

iAfrica Transcriptions (Pty) Ltd

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH

AFRICA

JOHANNESBURG

CASE NO: 20546/2005

DATE: 2012-08-24

10 In the matter between

MARATHON EARTHMOVERS CC

Applicant

and

AVELINO VASCO DOS SANTOS

First Respondent

DEBORAH DOS SANTOS

Second Respondent

J U D G M E N T

WILLIS; J:

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[1] The applicant seeks an order declaring the half-portion of erf 1153 Ridgeway Extension 5 Johannesburg Gauteng ('the property') co-owned by the first respondent to be specially executable, together with an order

that a writ of execution be issued against the property. The applicant also seeks an order for costs against the first and second respondents.

[2] Judgment was obtained against the first respondent in favour of the applicant on 28 October 2009 in the sum of R128 983- together with interest and punitive costs. The Sheriff was duly instructed to attend at the property to attach the movable property of the first respondent. The Sheriff issued a return of service indicating that the first respondent had no movable assets.

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[3] The first respondent has confirmed that he has no movable assets. Accordingly, the applicant seeks to proceed against this half share in the immovable properties situated erf 1153 Ridgeway Extension 5 Johannesburg. It is common cause that the first respondent is the registered owner of this half share in this particular property.

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[4] The basis upon which the first respondent seeks to resist the order sought by the applicant is that he was divorced from the second respondent on 4 June 2010 (i.e. after the judgment had been obtained) and that, in terms of the agreement of settlement between himself and the second respondent which was made an order of court, the following is recorded in respect of this half share in the property (which is commonly known as 17 Alamein Street, Robertson Johannesburg) –

“The defendant will transfer his half share of the immovable property to the plaintiff”.

The defendant to whom reference is made is the first respondent in this case, the plaintiff was the second respondent.

[5] I am referring here to the order made in divorce action between the parties. It is common cause that the first respondent has not yet complied with that term of the divorce settlement agreement. Mr *Lindeque*, who appears for the first and second respondents, has relied in this regard very strongly on the case of *Corporate Liquidators Pty Ltd and Another v Wiggle and others* 2007 (2) SA 520 (T). I hope that I may be forgiven for
10 quoting from a text book, rather than directly from the learned authorities, but I plead, in mitigation, that I am sitting delivering an *ex tempore* judgment in a busy Motion Court. In *Wille's Principles of South African Law*, 9th Edition by Francois de Bois, Butterworths, 2007 at p519, the following is said in respect of derivative acquisition of ownership:

20 The most important derivative modes of acquisition of ownership are delivery in a case of moveable and registration in a case of immovable. Derivative acquisition of ownership describes transfer of ownership from the predecessor in title to the successor. In order to transfer ownership to main requirements must be satisfied. There must be agreement between the parties to transfer ownership and there must be a form of conveyance – delivery conveys ownership in the case of moveable and registration in the Deed's registry does the same in the case of immovable property. In certain circumstances, ownership or a share therein transfers automatically or by operation of law. Thus on married and

community of property, insolvency and death, ownership in an estate passes automatically without a registration or delivery.

In the case of division of common property, however, ownership does not pass automatically but only on delivery or registration.

The learned authors quote as authority for the proposition that in the case of division of common property, however, ownership does not pass automatically but only on delivery or registration: Voet 41.1.1; Maasdorp *Institutes of South African Law* Vol 2 at page 69 and Jones *Conveyancing* at page 381.

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[6] In what I shall refer for the sake of convenience as 'the *Wiggle* case' (supra), Hartzenberg J, delivering the judgment of the court, said:

"Our system of deeds registration is a negative one where the deeds registry does not necessarily reflect the true state of affairs."

(See paragraph [16] of his judgment). This is correct, but it must be understood that this does not mean that the failure to register a transfer, consequent upon a court order, of property that was owned by and which remains registered in the name of a particular person that the property
20 can, merely by reason of the settlement agreement between the parties that was made an order of court, can, in fact, be deemed, as against the whole world, to be owned by someone else. As the quoted passage from *Wille's Principles* above makes clear, there must be both an intention and registration for the passing of ownership to take place. In other words, if registration has taken place for example by way of fraud, then obviously

the intention was missing and the fact that ownership is registered in the Deeds Registry Office is not decisive. For a transfer of ownership of the kind in question to prevail against the whole world, there must both be an intention to transfer and actual registration of transfer in the Deeds Registry Office by registration. The two go together.

[7] I regret to say that I consider the judgment of Hartzenberg J, with which judgment Mavundla J and Ranchod AJ concurred, to be incorrect in law. Fortunately, however, the facts in this particular case are in any event
10 distinguishable from those in the *Wiggle* matter, in two significant respects: (1) in the *Wiggle* matter the parties were married in community of property whereas in the present matter the parties were married out of community of property and (2) in the settlement was made an order of court in the *Wiggle* matter, the following was recorded:

"Verweerderes word die uitsluitlike eienares van ...
(the property in question)."

[8] The wording was very different from the wording in the case before me. The court ordered the defendant to transfer his half share of
20 immovable property to the plaintiff. The court did not make an order that the plaintiff became, upon the making of that order, the owner of the property in question. The *Wiggle* case illustrates that hard cases can make bad law. It is impossible in the *Wiggle* matter not to have considerable sympathy for Mrs Wiggle (number one). In the result the applicant succeeds and an order is made in terms of Prayers 1 and 2 of

the notice of motion dated 24 April 2012 and the first and second respondents are jointly and severally liable to pay the costs, to pay the applicant's costs in this application.

COURT ADJOURNS

Counsel for the applicant: *Adv D Mahon*.

Counsel for the first and second respondents: *Adv I M Lindeque*.

Attorneys for the applicant: Schindlers.

10 Attorneys for the respondents: Smit & Grove.

Date of hearing: 22nd and 24 August 2012

Date of judgment: 24 August 2012.