

SOUTH AFRICA / JUDGMENT

Buitendag v Van Rooyen (2024/077124) [2025] ZAGPJHC 175 (17 February 2025)

[2025] ZAGPJHC 175**COURT**

South Gauteng High Court, Johannesburg

BEFORE

WJ du Plessis

CASE / FILE NUMBER

2024/077124

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Source record**THE****HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****Case****2024-077124****(1)****REPORTABLE: No****(2)****OF INTEREST TO OTHER JUDGES: No****(3)****REVISED: Yes****17****February 2025****In****the matter between:**

LUCHAN

BUITENDAG

Applicant

and

WIENANDT

RUAN VAN ROOYEN

Respondent

This

judgment has been delivered by uploading it to the CaseLines digital

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South Africa,

Johannesburg, and by emailing the attorneys of record of the parties.

The deemed date and time of the delivery are

10H00 on 17 February
2025.

JUDGMENT

DU PLESSIS J

Introduction

- [1] This case concerns the termination of co-ownership of an immovable property following the breakdown of a romantic relationship between the parties. It gives credence to the maximum *communio est mater rixarum*.^[1] The key issue is how the division of the property and expenses should occur, given the competing claims regarding financial contributions, fairness, and ancillary practical considerations.
- [2] The applicant, Ms Buitendag, and the respondent, Mr van Rooyen, were in a romantic relationship for approximately four years. Initially, they lived with Ms Buitendag's mother before moving into an apartment owned by Mr van Rooyen. In October 2020, they decided to purchase a house together with the intention of making their relationship more permanent.
- [3] The property was purchased for R1 080 000, with Mr van Rooyen paying a deposit. The balance was financed through a bond of R962 000. Mr van Rooyen also covered the transfer and bond registration costs. There was no express agreement on how expenses related to the property would be shared.
- [4] The relationship ended one month after purchasing the property, and Ms Buitendag moved out. Since then, Mr van Rooyen has remained in exclusive occupation of the house and has borne the ongoing costs, including bond repayments, rates and taxes, insurance, and maintenance. He estimates that he has spent R 611,640.87 to date.
- [5] By June 2023, Ms Buitendag requested to be released from the bond and co-ownership as her financial obligations under the bond prevented her from obtaining credit. Mr van Rooyen was reluctant to sell or transfer the property into his name due to concerns over transfer costs and uncertainty about qualifying for a bond on his own. He later proposed applying for a substitution bond but insisted that Ms Buitendag cover the associated costs. They could not agree on how the co-ownership should terminate, so they each approached attorneys for assistance.
- [6] On 6 June 2024, Ms Buitendag's attorneys proposed a settlement, offering Mr van Rooyen three options:
- a. Purchasing her 50% share at market value within three months, subject to his ability to secure financing; or
 - b. Listing the property for sale and dividing the proceeds equally after sale-related expenses;

or

- c. Selling the property by public auction and dividing any proceeds.

[7] This proposal was rejected by Mr van Rooyen's attorneys, who cited a Lightstone valuation valuating the property at R900 000, arguing that selling the property would result in a financial loss. The attorneys emailed that Ms Buitendag's proposal was thus rejected by Mr van Rooyen "with the contempt it deserves".

[8] A second settlement proposal was made, modifying the terms to:

- a. Allowing Mr van Rooyen to buy out her 50% share of the undivided property at a fair market value, conditional on securing a bond;
- b. If unable to obtain a bond, sell the property on the open market for the highest reasonable and realistic offer, with Mr van Rooyen retaining all proceeds due to his financial contributions;
- c. If no sale occurred within six months, sell the property by public auction, with Mr van Rooyen assuming the risk of any shortfall.

[9] This proposal was also rejected within 30 minutes, with Mr van Rooyen's attorneys replying "[o]ns stel voor u kliënt gaan voort met haar aksie".[2]

[10] Despite refusing the formal settlement offers, Mr van Rooyen contacted Ms Buitendag two days later, informing her that he had prepared an R1 000 000 offer to purchase for her to sign so that he could apply for a bond in his name. She requested that they communicate through their attorneys. He contacted her attorney directly, but the attorney advised that all settlement discussions

should be done through the legal representatives. Her attorneys also wrote his attorneys to inform them of the phone call. His attorneys did not reply to the email.

[11] Ms Buitendag subsequently launched this application requesting that the property be sold in the open market or by way of auction. She did not want to be liable for the costs of the transfer.

[12] Mr van Rooyen remains opposed to selling the property on the open market or by way of auction, arguing that this would result in financial loss. Since he contributed more to the purchase and upkeep of the property, he submits that he should be compensated. In his notice of motion, he states:

- a. "He will purchase the 50% undivided share with no clear indication of the price he considers fair, with Ms Buitendag paying the various transfer costs of the bond and the house into his name;

Alternatively

b. Ms Buitendag pays R305 820.43 as reimbursement for past expenses before he will agree to buy her share.”

[13] He has not submitted a sworn valuation of the property, home loan bank, or proof of any other expenses.

The law

[14] A co-owner cannot be forced to remain a co-owner where the relationship between the co-owners has deteriorated to such an extent that the relationship cannot continue.[3] In such instances, it should be terminated. The parties in this matter agree to the termination of the co-ownership. They disagree on how it should be terminated and thus approached the court for assistance.

[15] The crisp matters in contention, as set out above, are whether the property should be sold on the open market, or the 50% co-ownership share of the applicant be transferred to the respondent, and whether the applicant is obligated to cover a portion of the respondent's expenses occurred to date, or the expenses for the transfer into his name.

[16] In *Robson v Theron*, [4] the court elaborated that the *actio communi dividundo* originates from Roman law and was subsequently integrated into Roman-Dutch law, which continues to be well-established in contemporary legal practice. The *actio communi dividundo* allows co-owners to divide jointly held property and settle any financial obligations ("personal items of payment" or

praestationes personales)[5] linked to it. In other words, the *actio communi dividundo* deals with the division of the property and the adjustment of the various claims amongst the co-owners.

[6] This action applies regardless of whether one or both parties are in possession of the property.

[17] The purpose of this action is twofold: Firstly, to divide the joint property and secondly; to settle financial claims related to profits earned or expenses incurred in connection with the shared asset. A fundamental principle behind this action is that, as stated earlier, no co-owner is obliged to remain a co-owner against their will. If co-owners wish to divide their property, they can either agree on a division themselves or seek court intervention if they cannot agree.[7]

[18] When resolving co-ownership disputes, a court has a broad and equitable discretion. It considers factors such as the specific circumstances of the case, what is most beneficial for all co-owners, and their preferences. If a physical division of the property is impossible, impractical, or unfair, the court may either award the entire property to one co-owner, provided they compensate the others or order that the property be sold by way of auction, with the proceeds being divided among the co-owners.

[19] These remedies, grounded in Roman-Dutch law, have been confirmed in South African case law.[8]

[20] Robson v Theron[9] also laid the foundation for more flexibility when co-ownerships are dissolved. While Robson was concerned with a (commercial) partnership, the principles were accepted in Van Onselen NO v Kgengwenyane,[10] which was concerned with a (romantic) partnership and a residential property – similar to this case. The court in Van Onselen clarified that the law has moved away from a rigid approach regarding the division of co-ownership. Instead, the courts have a greater

equitable discretion to ensure that the outcome is fair to the parties and practical in the given circumstances. Of course, not

being strictly bound by rigid rules does not imply that this power is unlimited. Instead, it means that the traditional principle that the property should be sold at a public auction to the highest bidder is not an absolute rule but a guideline. These legal principles will guide my broad discretion in coming to a fair solution, although I must repeat Selke J, in saying that a court cannot perform miracles.[11]

[21] To return to the facts, each option (buying out of Ms Buitendag's share at fair market value or selling the property on the open market or auction) has advantages and disadvantages.

[22] On the one hand, a buy-out would allow Mr van Rooyen to retain ownership of the property while paying Ms Buitendag her undivided share. This would allow Mr van Rooyen to continue residing on the property and prevent unnecessary losses associated with a rushed sale in poor market conditions. The transaction costs may also be lower, as agent commissions and auction fees would be avoided. The disadvantages are all the uncertainties in such an approach: Mr van Rooyen's ability to qualify for a bond; disputes in the valuation process and the question of what to do with Mr van Rooyen's expenses. Thus, A fair solution would be premised on the purchase price being determined independently, Mr van Rooyen having to secure financing within a specified time, and clarity on the expenses that Ms Buitendag should pay, if any.

[23] On the other hand, a sale of the property would ensure a clean break, prevent disputes over valuation by allowing market forces to determine the fair price, and put a time limitation on how long to wait before proceeding to sell the house on auction. The disadvantages are the possibility of financial loss to both parties, the fact that Mr van Rooyen would need to vacate the property and having to wait for the property to get sold (either privately or by way of auction). There is also a risk of selling the property at a price lower than the outstanding bond, which means the parties will be liable for the outstanding amount.

[24] As alluded to, auxiliary to all this, is the issue of whether Ms Buitendag should share in the expenses that Mr van Rooyen incurred during the co-ownership. To answer this question, I distinguish between costs associated with acquiring and maintaining co-ownership, such as the initial deposit, the bond registration fees, property transfer costs, rates and taxes, and insurance.

- [25] There are also two underlying principles: Firstly, the fact that a co-owner does not reside in the property does not absolve them of the duties of (co-)ownership and the financial obligations in terms of the mortgage bond. For example, Ms Buitendag remains jointly liable for the mortgage bond, as co-ownership carries rights and responsibilities regardless of occupation. For this reason, I am not convinced that it would be entirely fair to absolve her from such responsibilities by not requiring her to pay some of the costs of establishing and maintaining the co-ownership relationship. Even more so, should Ms Buitendag benefit from the proceeds of the property sale (possible profits), it is only fair that she also contributes to certain joint ownership expenses. For instance, rates and taxes, insurance, bond registration, and transfer costs are co-ownership-related expenses and should be shared equally.
- [26] Secondly, it must be considered that Mr van Rooyen exclusively occupied the property, and some expenses incurred were due to this (exclusive) occupancy. In this instance, bond repayments function as a substitute for rent and should be borne solely by Mr van Rooyen. Similarly, routine maintenance is an ordinary cost of living and should be the responsibility of the party who benefited from the occupation, and Mr van Rooyen remains liable for that.
- [27] Accordingly, if the property is sold, 50% of the deposit, rates, taxes, insurance, and initial purchase costs should be deducted from the net proceeds before division between the parties. The bond instalments, maintenance and consumption charges should not be deducted.
- [28] As indicated above, both options have their advantages and disadvantages. It seems reasonable to give Mr van Rooyen the option to buy out Ms Buitendag, but strict timelines should be laid out to ensure that the matter does not continue indefinitely. Mr van Rooyen cannot claim the costs that can be regarded as "substitute for rent" payments (the bonds, the water and electricity consumption, and the everyday maintenance). He should also pay the costs of the transfer into his name. Ms Buitendag is liable for 50% of the expenses incurred to become co-owner and co-bondholder (i.e. the deposit, the initial transfer and bond registration costs) and the property rates and taxes. She should, however, not be liable for the transfer costs associated with transferring the house into the sole name of Mr van Rooyen.
- [29] Should the buy-out option not materialise within the stipulated time for whatever reason, then the property should be put on the open market to be sold, failing which, it should be sold by way of auction. The order will provide clear mechanisms and timeframes to which the parties will be bound.

Costs

- [30] The normal rule is that costs should follow the results. The applicant is substantially successful as the court's decision is mostly based on one of the offers she made (through her attorney) to the respondent, and what is set out in her notice of motion.

[31] Despite various attempts to settle, the matter could not be settled. The respondent's WhatsApp message to her, in which he offered to apply for a loan of R1 000 000 to take over the bond, seems genuine, but unfortunately, it was not made through the respondent's attorneys. It is unclear why his attorneys did not reply to the applicant's attorneys' email to inform them that this offer was made. These considerations would have been more relevant had the applicant persisted with costs de bonis propriis against the respondent's attorneys, for the refusal to mediate and avoid litigation. Instead, they merely asked for costs. It remains unfortunate that there was no greater effort to mediate at that stage to avoid litigation. The respondent's stance that the applicant should continue and litigate warrants a cost order against him.

Order

[32] The following order is made:

1. The joint ownership of the immovable property described as Erf 1985, Geduld Extension, Springs Registration Division IR, Gauteng, also known as 50 Hofmeyer Street, Geduld Extension, Springs, Gauteng ("the Property") is hereby terminated.
2. The respondent shall have the first option to acquire the applicant's 50% undivided share in the property, subject to the following conditions:
 - 2.1. The purchase price shall be determined by an independent valuer appointed by agreement between the parties within 30 days of this order, or failing agreement, by an independent valuer appointed by the Chairperson of the South African Institute of Valuers, with the costs for such an appointment to be shared equally between the parties.
 - 2.2. The respondent shall deduct 50% of the expenses relating to the bond registration and transfer, the deposit paid, and the rates and taxes from the buy-out price. The respondent may not deduct bond instalments, consumption charges or routine maintenance payments.
 - 2.3. The respondent must secure financing and initiate the transfer of the applicant's share within 30 days from the valuation date.
 - 2.4. Upon transfer, the applicant shall be fully released from all liabilities related to the existing mortgage bond.
 - 2.5. The respondent shall bear all transfer and bond registration costs arising from acquiring the applicant's share.
3. If the respondent does not exercise the buy-out option within 60 days, the property shall be placed on the open market for sale at a fair and reasonable market-related price on the following terms:
 - 3.1. Each party shall cooperate with the other regarding the sale, particularly with the appointment of an estate agent to sell the property at the highest and reasonable offer. If the parties cannot agree on an estate agent, each party shall appoint one.

3.2. Each party shall cooperate with the appointed estate agent(s) in the viewing of the property by any prospective purchaser, sign all such documents required and do all things necessary in order to transfer

registration of the property in the name of any purchaser.

3.3. The proceeds of the sale of the property shall first be paid to the bondholder for the amount outstanding on the mortgage bond registered against the title deed of the property.

3.4. The following expenses shall be deducted from the proceeds of the sale, if any, before division between the parties:

3.4.1. All expenses and costs incurred in the sale of the property, including estate agent's commission, if applicable.

3.4.2. The 50% of municipal rates and taxes, homeowner's insurance, and initial purchase costs (transfer and bond registration fees) that the respondent paid.

3.4.3. The bond repayments and maintenance costs shall not be deducted, as they were incurred exclusively for the benefit of the respondent.

3.5. The net proceeds after the deductions in 3.4 above shall be divided equally between the parties.

3.6. If the property is sold at a loss, the shortfall must be shared equally between the parties after the deductions in 3.4.

4. If the property remains is not sold within six months of this order, then the Sheriff of the High Court is appointed as receiver and liquidator to sell the property by way of public auction within four months of their appointment.

4.1. The liquidator shall have the authority to:

4.1.1. Sign all documents necessary to transfer the property to the purchaser.

4.1.2. Pay the bondholder the amount outstanding on the mortgage bond registered against the title deed.

4.1.3. Settle any outstanding municipal rates and taxes from the sale proceeds.

4.1.4. Deduct reasonable sale-related expenses, including auction costs and agent commissions.

4.2. The net proceeds of the auction shall be divided equally between the parties, after the deductions outlined in paragraph 3.4.

5. The respondent is to pay the cost of this application, which costs are to be taxed on scale A.

WJ du Plessis

Judge of the High Court

Gauteng Division, Johannesburg

Heard on: 12 February 2025

Decided on: 17 February 2025

For the applicants: SPM Vorster instructed by O'Donoghue & Marais Inc For the respondents K Blair instructed by JH van Heerden & Cohen Attorneys

- [1] Co-ownership is the mother of disputes
- [2] We suggest that your client continues with her action.
- [3] These principles were set out in numerous cases, such as *Prinsloo v van Niekerk* 1921 TPD 115 and *Ntuli v Ntuli* 1946 TPD 181.
- [4] *Robson v Theron* 1978 (1) SA 841 (A), references omitted.
- [5] See 854H – 855F for the authority cited.
- [6] See Van der Merwe LAWSA “Things” volume 27 par 217 and the authorities he cites, namely *Grotius* 3 28 9; *Oosthuyzen v Plessis* (1887) 5 SC 69; *Fryer v Engelbrecht* 1910 CTR 863; *Runciman v Schultz* 1923 TPD 4.
- [7] See also *Ntuli v Ntuli*, 1946 TPD 181 at 184.
- [8] See *Estate Rother v Estate Sandig*, 1943 AD 47 at 53–54; *Drummond v Dreyer* 1954 (1) SA 306 (N).
- [9] 1978 (1) SA 841 (A), references omitted.
- [10] 1997 (2) SA 423, see specifically 329 I.
- [11] *Drummond v Dreyer* 1954 (1) SA 306 (N) at 308B.

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