

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

CASE NO: 5777/2021

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

TSHOLOHELO EDDIE MOKGOBO

1st Applicant

APHAPHIA MPOTSENG MOKGOBO

2nd Applicant

and

KEITUMETSE MAGGIE MABONA

1st Respondent

**ANY AND ALL PERSONS RESIDING AT OR OCCUPYING
THE PROPERTY OF THE APPLICANTS THROUGH OR BY
VIRTUE OF THE RESIDENCE BY OR OCCUPATION OF THE
1ST RESPONDENT**

2nd Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

3rd Respondent

HEARD ON: 18 AUGUST 2022

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for hand-down are deemed to be at 09h30 on 14 November 2022.

Introduction

[1] The applicants seek an order in terms of the provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998 (the PIE Act), evicting the first and second respondents from the property known as [....] M[....] street, R[....], Bloemfontein, Free State Province, also known as erf number [....], Mangaung district, Bloemfontein.

[2] The first respondent opposed the application and simultaneously filed a counter application seeking, *inter alia*, that the third respondent is ordered to conduct an inquiry in terms of section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act, 81 of 1988 (the Conversion Act) with regards to erf [....] Mangaung district, Bloemfontein, Free State Province, and that the parties are granted leave to approach the court on the same papers after the third respondent had conducted the inquiry.

The founding affidavit

[3] The applicants were, in the year 2020, interested in purchasing a residential property. They were referred to a certain Matshidiso Emily Morakabi (Mrs Morakabi), who confirmed that she was indeed selling a property that she showed to them. The applicants wished to formalise the agreement and instructed Messrs Phatsoane Henney Attorneys to do the necessary.

[4] The attorneys, before drafting the formal documents, conducted a Deeds Office search and established that the property to be sold belonged, and was registered, in the names of Matshidiso Emily Morakabi and Philip Mahlomola Morakabi on 17 November 2014.

[5] A written sale agreement was concluded on 28 October 2020 at the attorneys' offices. As of this date, Philip Mahlomola Morakabi was deceased and the sale of the property agreement was concluded with Mrs Morakabi in her capacity as the representative of the deceased estate; whereafter the transfer and registration process began and was finalised on 15 January 2021.

[6] Mrs Morakabi informed the applicants that the relevant property was occupied by the first respondent and that she, as the owner of the property, would inform the first respondent that she would be selling the property. The first respondent would have to vacate the property and or relinquish her occupancy of the premises by virtue of the sale. The applicants could not confirm whether Mrs Morakabi did act accordingly.

[7] Early in January 2021, the applicants were informed by their attorneys that the property would soon register in their names. They informed Mrs Morakabi of the impending property registration and requested her to inform the first respondent to vacate the premises once the registration had taken place.

[8] To their surprise, Mrs Morakabi informed them that she could not go to the first respondent and give her notice to vacate the property by virtue of the following:

1. A family dispute existed between them;
2. She and the first respondent had a pending court dispute between them which prohibited her from going to the first respondent; and
3. That the duty to give the occupant notice rested upon the applicants as she would no longer be the owner of the property.

[9] The applicants then approached the first respondent and informed her that they purchased the property which she had to vacate once the registration process was finalised. Their attempts in this regard were unsuccessful and in May 2021 they approached their attorneys who despatched a formal notice to vacate the premises

to the first respondent. The first respondent opposed the legal steps through her attorneys at Legal Aid.

The opposing affidavit and counterapplication

[10] The first respondent's opposing affidavit also served as the founding papers for her counterapplication. She averred that her mother, Kenalemang Angelina Mabona, and Mrs Morakabi, are the children of her late grandmother, Sophie Mabona, who was allocated the property in question as per a site permit issued by the third respondent on 9 February 1984. She was raised by her grandmother and occupied the property since birth.

[11] Her grandmother died on 8 June 2010. She was 31 years at the time. She resided at the property with her grandmother until the date of her death. Her mother and aunt never lived with her grandmother.

[12] She approached the Master of the High Court in 2014 when it came to her attention that her aunt, Mrs Morakabi, had obtained Letters of Authority in relation to her grandmother's estate in a fraudulent manner. The Master issued fresh Letters of Authority in the names of both her mother and her aunt, Mrs Morakabi. It appeared to her that Morakabi had purposely omitted her mother's name from the next-of-kin affidavit, creating the impression that she was the only child of her deceased grandmother. As a result, she was appointed as the sole representative of the estate. Copies of all these documents, including the revoked Letters of Authority, were attached to the first respondent's opposing affidavit.

[13] It was clear to her that her aunt did not have the right to sell the property. This fact and state of affairs were brought to the attention of the applicant's attorneys through the exchange of correspondence between her attorneys and the applicants'. She was advised that the third respondent had a duty to conduct an inquiry in accordance with the Conversion Act. She was convinced that the inquiry was never done as she was never approached by anyone from the third respondent who had the duty to establish who the occupants of the property were, as part of the inquiry.

[14] Her occupation of the property was never unlawful as her right to occupy was never terminated by the lawfully appointed Master's representatives of the estate of her late grandmother.

[15] Her averments were confirmed by her mother, Kenalemang Mabona, who stated in her affidavit that she was the first respondent's mother and was appointed, together with her sister, Mrs Morakabi, as representatives of the estate of their late mother. She never agreed to, nor was she aware of the sale of the property to the applicants. Mrs Morakabi never obtained her permission to dispose of the property of her late mother and she was not aware of any inquiries by the third respondent. The first respondent resided on the property in question since her birth.

[16] The first respondent stated that she had a protection order against Mrs Morakabi barring the latter from entering the property she occupied. To this effect, she attached a copy of the protection order to her affidavit. This order was granted on 25 September 2019, ordering Mrs Morakabi not to harass, insult and emotionally abuse her and not to prevent her or any child who ordinarily lived on the residence at [...] Kagisanong, R[...], Bloemfontein from entering or remaining thereon or on any part thereof.

The applicant's answering and replying affidavit

[17] The applicants raised three points *in limine* to the first respondent's counterapplication in that, firstly, the first respondent's relief sought in the counterapplication was not permissible in law; secondly, the non-joinder of the seller or the non-attachment of her confirmatory affidavit and, thirdly, the lack of *locus standi* of the first respondent's attorney, who deposed to a confirmatory affidavit as the latter had no standing to act on behalf of the first respondent as a party to these proceedings.

[18] The relief sought by the first respondent was not permissible in law as the court was requested to make a declaratory order in circumstances where the third

respondent had already made a decision¹. As the third respondent's decision to transfer the property into the name of Mrs Morakabi was not reviewed and set aside, the court could not make an order that an inquiry in terms of the Conversion Act is held, as such an inquiry would be moot.² The Conversion Act provided for the transfer of property into the names of persons who were the holders of permits to occupy and who were not entitled to become owners thereof.³ The Director-General was enjoined to conduct an investigation into the identity of the person(s) entitled to receive ownership.⁴ The decision taken by the Director-General or his delegate to transfer the property into the name of Mrs Morakabi and, whether or not an enquiry was held, was an administrative decision that could only be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).⁵

[19] Mrs Morakabi was granted ownership of the property in terms of section 4(1)(b) of the Conversion Act and had the right to transfer ownership to the applicants.⁶ The applicants admitted that the registration of the property into the names of Mr and Mrs Morakabi was in November 2014 after the amended Letters of Authority were issued by the Master⁷. They also admitted the contents of paragraph 2.8 of the answering affidavit⁸ relating to annexures B,C,D and E to the first respondent's counterapplication. Annexure B was the copy of the Master's letter dated 22 May 2014 that invited Mrs Morakabi's comments to the first respondent's allegations; annexure D, a copy of the revoked initial Letters of Authority dated 24 October 2012; annexure C, a copy of the next-of-kin affidavit dated 24 October 2012 and annexure E, a copy of the fresh Letters of Authority issued in both the first respondent's mother and Mrs Morakabi's names, bearing the date stamp of 2 July 2014.

[20] The applicants sought an order, *inter alia*, declaring the first and second respondents unlawful occupiers within the meaning of the PIE Act⁹ and that it would

¹ Para 2.1.2.

² Para 2.1.3.

³ Para 2.1.4.

⁴ Para 2.1.5.

⁵ Para 2.1.6.

⁶ Para 7.5.

⁷ Para 7.2.

⁸ Para 7.1.

⁹ Prayer 1 of the notice of motion.

be just and equitable that they are evicted from the property as the applicants were the owners of the property¹⁰. The applicants were, among others, denied any form of rental income which could be raised from potential lessees and the property was not available and open for viewing to attract potential buyers.¹¹

The legal position

[21] In *Grobler v Phillips and Others*,¹² it was stated that justice and equity in terms of the PIE Act means that a just and equitable balance is struck between the rights of the occupier and those of the owner to infuse justice and equity in the inquiry.¹³

[22] Section 4(8) of the Act provides that If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine a just and equitable date on which the unlawful occupier must vacate the land under the circumstances.

[23] The question that arises is whether it is just and equitable to grant an order of eviction on a consideration of all the relevant circumstances of this case. In *Grobler v Phillips and Others*,¹⁴ it was stated that: “*No case in which an order of eviction from a residence is sought can ignore the visceral reality of what is sought, namely the ejectment of a person from their home in vindication of a superior right to property. Nor can the legal process by which the order is obtained be divorced from our fraught history of eviction and ejectment of vulnerable persons from their homes. It is to this visceral reality that our Constitution addresses itself in s 26, and in this context that relevant legislation is to be interpreted and applied.*”

[24] In the present matter, the first respondent is 43 years old and has lived on the property since birth. It is not in dispute that Mrs Morakabi sold the property on her own without the consent of her sister who was the co-executrix or co-representative

¹⁰ Para 12.1 of the founding affidavit.

¹¹ Applicants’ heads of argument: paras 6.5.8 and 6.5.9.

¹² (CCT 243/21) [2022] ZACC 32 (2022) para 39.

¹³ *Hattingh v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC).

¹⁴ *Supra*.

of their late mother's estate. The Master's letter of 22 May 2014 went unheeded by Mrs Morakabi which gave rise to the revocation of the Letters of Authority of 24 October 2012 and the subsequent issue of fresh ones by the Master on 7 July 2014. Notwithstanding the changed circumstances, she proceeded to singlehandedly register the property, forming an asset in the estate, in her and her husband's names. It is clear from a perusal of the Next-of-kin document, which is admitted by the applicants, that she presented herself to the Master as the only surviving child of her deceased mother. The conclusion is inescapable that she presented herself to the Master and probably the Director-General or his representative as the only survivor and possible heir to her deceased mother's estate. She manipulated herself into the position to allocate to herself an asset in the deceased estate.

[25] The centrepiece of the applicants' answering affidavit is that the decision taken by the Director-General or his delegate to transfer the property into the name of Mrs Morakabi and, whether or not an inquiry was held, was an administrative decision, which could only be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In the absence of a review application to set aside the administrative decision, the first respondent did not have a case.

[26] In *Kuzwayo v Estate late Masilela*,¹⁵ it was held that a holder of a site permit and an occupier of a site are entitled to apply for an order that the Registrar of Deeds can cancel a deed of transfer to a wrong person. They are also entitled to ask the director-general of Housing in a province to hold an inquiry in terms of section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 in order to determine to whom ownership should be granted.

[27] The court, in this case, rejected the argument¹⁶ that the proper course of action to have followed would have been to review the 'decision' of the official who signed the declaration in terms of PAJA, as 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. That was the only

¹⁵(28/10) [2010] ZASCA 167 (1 December 2010).

¹⁶Kuzwayo, *supra*.

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 a decision. Not every act of an official amounts to an administrative action that is reviewable under PAJA or otherwise.¹⁷

[28] The court went further and stated that: *“Unfortunately neither party was aware of any inquiry that may have been conducted in terms of s 2 nor of any administrative decision made pursuant to the inquiry. It would undoubtedly have been best for the Estate, had it been made aware of a decision of the Director-General, and of the declaration and transfer that would follow, to take the Director-General on review. But the Masilela family were not informed of any decision, and apparently Van der Merwe was also not advised of an inquiry or any of the consequences. The Director-General was cited as a respondent in the high court but did not participate in the proceedings. This court cannot assume that an inquiry was held and a decision was made. Thus Kuzwayo’s argument that Van der Merwe should have applied for a review of a decision is misconceived, as are all the attendant arguments in respect of such a review.”*¹⁸

[29] The Conversion Act requires the Director-general to 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 situated in a formalized township for which a township register has been opened, ownership with regard to such sites.¹⁹ Before a declaration can be made, the Director-General is required to conduct an enquiry into the affected site, and the identity of the occupier of the relevant site. Essentially 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.²⁰ The determination as to whom to

¹⁷ Kuzwayo, supra para 28.

¹⁸ Kuzwayo, supra para 29.

¹⁹ Section 1.

²⁰ Nzimande and Another vs Nzimande and Others (24490/12) [2012] ZAGPJHC 223 (11 September 2012)

declare as the owner is subject to an appeal.²¹ Section 3 sets out the procedure for an appeal by a person aggrieved by such a determination.²²

[30] In *Kuzwayo*, the court stated that, in its view, although the estate was probably entitled to acquire ownership, an inquiry should be held. Taking into consideration the circumstances of this case, it is clear that Mrs Morakabi's conduct in falsifying the information presented to the Master, having the property registered in her name, and her alienation of the property to the applicants, was outrageous and opportunistic. The only route to follow in order to infuse justice and equity in the given circumstances is, in my view, to follow the guidance of the provisions of the Conversion Act.

[31] In her counterapplication, the first respondent sought that an inquiry should be held and that the parties be granted leave to approach the court on the same papers after the third respondent had conducted the inquiry. The request is not preposterous as the applicants conceded that it was correct that the Conversion Act was applicable in this matter²³ and the Director-General was enjoined to conduct an investigation into the identity of the person(s) entitled to receive ownership in terms of the Conversion Act.²⁴ The remainder of the applicants' special pleas do not hold water bearing in mind the legal position set out above. It is not correct that Mrs Morakabi would suffer prejudice if she were not joined as a party to the present proceedings.

[32] It is trite that the successful party is entitled to the costs. However, due to the circumstances and the direction that this matter may follow, I am of the view that costs should be reserved for later adjudication.

[33] In the premises, I am of the view that the following order is appropriate in the circumstances:

Order:

²¹ Section 3 of the Conversion Act.

²² Section 3 of the Conversion Act.

²³ Para 7.4: Applicants' Answering and Replying Affidavit.

²⁴ Para 2.1.5: Applicants' Answering and Replying Affidavit.

1. The application for the eviction of the respondents on erf number [...], Mangaung district, Bloemfontein, is dismissed;
2. The Director-General for the Department of Housing, Free State Province, is directed to hold an inquiry in respect of Erf [...], Mangaung, Bloemfontein in terms of section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, and to declare who the owner of the Erf is.
3. The parties are granted leave to approach the court on the same papers, supplemented if necessary, after prayer 1 above has been complied with.
4. Costs are reserved for later adjudication.

MHLAMBI, J

On behalf of the Applicant:

Instructed by:

Adv. D.C Hatting-Boonzaaier

Phatsoane Henney Inc

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Westdene

Bloemfontein

On behalf of the Respondent:

Instructed by:

Ms I De Wet

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Bloemfontein

IN THE HIGH COURT OF SOUTH AFRICA,
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REPORTABLE: NO
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CIRCULATE TO MAGISTRATES: NO

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ADDENDUM TO JUDGMENT

MHLAMBI, J

[1] It has been brought to my attention by the registrar that paragraph 3 of the order does not correctly reflect the order because of a typing error. Paragraph 3 states that the parties are granted leave to approach the court on the same papers supplemented if necessary, after prayer 1 above has been complied with. The correct position is that the said paragraph should read that the parties are granted leave to approach the court on the same papers, supplemented if necessary, after paragraph 2 above has been complied with.

[2] It is therefore clear that this was a patent clerical error as envisaged by Rule 42(1)(b) of the Uniform Rules and the order has been amended accordingly.

Dated at Bloemfontein on this 14th day of November 2022

MHLAMBI, J

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