SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

FLYNOTES: FAMILY HOUSES

Property law – Family house – Acquired under apartheid legislation – Right to occupy a family house – Personal and real rights – Customary and common law – Registration and title deeds – Property law to be developed – Constitution, s 25.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 6990/2022

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
Date: 24 / 05 / 2022

In the matter between:

SHOMANG, IRENE	**APPLICANT**
AND	
MOTSOSE, ISAAC N.O.	**FIRST RESPODENT**
THE DIRECTOR-GENERAL OF DEPARTMENT OF HUMAN SETTLEMENT, GAUTENG PROVINCE	**SECOND RESPONDENT**
THE MEC OF THE DEPARTMENT OF HUMAN SETTLEMENT, GAUTENG PROVINCE	**THIRD RESPONDENT**

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**FOURTH RESPONDENT**
THE REGISTRAR OF DEEDS: JOHANNESBURG	**FIFTH RESPONDENT**
THE MASTER OF THE HIGH COURT: JOHANNESBURG	**SIXTH RESPONDENT**

JUDGMENT

DU PLESSIS AJ

Background

[1] This case came before the court on the unopposed motion roll. The purpose of the application is to ask the court to direct the Registrar of Deeds to cancel a Title Deed currently registered in the name of the late Johannes Moloi, and to direct the Director-General of the Department of Human Settlement (Gauteng) and the MEC of the Department of Human Settlement (Gauteng) to conduct an inquiry to determine whose name should appear on the title deed of what is known as a “family home”.

[2] This case, although unique in its facts like every case that comes before the court, highlights a common problem: houses that, through a variety of laws in the early 1990s, were upgraded from leasehold or permits into ownership, requiring the name of a single family member to be entered onto title deeds, for a house that is regarded as a "family house". With the generation of the first titleholders dying, the reporting of deceased estates followed by inheritance laws, mostly interstate, conflicts emerge between individual owners and family members living in what they understand to be a collective family house. This notion of a family house is part of a broader legacy of apartheid's racially discriminatory spatial planning in the cities, as will be explained later.[1]

The parties

[3] The Applicant ("Ms Shomang") and the late Johannes Moloi ("Mr Moloi") entered into a family house rights agreement, in terms of which Ms Shomang

[1] Bolt M "Homeownership, Legal Administration, And The Uncertainties Of Inheritance In South Africa’s Townships: Apartheid’s Legal Shadows" 2021 (120) *African Affairs* 148.

nominated the deceased as the custodian of the family house title in respect of the property Erf [....] Naledi Township.

[4] The first respondent, Mr Isaac Motsose ("Mr Motsose"), is the executor of the estate of late Johannes Moloi, appointed so with the Letters of Authority issued in terms of section 18(3) of the Administration of Estates Act.[2]

[5] The second respondent, the Director-General of the Department of Human Settlement, Gauteng Province ("the DG"), is the officer responsible for housing matters in terms of the Conversion of Certain Rights into Leasehold or Ownership Act[3] ("Conversion Act") under the Gauteng Housing Act.[4]

[6] The third respondent, the MEC of the Department of Human Settlement, Gauteng Province ("the MEC"), is the executive person responsible in terms of the Conversion Act under the Gauteng Housing Act.

[7] The fourth respondent is the City of Johannesburg Metropolitan Municipality ("City of Johannesburg"), a municipality contemplated in section 2 of the Local Government, Municipal Systems Act.[5]

[8] The fifth respondent is the Registrar of Deeds, Johannesburg ("the Registrar"), responsible for the registration of the property in question.

[9] The sixth respondent is the Master of the High Court ("the Master"), Johannesburg, and responsible for overseeing the administration of the estate of late Johannes Moloi, in whose name the property in question is still registered.

[10] The judgment will refer to the parties by name for ease of reading.

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[2] 66 of 1965.
[3] 81 of 1998.
[4] 6 of 1998.
[5] 32 of 2000.

History of the property rights

[11] The property in question was designated for occupation by "Black People" in terms of the Apartheid Black (Urban Areas) Consolidation Act.[6] This precluded people classified as "black" in terms of the Population Registration Act[7] from owning properties in the urban areas and townships, ensuring that the occupation of black people in urban areas was only temporary.[8]

[12] Naledi township is situated in an area formerly declared a Black Affairs Administrative Area.[9] In terms of the Black Affairs Administrative Act,[10] the Blacks (Urban Areas) Consolidation Act[11] and its regulations.

[13] Because black people were not allowed to own property in urban township areas, the State issued permits, residential permits and certificates of occupation, granted in terms of the Regulations Governing the Control and supervision of an Urban Black Residential Area.[12] This regulation, also known as R1036, provided black people with either site permits (regulation 6, to erect a house with their own funds), residential permits (regulation 7, where people rented a dwelling from the local authority) or a certification of occupation (regulation 8, where a person bought a house from the local authority).

[14] These rights, however, were personal rights and were based on contractual rights stemming from agreements between an individual and the local authority. Not even the certification of occupation gave the holder a real right: it remained a contractual right of occupation enforceable only against the Council. The regulation

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[6] 25 of 1945. This Act was one of many Acts used by the Apartheid government to enforce the policy of spatial segregation. It interacted with, amongst others, the Group Areas Act 41 of 1950, the Prevention of Illegal Squatting Act 52 of 1951, the Physical Planning Act 88 of 1967.
[7] 21 1950.
[8] Pienaar JM *Land reform* (2014) 105.
[9] In terms of section 2(1)(a) of the Black Affairs Administrative Act 45 of 1971.
[10] 45 of 1971.
[11] 24 of 1945.
[12] GN R1036 of 14 June 1968, issued in terms of section 38(8)(a) of the Blacks (Urban Areas) Consolidation Act 25 of 1945.

also provided for what would happen to these permits in the case of the death of the permit or certificate holder.[13]

[15] The Black Communities Development Act[14] was amended in 1986 to provide for full ownership rights of black persons in urban areas. This required that the land be surveyed, and a general plan be registered. After that, a township register had to be opened in terms of section 46(4) of the Deeds Registries Act.[15] This was a cumbersome process, leading to only leaseholds being registered.

[16] The Conversion Act,[16] commencing on 1 January 1989, intended to formalise and confer leasehold or full ownership upon the beneficiaries. It repealed the R1036 regulations and made it the responsibility of the provinces to transfer occupational rights granted by regulations 6 and 8 permits into leasehold or ownership.[17]

[17] The Upgrading of Land Tenure Rights Act[18] (ULTRA) was promulgated to automatically convert all registered leaseholds into ownership when a Township Register was opened. The Registrar of Deeds endorsed these leaseholds into ownership free of charge.

[18] The national legislation should be read with sections 24A and 24B of the Gauteng Housing Act,[19] which gives the provincial department the authority to adjudicate on disputed cases that emerge from the transfer of residential properties. The Conversion Act empowers the MEC to ensure the transfer of residential properties to individuals determined to be lawful beneficiaries. Thus, the MEC must conduct an inquiry in disputed cases to determine who the lawful beneficiaries are.

[19] It is under these laws that Ms Shomang's late grandfather, Johannes Motaung ("Mr Motaung"), applied to the municipal council in Soweto for accommodation around 1960. The permit was approved, the house was allocated to him, and the

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[13] Regulation 17 and 15(7).
[14] 4 of 1984.
[15] 47 of 1937.
[16] 81 of 1988.
[17] *Khwashaba v Ratshitanga* [2016] ZAGPJHC 70 par 5.
[18] 112 of 1991.
[19] 6 of 1998.

family moved in. Ms Shomang's mother, and later she herself, resided with Mr Motaung in the house.

[20] Around 1979, Ms Shomang's mother moved out to reside with her partner, leaving Ms Shomang with her grandfather in the house. Around 1986, her grandfather married Ms Saralia Motaung ("Ms Motaung"), "who became my grandmother".[20] The children of Ms Motaung, Mr Paulus Moloi and Mr Johannes Moloi ("Mr Moloi") would visit from time to time.

[21] Mr Paulus Moloi went missing during a party celebrating the release of Nelson Mandela from prison in 1990 and has not been seen ever since. A month after his disappearance, Ms Shomang's grandfather died.

[22] After her grandfather's death, the residential permit was never transferred to a specific individual in the family. That was because the Conversion Act was implemented, and the issuing of the residential permits stopped.

[23] After her grandfather was buried, Mr Moloi moved into the property to reside with his mother and Ms Shomang. Ms Motaung died in 1994.

[24] In 1996, when Ms Shomang heard that the predecessors of the DG and the MEC were transferring ownership of the properties to qualifying beneficiaries, she lodged an application for ownership of the property at the Housing Transfer Bureau. Mr Moloi also lodged such a claim.

[25] Ms Shomang was invited to an inquiry in accordance with section 2 of the Conversation Act in 1997. In a meeting held on 11 June 1997, attended by Ms Shomang and Mr Moloi, the council's officials informed Ms Shomang that due to competing claims lodged, the council was compelled to adjudicate the claims.

[26] At the adjudication, Ms Shomang and Mr Moloi informed the officials that the house is a "family house", and that they intend to keep the property for the benefit of the family. They requested that the property be registered in both their names.

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[20] Applicant’s founding affidavit, par 5.10.

However, the officials rejected the request stating that they were not allowed to register the property in the name of more than one family member.

[27] Instead they were informed that a "Family House Rights Agreement" should be considered and the family must appoint a custodian of the title of the property on behalf of the family. The custodian would have a supervisory role over the property on behalf of the family and will not have sole ownership. This meant, Ms Shomang avers, that the rights to use and occupy the property remained within the direct family.

[28] Ms Shomang and Mr Moloi then concluded an agreement. They agreed that Mr Moloi would be appointed as custodian of the property. This is reflected in the adjudication judgment of 11 June 1997 that states that:

> The property be registered in the name of Johannes Moloi subject to Irene Shomang and her descendants being granted full rights of family to the property as per agreement annexed marked "A".

[29] The current title deed still indicates the owner as Johannes Moloi, with a registration date of 22 April 1998. The second endorsement listed is "Art 2 Wet 112/1991" (ULTRA) saying "NOU EIENDOMSREG".[21]

[30] Ms Shomang and Mr Moloi continued to occupy the property on this understanding until Mr Moloi passed away in 2003. Ms Shomang was appointed the executrix of his estate. She remained the only occupier of the property, along with her children. She lived peacefully in the house until 2016, when the Master of the High Court invited her for re-adjudication of the appointment as executor of Mr Moloi's estate.

[31] At this meeting she was informed for the first time that Mr Moloi had a child, Mr Isaac Motsose ("Mr Motsose"), the first respondent. The Master ruled that Mr Motsose is the lawful child of Mr Moloi, and appointed him executor of Mr Moloi's estate.

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[21] “Now ownership rights.”

[32] Once appointed the executor, Mr Motsose threatened Ms Shomang with eviction, arguing that he is now the sole owner of the property. She also suspects that he wants to alienate the property for his own gain. Mr Motsose has never resided in the property.

[33] This prompted Ms Shomang and two family members[22] to approach the offices of the DG on 25 May 2016, after which the DG investigated the matter and compiled a report. The report stated:

> [o]ur records indicate that this property is subject to a family rights agreement. This family rights agreement was imposed by adjudication judgment dated 29th April 2016 […]. We further confirm that the original registered title holder i.e. Johannes Moloi was appointed as custodian of the property on behalf of the family, and he is thus a custodian.
>
> The Department of Housing acknowledges the following:
>
> 1. The Department of housing acknowledges the error of not noting a family rights over the property and not registering same against the title deed.
>
> 2. The department of housing will as soon as processes allow register these rights in favour of the Shomang family members mentioned above.
>
> 3. To protect the family rights and property by noting a caveat over the property.
>
> We therefore recommend as follows:
>
> 1. That the Department of Housing note a caveat against the property to protect it against any alienation now and in the future.

[22] Listed as Lehlohonolo Perterson Shomang and Neo Shomang.

2. That the family rights protection in the form of a usufruct be registered against the property once such a process is undertaken.

3. That the relevant attorneys be instructed accordingly to undertake the above instructions.

[34] This report indicates that the transfer and registration of the property in the name of Mr Moloi is subject to an agreement entered into between Mr Moloi and Ms Shomang, intended to give them equal rights over the property. The DG also admits the error of not registering the right of Ms Shomang over the property. They proceeded by noting a caveat against the property to protect it against any alienation now and in the future and to register a family rights protection in the form of a usufruct be registered against the property once the process is undertaken.

[35] Mr Motsose's threat of eviction, Ms Shomang avers, is "contrary to the duties of the custodian of the family house". This, Ms Shomang says, goes against his duty as custodian, "to resume the same duties as the deceased". Therefore, he cannot be entrusted with the responsibility of being the custodian of the family house rights title.

[36] She approached the court asking for the following orders:

i) to set aside an adjudication judgment of 11 June 1997;

ii) to direct the Registrar of Deeds, Johannesburg, in terms of section 6 of the Deeds Registries Act 47 of 1937, to cancel the existing title deed T[....], currently still registered in the name of the late Johannes Moloi within 60 days, failing which the second and third respondent are directed to award ownership of the property to the applicant.

iii) That ownership of the property revert back to the City of Johannesburg Metropolitan Municipality;

iv) That the DG and/or the MEC, as soon as possible after prayer 1 and 2 have been effected, hold an inquiry in terms of Section 2 of the Conversation

of Certain Rights into Leasehold or Ownership Act 81 of 1988 as amended,[23] for purposes of conferring ownership of property, or in the alternative that a caveat be noted against the property to protect the property against any future alienation;

v) That Mr Motsose be ordered to refrain from threatening to evict Ms Shomang and all those that occupy the property through her.

vi) Further and/or alternative relieve.

The purpose of the Conversation Act and the Upgrading of Land Tenure Rights Act

[37] In *Phasha v Southern Metropolitan Council of Johannesburg*[24] Satchwell J afforded a generous and purposive interpretation to the Conversion Act, that gave the DG a wide discretion concerning agreements or transactions and the impact of such agreements on decisions of ownership rights.

[38] In *Nzimande v Nzimande*[25] the court stated that the content of the right relied upon by the person claiming the right must be determined before the DG can pronounce on its legality. The court further re-iterated that "[t]he content of this right is really the values and practices the right is designed to support".[26]

[39] In *Maimela v Maimela*[27] it was clarified that the Conversion Act (as amended in 1993) intended to formalise and confer leasehold or full ownership upon beneficiaries. Section 2 required that an inquiry be conducted before leasehold rights and ownership were granted. Section 4 then provides the Director-General to declare a person who met certain requirements to be granted ownership. Section 5 provides for the transfer of property into the name of such a person once the declaration has been made. In *Khwashaba v Ratshitanga*[28] it was stated that such

[23] *Maimela v Maimela* [2017] ZAGPJHC 366, par 8.
[24] [2000] 1 All SA 451 (W).
[25] [2004] JOL 13167 (W).
[26] Par 56.
[27] [2017] ZAGPJHC 366
[28] [2016] ZAGPJHC 70.

family agreements restrict the rights of owners. The court said that ULTRA and the Conversion Act must be read together to give contextual meaning to consider the occupational rights of occupiers.[29]

[40] The ULTRA conversion process has also been the focus of the *Rahube* judgment, where the Constitutional Court set out the process in detail.[30] *Rahube* dealt with situations where certain permits were automatically upgraded, and the discriminating effect it had on women, as the manner in which property rights were held by African people were distorted in favour of men under apartheid.[31] It noted that the purpose of the Act is to redress the injustices caused by the colonial and apartheid regimes.[32] Thus, the mischief that the Act wants to rectify is to provide for recognition and security of tenure rights that had previously been ignored or systematically devalued.[33] Read with section 25(5) of the Constitution that obliges the state to take reasonable legislative and other measures, within available resources, to foster conditions to enable citizens to gain access to land on an equitable basis, the court made it clear that "[t]he quest to enable citizens to equitably access land must include attempts to strengthen rights in land that were previously held, such as the informal right that the applicant holds through her lengthy occupation of the property in question".[34]

[41] Thus, the Conversion Act read with ULTRA was meant to improve the precarious tenure position of black persons caused by apartheid laws. It, therefore, focussed on the occupational rights of occupiers.[35] The fact that Ms Shomang had to approach the court to help protect her right in the family property indicates that property rights of occupiers of family homes still has precarious rights, as the rights in terms of which they occupy the property is at odds with the registered property rights of a single individual owner, with all these rights viewed through the lens of the common law.

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[29] Par 25.
[30] *Rahube v Rahube* [2018] ZACC 42.
[31] Par 28.
[32] Par 38.
[33] Par 51.
[34] Par 49.
[35] *Khwashaba v Ratshitanga* [2016] ZAGPJHC 70 par 25.

The history and characteristics of "family homes"

[42] One of the features of apartheid urban South Africa was black townships, where black people were conferred rights to stay in the urban areas on similar terms to that of Ms Shomang's grandfather – with a permit to reside. This property right depended on the State and its administrative machinery for conferral and protection. These permits allowed families to stay in urban areas, in what is called "family homes" that reflected the understanding of the collective rural home.[36]

[43] What sets it apart from what is traditionally understood as the realm of customary law in rural areas is that formal title deeds exist in the urban areas, and there is no chiefly control.[37] Families with freehold titles customise the titles to fit with family norms, as is evident in the agreement between Ms Shomang and Mr Moloi, rather than attempting to comply with legal prescripts.

[44] It was possible to pass down these permits through the administrative system. However, due to a lack of administrative capacity, these homes were often held within the families without undergoing such a process. Then, from the late 1980s, it became possible through the various legislative instruments mentioned earlier to "upgrade" these rights to leasehold or ownership,[38] typically by registering the property in the name of an individual nominee (the "custodian") that then became the registered owner of the "family house".[39]

[45] In many instances, the link between the dead, the living and the unborn is also stark. Many people do not report deceased estates or transfer the property in the living generation's name because the house belongs to the lineage, connecting the generations.[40]

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[36] Bolt M "Homeownership, Legal Administration, And The Uncertainties Of Inheritance In South Africa's Townships: Apartheid's Legal Shadows" 2021 (120) *African Affairs* 225.
[37] Kingwill R "[En] gendering the norms of customary inheritance in Botswana and South Africa" 2016 (48) *The Journal of Legal Pluralism and Unofficial Law* 214.
[38] In terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 and the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA).
[39] *Rahube v Rahube* [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC).
[40] See in general the doctoral thesis of Kingwill, R.A., 2013. *The map is not the territory: law and custom in 'African freehold': a South African case stud*y dealing with these issues extensively.

[46] The concept of "family homes" and the property rights that they confer on the people living in them is thus a common occurrence and yet is invisible to the "formal laws" of South Africa. Formally, the registered owner is conferred rights that bestow on them the normal entitlements of ownership in terms of the common law, including alienating the property at will. This sometimes leads to great conflicts as this goes against the norms that underlie the idea of a "family home", as is visible in this case.

[47] Family homes govern a family's relation to immovable property. It is based on the principle that the person in control of the property ("custodian" or "caretaker") has a collective kin-based obligation to preserve the property. By implication, then, kin members ability to alienate the property is limited by their obligations. Moreover, it is not always possible for people on the outside to determine who the custodian of the property is. It is undoubtedly more complicated than fixating on the individual titleholder whose name is written on the title deed.[41]

[48] The custodian's duty rests on the relationship of the family to the property, not just the present-day family but also the ancestors.[42] This, however, usually happens outside the realm of the law, leading to a disjoint between registration, tenure and succession rights.

[49] The family house is held and "informally[43]" transmitted through the family (as opposed to individuals). These family members include male and female members, past, present and future – related in most cases in South Africa through the male line of descent (patrilineage).[44] While the property passes through a patrilineage, both sons and daughters inherit patrilineal family membership.

[50] Patrilineal does not necessarily equate to patriarchal, and where it does, the Constitution requires us to do away with such gender discrimination. But just

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[41] Kingwill R "[En] gendering the norms of customary inheritance in Botswana and South Africa" 2016 (48) *The Journal of Legal Pluralism and Unofficial Law* 215.
[42] Bolt M and Masha T "Recognising the family house: a problem of urban custom in South Africa" 2019 (35) *South African Journal on Human Rights* 166.
[43] The term "informal" might evoke the idea that the system is disorganised, despite evidence that these systems are often complex, well-organised systems with rules and procedures. The use of the word informal therefore does not suggest a free-for-all situation, but rather customs or rules that are not recognised by the common law property system.
[44] Hornby D, Kingwill R, Royston L and Cousins B *Untitled: securing land tenure in urban and rural South Africa* (2017) 78.

because property devolves in the male lineage does not *per se* make it a gender-discriminatory practice, as Ngcobo J's minority judgment discussed below, warned in *Bhe v Khayelitsha Magistrate*.[45]

[51] Replacing customary law of succession and inheritance with common law intestate succession means a clash of norms, as is evident in this case. In this case, bureaucrats tried to navigate between the two different normative worlds to ensure family members' access to the property: one where formal law requires an individual title, which bestows the owner with sole rights of *inter alia* alienation of property, and upon their death, devolving to the rightful heirs in terms of intestate succession. And another, whereas family house is not understood as "property" in the common-law sense. It is also not "inherited" in the way movable property is but is rather based on the succession of the duties and responsibilities of the custodian of the house – which is why often the property remains registered in the name of the deceased.[46]

[52] Since the Deeds Registration Act[47] does not recognise family house rights, it leaves people with only bureaucratic protection but no formal legal protection. As long as the rights are thus adjudicated in the realm of the bureaucracy, they are protected. However, as soon as they enter a court of law, the common law kicks in, leaving them venerable of their rights in the family property not being protected.[48]

[53] Therefore, on a narrow understanding, the property in question has an individual owner whose name is registered on a title deed in the deed's office.[49] On the death of the title holder, the home will either go to the person bequeathed in a will or devolve instate as in this case. In this case to an unknown heir who never occupied the family home, nor have any connections to it outside the common law.

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[45] *[2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).*
[46] Kingwill R "[En] gendering the norms of customary inheritance in Botswana and South Africa" 2016 (48) *The Journal of Legal Pluralism and Unofficial Law* 211, Bolt M "Homeownership, Legal Administration, And The Uncertainties Of Inheritance In South Africa's Townships: Apartheid's Legal Shadows" 2021 (120) *African Affairs* 160.
[47] 47 of 1937.
[48] See Hlongwane v Moshoaliba [2018] ZAGPJHC 114.
[49] See *Hlongwane v Moshoaliba* [2018] ZAGPJHC 114 discussed below.

[54] All this interacts with inheritance law. In estates less than R250 000, the Master appoints a family representative by issuing a "Letter of Authority",[50] allowing them to take control and distribute the assets and take them out of the purview of the Master's oversight.

[55] The question then is, how does one resolve these conflicting norms: the customary law norms that underlie the idea of a "family home" and the common law norms of ownership being restricted to a private individual whose name is entered in a title deed, as expressed in the legislation? Case law can provide some guidance in the matter.

[56] An important starting point is that customary law must be understood in its own framework, not through the common law lens. The was already the warning from the Constitutional Court in *Alexkor Ltd v Richtersveld Community*.[51] It asked that the nature and content of rights in property held based on customary law be determined with reference to customary law, and not with reference to common law.[52] The court makes it clear that customary law is an integral part of our law and that, like all law, it depends on the Constitution for its ultimate force and validity. In other words, whether it is valid or not does not depend on the common law – it depends on the Constitution. And courts are, in terms of section 211(3) of the Constitution, obliged to apply customary law when it is applicable. In doing so, the court must have regard to the spirit, purport, and objects of the Bill of Rights.

[57] This means that the Constitution acknowledges the distinctiveness of customary law as an independent source of norms within the legal system. Of course, *Alexkor* also speaks of the difficulty of applying customary law: it is not written, but rather a system of law known to the community, practised and passed on. A system with its own values and norms. And it will continue to evolve, as we have also seen in the case of family homes in an urban setting, and it will have to do so within the framework of the values and norms of the Constitution. These

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[50] Section 18(3) of the Administration of Estates Act 66 of 1965.
[51] [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC).
[52] Par 50.

principles have also been confirmed by the Supreme Court of Appeal recently in *Gongqose v Minister of Agriculture, Forestry & Fisheries; Gongqose v S.*[53]

[58] Ngcobo J's dissenting judgment in *Bhe v Khayelitsha Magistrate*[54] touched on the issue of the intersection between family homes and intestate succession. His concern was that intestate succession might distort the concept of a family home.[55] Referring to the report of the Law Commission, he highlights the reasons why the institution of family property should be preserved. If family property devolves in terms of the rules of common law, family members may be left without a home and livelihood.[56] Both customary law and the Intestate Succession Act should therefore apply, subject to fairness, justice, and equity requirements. To achieve that, the Law Commission recommended that the institution of family property be preserved. It further recommended that in appropriate circumstances, an enquiry should be made (by the Magistrate Court), having regard to the best interest of the family and the equality of spouses in marriages. He concludes by saying that[57]

> It seems to me therefore that the answer lies somewhere other than in the application of the Intestate Succession Act only. It lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. The choice of law mechanism must be informed by the need to: (a) respect the right of communities to observe cultures and customs which they hold dear; (b) preserve indigenous law subject to the Constitution; and (c) protect vulnerable members of the family. Indigenous law is part of our law. It must therefore be respected and accorded a place in our legal system. It must not be allowed to stagnate as in the past or disappear.

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[53] [2018] ZASCA 87.
[54] [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).
[55] Par 231.
[56] Par 232, quoting Allen J "Balancing justice and social unity: political theory and the idea of a truth and reconciliation commission" 1999 (49) *U. Toronto LJ* .
[57] Par 236

[59] In *Rahube v Rahube,*[58] a case mentioned earlier, a brother wanted to evict his sister from the family home based on the argument that he was the titleholder of the house. In this case, the Constitutional Court held that section 2(1) of the Upgrading of Land Tenure Rights Act[59] is constitutionally invalid, as it *automatically* converted holders of land tenure rights into owners of the property without affording affected parties proper notice or opportunity to make submissions. *Rahube* differs from this case insofar Ms Shomang did have an opportunity to make a submission before the property registration in the name of Mr Moloi. The applicant also did not make an argument based on the upgrade to ownership in terms of ULTRA, on similar grounds as put forth in *Rahube*, but similar arguments can be made that automatic upgrades to title did not acknowledge the idea of a family home.

[60] Thus, if we take serious the place of customary law in the Constitution as a source of law in its own right, it requires that we deal with it on its own terms, and not through the lens of common law. It also requires that we accept the fluidity of customary law and that the way it adapts to modern living means that it is also prevalent in urban areas as practised by people living in terms of it.[60] The law needs to respond to it by recognising it for what it is.

[61] One way of doing it is to recognise that the right to occupy a family house is a right in property that deserves protection. The characteristics of such a house were extensively dealt with above, and rest mostly on the strong focus on kindship that links to the understanding that the property itself is also more than a commodity that can be traded and inherited. When these two characteristics meet, the property stands separate from the living members. It is a collective good whose value as a place connecting kinship across generations is bigger than the value it can fetch in the market by a person whose name happens to be on the title deed. That does not mean that it can never be alienated, but it cannot be alienated by the sole decision of the person listed on the title deed.

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[58] [2018] ZACC 42.
[59] 112 of 1991.
[60] *Bhe v Khayelitsha Magistrate* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) par 236.

[62] A discussion of the case of *Hlongwane v Moshoaliba,*[61] a full bench of the Gauteng Division of the High Court, is necessary here. The case dealt with a situation where the family members also had an agreement that the property would be family property but that the property would be registered in the name of the oldest brother as "custodian" of the property. Unlike in the case of Ms Shomang, they were advised that the four of them qualified to be joint owners, but the sisters declined. Instead, they decided that it should be registered in the brother's name. (On these facts alone, the case is distinguishable from the one this court is dealing with).

[63] After a family fight, the brother left the family house. Unbeknownst to the family members still occupying the house, he sold it to a third party (Ms Moshoaliba, the first respondent). In other words, the property was already alienated to someone *outside* of the family in whose name the property was registered.

[64] The court was faced with a situation where third parties (the public) had to be able to rely on the title deed to inform them whether the person may transact in the alienation of such property.[62] It is distinguishable from the case at hand as there was *already* a transfer to a third party, which is why the court spent a considerable amount of time discussing the abstract theory of ownership that does not require a *iusta causa* for the transfer.[63]

[65] The court indicated that "there is no evidence that the first respondent was aware of the agreement [that the property was to be the family house] or that it had been brought to her attention before purchasing the property. The agreement was also not registered in the title deed to make the public aware of the restriction on the property."[64] This would suggest that such an endorsement or agreement, while it might not have a *legal* effect in the sense that it bestows the same rights that an individual registered owner might have in property on the holders of a right in the family property, it does fulfil the function of *publicity*. It informs third parties that might want to acquire the property that different rules apply to its alienation.

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[61] [2018] ZAGPJHC 114.
[62] Par 37.
[63] The court relied heavily on *Legator McKenna Inc v Shea* 2010 (1) SA 35.
[64] Par 51.

[66] I am mindful of the vital publicity function that registration plays in South African law.[65] For this reason, section 16 of the Deeds Registries Act[66] provides for the transfer of ownership through conveyancing. The bulk of the focus is on individual land rights on the conveyancing of real rights. Worth a mention is that the Communal Land Rights Act[67] (declared unconstitutional[68]) provided for an amendment to section 16 by inserting 16C to provide for the registration of new order rights of communal land rights. This would have made provision for the registration of communal land rights that could not be disposed of without a written resolution of the community, nor be alienated to a person who is not a member of the community without first offering to family members, members of the community or the State. Therefore, it is not inconceivable for rights held in property in terms of customary law norms to be accommodated in the deed's registry system.

[67] The court in *Hlongwane* found that such a "family house rights agreement" is nothing but a personal arrangement between the siblings. It does not elevate the arrangement above the real right of ownership in the immovable property that is registered through the transfer process. I understand that I am bound by this rule as far as the agreement is concerned. However, I think, taking into account the transformative ideals of the Constitution[69] and the right of security of tenure (s 25(6)), that in the *Hlongwane* case, the siblings, and that in this case, Ms Shomang, are entitled to, a different interpretation is possible.

[68] If I only consider the common law, it means that when the estate is finalised, the property will be transferred to Mr Motsose and he will be the common law owner. His claim to the property would be preferred because he is the registered owner. This property right will then stand in tension with the property right of Ms Shomang, namely the right to the family home, an unregistered property right.

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[65] A good historical overview can be found in Muller G, Brits R, Boggendpoel Z-Z and Pienaar J *Silberberg and Schoeman's the law of Property* 6th ed (2019) pp 225 – 229.
[66] 47 of 1937.
[67] 11 of 2004.
[68] *Tongoane v National Minister for Agriculture and Land* Affairs [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC).
[69] Langa JP "Transformative constitutionalism" 2006 (17) *Stellenbosch Law Review* .

[69] But understanding customary law within its own framework and the duty of property law to transform, section 39(2) of the Constitution obliges a court, when interpreting legislation, and when developing the common law or customary, to promote the spirit, purport and objects of the Bill of Rights.

[70] Dealing with the transformation of property law, as required by the Constitution, Froneman J gave guidance in *Daniels v Scribante*[70] by stating that

> the absolutisation of ownership and property and the hierarchy of rights it spawned did not fulfil the purpose of founding political and economic freedom in South Africa.

[71] He referred to the work of the late Professor André van der Walt. The latter postulated that traditional notions of property do not suffice in a transformation context.[71] It should also be understood in the history of land rights in South Africa. The South African system of land rights always privileged the institution of ownership. The implication is that there is a hierarchy of rights: with ownership at the top of the hierarchy, followed by real rights (in this case, registered rights), and at the bottom any personal rights (in this case, the agreement between Ms Shomang and Mr Moloi). This hierarchy then determines how conflicts will be resolved: ownership (registered) will always trump any other rights unless a registered real right limits it or it is limited by legislation. There is no reference to the context or the people's circumstances.[72] It does not take into account that the rights of black people living in these family homes was precarious and dependent on the mercy of the State and its administrative processes during apartheid. These rights could never stand up against the rights of owners.

[72] Apartheid land laws were designed to uphold this privilege. The land rights of black people were almost always deficient because they were personal rights, and the land rights of white people were almost always privileged.[73] The common law property system supported this because the common law land rights of white people

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[70] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).
[71] Van der Walt AJ *Property in the Margins* (2009)16.
[72] Van der Walt AJ *Property in the Margins* (2009) 27.
[73] Van der Walt A "Property rights and hierarchies of power: a critical evaluation of land-reform policy in South Africa" 1999 (64) *Koers-Bulletin for Christian Scholarship* 262.

were protected in terms of the ownership paradigm. In contrast, the land rights of black people were left with the precarious system of statutory rights,[74] often unrecognised and unprotected.[75] Property rights were abstracted from the context and contested in an abstract space, purporting to be devoid of normative values.

[73] The ownership model is an inflexible system that does not allow for alternative models of holding land, especially not the social tenures that operate outside this formal system.[76] For property law to transform, what is needed is a fragmentation of land rights, not by abolishing ownership but by developing a more comprehensive range of rights, such as a property right in a family home, that can sometimes trump ownership. It is not simply a process of making more people common law owners, but it requires that we give effect to other rights in property too. This needs to be flexible and context-sensitive and allow for the creation of new rights and the adaptability of existing rights to new situations.[77] If these structural inequalities in the property system are not addressed, transformation will be impossible, and our constitutional ideals not be attained.

[74] In a sense, this is what happens in the bureaucratic processes. Administrative traces indicate agreements and understanding between family members who knew and trusted one another enough not to have to turn their normative understanding about a "family home" into the language of the formal law. It relied on the administrative system itself and the practices of the officials that give greater recognition to the people's conceptions of the family home than what the law does.[78]

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[74] Black land rights were restricted to communal land tenure in “traditional” areas, statutory land rights such as sit permits, residential permits, lodger’s permits, hostel permits of certificates of occupation. Black rights were not very secure, as their existence was dependent on the government, and they were not regarded as secure enough to be used as surety for bank loans. Some of the legislation (this is not the complete list), included the following: Group Areas Act 77 of 1957;Group Areas Act 36 of 1966;Black Administration Act 38 of 1927;Prevention of Illegal Squatting Act 52 of 1951;Native (Urban Areas) Act 23 of 1920;Natives (Urban Areas) Consolitation Act 25 of 1936;Tresspass Act of 1959;Black Local Authorities Act of 1982.

[75] Van der Walt A "Property rights and hierarchies of power: a critical evaluation of land-reform policy in South Africa" 1999 (64) *Koers-Bulletin for Christian Scholarship* 262.

[76] Kingwill et al Untitled 391.

[77] Van der Walt A "Property rights and hierarchies of power: a critical evaluation of land-reform policy in South Africa" 1999 (64) *Koers-Bulletin for Christian Scholarship* 269.

[78] Bolt M and Masha T "Recognising the family house: a problem of urban custom in South Africa" 2019 (35) *South African Journal on Human Rights* 164.

[75] Ms Shomang's record-keeping, her reliance on an administrative system to assert her rights as far as she can, and the fact that she and Mr Moloi concluded an agreement, giving words to the family home arrangement, bolsters her case. It is clear that the Department of Human Settlements attempted to recognise the customary understanding of property rights in these family homes, but this is not enough to stand up in a court of law without developing property law.

[76] Of course, it can also be argued that in the absence of that agreement being registered, it does not confer on Ms Shomang any *real* rights (such as *usus*). But that still would be to try and understand these rights through the prism of common law.

[77] When Ms Shomang had the "Letter of Authority", she simply kept on living in the family home without distributing the asset because there was no dispute about her and the occupants' rights in the house. Should she have wished to register it, there simply is no category of "family house" in the Deeds Registries Act.[79] Customary law is still subordinate to common law, despite the various rulings of the Constitutional Court to recognise it.[80]

[78] To give effect to the Constitution and its transformative imperatives, it requires that property law develops. The situation of family members living in a family house without their tenure rights being secured goes against the aims of the Constitution in section 25(5) and arguably also section 25(6). It needs urgent addressing. The main duty rests on the legislature in terms of section 25(6). However, the Constitution binds all of us: judges, citizens, officials and family members living in a family houses.

Remedies

[79] This interplay between common law and customary law pertaining to family houses in urban settings leaves the question: what are the remedies. The applicant's prayers on this matter are set out at the beginning of this judgment. In *Kuzwayo v*

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[79] 47 of 1937.
[80] Claassens A "Recent Changes in Women's Land Rights and Contested Customary Law in S outh A frica" 2013 (13) *Journal of agrarian change* 75

Estate late Masilela[81] the Supreme Court of Appeal stated that the section 2 inquiry is the legal remedy applicable where the property is transferred to an individual without taking account of the entitlement of other occupiers of the property in question.

[80] The problem is, in this case, there *was* such an inquiry that did find that the applicant has a right to the family home but that the property should only be registered in the name of Mr Moloi. There is an agreement to indicate that he is regarded as a custodian of the family home, and that the title deed should indicate that this is family property. This was confirmed by the letter from the DG in 2016. Such a right to family property trumps the right of the common law owner, Mr Motsose, who is not an innocent third party but someone who is aware of the arrangement.

[81] Ms Shomang asked for an order to make it possible to continue with the family home – to cancel the transfer to Mr Moloi and for the DG and MEC to reconsider whose name should be entered on the title deed. The officials navigating this section 2 inquiry will have to navigate through customary law norms, which, for now, must be translated into common law legal title that is registrable in the Deeds Registrar Act, with a clear endorsement on the title deed that it is a family home.

ORDER

[82] Therefore, I am granting the following orders.

1. It is declared in terms of the letter from the Director of Gauteng Housing Department of Local Government and Housing Assets Disposal and Regulation Directorate dated 25 May 2016, that the property known as ERF [....] held in Title Deed No: T[....] is subject to a family rights agreement imposed by adjudication judgment dated 29 April 2016.

2. The Fifth respondent is ordered to transfer the property held in the Title Deed No: T[....], which holds property known as ERF [....], Naledi Township

[81] (2010) ZASCA 167.

Gauteng Province, currently registered in the name of Johannes Moloi, in the name of Irene Shomang (6607110478084), as custodian of the family house, with a caveat on the title deed that it is a family house.

3. The first respondent is interdicted from passing ownership, selling, or encumbering the property known as ERF [....] whatsoever until such time as the property has been transferred into the name of Ms Irene Shomang.

WJ du Plessis
Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Ms Dhingange
Instructed by:	Phuti Manamela Inc Attorneys
Counsel for the respondent:	Unopposed
Instructed by:	Unoppsed
Date of the hearing:	29 April 2022
Date of judgment:	24 May 2022