

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH**

**Case no: 2361/2010
Date heard: 26.5.2011
Date delivered: 8.11.2011**

In the matter between:

LORNA NOYOSE FIFANE

First applicant

NCUMISA KHUTSENE

Second applicant

WENDY RAMTHE

Third applicant

MONDE NDLALENI

Fourth applicant

PHINDIWE NDLALENI

Fifth applicant

NOBALINDI MSHUMPELA

Sixth applicant

MNIKELO NDLALENI

Seventh applicant

NTUTHUZELO NDLALENI

Eighth applicant

VUYELWA FIFANE

Ninth applicant

vs

SIMPHIWE FIFANE

First respondent

NELSON MANDELA BAY MUNICIPALITY

Second respondent

THE REGISTRAR OF DEEDS

Third respondent

BOQWANA LOON AND CONNELLAN INC

Fourth respondent

JUDGMENT

TSHIKI J:

A) INTRODUCTION

[1] First applicant is one of the children and the daughter of the late Lettie Nomva Fifane who died on the 8th February 1989. I will refer to Lettie Nomva Fifane as the deceased. The deceased also had two other female children Lulama and

Nondumiso also known as Patricia. Both Nondumiso and Lulama have since deceased but had their own children and grandchildren. Nondumiso had one child, a son Phumzile Justice Fifane whom I shall hereinafter refer to as Phumzile. Phumzile died on the 24th January 2005, leaving one child the first respondent herein.

[2] During her lifetime the deceased was the occupant and resident of the house situate at Stand no 210205, 14 Molefe Street, New Brighton, Port Elizabeth under the then called 99 year lease. I shall refer to the stand as the property. The 99 year lease was only available to Black occupants of houses in the townships in South Africa. In terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (the Act), the houses in the townships which were held in terms of the 99 year lease could be converted into ownership by those who occupy them and upon a satisfaction of certain conditions.

[3] The first applicant is the only surviving child of the deceased.

[4] It is common cause that the property in question was subsequently bought by Nondumiso from the Port Elizabeth Municipality, the Nelson Mandela Bay Municipality referred to as the second respondent. It is not clear under what circumstances was the property sold by the second respondent to Nondumiso. It is common cause that on 21 November 1995, Nomalungelo Mavis Sandlana, Lulama Muldred Ndlaleni and Nondumiso Patricia Fifane approached the office of the Master of the High Court with a view to report the death of the deceased. A record of the proceedings which reveals the purpose of their visit is annexed to the proceedings on page 52. First applicant was not present though she was one of the heirs of the

deceased. Those who attended requested that the property be given to Nondumiso who is referred in the record as Patricia. They were advised that nothing could be decided without the presence of the other members of the family including the first applicant herein. What next happened is that the property was bought by Nondumiso.

[5] Before I deal with the first respondent's version, I must voice my displeasure in the manner in which the applicants' papers are drawn and presented. This has been done in a poor and undesirable fashion to the extent that it is clear that they were never checked after they had been typed and before they were filed in Court. Attorneys or counsel who present slovenly drafted papers for their clients in that fashion should not be allowed to charge their clients for such work. Paragraph 2.4 of the Notice of Motion proves the careless manner in which the applicants' case has been presented. Details of the contents of para 2.4 will be mentioned later in this judgment. Annexures are not given numbers for easy identification for instance the document on page 52 of the record.

[6] I now deal with the first respondent's version. He states that the property in issue is registered in the name of his grandmother Nondumiso Patricia Fifane and this was done in 1999. The late Nondumiso was in fact given a title deed to the property. First respondent has been residing in the said property since birth. Apparently after the death of his grandmother, first applicant came to stay with him in the same property. After the death of his grandmother Nondumiso, the Fifane family started to fight for the ownership and/or possession of the said property. In 2006, he was appointed by the Master of the High Court as the estate representative of both

his late mother and his late father's estates. His father Phumzile died on 24th January 2005. When he received the papers of the proceedings in this case the property was in the process of being transferred into his name as the heir of his late father who would have inherited from Nondumiso. The transfer was to be effected by the attorneys who are the fourth respondents herein.

[7] He denies that the property belonged to the estate of the deceased. He further denied that the applicants are legally entitled to inherit the said property. According to him, applicants are not entitled to get the orders sought herein. It is apparent from annexures SF4 and SF5, that Nondumiso pre-deceased her son Phumzile Justice Fifane. According to the annexures Nondumiso died on 23 August 2004 whereas Phumzile died on 24 January 2005. The two annexures SF4 and SF5 are letters of authority appointing the first respondent as the estate representative of the estates of the late Nondumiso and Phumzile. Both letter of authority which reflect the dates of death of both deceased persons.

[8] I gather from the papers that there has been no winding up of the estate of the late Nondumiso and it does not appear that there is a liquidation and distribution account. For that reason, the estate of the late Nondumiso, the owner of the property, should have been joined in these proceedings duly represented by its estate representative. There is no such joinder and that first respondent has been cited herein only in his personal capacity.

[9] During argument of this application, Mr M.W. Nobathana appeared for the applicants and Mr V. Naidu represented the first respondent. There was no

appearance for the other respondents who did not oppose the application.

B) DID THE PROPERTY FORM PART OF DECEASED ESTATE?

[10] I agree with Mr Naidu that the relevant Act in terms of which the property would have been converted to ownership on behalf of the deceased is the Conversion of Certain Rights Into Leasehold or Ownership Act 81 of 1988 (the Act). The Act came into force in January 1989. The Act that has been cited by Mr Nobathana does not apply herein especially when one has regard to the fact that when the Upgrading of Land Tenure Right Act 112 of 1991, the Act cited by applicant, came into force after the deceased had already died.

[11] Section 2 of the Act provides:

- “(1) The Director-General shall conduct an inquiry in the prescribed manner in respect of affected sites within his province in order to determine who shall be declared to have been granted a right of leasehold or in the case where the affected sites are situate in a formalised township for which a township register has been opened, ownership with regard to such sites
- (2) ...
- (3) ...
- (4) At the conclusion of the inquiry and after having considered any relevant claim or objection, the Director-General shall, if he is satisfied that the person concerned is, subject to the provisions of subsection (3), in respect of the site concerned –
 - (a) the holder of a site permit, certificate or trading site permits; or
 - (b) the holder of rights which in the opinion of the Director-General are similar to the rights of the holder of a site permit, certificate or trading site permit,
 determine whom he intends to declare to have been granted a right of leasehold or, in the case where the site is situate in a formalised township for which a township register has been opened, ownership in

respect of the site concerned.”

[12] I have no doubt that given the circumstances of the deceased, had she applied, she would have been granted ownership of the property. Unfortunately, there was no such determination by the Director-General as contemplated in the Act. The deceased was therefore not the owner of the property when she died and therefore the property could never have formed part of the deceased’s estate.

[13] The enquiry could also have been conducted even after the deceased death to determine who of her children should be the owner of the property in terms of the intestate succession. (***Nzimande v Nzimande and another (2004) JOL 13167 (W)***).

[14] Instead of the determination by the Director-General in terms of the Act the second respondent decided to sell the property to Nondumiso which sale was effected for reasons not clear in the applicant’s papers.

C) ISSUES

[15] The issues herein are whether or not this Court has the right to interfere by way of reviewing the second respondent’s decision to sell the property to Nondumiso. Further, whether this Court can, at this stage, have the power to review and set aside the decision of the second respondent in selling the property to Nondumiso. And lastly, whether the Court should direct the sixth respondent to register the property in the name of first respondent and the applicants.

[16] My earlier decision that the property was never owned by the deceased answers all the questions posed above in the negative. Paragraph 2.4 of the Notice of Motion is vague and does not make sense. It does not indicate in what capacity is the person referred to therein appointed. It is termed as follows:

“2.4 Reviewing and setting aside the decision of the second respondent appointing the second respondent of which it granted of Erf 2102 Ibhayi, Division of Port Elizabeth, situate at 14 Molefe Street, New Brighton, Port Elizabeth to Nondumiso Fifane, in terms of the upgrading of Land Tenure Rights Act, 1991 (Act 112 of 1992) and directing the sixth respondent to register the property in the name of the first respondent and applicants.”

[17] In my view the whole sentence does not make sense and in any event even if it was, and assuming that it meant to ask the Court to direct this Court to review and set aside the second respondent's decision to sell the property to Nondumiso, there would be no valid basis for this Court to interfere with the second respondent in dealing as it pleased with its property. It was the second respondent's property and not that of the deceased. The provisions of the Act above do not apply in the facts of this case for the reasons I have already explained.

[18] For the reasons that are to follow, the applicants' application for review is way out of time, however, that notwithstanding, I will deal with its merits in an attempt to convince the applicants that even on the merits they could not have succeeded.

D) DELAY

[19] The right to apply for review of administrative action is in terms of section 33 (1) of the Republic of South Africa Constitution Act, 1996 which provides that everyone has the right to a procedurally fair, lawful and reasonable administrative

action. However, the process of enforcing those rights is governed by section 7 of the Promotion of Administrative Justice Act (PAJA) no 3 of 2000.

[20] Section 7 (1) of PAJA provides *inter alia* that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the decision complained of was taken. Even before the promulgation and application of PAJA common law made provision to challenge unfair and unlawful administrative action within a reasonable time and without delay. An applicant is obliged to make an application for condonation of the late filing of the application for review which has been taken out of time in terms of PAJA. If such application is not filed within a reasonable time in terms of the common law an applicant should explain in his founding affidavit the reasons for the delay in taking action. None of the above has been done by the applicant herein.

[21] The property was sold to Nondumiso in 1999 and was registered in her name in the same year. In 2006, first applicant became aware that the property was sold and registered in the name of Nondumiso but she only took action to lodge the present proceedings in 2010. In ***Wolgroeners Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 12 (A)*** the Court held that the Court has an overriding discretion to refuse to entertain review proceedings not brought within a reasonable time, even in the absence of proof that the respondent has suffered material prejudice.

[22] Even where the issue of condonation arises, the Court exercises a discretion which is a judicial discretion to be exercised in the light of all the relevant

circumstances (***Sedgefield Ratepayers and Voters' Association v Government of the RSA 1989 (2) SA 685 (C)*** at 696D). Applicant has not applied for the condonation of the late filing of the review application. There are, therefore, no reasons for this Court to condone the late filing of the application. In ***Radebe v Government of the Republic of South Africa 1995 (3) SA 787 (N)*** at 798A-D, H-J the Court held that in the absence of a statutory time limit, the Courts, in terms of their inherent powers to regulate procedure, require review proceedings to be instituted within a reasonable time. There are two principal reasons for the rule that the Court should have the power to refuse to entertain a review at the instance of an aggrieved party who has been guilty of unreasonable delay. The first is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions. In deciding whether a reasonable time has elapsed, the Court does not exercise a discretion. The enquiry is a factual one, depending on all the relevant circumstances. If the Court were to arrive at the conclusion that there has been unreasonable delay, it exercises a discretion as to whether the unreasonable delay should be condoned.

[23] Having said above I have no reason to believe that the applicant should be entitled to a condonation. Be that as it may, I will deal with the merits of the review for the sake of completeness and finality. As already alluded to *supra* there are no reasons for me to interfere in the second respondent's power to deal with the property in question. The property does not belong to the deceased and neither does it belong to the estate of the deceased. In my view, it became the estate of Nondumiso after the deceased's death and should, therefore, have been dealt with in its capacity as the property of the estate late Nondumiso and not as the property

of the deceased. It never was the property of Leticia Fifane at any given moment.

[24] The late Nondumiso is alleged to have misrepresented facts when she bought the property from the second respondent. First applicant and other applicants contend that they never authorised Nondumiso to register the property in her name. Indeed they have no business to authorise Nondumiso to register the property in her name because they had no *locus standi* to deal with the property. Neither did they have any relationship with the property other than that it was their home when their mother, the deceased, was still alive. It is unfortunate that the deceased died before the property was registered in her name but there is nothing that this Court can do to assist the applicants. This is so because the property was never in law the property of the deceased. It has never been owned by the first applicant's mother at all. It, therefore, could never have been the property of the deceased. For the above reasons there are no grounds for this Court to interfere with the second respondent's actions in selling the property to Nondumiso.

E) COSTS

[25] I gather from the evidence on record that the applicants differ materially in their employment status. Some are unemployed, others are employed but fall under low income group and the others are referred to as business people. It is also common cause that they are all related to each other. For instance the main applicant who has deposed to the founding affidavit is unemployed. I then have to also take into consideration that the first respondent is also indigent in that he is represented by the Justice Centre in Port Elizabeth in terms of the Legal Aid Act. If I

award costs against the applicants without discrimination they would have to pay costs jointly and severally notwithstanding the fact that I have no idea how much is the income of those employed and or those self employed. It may be too little for them to afford the High Court costs. It is only the fifth respondent who is in gainful employment as a teacher. In my view it would not be fair to her if I make the award of costs against applicants. In the circumstances, I would rather prefer not to make an order of costs herein.

[26] In the result, I make the following order:

[26.1] The application is dismissed.

[26.2] Each party is to pay its own costs.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

For the applicants	:	Adv. W. Nobantana
Instructed by	:	Andile Ngqakayi Inc
		PORT ELIZABETH
For the respondents	:	Mr. V. Naidu
		(for first respondent)
		PE Justice Centre
		PORT ELIZABETH