

SOUTH AFRICA / JUDGMENT

E.T.N v H.E.T (66959/2016) [2018] ZAGPPHC 492 (5 April 2018)

[2018] ZAGPPHC 492

COURT

North Gauteng High Court, Pretoria

BEFORE

Hattingh AJ

CASE / FILE NUMBER

66959/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH

AFRICA

GAUTENG DIVISION, PRETORIA

(1)

NOT RPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES

(3)

REVISED.

CASE NUMBER: 66959/2016

5/4/2018

In the matter

between:

E T N

APPLICANT

and

H

E T

RESPONDENT

JUDGMENT

HATTINGH AJ

BACKGROUND

[1]. The parties used to be in a relationship but never got married. In or about 2009 the parties purchased an immovable property together.

[2]. The property is described as [...] ("the property"). The property was purchased for an amount of R208,990.00 (Two Hundred and eight Thousand Nine Hundred and Ninety Rand). The parties acquired finances to purchase the property per a Mortgage Loan Agreement with First National Bank ("FNB").

[3]. From the purchase of the property, the parties resided together in the property until the relationship came to an end during February 2013. The relationship came to an end when the respondent moved to Pretoria for purposes of work during 2012. The applicant remained behind in the property but during February 2013 also moved out of the property.

[4]. It is averred by the applicant that respondent pays for the bond, light, water, rates and taxes whilst the applicant had to pay for groceries and related expenses. The applicant further states that she made various improvements to the property in that she erected a palisade fence, certain tiling was done and paving in front of the house. These averments are denied by the respondent. The respondent further state that the property got vandalised and he had to get tenants to stay there. He had them stay there without paying any rent. The applicant said the improvements to the property cost her R21,000.00 (Twenty One Thousand Rand).

[5]. The applicant say that sometimes the bond is behind and that the same might influence her credit record. The applicant states that she and the respondent have not seen each other since 2013. They have no ties to each other except for the immovable property.

[6]. The applicant states that she wish to purchase a new property for her and her child but is precluded from doing so because of the bond registered over the present immovable property. It is the version of the applicant that it was always the intention to own the property jointly.

[7]. The applicant appointed a property valuator, Les Flint, that valued the open market value at +/- R400,000.00 (Four Hundred Thousand Rand) and the forced sale value in the region of R300,000.00 (Three Hundred Thousand Rand).

[8]. She states that there is no benefit for her to remain in the current situation. The love is lost between them and she has no say in what happens to the property.

[9]. It is the position of the respondent that the property is to be divided on sale in terms of everyone's financial input in the purchase of the property and monies spend on the property.

[10]. The respondent is further relying on a document where the applicant made him an offer to purchase her share out in the amount of R24,000.00 (Twenty Four Thousand Rand). He further state that she accepted the offer and therefore she is only entitled to R24,000.00 (Twenty Four Thousand Rand).

[11]. In support of this the respondent states that at some stage on or about 11 February 2013 he was contacted by Jaco van der Merwe, a legal advisor of FNB Law on Call, and an agreement was reached in terms of which the applicant would accept an amount of R24,000.00 (Twenty Four Thousand Rand) in lieu of a 50% interest of the house.

[12]. It is further stated by the respondent that the applicant wanted to withdraw herself from the joint bond and to remove her name and wanted him to buy her 50% by paying the R24,000.00 (Twenty Four Thousand Rand). The respondent attached a copy of a letter dated 11 September 2013 from FNB.

[13]. If regard is had to the letter referred to above the following is quite clear: At the right top side of the page, which contains the emblem of FNB, it contains the address as:

"FNB LIFE

4th Floor, No 3 First place

Simmonds Street

P.O. Box 6901

Johannesburg

2000

Fax 0113568525

lawoncallc/aims@fnb.co.za"

and at the bottom of .the page:

A division of Momentum Group Limited, Reg no 1004/002186/06. An authorised financial services and credit provider."

[14]. This information must be compared to the information in the attached document with the bond details. In the middle of the page it clearly states: "Smart Bond" and at the right top side of the page, it contains the following address:

"FNB Housing Finance

57 Frikkie De Beer Street

Menlyn Place

Pretoria

0181"

[15]. This document clearly states that the Bond details are send to H E T and E T N , Home Loan statement as set at 14/10/2016, Account Number [...], Branch Code 250655, Bond property Stand [...]. This document clearly shows the transaction history and all payments made on the movement on the 29/06/2009 where the purchase price was paid to Van Staden & Booysen in the amount R205,000.00 (Two Hundred and Five Thousand Rand) up until the 1/10/2016 showing the outstanding amount

on the property being R226, 209.59 (Two Hundred and Twenty Six Thousand Two Hundred and Nine Rand and Fifty Nine Cents).

[16]. It is clear that the letter addressed to the respondent was done by a legal division probably sitting in the FNB Life assurance section of FNB. In his letter he states:

"RE: E N / YOURSELF

BREACH OF CONTRACT

We refer to the above and confirm that we act on behalf of E. N herein.

It is our instructions that you have entered into a written agreement with our client, in terms of which you are to repay her an amount of R R24,000.00 (Twenty Four Thousand Rand) and further to the above, that you will make sure that her name is to be removed from the bond.

To date hereof our client have not received any monies as agreed.

Please be advised that you are in breach of contract. We hereby place-you on terms to rectify same breach within 14 (fourteen) days of receipt hereof, failing which, our client will proceed with legal action for the amount. The costs of this action will be for your account. If you fail to responded to the action mentioned herein, our client will obtain judgment against you, have you blacklisted and can issue a warrant of execution in order to attach and sell your property."

[17]. This letter was signed by Jaco van der Merwe, Legal Advisor. It is clear that this letter was not done by the Financing Department of FNB but probably by a legal advisor in the FNB Life section. Even if regard must be given to the said letter there is clearly noncompliance to the payment of R24,000.00 (Twenty Four Thousand Rand) as well as the fact that the applicant was never removed from the bond. The letter was dated 11 September 2013.

[18]. Then there was also an affidavit made by the respondent at a police station that states the following:

"I declare that as per N E T requested to be paid R24000.00 for a wall that she build on the abovementioned address in order to removed signed not as further bond. I will afford to pay this amount within 18 months as per her request the total of R24000.00 on the monthly instalment of R1500.00."

the affidavit seems to be signed by the respondent. It was dated 18 February 2013.

[19]. There was no compliance by the respondent to the undertaking to pay the R24,000.00 (Twenty Four Thousand Rand) over 18 months. It is therefore safe to say that if there was in fact such an offer made by the applicant it me to nought.

[20]. the remedy to this dispute clearly falls within the common law principle of the *actio pro socio* and/or the *actio communi dividundo*.

[21]. It is clear that in the case of the *actio communi dividundo* that the court has a wide equitable discretion in making a division of the joint property, having regard, *inter alia* to the particular circumstances, what is most to the advantage of all the co- owners and what they prefer. See *Robson v Theron*, 1978 (1) SA (AD) page 855: It is further stated in the same case that:

"This where it is impossible, impracticable or inequitable to make a physical division of the joint property, the court in exercising its equitable discretion may award the joint property to one of the co-owners provided that he compensate the others or cause the joint property to be put up to auction and the proceeds divided amongst the co-owners."

[22]. It is clear that both parties purchased this property not as an investment primarily but rather as a house where they wanted to live together. As life is unpredictable this noble intention by both parties never came to fruition.

[23]. The principles of the common law applicable to the *actio communi dividundo* are summarised as follows:

23.1. No co-owner is normally obliged to remain a co-owner against his will.

23.2. This action is available to those who own specific tangible things (*res corporales*) in co-ownership, irrespective of whether the co-owners are partners or not, to claim division of the joint property.

23.3. Hence this action may be brought by a co-owner for the division of a joint property where the co-owners cannot agree to the method of division. Since a partnership asset is joint property which is held by the partners in co- ownership, it follows that a partner may as a co-owner bring the action for the division of a partnership asset where the co-partners cannot agree to the method of its division.

23.4. It is for purposes of this action immaterial whether the co-owners possess the joint property jointly or neither of them possesses it or only one of them is in possession thereof.

23.5. This action may also be used to claim an ancillary relief payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property.

23.6. The court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court has in respect of the mode or distribution of partnership assets among partners.

[24]. After due consideration of all the probabilities in the light of the particular circumstances of the present matter it appears to me both practical and probable that it was at all relevant times the intention of the parties that the said asset should be considered to belong to both the parties equally.

[25]. It is trite that costs normally follow the successful party and in this specific instance the applicant is the successful party.

[26]. After reading the papers and hearing counsel during argument the following order is made:

1. That the applicant and the respondent are both entitled to appoint an estate agent to sell the immovable property the price of which is to be agreed upon by the parties within 30 (thirty) days from the date of this order failing which the applicant's value shall be accepted as per the valuation as annexure "B" to the founding affidavit;
2. that should the immovable property not be sold on the open market within 60 (sixty) days from listing and as per prayer 1 above, then the immovable property shall be sold on by way of public auction with a reserve price equal to the debt owed on the property.
3. That should the respondent refuse and/or fail to comply with the relief sought in prayers 1 to 2 above and refuse to sign the necessary

documentation needed to sell or auction the immovable property then and in such event the Sheriff of the High Court Is authorised to sign all necessary documentation on the respondent's behalf in order to comply with the relief sought in prayers 1 - 2 above and to transfer the immovable property in the event that the immovable property is sold;

4. That the respondent is ordered to pay the costs of the application on a party party scale.

ACTING JUDGE OF THE HIGH COURT

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