

SOUTH AFRICA / JUDGMENT

M.K N.O v J.H.P.T and Others (2023/030065) [2025] ZAGPPHC 555 (28 May 2025) [2025] ZAGPPHC 555

COURT

North Gauteng High Court, Pretoria

BEFORE

Bam

CASE / FILE NUMBER

2023/030065

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

HELD AT PRETORIA

CASE NO: 2023/030065

DOH: 26 November 2024

DECIDED: 28 May 2025

1)

REPORTABLE: NO

2)

OF INTEREST TO OTHER JUDGES: NO

3)

REVISED.

DATE 28 MAY 2025

SIGNATURE

In

the matter between:

M[...]
K[...] N.O.
(ID:
8[...])
(In
her capacity as the executor of Estate Late W[...] B[...] T[...]
in terms of the letters of executorship issued by the
Master of
the High Court, Johannesburg, dated 10 March 2022)
Applicant
And
J[...]
H[...] P[...] T[...]
First
Respondent
CHANGING
TIDES (Pty) LTD. N.O. (registration number 1986/0044794/06)
Second
Respondent
MASTER
OF THE HIGH COURT JOHANNESBURG
Third
Respondent
This judgment has been
handed down remotely and shall be circulated to the parties by way of
email / uploading on Caselines. The
date of hand down shall be deemed
to be 28 May 2025.
ORDER
1.
The application is dismissed with costs.

JUDGMENT

Bam J

Introduction

1. The applicant applies to this court for an order authorizing, inter alia, the termination of joint ownership in the immovable property, described as Erf 1[...] B[...] Township Registration Division IR, The Province of Gauteng (the property), which currently vests in undivided shares in her as the duly appointed executrix of Estate

Late W[...] B[...] T[...] and in the first respondent. The order sought is to further authorize the sale of the immovable property,

along with certain ancillary relief. First respondent opposes the application on various grounds. The grounds include a point in limine founded on the provisions of Section 97 of the Deeds Registry Act[1] (the Act). Section 97 (1) of the Act reads:

‘Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days’ notice before the hearing of such application and such registrar may submit to the court such report thereon as he may deem desirable to make.’ (own underline)

2. In response to the merits, the first respondent submits, inter alia, that he owns the entire property, following the divorce decree issued by this court, which incorporated the settlement agreement between him and the late Mrs T[...]. I commence by introducing the parties before setting out a sketch of the background facts.

Parties

3. The applicant is the duly appointed executor of the Estate late W[...] B[...] T[...] with her business address situated at Tinto & Associates Inc, 9[...] D[...] Avenue, Pretoria, Gauteng.
4. First respondent is J[...] H[...] P[...]T[...], an adult male and joint owner of the immovable property in question. The first respondent was married to the late Ms. T[...] until the time of their divorce in 2009.
5. Second respondent is Changing Tides 17 (Pty) Ltd, N.O. (registration number 1986/0044794/06), a private company with limited liability duly incorporated in accordance with the laws of the Republic of South Africa with its principal place of business at [...] M[...] Crescent, Milkwood Park, La Lucia Ridge, Durban. Second respondent is cited in its representative capacity as the duly appointed and sole trustee of South African Home Loans Guarantee Trust, IT 10713/2000, a Trust duly registered in terms of the laws of the Republic by the Master of the High Court of South Africa. The applicant seeks no relief against the second respondent.
6. Third respondent is the Master of the High Court of South Africa, Johannesburg, with its offices situated at 6[...] M[...] Street, Corner Marshall and Sauer Streets, Pixley ka Seme, Johannesburg. The relief sought against the Master is that they approve the sale of the immovable property and, where the Master deems it fit, set the conditions of the sale.
7. Of the three respondents, only the first respondent is resisting the relief sought by the applicant. In the event, I shall refer to the first respondent as respondent. Where necessary, I specify the particular respondent.

The relief sought

8. In summary, the relief sought by the applicant may be stated as: The applicant seeks the authority of this court to enable her as the executor: (i) to sell the immovable property, subject to Section 47 and any other relevant provision of the Administration of Estates Act; (ii) to terminate the joint ownership of the property described as Erf 1[...] B[...] Township

Registration Division IR, The Province of Gauteng (the property), subject to those conditions as the court may determine, including the manner in which the property is to be sold and further providing for the respondent to have the right of first refusal; and further subject to the conditions imposed by the Master; (iii) to receive and apply the proceeds of the sale contemplated in paragraph 1 of the Notice of Motion to settle the liabilities of the estate and defray the costs incurred in the administration of the estate; to pay any

profit remaining after payment of the debts and expenses to the respondent; and (iv) to authorize her or the sheriff to sign the

necessary papers to effect transfer to either the respondent or a third party.

The facts

9. The common cause facts are: The property in question was first registered in the names of the late Mrs T[...] and the respondent in 1992, more than 32 years ago. In 2007, a mortgage loan (loan) was registered against the property in favour of the second respondent. Following her appointment in March 2022 as executrix of the estate of the late Ms. T[...] in March 2022, who died in 2019, it came to the applicant's attention that the repayments towards the loan were either sporadic or not made at all. She wishes to sell the entire property on the basis that the respondent either refuses or neglects to engage with her with a view to either purchasing the remaining half of the property alternatively, signing off the relevant papers to effect transfer to a third party.

Applicant's

submissions

10. The applicant submits that as the executor of the estate, she is obliged in terms of the Administration of Estates Act to sell the property in such a manner and subject to the conditions, as the Master may approve. She submits that her proposed method of terminating the joint ownership is just and equitable. She records that neither she nor the second respondent are opposed to the first respondent's keeping the property in the event he so desires, provided he furnishes the necessary guarantees. The applicant records in her founding papers that the outstanding amount together with interest at the time of deposing to the founding

affidavit stood at R 196 025.00, with interest calculated at 9% from 1 March 2023 to date of full payment. The arrears were calculated in the amount of R88 313. 46 as at 15 March 2023.

11. The applicant further draws this court's attention to section 26(1) of the Constitution of the Republic of South Africa, which guarantees everyone the right to adequate housing. She records that in the event the respondent claims that the present application infringes on his right to adequate housing, it is incumbent upon him to place such information before this court. In response to the respondent's assertion that he is the owner of the entire property, pursuant to the divorce decree, the applicant submits that the settlement agreement,

although binding between the spouses, did not vest dominium of the deceased's half share of the property in the respondent any more than a contract of sale of land passes ownership on the purchaser would.

Respondent's

submissions

12. The respondent raises a point in limine founded on the applicant's non-compliance with Section 97 of the Deeds Registry Act. In this regard, he submits that the

application involves the performance of an act in the deeds registry, yet the applicant failed to give notice to the registrar before the application was made, as required by the section. He submits that the application should be dismissed on this ground alone.

13. Based on the assertion that he is the owner of the entire property, following the divorce decree, he submits that bar the relief of termination of the joint ownership, the applicant lacks locus standi for the remainder of the relief she seeks before this court.

Issues

14. The issues for determination are:

(i) Whether the applicant complied with Section 97 of the Deeds Registry Act. In the event the applicant failed to comply, the implications for such failure must be determined, (point in limine).

(ii) Whether the respondent is correct in his assertion that he owns the entire property pursuant to the decree of divorce.

(iii) Whether, considering the provisions of section 47 of the Administration of Estates Act, this court is in a position to grant the relief sought by the applicant; and

(iv) Costs

Point in Limine: Whether the applicant complied with Section 97 of the Act, and the implications

15. Section 97 of the Act reads:

'97. Notice to registrar of application to court

(1) Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days' notice before the hearing of such application and such registrar may submit to the court such report thereon as he may deem desirable to make.' (own underline)

16. It may be said that the main relief sought from this court is the termination of joint ownership in the property. The act of terminating joint ownership undoubtedly involves the performance of an act in a deeds registry, which in turn calls for compliance with Section 97.
97. There is nowhere in the papers where the applicant avows compliance with the provisions of the section. Nor is there any averment that the application was either served upon the registrar to further the purpose of the provision. Thus, it must be accepted that the applicant has not complied with the provisions of Section 97.
17. Does the non-compliance with the provision mean the end of the application? Guidance in finding this answer must be sought from case law. In *Ex Parte: Sanders*[2], the court held that non-compliance with the provisions of the section was fatal to the application, whereas compliance even with a short notice than the prescribed seven days could be condoned. It may be said that the court's approach in *Sanders* was steeped in literalism. However, in *Scott NO and Another v Nelson Mandela Bay Metropolitan Municipality*, the court adopted what is now known as the purposive approach, as may be gleaned from its reasoning:

'I do accept that the law requires that notice be given to the Registrar, but I consider relevant, in favour of the applicants, the

fact that the application was served on the office of the Registrar and a report prepared by the Registrar forms part of the record. I am therefore satisfied that the purpose which the rule was intended to serve has been met.'

18. In *A.A.V NO v Y.V* the court, underscoring the peremptory nature of the provision, held the view that non-compliance with the provision was fatal to the application. It said:

'This submission ignores the provisions of section 97 (1) of the Deeds Registries Act which are peremptory with regards to the need to file notice regarding any proceedings in court ... [16] I, therefore, hold the view that failure to notify or even join the registrar of deeds is fatal to the application.'

19. However, it appears that the distinction between directory and mandatory provisions when interpreting legislation with a view to assessing compliance has been discarded, regard being had to the purposive approach espoused by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*. Here the court observed:

'Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory"

ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision'

20. The purposive approach was advocated for by the Supreme Court of Appeal in *Signature Real Estate (Pty) Ltd v Charles Edwards Properties and Others*. Here the court was emphatic that even peremptory provisions must yield to two interpretive imperatives, namely, the injunction of Section 39(2) of the Constitution, which enjoins courts, when interpreting any legislation, to promote the spirit, purport and

objects of the Bill of Rights; and the purpose of the statute, more specifically, due regard must be had to whether adopting a strict or literal interpretation of its provisions is consistent with what the Act seeks to achieve[6].

21. The purpose of the provision is to afford the registrar the opportunity to make an informed decision on whether it is necessary to file the report envisaged in the section. It may be that a report may not always be necessary, but the registrar cannot make such a decision without being afforded the opportunity to consider the relief sought. It follows that the purpose for which the section was enacted has not been achieved in the present case. In the circumstances, the application cannot be granted.

Whether the respondent owns the entire property pursuant to the decree of divorce

22. It is convenient to at once dispose of the respondent's contentions that he is the owner of the entire property, pursuant to the decree of divorce. The contention is incorrect. The divorce decree endows the respondent with a personal right, which is enforceable only against the other party to the agreement, to claim transfer or the endorsement of the deed to reflect him as the sole owner. To achieve termination of the co-ownership and acquire dominium of the entire property requires the act of attestation or registration to be performed by the Registrar of Deeds, which it is common cause has not taken place in the present case. The decision of the Supreme Court of Appeal in *Fischer v Ubomi Ushishi Trading & others*, makes this plain:

'[C]o-ownership in land is only terminated on attestation (registration) of deeds of partition transfer by the registrar, when ownership is conveyed to the respective owners of the land. Spouses married in community of property automatically become bound co-owners of immovable property in their joint estate. Upon termination of the joint estate ... on divorce, the bound co-ownership was replaced by free co-ownership until such time as the subdivision ... was effected. It is only upon attestation of the deeds of partition transfer by the registrar that free co-ownership is replaced by individual ownership.'[7]

23. The court in *Ubomi* referred to section 26 of the Deeds Registry Act, which reads: (I have abbreviated the provision for convenience)

'26. Deeds of partition transfer (1) If two or more persons who own in undivided shares the whole of any piece or pieces of land, have agreed to partition that land, the registrar shall, on production to him of a power of attorney ... authorising the passing of deeds of partition transfer of such land..., attest deeds of partition transfer..., conveying to the respective owners the land or shares therein awarded to them under the said agreement.'

Whether this court is in a position to grant the relief sought

24. Section 47 deals with Sales by the Executor and it reads:

‘Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that-

- (a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or
- (b) if the said heirs are unable to agree on the manner and conditions of the sale, the executor shall sell the property in such manner and subject to such conditions as the Master may approve. (own underline)

25. The applicant asks this court to authorize the termination of joint ownership in the property subject to the court placing various conditions, which include the manner in which the property is to be realized. At this point, the court has no information on whether the executrix had identified or even consulted any heirs; whether there are any minor children or persons represented by a curator who have an interest in the property; what their views are, whether there were any disagreement between the heirs, and the nature of those disagreements. Certainly, the applicant is silent on these critical issues. The applicant does not claim to have ever approached the Master for consent but contents herself with inviting the Master to issue those conditions in line with Section 47.

26. But there is something more perplexing about the applicant’s decision to come to court directly, without approaching the Master, it is that the court is asked to step into the role of an administrator by setting conditions with no relevant information whatsoever. In *Bester N.O v Master of the High Court and Another*, a matter concerned with an administrative review of the Master’s failure to issue their consent, in circumstances where the applicant had sought such consent prior to coming to court, the court after surveying relevant authorities, was of the view that it was not in as good a position as the Master would be to make the decision on the manner and conditions of sale. It noted:

‘[48] [E]ven in a case where there is a single heir, as opposed to a number of heirs, if the single heir did not consent to the manner and conditions proposed for the sale by the executor, the executor would be required to approach the Master for approval.’[8]

27. It must be noted, as the provision of Section 47 make plain, that the executor is vested with the authority to sell the property. The court made the point in *Jackson v Stanford Cawood and Others*[9] that Section 47 relates to the manner and conditions of sale of estate property by the executor, and not to the decision as to

whether or not to sell.

28. It seems to me that stepping into the Master's shoes and setting the conditions and the manner in which the sale is to be carried out, even where, as in the present case, the applicant still intends to seek the Master's consent, is not what was intended by the lawmakers. Besides being a recipe for chaos, in the event the Master were to issue conditions contrary to those issued by this court after considering the circumstances of this case, I am persuaded that, acceding to the applicant's request would offend the separation of powers rule[10]. The application must thus be refused.

Rule 46A

29. The founding affidavit alludes to Section 26 of the Constitution and to the provisions of Rule 46 of the Uniform Rules. It attempts to challenge the respondent to bring to court relevant information of the sought envisaged when a judgment creditor, in the position of bondholder, wishes to execute against the primary home of the execution debtor. Yet, no such judgment exists in this case. The second respondent, for whom it appears the executrix also acts in these proceedings, has not walked the long and demanding road of obtaining execution against the immovable property which constitutes the primary residence of the execution debtor. Instead of proceeding by way of Rule 46A against the respondent for his share of the bond repayments, a process, over which the court is mandated to exercise judicial oversight, the applicant, empowered by her nomination secured through the second respondent, chose to bring this application. Based on the reasoning in this judgment, the application was not thought through. In the process the respondent was forced to incur costs to protect not only his interest in the property but his home. The application falls to be dismissed with costs.

Order

1. The application is dismissed with costs.

N.N BAM J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Date of Hearing:

27 November 2024

Date of

Judgment:

28 May 2025

Appearances:

For the Appellant Adv P.I Oosthuizen Instructed by: Velile Tinto & Associates Wapadrang,
Pretoria Counsel for the respondent: Adv C.J Mouton Instructed by: Michael Krawits & Co c/o
Nixon Collins Attorneys, Waterkloof, Pretoria

[1] Act 43 of 1957.

[2] (3022/02)

[2002] ZAWCHC 34; [2002] 3 All SA 619 (C); 2002 (5) SA 387 (C) (19 June 2002), page 5.

[3] (920/2012)

[2013] ZAECPEHC 3 (29 January 2013).

[4] (39813/2019)

[2021] ZAGPJHC 865 (1 July 2021), paragraph 15, 16.

[5] (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013), paragraph 30.

[6] (415/2019)

[2020] ZASCA 63; 2020 (6) SA 397 (SCA) (10 June 2020), paragraph 17.

[7] (1085/2017)

[2018] ZASCA 154(19 November 2018), paragraph 27.

[8] (17428/2021)

[2023] ZAWCHC 208; 2023 (6) SA 199 (WCC) (16 August 2023), paragraph 48.

[9] (3945/2016)

[2017] ZALMPPHC 20 (18 August 2017), paragraph 29.

[10] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004); paragraphs 45 - 46; International Trade Administration Commission v SCAW South Africa (Pty) Ltd (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC); 72 SATC 135 (9 March 2010, paragraph 95.

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Prepared on 9 October 2026 · Esheria