

Intro

In this issue, among others, we look at two cases that deal with evictions. Fasken Martineau (then Bell Dewar) handled both cases, dealing as they do, with a great many of our housing matters. Housing remains a fraught and difficult arena in the law, because there always are competing rights.

While ProBono.Org says goodbye to its founder director this month, we welcome Michelle Posemann as our Durban director. ■

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Sweet Sensations (Pty) Ltd v The Occupiers of Erf 3, 703 Western Services Road, Wynberg

On 29 April 2012, the pro bono department at Fasken Martineau (then Bell Dewar) received instructions from a community of about 400 occupiers (69 families) living on Erf 703 in Wynberg to oppose an eviction brought by a private company, Sweet Sensations (Pty) Ltd.

The community had lived there from about 1994 with the permission of the then owner. The owner operated a factory on the premises and employed some of the occupants. At some stage he built about 10 rooms on the property for the occupiers, with running water and electricity, and free occupancy. Unfortunately, in 2006, the factory closed and the property was subsequently sold, but the occupiers remained on the property.

In January and May 2011, the occupiers received notices cancelling their occupancy, and in July 2011 the new owner served them with eviction applications. They attended the ProBono.Org Housing Clinic and were referred to Fasken Martineau for assistance.

Fasken Martineau's pro bono department defended the eviction application and obtained a court order that compels the City of Johannesburg to provide emergency accommodation to the occupiers. There are a total of 96 minor children on the premises, 68 of whom are of school going age. The average income of these occupiers ranges between R500 and R1500 per month and they would have been rendered homeless if the eviction was granted with no alternative housing options available to them. ■



Sweet Sensations shacks

Ernest Mosoeu

Ernest Mosoeu bought an RDP stand in Ironsyde, Hlathatsi Section, Katlehong. He paid the full purchase price for this property but it was not registered in his name. Ernest regularly received the monthly rates and services account from the Emfuleni Municipality and therefore thought the stand was legally his. He and his family had been staying there for about 15 years with his two sons, and had built various improvements on the property.

Ernest came to our offices in need of assistance in defending an eviction application brought against him by Ms Victress Dhlamini on 29 November 2012 in the Vereeniging Magistrate's Court. She claimed she had bought the property in question and that she was the rightful owner. Thabile Omoighe, assisted by Wesley Verwey from Fasken Martineau's Dispute Resolution

Department represented Ernest in this matter. ProBono.Org also sent out a request for pro bono counsel and adv H.P Van Nieuwenhuizen agreed to represent Mosoeu in March 2013.

A deed search reflected Victress' claim as correct as she was indeed the registered owner, but Ernest had also purchased this stand in 1998 from Engela Margaret and Ruben Benjamin Smit for R12 000. It seems the initial owners had sold this stand to both Ernest and Victress. Victress had bought it for R75 000 and the property was subsequently registered in her name in 2008.

The eviction application was defended on the basis that Ernest was a bona fide occupier who was entitled to emergency accommodation, in the event of the eviction being granted. Ernest was also entitled to claim for the improvements he had made to the property and he therefore included

an unjust enrichment claim against the applicant.

The application was heard on 26 June 2013. The court considered Ernest's enrichment claim as part of the proceedings and found Ernest's improvements to the property considerable, which would have enriched the applicant unjustly if he was evicted and therefore found that he had secured a retention right for the improvements. Therefore, Ernest, as possessor of the improvements was given the right to stay in the property until he is fully compensated for them.

The court also found that the municipality did not comply with its obligation to provide temporary emergency shelter to the Mosoeu family.

The application was therefore dismissed with costs thanks to the Fasken Martineau team, advocate Van Nieuwenhuizen and ProBono.Org. ■

CUSTOMARY LAW MARRIAGE – A HUGE PROBLEM LOOMING

A recent judgment, handed down on 7 August 2013 by Judge Khumalo in the North Gauteng High Court, in the matter of Raisiba Mathiba v Minister of Home Affairs and others, has once again highlighted a problem frequently encountered by clients who come to ProBono.Org. This relates to the problematic criteria which the Department of Home Affairs (DHA) uses to decide whether to register a customary marriage or not.

In this case, despite the couple in question having lived together as man and wife for some time and the marriage having been negotiated



between the families, the judge held that the DHA was correct not to register the marriage because the last payment of lobolo had not been made. The husband died

before it was paid.

The Recognition of Customary Marriages Act is not highly prescriptive, stating merely that

in order for a customary marriage to be valid, the spouses have to be over 18, must consent to being married to one another under customary law, and the marriage must be “negotiated and entered into and celebrated in accordance with customary law.”

The definition of what constitutes a valid customary marriage is thus open to a fair measure of interpretation, with court decisions being a guide.

The judge quoted the case of *Motsoatsoa v Roro and Others* 2011 (2) where it was held that because the requirements of a customary law marriage are vague, a factual determination has to be made to decide if a marriage is valid or not.

In this judgment, despite judge Khumalo stating that in most respects the marriage had come into being, he refused



the applicant’s prayer to have the marriage registered. The consequences for the applicant are that she cannot inherit from the estate and access any pension and insurance policies.

ProBono.Org believes that the Constitutional Court needs to make a ruling on what constitutes a valid customary marriage, taking into consideration the fluid, complex and

ever changing nature of customary law. In particular the Court needs to take cognisance of the fact that very rarely are lobola payments ever completed for a variety of complex reasons, so this alone cannot

be the criterion used to judge if a marriage is a marriage or not. Women are severely prejudiced if the marriage they have entered into is not registered, on the death of her spouse or the dissolution of the marriage. In the absence of registration women are also vulnerable to subsequent civil marriages that are registered rendering their marriages invalid. ■

No ID document – no identity

How often do you have to show your ID book / passport / driver’s license to confirm your identity? Often – at the airport, banks, road blocks, the list goes on. So imagine yourself without a form of valid identity.

Mr Ombeni Mulindolwa, applied for his refugee identity document over three years ago and had still not received it. During this period, he had made three separate applications and still had not received his refugee identity document. In effect there were integral aspects of his daily life that were just put on hold. ProBono.Org Durban persistently intervened on his behalf, by following up on his application and highlighting the urgency to the Department of Home Affairs in having his application processed without any further delays.

Mr Aberua Ikabu, a recognised

refugee was also affected by the huge administrative delays with the Department of Home Affairs. Mr Ikabu is a research assistant pathologist, employed by the Kwazulu-Natal Research Institute for Tuberculosis and HIV. As part of his duties, he is required to travel overseas for various important research seminars and workshops. He was in possession of the UNHCR travel passport and was booked to travel to Glasgow at the end of June 2013. He was, however, informed at the airport that he could no longer use the UNHCR travel document and had to apply for a new passport. Unfortunately he did not receive his passport and had to postpone many important workshops that he was due to attend. On his behalf the Durban ProBono.Org Refugee Law Clinic highlighted his particular circumstances with the Director General: Asylum Seeker



Management at the Department of Home Affairs. Without his passport, Mr Ikabu was unable to perform his job functions and could potentially lose his job. Further, he could not attend many educational research workshops that were important not only in advancing his career, but also for the development of public health at large. Through ProBono.Org’s intervention, his application was fast tracked and his passport was dispatched for collection. ■

ACCESS TO JUSTICE WEEK DURBAN 2013

August was an exhilarating time in Durban. In addition to our usual programme, numerous Durban law firms participated in Access to Justice Week.

The annual Access to Justice Week is an initiative of the Department of Justice and Constitutional Development, which is implemented by the Department locally. It is a wonderful opportunity for members of the public to obtain free legal advice and learn about different institutions that are available to assist with various legal problems.

Accessing the civil justice system is hard for the marginalised and vulnerable, and initiatives such as Access to Justice Week are of importance in our country.

ProBono.Org Durban participated in this year's Access to Justice Week which took place from 26 -30 August 2013. The Department identified the Masters Office and City View Shopping Centre as the venues.

The ProBono.Org help desks at the Master's Office and at the City View Shopping Centre were staffed by fourteen law firms and reached just under 100 people. It must be noted that this was achieved by having these help desks operative only two hours per day.

The types of issues the attorneys provided advice and assistance on were wide ranging: deceased estates, drafting of wills, pension fund pay out queries, land restitution/claims, divorce, division of joint estates, maintenance,

evictions, property transfer queries, consumer related matters and unfair labour practices.

This initiative is a great way for attorneys to get in touch with the legal needs of the poor and meaningfully volunteer their time to assist members of the public in need of legal assistance. It is also an opportunity for ProBono.Org Durban and participating law firms to network with one another in a collegial manner and provided a chance to engage with other stakeholders and to continue to forge good relationships with other organisations and state institutions.

The success of Access to Justice Week Durban is a reflection of how a breeding ground can be created for access to justice if the state works together with private independent organisations and attorneys in the private sector in reaching out to the members of the public.

A sincere thank you to the law firms that participated in Access to Justice Week 2013: Joshua Attorneys; Francois Medalie & Co, DM Govender Attorneys; Arnold Singh Attorneys; Dlamini Michael Inc; PNH Attorneys; Sha Singh & Associates; S RamrachiaSingh & Associates; Lachanna Attorneys; Woodhead Bigby Irving Co; Jay Reddy Attorney; Memka & Associates; Sam Pillay and Co; Vasantha Naidoo Attorneys; Phipson De Villiers Attorneys; Calitz Crockart; Larry Singh & Associates; and K Durai and Associates.

Service Delivery Day, 13 September 2013

On 13 September 2013 the Durban Master's Office decided to mark Service Delivery Day by partnering with ProBono.Org to have a facility for the public to access free legal advice. We thank Woodhead, Bigby and Irving; Thorpe and Hands; and Zubeda K. Seedat and Company for making their pro bono services available for the first Service Delivery Day initiative.

HELLO AND GOODBYE

Exactly seven years ago, Odette Geldenhuys founded ProBono.Org, the first pro bono clearinghouse in South Africa. With the support of The Atlantic Philanthropies and the largest law firms in South Africa, Odette could build ProBono.Org as the premier organisation that primarily focuses on developing a solid pro bono culture. We wish her well on her new position with Webber Wentzel in Cape Town.

We are very pleased to welcome Michelle Posemann, an advocate and an active proponent of appropriate dispute resolution, to the helm of ProBono.Org Durban and as a member of the greater pro bono team. Michelle has excellent relationships with both the bar and the side bar, and she is looking forward to building on these relationships and engaging with colleagues about the expanding pro bono opportunities offered by ProBono.Org.



Michelle Poseman



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