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

**Case number: 13142/2022**

In the matter between:

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| **Z[...] I[...]** | Applicant |
| and | |
| **W[...] I[...]** | First respondent |
| **THE REGISTRAR OF DEEDS, CAPE TOWN** | Second respondent |

**JUDGMENT DELIVERED ON 9 MARCH 2023**

**VAN ZYL AJ:**

**Introduction**

1. This is an application based on the *actio communi dividundo* for the termination of the parties' joint ownership of the immovable property known as Erf [...], M[...] P[...], situated at C[…]C[…], W[…], M[...] P[...] ("the parties" being the applicant and the first respondent). The sole issue in dispute is how the proceeds of the property are to be divided between them.

2. The parties purchased the property jointly in 2005 after they were married in terms of Islamic law. They had two children. The property served as the family home until the parties' divorce in 2015. At the time of the divorce the parties did not discuss what would happen with the property, but the applicant

moved out in early December 2015 to live elsewhere. The first respondent continues to reside on the property.

3. The need for the termination of the parties' joint ownership is common cause on the papers. In his answering affidavit the first respondent states his case as follows:

> "*I appreciate that the immovable property has to be sold, or I purchase the share of the Applicant. I, however, do not feel it is fair, just or equitable that the Applicant receives half the equity in the immovable property upon termination of ownership. I feel that considering the she contributed Zero Rand towards the immovable property and benefited from it since we moved into it, she is entitled to 20% of its equity. Not 50% as she claims."*

4. The applicant contends that the proceeds should be shared equally between the parties. The first respondent, as appears from the quote above, claims the lion's share of the proceeds, as he, so he submits, paid (*inter alia*) the monthly mortgage bond instalments in respect of the property over the years.

**The principles underlying the termination of co-ownership**

5. There is no dispute between the parties as to the applicable legal principles. Where property is owned in joint ownership, each co-owner has an undivided share in such property, and a right to share it (see the discussion in Badenhorst *et al Silberberg and Schoeman's The Law of Property*[1]). The various shares need not be equal (although, in the present matter, they are).

6. Every co-owner is entitled to use the joint property reasonably and in proportion to his or her share, and 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

[1] 5ed, LexisNexis, at pp 133-136.

he or she is released from the duty to account (see *Pretorius v Botha*[2]).

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

   7.1 The existence of joint ownership.

   7.2 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.

   7.3 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 (*Pretorius v Botha*[4]) taking into account the particular circumstances of the matter, what is most advantageous to the parties, and what they prefer (*Robson v Theron*[5]).

8. 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.*".

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2 1961 (4) SA 722 (T) at 724F.
3 1978 (1) SA 841 (A) at 854G-857E.
4 *Supra* at 726D-E.
5 *Supra* at 855C-E.
6 At p35.

9. In *Robson v Theron supra* it was held at 857C-D that the action may also be used to claim as ancillary relief payment in respect of the fulfilment of personal obligations relating to profits enjoyed or expenses incurred in connection with the joint property. A court has a wide equitable discretion in making a division of joint property.

10. How then should the Court exercise its discretion in the present case?

**The parties' contentions as regards their respective contributions**

11. The first respondent explains, by way of background, that he had initially wished to purchase the property in his own name. It was on the market for R180 000,00. He did not however qualify on his own for a mortgage bond in that amount. He and the applicant thus agreed that they would purchase the property jointly, but that the first respondent would be liable to pay the bond payments in respect thereof.

12. It was further agreed informally between the parties that the property would on their death (or on the first respondent's death – there is a dispute between the parties in this respect) be bequeathed to their children. The agreement was never formalised and any intention to be bound thereby appears to have been abandoned by both parties. The children are currently 18 and 20 years old, respectively. They do not lay claim to the property.

13. As previously mentioned the property served as the family home and the applicant moved out upon the parties' divorce in 2015. The applicant explains that she is currently residing at her parents' property. She has not been able to purchase another property as she does not qualify for a mortgage bond because she is still a registered co-owner of the parties' property and liable for the bond registered over the property.

14. In 2016, the applicant was informed by a neighbour that the property was for sale. Nothing came thereof, and the first respondent denies that the property was ever for sale.

15. In May 2022 the applicant's attorney sent a letter to the first respondent, indicating that the applicant did not wish to remain co-owner of the property. It was suggested that the property be sold on the open market and the proceeds divided between the parties in equal shares. As an alternative, the first respondent was invited to purchase the applicant's undivided half-share of the property. The letter was served by the Sheriff on the first respondent personally, but no response was received thereto.

16. This application was instituted as a result of the first respondent's failure to respond to the applicant's suggestions.

17. A dispute of fact has arisen on the papers as regards the parties' respective financial contributions towards the property over the years.

18. The first respondent contends in his answering affidavit that, as he paid for all expenses in relation to the immovable property, the applicant should only be awarded 20% share in the immovable property as he "feels" that it would be unfair to allocate more to her.

19. This, he submits, is because he continued to support the family, paid the mortgage bond and school fees, "*and so on*". The applicant would "*occasionally*" use her money towards purchasing some food and clothing for the minor children. Most of her income was used to purchase personal items for herself. The first respondent says that none of the applicant's income was used towards the upkeep and maintenance of the immovable property.

20. When the applicant vacated the property in 2005, the first respondent continued to pay for all of the expenses in relation to the upkeep and maintenance of the property. He also continued paying the bond, rates and

taxes, electricity and so forth. The first respondent alleges that he has spent R77 400-00 on improvements to the property since 2006. He did maintenance work on the property every few months since 2007, at his cost. The work included painting the walls, fixing doors, the installation of new windows, fixing wall cracks, attending to plumbing, the replacement of geysers and other appliances, and so forth. This retained the value of the property. He also attached an invoice dated 13 October 2013 in the sum of R57 000-00 for the installation of doors and gates, and paving done at, which, so he says, the applicant did not contribute towards.

21. The applicant contends that the first respondent's argument ignores not only her own financial contributions to their erstwhile common household and to the property, but also the contributions that the applicant made during the course of a fourteen-year marriage as a homemaker, wife and mother. The applicant points out that she not only made financial contributions in respect of the immovable property and the household, but she contributed on a more personal and emotional level by fulfilling her role as a mother to the parties' children and spouse to the first respondent.

22. Those contributions enabled the parties to obtain a mortgage bond in respect of the immovable property and allowed the first respondent to work full-time and earn a salary so as to pay the mortgage bond instalments in respect of the immovable property.

23. According to the applicant it is not correct that the first respondent paid for all expenses in respect of the property. She indicates that, in addition to various other financial contributions that she made to the parties' household, she also on occasion paid for water, electricity, rates and taxes. She obtained part-time employment during the course of the parties' marriage to ensure that she would be available to see to the children's needs, both personal and scholastic. Had it not been for this, she would have secured full-time employment, earning a more substantial salary.

24. She managed the household on her own. Apart from the monthly mortgage bond instalments pertaining to the immovable property paid by the first respondent, the applicant paid for items such as the school fees of the parties' one daughter, as well as groceries, medical expenses and clothing for the children and herself. If she did not have sufficient funds to meet these expenses, she relied on her parents for financial assistance.

**Evaluation**

25. I do not think that the dispute about who paid for what in the course of the marriage is fatal to the applicant's case. This matter is one that can be determined on the papers. Accepting the first respondent's version[7], it is clear that, by the first respondent's own acknowledgment, the applicant contributed financially (albeit in a lesser way than the first respondent) and otherwise to the common household.

26. The Supreme Court of Appeal has stated in *Bezuidenhout v Bezuidenhout*,[8] in the context of a redistribution order in terms of section 7(3) of the Divorce 70 of 1979, that the traditional role of a housewife, mother and homemaker should not be under-valued because it is not measurable in terms of money.[9]

27. The first respondent states that it cannot be argued that, because he is a male, he did not contribute emotionally in other respects towards the rearing and parenting of the children. Many mothers and fathers work part-time and full-time and contribute just as much towards the upkeep of the home and the rearing of the children as the other parents. There is nothing on the papers to suggest that the first respondent did not assist the children with their homework and extramural activities, staying up late nights for them, caring for and guiding them "*just as much or more*" than the applicant. As any devoted husband, the first respondent also would have provided an emotional and

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7 On the basis of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.
8 2005 (2) SA 197 (SCA).
9 At para [28].

parental contribution toward the applicant and their children in his role as father and husband.

28. I have no doubt that that was the case, and I do not regard the papers as downplaying the first respondent's role as husband and father. His contribution in this respect is, of course, also not measurable in money.

29. It has to be borne in mind that the joint ownership of the property in this matter does not stem from a commercial transaction, where the transaction can be unravelled with mathematical precision with reference to the financial input of each co-owner. The property in the present matter was purchased and owned by the parties in the course of a marriage relationship. The point of departure was that both parties would not only make financial contributions to their joint household and expenses, but would also provide a nurturing environment for the well-being of their marriage and their children.

30. That the value of each party's share of the proceeds cannot be unravelled as in the case of a commercial transaction is borne out by the fact that the first respondent is unable to explain how he arrived at his 20% allocation. He has not delivered a counter-application and has given scant (if any) proof in support of his calculations regarding improvements done over the years. It is virtually impossible to quantify each party's combined financial and emotional contributions to the household in the circumstances of a marital relationship that lasted fourteen years, especially in the absence of detailed and sufficient evidence in that respect.

31. The fact that the first respondent made improvements to the property since the parties' divorce does not, in my view, entitle him to a greater share of the proceeds. He alleges that the applicant did not contribute to those improvements – but that is because the applicant never knew that the improvements had been done. There is no evidence on record to the effect that the first respondent informed the applicant of his intention to do renovations or improvements, such as co-owners are generally obliged to do

prior to effecting changes to the property (see, for example, *Erasmus v Afrikander Proprietary Mines Ltd*[10]). The applicant did not have any knowledge of improvements done at the property prior to the delivery of the answering affidavit.

32. The same applies to the payment of the bond, rates and service charges. The first respondent has had the exclusive use and benefit of the property since December 2015, and was the consumer in relation to the use of the property and the municipal services rendered thereat. The applicant had to obtain alternative accommodation. The applicant highlights that she is currently in a position where she is the owner of a half share in an immovable property which she cannot use or benefit from, whilst the owner of the other half of the immovable property has all the benefit. The first respondent never paid or tendered any form of rental to the applicant.

**Conclusion**

33. On consideration of the matter as a whole, I am of the view that the most equitable outcome in the particular circumstances is that the net proceeds of the sale of the property be shared by the parties on an equal basis.

**Costs**

34. As a general rule, the party who succeeds should be awarded costs. The applicant's counsel argued that, in any event, the first respondent should pay the costs because of his failure to attempt a settlement of the matter prior to the institution of the application.

35. The present matter is, however, despite the parties' divorce, akin to a matrimonial dispute that had not previously been determined. In the circumstances I am of the view that each party should pay their own costs.

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[10] 1976 (1) SA 950 (W) at 960C-E.

**Order**

36. In the premises, it is ordered as follows:

36.1 The parties' co-ownership of the immovable property known as Erf [...] M[...] P[...], situated at C[…] C[…], W[…], M[...] P[...], ("the property") is terminated.

36.2 The property shall be offered for sale on the open market within one month of the date of this order, at its current reasonable market value, and both the applicant and the first respondent shall be entitled to market the property.

36.3 In the event that the property is not sold within 4 (four) months of the date of this order, the property shall be sold by public auction to the highest bidder.

36.4 The first respondent shall co-operate in the sale of the property as described in this order, including, but not limited to, providing access to the property at all reasonable times to estate agents and prospective purchasers for viewing purposes.

36.5 The parties shall sign all such documentation and take all steps 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 Sheriff of the High Court in whose jurisdictional are the property is situated shall be entitled to sign such documentation or take such steps on such parties' behalf.

36.6 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.

36.7 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:

36.7.1 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;

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

36.7.3 the cost of obtaining a plumbing certificate;

36.7.4 the costs of obtaining a rates clearance certificate;

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

36.8 The applicant may appoint the conveyancer who shall give effect to the transfer of the property.

36.9 Each party shall pay his or her own costs of the application.

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

**Appearances**:

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| **For the applicant:** | R. Steyn, instructed by Bellingan Muller Hanekom Inc. |
| **For the first respondent**: | M. Abduroaf, instructed by Aniel Jeaven |

Attorneys