REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14/27343

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

[T……], [R……] Applicant

And

[T……..], [N……..] First Respondent

THE STANDARD BANK OF SOUTH AFRICA LTD Second Respondent

J U D G M E N T

MAKUME J

INTRODUCTION

[1] In this application the applicant seeks several orders couched in the alternative against the first respondent all aimed at achieving a termination of the co-ownership that exists between the applicant and the first respondent ("*the parties*").of certain immovable property situate at 147 T…… T…., Road Three, W……. Park, Johannesburg ("*the property*")

[2] The parties have been living apart since the year 2001 and are presently engaged in divorce proceedings. The divorce action is set down to be heard in this Division on 15 April 2015.

[3] The second respondent is a mortgagor in respect of the property and has an interest in the disposal of the property because of an amount of R111 000,00 due to it by the parties. The second respondent's loan is secured by a bond registered over the property. Respondent in this matter has reference only to the first respondent.

[4] It is common cause and not in dispute that the parties are married in community of property. It is also not in dispute that the parties jointly acquired the property during the year 1995 and entered into a loan agreement as joint purchasers with the second respondent who advanced the purchase price. It is further not in dispute that the parties are joint debtors of the second respondent.

WHAT IS IN DISPUTE

[5] The applicant says that as a joint owner of the property she is entitled to a division of the property whilst the respondent says that the applicant waived her rights to division of the property on the 9th February 2012 when the parties entered into a deed of settlement.

[6] It is the validity of that deed of settlement which is in issue and may be dispositive of the matter.

HISTORICAL BACKGROUND

[7] It is necessary to set out a brief narrative of certain facts and circumstances giving rise to this application which bear on the question to be decided as they emerge from the papers.

[8] The applicant left the common home which is the property during the year 2001 taking with her the two children born out of their marriage namely M…… and L…….

[9] On the 9th February 2012 the parties concluded a deed of settlement. The preamble as well as clauses 1 and 2 of that deed of settlement are relevant in this matter and I deem it necessary to quote same in full:

> "*Deed of Settlement*
>
> *(a) Whereas the plaintiff has issued summons out of the above honourable court claiming inter alia a decree of divorce.*
>
> *(b) The defendant admits that there has been an irretrievable breakdown of the marriage and that there is no reasonable prospect of reconciliation between the parties.*
>
> *(c) The parties have reached agreement subject to approval of the above honourable court concerning division of the assets.*
>
> *(d) The parties wished to record the terms of the aforesaid agreement which agreement is conditional upon a decree of divorce being granted by the above honourable court in this action.*"

THE PARTIES AGREE AS FOLLOWS:

> "*1. Immovable property*
>
> *Should the property at 147 T…… T…., Road Three, W……. Park, 1……. be sold one-quarter of the profit is to be paid to L…… and M…….. equally.*
>
> *2. Movable property*
>
> *Each party to retain assets which is in his or her possession.*"

[10] On the 17th February 2012 after conclusion of the deed of settlement the applicant issued summons against the respondent out of the Regional Court, Germiston under Case No CRC 142/12 in which action the applicant prayed as follows:

10.1 A decree of divorce on the grounds of an irretrievable breakdown of the marriage.

10.2 As per settlement Annexure “A”.

[11] It is to be understood that Annexure “A” refers to the deed of settlement that was annexed to the summons and particulars of claim to which I have referred to above.

[12] It is common cause that on receipt of the summons the respondent did not enter appearance to oppose same as according to him the matter had become settled. However it was the Regional Court which was to have the last word on that matter.

[13] The matter was set down on the unopposed roll. The applicant avers that she informed the respondent about the court date and requested him to be present.

[14] The applicant appeared at the Germiston Regional Court. It is not clear on which date and whether she was legally represented or not. What happened in that court is what the applicant says at paragraph 15 of her replying affidavit she says the following:

> "*Upon attending court for purposes of making the agreement an order of court that the discrepancies relating to a failure to provide for maintenance and contact as well as division of the joint estate was pointed out by the magistrate resulting in the magistrate refusing to make the agreement an order of court.*"

[16] No divorce was granted and the deed of settlement was not made an order of court as prayed for. The question is thereafter what is the status of the deed of settlement? I will revert to that aspect later.

[17] Having not succeeded in securing a divorce the applicant instructed her present attorneys of record who on the 23rd May 2012 filed a notice withdrawing the action instituted in the Germiston Regional Court. Simultaneously with that notice of withdrawal the applicant's attorneys addressed a letter to the respondent inviting him to a without prejudice consultation with a view to resolving matters incidental to the divorce action.

[18] The respondent did not avail himself of the opportunity to discuss the issues as a result the applicant's attorneys issued summons in the South Gauteng High Court on the 29th June 2012 and on the 1st August 2013 the respondent entered appearance to defend.

[19] Pleadings are closed in that matter and as is practice applicant's attorneys addressed correspondence to the respondent's attorneys making proposals for settlement. In October 2013 the applicant's attorneys sent an unconditional tender in terms of Rule 34(1) of the Rules of this Court in which the applicant proposed that the property be sold for R600 000,00 and that the nett proceeds of such sale be divided equally between the parties after payment of the mortgage bond liability, estate agent commission, rates clearance costs as well as bond consolation costs. The respondent did not respond to that proposal.

[20] On the 7th November 2013 the parties appeared at roll call before the Deputy Judge President Mojapelo for allocation of a judge. It is not clear what transpired on that day and why no judge was allocated to hear the matter. The parties have different versions and reasons why the matter could not proceed on that day. However, it is not crucial to know the reasons as that is not relevant for purposes of this judgment.

[21] What seems to have happened thereafter is that the parties held a discussion on the 7th November 2013 at court. This appears from the contents of a letter written by the applicant's attorneys to the respondent's attorneys dated the 12th December 2013 which reads as follows:

> "*Enclosed herewith kindly find an agreement of settlement resolving the outstanding issues herein in accordance with the discussions we held at the trial of the aforementioned matter on 7th November 2013. Our client is eager to resolve the matter as timeously as possible and we request that your client revert to our offices as his earliest convenience regarding his agreement forthwith.*"

[22] In the proposed settlement agreement once more as in the previous proposal the applicant indicated that there shall be a division of the joint estate and to that extent that one Ruben Miller of RMB Trust was to be appointed as the receiver and liquidator to attend to the division of the joint estate.

[23] As with the previous proposal the respondent did not reply thereto let alone to acknowledge receipt thereof.

[24] On the 16th January 2014 applicant's attorneys addressed a letter to the respondent's attorneys calling on them to give this matter their attention and revert to them still nothing happened. Several other letters followed with no response not even an acknowledgment of such letters. Ultimately the applicant's attorneys reported the conduct of respondent's attorneys to the Law Society.

[25] It is against this background that on the 28th July 2014 the applicant launched this application.

THE STATUS OF THE DEED OF SETTLEMENT POST THE WITHDRAWAL OF THE GERMISTON CASE

[26] The respondent argues that this application should be dismissed because the parties entered into a deed of settlement in which according to him the immovable property belongs to him. The applicant denies that in the settlement agreement she gave away her share of the property. Secondly, it is the applicant's case that the deed of settlement not having been made an order of court falls off and is of no further use between the parties.

[27] It is common cause that this deed of settlement was drawn up by some individual whose legal qualifications and knowledge of commercial agreements is not known but is clearly doubtful judging by the words used and it is accordingly to be doubted if that is what the parties meant.

[28] In the first instance the preamble suggests that at the time the agreement was concluded legal action by way of summons had already commenced. This is not correct because summons was issued a week later.

[29] Paragraph 1 of the deed of settlement dealing with the immovable property says that in the event the property is sold then the children of the marriage will be allocated one-quarter of the nett profits thereof. Clause 1 does not say what should happen to the balance of the nett profit

neither does it say who should sell the property. There is nowhere in this deed of settlement where it is said that the property shall become the sole asset of the respondent or the applicant. It is therefore not correct for the respondent to attach a meaning to the clause that is not there in the agreement.

[30] His Lordship GREENBERG JA in the matter of *Norman v Hughes and Others* 1948 (3) SA 495 at page 505 (AD) said the following regarding interpretation of words used in a contract:

> "*It must be borne in mind that in an action on a contract the rule of interpretation is to ascertain not what the parties' intention was but what the language used in the contract means that is what their intention was as expressed in the contract.*"

[31] In the words of the deed of settlement the parties agreed to give their children a quarter of the proceeds leaving for themselves to share the three-quarters and that situation was to happen only in the event that the property is sold. If the property is not sold then each of the parties retained equal shareholding to the property.

[32] The deed of settlement is still valid it was never conditional. All it means is that if the court was satisfied with the terms then it would be asked to make it an order of court together with the granting of a divorce. The settlement agreement is still valid and has not taken away the applicant's portion or share of the property.

THE *ACTIO COMMUNI DIVIDUNDO*

[33] The respondent presented argument that the application is premature and unnecessary as the issue raised therein will be dealt with at the divorce trial set down for hearing on the 15th April 2015. The respondent is of the view that all the disputes and the relief sought in this application will be dealt

with at a trial. What the respondent does not say in clear terms is that the applicant has no right to bring this application neither does the respondent say that that there are reasonable prospects that the trial court will order that applicant forfeit the benefits arising out of the marriage in community of property. The respondent bases his opposition to this application on the existence of the deed of settlement. I have found that that agreement does not give sole ownership of the property to the respondent.

[34] The principles relating to the *actio communi dividundo* were summarised by Joubert JA in the matter of *Robson v Theron* 1978 (1) SA 841 (AD) in the following terms:

> "*(i) No co-owner is normally obliged to remain co-owner against his will.*
>
> *(ii) This action is available to those who own specific tangible things (res corporalis) in co-ownership irrespective of whether the co-owners are partners or not, to claim division of the joint property.*
>
> *(iii) Hence this action may be brought by a co-owner for the division of joint property where the co-owners cannot agree to the method of division.*
>
> *(iv) It is for purposes of this action immaterial whether the co-owners possess the joint property jointly or neither of them possess it or only one of them is in possession thereof.*
>
> *(v) This action may also be used to claim as ancillary relief payment of praestationes personalis relating to profits enjoyed or expenses incurred in connection with the joint property.*
>
> *(vii) A court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court has in respect of the mode of distribution of partnership assets amongst partners as described by Pothier.*"

[35] I am satisfied that the applicant's case meets the criteria as set out in the *Robson* matter. The applicant made settlement proposals to the respondent on two occasions besides several letters addressed to his attorneys calling for a discussion on the proposal. The respondent did not show any interest in arriving at a settlement that would have included the property. He simply kept quiet. It appears to this Court that when the matter was due to be heard on the 7th or the 11th November 2013 no agreement could be reached resulting in a postponement. The fact that the divorce matter is set down for hearing on the 15th April 2015 is no guarantee that the matter will be heard judging by the conduct and attitude of the respondent.

[36] The respondent has in support of his case referred me to the matter of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA. That matter dealt with the legality or otherwise of a contract concluded contrary to public policy. I see no relevance of that case to the present matter. Similarly the matter of *Schoeman v Rokeby Farming Co (Pty) Ltd* 1972 (4) SA 201 (NPD) has no relevance to the present matter. That matter dealt with an exception to the particulars of claim in which the plaintiff claimed from his partner a contribution for losses suffered by the plaintiff on termination of the partnership agreement. This matter does not deal with a claim by one partner against the other on dissolution. It is about dividing an existing asset of an existing partnership.

[37] The grounds of opposition relied upon by the respondent have no merit. The fact that the main divorce action is to be heard on the 15th April 2015 does not make this application premature. The outcome of that trial is

not dependent on the outcome of this application. Co-ownership of the property exists and on dissolution of the marriage co-ownership of the property will still be in existence and will have to be dealt with in exactly the same manner as in this application.

[38] I am accordingly persuaded that the applicant is entitled to bring an end to the joint of ownership and I accordingly make the following order:

1. Terminating, in terms of the *action communi dividundo*, the Applicant and the First Respondent's co-ownership of the immovable property situated at No. 1….. T…… T…., Road Three, W…….. Park, Johannesburg ("the Property").

2. Directing that:

2.1 Either party is to purchase the other party's half share in the property;

2.1 The party electing to purchase the other party's half-share in the property is to pay over to the other party the sum of money equal to half the market value of the property;

2.3 such value of the property will be determined on the average of three independent estate agents' valuation thereof;

2.4 in dividing the proceeds of the sale the parties shall first deduct one quarter of the proceeds and pay same over for the benefit of their children M……. and L…….;

3. Alternative to prayer 3 above, directing that in the event that the parties are unable to purchase the other's half-share in the property, that:

3.1 The property is placed on the open market for a period of 3 (three) months, from date of the order being served on the First Respondent's attorney-of-record, and sold accordingly;

3.2 That the moneys receive in this regard are to be divided equally between the applicant and the First Respondent, subject to paragraph 2.4 above.

4. Alternative to prayers 2 and 3 above, directing that the property be placed on the market and marketed for sale on such terms and conditions as the Applicant may, in her sole discretion, determine.

5. Granting the Applicant the power and authority to direct and effect the sale and/or disposal of the Property (including the power and authority to solely negotiate and agree on the terms

and conditions upon which the Property is to be sold and/or disposed of) without recourse to the First Respondent.

6. Alternatively to prayer 5 above, directing the First Respondent to co-operate fully with respect of the marketing, sale and/or disposal of the Property by *inter alia,* doing all things and signing all documents necessary to give effect to prayers 2.3 and 4 above;

7. Directing that, for so long as the First Respondent retains the sole use, occupation and benefit of the Property, the First Respondent is to timeously pay all applicable municipal, water and other charges, costs and amounts relating to, or associated with, the Property as well as amount payable, in terms of, *inter alia,* the Property Sale and Purchase Agreement, the Loan Agreement, the Mortgage Bond, the Sectional Titles Act No. 95 of 1986 (the Property Relate Costs, as more fully defined I the attached Founding Affidavit"), calculate from January 2001 until such time as the First Respondent no longer has the sole use, occupation and benefit of the Property;

8. Directing that, for so long as the First Respondent should (prior to registration and transfer of the Property into a purchaser's name) no longer have the sole use, occupation and benefit of the Property and pen ding registration and transfer of Property

into such purchaser's name, the Applicant is empowered and authorised to administer the Property as she, in her sole discretion, may determine (including the sole power and authorisation to let out the Property on such terms and conditions as the Applicant, in her sole discretion, may determine);

9 Directing that immediately after the registration of the transfer of the Property into a purchaser's name and all costs relating to the marketing, sale and transfer of the Property including (but without limitation) estate agents' commission and any amount which may be owing g to the Second Respondent (in terms of the Loan Agreement and Mortgage Bond) have been paid:-

9.1 a 50% portion of the net proceeds of the sale of the Property is to be paid to the applicant forthwith subject to paragraph 2.4 above;

9.2 a 50% portion of the net proceeds of the sale of the Property is to be paid to the First Respondent ("the First Respondent's Share ") subject to paragraph 2.4 above;

10 The Sheriff is authorised and directed to take any steps and do all such things that the parties have been directed to take and/or

do in the parties' stead in the event that any of the parties fail/refuse and/or neglect to do so themselves.

11. Costs of this application on a party and party scale as against the First Respondent

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	11 FEBRUARY 2015
DATE OF JUDGMENT	13 MARCH 2015
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