

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

THE HOUSE IS MINE, SAYS THE DIVORCE ORDER. NOT SO, ARGUES EX-SPOUSE'S CREDITOR: WHEN IS THE SPOUSE'S TITLE UNASSAILABLE?

**Fischer v Ubomi Ushishi Trading and Others (1085/2017) [2018]
ZASCA 154 (19 November 2018)**

An interesting conundrum arose in this matter. X and Y's marriage in community of property was dissolved pursuant to divorce proceedings. The settlement agreement that was made an order of court provided that Y would acquire X's half share in the property. Subsequently a creditor of X obtained judgment against X and sought an order allowing execution against X's half share, as the deeds office records still reflected X and Y as joint owners. Could Y's objection that she became owner of X's half share when the divorce order was handed down succeed?

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs Haynes are the registered owners of an immovable property. They were (initially) married in community of property but divorced in December 2012. In terms of the settlement agreement incorporated in the divorce order, Mr Haynes' half share was awarded to Mrs Haynes.

Mr and Mrs Haynes remarried in April 2014, this time out of community of property in terms of an antenuptial contract, with the exclusion of the accrual system. It was not refuted that they had entered into the antenuptial contract to ensure that Mrs Haynes would retain all her rights in the property, in keeping with the earlier settlement agreement.

Precisely a year later, on 28 April 2015, they were divorced for a second time. The divorce order recorded that each party would retain their respective possessions.

In March 2015, a Mr Fischer successfully issued summons against Ubomi Ushishi Trading 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 the former's indebtedness. The warrant of execution against Ubomi proved futile because it had ceased trading. So too did Mr Fischer's attempt to execute against the movable assets of Mr Haynes result in the sheriff issuing a *nulla bona* return (no assets to sell).

As the debt remained unpaid, Mr Fischer applied to court 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. Mrs Haynes resisted the claim on the ground that she had

acquired full ownership of the property.

The Cape Town High Court dismissed Fischer's application. It held that upon the granting of the decree of divorce, dominium of the property vested with immediate effect in Mrs Haynes. (In reaching this conclusion, it considered two conflicting previous judgments: *Corporate Liquidators v Wiggill* (2007) and *Middleton v Middleton* (2010). 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 section 7(1) of the Divorce Act, 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 registration of transfer.)

Fischer appealed to the Supreme Court of Appeal.

HELD:

Does ownership pass on granting of the divorce order?

- The starting point in deciding whether ownership of the property vests immediately on divorce is section 16 of the Deeds Registries Act (the DRA). 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....'

- 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. The DRA, as is apparent from its long title, was passed to consolidate and amend the laws throughout the country relating to the registration of deeds. It 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 many previous judgments, the purpose of the requirement to formally register title, is 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.

- 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.
- Section 16 of the DRA 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'. The section 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 therefore 'the main mechanism of ensuring sufficient publicity in the context of land title'.
- The general rule in section 16 is that 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.'

- Thus, on a proper construction of section 16 of the DRA, derivative acquisition of ownership in land requires registration. In this regard, 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. (In this regard, specifically, 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) 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) ...

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.')

- That derivative acquisition of ownership in land requires registration, has been the position at common law for more than a century. 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.
- Further, section 16 of the DRA, on its plain wording, contemplates the transfer of ownership of land from one person to another; 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, certain endorsements provided for in the DRA (such as in terms of ss 45bis(1)(a) and 45bis(1A)) fall within the savings provision in section 16.
- Therefore, the finding of the court *a quo* was incorrect; ownership did not pass on the granting of the divorce order. Rather, registration was required for rights to

pass.

- But that is not the end of the matter. 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.

Effect of the fact that Mrs Haynes' rights preceded those of Fischer

- 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.

Fischer's appeal was accordingly dismissed.

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