

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 1085/2017

In the matter between:

ANDRE FISCHER

APPELLANT

and

UBOMI USHISHI TRADING CC

FIRST RESPONDENT

RODNEY HAYNES

SECOND RESPONDENT

CHARLENE LA-VERNE HAYNES
(née BRINKMEIER)

THIRD RESPONDENT

Neutral citation: *Fischer v Ubomi Ushishi Trading & others* (1085/2017) [2018] ZASCA 154(19 November 2018)

Coram: Shongwe ADP and Cachalia, Saldulker and Schippers JJA and Mothle AJA

Heard: 05 September 2018

Delivered: 19 November 2018

Summary: Deeds Registries Act 47 of 1937 (the Act) – transfer of immovable property formerly an asset in joint estate of spouses married in community of property – whether ownership of half share in immovable property vests immediately in spouse upon granting of divorce order or through transfer by way of endorsement under the Act – whether spouse acquires personal right to claim transfer by virtue of divorce order.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Nelson AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Saldulker and Schippers JJA (Shongwe ADP, Cachalia JA and Mothle AJA concurring):

1. [1] This appeal raises the question whether a real right to a half share in immovable property vests in a spouse immediately upon the dissolution of a marriage in community of property pursuant to a court order incorporating a settlement agreement in terms of which one spouse foregoes his half share in the property in favour of the other, or whether that right vests only after endorsement of transfer in the Deeds Registry. An ancillary issue concerns the nature of the right acquired by the spouse by virtue of a court order.

[2] Mr and Mrs Haynes, the second and third respondents respectively, are the registered owners of immovable property known as Erf 31865, Goodwood, Cape Town, located at 6 Arlington Crescent, Riverton, Western Cape (the property). Their marriage in community of property was dissolved by an order of divorce dated 10 December 2012. In terms of a settlement agreement incorporated in the divorce order, Mr Haynes waived his right, title and interest in the property in favour of Mrs Haynes.

[3] In 2015 the appellant, Mr Andre Fischer, obtained default judgment against the first respondent, Ubomi Ushishi Trading CC (Ubomi) and Mr Haynes for payment of the sum

of R566 500, and applied for an order declaring Mr Haynes' undivided half share in the property specially executable.

[4] The Western Cape Division of the High Court, Cape Town, dismissed the application. It held that upon the granting of the decree of divorce, dominium of the property vested with immediate effect in Mrs Haynes. The issue on appeal is whether the court a quo was correct in dismissing the application. The appeal is with its leave.

[5] In 2007 Mr and Mrs Haynes acquired the property from Mrs Haynes' father subject to a lifelong usufruct in favour of the latter. The settlement agreement which they concluded on 7 November 2012, dealt with the property as follows:

'4. PATRIMONIAL ASSETS

4.1 IMMOVABLE PROPERTY

The parties record that they are co-owners of the immovable property situated at 6 Arlington Crescent, Elsies River, being Erf 31865 Cape Town and agree:

4.1.1 That the immovable property be awarded to the Plaintiff [Mrs Haynes] and the Defendant [Mr Haynes] waives all rights, title and interest in respect of same in favour of the Plaintiff.

4.1.2 That the defendant shall be liable for the monthly mortgage bond payments in respect of the immovable property until settlement of same.

4.1.3 That Plaintiff at her own cost shall effect transfer of the property into her name upon settlement of the mortgage bond'

[6] However, they remarried on 28 April 2014, this time out of community of property in terms of an antenuptial contract, with the exclusion of the accrual system as contemplated in the Matrimonial Property Act 88 of 1984. It is not disputed that they entered into the antenuptial contract to ensure that Mrs Haynes would retain ownership of the property, in keeping with the settlement agreement. Precisely a year later, on 28 April 2015, they were divorced for a second time. The Cape Town Regional Court issued the order dissolving the second marriage, which included an order that each party would retain their respective possessions.

[7] In March 2015 Mr Fischer issued summons against against Ubomi and Mr Haynes for payment of R566 500, based on an acknowledgement of debt by Ubomi, and a suretyship agreement concluded by Mr Haynes for its indebtedness. It does not appear from the papers when the debt was incurred or the suretyship agreement signed. On 4 June 2015 Mr Fischer obtained judgment against Ubomi and Mr Haynes for payment of R566 500. A warrant of execution against Ubomi proved futile because it had ceased trading. Mr Fischer's attempt to execute against the movable assets of Mr Haynes resulted in the sheriff issuing a *nulla bona* return.

[8] The debt remained unpaid and as stated earlier, Mr Fischer applied to the court a quo for an order declaring Mr Haynes' half share in the property executable, since he was still reflected as a co-owner thereof in the Deeds Registry. In February 2014 the value of the property was between R830 000 and R870 000. Mrs Haynes resisted the claim on the ground that she had acquired full ownership of the property.

[9] In her answering affidavit Mrs Haynes stated that Mr Haynes was 'no longer the half share owner of the property'. She alleged that full individual ownership of the property passed to her when the divorce order was granted in 2012. In the alternative she contended that her personal right to full ownership thereof preceded Mr Fischer's claim. It is common cause that her right to have her husband's half share of the property registered in her name preceded Mr Fisher's claim.

[10] In dismissing the application the court a quo considered two judgments: *Corporate Liquidators* and *Middleton*. In *Corporate Liquidators* it was held that where parties entered into a settlement agreement regarding the division of their assets, which is made an order of court as contemplated in s 7(1) of the Divorce Act 70 of 1979, ownership of immovable property vested immediately. Registration of transfer of property to a spouse was, therefore, not a prerequisite for ownership. The court in *Middleton*, on the other hand, held that a settlement agreement created only a personal right for the transfer of ownership

and consequently that the divorce order did not vest ownership without *traditio* (delivery or transfer).

[11] The court a quo followed *Corporate Liquidators*, because that judgment, it said, was in large measure based on the judgment in *Ex Parte Menzies*, and both judgments had been followed in *Salie*. It concluded that s 16 of the Deeds Registries Act 47 of 1937, which required ownership of land to be transferred only by means of a deed of transfer executed by the registrar of deeds, was expressly qualified by the words, 'Save as otherwise provided in this Act or in any other law'. The Divorce Act, the court stated, was such a law. It thus held that upon the granting of the decree of divorce, dominium in the property vested with immediate effect in Mrs Haynes; and that Mr Haynes retained no right to the property capable of being declared executable at the instance of Mr Fischer. This was the argument by counsel for Mrs Haynes before us.

[12] The starting point in deciding whether ownership of the property vests immediately on divorce is s 16 of the Deeds Registries Act. It provides in relevant part:

'16 How real rights shall be transferred

Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar....'

[13] It is a settled rule of statutory interpretation that when interpreting legislation, what must be considered is the language used, the context in which the relevant provision appears and the apparent purpose to which it is directed.

[14] The Deeds Registries Act, as appears from its long title, was passed to consolidate and amend the laws throughout the country relating to the registration of deeds. The Act represents an attempt to regulate administrative aspects of the registration of land in an orderly, clear, complete and practical way, whilst simultaneously granting landowners

substantial protection. As stated in *Houtpoort*, and affirmed by this court in *Oriental Products*, registration of title is for the purpose of publicity; it is a system of public access to the land register reflecting owners of property and the registration of other protected rights. The public is entitled to rely on the correctness of entries in the deeds office, although the fact of registration is not a guarantee of any right registered.

[15] So, the effect of the registration of transfer of immovable property is that the owner and the public are protected. First, it enables the registered owner of land to prove its right of ownership by presentation of a registered title deed. This enables the owner to enforce this right against anybody. Second, as a result of the publicity that goes together with ownership, registration also provides adequate protection to members of the public wishing to conclude transactions involving land. The public has access to the land register to establish ownership of land and the restrictions to which it is subject.

[16] Section 16 of the Deeds Registries Act confirms the principle that transfer of immovable property must take place before the court of the place where the land is situated (*traditio coram iudice loci rei sitae*). This principle 'still forms the backbone of the current system of transfer of immovable property in South Africa'. Section 16 further provides that other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar of deeds. Section 16 is 'the main mechanism of ensuring sufficient publicity in the context of land title'.

[17] Section 16 of the Deeds Registries Act thus provides that as a general rule, real rights in land can be transferred only by registration in the deeds office. Its central role in the registration system has been described as follows:

'Section 16 of the Deeds Registries Act constitutes the core of the registration system, and embodies a principle of deeds registration, which has been confirmed on numerous occasions by the courts. It comprises two parts. On the one hand, it provides for the derivative acquisition of ownership in immovable property by means of execution of a deed of transport in the presence of the registrar, and attestation of the deed by the registrar, except in cases expressly excluded. On

the other hand, it provides that the rights to immovable property other than ownership may only be transferred by way of a notarial deed, registered by the registrar, except in the cases expressly excluded. Hence, section 16 of the Deeds Registries Act deals with the transfer of ownership of immovables by one person to another. Simultaneously it gives effect to the acquisition of ownership in derivative form. The moment at which the registrar attests the deed is regarded as the moment of registration. This is the point at which the transfer of ownership from one person to another is given effect. Owners are substituted: the transferor is relieved of his or her rights and responsibilities to the land, and the ownership of that land now lies with the transferee.'

[18] Thus, on first principles and a proper construction of s 16 of the Deeds Registries Act, derivative acquisition of ownership in land requires registration. Mrs Haynes' acquisition of Mr Haynes' interest in the property was derivative: it arose from the settlement agreement which gave Mrs Haynes a personal right to enforce registration of Mr Haynes' undivided half share in the property. That agreement, though binding on the contracting parties, did not by itself vest ownership of Mr Haynes' half share in the property in Mrs Haynes, any more than a contract of sale of land passes ownership to the buyer. It follows that *Middleton* was correctly decided. The vesting of ownership of the property in Mrs Haynes required an act of transfer by way of an endorsement on the title deed of the property in terms of s 45bis(1)(a) of the Deeds Registries Act. It provides:

'If immovable property or a lease under any law relating to land settlement or a bond is registered in the deeds registry and it –

- a. (a) formed an asset in a joint estate of spouses who have been divorced, and one of them has lawfully acquired the share of his or her former spouse in the property, lease or bond;
- b. (b) ...

the registrar may on written application by the spouse concerned and accompanied by such documents as the registrar deems necessary, endorse on the title deeds of the property, or on the lease or the bond that such spouse is entitled to deal with such property, lease or bond, and thereupon such spouse shall be entitled to deal therewith as if he or she had taken formal transfer or cession into his or her name of the share of the former spouse or his or her spouse, as the case may be, in the property, lease or bond.'

[19] That derivative acquisition of ownership in land requires registration, has been the position at common law for more than a century. In *Lucas' Trustee* Innes CJ put it this way:

‘ . . . the general rule of our law is that real rights in land can only be validly constituted by registration *coram lege loci*. There are well recognised exceptions to that rule, such as, for instance, acquisition of ownership to land by prescription, or of an interest in land by marriage in community of property, and so on. But none of those exceptions apply in the present case. Hence the general rule governs, and the real right which is sought to be established is, it appears to me, in the same position as a right of ownership or right of mortgage or a claim to some portion of the *dominium* cut off and separated from it so as to create a servitude. In such cases the right can only be validly constituted by registration.’

[20] Further, s 16 of the Deeds Registries Act, on its plain wording, contemplates the transfer of ownership of land from one person to another. As this court has said, it is concerned with the transfer of real rights in land. It seems to us that in enacting the savings provision, namely, ‘Save as otherwise provided in this Act or in any other law’, the legislature contemplated a law dealing with the transfer of real rights in land. The Divorce Act is not such a law. Section 7(1) of that Act does no more than authorise a court to make an order regarding the *division* of the assets of the parties: it says nothing about the transfer of real rights in land. By contrast, endorsements in terms of ss 45*bis*(1)(a) and 45*bis*(1A) of the Deeds Registries Act fall within the savings provision in s 16. So too, the transfer of rights in terms of a bond by endorsement, as provided in s 40(1)(b) of the Administration of Estates Act 66 of 1965.

[21] This brings us to *Corporate Liquidators*, a decision of a full court. The facts can be briefly stated. Mr and Mrs Wiggill were married in community of property. They had two properties: Portion 13 of the farm Goedehoop (Goedehoop) and Erf 833, Louis Trichardt (Erf 833). In anticipation of their divorce they concluded a settlement agreement in which they agreed that Goedehoop would be sold and the purchase price used to pay an outstanding mortgage bond over Erf 833 (registered in Mr Wiggill's name). Erf 833 would then be subdivided. Mrs Wiggill would become the registered owner of the unencumbered

Portion 1 of Erf 833 and Mr Wiggill, of the remaining extent. A usufruct would be registered over the remaining extent in favour of Mrs Wiggill's parents.

[22] The marriage was dissolved in March 1998 and the settlement agreement made an order of court. Goedehoop was sold and the bond on Erf 833 paid. However, Erf 833 was not subdivided and portion 1 thereof was not transferred to Mrs Wiggill. In the interim Mr Wiggill married the second Mrs Wiggill in community of property. In February 2002 Mrs Wiggill applied for an order committing Mr Wiggill for contempt of court for failure to comply with the court order. She alleged that he had paid the outstanding amount on the bond on Erf 833, but had failed to cancel it in accordance with their agreement, and that he had borrowed further monies under cover of the bond. Mrs Wiggill asked for an order that Erf 833 be subdivided and that portion 1 thereof be transferred to her; and that the remaining extent be transferred to the insolvent estate of Mr Wiggill and the second Mrs Wiggill, whose estate was surrendered in March 2002. The trustee of the insolvent estate sold Erf 833 at a public auction free of any encumbrance.

[23] However, ownership of Erf 833 had not yet been transferred. It was still registered in the name of Mr Wiggill. The trustee argued that upon dissolution of the marriage Mrs Wiggill obtained only a personal right against Mr Wiggill to give effect to the settlement agreement; and that she had no real right in respect of Erf 833 because Mr Wiggill's second joint estate was sequestrated before transfer of the property into her name. Likewise, Mrs Wiggill's parents only acquired a personal right to have the real right of usufruct registered in their favour.

[24] The court of first instance reasoned that one of the natural consequences of a marriage in community of property was that both spouses immediately became co-owners of their previously separate estates, which became the joint estate, regardless of in whose name the assets were held. On dissolution of the marriage the reverse followed automatically. Therefore, so it held, on divorce Mrs Wiggill's share vested in her and registration of her portion in her name was a mere formality.

[25] Hartzenberg J endorsed this view and stated that the court below was 'quite correct to equate the process of subdivision with the transfer of the properties into the names of the parties', and that those steps were mere formalities to give effect to their intention. The learned judge said that in a case where parties enter into a settlement agreement regarding the division of their assets which is made an order of court in terms of s 7 of the Divorce Act, the division of the joint estate would be regulated by that agreement and the parties would be bound by it. He cited an example of spouses married in community of property who owned two fixed properties and agreed that each would receive one property, and concluded that ownership of the respective properties would vest in the parties immediately once the settlement agreement was made an order of court. This, Hartzenberg J said, accords with the common law as expounded in *Rosenberg*. Registration of transfer of the properties in the names of the respective spouses was not a prerequisite for ownership to vest in them, since our system of deeds registration was a negative one, which did not necessarily reflect the true state of affairs. The court concluded that Mrs Wiggill was the owner of an unencumbered Portion 1, and was entitled to the cancellation of the bond over it and transfer of the property into her name.

[26] The court, however, erred. To begin with, its reliance on *Rosenberg* was misplaced. In that case this court, with reference to *Voet* (23 2 68), held that for the sake of completeness, the registrar of deeds required a wife, who after her husband's death wished to deal with her half share in land, to first receive transfer. That practice however did not alter the principle that dominium of the land passed by reason of the community of property. However, in *Greenberg* this court held that the position under our modern system of administering deceased estates was that a legatee does not acquire dominium of immovable property immediately on the death of the testator. Instead, the legatee acquires a vested right to claim delivery of the legacy from the testator's executor at some future date. The legatee acquires dominium in the property only once it is transferred to him by the executor. When community of property is terminated (by death), the survivor is not on such termination automatically and immediately vested with dominium of half of the assets of the joint estate, but merely the right to claim from the executor half of the net balance

of the joint estate after winding- up. As Van Schalkwyk points out, the common law position set out in *Rosenberg* no longer forms part of our law; and further that *Rosenberg* dealt with the dissolution of marriage by death, not divorce, and there is no common law authority applying the principle also in the case of divorce.

[27] Fundamentally however, the court in *Corporate Liquidators* overlooked the common law principles of co-ownership, as well as the requirement in s 26 of the Deeds Registries Act that co-ownership in land is only terminated on attestation (registration) of deeds of partition transfer by the registrar, when ownership is conveyed to the respective owners of the land. Spouses married in community of property automatically become bound co-owners of immovable property in their joint estate. Upon termination of the joint estate of Mr and Mrs Wiggill on divorce, the bound co-ownership was replaced by free co-ownership until such time as the subdivision of Erf 833 was effected. It is only upon attestation of the deeds of partition transfer by the registrar that free co-ownership is replaced by individual ownership. At that point ownership of portion 1 of Erf 833 would have vested in Mrs Wiggill – a right that could, in the circumstances, only have been validly constituted by registration. Thus, Mrs Wiggill obtained only a personal right to subdivision and transfer of portion 1 of Erf 833. The court therefore erred in holding that the subdivision of Erf 833 was a mere formality.

[28] Moreover, no separate portions of Erf 833 existed in which Mr and Mrs Wiggill's individual ownership could vest at the time that the joint estate was terminated by divorce. So, the court's finding that Mrs Wiggill was 'the owner of an encumbered portion 1' was also incorrect. The term 'co-ownership' denotes that two or more persons own a thing at the same time in undivided shares, ie each co-owner has the right to share in the entire thing, but the various shares need not be equal. But two co-owners cannot have ownership of different parts of an undivided thing. As Van der Merwe explains: 'Since more than one person cannot simultaneously have full ownership of the same thing, co-ownership in undivided shares or *communio pro indiviso* comes into existence between them. Only if the thing which is the object of co-ownership is indeed divisible and is in fact divided, does

each co-owner acquire absolute ownership of a proportional separated part of the composite thing.' (Our translation.)

[29] For these reasons, and to the extent that it held that dominium of immovable property vests immediately in a spouse in accordance with a settlement agreement that is made an order of court, and that transfer of such property is not required for dominium to vest, *Corporate Liquidators* was wrongly decided. It follows that the court a quo erred by relying on this case in holding that upon the granting of the divorce order, ownership of Mr Haynes' half share in the property vested immediately in Mrs Haynes; and in its interpretation of s 16 of the Deeds Registries Act.

[30] But that is not the end of the matter. As already stated, Mrs Haynes raised an alternative defence that her right to full ownership of the property preceded Mr Fischer's claim. Properly understood, this was a personal right against Mr Haynes to compel transfer of his half share in the property into her name. At the time that Mrs Haynes acquired this right, there was no other greater or competing right to defeat her claim. When Mr Fischer applied for an order declaring the property executable, Mr Haynes had already alienated his half share in the property to Mrs Haynes by way of the settlement agreement. There is no suggestion that the settlement agreement or the antenuptial contract preceding the second marriage was concluded improperly so as to defeat the rights of creditors. Indeed, the undisputed evidence is that the agreement was concluded to ensure that their children, who were of tender age at the time, would not be deprived of their home;

and also to give effect to the usufruct in favour of her father.

[31] In the result the appeal is dismissed with costs.

H K Saldulker

Judge of Appeal

A Schippers
Judge of Appeal

Appearances

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