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

CASE NO: 23667/2015

(1)	REPORTABLE: Yes ☐ / No ☒
(2)	OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3)	REVISED: Yes ☐ / No ☒
Date: 01 August 2024 WJ du Plessis	

In the matter between:

MAKHENTSHI NELSON KGASI

APPLICANT

and

MOHAMED ALI VILANE

FIRST RESPONDENT

MOHAMED ALI VILANE NO

SECOND RESPONDENT

**THE DIRECTOR-GENERAL OF THE THIRD RESPONDENT
DEPARTMENT OF HOUSING, GAUTENG
PROVINCE**

**THE MEC FOR THE DEPARTMENT OF HOUSING, FOURTH RESPONDENT
GAUTENG PROVINCE**

THE DEPARTMENT OF HOUSING

FIFTH RESPONDENT

REGISTRAR OF DEEDS, JOHANNESBURG

SIXTH RESPONDENT

JUDGMENT

DU PLESSIS AJ

Background

[1] This is a case about the entitlement to a house initially allocated in terms of the Black (Urban Areas) Consolidation Act¹ (hereafter the Urban Areas Act) and various regulations promulgated in terms of it, a lease registered in terms of the s6A of the same act, and later in terms of s 52(1) of the Black Communities Development Act,² as well as the Conversion of Certain Rights into Leasehold or Ownership Act³ (hereafter the Conversion Act) and the Upgrading of Land Tenure Rights Act⁴ (hereafter the ULTRA). The aftershock of these regulatory measures, promulgated as part of the Apartheid government's grand scheme of spatial apartheid, greatly impacts family relations, causing great strife. This is one such case.

[2] The Applicant (hereafter referred to as "Mr Kgasi"), seeks an order for an adjudication to be held by the Third to Fifth Respondents relating to the ownership of immovable property situated at 5[...] M[...] Street, Zone [...], M[...], Soweto, held in terms of Deed TL8587/1999. The property is currently registered in the name of the First Respondent (hereafter referred to as "Mr Vilane"), and the Applicant's deceased mother,

¹ 25 of 1945.

² 4 of 1984.

³ 81 of 1988.

⁴ 112 of 1991.

Wilhelmina Madibeng Vilane (hereafter referred to as “the deceased”). He was in a relationship with the deceased, who passed away in 2003.

[3] The Third Respondent is the Director General of Housing (hereafter “the DG”), Gauteng Province, cited in their capacity as the officer responsible for housing matters in terms of the Conversion of Certain Rights into Leasehold or Ownership Act,⁵ (the “Conversion Act”) or under the Gauteng Housing Act⁶ (the “Gauteng Housing Act”).

[4] The Fourth Respondent is the MEC of Housing in Gauteng (hereafter “the MEC”), cited in their representative capacity as the member of the Executive responsible in terms of the Conversion Act or under the Gauteng Housing Act.

[5] The Fifth Respondent is the Department of Housing (hereafter “the Department”), a statutory body established in terms of an Act of Parliament to regulate housing matters. The Sixth Respondent is the Registrar of Deeds, Johannesburg, responsible, amongst other things, for the registration of immovable properties.

[6] Mr Kgasi seeks an order to set aside the purported decision and for them to adjudicate on the matter and determine who the true owner of the house in question is after an investigation and a hearing in terms of s 2 of the Conversion Act or the Regulations in terms of the Gauteng Housing Act.

Background

[7] The house in question has a long history. Situated in Zone [...], M[...], Soweto, it was initially allocated to Mr Kgasi’s deceased maternal grandmother, Motlalepule Bertha Kgasi (“Bertha”), in terms of what was known as “the green book system”, formally

⁵ 81 of 1988.

⁶ 6 of 1998.

leasehold in terms of Regulation 7 of Chapter 2 of the Regulations Governing the Control and Supervision of the Urban Residential Areas and Related Matters GN 1036⁷ (hereafter “R1036”). She obtained this right to reside in the house on 16 July 1958. All her children and grandchildren who were alive at the time are listed on this permit. This was because, during apartheid, if the name did not appear on the permit or green book, the police could arrest you. In the green book, the following names are listed: the deceased and Mr Kgasi; Joyce and Saul, the children of the deceased daughter Emma; and Clement, the child of the other deceased daughter Joyce.

[8] Mr Kgasi states that he was raised by his grandmother and has lived on the property since he was five months old. Bertha passed away on June 6, 1996. She had lived on the property until then.

[9] Mr Vilane stated that he and the deceased were married. They met around 1963 in Hillbrow, where the deceased was employed. She worked as a domestic worker and resided with her employer. She came to the house on her day off. Mr Vilane states that they married on 10 September 1975 and attaches a marriage certificate as proof, stamped by the Bantu Affairs commissioner. He states that the reason the death certificates show that she died unmarried is because there were no computers to capture the date of black married persons. The court accepts the validity of the certificate as proof of the marriage.

[10] In the 1980s, when the deceased lost her job, she moved back into the house with Mr Vilane. At Bertha's invitation, they erected a shack on the property. Mr Vilane lived there until the deceased passed away in 2003.

[11] Mr Vilane states that on 10 July 1981, he, the deceased and Bertha went to the local municipal offices to obtain a lodgers permit for him and the deceased to indicate that

⁷ GG 2096 of 1968-06-14.

he was living on the property with Bertha's consent. Mr Vilane produced a permit issued in 1981, on which he appears as the permit holder with his wife, the deceased. The permit initially read "lodger's permit", but "lodger" is crossed out and "accommodation" is written next to it. The permit states that it is issued in terms of Regulation 20 of Chapter 2 of R1036 regulations. At the bottom, next to "name of site/residential permit holder", it is signed "Bertha Kgasi".

[12] Mr Vilane states that by that time, he and the deceased had taken over most of the house's affairs, including paying rent to the council. Around 1984, Bertha suggested that the deceased, as the last born and the only child alive, and Mr Vilane should buy the house. On 10 November 1984, Mr Vilane signed the deed of sale with the West Rand Development Board. Hereafter, he extended the house and built an extra room. The deed of sale indicates that it is sold in terms of s 6A of the Urban Areas Act.

[13] Around 1998, the deceased lodged a claim with the Housing Transfer Bureau to become the registered owner of the property. As she was married in community of property, Mr Vilane also had to be on the claim form. Once identified and the marriage certificate produced, the claim form was completed. Mr Kgasi says he was not informed of the process back then, nor was anyone staying in the house or listed in the green book. He first learned about this after his mother passed away.

[14] Around this time, a dispute arose between Mr Vilane and Mr Kgasi, and the deceased obtained an eviction order to evict Mr Kgasi from the property on 5 October 1998. On 23 February 1999, the property was registered in the names of Mr Vilane and the deceased, in terms of the Conversion Act. It indicates that it is a certificate of registered right of leasehold in favour of Mr Vilane and the deceased in terms of s 52(1) of the Black Communities Development Act read with s 4 and 5 of the Conversion Act.

[15] After the deceased's passing in 2003, Mr Vilane invited Mr Kgasi back into the property as he had no permanent place of residence. The peace was short-lived, as, according to Mr Vilane, Mr Kgasi tried to have him forcefully removed from the property, demanding the house.

[16] Mr Kgasi avers that after the deceased passed away, Mr Vilane started harassing him to leave the property. Mr Kgasi learned that Mr Vilane had a girlfriend who wanted to stay in the house, but Mr Kgasi refused. This is when Mr Vilane called the police and wanted to evict Mr Kgasi. Mr Vilane applied for a protection order against Mr Kgasi. Mr Kgasi, in turn, went to court to file a complaint about keeping the peace. In between this, in 2010, Mr Vilane approached the WITS law clinic to assist him in writing a letter to Mr Kgasi informing him that he was the registered co-owner of the property.

[17] Mr Vilane eventually applied for an eviction order in the Magistrate's court in 2013, stating that Mr Kgasi was an unlawful occupier. The eviction was defended, and on 6 August 2015, Mr Kgasi and his immediate family were ordered to vacate the property. He did not.

[18] Mr Kgasi avers that he stays on the property with his customary wife. He states that at 56 years old, this is the only home he knows. He does not have another place to stay. He never suspected that the property was registered in anyone's name, and he assumed that the property was still held under the late Bertha in terms of the green book.

[19] Mr Kgasi believes the house should have been given to him or at least to the deceased. Mr Vilane was always gainfully employed but failed to buy his own property. The property was obtained with a subsidy from the Department of Housing. Mr Kgasi does not trust Mr Vilane – he fears the property might be sold to a third party.

[20] Mr Kgasi states that the decision to convert the property to ownership in the name of Mr Vilane and the deceased should be reviewed because there was misrepresentation when making the decision. He brings the review on the following grounds:

- i. It is unclear whether there was an inquiry with an adjudication before the transfer of the house. It is unknown what information was before the Department, and if they knew who stayed in the property, why they were never informed about their rights to claim.

- ii. The property was possibly obtained fraudulently, as the Department was not informed of other potential claimants. The matter should be adjudicated or re-adjudicated to determine who should qualify to be the property owner.
- iii. The department's criteria for allocating the house are whether the claimant is listed in the green book, on the permit, or the 99-year lease. Mr Vilane does not appear on any of these. However, all the children and grandchildren of Ms Kgasi, who are still alive, qualify. With this knowledge, the Department might have made a different decision.
- iv. It is just and equitable that the matter be referred back to be adjudicated upon so that the interests of all the parties can be considered.

Respondent's case

[21] Mr Vilane objects to the application on various grounds. Firstly, he states that the fact that neither the Housing Transfer Bureau, who made the decision nor the City of Johannesburg, the successor in title of the West Rand Development Board and previous owner of the property, are joined makes the application fatally defective. For reasons that will become apparent later, it is not necessary to decide on this.

[22] Secondly, they raise the issue that 16 years have passed since the Housing Transfer Bureau's decision, and they have yet to ask for condonation. This is an inordinate and unreasonable time and will prejudice Mr Vilane, who has occupied the property since 1981 and has been co-owner since 1999. It is unnecessary to decide on this for reasons that will become apparent later.

[23] Thirdly, the claim to set aside has prescribed in terms of s 11(d) of the Prescription Act 68 of 1969. The property being registered in 1999 means that that was when Mr Kgasi was deprived of his rights to the property. The problems surrounding prescription in

these instances have been dealt with in *Sebatana v Mangena*⁸ and will not be repeated here. Again, this argument is not applicable due to the reasoning below.

[24] Regarding the merits, Mr Vilane argues that the property was awarded in terms of s 2 of the Conversion Act. In terms of this and the criteria for eligibility for ownership of a previously Council-owned property, they comply. This is because the original permit holder relinquished her rights to the property, and Mr Vilane and the deceased purchased the property from the Council in 1984, paying rent since 1981, when they became lodgers on the property. By the time of the transfer of the property around 1998, the deceased's period of occupation exceeded that of Mr Kgasi. Furthermore, the deceased's rights to the property flowed from her mother, who was alive and consented to Mr Kgasi residing on the property until she evicted him in 1998. Mr Kgasi is not an heir of the property as the deceased's estate had a market value of R46 000, and thus, in terms of intestate succession, Mr Vilane inherited the entire half share of the joint estate.

[25] Mr Vilane claims that the Department of Housing did announce that interested parties were invited to make submissions for ownership of previously Council-owned houses. In any event, he argues, since Mr Kgasi's rights flowed through his mother, and because she was living at the time, Mr Kgasi was not an interested party at the time.

Discussion of the legal principles involved

[26] Spatial Apartheid depended on a myriad of regulations that supported discriminatory practices regarding who may live where and in terms of what rights. Rights to property in urban areas were highly regulated. Johannesburg, as in many other cities, black people's rights to reside in the urban areas were based on permit systems, where occupiers of urban properties depended on state permission to reside in these areas. As will be shown, during the 1980s, there was a legislative drive to upgrade these permits to

⁸ [2013] ZAGPJHC 246 from para 136.

long-term leases. In the dying days of Apartheid at the end of the 1980s and beginning of the 1990s, legislation was promulgated to upgrade certain rights to ownership. This history is reflected in the facts before the court on a personal level.

[27] Site permits, residential permits, and certificates to occupy land in Soweto were mostly granted under the R1036 regulations – the Regulations Governing the Control and Supervision of Urban Residential Areas.⁹ These were issued in terms of s 38(8)(a) of the Urban Areas Act.

[28] These regulations provided for various permits that regulated rights to land in urban areas. These rights remained personal in nature, as they were based on contractual relationships between the local authority and the individual.¹⁰ The most prominent categories were:

- i. Regulation 6 site permits authorised the holders to lease an undeveloped site and erect a dwelling on it, which required a building permit. The holder and their dependents were given exclusive use and occupation of such a site. This permit could be transferred by means of a lease or alienation to another qualified person, subject to the Minister's approval.
- ii. Regulation 7 residential permits authorise the holder to lease a Council dwelling against payment of rent and levies. Bertha had this permit. In terms of Regulation 7(1), Mr Kgasi was a tenant (dependant) who had a right of occupation (until 1984).
- iii. Regulation 8 certificate to occupation applied to dwellings sold by the Council to a qualified person. This was not a sale of freehold property but rather a sale of a contractual right of occupation against the Council.
- iv. Regulation 20 Lodger's permits authorised the holder and his dependants named on the permit to lease a part of a dwelling. These permits were reserved for lodgers who were not dependent on the registered occupier

⁹ GN R1036 of 14 June 1968.

¹⁰ Olivier, N. "Property rights in urban areas." (1988) *SAPR/SAPL* at p 27.

(such as Mr Vilane and the deceased). The registered occupier's unmarried sons, daughters, widows, and unmarried grandchildren did not need to apply for these permits. These permits could not be transferred.

[29] The permit or certificate could be transferred under certain conditions.¹¹ However, the permits and certificates lapsed on the holder's death, although the dependant or heir had a preference in the allotment of the site or dwelling.¹²

[30] In 1978, the Urban Areas Act (sections 6A, 6B, and 6C) allowed for the registration of 99-year leasehold rights over property in black urban areas. S 6A is applicable in this case and states:

(1)(a) Notwithstanding the provisions of this Act or of any other law to the contrary, an administration board may in respect of land acquired by it under section 12 of the Black Affairs Administration Act, 1971 (Act 45 of 1971), or of which it is the registered owner, upon application made to it in the prescribed manner and on the conditions prescribed generally or approved by the Minister in any particular case, grant in the prescribed manner in respect of any surveyed site situated on such land, a right of leasehold for a period of ninety-nine years to a qualified person.

[...]

(5) Registration under subsection (4) of a right of leasehold shall, in addition to the right of occupation, have the effect of vesting in the holder of the right of leasehold-

(a) subject to the provisions of any law relating to the erection, alteration or demolition of buildings, the right to erect on the surveyed site in question any building for residential purposes or for the purposes of conducting therein any profession or business, as the case may be, or to alter or demolish any building thereon, and to enjoy, in accordance with the regulations and any conditions prescribed generally or any conditions approved by the Minister in any particular case and endorsed against the

¹¹ Regulation 9.

¹² Regulation 17(2).

entry in the register relating to the site in question, the right of occupation of any building on the site, whether erected before or after registration;

(b) the right to encumber, by means of a mortgage, the right of leasehold; and

(c) the right to dispose of the right of leasehold to any qualified person, which shall include the right to let or bequeath the site to a qualified person: Provided that where such right is bequeathed to or devolves upon a person who is not qualified to hold the right, only the net proceeds of any sale of the right shall be transferred to such person.

[31] Black persons could thus acquire a registered real right to state-owned property. The holders' rights were still derived from the state. The Deed of Sale of 1984, signed by Mr Vilane, was such a leasehold. The granting of this lease had the effect of replacing the Regulation 7 permit.

[32] In 1986, the Black Communities Development Act in s 52(1) provided that

A board, local authority, township developer or the State may, subject to the provisions of section 57D(i) in the case of a board or local authority, in respect of land of which the board or local authority is the registered owner or which vests in the board or local authority or which has been made available to such board or local authority in terms of the provisions of section 34 (9);

(ii) in the case of a township developer, in respect of land of which it is the registered owner or made available to such developer in terms of the provisions of section 34 (9); and

(iii) in the case of the State, in respect of land owned by or vested in it, on application made to it in the prescribed manner and on the conditions prescribed generally or approved by the Minister in any particular case, or contained in conditions of title or township conditions contemplated in section 57B, grant to a competent person in the prescribed manner in respect of any leasehold site situated on such land, a right of leasehold for a period of 99 years calculated as from the date of the granting thereof: Provided that where such a right of leasehold is in terms of this Act transferred to another competent person in terms of this Act,

the currency shall be for a like period of 99 years, calculated as from the date of such transfer.

[33] The “Certificate of Registered Right of Leasehold” registered in the name of Mr Vilane and the deceased, which is the Deed that he attaches to prove his ownership, is such a right. This replaced the previous leasehold with a leasehold registered on 23 February 1999. Mr Kgasi’s name does not appear on this certificate.

[34] Having established that this right flows from the Black Development Act, it is necessary to look at the process of converting certain rights in property in terms of the Conversion Act.

[35] The Conversion Act was enacted (commencing 1 January 1989) to convert specific categories of tenure into more meaningful forms of title—first leasehold and then full title. The occupational rights provided by the various permits were converted in specific ways. In 1996, in terms of a resolution signed by the Premier of Gauteng Provincial Government, the member of the Executive Council: Housing and Land Affairs was designated as a competent authority for the administration of the Conversion Act in terms of s 234(c)(ii) of the Interim Constitution. This meant that the properties managed by the Housing Bureau now fall under the supervision of the Fourth, Fifth and Sixth Respondents.

[36] The Conversion Act repealed R1036 regulations and transferred the occupational rights held in terms of regulations 6 and 8 into leasehold or ownership. However, Regulation 7 permits were to remain rented properties in terms of s 6 of the Conversion Act, until the municipality changed the relationship with the tenants. As Jajbhay J put it in *Nzimande v Nzimande*,¹³ the rights conferred by these permits were retained and are protected by s 6 of the Conversion Act.

¹³ 2005 (1) SA 83 (W).

[37] Even if the above-mentioned s 6A and s 52(1) leaseholds replaced the Regulation 7 permit, it is important to pause here for a moment and ask whether s 2 of the Conversion Act¹⁴ applies to the upgrade of Regulation 7 permits because it has implications for the relief Mr Kgasi seeks.

[38] *Toho v Diepmeadow City Council*¹⁵ clarified that specific properties were “affected sites” as per the definition in the Conversion Act. Only these “affected sites” trigger the application of s 2 of the Conversion Act. These sites are property held in terms of the site permit in terms of Regulation 6, the certificate to occupy in terms of Regulation 8; trading site permits in terms of Chapter 3 of the regulations and tenure under a local authority’s permit granting rights, which were similar to the three previously mentioned rights. However, the unregistered statutory leases that came into being with the promulgation of

¹⁴ 2. Inquiry as to rights of leasehold.—

(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 formalized township for which a township register has been opened, ownership with regard to such sites.

(2) Before the commencement of such inquiry the Director-General shall, after satisfying himself as to the identity of the affected site and of the person appearing from the records of the local authority concerned to be the occupier of that site, and, in respect of premises referred to in section 52 (5) of the principal Act, is in possession of an aerial photograph or plan of the premises concerned, certified as provided in section 52 (5)

(a) of that Act, publish a notice indicating that such inquiry is to be conducted.

[...]

(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—

[...]

(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 that site is situate in a formalized township for which a township register has been opened, ownership in respect of the site concerned.

¹⁵ 1993 (3) SA 679 (W).

the Conversion Act do not fall under the definition of “affected site”, such as the residential permits under Regulation 7, hostel permits in terms of Regulation 5, and permits for the occupation of a site in terms of chapter 3 of the regulations.¹⁶ S 6(1)(a) of the Conversion Act not only converted the permit into a statutory lease but also excluded these rights from the definition of “affected site” and thus from s 2 of the Conversion Act. If this matter dealt only with the “green book” permit – the Regulation 7 permit in the name of Bertha - then no inquiry was needed before the upgrading, as these rights are not upgraded in terms s 2 of the Conversion Act.

[39] In the *Toho* case, Stegman J also clarified that this statutory leasehold did not preclude a permit holder from acquiring a leasehold on the premises. Such a leaseholder remained free to apply for the grant of a leasehold in terms of the Black Communities Development Act.¹⁷ This is precisely what happened in this case, with the clear indication on the lease that it should be read with ss 4¹⁸ and 5¹⁹ of the Conversion Act, replacing the Regulation 7 permit.

¹⁶ At 693.

¹⁷ At 694.

¹⁸ 4. Granting of leasehold or ownership.—

(1) The Director-General shall, upon the expiry of the period specified for appeal under section 3 (1) or, in the case of such appeal, on the confirmation, variation or substitution of the determination referred to in section 2 (4), in the prescribed manner declare the person concerned to have been granted—

(a) a right of leasehold in respect of the affected site concerned under section 52 (1) of the principal Act [it being the Black Communities Development Act], whereupon that person shall be deemed for all purposes to have been granted a right of leasehold under the said section 52 (1).

¹⁹ 5. Registration of leasehold or transfer of ownership.—

(1) Whenever the Director-General has made a declaration—

(a) in terms of section 4 (1) (a), he shall lodge such declaration and every deed and other document necessary for the registration of the right of leasehold concerned with the registrar concerned, who shall—

(i) for the purposes of registration, accept that the particulars contained in the declaration are correct; and

(ii) without the production of any certificate to the effect that the levies or charges in respect of the affected site concerned have been paid to the local authority, register the right of leasehold in favour of the person mentioned in the declaration.

[40] Most of the cases relied on by Mr Kgasi do not deal with Bertha's type of leasehold. For instance, *Nzimande v Nzimande*²⁰ dealt with a Regulation 8 certificate to occupy that was ceded to the deceased husband's brother, even though the customary law wife had been staying on the property with the deceased. The reason for this was because of the intestate inheritance laws that precluded women from inheriting. An enquiry was later held in terms of s 2 of the Conversion Act, and the property was then transferred to the wife. The brother-in-law appealed this and argued that the appeal panel was restricted to only consider the holders listed on the certificate. Jajbhay J disagreed and gave a purposive interpretation, stating

“The purpose intended [by the Conversion Act] is to guarantee a fair and impartial enquiry into the contentions of the contending parties, as to who would ultimately qualify to acquire ownership of the house. The content of the right relied upon by the appellant must be determined before the Director-General can pronounce on the legality thereof. The content of this right is really the values and practices the right is designed to support.”

[41] While the court agrees with this judgement, Mr Kgasi's case differs from the *Nzimande* case because the s 2 Conversion process was applicable in that case.

[42] Likewise, the *Shai v Makena Family*²¹ case referred to also dealt with a Regulation 8 certificate to occupy and the lack of process followed in terms of s 2 of the Conversion case.

[43] As did the Supreme Court of Appeal case of *Kwashaba v Ratshitanga*,²² which dealt with a Regulation 8 certificate to occupy and a subsequent leasehold in terms of s 6A of the Urban Act and the division of the property upon divorce. Interestingly, in that

²⁰ 2005 (1) SA 83 (W).

²¹ 2013 JDR 0608 (GNP).

²² [2016] ZAGPJHC 70.

case, the applicants argued that the property is a “family house” and was never intended to be the exclusive property of the first applicant, as the leasehold that was upgraded was held on behalf of the family. The automatic transfer of the property was set aside on the basis that the occupants of the property who lived there should have been considered for ownership, as the transfer of the house was subject to a family agreement restricting the rights of owners.²³

[44] It is not too clear from the papers, but it seems like Mr Vilane’s leasehold rights got upgraded in terms of s 2 of the ULTRA that was promulgated to convert all registered leaseholds into ownership automatically²⁴ when the township register was opened. If this was the case, which I presume it was, then in terms of ULTRA, no similar adjudication process as in s 2 of the Conversion Act was required.²⁵ Here, *Rahube v Rahube*²⁶ also does not help Mr Kgasi because *Rahube* deals with the discriminatory effect such exclusion had on women. There is no challenge about the constitutionality or not of s 2(1) of the ULTRA in cases such as these were before me.

[45] On provincial level, in Gauteng, the Gauteng Housing Act²⁷ in s 24A provides that 24A. Transfer of residential properties.-

(1) The Department is authorised to adjudicate on disputed cases that emerge from Housing Bureaus established for the transfer of residential properties, by Premier's Directives in terms of section 171 of the Local Government Ordinance, 1939 (Ordinance No. 17 of 1939) *and disputed cases that emerged from the transfer of residential properties in terms of the Conversion of Certain Rights into Leasehold or Ownership Act, 1988 (Act No. 81 of 1988)*. [own emphasis]

[...]

²³ Para 18.

²⁴ Ndaba v Thonga [2020] ZAGPJHC 404.

²⁵ I do not comment on the constitutionality of this differentiated procedure, as this is not before me.

²⁶ [2018] ZACC 42.

²⁷ 6 of 1998.

[46] The Province's Department of Housing is thus tasked with dealing with disputes arising from transferring residential properties under the Conversion Act. It does not state anything about an inquiry before upgrading the rights.

[47] Considering all this, the fact that s 2 of the Conversion Act is not applicable, that the upgrade in terms of s 2 of the ULTRA does not require a decision to be made before upgrading, and that the Gauteng legislation only deals with adjudicating *disputes* and not making decisions, there was no “decision” made. It follows that there is then also no decision to review. The application must thus fail.

[48] This does not mean that the court does not also sympathise with Mr Kgasi’s argument that this is the only house he has known since birth. It is not clear what legal right he relies on to stake his claim. For instance, he does not contend that it is a “family home”,²⁸ and that he might, therefore, have certain entitlements recognised by law that need to be considered. Family agreements are often recognised and endorsed on title deeds, and the Conversion Act, in s 2(3)(a), also alludes to that. However, living in the house does not automatically grant Mr Kgasi a legal title to the house, especially not in the absence of proof of some family agreement or family practice.

[49] For example, a family house is based on certain norms or customs that need to be proven if the claim is a right in the family property. *Shai v Makena Family*²⁹ is an example of this. Examples of norms related to the family house include:³⁰

²⁸ See *Shomang v Motsose N.O.* 2022 (5) SA 602 (GP) from para 42 onwards.

²⁹ 2013 JDR 0608 (GNP).

³⁰ Kingwill, R. (2008). “Custom-building freehold title: the impact of family values on historical ownership in the Eastern Cape” in *Land, Power and Custom: Controversies generated by South Africa’s Communal Land Rights Act*, 198. See also case studies and discussion in RA Kingwill *The Map is Not the Territory – Law and Custom in ‘African Freehold’: A South African Case Study* (PhD thesis University of the Western Cape 2013).

- i. All family members have access to the family property instead of one person owning freehold land to the exclusion of others. Registration of the property into an individual name is often not performed by the family but through a system of adjudication and automatic upgrading through various pieces of legislation.
- ii. A custodian is usually in charge of the house and responsible for its upkeep. Succession usually relates to this role rather than to the inheritance of an object.
- iii. Family members (male and female) can access the property, provided they follow the family norms. Even non-family members are often welcomed in the family home as they adhere to the family norms.
- iv. Such familial ownership also means that the house often cannot merely pass on inheritance to the next individual heir.
- v. Family membership is maintained by participating in family affairs, events, and ceremonies. Once physically and socially removed from the family, you risk your access to the property, too.

[50] These remarks are made *obiter*, by example of what a claim to the family property would entail. It is *obiter*, since the relief sought is to review and set aside the decision to award the house, not to declare who has the rights to the property.

[51] To summarise, the leasehold replaced the Regulation 7 permit, and such leasehold follows the upgrading process in s 2 of the ULTRA, not s 2 of the Conversion Act. S 2 of the ULTRA does not involve a “decision” like s 2 of the Conversion Act. Thus, there is no decision to review, and for that reason, the application must be dismissed.

[52] The parties addressed me regarding costs. The applicant felt that since both parties relied on public interest law firms to present them in court, there should be no order regarding costs. The respondent argued that the application was incorrectly before the court; Mr Kgasi should have challenged the eviction application and not brought this

application to frustrate the respondent from asserting his rights. I agree with the applicant on the issue of costs.

Order

[53] I, therefore, make the following order:

1. The application is dismissed.
2. I make no order as to costs.

WJ DU PLESSIS

Acting Judge of the High Court

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Instructed by:

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Mr Mtukushe

Instructed by:

WITS law clinic

Date of the hearing:

20 May 2024

Date of judgment:

01 August 2024