IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[*Reportable*]
Case No: 8897/2014

In the matter between:

[V……] [V…….] [M……]	Applicant
and	
[M…….] [G……] [V…….]	First Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Second Respondent
MINISTER OF HUMAN SETTLEMENT	Third Respondent

JUDGMENT: 21 APRIL 2016

HENNEY J

Introduction

[1] The crisp issue for determination is, whether a limited real right to immovable property vesting in the joint estate of the Applicant, and First Respondent prior to divorce which were converted into a real rights once ownership of that immovable property was registered in their names after divorce can be regarded as a patrimonial benefit of the

joint estate capable of being forfeited. In terms of the amended Notice of Motion the following relief was sought by the Applicant:

1.1 declaring that the Applicant is the sole owner of the immovable property ("the Property") known as Erf [6…….] [K……..], in the city of Cape Town, Division Cape, Western Cape Province, in extent 106 (One Hundred and Six) metres, as will appear from General Plan S.G No. 49/2010, and held by Certificate of Consolidated Title No. [6…….] under Deed of Transfer [T……..], also known as [C…….], [S…….], [K……], alternatively, that Applicant and Respondent's joint ownership of the property held in undivided half shares is terminated; further alternatively ordering the termination thereof.

1.2 Directing that the Deed of Transfer [T…….] over the property, now registered in the deeds office by the second respondent, be rectified to reflect that the Applicant, namely "Virginia Vuyokazi Mpela", is the sole owner of the property, and that the title deed to the property be rectified accordingly.

1.3 Directing that Respondent sign all documents and take all / any further steps necessary to cause the transfer of his registered undivided half share in the immovable property to Applicant, and have it registered in the Applicant's name such that Applicant becomes the sole registered owner of the immovable property in question.

1.4 Directing that should the Respondent refuse and/or fail to sign the above-mentioned documents and/or take such steps when duly requested to do so, the Sheriff of the High Court for the District where the immovable property is located, is authorized and directed to sign all documents and take all/any steps required to effect registration of transfer of the Respondent's half undivided share in the property to the Applicant on behalf of the Respondent.

1.5 In the alternative to Prayer 2 and 3 herein above, that this Honourable Court makes such directions as to the termination of the joint ownership of the property as it deems just and equitable in the circumstances.

1.6 Both the Applicant and First Respondent are indigent. Mr Walters appeared pro bono for the Applicant and Miss Mannel was instructed by Legal Aid South Africa for the First Respondent.

[2] Background Facts

The Applicant and First Respondent were married in community of property on 15 December 1992. The First Respondent bought an informal dwelling or shack which was later converted into a dwelling and which is the subject of this dispute from a certain Mr Ben Nokwe in 1987 on this very land which now constitutes the property. The dwelling and the associated rights to use the land which the dwelling stood upon their, subsequent marriage became their "family home" and fell within their joint estate.

[3] On 26 May 2005, the Applicant and the First Respondent jointly applied for a subsidy to the National Housing Department which was approved and an Agreement of Sale was concluded as a result thereof. The transaction between the Department and the Applicant and the First Respondent was approved on 12 July 2005. There were delays in the conclusion of the transfer relating to the construction of improvements to the property, surveying the land on which the property is situated, and documenting and affecting the transfer of ownership. These delays all occurred prior to the divorce of the parties which took place on 24 June 2008.

[4] The Applicant, prior to the dissolution of the marriage had to vacate the property as a result of the conduct of the First Respondent which conduct gave rise to the divorce proceedings and the divorce order, and according to the Applicant, the forfeiture order in particular. The divorce order was granted on an unopposed basis. The relevant portion of the divorce order states:

> "*The Defendant forfeits the patrimonial benefits of the marriage including the informal dwelling situated at [C…….], [S…….], [K……], Erf no [1……..], BKS No: [1……] Phase 2 in Plaintiff's favour as her sole and exclusive property*."
>
> (own emphasis)

[5] After the divorce order was granted, Applicant requested the First Respondent to vacate the property. He advised her to discuss the matter with the community leaders. She was told by the community leaders that they would not allow First Respondent to vacate the property, unless she could provide alternative accommodation to the First Respondent. She also sought legal advice to evict First Respondent whereafter she launched an application for his eviction from the property.

[6] The First Respondent did not oppose the divorce. However, upon realizing that the divorce court forfeited his rights and benefits he had in the property, he launched an application for the variation of the divorce order which was dismissed on 29 March 2012. This fact was conveyed to the Third Respondent. Despite this, the Third Respondent permitted the property to be registered in both the Applicant and First Respondent's names on 16 August 2012.

[7] The Applicant's Case

The Applicant argued that the divorce order is clear, and states that the First Respondent "forfeits all patrimonial benefits of the marriage including the informal dwelling" as described above in the order of the divorce court. The Applicant is of the view that the description in the divorce order of the immovable property and the improvements thereon refers to that very same property.

[8] At the time of the divorce order as described earlier, the Applicant holds that they had acquired limited corporeal rights which can be regarded as patrimonial assets which fell within the patrimonial estate of the parties, which was vested in their joint estate. At the time of the divorce a corporeal thing, the so-called shack / informal dwelling; an incorporeal thing, namely, the use rights to the land on which it was constructed; and also further incorporeal things, namely the limited real rights, and/or contingent rights arising from the approval of the application for subsidy and the related process which would lead to the transfer of the real rights of ownership to them from the Housing Department, had accrued to them.

[9] The Applicant therefore contends that they had limited real rights in the property vesting in their joint estate prior to the divorce which were converted to real rights once ownership of the property was registered in their names by the Registrar of Deeds (as had subsequently taken place).

[10] Mr Walters submitted that while the real rights to ownership of the property was contingent upon registration of transfer of the immovable property in their names jointly and in undivided shares, the approval of the application by the Housing Department and further implementation thereof by the Housing Department and all the legitimate expectations which attached thereto accrued to them.

[11] He submitted that these were all contingent rights vesting in and this part of the parties' joint estate as they were married in community of property. He further argued, that in making an order where parties are married in community of property, the court may dispense of that property by ordering the division of their estate, forfeiture of benefits to the marriage, and also make an order for the adjustment upon division as a result of certain transactions in terms of which the joint estate suffered a loss.

[12] In making any of these orders, the court will recognize that limited real rights, and/or contingent rights, may vest in such a joint estate, and should be dealt with accordingly in making these orders applicable in a given case. Mr Walters in his argument refers to Van Niekerk: `Practical Guide to Patrimonial Litigation in Divorce Actions' in Substantiation (Issue 16) thereof, where the learned author in Chapter 7.2 states that in order to determine "means" in a divorce action, "assets" consists of and

includes rights, title, or interest which is capable of being valued in monetary terms. Such rights, title or interest may be in a corporeal thing or incorporeal thing which is capable of being valued in monetary terms.

[13] He argued relying on Van Niekerk (supra) that such right would include the right to claim transfer of immovable property in terms of which a duly executed written agreement to such effect notwithstanding the fact that such property is not yet registered in the name of such a person. Such a right he says according to Van Niekerk to claim transfer may have monetary value and therefore be an asset in the joint estate of parties to a divorce. Mr Walters submits that such a right would also be an asset in the joint estate for the purposes of the court making any order of forfeiture. Such a right he argued, would also not be excluded in terms of s18 of the Matrimonial Property Act, 88 of 1984[1].

[14] He further submitted, that all contingent rights to ownership of the property clearly fell within the joint estate of Applicant and First Respondent at the time of their dissolution of their marriage. Since the divorce order provides for the forfeiture of all such rights on a proper construction of the order, and by necessary inference and implication the actual and/or contingent rights related to directly or indirectly, the forfeiture would include the transfer of ownership of an undivided half share thereof to the First Respondent.

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[1] **18. Certain damages excluded from community and recoverable from other spouse**
Notwithstanding the fact that a spouse is married in community of property-

(a) any amount recovered by him or her by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him or her, does not fall into the joint estate but becomes his or her separate property;

(b) he or she may recover from the other spouse damages in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of that spouse and these damages do not fall into the joint estate but become the separate property of the injured spouse.

[15] He therefore submits that the divorce order is valid and enforceable and, that it also applied to the First Respondent's actual and/or contingent rights.

[16] Rectification of the Title Deed

The Applicant further argued that in terms of s4(c) of the Deeds Registries Act, Act 47 of 1937 as amended ("the Deeds Act"), that errors in the registration process may be rectified. Mr Walters argued that although there is little authority that deals with a defective title deed or office error, there is however, support for the view that registration is not conclusive with regards to real rights in land.

[17] He argued that the real and valid underlying causa and intention to transfer the title into the name of the Applicant and First Respondent was not taken into account upon registration of the property. There was a fundamental flaw to the underlying causa and intention of the Department when ownership of the property was transferred to the Applicant jointly and or undivided shares with the First Respondent as if they were still married in community of property. This was done firstly without reference to the divorce order and secondly, without reference to the forfeiture of all rights real or contingent to the property as directed by the divorce order. The officials of the Department either overlooked, or failed to properly appreciate the terms of the divorce order and then failed to implement it, or adhere to it.

[18] He argued that the court has the power to intervene and remedy that error by directing the rectification of the title deed. He further argued that the court is empowered to do so in terms of s6 of the Deeds Act or, alternatively by means of a rectification of a

transfer in terms of s16 or 31 of the Deeds Act. He further argued that this court also has an inherent jurisdiction and power to ensure that its orders including those orders of lower courts within its jurisdiction are adhered to and applied fairly and properly.

[19] As a further alternative Mr Walters argued that the court could also order the termination of the parties' joint ownership of the property. Regarding this point he argued that the Applicant did make out a case that it could be just and equitable to allocate to the Applicant (and direct transfer) of First Respondent's entire half share in the property to the Applicant.

[20] In doing so, he argued the court should have regard to the terms of the divorce order; the circumstances giving rise to the divorce; the events that had taken place since the granting of the divorce order, and the respective means of the Applicant and the First Respondent.

Given these circumstances, the First Respondent has not put up any bona fide defence to the alternative relieve claimed by the Applicant.

[21] <u>The First Respondent's Case</u>

Miss Mannel argued that the First Respondent understood the divorce order to mean that he forfeits his patrimonial benefit to his informal dwelling, the corrugated sheet structure. According to the First Respondent, the Deeds office when it registered the property in both his and the Applicant's names on 23 February 2012, did so, not because they made

a mistake, but because he believed that he and the Applicant are joint owners of the property.

[22] According to the First Respondent he and the Applicant had a contingent right over the property; a mere hope that they might own it at a later stage. According to Miss Mannel, the parties merely had a tenure over the immovable property. She argued that in the previous dispensation the right to tenure had a lesser title than ownership. According to her the current tenure is on par with ownership. This tenure, so she argued, had a suspensive condition that must be adhered to.

[23] The Magistrate during the divorce proceedings had no power to grant a forfeiture order of the immovable property to which the parties had tenure to. This tenure according to her is only converted into full ownership at a later stage. She based her argument on the dictum in *Ex parte Western Cape Provincial Government and Others*; In *re DVB Behuising (Pty) Ltd v North West Provincial Government and Another 2000(4) BCLR 347 (CC)*. She also relied on the decision of *Reeder v Softline and Another 2000 (4) ALLSA 105 (W)* and argued that the contingent rights the Applicant and the First Respondent had over the immovable property was not a vested right that accrued to them during the subsistence of their marriage.

[24] At the time of their divorce, the parties merely had a tenure over the property and not a real right that vested in their joint estate. They received a housing subsidy from the Department of Human Settlements with which they secured a tenure to ownership at a later stage from the City of Cape Town. The City of Cape Town therefore, during the divorce proceedings was the owner of the immovable property.

[25] They had no right that actually vested in them. They had no enforceable right. The immovable property could thus not form part of their matrimonial property. They only had owned the informal dwelling. Miss Mannel therefore went on to argue that the divorce court only could make an order with regards to the informal dwelling as being the corrugated sheeting structure.

[26] In reply to these submission Mr Walters argued that the First Respondent's contention that the right to "tenure" amounts to a lesser title than ownership is flawed. This view is founded on an incorrect reading and application of the DBV Housing case. That case dealt with a limited form of tenure created by Proclamation R293 of 1962, issued in terms of the Native Administration Act 38 of 1927. In contrast, the Upgrading of Land Tenure Rights Act 112 of 1991, was enacted to ensure that a limited form of ownership was to be upgraded to full ownership.

[27] The DBV case so Mr Walters argued dealt with the issue whether the limited tenure stood to be transferred in terms of Section 2(1) read with s6(1) of the Upgrading of the Land Tenure Rights Act 112 of 1991. In this particular case, the Applicant and First Respondent obtained transfer, if regard is to be had to the Deed of Transfer[2]. The property had been transferred in terms of s13(1) of the Upgrading of Land Tenure Rights Act 112 of 1991.

[28] According to Mr Walters the whole purpose of the Act was to convert land tenure rights into ownership. This matter does not concern the granting of tenures obtained under proclamation R293 of 1962, which were issued in terms of the Native

[2] Record at 18 – 20.

Administration Act, 38 of 1927, which conferred a limited form of ownership and stood to be transferred in terms of section 2 of s3 of the Upgrading of Land Tenure Rights Act 112 of 1991.

[29] The Respondent's reliance on the Reeder case is also misplaced in that the Reeder matter dealt with a marriage out of community of property subject to accrual as opposed to the current case in which the parties were married in community of property only. In such a case the contingent rights to assets in another spouse's estate in a marriage out of community of property is subject to accrual only after the marriage is dissolved.

[30] As opposed to a marriage in community of property as with the present matter whereas the rights are vested in the joint estate prior to divorce. The housing application form[3] is clear evidence of a valid purchase contract concluded between the Applicant, First Respondent, Third Respondent, and others prior to the divorce order being granted.

[31] Evaluation:

It is trite that when parties are married in community of property, the nature of the relief which they can claim is either an order for division of the joint estate or an order for forfeiture of the benefits of the marriage in community of property. In this particular case during the divorce proceedings, the court made an order for the forfeiture of the benefits of the marriage in favour of the Applicant. This included an order that the First Respondent forfeits the patrimonial benefits of the marriage which included the informal

[3] Record p102 – 105.

dwelling situated at [C…….], [S……..], [K……], Erf no:[1…….],BKS no:[1…….] Phase 2 in favour of the Applicant as her sole and exclusive property.

[32] It is common cause that during the subsistence of the marriage the Applicant and the First Respondent applied for subsidized housing which was approved on 12 July 2005[4]. In terms of that document a "contract of purchase" was also concluded between them and the Housing department on 13 June 2005. It is therefore not disputed that the Applicant and First Respondent concluded an agreement of sale during the subsistence of the marriage with the Housing Department to acquire the property. It was also clear that everything was set in motion for them to acquire ownership of the property which included having construction of the improvements thereon. Further steps were undertaken towards the transfer of the ownership thereof to the joint estate of the Applicant and the First Respondent.

[33] It was also clear that the registration of transfer of ownership of the property to Applicant and First Respondent would occur on a future date. In my view, this was much more than a mere tenure, or hope that the property would one day be transferred into the name of Applicant and First Respondent. They acquired a right to claim transfer of the immovable property in terms of a duly written agreement which were clearly evident from their application for housing document[5]. In this regard, I am in total agreement with the view expressed by the learned author Van Niekerk: Practical Guide to Patrimonial Litigation In Divorce Actions (Issue 16) at paragraph 7.2 where he states "*For purposes of determination of "means" in a divorce action, it is suggested that an asset consists of the*

[4] See record page 104 under the heading "Status History Information".
[5] Record page 102 – 105.

rights, title or interest which a person may have in any corporeal or incorporeal thing, which is capable of being valued in monetary terms. It therefore follows that an asset may be tangible or intangible. For instance, a person may be the full beneficial owner of a tangible asset such as a Ferrari sports car or, on the other hand, may have the right to claim transfer of immovable property in terms of a duly executed written agreement to such effect, notwithstanding the fact that such property is not yet registered in the name of such a person. Such a right to claim transfer may have a monetary value and therefore be an asset in the estate of such a person."

[34] The author then proceeds to mention that apart from obvious assets such as movable property like motor vehicles, tools and coins et cetera and immovable property they are also other assets which can be taken into account like shares in companies, membership interests in close corporations, loan accounts, share options and pension interests. I am also in agreement with the argument as advanced by Mr Walters that a party's vested rights in immovable property if such a property has been acquired in terms of the duly executed written agreement cannot be affected if the registration of the transfer of the property has not been concluded.

[35] To put it differently, the rights that a party has acquired in terms of an agreement to own the property remains unaffected. Such a right therefore can be regarded as an asset which a party can acquire during the subsistence of a marriage which can either be regarded as an asset for the purposes of the division of the joint estate, or in an appropriate case for the forfeiture of a benefit of the marriage in community of property. In this particular case the First Respondent at the time of the divorce has forfeited his right in the immovable property which could not later have been transferred into his name.

[36] In *Persad v Persad and Another 1989 (4) SA 685 (D)* the court after having granted a decree of divorce to the plaintiff ordered that the City Council transfer to the plaintiff all the rights, title and interests in the lease which her husband had concluded with the City Council, in respect of a house administered by the City Council under a municipal housing scheme. The court thus held that the tenancy of the house was a benefit derived from the marriage and was an asset of the joint estate acquired during the marriage: it had been acquired for the purposes of the marriage, for the purposes of the matrimonial home that was needed because of the marriage. The court thus held at the benefit was a patrimonial one as it had a value to the joint estate.

[37] The court was of the view that the tenancy was a patrimonial benefit of the marriage. The principle laid down therefore was that all benefits of a patrimonial nature in cases where the parties did not establish or prove a real right in immovable property forms part of the joint estate that can be forfeited at the dissolution of the marriage. See also *Wertheim v Wertheim 1976(4) SA 633 (W); Matthee v Koen en Andere 1984 (2) SA 543 (C)*. In this particular case, the parties have a stronger right in a form of a limited real right, which it could enforce against the owner as well as a third party. It was a right to claim transfer of the immovable property which was an asset in the joint estate for the purposes of the court making an order of forfeiture which in my view can be rightfully regarded as an asset and a patrimonial benefit for the purposes of forfeiture.

[38] It is clear that as from the date of divorce the immovable property could only have been transferred to the Applicant and not to both the Applicant and the Respondent. Had the transfer thus taken place before the parties were divorced the property would have been transferred into the name of the Applicant as a as a result of the forfeiture order.

Unfortunately for the Applicant, the transfer at the time of divorce did not take place and only took place much later on 23 February 2012, when it was transferred from the City of Cape Town as a registered owner into the name of Applicant and First Respondent.

[39] This was clearly an error. Mr Walters relying on the learned authors Muller and Pope: Land Title In South Africa at p109 argued that while dominium, when properly registered against the title deed of the land may have full effect as a real right, but where such a right which does not have the quality of a real right it cannot become such through an erroneous registration and that such qualities must include a valid underlying causa and intention to transfer title. Where registration thus takes place without all these requirements for transfer having taken place whether either intentionally or in error the court will order rectification to reflect the true and correct position. I agree with this contention. This is clearly what happened in this case where registration took place in the name of both the Applicant and First Respondent without having regard to the true nature of the respective rights to the property. This was done despite an effort that was made by the Applicant through her attorneys in a letter dated 25 June 2012[6] to the City Council informing them that Applicant as a result of the forfeiture order by the divorce court was sole and exclusive owner of the property, and that the necessary amendments be made to the transfer deed to reflect the Applicant as being the sole owner of the property, where such a situation exists the court is entitled to rectify such an error. See *LAWSA Vol 27 (2nd ed)* para *231* at page *236*, where the learned authors stated the following:

> *"(a) Real rights and ante omnia ownership may be acquired by various modes which are not reflected in the deeds office. Illustrations are where ownership is acquired by prescription, by expropriation, by statute or as a result of a marriage in*

[6] Record p99 – 100.

community of property. Moreover, it is now accepted that a fideicommissary acquires ownership of immovable property upon fulfilment of the fideicommissary condition without the need for registration. In all these instances the true owner is in a stronger position than a bona fide acquirer who acquires the property from the person registered as owner in the deeds registry. Moreover, several modes of termination of real rights, like abandonment, confusio and the extinction of a principal debt secured by a bond are not reflected immediately in the deeds registry.

(b) Although the registrar does not play a passive role and examines every deed carefully before registering it, registration may nevertheless take place without the requirements for transfer having been complied with. Thus the transferor may not have had the capacity to transfer the thing, the signature of the transferor may have been forged, or the transferor may have been fraudulently induced to sign a transfer deed in the belief that it was another type of document. In the above cases the court will order rectification of the deeds registry records in favour of the original owner vis-à-vis a bona fide acquirer."

[40] There was thus a fundamental flaw to the underlying causa and intention of the Department and ownership of the property was transferred to both the Applicant and First Respondent in undivided shares as if they were still married in community of property. The true state of affairs was, that it was done without reference to the divorce order and also without reference to the forfeiture of all the rights, real or contingent to the property as directed by the divorce order. It seems that the officials of the Department overlooked or failed properly to appreciate the terms of the divorce order and then failed to implement or adhere thereto. The Applicant therefore made out a case for this court to intervene and remedy the error.

[41] As to the question of costs both parties it seems are indigent, Applicant was assisted on a pro bono basis and the First Respondent was assisted by Legal Aid South

Africa. Mr Walters on behalf of the Applicant submitted that if the court should find that the Applicant be registered as the sole owner of the property, that it would be fair to direct that all and any disbursements reasonably incurred on behalf of the Applicant in advancing her claims, and any costs in giving effect to the order, should be paid by First Respondent. I am not convinced that this would be an appropriate order given the fact that both the parties could not even afford to proceed with this matter in this court without the invaluable assistance given to them by Mr Walters, and in particular his firm of instructing attorneys on a pro bono basis. I hereby wish to express my gratitude and admiration to them for a job well done. I am rather convinced that the First Respondent would not be able to pay any costs whatsoever.

[42] In the result therefore I make the following order:

1) That the Applicant is the sole owner of the immovable property known as Erf [6…….] [K…….], in the City of Cape Town, Division Cape, Western Cape Province, in extent 106 (One Hundred and Six) metres, as will appear from General Plan S.G No. 49/2010 and held by Certificate of Consolidated Title No. [T……..] under Deed of Transfer [T…….], also known as [C…….], [S…….], [K……..].

2) It is directed that the Deed of Transfer [T……] over the property, now registered in the deeds office by the Second Respondent, be rectified to reflect that the Applicant, namely “Virginia Vuyokazi Mpela”, is the sole owner of the property, and that the title deed to the property be rectified accordingly.

3) The First Respondent is directed to sign all documents and take all / any further steps necessary to cause the transfer of his registered undivided half share in the immovable property to the Applicant and have it registered in the Applicant's name such that the Applicant becomes the sole registered owner of the immovable property in question.

4) It is further ordered that should the First Respondent refuse and/or fail to sign the above-mentioned documents and/or take such steps when duly requested to do so, the Sheriff of the High Court for the District where the immovable property is located is authorized and directed to sign all documents and take all/any steps required to effect registration of transfer of the Respondent's half undivided share in the property to the Applicant on behalf of the Respondent.

5) I make no order as to costs.

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R. C. A. HENNEY

Judge of the High Court