

SOUTH AFRICA / JUDGMENT

Bosman v Hoffmann (48330/2021) [2022] ZAGPPHC 588 (12 August 2022)

[2022] ZAGPPHC 588

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

48330/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

Number: 48330/2021

REPORTABLE:

YES / NO.

OF

INTEREST TO OTHER JUDGES: YES / NO.

REVISED.

12

August 2022

In

the matter between:

ANDREW

MURRAY BOSMAN

Plaintiff

and

MARINEL

HOFFMANN

Defendant

JUDGMENT

NYATHI J

Introduction

- [1] This is an application whereby the Applicant seeks the termination of the joint ownership of an immovable property known as [...] Street, Constantia Park (“the property”), together with ancillary relief relating to the manner of the division. The Applicant and the Respondent are joint and equal registered owners of the property. The Applicant invokes the *actio communi dividundo* to this end.
- [2] The application is opposed by the Respondent, who raises *res judicata* as a point in limine.
- [3] The Respondent alleges that a dispute which formed the basis of an action instituted by the Applicant against her is the same issue raised in this application. This dispute, she asserts, was resolved between the parties by way of a settlement agreement which was made an order of court. She submits that Applicant has not made out a case in his founding affidavit, which is deserving of the relief sought.

Background

- [4] The parties were in a romantic relationship after the Respondent’s divorce from her former husband. They soon agreed to stay together and decided to buy a property and obtained a joint bond from Standard Bank to finance the property. The relationship later soured and the parties drifted apart.
- [5] The Applicant moved out of the property and rents a residence somewhere else. The Respondent resides in the property and continues her business of a kindergarten within a portion of the property as was the case from the inception.
- [6] On or about 15 November 2016 the Applicant issued summons against the Respondent with two claims. Claim A was for the termination of joint ownership of the property and Claim B was for payment of an outstanding amount due and owing to the Applicant in terms of an agreement between the parties.
- [7] On 29 April 2020 the parties signed a settlement agreement dealing with both Claim A and Claim B. Claim A was settled on the basis that the Applicant's 50% share in the property would be sold to a certain Mr Francois Swanepoel (‘Swanepoel’), and Claim B was settled on the basis that the Respondent would pay an amount of R180 554.03 to the Applicant.
- [8] The settlement agreement was made an order of Court on 13 May 2020.
- [9] The Respondent paid the amount of R180 554.03 to the Applicant.

- [10] Swanepoel did not purchase the Applicant's 50% share in the property. This is admitted by the Respondent.
- [11] On 6 August 2021 Swanepoel cancelled his home loan application and advised the parties that it is not as simple as purchasing a half share in the property for R950 000.00; Standard Bank does not want to release the Applicant as debtor and replace him with Swanepoel, as the Applicant and the Respondent are co-debtors for the entire amount on the outstanding bond. Swanepoel and the Respondent must apply for a bond in both their names for the full amount and the Respondent will not qualify for same. These reasons are not disputed by the Respondent.
- [12] Respondent alleges that a suspensive condition could thus not be met for the sale to go through.

Res judicata

- [13] For a defence of res judicata to succeed, the following requirements should be proved:

13.1 There should be concluded litigation;

13.2 Between the same parties;

13.3 Concerning the same issue;

13.4 Based on the same cause of action.

- [14] Respondent argues that the settlement agreement constitutes concluded litigation as it was made a court order.
- [15] In response to the issue of res judicata, the Applicant states that the suspensive conditions in the settlement agreement and the offer to purchase have not been complied with and that the agreement can therefore not be enforced. Res judicata does therefore not apply as the settlement agreement is void ab initio.
- [16] In *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 432, a suspensive condition (or condition precedent) was described as a provision which suspends the operation of the obligation until the condition is fulfilled. Coincidentally, the example given in Wille's Principles[1] is "... A agrees to purchase a house on condition that she obtains a mortgage bond."
- [17] Clause 1.6 of the settlement agreement is a suspensive condition in that it states:
- "The parties accept that the sale of the Plaintiff's half share in the Property is subject to the conditions set out in the offer to purchase and subject to the approval of Standard Bank, the mortgage bondholder."*
- [18] Clause 11.1 of the offer to purchase is a further suspensive condition in that it states:

“This agreement is subject to the suspensive condition that the PURCHASER obtains written approval of a Mortgage bond from a financial institution in the amount of R950000-00 (Nine Hundred and Fifty Thousand Rand Only) within 30 days of the signature date hereof, failing which this agreement will be of no force and effect.”

[19] The 30 days lapsed on 04 June 2020.

[20] Standard Bank did not give its approval for the transaction and Swanepoel could thus not provide the requisite written approval of a mortgage bond.

[21] Without (1), the approval of Standard Bank and (2), the written approval of a mortgage bond from a financial institution, no obligation arises between the parties.

[22] It is important to note that Swanepoel cannot be compelled by way of litigation or otherwise, to fulfil these suspensive conditions.[2]

[23] The suspensive conditions were not fulfilled and consequently the settlement agreement is void ab initio and cannot support a defence of res judicata.

[24] The point in limine based on res judicata is accordingly dismissed.

Actio communi dividundo

[25] “No co-owner is obliged to remain a co-owner against his or her will. In the absence of an agreement to the contrary, any co-owner may demand partition of the common property at any time.”[3]

[26] Similar sentiments are expressed in Delpoort[4] as follows: “ A joint owner cannot be compelled to remain a joint owner against his wishes. This means that every joint owner is at all times entitled to demand a termination of the joint ownership, except if the parties had agreed not to effect a division until the expiry of a certain period. An agreement never to terminate the joint ownership is null and void.”[5]

[27] A termination of joint ownership can occur either voluntarily or pursuant to a Court order. This is the essence of the actio communi dividundo.

[28] An applicant for relief under the actio communi dividundo need to allege and prove that:

- (a) he is a co-owner;
- (b) he wishes to terminate his co-ownership; and
- (c) the parties cannot agree as to the method of division.

[29] The Court has a wide discretion to effect an equitable partition. Where a division is not practical, the Court can award the property to one joint owner on the basis that he must compensate the other joint owner for his or her shares. Where the methods of partitioning appear to be impractical, the Court may order the property to be sold by public auction and the proceeds to be shared among the joint owners.

- [30] The Respondent states that she stands to suffer great economic and financial prejudice should she be forced to dispose of her half share in the property. This includes relocation costs of her business, rental increases and that she may be forced to close her business should she not find a suitable property in the same area where the property in question is. The Respondent is of the view that the Applicant is not suffering any prejudice.
- [31] This is not a defence to a claim for the termination of joint ownership. At best, these are circumstances for the Court to consider when determining the mode of division. In circumstances where the Respondent cannot afford to take over the ownership of the property in its entirety, these circumstances cannot be considered relevant.
- [32] The Respondent's circumstances cannot serve as a tool to shackle the Applicant to the joint property in perpetuity. The romantic relationship was the glue that held the parties together. With its end, the parties ceased living together. It is that the parties ought to make a clean-break with their past.
- [33] The fact that the parties did make a serious effort to get a purchaser of the Applicant's share of the property, counts more in favour of a liquidation of the property with the proceeds shared, less any proven claims by either party. The application should succeed.
- [34] I accordingly issue the following order[6]:
1. The parties' joint ownership of the property situated at [...] [...] Street, Constantia Park ('the property') is terminated in terms of the *actio communi dividundo*.
 2. The parties should through their attorneys, appoint a properly qualified individual or institution to serve as receiver and liquidator with the following powers and functions:
 - 2.1. To sell the property to either of the parties for a purchase price that he deems to be the true market price of such property;
 - 2.2. To sell the property either by public auction or private treaty, on such terms and conditions, as they seem to him most beneficial;
 - 2.3. To afford both parties the opportunity to make presentations to him about any matter relevant to these duties and to order the manner in which the proceeds of the joint property should be divided;
 - 2.4. To sell the property provided that he has given both parties four weeks' notice of his intention to do so;
 - 2.5. To sign any documents as may be necessary to effect transfer of the property sold from the persons in whose name it is registered to the purchaser thereof;

2.6. To afford both parties personally or duly represented, the opportunity to make representations to him about the identity of any purchaser, as well as a purchase price of the property, including but not limited to:

2.6.1 The time and/or manner in which the property should be realised;

2.6.2 The price for which the property should be realised; and

2.7 To engage the services of any suitably qualified person or persons to assist him in determining the true market value of the property, and to pay such person, the reasonable fees which may be charged by him/her;

2.8 To call upon either party to produce any books, statements, invoices, records and documentation which he may reasonably require;

2.9 To pay all debts in respect of the property;

2.10 To distribute the net proceeds accruing from the sale of the property, between the parties, in equal shares, alternatively as he deems fit based on any representations made to him by the respective parties;

2.11 To be entitled to apply to the above honourable court for any further directions that he may consider necessary;

2.12 To pay the reasonable fees of the receiver as per the tariff as prescribed in the Insolvency Act and to apportion such fees between the parties, in equal shares.

3. The respondent is ordered to pay the costs of this application.

J.S. NYATHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

HEARD ON: 15 March 2022

DELIVERED:

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[1] Wille's Principles of South African Law 9th Edition p794 – F. du Bois et al.

[2] Design and Planning Service v Kruger 1974 (1) SA 669 (7) at 695C-F; Jurgens Eiendomsagente v Share [1990] ZASCA 81; 1990 (4) SA 664 (A) at 674D-675B.

[3] Wille's Principles – 9th Ed. p561.

[4] South African Property Practice and the Law – H.J. Delport 2nd edition [Service 21, 2017] – p29.

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

[6] Adapted liberally from Dosio J's order in Crawford (supra). See also CG v AG & Another 2020 (6) SA 487 (ECP).

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