IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 4631/2011

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

DATE:27/5/2021

In the matter between

ABSA BANK LIMITED Applicant

And

L G C[…] 1st Respondent
S M C[…] Occupant / 2nd Respondent

JUDGEMENT

BARNARDT AJ

1. This is an application to declare the immovable property, Erf […] G[…], Unit […], Township, Registration Division J.R. Province of North West (the property), executable in terms of Rule 46A of the Uniform Rules of Court. The application is opposed by the occupant / 2nd respondent (second respondent) on the basis that she is the owner of the property and that the first respondent, without her consent or knowledge, mortgaged the property.

2. Although the first respondent did not oppose the application, he attended the hearing in person.

3. Cognisance needs to be taken of the fact that I did not only consider the affidavits with annexures filed in this application, but all affidavits, pleadings and documents filed on Caselines.

BACKGROUND

4. The property, according to the second respondent was purchased by the respondents, who was at that stage married in community of property, on 10 May 2001 from the Department of Local Government and Housing for R2 475, 00.

5. The respondents were divorced on 17 June 2005 in the Central Divorce Court, Odi and according to the decree of divorce, the joint estate was divided. The respondents entered into settlement agreement on 15 August 2005, being almost two months after the decree of divorce was granted. The first respondent was the plaintiff, and the second respondent was the defendant. The important paragraphs of this agreement read as follows:

> "4.
>
> IMMOVABLE PROPERTY
>
> The parties own between themselves as Immovable property known as site […] Zone […] situated at G[…]. The parties agree that the said property will be retained and be registered in the names of the Defendant who shall then be responsible for all debts in respect of such property. The Defendant will pay the Plaintiff an amount of R20 000, 00 as his half share of the said property within a month after the divorce."

And

> "12
>
> ORDER OF COURT

> Notwithstanding anything to the contrary herein contained this agreement is subject and conditional upon it been made an Order of this Honourable Court."

6. The settlement agreement was never made an order of court and the parties never arranged for the property to be registered into the name of the second respondent. According to the second respondent she did not have funds to effect transfer of the property into her name by the Registrar of Deeds because she was unemployed at the time.

7. She indicated that she borrowed the money from her employer to pay the first respondent the amount of R20 000, 00 in terms of the settlement. From the "Moriting Employee Benefits" document provided as proof of this loan, it is evident that she borrowed R30 653, 00 as a Housing loan guarantee with no explanation about what she did with the remaining R10 600, 00. According to the document the second respondent was dismissed with date of exit 30 November 2005, whilst the settlement agreement was entered into in August 2005.

8. The respondents remarried on 22 March 2007 and this time, concluded an antenuptial contract, with their marriage regime to be out of community of property. This contract was properly registered through the assistance of Gerneke & Potgieter Attorneys. According to the second respondent this was done because she was the owner of the house and did not want the first respondent to have any claim thereto, but it is unclear why she did not ask the attorneys responsible for the registration of the antenuptial contract to assist with the registration of the property into her name. The antenuptial contract was signed on 23 January 2007 and on 28 February 2007, Mr. Gerneke, the same notary, assisted the first respondent to have a bond registered in favour of ABSA Bank (the applicant) in the amount of R180 000, 00 over the property, which she wanted to protect against the first respondent. The bond was eventually registered on 8 February 2008.

9. Apart from the Deed of Grant […], done and signed on 29 November 2007 and registered on 8 February 2008 by the Department of Local Government and Housing, North West, showing that the property to be registered in the name of the first respondent only, no other deed of registration was provided. It is noted that according to this document the property was purchased on 10 May 1990 by the first respondent for R9 975, 00.

10. As indicated above, the bond in favour of the applicant was registered on 8 February 2008 against the property and the first respondent failed to make payment of all amounts due to the applicant. As agreed between the applicant and the first respondent the full amount outstanding, being R184 231, 98 on 25 November 2010, became due, owing and payable.

11. Summons was issued against the first respondent and due to no appearance to defend, default judgment was granted on 11 March 2011. On 8 June 2011 the first respondent made a new arrangement to pay R2 000, 00 per month with the applicant, but he failed to make payments in accordance with the agreement.

12. On 15 December 2011, an application by the applicant in terms of Rule 46(1)(a)(ii) to declare the immovable property executable was granted and on 31 January 2012 a warrant of execution in respect of the property was issued and executed by the Sheriff. The property was to be sold in execution on 13 June.

13. On 7 June 2012 the second respondent served the applicant's attorneys of record with an urgent application to be enrolled for 12 June 2012 to stop the sale in execution. A notice of intention to oppose was filed, but the application was not on the roll of 12 June 2012 and the sale in execution proceeded on 13 June 2012.

14. The second respondent brought a rescission application which was granted on 22 April 2013. In terms of the order, the second respondent was inter alia granted leave to be joined as a defendant in the main action. Only the second respondent filed a plea

in answer to the applicant's declaration and the applicant proceeded with default judgment against the first respondent, which was granted on 3 April 2014.

15. The matter was enrolled on the trial roll on 11 March 2016, but the second respondent's attorneys of record withdrew before the trial date and she appeared in person and the trial was postponed to 13 February 2017. On 13 February 2017, the trial matter was postponed *sine die* to enable the second respondent to bring an application for "the enforcement of any and all rights she might want to enforce regarding the ownership of the immovable property".

16. The second respondent's application for a declaratory order, which was filed on 8 March 2017 was opposed and the applicant also filed a Rule 30 notice. According to the applicant's founding affidavit, this application was withdrawn.

17. The main action was enrolled for trial on 29 November 2018 but was removed from the roll by agreement between the parties on the basis that the applicant will pursue an application for an order in terms of Rule 46(1)(a) and the second respondent will have an opportunity to vindicate her rights.

18. The application *in casu* was served on the second respondent on 16 October 2019 and the second respondent filed her answering affidavit on 13 December 2019.

19. The second respondent did not bring a counter application, but requested as follows in paragraph 10 of her answering affidavit:

> "I will also humbly request the Honourable Court to declare that I am, and have been, the sole owner of the property since 15 August 2005, being the date on which the settlement in terms whereof the property was to be transferred into my name was entered into.
> It is furthermore clear from the facts set out *supra* that the bond was registered without my consent, which was required due to the fact that I

was the beneficial owner. I will therefore request that the bond registered over the property be cancelled."

20. It is undisputed that the arrears on the bond account were, according to the Certificate of Balance dated 28 February 2019, R403 826, 11 and according to the founding affidavit, no payments were made since 2015.

OWNERSHIP OF IMMOVABLE PROPERTY

21 Section 16 of the Deeds Registries Act, 47 of 1937 reads as follows:

"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…."

22. As was stated in ***Fischer v Ubomi Ushishi Trading CC and Others***[1]

"[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 judice 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

[1] 2019 (2) SA 117 (SCA) par. 16 -17

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.'

23. The Supreme Court of Appeal went further and discussed the acquisition of ownership in land through derivation[2].

> "[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

[2] 2019 (2) SA 117 (SCA) par 18 -20.

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.http://www.saflii.org/za/cases/ZASCA/2018/154.html - _ftn17 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 45*bis*(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.'

[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."

24. The Supreme Court of Appeals also concluded that both ***Corporate Liquidators (Pty) Ltd & another v Wigill & others***[3] and ***Salie v Bales NO & others***[4] were incorrectly decided.

> "[21] This brings us to *Corporate Liquidators*, a decision of a full court.http://www.saflii.org/za/cases/ZASCA/2018/154.html - _ftn21 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 G[…] (G[…]) and Erf […], L T[…] (Erf […]). In anticipation of their divorce they concluded a settlement agreement in which they agreed that G[…] would be sold and the purchase price used to pay an outstanding mortgage bond over Erf […] (registered in Mr Wiggill's name). Erf […] would then be subdivided. Mrs Wiggill would become the registered owner of the unencumbered Portion 1 of Erf […] and Mr Wiggill, of the remaining extent. A usufruct

[3] 2007(2) SA 520 (T)
[4] Saflii (7462/2009) [2012] ZAWCHC 32 (29 March 2012)

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. G[…] was sold and the bond on Erf […] paid. However, Erf […] 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 [..], 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 […] 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 […] at a public auction free of any encumbrance.

[23] However, ownership of Erf […] 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 […] 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 […] 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 […] 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 […]. The court therefore erred in holding that the subdivision of Erf [..] was a mere formality.

[28] …

[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." (my underlining).

25. I accept that the respondents agreed that the "property will be retained and be registered in the name of the Defendant who shall then be responsible for all debts in respect of such property" and that the first defendant applied for the mortgage over the property well knowing that he has ceded all his rights in the property to the second respondent.

26. The second respondent, however, did nothing to ensure that the property be registered in her name and was at all instances aware of the fact that the first respondent was still a registered owner. She was also aware of the fact that their settlement agreement was never made an order of court and therefore it could only have force *inter partes.*

27. In ***Hlongwane and Others v Moshoaliba and Others***[5] three sisters appealed against the dismissal of their application to have the sale and transfer of and registration of a mortgage bond against their family house set aside. Even though the sisters knew they could have been registered as co-owners with their brother Dennis, they allowed their family house to be registered in only their brother's name. Their brother sold the property without their consent and Standard Bank registered a mortgage bond against the property on behalf of the new owner.

28. The full court held as follows:

> "[45] There seems to be no doubt from a moral point of view that what Dennis did was not fair, and thus the situation in which the appellants find themselves in deserves some sympathy. There is also no doubt from the appellants' papers that this is a matter of significant personal importance.
>
> [46] However, in law what needs to be considered is whether the agreement which the appellants concluded with Dennis and the subsequent transfer of the house into his name brought about valid and enforceable transfer. The same applies to the transfer of the property into

[5] Saflii (A5009/2017) [2018] ZAGPJHC 114 (2 February 2018)

the name of the first respondent and the registration of the mortgage bond simultaneously with the transfer.

[47] The appellants in their papers do not make out any case that there was any defect in the agreement they concluded with Dennis. The agreement and the transfer on their version were done with their consent. They agreed to have the property transferred into the name of their brother. No endorsement was entered on the title deed to restrict his rights to transfer the property or to deal with it in any other way as a registered owner. He was thus legally competent to transfer the property, and Ms Moshaoliba was legally competent to acquire the property.

[48] In light of the above, the conclusion reached by the court below that "de facto," there was no defect in the title," cannot be faulted. It was also correct in my view to say that the misconduct on the part of Dennis after the transfer of the property into his name cannot give rise to defects in the title, but rather it likely gives rise to a claim in damages.

[49] The appellants on their version knew from the advice of the officials that the property could be jointly registered into their names. They consciously elected, being fully aware of their rights, to have the property registered in the name of Dennis. They did not insist on an appropriate endorsement of the title deed. Their agreement effectively replaced their right to ownership with the personal right. This means in selling the house he effectively breached his personal obligation to his sisters, the appellants.

[50] It is evidently clear from the papers that the intention was to transfer the house without the transfer being tainted. It accordingly follows in applying the abstract theory of transfer that the requirements of a valid real agreement were satisfied and thus the transfer to the *bona fide* purchaser was valid and enforceable and accordingly the property cannot be vindicated.

[51] The terms of the agreement that the property was to be the family house do not assist the case of the appellants in two aspects. The first being that there is no evidence that the first respondent was aware of the agreement or that it had been brought to her attention before purchasing

the property. The second aspect is that the agreement was registered in the Title Deed to make the public aware of the restriction on the property.

[52] The complaint by the appellants that the department erred in registering the property without including the notion of “Family House” in the deeds registry does not assist the case of the appellant. There was, in this respect never a procedural attack on the procedural validity of the finding that the property should be registered in the name of Dennis.

[53] The same applies to the comment by the department that it could not alienate the house nor bequeath any party the property in the face of the “Family House Rights Agreement.” I have already mentioned somewhere else in this judgment that this notion was nothing but a personal arrangement between the siblings. It does not elevate that arrangement above the real right of ownership in the immovable property, registered through the transfer process.

[54] The comment, more importantly, does not assist the case of the appellants because once the determination and the registration processes were completed the official of the department became *funtus officio.* In the circumstances, the advice of the department was misconceived particularly when regard is had to the fact that the Act makes no provision for the concept of a “Family House.”

[55] The validity of the decision of the Director-General to transfer and register the property in the name of Dennis, was never attacked in any proceedings, be it to appeal or review. It accordingly follows that the factual position arising from that decision and the legal consequences cannot be ignored.

[56] It can thus be inferred that before making the declaration that Dennis had met the requirements to be granted the ownership of the property and that it be transferred into his name, the Director-General complied with the requirements of s 2 read with s 3 of the Act. In other words, the determination made was published in the prescribed manner with an indication that the determination was subject to an appeal by any aggrieved person including the appellants. It should also be noted in this respect that the appellants did nothing to challenge the fact that in transferring the property the “restriction family housing” was not included

and they instituted these proceedings nine years after Moshoaliba purchased the house."

29. The first respondent did not have the second respondent's permission to apply for a mortgage bond over the property, however, the settlement agreement only provided her with a personal right against the first respondent for the transfer of the property and if she suffered any damages due to his conduct a claim for damages.

30. I therefore grant the following order:

ORDER.

1. The hypothecated property:

   ERF […] G[..] UNIT [..]

   TWONSHIP REGISTRATION DIVISION J.R., PROVINCE OF NORTH WEST

   MEASURING 325 (THREE HUNDRED AND TWENTY-FIVE SQUARE METERS)

   HELD BY DEED OF GRANT […]

   be declared specially executable in terms of Rule 46(A) (8) that the property may be sold by the Sheriff.

2. The immovable property is declared specially executable in terms of rule 46(8)(d) and the immovable property may be sold with a reserve price of R130 000, 00.

3. the registrar is authorized to issue a writ of execution against the immovable property, in terms of Rule 46(1) read with Rule 46(A).

4. That the first respondent pays the costs of the execution of the said property.

5. That the respondents (Mr and Ms C[…]) jointly and severally pay the costs of suit on a party and party scale.

_____

ACTING JUDGE JF BARNARDT
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 May 2021.

APPEARANCES

For the applicant: Adv J van der Merwe

Instructed by: Tim du Toit & Co Inc.

For the first respondent: Mr C[...]
In person

For the second respondent (occupier) Ms N Moses
Nicole Moses Inc.

Date of hearing: 9 March 2021

Date of Judgement: 27 May 2021