

SOUTH AFRICA / JUDGMENT

Koko v Koko (5403/2016) [2020] ZALMPPHC 72 (25 August 2020)

[2020] ZALMPPHC 72

COURT

Limpopo High Court, Polokwane

BEFORE

Mangena

CASE / FILE NUMBER

5403/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 5403/2016

In

the matter between:

KGABO

JEANETTE KOKO

APPLICANT

And

JEFFENEY

GRACE KOKO [BORN: LEGORA]

RESPONDENT

JUDGMENT**MANGENA AJ**

- [1] The facts of this case confirm the correctness of the observation attributed to Pablo Picasso: “Only put off until tomorrow what you are willing to die having left undone”.
- [2] The applicant, Kgabo Jeannete Koko was married in community of property to the late Noko Johannes Koko who passed away on the 19 May 2013.
- [3] Subsequent to the passing on of Mr Koko, the applicant was appointed an executrix of the estate by the master of the high court with powers to liquidate and distribute the estate of the late Noko Johannes Koko.
- [4] One of the assets which formed part of the estate of the deceased and is the subject of this proceedings is [...] which at the time of the death of Mr Koko was also registered in the names of Jeffeney Grace Koko, the respondent.
- [5] The applicant has approached this court for an order declaring that the respondent who despite being the registered owner, does not have any right, title and interest in [...] situated at number [...], Polokwane.
- [6] The basis for the application can best be understood against the following brief background facts: The late Noko Johannes Koko married Jeffeney Grace Koko, the respondent in community of property on 13 February 1979. During the subsistence of the marriage, the parties acquired an immovable property situated at [...], Polokwane and same was registered in both their names. The property was financed through a mortgage loan obtained from NBS.
- [7] The marriage between the late Noko Johannes Koko and the respondent was dissolved by an order of the North Eastern Divorce Court on the 24 January 2001 with an ancillary order that the joint estate shall be divided.
- [8] Upon dissolution of the marriage, the respondent left the matrimonial home and took with her some movable assets. The deceased remained in occupation and was responsible for payment of the home loan account as well as municipal levies and taxes. The property however remained registered in both the names of the deceased and the respondent. From the reading of the papers filed, it appears that the parties were unable to agree on adjustments to be made on the share payable to the respondent as well the date for the determination of the value of the immovable property. I will deal with these two issues later in this judgment.

- [9] The deceased later married the applicant, Kgabo Jeannette Koko in community of property and they continued to stay in the same property notwithstanding that it is still registered in the names of Mr Koko and the respondent. During this period, they effected some improvements on the property and were responsible for its general maintenance and upkeep.
- [10] The applicant argues that the respondent did not make any financial contribution towards the payment of the home loan and the general improvements on the property and should therefore not be entitled to benefit from the appreciation of the property. At best, the value of her share should be limited to the date of
- divorce, being 24 January 2001.
- [11] The respondent opposed the application and contended forcefully that the actual date of valuation relevant to the division of the estate is the present market value as she is a co-registered owner with rights, title and interest in the property.
- [12] The respondent further dispute the assertion by the applicant that the immovable property formed part of her joint estate with the deceased. She argued, correctly so, in my view, that given the fact that the joint estate between herself and the deceased had not yet been divided, only an undivided half share belonging to the deceased formed part of their joint estate.
- [13] When the matter was called for hearing on the opposed roll of the 13 September 2018, neither the applicant nor her legal representative were in attendance. Mr Oberholzer, counsel for the respondent, applied for the dismissal of the application with costs as well as for an order for the appointment of a liquidator to divide the joint estate between the deceased and the respondent as per the court order of the North Eastern Divorce Court granted on 24 January 2001 under case number 4909/1999. I duly granted the orders as prayed for by Mr Oberholzer.
- [14] Subsequent to the granting of the orders on 13 September 2018, applicant requested for reasons for the orders on 08 November 2018 and again on 06 December 2018 when it was brought to my attention and I duly responded to the request on 07 December 2018.
- [15] The applicant filed an application for leave to appeal on 22 June 2020 which is more than 21 months after the order was granted.
- [16] The application for leave to appeal is opposed by the respondent on the basis that it is inordinately out of time and that the liquidator appointed as per the court order of the 13th September 2018 has already finalised the process and filed the report with the court.
- [17] The report by the liquidator has not been challenged nor is there an application to set it aside. In the premises, the application for leave to appeal will not serve any purpose as it does not bear the prospects of success. I agree with these submissions.

[18] Applications for leave to appeal are regulated by Rule 49 (1)(b) which provides as follows:

“(b) When leave to appeal is required and it has not been requested at the time of the judgement or order, application for such leave shall be made and the grounds therefore shall be furnished within 15 days after the date of the order appealed against. Provided that when the reasons or the full reasons for the court’s order are given on a later date than the date of the order, such application may be made within 15 days after such later date : Provided further that the court may on good cause shown, extend the aforementioned periods of 15 days”

[19] The order which the applicant seeks leave of this court to appeal was granted on 13 September 2018 and the reasons were requested on the 08 November 2018. The application for leave to appeal is indisputably out of time and the applicant has not applied for condonation.

[20] The failure by the applicant to seek for condonation and explain the reasons for the delay in bringing the application for further leave to appeal is fatal in that there is no proper application for leave to appeal before court.

[21] It follows axiomatically that the application should be struck off the roll with costs.

[22] If I am wrong, the application should fail because the appeal does not have a reasonable prospect of success.

[23] The high watermark case for the applicant is that the respondent is not entitled to 50% of the value of the immovable property as at date of division of the estate but on the date of the granting of the divorce order. The applicant bases this contention on the improvements made and the fact that they were solely responsible for the repayment of the home loan account and municipal rates and taxes.

[24] The applicant’s case is without merit as it fails to appreciate the legal consequences of the marriage in community of property as well as the nature of the legal rights the respondent has on the property arising out of the marriage concluded between her and the deceased. The two were in bound or restricted co-ownership of the immovable property. For as long as the joint estate has not been divided, the respondent retained all her rights of ownership in respect of her undivided share of the property.

[25] In *Tjamuaha and Another v Master of the High court and others*, [1] the Supreme Court of Namibia expressed the legal position regarding co-ownership as follows:

“(14) As a result of the marriage in community of property the deceased and the respondent were co-owners or joint owners of the assets in the estate. Co-ownership is simply the facts of two or more persons owning a thing in undivided shares which shares need not be equal. This factual situation comes about through agreement (free co-ownership) or through other relationships such as a marriage or partnership (bound or restricted co-ownership). Because the share of the co-owner is indivisible no co-owner has a right to specific physical part or portion of the thing that is the subject matter of the co-ownership

relationship. Whereas a joint owner in a free-ownership can dispose of his undivided share without consent of his co-owners the joint owners in a restricted co-ownership relationship cannot do this. When it comes to the restricted co-ownership this is simply one of the consequences of the relationship between the parties, whereas in cases of free ownership it is the only relationship between co-owners. It thus follows that the undivided share in restricted co-ownership relationships does not play as great a role during such relationships as the true value of such undivided share is only realized upon termination of the co-owner relationship. In general a co-owner in a free co-owner relationship can insist on a partitioning or division of the joint property at any time. This, a co-owner by virtue of a marriage in community of property cannot do. This will by law only happen when there is a divorce or upon the death of a spouse. Barring an agreement between the co-owners, each co-owner is liable for his share of the expenses and losses involved in the running and upkeep of the joint property.

“(15) It follows from what is stated above that upon partitioning or division, each co-owner is entitled to his/her share of the property after the settling of the expenses or debts in connection with the property. Where the co-owners cannot agree on the division a court can order the sale of the property and the division of the money or order one co-owner to buy out the other or generally make such order as it deems fit to effect the division or partitioning.

[27] What emerges from the Namibian judgment accords very well with our own law and is a clear confirmation of an established and settled law that division of the joint estate may be brought about by agreement between the parties, or in the event that no agreement is reached by them, the appointment of a curator or a liquidator or a receiver to divide the joint estate. Absent an agreement, division of the joint estate cannot be accomplished by one of the parties. See *Maharaj v Maharaj*[2] and *S V Nedbank Limited*,[3].

[26] In *Gillingham & Gillingham*,[4] Innes CJ expressed the legal position as follows:

“The law governing this matter seems to me to be perfectly clear. When two persons are married in community of property a universal partnership in all goods is established between them. When a court of a competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the court to divide the estate and the court has the power to appoint some person to effect the division on its behalf.

[28] On the facts of this case, the respective parties are in agreement that the joint estate between the late Noko Johannes Koko and the respondent had not been divided. The delay in effecting the division of the joint estate is due to the failure of the parties to reach an agreement on the liabilities of the joint estate.

- [29] On the authority of Gillingham above, the court is entitled to intervene and order an appointment of a liquidator to effect the division of the joint estate. The applicant does not have the right to determine the value of the property due and payable to the respondent. In *Revill & Revill*
- [5] the court held that “no man can be a judge in his own cause. In other words, neither party can take upon himself or herself the right to divide the joint estate. In fact, no party in any form of community is entitled to divide the common property and the other party be forced to accept that position”.
- [30] What the applicant fails to appreciate is that an order for the division of the joint estate does not divest the respondent of her rights and interests in the property. She remains a co-owner until division takes place either by agreement or the order of court through the appointment of a liquidator with powers to collect, realise or divide the estate.
- [31] It is the duty of the receiver and liquidator to receive the assets and liabilities of the joint estate, liquidate same and distribute the free residue to the parties. What the receiver and liquidator do is to attend to the modus of giving effect to the court order of division of the joint estate. The date of determining the value of the undivided share in the joint estate is the date on which division takes place. That is the date the court order is given effect to.
- [32] Where a co-owner pays all the expenses necessary for the upkeep of the property as in this case, such a co-owner may recover from the other co-owner his/her proportionate share of such expenses. Therefore in as much as the co-owners share the expenses they are entitled to share in the benefits that accrue to the property as well.
- [33] I accordingly find the contention by the applicant that the respondent is only entitled to the share of the value of the property as the date of divorce contrary to established legal principles and not supported by any authority. Indeed counsel for the applicant was invited to supply any authority relied upon for his contention and none was provided.
- [34] This does not however mean that the applicant is not entitled to be compensated for the expenses incurred on the improvements made on the property as well as the payment made in respect of municipal rates and taxes. These expenses need to be furnished to the appointed liquidator who will consider them and make a determination for their allowance or deduction in the preparation of the final account for submission to court.
- [35] The liquidator has already filed his report and granting leave to appeal in these circumstances will be putting a strain on the limited judicial resources and will not be in the best interests of justice.
- [36] Consequently, the application should also fail on this reason as it does not bear prospects of success.

Order:

The application for Leave to appeal is dismissed with costs.

MANGENA AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

1. For the Applicant

: Mr Sekukuni

Instructed by

: Sekukuni Attorneys

2. For the Respondent

: Mr Oberholzer

Instructed by

: De Bruin Oberholzer

3. Date of hearing

: 09 July 2020

4. Date delivered

: 25 August 2020

[1] Case number SA 62/2015 delivered on 26 October 2016, Supreme Court of Namibia

[2] 2002 (2) SA 648 (D)

[3] 5058/2019 [2020] ZALMPPHC 46 (11 June 2020)

[4] 1904 TS 609 at 613

[5] 1969

(1) SA 325 (C)

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Prepared on 11 October 2026 · Esheria