IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 9093/07

In the matter between:

LEON HAUPTFLEISCH VAN NIEKERK	Applicant
and	
DIEDERIK JOHANNES VAN NIEKERK	First Respondent
JOHANNES NEL VAN NIEKERK	Second Respondent
DAWID MORRIES VAN NIEKERK	Third Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Fourth Respondent

Judgment handed down on 23 May 2011

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1. The applicant and the first three respondents are brothers. They are the joint owners of five erven situate in Wellington, Western Cape, and which they own the erven in equal undivided shares of 25% each. Their mother, Mrs Leonie Morries van Niekerk, has a lifelong usufruct over the properties. In August 2007 the applicant applied for an order in terms of which the properties are to be divided on the basis that he acquires two of the properties (which have a combined value of approximately 25% of the

aggregate value of all the properties) and that his brothers remain as the joint owners, in undivided shares, of the remaining erven.

2. The matter came before Desai J on 3 November 2010. He made an order on 10 November 2010 in terms whereof the matter was set down for hearing on 10 May 2011 which order was to be served upon the first respondent by way of registered mail. Desai J had also raised whether Mrs van Niekerk ought not to be joined as a party.

3. Subsequent to the hearing before Desai J, the application was served upon Mrs van Niekerk, who filed an affidavit wherein she indicated that she was aware of the application, and did not oppose it. She was, I place on record, also present in court when the matter was argued before me. The first respondent was not. The letters addressed to him were posted two days late and, in respect of the one letter, though it was addressed correctly to his address in Wellington, it was addressed to Leon Hauptfleisch van Niekerk, the applicant. Presumably the first respondent would not open a letter addressed to his brother. The second and third respondents did, however, appear and Mr Johannes Nel van Niekerk informed me that, for quite some time now, he had not heard from his brother. As he put it, his brother had disappeared. I need not deal with the allegations he made in that regard. In the premises the first respondent did not receive proper notice of the application.

4. The background to the acquisition of the properties is not in dispute and is as follows:

(a) Their grandfather who was born in 1906 owned the five properties, namely erven 911, 912 and 915 (50 – 60 Church Street) ("the Church Street properties") and erf 1164 (84 Church Street) and erf 1165 (91 Bain Street) ("the Bain Street properties"). On the Bain Street properties there is erected a double storey building consisting of 8 residential flats and, immediately adjacent thereto, a residential house.

(b) When he passed away on 4 July 1973 he left the properties to their grandmother, Anetta Magdalena Nel. Their only child, Mrs Leonie Morries van Niekerk, is the mother of the four brothers.

(c) In terms of her will dated 17 August 1973, the grandmother, Anetta Magdalena Nel, who died on 22 March 1974, bequeathed the residue of her estate to her grandchildren, the four brothers, subject to a usufruct in favour of Mrs van Niekerk, their mother. By notarial deed of cession of usufruct she was granted the usufruct for her lifetime of the properties. By deed of transfer in 1979, the *"bare dominium"* of these properties were transferred to the four brothers subject to the usufruct.

(d) Since 1974 Mrs van Niekerk had been letting the properties and collecting the rent as the civil fruit of her usufruct.

5. The applicant stated in his affidavit that, for some time now, it has been impossible for him to deal with his brothers in respect of the properties.

Though they had mooted various options in which they and their mother ought to deal with the properties, no agreement will ever be reached between them. It is for this reason that he, as a co-owner, seeks the division of the properties.

6. The division which the applicant proposes is based upon the fact that the Bain Street properties form a single commercial unit, whilst the Church Street properties are immediately adjacent to each other and some distance from the Bain Street properties. The applicant had obtained valuations which reflect that the Bain Street properties is, approximately, 25% of the aggregate value of all the properties. His brothers had rejected, even prior to the institution of the application, the proposal that the applicant retain for himself the Bain Street properties.

7. The division proposed by the applicant would, of course, commend itself to any one of the brothers who wished to terminate his joint ownership of the properties. This is certainly so as Mr Johannes Nel van Niekerk, the second respondent, indicated to me when the application was argued before me.

8. All three brothers filed notices of intention to defend.

9. Only the first respondent, Mr Diederik Johannes van Niekerk, filed an opposing affidavit. In it he contended that the proposed division was unfair, uneconomical and to the prejudice of the respondents and/or their mother – only the applicant would benefit from the division. He pointed out that the proposal also did not seek to compensate the owners for any amounts

invested in the properties, or expenses incurred by them. Mr Baguley, who appeared for the applicant, conceded that there must be an accounting for any expenses incurred by the co-owners in respect of the properties upon the division of ownership.

10. The first respondent also placed in dispute the valuations upon which the applicant relies. The applicant had already, in his notice of motion, anticipated that a valuer be appointed who was completely independent and who would value the properties. The intention was that the applicant would compensate his brothers for any amounts in excess of the 25% holding he had in the common properties when obtaining ownership of the Bain Street properties.

11. Throughout his affidavit he persisted with the contention that the proposed division was only to the advantage of the applicant. He pointed out that there is no reason why the applicant, as opposed to the first, second or third respondent, should obtain ownership of the Bain Street properties.

12. It is not in dispute that a co-owner cannot be obliged to remain such against his will and the co-ownership can be terminated with the *actio communi dividundo*.[1]

13. It is correct, as Mr Baguley had submitted, that the court has a wide and equitable discretion in making a division of joint property (*Robson v Theron* 1978 (1) SA 841 (A) at 856-7).

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[1] *Robson v Theron* 1978 (1) SA 841 (A).

14. In *Robson v Theron* Joubert JA observed as follows at 855C-F:

> *"The court has a wide equitable discretion in making a division of the joint property, having regard, inter alia, to the particular circumstances, what is most to the advantage of all the co-owners and what they prefer. Bort Advyssen 19; Van Leeuwen Censura Forensis 1.4.27.5; Voet 10.3.3. It is interesting to note that the modes of division referred to by the Roman-Dutch jurists are substantially identical to the modes of distribution of partnership assets as described by Pothier. Cf. De Groot 3.28.6. Thus where it is impossible, impracticable or inequitable to make a physical division of the joint property, the court in exercising its equitable jurisdiction may award the joint property to one of the co-owners provided that he compensates the others, or cause the joint property to be put up to auction and the proceeds divided among the co-owners. Voet 10.3.3, read with Voet 10.2.22-28; De Groot 3.28.8; Van Leeuwen RHR 4.29.3; Van Sutphen Practyke De Nederlantsche Rechten, sub voce Scheydinge No. 7; Wassenaar Practyck Judicieel Cap 7 No. 45; Pauw Observationes Tumultuariae Novae volume 1, No. 77. Cf. Estate Rother v Estate Sandig 1943 AD 47 at 53-4; Drummond v Dreyer 1954 (1) SA 306 (N)."*

15. In *Estate Rother* de Wet CJ pointed out that one of the recognised modes of division is a sale by public auction and a division of the proceeds, particularly where it is impracticable or inequitable to allow a partition of the property.

16. As Jones J pointed out in *Gatenby v Gatenby and Others* 1996 (3) SA 118 (E) at 123D – with reference to *Robson v Theron* –

"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 among partners as described by Pothier."

17. In *Ex parte Sewpaul and Another: In re Jumanee and Others* 1947 (3) SA 299 (D), Henochsberg AJ said as follows at 302:

"In partition proceedings the court is bound to consider the equities of the case, Motala v Estate Lockat and Another 1945 NPD 351. Where it is impracticable or inequitable to allow a partition, the court will make such an order as to justice or the equities of the case may require. The discretion of the court is a wide one. Estate Rother v Estate Sandig 1943 AD 47."

18. Though the applicant contends that it is equitable that the properties be divided by him taking transfer of the Bain Street properties, because they are physically adjacent and because they constitute 25% of the aggregate value of the properties, it does not answer the question why it would be equitable for him as opposed to any of his brothers to take sole ownership of the Bain Street properties.

19. Though the second and third respondents appear to be on speaking terms, they are clearly not on speaking terms with the first respondent. Why would they then, in future, divide the Church Street properties amongst themselves, other than to have them sold? In the latter regard I emphasise that all were in agreement before me that it would be inappropriate to sell the properties at the moment as they were still subject to the usufruct of Mrs

van Niekerk, and presumably little value, if any, would be achieved on an auction sale.

20. Mr Johannes van Niekerk also bemoaned the fact that he was not possessed of any funds and, for instance, would not be able to bear the costs of transfer of these valuable properties.

21. In the premises it seems to me that it would be manifestly inequitable for the applicant to be granted the relief which he seeks – he would receive the Bain Street properties, whilst his brothers would remain as co-owners of the Church Street properties; he will be entitled to deal with the Bain Street properties as he deem fit, whilst they will still be locked into the co-ownership of the remaining properties; the second respondent certainly does not have the funds to pay his share of the transfer fees (nor does it seem does the third respondent); the respondents oppose the relief; and, finally, both the applicant and the two respondents have indicated that a sale by way of an auction (or otherwise) would be inappropriate as they would receive very little value by virtue of the existing usufruct in favour of their mother. Put differently, it seems to me that the relief sought by the applicant is arbitrary and there is no basis upon which the applicant, as opposed to any of the respondents, would be entitled to a partition on the basis sought by them.

22. In the premises it seems to be that it would be neither just, nor equitable, to order the partition of the properties along the lines suggested by the

applicant. It would also be against the wishes of all the parties to dispose of the properties by way of public auction.

23. It seems to me that the reality is that whilst their mother has the usufruct, and they only the bare dominium in the properties, their interest in the properties are of little value to them.

24. Given their express wishes not to proceed by way of public auction, and no other equitable division of the properties having been put forward, it seems to me that the application falls to be dismissed with costs. In the premises I make the following order:

The application is dismissed with costs.