

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1535/2006

In the case between:

KEITUMETSE MELODY SAILA

Plaintiff

and

TSHEDISO KENNETH THULO

1st Respondent

MATHAPELO PATIENCE THULO

2nd Respondent

PONANE ESAU MAHLABA

3rd Respondent

MOLEHI WALTER KGAILE

4th Respondent

KELEBOGILE THEODORIA KGAILE

5th Respondent

REGISTRAR OF DEEDS

6th Respondent

THE MANGAUNG MUNICIPALITY

7th Respondent

JUDGEMENT:

MOCUMIE, AJ

HEARD ON:

6 DECEMBER 2007

DELIVERED ON:

7 FEBRUARY 2008

[1] The applicant, Ms Keitumetse Melody Saila is the duly appointed executrix in the estate of Mrs N A Saila, who was her late mother. She seeks an order:

“(a) Nullifying and / or setting aside retrospectively the registration of the property commonly known and described as Erf 42992 Mothibi Street, Rocklands, Bloemfontein, currently held under Title Deed No.: T1063(32006, at Deeds Office, Bloemfontein and which property has been registered in the names of first to fifth Respondents.

b) Compelling the 6th Respondent to register the property referred to in paragraph (a) herein, in the name of the Applicant, Keitumetse Melody Saila;

(c) Order the Applicant to pay all the costs pertaining to the transfer of the said property in her name;

(d) Cost of suit against the first to the fifth Respondents, and seventh Respondent only if defended;

e) Further and / or alternative relief.”

The application is opposed by all respondents.

[2] The application has to be understood in the following context.

Mrs Saila and her husband started to stay in Erf 4299, Rocklands, Bloemfontein, (“the property”) in 1982. They relocated to Bloemspruit in 1987/1988 to pursue farming there.

Applicant's father passed away on 21 January 1998 followed by her mother on 5 January 2005. The late Mrs Saila entered into an oral lease agreement with Mr Thulo (first respondent). Mr and Mrs Thulo (second respondent) started to stay at the property sometime in 1998. Towards the end of 1998 almost twelve months from the time they moved into the property, he reported the fact that he had a lease contract with the late Mrs Saila, who was no longer staying at the property, to the Mangaung Municipality (seventh respondent). Seventh respondent cancelled Mrs Saila's residential permit and granted first respondent occupational rights which were converted to ownership rights in terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (*"the Conversion Act"*) on 12 March 1998. The property was transferred in the names of first and second respondent on 5 February 1999. First and second respondent in turn sold the house to third respondent for an undisclosed amount. It is not shown in the papers when registration of the property was effected in the names of third respondent. Third respondent in

turn sold the property to fourth and fifth respondent. The registration of the property in their names was effected on 23 January 2006.

[3] On 16 March 1998 the late Mrs Saila was informed of seventh respondent's decision. On 30 March 1998 she lodged an appeal with seventh respondent which was unsuccessful. She then declared a dispute over who was the rightful occupier prior to first respondent being granted ownership by seventh respondent. The dispute was heard by the Adjudication Committee set up to hear disputes in this regard. On 14 May 1998 the Committee ratified the decision that was made earlier that first respondent was the rightful occupier and consequently the owner in terms of the R7 500, 00 Rebate Scheme applicable then. Mrs Saila was not satisfied with this decision and seventh respondent sought advice from the City Council legal advisor. In a letter drafted as a opinion, Mr Van Jaarsveld opined as follows:

"2. Although Ms NSaila concluded a lease agreement with Mangaung City Council on March 25, 1992 for the lease of site 2992, she is not currently occupying the premises. She is furthermore in breach of the lease agreement in respect of the following clauses:

2.1 clause 6-she sublet the premises to Mr KT Thulo

without the lessor's prior written consent;

2.2 clause 19-she failed to pay the rates and service

charges due to the lessor, on the due dates;
 2.3 *clause 23-she failed to pay rental due in terms of*
 See page 60 “A”-61 of the Opposing Affidavit.

The late Mrs Saila was informed of this decision on 15 May 1998. Notwithstanding this, there was never an attack on the procedural validity of that decision by way of appeal or review to this Court.

[4] According to the Registrar of Deeds as confirmed in para 5.3 of his affidavit dated 6 December 2006 no certificate of leasehold was ever issued to Mr. Abram Saila (the applicant’s late father) or Mrs Saila (the applicant’s late mother) in respect of the property.

[5] In my view there are two issues which I have to decide upon. Whether to grant the application for condonation as prayed for from the bar and whether the relief sought should be granted.

The application is extremely flawed based on two simple reasons. Firstly an application for condonation for late filing of this application which applicant argued should be considered as an appeal was made from the bar. No substantive application in which the grounds of such application were set out was filed with the Registrar and served on the respondents. The Rules are clear that if both steps have not been taken, the application was not “made”. (**Tyhopho v Santam Insurance Co Ltd** 1984 (2) SA 73 (Tk) ;**Jacobs v Polmed Medical Fund** 2001 2 SA 502 (T) at 506. Failure to lodge

an appeal within the prescribed time and in the prescribed form cannot be condoned unless good cause is shown. Undoubtedly the applicant has a duty to explain the long delay of seven years which lapsed before approaching this Court when it was clear as early as 2000 at least that she was not satisfied with the decision of seventh respondent and was aware of the procedural steps to take to address her dissatisfaction. She has not advanced a reasonable explanation for this unreasonable delay. On this basis alone the application for condonation for the late filling of this application cannot succeed.

- [6] Secondly this application cannot even be regarded as a review as it clearly does not comply with Rule 53 in particular. In terms of the common law such review application should be brought within a reasonable time without necessarily prescribing what reasonable time is. See **Wolgroeiërs Afslaërs (Edm) Bpk v Munisipaliteit van Kaapstad** 1978(1) SA 13 (A). Section 7 of Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) which now governs the review of administrative actions provides that judicial review must be instituted without unreasonable delay and not later than 180 days of after the date on which the person concerned was informed of the administrative action if no internal remedies were available. This is meant to *inter alia* bring finality to administrative decisions and acts and not encourage litigants to approach

courts many years later when chances of recollection and reconstruction of cases may be virtually impossible. See

Qqweta v Transkei Development Corporation Ltd and

Others 2006(2) SA 603(SCA) at 612E-613A.

- [7] The Conversion Act deals with the conversion of occupational rights into ownership rights as set out in section 6 read with section 8 . For clarity section 6 provides that:

“6(1) The holder-

(a) of a residential permit ... referred to in the regulations... issued by a local authority allowing the person mentioned therein to occupy a site set apart under those regulations ...shall from the commencement of this Act... become the holder of a right of leasehold or an owner, from such date;

(2) Subject to any by-laws relating to letting that may apply to the site or accommodation concerned, a lease contemplated in subsection (1)-

(a) may be terminated by the lessee on three months' written notice;

(b) shall be subject to the payment of rental by the lessee to the lessor in an amount equal to the amount paid by the lessee

immediately before the commencement of this Act in respect of the site or accommodation concerned unless such amount is varied by agreement.

Section 8 provides that:

“No person, including the State, shall be liable in respect of anything done in good faith in the exercise or performance of a power of duty conferred or imposed by or under this Act”.

- [8] The Conversion Act prescribes an open, transparent enquiry process for the resolution of disputes with regard to the ownership of section 6 houses. It is clear from the scheme of the Act that it is imperative that the process should be compatible with the principles of *audi alteram partem*, as well as the rules of natural justice in order to ensure that there is fair administrative justice. In addition in order to benefit from the Conversion Act the lessee had to satisfy the requirements set out in the letter referred to in para 3 above. See **Nzimande v Nzimande** 2005 (1) SA 83 (WLD) for a detailed analysis of the historical background of landownership of black African people

in this country.

[9] It is common cause or at least not in dispute that:

9.1 Mrs Saila was not staying in the property in dispute for a considerable time;

9.2 She did not pay rent to seventh respondent at R89, 00 per month;

9.3 She did not pay for services in that period;

9.4 She received money for rent from first respondent albeit on different bases;

9.5 She had not applied for the conversion of her residential rights into ownership rights in the prescribed form and in terms of the R7, 500, 00 Rebate Scheme; and

9.6 Seventh respondent's decision to grant first respondent a

certificate of ownership in respect of the property in

dispute was properly made as its validity was never

attacked in any proceedings be it an appeal or review

before a Court of law. It follows that until the certificate

is set aside by a Court in proceedings for judicial review,

it exists in fact and it has legal consequences that simply

cannot be over looked: See **Nzimande v Nzimande**

and Another 2005 (1) SA 83 (WLD) at 97A. This

salutary principle was endorsed and given the necessary

imprimatur by Howie P et Nugent JA in Oudekraal Estates (Pty) Ltd v City Of Cape Town and Others

2004 (6) SA 222 (SCA) at 242A stated:

“The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

- [10] I am of the view that the applicant was dilatory and should have filed the application in 2000 as per letter of the Head: Local Government & Housing dated 7 November 2000, Annexure “B” at page 62 and 63 which is the date on which she first became aware of first respondent’s actions or at least before her mother passed on in 2004. I say this because in relation to the issue of alleged misrepresentation (false information) given to seventh respondent by first respondent, the late Mrs Saila admitted in one of her letters as alluded to above that she was renting the house out or at least that she left first respondent in the house to look after it. Yet applicant avers that her parents left the house in or around 1997 to set up a farming business. The late Mrs Saila admitted renting

out the house contrary to her agreement with seventh respondent and then later on alleges that she was misled by first respondent to give him a receipt to get money from his employer. These are conflicting versions giving rise to improbabilities. Mrs Saila has passed on and as a result there is no way to test the veracity of her averments different as they are on their own and as compared to the applicant's.

- [11] It should be abundantly clear that the inordinate delay by the applicant to launch this application has serious prejudice for the respondents. This is clear from the fact that after seventh respondent sold the property to first respondent, he sold it to third respondent who also sold it to fifth respondent. Fifth respondent bought the house *bona fide* from third respondent and has to date not occupied the house to use it as he had wanted to for seven years. It is clear from the history of this matter that the property in issue has gone through many hands. To attempt, at this late stage, to undo all the various transactions would, in my view, cause serious prejudice to various people who were involved. This could have been avoided if the applicant had taken appropriate action at the appropriate time. In any event, as alluded to above, applicant

has not filed any substantive application for condonation. There is therefore nothing to consider.

- [12] It seems to me that in any event the applicant's claim to have the transfer of the property set aside and to demand registration of the house in her name prescribed in 2003 by virtue of section 11 of the Prescription Act 68 of 1969. See subsections 10 and 11 of the Prescription Act 68 of 1969. See too **Radebe v Government of the Republic of South Africa and Others** 1995 (3) SA 787 (NPD) at 804 A – B, whereat **Booyesen J** states:

“Assuming the applicant had the right to have the expropriation and transfer set aside or to demand redelivery of the land to him by registration thereof in his name, that right arose as soon as he was deprived of his possession and ownership. The effect of the expropriation, whether valid or not, is that the applicant has been deprived of ownership of the land. He was thus left with no more than a personal right (if he has any right at all) to claim redelivery of the land by registration of title in his name. Such a claim constitutes a debt within the meaning of ss 10 and 11 of the

Prescription Act 68 of 1969. While 'debt' is not defined in the Act, it has to be given a wide and general meaning."

In the circumstances, it would, in my view, serve no useful purpose to grant this application.

[13] In the light of the conclusion I have reached in respect of the delay and prescription it is not necessary for me to decide the various other matters raised in argument. It is clear from the evidence before me that the late Mrs Saila resided in the house in dispute under a regulation 6 residential permit granted by seventh respondent which gave her residential rights only and not lease hold rights by the time she passed on in 2003. Even if I may be wrong in the interpretation of the relevant sections and regulations of the Conversion Act and can conclude that she was the rightful occupier prior to seventh respondent granting first respondent rights he was not entitled to have, in the light of her not having met the requirements set out, the property would revert to seventh respondent in terms of the Title Deed T2156/1999 in which event, seventh respondent would be entitled to deal with the

property as it pleased. I therefore conclude that applicant has not made out any case entitling her to the relief sought. The relief sought cannot be granted.

[14] The remaining issue is that of costs. I have considered this matter although not fully argued. In the peculiar circumstances of this case I do not find that it is necessary for any costs order to be made.

[15] **I make the following order:**

15.1 The application as per notice of motion is dismissed.

15.2. No order as to costs.

B. C. MOCUMIE, AJ

On behalf of the applicant:

L.L. Ketja
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of the 1st, 2nd and
3rd respondents:

J. van der Vyver
Instructed by:
Kramer Weihmann & Joubert Inc.
BLOEMFONTEIN

On behalf of the 4th and
5th respondents:

S. Oosthuizen
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the 6th respondent:

Registrar of Deeds
Instructed by:
The State Attorney
BLOEMFONTEIN

On behalf of the 7th respondent:

H.N. Botha
Instructed by:
Naudes
BLOEMFONTEIN