IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
2024-01-15
DATE **SIGNATURE**

Case Number: 70305/2018

In the matter between:

LINDI RONSY MASILELA First Applicant

GERALD MASILELA Second Applicant

and

SIBUSISO KOOS MASILELA First Respondent

ELIZABETH KGELESWANE MASILELA Second Respondent

THE CITY OF TSHWANE METROPOLITAN

MUNICIPALITY Third Respondent

This judgment 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 for handing down is deemed to be 15 January 2024.

JUDGMENT

POTTERILL J

Introduction

[1] In this matter I will for ease of reference refer to the applicants as the applicants cited in this application for rescission of the eviction order and the respondents as only Mr Koos Masilela [referred to as such in the evidence], Koos Masilela's mother has passed away although still cited as a respondent. I do so with no disrespect intended but as both the applicants and respondents have the surname Masilela referring to all the parties as the Masilela's muddles the water.

[2] Mr Koos Masilela obtained an order evicting the applicants from "…." [the property], hence the application for rescission of this order together with a consolidated application to declare the transfer of the property to Mr Koos Masilela unlawful; also seeking a declaration that the applicants are the lawful owners of the property.

[3] I referred the matter to oral evidence because the applicants had a written right of leasehold and an approval application while Mr Koos Masilela provided a deed of transfer.

[4] The outcome of the applications all revolve around the question who the lawful owner or possessor of this property is with the right to occupy the property.

The evidence

[5] Lindi Ronsy Masilela testified on behalf of the applicants. She has been residing on the property for 63 years. He father is Johannes Masilela born in 1926 and he passed away on 2 July 2016. His wife, and her mother, was Mavis and her siblings were Intelligent, Nomsa and Gerald. When the written leasehold was granted they were living on the property together with her grandfather and a child called Jabulani. The written leasehold reflects this, as well as, that it was granted on 14 December 1983 and will expire on 13 December 2083. Mr Koos Masilela never lived there and is not family of them. She admitted that the property belonged to the Municipality and they leased the property for 99 years.

[6] Her father wanted to renovate and expand and the municipality gave him the right to do so by means of a building permit dated 9 October 1984. This building permit was also handed in as an exhibit reflecting that Johannes Masilela was granted permission to build on the property.

[7] She described how the property initially looked and how it was expanded. She testified that many significant events happened there and that her older brother, as well as two grandchildren got married at the property and her father was buried from the property. The property was never sold and they paid the water and electricity for this property to the municipality.

[8] She had never met Mr Koos Masilela before and did not know him. She saw him at the funeral of her father and two weeks after the funeral. He then for the first time claimed the property was his. They asked for documents to prove this but he never at any stage prior to court proceedings provided them with any documents. She denied that he confronted her at the property with a file containing documents. She denied that Koos Masilela’s father had bought the property from her father in 1985 because he would have treated it as a family affair and would have told him. If

Mr Koos Masilela's father bought the property, why did they not move in, but in any event Koos Masilela could not have personal knowledge because he was too young when this averred transaction would have taken place.

[9] Her father left a will and in this will the property is not specifically bequeathed. An executor has not been appointed by the Master of the High Court because they consulted with attorneys and they were advised to first sort out this court case before the executor is appointed. She did not know why in the will the property is not specified.

[10] A document was shown to her that was created on 9 June 2018 with a heading Tshwane Owner Information Report. It was put to her that Mr Koos Masilela in terms of a redistribution agreement pursuant to his father's death owned the property. In terms of this agreement it was transferred from his mother to him. This document reflected that on 26 June 2018 the property was registered in Mr Koos Masilela's and his wife's names, to whom he is married in community of property. She frowned upon this document because it did not show any history of previous owners and nothing on it showed it was an official document.

[11] The witness was also confronted with a form that the mother of Mr Koos Masilela had supposedly taken to the municipality to be declared indigent so as not to pay rates and taxes to the municipality for this property. This was apparently done in 2005. She denied that this document proved anything because there was no stamp and no signature on this document.

[12] Mr Koos Masilela testified that his father passed away in 2016 and there was no will. After two months of grieving he took his mother to an attorney to help with the estate. The attorney informed him of this property and he was surprised because he did not know of it. He asked why they did not take possession of the property in 1985 and he was told that the applicants refused them possession. He also testified

that it was a state of emergency in 1985. He testified that the property had been bought by his father. He did not have that title deed and did not know for how much the property was bought.

[13] With the consent of his family a redistribution agreement was drafted wherein he and his wife would inherit this property. He relied on a deed of transfer in the names of S K Masilela and E K Masilela as proof that he was the owner of this property. The deed reflected that it was a donation from his unmarried mother.

[14] He approached the applicants but saw it was the funeral and did not proceed to confront them about the property. He then again went to the applicants at the property but was treated badly and insulted by being told that he was a Zimbabwean Masilela. He had a file with public documents proving his ownership including the title deed, and wanted to show them that he was the owner of the property. But they were aggressive and he left. He then went to see an attorney.

[15] In cross-examination he stated that his mother wanted to be noted as being indigent so that she could receive a discount on paying water and electricity because she was at that stage a pensioner. When confronted with the fact that she was only 50 years old in 2005 he said that in fact she was not a pensioner but was ill as she was a diabetic and asthmatic. When confronted with that his father as the owner of the property should have applied for a discount on the payment of water and electricity he answered that in fact his mother was the owner of the property.

[16] When asked what documents he had in the file when he wanted to prove ownership to the applicant when visiting the property, he said it was not the title deed but the computer printout before court. This document was however dated 2018 whereas he was at the property with this document in 2016. He then said it must have been the same document but one dated 2016 but he did not know where this document was.

[17] When confronted with why his father would buy the property in 1985 and never claim ownership he for the first time testified that his father had engaged SANCO to obtain possession of the property but was never successful.

Locus standi

[18] On behalf of Mr Koos Masilela a point *in limine* was taken that the applicants did not have *locus standi* because only an executor of the estate of the late applicants' father would have *locus standi.* This argument is rejected. The eviction order was granted against the applicants, consequently they have *locus standi* to bring the rescission of that order. Not in substantive or procedural law can a party against whom an order was granted have no right to approach a court to set it aside. This argument has no merit and such an argument clearly infringes section 34 of the Constitution.

[19] In *Firm-O-Seal CC v Prinsloo & Van Eeden Inc. and Another* (483/22) [2023] ZASCA 107 (27 June 2023) the Supreme Court of Appeal in par [6] found as follows:

> *"Locus standi in iudicio* is an access mechanism controlled by the court itself.Generally, the requirements for *locus standi* are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant's interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant [footnotes omitted]."

Being in possession of a property for 60 years and still residing in the property most certainly clothe the applicants with an adequate interest and eviction would constitute a wrong against the applicants. The applicants have standing.

Non-joinder

[20] Closely linked to the *locus standi* argument was the argument that the Master of the High Court should have been joined. This argument too is rejected. The fact that the estate has not been reported was explained, but in any event, it does not affect the question this Court needs to decide. If the estate is not yet with the Master what interest will the Master have in this matter? This argument is unmeritorious and needs no further address.

Condonation for the late filing of the rescission application

[21] In the heads of argument of behalf of the respondent not any reasoning is set out as to why condonation should not be granted excepting for bold statements that the applicants did not bring their case within a reasonable time and failed to provide an acceptable explanation for the delay.

[22] The horse had already bolted in this matter. The fact that the matter was referred to oral evidence implies that condonation was granted otherwise the matter could not have been heard. But in any event, the applicants set out good reasons for the 5-month period before bringing this rescission application. They did not do nothing for 5 months, they within 20 days after the eviction order was granted launched an application to stay the eviction order and declare the registration of the property into Koos Masilela and his wife’s names unlawful. Upon investigation they realised that they could not let the eviction order stand and then also launched the rescission application in terms of Rule 42(1) of the Uniform Rules of Court. This had to be done because an order granted has to be obeyed until set aside. I am satisfied that the applicants have shown good cause and furnished sufficient explanation for the delay in bringing the rescission application. The consolidation order also negates

against any argument that there was an unreasonable delay. In as far as it is may be necessary, condonation is granted.

Reasons for the decision

[23] As a starting point this Court must keep in mind that Section 25(1) of the Constitution is clear that no person may be deprived of their property. I also accept that for the applicants and Mr Koos Masilela occupation and ownership of the property is an issue of paramount importance.

[24] The applicants had to on a preponderance of probabilities prove that they still have a right to occupation in terms of the 99-year leasehold granted to their father and that the property had not been sold to Koos Masilela's mother or father.

[25] The written 99-year leasehold was presented to Court. In terms of this agreement the Municipality owns the property and the applicants' father had a right, with the occupants [the applicants as cited in the lease] to lease there till 2083. The question to be answered is whether the title deed in the names of Koos Masilela and his wife upsets this lease agreement depriving them of further occupation of this property.

[26] It is trite that ownership in general trumps possession of immovable property. A title deed will also constitute proof of ownership. I am however unconvinced from the evidence led and the real evidence handed in that in this matter the title deed indeed proves ownership. It is undisputed that this long lease exists and has not been terminated. It is common cause that Mr Koos Masilela was aware that the applicants were occupying this property and his parents were aware that the applicants were occupying this property since at least 1985. Mr Koos Masilela's own legal representative put it to Ms Masilela in cross-examination that in fact the municipality was the owner of the property rendering the version of Mr Koos Masilela that his father or mother bought the property from her father untenable; he was not

the owner, the municipality was. There is no evidence that the municipality sold the property to Koos Masilela's father or mother.

[27] Mr Koos Masilela did not make a good impression on the court because he in cross-examination changed his version on multiple material issues whereas Ms Masilela was a credible witness and made concessions were she did not know the answer, for example she did not know why the property was not mentioned in the will.

[28] Mr Koos Masilela was initially adamant that his father bought the property from the applicants' father. This material fact changed to his mother having bought the property. This material contradiction was necessitated because he was confronted with why the mother would be asked to be declared indigent for paying water and electricity if the father owned the property. He pertinently testified that his mother was a pensioner and therefore she approached the municipality but when confronted with her age he adapted his evidence to her being ill, not a pensioner. He testified in chief that he had the title deed with him when he wanted to advise the applicants that he is the owner of the property. In cross-examination he testified he did not have the title deed, but had a computer printout which he presented to court. This document was however dated 2018 rendering it impossible to have been in his possession in 2016. Mr Koos Masilela was not a reliable witness.

[29] It is furthermore highly improbable that when a person buys a property that you will simply leave people in occupation from 1985 to 2016 without them paying rent, taking occupation yourself, or evicting the applicants. It was also never denied that the applicants paid the water and electricity until 2016. The state of emergency in 1985 understandably would have impacted on the parents of Mr Koos Masilela to take action against the applicants, but the state of emergency did not last until 2016 and this reason is on probabilities rejected. For the first time in cross-examination did he testify that his father also engaged SANCO to help to evict the applicants. This was never put to the applicants' witness and this reason is rejected as an

afterthought or embellishment to provide a further reason for this 30-year period that no action was taken.

[30] None of the other documents handed in by Mr Koos Masilela negate the version of the applicants. They are unofficial computer printouts not setting out the history of the transfer of this property. There is no evidence to contradict the evidence on behalf of the applicants that the 99-year lease is in existence and gives them a right to occupation. The background to the title deed reflecting ownership in untenable; there is no evidence of transfer of ownership from the municipality to the parent or parents of Mr Koos Masilela. There is no proof or evidence from the transfer of ownership from the father of the applicants to the parents of Mr Koos Masilela. There is no evidence as to what amount the property was sold for. I accept that with the passing of Mr Koos Masilela's mother her evidence is lacking, but with immovable property there will be a paper trail. It matters not that the long lease was not registered because Mr Koos Masilela and his parents knew of their occupation for 30 years. The argument that their occupational rights were not converted into leaseholds in terms of The Conversion of Certain Rights to Leasehold Act[1] does not negate their right to occupation in terms of the leasehold they in fact have. The fact that the applicants' father did not in his will bequeath the property does not support only the inference that it did not belong to him, it also supports the inference that he could not bequeath it because it belonged to the Municipality and his children's right to occupation being safe till 2083. This is fortified by the Form 3 whereby the applicants' father in1997 applied for the conversion of his right to leasehold to a sale of the property by the city council with transfer at no cost to the applicants' father.

I accordingly find that the applicants have proven that they have a right to occupation.

The rescission of the eviction order.

[31] I am satisfied that had the Court been appraised of all the facts in this matter the eviction order would not have been granted and was granted erroneously in the

[1] 81 of 1988

absence of the applicants. In terms of Rule 42(1) the eviction order is set aside with costs.

Declaration sought that the registration and transfer of the property to Koos Masilela was unlawful and is to be set aside.

[32] It follows that due to the untenable issues addressed above the transfer and registration of the property to Mr Koos Masilela must be set aside. This follows from the finding that the municipality was the owner of the property but seemingly it was directly transferred from the leaseholder to the father or mother of Mr Koos Masilela, albeit with no proof. The Form 3 from the City Council confirms that in 1997 it was still the owner of this property. I am satisfied that this property could not be sold as averred or indeed was sold as averred.

[33] The applicants are not seeking a review, it follows from the oral evidence led that the transfer and registration was unlawful in the circumstances.

Acquisitive prescription

[34] On behalf of the applicants it was submitted that the applicants had been in occupation for 30 years and therefore are the owners by means of acquisitive prescription.

[35] Acquisitive prescription was however not addressed in the applications. No evidence was led thereon, for example, the intention to own versus possess, excepting for attaching the Form 3. In view thereof I am not prepared to grant such a request; no such order was sought.

[36] With the transfer and registration set aside the applicants are to remain in occupation. They have remedies in terms of two Acts to obtain ownership. Likewise

the respondent can obtain proof that the municipality had sold the property and to whom.

[37] I make the following orders:

[37.1] The eviction order granted on 3 September 2019 is rescinded and set aside. The first respondent is to carry the costs.

[37.2] The transfer and registration of the property, "…." to the respondents by means of Title deed"…"is set aside. The Registrar of the Deeds office is ordered to set it aside.

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S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 70305/2018

HEARD ON: 26 AND 27 OCTOBER 2023

FOR THE APPLICANTS: ADV. B. LUKHELE

INSTRUCTED BY: MaMyeni Mazibuko Attorneys

FOR THE RESPONDENTS: MR. T. PILLAY

INSTRUCTED BY: Pillay Thesigan Inc.

DATE OF JUDGMENT: 15 January 2024