

SOUTH AFRICA / JUDGMENT

# C.K.N and Another v Villa Siesta Pet Retreat CC and Another (059704/2022) [2024] ZAGPPHC 1230 (28 November 2024)

**[2024] ZAGPPHC 1230****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

Baqwa

**CASE / FILE NUMBER**

059704/2022

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE Number: 059704/2022

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED: YES/NO

28/11/2024

In the matters between: - C[...] K[...] N[...], GARY ALFRED APPLICANTS And VILLA SIESTA PET  
RETREAT CC, RESPONDENTS J[...] N[...]

**JUDGMENT**

BAQWA, J

## Introduction

- [1] This application arises out of a disputed ownership of immovable property. The applicants allege that they are co-owners of the property and this is denied by the respondents. It is on the basis of this alleged co-ownership that the applicants seek an order under the *actio communi dividundo* for termination of the joint ownership and division of the joint property.

### Points in Limine

- [2] The respondents have raised three points-in-limine namely, whether there is a valid application before this court (whether the applicant's affidavits have been properly deposed to); whether the matter is *res judicata* and whether the applicants have the necessary *locus standi* to bring this application. I deal with these points *seriatim*.

### Re Judicata

- [3] The respondent's contention is that the conclusion of a settlement agreement between the first applicant and the second respondent rendered the dispute *res judicata*, meaning the matter had already been adjudicated upon in proceedings between the same parties and could therefore not be raised again.
- [4] *Res judicata* requirements are that there must be concluded litigation between the same parties, in relation to the same subject matter based on the same cause of action.
- [5] Evidently, the parties to this application are not the same as the parties to the divorce action and the subject matter of this litigation is not the same as in the divorce action. The fact is, at no time has any court ever determined the issue of termination of ownership between parties consequently this point in limine falls to be dismissed as it is not sustainable.

### Same thing and same cause of action (*idem res/eadem causa petendi*)

- [6] The subject matter in the divorce was the decree of divorce and the and the proprietary consequences of the divorce. The divorce action was not based on the *actio communi dividundo* which is the cause of action relied upon in this application.

Whilst clause 5.5 of the settlement agreement served to confirm the respective shares of the first applicant, the second applicant and the third respondent as co-owners, it did not resolve the issue of termination of co-ownership or whether the applicants are entitled to the sale of the property. This point in limine is therefore equally nor sustainable because clause 5.5 which represents an agreement to agree without providing a deadlock breaking mechanism is void for vagueness and enforceable. See *Premier, Free State and Firechem Free State (Pty) Ltd.* [1]

No proper affidavit before court

- [7] The respondents further contend that there is no proper founding affidavit before the court because affidavit had been electronically commissioned- in that the deponent was physically present in Brisbane, Australia and not physically before the commissioner of oaths.
- [8] The regulation prescribing the form and manner in which the oath or affirmation shall be administered are the Regulations Governing the Administration of an Oath or Affirmation. [2]
- [9] Regulation 3 (1) provides; “the deponents shall sign the declaration in the presence of the commissioner of oaths” which raises the question whether a deponent can commission an affidavit when not physically present with the commissioner of oaths, but where the commissioner and deponent can see and hear one another on an electronic platform such as Ms Teams.
- [10] In a similar case dealt with by the Court in Knuttel N.O and Other v Bhana and Others[3] the Court held that non-compliance with the Regulations does not per se invalidate an affidavit and said;
- “The full court in S v Munn[4] confirmed at that the regulations are directory only and that non-compliance with the regulations would not invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent’s signature to an affidavit.”*
- [11] The current position therefore is that the court will not reject an affidavit because the deponent was not physically present in the same place as the commissioner provided the deponent and the commissioner are “within eyeshot” of one another. There is therefore no reason why a person taking the oath over a video call in front of a commissioner should be regarded as less truthful than an affidavit deposited to in the conventional manner.
- [12] In this matter the deponent and his attorney provide an explanation as to why it was not feasible to commission the founding affidavit in the conventional way. The applicants who are based in Brisbane were informed by the South African Embassy that they would need to travel to Canberra, 2400 kilometres away in order to see a Commissioner of Oaths. It was however not certain when the Commissioner would be present.
- [13] In the circumstances there has been a substantial compliance with the regulations and the point in limine regarding the validity of the affidavit is not sustainable.

#### The Common Cause Facts

- [14] The facts set out hereunder have either been admitted or deemed to be admitted. Where the respondent has denied any fact even if it’s a bare denial, that fact is not included as a common cause fact.
- [15] The common cause facts are as follows:

#### 15.1 The Property

15.1.1 Is a large property measuring 2. 6147 hectares which currently consists of two stand alone houses; an animal boarding facility or kennel; industrial buildings, to wit, warehouses, workshops, offices, factories, shops and ablutions and staff accommodation

15.1.2 Has a municipal valuation of R4 570 000.00

15.1.3 Is zoned as agricultural land.

15.2 On 16 November 1996 the first applicant and the second respondent were married out of community of property.

15.3 During or about 1999:

15.3. 1 The second applicant found an advert for the sale of the property, and

15.3.2 The first applicant, the second applicant and the second respondent all decided to leave Johannesburg so that: the second respondent could operate the boarding Kennels (from the property) and the applicants could run their construction business (from the property).

15.4 The first applicant, the second applicant and the second respondent had various discussions and agreed that both the first applicant and the second respondent would financially contribute towards the transaction and that the registered owner of the property would be the first respondent.

15.5 The first applicant, the second applicant and the respondent all agreed that the property would be registered in the name of the first respondent.

15.6 Thereafter, the property was purchased by the first respondent. The second respondent is the sole member of the first respondent

15.7 The purchase price was paid by way of a loan obtained from Standard Bank and a mortgage bond was registered over the property in favour of Standard Bank.

15.8 During or about 2004, the first applicant, the second applicant and the second respondent all decided to increase the bond over the property to fund improvements to the property. The value of the increased mortgage bond was R1 300 000.00

15.9 The first and second applicant signed surety in respect of the increased mortgage bond obligations owed to Standard Bank.

15.10 The first applicant and second respondent were divorced in 2008 and the divorce order incorporated a settlement agreement which recorded the “shares” of the “net proceeds” which the first applicant and second respondent would be paid upon the sale of the property.

15.11 Until 2008 the first and second applicant serviced the mortgage bond. Obligation owed to Standard Bank. After 2008, the first and second applicants paid 75% of the obligations due to Standard Bank.

15.12 Further, the first applicant paid a monthly amount of R2 525.00 towards the upkeep of the property.

15.13 In January 2017 the first applicant concluded a lease with Cartel Events Management (“Cartel”) in terms of which a portion of the property was let to Cartel. The rental income from the Cartel lease was initially shared between the first applicant and the second respondent equally.

15.14 In July 2018, the first applicant concluded a further lease agreement with 4 Sure Balustrades with the first applicant being the beneficiary of the 4 Sure lease rental stream.

15.15 During or about February 2018 (after the first applicant had obtained his Australian Visa) the first applicant and second respondent met and discussed the “timeframes in respect of the first applicant being paid for his share of the property.”

15.16 At this meeting the first applicant and second respondent agreed that

15.16.1 The first applicant would cede his share of the Cartel lease rental to the second respondent “in lieu of any amounts [he] may owe in respect of the costs of the property.”

15.16.1.2 The second respondent would move into “my house” (i.e the applicant’s house on the property).

15.17 On 17 July 2018, the first applicant left South Africa and moved to Australia

15.18 During February 2021, the first applicant mentioned to purchase a property in Australia and that he would need to receive his “share of the proceeds from the Property in the near future.” The parties discussed the possibility of the second respondent “buying out” the first applicant.

15.18.1 These discussions did not result in an agreement that the second respondent would buy the first applicant out for an agreed price.

15.19 On 5 April 2021

15.19.1 The first applicant sent a text message to the second respondent saying the following:

*“This renting is costing a fortune..... so please understand my urgency regarding this..... We getting close to the three years we spoke about prior to me leaving. I need to have some idea soon.....so as to make my own plans.....”*

15.19.2 The second respondent did not respond to deny that the parties had spoken of three-year period for the sale of the property. Instead, she said “we will go to the bank as soon as we can, I promise. Will be this month or next.”

15.20 In September 2021, first applicant found a property that he wished to purchase in Queensland, Australia. He informed the second respondent that he required “a portion of my share to be paid out to me,” so that he could pay the deposit. The second respondent responded to the effect that: “she will see what she can be able to raise.”

15.21 The first respondent offered the first applicant the amount of R700 000.00 to buy his share of the property. However, the first applicant did not agree to this and no binding agreement came about.

15.22

15.22.1 The first applicant sent a further text message to the second respondent asking whether the bank had responded regarding the loan. He enquired whether the second respondent's family was willing to stand as surety to assist the second respondent in getting a loan to buy him out.

15.22.2 The second respondent replied to say "I have asked my dad and he is happy to. I have mentioned it to the bank and they said it is not necessary....."

15.23 On 15 October 2021, the second respondent sent a text message to the first applicant say:

*"Joy; not holding you to ransom. Just not prepared to do my parents in. I am going ahead with everything to buy you out."*

15.24 Between 20 October 2021 and 21 October 2021, the parties exchanged various emails in which the second respondent conveyed to the first applicant that she was willing to pay me an initial amount of R700 000.00 in respect of my share in the property."

15.25 The parties were unable to agree upon the full purchase price for the first applicant's share in the property and the respondents are unwilling to place the property on the market for sale.

## The Law

[16] The registered ownership of immovable property may not necessarily be confined to one person. He may hold it as a nominee of another person. See *Du Plooy And Another v Du Plooy and Others*.<sup>[5]</sup>

[17] The point is illustrated further in *Pienaar v Van Heerden*<sup>[6]</sup> where partners agreed that an immovable property which was agricultural land which would be registered in the name of the one of the partners who would act as nominee for the others. This was agreed because under the provisions of s.5 (2) of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919, a subdivision of agricultural land into area of less than one morgen was prohibited.

The Court said "..... There is no reason why land cannot be worked by two persons, while ownership is registered in the name of only one of them, pursuant to an arrangement whereby he holds as nominee for the partnership."

[18] Joint ownership is a well-recognised concept in South Africa law. The concept implies that two or more persons, including juristic persons, may own property at the same time in undivided shares.<sup>[7]</sup> A co-owner need not be registered in the deeds registry in the deeds registry in order for him to be accepted in law as a co-owner. *Minne v Minne and Others*.<sup>[8]</sup>

[19] Each co-owner is entitled to share in the profit generated by the property unless the co-owners have agreed to share the profits

differently. See *Runciman v Schulz*. [9]

[20] Each owner has the right to freely and without reference to the other owner or co-owners, to alienate his share in the property. [10]

[21] Where the co-owners are unable to agree regarding the manner in which the property is to be divided, the court will make an appropriate order. See *Silberg*. [11]

[22] If the property cannot be divided because it is not lawful or economical to do so, the court will order that the property be sold. See *Rademeyer v Rademeyer*. [12] The basis for such an action would be the *actio communi dividundo*.

## Analysis

[23] In this application the parties are unable to reach consensus regarding the purchase price at which the second respondent will buy out the first applicant.

[24] Further, the property cannot be divided because it is zoned as agricultural land and the Subdivision of Agricultural Land Act, 1970 restricts the subdivision of agricultural land except with the permission of the Minister.

[25] It would also be expensive to subdivide the property even if permission was given to do so, as the owners would have to hire Town Planners to give effect to the subdivision. Neither of the parties is willing to incur the necessary expenses.

[26] The only available option would seem to be an order in terms of the *actio communi dividundo*. See *Crawford v Goodman*. [13]

[27] The parties are at loggerheads and there would seem to be no room for co-operation between them. In the circumstances the best option would be to sell the property and thereafter consider claims according to what is due to each party.

[28] In result, I make the following order

1 It is declared that the first and second applicants are co-owners of the following immovable property: HOLDING NO.1 [...], situated at 1[...] T[...] ROAD, MONAVONI AGRICULTURAL HOLDINGS, CENTURION ("the Property").

2 It is declared that from 24 September 1999 until the date of this order, a relationship of partnership (and co-ownership) existed between the applicants and the first respondent in respect of the Property in terms of which:

2.1 The first applicant held a 40% share in the Property;

2.2 The second applicant held a 20% share in the Property; and

2.3 The first respondent held a 40% share in the Property.

3 The co-ownership of the applicants and the respondents, in the immovable property (and their partnership) is hereby terminated.

4 Mr George Ramalho of Ranel Trust (insolvency Practitioners and Estate Administrators) is hereby appointed as a liquidator with authority to realize the Property, to liquidate the liabilities of the partnership, to prepare a final account and to pay to the parties whatever is owing to them by virtue of their respective shares as co-owners in the Property.

5 The Liquidator shall have the following further powers and functions:

5.1 To take control over the estate of the partnership between the parties and to assume all powers as administrator thereof.

5.2 To accumulate details of all liabilities of the partnership.

5.3 To sign and execute any document or deed in respect of the Property of the partnership thereby enabling transfer of the Property.

5.4 To realise the Property at the price that he/she deems fit to be the true market value of asset either by public auction or private treaty;

5.5 To apply to this Court for any further directions or powers as he/she shall or may consider necessary;

5.6 To institute legal proceedings against any person for the delivery to her/him of any assets, in the partnership in whatever Court it shall be appropriate to bring such proceedings;

5.7 To instruct and appoint attorneys and/or counsel to institute proceedings on his/her behalf for the purpose of obtaining delivery of any such assets alleged to be vested in the partnership and to obtain such other or alternative relief as the circumstances may require;

5.8 To pay the liabilities of the partnership;

5.9 To pay his/her reasonable fees and to apportion such fees between the parties in the same proportion as they are entitled to the assets of the partnership.

5.10 To pay to the parties the amounts due to them in accordance with their respective ownership shares in the Property.

6 The respondents are ordered to pay the costs of this Application on Scale C.

SELBY BAQWA

JUDGE OF THE HIGH COURT

Date of hearing: 11 November 2024

Date of judgment: November 2024

Appearance On behalf of the Applicants Adv JP Prinsloo cobus.legal@gmail.com Instructed by KEITH SUTCLIFFE & ASSOCIATES INC michael@ksalaw.co.za On behalf of the Respondents Adv MS Mphahlele SC Adv D Sigwavhulimu smphahlele@law.co.za Instructed by WOLVAARDT INCORPORATED eloise@wolvaardtinc.co.za

- [1] 2000
- (4) SA 413 SCA.
- [2] Published GN R1258 in GG3619 of 21st July 1972.
- [3] [2002] 2 ALL SA 201.
- [4] 1973
- (3) SA 736 (NCD) confirmed at 743H.
- [5] [ 2012] 4 ALL SA 239 SCA.
- [6] 1985
- (3) ALL SA 227 (W).
- [7] Para 230.
- [8] (71753/2018)
- [2022] ZAGPPHC 486 Para 35.
- [9] 1923 TPD 45.
- [10] See Silberg Supra at 311.
- [11] Page 312.
- [12] 1968
- (3) SA I ©.
- [13] [2002] ZAGPJHC 435.

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