IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Heard at **RANDBURG** on 7 June 2000 **CASE NUMBER**: LCC 138/99
before **Gildenhuys J**

Decided on: 14 June 2000

In the case between:

THANDEKILE JULIA HADEBE Plaintiff

and

VUSIMUZI JOHANNES HADEBE First Defendant

THE REGISTRAR OF DEEDS PIETERMARITZBURG Second Defendant

JUDGMENT

GILDENHUYS J:

[1] The plaintiff claims from the first defendant transfer of property which she alleges the first defendant owns as her nominee. She bases her claim on section 3 of the Restitution of Land Rights Act[1], which reads as follows:

> "(3) Subject to the provisions of this Act a person shall be entitled to claim title in land if such claimant or his, her or its antecedent-
>
> (a) was prevented from obtaining or retaining title to the claimed land because of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 9 (3) of the Constitution had that subsection been in operation at the relevant time; and
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> (b) proves that the registered owner of the land holds title as a result of a transaction between such registered owner or his, her or its antecedents and the claimant or his, her or its antecedents, in terms of which such registered owner or his, her or its antecedents held the land on behalf of the claimant or his, her or its antecedents."

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1 Act 22 of 1994, as amended.

[2] The plaintiff is a female domestic worker from Gauteng. She is the widow of Shadrack Hadebe, to whom she was married by customary union on 14 February 1946. She considers her permanent home to be at Ezakheni, Ladysmith, KwaZulu-Natal.

[3] During 1981 the plaintiff's husband suffered a stroke which left him terminally ill. He subsequently died, on 16 December 1981. After his stroke, but prior to his death, the plaintiff resolved to purchase a stand at B2162, Ezakheni township, Ladysmith. I shall refer to this stand as "the property".

[4] The Ezakheni township manager refused to allow the property to be registered in the plaintiff's name on the grounds that, as a black woman, she was prevented by law from acquiring immovable property. Because the plaintiff's husband was terminally ill, the township manager recommended that she register the property in the name of a male nominee other than her husband, in order to avoid the need for a further transfer after his death. The plaintiff accordingly entered into an oral agreement with her son, the first defendant, to acquire and hold the property as her nominee.

[5] The terms of the oral agreement between the plaintiff and the first defendant were, according to the plaintiff:

* That the plaintiff would purchase the property;
* That the property would be registered in the name of the first defendant, who would hold the property in his representative capacity as a nominee for the plaintiff;
* That the plaintiff would be entitled to all the rights and benefits of ownership of the property and responsible for all the maintenance and costs of the property; and
* That the first defendant would not have any rights of ownership over the property and would not be responsible for any of the maintenance and costs of the property.

[6] The plaintiff purchased the property with her own money and it was registered in the name of the first defendant in terms of a Deed of Grant dated 26 October 1981. Subsequently, she built a house on the property, also with her own money. Over time, she has paid all rates and other service charges in respect of the property and took all decisions relating to the property. The first defendant, so the plaintiff alleged, never made any contribution to the costs of the property, nor has he at any stage exercised any rights of ownership in respect of the property.

[7] In a summons served personally on the first defendant, the plaintiff asked for an order confirming her right to claim title to the property, and that the first defendant (or failing him, the Sheriff of Ladysmith) must transfer the property to her. The first defendant did not defend the action.

[8] Before she may claim title to the property in terms of section 3, the plaintiff needs to satisfy the Court of the following:

* That she was prevented from obtaining title to the property because of a law;
* That the law would have been inconsistent with the prohibition of racial discrimination contained in section 9(3) of the Constitution,[2] had that subsection been in operation at the relevant time; and
* That the defendant holds title to the property as a result of a transaction between himself and the plaintiff in terms whereof he held the land on behalf of the plaintiff.

[9] Mr Chaskalson, who appeared for the plaintiff, relied on certain sections of the Black Administration Act[3] and also of the Natal Code of Bantu Law,[4] as being the laws which prevented the plaintiff from obtaining title to the property. There can be no doubt that these provisions would have prevented the plaintiff from acquiring the property during 1981 in her own name.

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2 Constitution of the Republic of South Africa, Act 108 of 1996.

3 Act 38 of 1927, as amended.

4 Contained in proclamation R195 of 1967, Regulation Gazette 839, 8 September 1967 and made in terms of the Bantu Administration Act, Act 38 of 1927, as amended.

[10] The relevant section of the Black Administration Act provides:

11(3)(b): "A Black woman . . . who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian."

[11] At the time, the relevant provisions of the Natal Code of Bantu Law were the following:

26: "Any Bantu may acquire property, but this right in so far as females, minor sons and kraal inmates are concerned, is subject to the provisions of section 35."

27(2): "Subject to the provisions of section 28, a Bantu female is deemed a perpetual minor in law and has no independent powers save as to her own person and as specially provided in this Code."

28(1): "Any unmarried female, widow or divorced woman, who is the owner of immovable property or who by virtue of good character, education, thrifty habits or any other good and sufficient reason is deemed fit to be emancipated, may be freed from the control of her father or guardian by order of the Bantu Affairs Commissioner's Court and vested with the full powers of a kraal head or with full rights of ownership in respect of any property she may have acquired and with full power to contract or to sue or be sued in her own name . . ."

35(1): "A kraal head is entitled to the earnings of his minor children and to a reasonable share of the earnings of the other members of his family and of any other kraal inmates. Such earnings are to be utilised by him primarily for the maintenance and benefit of the house providing them and for general kraal purposes."

36: "The kraal head is the owner of all kraal property in his kraal . . ."

44(3): "The natural guardian of a married woman is her husband."

44(4): "The natural guardian of a widow is the head of the kraal to which she belongs."

[12] In the matter of *The Minister of Land Affairs and Another v Slamdien and Others*,[5] Dodson J held that the purposive interpretation of the Restitution of Land Rights Act -

> ". . . strongly points to its underlying purpose being to address dispossessions of land rights which were the result of a particular class of racially discriminatory laws and practices, namely those that sought specifically to achieve the (then) ideal of spatial apartheid, with each racial and ethnic group being confined to its particular racial zone. These would then be those laws and practices which discriminated against persons on the basis of race in their exercise of rights in land in order to bring about that racial zoning. It does not, in my view, include any racially discriminatory law or practice whatsoever, regardless of the particular area of human activity where the discrimination had it's impact. It was that particular class of the laws which gave rise to the phenomenon of forced removals with their associated awful consequences. It is that phenomenon which the land restitution regime seeks to address."[6]

I asked Mr Chaskalson whether section 3[7] (which provides for claims against nominees) should not be subject to the same limitation, so that it will apply only to cases where the racial discrimination referred to in the section was aimed at promoting the (then) ideal of spacial *apartheid*. Mr Chaskalson submitted that the reference to "racial discrimination" in section 3 is linked to section 9(3) of the Constitution. The words "past racially discriminatory laws and practices" in section 2(1)(a) of the Restitution of Land Rights Act,[8] to which judge Dodson referred in the *Slamdien* case, contains no such link. It seems to me that the difference in wording does indicate that section 3 is a stand alone provision, aimed at addressing a different circumstance. The "racial discrimination" referred to in section 3(a) is such as envisaged in section 9(3) of the Constitution.

[13] The next question is whether the legal provisions which prevented the plaintiff from obtaining title are inconsistent with the prohibition against racial discrimination as contained in section 9(3) of the Constitution, had that prohibition applied at the time. In this respect it must be kept in mind that the provisions probably did no more than mirror the indigenous law applicable at the time. Under the

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5 [1999] 1 All SA 608 (LCC).

6 *Slamdien*, above n 5 at para [26].

7 Section 3 of the Restitution of Land Rights Act.

8 Section 2(1)(a) contains one of the threshold requirements for a restitution claim.

Constitution,[9] the Courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

[14] The discrimination against black women as contained in the legal provisions to which I have referred, made their position considerably worse than the equivalent position of white women at the same time. Although a white woman married in community of property could, in 1981, not have property registered in her own name (unless she was an *openbare koopvrou*), she would (unlike her black compeer) obtain full legal capacity upon the death of her husband. She would also have full legal capacity if she was an unmarried major, or if she was married out of community of property and with exclusion of the material power. According to the evidence of the plaintiff, had it been possible for a black widow to buy property in her own name, she would have waited for her husband to pass away before buying the property. His death, at the time, was imminent. Although the plaintiff might have applied for emancipation, the requirement which makes that necessary pertains to black women only, which as such is discriminatory. There can be no doubt that the legal restrictions on the rights of black women to which I have referred, would have run foul of the constitutional right to equality,[10] had that right existed at the time.

[15] Under section 9(5) of the Constitution, racial discrimination is unfair unless it is established that the discrimination is fair. It might have been open to the defendant, had he appeared in the matter, to show that in the context of indigenous law, the discrimination against the plaintiff was not unfair. I doubt whether that is so. In the absence of any evidence that the discrimination might be fair, I must treat it as unfair.

[16] Lastly, the plaintiff must show that the defendant holds the land on her behalf. Her agreement with the defendant, as I have analyzed it, is clearly to that effect. So also the fact that she paid for the property, improved it and maintained it, all out of her own funds.

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9 Section 211(3) of Act 108 of 1996.

10 Section 9 of Act 108 of 1996.

[17] The legal relationship between the plaintiff and the first defendant which emanated from the facts set out above, is that of an informal trust whereunder the first defendant (as "nominee", which could also mean trustee) would hold the property for the plaintiff.[11] The defendant has no more than the bare *dominium* of the property. The beneficial ownership (*genotsregte*) vests in the plaintiff.[12] Until the *dominium* in the property is transferred to the plaintiff, the plaintiff has the right *to*, not the right *of* ownership.[13] The terms of the oral agreement between the plaintiff and the first defendant, as set out by the plaintiff, do not include a right for the plaintiff to claim transfer of the property. Such right may be a tacit or essential term of the nominee agreement. Be that as it may, section 3 of the Restitution of Land Rights Act provides the plaintiff with the right to claim title to the property.

[18] I conclude that the plaintiff is entitled to relief under section 3 of the Restitution of Land Rights Act. The section entitles her "to claim title in" the property. This means that she may claim transfer of the property, not that she has already become the owner of the property. That interpretation conforms with the tenor of a nominee agreement, as examined above.

[19] The plaintiff will have to initiate the requisite steps to have the property registered into her name. The first defendant will have to sign the necessary documents, or failing him, the Sheriff for Ladysmith. In formulating the order, I was guided by the formulation of the prayers in the plaintiff's notice of motion. The Registrar of Deeds (second defendant), although served with the papers, declined an invitation to submit a report to the Court. To the extent that transfer duty, stamp duty and fees may be payable in respect of the transfer, section 42(2) of the Restitution of Land Rights Act allows the Minister of Land Affairs to direct that no such monies shall be paid. Because discriminatory legislation has put the plaintiff in a position where she requires transfer of what is in effect her own property, I will recommend to the Minister to make an appropriate direction under section 42(2).

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11 *Dadabhay v Dadabhay and Another* 1981 (3) SA 1039 (A) at 1050A.

12 *Strydom en 'n Ander v De Lange en 'n Ander* 1970 (2) SA 6 (T) at 12B-C.

13 *Adam v Jhavary and Another* 1926 AD 147 at 154.

[20] In line with the general policy of the Land Claims Court, the plaintiff did not ask for costs. I will make no order for costs.

[21] The Court orders as follows:

(a) It is declared that the plaintiff is entitled to claim title and to obtain transfer of the immovable property registered in the name of the first defendant at B2162, Ezakheni township, Ladysmith, KwaZulu-Natal;

(b) The first defendant is ordered, within fourteen days after presentation of the requisite documents by or on behalf of the plaintiff to him, to sign and execute all documents which may be necessary to pass transfer of the immovable property at B1262, Ezakheni township, Ladysmith, KwaZulu-Natal to the plaintiff;

(c) Should the first defendant fail or refuse to sign and execute the documents within the fourteen day period referred to in (b), the Sheriff for the High Court having jurisdiction in the district of Ladysmith is hereby authorised and directed to sign and execute such documents, and his or her signature shall be as effective as if the documents were signed by the first defendant;

(d) All costs of transfer (including transfer duty, if any), any fees of the Sheriff under (c) and all other costs necessary to effect the transfer, are payable by the plaintiff;

(e) It is recommended to the Minister of Land Affairs that she directs, in terms of section 42(2) of the Restitution of Land Rights Act, that no transfer duty, stamp duty or other fees be paid in respect of the transfer of the property from the first defendant to the plaintiff; and

(f) No order is made as to the costs of this action.

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JUDGE A GILDENHUYS

For the plaintiff:
Adv M Chaskalson instructed by *Legal Resource Centre*, Durban.

For the respondents:
No appearance.