

SOUTH AFRICA / JUDGMENT

Fourie v Honeyborne (63887/2015) [2017] ZAGPPHC 497 (4 August 2017)

[2017] ZAGPPHC 497

COURT

North Gauteng High Court, Pretoria

BEFORE

T J Raulinga

CASE / FILE NUMBER

63887/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 63887/ 2015

DATE:

4/8/2017

In

the matter between:

SOPHIA

MARIA FRANSINA

FOURIE PLAINTIFF

And

INGE

HONEYBORNE DEFENDANT

JUDGMENT

RAULINGAJ,

1. The parties are co-owners of an immovable property, Erf [...], Kanonkop, Middleburg, Mpumalanga. The applicant brought this application against the respondent, seeking the following relief:

- 1.1 A declaratory order that the joint ownership is "hereby"

terminated:

- 1.2 An order that both parties will be entitled to market the property for sale in the open market for a period of six (6) months, or longer period or maybe agreed upon in writing, and in the absence of a sale of the property in the aforementioned period, that the property thereafter be sold on public auction, with a reserve price of R1200 000.00;

- 1.3 An order declaring the appropriation of the proceeds of the aforementioned sale;

- 1.4 The parties to be ordered to co-operate In the marketing and selling of the property, failure of which the sheriff is authorised to sign transfer documents on behalf of the defaulting party; and

- 1.5 Costs, if opposed.

2. The applicant and the respondent were involved in a romantic relationship. The above property was purchased during the subsistence of the relationship.

3. On 19 November 2012 the parties entered into a written Lease Agreement and option to Purchase in terms of which the respondent

would rent the applicants undivided share In the property for fixed term which term is to expire on 31October 2021. She also has an option to purchase the applicant's undivided half share in the property, which option is valid and may be extended by the respondent

at any time of the duration of the Lease Agreement. As such, the respondent has not been residing on the property and has let out the property as a whole since. This she did because the applicant does not reside on the property.

4. The respondent raises a point in limine contending that the applicant founding affidavit is defective in that it has not been properly commissioned - the certificate of the commissioner of Oaths is defective because he neglected to insert his full names.
5. Further, that the application must be dismissed because the applicant failed to attach, or even refer to the Lease Agreement between the parties; failed to attach, or even refer to the Option to Purchase between the parties and failed to disclose or refer to the correspondence between herself and the respondent's previous attorneys in December 2014.

6. It is also common cause that the respondent's opposing affidavit was filed and served on 15 February 2016, whereafter the applicant did nothing to further pursue the application. The application is therefore enrolled by the respondent for adjudication. On this point, I must Immediately say that the

fact that the application is enrolled by the respondent does not of necessity mean that the applicant has a weak case to present.

7. The applicant also applies for condonation for the late filing of the replying affidavit. The respondent does not seem to oppose such application. Accordingly I grant condonation.
8. At the hearing of the application, the applicant attempted to sneak in a supplementary affidavit in order to cure the defect in the founding affidavit. This the applicant did without condonation and an Indulgence in terms of Rule 6(5)(e) of the Uniform Rules of Court. It is trite that observance of the Rules of Court Is not a mere formality - Watloo Meat and Chicken SA(Pty)Ltd v Silvy Luis (Pty) Ltd and Others 2008(5) SA461(T) at 472G-H. I therefore refuse to admit the affidavit for non-compliance.
9. However, the failure by the Commissioner of Oaths to insert his names may be condoned by the Court in the exercise of its discretion in the interest of justice. In the Standard Bank of SA(Ltd) and Godfrey Dlamini and Another case number: 42232/2015 Gauteng, Pretoria, the court condoned an affidavit which did not comply with the requirements of a certified affidavit as provided for in Government

Gazette of 21July 1972 as amended. In that case the Commissioner of Oaths had failed to ask certain questions as governed by Regulations

1(1), 2(1) and 2(2).

10. It is important to note that the requirements as contained In Regulations 1,2 3 and 4 of Government Gazette R1258 of 21 July 1972 as amended and as published in terms of section 10(1) of the Justice of the Peace and Commissioner of Oaths Act 16 of 1963 are not peremptory but merely directory - See in this regard S v Msibi 1974(4) SA 821(n at 821H and Lohrman v Vaal Ontwikkellngs maatskapppy (Edms)Bpk 1979 (3) SA 391 (T) at 396H -397A.
11. The only omission in the cerficate of oaths in this case is that he/she did not insert his full names, otherwise the remainder of the certificate complies with the regulations. In the light of what the law espouses above, I am convinced that the certificate compiles with regulations 1 to 4.
12. As a general rule, every co-owner is entitled to have co-ownership terminated. The relief sought is founded on the action communi dividundo which originated in Roman Law, was adopted in Roman Dutch law as the actie van deelinghe or actie van scheydinge and cascaded to our present law. It was described in Robson v Theron 1978(1) SA 841(A) at 854H-855A as having two purposes, namely, (1) division of joint property and payment of praestationes personales relating to profits enjoyed or expenses incurred in connection with the joint

property. Its basic underlying notion is that no co- owner is normally obliged to retain such against his or her will. The co-owner of the property may insist on a partition of the property at any time unless there is an agreement between the co-owners not to do so within a certain period -Van Leeuwwen; loc cit; Badenhorst v Marks 1911 TPD 144, 147.

13. Even if there is an agreement to constitute perpetual joint ownership, the co- owner may demand partition at any time - Voet 10.3.5. If the co-owners cannot agree on the manner in which the property is to be divided between them, the Court is empowered to make such order as appears to be fair and equitable in the circumstances. Where the property is not physically capable of subdivision such an order may, for example, entitle one of the co-owners to obtain the whole of the property upon payment of a certain sum. If this is not appropriate, or possible, the court may order the property to be sold and proceeds to be divided amongst the co-owners according to their shares - Rademeyer v Rademeyer 1968(3) SA 1(c). One well recognised mode of doing this is a sale by public auction and a division of the proceeds - Estate Rother v Estate Sanding 1943 AD 47, 53. The court may make any equitable adjustment If one of the co-owners has, for example benefitted financially from the property or incurred expenses in respect of the property.
14. The applicant has alleged and proved the existence of joint ownership. She also has alleged and proved that the respondent refuses to agree to termination of the joint ownership and that they cannot agree in respect of the method of termination or an agreement or can they agree on the terms of the agreement. This therefore gives the court discretion to deal with the matter in a just and equitable manner.
15. The respondent submits that on the 19 November 2012, the parties entered into a written Lease Agreement and Option to purchase in terms of which the respondent is renting the applicant's undivided share in the property for a fixed term until 31 March 2021. The respondent further submits that she has since leased the property as a whole since 2014 to the current occupants, which she is entitled to do in terms of clause 36 of the Lease Agreement.
16. It is trite law that a party may sell a property even where a lease agreement is in place. This is in line with the principles of "Huur gaat voor koop" which will apply to ensure that the lessee is protected. This is similar with the offer to purchase.
17. It was held in Shalala v Seib 1950(1) SA 851 (C) that:

'As regards the conditions of the existing lease, the purchaser is.....admittedly bound - virtually in the position of the landlord vis-a-vis the tenant.....Since the tenant must pay his rent to the purchaser, the original landlord's right to claim rent in consideration of the tenant's occupation is gone; and there is thus much to be said both on ground of convenience and of equity, for the view that the obligation to recognise a renewal of the lease should likewise pass from the original landlord to the purchaser. The alternative is to leave the tenant with an action for damages for breach of contract against his original landlord: but it was to avoid that very result that the Roman -Dutch law departed from the Roman law whereunder the tenant had only personal

rightand applied the doctrine of "huur gaat voor koop" to the tenant's right of occupation".

18. It was held further that:

"It see no reason why these considerations should not apply to an option to purchase, which Is a material component of and was a key motivating factor in the conclusion of the Lease Agreement Our courts have made it clear that if an option to purchase is Incorporated In a lease, principles similar to those on options to renew apply'.

19. It is on this reasoning that the submission by the respondent that she is renting the applicant's undivided half share in the property for a fixed term and she has an option to purchase, cannot be sustained. The respondent can still exercise her right as suggested in the Shalala case(supra).
20. It seems to me that the parties cannot agree on the manner in which the property is to be divided between them. This Court is therefore empowered to make an order as appears to be fair and equitable in the circumstances.
21. It is my considered view that what is just and equitable is to appoint a receiver to investigate each party's contribution and to divide the property accordingly.
22. In the premise I make the following order:
 - 22.1 A receiver is to be appointed by the legal representatives of the parties to investigate each party's contribution and to divide the property accordingly.
 - 22.2 Each party to pay its own costs.

T J RAULINGA

JUDGE OF THE GAUTENG DIVISION, PRETORIA

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