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

REPORTABLE
Case Number: 16438/2021

In the matter between:

DAVID ARTHUR AUSTIN	**First applicant**
EVAN GEORGE AUSTIN	**Second applicant**

and

JOHN CAMERON AUSTIN	**First respondent**
GRAHAM ERIC AUSTIN	**Second respondent**

JUDGMENT DELIVERED ON 4 APRIL 2022

VAN ZYL AJ:
Introduction

1. The Roman law maxim *communio est mater rixarum* (co-ownership is the mother of disputes) has yet again been proven true.

2. The parties are four brothers who inherited an immovable property situated at Erf [....] (3[…] R[…] Road), Westcliff, Hermanus in equal shares from their mother's deceased estate in 1996. Their father lived in the property until his death in March 2020. The property is built up with a main house, which is currently vacant, and four outbuildings or flatlets. The first respondent resides in one of these flatlets. Two of the other flatlets are let out to "full-time" tenants (the papers do not disclose the

duration of these rental agreements). No part of the rental paid by these tenants is paid over to the remaining three brothers. The applicants and the second respondent do not reside on the property.

3. The relationship between the parties is strained. It appears from the papers that the first respondent is not paying any rental in respect of his occupation of a flatlet on the property, despite an arrangement to the effect that he would pay a sum of R4 500,00 per month. There is currently litigation pending between the applicants and the first respondent in the Hermanus Magistrate's Court for the payment of the arrear rental.

4. During 2005 the second respondent encumbered his share of the property with a mortgage bond in the amount of R300 000,00, which he used for his own benefit. Whilst the second respondent is solely liable for repaying the bond, all four of the co-owners signed personal surety in respect thereof. The other co-owners are thus at risk should the second respondent fail to make the bond repayments. It seems that he has in fact not been able to service the bond. There is a dispute on the papers regarding which of the parties have been making payments on the bond. I do not have to decide which version is correct, but this dispute is indicative of the seriousness of the problems facing the co-owners.

5. The applicants no longer wish to remain co-owners of the property as the parties are incapable of making decisions in respect thereof, and it has become a financial burden. The first applicant and first respondent accuse each other of being the cause of the fraught relationship. One of the disputes relates to the maintenance of the property – each of them says that he is the one responsible for maintaining it and for paying the municipal rates and taxes. Fortunately, I do not have to decide who is to blame for the state of affairs. It is common cause on the papers that the parties' co-ownership of the property should be terminated. What remains in dispute is when such termination should take place. The applicants want the property to be sold immediately.

6. The first respondent opposes the application, whilst the second respondent does not. The second respondent has not delivered any affidavit in these

proceedings, despite the fact that the first respondent refers throughout his affidavit to the second respondent's alleged agreement with the course suggested by the first respondent.

The facts considered in the context of the principles underlying the termination of joint ownership

7. Where property is owned in joint ownership, each co-owner has an undivided share in such property, and a right to share it.[1] The various shares need not be equal (although, in the present matter, they are). Every co-owner is entitled to use the joint property reasonably and in proportion to his or her share. Each co-owner is entitled to his or her share of the profits derived from the property, such as rental received in respect of it. Each co-owner is obliged to account to the other (and bears the onus of proving that he or she is released from the duty to account).[2]

8. As a general rule, each co-owner is entitled to have the co-ownership terminated with the *actio communi dividundo*,[3] as no co-owner is obliged to remain such against his or her will. A party claiming the termination of co-ownership must allege and prove the following:

8.1. The existence of joint ownership.

8.2. A refusal by the other co-owner to agree to a termination of the joint ownership, an inability to agree on the method of termination, or an agreement to terminate but a refusal to comply with the terms of the agreement.

8.3. Facts upon which the court can exercise its discretion as to how to terminate the joint ownership. Generally, the court will follow a method that is fair and equitable to all of the parties[4] taking into account the particular

[1] See the discussion in Badenhorst *et al Silberberg and Schoeman's The Law of Property* (5ed, LexisNexis) at pp 133-136 ("Silberberg and Schoeman").
[2] *Pretorius v Botha* 1961 (4) SA 722 (T) at 724F.
[3] *Robson v Theron* 1978 (1) SA 841 (A) at 854G-857E.
[4] *Pretorius v Botha supra* at 726D-E.

circumstances, what is most advantageous to the parties, and what they prefer.[5]

9. According to Silberberg and Schoeman[6] "*there are certain indications that a court may postpone a partition if it is uneconomical or otherwise detrimental to the interests of the co-owners as a whole, but all such remarks are only* obiter dicta *and it remains to be seen whether a court will in fact refuse, at least for the time being, a co-owner's demand for partition. For, if the co-owners cannot agree on the manner in which the property is to be divided among them, the court will make such order as appears to be fair and equitable in the circumstances.*".

10. It is common cause on the papers that the comparable average sales price for the property is R2 million. The first applicant suggests that the property be marketed at between R2,3 million and R2,5 million. This is based on a valuation dated 9 February 2022 provided by Greeff Christie's International Real Estate, who is of the view that it is not in the family's best interests to spend additional money on renovating the property. The property is situated in an area bordering the nearby informal settlement, and in which property prices are steadily declining as a result of increased urban decay.

11. The property was put up for sale in September 2020 at a price of R2,6 million. An offer was received for R2,2 million, but the first respondent refused to accept it and took the property off the market prior to it being listed for a period of three months.

12. The first respondent agrees with the applicants that the property be sold and the co-ownership be terminated, but disagrees as to when this should be effected. The reason for the disagreement is that the first respondent believes that, with various repairs and renovations to the property, a better purchase price may be obtained. To effect the renovations, the first respondent requires a tenant to be placed in the main house of the property and to use the rental received as a result to fund the improvements. I point out that it is not disputed on the papers that the

[5] *Robson v Theron supra* at 855C-E.
[6] At p 135.

parties did attempt to rent out the main house in December 2020 already. At the time, the first respondent objected thereto, stating that the house was not ready for occupation.

13. The first respondent nevertheless now suggests that a tenant be obtained within a period of, say, six months. Should no tenant take up occupation, then the property may be sold. Should a tenant be secured, then a further period of six months should be allowed for the various improvements to the property to be made.

14. The improvements that he has in mind are the following:

Improvements required in order to render the main house rentable:

14.1. Find the reason for the damp and mouldy wall in the main bedroom. Once that is dry, the wall must be plastered and painted. The first respondent believes that the cause of the damp is faulty gutters.

14.2. Clean, paint and seal the drain cover.

14.3. Replace the electric geyser in the main house.

14.4. Paint or tile the steps to the main house.

14.5. Varnish the floors at the entrance, the window frames and the wooden doors.

14.6. Fix the LED wiring.

14.7. Fix the back porch light.

14.8. Fix or erect a wooden partition for the tumble dryer.

14.9. Secure a wooden shelf.

14.10. Install a post box.

14.11. Sort out the alarm system.

14.12. Adjust the electric latch on the front gate.

Repairs in preparation for sale

14.13. De-rust and paint the solar panel frame.

14.14. Dress the lawn.

14.15. Wood-chip the flower beds.

14.16. Secure the ramp at the parking aby.

14.17. Lift the paving in the parking area, level the substrate, and re-

lay.

14.18. Repair the main parking electric gate.

14.19. Install a washing line for the lower flatlet.

14.20. Repair the kitchen door in the lower flatlet.

14.21. Repair the courtyard door to the lower flatlet.

14.22. Paint the stairs to the upper flatlet.

14.23. Replace the electric metre in the upper flatlet.

14.24. De-rust and paint the security gates to the side flatlet, the lower flatlet and the main house, as well as the courtyard gate the main house.

14.25. Champfer and paint the wooden courtyard gate.

14.26. Replace the pressure gauge on the irrigation surface pump.

15. It is immediately apparent that these repairs are relatively minor and some are merely cosmetic.

16. The first respondent argues that these improvements will increase the property's market value to R3,2 million: ".. *the property can be marketed for at least R3 200 000.00. … with improvements, this amount could at least be justified*". He relies in this regard on a valuation dated 25 May 2021 from Redz Etc. Realtors, which indicates that an estimated fair market value for the property would be R2,8 million. According to the first respondent, "*this price can only be achieved once the improvements have been effected"*. That valuation does not, however, consider any improvements to the property and therefore does not support the contention that the proposed renovations will materially increase the market value.

17. The first respondent's motives may be good: he states that he does not seek to hold the applicants to their joint ownership of the property indefinitely, but simply seeks an order that will result in the maximum yield from the sale for all of the parties. Nevertheless, I do not see how the repairs suggested by the first respondent (having regard to type of repairs) will result in the drastically improved selling price he is seeking to achieve.

18. The first respondent does not state how much the suggested repairs will cost, or who will effect them. He does foresee that a rental of about R8 300,00 per month

can be charged in respect of the main house. This means that, on his version, renovations valued at R49 800,00 (much of which will have to be done prior to placing a tenant in the main house) will result in a drastic increase in the market value of the property. He does not indicate how the initial repairs (readying the house for a tenant) are to be paid for. Given the fraught relationship between the parties, all of these issues will no doubt lead to further disputes.

19. At its core, and given the nature and probable cost of these renovations compared to the envisaged increase in market value of almost R900 000,00, the first respondent's suggestion is clearly impractical and untenable, and I do not accept it on the papers. As appears from the valuation suggested by Greeff, the property "*needs a considerable amount of money spent on it to bring it back to its former glory. With this said, the area historically does not carry vey high prices, so any potential buyer would have to bear this in mind so as not to over-capitalise*".

20. I am, in the circumstances, of the view that the applicants have made out a proper case for the termination of co-ownership without delay.

21. The parties are in agreement that no-one of them wishes to buy over any of the other shares in the property. It seems therefore that a sale on the open market is the best way forward, with a back-up arrangement in the event of no offer being received.

Costs

22. The first respondent argued that the applicants should pay the costs of the application even if they are successful, because they failed to submit a notice in terms of Rule 41A together with their application. Had such a notice been given, the first respondent would have been willing to mediate and the litigation would not have been necessary. This argument was raised for the first time in oral argument at the hearing of the application.

23. The applicants admittedly failed to submit the required form. As stated in the

case of *M N v S N*[7] I do not wish to be understood as underestimating the value of mediation and the importance of compliance with the rule. Nevertheless, the first respondent's legal representatives apparently also overlooked it, because the first respondent did not, when giving notice of opposition or when delivering his answering affidavit, file the similar notice required from a respondent in terms of Rule 41A(2)(*b*). There is no statement under oath from the first respondent that he would have wanted the matter to be referred to mediation.

24. It appears, moreover, from the papers that various attempts have been made by the applicants since 2020 to terminate the co-ownership by agreement. The first respondent does not deny that these attempts were made, but says, without elaboration, that they were "unreasonable" and that he has always maintained that the property should be renovated prior to being put up for sale. He reluctantly agreed to the property being marketed in September 2020, but declined to accept an offer that had been made at the time.

25. It seems to me that the first respondent has been steadfast in his refusal to consider any proposal other than his own. With or without a Rule 41A notice, he could have sought to resolve the dispute upon receipt of the application, or at any stage thereafter.

26. In the circumstances, I am of the view that the general rule in relation to costs should be adhered to, and that costs should follow the event.

Order

27. In the circumstances, the following order is granted:

27.1. The parties' co-ownership of the immovable property situated at Erf [....] (3[…] R[…] Road), Westcliff, Hermanus ("the property") is terminated.

27.2. The property shall be offered for sale on the open market within one

[7] (10540/16) [2020] ZAWCHC 157 (13 November 2020) at para [10].

month of the date of this order, at a price of not less than R2 000 000,00 (two million rand).

27.3. In the event of no offer in the amount of R2 000 000,00 or more being received within a period of six months of the date of this order (and in the event of a lower offer being received, the parties being unable to agree on the acceptance of such lower offer) the property shall be sold by public auction at a reserve price of R1 750 000,00 (one million seven hundred and fifty thousand rand).

27.4. The parties shall sign all such documentation as required in order to conclude the sale agreement and to effect transfer of their undivided shares of the property into the purchaser's name. In the event that any of the parties fail to sign such documentation upon request, the Registrar of the High Court shall be entitled to sign such documentation on such parties' behalf.

27.5. Pending the sale of the property, the second respondent shall continue to be responsible for payment of the monthly bond instalments over his share of the property.

27.6. The parties shall be entitled to payment of the net proceeds from the sale of the property in equal shares upon registration of transfer into the name of the purchaser, provided that the amount outstanding on the existing bond registered over the second respondent's share of the property, including the costs of cancellation of such bond, shall be paid from the second respondent's share of the net proceeds.

27.7. The net proceeds of the sale of the property shall be the selling price of the property, less the total of the following expenses if incurred, namely:

27.7.1. the commission due to the estate agent who was the effective cause of the sale, alternatively, should the property be sold on public auction, the auction fees payable in respect of the sale;

27.7.2. the costs of obtaining an entomologist's and electrician's certificate;

27.7.3. the cost of obtaining a plumbing certificate;

27.7.4. the costs of obtaining a rates clearance certificate;

27.7.5. any other costs necessary in order to conclude the sale of the property.

27.8. The applicants may appoint the conveyancing attorney who shall give effect to the transfer of the property.

27.9. The first respondent shall pay the costs of the application.

P. S. VAN ZYL
Acting judge of the High Court

HEARING DATE: 15 March 2022

Appearances:

Counsel for the applicants: B. Brown, instructed by Van Niekerk & Jansen Van Rensburg Attorneys.

Counsel for the first respondent: C. Tait, instructed by Vanderspuy Cape Town