

The South Gauteng High Court – example

The following example is a matter that was settled out of court, with the agreement formalised by the judge. As such, it exemplifies the complications surrounding court proceedings: because of frequent postponements, and the costs of these and costs following adverse judgments, court may form one part of a wider negotiation. The example has been selected because explicit consent was secured from the members of the family to write the case up in detail.

This was written up in Bolt, M. 2018. 'The making of a black middle class: race, law and property in Johannesburg, South Africa'. Paper presented at the Centre of African Studies, University of Edinburgh, 17 January.

In a corridor of the Johannesburg High Court, a group of siblings celebrated, reflecting on the settlement that had just been formalised with their deceased brother's wife. Their father had died in 1985, with a house in Soweto – an agglomeration of townships at the time designated exclusively for black people. By that point, the house was under a 99-year lease, and it went straight to his eldest son, and that eldest son's wife then inherited it upon the latter's recent death. This was a classic dispute over what is known as a family house. The siblings of the deceased were ranged against the surviving spouse: the 'family' with collective entitlement, versus the heir under intestate succession law. One of sisters underlined to me that their sister-in-law wanted to inherit the estate alone, but the house belongs to the family. She cannot just keep it because she is married in community of property. It had belonged to their late parents, and the deceased was merely a caretaker who took advantage of his position to register the house in his own name by shady means. Complicating matters, the deceased and his wife had not actually been living in the house. It was one of the sisters who resided there and, after initially 'being nice', their brother's wife tried to evict her and sell it. They then thought 'we also have rights', and approached an attorney recommended by neighbours.

A clever case had been assembled to justify a reversal of the deceased brother's title deed. The latter had inherited the house as eldest son under the Black Administration Act, a piece of legislation dating from before apartheid, which attempted to impose a crude interpretation of customary law on all black South Africans. This had been removed from the books following post-apartheid constitutional challenges. But the idea was to argue that its application even during apartheid might be contested retrospectively. This is on the grounds that the result has been gender discrimination not only confined to the past, but rather with powerful effects that have persisted since the judgment and into the present.

The judge clearly weighed this argument carefully, as he postponed the matter so that a bundle laying out relevant case law could be prepared. But it became immaterial whether the argument was persuasive, because the wife withdrew in anticipation of losing and facing court costs. The court order that followed split the house equally among the surviving siblings and their brother's spouse, effectively reversing transfer of title from father to son and distributing across all children. One sister would be able to stay in the house, and the other siblings would make their way home to the city of Bloemfontein the next morning.

These siblings were unusual in having the means and the confidence in the system to take the matter to court. Revealing something of their class positions, they explained how one sister could not be present today because she lives in Canada. Another exclaimed: 'we are happy today, we are going to drink champagne'. Their advocate added that most people in such situations do not have the money to come to court, and many are scared about what people can do to them in such instances.