

SOUTH AFRICA / JUDGMENT

B.G.V.R v A.M.B (966/2014) [2015] ZAECPEHC 35 (22 May 2015)

[2015] ZAECPEHC 35

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

E Revelas

CASE / FILE NUMBER

966/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION – PORT ELIZABETH

Case

No: 966/2014

In

the matter between:

B.G.

V.

R.

Applicant/Defendant

and

A.

M.

B.

Respondent/Plaintiff

JUDGMENT

REVELAS J

- [1] This judgment concerns an exception. The parties hereto were married to each other until their marriage was dissolved in 1992 when the applicant sued the respondent for a divorce. A settlement agreement was entered into by the parties upon the dissolution of their marriage and was incorporated in the decree of divorce handed down in this court on 22 June 1992 by his Lordship Mr Justice Kroon. Clause 3(b) of the settlement agreement between the parties provided as follows:

“Die partye kom ooreen dat die roerende eiendom geleë te Greyling Straat 28, Despatch, ‘n bate van die gemeenskaplike boedel uitmaak. Die partye kom voorts ooreen met betrekking tot gemelde onroerende eiendom dat dit verkoop mag word, indien die eiser so besluit. Indien die eiendom verkoop word sal die netto opbrengs daarvan gelykop verdeel word tussen die partye, nadat alle kostes aangegaan met betrekking tot die verkoop van die eiendom gedelg is, wat sal insluit die uitstaande bedrag op die koopsom en verkoopsagentkommissie en enige ander aanverwante kostes met betrekking tot die verkoop van die eiendom” (emphasis added).

- [2] The respondent, as plaintiff, in pursuance of her half share of the property referred to in clause 3(b), instituted an action against the applicant wherein she claimed orders to the effect that a receiver be appointed to administer:

- (a) the termination of the joint ownership of the immovable property referred to in the settlement agreement (“the property”);
- (b) the sale of the property and;
- (c) the division of the proceeds of the sale.

- [3] I will refer to the parties as they are referred to on the pleadings in the action for the appointment of a receiver.

- [4] The applicant raised an exception contending that:

“It is clear from the documents attached to the plaintiff’s particulars of claim as “A1” to “A5” that no obligation was created in the deed of settlement that would oblige the plaintiff (sic) to sell the property”.

- [5] The applicant argues that in the particulars of claim, the respondent relies on a term of an agreement which precludes the respondent from claiming what she does. Therefore ex facie the allegations made by the respondent, and the document on which her cause of action may be based, the claim is bad in law and does not sustain a cause of action.

- [6] In terms of Uniform Court Rule 23(1), a exception may be brought on two grounds:

- (i) Where a pleading is vague and embarrassing.

(ii) Where a pleading lacks allegations to sustain a cause of action.

- [7] An exception is aimed at avoiding unnecessary evidence being led at the trial (*Barclay's National Bank Ltd v Thompson* 1989(1) SA 547 (A) at 553. The excipient (the applicant) bears the onus of proving that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed (*Francis v Sharp* 2004(3) SA 230 (C) at 233). In determining whether a plaintiff's pleading are excipiable, a court must assume the correctness of the allegations in the pleading. (*Marney v Watson and Another* 1978(4) SA 140 CPA at 144F).
- [8] In the respondent's particulars of claim, she cites clause 3(b) of the deed of settlement cited above and alleges that the defendant, after the passage of the very considerable period of time, has decided not to sell the property. The respondent submits that even though the applicant may be vested with a type of discretion to sell the property as is evidenced from the language used in clause 3(b), he is nonetheless obliged to exercise that discretion *arbitrio boni viri* or in accordance with the judgment ordinarily displayed by a person of good character.
- [9] In the settlement agreement (clause 3(b)) which confers the aforesaid discretion on the applicant, the parties also agreed that the property is an asset of their joint estate. They are co-owners of the property. As such, one of them is entitled to sue for partition of the common property (the *actio communi dividundo*), provided the plaintiff seeking partition, first endeavoured to reach agreement on the matter. first. The respondent has done just that and that much is apparent from her pleadings. Courts also have a wide discretion to effect an equitable partition amongst co-owners and usually endeavour to devide the property physically between the co-owners in accordance with the value of the property and each co-owners' share (LAWSA, Volume 27, CG Van Der Merwe: Things (Ownership) at pages 351, paragraph 413 and the cases and authorities cited therein). That being the case, her claim is not unequivocally precluded because of the wording of clause (3) the exception raised is misconceived.
- [10] Conflicting interpretations may indeed arise as to what was intended by clause 3(b) of the settlement agreement, but in my view, the questions which may arise in that regard are to be determined at the hearing of the matter and are not capable of being disposed of by way of exception. The respondent's pleadings are not excipiable. Assuming for the moment the correctness of the allegations therein, she has clearly demonstrated a cause of action that is not precluded from claiming the relief sought therein.

[11] Accordingly the exception is dismissed with costs.

E REVELAS

Judge of the High Court

Obo the Plaintiff:

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136 Cape Road

Mill Park

Port Elizabeth

Obo the Defendant:

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