

SOUTH AFRICA / JUDGMENT

Maluleka N.O v Mbatha and Another (2019/63169) [2022] ZAGPPHC 419 (15 June 2022) [2022] ZAGPPHC 419

COURT

North Gauteng High Court, Pretoria

BEFORE

WJ du Plessis

CASE / FILE NUMBER

2019/63169

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 2019/63169

REPORTABLE:

No

OF

INTEREST TO OTHER JUDGES: No

REVISED:

No

Date:

15 June 2022

In

the matter between:

SENIAS
MALULEKA N.O
APPLICANT
and
JOYCE
MALESHATA MBATHA (MASIA)
FIRST RESPONDENT
MASTER
OF THE HIGH COURT, PRETORIA
SECOND RESPONDENT

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JUDGMENT

DU PLESSIS, AJ

Factual background

- [1] This case was enrolled as an unopposed application. The applicants seeks an interdict ordering the first respondent, as co-owner of certain immovable property, to sign and accept an Offer to Purchase.
- [2] The applicant brings the application as the executor of the deceased estate of the late Constance Marry Maluleka, who passed away on 26 November 2010. She left behind two, then minor, now major children, who are the sole beneficiaries of the estate.
- [3] The deceased inherited 75% of the immovable property of Mr. William Motlhala Masia, and the first respondent inherited the other 25%. Upon the death of Mr Masia, the property was transferred into the names of the deceased and the first respondent who held the property in undivided co-ownership.
- [4] The beneficiaries of the estate of Ms Maluleka now want the immovable property sold. The applicant, acting on their wish, instructed auctioneers to proceed with the sale of the immovable property on behalf of the executor.
- [5] In September 2018, the applicant was presented with an Offer to Purchase. The applicant's attorney then contacted the respondent telephonically and informed her that as the co-owner, "she will have to sign the Offer to Purchase and also commit to signing the necessary transfer documents".[1]

- [6] The first respondent (and also the attorney she consulted) did not respond to the applicant's request, and the Offer to Purchase lapsed. The applicant continued with its efforts to sell the immovable property, which led to another Offer to Purchase. The first respondent refused to accept correspondence in this regard.
- [7] The applicant wishes to finalise the sale of the immovable property in order to finalise the winding up of the estate. He finds that the first respondent and her legal representative are not cooperative in this regard.
- [8] Applicant avers that the sale of the property does not prejudice the first respondent, as she does not live in the property. The property is furthermore occupied by people unknown to the applicant. They do not pay rent, which causes financial prejudice to the estate and the beneficiaries. The applicant further avers that the purchase price is fair and reasonable and that not selling it will lead to further deterioration of the house, which means a decrease in value. For this reason the applicant requests the court to order the first respondent to sign and accept the Offer to Purchase.

Co-ownership

- [9] Co-ownership indicates a situation where two or more persons own a thing (the immovable property in this instance), in undivided shares. In other words, each co-owner has the right to a share in the entire property. It is one ownership which vests in several persons. This means that a co-owner cannot alienate or encumber the property without the consent of the other co-owner.[2] A co-owner can only alienate their share in the property without the consent of the other co-owner (unless there is an agreement that prohibits this).
- [10] The law further distinguishes between bound and free co-ownership. In the case of the former, co-ownership is a result of an underlying legal relationship between the parties. In contrast, in the case of free co-ownership, the only legal relationship between the parties is the co-ownership of the thing.[3] In the current matter the property is held in free co-ownership since there is no underlying relationship that binds the co-owners

separately from the fact that they are co-owners.

- [11] Free co-ownership has various implications. For one, the co-owner can alienate their undivided co-ownership share independently. They can also terminate their co-ownership unilaterally. And the joint exercise of entitlements is not determined by an underlying legal relationship between the parties.[4]
- [12] As for the rights and obligations of the parties: the exercise of entitlements that result from co-ownership and all legal actions

concerning the property must be performed jointly by the co-owners. While a co-owner is free to alienate its share in the property without the cooperation of the other co-owners,[5] all co-owners must give permission before the property can be alienated.[6]

- [13] Should co-owners not agree that property be alienated, the co-owner can claim the subdivision of the property in accordance with their share and then, once subdivided, sell their divided share of the property. Subdivision might, however, not always be possible.
- [14] A co-owner can also approach the court with the *actio communi dividundo* to make a division.[7] If co-owners cannot agree on the division of the property, the court will order a division.[8] The court has a wide discretion in determining the termination of joint ownership of immovable property based on the *actio communi dividundo*.[9]
- [15] If it would be uneconomical or detrimental to physically divide the property (or if the property is indivisible), the court may order that the property be sold and that the proceeds be divided between the co-owners in accordance with their share.[10] Alternatively, the court may order that the one co-owner compensate the other in accordance with their shares, after the property is valued.[11]
- [16] *Van Sittert v Knobel*, [12] sets out the requirements for the termination of co-ownership, namely that there must be: 1) co-ownership, 2) a refusal by the other owners to agree to the termination of co-ownership, the method of termination or a refusal to comply with terms of a termination agreement; and 3) facts upon which the court can exercise its discretion as to how to terminate the joint ownership. In general, the court will follow a method that is fair and equitable to all parties. This can include a sale by public auction.[13]

Application of the law to the facts

- [17] In the current case, the co-ownership was established by inheritance. It is free co-ownership. It is also a good example of the Roman law maxim *communio est mater rixarum*, meaning that co-ownership is the mother of all disputes. While the court has sympathy with the frustrations of the co-owner who gets no cooperation or correspondence from the other co-owner, the order sought cannot be granted because the remedy lies elsewhere.
- [18] The applicant, therefore, has various options. It can freely sell its 75% share in the property, either to third parties or the respondent. It can also approach the court based on the *actio communi dividundo*, where one option is to ask the court to order the property to be sold by public auction and the proceeds divided between the co-owners

based on their shares.[14] However, it cannot approach this court for an order to compel the co-owner to sign an Offer to Purchase as in this case.

Order

- [19] In the event, the following order is made:
1. The application is dismissed.
 2. The applicant may, if so inclined, supplement its papers to apply for appropriate relief.

WJ du Plessis

Acting Judge of the High Court

Counsel for the applicant: Ms S Jozana

Instructed by:

Mthembu Attorneys

For the for respondent: Unopposed

Instructed by:

Unopposed

Date of the hearing: 2022/06/10

Date of judgment:

2022/06/15

[1] Par 4.8 of the Founding Affidavit.

[2] Horn et al Introduction to the Law of Property (2021) 64.

[3] Horn et al Introduction to the Law of Property (2021) 64.

[4] Horn et al Introduction to the Law of Property (2021)

67. See also Oblowitz v Oblowitz 1953 (4) SA 426 (C).

[5] Ex parte Menzies et Uxor

[1993] 4 All SA 455 (C) at 466-467; Coetzee v Coetzee

[2006] JOL 36545 (WCC).

[6] Van der Merwe v Van Wyk 1921 (EDC) 298.

[7] Robson v Theron 1978

(1) SA 841 (A).

[8] Britz v Sequeria

[2020] 2 All SA 415 (FB) stated that “there is no reason why [an] application procedure may not be utilised if material factual disputes are not foreseen”.

[9] Robson v Theron 1978

(1) SA 841 (A).

[10] Rademeyer v Rademeyer

[1968] 3 All SA 105 (C); Claassen v Quenstedt

[2014] ZAECPEHC 18.

[11] Kruger v Terblanche 1979

(4) SA 38 (T).

[12]

[2018] ZACPPHC 566 par 14.

[13] Estate Rother v Estate Sanding 1943 AD 47.

[14] See, for instance Matadin v Parma

[2010] ZAKZPHC 18.

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