

**IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA**

CASE NO: 2731413

In the matter between:

P[...] J[...] J[...] V[...] R[...] N.O

APPLICANT

And

A[...] M[...] N.O

FIRST RESPONDENT

NEDBANK LIMITED

SECOND RESPONDENT

THE REGISTRAR OF DEEDS JOHANNESBURG

THIRD RESPONDENT

THE SHERIFF, GERMISTON SOUTH

FOURTH RESPONDENT

ANTON PIETER VENTER

FIFTH RESPONDENT

JUDGMENT

WISIMEKI J:

[1] The Applicant, in this application, seeks a declaratory order in terms of which:

“1. It is declared that the Applicant is entitled to, and authorised to take whatever steps are necessary to be taken in order to effect and procure a transfer of the immovable property better known as Erf [...], T[...], E[...] M[...] M[...], Registration Division JR Gauteng, and held by title deed T[...] and in extent 952.00m² to the fifth Respondent;

2 it is hereby declared that the necessary authority is granted for the implementation of the sale concluded between the Applicant and the fifth Respondent, in respect of the immovable property mentioned in prayer 1 above, in accordance with the terms and conditions of the agreement which is attached to the founding affidavit as annexure “E”;

3. The First Respondent is ordered to sign whatever documents are necessary to be signed in order to procure a transfer of the immovable property to the Fifth Respondent on the terms and conditions of the agreement, attached to the founding affidavit as annexure "E”;

4. In the alternative to prayer 3 above the Fourth Respondent is hereby authorised and directed to sign whatever documents are necessary to be signed in order to effect a transfer of the immovable property mentioned in prayer 1 above, to the Fifth Respondent;
5. No costs orders or any other substantial relief is sought against the Second, Third, Fourth and Fifth Respondents, unless these Respondents oppose this application without success;
6. No costs order is sought against the First Respondent, unless the First Respondent opposes this application without success;
7. Further and/or alternative relief”.

BRIEF FACTS

[3] The Applicant is the executor in the deceased estate of B[...] M[...] (the deceased) while the First Respondent is the executrix in the deceased estate of S[...] M[...] (the joint owner). The deceased and the joint owner were married to each other in community of property. The deceased passed away on 28 March 2009 while the joint owner passed on on 24 May 2009. The two are survived by two minor children N[...] A[...] M[...] and M[...] M[...] and A[...] M[...] a grandchild. The deceased and the joint owner, during their lifetime, purchased an immovable property being Erf [...], T[...], E[...] M[...] M[...], Registration Division JR Gauteng, and held by title deed T[...] measuring 952.00m² (the property).

It was discovered that both estates shared the same number at the Master’s office. In the meantime, and on 11 November 2011, Anton Pieter Venter, the Fifth Respondent, purchased the property at a public auction for the amount of R350 000.00. The property is bonded to Nedbank which took judgment against the joint estate. Nedbank as at 30 July 2013 was owed R737 803.10 as evidenced by a certificate of balance annexure “N” to the Replying Affidavit appearing on page 131 of the paginated papers.

As correctly pointed out the amount due owing and payable to Nedbank must by now be more than the disclosed amount. The Applicant wants to transfer the property to the Fifth Respondent in order to finalise the estate of the deceased. The First Respondent does not agree contending that the property is worth much more than R350 000.00. The deadlock between the Applicant and the First Respondent has resulted in this application.

THE ISSUE

[4] The issue to be determined is whether the Applicant has made out a case for the relief that he seeks.

[5] In a nutshell the Applicant seeks to compel the First Respondent to co-operate in the selling of the property which belongs to the joint estate. Mr Jacob’s contention that the Applicant sold the undivided share of the deceased cannot be correct as that is not what was communicated to the Fifth Respondent when the property was sold. As Mr Erasmus correctly submitted, it can hardly be imagined that a person can buy part of the property without knowing who will buy the remaining part. Sharing the property in this way would be courting disaster. The parties are now *ad idem* that the property must be sold as a unit.

PRINCIPLES

[6] 1. No co-owner is normally obliged to remain a co-owner against his will. As a general rule a co-owner is entitled to have co-ownership terminated by invoking *actio-communi dividundo*. (*Robson v Theron* 1978 (1) SA 841 SA 841 (A)).

2. Courts come to the rescue of parties who are co-owners and who for one reason or the other are unable

to agree on the method of termination; where one party refuses to terminate the joint ownership or where the two agree to terminate but the other refuses to comply with the terms of the agreement.

3. Courts, however, assist where there is joint ownership and proper facts have been placed before them. The courts follow methods which are fair and equitable to the parties. (*Harms: Amler's Precedent of pleadings, Seventh Edition, at 245*)

[7] The First Respondent contends that the property is worth R550 000.00 and that the amount ought to be the purchase price of the property. The First Respondent produced Ekurhuleni Metropolitan Municipality valuation annexure "B" to the opposing affidavit reflecting the market value of the property as at 21 August 2009 as R684 000.00. Another valuation certificate annexure "C" to the opposing affidavit shows the market value of the property as R570 000.00. The First Respondent's agent in light of the valuation certificates made an offer to the Fifth Respondent requiring him to pay R550 000.00 for the property. (Annexure "D" to the opposing affidavit). The offer, of course, was not acceptable to the Fifth Respondent. It is noteworthy that Mr Jacobs conceded that the Respondent's valuation certificates of the property were all not sworn to. They, therefore, cannot be considered.

[8] The Applicant duly presented evidence to show that the property has been vandalised and the damages require a substantial amount to restore it to its original condition. This was not seriously contested by Mr Jacobs. The value of the property with the damages leaves the property with no equity at all. The photographs which form annexure "L" to the Replying Affidavit confirm the condition of the property.

[9] The Fifth Respondent has shown tremendous interest in the property in its condition. It appears he has even effected some serious improvements and that he has taken occupation.

[10] Mr Jacobs, in his contentions, relied on possibilities, *inter alia*, that the property could fetch R550 000.00 if it were to be sold properly. This contention obviously does not seem to have regard to the condition of the property. It is vandalised. Going along with the contention would amount to speculation. We also do not deal with possibilities but probabilities in civil matters.

[11] What is known is that the Fifth Respondent wants to carry on with the deal. These are naked facts. Mr Erasmus submitted that the market value of the property as at 25 January 2012 was R400 000.00. The report which is annexure "G" to the founding affidavit shows that the property is in bad shape. The Applicant's evidence is that a forced sale, as at 25 January 2012 would have been approximately R320 000.00. This appears reasonable. It must be remembered that this valuation is the most recent valuation. The First Respondent appears to have no money to enable her to obtain a proper valuation certificate. Indeed, the estate appears to consist only of the property. The estate is in fact insolvent.

[12] Nedbank, the major creditor, is claiming R737 803.10 from the joint estate. Whether the property is sold for R550 000.00 or R624 000.00 Nedbank's debt is not covered. The Applicant has produced evidence to show that Nedbank has agreed to reduce the debt should the current deal go through. Indeed, Nedbank as evidenced by annexure "D" to the Founding Affidavit, in that event, would only expect to be paid R312 359.94 instead of the actual debt. Nedbank, being in business, expects to get its money as soon as possible. The longer it takes for it to get the money, the more prejudiced the bank becomes.

[13] There is a done deal should the Fifth Respondent's deal go through. This indeed, is a case of a bird in hand being more valuable than those in the bush. It will be unreasonable to expect Nedbank to wait for something that may not even materialise.

[14] The evidence as a whole reveal that it would be proper and prudent to allow the application to go through because that would result in the fair and equitable balancing of the interests of the parties. The amount of R350 000.00 more or less is in line with the market value which *in Ex Parte Mattysen EH Uxor (First Rand Bank Ltd inten/ening), 2003*(2) SA 309 (TPD) at 315*)(C) was said to be "tKe probable price that

a willing, well informed buyer would pay a willing well informed seller in a normal open market transaction at the date of valuation, when neither party is under any anxiety or compulsion to sell or buy, other than the normal desire to transact”’.

[15] Having regard to the facts of this matter, in my view, the application should succeed.

[16] Mr Erasmus, at the end of his submissions, provided the court with a draft order which, if the court agrees with, ought to be made an order of the court. I have duly perused the draft order and I am in full agreement therewith.

ORDER

[17] In the result, the draft order which I have marked “X”, signed and dated and hereto annexed is, accordingly, made an order of the court.

M.W MSIMEKI

JUDGE OF THE NORTH

GAUTENG HIGH COURT, PRETORIA

COUNSEL FOR THE APPLICANT: Adv. F. Erasmus

INSTRUCTED BY: Van Rensburg Inc.

COUNSEL FOR THE RESPONDENT: Adv. Jacobs

INSTRUCTED BY DATE OF HEARING: 05 FEBRUARY 2014

DATE OF JUDGMENT: 12 FEBRUARY 2014

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

BEFORE THE HONOURABLE JUSTICE MSIMEKI J ON 5 FEBRUARY 2014

CASE NO: 27314/2013

In the matter between:

P J J[...] V[...] R[...] N.O.

Applicant

and

A[...] M[...] N.O.

First Respondent

NEDBANK LIMITED

Second Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

Third Respondent

THE SHERIFF GERMISTON SOUTH

Fourth Respondent

ANTON PIETER VENTER

Fifth Respondent

DRAFT ORDER

HAVING HEARD COUNSEL for the Applicant and First Respondent the following order is granted:

1. It is declared that Applicant is entitled to and authorised to take whatever steps are necessary in order to effect and procure a transfer of the immovable property better known as Erf [...], T[...], E[...] M[...] M[...], Registration Division J.R. Gauteng and held by Title Deed T[...] and in extent **952m²** to Fifth Respondent;
2. It is hereby declared/that the necessary authority is granted for the implementation of- the sale concluded between Applicant and Fifth Respondent, in respect of the immovable property mentioned in paragraph 1 above, in accordance with the terms and conditions of the agreement which is attached to the Founding Affidavit as Annexure “E”.
3. Fourth Respondent is hereby authorised and directed to sign whatever documents are necessary to be signed in order to effect a transfer of the immovable property mentioned in paragraph 1 above, to Fifth Respondent.
4. First Respondent is ordered to pay the costs of the application.

BY ORDER OF THE COURT REGISTRAR

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Advocate F Erasmus, on behalf of the Applicant, and Advocate T.L Jacobs, on behalf of the First Respondent, argued the matter.