



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: No

Signature: _____

CASE NO: 16117/20

In the matter between:

CALLAGHAN: CONSTANCE ELIZABETH VERONICA

Applicant

and

CITY OF JOHANNESBURG MUNICIPALITY

First Respondent

ANTHONY GLEN DU PLESSIS

Second Respondent

SAMANTHA BERNADINE DU PLESSIS

Third Respondent

**DIRECTOR-GENERAL: DEPARTMENT OF HUMAN
SETTLEMENT, GAUTENG PROVINCE**

Fourth Respondent

**MEC: DEPARTMENT OF HUMAN
SETTLEMENT, GAUTENG PROVINCE**

Fifth Respondent

REGISTRAR OF DEEDS, JOHANNESBURG

Sixth Respondent

Coram: Fourie AJ

Heard on: 3 August 2021

Delivered: 12 November 2021

Summary: Competing claims to rights of leasehold in respect of state-funded residential municipal property, to be dealt with in terms of the inquiry mechanism in section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, read with sections 24A - 25 of the Gauteng Housing Act 6 of 1998, and applicable regulations. *Kuzwayo v Representative of the Executor in the Estate of the late Masilela* [2011] 2 All SA 599 (SCA) applied.

JUDGMENT

Introduction

1. The primary relief sought by the applicant herein is an order declaring that ownership of certain immovable residential property “*be awarded to the estate late Molly Sybil Deane, and thereby forming part of her deceased estate*”. As ancillary relief, the applicant seeks an order directing the Registrar of Deeds to take the necessary steps “*to have the property transferred into the estate late of the deceased*”.

The applicant's case

2. The factual basis on which this somewhat unusual relief is claimed, can briefly be summarised as follows:
 - 2.1. The applicant is the duly appointed executrix of the estate of the late Molly Sybil Deane (“Mrs Deane”). The applicant is also the daughter and sole beneficiary of Mrs Deane’s estate.
 - 2.2. Mrs Deane was awarded occupation of the property, being immovable residential property described as Stand 536A (New number 640), 51

Major Street, Noordheuwel ("the property"), by the predecessor in title of the first respondent ("the municipality") on 1 February 1990. She duly occupied the property, together with her (now) late husband.

2.3. On 23 October 2003, the municipality issued Mrs Deane with a clearance to purchase the property, which had been renumbered as Stand 640. Mrs Deane took steps to have the property registered in her name, but registration had not taken place when she passed away on 30 May 2006, at the age of 78.

2.4. The Registrar of Deeds refused to accede to the applicant's request to have the property registered in the name of the deceased's estate, and it remains the registered property of the municipality.

2.5. The second and third respondents (the Du Plessis) moved into the property with the consent of Mrs Deane during around 1990, and occupied the property with her. They remain in occupation of the property.

2.6. After Mrs Deane passed away, the applicant requested the Du Plessis to pay occupational rent in respect of the property, but they refused, and instead have laid claim to ownership of the property. The estate is suffering prejudice as it cannot recover occupation rent, or bring proceedings to evict the Du Plessis, until such time as the records in the Deeds Office reflect the estate as the registered owner of the property.

2.7. In support of her application, the applicant attached a form issued by the Johannesburg Housing Department, and completed and signed by Mrs

Deane, on 1 February 1990. The form indicates that Mrs Deane would occupy the property with her grandchildren. The applicant also attached a document issued by the first respondent, titled "Clearance to purchase housing unit", and dated 23 October 2003. The relevant portion of the form is reproduced here:

City of Johannesburg

Date: 23/10/2003

To Estates Section
Newtown

CLEARANCE TO PURCHASE HOUSING UNIT:

Mr, Mrs, Miss MOLLY SYBIL DEANE is the legal registered tenant of the above unit and would like to purchase and take transfer of the unit.

Stand no : 536 A (NEW No 040)

Address : 101402 STREET
NOORAJONG

Account no : 700643871

Date of tenancy 1/2/90

Identity no 2811240078087

3. It is not clear from the founding papers what steps, if any, were taken by Mrs Deane pursuant to the issuing of this form, to purchase and take ownership of the property. During argument, her counsel suggested that this at least indicates an intention by Mrs Deane to purchase the property.

4. The legal basis pleaded by the applicant in support of her claim is quoted in full, from the founding affidavit:

"THE APPLICABLE LEGISLATION

28. The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 was amended in 1993 ("the Conversion Act") to provide for the conversion of right to land into ownership.

29. There is no reference to a cancelled permit in the file of the first respondent.

30. The Act required the Director General of the Department of Housing to conduct an inquiry into the affected site and to identify the occupier of the relevant site. In this matter I'm not sure as to whether such investigation took place after the deceased laid claim over the ownership of the property.

31. The Director General is given a wide discretion in order to guarantee a fair and impartial enquiry into the contention of the contending parties, as to who would ultimately qualify to acquire ownership of the house. I am not aware of any competing rights over ownership of the property.

32. The Act empowers the Director General after having made a determination, to publish a notice stating that a determination has been made, the particulars of the determination would be open for inspection for a period of 14 days.

33. I am not certain as to whether the Director General has taken any of the steps referred to above in this case. However, the inordinate delay in finalising the matter since the deceased lodged a claim of ownership has come at the detriment to the deceased [estate] as the property, currently cannot form part of the deceased estate without the intervention of this court. It is for this reason that I submit this court should intervene and declare ownership of the property to the deceased."

5. During argument, counsel for the applicant submitted that this is a unique case (i.e. no precedent exists for the relief claimed on a similar factual or legal basis). He argued that, as the deceased was the only registered tenant, and as she had indicated an intention to purchase the property in 2003, the court should exercise its discretion to effect transfer by “endorsement” to the deceased estate, as “logic dictates that only a court can endorse a property”. I don’t pretend to understand this argument, and will return to it later.

Opposition

6. The application was properly served on the municipality and on the Gauteng Provincial Housing Department. None of these entities responded to the application, and did not oppose it or file explanatory affidavits. The Du Plessis do oppose the application.

The Du Plessis’ case

7. The applicant alleges in her founding affidavit that the Du Plessis have attempted to frustrate the registration of ownership into the name of the deceased estate, by deposing to an affidavit during October 2019, in which they falsely claim that Mrs Deane had informed the housing office during 2001 that nobody in her family intended returning to the property.
8. In the answering affidavits, the Du Plessis plead the following case:
 - 8.1. They are married, and currently reside at the property, with their minor children.

8.2. During January 2000, and at the invitation of Ms Algene Noreen Bowes, the then occupant of the property, Mr Du Plessis moved into the house, as Mrs Bowes was planning to leave. Mrs Bowes informed Mr Du Plessis that the property had previously been occupied by Mrs Deane, but that she had left several years prior to that. Mr Du Plessis moved in, with his then wife and their young children.

8.3. Mr Du Plessis recounts that the property was in a poor state of repair. He wanted to fix it up, and in 2003 he started looking for Mrs Deane, to discuss her intentions regarding the property. With the help of neighbours, he located Mrs Deane at her new address in Florida, and met with her. He explained that he was living at the property and paying the municipal bills. Mrs Deane told him that neither she nor any of her children were interested in the property, as it is not in a good area.

8.4. Soon thereafter he attended with Mrs Deane at the municipality's housing offices, in order for Mrs Deane to inform the municipal officials that she would relinquish her claims to the property. She duly signed several documents at "Mr Jeff's office". Mr Jeff instructed Mr Du Plessis to submit a claim to the property at the municipal offices in Smith Street, which he duly did.

8.5. Years passed with no word from the municipality, despite the occasional inquiry from Mr Du Plessis, which included him notifying the municipality of Mrs Deane's death. Mr Du Plessis continued to occupy the property, and has effected over R300 000 worth of improvements to it. It was only

in 2019, for the first time, that the applicant arrived on the scene and indicated that she wanted the property.

9. On behalf of the Du Plessis, the following primary legal submissions were made:

9.1. Mrs Deane abandoned her right to occupy the property prior to 2000, when she left the property.

9.2. The application is premature, as it should have been referred to an inquiry in terms of section 24A of the Gauteng Housing Act 6 of 1998, read with section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 ("the Conversion Act").

9.3. While the Deeds Registries Act allows, in certain circumstances, a High Court to declare a person to be the lawful owner of immovable property, and to order the registration of transfer of the immovable property to reflect this, a prerequisite to the exercise of these powers is a substantive cause of action, eg. competing real rights. Here, the submission continued, the applicant had, at best, demonstrated that Mrs Deane once held a personal right to occupy the property, which terminated on her death.

The replying affidavit

10. The applicant admits that Mrs Deane allowed Mrs Bowes to occupy the property, but asserts that Mrs Deane retained the right to occupy, and never surrendered it. Accordingly, the applicant argues, Mrs Bowes could not have

provided Mr Du Plessis with an occupation right that superseded that of Mrs Deane, regardless of whether Mrs Deane actually stayed on the property.

11. As for the improvements to the property, the applicant argues that if such improvements were made, the Du Plessis can submit a claim against the deceased estate, presumably for compensation of some sort.
12. The remainder of the reply consists of argument, hearsay and other irrelevant allegations.
13. It is no overstatement to note that the papers in this matter are hardly a model of clarity or completeness. It is regrettable that the municipality, who could potentially have shed some light on the matter, elected to stay out of the fray. I turn now to the law, in the hope of obtaining some guidance on the way forward.

Applicable legislation

14. In the heads of argument, counsel for the applicant cited section 2(1) of the Conversion Act (inquiry by secretary into granting of leaseholder rights), section 1(xi) the Prevention of Illegal Eviction from Land Act ("the PIE Act") (definition of unlawful occupier), and sections 3(5) and (6) of the Extension of Security of Tenure Act 62 of 1997 ("ESTA").
15. It is not clear why these particular provisions were referred to, or how they support the applicant's claim for registration of ownership of the property into the name of the deceased estate. Clearly ESTA is not applicable, as it only applies to rural (non-municipal) land. The PIE Act regulates the eviction of

unlawful occupiers, but the applicant does not seek the eviction of the Du Plessis in this case. The applicant does not seek any inquiry in terms of section 2(1) of the Conversion Act, which, for the reasons set out below, is plainly the correct route to follow.

16. Counsel for the Du Plessis relies on section 24A of the Gauteng Housing Act 6 of 1998 (“the Gauteng Housing Act”), read with section 2 of the Conversion Act, in support of the argument that the entire application is premature, as disputed claims to Council-owned leased properties are to be referred to the Gauteng Housing Tribunal for an inquiry to be held into the history of the matter, and the veracity of the disputed claims. In support of this claim, counsel relied on the decision of the Supreme Court of Appeal in *Kuzwayo v Representative of the Executor in the Estate of the Late Masilela* [2011] 2 All SA 599 (SCA) (“*Kuzwayo*”), a case concerning competing claims to the right to occupy and seek a conversion to ownership, of state-owned residential property, in circumstances where the permit-holder had abandoned the property, and the occupier had occupied it and improved it over a period in excess of 20 years. The similarity to the facts of this case are clear.
17. The High Court had granted an order similar to the relief sought here, namely the transfer of registration of ownership to one of the parties. On appeal, the SCA held that this order was incorrect, and what should in fact have happened is that an inquiry in terms of section 2 of the Conversion Act should have been held. Section 2 reads:

“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 situated 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.

(3) For the purposes of the declaration under subsection (1) the Director-General may—

(a) give effect to any agreement or transaction in relation to the rights of a holder contemplated in subsection (4) (a) or (b) in respect of the site concerned, between such holder and any other person;

(b) give effect to any such agreement or transaction, or to any settlement or testamentary disposition in respect of such rights, entered into or made before the death of the last such holder;

(c) consider any intestate heir of the last such holder to have been granted a right of leasehold or, in the case where that site is situated in a formalized township for which a township register has been opened, ownership in respect of the site concerned;

(d) give effect to any court order or sale in execution in relation to the site concerned, notwithstanding that such agreement, transaction, settlement, testamentary disposition or intestate succession could not by virtue only of the provisions of the regulations have been entered into or made or was entered into or made without the approval of any person whose approval would have been required under the regulations, and notwithstanding that the site permit, certificate or trading site permit concerned had lapsed upon the death of such holder.

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

(5) Whenever he has made a determination as contemplated in subsection (4), the secretary shall publish a notice stating—

(a) that such a determination has been made in respect of the site stated in the notice;

(b) that the prescribed particulars of that determination are open to inspection for a period of 14 days as from the date of the publication of the notice at the prescribed place;

(c) that that determination shall be subject to appeal to the Administrator concerned in the prescribed manner; and

(d) that, subject to any decision of the Administrator concerned on appeal, the person concerned shall be declared 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.”

18. The SCA concluded that the proper order to be made in the circumstances of that case, was as follows:

“The proper order to be made

[32] The Conversion Act requires an inquiry to be conducted by the Director-General pursuant to section 2 before a declaration is made that a site permit be converted to full ownership, and before transfer is effected to the occupier. The high court erred in directing transfer by the Gauteng Provincial Government to the Estate in the absence of such an inquiry. In my view, although the Estate is probably entitled to acquire ownership, an inquiry should be held. The high court was correct, however, in ordering the cancellation of transfer to Kuzwayo. She has no right to the property and her conduct in opposing the application and pursuing this appeal is remarkably opportunistic.

[33] 1. The appeal is dismissed with costs, including those of two counsel.
2. Paragraphs 1 and 2 of the order of the high court are replaced with the following:

“(1) The Registrar of Deeds (Johannesburg) is ordered to cancel the title deed number T020450/2004 in respect of Erf 2000 Vosloorus and to cancel all the rights accorded to the first respondent by virtue of the deed.

(2) The Director-General for the Department of Housing, Gauteng Province, is directed to hold an inquiry in respect of Erf 2000 Vosloorus in terms of s 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, and to declare that the holder of the site permit in respect of the Erf is the owner thereof.”

19. The Gauteng Housing Act 6 of 1998 contains further regulations applicable to this type of inquiry in Gauteng:

“24B Establishment and composition of adjudication and appeal panels

(1) There are hereby established an adjudication panel and an appeal panel.

(2) The MEC appoints so many adjudicators as the MEC deems necessary to adjudicate on disputed cases in order to determine the lawful beneficiary to whom a residential property must be transferred.

(3) The adjudication panel comprises of persons drawn from the following categories:

- (a) practicing advocates and attorneys; and
- (b) other legal professionals (lecturers, legal advisors, etc.):

Provided that-

- (i) they do not act as adjudicators in the area of a council if they are a member or employee of that council; or
- (ii) they do not act as adjudicators in the area of a council if they are members of a firm of attorneys which have acted or is still acting on behalf of that council; or
- (iii) if a state department or private company employs them, written permission to perform work as an adjudicator must be obtained from such employer.

(4) No adjudicator may represent any party to adjudication.

(5) The appeal adjudicators shall be selected by the MEC from the panel of adjudicators, and shall only deal with appeal adjudications.

(6) The prohibitions contained in subsection (3) equally apply to appeal adjudicators.

(7) Adjudicators and appeal adjudicators are appointed for a maximum period of two years: Provided that the MEC may re-appoint adjudicators and appeal adjudicators on the expiry of the two year period for a further period of two years.

(8) The remuneration of adjudicators and appeal adjudicators is determined by the MEC with the concurrence of the Member of the Executive Council responsible for financial matters in the Province.

(9) The MEC may from time to time review the membership of adjudicators and appeal adjudicators.

24C Regulations

(1) The MEC may by notice in the Provincial Gazette make regulations relating to any matter that may be prescribed in relation to the transfer of residential properties and may, without limiting the generality hereof, specifically prescribe-

- (a) the functions of the Department;
- (b) the powers and duties of adjudicators and appeal adjudicators;
- (c) the functions of municipalities;
- (d) the procedure for conducting proceedings;
- (e) the procedure for appeal hearings; and
- (f) any other matters that the MEC deems necessary or sensible to prescribe in order to achieve the objects of the transfer of residential properties.”

20. Detailed regulations on the process of adjudication of competing claims of this nature, have been promulgated by the MEC¹.

Analysis

21. The applicant has failed to make out a case for the relief sought, which is in any event not competent for this court to grant, prior to an inquiry as envisaged in the Conversion Act, read with the relevant provincial legislation and regulations. However, in my view it would not be appropriate to simply dismiss the application. The dispute needs to be resolved, and there is a custom-made dispute resolution mechanism designed for disputes of exactly this kind.

22. The SCA in *Kuzwayo* made it clear that these types of disputes cannot simply be brought to the High Court for determination on the papers, and for resulting orders for transfer to be granted. The inquiry process will allow for a far more effective gathering and analysis of evidence, and the determination of factual disputes, than can be achieved on the papers before me. The dispute must be dealt with at an inquiry, as the first port of call.

¹ TRANSFER OF RESIDENTIAL PROPERTIES ADJUDICATION REGULATIONS

Published under [Notice 2265 of 2001] GenN 2265 of 2001 (PG 59 of 18 April 2001), as amended by GenN 1981 of 2003 (PG 240 of 25 July 2003) GenN 2906 of 2003 (PG 364 of 5 September 2003).

23. The applicant makes express reference to the need for such an inquiry in her founding affidavit, but provides no reasons for not proceeding with such an inquiry, apart from stating that she has no idea whether such an inquiry was ever conducted. Her counsel submitted that the definition of 'affected site' in the Conversion Act does not cover the property in question. I do not agree with this submission, but in any event, the subsequent definitions in the Gauteng Housing Act and the regulations applicable to disputes of this kind, clearly encompass exactly this dispute. For example, the regulations referred to above (and attached to this judgment) define the scope of this type of inquiry as follows: *"disputed properties" are state-financed residential properties which cannot be transferred because of disputes with regard to the identity of the transferees without such disputes having been adjudicated, and includes but is not limited to affected sites as defined in section 1 of the Conversion of Certain Rights into Leasehold or Ownership Act, 1988 (Act 81 of 1988)"* “

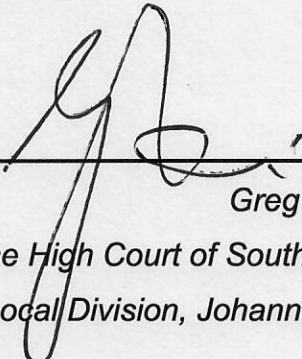
24. The applicant should have referred the dispute to the Provincial Housing Department for an inquiry to be held in terms of the legislation and regulations cited above. The present application is misplaced. The applicant's motives appear to be purely commercial, and opportunistic. Whether she will succeed over the competing claim of the Du Plessis, is for the relevant adjudication panel to decide in due course. In my view the applicant should pay the costs of a failed application.

25. In the circumstances, I make the following order:

Order

(1) The application is dismissed, with costs.

(2) The MEC, alternatively the Director-General for the Department of Housing, Gauteng Province, is directed to convene an inquiry in respect of Stand 536A (New number 640), 51 Major Street, Noordheuwel ("the property") in terms of s 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, read with the applicable provisions in the Gauteng Housing Act 6 of 2000, and applicable regulations, in order to determine who shall be declared to have been granted a right of leasehold over or ownership of the property.



Greg Fourie
*Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

HEARD ON:	3 August 2021
DATE OF JUDGMENT:	12 November 2021
FOR THE APPLICANT:	Advocate K Shole
INSTRUCTED BY:	Molefe Dlepu Attorneys
FOR THE SECOND & THIRD RESPONDENTS:	Advocate T Mathopo
INSTRUCTED BY:	Temba & Associates
