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

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 010996/2023

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

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DATE

In the matter between:

YVONNE TSHAKA NKOMO	First Applicant
ROBERT NKOMO	Second Applicant
DAPHNE PULENG NGWENYA	Third Applicant

and

VICTORIA CHAKA	First Respondent
FLOYD CHAKA	Second Respondent
JOHANNESBURG METROPOLLITAN MUNICIPALITY	Third Respondent
HOD LOCAL GOVERNMENT HOUSING GAUTENG PROVINCIAL	Fourth Respondent
REGISTRAR OF DEEDS	Fifth Respondent

JUDGMENT

MKHABELA AJ:

Introduction

[1] The applicants seek a declaratory order to the effect that the registration of Erf […], Diepsloot Township, Registration Division IQ, Province of Gauteng ("the property") in the name of the first respondent, Mokgadi Victoria Chaka be set aside.

[2] The applicants, simultaneously, seek an order that the property be registered in the names of the first, second and third applicants and the fourth respondent. The fifth respondent, which is the Registrar of Deed, is requested, so the relief continues, to register the property accordingly.

[3] The first respondent filed an intention to oppose the relief that the applicants are seeking. Notwithstanding such notice of opposition, the first respondent stated that she does not oppose the relief in question.

[4] It is necessary to reproduce the relevant paragraph in the answering affidavit which unequivocally indicates that the relief is not opposed which reads as follows:

"It is common cause that Erf […] is a family property whose house number […] L[…] S[…] (previously known as Botsheleng), Zone 1, Diepkloof, Soweto, Johannesburg, Deeds Office description Erf […], Diepkloof, Registration Division IQ, Province of Gauteng, is a family house."

[5] The first respondent continues in her answering affidavit and to the extent that is relevant for the relief that the applicants are seeking as follows[1]:

"Abuse of Process

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[1] The first respondent reiterated her stance of not opposing the relief that the applicants are seeking in her heads of argument and oral submissions.

The prayers sought by the applicant are unnecessary for the Honourable Court to even entertain for the mere fact that, at no stage has the First Respondent or the Second Respondent opposed any application to register or to include the names of the First Respondent and her daughter."

[6] It is common[2] cause between the parties that the property is a family home which was registered to the parties' late father in accordance with the permit system operated by the previous Apartheid Government to regulate houses in the black township.

[7] After 1994 all permissions and certificates of occupation were upgraded to full ownership. The first respondent secured the registration of the property in her name to the exclusion of the other two siblings or their descendants[3].

[8] It is further common cause or not disputed that the property is currently registered in the name of the first respondent only.

[9] For some reason the second respondent is listed in the current certificate of occupation. It is not in dispute that the second respondent, being the first respondent's son, cannot be included in the title deed since his mother is still alive and is entitled to be included in the title deed as co-owner.

The law and analysis

[10] The law pertaining to intestate succession is clear. When the father's siblings passed away without a will, he died intestate. The Intestate Act, 81 of 1987,provides that if one dies without a valid will, one 's estate devolve according to the intestate Succession Act. This would in this particular case entail that one's estate would be divided amongst one's surviving children – who are the children of their late's father.

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[2] The first applicant and the first respondent are siblings. The third applicant is the only biological child of the sibling's brother, the late Andrew Chaka.

[3] The third respondent being the only biological child of the one of the two siblings' brother, is legally entitled to take the place of her late father and thereby be registered as co-owner of the property.

[11] In the circumstances all three siblings are by virtue of the intestate succession co-owners in equal shares. The third respondent as the only biological child of the late sibling is also entitled to inherit as contemplated by the Intestate Succession Act as alluded.

[12] However, the second applicant, being the husband of the first applicant, cannot in my view be included in the title deed since he is not a sibling albeit that he is married in community of property with one of the siblings, the first applicant.

[13] Similarly, the second respondent, being the child of the first respondent, cannot be included in the title deed given the fact that his mother is still alive and will be included in the title deed.

[14] The initial relief that the applicants were seeking was to include also the name of the second applicant in the title deed. However, during oral submissions it was conceded by the applicants' representative that the second applicant would not be included in the relief that the property must also be registered in his name notwithstanding his marriage in community of property with the first applicant.

[15] It is now trite that a court is competent to grant an order that is just and equitable in terms of section 172 (1)(b) of the Constitution even if there is no declaration of constitutional invalidity in terms of section 172(1)(a) of the Constitution since a just and equitable remedy does not hinge on the declaration of invalidity[4]. On this score the facts of this particular case calls for a further additional order that is ancillary to the main relief albeit not prayed for by the applicants.

[16] The further order that I contemplate pertains to the additional relief that the first respondent is prohibited from occupying a lion's share of the immovable property. It

[4] Head of Department Mpumalanga Department of Education and Another v Hoer skool Ermelo and Another 2010 (2) SA 415 (CC) at para 97 per Moseneke DCJ.

was not in dispute that the first respondent is currently occupying the property with her son and daughter in law and thereby occupying a large share of the immovable property as if she were a sole owner thereof.

[17] For all these reasons, it is just and equitable to grant the additional order to take into account the co-ownership of the immovable property.

[18] What remains is the ancillary relief that the fifth respondent should register the property in the name of the first applicant, the third applicant and the first respondent despite an absence of a return of service on the fifth respondent.

[19] In my view the failure to serve the fifth respondent with the application is not fatal for the relief sought since the fifth respondent would not have opposed the relief given its statutory duty to register the immovable property in any event.

[20] I turn now to the issue of costs. I am alive to the fact that this is a family dispute and any order of costs against any of the litigants would have a negative effect on the already fragile relationship amongst the siblings. In my view the fact that this is a family dispute militates against following the normal rule that costs should follow the event.

Order

[21] In the result I make the following order:

1. The fifth respondent is ordered to register the property described as Erf […], Diepkloof Township, Registration Division IQ, Province of Gauteng, in the names of the first applicant, the third applicant and the first respondent in equal shares as co-owners of the immovable property.

2. The fifth respondent is also ordered to amend the registration in the name of the first respondent to reflect that she is not a sole owner of the property but only a co-owner as directed above.

3. The first respondent is also prohibited from behaving as if she is the sole owner of the immovable property and must not occupy more that her proportional share of the immovable property without an express agreement with the other co-owners.

4. Each party is to pay his/her own costs..

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R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting 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 **27 March 2024**.

COUNSEL FOR THE APPLICANTS:	L Mbanjwa
INSTRUCTED BY:	L Mbanjwa attorneys
COUNSEL FOR RESPONDENTS:	Adv TL Mahasha
INSTRUCTED BY:	Mahasha attorneys inc
DATE OF THE HEARING:	18 September 2023
DATE OF JUDGMENT:	27 March 2024