

SOUTH AFRICA / JUDGMENT

Matadin v Parma and Others (4638/2009) [2010] ZAKZPHC 18 (7 May 2010)

[2010] ZAKZPHC 18

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Gorven

CASE / FILE NUMBER

4638/2009

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

10

IN THE

KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. 4638/2009

In the matter between:

ROOKMANI MATADIN APPLICANT

and

SARASPATHEE PARMA FIRST RESPONDENT

SAIGARAN RAMADOO BRIMIAH NO SECOND RESPONDENT

THE MASTER OF THE HIGH COURT THIRD RESPONDENT

JUDGMENT

GORVEN J

This application concerns an immovable property described as Portion 130 of Erf 3229 Pietermaritzburg, registration division FT, province of KwaZulu-Natal, in extent 300 square metres (“the property”). The property has on it a house and is located in Northdale, Pietermaritzburg. The title deed reflects the owners of this property as being the applicant, the first respondent and one Heera Parma, who is deceased (“the deceased”) and whose estate representative, appointed by the third respondent on 8 April 2009, is the second respondent. It is therefore clear, and indeed common cause, that the three above-mentioned persons are joint owners, in undivided shares, of the property.

The first respondent and some of the children of the deceased occupy a portion of the property. There is also at least one tenant

occupying a portion of the property. According to the third respondent, the deceased died intestate and, accordingly, it would

appear that his children will be his intestate heirs. It is clear from the papers that the applicant, the first respondent and the children of the deceased are unable to reach agreement on the use of the property. The first respondent and the children refused to accede to the applicant's request to sell the property. That attitude led to this application which only the first respondent opposes.

The basis for the application is well recognised in our law. The cause of action invoked by the applicant is the *actio communi dividundo*. This was recognized by the old authorities including Voet¹ and van Leeuwen² and has been recognized ever since. The underlying rationale is that every co-owner of 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 period³. Even if there is an agreement to constitute perpetual joint ownership, the co-owner may demand partition at any time⁴. 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 the proceeds to be divided amongst the co-owners according to their shares⁵. One well recognised mode of doing this is a sale by public auction and a division of the proceeds⁶. The court may make any equitable adjustment if one of the co-owners has, for example, benefited financially from the property or incurred expenses in respect of the property.

The principles relating to the *actio communi dividundo* were conveniently summarised by Joubert JA in *Robson v Theron* as follows:

1. No co-owner is normally obliged to remain a co-owner against his will.
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.
3. Hence this action may be brought by a co-owner for the division of joint property where the co-owners cannot agree to the method of division...
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.
5. This action may also be used to claim as ancillary relief payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property.

6. A 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 of distribution of partnership assets among partners as described by Pothier. 7

In the present matter the applicant requests that the property be sold by public auction subject to a reserve price and, in the

alternative, that if the reserve price is not realised, the property be marketed and sold through the agency of a registered estate agent by private treaty. In both of these instances the order sought is that the proceeds be divided equally between the co-owners. The applicant has made provision, in the further alternative, for the first and second respondents to pay her out for her share and for her undivided share to be registered equally in their names. It does not appear possible, however, for the second respondent to be ordered to do this since he is the deceased's estate representative. The third respondent has, in a helpful report, indicated that the second respondent is enjoined to sell the estate assets, namely the deceased's undivided joint share in the property. The fourth respondent endorses the application in so far as it seeks to sell the property and divide the proceeds equally between the joint owners. This is because, for obvious reasons it is both easier to sell as a whole and likely to benefit the co-owners more than would a sale of an undivided share.

The first respondent opposed the application. In her first ground of opposition she sought to assail the locus standi of the applicant. She did so based on the mistaken premise that the applicant founded her locus standi on being the executrix or estate representative of the deceased. As indicated above, this is incorrect since the estate representative of the deceased has been joined as the second respondent and has, quite appropriately in my view, not entered the lists. Since the applicant is admittedly a co-owner, her locus standi to bring the application is clear and established. There is therefore no merit in the first ground of opposition.

The second ground of opposition was that the application is premature because an estate representative, the second respondent,

has been appointed whose duty it is to sell the property and wind up the estate. It is certainly the second respondent's duty to wind up the estate. As regards the sale of the property, however, he is in precisely the same position as the applicant and the first respondent. All that he is entitled to sell, absent agreement between the co-owners to sell the property as a whole, is the deceased's one-third undivided share in the property. This second ground of opposition is, therefore, equally without merit.

From this it is quite clear that the applicant is entitled to bring an end to the joint ownership. The only practical manner in which this can be done is for the property to be sold and the proceeds divided between the joint owners. I am also of the view that the sale by public auction subject to a reserve price is the most appropriate initial manner of selling the property and that, failing the reserve price being realised, that the property should be marketed and sold through the agency of a registered estate agent by private treaty. Two estate agents have indicated what they regard as

the market price of the property. These letters were given almost one year apart and I accept that the lower and more recent of the two, the sum of R310 000.00, should form the reserve price.

The first respondent raised the issue that the applicant has collected rentals in respect of the outhouse to the property and not accounted to the other two co-owners for these rentals. The applicant disclosed this fact in her founding affidavit and stated that she utilised these payments towards the rates obligation attaching to the property. When confronted with this, the first respondent denied that the applicant had paid the rates and claimed that she herself paid certain municipal charges. No particularity was given and no receipts put up. It would appear that these charges relate to the electricity and water consumption and other municipal services such as refuse removal which should be for the account of the occupants in any event. In reply the applicant put up receipts from the municipality in respect of rates payments made in respect of the property and made out a case that the municipality threatened to sell the property to satisfy the arrear rates claim.

The question is whether any equitable adjustment needs to be made for the benefit to the first respondent and one of the daughters of the deceased having occupied the property, the receipt of rentals by the applicant and the claim by the applicant to have paid certain of the rates and that of the first respondent that the husband of the occupying daughter and she have paid municipal charges. The applicant, as co-owner, was clearly entitled to occupy a portion of the property. This she has done by way of the tenant occupying the outhouse and paying rentals to her. As regards the payments of expenses, there is not sufficient clarity on exactly how much has been paid by each party or in respect of what obligations the payments have been made on the papers. This is not a matter which requires oral evidence since the property is a modest one and the expense of such a course would in all probability take up all or most of the proceeds of the sale. In any event, neither party has requested such a measure. The courts, after all, have a wide discretion and I do not believe it necessary to make any adjustments in respect of expenses incurred or benefits of occupation enjoyed.

The only remaining issue relates to the question of costs of the application. The applicant seeks costs on an attorney and client

scale on the basis that the first respondent was invited to agree to the sale of the property. In this respect a letter dated 16 January 2009 was addressed by the applicant's attorneys to the attorneys who represented the first respondent inviting the first respondent to resolve the matter amicably so as to avoid the matter proceeding to the High Court. This elicited a response by way of a letter dated 18 March 2009 from the first respondent's attorneys stating the following: "Kindly note that you can proceed in this matter as our client is not interested in resolving the matter". It is quite clear that the first respondent has been deliberately obstructive. She occupies the property and has clearly decided that she will continue in occupation for as long as possible. Had she approached the matter sensibly, the applicant would have incurred no costs whatsoever. Her dismissive approach and raising opposing points which clearly have no merit whatsoever in my view warrants a punitive costs order against her. However I can see no warrant for an adverse costs order against the second respondent. It would appear that the opposition to the proposed

sale emanated not from him but from the children of the deceased who are not entitled to represent the estate of the deceased. This is so even though the correspondence of the first respondent's attorneys claimed to represent one of the children as executor in the deceased's estate named in the will. The third respondent has pointed out that the estate is an intestate one so it appears that the claim by the person concerned to have been named executor in the deceased's

will is a fabrication. In any event it was accepted by the first respondent that the person concerned was clearly not appointed

executor. Since the second respondent was never asked to consent to the sale and never refused and, in addition, has not opposed the application, I do not believe that the estate should be ordered to bear any costs in respect of the application.

In the event the following order is made:

The immovable property described as Portion 130 of Erf 3229 Pietermaritzburg, registration division FT, province of

KwaZulu-Natal, in extent 300 square metres shall be sold by public auction subject to a reserve price of R 310 000.00.

In the event of the said reserve price not being realised at the sale by public auction, the said property shall be sold through the agency of a registered estate agent, agreed upon between the parties, by private treaty.

The net proceeds of the said sale, whether by public auction or private treaty, shall be divided and paid to the applicant, the first respondent and the second respondent as to one third each.

In the event of the first respondent not having satisfied a taxed or agreed bill of costs in relation to this application at the time the distribution is made, such costs shall be paid from the one-third share due to the first respondent.

The applicant, the first respondent and the second respondent are ordered to sign all documentation necessary to effect transfer and registration pursuant to the said sale within three days of presentation to them of the said documentation by the conveyancer appointed to effect the registration of transfer.

In the event of any of the applicant, the first respondent or the second respondent failing to comply with paragraph 5 hereof, the Sheriff of the High Court, Pietermaritzburg, is hereby authorised and directed to sign such documentation on their behalf.

The first respondent is directed to pay the costs of this application on the scale as between attorney and client.

Date of Hearing: 7 May 2010

Date of Judgment: 7 May 2010

For the Applicant: R Singh instructed by Siva Chetty & Company

For the First Respondent: Not present

1 10.3.1

2 Censura Forensis 1.3.27

3 van Leeuwen, loc cit; Badenhorst v Marks 1911 TPD 144, 147; Schefermann & Others v Davies 1944 NPD 20, 21-22; Robson v Theron 1978 (1) SA 841 (A) 855A

4 Voet 10.3.5

5 Rademeyer v Rademeyer 1968 (3) SA 1 (C)

6 Estate Rother v Estate Sandig 1943 AD 47, 53

7 at 856H-857D .

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAKZPHC/2010/18.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/matadin-v-parma-and-others-unknown-topic-akzphc-2010--6a3ea51b3b1caa9129811ec7>

Prepared on 10 October 2026 · Esheria