THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 28/2010**

In the matter between:

MVULAZANA GEORGINA KUZWAYO **Appellant**

and

THE REPRESENTATIVE OF THE EXECUTOR IN THE ESTATE OF THE LATE MBONGENI JONAS MASILELA **Respondent**

Neutral citation: ***Kuzwayo v Estate late Masilela*** **(28/10) [2010] ZASCA 167 (1 December 2010)**

Coram: LEWIS, VAN HEERDEN, MAYA and SHONGWE JJA and K PILLAY AJA

Heard: 16 NOVEMBER 2010

Delivered 1 DECEMBER 2010

Summary: Holder of a site permit and occupier of site entitled to apply for order that Registrar of Deeds cancel deed of transfer to wrong person; also entitled to ask that Director-General of Housing in province hold an inquiry in terms of s 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 in order to determine to whom ownership should be granted.

ORDER

On appeal from the South Gauteng High Court (Masipa J sitting as court of first instance):

1 The appeal is dismissed with costs, including those of two counsel.

2 Paragraphs 1 and 2 of the order of the high court are replaced with the following:

‘(1) The Registrar of Deeds (Johannesburg) is ordered to cancel the title deed number T020450/2004 in respect of Erf 2000 Vosloorus, Gauteng Province, and to cancel all the rights accorded to the first respondent by virtue of the deed.

(2) The Director-General for the Department of Housing, Gauteng Province, is directed to hold an inquiry in respect of Erf 2000 Vosloorus, Gauteng Province, in terms of s 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, and to declare that the holder of the site permit in respect of the Erf is the owner thereof.’

JUDGMENT

LEWIS JA (VAN HEERDEN, MAYA AND SHONGWE JJA AND K PILLAY AJA concurring)

[1] This appeal reveals a sad tale of bureaucratic bungling and an opportunistic attempt to take advantage of it. The bungling lay in converting a site permit into ownership in terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (the Conversion Act), and transferring the site to the wrong person. The appellant, Ms M G Kuzwayo (now Peacock), who was the first respondent in the high court, was the beneficiary of the clerical error, as I shall show. The respondent in the appeal is the Estate of the late Mr M J Masilela, which should have been the beneficiary of the transfer. The representative of the executor of the deceased Estate of Masilela, Sentinel International Trust Company (Pty) Ltd, in turn represented by Ms I Van der Merwe, brought an application to cancel the deed of transfer pursuant to s 6 of the Deeds Registries Act 47 of 1937.

[2] Masipa J granted an order that the Registrar of Deeds, the second respondent in the court below, cancel the title deed incorrectly issued. She also ordered the Gauteng Provincial Government (represented in the high court proceedings by the third respondent, the Director-General for the Department of Housing, Gauteng and the fourth respondent, the MEC for the Department of Housing, Gauteng) to transfer the property to the deceased Estate. It is against these orders that Kuzwayo appeals with the leave of the high court. The other respondents in the court below have played no role in this appeal.

[3] The background to the application to the high court is briefly this. On 4 January 1985 a site permit in respect of Erf 2000, Vosloorus, Gauteng, was granted to Kuzwayo on her application. She had indicated on the application form that she intended to build a house on the site as soon as her application was approved. But on 21 January 1987 she was sent a notice asking her to report to Mr G T Prinsloo of the Vosloorus Town Council because she had not paid any site rent. She signed the notice, stating that she was unable to pay the amount required and that she thereby handed the site back to the town council. (In her answering affidavit Kuzwayo denied that the signature on the form was hers, a matter to which I shall return.)

[4] On 23 January 1987 Masilela applied for a site permit and was allocated the site that Kuzwayo had handed back. The application form indicated that he paid arrears of R221.60 (what Kuzwayo had owed); an advance of R166.20 and R3 000 for ‘infrastructure’. Masilela subsequently also paid R380 for water and sewerage connections to the site.

[5] It is not disputed that Masilela built a house on the site, the building plans having been approved by the town council, and that he and his family lived in it for 13 years before his death on 31 December 2000. His family continued to live in the house after his death, and all municipal accounts were paid by the Masilela family. By the time the high court heard the application

the Masilela family had lived on the property for some 22 years and two of his children and their children still occupied it.

[6] The Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 was amended in 1993 so as to provide, inter alia, for the conversion of site permits (or other rights in land) into ownership where the affected site was situate in a formalized township – which Vosloorus was. Section 4 of the Act provides for the Director-General to declare a person who has met certain requirements to have been granted ownership of the property concerned, and s 5 provides for a transfer of property into the name of such a person once a declaration has been made.

[7] Before a declaration can be made, however, the Director-General is required, under s 2 of the Act, to conduct an inquiry into the affected site and as to the identity of the occupier of the relevant site. The section sets out in detail the inquiries to be made by the Director-General and the steps to be followed. Essentially what has to be established is the identity of the person who is entitled to a site and the rights that should be conferred on him or her. The section requires the Director-General to consider any claims to a site, or objections to claims, and then to make a determination as to whom to declare as the owner of the site in question. Such determination, and the fact that it is subject to appeal in terms of s 3 of the Act, must be published in the prescribed manner. Section 3 sets out the procedure for appeal by a person aggrieved at the determination.

[8] Once the period in which an appeal may be prosecuted has elapsed the Director-General is required, as I have said, to declare that ownership of the site shall vest in the person in favour of whom the determination has been made, and transfer follows. It is of the essence of the inquiry that the Director-General establishes who, according to the records of the local authority, is in occupation of a site.

[9] There is no evidence that any inquiry was conducted by the Director-General in respect of the site. But on 3 March 2004, some three years after

Masilela had died, Ms F Visagie, a delegate of the Director-General, issued a declaration that Kuzwayo had been granted the right of ownership in respect of the site. On the same day, Visagie certified that the site had been bought by Kuzwayo. And on 7 April the site was transferred to her. The obvious inference to be drawn from this is that Visagie looked only at the first allocation of the site to Kuzwayo, and failed to notice that she had handed the site back and that it had subsequently been allocated to Masilela who had paid for it. A serious clerical error was made. And it is quite possible that no inquiry was held and that there was no decision that would have allowed for any declaration or transfer at all. Regrettably the Gauteng provincial government has played no part in the proceedings and the court has not had the benefit of evidence in this regard.

[10] The Masilela family, the representative of the executor of the deceased Estate and Kuzwayo were all ignorant of any process in respect of the site. It was only when municipal accounts for services, addressed to Kuzwayo at the address of the site occupied by the Masilela family, started being received sometime in 2005, that the family realized something was amiss. Previous municipal accounts in Masilel's name had been sent to him at that address.

[11] The Masilela family informed Sentinel, the representative of the executor of the Estate, of this development. However, when Sentinel attempted to have the error rectified, it was advised that the Registrar of Deeds could not change the deeds register without an order of court. Hence the application under s 6 of the Deeds Registries Act for an order directing him to do so.

[12] The application was opposed, Kuzwayo taking numerous points in limine and raising various defences, some of which I shall deal with, albeit briefly, and others of which have been abandoned. An extraordinary feature of her opposition is that she failed altogether to explain what right she had to a permit in the first place. Despite the fact that Masilela or his family had occupied the property, in terms of a valid site permit, for nearly 18 years before the site was transferred to Kuzwayo, and that Masilela had built a

house on it, and paid for municipal services in respect of it, Kuzwayo asserted that she was entitled to the site and that the deeds register should not be rectified.

[13] Kuzwayo, in her answering affidavit, apart from dealing with the points in limine, alleged that she had been allocated a site but that she had not paid for it on the advice of an official who suggested she pay for her children's education rather than the site. She denied that she had signed the document relinquishing the site, asserting that the signature was not hers. She had, she said, actively pursued and waited for the property over the years. She did not substantiate this allegation in any way.

[14] The denial of the signature is not to be given any credence. It is clear from her conduct over many years that Kuzwayo laid no claim to the property. It was developed and occupied by Masilela and his family over a long period and Kuzwayo made no queries about it, let alone claimed any right to it, in that time. The only evidence that she adduced to show any connection between herself and the property was a municipal account addressed to her on 13 August 2008 – after the site had been transferred to her. The account was attached as an annexure to a supplementary answering affidavit.

[15] Kuzwayo's claim to a right in the site was countered by Prinsloo, who deposed to an affidavit in support of the application. Prinsloo was the housing manager in the Vosloorus Town Council when Kuzwayo applied for a site permit. He said that the site was undeveloped when it was allocated to her. She was required to pay site rent and to build on it. But she defaulted on her payments. Several notices were sent to her calling on her to pay the amounts owed. Copies were attached to Prinsloo's affidavit.

[16] Prinsloo interviewed Kuzwayo about her failure to pay rent. She said that she was unable to pay, and agreed to return the site to the council. She signed the document acknowledging that she was in arrears and was returning the site in his presence.

[17] Prinsloo was also responsible for the allocation of the site subsequently to Masilela. He confirmed that Masilela had paid all amounts due to the council. And he had submitted building plans for approval by the council and then developed the site accordingly. Prinsloo's view was that Masilela's estate was entitled to be declared the owner of the property and that transfer should have been effected to it.

[18] Needless to say, Kuzwayo questioned Prinsloo's authority. She also denied that she had handed back the site. She added, in a further supplementary affidavit, that she was informed in 2003 that there had been a newspaper advertisement that she was to be granted the property. She thought that the site in question was undeveloped until transfer to her in 2004 when she discovered the truth. She did not, however, state what she had done to take possession of the site or exercise any of her rights since then.

[19] It may seem obvious at this stage that the transfer of the site to Kuzwayo was a mistake. But, as I have said, she raised several issues in limine and legal defences to which I now turn.

Locus standi

[20] The applicant in the court below was 'the Representative of the Executor in the Estate Late Mbongeni Jonas Masilela'. The founding affidavit was deposed to by Ms van der Merwe, who said that she was duly authorized to depose to it as the representative of Sentinel International Trust Company (Pty) Ltd, the company that was administering the Estate of Masilela. Sentinel, she said, was authorized to administer the Estate by virtue of a power of attorney granted by the executor on 18 July 2002.

[21] She attached various documents to prove her authority to act. These included letters of executorship issued by the Master on 26 October 2001, which had appointed Mr F A Pienaar, in his capacity as a nominee of Old Mutual Trust, as executor and a Master's certificate replacing Mr Pienaar with Mrs A M Pienaar, issued on 12 July 2002. Mrs Pienaar in turn had given a power of attorney to administer the Estate to Sentinel on 18 July 2002. Van

der Merwe did not, however, attach any document demonstrating her authority to act for Sentinel. This defect was cured when Van der Merwe deposed to the replying affidavit and attached a resolution of Sentinel authorizing her to act on its behalf.

[22] Kuzwayo argued that it was the executor, Mrs Pienaar, who ought to have represented the Estate, and that Sentinel lacked locus standi. The power of attorney in favour of Sentinel stated that Sentinel 'or its duly authorised representative' was authorized to do all things necessary to manage and administer the Estate. The high court found that Sentinel did have locus standi and dismissed the point in limine.

[23] Nonetheless Kuzwayo persisted with the point on appeal. The argument was that only the executor had locus standi to bring an application. Counsel for Kuzwayo could not explain why the executor was not permitted to authorize Sentinel (which in turn authorized Van der Merwe) to litigate on behalf of the Estate. It is true that the papers lack clarity: one has to look to the attachments of Van der Merwe to the founding and replying affidavits to establish the chain of authority. And while the applicant was cited as 'The Representative of the Executor in the Estate of the Late Mbongeni Jonas Masilela', Van der Merwe averred that she was 'duly authorized' to depose to the affidavit as the representative not of the Estate but of Sentinel. However, the authority was established on the papers albeit in a clumsy fashion, and the point should not have been persisted with on appeal. Unfortunately this persistence resulted in an application by the executor to join in the appeal. I shall deal with that application in due course. I consider that Sentinel did have the authority to bring the application in the high court.

Ownership

[24] Kuzwayo argued that the high court should not have found that the Estate was the owner of the site. But it did not make any such finding. The court simply found that the site permit vested in the Estate and that the transfer to Kuzwayo pursuant to the provisions of the Conversion Act had to be cancelled. It ordered that the site should revert to the Gauteng Provincial

Government and that the latter should transfer it to the Estate. Whether this order was permissible is a matter to which I shall revert.

The Estate's cause of action

[25] The application to the high court was said to be brought in terms of s 6 of the Deeds Registries Act, and the high court made its finding on that basis. Section 6 is not an empowering provision, however. It provides only that the Registrar of Deeds may not cancel any deed of transfer except upon an order of court. Kuzwayo argued that an application could not be brought under s 6: there must be some other cause of action.

[26] Sections 2, 4 and 5 of the Conversion Act do not directly confer a right of ownership on a site permit holder and occupier. But s 2 does require the Director-General to identify the person who is in occupation of the site (in accordance with the records of the local authority) and after inquiry, declare that that person has the right to acquire ownership. In my view, the Estate, as holder of the site permit, was entitled to ask the court for an order cancelling the transfer to Kuzwayo who was neither a permit holder nor an occupier of the site. The court has the inherent power, implicit in s 6 of the Deeds Registry Act, to order cancellation of rights registered in the Deeds Register: *Ex parte Raulstone NO* 1959 (4) SA 606 (N) and *Indurjith v Naidoo* 1973 (1) SA 104 (D).

[27] The Estate was also entitled to ask that the Director-General conduct the inquiry required in terms of s 2 of the Conversion Act. The two Masilela children who continued to occupy the site after Masilela's death could, in my view, also have brought an application in the same terms, provided that they were heirs to the Estate.

Administrative Action: Review

[28] Kuzwayo argued that the proper course of action for Van der Merwe to have followed would have been to review the 'decision' in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). But her counsel was hard put to explain what decision it was that could be reviewed. He

submitted that it was the ‘decision’ of the official who signed the declaration and the deed of transfer. That cannot be so. The only administrative decision that could and should have been made was that of the Director-General or his delegate, after the inquiry mandated by s 2 of the Conversion Act. And that was the only decision that could be subject to review. The act of signing the declaration and the deed of transfer were but clerical acts that would have followed on a decision. Not every act of an official amounts to administrative action that is reviewable under PAJA or otherwise.

[29] Unfortunately neither party was aware of any inquiry that may have been conducted in terms of s 2 nor of any administrative decision made pursuant to the inquiry. It would undoubtedly have been best for the Estate, had it been made aware of a decision of the Director-General, and of the declaration and transfer that would follow, to take the Director-General on review. But the Masilela family were not informed of any decision, and apparently Van der Merwe was also not advised of an inquiry or any of the consequences. The Director-General was cited as a respondent in the high court but did not participate in the proceedings. This court cannot assume that an inquiry was held and a decision was made. Thus Kuzwayo’s argument that Van der Merwe should have applied for a review of a decision is misconceived, as are all the attendant arguments in respect of such a review.

The application to intervene

[30] Shortly before the hearing of the appeal the Board of Executors Trust Ltd, as the executor of the Estate (in place of Mrs Pienaar) sought leave to intervene as the executor. (In fact the application should have been brought in the name of Old Mutual Trust, and leave was sought to amend the founding affidavit – something that is not possible. But since the application must be refused nothing turns on this.) Counsel for the applicant argued that the executor should be joined if Sentinel did not properly represent the Estate. The application was sought on the basis that Kuzwayo persisted with the argument that Sentinel had no locus standi.

[31] Counsel advised that the executor was of the view that Sentinel had been properly before the high court, but had brought its application ex abundante cautela. I have already held that Sentinel had locus standi as the representative of the executor. Accordingly the executor itself cannot be joined. The application is refused with costs.

The proper order to be made

[32] The Conversion Act requires an inquiry to be conducted by the Director-General pursuant to s 2 before a declaration is made that a site permit be converted to full ownership, and before transfer is effected to the occupier. The high court erred in directing transfer by the Gauteng Provincial Government to the Estate in the absence of such an inquiry. In my view, although the Estate is probably entitled to acquire ownership, an inquiry should be held. The high court was correct, however, in ordering the cancellation of transfer to Kuzwayo. She has no right to the property and her conduct in opposing the application and pursuing this appeal is remarkably opportunistic.

[33] 1 The appeal is dismissed with costs, including those of two counsel.

2 Paragraphs 1 and 2 of the order of the high court are replaced with the following:

‘(1) The Registrar of Deeds (Johannesburg) is ordered to cancel the title deed number T020450/2004 in respect of Erf 2000 Vosloorus and to cancel all the rights accorded to the first respondent by virtue of the deed.

(2) The Director-General for the Department of Housing, Gauteng Province, is directed to hold an inquiry in respect of Erf 2000 Vosloorus in terms of s 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, and to declare that the holder of the site permit in respect of the Erf is the owner thereof.’

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C H Lewis

Judge of Appeal

APPEARANCES

APPELLANTS:	A M van Wyk Instructed by Garratt Mbuyisa Neale Inc Johannesburg Symintgton & de Kok Bloemfontein
RESPONDENTS:	M Sikhakhane (with him K Mnyandu) Instructed by Gcwensa Attorneys Johannesburg Webbers Attorneys Bloemfontein
INTERVENING APPLICANT:	G Malindi SC Instructed by Webbers Attorneys Bloemfontein