REPUBLIC OF SOUTH AFRICA

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

CASE NO: **A3040/2011**

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

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

Soetmelk, Edward	**Appellant**
And	
Seezing, Raymond Victor	**First Respondent**
The Housing Appeals Tribunal	**Second Respondent**
Mulder, G	**Third Respondent**
Twaise-Ratlou, G	**Fourth Respondent**
Registrar of Deeds, Johannesburg	**Fifth Respondent**

JUDGMENT

Van der Linde, J:

Introduction

[1] This is an appeal under s.3(2) of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 ("the Conversion Act"), read with the Gauteng Housing Act 6 of 1998 ("the Gauteng Housing Act") and the regulations made by the MEC under s.24C of the latter Act, against a decision of an appeal adjudication on 15 February 2011 on appeal to it against a decision by an adjudicator on 2 June 2010.

[2] The appellant's son Mr Godfrey Soetmelk and his son are current occupants of the house at [2…….] [A……] Street, [E…..] Park, and so are the first respondent and his son. The appellant and the first respondent are related: the appellant's father was Mr Mathew Soetmelk; the first respondent's mother, Emily, was Mr Mathew Soetmelk's sister, and so the two protagonists in this appeal are direct cousins.

[3] The first tribunal, the adjudicator, after hearing evidence, awarded the house to the Estate of Late Winnie Soetmelk, the responsible representative of which is the appellant, but the appeal adjudicators on appeal to them reversed that decision and awarded the house to the first respondent.

[4] The appellant seeks an order upholding the appeal against the award of the appeal adjudicators, and reinstating the award of the adjudicator, i.e. in favour of the deceased estate. The house will then, according to the submission, be dealt with in accordance with the appropriate laws relating to succession.

[5] The first respondent not only opposes the appeal on the basis of its asserted lack of merits, but has also applied substantively for an order setting aside the appeal for lack of

prosecution. That application was supported by a founding affidavit, and the appellant's son, Mr Godfrey Soetymelk, who was joined as first respondent in that application, filed an answering affidavit. A replying affidavit followed.

[6] That application lead to an application by the appellant for condonation for the late filing of the record of appeal. It was supported by a founding affidavit. The condonation application was opposed by the first respondent who filed an answering affidavit. There was no replying affidavit filed. On 13 March 2013 Thulare, AJ recorded an agreement that the first respondent's application to set aside the appeal was deferred to the hearing of the substantive appeal.

[7] Against this introduction the two overarching issues before this court are whether it is the appellant's condonation application or, against that, the first respondent's attack on the appeal for lack of prosecution that should succeed; and, of course, the merits of the appeal. An application for condonation of a process step in a matter that lacks substantive merits cannot succeed. On the other hand, if the appeal has good prospects, that is an important factor in favour of granting an application for condonation. That being so the merits of the appeal need first to be considered.

The merits of the appeal

The facts

[8] The material facts as these emerged from the initial adjudication are not in dispute. They are that in 1972 the late Mrs Winnie Soetmelk and her husband Mr Matthew Soetmelk applied to the relevant local authority for the right to occupy the house. Childless couples were precluded from acquiring such rights and the appellant, who was Mr Matthew

Soetmelk's nephew, resolved to assist them by proposing that they adopt his son Mr Godfrey Soetmelk, then about four years old, and that he then reside with them.[1]

[9] The proposal was accepted, the Soetmelks were awarded the rights[2] and the young Godfrey went to live with them. In 1984 Mr Matthew Soetmelk passed away. It would appear that on 14 March 1986 the local authority and Mrs Soetmelk entered into a lease agreement. Although the document itself does not form part of the record, it was accepted by all that such a lease agreement in fact came into existence at that stage.

[10] On 23 October 1987 the Alberton Town Council sold the property to Mrs Soetmelk in terms of a written deed of sale. That document does form part of the record before us, although one page from it is missing.[3] The parties were not able to supply the missing page from the Bar.

[11] In January 1988 Mr Godfrey Soetmelk went off to military service for two years, and the first respondent's older brother, Mr Richard Seezing, moved into the house with Mrs Winnie Soetmelk. That came about because the appellant had arranged it at the express request of Mr Richard Seezing's mother.

[12] When Mr Godfrey Soetmelk returned from the Defence Force in December 1989 he moved back into the house. At that time Mr Richard Soetmelk, and his wife, and their two children, were staying there with Mrs Soetmelk. In 1991 Mrs Soetmelk left the house and so did Mr Godfrey Soetmelk; at the end of that year Mrs Soetmelk passed away. In that year Ms Maria Soetmelk, the appellant's daughter, moved into the house to assist with the care-taking of Mr Ricard Seezing's baby, Erel. She stayed there until early 1997.

---

[1] In the cross-examination of the appellant it was suggested that this was a fraud, since the boy Godfrey was never legally adopted. That was an unfortunate description of what had transpired. First, the relevant regulatory framework was not before the tribunal, and so one does not know whether a biological or legally adopted child was essential, or whether a child that was simply in fact being cared for by the adult applicants for the housing rights was sufficient. Second, whatever the regulation, one does not know what the witness' bona fide understanding of its requirement was.

[2] Precisely what rights were awarded to them was never examined in the transcript.

[3] Internal pagination, p5.

[13]In late 1998 Mr Godfrey Soetmelk again moved back into the house, where Mr Richard Seezing was still staying. In May or June 2006, the first respondent also moved into the house, at his brother's, Mr Richard Seezing's, invitation. In November 2007 Mr Richard Seezing passed away.

[14] In this time-frame differences of opinion within the family arose. This led to the appellant approaching the Master's office, and him being issued with Letters of Authority on 29 August 2006.[4] In terms of this document, the appellant was authorised to collect the assets of the deceased estate of Mrs Winnie Soetmelk, pay the debts of the estate, and transfer the net residue to the heirs of the deceased.

[15]The hearing before Mr RS Malatji, the adjudicator, followed on 6 May 2010, and his award in favour of the appellant followed on 2 June 2010. There was a right of appeal to be exercised within 30 days of that award. The first respondent appealed, leading to the award of the appeal adjudicators in favour of the first respondent, on 15 February 2011. Thereafter, in accordance with the appeal award, the house was transferred to and registered in the name of the first respondent. The first respondent therefore now holds the title deed to the property.[5]

[16]The appellant then filed an appeal to this court on 31 May 2011 against the award of the appeal tribunal. The appellant's attorneys thereafter made regular enquiries for the transcript of the proceedings, on 2 June 2011, 13 August 2011, 13 September 2011, 8 November 2011, 24 February 2012, 20 April 2012, and 23 August 2012. Eventually, on 10 September 2012 they were called to say that the transcript was ready for collection. The appeal record was then submitted, and the hearing date of 13 April 2013 was awarded. The notice of appeal was then filed.

---

[4] The document itself is not part of the transcript before us, but was often referred to in the evidence.

[5] It was not argued on behalf of the first respondent that registration of transfer immutably rendered him owner of the property, and that aspect, particularly the effect of the fact that in Legator McKenna Inc and Another v Shea and Others 2010 (1) SA 35 (SCA) the Supreme Court of Appeal held that, in our law, the abstract theory of transfer applies to immovable property, was not investigated.

[17]The record before us includes a set-down of the appeal hearing for 9 October 2013, and a letter dated 26 September 2013 by the first respondent's attorney withdrawing as attorney of record.

The legal framework: in particular, the appeal function of this court

[18] The starting point is the Conversion Act which provides for the conversion of certain rights of occupation into leasehold or ownership. Under s.2 of that Act the D-G is empowered to conduct an enquiry in respect of an *"affected site"* to determine who shall be declared to have been granted, in the case where the site is within a formalized township[6] for which a township register had been opened, ownership with regard to the site. This is the enquiry which the adjudicator, acting under ss. 24A and 24B of the Gauteng Housing Act, and the regulations, had embarked on in the present matter.

[19] The powers of the adjudicator are set out in s.2(3)(a) to (d) of the Conversion Act. They are wide, because they enable him or her to determine whom he or she intends to declare to have been granted ownership of the site concerned; and, importantly, the paragraphs referred to make it plain that the adjudicator has a discretion (*"may"*) not to follow strict law in doing so. This much is clear when regard is had to the qualification at the end of s.2(3).

[20] Despite that broad conferment of powers, there is an important jurisdictional prerequisite for the exercise of those. It is that only an *"affected site"* can be the subject-matter of the enquiry in respect of which the adjudicator can exercise his powers.[7] That is a defined concept; and at its very lowest, it refers to a site purporting to be occupied by virtue of a permit issued by the local authority conferring rights which in the opinion of the *"secretary*

[6] I have assumed that Eden Park was at all times such a township.
[7] Cf. Phasa v Southern Metropolitan Council of Johannesburg, 2000(2) SA 455 (WLD) at 476C.

concerned"[8] are similar to the rights which are held by the holder of a site permit, certificate, or trading permit.

[21]The record contains no examination of this issue; but I propose assuming that in fact the site here concerned was so qualified. If it were not so qualified, the entire process may be nullity, and in turn that would elicit an enquiry as to the consequences particularly of the transfer of the property to the first respondent. It may be that that transfer remains unaffected, but also unimpeachable.[9]

[22]Reverting then to the discretion: Satchwell, J in Phasha touched on it,[10] and the way the learned judge described it, is akin I suggest to a discretion of the second type discussed by the full court in this division in Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another,[11] and referred to as a *"discretion loosely so called"*.

[23]The relevance of this observation for present purposes is that the power of the appeal body is not limited to interference only when the lower body will have committed a misdirection. If the appeal body considers that it would have come to a different conclusion that that of the lower body, it is entitled to substitute its decision for that of the lower body.

[24]That conclusion fits the express conference of power upon the appeal adjudicators and the high court, respectively in s.3(1) and s.3(6) of the Conversion Act, read with regulation 5(2)(c).

Reasoning

[25] Having set out the factual background, and having identified the legal framework within which we are to function, it is time now to apply our attention to the facts, so as to arrive at the conclusion that we believe ought to have been arrived at by the appeal adjudicators.

---

[8] Probably now a reference to the relevant Provincial MEC.
[9] This aspect obviously was not argued before us, the parties assuming no doubt that the jurisdictional issues were beyond reproach.
[10] Op cit, 478 C to F.
[11] 1999(4)SA799(W) at 804, 805 per Cloete, J (as he then was).

[26]We start from the vantage point that neither of the two cousins, not the appellant nor the first respondent, was the holder of any site permit or a certificate, or any permit which conferred rights to them that could be considered as similar to the rights that may have been held by the holder of a site permit or certificate, as envisaged in the Conversion Act. We have already recorded that we assume that, on the other hand, the property concerned here qualified as an *"affected site"*.

[27]That implies that, at least so far as our assumption goes, Mrs Winnie Soetmelk was, if not by reason of the lease agreement then by virtue of the sale agreement, the holder of a permit which conferred on her rights similar to the rights that were held by the holder of a site permit or a certificate holder.

[28]But her position, in life, was in fact and in law considerably stronger than that. She was the purchaser under an agreement whereby she was entitled to demand transfer of ownership against payment of the purchase price. That agreement also expressly conferred on her the right to possession and occupation of the property with effect from 1 October 1987.[12]

[29]Next, we reason that when Mrs Soetmelk died four years later at the end of 1991, the entitlement to claim transfer of the house against appropriate tender of counter-performance formed part of her estate. This conclusion is different from that of the appeal adjudicators, who concluded that the sale agreement was no longer in effect when Mrs Soetmelk died. They did so on the basis that she was in material breach of the agreement for not having paid the purchase price instalments due under the agreement, and also for having breached clause 11 whereby she was oblige to have stayed in the property until the full purchase price will have been paid.

[30]But of course the record does not inform one as to whether Mrs Soetmelk had in fact not paid the purchase price. It does not speak of steps taken by the local authority to cancel the

[12] Clause 7, p130.

agreement for breach; and there is also no record of a decision to cancel and *a fortiori* no record of a written communication of such a decision to cancel to Mrs Soetmelk.

[31] One accepts that on so sparse a record as this it is difficult to draw reliable inferences. But that difficulty applies to both sides. And we cannot accept that the probable inference, there being no facts, is that Mrs Soetmelk breached the sale agreement; and even if she had breached the sale agreement, that the seller had actually resolved to cancel the agreement, and had actually conveyed the decision to cancel to Mrs Soetmelk. After all, while she was alive, one knows that she was not actually evicted from the house.

[32] This conclusion then takes one to the next pillar, which is that the person who is legally charged with the collection of the assets of the estate, being the appellant by virtue of the Letters of Authority, has claimed before the initial adjudicator that the house be transferred to the estate.

[33] One obviously accepts that a substantial passage of time has lapsed between end 1991 when Mrs Soetmelk passed away, and 29 August 2006, when the Letters of Authority were issued to the appellant. But weighed against the first respondent's position, who had only been living in the house for some four years when the enquiry before the adjudicator took place, all the while during which Mr Godfrey Soetmelk had also lived there, it seems that that passage of time is really a neutral factor.

[34] Importantly, the first respondent did not contend that the fact that he had been living in the house had conferred on him any right that was recognised in the Conversion Act, or any other relevant legislation or principle of law. To the contrary, it is the estate of Mrs Soetmelk that might have relied on the principle expressed in the adage, *qui prior est tempore potior est iure*.[13] The provisions of the Conversion Act, specifically s.2(1) and s.2(3), are in our view more compatible with the notion of the recognition, obviously in the new form envisaged by

[13] Priority in time gives priority in law.

the Act, of rights that had already accrued to a claimant under previous legislative structures.

[35]In their reasoning the appeal adjudicators accepted that no payments at all had been made in respect of the purchase price. This conclusion was the foothold for their conclusion that Mrs Soetmelk and after her, her executor, had repudiated the sale agreement. They then went on to record that it was common cause that the first respondent had lived in the property since 2001, has maintained the property, and has had a consistent, stable and long association with the property. Juxtaposing these two positions, they then conclude that in equity the house should be awarded to the first respondent.

[36]The difficulty we have with this reasoning is that, certainly as far as our record is concerned, there is no warrant for the conclusion that no payments on account of the purchase price had been made. The repudiation conclusion is then unwarranted. It is true that the respondent maintained the property, but he was living in it.[14] The one person who had in any event outstripped the first respondent's tenure in the property by far, was of course Mr Edward Soetmelk.

[37]It is true that Mr Edward Soetmelk is not a claimant for the property, but the principle which his much longer association with the property shows up, is that mere presence in the property does not found an entitlement under the principles recognised in the Conversion Act. In our approach above we have not accepted that the power of the adjudicator under the Conversion Act, and similarly the powers of the appeal adjudicators on appeal to them, was to award houses to people whom in his or her opinion was most deserving, thereby applying some undefined sense of equity.

[38]We have rather approached the matter on the basis that the power of the adjudicator was to award houses to people who claimed an entitlement in law to them, even if the entitlement in law might not have passed muster, were the law applied strictly. Put

[14] However, likely not for the period of time assumed by the appeal adjudicators; see the exposition of the facts earlier in this judgment.

differently, we have not approached the matter on the basis that either the adjudicator, or the appeal adjudicators, or this court, had a power in equity. We do not believe the Conversion Act, properly construed, affords such a power.

[39] It follows from the foregoing that in our view the appellant's prospects of success on appeal are good.

Condonation

[40] The first respondent made heavy weather of the delays that had been occasioned by the appellant in the prosecution of the appeal. There is of course also the factor that registration of transfer of the property to the first respondent had already been effected, and that that fact ought to have brought some legal certainty. We deal with this latter aspect first.

[41] The record does not tell when precisely transfer had taken place. From the affidavit supporting the first respondent's application to set aside the appeal, it appears that it will have occurred between 15 February 2011 and June 2011. Since the notice of appeal had to be lodged within 30 days of knowledge of the appeal adjudicators' decision, the first respondent was on risk at least until mid-March 2011.

[42] Nor was it argued before us[15] that in view of the transfer having taken place, the property can no longer be transferred to the estate of Mrs Soetmelk. It seems to us that if the property ought in the first place to have been transferred to the estate of Mrs Soetmelk, as the adjudicator had found, and if we have the power to direct that that is what the appeal adjudicators ought to have held, then the subsequent transfer to the first respondent is liable to be set aside.

[43] Two aspects concerning condonation have been raised on the papers. The first is the first respondent's application to set aside the appeal, and the second is the appellant's

[15] As we have pointed out in a footnote above.

application for condonation for the late filing of the record of the appeal. The first application was brought on 16 August 2012, based on a founding affidavit that had been testified to on 20 July 2012. The answering affidavit came on 10 September 2012, explaining that the record had since become available. The replying affidavit was filed on 12 October 2012, and the application to set aside the appeal was then set down for hearing on 13 March 2013. On that day it was postponed for hearing with the substantive appeal. Two weeks later the appellant's application for condonation followed.

[44] In the appellant's application an explanation is furnished about the inordinate delays caused by the fact that the record had to be obtained not from the usual Department of Justice contracted sources, but from the Housing Department. There was little that the appellant could do short of obtaining a court order to expedite that process.

[45] There is no doubt that the appellant could have been more adept in securing the appeal record and prosecuting the appeal, but a balance has to be struck between the first respondent's prejudice, and the prejudice to be suffered by the intestate heirs of the estate of Mrs Winnie Soetmelk. On consideration, the first respondent's position has, at a practical level, changed little. He was staying in the house before the appeal process started, and is still staying there. On the other hand, there are potential heirs who ought to inherit the property and their rights will have been prejudiced without them having been to blame for any delay.

[46] We would refuse the first respondent's application, and grant the appellant's application, in each case with an appropriate costs order. An appropriate order dealing with the reinstatement of the appeal should also issue, in view of our reasoning.

Conclusion

[47] In the result, in our view, the appeal must succeed. We make to following order:

(a) The first respondent's application to set aside the appeal is dismissed, and the appellant is directed to pay the costs of that application.

(b) The appellant's appeal is reinstated.

(c) The appellant's application for condonation for the late filing of the record of appeal is granted, and the appellant is directed to pay the costs of that application.

(d) The decision on 15 February 2011 of the appeal adjudication panel comprising Messrs AY Bhayat, GS Mulder and G Twaise, is set aside, and there is substituted for that decision the following: 'The appeal against the award of adjudicator Mr S.R. Malatji dated 2 June 2010, is dismissed'.

(e) The registration of transfer of the immovable property situate at 214 Austin Street, Eden Park, is set aside; and registration of transfer of the said property is to be effected to the estate of the late Mrs Winnie Soetmelk.

WHG van der Linde
Judge, High Court
Johannesburg

I agree.

A Mayet
Acting Judge, High Court
Johannesburg

For the appellant: Attorney MD Hlatshwayo
(0724075875)
Hlatshwayo-Mhayise Inc
15th floor Schreiner Chambers
94 Pritchard Street
Johannesburg
011-3337303

For the first respondent: Adv. T Steyn

Instructed by Klopper Jonker Inc
c/o The Document Exchange
Docex 216
Johannesburg
Ref. Mr E Ungerer/S1000386

Date argued: 18 April, 2016
Date of judgment: 29 April, 2016