Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case no: 15082/2020

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

Signed: ……. **Date: 17 July 2023**

In the matter between:

MARULE, LERANYANE CHRISTINA	First Applicant
MARULE, MASEMETA JOHN	Second Applicant
MNISI, MPHO ELIZABETH (nee Marule)	Third Applicant
MOGABUDI, NTALE MARIA (nee Marule)	Fourth Applicant
MARULE, SELEBANE SYLVIA N.O. (in her capacity as executrix of the estate of the late Metlele Karel Marule)	Fifth Applicant

and

MARULE, ERNEST	First Respondent
MARULE, ELIZABETH THELMA	Second Respondent
DIRECTOR-GENERAL, DEPARTMENT OF HUMAN	Third Respondent

SETTLEMENTS, GAUTENG PROVINCE

MEC, DEPARTMENT OF HUMAN SETTLEMENTS, GAUTENG PROVINCE Fourth Respondent

EKURHULENI METROPOLITAN MUNICIPALITY Fifth Respondent

REGISTRAR OF DEEDS, JOHANNESBURG Sixth Respondent

JUDGMENT

MOULTRIE AJ

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 18 July 2023.*

[1] The first to fourth applicants and the first respondent are children of the late Solomon and Dinah Marule, and the fifth applicant is the executor of one of their siblings. The second respondent is the first respondent's spouse.

[2] This matter relates to an immovable property situated in Wattville, Benoni that the applicants (but not the first and second respondents) refer to as their "family house". The property is currently registered by the Registrar of Deeds in the names of the first and second respondents under Deed No TL34003/2003, which I shall refer to as the 2003 Deed. It is common cause that prior to 2003 (at the earliest), the owner of the property was the fifth respondent Local Authority, being the Ekurhuleni Metropolitan Municipality and its predecessors.

[3] In this application, the applicants seek orders:

(a) cancelling the 2003 Deed;

(b) directing the Registrar of Deeds to "*revert the ownership*" of the property to the Local Authority "*in order for them to facilitate that the Third Respondent (The Director-General of Human Settlements, Gauteng Province) hold an investigation and a hearing in terms of Section 2 of The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 as amended in 1993, for the purposes of determining who is rightfully entitled to the ownership of [the] property*"; and

(c) ordering that a caveat be issued against the Deed preventing the alienation of the property "*until this matter has been finalised*".

[4] During the apartheid era, the property formed part of land which was designated for occupation by Black people under the Blacks (Urban Areas) Consolidation Act, 25 of 1945. In terms of this legislation, a Black person could apply for and be granted a permit by the relevant local authority to reside in a house owned by it on such land.

[5] In 1952, the parties' father, Solomon Marule applied for such a permit. The application was successful, and he was allocated Municipal House No. [...]. The permit was subsequently renewed from time to time. For example, the permit issued on 4 November 1971 records that Solomon Marule was granted permission "*to occupy, together with the undermentioned member(s) of his family, Municipal House No. [...]*". The "*undermentioned members of his family*" numbered thirteen identified people and included his wife, Dinah, as well as all the applicants and the first respondent, all of whom stayed in and grew up in the house.

[6] It is relevant to note at this juncture that the 1971 permit can only (as the first and second respondents allege) have been a "residential permit" as contemplated in Regulation 7 of the Regulations Governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters published under Government Notice R1036 of 14 June 1968 and that it was not a "site permit" as contemplated in Regulation 6, or a Certificate of Occupation as contemplated in Regulation 8 thereof. Site permits were issued for the purposes of allowing the holder to erect a dwelling on a vacant site (which was clearly not the case, as

Solomon Marule's successful 1952 application had been for the allocation of a "Municipal House"), and Regulation 8 Certificates were not "permits" at all. Furthermore, the word "site" was crossed out on the 1971 permit and Solomon Marule had referred to his permit as a residential permit as early as 1954, and the 1966 permit expressly stated that it was a residential permit.

[7] It is common cause that Solomon Marule moved out of the house in the early 1980s and applied to transfer his tenancy to the first respondent. The application was signed by the first respondent as the "*prospective tenant*", and he specifically undertook "*to accommodate all [Solomon Marule's] dependents reflected on [his] registered permit … under all circumstances except when they find alternative accommodation*". While it is common cause that the Local Authority purported to approve the application on 2 September 1981, it is not apparent from the papers whether a replacement permit was issued at that stage.

[8] The precise reasons why Solomon Marule nominated the first respondent (and not any of his other children, including the first applicant, who was his eldest child) for the tenancy are disputed. However, the applicants rightly point out (and the first and second respondents do not appear to dispute) that the transfer could not have been a matter of inheritance or any other unilateral act on his part. The tenancy did not constitute property that was legally amenable to being transferred, whether by testation or otherwise, and whether to the first respondent or any other person. Furthermore, it does not appear to me that the 1968 Regulations included any provision for the transfer of a residential permit. As such, Solomon's reasons for nominating the first respondent as the new tenant of the house are irrelevant.

[9] Solomon passed away during August 1984. Shortly afterwards, on 12 December 1984, the Local Authority issued a new residential permit to the first respondent in terms of the 1968 Regulations entitling him to occupy the house together with the second respondent and various other named members of the family, including all of his siblings. A number of them continued to occupy the house for various periods between 1981 and 2018.

[10] On 30 May 2003, in circumstances of which the applicants plead ignorance, and

which are not explained by the respondents, a "Certificate of Registered Grant of Leasehold" (i.e. the 2003 Deed) was registered in the Johannesburg Deeds Office in relation to "erf [...] Wattville Township", which appears to have been identified on a General Plan prepared in 1985. The 2003 Deed certifies that "*the right of leasehold in respect of erf [...] … has been granted to [the first and second respondent] by the Ekurhuleni Metropolitan Municipality*".

[11] Both parties refer to the 2003 Deed as a "title deed" and assume that it confers rights of ownership over the property on the first and second respondents. While I do not think that mere registration (without more) of the 2003 Deed could have conferred such rights, it is beyond doubt that the first and second respondents are currently the registered owners of the property. The printout of a Deeds Office property search attached to the founding papers (which also refers to the 2003 Deed as a "title deed") states that the nature of the first and second respondent's rights over the erf is that of "*eiendomsreg*" (i.e. ownership),[1] and this is confirmed by a report filed in the matter by the Registrar of Deeds, which states that:

> *According to the records of this office, Erf [...] Wattville Township, is registered in the names of [the first and second respondents] by virtue of Certificate of Registered Grant of Leasehold: TL34003/2003. The records further reflect that the said leasehold has been upgraded in terms of the Upgrading of Land Rights Act 112 of 1991 into full ownership.*

[12] The question that arises for determination in this matter is whether, as the applicants contend, the only process whereby the first respondent's residential permit issued under Regulation 7 of the 1968 Regulations could lawfully have been converted into a right of ownership would have had to involve an inquiry held in terms of section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act, 91 of 1988 ("the Conversion Act") as amended in 1993. The applicants base their argument for the relief they seek squarely on the contention that no such inquiry (which I shall refer to as a "section 2 inquiry") took place.

[13] Although the first and second respondents appear to dispute (albeit without much conviction) that a section 2 inquiry did not take place, their primary contention on

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[1] *Van Heerden v Pienaar* 1987 (1) SA 96 (A) at 106F.

the merits of the application is that section 2 is of no relevance to the question of the validity of the 2003 Deed and their ownership of the property. This, they say, is because the residential permit was not an "affected site" as envisaged in section 2 of the Conversion Act but resulted in a statutory lease in terms of section 6 of that Act.

[14] In my view, the first and second respondent's contention is correct. For the reasons set out at length by Stegmann J in *Toho v Diepmeadow City Council*,[2] there is no scope for a section 2 inquiry in relation to a house occupied by virtue of a residential permit issued under Regulation 7 of the 1968 Regulations. The court concluded that the Conversion Act made "*specific provision*" in section 6 for such properties, which do not fall within the definition of an "affected site" as defined in section 1 thereof. The court held that:

> *With effect from the repeal of the 1968 ... Regulations [by the Conversion Act] on 1 January 1989, the tenure evidenced by the residential permit was converted into an unregistered statutory lease [by virtue of section 6(1)(a) and that this] by implication had the further effect of excluding the residential permit from the category of rights which qualified for consideration by the [Director-General] with a view to forming an opinion for the purposes of the definition of 'affected site' and of s 2(4)(b)(ii) of the Conversion … Act.*
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> *In other words, I hold to be correct Mr Navsa's submission that, as a matter of law, the [Director-General] had and has no power to form the opinion that the rights formerly held under such a residential permit were sufficiently similar to the rights held under a site permit, a certificate of occupation or a trading site permit, to warrant the holding of an inquiry under s 2 of Act 81 of 1988 with a view to the conversion of the tenure under such a residential permit to leasehold.*[3]

[15] The authorities that the applicants rely on for their contention to the contrary (i.e. that the 2003 Deed was invalid in the absence of a section 2 inquiry) are

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[2] *Toho v Diepmeadow City Council and Another* 1993 (3) SA 679 (W).

[3] *Toho* (above) at 689J-693D. For the sake of completeness, I note that the Conversion Act was amended in 1993, after the Toho judgment was delivered, so as to replace the provincial secretary with the Director-General, but this change is of no significance for current purposes.

distinguishable:

(a) *Kuzwayo* was a case involving a site permit (i.e. a permit entitling the holder to construct their own house) issued under Regulation 6 of the 1968 Regulations,[4] which is expressly included within the definition of an "affected site" in the Conversion Act.

(b) The court in *Phasha* held on the facts that the property in question was occupied by virtue of a trading site permit as defined in section 1 of the Conversion Act, [5] which is expressly included within the definition of an "affected site" and to which section 2 undoubtedly applies.

(c) It is not apparent from the report in *Disetsane* (which was an appeal against the refusal of an unopposed application) on what basis the applicant had challenged the validity of the relevant Deed of Transfer, but it was undisputed that the property had been transferred in error. The only finding made by the court was that section 6 of the Deeds Registries Act, 47 of 1937 empowers a court to order cancellation of an erroneously registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land.[6]

(d) While it is also not clear what the nature of the right of occupation had been in *Ntshalintshali*, the court's order cancelling the relevant title deed was made on the basis that the second respondent had knowingly taken advantage of an erroneous failure by the Housing Department to endorse a "family rights agreement" against the title deed and had therefore sold "a property that she was not entitled to sell".[7] There is no suggestion in the current matter of the existence of such an agreement.

(e) *Khwashaba* involved a property occupied by virtue of a certificate of occupation issued under Regulation 8 of the 1968 Regulations, and it was common cause that a property occupied by virtue of such a

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[4] *Kuzwayo v Representative of the Executor Estate Late Masilela* [2011] 2 All SA 599 (SCA) paras 3 - 5.

[5] *Phasha v Southern Metropolitan Local Council* 2000 (2) SA 455 (W) at 475A – 480G.

[6] *Disetsane v Moganedi* 2014 JDR 1720 (GP) para 13.

[7] *Ntshalintshali v Sekano* 2015 JDR 1413 (GJ) paras 5 and 6.

certificate was an affected site that "*falls within the scope of section 2 of the Conversion Act*".[8]

[16] Although the disputed properties in *Maimela*[9] and *Molata*[10] were originally occupied by virtue of residential permits issued under Regulation 7 of the 1968 Regulations, these cases were both decided without any reference to *Toho*, and on the basis that they were indistinguishable from those of *Kuzwayo*,[11] *Khwashaba*[12] and *Nzimande*,[13] which related to properties that had all been occupied by virtue of either Regulation 6 site permits or Regulation 8 occupation certificates. The court in *Nzimande* specifically observed that the statutory procedure provided for in section 2 of the Conversion Act applied only to Regulation 6 and Regulation 8, and not to Regulation 7 rights.[14] I am thus of the respectful view that *Maimela* and *Molata* were incorrectly decided insofar as the orders issued therein were based on the absence of a section 2 inquiry.

[17] In the circumstances, even if I accept in favour of the applicants that no section 2 inquiry was held prior to the registration of the 2003 Deed, the applicants are not entitled to an order cancelling the 2003 Deed on that basis.

[18] While no other basis was advanced by the applicants for the relief that they seek, and although I am not called upon in this matter to determine whether the first and second respondent's title is invalid for any other reason (and while it must thus be emphasised that nothing in this judgment should be taken as constituting the determination of any such question), I should note that:

(a) As the court in *Toho* observed, it was possible for a residential permit holder such as the first respondent to have acquired a leasehold such as that provided for in the 2003 Deed in terms of Chapter VI of the Black Communities Development Act, 4 of 1984. This possibility was

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[8] *Khwashaba v Ratshitanga* 2016 JDR 0776 (GJ) para 24.

[9] *Maimela v Maimela and Others* (13282/16) [2017] ZAGPJHC 366 (24 August 2017).

[10] *Molata v Lekaje* 2016 JDR 1265 (GJ) paras 2 and 11.

[11] *Kuzwayo* (above).

[12] *Khwashaba* (above).

[13] *Nzimande v Nzimande* 2005 (1) SA 83 (W) para 33.

[14] *Nzimande* (above) paras 13 - 16.

specifically contemplated in section 11(2) of the Conversion Act, which provides that "*[n]othing in this Act contained shall be construed as prohibiting any person from acquiring of his own accord a right of leasehold or ownership in respect of a site*".

(b) Section 52(1)(a) of Act 4 of 1984 (which forms part of chapter VI) has at all material times provided for a local authority to "*grant to any person … a right of leasehold in the prescribed manner in respect of any leasehold site which is situate on … land*" of which it is the registered owner or which vests in it. Section 52(10) envisages that such leasehold would be registered in the appropriate deeds registry.

(c) Furthermore, the provisions of section 2 of the Upgrading of Land Rights Act, 112 of 1991, would potentially explain the statement in the report submitted to this court by the Registrar of Deeds to the effect that the first and second respondent's leasehold has been upgraded to full ownership in terms of that Act.

[19] With regard to costs, the usual rule is that the successful party should be awarded their costs. The first and second respondents have been substantially successful, and I see no reason to depart from that approach. None of the other respondents opposed the application, and none of them should be awarded costs.

[20] I grant the following order:

1. The application is dismissed.

2. The applicants are jointly and severally ordered to pay the costs of the first and second respondents.

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

Heard on: 19 Jan 2023

Date of judgment: 18 July 2023

APPEARANCES

For the Applicant:	L Memela instructed by Gcwensa Attorneys
For the Respondent:	MA Tshivhase instructed by T Morotolo Attorneys