



CONSTITUTIONAL COURT OF SOUTH AFRICA

Matshabelle Mary Rahube v Hendsrine Rahube and Others

CCT 319/17

Date of hearing: 17 May 2018
Date of judgment: 30 October 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 30 October 2018 at 10h00 the Constitutional Court handed down judgment in an application for confirmation of an order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court order declared section 2(1) of the Upgrading of Land Tenure Rights Act (Upgrading Act) unconstitutional and invalid insofar as it automatically converts land tenure rights into rights of ownership of property, without providing other occupants or affected parties an opportunity to make submissions.

The applicant, Ms Rahube, and the first respondent, Mr Rahube, are siblings who together with eight other people, moved into a house in Mabopane in the 1970s. In 1987, a Certificate of Occupation (Certificate) was issued by the Department of Interior of the Bophuthatswana Government Service in Mr Rahube's name. The Certificate was issued under a Proclamation promulgated in terms of the Black Administration Act. In 1988, the Department of Local Government and Housing of the Republic of Bophuthatswana, again acting in terms of the Proclamation, issued a Deed of Grant in the name of Mr Rahube.

Ms Rahube lived on the property without Mr Rahube for many years. However, in 2009, Mr Rahube instituted eviction proceedings against Ms Rahube in the Garankuwa Magistrates' Court. His case was based on the fact that the land tenure right he held by virtue of the Deed of Grant had been converted to a right of ownership by section 2(1) of the Upgrading Act. Ms Rahube opposed the proceedings. The eviction proceedings were

suspended pending an application before the High Court where Ms Rahube challenged the constitutionality of section 2(1) of the Upgrading Act.

The High Court held that the land tenure rights which the Upgrading Act sought to recognise and convert were acquired under a legislative regime that was discriminatory. The conversion of rights happened automatically and without notifying interested parties. The High Court held that the Upgrading Act continued the exclusion of women from the right of ownership. This is because, in terms of the Proclamation, only men could be the head of the family and therefore hold the land tenure rights that were later upgraded. It further found that the Upgrading Act did not contain sufficient remedies for persons negatively affected by the upgrading of a right and, as a result contravened their right to approach a competent court to resolve a dispute.

The High Court held that its order of constitutional invalidity should apply retrospectively to 27 April 1994. Further, the High Court found that it would be just and equitable that the order of constitutional invalidity be suspended for 18 months. The High Court interdicted Mr Rahube from passing ownership, selling or encumbering the property until Parliament cures the defect. The High Court held that the Minister for Rural Development and Land Reform, was liable to pay Ms Rahube's costs.

Before the Constitutional Court Ms Rahube submitted that section 2(1) of the Upgrading Act was constitutionally invalid because it violated her constitutional rights of equality, property and just administrative action. She submitted that the Upgrading Act failed to protect women because it upgraded the Certificates and Deeds of Grant, which were only issued to men during apartheid. This amounted to discrimination on the basis of gender. She argued that the Upgrading Act violated her right to property because it deprived those with a legitimate claim to the property but with no Certificate or Deed of Grant from exercising their property rights. Ms Rahube further argued that section 2(1) of the Upgrading Act contravened the right to property because it failed in its purpose to protect previously insecure land tenure rights. Finally, Ms Rahube contended that section 2(1) of the Upgrading Act violated her right to just administrative action because it provided for automatic conversion without an administrative enquiry to ensure that the appropriate person was registered as the owner of the property.

In a unanimous judgment written by Goliath AJ, the Constitutional Court confirmed the order of the High Court, subject to specific amendments. In so doing, it considered the veracity of the claim that during apartheid only men could be the head of the family and hold Certificates and Deeds of Grant. It conducted a historical and contextual interpretation of the Proclamation and concluded that the Proclamation had the effect of excluding women from holding land tenure rights. The Court held that because section 2(1) was based on a position created by apartheid legislation, it was contrary to the overall aims of the Upgrading Act and could have no legitimate governmental purpose. Consequently, section 2(1) was found to be irrational and thus constitutionally invalid.

The Court held that the section not only failed to meet the lowest constitutional threshold of rationality, but was also unreasonable. This is because it indirectly differentiated between men and women in a way that amounted to discrimination on the basis of gender. The unreasonableness of section 2(1) is enhanced by examining the constitutional right to property. Section 2(1) was a legislative measure intended to facilitate equitable access to property, but failed to do so because it upgraded land tenure rights to ownership rights in a way that discriminated against women. Moreover, without making a final decision about whether the rights of just administrative action and access to courts were violated by section 2(1), the Court concluded that the lack of efficient methods for affected persons to claim recourse pointed towards the unreasonableness of section 2(1).

Having found section 2(1) of the Upgrading Act to be constitutionally invalid, the Court confirmed the order made by the High Court, including the order of retrospective effect. It did however limit the effect of this retrospectivity in three cases. The declaration does not invalidate land tenure rights which were upgraded to ownership rights held in property that was transferred to a third party acting in good faith; property that had been inherited by a third party in terms of a finalised estate; and property that had through an unforeseen event, ended up in the control of a woman. The Minister for Rural Development and Land Reform was also ordered to pay Ms Rahube's costs in this Court.