REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2020/19559

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
07/10/2022

In the matter between:

GAUTENG PROVINCIAL GOVERNMENT: DEPARTMENT OF HUMAN SETTLEMENTS	**First Applicant**
ESTATE LATE OF BALTINA KIDIBONE BOGATSU	**Second Applicant**
ESTATE LATE OF ELUSAI BOGATSU	**Third Applicant**

and

DITHABISO ELIZABETH POGATSI	**First Respondent**
(Identity Number: [....])	
ESTATE LATE OF SEMPU WILLIAM POGATSI	**Second Respondent**
MASTER OF THE HIGH COURT, JOHANNESBURG	**Third Respondent**
REGISTRAR OF DEEDS, JOHANNESBURG	**Fourth Respondent**

JUDGMENT

MANOIM J:

[1] This is an application to rectify a title deed to a house in Dobsonville Soweto. Its history is a microcosm of the transition from Apartheid land control in townships to the law as it is presently.

[2] This legal history provides important context for the present dispute. Prior to 1988 African people could not own property in so called white designated areas. But since African people were required by the apartheid system to provide a work force in white areas they needed to stay in these areas. Hence the fiction was created that they were present but not permanent occupants. To bring some reality to this fiction policies under the apartheid government started to change.

[3] In *Moloi v Moloi*, Dodson AJ gives a lucid account of this history as the change started from 1988.[1]

> *"The Conversion of Certain Rights to Leasehold Act 81 of 1988 was part of the apartheid government's attempts to reform its influx control policy when it was forced to recognise that Africans could not perpetually be relegated to the status of temporary sojourners in South Africa's cities.*
>
> *The Act allowed for rights of occupation under the racially discriminatory regulations which controlled the occupation of African townships ("the Urban Area regulations") to be converted into 99-year leasehold. The 99-year leasehold was recognised as a form of title which was registrable in the Deeds Registry. It was capable of transfer. However racial discrimination persisted in so far as it did not accord recognition of full ownership to its intended beneficiaries.*
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> *In 1993 the Act was substantially amended. The name of the Act was changed to the Conversion of Certain Rights into Leasehold or Ownership Act 81 of*

[1] *Moloi v Moloi and others; Smith and another v Mokgedi and others* [2014] JOL 32594 (GSJ).

1988. I will refer to it as the "Conversion Act". As the name change suggests, provision was now made for the conferral not only of leasehold but also of ownership where the affected property was situated in a formalised township for which a township register had been opened.

By way of Proclamation 41 of 1996 dated 26 July 1996 the administration of the Conversion Act was assigned to the provinces in terms of section 235(8) of the Constitution of the Republic of South Africa, Act 200 of 1993 and section 2(2) of the Land Administration Act 2 of 1995. The Gauteng Province has effected subsequent amendments to the Conversion Act"[2]

[4] As noted earlier prior to 1988 Black persons could not own land in Urban areas. Instead, they were given permits in terms of the then prevailing regulation.[3] One such permit was given to the late Martha Bogatsu. There is no date in the record when she passed away. However, it must have been before 1984 because on that date there is a housing permit in the record. It records the following:

a. That William Pogatsi is the permit holder;
b. That his three brothers and one sister (the second applicant) were granted the right to occupy the house as well;
c. Later the first respondent name was added and is recorded as his wife.

[5] William has also since past away on 12 April 2005. He was it is common cause the eldest son of the late Martha which probably explains why he is recorded as the holder of the permit in 1984.

[6] In 1986 William married Elizabeth Pogatsi the first respondent (Elizabeth). Elizabeth's says her name was added to the housing permit after William had got

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[2] This was by way of the Gauteng Conversion of Certain Rights into Leasehold or Ownership Amendment Act 7 of 2000; Gauteng General Law Amendment Act 4 of 2005.
[3] Government Notice R1036 of 14 June 1968 Regulations Governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters. As Dodson AJ points out this was amended on numerous occasions, the last such amendment having been effected by Government Notice 2733 of 17 December 1982. See Moloi op cit. footnote 2.

divorced and married her. From the housing permit it does appear her name was added on at a different time to the others as the signature of the township manager is different.

[7] Elizabeth says at that time she stayed in the house together with William and his youngest brother Piet. She says at that stage Baltinah, who is the second applicant was not staying in the house and that she has since her own marriage being living in the North-West.

[8] Then as outlined earlier leasehold was introduced. This allowed permit holders to convert their rights first to 99-year leasehold and then to full ownership.

[9] As explained by Dodson AJ in *Moloi* under the 99-year leasehold regime:

> *"The determination of who would be entitled to the leasehold rights would in terms of section 2 of the Act be determined at an administrative inquiry."*[4]

[10] But he notes that even when full ownership became possible later under the 1993 Conversion Act:

> *"the procedure for determination of the person entitled to leasehold or ownership pursuant to an inquiry was retained."*[5]

[11] In 1998 the home was transferred into the name of William and Elizabeth by the Western Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council.[6]. According to Elizabeth after her husband passed away in 2005, she reported his death to the Master. She was then advised by the Master's office to have the house (then according to her registered in both their names) to get registered in her name. This duly came about in 2006.

[12] It is this transfer the applicants seek to set aside. The Department says this was an error on its behalf.

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[4] *Moloi v Moloi and others; Smith and another v Mokgedi and others* [2014] JOL 32594 (GSJ) para 3.
[5] *Moloi v Moloi and others; Smith and another v Mokgedi and others* [2014] JOL 32594 (GSJ) para 4.
[6] Answering affidavit ad paragraph 9 and annexure DEP 3.

[13] The facts it relies on are that after that death of Martha the Housing Transfer Bureau sold the property at a discount William. There is no detail as to when this occurred nor on whose information this is based. Elizabeth claims to have no knowledge of any family consultation. But what is clear from the record is that at the time the 1998 transfer, William was the permit holder and thus in a different position to his siblings.

[14] Then in 2004 according to the Department a Family House Rights Agreement was entered into by William, the second applicant and the one sibling Elusia Bogatsi (also since deceased in 2019) Next to Elizabeth's name is the remark "refused to come and sign" The other three all arrived and signed.

[15] Elizabeth denies any knowledge of the existence of this agreement and claims that the first time it came to her notice was in the course of these proceedings.[7] But even if I accept that this document was entered into by William at the time, it does not purport to give any rights of ownership to the other siblings or their descendants.

[16] The document has several features to it which are at variance with the then known facts. It records that the council will be transferring the house to William who it describes as the 'custodian.' But by this time William was already the owner of the property (having with Elizabeth taken transfer in 1998). It is not clear why it should state "the Council proposes to sell the property" to Willam in a document dated 2004.

[17] But this notwithstanding the rights sought to be relied on the document by the applicants are those of the remaining siblings, who are referred to as the 'entitled family members.'

[18] The department alleges that:

> *The intention of this agreement was to ensure that the custodian and his spouse shall keep the property as a family house with residential accommodation available for the benefit of the entitled family members (the*

[7] Answering affidavit ad paragraph 9.

Second and Third Applicants), their spouses and their minor children. I annex hereto the family house rights agreement as annexure "MF2".

[19] But the content of this document does not go this far as the department contends it does. What it does state is the following:

5.Customary rules
The Entitled Family Members shall
a) endeavour to find other suitable accommodation within their means and shall then vacate the property;
b) keep the Custodian regularly informed on the general nature of their financial and employment circumstances, so that their ability to contribute to expenses may be ascertained.

[20] The second applicant I will accept can claim to be one of the contemplated "entitled family members." But this document does not confer any rights of ownership or possession of the property. Rather, it gives them certain temporary rights of tenancy which in any event they did not exercise at the time.

[21] What the agreement goes on to record is that the Custodian must keep a signed original of the agreement to the title deed, and second, that if at any stage in the future legislation comes into effect for a form of family ownership to be recorded then they (the entitled members) could apply to have a note of the agreement endorsed on the title deed. Quite what the effect of such an endorsement would mean is by no means clear. But assuming for the time being on the most favourable construction of it for the applicants, that it meant that once a law creating family membership was passed, they could become joint owners there are two problems. First Elizabeth to whom joint title had passed in 1998 was never a party to the agreement. Without her consent no title could have been passed nor for that matter give the other any other rights in respect of the property. Second no such legislation has yet been passed.

[22] In short there is nothing in this agreement between the entitled members and William, then a joint owner of the house with the first respondent, which suggests that:

d. That property was erroneously transferred to the first respondent in 2006;

e. That the second applicant or any other of the descendants of the entitled members have any rights to the house.

[23] It may well be that in 1998 a better process of consultation should have taken place before the house was transferred to William and Elizabeth – but that has long passed and if there was to be review it should have taken place then.

[24] What now appears to have precipitated this dispute so many years later is that:

> *"The descendants of the custodian have also been denied rights of admission to the property by the First Respondent. She has ultimately illegally appropriated the property to herself to the exclusion of the other entitled family members and their descendants."*

[25] I accept that the shortage of housing has had unfortunate consequences for later generations, but this does not mean anything unlawful has taken place.

[26] In *Myers v Van Heerden,* the court held that the only grounds on which a deed can be altered or added to are when:

> *"(a) that there was no justa causa for the execution of the deed, for example, because the transfer was induced by fraud or because the contract, in execution of which the deed was registered, was induced by fraud; and (b) that the deed does not reflect truly the agreement entered into by the parties, for example, because the deed as registered does not truly carry out, and is not a true record of the contract entered into by the parties or because the contract, in execution of which the deed was registered, does not, on account of mutual error, reflect the true intentions of the parties and the deed in consequence does not carry out the contract nor is it a true record of the execution of the contract."*[8]

[8] 1966 (2) SA 649 (C).

[27] There is nothing in the family agreement that evidences an agreement to change the ownership of the property. At best it gave some rights of tenancy to the family members at the time. But that was in any event not a right they could exercise since they were not in the house in the time. Nor did it purport to confer joint ownership on the other siblings. There is no language in it to this effect. And as noted Elizabeth a co-owner was not party to this agreement. There is thus no evidential basis to go behind the existing terms of the deed.

[28] If this is the case, then there is no basis to suggest that the 2006 transfer was done in error. The applicants have not made out a case for the relief they seek. The application accordingly fails.

ORDER:-

[29] In the result the following order is made:

1. The application is dismissed.

2. The applicants are liable for the costs of the first respondents jointly and severally the one paying the other to be absolved.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 19 April 2022
Date of judgment: 07 October 2022

Appearances:
Counsel for the First, Second and Third Applicant: Adv JD Napo

Instructed by.	Raborifi R.Inc Attorneys
Counsel for the First Respondent:	Adv S.F Sibisi
Instructed by:	Motlhasedi Attorneys