

## CASES / VONNISSE

### SECTION 4(1)(b) OF THE DEEDS REGISTRIES ACT 47 OF 1937 AS A REMEDY FOR THE MISTAKEN TRANSFER OF LAND

*Bester NNO v Schmidt Bou Ontwikkelings CC*  
[2012] ZASCA 125 (21 September 2012)

#### 1 Introduction

The deeds office practice was recently (dis)honoured by the Supreme Court of Appeal's (SCA) decision in *Bester NNO v Schmidt Bou Ontwikkelings CC* (*supra*), which was expected to address an "interpretative dearth" with regard to the application of section 4(1)(b) of the Deeds Registries Act 47 of 1937 (DRA). The main issue (for the purpose of this note) in this case related to two questions. The first question before the court was the applicability of the abstract theory of ownership to immovable property and how it impacts on the registration of such ownership in the deeds office. The second question dealt with the correct procedure in terms of the DRA to rectify a mistaken transfer arising from an incorrect property description in the title deed. With reference to the second question, the SCA applied section 4(1)(b) as a remedy to rectify the mistaken transfer of the property. This note analyses the decision in *Bester v Schmidt Bou supra* with regard to the manner in which the respondent, Schmidt Bou Ontwikkelings CC (Schmidt Bou), applied for an order for rectification of the mistaken transfer of an incorrect property, and the court's application of the relevant provisions of the DRA. The note will conclude with a discussion of alternative provisions of the DRA which could be applied to remedy the dispute in this case.

#### 2 Facts

The circumstances that led to the mistaken transfer of the property were that the respondent, Schmidt Bou, was the owner of Erf 3117, Sedgfield, in Cape Town (referred to in the judgment and herein as "the mother erf"). In October 2003, Schmidt Bou sold a portion of the mother erf to Innova Holding (Pty) Ltd (Innova). The deed of sale contained a suspensive condition which provided that the mother erf be subdivided and the relevant portion be transferred to Innova (par 1). This subdivision was approved by the Surveyor-General in January 2005. The mother erf was subdivided into two portions as erf 4675, a portion of erf 3117 and the remainder of erf 3117. It was the intention of the parties that only a portion of the subdivided property would be transferred to

Innova, while Schmidt Bou would retain ownership of the remainder (par 3). Both parties instructed a conveyancer to attend to the transfer of the property and issued the deed of sale to him. It became evident from the facts that the transfer took place on the strength of the power of attorney signed by Schmidt as the representative of Schmidt Bou (*Schmidt Bou Ontwikkelings BK v Bester NNO* (1689/2010) [2011] ZAWCHC 325 (17 August 2011) par 8). This power of attorney erroneously authorized the transfer of the whole mother erf to Innova (*Bester v Schmidt Bou supra* par 4). Notably, Schmidt signed the power of attorney in November 2003, before the approval of a subdivision diagram in January 2005 (*Schmidt Bou v Bester supra* par 9). The implication of this chain of events is that the power of attorney to transfer the portion in question authorized the transfer before the correct description of the property was approved by the Surveyor-General. As a result, the title deed also contained the mistaken transfer of the whole mother erf to Innova, despite the parties having agreed to transfer only a portion of the erf. When Schmidt Bou became aware of the error, it asked for co-operation from Innova and subsequently Innova's liquidator (the appellant Bester NNO), upon its sequestration in April 2009, to rectify the error, but without success (*Schmidt Bou v Bester supra* par 21). In response, the liquidators refused such rectification and took the position that a retransfer of the land back to Schmidt Bou could only be done by an order of the court (*Schmidt Bou v Bester supra* par 21). As a result, Schmidt Bou applied to the High Court for relief.

### 3 Main issues

Schmidt Bou made an application to the High Court for the following orders: Firstly, it sought a declaratory order against the liquidators of Innova, on the basis that it was the owner of the mother erf mistakenly being transferred to Innova. Secondly, it sought rectification of the title deed pertaining to the property, in order to reflect the true owner of the property as Schmidt Bou, instead of Innova. The third order was for cancellation of a continuing covering bond registered in the name of Innova "over the remainder" of the mother erf (*Bester v Schmidt Bou supra* par 6). Fourthly, it sought an order directing the registrar of deeds in Cape Town to give effect to the rectification of the title deed and cancellation of the bond. This note is restricted to the first and second issues, as they are important for an analysis of the registration procedures under discussion.

The liquidators in the High Court raised prescription and estoppel as defences, in order to thwart Schmidt Bou's applications. They contended that Schmidt Bou's claim had prescribed by extensive prescription under the Prescription Act 68 of 1969. As a result, they refused to consent to the rectification of the title deed pertaining to the property in order to reflect Schmidt Bou as the true owner (*Bester v Schmidt Bou supra* par 5). The defence of estoppel was raised by Absa Bank to stop Schmidt Bou from denying that ownership had been validly transferred to Innova. Absa allegedly relied upon the representation of the conveyancer for passing the bond to its detriment (*Bester v Schmidt Bou supra* par 19). These defences were not successful in both the High Court and on appeal. They will be referred to briefly where necessary in the analysis below. Before embarking on an

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analysis of the court's decision, an overview of the following theories of ownership is necessary.

#### 4 Causal and abstract theories of ownership

South African common law recognizes two modes of acquiring ownership which originated from the Roman-Dutch law (Hosten, Edwards, Nathan and Bosman *Introduction to South African Law and Legal Theory* (1980) 338–342; and *LAWSA XIV Ownership of Land* par 7–9). By far the most common mode is a derivative acquisition whereby ownership is transferred from one person to another in terms of a bilateral agreement (*LAWSA XIV* par 7; and see also Van der Walt and Pienaar *Introduction to the Law of Property* 4ed (2009) 144). A simple delivery in the case of movables is sufficient for the transfer of ownership, while registration of a deed of transfer is essential for the transfer of immovables (Hosten *et al Introduction to South African Law* 342; and see also s 16 of the DRA). In both types of delivery, the following requirements must be met, namely (1) delivery of the thing to the transferee, (2) existence of a real underlying agreement; and (3) a valid reason for the transfer (that is, a *iusta causa* such as a sale or donation) (*Commissioner of Customs & Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369,398–399; *Trust Bank van Afrika Bpk v Western Bank Bpk* 1978 (4) SA 281 (A) 301H–302A; and *Concor Construction(Cape)(Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A) 933A–C). The third requirement has raised judicial debates because of its relationship with the second requirement. These debates relate to existing uncertainties as to whether the requirement for the existence of a real agreement is a separate requirement, or whether the mutual intention of the parties to transfer is sufficient for a valid passing of ownership (Hosten *et al Introduction to South African Law* 342). The question here is whether or not the invalidity of the underlying agreement which gave rise to the transfer affects the validity of the transfer itself, despite the existence of a mutual intention to pass ownership (Hosten *et al Introduction to South African Law* 342). This question is relevant to the relief sought in *Bester v Schmidt Bou* (supra), whereby the court was asked to declare Schmidt Bou as the owner of the mother erf mistakenly transferred to Innova.

The debates regarding the relationship between the requirements for the existence of a valid agreement and a valid ground for transfer gave rise to two theories that distinguish between the contractual relationship of the parties and the passing of ownership (Scholtens “Justa Causa Traditionis and Contracts Induced by Fraud” 1957 74 *SALJ* 280 281). One view follows a causal theory in terms of which the agreement which provides grounds for the transfer must be valid in order for ownership to pass (Hosten *et al Introduction to South African Law* 343). This theory does not consider delivery as a separate requirement for the transfer of ownership (Schutte “The Characteristics of an Abstract System for the Transfer of Property in South African Law as Distinguished From a Causal System” 2012 15 *PELJ* 120 121). Another view is based on the abstract theory. The main tenet of this theory is the mutual intention of the parties. Ownership is validly passed if delivery was accompanied by a mutual intention to transfer and to acquire ownership (Hosten *et al Introduction to South African Law* 343). It is

immaterial whether or not the preceding agreement was valid (Hosten *et al Introduction to South African Law* 343). Unlike the causal theory, the underlying agreement and the transfer of ownership are treated as separate juristic acts in the case of the abstract theory (Schutte 2012 *PELJ* 123). In this case, the real agreement for the transfer of ownership is the mutual intention of the parties and not the underlying agreement to pass ownership (Schutte 2012 *PELJ* 123). The abstract theory does not, however, mean that the legal cause of transfer of ownership is unimportant. Where the transfer of immovable property is registered, the *causa* is generally disclosed in the deed of sale and in the recital clause of a deed of transfer and the power of attorney to transfer the property (Van der Walt and Pienaar *Law of Property* 146). The Roman law also recognizes an intermediate system between the two extremes. It recognizes what is called a putative *causa* (Scholtens 1957 *SALJ* 281). The *causa* is putative if the underlying agreement between the parties to pass transfer is affected by some defects such as error or fraud (Scholtens 1957 *SALJ* 281). According to Scholtens (1957 *SALJ* 281), "it is possible even where a pure abstract theory is followed to refuse to recognise the intention of the parties to transfer ownership in exceptional cases".

The abstract theory in South African law was adopted in the case of *Commissioner of Customs v Randles* 1941 (*supra*). With reference to movable property, the court, per Watermeyer JA, held that "[o]wnership of the movable property does not in our law pass by the making of a contract" (369). The court added that "[i]t passes when delivery of possession is given accompanied by an intention on the part of the transferor to transfer ownership and on the part of the transferee to receive it" (369; and see also *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) par 10 where the same view was expressed in relation to immovable property). In the case of *Legator McKenna INC v Shea* (2010 (1) SA 35 (SCA) 21); and see Bhuqa "Causal or Abstract?" January 2012, Ghost Digest <http://www.ghostdigest.co.za/articles/causal-or-abstract?/52809> accessed 2013-03-07, for a discussion of this judgement), the court referred to the essential requirements of the abstract theory as twofold in relation to transfer of immovable property. These requirements are the delivery effected by registration of transfer in the deeds office, coupled with a real agreement (par 22). The court referred to the essential elements of the real agreement as the intention of the parties to transfer and receive ownership (par 22). Importantly, the court held that ownership will, however, not pass, despite the registration of the transfer if there is a defect in the real agreement (par 22). It acknowledged that, although the abstract theory does not require a valid underlying contract, the defect in such a contract may affect the transfer of ownership in terms of a deed of transfer. The court implicitly recognizes that a putative *causa* may still affect transfer of ownership, despite the application of the abstract theory. In the process of the registration of deeds of transfer at the deed offices, establishing a valid *causa* (as discussed below) is still important, and the registrar plays a pivotal role in deciding whether to reject or pass a deed of transfer for registration (Bhuqa "To Reject or Not To Reject! That is the Question" 2010 2 *South African Deeds Journal* 37 37).

## 5 An overview of the deeds-registration practice

The discussion above highlights the importance of the registration of a deed of transfer for the transfer of ownership with regard to immovable property. This registration is nevertheless not an easy process that involves the simple recording of these transfers. It involves what the Appellate Division once referred to as “the mysterious procedures, known only to conveyancers and officers in the Deeds Office, which are involved in transferring titles to land” (*Chief Registrar of Deeds v Hamilton-Brown* 1969 (2) SA 543 (A) 554). The procedures for the registration and transfer of titles are primarily regulated in terms of the DRA (*supra*). This piece of legislation is correctly “a codification of the practice; though not a complete codification” (Nel Jones on *Conveyancing in South Africa* 4ed (1991) 13). There are numerous pieces of legislation that apply to the procedures in the deeds office. In addition, these procedures are based on non-codified customs and practices, which make it a specialized area of legal practice. The DRA also imposes certain duties on each registrar of deeds managing the deeds offices in South Africa, as well as the chief registrar of deeds (CRD) (s 2(1)(b)). The CRD serves as the chairman and executive officer of all the deeds offices in South Africa (s 2(1)(a)). The main duty imposed on the CRD is to “exercise such ‘supervision’ over all the deeds registries as may be necessary in order to bring about uniformity in their practice and procedure” (s 2(1)(a)). Until 2010, each registrar of deeds acted autonomously from other registrars and the CRD in their daily practices. One registrar was not obliged to follow the practice and procedure directives issued by the CRD (Nel Jones on *Conveyancing* 21). As a result, the Chief Registrars Circulars (CRCs) and Registrar’s Conference Resolutions (RCRs) applied to ensure uniformity in the deed-registration process were not enforceable. This compromised the uniformity envisaged in section 2(1)(a) of the DRA. This anomaly was addressed with the amendment of the DRA by the Deeds Registries Amendment Act (20 of 2010) (DRAA). The DRAA inserted section 2(1D) and section 3(1)(z). The importance of these sections is that the supervisory duty of the CRD in section 3(1)(a) of the DRA now includes the issuing of CRC’s and RCRs. It is also a statutory duty for all the registrars to implement these directives uniformly in all the deeds offices (CRC 10 of 2010).

## 6 The applicable provisions of the DRA

In terms of section 16 of the DRA, ownership of land is conveyed by a deed of transfer duly executed by the registrar or by endorsement in the case of a transfer to the state. Before a transfer can be executed, all deeds and supporting documents submitted for registration must be examined for legality and registrability (s 3(1)(b) read with reg 45(7) of the Regulation in terms of the DRA in GG 466 of 1963-03-29; see a discussion of the examination process in Kilbourn *The ABC of Conveyancing* (2008) 8–2). If such deeds or documents are not permitted by the DRA or any other law, the examiner must reject the transfer if he or she can raise a valid objection for such rejection (s 3(1)(b) read with reg 45(7) of the Regulation in terms of the DRA, above). In a conventional transfer of land, ownership is transferred by a deed of transfer which must be prepared substantially in accordance with form E (template)

prescribed by the regulations (s 20 read with reg 82). The deed of transfer in terms of this form contains various parts or clauses which are essential for the transfer of ownership. Among the clauses that are examined for validity are the recital or *causa* clause, the description of the transferor(s) and transferee(s), and the description of the property. The deed of transfer must also be accompanied by basic documents which must be lodged with it. The relevant documents are the title deed and the power of attorney to transfer. Certain other supporting documents may also be necessary, depending on the type of transfer of the property.

In a typical transfer of immovable property, the parties will agree on the sale and must put their agreement in writing (s 2(1) of the Alienation of Land Act 68 of 1981 (ALA)). This agreement must, among others, disclose the names of the parties, the description and extent (the property measurements) of the property (S 6(1)(a) and (b) of the ALA). The preparation of the deed of transfer must be done by a conveyancer (s 15 and 15A of the DRA read with reg 44A). A power of attorney to pass transfer is therefore prepared to authorize a conveyancer to effect the transfer (s 15 and 15A of the DRA read with reg 44A). It is generally not required to lodge a deed of sale as a supporting document with the deed of transfer (reg 65(1)). However, the power of attorney must be lodged (reg 65(1) of the DRA). It serves as the authority for statements contained in the deed of transfer and it is required to reflect the main provisions of the deed of sale (Nel *Jones on Conveyancing* 99). Corresponding provisions in the DRA require the power of attorney and the deed of transfer to disclose, among others, the reason or *causa* for the transfer and a description of the property (reg 28(1), 29, 65(3) and form E). These clauses must arguably reflect the agreement of the parties as disclosed in the deed of sale.

The prescribed form E is also used to transfer a portion of the land. Form E requires the insertion of an appropriate recital of the nature of the transaction or the circumstances which necessitate the transfer. The deed of transfer must therefore disclose whether the reason of transfer is, for example, sale, donation or exchange (RCR 24/2006; RCR 25/2006 and RCR 38/2009). The recital is also helpful for examiners to determine whether or not the transfer is permissible and therefore registrable (Chief Directorate: Deeds Registration: *South Africa Deeds Practice Manuals: The Consolidated Practice Manuals of the Deeds Office of South Africa* (2007) 1–124). Based on the abstract theory applied by our courts, it is not the duty of examiners to verify whether or not the reason for the transfer is based on a valid and binding contract (Nel *Jones on Conveyancing* 14). The power to ask for proof in section 4(1)(a) of the DRA is used only to investigate facts and to assist the examiner to exercise his or her discretion in a reasonable manner. According to Jones, “if he finds he may be registering a voidable title, he must refer the parties to court” (Nel *Jones on Conveyancing* 14). As a result, a reference to the *causa* clause does not imply the application of a causal theory of ownership during the registration process.

The description of the property in the deed of sale generally follows that in the title deed of the property. The situation is different when the description in the title deed has changed. For instance, if the property has been subdivided

into portions, a transfer of any portion will follow the description in the diagram (reg 32). A copy of the diagram of a portion approved by the Surveyor-General must be lodged (reg 32; Cf RCR 3 of 2009, in terms of which a single copy is sufficient). A copy of this diagram is helpful for both the conveyancer and examiners, in order to verify any possible changes in the description of the property in the title deed. It is apparent from regulation 32 that a newly surveyed portion of a piece of land cannot be transferred if it is not based on the diagram. The diagram must first be approved by the Surveyor-General and be registered with the registrar before any transfer can be registered (s 14 of the Land Survey Act 8 of 1997 read with reg 20(7) of the Regulations in terms of the DRA supra). The diagram is in practice lodged simultaneously with the deed of transfer and the supporting documents. The case under discussion illustrates that the description of the property can cause a legal dispute when an error occurs in the registration of the property. The DRA provides some remedial procedures in such a case. These procedures serve the same purpose of rectifying mistakes, but differ in terms of the process to be followed as well as the requirements to be satisfied in terms of the DRA. In addition, some of them require co-operation from other parties who have interests in the property, whereas such co-operation is not necessary in other cases.

### 6 1 *Rectification in terms of section 4(1)(b)*

Section 4(1)(b) of the DRA gives the registrar a discretionary power to rectify certain errors which occur in any registered title deed. This section does not require an application to the registrar to effect the amendment of an error. However, it has become an established practice that an application is lodged (West "Application of Section 4(1)(b) of the Deeds Registries Act 47 of 1937 and the Intricacies Involved Therewith" 2007 11 *South African Deeds Journal* 12 13). The purpose of this section is mainly to rectify "patent clerical errors" (West 2007 11 *South African Deeds Journal* 13). The DRA does not make provisions for the type of errors contemplated in section 4(1)(b). This section identifies limited areas in the title deed where such rectifications may be made. The rectification may be made in respect of the names and description of the parties, description of the property, as well as a description of the conditions of the title. The rectification must satisfy certain requirements. Any interested party, such as bondholders or usufructuaries, must consent to the amendment in writing (s 4(1)(b)(i)). If such consent is refused, a party who seeks such rectification may apply to court for an order to rectify the title deed (s 4(1)(b)(iii)). One important requirement differentiates this procedure from others in the DRA. Section 4(1)(b) requires the registrar not to authorize rectification "if it would have the effect of transferring any rights" (s 4(1)(b)(iv)). Registered title deeds are not immune to errors. The requirement to avoid a transfer of rights is arguably to guard against any misuse or abuse that may occur when parties seek rectification in the title deed (see West "Application of Section 4(1)(b)" 2006 8 *South African Deeds Journal* 18 for a discussion of the misuse or abuse of this section). Such abuses are possible in cases where this section is used to rectify an erf number for another erf in the property description (West 2007 11 *South African Deeds Journal* 12). As the analysis of the *Bester v Schmidt Bou* case in this note illustrates, it remains

difficult for the court to interpret section 4(1)(b) in order to prevent its abuse. The requirement that prevents a rectification which has the effect of transferring rights is arguably a deciding test to prevent possible abuses of this section. Where a rectification may have such effects, it is essential to consider other means of rectification, such as a rectification transfer or an application to the court to cancel this transfer.

## 6 2 *Rectification-transfer procedure*

When there is an error which affects the rights of the parties in the registration of a transfer, and when one of the parties requires the property to be retransferred to the original owner, a possible option is a rectification-transfer procedure. There is no specific provision in the DRA for regulating this process. However, a long-existing procedure for this rectification has been adopted where the provisions of section 4(1)(b) and section 39(1) of the DRA are not applicable. Section 39 is applicable when the same property has been registered erroneously in the names of different persons. A certificate of registered title in terms of this section will be issued to the correct owner of the property in order to remedy the defect of the same property being held under different titles. A rectification transfer is used mainly when it is essential to reverse the transfer of a property as a result of an error in the registration process. The following are examples of when this is applicable:

- (i) where only one of two properties acquired in terms of an agreement was, in error, not transferred to the purchaser due to an error on the part of the conveyancer;
- (ii) where the incorrect property has been transferred to the purchaser due to confusion with regard to the numbering of erven in a township or sectional scheme; and
- (iii) where the parties, in concluding the agreement of sale, have mistakenly described the incorrect property in the agreement and have agreed to rectify the error. In this instance, there will usually be two rectification transfers, in that the property which was transferred incorrectly will have to be transferred back to the original transferor against the transfer of the correct property to the purchaser (Chief Directorate: Deeds Registration *Deeds Practice Manuals* 1–168).

The procedure for rectification of such transfer follows form E. Such registration is indicated in the recital clause, which must specify the circumstances under which the error occurred and how rectification must be effected. In addition, the DRA does not state whether or not both parties must consent to rectification. However, it seems logical that the variety of circumstances under which such a rectification transfer may be undertaken require the parties to come to an agreement (Nel *Jones on Conveyancing* 93).

## 6 3 *Cancellation of a title deed in terms of a court order*

In terms of section 13(1) of the DRA, once the registrar has executed the deed of transfer (which now becomes a title deed of the property therein), such deed of transfer is deemed to be registered. The registrar cannot, after

such registration, go back and cancel his or her action in order to rectify any material mistake in the title deed. An aggrieved party in this case can either agree with the other party to correct the mistake by means of a rectification transfer, or as indicated, this depends on whether or not the other party is co-operating. If such co-operation is not possible, the aggrieved party will most likely seek an injunction from the court.

The DRA makes provision for the cancellation of a transfer by applying to court in section 6. This section provides that a deed of transfer may not be cancelled except by an order of the High Court (s 6(1) read with s 102). The court may cancel the title deed if, for example, it declares the transfer in terms of such title deed to be null and void (*Knor NO v Mofokeng* [2012] JOL 28601 (GSJ) par 6). Once the title deed in question is cancelled, the title deed of the land, immediately before the registration of such title deed, is revived and the transfer endorsement on the title deed of the property before the mistaken transfer in question is cancelled (s 6(2)). As a result, the property which was erroneously transferred is now held under the original title. This section may therefore be used to maintain the status *quo ante* of the entire transfer process. The parties may then begin a new process of transferring the property without the mistake.

## **7 The decisions of the courts**

### *7.1 The decision before the High Court*

The High Court accepted the application of the abstract theory in our law (par 12). It accepted that ownership of property in terms of this theory is completely detached from the contributory cause (*aanleidende oorsaak*) (par 16). The court correctly acknowledged that there was a valid agreement in this case. The parties, however, did not agree on the transfer of the whole erf to Innova. The intention of the parties was to transfer only the portion of the mother erf (par 17). The court found that in the absence of a real intention between the parties to transfer the whole mother erf to Innova, the transfer of such erf was a mistake (par 19). It is not clear from the fact whether or not Schmidt Bou relied on section 4(1)(b) for rectification. The court referred to this section and correctly held that, if any person who has to give consent to such rectification refuses to do so, such rectification may be made on the authority of the court (par 22). The court, without elaborating further, also correctly held that such rectification must not have the effect of transferring rights (par 22). Following the decision in *Ex Parte Millsite Investment Co (Pty) Ltd* (1965 (2) SA 583 (T) 586F–G), it expressed its inherent power to make orders in matters related to land registration. It finally upheld the application for rectification of a mistaken transfer of the mother erf. It ordered that “the description of the property on page two of the title deed be replaced by the description of the portion as intended by the parties” (par 49; translated from the Afrikaans version of the judgment). The respondents Bester NNO and Absa Bank appealed to the SCA based on the two defences already mentioned.

## 7.2 *The decision before the SCA*

The SCA upheld Schmidt Bou's application and rejected the appellants' defences. The court discovered that neither of the parties had the intention to transfer the whole property to Innova (par 5). It drew an inference from the facts that the directors of Innova knew that they were not entitled to transfer the remainder of the property. In the opinion of the court, they "opportunistically exploited the mistaken transfer of the property to the advantage of Innova" (par 6). The findings of the High Court that ownership of the remainder never passed to Innova was not disputed on appeal. Consequently, the SCA ordered the deed of transfer to be rectified to reflect the true ownership of the property (par 8). The court concluded that such rectification "flows ... from section 4(1)(b)" (par 8).

The main parts of the appeal related to arguments raised in support of the two defences raised by the appellants. One of these arguments was relevant. The appellants argued that Schmidt Bou's claim for rectification of the title deed constituted a debt in terms of the Prescription Act (*supra*). They claimed that such debt had prescribed after a designated prescription period in terms of this Act. The argument tended to distinguish rectification of a contract from that of a deed of transfer. The former, it was argued, did not alter the rights of the parties, while rectification of a deed of transfer did (par 11). The court rejected this argument. It held that Innova never became the owner of the remainder "despite the entry in the deeds registry" (par 11). It held further that the rectification sought would not constitute any delivery nor would it change the rights and obligations of the parties. In the court's view, such rectification "simply corrects the erroneous reflection of those rights" (par 11). In the end, the court did not see any difference between rectification of a contract and rectification of a deed of transfer. The court also held that the appellant's claim for rectification of the deed of transfer did not constitute a claim for delivery in the form of a *rei vindicatio* (par 12).

## 8 Discussion and analysis

The decision in *Bester v Schmidt Bou* raises several issues which have an adverse impact on the deeds-office practices and the registration of deeds. Rather than advancing the practice in this area, the decision adds to the existing conundrums relating to the interpretation of the DRA and other relevant pieces of legislation. The decision is correct in advancing the application of the abstract theory of ownership in South African law. Despite the theory being part of our law, the challenges faced by officials of the deeds office in the application of this theory cannot be ignored. Firstly, the examiners are responsible to ensure the legality and registrability of deeds. They primarily rely on conventional documents required for a particular transaction. Although they have the power to call on additional proof of facts relating to a particular transaction in terms of section 4(1)(a), this proof will generally only be required if a fact in the deed or supporting documents cannot be established based on these documents. For instance, the examiner may call for a deed of sale to establish the real reason for a transfer of property if it is not clear from the recital clause. If the recital clause is indicated precisely on

the deed of transfer, it is not the duty of the examiner to establish whether or not both parties had an intention to transfer the property. In this case, the intention of the parties is not important to the examiner. What is important is the underlying reason for the transfer as reflected on the recital clause. This is where the abstract system is important in theory and not viable in practice. As a result, the application of these theories of ownership is important only when there are disputes between the parties as to whether or not ownership has passed from one person to the other. Arguably, they serve little purpose for the examination of the validity and registrability of the deeds, which rely only on relevant information in the documents lodged at the deeds office. Although the abstract theory is now part of our law, it has been suggested correctly that the validity and registrability of deeds remain the duties of the examiners, while theories are manifestly the domain of the courts (Bhuqa January 2012, above). These theories are therefore the domain of a judicial process to resolve the dispute relating to ownership. They serve little purpose (if any) with regards to the registrability of such ownership. If the question as to whether or not there was an intention to transfer is not in dispute, it is patent that the correct registrability of such transfer may still be in question.

The SCA in *Bester v Schmidt Bou* correctly applied the abstract theory to decide whether or not there was an intention to transfer the whole property to Innova. It is apparent from the facts that the intention to transfer existed. Nevertheless, the intention was to transfer a portion and not the whole mother erf to Innova. What is also not disputed is the fact that Schmidt Bou was interested in receiving the property back or the remainder thereof which did not form part of the agreement. Leaving aside the relevant deeds-office process to revert the remainder to him, Schmidt Bou evidently asked the court for a remedy in the form of *rei vindicatio*. It is therefore questionable as to why the court found that Schmidt Bou's claim for rectification of a deed of transfer did not constitute a claim for delivery in the form of *rei vindicatio*. The court, with due respect, erred in not finding that the appellant was asking for a vindicatory remedy of its property from Innova.

The second issue is related to the relevant deeds-office process to remedy the situation. The appellant also asked the court to order the title deed to be rectified in order to reflect itself as the true owner of the property. As the discussion above indicates, "rectification" in terms of the deeds-office process can mean various processes. It could either be through a rectification transfer; an order of court cancelling the title deed; rectification in terms of section 4(1)(b); or the issuing of a certificate of registered title in terms of section 39. In both the decisions of the High Court and the SCA, there is no indication that Schmidt Bou invoked any such processes. This leaves one with an important question as to whether or not, on close scrutiny, such rectification indeed flows from this section, as the SCA concluded (par 8). This depends on whether or not the relevant rectification satisfies the requirements of the section.

Section 4(1)(b), as indicated, allows for the rectification of patent clerical errors which could not be detected on examination of the title deed. The facts in *Bester v Schmidt Bou* indicated that the deed of sale and the power of attorney to transfer the property were prepared before the subdivision

diagram was approved by the Surveyor-General. It was also indicated that the description of the property in the power of attorney was that of the mother erf, and this description was followed in the deed of transfer. Where the property in the title deed and the deed of transfer remains the same, lodging of a diagram is not required, as contemplated in regulation 32. From the viewpoint of the examiner who examines such transaction, and unless the property printout drawn from the deeds office indicates such subdivision, there is no possibility that the examiner could detect something untoward in relation to any error in the description of the property. It is only if the description in the title deed referred to the mother erf, while that in the deed of transfer referred to the portion that the examiner would have asked for lodging of a subdivisional diagram. The error in this case lay in the minds of the parties and not in the documents submitted for registration at the deeds office. Despite the property having been subdivided in terms of the diagram at the time of registration, and unless the property printout indicated otherwise, there was no error that occurred during the registration of the whole mother erf instead of the portion. The error in this case, in my view, falls outside the scope of section 4(1)(b).

The court also misinterpreted an important requirement in section 4(1)(b)(iv), which prohibits the application of the section if rectification will have the effect of transferring rights. On a proper application of the abstract theory, no rights in relation to the remainder of the property were transferred from Schmidt Bou to Innova, as the court correctly found. This is simply because there was no intention to transfer the mother erf. Taken from this perspective, rectification of the property description in the deed is simply to reflect the existing rights of the parties in relation to respective properties. This view is also shared by the SCA. The court correctly held that Innova never became the owner of the remainder “despite the entry in the deeds registry” (par 11). As a result, it held that a rectification sought will not constitute any delivery nor will it change the rights and obligations of the parties. Disregarding the entry in the deeds registry, the court is right in its finding that Innova never became the owner. However, its conclusion that rectification in terms of section 4(1)(b) will simply correct the erroneous reflection of those rights is questionable. Although in theory the rights in relation to the remainder still remained with Schmidt Bou, these rights are in practice based on the deeds-registry records. Consequently, the records in the deeds registry reflect Innova as the owner of the whole erf before any rectification. It would be unfounded to ignore the rights in the mother erf which have been transferred to Innova and recorded in the deeds office. Until any rectification of the error is effected, ownership of the mother erf has been transferred to Innova, as recorded in the deeds office. As a result, rectification of the property description to reflect only the portion of the erf, as transferred to Innova, is in essence transferring the right to the remainder of the mother erf back to Schmidt Bou. Any such rectification sought will therefore have the effect of transferring the ownership rights in the remainder of the property back to Schmidt Bou in contravention of section 4(1)(b)(iv).

One should also take into account the transfer endorsement already made on the title deed of the mother erf during the mistaken transfer. If one looks at such endorsement, one will draw a reasonable conclusion that the rights in

the whole mother erf have been transferred to Innova. This is the record that will be found by members of the public doing a property search. If rectification is effected in the title deed of the property to Innova, the question remains as to which title deed will hold the mother erf. The DRA does not recognize “the recording of ownership in the air”. The SCA has thus erred, firstly by invoking section 4(1)(b) to rectify the error in this case, and secondly, by holding that rectification sought will not have the effect of transferring rights but will simply correct the erroneous reflection of such rights. It is clear from this analysis that the rectification sought in this case does not flow from this section. Section 4(1)(b) is therefore not an appropriate remedy to address the mistaken transfer of a property in this case.

## **9 Possible remedies applicable in this case**

The main issues before the SCA in the *Bester v Schmidt Bou* case were whether or not ownership has passed in theory, and if it has not been passed, how the passing of ownership recorded at the deeds office may be rectified. Schmidt Bou had solicited co-operation from Innova, but such co-operation was in vain. As a result, he approached the court for assistance. It is not clear whether or not such co-operation was based on section 4(1)(b)(ii) of the DRA. Even if Schmidt Bou invoked this subsection, it remained to the court to determine whether or not the rectification in terms of section 4(1)(b) is the correct procedure to remedy the error in the deed. As indicated, the court overlooked the two important requirements of this section. Both these requirements put the remedy in question outside the scope of section 4(1)(b). Only two possible procedures in terms of the DRA were feasible to remedy the situation.

The rectification asked by Schmidt Bou could possibly be carried out by a rectification transfer. Rectification sought affects the parties’ rights in the remainder of the mother erf which was transferred to Innova. This rectification fits neatly into a situation where the parties mistakenly described the incorrect property in the agreement, which they now wanted to rectify. The recital clause will simply state the circumstances underlying the error and the reason for such rectification. To prove such error, a subdivision diagram will have to be lodged to indicate the status of the property at the time of registration. One stumbling block, however, remains for applying a rectification-transfer procedure in this case. The difficulty faced by Schmidt Bou was in obtaining co-operation from Innova to carry out such rectification. The reason for Schmidt Bou approaching the High Court was the difficulties experienced in obtaining co-operation from Innova to remedy the mistaken transfer of the mother erf. The only option to enforce such co-operation was through an order of the court. However, this application could not be based on such order in terms of section 4(1)(b)(ii).

The only available procedure to remedy the situation could be an application to the court for an order to cancel the title deed in terms of section 6 of the DRA. This is viable in this case, as such an order does not depend on any co-operation from the other party. Putting aside the financial implications of this procedure, the effect of the order would be to put the parties in a position they were in before the whole transfer process. The order would have

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the effect of a vindicatory remedy in the form of *rei vindicatio*. The remedy sought by Schmidt Bou should arguably have been in terms of this section.

## 10 Conclusion

The discussion above highlights the problem of applying theories of passing ownership to the practical registration of deeds. The implication of the abstract theory for the deeds-registration procedure remains one of dividing the procedure for the passing of ownership between the courts and the officials of the deeds office. It is argued here that the registrability of deeds should remain the duty of the deed-registry officials, while theories should manifestly remain the domain of the courts.

It is evident in this case that requesting the court to pronounce on the process of rectifying a mistaken transfer of property in a situation such as the one in this case is simply asking the court to enter into the legal terrain of a mysterious procedure only known to deeds officials and conveyancers. As this case illustrates, the court must confine itself to the theoretical dispute relating to ownership and ask for an expert opinion regarding the relevant deeds-office procedure before they give orders which may have adverse impacts on the process in the deeds office. Although they have an inherent power to make orders in matters related to land registration, as pronounced in *Ex parte Millsite Investment supra*, they should exercise the necessary caution of making orders which may transcend the existing practice in the deeds registry. This is exactly what the SCA in *Bester NNO v Schmidt Bou Ontwikkelings CC* did by incorrectly making an order to retransfer the remainder of the mother erf back to Schmidt Bou in terms of section 4(1)(b) of the DRA.

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