

## DERIVATIVE ACQUISITION OF OWNERSHIP

### PART 3 – REGISTRATION

#### Introduction

We have now discussed the various forms of delivery which are effective to pass title of **moveable** property. Just as the transfer of ownership of moveables requires delivery, so the transfer of immoveable property (land and buildings), requires registration.

#### Registration of Deeds

In the past, the transfer of immoveable property used to be effected by the handing over of deeds. A deed would describe the property concerned, together with any real rights or interests over it and represented the owner's title to the property. Ownership would pass when the deed was endorsed in favour of the purchaser and handed over with the intention to pass ownership. The role of the title deed in the process was not unlike the role played by the bill of lading in the **Lendlease** case discussed earlier. The deed would be a symbolic instrument of ownership and control over the immoveable property.

Today, registration of immoveable property is, though, now a function undertaken by the Registrar of Deeds in each province. The process of registration is regulated by the Deeds Registries Act 47 of 1937. The Registrars of Deeds are assisted by a staff and a highly specialised group of legal professionals known as conveyancers. Many attorneys choose to specialise in conveyancing (as it is a lucrative business with little of the confrontation and drama involved in much legal practice). They must take a

special exam in order to be admitted as conveyancers, and only conveyancers can appear before the registrar to effect the transfer of immovable property.

The process for the transfer is summarised at pages 140 to 142 of the Van Der Walt textbook (6 ed). We will not go through it in detail in the lecture, but you should familiarise yourself with it.

Ownership only passes once the transfer of ownership is registered with the Registrar of Deeds.

### **Negative System of Registration**

The registration of deeds is meant to ensure a transparent and secure system of land ownership. The point is to make landowners secure in their property rights by providing an independent, properly controlled, authoritative and publically accessible database of who owns what.

It is important to emphasise, however, that registration of title is not a magic wand with which transfer of ownership is made permanent and irrevocable. This is so because South Africa operates a **negative system of registration**. This means that the correctness of the information contained in the deeds registry is not guaranteed. In addition, there is a great deal of information which is not recorded at the deeds registry. For example, passing of ownership by prescription is not generally recorded at the deeds registry. Nor is the advent of co-ownership by marriage in community of property. Whether someone is owner of a thing is to be established by reference to objective law, not simply to what is recorded at the deeds office. Of course, without more, registration of title is very strong evidence of its validity, but it is not conclusive.

An acquirer of defective title is not immunised by registration of transfer into his or her name.

### **Menqa v Markom**

This is well illustrated by the decision of the Supreme Court of Appeal in *Menqa v Markom*. In that matter, Markom purchased a house in Maitland, Cape Town. At the time, the house was being occupied by a Mr. Tromp in terms of a lease agreement with the estate of the deceased previous owner of the property. The executor of the deceased estate gave Tromp notice to vacate the property by 1 June 1995. Tromp did not vacate.

On 4 June 1995, Markom visited the property. A fight broke out between Markom and Tromp. Tromp then sued Markom in the Magistrates' Court for damages arising out of injuries Tromp said he sustained during the fight. Markom did not defend the action (he said he was unaware of it) and Tromp took default judgment against him for approximately R98 000.

In the meantime Tromp had vacated the house. Markom moved in with his family and transfer of the house to Markom was registered at the Deeds Registry.

Tromp's judgment remained unsatisfied, and he applied to the Clerk of the Magistrates' Court for a writ attaching Markom's house and authorising a sale in execution. Markom said that he only became aware of the judgment and the writ of attachment when he received notice that his home was about to be sold-in-execution.

Markom's attempts to have the judgment set aside and to stay the sale-in-execution failed. The sale went ahead. The house was sold to Menqa and transferred into his name by the Registrar of Deeds.

Undeterred, Markom launched an application in the High Court for an order setting aside the sale-in-execution on the basis that the writ authorising it was granted by the clerk of the court, and not by a Magistrate. It is a rule of constitutional law, laid down in **Jaftha v Schoeman** that only a Magistrate can grant an order authorising the sale-in-execution of a person's home. The rule applies to all sales-in-execution which took place since the commencement of the Constitution.

The High Court found that, because of this, the writ of execution was invalid, and the sale upon which it was based a nullity. The sale could not have served to pass any title to Menqa when the property was subsequently transferred to him. The High Court accordingly set aside the sale and ordered the Registrar to re-transfer the house back into Markom's name.

Menqa appealed. The main question on appeal was whether section 70 of the Magistrates' Court Act saved the validity of the sale. Section 70 states that a defective sale-in-execution is to be treated as valid unless the purchaser has notice of the defect or is in bad faith.

The Supreme Court of Appeal decided, however, that Section 70 cannot save an otherwise void sale-in-execution. What it does (as suggested by the minority concurring judgment of Cloete JA) is protect the purchaser against some kinds of defect in the process of the sale. It cannot make valid a sale which was null and void at the outset.

The Supreme Court of Appeal accordingly confirmed the High Court's order setting aside the sale in execution, but deleted the order that the Registrar transfer the property back into Markom's name. There remained the fact that Menqa had paid money over for the property, some of which had been paid on to Tromp, and some of which had been paid to Nedbank in satisfaction of Markom's bond with it. As neither Nedbank nor Tromp were parties to the appeal, or the High Court application, separate proceedings for the vindication of the property by Markom would have to resolve to what extent Tromp and Nedbank were liable to repay to Menqa the sums they received.