

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

AWAITING PROPERTY TRANSFER - IT'S AN 'ASSET' IN DIVORCE

M v V and Others (8897/2014) [2016] ZAWCHC 44 (21 April 2016)

When parties married in community of property divorce whilst they are awaiting transfer of property from the Department of Human Settlements, in whose name must transfer be registered? This was the dispute in the present matter, where the divorce order provided that spouse A forfeited all patrimonial benefits to spouse B. The divorce order was granted 3 years after the agreement with the Department had been signed and 5 years before transfer was finally registered in the name of both spouses.

The Judgment can be viewed [here](#).

FACTS

In December 1992, M and V married each other in community of property. At the time, V owned an informal dwelling (shack) which was later converted into a dwelling and the couple lived here during the subsistence of their marriage.

In May 2005, M and V jointly applied for a subsidy to the National Housing Department. This was approved and an agreement of sale was concluded with the Department in respect of the land on which the dwelling was erected.

Unfortunately there were many delays in effecting registration of transfer of the property, due to the construction of improvements to the property, surveying the land and documenting and affecting the transfer of ownership.

The parties divorced in June 2008, before transfer was effected. V did not contest the divorce. The divorce order provided, amongst other things, that V forfeited "the patrimonial benefits of the marriage including the informal dwelling ... in Plaintiff's favour as her sole and exclusive property." (Plaintiff was M.)

The details of the divorce order were conveyed to the Department of Human Settlements. However, when subsequently in 2012 ownership in the property was transferred, it was registered in the names of both M and V.

M thereupon approached the court arguing that, as the divorce order provided that V forfeited all patrimonial benefits of the marriage "including the informal dwelling", transfer should have been effected to her only. M sought an order declaring that she was the sole owner of the property.

HELD:

- In terms of the sale agreement with the Housing Department, M and V would acquire ownership of the property, including the improvements thereon.
- This constituted more than mere tenure of the property or a hope that the property would one day be transferred into their names. They acquired a right to claim transfer of the immovable property in terms of a duly written agreement.
- From a divorce law point of view, this right constituted an asset to be included in the determination of "means". (For the calculation of "means", an asset consists of the rights, title or interest which a person may have in any corporeal or incorporeal thing, which is capable of being valued in monetary terms. An asset may be tangible or intangible and an example of an intangible asset is 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.)
- The vested rights acquired in terms of the duly executed written agreement were not affected by the fact that registration of the transfer of the property had not been concluded at the time of the divorce. The right remained an asset in the joint estate of M and V prior to divorce; it was 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.
- This is the right that V forfeited in terms of the divorce.
- As such, in terms of the divorce order, the property should have been transferred to M only, and not to M and V. There was thus a fundamental flaw to the underlying causa and intention of the transfer.
- The court accordingly issued an order confirming that M was the rightful owner of the property and ordered V to sign the necessary documentation that transfer into her name can be effected.

(The outcome in this judgment is agreed with although certain statements in the judgment were incorrect. In several places in the judgment, the court equated the rights that M and V held in terms of the agreement entered into with the Department, to limited real rights, enforceable as against the whole world. This is not so. What the parties gained from that agreement were mere personal rights to claim transfer of the property from the Department. This is hardly enforceable against the whole world.)

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