

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

CASE NO: 1975/2013

In the matter between:

SHACKLETON CREDIT MANAGEMENT (PTY) LTD

Applicant

and

J[...] J[...] N[...]

First Respondent

U[...] M[...] N[...]

Second Respondent

ABSA BANK LTD

Third Respondent

JUDGMENT

Bloem J

[1] The applicant, Shackelton Credit Management (Pty) Ltd (Shackelton), seeks an order that a certain immovable property, sectional title 3[...], SS Innikol, scheme number 9[...], measuring 84 square meters in extent, held under sectional title deed ST3[...], Louis Fourie Road, Vyf Brakke Fontein, Mossel Bay (the property), be declared executable. The first and second respondents are J[...] J[...] N[...] (Mr N[...]) and U[...] M[...] N[...] (Mrs N[...]) respectively and the third respondent is Absa Ltd.

[2] It is undisputed that during 2004 and at Gqeberha, Mr N[...] executed a deed of suretyship in favour of Standard Bank. In terms thereof he bound himself as surety

and co-principal debtor with Sophisticated Agencies CC (the principal debtor) in respect of the principal debtor's liability arising out of an overdraft facility that Standard Bank advanced to the principal debtor. The latter breached the terms of the overdraft facility and became indebted to Standard Bank. Mr N[...] failed to settle the principal debtor's indebtedness to Standard Bank. On 5 August 2013 the registrar of this Court entered judgment in favour of Standard Bank against the principal debtor and Mr N[...] in respect of two claims. Only the first claim, for payment of R386 486.29, is relevant to this application. Standard Bank ceded its rights, title and interest in and to its book debts, inclusive of its claim against the principal debtor and Mr N[...], to Shackelton with effect from 19 November 2020. During March 2023 Shackelton instituted the present application.

[3] Only Mrs N[...] opposed the application. She alleged that she and Mr N[...] were married¹ but that their marriage was dissolved by an order of divorce on 16 April 2013. The court order incorporated the terms of a deed of settlement, which Mr and Mrs N[...] had concluded. Clause 5 of the deed of settlement deals with the division of their joint estate. They agreed that, when the divorce order was granted, Mr N[...] would forego his half-share in the property in favour of Mrs N[...]. It stated that she would become the sole owner of the property and Mr N[...] would become the sole owner of another identified immovable property. In the deed of settlement Mr and Mrs N[...] undertook to sign all documents necessary to give effect to the transfer of their respective half-shares in the above properties from one to the other. They furthermore agreed on the firm of attorneys which would attend to the registration of the immovable properties into their respective names. The deed of settlement dealt with the division of the immovable properties and their registration into the respective parties' names as follows:

"5.3 The Plaintiff will become the sole owner of the following:

- 5.3.1 ... ;
- 5.3.2 The sectional title unit, SS Innikol
 Scheme NO/year: 9[...]
 Unit: 3[...]
 Title Deed No: ST3[...]
 And all common use areas.
 Situated at Hartenbos

¹ Although it is not expressly stated in the affidavits filed of record, it is clear from the documentation attached to Mrs N[...]’s affidavit that she and Mr N[...] were married in community of property.

The Defendant undertakes to sign all documents necessary to transfer his half undivided share into the name of the Plaintiff.

5.4 The Defendant will become the sole owner of the following:

5.4.1 Erf: 2[...]
 Hunters Retreat
 Title Deed: T58[...]
 Situating at [...] C[...] Road, Sherwood

The Plaintiff undertakes to sign all documents necessary to transfer her half undivided share into the name of the Defendant.

5.5 The Parties hereby nominate and appoint Laubscher Attorneys as the Attorneys who will attend to the registration of the transfer of the said immovable properties onto the name of the respective parties.”

[4] In summary, the factual situation relevant to the relief sought in this application is that on 16 April 2013 Mr and Mrs N[...] divorced and on 5 August 2013 judgment was granted against Mr N[...], not against Mrs N[...]. The judgment was accordingly granted after the divorce order had been granted. It is against that background that Shackleton seeks an order declaring the property executable.

[5] In Mrs N[...]’s main defence she claims that she is the sole owner of the property, that Shackleton does not have a claim against her and that it was accordingly not entitled to an order declaring the property to be executable. She alleged that, when Mr N[...] alienated his half-share of the property to her, she acquired sole ownership thereof. Surprisingly, she nevertheless said that this court must determine when full ownership in the property passed to her. In this regard, she asked whether “*it [was] upon the granting of the divorce order on 16 April 2013 or upon the endorsement of the title deed?*”

[6] The answer to Mrs N[...]’s claim that she is the sole owner of the property is to be found in the distinction between real rights and personal rights. Real rights are concerned with the relationship between a person, like the owner of a thing, and the thing.² The holder of the real right is entitled to control the use of the thing. A real right is enforceable against any person who seeks to deal with the thing (to which the real right relates) in a manner which is inconsistent with the holder’s right to control the use of the thing.³

² *Ethekwini Municipality v Mounthaven (Pty) Ltd* 2019 (4) SA 394 (CC) para 9.

³ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at 20B-C.

[7] Personal rights are concerned with the relationship between persons. The holder of a personal right can enforce it, not against all, as is the case with a real right, but only against another person or a group of persons,⁴ based on a special legal relationship, such as a contract, a delict or some other good and sufficient cause.⁵ A personal right entitles the holder thereof to claim some performance or action by another person or persons.

[8] Immovable property is acquired by either the original or derivative method. If the acquisition is dependent on the cooperation of a predecessor in title, the property is acquired by the derivative method. In the absence of a predecessor, the property is acquired by the original method.⁶ Immovable property is transferred when the transferor transfers it to the transferee by registration of a deed of transfer in the deeds office. The two requirements for the transfer of ownership in immovable property from one person to the other are firstly, that the transferor must have the intention of transferring the property to the transferee, who must have the intention of receiving the property; and secondly, the transfer must be effected by registration of a deed of transfer in the deeds office.⁷

[9] Mrs N[...] contended that Mr N[...]’s half-share in the property vested in her immediately on divorce. Section 16 of the Deeds Registries Act 47 of 1937 is the starting point in deciding whether that contention is correct. In relevant part section 16 reads as follows:

“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 [of deeds], 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 [of deeds] ...”. (own underlining)

⁴ *Absa Bank Ltd v Keet* 2015 (4) SA 474 (SCA) para 20, where the court explained the distinction between a real right and a personal right as follows: “*Real rights are primarily concerned with the relationship between a person and a thing, and personal rights are concerned with a relationship between two persons.*” In *Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited* Froneman J stated that real rights are protected against all the world whereas personal rights carry protection only between immediate parties.

⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* 5 ed (LexisNexis) Butterworths, 2006) at 51.

⁶ *Silberberg and Schoeman’s The Law of Property* n 5 at 71 and 72.

⁷ *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) at para 22; referred to with approval in *Absa Bank Limited v Moore and Another* 2017 (1) SA 255 (CC) para 14.

[10] In *Fischer v Ubomi Ushishi Trading CC and others*⁸ it was held that, on a proper construction of section 16, derivative acquisition of ownership in land requires registration. In this case, Mrs N[...] acquisition of Mr N[...] half-share in the property was derivative, because it arose from the deed of settlement which gave Mrs N[...] a personal right to enforce registration of Mr N[...]’s half in the property.

[11] When the above principles are applied to the facts of the present case, Mrs N[...]’s claim, that she is the sole owner of the property, is legally incorrect. It is common cause that Mr N[...]’s half-share in the property had not been transferred to her by registration in the deeds office. The reason therefor, the alleged lack of financial resources, is immaterial. The deed of settlement or the order which incorporated the deed of settlement did not by itself vest ownership of Mr N[...]’s half-share in the property in Mrs N[...]. She required something more. In terms of section 45bis(1)(a) of the Deeds Registries Act 16 she was required to apply to the registrar to make an endorsement on the title deed of the property to the effect that she is entitled to deal with the property. Upon such endorsement she “*shall be entitled to deal therewith as if ... she had taken formal transfer ... into ... her name of the share of [her] former spouse ... in the property ...*”.⁹ In terms of section 16 she required “*a deed of transfer executed or attested by the registrar*” for ownership in Mr N[...]’s half-share to be transferred into her name.

[12] What accrued to Mrs N[...] on divorce was not the ownership of Mr N[...]’s half-share in the property, but the right to claim that Mr N[...] be compelled to transfer his half-share in the property into her name.¹⁰ Until registration takes place, Mrs N[...] will

⁸ *Fischer v Ubomi Ushishi Trading CC and others* 2019 (2) SA 117 (SCA) paras 12 to 29.

⁹ Section 45bis(1)(a) of the Deeds Registries Act reads as follows:

“(1) If immovable property or a lease under any law relating to land settlement or a bond is registered in a 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; or

(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.

¹⁰ *Estate Smith v Estate Follett* 1942 AD 364 at 383.

remain the holder of a personal right enforceable only against Mr N[...] to compel him to transfer his half-share of the property into her name. Her personal right will be changed to a real right only upon registration. That is when her personal right will come to an end and she will become the holder of a real right. It is only then that she will become the sole owner of the property.¹¹

[13] In the circumstances, Mr N[...]’s half-share in the property did not vest in Mrs N[...] immediately upon the conclusion of the deed of settlement or when the deed of settlement became an order of court. Ownership of the property would have passed to her only upon registration in the deeds office. In the circumstances, Mrs N[...]’s main defence, that she is the sole owner of the property, must fail.

[14] Mrs N[...] also claimed, in the alternative, *“that upon granting the order, I acquired a personal right to compel transfer to me of my ex-husband’s half share in the property in question. This personal right protects my interests in the property against the claim of the Applicant until it is formally transferred by the endorsement into my name.”* As pointed out above, when the deed of settlement was made an order of court, Mrs N[...] acquired a personal right to claim transfer of the property into her name. There was no evidence to show that, when Mrs N[...] acquired that right, she faced a greater or competing right to defeat her claim. When Standard Bank obtained the judgment on 5 August 2013 and when Shackleton subsequently instituted the present application on 8 March 2023 for an order declaring the property specially executable, Mr N[...] had already alienated his half-share in the property to Mrs N[...] by way of the deed of settlement which was incorporated in the divorce order. In the circumstances, and in accordance with *Fischer v Ubomi Ushishi*, Mrs N[...]’s personal right against Mr N[...] to compel transfer of his half-share of the property preceded Shackleton’s claim. The relief sought by Shackleton against Mr and Mrs N[...] can for that reason not be granted. The application should accordingly be dismissed. Costs should follow the result.

[15] In the result, it is ordered that the application is dismissed with costs.

¹¹ *Ethekwini Municipality v Mounthaven (Pty) Ltd* n 2 paras 18 and 19.

GH BLOEM
Judge of the High Court

APPEARANCES

For the applicant:	Mr I Lambrecht, instructed by Lynn and Main Attorneys, Johannesburg and Joubert Galpin and Searle Attorneys, Gqeberha.
For the second respondent:	Ms N Karsan, instructed by Johan Nel Attorneys, Mossel Bay and Strauss Daly Attorneys, Gqeberha.
Date heard:	25 April 2024.
Date of delivery of judgment:	14 May 2024.