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

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

**Case No: 36953/2019**

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

**18 September 2023**

In the matter between:

| | |
|---|---|
| **EDWIN MOHLABANE NGOZO** | First Applicant |
| **QUEEN AGNES MAKHUBO** | Second Applicant |
| **LEAH NGOZO** | Third Applicant |
| **LUCKY NGOZO** | Fourth Applicant |

and

| | |
|---|---|
| **GRACE NGOZO** | First Respondent |
| **EKURHULENI METROPOLITAN MUNICIPALITY** | Second Respondent |
| **REGISTRAR OF DEEDS** | Third Respondent |
| **MASTER OF THE HIGH COURT** | Fourth Respondent |

---

**JUDGMENT**

---

***Coram*** **NOKO J**

***Introduction***

[1] The applicant launched an application to first declare the Will executed by the late Anna Nkosi-Ngozo to be invalid. The testator having bequeathed the property, *to wit*, erf [...], K[...] Township, held by Certificate of Leasehold TL42784/1999 (*Deed*) situated at [...] Nhlapo Section, K[...], Germiston (*property*) to the first respondent, Grace Ngozo. Secondly, to declare the Deed registered in favour of the first respondent null and void. The respondent has raised several points *in limine* against the application.[1]

[2] Grace Ngozo is the only respondent opposing the application and reference to the respondent in this judgment shall only refer to Grace Ngozo.

***Background***

[3] The factual background is common cause between the parties. The late Joseph Ngozo and Christine Ngozo were registered holders of the certificate of occupation issued in respect of [...] Nhlapo section. The late Christine Ngozo predeceased Joseph Ngozo who subsequently remarried Anna Nkosi on 17 November 1981. Mr Ngozo passed away on 28 November 1982. Mrs Anna Nkosi resided on the property with the applicants, and two stepdaughters, namely, Lucy and Alice. She then executed a Will bequeathing the property to the respondent on 8 January 1993.

[4] At the time when the Will was executed the deed was not yet issued as it was still the case in Africans' townships that the rights granted to Africans were only rights to occupy and not ownership.

[1] These points could not readily be discerned from the answering affidavit but were clearly highlighted in the Plaintiff's Heads of Argument.

[5] The court has, per Dlamini J, ordered on 5 October 2022 that the *"… the parties must refer this dispute to the Director-General (D-G) for the Department of Human Settlements, Gauteng to hold and enquiry in respect of House [...] Nhlapo Section, K[...]; so as to determine who shall be declared the rightful owner/s in terms of section 2 of the Conversion of Certain Rights into Leasehold Act, Act No. 81 of 1988, as amended (Conversion Act)."*[2] The applicant's counsel submitted that this order could not be implemented as the DG's office stated that the process contemplated in terms of the Conversion Act envisages that the property should still be in the name of the state and in this instance the deed is already issued to the respondent and it will be moot to institute the inquiry.

***Issues for determination***

[6] The issues for determination are whether:

6.1. the respondent's points *in limine* are sustainable,

6.2. the applicant has made up a case for the declaration of the Will invalid and

the order cancelling the deed issued in favour of the first respondent.

***Parties' contentions and submissions***

***Points in limine***

[2] See Caselines 53.

<u>*Non-joinder of Vusumuzi Ngozo*</u>

[7] The counsel for the respondent contended that Vusumuzi Ngozo, who is a fiduciary heir in terms of the Will of the late Mrs Anna Nkosi-Ngozo has interest in the impugned Will which is sought to be declared invalid and should have been joined in the *lis*. The applicant conceded that indeed Vusumuzi Ngozo was indeed not joined but he is aware of the proceedings and has in fact deposed to a confirmatory affidavit in relation to the answering affidavit deposed to by the respondent. In reply the respondent's counsel correctly contended that it is not sufficient to contend that the Vusumuzi Ngozo is a party on the basis that he has deposed to a confirmatory affidavit. He must be properly cited and joined as a party.

[8] It was held by the Supreme Court of Appeal in *Golden Dividend v Absa Bank*[3] that "*[T]he test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In Gordon v Department of Health, Kwazulu-Natal [2008] ZASCA 99; 2008 (6) SA 522 (SCA) it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined.*"[4]

[9] It is ineluctable that the outcome of the adjudication on the validity of the Will has an impact on Vusumuzi Ngozo's benefit from the Will and to this end he is entitled to be joined and should have been joined as a party to the litigation. This point *in limine* has merits and is sustainable in respect of the relief to declare the Will invalid but may not affect the relief sought regarding the setting aside of the registration of the transfer to the respondent.

---

[3] (569/2015) [2016] ZASCA 78 (30 May 2016)

[4] Ibid at para [10].

*Lack of locus standi*

[10] The respondent contended that the applicants are the grandchildren of the late Joseph Ngozo and are not entitled to inherit per representation unless there is a Will. To the extent that there is no Will executed by the late Mr Joseph Ngozo they are disqualified to benefit *ab intestatio*. To this end, so went the argument, they do not have *locus standi* to bring the application and this application should ergo be dismissed. The applicant's attorneys correctly highlighted the importance of the *locus standi* and he also referred to the judgment of the constitutional court in *Giant Concerts cc v Rinaldo Investments Pty Ltd and Others*[5] where it was held that the question of *locus standi* must be determined before the merits of the *lis* are considered by the court.

[11] This point *in limine* was ill-conceived because the Conversion Act considers that the individuals who had right to occupy the property are entitled to claim ownership of the land. In this regard it is common cause that the applicants were listed as occupiers of the property. Their legal standing is therefore not dependent on their status in relation to the late Jospeh Ngozo but by virtue of their rights as occupiers[6]. To this end the point *in limine* is therefore unsustainable and must be dismissed in respect of the two applicants who are listed as dependents. The outcome in respect of the rest of the applicants the point *in limine* has merits but as set out below the outcome of the judgment would not be negatively affected.

*Res judicata*

[12] The attorney for the respondent contended that the *lis* between the parties served before a Commissioner's Court for the District of Germiston under case number 30/83.

[5] 2013 (3) BCLR 251 (CC) at para 32

[6] See Caselines 57 where first and third applicants are listed as dependents who were entitled to reside with the Late Anna Nkosi on the property.

The findings by the commissioner were in favour of the Hluphekile Anna Ngozo. To this end, so went the argument, the issues between the parties are *res judicata* though the records for the proceedings and findings cannot be made available as they have been destroyed 5 years after judgment was made.

[13] It has been stated in *Isedor Skog N.O. & Others v Koos Agullus & Others* [7] at para 64 that *"… the doctrine of res judicata has ancient roots as an implement of justice. Its purpose was to protect the litigants and the courts. The defence of res judicata was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause. The gist of the plea of res judicata is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and can therefore not be raised again.*[8]

[14] It was further stated in *Democratic Alliance v Brummer*[9] *"… that where the judgment does not deal expressly with an issue of fact or law said to have been determined by it, the judgment and order must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. Careful attention must be paid to what the court was called upon to determine and what must necessarily have been determined, in order to come to the result pronounced by the court. The exercise is not a mere mechanical comparison of what the two cases were about and what the court stated as its reasons for the order made."*[10]

[15] The above SCAs' judgments set out the approach which I should embark upon in considering the point in limine of *res judicata*. This trajectory is frustrated as I am put in

7 (797/2021) [2023] ZASCA 15 (20 February 2023)
8 At para 64.
9 (793/2021) [2022] ZASCA 151 (3 November 2022)
10 Ibid, at para 15.

an invidious position as there are no records for me to make a comparison between the facts of *lis* which served before the Commissioner's Court and the *lis* serving before me. I am therefore invited to attempt to exploit my wits in the realm of conjecture which route I am loath to venture on.

[16] That notwithstanding, even without the records from the Commissioner's court the case numbers shows that the *lis* was launched in 1983 and this was before the Conversion Act. As such the dispute which served before court then was before the deed was issued which would have been preceded by an inquiry in terms of the Conversion Act. To this end the *lis* which served then could have been the same as the *lis* now before me. The Conversion Act endows the powers to make inquiries to the Human Settlement.[11] To the extend, that no record is presented before the court to demonstrate that the matter dealt with then is the same as the one serving before this point *in limine* is therefore not backed by any evidence and is therefore unsustainable and must fail.

*Condonation and Prescription.*

[17] The attorney for the respondent contended that 30 years has passed since 1983[12] and the applicant has failed to request condonation for the launching of the application explaining the inordinate delay. As I have set it out above the nature of the *lis* which served before the commissioner in 1983 could not have been the *lis* which now serves before me. The Will of the late Anna Nkosi was executed in 1993 and the deed was only issued in 1999. The respondent has also failed to identify the authority or legal principle on which the contended requirement for condonation is predicated.

[11] The court has already made an order that the *lis* be referred to the D-G.

[12] Since the findings of the Commissioner's Court.

[18] The attorney contended further that with the lapse of 30 years since the Will was executed the claim by the applicants has prescribed. This contention fails to appreciate that the rights flowing from the Will would have only been exercised after the death of the Mrs Anna Nkosi. As will be noted below the application to declare the Will invalid has no merits and is unsustainable. To this end this point need not detain me further.

[19] Prescription in relation to the claims for the setting aside the deed is also meritless as it was only issued in 1999 and since prescription in respect of claim over land is 30 years and the challenge would have prescribed after 2029. This point must therefore also be dismissed.

*Application being frivolous and vexatious.*

[20] The attorney contends that the late Anna Ngozo was appointed in the estate of the late Joseph Ngozo. In the execution of instructions as set out in the Administration of Estate Act she would have dealt with the property. The failure by the applicant to challenge that appointment, so the argument continued, makes the applicants case frivolous. I am at pains to decipher the legal logic underpinning this point but find same unsustainable. The property dealt with was not the property of the late Joseph Ngozo because as at the time of his death in 1982 there were no title deeds which endowed ownership on African people. As such the contention that the property was part of estate of the late Ngozo is found wanting.

***Merits***

[21] The applicant’s counsel contends that the Will should be set aside as it dealt with the property which did not belong to Anna Nkosi. The counsel having submitted that

*"[I]n simple terms can a Will be made like a child in ventry samere*[13] *and only becomes a human being upon birth?"* The Will cannot dispose of an asset which does not belong to the testator. To this end, so went the argument, it must be set aside as the property did not form part of the estate of the late Anna Nkosi.

[22] Wills can be challenged in general on four grounds, viz, lack of requisite formalities, forgery, testamentary capacity, and undue influence. The applicant's counsel has failed to present any evidence which implicates any of those grounds or refer to any facts that would have vitiated the validity of the Will. It is noted that there is nothing untoward to have a Will which relates to a property which no longer exists, and such a Will cannot be declared invalid on that basis. To this end, I find that the relief for the declaration of invalidity of the Will not to have been properly substantiated and stand to be dismissed.

[23] The applicant's second relief relating to the registration of transfer of the property which was not preceded by an inquiry contemplated in section 2 of the Conversion Act is not being challenged by the respondent.

***Legal analysis and analysis***

[24] The historical background relative to ownership of land by Africans in South Africa was chronicled in various judgments.[14] The dark history of land tenure provided a limited and egregious pattern of ownership of land by Africans through various statutes.[15] The said unpalatable history was assuaged by the introduction of the

---

[13] Meaning in his mother's womb.

[14] See *Nzimande v Nzimande* 2005 (1) SA 83 (W), *Phasha v Southern Metropolitan Local Council* [2000] 1 ALL SA 451 (W), *Kuzwayo v Estate Late Masilela* [2010] ZASCA 167 (1 December 2010), unreported judgment in *Ndaba v Thonga and Others* (18674/20199 [2020], (23 November 2020) (Gauteng Local Division).

[15] See Native Land Act 27 of 1913, Native Urban Areas Land Act 21 of 1023, Group Areas Act, regulations governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters of 1968, Black Communities Act 4 of 1984.

Conversion Act in terms of which the precarious land tenure was converted into full ownership of land by Africans.

[25] The Conversion Act authorised the Commissioner[16] to, *inter alia*, hold an inquiry and make determinations in respect of permits, leaseholds, and ownership rights of land by African people. This process, which is set out in section 2 of the Conversion Act,[17] is intended to determine to whom the property should be allocated. The provisions of section 2 of the Conversion Act are etched in peremptory terms and as such non-compliance therewith would ordinarily be visited with nullity.

[26] As set out above the court, per Dlamini J, has already ordered that the dispute be referred to the relevant functionary of the Department of Human Settlement and as such this judgment is limited to the determination whether the deed held by the respondent in her capacity as the representative of the estate of the late Anna Nkosi can be cancelled. Absent any lawful justification or exception for not complying with the Conversion Act then *cadit quaestio*. In this regard section 6 of the Deeds Registries Act endows this court with power to direct the Registrar of Deeds to cancel deeds which were registered pursuant to, *inter alia*, unlawful, or illegal conduct.

[27] The main contention of the respondent is that the late Anna Nkosi purchased the right to occupy the property. The said right relates to occupation and ownership will only follow pursuant to the provisions of the Conversion Act. The main contention is therefore unsustainable and must fail.

***Epilogue to the analysis***

[16] The administration and the implementation of the Conversion Act was assigned to Provinces and resides in the Department of Human Settlement, under the tutelage of the Director General.

[17] Section 2 provides that: *"(1) Any secretary shall conduct an inquiry in the prescribed manner in respect of affected sites within development areas situated within his province, in order to determine who shall be declared to have been granted a right of leasehold with regard to such sites"*

[28] Having considered legal exposition above it follows that the relief for the declaration of invalidity of the Will of the late Anna Nkosi is unsustainable and must be dismissed. The relief about the setting aside of the registration of Certificate of Leasehold TL42784/1999 has sound legal basis and is required to give effect to the order already granted by Dlamini J.

***Costs***

[29] There are no reasons why the costs should not follow the results.

**Order**

[30] I make the following order:

1. The Registrar of Deeds (Johannesburg) is ordered to cancel the registration of Certificate of Leasehold TL42784/1999 held in respect of house situated at [...] Nhlapo Section, K[...].

2. It is declared that the Certificate of Occupation issued in favour of the Late John Ngozo issued in 1966 is reinstated.

3. The Director-General: Department of Human Settlement, Gauteng Province or the relevant functionary is directed to institute an inquiry as contemplated in terms of the Conversion of Certain Rights to Leasehold Act 81 of 1988 (as amended).

4. The first respondent is directed to pay the applicants’ legal costs.

______________________________

**MOKATE VICTOR NOKO**
**JUDGE OF THE HIGH COURT**
**GAUTENG LOCAL DIVISION, JOHANNESBURG.**

This judgement 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 of the judgment is deemed to be **18 September 2023.**

**Appearances**

| | |
|---|---|
| For the Applicant: | Adv A Mokoetla |
| Attorneys for the Applicant: | Buthelezi Attorneys, c/o Ndhlovu Attorneys Johannesburg. |
| For the First Respondent: | Mr RE Maesela |
| Attorneys for the First Respondent | Maesela Attorneys Inc. |
| Date of hearing: | 6 September 2023 |
| Date of judgment: | 18 September 2023. |