Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 18681/2015

Before: The Hon. Ms Justice Allie
The Hon. Mr Justice Saldanha
The Hon. Mr Justice Binns-Ward

Hearing: 25 July 2016
Judgment delivered: 8 September 2016

In the matters between:

JOHANNES DANIËL COETZEE Appellant

And

HUGO JOHANNES COETZEE Respondent

JUDGMENT

BINNS-WARD J (ALLIE and SALDANHA JJ concurring):

[1] The defendant in the court a quo has come on appeal against the judgment of the trial judge in an action brought by the plaintiff for the termination of the parties' joint ownership of the farm, B… No. 1…., situate near V…..in the Municipality of P….. Leave to appeal was granted by the trial judge. It is convenient to refer to the parties as at first instance.

[2] The parties are related to each other. The plaintiff is the defendant's nephew. The farm has been in the family for generations (since 1852). There is a family cemetery on the property. The plaintiff currently owns a 90 per cent undivided share in the property and the defendant owns the remaining 10 per cent.

[3] The plaintiff purchased his share from his parents in about 2002. He grew up living on the property. After acquiring his proprietary interest, the plaintiff has effected significant improvements to the homestead - in which he lives with his wife and children - and to a number of the outbuildings. It appears that the property was in a very rundown state when he purchased his interest in it. Although the plaintiff's principal source of income is derived from a fish meal business that he carries on in V……, he does use the farm commercially when he fattens cattle purchased to be put out to graze on the land during the winter months when the veld in that area is verdant. He also uses a building on the property for the purpose of a business that repairs canvas bags. His wife uses another building for her meat processing business.

[4] The defendant inherited his share from his parents, who were the plaintiff's grandparents, in 1966. He also grew up on the farm and has maintained a close connection with it throughout his life. He has lived in a house on the property, which is now his principal place of residence, since 1998. The defendant had to undertake extensive restoration work to the house in which he lives in order to make it habitable. His evidence that he had expended in the order of R400 000 on the restorations was not contested. He maintains a flower and vegetable garden near the house and there is some suggestion in the evidence that he might be able to generate a small income by growing plants for horticultural purposes.

[5] The plaintiff claimed an order in the following terms:

> A.1 'n Bevel dat die partye se mede-eienaarskap van die restant van die plaas B.... nr. 1..., in die Munisipaliteit B....., A..... P....., Provinsie van die Wes-Kaap, groot 1.....,7..... hektaar, ontbind word;[1]
>
> A.2 Dat die Verweerder gelas word om alles te doen wat nodig is om die oordrag van sy een-tiende aandeel in die eiendom beskryf as die restant van die plaas Bovenplaat nr. 1....., in die Munisipaliteit B....., A..... P....., Provinsie van die Wes-Kaap, groot 1.....,7..... hektaar aan die Eiser te bewerkstellig teen betaling deur die Eiser van die

[1] An order that the parties' co-ownership of the farm B……. No. 1……..… be terminated. (My translation.)

bedrag van R233.260,00 of sodanige ander bedrag as waarop die partye skriftelik mag ooreenkom;[2]

B Alternatiewelik to A.2 hierbo, dat die partye meewerk om binne 10 dae ná datum van hierdie bevel opdrag te gee aan 'n afslaer om binne 30 dae daarná en ná minstens 10 dae kennisgewing deur die afslaer per advertensie in een Engelstalige en een Afrikaanstalige dagblad wat in die omgewing van die gemelde eiendom sirkuleer die gehele voormelde eiendom te verkoop aan die hoogste bieër per openbare veiling gehou op die gemelde eiendom;[3]

C Dat nege-tiendes en een-tiende van die opbrengs van die verkoping ná aftrekking van afslaerskommissie, advertensiekoste en ander koste redelikerwys noodsaaklik aangegaan om die verkoping te bewerkstellig aan onderskeidelik die Eiser en die Verweerder uitbetaal word by registrasie van oordrag van die eiendom in die naam van die koper;[4]

D Indien enige party sou versuim om uitvoering te gee aan enige van die voormelde bevele, dan word die Balju gemagtig en gelas om in die plek van sodanige party te tree en alles te doen wat nodig is om uitvoering aan die voormelde bevele (na gelang van die geval) te gee;[5]

D Dat die Verweerder gelas word om die Eiser se gedingskoste te betaal, gemelde koste in te sluit die kwallifiserende- en voorbereidingsfooie en uitgawes van die eiser se deskundiges van wie opsommings of verslae geliasseer is.[6]

The defendant, on the other hand, contended that the property should be partitioned by means of a subdivision that would permit him to obtain exclusive ownership of the cottage in which he resides with his partner or long term companion and an area of the surrounding land.

[6] It is common ground that any subdivision of the property would be subject to the Subdivision of Agricultural Land Act 70 of 1970 ('the Subdivision Act') and

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[2] That the defendant be directed to do all things necessary to effect the transfer of his one tenth share in the property to the plaintiff against payment by the plaintiff of the sum of R233.260,00 or such other amount as the parties might agree in writing. (My translation.)

[3] Alternatively to A2 above, that the parties co-operate to appoint an auctioneer within 10 days of the date of this order to, within 30 days thereafter and after not less than 10 days' notice by the auctioneer in an advertisement to be placed in one English language and one Afrikaans language newspaper circulated in the area in which the property is situated, sell the entire property to the highest bidder by public auction to be conducted on the property. (My translation.)

[4] That nine tenths and one tenth of the proceeds of the sale after deduction of the auctioneer's commission, advertising costs, and any other costs reasonably necessarily incurred to effect the sale be paid to the plaintiff and the defendant, respectively, upon transfer of the property into the purchaser's name. (My translation.)

[5] In the event of either party failing to comply with any of the aforegoing orders, the Sheriff is authorised and directed to do everything necessary (according to the circumstances) for the carrying out of the aforementioned orders (My translation.)

[6] Directing the defendant to pay the plaintiff's costs of suit, such costs to include the qualifying and preparation costs of the plaintiff's expert witnesses whose summaries or reports have been filed of record. (My translation.)

therefore could occur only with the previously obtained consent of the national Minister of Agriculture.[7] Approval for any physical partitioning of the land would also need to be obtained from the local authority in terms of the applicable planning legislation. The plaintiff contended that, absent evidence that the Minister would approve a subdivision of the farm, the Subdivision Act constituted an obstacle to the court's ability to make an effective order for the partitioning of the property. To the extent that the judgment of Baker J in *Van Der Bijl and Others v Louw and Another* 1974 (2) SA 493 (C), which was relied on by the defendant, held otherwise, the plaintiff argued that that case was distinguishable by virtue of a subsequent amendment to s 4 of the Subdivision Act. Section 4(1) of the Act, which was substituted by s 2 of Act 18 of 1981, requires an application for ministerial consent to be submitted by the 'owner', which in the case of co-owners denotes all of them acting jointly.[8] At the time that *Van Der Bijl* was decided s 4(1) did not expressly require an application for ministerial consent to be submitted by the owner.

[7] There was also a claim in reconvention by the defendant for an accounting by the plaintiff. By agreement between the parties, a ruling was made in terms of rule 33(4) that the claim for an accounting should be tried separately after the basis upon the termination of the parties' joint ownership of the property had been decided.

[8] At the end of the trial the court a quo made an order in the following terms:

> (i) The co-ownership between the parties in respect of the property described as The Remainder of the Farm Bovenplaat no 115, in the Berg River Municipality, Division

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[7] The Subdivision Act has been repealed in terms of the Subdivision of Agricultural Land Act Repeal Act 64 of 1998. The repealing legislation has, however, not been brought into effect. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC), at para 91, the Constitutional Court ventured a number of possible reasons for the long delay in bring the repealing legislation into effect; viz. (a) that the legislature may seek to put other provisions in place in terms of which national government would have other means to control the subdivision of 'agricultural land',
(b) pending provincial governments acquiring the required capacity to administer the functional area of agriculture and the assignment of such administration to them, (c) the assignment of the administration of the functional area of agriculture to municipal authorities. Chapter 8 of the Draft Sustainable Utilisation of Agricultural Resources Bill of 2003, which was not introduced in Parliament, contained provisions which, if adopted, would substantively reintroduce the repealed legislation. The draft bill suggests that the first of the aforementioned possibilities ventured by the Constitutional Court offers the most likely future course.

[8] '*Owner*' is defined in s 4(1)(b) of the Subdivision Act with reference to the meaning assigned to the word in s 102 of the Deeds Registries Act 47 of 1937.

Piketberg, Province of the Western Cape, in extent 156, 7454 hectares[9] ("the property") is hereby dissolved;

(ii) The defendant is ordered, on demand, to do everything that is necessary to effect transfer of his 1/10th undivided share in the property to the plaintiff within a period of 90 days;

(iii) Should the defendant fail to act as aforesaid the Sheriff is authorised in the defendant's stead to sign all documents and generally do everything that is required in order to effect the aforesaid transfer;

(iv) The aforesaid transfer shall be subject to the requirement of the Registrar of Deeds;

(v) The parties will be liable in equal parts for payment of all costs attendant to and/or required for the registration of transfer;

(vi) The plaintiff shall pay to the defendant for his 1/10th undivided share an amount equivalent to 1/10th of the market value of the property after such value has been determined by a qualified valuer. The valuer must determine such value within a period of 15 (fifteen) days from the date of this order;

(vii) Defendant is directed to pay the plaintiff's costs, including the qualifying and preparation costs and expenses of the plaintiff's experts in respect of whom expert evidence summaries had been delivered.

[9] The plaintiff obtained leave to cross-appeal against the failure by the trial court to determine the value of the property for the purpose of determining the amount he had to pay the defendant for the latter's one tenth interest. The plaintiff failed to prosecute the cross-appeal timeously in accordance with the rules. He applied for condonation of his default. The application was not opposed. We were of the view it would be in the interests of justice to grant condonation and an order to that effect was made before we heard argument in the appeal. The plaintiff must bear any wasted costs occasioned by the application for condonation.

[10] The defendant's notice of appeal sets out numerous grounds of appeal. It would impose unduly on this judgment to address them individually. Indeed, the all too evident tendency of some practitioners to attack each and every aspect of a judgment in a notice of appeal is to be discouraged. They should be mindful that the resultant lack of focus is liable to detract from the presentation of their clients' cases by eliciting the sort of judicial scepticism illustrated in the comment by a US Appeals Court judge that when he sees 'an appellant's brief containing seven to ten points or

[9] The extent of the property given in the court order was taken from title deed. It was common cause, however, that the area given in the title deed was incorrect, apparently as a result of primitive survey methods.

more, a presumption arises that there is no merit to *any* of them'.[10] The material grounds of appeal upon which the defendant relies are:

1. That the court a quo erred in not following the judgment in *Van der Bijl* and in finding that it was 'legally impossible' to make a partitioning order;
2. That the court a quo erred in finding that the subdivision of the farm would be impracticable and in doing so had failed to take sufficient cognisance of the objective evidence to the contrary, most particularly that of Cornelius Van der Walt and Anella Coetzee.

[11] The trial court was seized of a claim under the *actio communi dividundo*. The applicable principles have been rehearsed in at least two judgments of the appeal court: see *Estate Rother v Estate Sandig* 1943 AD 47 and *Robson v Theron* 1978 (1) SA 841 (A).

[12] In *Estate Rother*, at pp. 53-54, De Wet CJ stated, with reference to the authorities to which the court had been referred in argument:

> It seems to me that the effect of these authorities is fairly summed up by De Villiers CJ in *Dickson v Stagg* (3 S.C. 115), as follows: -
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> > 'It is quite true that under the ordinary law one of two or more co-proprietors is entitled to claim a partition of the land, but that rule is subject to exceptions, one of these exceptions being that where it was impracticable or inequitable to allow such a partition, the Court would in such a case make such an order as the justice or the equity of the case might require.'
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> The discretion of the Court is a wide one and one of the recognised modes of division is a sale by public auction. See Groenewegen's note to Grotius 8.28.8; Schorer note 444; van Leeuwen, R.H. Recht, 4.29.3; Censura Forensis 1.3.27, 5 and 7; Voet 10.3.3 and 10.2.22.

[13] In *Robson*, Joubert JA offered the following insights into the *actio communi dividundo*:

> This action which originated in Roman law has been adopted in Roman-Dutch law as the *actie van deelinge* or *actie van scheydinge*. It is well known in our present law. Its chief characteristics appear from *Voet*, 10.3.1. (*Gane's* trans.):
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> > 'This action for the division of common property is a mixed, a two-sided and a *bona*

[10] Aldisert, *Opinion Writing*, (1990) at 89, commended to Australian counsel by McHugh J in *Tame v New South Wales* [2002] HCA 35, at para 70. See *Hing and Others v Road Accident Fund* 2014 (3) SA 350 (WCC), at para 4 (note 2).

> *fidei* action. [11] By it those who hold property in common. generally by particular title, claim to have it divided and personal items of payment made good. It is available, that is to say, to those who hold common property in undivided shares. This is so whether the property is common between them in a partnership or without a partnership *D.*10.3.2.; whether they possess it, or neither of them or only one of them is in possession *D.*10.3.30; whether they hold the common ownership on the same or on different rights, the one perchance by title of institution as heir and the other by title of legacy *D.*10.3.8.1; and whether they are direct or beneficial owners.'

… The *actio communi dividundo* has a two-fold purpose, viz. to claim division of joint property and payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property. *Van der Linden*, 1.15.15; *Voet*, 10.3.3 Van Leeuwen, *Censura Forensis*, 1.4.27.2,4.

The basic notion underlying the *actio communi dividundo* is that no co-owner is normally obliged to remain such against his will. Van Leeuwen, *Censura 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 the 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 JP).

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 discretion 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

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[11] Watermeyer J quoted Buckland, *Roman Law* at 539 on the *actio communi dividundo* as follows: 'The action was a *bonae fidei iudicium, duplex*, in the sense that its formula did not distinguish plaintiff and defendant; it was expressed to apply to all parties alike, though, in view of questions of proof, the claimant of the action was treated as plaintiff.' This explains the meaning of 'two sided' in its context in Gane's translation of '*duplex*' in the passage in Voet quoted by Joubert JA. See *Blue-Cliff Investments (Pty) Ltd and Another v Griessel and Others* 1971 (3) SA 93 (C), at 97B.

> divided among the co-owners. *Voet*, 10.3.3, read with *Voet*, 10.2,22 - 28; *De Groot*, 3.28.8; Van Leeuwen, *R.H.R.*, 4.29.3; Van Zutphen, *Practyke de Nederlantsche Rechten*, *sub voce* scheydinge no. 7; Wassenaar, *Practyck Judicieel*, cap. 7. no. 45; Pause, *Observationes Tumultuariae Novae*, vol. 1, no. 77. Cf. *Estate Rother v Estate Sandig*, 1943 AD 47 at pp. 53 - 54; *Drummond v Dreyer*, 1954 (1) SA 306 (N).

[14] It follows that the trial court was vested with a discretion to determine the basis upon which the parties' joint ownership should be terminated. The discretion was one in the wide sense of the word. This court is therefore able to substitute its own determination for that of the court a quo if we are convinced, for reasons founded in law or predicated on a different finding on the facts, that the application should have been decided differently. We are not as limited in our ability to interfere as we would have been if the decision of the court a quo had been made in the exercise of a discretion in the true or narrow sense.[12]

[15] The court a quo decided that an order for the physical partitioning of the farm between the protagonists was legally and practically impossible. The defendant's counsel argued that the decision was unfounded on both bases. He submitted that it was incongruous with the statement of the applicable law in the judgment in *Van der Bijl* on the first leg and against the weight of the evidence on the second leg. If his submissions were well made that would give this court the liberty to interfere in the determination made by the trial court.

[16] The judgment in *Van der Bijl* was concerned with an application by the defendants in that matter to amend their plea in various respects. The application was opposed. As Baker J observed, the effect of the part of the proposed amendment pertinent to the current matter was essentially in the nature of an exception that no cause of action had been disclosed in the particulars of claim. The defendants in that matter had sought to introduce an allegation that the plaintiffs' claim for a partition of the agricultural land owned jointly by the parties could not succeed absent proof that the Minister had consented, or was willing to consent, to it in terms of the Subdivision Act. The learned judge rejected the allegation that the defendants in that case sought to introduce as legally unsound. He did so on the basis that the Act had not introduced any new requirements to the *actio communi dividundo*. It certainly

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[12] See *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A), at 360D-362F and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at para 83-90.

contained nothing to suggest an intention that the *actio* should not apply in respect of agricultural land. The judge acknowledged, however, that the effect of the Subdivision Act was that a partition order in respect of agricultural land could not be carried into effect without the consent of the Minister, but held that that did not oust the court's jurisdiction to make such an order, even if its effect in the circumstances would only be provisional pending ministerial approval of a subdivision in accordance with its tenor. Baker J acknowledged that in the event of the Minister subsequently refusing to give the required consent the parties could find themselves back at square one, as in a game of snakes and ladders.

[17] Our attention was not directed to any case in which a partition order had been made by a court in respect of agricultural land in circumstances in which there was no indication as to whether or not the Minister's consent had been given or would probably be forthcoming. In *Bekker NO v Duvenhage* 1977 (3) SA 884 (E), which concerned a claim for the enforcement of a contract that would require a subdivision of agricultural land to be effected, it was held that a court would not make a partition order in circumstances in which the Minister had refused to consent to a subdivision. The reasoning for that determination was the contract in issue in that case had become extinguished when it became impossible of performance upon the Minister's refusal to consent to the required subdivision. The position in *Bekker* was therefore quite distinguishable on its facts from the principle described in *Van der Bijl*. An order for the partitioning of the land in that case would quite evidently have been a *brutum fulmen*.

[18] As mentioned, the plaintiff's counsel sought to distinguish *Van der Bijl* on the ground of a subsequently effected amendment to s 4 of the Subdivision Act. The effect of the amendment has already been described above.[13] The plaintiff's counsel argued that in the face of either owner's unwillingness to be party to the required application for ministerial consent, any partition order would be a *brutum fulmen*. There is no merit in the contention that the plaintiff could frustrate the effectiveness of any partition order by refusing to be party to the required application to the Minister in terms of s 4 of the Subdivision Act. Any court making a partition order in respect of agricultural land in circumstances in which the Minister's consent was still to be obtained could competently make ancillary orders directed at assisting the

[13] At paragraph [6].

effectiveness of the partition order. These might include giving the parties directions to submit the application to the Minister within a given period and providing for a surrogate, such as the Sheriff, to do whatever was necessary to that end on behalf of any recalcitrant party. It seems to me that the argument advanced on behalf of the plaintiff in this respect ignores the effect on the property of the institution of proceedings under the *actio*. Once *litis contestatio* has been reached in such proceedings, the property is *res litigiosa* and may then be disposed of only in accordance with the court's judgment.[14] The notion that one of the parties might be at liberty to frustrate the execution of the court's order is inconsistent with that reality. I respectfully disagree with the *obiter dictum*[15] by Roux J in *Kruger v Terblanche* 1978 (2) SA 198 (T), at 206H that the court could not compel the parties to make an application in terms of the Subdivision Act.

[19] The notion expressed in the judgment of the court a quo that a court cannot direct that an application for subdivision be submitted in a case in which one of the co-owners did not desire to make such an application, on the basis that to do so would be to make an agreement for the parties, is unfounded. The court would not be making an agreement between the parties; it would be determining upon subdivision as the appropriate means of terminating the co-ownership order and giving directions as to how that end was to be obtained.[16]

[20] In any event, I do not consider that the amendment of s 4(1) of the Subdivision Act bears the significance that the plaintiff's counsel sought to attach to it. Even before the statutory amendment, an application for ministerial consent would have been purposeless if it did not have the owner's buy-in, for without the owner's co-operation any consent obtained from the minister could not have been carried into effect. The amendment had the effect that the Minister is now required to entertain only applications by the owners of agricultural land. Non-owners may not submit such applications. In a situation in which one or more of the co-owners of agricultural land wishes to subdivide and the other(s) not, I would imagine that if the difference of opinion is irresolvable and serious enough, proceedings in terms of the *actio communi dividundo* would probably follow.

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[14] *Blue-Cliff Investments (Pty) Ltd and Another v Griessel and Others* supra.
[15] The parties in *Kruger v Terblanche* were *ad idem* that it was not practical to subdivide the property in issue.
[16] This much is in fact essentially spelled out in the passages from *Van der Bijl* at p. 501B-F and 499A-D and 409H-500B, respectively, quoted by the trial judge in paras. 47-48 of her judgment.

[21] In my judgment the court a quo was therefore misdirected in holding that it was legally impossible to make an order for the partitioning of the farm. The position adopted by the court a quo entailed an unjustified rejection of the authority of the judgment in *Van der Bijl*.

[22] The bases upon which the trial court sought to distinguish *Van der Bijl*, namely, (i) that the parties in that case both agreed on a partitioning of the farm and (ii) the effect of the subsequent amendment of s 4(1)(a) of the Subdivision Act, are not sustainable. It is correct that the parties in *Van der Bijl* both considered that the farm was practicably capable of subdivision, but they were at odds as to how the subdivision should be defined. As the parties all accepted what the value of the farm was, the defendants had offered to buy the plaintiffs share for an amount determined with relation to their proportionate ownership of the whole. The plaintiffs were unwilling to be bought out on that basis. There was therefore no agreement between the parties in respect of the subdivision of the land, as apparently understood by the judge a quo. The defendants in *Van der Bijl* had sought in a special plea to frustrate the plaintiffs' claim for a partition order on the basis that it could be carried out only with the consent of the Minister of Agriculture. They sought to contend that such consent could be obtained only with their co-operation and agreement, which would not be forthcoming. The position of the defendants in *Van der Bijl* in respect of the consent required from them in any application for ministerial approval was thus essentially indistinguishable from that maintained by the plaintiff in the current case. I have already indicated how a court is able to address the position of an uncooperative co-owner by appropriate formulation of the terms of the partitioning order.

[23] Whether the conclusion that the trial court was materially misdirected on the law merits interference by us on appeal with the orders that it made depends, of course, on the practical considerations. The misdirection would be of no moment if a partitioning order would have been impracticable. The misdirection does, however, mean that we are at liberty to substitute our own order should we conclude on the basis of our own assessment of the evidence and in the exercise of *our* discretion that the outcome of the trial should have been a different one.

[24] As noted earlier, *Van der Bijl* was a decision made on a question that in effect raised a point on exception. Even if it is assumed that the absence of ministerial

consent does not detract from the court's authority to make a partitioning order, there is a well-established disinclination by courts to make orders that are, or would be, likely to be ineffectual – the so-called '*brutum fulmen*'.[17] Evidence as to the prospects of ministerial consent being forthcoming is undoubtedly relevant in a trial context when physical partition of agricultural land is being sought in a claim under the *actio communi dividundo*.[18] Indeed, the only reason I can think of that would have justified the extensive evidence adduced by both sides in the current case on the likelihood or unlikelihood of ministerial consent being obtained for any partitioning of the land that might meet the requirements of a termination of the joint ownership was the need to persuade the trial court about the likely effectiveness, or ineffectiveness, as the case might be, of a partition order.

[25] The plaintiff adduced evidence that the Minister would be unlikely to consent to a subdivision and that therefore the court should exercise its discretion in favour of terminating the joint ownership by some other mode of division. The defendant's evidence, by contrast, was directed to persuade the court that the conventional approach of physical partition was feasible. In point of fact neither party conducted the trial on the basis that the Minister's consent was legally a *sine qua non* to the court's power to make a partition order. Had the plaintiff's attitude been that the court was absolutely precluded from making a partition order he would, no doubt, have noted an exception to the defendant's claim in reconvention. He did not.

[26] The object of the Subdivision Act is, in the national interest, to prevent the fragmentation of agricultural land into uneconomic units.[19] It was common cause that Bovenplaat Farm No. 115 fails to qualify as an economic agricultural unit according to the criteria applied by the Department of Agriculture in terms of the Conservation of Agricultural Resources Act 43 of 1983. However, it was also not in dispute that the Department was opposed in principle to any reduction in agricultural capacity by the subdivision of even uneconomic agricultural units. As I understood the evidence, the rationale for this approach is to preserve the potential for such units to be

[17] See the discussion above (at para. [17]) of the judgment in *Bekker NO v Duvenhage*.
[18] Thus in *Kruger v Terblanche* supra, at 206G, the court had regard to the opinion of the relevant departmental official that consent for the subdivision of the agricultural land in issue in that case was most unlikely to be given as a weighty factor against the practicability of a portioning order.
[19] See e.g. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) (2008 (11) BCLR 1123; [2008] ZACC 12) in para 13; *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA) ([2003] 4 All SA 553) at paras. 5 and 15 and *Adlem and Another v Arlow* 2013 (3) SA 1 (SCA) at para 9.

consolidated with other units to create or restore economically sustainable agricultural land units for the future benefit of the country.

[27] The defendant adduced evidence to indicate that he could achieve a situation in which a consolidation of uneconomic units on more fertile ground in another part of the Piketberg municipal area could be offered in exchange for a subdivision of B…. Farm No. 1…….. That such considerations might favourably affect an application for ministerial consent was common cause between the expert witnesses. The plaintiff's experts maintained that the alternative land had to be close by to the land that it was proposed to subdivide, a proposition that was resisted by the defendant's witnesses. The defendant's witnesses gave examples of successful applications where the land to be consolidated was situate a significant distance away from the land to be subdivided. Having regard to the object of the Act, I fail to see why the relative proximity of the land units concerned should be determinative. That has nothing to do with the apparently desired result, which is the maintenance and increase, nationally, of agricultural land units of a size that will enhance agricultural productive capacity.

[28] The trial court was bound, in my view, to have attached significant weight to the evidence of Cornelius van der Walt, an official in the Western Cape Department of Agriculture charged with making recommendations to the national Department in respect of subdivision applications, that an application for the subdivision of the farm as proposed by the defendant enjoyed good prospects of success. Van der Walt testified that he would support such an application in principle and that the national Department followed his recommendation in the determination of the vast majority of applications submitted in terms of s 4 of the Subdivision Act.[20] The trial judge briefly summarised the import of Van der Walt's evidence in her judgment, but did not indicate the weight, if any, that she had attached to it. This may well have been because of her view that the plaintiff's voluntary participation in any application for ministerial consent was a *sine qua non*. If that view had been well-founded, Van der Walt's evidence would indeed have carried little value in the face of the plaintiff's opposition to the partitioning of the farm.

[20] Agriculture is an area of concurrent national and provincial competence listed in Part A of Schedule 4 to the Constitution, and in terms of s 41(1) national and provincial government are enjoined to consult on matters of common interest and co-ordinate their actions and legislation with one another in matters of common interest.

[29] There was also evidence that the Minister had historically adopted an indulgent approach to applications for the subdivision of agricultural land when these sought to effect a division of ownership in cases when undivided co-ownership had vested in the parties prior to the commencement of the Subdivision Act. It will be recalled in this regard that the defendant had come into his undivided share of the property in 1966, whereas the Act came into operation on 2 January 1971. The trial judge made no reference to this evidence in her judgment. This might have been for the same reason that I have ventured for her failure to weigh the evidence of Van der Walt.

[30] Other factors that weighed in favour of the prospects of a subdivision application being favourably considered were the proximity of the portion of the farm that the defendant wished to have registered in his name to a number of existing small holdings. There was a farm between those small holdings and the portion of B……. No 1…… to which the defendant laid claim – which is a negative factor, but as the crow flies, the distance across the relevant portion of the intervening farm and the subject property is a very short one. Furthermore the evidence indicated that the subject property lies just outside the urban edge of Velddrif and on the side of the town towards which any urban expansion is expected to occur.

[31] Even were the Minister of Agriculture to consent to a subdivision, it could not be effected without the approval of certain other authorities. Approval would also be required from the municipality in terms of the applicable land use planning legislation, from the Department of Water Affairs because the farm borders on the Berg River and from the roads authority in respect of questions of access to a proclaimed road. The evidence suggested that any proposed subdivision would receive consideration by all the relevant authorities on a co-operative and co-ordinated basis. I have already mentioned the factors that could militate towards a favourable consideration by the planning authority. The part of the farm that would be the subject of subdivision is far removed from its river front area and does not appear to have any characteristics that would be of material interest to the Department of Water Affairs. The defendant uses municipal water on the portion of the property that he occupies. The proposed subdivision would not change the current access arrangement to the farm and thus is also not expected to excite any opposition by the roads authority. The current access road transects the portion of the farm that the

defendant wishes to have excised. The defendant is willing for the existing access to the remainder of the farm to be maintained. He proposes the registration of a right of access in favour of the remainder along the existing route of the road over the portion of the land that would be transferred into his ownership when the subdivision is effected.

[32] In my judgment all the aforegoing factors, weighed cumulatively, afforded sufficient indication that an application for the partition of the farm in such a way that would allow the defendant to remain living in his house and the continued enjoyment of the area around it that he gardens would apparently enjoy realistic prospects of success. The fact that various statutory consents would be required for the partitioning of the property thus did not in the circumstances of this case justify adopting an approach that ruled out terminating the parties' co-ownership by way of a physical division between them of the commonly owned property. As the description of the common law earlier in this judgment illustrates, a physical division is the indicated course, unless it would be impossible, impracticable or inequitable.

[33] It should perhaps be mentioned that the plaintiff's counsel argued that a subdivision of the farm was impracticable because of the time that would be entailed in processing the necessary applications through the offices of the statutory authorities whose consent or approval would be required. The evidence establishes that that might take several years. I am unpersuaded by the argument. The bureaucratic processes involved in unravelling co-ownership of agricultural land are an inherent factor in the co-ownership of such land. They go with the territory, as the saying goes. They do not detract from the common law principles that apply when the parties desire the termination of their co-ownership and are unable between themselves to agree how that should be achieved.

[34] There was also considerable emphasis in the papers and in argument on the fact that the plaintiff and the defendant do not get on well together. They have been difficult neighbours. It is unnecessary to set out the sometimes insalubrious detail. Suffice it to say that I do not consider the state of their personal relationship to be of relevance to the division of the property. There is no reason to regard it as a basis for preferring the one's prima facie entitlement to a part of the property, to which each of them has familial ties, over that of the other. And if they should continue to find their life as neighbours trying after the farm has been partitioned, their experience in that

regard will not be unlike that of many other property owners who find themselves living in unhappy propinquity to the person next door.

[35] The defendant claimed an eccentrically shaped portion of the farm in the vicinity of the dwelling house that he occupies. The portion is approximately 15 hectares in extent, which represents roughly 10 per cent of the total area of the farm as per the title deed, albeit significantly less so of its actual extent, even taking into account a portion that is subject to expropriation for the purposes of the Sishen-Saldanha railway line that transects the farm. The odd geometric shape of the portion claimed by the defendant is explained by his desire to obtain a land unit that will include not only the dwelling house in which he resides and its immediate surrounds, but also an area that would give him a physical link from there to the family graveyard and incorporate the graveyard itself. The defendant's parents are both buried in the graveyard and it is the defendant's wish ultimately to be interred there himself. He regularly visits the graveyard and has tried to keep it in some form of order. There is no laid out route between the defendant's house and the graveyard. He walks over the veld to get there.

[36] We enquired of the plaintiff's counsel during the hearing whether, if the defendant were to be awarded a portion of the farm that did not include the private cemetery, the plaintiff would be willing to allow him access and the choice to be buried there. We were advised by counsel, after he had taken instructions that the plaintiff would not be willing to afford anyone the right to enter on the farm or be buried there if he were to become its sole owner or the sole owner of the major portion of it.

[37] The farm does not lend itself to an equitable division simply by dividing its physical extent between the parties in direct proportion to the extent of their undivided interest. Parts of the farm comprise marshy areas near the river that are not usable. The soil in the other parts is of variable quality for agricultural purposes. Some of the best grazing area, for example, lies close to or around the defendant's dwelling. The evidence concerning the market value of the land was wildly disparate. The plaintiff's valuer valued it on the assumption that it would be used as the plaintiff currently uses it; that is as an uneconomic agricultural land unit. He determined a value of just over R2,3 million. The defendant's valuer contended that 'the highest and best use' of the land was as a lifestyle property – a rural retreat for a wealthy city

dweller. There was evidence that certain other river-fronting properties in the area were used as holiday properties. The defendant's valuer estimated the market value of the property at over R9 million. There were valid reasons to be critical of both valuations. There was no evidence as to the value of the portion of land that the defendant wished to have apportioned to him as a subdivided unit. It was, however, common cause that the smaller unit that would result if the subdivision were effected would have a significantly higher rand value per hectare than the larger remainder.

[38] In the circumstances the court is left in the position in which it must determine the physical apportionment of the land as best it can on the rather uncertain evidence as to its value to achieve a fair division between the parties. It must do so having regard to their respective needs and interests in the land and with a view to the objective that the division should also broadly bring about a result that in a monetary or financial sense would reflect their proportionate shares in the current ownership of the undivided whole. In my judgment that result would be achieved if we were to direct that the area of approximately five hectares delineated within the red line endorsed on the aerial photograph at p 219 of Bundle A of the trial record must be subdivided and registered in the defendant's name as sole owner, against the registration of the remaining area of the farm as the sole property of the plaintiff, and that he be granted certain servitutal rights to be discussed presently. The area to be apportioned to the defendant in terms of the contemplated subdivision includes the current access to the farm from the adjacent public road. A right of way along the route of the current access road to the plaintiff's compound on the farm will have to be registered over the defendant's portion of the land in favour of the remainder.

[39] The area apportioned to the defendant excludes the family graveyard. In order to access the graveyard, the defendant would need to be given some form of right of way.[21] To maintain his interest in the graveyard, he would also need to be given the right to tend to the graves and the right to be buried there. Whereas there was a closed number of recognised personal servitudes in Roman Law, that is no longer the case in modern law.[22] (In *Nkosi and Another v Bohrmann* [2001] ZASCA 98 (25 September 2001), at para 37, it was held that s 6(4) of the Extension of Security of Tenure Act 62 of 1997 gave everyone the right to visit and maintain family graves on

[21] A servitude of *iter ad sepulchrum* (footpath to a grave) was recognised in Roman Dutch law; see Joubert et al (ed) LAWSA, Second Edition, vol 24, para 580, n 4.
[22] See, for example, CG Van der Merwe *Sakereg* 2de uitgawe at 506-508.

land belonging to someone else. Howie JA remarked that '[s]ubject to reasonable conditions imposed by the owner or person in charge as to safeguarding life or minimising work disruption on the land concerned, this subsection, apart from imposing what is in effect a right of way over the land, entitles family of the buried deceased to maintain graves indefinitely, including tombstones and railings, if any. The impact of all these provisions is that a grave, practically and legally, effects a permanent diminution of the right of ownership of the land'.[23] It is always possible, however, that the legislation could be amended to remove the effect of the subsection. It is therefore desirable that the intended result be entrenched by the registration of an appropriate servitude.)

[40] After the hearing of the appeal and upon our direction we were provided with a report by the registrar of deeds. Section 97(1) of the Deeds Registries Act 47 of 1937 provides that 'Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days' notice before the hearing of such application and such registrar may submit to the court such report thereon as he may deem desirable to make.' The registrar has indicated that, subject to compliance with any applicable law, there would be no objection to relief being granted as sought in the proceedings.

[41] In order to achieve the contemplated subdivision of the farm, applications will have to be made to the various authorities mentioned earlier. It would be appropriate in the circumstances for the court order to incorporate directions to the parties to make such application within a stipulated period and to provide that in the event of either of them declining to sign or endorse the documentation required for that purpose, the Sheriff for the district of Velddrif be authorised and directed to do so on that party's behalf and in that party's name.

[42] The parties should bear the costs of effecting the contemplated subdivision equally. Such costs would include the costs of the required land surveys, professional fees and any charges levied by the organs of state concerned in respect of the required applications in terms of the applicable statutory instruments.

[43] As acknowledged above, it is possible that the contemplated physical division

[23] *Nkosi v Bohrmann* at para 37-38.

of the property between the parties might be thwarted by virtue of the refusal of any of the relevant authorities to grant the required statutory consent or approval. In that event, and allowing for the determination of any appeals or applications for judicial review that either party might consider indicated in the circumstances, the property will have to be sold by public auction. The order to be made will make provision for such contingency.

[44] The defendant has been substantially successful in the appeal. Apart from its cross-appeal concerning the formulation of part of the trial court's order, the plaintiff sought to defend the judgment of the court a quo. The order to be made in the appeal renders the cross-appeal irrelevant. There is no reason why the costs of the appeal should not follow the result. The trial court ordered the defendant to pay the plaintiff's costs in the action. In my view, having regard to the peculiar 'two sided' character of a claim under the *actio communi dividundo*,[24] the generally appropriate order in such matters should be that each co-owner bear his own costs. The litigation was necessary because they were unable to reach agreement on the basis of the termination of their co-ownership. I do not think either of them can be said to have been unreasonable in contending for the termination to be effected in the different ways pleaded in the claims in convention and reconvention.

[45] The following order is made:

a. The appeal is upheld with costs.

b. The order made by the trial court is set aside and substituted with an order in the following terms:

    i. It is directed that the parties co-ownership in undivided shares of the Remainder of the Farm B……. P…… No. 1…… P…… held by the parties under Deeds of Transfer T1……. and T5…….. (hereinafter referred to as 'the farm') be terminated in accordance with the provisions of paragraphs ii-xiii below.

    ii. It is directed that, subject to the required statutory consents and approvals therefor being obtained, the farm must be subdivided in a manner so as to enable the area of approximately five hectares delineated within the red line endorsed on the aerial photograph p 219

[24] See para. [13] and note 11 thereto, above.

of Bundle A of the trial record, a copy of which is annexed, to be registered as a separate land unit in the defendant's name as sole owner, against the simultaneous registration of the remaining area of the farm in the sole ownership of the plaintiff.

iii. The parties are directed, after mutual consultation with each other, either directly or through their respective attorneys, to jointly submit the necessary applications for the required consents and approvals for the subdivision of the farm in terms of paragraph (ii) above, including any application for the rezoning of the land that might be inherently necessary for the purpose, within nine (9) months of the date of this order, or such extended period as they might agree upon in writing or as might be granted on application to a judge in chambers. The defendant shall be entitled, should he so wish, to support the application(s) for subdivisional approval by offering any other agricultural land he may be able to secure for consolidation purposes.

iv. In the event of either party failing or refusing to complete or sign any document required to be submitted in support of any required application referred to in paragraph (iii) above, within 10 days of having been requested by the other party or his attorney in writing to do so, the Sheriff for the district of Velddrif is hereby authorised and directed to complete or sign such document in the stead of and on behalf of the party who is in default.

v. Any subdivision of the farm to be effected in terms of paragraph (ii) above, shall include provision for the registration of a praedial servitude of right of way over the portion of the farm to be separately registered in the defendant's name in favour of the remainder thereof to be separately registered in the plaintiff's name. Unless the parties otherwise agree in writing to be signed by both of them or by their agents authorised thereto by them in writing, the route of the servitude shall be determined to coincide with the route of the current access road onto the farm from the R399.

vi. It is directed that simultaneously with the registration of ownership of

the subdivided properties contemplated in terms of paragraph (ii) above, there shall be registered a personal servitude in favour of the defendant against the title deeds of the remainder of the farm in terms whereof the defendant shall be afforded the right for the duration of his lifetime to access the private graveyard situate on the farm and tend to the graves there and upon his death to be interred or, should he be cremated, to have his ashes interred in the said graveyard.

vii. The plaintiff is directed to furnish any consent that may be required to enable the registration of the personal servitude contemplated in terms of paragraph (vi) above.

viii. In the event of the plaintiff failing or refusing to furnish any consent referred to in paragraph (vii) within 10 days of having been requested in writing to do so by the defendant or his attorney, the Sheriff for the district of Velddrif is hereby authorised and directed to do everything necessary to furnish such consent in his stead and on his behalf.

ix. The plaintiff and the defendant shall be jointly and equally liable in respect of the costs and charges necessarily to be incurred in respect of the necessary applications referred to in paragraph (iii) above and in respect of the registration of the praedial servitude contemplated in terms of paragraph (v); and in the event of one party paying more than his share thereof he shall be entitled to recover the overpayment from the other.

x. Save for any costs incurred in connection with the granting of any consent thereto by or on behalf of the plaintiff (which shall be borne by the plaintiff), the defendant shall be solely responsible for payment of any costs to be incurred in respect of the registration of the personal servitude contemplated in terms of paragraph (vi) above.

xi. In the event of any of the required consents or approvals for the subdivision of the farm in accordance with the provisions of the aforegoing paragraphs of this order being refused, and after the unsuccessful exhaustion of any appeal or review remedies of which the parties might avail in respect of any such refusal, alternatively, in the

event of the parties failing to make the necessary applications within the period permitted in terms of paragraph (iii) above, and after the final determination of any claim still pending in respect of the issues reserved for later determination in terms of the ruling in the action made by the trial court in terms of rule 33(4), the farm shall, upon not less than 10 days' written prior notice by either party to the other, be placed in the hands of the Sheriff for the district of Velddrif to be sold, without reserve, at a public auction to be conducted by the Sheriff in as close accordance as may be practicably and appropriately possible with the provisions of rule 46 of the Uniform Rules of Court, with the party placing the property in the hands of the Sheriff being regarded for that purpose as if he were the 'execution creditor'.

xii. The parties shall be liable *inter se* for the costs incurred in respect of any sale of the property in terms of paragraph (xi) above in direct relationship to the extent of their respective co-ownership of the property; that is as to nine-tenths by the plaintiff and one-tenth by the defendant.

xiii. The net proceeds of any sale of the farm pursuant to the provisions of paragraph (xi) above, shall be paid by the Sheriff upon transfer of the property in favour of the purchaser as to nine-tenths thereof to the plaintiff and one-tenth to the defendant.

xiv. Each party shall bear his own costs in respect of the trial of the issues before Cossie AJ.

A.G. BINNS-WARD

R. ALLIE

V.C. SALDANHA