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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 38827/2016

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

.....

SIGNATURE

.....

DATE

In the matter between:

MARTHA AZLINAH TSHABALALA

First Applicant

MOSA EMILY TSHABALALA

Second Applicant

THANDI EMILY TSHABALALA

Third Applicant

SONTO THANDIWE TSHABALALA

Fourth Applicant

ESTHER RAMANANTSO

Fifth Applicant

EDWARD RAMANANTSO

Sixth Applicant

JULIA RAMANANTSO

Seventh Applicant

MICHAEL RAMANANTSO

Eighth Applicant

DOROTHY NKOSINGIPHILE RAMANANTSO

Ninth Applicant

NOMPUMELELO THANGO

Tenth Applicant

and

DUMAZILE RACHEL TSHABALALA	First Respondent
DUMAZILE RACHEL TSHABALALA N.O.	Second Respondent
THE MASTER OF THE HIGH COURT, JOHANNESBURG	Third Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOUSING, GAUTENG PROVINCE	Fourth Respondent
THE MEC FOR THE DEPARTMENT OF HOUSING, GAUTENG PROVINCE	Fifth Respondent
THE DEPARTMENT OF HOUSING	Sixth Respondent
THE REGISTRAR OF DEEDS, JOHANNESBURG	Seventh Respondent

JUDGMENT

MATOJANE J

Introduction

[1] The applicants in this matter seek an order cancelling Title Deed Number TL1146/1998 in terms of which the immovable property known as Erf [...] Mofolo South Township (the 'property') is held by the first respondent and her late husband, Mr Fana Daniel Tshabalala. Further, the applicants seek the following relief: that the decision of the fourth to sixth respondents in allocating the property to the first respondent and the late Fana Daniel Tshabalala be reviewed and set aside; for an order that the matter be referred back to the fourth and sixth respondents for adjudication in terms of section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 ('the Act') in order to determine the rightful claimant to the property;

The parties

[2] The first respondent was married in community of property to late Fana Daniel Tshabalala. The first and second applicants are the sisters of the late Fana Daniel

Tshabalala. The fourth to the eighth applicants are the children of the late Tshimakatso Ramanantso who was the sister of the first and second applicant. The ninth and tenth applicants are the children of the other two siblings of the first and second applicants.

[3] The application is opposed by the first respondent, who avers that the property was lawfully transferred into her name and that of her late husband in terms of the provisions of section 5 of the Act. The first respondent currently resides on the property and has improved the property by building two additional rooms and a garage.

Background facts

[4] Richard Tshabalala, the late father of the first and second applicants, was issued with a regulation 8 certificate of occupation of the property by the then West Rand Administration Board ('Board'). He had seven children, all of whom were named on the residential permit. In 1980, Richard Tshabalala passed away intestate. His rights of occupation of the property was ceded to his wife, Manana Paulina Tshabalala.

[5] Manana Paulina Tshabalala was mother to the first and second applicants and the grandmother of the other applicants. She accepted the cession and transfer of the deceased's rights, title and interest in the Certificate of Occupation on 2 October 1985. The Board consented to her substitution as holder of the Certificate of Occupation in respect of the property on the same day. The Certificate of Occupation was issued to her by the Soweto City Council on 3 October 1985.

[6] On 30 July 1996, the late Manana Paulina Tshabalala ceded all her rights and interest in the property to her son, the late Fana Daniel Tshabalala, who was married to the first respondent in community of property. Her eldest son, Elias Tshabalala, the father of the third applicant, signed the deed of cession as a witness, as did the second applicant, Emily Tshabalala.

[7] The property was registered in the names of the first respondent and the late Fana Daniel Tshabalala on 9 January 1998 in terms of s 5 of the Act.

[8] The applicants aver that Manana Paulina Tshabalala never ceded her rights and interest in the property to the late Fana Daniel Tshabalala. They state that Manana Paulina Tshabalala executed a will in which she bequeathed the property to all her children in equal shares. They state that the first respondent and her husband obtained ownership of the property without the knowledge of the applicants, who are the testate heirs of the estate of Manana Paulina Tshabalala.

[9] The applicants have attached to the founding affidavit a copy of a document which purports to be the Last Will and Testament of Manana Paulina Tshabalala, dated 1 August 1999, The deponent to the founding affidavit, who is the first applicant, states that the will was in the possession of their late brother, Elias Tshabalala, who did not deliver it to the Master of the High Court. The applicants are unable to show that the estate of Manana Paulina Tshabalala was reported to the Master. The first applicant states further that she did not see the will herself, but was told by her mother that the property belongs to all her children.

The issues

The will

[10] I first deal with the copy of the document of the purported will that the applicants seek to rely on. Section 8(1) of the Administration of Estates Act 66 of 1965 provides that:

‘Any person who has any document being or purporting to be a will in his possession at the time of or at any time after the death of any person who executed such document, shall, as soon as the death comes to his knowledge, transmit or deliver such document to the Master.’

[11] The Master cannot accept a copy of a will. If the original will is lost or destroyed and a copy is available, an application to court will be necessary to have the copy declared to be a valid will. If there is no original will available, the estate devolves according to the Intestate Succession Act 81 of 1987. The applicants have not delivered the original will to the Master, nor have they applied to court for the

validity of the copy attached to the founding affidavit to be determined by a Court.¹ Accordingly, no reliance can be placed on the purported will of the late Manana Paulina Tshabalala.

[12] I turn now to the second issue, namely, whether the late Manana Paulina Tshabalala ceded the property to the late Fana Daniel Tshabalala. As I shall illustrate, Manana Paulina Tshabalala wanted to divest herself of her rights in the property. She executed a deed of cession which was in the form of an affidavit on 30 July 1996. The deed of cession is contained in a standard form document and bears the official stamp of the West Rand Provincial Administration. It records as follows:

‘I, the undersigned Manana Paulina Tshabalala identity number [...]3 and holder of Certificate of Occupation dated 3 October 1985 issued to me by the Soweto City Council in respect of the property situated at [...] Mofolo South do hereby cede all my rights and interest over the property [...] Mofolo South to Fana Daniel Tshabalala identity number [...]7. I have no objection to the title being registered directly in his name.’

[13] The deed of cession was signed in the presence of two witness, one of whom is the cedent’s eldest son, the late Elias Tshabalala. This constituted an out-and-out cession, which means that the cedent, Manana Paulina Tshabalala, was completely divested of her rights in respect of the property.² In consequence, the rights to the property vested in the cessionary, the late Fana Daniel Tshabalala and formed part of his joint marital estate.

[14] The cedent, having once ceded the right, is precluded from ceding it to a second cessionary.³ In this matter, the late Manana Paulina Tshabalala is precluded from bequeathing her rights in respect of the property in her will. Therefore, even if the copy of Manana Paulina Tshabalala’s will was recognised as valid by a court, the applicants’ difficulty lies in the fact that the testator had already divested herself of her rights. Any subsequent purported cession by a cedent in respect of a right would

¹ Section 2(3) of the Wills Act 7 of 1953.

² This may be distinguished from cession *in securitatem debiti*. See *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA).

³ LAWSA ‘Cession’ Vol.3 3 ed at 171-174.

have no effect, and would not confer any rights on the second cessionary or cessionaries.⁴

The Conversion of Certain Rights into Leasehold or Ownership Act

[15] The Act came into operation on 1 January 1989. The intention of this legislation was to formalise and confer leasehold or full ownership upon the beneficiaries. This Act repealed R1036 regulations and made the provinces responsible for the transfer of the occupational rights granted by regulation 6 and 8 permits into a leasehold or ownership.

[16] The Act was amended in 1993 to provide, among other things, for the conversion of site permits (or other rights in land) into ownership where the affected site was situated in a formalised township – which the property in this case was. Section 4 of the Act provides for the Director-General to declare a person who has met certain requirements to have been granted ownership of the property concerned, and s 5 provides for a transfer of property into the name of such a person once a declaration has been made.

[17] Before a declaration can be made, however, the Director-General is required, under s 2 of the Act, to conduct an inquiry into the affected site and the identity of the occupier of the relevant site (in accordance with the records of the local authority). The section sets out in detail the inquiries to be made by the Director-General and the steps to be followed. What has to be established is the identity of the person who is entitled to a site and the rights that should be conferred on him or her. The section requires the Director-General to determine who to declare as the owner of the site in question, and transfer follows.

[18] The applicants contend that the first respondent and the late Fana Daniel Tshabalala obtained title to the property by fraudulent and unfair means in that they failed to disclose to the Department of Housing of the applicants' interest in the property.

⁴ Ibid.

[19] The first respondent avers that an inquiry was conducted by the Director-General in respect of the site. After that, a declaration was made by the Director-General in terms of s 4(1) of the Act. The property was subsequently transferred into the names of the first and second respondents in terms of s 5 of the Act, as is evidenced by the title deed.

[20] The applicants also contend that the late Fana Daniel Tshabalala stated in a letter that he never intended to own the property and that he did not know how his wife acquired joint ownership of the property. They further contend that he executed a will in which he bequeathed the property to his siblings and to the descendants of his predeceased siblings. The first respondent, being the surviving spouse of Fana Daniel Tshabalala, disputes the authenticity of the letter, as well as the purported will, which she states was never submitted to the Master of the High Court.

[21] The disputes of fact raised in this matter, if any, must be resolved in favour of the first and second respondents according to the rule in *Plascon-Evans* rule.

[22] In the result, I conclude that the applicants have not made out a case for the relief which they claimed.

Order

1. The application is dismissed with costs.

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 18 June 2019

Date of judgment: 28 June 2019

Appearances:

Counsel for the Applicant: Mr M Motaung

Instructing Attorneys: Legal Aid SA

Counsel for the 1st & 2nd Respondents: Mr Gladwell Ngqase

Instructing Attorneys: Ngqase Attorneys