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

**CASE NO: 2020/40164**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

11/10/2022

In the matter between:

**MABENA, AGNES**

**First Applicant**

**MOGANE, TIMOTHY**

**Second Applicant**

**and**

**MOGANE, NOKUTHULA ALINA NO (the executrix in the estate of the late  
Vangile Margaret Mogane)**

**First Respondent**

**MOGANE, THULISILE**

**Second Respondent**

**THE DIRECTOR-GENERAL OF THE DEPARTMENT  
OF HUMAN SETTLEMENTS, GAUTENG PROVINCE**

**Third Respondent**

**THE MEC OF DEPARTMENT OF HUMAN  
SETTLEMENTS GAUTENG PROVINCE**

**Fourth Respondent**

**THE MASTER OF THE HIGH COURT  
(JOHANNESBURG)**

**Fifth Respondent**

THE CITY OF JOHANNESBURG

Sixth Respondent

THE REGISTRAR OF DEEDS (JOHANNESBURG)

Seventh Respondent

## JUDGMENT

MOORCROFT AJ:

### Summary

*Passing of ownership – real agreement – transfer by local authority to deceased not vitiated by Family Agreement that gives rise to personal rights, if any*

### Order

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicants are ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

## INTRODUCTION

[3] The applicants seek an order cancelling Title Deed [...] in the name of the late Ms Vangile Margaret Mogane who was during her life<sup>1</sup> the owner of immovable property at Erf [...], Diepkloof Gauteng, as well as an order that the property revert to its previous owner, the City of Johannesburg, and that a hearing then be held in terms of the provisions of section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (the Conversion Act), for the purpose of determining the identity of the rightful claimant of the property.<sup>2</sup>

[4] The executor of the deceased estate is cited as the first respondent.

[5] Before dealing with the merits of the application it is advisable to deal selectively with the legislative background.

## THE CONVERSION OF CERTAIN RIGHTS INTO LEASEHOLD OR OWNERSHIP ACT AND THE GAUTENG HOUSING ACT

[6] The Gauteng Housing Act 6 of 1998 was promulgated to provide for the promotion and facilitation of housing development within Gauteng. It establishes principles that underpin housing development in the province. In terms of section 24A, the Department of Housing in the Province is authorised to adjudicate on disputed cases emerging from housing bureaus established for the transfer of residential properties, by the Premier's directives in terms of section 171 of the Local Government Ordinance 17 of 1939<sup>3</sup> and disputed cases that emerged from the transfer of residential properties in terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, the 'Conversion Act.'

[7] The Conversation Act came into force on 1 January 1989 and it repealed the Regulations Governing the Control and Supervision of an Urban Black Residential Area and Related Matters (GN R1036 of 14 June 1968) and abolished the residential

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<sup>1</sup> She passed away in 2011

<sup>2</sup> Notice of motion (Caselines 001-2)

<sup>3</sup> Housing Bureaus were established and an agreement of co-operation was issued as a directive in terms of section 171 of the Local Government Ordinance

permits under regulation 7.<sup>4</sup>

[8] The existing rights created by the residential permits were retained by section 6 of the Conversion Act, and the permit holder was now to be regarded as a lessee while the local authority was to be the lessor.

[9] Section 2 the Conversion Act provides that the Director-General of the Provincial Administration must conduct an inquiry in order to determine who shall be declared to have been granted a right of leasehold or ownership of 'affected sites'.<sup>5</sup>

[10] At the conclusion of the inquiry the Director-General must determine whom he intends to declare to have been granted a right of leasehold or ownership in respect of the site concerned, if he or she is satisfied that the person so declared is the holder of a site permit, certificate or trading site permit, or the holder of rights which in the opinion of the Director-General are similar to the rights of the holder of a site permit, certificate or trading site permit. Any person aggrieved by any determination so made may, within such period and in such manner as may be prescribed, appeal against that determination.

#### THE FAMILY HOUSE RIGHTS AGREEMENT

[11] In 2004 the applicants and the late Ms Mogane entered into a Family House Rights Agreement in terms of which it was noted that the City of Johannesburg (the Council) proposed to sell the property to the late Vangile Margaret Mogane and to pass transfer in unrestricted full ownership to her.<sup>6</sup>

[12] The agreement contained an unenforceable<sup>7</sup> *pactum successorium* that she

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<sup>4</sup> See the judgment by Jajbhay J in *Nzimande v Nzimande & another* [2004] JOL 13167 (W) for a review of the history of the legislation. See also *Moloi v Moloi and others; Smith and another v Mokgedi and others* [2014] JOL 32594 (GSJ)

<sup>5</sup> The definition is in section 1: An 'affected site' means a site which is or purports to be occupied by virtue of a site permit, a certificate, a trading site permit, or a permit issued by the local authority concerned conferring upon the holder thereof rights which in the opinion of the Director-General concerned are similar to the rights which are held by the holder of a site permit, certificate or trading site permit

<sup>6</sup> Caselines 001-37

<sup>7</sup> See *McAlpine v McAlpine NO and Another* 1997 (1) SA 736 (A)

would bequeath the property to a family member.<sup>8</sup> The late Ms Mogane did in fact leave the property to her children and in any event complied with what the *pactum successorium*.

[13] The agreement it also provided that the property be kept available by her as Custodian for shared occupation by the present applicants (referred to as Entitled Family Members) and their spouses and minor children. The applicants undertook to find other suitable accommodation for themselves and would then vacate the property.

[14] Molahlehi J in *Hlongwane and Others v Mosholiba and Others*<sup>9</sup> described a similar family agreement as “*nothing but a personal arrangement between*” certain individuals.<sup>10</sup> The same comment applies in this matter.

### THE TITLE DEED

[15] The property was transferred<sup>11</sup> by the City of Johannesburg into the name of the late Vangile Margaret Mogane under Deed of Transfer [...] on 15 February 2005.<sup>12</sup> This was done pursuant to the Conversion Act. None of the provisions of the Family House Rights Agreement found their way into the title deed.

[16] Ownership therefore passed and Ms Mogane obtained a real right. The requirements for the passing of ownership are delivery (in the case of a movable) or registration in the Deeds Office (in the case of immovable property) coupled with a real agreement in terms of which the transferor has the intention to pass ownership and the transferee has the intention to become owner.<sup>13</sup> There is nothing to suggest that the real agreement between the late Ms Mogane and the City of Johannesburg was in any way tainted, and no basis for setting the transfer aside.

[17] The real agreement is also not tainted by the Family House Rights

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<sup>8</sup> The late Ms Mogane did in fact leave the property to her children and in any event complied with the *pactum successorium*

<sup>9</sup> *Hlongwane and Others v Mosholiba and Others* [2018] ZAGPJHC 114

<sup>10</sup> In that case, siblings

<sup>11</sup> The report by the Registrar of Deeds appears at Caselines 003-2

<sup>12</sup> Caselines 001-24

<sup>13</sup> *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) paragraph 22

Agreement. In any event, the property was registered in the name of the late Ms Mogane with the knowledge and co-operation of the applicants. They entered into the Family House Rights Agreement on the basis that she would become owner, that she would eventually bequeath the property to a family member, and that they would have a temporary personal right to stay at the property.

### THE RELIEF SOUGHT

[18] The present applicants lay claim to the property and wish to have the property revert to the City of Johannesburg so that a hearing can be held. There is no basis in law for such relief. The property belonged to Ms Mogane; she had the real rights and could bequeath the property to any person she wished. The fact that she did so in compliance with the Family House Rights Agreement does not detract from her rights as owner.

[19] The first respondent as executrix has to deal with the property and would be entitled and obliged to pass transfer to the late Ms Mogane's heirs, either in terms of the will or in terms of the law of intestate succession.

### CONCLUSION

[20] I therefore make the order set out in paragraph 1 above.

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**J MOORCROFT  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION  
JOHANNESBURG**

***Electronically submitted***

Delivered: This judgement 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 **11 OCTOBER 2022**

COUNSEL FOR THE APPLICANTS: L MEMELA

INSTRUCTED BY GCWENSA ATTORNEYS

ATTORNEY FOR FIRST RESPONDENT: T MUKWANI

INSTRUCTED BY: T MUKWANI ATTORNEYS

DATE OF THE HEARING: 5 OCTOBER 2022

DATE OF ORDER: 11 OCTOBER 2022

DATE OF JUDGMENT: 11 OCTOBER 2022