



SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Fischer v Ubomi Ushishi Trading & others [2018] ZASCA 154

Today the Supreme Court of Appeal (SCA) dismissed an appeal by the appellant and awarded full ownership of the property to the third respondent.

The issue before the SCA was whether a real right to a half share in immovable property vested in a spouse immediately following the dissolution of a marriage in community property pursuant to a court order incorporating a settlement agreement in terms of which one spouse foregoes his half share in the property in favour of the other, or whether the real right vested only after endorsement of transfer in the Deeds Registry. An ancillary issue concerned the nature of the right acquired by the spouse by virtue of a court order. The third respondent raised an alternative defence that her right to full ownership of the property preceded the appellant's claim.

The appellant issued summons against the first respondent and the second respondent for payment of R566 500, based on an acknowledgement of debt by the first respondent and a suretyship agreement concluded by the second respondent for its indebtedness. The second and third respondents, respectively, were the registered owners of the immovable property. Their marriage in community of property was dissolved by an order of divorce dated 10 December 2012. In terms of a settlement agreement incorporated in the divorce order, the second respondent waived his right, title and interest in the property in favour of the third respondent, the wife. The second and third respondents however remarried on 28 April 2014, out of community of property, in terms of an antenuptial contract, with the exclusion of the accrual system. Precisely a year later, on 28 April 2015, they were divorced for a second time. The Cape Town Regional Court issued the order dissolving the second marriage, which included an order that each party would retain their respective possessions. The appellant applied to the court a quo for an order declaring the second respondent's half share in the property executable. The third respondent resisted the claim on the ground that she now had full ownership of the property. The Western Cape Division of the High Court, Cape Town dismissed the application. It held that upon the granting of the decree of divorce, dominium of the property vested with immediate effect in the third respondent.

In dismissing the application the court a quo considered two judgments: *Corporate Liquidators (Pty) Ltd & another v Wiggill & others* 2007 (2) SA 520 (T) and *Middleton v Middleton & another* 2010 (1) SA 179 (D).

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 s 7(1) of the Divorce Act 70 of 1979, 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* 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 *traditio* (delivery or transfer).

The SCA held on a proper construction of s 16 of the Deeds Registries Act 47 of 1937, derivative acquisition of ownership in land required registration. The third respondent's acquisition of the second respondent's interest in the property was derivative: it arose from the settlement agreement which gave the third respondent a personal right to enforce registration of the second respondent's undivided half share in the property. That agreement, though binding on the contracting parties, did not by itself vest ownership of the second respondent's half share in the property in the third respondent any more than a contract of sale of land passed ownership to the buyer, and it therefore followed that *Middleton* was correctly decided.

The SCA found further that 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 was only terminated on attestation of deeds of partition transfer by the registrar, when ownership was conveyed to the respective owners of the land. With regard to the second respondent's alternative defence, the SCA held thus that at the time that the third respondent acquired the personal right to compel transfer of the second respondent's half share in the property into her name, there was no other greater or competing right to defeat her claim. When the appellant applied for an order declaring the property executable, the second respondent had already alienated his half share in the property to the third respondent by way of the settlement agreement.