

issue of contractual mistake and should be avoided. The correct approach is to determine whether the mistake in question (whether of law or fact) merely relates to motive, in which case it is not material and does not prevent the existence of a consensual contract, or conversely impacts upon an element of *consensus*, in which case it is material and vitiates consent to a contract. If the relevant mistake is found to be material, and incidentally it is suggested that a mistake of law can qualify as such in appropriate circumstances, then the next question is whether it was reasonable when tested against the objective guidelines that the courts have developed in this regard. The possible application of waiver within the circumstances should follow a similar pattern. Ultimately, the classification of a mistake as being one of law or one of fact should merely be coincidental to the enquiry, although conceivably in most cases an *error iuris* will probably relate to motive.

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**NATURE OF OWNERSHIP IN IMMOVABLE PROPERTY OF THE
JOINT ESTATE ON DIVORCE**

Corporate Liquidators (Pty) Ltd v Wiggill [2006] 4 All SA 439 (T)

1 Introduction

This case deals with the effect of divorce on co-ownership in immovable property of the joint estate of parties married in community of property. After stating the facts and decision of the court, I refer to a few basic property law concepts that are relevant to the decision. Property law aspects relevant to the case are merely highlighted and no in-depth discussion is provided. I conclude with an evaluation of the decision.

2 The case

2.1 Facts

Mr Wiggill and the respondent were married in community of property. They had two properties: Portion 13 of the farm Goedehoop and Erf 833 Louis Trichard. They entered into a written agreement that Mr Wiggill would institute divorce proceedings immediately and that their agreement be made an order of court. In terms of their agreement the Goedehoop farm would be sold and the income used to pay the remaining bond on Erf 833, and some other debts. Erf 833 would then be subdivided into equal portions. An unencumbered portion (Portion 1) would be registered in the respondent's name and the remaining extent in the name of Mr Wiggill (para 3). At that stage Erf 833 was registered in Mr Wiggill's name (para 5). A usufruct would be registered over the remaining extent in favour of the respondent's parents (the second and third respondents). It was

agreed that this would be done without delay and that the parties would be jointly liable for the costs (para 3).

The marriage was dissolved by the court on 27 March 1998 and the agreement was made an order of the court. Immediately after the divorce the respondent placed pressure on Mr Wiggill to give effect to the agreement. The Goedehoop farm was sold and the bond on Erf 833 was paid, as well as the other identified debts. Mr Wiggill stalled and did not perform the remainder of the agreement. During that time he married Mrs Wiggill in community of property. The respondent applied for an order committing Mr Wiggill to prison for contempt of court during February 2002 for failure to comply with the court order. In her affidavit the respondent explained that Mr Wiggill had paid the outstanding amount on the bond but failed to cancel the bond as per their agreement. He borrowed further monies from ABSA under the cover of the bond that had not been cancelled (para 4). The application was served upon Mr Wiggill on 20 February 2002 (para 5).

Mr and Mrs Wiggill were insolvent and their estate was surrendered on 20 March 2002. The trustee of the insolvent estate (second appellant in employment of the first appellant) sold Erf 833 at a public auction free of any encumbrance. Ownership in the erf was, however, not yet transferred. It was still registered in the name of Mr Wiggill. The liquidator argued that the respondents only had personal rights against the insolvent estate (para 5).

2.2 *Decision of the court a quo*

Claassen J held in the court *a quo* (para 6) that the natural consequences of a marriage in community of property are that the spouses automatically become co-owners of the property in their joint estate regardless of the person in whose name it is registered. The opposite is true where the joint estate is dissolved by divorce. The ownership of each spouse's share automatically vests in that spouse. The respondent's right to her share of the immovable property immediately vested in her on divorce and Mr Wiggill had no claim to it. Therefore the respondent's portion of the property never became part of the joint estate of Mr and Mrs Wiggill. Registration of the respondent's portion in her name was a mere formality. The court ordered compliance with the agreement. The respondent's portion had to be registered in her name and Mr Wiggill's portion (the remaining extent) had to be transferred to the insolvent estate, subject to a life-long usufruct in favour of the second and third respondent. (It is not clear from the case report whether Claassen J meant that the respondent's ownership in the property is that of co-ownership in an undivided share or ownership in a portion of the property.)

2.3 *Appeal*

The appellants agreed that on marriage in community of property a joint estate comes into existence. Both spouses become co-owners regardless of whose name the property is registered in. They contended that on divorce the respondent only acquired a personal right against Mr Wiggill to comply with the divorce agreement. Consequently, Mr Wiggill's estate was sequestrated before transfer of the property and, therefore, the respondent only had a personal claim against the insolvent estate. The argument was also applicable to the second and third respondent (para 7).

2.4 Judgment

Hartzenberg J (para 8) referred to *Ex parte Menzies* 1993 (3) SA 799 (C) which held that under the modern system of administering deceased estates, ownership of a surviving spouse's half share of immovable property does not automatically vest in that spouse. Ownership passes on registration thereof in her name by the executor (814F–G). King J in *Ex parte Menzies* clearly stated that the above was only applicable to succession. The position was different in matters of divorce (815A). King J referred to Hahlo *The South African law of husband and wife* (1985) 175 fn 108, stating that “[on divorce], each spouse retains, subject to an order of forfeiture of benefits, his or her half-share until division is effected”.

King J then stated that

“it would rarely arise in practice that they would elect to continue in co-ownership in this new form [free co-ownership], and thus possibly the rule has grown up that the granting of divorce carries with it an automatic order for division” (815G).

Hartzenberg J then highlighted four important aspects of the case (para 13):

1. Dissolution of a marriage by divorce is not governed by the laws of succession.
2. The order of divorce itself changes the co-ownership of the parties from ‘tied’ [or bound] co-ownership to ‘free’ co-ownership.
3. Section 7(1) of the Divorce Act gives an opportunity to the spouses to divide the joint estate in any way that suits them.
4. It is arguable that an order of divorce, even without a concomitant order for division of the joint estate, has the automatic effect of dividing the joint estate.”

To illustrate the effect of section 7(1) of the Divorce Act 70 of 1979 Hartzenberg J used the example of spouses in community of property who agree that on divorce the husband will receive a personal computer and his wife a lounge suite from the joint estate. He argued that ownership vested automatically in the separate items when the agreement was made an order of the court (para 15). He then used the example where there are two immovable properties in the joint estate and the spouses agreed that each would receive one of the properties. He indicated that ownership vested in the properties when the agreement was made an order of the court in line with the common law as expounded in *Rosenberg v Dry's Executors* 1911 AD 679, and that registration was not necessary for ownership to pass (para 16).

Hartzenberg J indicated that there were two obvious differences between the last example and the current case. There were two immovable properties in the example, whereas Erf 833 still had to be subdivided. The other difference was that Erf 833 was encumbered with a bond. However, he stated that the agreement to subdivide was clear. The portions were clearly described and indicated on a plan. Mr Wiggill had no discretion as to how the property was to be subdivided or to whom it should be transferred (para 17). The judge then stated:

“Claassen J [in the court *a quo*] was quite correct to equate the process of subdivision with the transfer of the properties into the names of the parties. Those steps were mere formalities to give effect to the intention of the parties. The court gave effect to their intention by making their agreement a court order in terms of the provisions of section 7(1) of Act 70 of 1979” (para 17).

As for the bond, Hartzenberg J indicated that ownership of portion 1 vested in the respondent on the date of divorce. On 3 April 1998 the bond was paid off. After that the respondent did not encumber her portion. The debts incurred by

Mr Wiggill after that date cannot encumber the joint estate. The joint estate came to an end on the date of divorce. Mr Wiggill did not have the capacity to encumber portion 1. The bondholder will not have a claim against the respondent (para 18).

Hartzenberg J concluded that the first respondent was the owner of an unencumbered portion of Erf 833 (Portion 1). The respondent was entitled to a division of the property and transfer of Portion 1 (para 20). The parties agreed to share the costs of subdivision and transfer. After divorce the costs became the responsibility of the separate estates. Mr Wiggill's estate was insolvent. The respondent would have to pay the costs and claim half against the insolvent estate as a concurrent creditor (para 21).

The second and third respondent's right did not vest automatically on divorce as they were not parties to the marriage. They only had a personal right to obtain a real right (a *ius in personam ad rem acquirendam*). The second and third respondents had no more than concurrent claims for the value of the usufruct against the insolvent estate (para 22). The order in favour of the second and third respondents was set aside.

3 Evaluation

3.1 Individual ownership

Ownership can be described as the most comprehensive real right that a legal subject can have to a thing (Grotius *Inleidinge* 2 3 10; Van der Linden *Koopmans handboek* 1 7 1; *Gien v Gien* 1979 2 SA 1113 (T) 1120C–D; Van der Merwe *Sakereg* (1989) 173; Sonnekus and Neels *Sakereg vonnisbundel* (1994) 249; Badenhorst *et al Silberberg and Schoeman's The law of property* (2003) 93; Van der Walt and Pienaar *Introduction to the law of property* (2006) 40). The owner of a thing can do with his/her thing as he/she pleases, subject to the limitations imposed by law (*Malherbe v Ceres Municipality* 1951 4 SA 510 (A) 517A–E; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 106–107; Van der Merwe 171; Sonnekus and Neels 250; Badenhorst *et al* 93; Van der Walt and Pienaar 41). The rights of an owner are limited by the law and the rights of others.

Ownership can only be exercised by an owner or co-owner (Badenhorst *et al* 94; Van der Walt and Kleyn "Duplex dominium: the history and significance of the concept of divided ownership" in Visser (ed) *Essays on the history of law* (1989) 213; Badenhorst *et al* 94; Van der Walt and Pienaar 48). The only accepted division of ownership is co-ownership. Fragmentation of ownership is not allowed in South African law (Van der Walt and Kleyn 215; Van der Merwe 378). Van der Walt and Pienaar 48 explain it as follows: "Two or more persons cannot simultaneously exercise *different kinds* of ownership regarding the same object, but two or more persons can be *co-owners* of a thing at the same time."

3.2 Co-ownership

Co-ownership is where two or more co-owners own the same thing simultaneously in undivided shares (Van der Walt and Kleyn 214; Van der Merwe 378; Badenhorst *et al* 127; Van der Walt and Pienaar 48). Co-ownership can be derived from an underlying legal relationship between the parties which forms the basis of the relationship (bound co-ownership), or the co-ownership can be the only relationship between the parties (free co-ownership – *Ex parte Menzies*

811B–E; Van der Merwe 378; Badenhorst *et al* 127; Van der Walt and Pienaar 57–58). All co-owners are entitled to share in the property. No co-owner can prevent another from using the joint property reasonably and in proportion to his/her undivided share (*Pretorius v Nefdt and Glas* 1908 TS 854; *Erasmus v Afrikaner Proprietary Mines Ltd* 1976 1 SA 950 (W) 959D–E; *Ex parte Menzies* 812B; Badenhorst *et al* 127–128).

Bound co-owners usually cannot alienate or burden their share in the property as long as the underlying relationship exists. The exercise of entitlements is determined by the underlying relationship. The co-ownership cannot be terminated unilaterally during the existence of the underlying relationship (Van der Merwe 380; Van der Walt and Pienaar 51).

A free co-owner has the right to alienate or burden his *share* without permission of the other co-owners (Van der Merwe 379; Van der Walt and Pienaar 61; Badenhorst *et al* 129; Van der Walt and Pienaar 51). A free co-owner cannot, however, burden the *thing* without the consent of the other co-owners (Van der Merwe 381; Van der Walt and Pienaar 52). Any free co-owner can claim division of the thing if it is divisible (Van der Merwe 387; Badenhorst *et al* 129; Van der Walt and Pienaar 56). Division is achieved by the *actio communi dividundo*.

Where spouses marry in community of property they become automatic co-owners of their joint estate on date of marriage (*Sayle v Commissioner of Inland Revenue* 1945 AD 388; *Lock v Keers* 1945 TPD 113; *De Wet v Jurgens* 1970 3 SA 38 (A); *Ex parte Menzies*; *Du Plessis v Pienaar* [2002] 4 All SA 311 (SCA); Van der Merwe 379; Cronjé and Heaton *South African family law* (2004) 71; Van der Walt and Pienaar 49). There are, however, certain exceptions (see Cronjé and Heaton 71). Ownership in the joint estate is regulated by the Matrimonial Property Act 88 of 1984. Spouses married in community of property are, therefore, bound co-owners (*De Wet v Jurgens* 1970 3 SA 38 (A) 46D; *Ex parte Menzies* 815E–F; Cronjé and Heaton 71). Certain acts relating to the joint estate can only be performed with the consent of the other spouse. These acts are listed in sections 15(2) and (3) and 17(1) of the Matrimonial Property Act. Different forms of consent are required depending on the juristic act. The joint estate is terminated upon divorce and the assets divided equally between the spouses (with the exception of a forfeiture order – see s 9(1) of the Matrimonial Property Act).

3.3 Transfer of ownership in immovable property

King J in *Ex parte Menzies* 805H–806A indicated that where the rights of ownership in immovable property can only vest in someone by way of *traditio* (transfer), the only effective way to accomplish transfer of ownership is by way of registration in the deeds office. Where ownership vests in a person without transfer, registration is not required for the transfer of ownership. Marriage in community of property falls under the latter (807C–D). Upon marriage in community of property the spouses automatically become bound co-owners of immovable property in the joint estate. Transfer of ownership is automatic, registration is not necessary (*ibid*; Cronjé and Heaton 71).

If undivided shares in immovable property accrue to both spouses on termination of the joint estate, the registrar can, on request of the former spouses, endorse the title deed of the property that the former spouses are entitled to deal with the property as if they have taken formal transfer of their undivided shares (s 45bis1A of the Deeds Registries Act 47 of 1937).

Where two or more persons own an undivided share in immovable property they can agree to partition the land. By attesting the deed of partition transfer, the registrar transfers ownership over the portions to the different owners (s 26(1) of the Deeds Registries Act). Co-ownership of the property effectively ends when the deed of partition transfer is attested by the registrar. This is also the case where the partitioning of land is ordered by the court (s 26(7)). Before the erf can be subdivided and transfer effected by the registrar, a land surveyor drawing and sketch plan must be drawn up. Permission has to be obtained from the local authority for subdivision. The diagram has to be approved by the Surveyor General. Consent to release the bond from the bondholder is required where a bond exists over the property (Kilbourn "Conveyancing" in *Butterworths forms and precedents* (2006) para 9.13.6; Christie *Conveyance practice guide* (2004) 98).

No registration of an undivided share in immovable property is allowed where the share is intended to represent a portion of the immovable property (s 24 of the Deeds Registries Act).

3 4 Comment and criticism of the court of appeal's decision

Hartzenberg J started off on the right track by indicating that parties married in community of property have bound co-ownership over property in their joint estate which, after dissolution of the estate, transformed into free co-ownership (para 13). The underlying agreement (community of property in contrast to co-ownership) fell away. The judge did not follow through on this principle. He merely discussed the effect of section 7(1) of the Divorce Act, which gives the spouses the option to divide the joint estate in any way that suits them. The judge equated the transfer of immovable property with that of sub-division of the property at the time of dissolution of the joint estate (para 17). The immovable property is, therefore, automatically sub-divided when the joint estate is terminated and each party obtains individual ownership of his or her portion.

The above logic is flawed if one looks at the basic property law principles referred to above. Sub-division of immovable property is not a mere formality. Co-ownership in immovable property is only terminated on attestation of the deed of partition transfer by the registrar (s 26 of the Deeds Registries Act). The procedure in section 26 is *mutatis mutandis* applicable to an order of division made by the court (s 26(7)). Before subdivision can be effected by the registrar, permission is required from the relevant local authority, the Surveyor General and the bondholder (para 3 3 above). Registration of an undivided share representing a portion of the immovable property is also not allowed (s 24(1)).

No separate portions of Erf 833 existed at the time of termination of the joint estate in which the respondent's and Mr Wiggill's individual ownership could vest. An owner can only have ownership over the whole property (see para 3 1). Two owners cannot have ownership over different parts of an undivided thing. They cannot have different kinds of ownership over the same thing. The only way in which two parties can have ownership in one thing is by way of co-ownership (see para 3 2). According to the approach in *Ex parte Menzies*, highlighted by Hartzenberg J, the spouses' bound co-ownership will convert into free co-ownership at termination of the joint estate (upon divorce). The respondent and Mr Wiggill, therefore, had equal undivided shares in Erf 833. Only Mr Wiggill's undivided share would fall within the joint estate of Mr and Mrs Wiggill. Mr Wiggill's undivided share in the property fell in the insolvent estate.

At the time that the bond was paid by Mr Wiggill, the respondent and Mr Wiggill were free co-owners of an unburdened property. A free co-owner cannot burden the property without the permission of the other co-owners (see para 3 2). Mr Wiggill did not have the capacity to encumber the whole property by borrowing under the existing bond. He and the respondent in fact agreed to cancel the bond. The property therefore remained unburdened. The respondent will further have a personal right (a *ius ad rem acquirendam*) against the insolvent estate to sub-divide the property in terms of her and Mr Wiggill's agreement which was made an order of the court.

The court's decision with reference to the second and third respondents is correct. They will merely have a personal claim against the insolvent estate for the value of the usufruct.

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**CAUTIONARY ASPECTS REGARDING AN ATTORNEY'S
TRUST ACCOUNT**

Wypkema v Lubbe [2007] SCA 36 (RSA)

1 Introduction

This decision may have important consequences for practising attorneys as far as their trust accounts are concerned. Not only did the Supreme Court of Appeal correct the court *a quo*'s misconceptions regarding the nature of an attorney's liability as drawer on a cheque drawn by him on his trust account, but it also held that the "conduct and the propriety of issuing . . . a post-dated cheque on a trust account, should be investigated" (para 21).

2 Facts

The relevant facts can be summarised as follows: The respondent, a practising attorney, approached the appellant on behalf of a client for the purpose of obtaining a loan as bridging finance pending registration of a mortgage bond over immovable property. The appellant agreed to the loan, which, together with his fee, amounted to R2 200 000. Prior to the appellant advancing any money in terms of the loan agreement, the respondent, under cover of a letter dated 13 September 2004, furnished the appellant with a cheque dated 14 September 2004 drawn by the respondent on his trust account for the above amount. The respondent apparently anticipated that funds resulting from the registration of the mortgage bond in question would become available on 28 September 2004, and in his covering letter he requested the appellant not to present the cheque for payment before 29 September 2004. The relevant part of the letter read as follows:

"Soos u bewus is sien ons toe tot die registrasie van 'n eerste verband ten gunste van Standard Bank oor die eiendom en is ons in besit van die brief van onderneming vir betaling van die gemelde bedrag teen registrasie van die gemelde verband.