

SOUTH AFRICA / JUDGMENT

## M.D.S v J.P.V (83856/15) [2021] ZAGPPHC 543 (16 August 2021) [2021] ZAGPPHC 543

COURT

North Gauteng High Court, Pretoria

BEFORE

DP de Villiers

CASE / FILE NUMBER

83856/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHERS

JUDGES: NO

(3)

REVISED

16.08/2021

Case

No: 83856/15

In

the matter between: S[...],  
M[...]  
D[...]  
PLAINTIFF  
and  
V[...],  
J[...] P[...]  
DEFENDANT

Summary: Actio communi dividundo — costs  
of the action in issue

## JUDGMENT

DE VILLIERS AJ

- [1] This matter should have never been litigated. The defendant and his then wife owned the property in issue before me. They agreed that he would acquire the property from their joint estate upon divorce. Upon the divorce, the plaintiff and the defendant, who were then in a romantic relationship, jointly bought the immovable property. The plaintiff was able to obtain the necessary finance. The plaintiff and the defendant became joint owners on 2 April 2003. Their romantic relationship ended in about June 2005. The plaintiff vacated the property. Until the parties separated, both the plaintiff and the defendant paid certain expenses pertaining to the property. The defendant remained in occupation of the property and enjoyed this benefit without paying rent. After the separation, the defendant paid expenses pertaining to the property and paid for some home improvements. He would later take the approach that these payments were not in lieu of rent. Time went by. About ten years after the relationship ended, the plaintiff commenced to take steps to dissolve the joint ownership. By then the mortgage bond had been cancelled.
- [2] Reasonable people would have resolved the matter. In short, they had to agree on the method of division of the property and the amount payable upon dissolution. It seems to have been common cause all along that the defendant had to purchase the plaintiff's half share as the manner to divide the joint asset. The amount due by the defendant in the first instance would have depended on a simple valuation of the property. Reasonable people would have agreed on this amount. In issue further would have been if the parties had to account for payment of expenses pertaining to the property (mortgage bond instalments, rates, property insurance, property taxes, etc.), the value of the defendant's occupation, and any agreed improvements to the property and/or any other improvements to the property. These matters should have been resolved without difficulty.
- [3] Initially the parties and their attorneys (at least on paper) sought a common-sense solution. I have not seen all letters, hence my guarded comments. During this initial period of seemingly co-operating, the parties on 31 August 2015 seemed to have agreed to value the property, with the suggested date for the valuation to have been 4 September 2015. It seems

that they also agreed that they would submit to each other proof of their contributions to the property before 9 September 2015. At that stage, they did not record the valuation of the occupation by the defendant and how this had to be dealt with. It seems that some letters were exchanged thereafter. I was referred to one such letter dated 14 October 2015. The defendant's attorneys insisted in this letter that the matter could not be resolved without proof of expenses paid. By then the envisaged exchange of schedules and proof

of payment that were meant to have been exchanged by 9 September 2015 had not been exchanged yet. This at least inter alia was because the defendant had not been able to obtain municipal statements as yet. As a result, the attorneys for the defendant declined to attend further negotiations until the exchange of documents.

- [4] There was a hardening of attitudes. I do not seek to apportion blame, as it may well be dangerous to do so without full evidence. In the end it does not matter, as it would take about six years to resolve the issues that were initially meant to be dealt with in about September 2015. The plaintiff sued the defendant in October 2015 for dissolution of the co-ownership. She sought relief that the defendant was to become the sole owner, and that he had to pay her R550 000.00, being the value of her half share of the common property. In short, on the facts of the matter where the plaintiff remained in sole occupation of the property, she sought a simple division of the joint ownership, without a full accounting process. Almost six years later, the parties would agree that the defendant had to pay the plaintiff R310 000.00.
- [5] The defendant argued before me that the plaintiff should have persisted in trying to negotiate a settlement and should be penalised with attorney-and-client costs for commencing the litigation process. It seems to me that the litigation process vindicated the plaintiff's decision to commence with legal proceedings as it seems to me that only a looming day in court brought about a settlement. As will appear below, at no stage did the defendant make an offer to pay any amount comparable to the eventual settlement, even when it ought to have been clear to him that he had to make a payment. Under those circumstances, the plaintiff was compelled to continue with the litigation, and in my view cannot be faulted for doing so.
- [6] The summons was issued on 19 October 2015 and served on 29 October 2015. This is the commencement date for the running of interest. See section 2A(2)(a) of the Prescribed Rate of Interest Act.[1]
- [7] The defendant gave notice of his intention to oppose the matter on about 9 November 2015. The plaintiff applied for summary judgment. The defendant delivered his affidavit on 5 January 2016. This is important, as already in this affidavit the defendant was able to reflect much of the accounting exercise he insisted upon. He did not address the value of the property, or the value of his occupation of the property. He took issue with the plaintiff's value of R1.1 Million, but did not suggest a value, as he easily could have done. The affidavit reflected amounts that that the plaintiff and the defendant expended on mortgage bond instalments that

was either the final or close to the final amounts as alleged by the plaintiff (R724 949.00 and R91 000.00). The amounts that he averred in respect of rates (R106 000.00 and R0), were again either the final or close to the final amounts as alleged by him. The amounts that he averred in respect of maintenance and improvements (R60 884.50 and R21 700.00), were again close to the final amounts as alleged by him. He referred to some insurance payments by the plaintiff. On his calculation, excluding the value of the property and the value of his occupation of the property, he averred that the plaintiff owed him about R300 000.00. What would have been clear to anyone is that once the value of the property and the value of his occupation of the property were considered, the defendant would be indebted to the plaintiff. He made no offer to pay any amount.

[8] The defendant was placed under notice of bar to plead on 3 February 2016. He delivered the original plea on about 10 February

2016. The defendant consented therein to the dissolution of the joint ownership, but averred that the parties had concluded an agreement in 2003: "It was an express, alternatively tacit, further alternatively implied term of the Agreement that that the parties would, at dissolution of their joint ownership in respect of the Property, render to one another a full account of all the expenses that they incurred in pursuance of and relating to their joint ownership in respect of the Property, which would where possible and necessary be supported by supporting vouchers." He alleged that he had made certain payments being mortgage bond instalments, rates and taxes, home improvements, and pleaded that the plaintiff too made certain payments. As was dealt with above, the defendant had a good idea of the amounts involved and he pleaded them, or most of them. He still did not plead the values of the property or the value of his occupation of the property. I repeat the point, he must have known that he was indebted to the plaintiff, but make no offer to make payment. The defendant asked that a process should be followed to determine a statement and debatement of account(s) supported by proof, the property should be valued, and any payment of the value of the property should be adjusted and the indebted party should pay to the other the amount owing. A counterclaim to this effect was instituted.

[9] The plaintiff denied the agreement. She pleaded that the parties only agreed to live together and to purchase the property jointly (and did not agree on the accounting process). She averred that the fair and equitable dissolution of the joint ownership would be that she be paid the value of the half share in the property. She pleaded that she "has not resided in the property since 2005, she has been deprived of her right of use and enjoyment of her half share of the property and thusly should not be held to account for necessities or improvements she did not consent to or enjoy". This defence was based on the wide and equitable discretion a court has in ordering a division of a property jointly owned.

[10] In the end an application to compel the defendant to make discovery was brought on 10 August 2016. The defendant made discovery on 26 August 2016. When the matter got to trial on 16 March 2017, the matter came before Louw J. The learned Judge granted an order in chambers. It is the type of order that would only have been granted by consent, as it in effect

puts in operation a process to achieve a statement and debatement of account(s) supported by vouchers, in part as claimed by the defendant. I saw the heads of argument drafted by the two counsel who appeared on that day. They raise some issues pertaining to the order, but before me the present counsel took no issue with the order. I address the matter on the basis that the order stands until set aside. Until then, it has to be complied with. The order terminated the joint-ownership, provided for the valuation of the property by a joint valuer, provided for the rendering of accounts, provided for proof of payment of expenses pertaining to the property, and provided that the value of the defendant's occupation be taken into account (which he had not tendered until then). The order also provided for mediation, and only a return to court should the mediation fail. The order spelled out that the final payment would

depend on the value of the property and the outcome of the statement and debatement of account(s).

- [11] The order by Louw J did not have its desired effect. The parties did not agree on the amount due by the defendant and/or the value of the property, the value of the defendant's occupation of the property, and/or the property related expenses. At the ordered mediation, only the value of the defendant's occupation was agreed upon as R329 956.80. This happened on 12 December 2017. I pause. The defendant's case at summary judgment was that the plaintiff, excluding this amount, owed him about R300 000.00. This was in accordance with the calculations in his plea. Once the amounts were set-off against the other, on the back of an envelope type calculation, the defendant on his version owed the plaintiff about the value of her half share in the property. He made no offer to make payment.
- [12] The matter had to go back to trial with very little progress having been made. The defendant did deliver a request for particulars for trial on 11 June 2018. Similar figures to those he used before were again contained therein. He sought agreement on a property valuation of R1.02 Million (as opposed to R1.1 Million), [2] reflected the value of his occupation as R329 956.80, and reflected amounts in respect of property expenses. On these figures, the defendant was indebted to the plaintiff in the sum of R464 100.45. He did not tender payment of this amount.
- [13] The many pre-trial conferences did not narrow the issues, and the matter proceeded to trial again on 25 February 2018 when it was crowded out. On 6 September 2018 the defendant offered payment to the plaintiff of about R45 000.00. Costs were not offered. It was a tenth of what his calculations showed, excluding costs. The matter proceeded to trial again on 14 November 2019 but again was crowded out. On 25 July 2019 the defendant thought a settlement meeting might be futile unless the plaintiff pays his costs and walks away from the matter as his settlement proposal. The matter proceeded to trial again on 3 February 2020, but was crowded out once again. Counsel for the defendant was recently appointed, but counsel for the plaintiff was appointed for the last three trial set-downs. She informed me that her opponents refused to meet her, and took the approach that the plaintiff had to prove her client's claim in court.

- [14] The matter came before me as an envisaged five-day trial on 26 July 2021. I took issue with the court time required where the disputes were not clear. I asked that common cause facts and disputed facts be determined. The two counsel were confident that the matter would be resolved. They then resolved the amount payable by the defendant. The parties agreed on a payment by the defendant of R310 000.00. They could not agree on costs. I had to decide that matter the next day, hence this judgment.
- [15] The failure to stop the runaway train in time, has one consequence: Someone will be left out of pocket to a significant extent. I agree with the opening sentence by the defendant's counsel in his heads of argument: This matter should never have seen the inside of a courtroom. I disagree that the plaintiff is to blame to such an extent that I must deprive her of the costs that she would otherwise have been entitled to.
- [16] In my view the usual approach regarding the effect of success, the circumstances of the case, and the conduct of the parties as set out above, all point to one result: Costs should follow the result. The result was substantial success to the plaintiff. Awarding her the costs would also be fair. The defendant had lived in a house only because his former romantic partner had (what he describes as) "requisite favourable consumer profile" to acquire the property. When she left, he did not pay rent. When she sought to end the joint-ownership, he did not take a common-sense approach and made an offer to pay what was due, but instead steered the matter to a detailed and accounting exercise that added little value. He had many opportunities to step back, look at the matter, and ask: "Where will this end?", and make a reasonable offer to settle his indebtedness. On his own calculations he was indebted to the plaintiff. After almost six years of litigation the amount owing by the defendant has been determined. In my view, it is fair that the plaintiff ought to be compensated for the reasonable expenses she had to incur to obtain payment of what was always due to her. The defendant's limited success in agreeing to a court order before Louw J does not detract from this approach.
- [17] The matter ends with this order:
1. The defendant is ordered to pay the costs of this action, including all reserved costs.

DP DE VILLIERS

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 August 2021.

APPEARANCES

On behalf of the Plaintiff

ADV N NORTJE

Instructed by:

ML SCHOEMAN ATTORNEYS

On behalf of the Defendant:

ADV R ELLIS

Instructed by:

TIAAN

SMUTS ATTORNEYS

Heard on:

26 and 27 July 2021

Delivered on:

16 August 2021

[1] 55 of 1975.

[2] The amount agreed upon later was R1.05 Million.

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Prepared on 10 October 2026 · Esheria