

SOUTH AFRICA / JUDGMENT

P.B.M v D.E.M and Others (15754/2015) [2018] ZAGPPHC 944 (4 December 2018)

[2018] ZAGPPHC 944

COURT

North Gauteng High Court, Pretoria

BEFORE

RG Tolmay

CASE / FILE NUMBER

15754/2015

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case

number: 15754/2015

REPORTABLE

: NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

DATE:

4/12/2018

In

the matter between: P[....]
B[....] M[....]
PLAINTIFF
Vs
D[....] E[....] M[....]
1ST DEFENDANT
THE REGISTRAR
OF DEEDS, PRETORIA
2ND DEFENDANT
STANDARD BANK
OF SOUTH AFRICA
LIMITED
(Registration no: 1962/000738/06
Account
no:[....])
3RD
DEFENDANT

JUDGMENT

TOLMAY, J:

INTRODUCTION:

- [1] Plaintiff (Mr M[....]) in this matter, instituted action against the First Defendant (Ms M[....]) for rectification of an offer to purchase relating to an immovable property, described as [....], Pretoria (the Mountain View property), which he and Ms M[....] purchased together. The crux of the dispute between the parties was that Mr M[....], sought a declarator that the joint ownership of the parties be terminated and that the purchase agreement, title deed and bond documents be corrected accordingly.
- [2] Mr M[....] and Ms M[....] were in a relationship with each other during 2005 and planned to move in together. Mr M[....] alleged that during June 2005, he and Ms M[....] entered into a verbal agreement, of which the terms were inter alia, that they would buy the Mountain View property, for the purchase price of R790 000-00, Ms M[....] would sell her house in Lotus Gardens (the Lotus Garden property) and would contribute R350 000-00 towards the purchase price of the property. On receipt of the R350 000-00, Ms M[....] would be entitled to one undivided half share in the property, failing which Mr M[....] would be sole owner of the property. Mr M[....] would pay the monthly bond instalments of the mortgage bond. Mr M[....] and Ms M[....] would both live at the property and contribute in equal shares to the municipal account in respect of the property.

- [3] On 7 June 2005 they signed the written offer. The offer to purchase indicated that Mr M[....] and Ms M[....] were married to each other by way of customary marriage. Standard Bank granted the home loan and registered a mortgage bond over the Mountain View property in the names of PB and DE M[....].
- [4] After this they took occupation of the property. Mr M[....] testified that he complied with his part of the deal and paid the bond instalments, which amounted to R8 453-39 per month. Ms M[....] in her evidence admitted that he paid the bond and full monthly municipal accounts in relation to the property. She paid for the groceries and household expenses.
- [5] Mr M[....] testified that Ms M[....] did not comply with the suspensive condition and failed to pay the R350 000-00. During the course of the trial it became common cause that she indeed never did, but she stated, in her evidence, that there never was an agreement that she would pay the R350 000-00, or that she would contribute towards the municipal account. According to her, the agreement was that she would only attend to the household expenses and groceries. She categorically denied that she ever agreed

to contribute R350 000-00 to the purchase price of the Mountain View property, after she sold her Lotus Garden property.

- [6] Mr M[....], in the pleadings, contended that, as the parties were not married, Ms M[....] fraudulently represented herself as being married to him. The evidence was however clear that both of them were well aware of the incorrect information contained in the purchase agreement. The evidence was that they gave the information to the estate agent, who completed the agreement, and both said she must have misunderstood them. Both of them signed the agreement and must take collective responsibility for the incorrect

information and misrepresentation towards Standard Bank and the purchaser.

- [7] The same should apply to the letter from Standard Bank, where Ms M[....], was described as Ms D E M[....]. Both of them were aware of this mistake, but never sought to rectify the incorrect information with Standard Bank.
- [8] During evidence Mr M[....] said that at the time of entering into the purchase agreement he earned± R12 000-00 per month, Ms M[....] said she earned between R12 000-00 and R15 000-00 per month. Both said that they could not individually afford the Mountain View property. This evidence was never disputed by any of the parties. As a result it was clear that they were planning to move in together, and could probably only persuade Standard Bank to award the loan based on their joint incomes. I am of the view that they, for those reasons, indicated that they were in a customary marriage and never alerted the bank or the purchaser to the fact that no marital relationship existed.

- [9] Ms M[...] refused to consent to the variation of the records and to transfer her share in the property to Mr M[...]. She furthermore pleaded that Mr M[...] represented to her and the other Defendants that they were co-owners on equal and undivided shares. She stated that on the basis of this representation she paid the household expenses, and is the legitimate owner of half a share in the property.
- [10] On the pleadings she alleged that she paid for a variety of household necessities and maintenance expenses and that Mr M[...] was estopped from alleging that she was not a co-owner. The question of estoppel was not raised during the trial, nor was it argued by Ms M[...]’s counsel. I take it therefore that this defence was abandoned. In the light of the evidence and

conclusion

that I arrived at such a defence would in any event not have succeeded.

- [11] Although it was stated in the plea that Ms M[...] had a pending claim for termination of co-ownership of the property, this claim was withdrawn by her. In the plea Ms M[...] merely asked that Mr M[...]’s claim be dismissed with costs, which was rather surprising as it was common cause between the parties, at the trial that the joint ownership should be terminated, how this should be done remained in dispute.
- [12] In evidence Mr M[...] confirmed that they did indeed intend to buy the property together as they could not afford it individually. He intended moving out of the flat, which he was renting and Ms M[...] would move out of her house in Lotus Gardens and move to the Mountain View property. At that point she was renovating the Lotus Garden property extensively.
- [13] They moved in together during August
2005. According to Mr M[...] he paid not only the bond and municipal account. He also paid for the domestic worker, garden services and groceries. According to him, Ms M[...]’s contribution was limited to paying for take-aways from time to time for her two children, who lived with them. He said that Ms M[...]’s son lived with them from 2005 and her daughter from 2008. Her brother fell ill at some point and he also moved in with them for a period of time. This was confirmed by Ms M[...]. He testified that he had to contribute to the maintenance of all of them additionally to the bond and municipal account. This was however disputed.
- [14] During 2008 Ms M[...] became seriously ill and was hospitalised. She was discharged in June 2009 and went to stay with her mother for some time. During her illness the children stayed with Mr M[...]. When she recovered she returned to the common home. The two lived together until 2014 when she moved out.

[15] It was put to Mr M[...] and later testified by Ms M[...] that she could not have made the promise to sell the house in Lotus Gardens as in terms of the title deed, sec 10A of the Housing Act, Act no 107 of 1988 applied and she was not allowed to dispose of the property for a period of 8 years, after she has taken transfer of the property. She only took transfer during

2009. The title deed however also stated that the property could not be sold during that period, unless the property was first offered to

the City of Tshwane's municipality. It would seem then, that the title deed did not put an absolute prohibition on the sale of the property, it only required that it must first be offered to the municipality, if it was sold within the 8 years period.

[16] It was common cause that, at the time of the purchase of the Mountain View property, Ms M[...] was extensively renovating the property at Lotus Gardens. The title deed indicated that the property was sold to her on 17 August 2006. She was however already in occupation of it during 2005, as she was living there when the two became involved in a relationship and bought the Mountain View property. Ms M[...] was still living in the Lotus Garden property at the time of the trial and had been living there since she moved out of the Mountain View property during 2014.

[17] She said she merely renovated the Lotus Garden house as she wanted to rent it out, and not because she wanted to, or promised to sell it. She said that she paid for all the groceries, while living with Mr M[...] and also bought small appliances. She conceded that she took the appliances that she bought with her when she moved out.

[18] She said she fell ill in November 2008 and was only discharged from hospital during June 2009. She returned home, but three days later, she was involved in a car accident and was again hospitalised. When she was discharged she returned to the Mountain View property, but was apparently in and out of hospital, until the parties separated during September 2014. Mr M[...] said that she lived with her mother for approximately 2 years during the period of her illness. She denied that she did so for that period.

[19] On her version she contributed about R3 000-00 per month for groceries, while the parties were living together. She also testified that whilst she was in hospital her son obtained a power of attorney, in order to see to her financial obligations and to apparently see to the financial needs of both him and his sister. From this one may infer that the relationship between her and Mr M[...] was not good, as one would have expected that your life partner would take such responsibility, and not your son, who was only 18 years old at the time and in matric.

[20] She testified that during this period her son did not contribute at all to the bond, the common household necessities or municipal accounts, despite the fact that her children resided with Mr M[...].

- [21] Ms M[....]'s son was then called, he confirmed that he obtained a power of attorney to attend to his mother's affairs, and his and his sister's financial needs. He contradicted his mother in stating that he did contribute to the municipal accounts. He also contradicted her in saying that he did pay for groceries, the domestic worker and the garden services. This evidence was never put to Mr M[....], as a result I rejected it. Unfortunately, this witness was in court for most of his mother's evidence, as Counsel for Ms M[....] did not anticipate that he would be a witness, therefore his evidence must be approached with some circumspection, as he might have adjusted his evidence to assist his mother. His evidence was, in any event, peripheral and did not really contribute to the dispute between the parties.
- [22] The common cause facts were, at the end of the case that Ms M[....] never contributed anything towards the bond or municipal accounts, when they were living together and kept her property at Lotus Gardens, which she apparently rented out. It was common cause that she had not contributed to any expenses, since she moved out of the Mountain View property during September 2014.
- [23] In this matter the actio communi dividundo found application. In Robson[1] the following was stated regarding the actio communi dividundo:

“.....

This action which originated in Roman law has been adopted in Roman-Dutch law as the actie van deeling or actie van scheiding. It is well known in our present law. Its chief characteristics appear from Voet, 10.3.1. (Gane's trans.):

“This action for the division of common property is a mixed, a two sided and a bona fide action. By It those who hold property in common, generally by particular title, claim to have it divided and personal items of payment made good. It is available, that is to say, to those who hold common property in undivided shares. This is so whether the property is common between them in a partnership or without a partnership D.10.3.2.; whether they possess it, or neither of them or only one of them is in possession D.10.3.30; whether they hold the common ownership on the same or on different rights, the one perchance by title of institution as heir and the other by title of legacy D.10.3.8.1; and whether they are direct or beneficial owners.”

Here again the expression “Personal items of payment” is the translation of praestationes personales. The actio communi dividundo has a two-fold purpose, viz. to claim division of joint property and payment of praestationes persona/es relating to profits enjoyed or expenses incurred in connection with the joint property.”

- [24] It is furthermore trite that the Court has a wide equitable discretion in making the division of the property.[2]
- [25] In order to attain a fair and just application of the actio communi dividundo one must as of necessity consider the evidence to ensure a just distribution of the joint property.

[26]

I am of the view that Mr M[...]'s version that Ms M[...] would have contributed R350 000-00 to the purchase of the Mountain View property was more probable. At the time she was earning the same amount of money, and actually slightly more than him. Apart from that she was the owner of an immovable property, which she started renting out when she moved out, while he was only renting a flat. At the time she was therefore in a financially stronger position than him. It is thus probable that the agreement was as alleged by Mr M[...]. Her children moved in with them which must have added to the costs and saved her some money.

[27] They both confirmed that they could not individually qualify for the bond that they required in order to purchase the property. It was therefore quite obvious that Ms M[...] had to contribute financially towards the purchase of the property in one way or the other. In the light of the fact that it was common cause that Mr M[...] was going to pay the bond, her financial contribution must have been coming from somewhere else and would on a balance of probabilities not only have been a contribution towards groceries.

[28] On her own version she contributed nothing towards the Mountain View property of which she was a joint owner since 2014. She still owned the Lotus Garden property, where she was still residing at the time of the trial. One would at least expected her, if she had a vested interest in the property to contribute financially to it.

[29] Considering that a Court has a wide discretion, which must be exercised judicially, and considering the circumstance of the case and equities, I am of the view that Ms M[...] can have no claim on the property, the joint ownership must be terminated and the property should be transferred to Mr M[...]. Her contribution towards the property, since it was bought was minimal, if at all, and since 2014 non-existent. She is the owner of her own immovable property. As a result I could find no basis on which to grant her any share in the joint property. I however do not regard it as just or fair that Ms M[...] should carry the costs occasioned by the transfer.

[29] I make the following order:

1. The offer to purchase is rectified by removing all references to the 1st Defendant as well as the alleged "customary marriage" where ever such reference are made in the document.
2. The joint ownership in the property known as [...], Pretoria between the Plaintiff and the 1st Defendant is dissolved.
3. The undivided half share in [...], Pretoria, presently registered in First Defendant's name is transferred into the name of the Plaintiff. All necessary documents to transfer the undivided share in [...], Pretoria, presently registered in First Defendant's name into the name of the Plaintiff, must be signed by her. If she should fail to and/or refuse to do so the Sheriff is ordered to sign such transfer documents instead and on behalf of the 1st Defendant.

4. The First Defendant is ordered to sign on request the 3RD Defendant's necessary documents to rectify the records of the 2nd and 3rd Defendants, so as to indicate that only the Plaintiff is responsible for the repayments of the home loan with account number [...].

If First Defendant fails and/or refuses to do so the Sheriff is ordered to sign such documents instead and on behalf of the 1st Defendant.

5. The 2nd Defendant is requested to rectify its records in regards to the ownership of the property, as well as the bond registered over the property by the 3rd Defendant, to indicate that the Plaintiff is the sole owner of [...] Pretoria and that the Plaintiff is responsible for all repayment of the home loan secured by the 3rd Defendant's bond over the property.
6. The costs of such transfer, correction of the bond and all related costs to be paid by the Plaintiff.
7. The First Defendant is ordered to pay the costs of the action.

RG TOLMAY

JOUGE OF THE HIGH COURT

DATE OF HEARING: 2 NOVEMBER 2018

DATE OF JUDGMENT: 4 DECEMBER 2018

ATTORNEY FOR PLAINTIFF: N K MATHIBE

ADVOCATE FOR PLAINITFF: ADV MASOMBUKA

ATTONREY FOR EFENDANT: KENNIE BOONZAIER ATTORNEYS

ADVOCATE FOR DEFENDANT: ADV RA ARCANGEN

[1] Robson v Theron 1978(1) SA 842 AD, p 850, E (Robson)

[2] Robson, supra, p855 C-E, p856 G-857C

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