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

Case No:3436/18

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: NO

25 August 2023

In the matter between:

SETLHATLOLE SIMON.	1st Applicant
SETLHATLOLE SOLOMON.	2nd Applicant

and

MOROESI ESTHER SETLHATLOLE *N.O.*	1st Respondent
MOROESI ESTHER SETLHATLOLE.	2nd Respondent
DIRECTOR GENERAL DEPARTMENT OF HOUSING, GAUTENG PROVINCE	3rd Respondent
REGISTRAR OF DEEDS, JOHANNESBURG.	4th Respondent

JUDGMENT

Coram NOKO J

Introduction

[1] The first applicant launched these proceedings on 30 January 2008 against the respondents the following orders, first, order cancelling the Certificate of Registered Grant of Leasehold TL 130025/2000 issued in respect of the property situated at 8623 Sharpville (*property*). Secondly, an order directing the second respondent to institute an enquiry in terms of section 2 of the Conversion of Certain Rights to Leasehold Act 81 of 1988 (*Conversion Act*).

[2] The second applicant was joined at the instance of the first applicant on 28 August 2022 in accordance with the court order uploaded on Caselines marked X.[1]

Background

[3] The property referred to above was initially occupied by the late Solomon Setlhatlole and his wife, the late Elizabeth Setlhatlole. Both passed on in 1950 and 1990 respectively. Their marriage was survived by two siblings, namely, the late Jacob Modise Setlhatlole and the late Welhemina Setlhatlole. The late Jacob Modise Setlhatlole was survived by his wife, Moroesi Esther Setlhatlole, being the second respondent whereas the late Welhemina Setlhatlole was survived by two male siblings, being both first and second applicants.

[4] The second respondent is cited in her personal capacity and in her capacity as the surviving spouse and executrix in the estate of her late husband Jacob Modise Setlhatlole. Copy of the Letters of executorship is uploaded on Caselines and marked K.[2]

---

1 See CaseLines 015-3.
2 See CaseLines 005-1.

The application is opposed only by Moroesi Esther Setlhatlole in her both capacities and reference to the respondent in this judgment refers to her in those capacities.

[5] A Residence Permit[3] (*Permit*) was issued in the name of the late Jacob Modise Setlhatlole in 1985 in terms of the regulations promulgated under Government Notice No R1036 of 14 June 1968. The said permit states that the property is leased to the late Jacob Setlhatlole, and it further listed individuals who are entitled to reside with him in the property. Both Simon Setlhatlole and Moroesi Esther Setlhatlole are also listed on the list of residents on the permit.

[6] A Certificate of the Right of Leasehold was subsequently issued in 2000 in terms of the Upgrading of Land Tenure Act 91 of 1991 (*Upgrading of Tenure Act)* in the names of the Late Jacob Modise Setlhatlole together with the second respondent. At the time when the certificate was issued the applicant and his mother were still resident on the property.

[7] The respondent instituted eviction proceedings against the late Welhemina Setlhatlole in 2017 who passed away shortly thereafter. In the meantime, the first applicant launched these proceedings in 2018 for the cancellation of the Certificate of Leasehold on the basis that it was issued local authority without complying with the provisions of the Conversion Act. The eviction proceedings have been stayed in the Vereeniging Magistrate Court pending the outcome of these proceedings.

[8] Applicants' counsel submitted that the rights of leasehold issued in terms of Upgrading of Tenure Act in terms which Certificate of Leasehold was issued were automatically converted into full ownership of the property.

---

[3] See Annexure M on CaseLines 007-1.

Issues in dispute

[9] The court is invited to determine whether the certificate of leasehold in respect of the property was issued contrary to the provisions of the Conversion Act. The respondent contends that the Conversion Act is not applicable in respect of this property.

Submissions and contentions by the Applicants.

[10] The applicants' counsel contended that section 2 of the Conversion Act clearly decrees that an enquiry should be held by the third respondent at which a determination should be made as to whom the title of the property should be awarded. The process was prescribed to ensure that the interest of all occupiers whose particulars are listed in the permit are considered.

[11] The inquiry in terms of section 2 of the Conversion Act was not complied with, counsel contended further, and this court is enjoined to cancel the certificate of leasehold and allow the third respondent to make an inquiry as contemplated in terms of the Conversion Act.

[12] The counsel further submitted that prior to the hearing he realised that the certificate of leasehold was issued in terms of the Upgrading of Tenure Act. The counsel submitted that Constitutional Court held in *Rahube v Rahube* 2019(1) BCLR 125 CC that even properties which were acquired in terms of the Upgrading of Tenure Act should also be proceeded by an inquiry as contemplated in terms of the Conversion Act. In view of the fact that an inquiry was never held the certificate was issued illegally and is susceptible to be cancelled.

Respondent's contentions and submissions.

[13] The respondents' counsel on the other hand contended that the property was purchased by the Late Jacob Modise Setlhatlole who entered into a deed of Sale with Oranje-Vaal Administration Board in 1983. Since this acquisition, so counsel argued, was prior the Conversion Act the said statute finds no application in respect of the property. In addition, counsel proceeded, the permit was also issued before the Conversion Act came into operation and that Act could ordinarily not be applied retrospectively. In principle the rights accrued to the respondents prior the regulatory framework now being invoked by the applicants.

[14] Respondents' counsel further argued that at the time when the late Jacob Modise Setlhatlole allowed the first applicant's mother to take occupation of the property the first applicant was only 14 years and as such, he cannot therefore lay any claim to the property. The first applicant has not right, so counsel proceeded, to exert in relation to the property as contrasted with the respondents. In retort the applicants' counsel argued that by virtue of the first applicant being listed as an occupier in the permit he has rights which need to be protected and ergo has *locus standi* to launch these proceedings.

[15] The counsel for the respondents could not advance any argument to gainsay the arguments put forward by the applicants' counsel in relation to the decision of the Constitutional Court as stated by the applicats'counsel.

The applicable legal principles and analysis.

[16] The historical background relative to ownership of land by Africans in South Africa was chronicled in various judgments.[4] The dark history of land tenure provided a limited and egregious pattern of ownership of land by Africans through various statutes.[5] The said unpalatable history was alleviated by the introduction of the Conversion Act.

[17] The Conversion Act authorised the Commissioner to, *inter alia*, hold an inquiry ad make determinations in respect of permits, leaseholds, and ownership rights of land by African people. This process, which is set out in section 2 of the Conversion Act,[6] is intended to determine to whom the property should be allocated. The determination made in terms of the Conversion Act may be challenged by any interested party.

[18] The administration and the implementation of the Conversion Act was assigned to Provinces. In the Province of Gauteng, this was with effect from 26 July 1996 in terms of Proclamation 41 of 1996, Government Gazette 17230 of 26 July 1996. On 28 August 1996, a resolution was signed by the Premier of the Gauteng Provincial Government designating the Member of Executive Council: Housing and Land Affairs as a competent authority for the administration of the Conversion Act.

[19] The Gauteng Provincial government promulgated the Gauteng Housing Act 6 of 1998 which provided for the mechanism to adjudicate over housing disputes. The Gauteng Province further promulgated the Gauteng Housing Amendment Act of 2000 with regulations relating to the adjudication procedure.

---

[4] See *Nzimande v Nzimande* 2005 (1) SA 83 (W), *Phasha v Southern Metropolitan Local Council* [2000] 1 ALL SA 451 (W), *Kuzwayo v Estate Late Masilela* [2010] ZASCA 167 (1 December 2010), unreported judgment in *Ndaba v Thonga and Others* (18674/20199 [2020](23 November 2020) (Gauteng Local Division).

[5] See Native Land Act 27 of 1913, Native Urban Areas Land Act 21 of 1023, Group Areas Act, regulations governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters of 1968, Black Communities Act 4 of 1984.

[6] Section 2 provides that: *"(1) Any secretary shall conduct an inquiry in the prescribed manner in respect of affected sites within development areas situated within his province, in order to determine who shall be declared to have been granted a right of leasehold with regard to such sites"*

[20] The process envisaged in the Conversion Act was intended to arrest the mischief associated with the precarious security of tenure amongst African people whose rights were systematically devalued. Schabort J having held in *Moremi v Moremi and Another* 2001 SA 936 (W) at 939I that *[T]he conversion of rights brought about by the 1988 Act formed part of the legislative process aimed at delivering society from the tenurial fetters of the years of racial segregation…*". Attendant thereto was also to avoid the possibility of rampant homelessness due to possible evictions where one family member could readily evict those who may have not been given title. To this end the provision of section 2 of the Conversion Act is couched in peremptory terms and as such non-compliance therewith should ordinarily be visited with nullity.

[21] To the extent that the prescript of the law was not followed to comply with the provisions of section 2 of the Conversion Act the ultimate registration of the property could not have lawfully taken place. Absent any lawful justification or exception for not complying with the law then *cadit quaestio*. In this regards section 6 of the Deeds Registries Act endows this court with power to direct the Registrar of Deeds to cancel Title deeds which were registered pursuant to, *inter alia*, unlawful or illegal conduct.

[22] The agreement of sale referred to the respondents' counsel provides in its preamble that Oranje-Vaal Administration Board "*… is willing to dispose of the <u>right of occupation</u>, in terms of Section 16(1)(c) of the Black (Urban Areas) Consolidation Act, 1945 (25 of 1945) as amended, and subject to the provision of Chapter 2 of Government Notice R1036 of 1968 of the house on site 8623 Black Township Zone B to and in favour of the purchaser*." (Underling added).

[23] In addition, clause 12 of the sale agreement provides that *"…it is expressly understood and agreed that the Purchaser shall not by virtue of this Agreement be entitled to acquire ownership of the land upon which the improvements have been erected or any real right is such land. The purchaser understands that as long as he is entitled to occupy the land on which the improvements are situated, he remains liable to pay site- rental as prescribed by regulations applicable to the land. It is also agreed that the ownership of the improvements shall be and remain vested in the Board until such time as the full purchase price, interest thereon, and any other amounts due by the purchaser have been paid by the board. It is further agreed that the risk of the improvements hereby sold, shall pass to the purchaser on completion of this Deed of Sale." (*Underlining added).

[24] It is abundantly clear that the sale agreement was not about the land and the purchaser was expected to continue with the payment of the rent over and above the purchase price for the right of occupation and/or the improvements. It is also trite prior to 1988 Africans could not own immovable property in South Africa. To this end the point *in limine* raised on behalf of the respondents that the property was acquired prior coming into effect of the Conversion Act is devoid of legal basis and therefore unsustainable and is bound to be dismissed.

Epilogue to the analysis

[25] It is ergo ineluctable conclusion that the Conversion Act applies to the property and in view of the peremptory nature of the Conversion Act non-compliance is construed as offending the Conversion Act and is bound to be visited with nullity.

Costs

[26] There is no reason why the costs should not follow the results.

[27] I make the following order:

1. The Registrar of Deeds (Johannesburg) is ordered to cancel the registration of Certificate of Leasehold no TL13005/2000 held in respect of House situated at 8623 Sharpville Township.

2. It is declared that the Residence Permit issued in favour of the Late Jacob Modise Setlhatlole is reinstated.

3. The Director-General: Department of Housing, Gauteng Province or the relevant functionary is directed to institute an inquiry as contemplated in terms of the Conversion of Certain Rights to Leasehold Act 81 of 1988.

4. The first and second respondents are directed to pay the applicants' legal costs jointly and severally, the one paying the other to be absolved.

_____

MOKATE VICTOR NOKO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **25 August 2023.**

Appearances

For the Applicant:	Attorney MD Hlatswayo
Attorneys for the Applicant:	Hlatswayo Mhayise Inc, Johannesburg.
For the Respondent:	Attorney M Muller
Attorneys for the Respondent	Legal Aid South Africa, Vereeniging.
Date of hearing:	16 August 2023
Date of judgment:	25 August 2023