

SOUTH AFRICA / JUDGMENT

N.S v R.S (D410/2020) [2025] ZAKZDHC 43 (18 July 2025) [2025] ZAKZDHC 43

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Singh

CASE / FILE NUMBER

D410/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

No. D410/2020

In

the matter between:

N[...]

S[...]

Applicant

and

R[...]

S[...]

Respondent

ORDER

The following order shall

issue:

1.
The parties' joint ownership of the property situated at 9[...] I[...] Close, Izinga Ridge, Umhlanga, KwaZulu-Natal, held under Deed of Transfer number ST31179/2018, is terminated.

2.
The property shall be sold forthwith by way of private auction, as

follows:

(a)
The applicant shall have the sole right to decide as to who shall be appointed to auction the property, and when such auction shall take place.

(b)
The property shall be sold subject to a reserve price of R5 million.

(c)
The occupation by the new owner shall be on transfer of the property or as arranged between the applicant and the purchaser.

(d)
Should the reserve price not be achieved, the respondent's half share shall be transferred and registered in the applicant's name against payment to the respondent of R3 million.

(e)
If the property is sold for more than R6 million, the nett proceeds of the sale shall be divided and the respondent shall be paid more than R3 million, if her half share from the nett proceeds of such sale exceeds R3 million.

[3]
The respondent is directed to sign any documents as may be necessary to effect the sale and/or transfer of the property.

[4]
Should the respondent fail to sign any such documents within seven (7) days of being called to do so, the sheriff of the high court shall be authorised to sign on her behalf.

[5]
The immediate division of the accrual between the parties in terms of s 8 of the Matrimonial Property Act 88 of 1984 is hereby ordered as

follows:

(a)

The calculation of the accrual of each party's estate, including the calculation of the accrual claim by the respondent (the defendant in the divorce action), shall be as at the date of this order.

(b)

In the interim, from the date of this order to the date of divorce, the matrimonial property system applicable shall be out of community of property, excluding accrual, community of property and community of profit and loss.

(c)

The respondent shall be entitled to payment of her accrual claim, as proven, as at the date of divorce.

(d)

Save for, on transfer of the property, the respondent shall be entitled to payment of whichever is the greater of the following

amounts:

(i)

Fifty percent of the nett proceeds from the sale of the property as referred to in paragraphs 2(a) – (e) above, or;

(ii)

The amount of R3 million on the registration of transfer of property to the applicant.

[6]

The respondent is directed to pay the costs of this application on scale B.

JUDGMENT

Singh J

Introduction

- [1] This application concerns an immovable property described as 9[...] I[...] Close, Izinga Ridge, Umhlanga, KwaZulu-Natal, held under Deed of Transfer number ST31179/2018 (the property).
- [2] The applicant relies on the *actio communi dividundo* to terminate the joint ownership of the property.

[3] The applicant and respondent are married to each other, out of community of property, subject to the accrual system. The property is registered in the joint names of the applicant and respondent in undivided shares. Both parties reside on the property together with their minor child. They are in the throes of divorce proceedings which commenced in

2020. A reading of the papers reflects that the primary residence of the minor child is the most contentious issue in the divorce action.

[4] The applicant launched this application on the basis that his continued living with the respondent on the property has become intolerable. He has made various attempts to place the property on the open market. These attempts have been unsuccessful and consequently, he offers to buy the respondent's share in the property. Alternatively, he seeks for the property to be sold by way of private auction. The respondent opposes the application and has also brought a conditional counter-application.

The law

[5] The *actio communi dividundo* is well entrenched in our law. It has been recognised by the old authorities, including Voet[1] and Van Leeuwen.[2] The underlying purpose is that every co-owner may insist on a partition of property at any time, unless there is an agreement between the co-owners not to do so within a certain period of time.[3] If co-owners cannot agree on the manner in which the property is to be divided, the court is empowered to make such a decision as appears to be fair and equitable in the circumstances.[4] The court, in other words, has a discretion which it must exercise judicially. If the property is not capable of sub-division, such an order may, for example, entitle one of the co-owners to obtain the whole of the property upon payment of a sum of money to the other party. If it is not possible to make such an order, the court may order that the property be sold and the proceeds be divided between the parties.[5]

[6] The principles relating to the *actio communi dividundo* were summarised by the Appellate Division in *Robson v Theron*,[6] as follows:

‘(a) No co-owner is normally obliged to remain a co-owner against his will.

(b) This action is available to those who owns specific, tangible things (*res corporals*) in co-ownership, irrespective of whether the co-owners are partners or not, to claim division of the joint property.

(c) Hence this action may be brought by a co-owner for the division of joint property where the co-owners cannot agree the method of division.

(d) It is for purposes of this action immaterial whether the co-owners possessed the joint property, jointly or neither of them possesses it or only one of them is in possession thereof.

(e) This action may also be used to claim ancillary relief payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property.

(f) The court has a wide discretion in making 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 amongst partners.'

[7] The common law was always available in the case of free ownership but not available in bound co-ownership. Due to the different forms of co-ownership, it is necessary to first identify which form of co-ownership is applicable. In *Robson*, the court did not draw a distinction between free and bound co-ownership. The distinction, however, was made in *Municipal Employees Pension Fund and others v Chrisal Investments (Pty) Ltd and others*. [7] The Supreme Court of Appeal (SCA) stated that in respect of free ownership, any co-owner may demand at any time, that the co-ownership

be terminated and that the co-owned property be divided between the owners. In respect of bound ownership, the co-ownership may only be terminated when the primary relationship is terminated.

[8] In, *Ex parte Menzies et Uxor*, [8] the court held that:

'The matrimonial home in a marriage out of community of property, need not in principle be treated as something other than 'free'

ownership, including a right of each co-owner to alienate his or her share freely.'

Accordingly, any restrictions upon unilateral exercise of rights of co-ownership where the marriage is one out of community of property, is no different to any other form of co-ownership.

[9] In considering the *actio*, the SCA, in *Chrisal*, stated that [9]:

'There is no closed list of instances of bound ownership. If the relationship gives rise to bound co-ownership, the co-ownership will endure for as long as the primary intrinsic relationship endures. Once it is terminated then, as in [*ex parte: Menzies et Uxor* 1993 SA 799 (C) at 811H to 812I and *Robson v Theron*, it will become free ownership and be capable of being terminated under the *actio*.' (Footnotes omitted.)

[10] An example of bound ownership is where the parties are married in community of property and are therefore bound co-owners by virtue of their matrimonial property regime. Where parties are married out of community of property, and are joint owners of property, this is regarded as free ownership extrinsic to the matrimonial property system. [10]

The applicant's case

[11] In a draft order, the applicant requests that the property be sold by way of private auction, with him having the sole right to appoint an auctioneer and that the property be sold, subject to a reserve price of R5 million. Should the reserve price not be achieved, then he seeks that the respondent's half share be transferred and registered into his name, against payment of R3 million, to the respondent.

- [12] In his founding papers, the applicant alleges that he has been solely responsible for the running costs of the property with no financial contribution from the respondent. Over and above those expenses, he has to pay maintenance for the respondent and the minor child. He attempted to market the property at R6 million, after assessing similar property sales in the area. The property, however, did not sell. At the time that the property was marketed at R6 million, the respondent was assured that the nett proceeds would be equally divided, and she would receive the sum of R3 million.
- [13] In order to overcome the state of affairs where the property had not been successfully sold, and with the financial backing of his family, the applicant intends to obtain a loan and pay the respondent R3 million against transfer of her half share of the property to him.

The respondent's opposition

- [14] The respondent opposes this application on three grounds, namely:
- (a) She disagrees that the value of the property is R6 million and submits that its true value is R7 616 641, and that on the applicants own version, the property ought to be marketed at between R6 million and to R6.75 million. In her answering affidavit, she submits that the property ought to be marketed for more than R6.75 million and that this court ought to set a reserve price.
 - (b) The respondent contends that the applicant launched the application to place himself in a better position to secure primary residence of their minor child as opposed to the overall objective of this application, namely the termination of joint ownership of the property. It is further submitted that the minor child enjoys the comfort zone within the environment of the property and if it were to be established that the respondent is awarded primary residence of the minor child, she may, in that instance, elect to remain on the property and pay the applicant his half share of the value of the property. In her written heads of argument, the respondent submits that this court is not required, nor tasked, with the competence, to adjudicate upon the issue of primary residence, and hence this application should not succeed. Ms Lennard, who appeared on behalf of the respondent, submits that this court, sitting as the upper guardian of the minor child, ought to take this into account in deciding the application.
 - (c) It would be premature to hear this application before a referee is appointed as the referee would assist the parties in determining the accrual value of the respective estates. The property is one such asset which impacts on the referee's functions and duties. The granting of the relief sought by the applicant usurps the referee's position.
- [15] In a conditional counter-application, the respondent seeks the immediate division of the accrual between the parties in terms of s 8(1) of the Matrimonial Property Act 88 of 1984. At the hearing of the application, Ms Ainslie, who appears for the applicant, submits that the applicant consents to the relief in the conditional counter-application and the order was included in the draft order sought by the applicant.

Application of the facts to the law

- [16] With regard to the first ground of opposition, namely that the property ought to be marketed for R6.75 million, the applicant, in his founding affidavit, was clear that the property was on the market for almost a year and there were no offers at R6 million. Likewise, the applicant submitted that even if he were to place the property on the market for the value submitted by the respondent, the property would need to be renovated. He does not have the funds to do this. The respondent, in her answering affidavit, put up details of various properties in the area and the amounts that those properties sold for. It is apparent that none of the properties sold for more than R6 million and the analysis put up by her also indicates that these properties in some instances, remained on the market for more than one year, before they were sold.
- [17] I am therefore of the view that the applicant correctly suggests that the property be sold at a reserve price of not less than R5 million. This is taking into account that the property did not sell for R6 million when it was placed on the market for that sum. In any event, in his draft order, the applicant tenders to pay the respondent R3 million for her share in the property which, is more than half the suggested reserve price. I intend, however, in setting the reserve price at R5 million, to provide for the possibility, that if, by any chance, the property is sold for more than R6 million, then the nett proceeds of the sale of the property, if the respondent's half share is more than R3 million, must be paid to her.
- [18] In respect of the second ground of opposition, the applicant, in his founding affidavit relies on the report of a forensic psychologist, Ms Phillipa Styles, who recommends that primary residence of the minor child be awarded to the applicant. In her report, Ms Styles states that, 'the continuing to live together in a hostile environment is not good for [B]'. I do not accept the respondent's version that ownership of the property ought not to be terminated or that this application ought not to be heard before the issue of the primary residence of minor child has been determined. Ms Lennard urged me to take the interests of the minor child into account in deciding this matter. The residence of the minor child will, firstly, in any event and notwithstanding whoever is awarded primary residence of her, be disrupted. This is unfortunately a consequence of divorce proceedings where minor children are involved. Secondly, the report of Ms Styles, if anything, suggests that the continued living together of the applicant and respondent is not conducive to the well being of the minor child. It does not, therefore, assist the respondent in submitting that ownership ought not to be terminated for this reason. This ground of opposition, is, therefore, without merit.
- [19] In keeping with what was held in *Chrisal and Menzie*, I am of the view that it is clear that the property falls within the category of free co-ownership. With or without the appointment of a referee, the applicant is entitled to the dissolution of the co-ownership of the property. The argument by the respondent that the sale of the property, will affect her accrual claim, is also in my view, without merit. The determinative date for the calculation of an accrual claim is the date of the dissolution of the marriage.[11] The right to share in the accrual, arises only upon the dissolution of the marriage and as such is until then only a contingent

right.[12]

[20] Having dismissed the respondent's grounds for opposition, I am satisfied that the applicant is entitled to bring an end to the co-ownership of the property and the only practical manner in which this can be done is that the property must be sold and the proceeds divided between the applicant and the respondent. I am of the view, that the sale of the property, subject to a reserve price, is the most appropriate manner of dealing with the property. The reserve price is therefore set at R5 million. Failing that, and should the reserve price not be achieved, then the respondent's half share must be transferred to and registered in the name of the applicant, against payment by the appellant of R3 million. In the event that the property is sold for more than R6 million, then the respondent must be paid the relevant half share of the nett proceeds of such sale, if

it exceeds the R3 million tendered by the applicant. I am also satisfied that, given the lack of agreement between the parties, and in order to prevent unnecessary litigation, the applicant is entitled to an order authorising him solely to appoint an auctioneer.

Costs of the application

[21] Each of the parties seeks the costs of the application. The applicant seeks the costs of the application on scale B, whilst the respondent seeks the costs of the application on scale C. The applicant was constrained to bring this application because the respondent did not consent to the termination of the co-ownership. The applicant further enjoyed success in this application and consented to the relief in the conditional counter-application. I am therefore of the view that applicant is entitled to the costs of the application on scale B.

Order

[22] The following order shall issue:

- (e) If the property is sold for more than R6 million, the nett proceeds of the sale shall be divided and the respondent shall be paid more than R3 million if her half share from the nett proceeds of such sale exceeds R3 million.
- (a) The calculation of the accrual of each party's estate, including the calculation of the accrual claim by the respondent (defendant in the divorce action) shall be as at the date of this order.

SINGH J

CASE INFORMATION

Date of Hearing

: 18 June 2025

Date of Judgment

: 18 July 2025

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[1] Voet 10.3.1.

[2] Censura Forensis 1.3.27.

[3] Schefermann and others v Davies 1944 NPD 20 at 21 to 22.

[4] Matadin v Parma and others

[2010] ZA KZPHC 18 (Matadin), para 2

[5] Rademeyer and others v Rademeyer and others 1968

(3) SA 1(C).

[6] Robson v Theron 1978 (1) SA 841 (A) at 856H - 857D (Robson).

[7] Municipal Employees Pension Fund and others v Chrisal Investments (Pty) Ltd and others
[2020] ZASCA 116; 2022 (1) SA 137 (SCA) (Chrisal).

[8] Ex parte Menzies et Uxor 1993

(3) SA 799 (C) ('Menzies') at 812D - E.

[9] Chrisal para 48

[10] Menzies at 812 H - I

[11] Section 3(2) of the Matrimonial Property Act 88 of 1984; AB v JB [2016] ZASCA 40; [2016] (5)
SA 211 (SCA) .

[12] LD v JD [2021] 1 All SA 909 (GJ) para 33.

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