw the title deed in his name. He further states that his deceased mother never gave him (the first respondent) and the second respondent permission to take over the ownership of the house. Mr Du Plessis raised technical objections to the first respondent's affidavit in that the commissioner of oaths dated the affidavit 25th July 2016 and date stamped it 21 July 2016. In the interests of justice the deponent was given the opportunity to provide a supplementary affidavit correcting the mistake. A confirmatory affidavit dated 16th August 2017 was duly provided. As a result no dispute remains in this hearing in respect of the deceased's intention.
- [7] I had occasion to serve on an almost identical matter *in Khwashaba v Ratshitanga* 2016 JDR 0776 (GJ), the only difference being that the property, a family house was sold after being transferred into the names of the holders of occupation. Since then I have not changed my views on the upgrading of the property from permit holder to ownership which is governed in this instance by the Conversion Act.
- [8] The intention of the Conversion Act was to formalise and confer leasehold or full ownership upon the beneficiaries. In terms of Section 2 of this Act an inquiry had to be conducted prior to the rights of leasehold or ownership was granted.

Section 2 of the Conversion Act reads as follows:-

Inquiry as to rights of leasehold

2. (1) Any secretary shall conduct an inquiry in the prescribed manner in respect of affected sites within development areas situated within his province, in order to determine who shall be declared to have been granted a right of leasehold with

regard to such sites ' . . .

(2) Before the commencement of such inquiry the secretary 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.

[9] The conversion Act must be further read with sections 24A and 24B of the Gauteng Housing Act No 6 of 1998. (Gauteng Housing Act) Section 24 A provides that:-

(1) the Department is authorized 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,

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

[10] The Gauteng Housing Act further places a duty upon the MEC to conduct an enquiry in disputed cases to determine lawful beneficiaries. If the upgrading from residential permit holder rights to ownership took place automatically, the basis of the transfer in the names of the first and the second respondents occurred without a lawful basis and in the interests of justice it therefore cannot be ignored and it should be set aside.

[11] In reference to a similar matter in *Shai V Makena Family* 2013 JDR 0608 (GNP), the court found that after assessing evidence, legislation and the authorities, that Paulos was only the *de jure* holder of occupation on behalf of his mother and her

family. Further, the court held that the officials had used section 2 of the Upgrading of Land Tenure Rights Act 112 of 1991(Upgrading Act), dizzily to transfer ownership to Paulos and Molly. Since the conversion took place without the knowledge of the other family members, the court found that neither Paulos nor Molly had acquired any rights of ownership.

- [12] In considering the intention in the Conversion Act read with the Upgrading Act, Jajbhay, J in *Nzimande v Nzimande & Another* 2005 (1) SA 83 (W), fittingly held that ‘it was not intended to automatically convert rights held under the R1036 regulations to more effective common law rights of leasehold or ownership without considering the availability, or lack thereof of new houses in the area, *the need for family members’ occupation rights to be recognized and protected* and the need not to increase homelessness but to decrease it in the defined area.’ (*my emphasis*).
- [13] The Upgrading Act came about and gave effect to improving the precarious position in which land tenure for black persons had been forced and therefore this Act should be read together with the Conversion Act to give contextual meaning to its proposed intention to consider the occupational rights of occupiers. Therefore it follows as the MEC is entrusted with the transfer of residential properties to individuals it will have to determine who the lawful beneficiaries are by using appropriate mechanisms in making its determination. The mechanisms provided by section 2 of the Conversion Act suitably address the precarious position of land tenure relating to permit hold and ownership.
- [14] In the present matter as well the first respondent alleges that he was unaware of the registration of the property into his and the second respondent’s name as he

did not apply for such registration. It is not in dispute that the first respondent's and applicant's mother (the deceased) had applied for ownership in 1995. As a result no enquiry was held to establish the beneficiaries of the property in question and it should be done to resolve the arising dispute.

[15] The only issue left relates to costs. The applicant requests costs in the event that the application is opposed. Counsel for the second respondent submitted that on the basis that the applicant abandoned her claim on prayer 3 her application for costs on this aspect should not succeed. It is acknowledged by both parties that prayer 3 from the commencement of the matter prayed for in the alternative. I therefore see no reason why costs should not follow the cause. The successful party should be entitled to the costs of this application.

[16] In the result it is hereby ordered as follows:

- 16.1 The Title Deed No: T 70021/ 1998, which deed holds property known as ERF [...] Meadowland Township, Soweto, Gauteng, which is currently in the names of both First and Second Respondents, RICHARD MAIMELA and RAISIBE BETTY MAIMELA, is hereby cancelled.
- 16.2 The Sixth Respondent (Registrar of Deeds, Johannesburg) is ordered to cancel Title Deed No: T 70021/1998 which deed holds property known as ERF [...], Meadowlands Township, Soweto, Gauteng which is currently in the names of the First and Second Respondents, RICHARD MAIMELA and RAISIBE BETTY MAIMELA.
- 16.3 The Third and Fourth Respondents are ordered to ensure that an enquiry is conducted in respect of the property known as ERF [...] Meadowlands Township, Soweto, Gauteng in accordance with and in terms of Section 2 of Act 81 or in terms of the procedures adopted for the resolution of housing disputes in the transfer of residential properties.

16.4 The Sixth respondent revert the ownership of the house known as ERF [...], Meadowlands Township, Soweto, Gauteng to the Gauteng Provincial Department of Housing pending the decision in accordance with the enquiry as envisaged in 16.3 above.

16.5 The respondent is to pay the costs of this application.

R. FRANCIS, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Counsel for the Applicant: Adv L Memela 011 333 7800

Instructed by: Attorneys

Counsel for the 2nd Respondent: Adv C. A Du Plessis 011 775 5800

Instructed by: Attorneys

Date of Hearing: 15 August 2017

Date of Judgment: 24 August 2017