

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT  
PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

Case no: 43844/2008

In the matter between:

3/6/2014

**PAPIE SYDNEY BALOYI**

**APPLICANT**

**AND**

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

04/06/2014

**MATHANE REBECCA BALOYI**

**RESPONDENT**

**Coram:** Baqwa J

**Heard:** 3 June 2014

**Delivered:** 3 June 2014

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JUDGMENT

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BAQWA J

**Flynote:** *Actio communi dividundo*-co-ownership rights.

**Summary:** This is an application to enforce the terms of a divorce order which included a deed of settlement.

### **Annotation**

#### **Case law**

Runciman v Schultz 1923 TPD 45

Badenhorst v Marks 1911 TPD 147

Robson v Theron 1978(1) SA 841 A at 855 A-B

Ntuli v Ntuli, 1946 T.P.D. 181 at p.184, per Barry, J.P.

- [1] This is an application for an order declaring the co-ownership between the parties of the immovable property known as 670 Block L Soshanguve, Gauteng (the immovable property) be terminated on certain terms and conditions and that a receiver be appointed to realise the immovable property and sell it at a market related price and that the proceeds arising from the sale of the immovable property be utilized to pay the outstanding amount in terms of the mortgage bond registered over the immovable property together with related expenses.

Applicant seeks further that the remaining balance be divided equally between the parties

## Background

- [2] The parties were previously married to each other in community of property. Their marriage was dissolved by a decree of divorce issued on 24 May 2010 and a written settlement agreement was incorporated in the decree of divorce.
- [3] At the time of divorce and as per their marriage in community of property, the parties were co-owners of the immovable property.
- [4] The parties agreed about the manner of division of the joint estate and the manner in which co-ownership of the immovable property was to be terminated. The terms were recorded in the settlement agreement. In the interim, respondent has resided in the immovable property.
- [5] The parties have attempted to implement the terms of the agreement regarding termination of the co-ownership but up to the time of launching of this application they have been unsuccessful.
- [6] The law

6.1. Joint ownership is the ownership which two or more persons have simultaneously in the same piece of property each having an undivided share in it. In the exercise of their rights, each joint owner may use, enjoy and alienate his/her share of the property.

All profits accruing to the property must be divided proportionately among the joint owners.

**Runciman v Schultz 1923 TPD 45**

6.2. A joint owner may claim a division of the common property at anytime, whether or not his co-owners are agreeable.

**Badenhorst v Marks 1911 TPD 147**

6.3. The claim of a co-owner to have co-ownership is in accordance and by virtue of the **actio communi dividundo** and a party claiming termination of co-ownership has to prove the existence of the joint ownership. Secondly, he must prove a refusal by the other party to agree to the termination of the joint ownership, an inability to agree the method of termination or an agreement to terminate but a refusal or inability to comply with the terms of the agreement. Thirdly an applicant must allege or prove the facts upon which the court can exercise its discretion as to how to terminate the joint ownership.

- [7] Respondent has filed an opposing affidavit in which she raises mainly two grounds of opposition. The first is the failure by the applicant to file the **curriculum vitae** and a consent by the proposed receiver RP Jordan. Applicant has filed a replying affidavit to which he annexes a 'consent to appointment as liquidator and receiver' by P Jordan together with his abridged curriculum vitae.
- [8] Further, respondent denies the cancellation of the purported agreement of sale between herself and the applicant on the one hand and R.P Baloyi and Ms R Mabusela (purchasers) on the other. In response, applicant has referred to correspondence dated 28 October 2013 in which the purchasers are notified of the agreement due to their failure to pay the amounts of R500,000 and R24,000 as per agreement. Respondent does not allege that the purported agreement dated 26 February 2013 was honoured by R.P Baloyi and Ms Mabusela yet the purchase price of R500,000 was due to be paid on 31 August 2013 in terms of the purported agreement of sale.

- [9] In the matter of **Robson v Theron 1978(1) SA 841 A at 855 A-B** Joubert JA pronounced as follows:

*"The basic notion underlying the **actio communi dividundo** is that no co-owner is normally obliged to remain such against his will. Van Leeu-wen , Centura Forensis, 1.4.27.1. Accordingly when co-owners are desirous of having their joint property divided and the share of each allotted to them in severalty, they may agree to this division among themselves without having recourse to judicial proceedings.*

*"Where there are co-owners who have agreed to divide then the only relief that one can claim from the other is an action for specific performance in terms of that agreement. Secondly, if there is a refusal on the part of one of the co-owners to divide then the other co-owner can go to Court and ask the Court to order the other to partition. Again, if the parties agree that there is to be a partition but the parties cannot agree as to the method or mode of partition, the Court is asked to settle the mode in which the property is to be divided"*

**(Ntuli v Ntuli, 1946 T.P.D. 181 at p.184, per Barry, J.P.)"**

- [10] **In casu**, the parties have failed to implement the terms of their settlement agreement and applicant has come to this court to ask for a settlement of the mode of which the property is to be divided.
- [11] It is common cause that the immovable property belongs to both parties. The divorce was finalised on 24 May 2010. It is common cause further that the parties have been living apart since 2008, some five years ago. The one party has during that period enjoyed occupation of the immovable property while applicant has had to look for alternative accommodation. This situation is not equitable as respondent does not proposes more rights than the applicant.

- [12] Counsel for applicant has asked for costs to be paid by the respondent whilst respondent's counsel argues to the contrary. If applicant had merely applied for the division of the joint estate and the respondent opposed, I would not have hesitated in awarding costs against her.

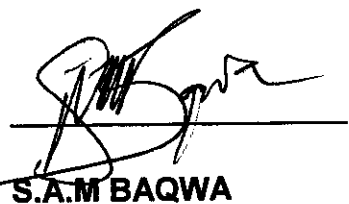
The applicant has made certain allegations of respondent having made profit by renting the property out. Respondent denies these allegations and the only way she could bring her side of the story was by filing opposing papers. Moreover one has to bear in mind that respondent may very well have expenses to claim for preserving the property over the years. In any event these are matters to be addressed and resolved by the liquidator.

In my view, costs must be paid out of the proceeds of sale of the property.

- [13] In the result, the following order is made:

13.1. Having read the papers, having listened to counsel and having considered the matter, I am satisfied that applicant has made out a case for the relief sought and an order is granted in terms of prayers 1,2,,4, and 5 of the Notice of Motion.

13.2. Costs to be paid out of the proceeds of the sale of the immovable property.



S.A.M BAQWA

(JUDGE OF THE HIGH

**COURT)**

**Counsel for the Applicant:**

**Adv M.L Haskins SC**

**Instructed by:**

**Shapiro and Ledwaba INC**

**Counsel for the respondent:**

**Instructed by:**

**Ehlers Fakude INC**