

SOUTH AFRICA / JUDGMENT

N.M v M.M and Another (2023/008561) [2024] ZAGPJHC 674 (24 July 2024)

[2024] ZAGPJHC 674**COURT**

South Gauteng High Court, Johannesburg

BEFORE

C Todd

CASE / FILE NUMBER

2023/008561

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****CASE****NO: 2023/008561****1.****REPORTABLE:****2.****OF INTEREST TO OTHER
JUDGES:****3.REVISED:
In**

the matter between:

M[...],
N[...] N[...]
Applicant
and
M[...],
M[...] N[...] M[...]
C[...]
First
Respondent
ABSA
BANK LIMITED
Second
Respondent
This judgment was
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deemed to be 10h00 on 24 July 2024.
Order: Paragraph [28] of
this judgment.

JUDGMENT

TODD, AJ:

Introduction

- [1] This is an opposed application in terms of which the Applicant seeks an order under the *actio communi dividundo*.
- [2] The Applicant and First Respondent are married to one another out of community of property with the application of the accrual system.
- [3] The Applicant instituted divorce proceedings during March 2022. The parties have two minor children. The main relief sought in the divorce proceedings, apart from a decree of divorce, is confirmation regarding the parties' parental responsibilities and rights, contact between the First Respondent and the minor children, the determination of the accrual in the parties' respective estates and division thereof, and payment of maintenance in relation to the minor children.
- [4] Neither party seeks relief in the divorce proceedings in respect of the immovable property which is the subject of this application, which they jointly own.
- [5] The Applicant and First Respondent are co-owners of that property, which served as the matrimonial home until the First Respondent left the home approximately three years ago following the breakdown in the parties' marriage relationship.

- [6] The parties agree that the marriage relationship has broken down irretrievably and also agree in principle that their joint ownership in the immovable property should be terminated.
- [7] The Applicant and minor children continue to reside in the immovable property and the Applicant wishes to continue to do so with the children, which she states is their home where they find comfort and stability.
- [8] Following an application in terms of the provisions of Rule 43 of the Rules of this Court, which was heard in June 2023, an order was made regulating the children's primary place of residence with the Applicant, the First Respondent's contact with the minor children, and ordering the First Respondent to pay maintenance to the Applicant for the minor children.
- [9] While the Applicant wishes to terminate the parties' joint ownership in the property, the First Respondent objects to this at this stage and states that this should occur only as a consequence of the parties' divorce.

Summary of the parties' contentions

- [10] The parties agree that the legal principles in proceedings of this kind are set out in Robson v Theron [1].
- [11] In summary the *actio communi dividundo* is the common law remedy for the termination of joint ownership in property. No co-owner is normally obliged to remain a co-owner against her will. The action is available for the division of joint property where co-owners cannot agree, and may be brought by a co-owner irrespective whether co-owners possess the joint property jointly or any one is in possession. This Court has a wide equitable discretion in making a division of joint property.
- [12] Ms Abro, who appeared for the Applicant, submitted that the Applicant is entitled to bring an end to the parties' joint ownership in the property concerned and that the practical manner for this to be done was for the property either to be sold in the open market with net proceeds to be divided equally, or for one party to acquire the other party's share, to become sole owner of the property, and to make payment to the other of their share in the equity in the property.
- [13] The Applicant seeks transfer of the First Respondent's half share in the property to her. Ms Abro submits that there can be no prejudice to the First Respondent, who will receive 50% of the value of the equity in the property (that is the sale proceeds less the balance due on the bond of the property). This, she submits, will occur whether the First Respondent's share is transferred to the Applicant or the property is sold on the open market.
- [14] The essence of the First Respondent's contentions in opposing the relief sought, as explained by Ms Vosloo-de Witt who appeared for the First Respondent, is that because the joint ownership of the property is "tied to the parties' marriage relationship" the sale of the First Respondent's 50% share in it will have an impact on the parties' respective accrual and

maintenance claims in the divorce proceedings. That being so, Ms Vosloo-de Witt submitted, it would not be just and equitable to force the First Respondent to sell his 50% share in the property because this would impact the Applicant's accrual and inflate her current bond costs. This would also have an impact on the maintenance which the Applicant would claim against the First Respondent in the divorce proceedings.

- [15] The First Respondent also submits that an order should not be made authorising the Applicant to purchase his share of the immovable property because this is something she cannot afford. Instead, he contends that the property should, in due course, be sold to a third party on the open market as a consequence of the divorce proceedings.

Analysis

- [16] As regards the First Respondent's contention that the Applicant cannot afford to purchase his share of the property, there does not appear to be any factual basis for this contention on the papers, and in any event I agree with Ms Abro that this is not a matter about which the First Respondent should be concerned provided that he receives his 50% share of the proceeds of the sale.
- [17] As regards the apparently related submission that a purchase by the Applicant of the First Respondent's half share in the property would potentially increase any maintenance claim that the Applicant might make against the First Respondent, there is on the papers no such maintenance claim in the divorce proceedings in which, it is common cause, neither party makes any claim for maintenance against the other.
- [18] As regards the First Respondent's submission that it would be preferable for the immovable property to be placed on the market, sold to a third party, and the net proceeds divided equally between the parties, the consequence of this would be that the Applicant would no longer be able to live in the property with the children. The property is their current home. It is difficult to see on what basis it could be contended that this is appropriate or just and equitable in the circumstances.
- [19] The First Respondent submits that he is entitled to appoint his own valuator to value the property and that he has not yet done so. There is no reason why he should not have done so already, but in any event, under the terms of the order that is sought, he will have a fair opportunity to do so. This is not, therefore, a ground on which to oppose the relief sought.
- [20] Insofar as the First Respondent submits that it would be more appropriate to defer the division of the immovable property to the impending divorce proceedings, I am unable to see how that would result in any decision other than that the jointly owned immovable property should be disposed of and the proceeds divided between the parties, essentially the relief sought in the present proceedings.

- [21] Since the parties both seek termination of their joint estate which includes the termination of their joint ownership of the immovable property concerned, there seems to me to be no legitimate basis for contending that this should be deferred or postponed until the divorce proceedings have been finalised.
- [22] Finally, and insofar as the First Respondent submits that the sale of the property might impact the accrual calculation in respect of their estates, I invited Ms Vosloo-de Witt to explain how this was so. I have considered her submissions in this regard, and do not agree that there is any legitimate complaint or risk in this regard.
- [23] I am satisfied that a proper case has been made for the relief that the Applicant seeks.

Costs

- [24] Regarding costs, Ms Abro submitted that the First Respondent's opposition to the application has resulted in delay and unnecessary financial expense, and that the First Respondent's grounds for opposing the Applicant's wish to remain in the home with the parties' minor children is without merit and is "spiteful, obstructive, vindictive and contrary to his minor children's best interests which are paramount". While the First Respondent accepts that joint ownership in the immovable property should be terminated, he opposes the application and persists in refusing to the Applicant purchasing his half share in the property. Ms Abro submitted that the First Respondent's conduct is obstructive, without merit and should be met with a punitive costs order.
- [25] In response Ms Vosloo-de Witt submitted that punitive costs should not be awarded simply because the First Respondent has opposed the application. She submitted that the application is in fact male fides because it constitutes an attempt to influence the parties' accrual and maintenance claims and that the First Respondent as co-owner "has every right to also claim full ownership of the property".
- [26] It seems to me that the First Respondent's stance, while without merit, does not meet the standard of warranting punitive costs. It did, however, warrant the use of an experienced counsel, and having regard to the importance of the issues to the parties the matter warrants an order of costs on the party and party scale B.
- [27] I agree with Ms Abro that it is appropriate to order that costs may be deducted from the sum to be paid to the First Respondent by the Applicant for his 50% share in the immovable property.
- [28] In the circumstances I make the following order:
1. The Applicant and the First Respondent's joint ownership in the immovable property described as Erf 1[...] B[...] Ext 1[...], B[...], Johannesburg, Gauteng, held under title deed number T6[...], measuring 378 m² in extent, and situated at 1[...] B[...] C[...] Estate, S[...] Avenue, Gauteng ("the immovable property"), shall be terminated in the following manner:

1.1 The Applicant and the First Respondent shall, within 5 (five) days of this order, each appoint a reputable real estate agent operating within the area of the jointly owned immovable property in order that they may each obtain a valuation of the immovable property;

1.2 The Applicant and the First Respondent shall accept the average of the two valuations obtained from the aforementioned real estate agents as the fair market related price of the immovable property;

1.3 The Applicant shall purchase the First Respondent's 50% share in the immovable property and make payment to the First Respondent of the amount due to him, being 50% of the equity in the immovable property, taking into account the outstanding amount owing to ABSA Bank Limited in respect of the registered mortgage bond with bond number 8[...]

1.4 The Applicant shall do all things necessary in order that she may be substituted as the sole registered Mortgage Bond Holder in place of the First Respondent in respect of the Mortgage Loan Account Number 8[...] held with ABSA Bank Limited, alternatively the existing mortgage bond shall be cancelled and a new bond registered over the immovable property in order that she be reflected as the sole mortgage bond holder and registered owner in respect of the immovable property and henceforth from date of substitution be solely responsible for the outstanding mortgage bond over the immovable property and payment of the monthly instalments thereof;

1.5 The First Respondent shall timeously and within (5) five days of request attend to sign all documents required of him and shall further provide all information and documents which may be necessary to give effect to the transfer of his 50% ownership to the Applicant;

1.6 In the event of the First Respondent failing to comply with the above or refusing to sign any and all documentation required in order to transfer ownership of the immovable property to the Applicant as aforesaid, the Sheriff of the above Honourable Court is hereby authorised to do so in the First Respondent's stead.

2. The First Respondent shall pay the costs of this application on the party and party scale B, which costs can be deducted from the sum to be paid to the First Respondent by the Applicant for his 50% share in the immovable property.

C TODD

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing:

22 May 2024

Date of

Judgment:

24 July 2024

APPEARANCES

Counsel for the Applicant: Adv. M Abro

Instructed by:

Di Siena Attorneys

Counsel for the Respondents: Adv. A Vosloo-de Witt

Instructed by:

Burnett Attorneys

[1] 1978

(1) SA 841 (A)

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