

SOUTH AFRICA / JUDGMENT

P.N v A.E (20081/2023) [2024]

ZAWCHC 266 (16 September 2024)

[2024] ZAWCHC 266

COURT

Western Cape High Court, Cape Town

BEFORE

Gordon-Turner

CASE / FILE NUMBER

20081/2023

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FLYNOTES: FAMILY – Divorce – Immovable property – Husband seeking termination of parties' co-ownership under actio communi dividundo – Co-ownership a consequence of marriage relationship – Purchased and occupied as their marital home – Reciprocal duty of support arose and legal relationship exists other than co-ownership itself – Application postponed for hearing as trial simultaneously with divorce action.

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 20081/2023

In the matter between:

P[...] N[...]

Applicant

and

A[...] N[...] E[...]

Respondent

Date of hearing: 11 September 2024

JUDGMENT DELIVERED ON 16 SEPTEMBER 2024

GORDON-TURNER, AJ:

Introduction

1. This opposed application concerns the termination of the parties' co-ownership of an immovable property in Sunningdale, Western Cape (the Sunningdale property), and ancillary relief, all claimed under the *actio communi dividundo*.
2. The *actio communi dividundo* is an action for the division of property held in common, and for profits and personal items of payment in respect of the property

(*praestationes personales*) to be made good between the joint owners.[1]

3. The applicant has pleaded and proved the necessary elements for that cause of action, namely co-ownership of the property with the

respondent, that he no longer wishes to be co-owner, that the property, which is a residential home, cannot readily be partitioned,

and that the parties have not agreed upon the mode of division of the property.[2]

4. The question that requires resolution is the manner and timing of termination of the parties' co-ownership taking account of their relationship as a married couple. The applicant prays that the Sunningdale property be sold on the open market, and that the net proceeds of the sale be divided between the parties subject to each being recompensed for what they have spent on the property on what he contends to be an equitable basis. The respondent contends that the fate of the Sunningdale property is inextricably intertwined with the issues in the parties' pending divorce action and resists the relief sought.

Background

5. The parties were married to each other in 2018, out of community of property with the inclusion of the accrual regime in terms of Chapter 1 of the Matrimonial Property Act, 88 of 1984 (MPA). No children are born of their marriage.
6. Their antenuptial contract provides that for the purposes of section 6 of the MPA, the nett values of the respective estates of the parties at the commencement of the intended marriage were Nil. The antenuptial contract further provided that three immovable properties in Midrand owned by the applicant, and all liabilities associated therewith, or any other asset acquired by him by virtue of his possession or former possession of such properties shall not be taken into account as part of his estate at either the commencement or the dissolution of the marriage. No assets of the respondent were excluded.
7. On 20 February 2022, the parties, as purchaser, executed an agreement of sale to purchase the Sunningdale property at a price of R3 715 000.00. The purchase price was paid by way of a deposit of R200 000.00 and the balance was to be financed by a loan from a bank in the amount of R3 515 000.00 secured by the registration of a mortgage bond. Both parties signed a home loan application with Standard Bank on 28 March 2022, each reflecting their residential address at a flat in Blouberg. The applicant's application form was headed "main

applicant”, and set out that he was employed, that his employer is Standard Bank, that his total monthly income is R96 726.00, that his declared monthly expenses were R63 653.00 and the amount available for repayments was R33 073.00 per month. The respondent’s application form was headed “co-applicant or surety”, and her employment status was stated as “unknown”. Her declared total monthly income is stated to be R200.00, and the amount available for repayments as R130.00 per month. The applicant

contended in his replying affidavit that the respondent’s income at the time exceeded R200 monthly, and still so exceeds it, but no further details were provided.

8. Standard Bank granted the home loan. It is common cause that the applicant paid the deposit of R200 000.00, the transfer duty and the transferring attorney’s fees in the total amount of R281 923.78, and that the respondent paid the costs of registering the bond over the property in the amount of R32 362.
9. Registration of transfer of the Sunningdale property into the names of the parties in equal half-shares, and registration of the mortgage bond in favour of Standard Bank, took place on 9 June 2022.
10. The parties took occupation of the Sunningdale property as their marital home.
11. The applicant has paid the monthly mortgage bond instalments of R32 362.00 per month from inception to date. The respondent has paid the rates, taxes and municipal charges in relation to the property, which are an average of R2 800.00 per month.
12. Problems arose in the marital relationship. The parties applied for protection orders against each other. The applicant instituted divorce proceedings.
13. Although at the time this application was instituted, only a notice of intention to defend had been filed by the respondent, I was advised from the Bar by both parties’ legal representatives that the pleadings have now closed, and that in the case management process the divorce action has been declared trial ready.
14. The respondent attached a copy of the applicant’s particulars of claim to her answering affidavit. The applicant, as plaintiff in the divorce action, alleges the following:

“6. The Plaintiff avers that the declared nett value of his estate at the commencement of the marriage contained in the Antenuptial Contract was incorrect and that such nett value was no less than R1 901 645.00 (One Million Nine Hundred and One Thousand and Six Hundred and Forty-Five Rand) as at the date of the conclusion of the Antenuptial Contract and/or the marriage.

7. The Plaintiff’s aforementioned nett value of his estate of R1 901 645.00 comprised of the following:

7.1 BMW 135i motor vehicle

R 180 000.00

7.2 Standard Bank pension

R1 356 265.00

7.3 Old Mutual Retirement Annuity

R 228 590.00

7.4 Standard bank shares

R 136 790.00

8. The Plaintiff accordingly avers that any accrual calculation in terms of section 4 of the MPA must be based on the fact that the nett value of the Plaintiff's estate as recorded in the Antenuptial Contract and/or at the commencement of the marriage was and ought to have been no less than R1 901 645.00, and the Plaintiff intends leading evidence to rebut that prima facie value of R0 (Nil) contained in the Antenuptial Contract, as per section 7(3) of the MPA."

15. On 28 September 2023, the applicant's legal representative addressed correspondence to the respondent's (then) attorney asserting that the applicant does not wish to remain a joint owner of the Sunningdale property, and that it had to be sold on the open market for a fair market value and the proceeds divided in equal shares. In the alternative, the respondent was invited to

purchase the applicant's undivided half-share therein for a market-related price. It was recorded that the applicant cannot

afford to pay the mortgage bond of the Sunningdale property, as well as rental for the accommodation into which he intended moving at the end of that month.

16. The letter on behalf of the applicant further stated:

"3.5 We propose that should your client agree to finalising and settling the divorce with or without the appointment of a receiver, a settlement of [the Sunningdale property] forms part of the divorce decree. However, we record that it is a separate issue as there is no joint estate and, therefore, does not form part of the divorce litigation."

17. The applicant thereby asserted the position contained in his founding papers that the termination of the parties' co-ownership of the Sunningdale property is a distinct issue from the determination of the accrual payment that may be due to one or the other pursuant to their antenuptial contract. However, he recognises that the manner and mode of terminating the ownership, if agreed,

would be part of the settlement agreement incorporated in the decree of divorce. He pointed out that the only issue that needed to be resolved is that of the accrual and proposed that the parties declare the respective values of their estates and endeavour to arrive at a settlement agreement, and failing agreement on the accrual payment to be made, he proposed that a receiver be

appointed by the Court to deal with the issue of the accrual “inclusive of the actual nett commencement value of our client”. The respondent was invited to revert in 30 days, failing which, the Court would be approached to adjudicate the matter.

18. The letter was not answered within thirty days, so the applicant contends that the offer to permit the respondent to purchase his half share of the property, not having been accepted, falls away.
19. On 1 October 2023, the applicant permanently and voluntarily vacated the Sunningdale property, and moved to his current rented accommodation in Milnerton. The respondent and her teenage son continued to reside in the Sunningdale property.
20. The applicant prays for the co-ownership of the property to be terminated and for an order that the property be offered for sale on the open market either by private treaty or by public auction. He requires that initial sums that he and the respondent paid towards the property, described above, be paid back to them respectively and that after deducting expenses, the proceeds of the sale of the property be divided in equal shares.
21. He alleges that since June 2022 the 17 monthly bond repayments he has paid amount to approximately R544 000. He does not, however, seek to recover from the respondent her half share of the bond repayments, for which she was and is liable as the co-mortgagor of the Sunningdale property.
22. The applicant is aggrieved that he no longer enjoys the use of the property, yet the respondent does, while he continues to pay the bond and insurance costs. He alleges that he cannot afford to pay the mortgage bond payments as well as his current rental which he disclosed, only in reply, as the amount of R16 500.00 per month. This unaffordability, so he averred, renders the termination of the co-ownership as urgent. He provided no detail of his means to support his contention that the bond payments are not affordable to him.
23. The application was not set down by the applicant as an urgent matter. Instead, the applicant’s legal representative made a successful approach to the Acting Judge President for an expedited hearing for this application.
24. In opposing the application, the respondent avers that she and the applicant are still married and the reciprocal duty to maintain each other subsists. The applicant had not tendered to provide her with alternative accommodation to that enjoyed in the Sunningdale property either by way of providing suitable rental accommodation at his cost or by offering a monthly amount for payment of rental accommodation. She contends that the present application was a reaction by the applicant to his failed attempt to obtain an interim protection order interdicting the respondent and her son from remaining in the Sunningdale property. She explained that the respondent had always assumed responsibility to provide accommodation for her and her son and was aware from the time of the purchase of the Sunningdale property that she unable to contribute towards the monthly bond instalments.

25. The respondent further contends that in the event that the applicant's claim in the divorce action to rectify the nett commencement value of his estate fails, then the respondent will be entitled to share in the accrual in his estate which may enable her to purchase the applicant's undivided half-share of the Sunningdale property. (This statement was understood to mean that in those circumstances there would be amount susceptible of accrual sharing). In his replying affidavit, in which the applicant took the opportunity to make unhelpful vituperative remarks about the respondent, he did not dispute the respondent's contention that her accrual claim could be a means for her to acquire his half share.
26. The property and its value together with the course of its future ownership, so the respondent submits, form part of the patrimonial disputes in the divorce action, which in turn will be relevant when determining whether she is entitled to personal maintenance. She has been advised that the disputes in the divorce action cannot be resolved by way of separate and contemporaneous motion proceedings.
27. The respondent took issue with the applicant's alleged inability to pay the monthly bond instalments and with his justification, based thereon, for an urgent hearing. The respondent attached to her answering affidavit the applications for bond finance which are referred to above. She averred that in addition to his monthly salary which she believes to have increased since 28 March 2022, the applicant receives annual bonuses and she believes that he also receives incentive bonuses which were not included in the disclosure of his income in the loan application form. She further stated that he owns Standard Bank shares from which he potentially receives annual dividends.
28. The respondent alleges that when the parties acquired the property "it was never agreed that at the termination of our co-ownership, that the proceeds from the sale of the property should be dealt with in accordance with the principles of a partnership."
29. In reply, concerning his disclosures on the loan application, his salary increases since March 2022, and his additional sources of income from bonuses, incentive bonuses and dividends, the applicant did not dispute these allegations but contended that they are irrelevant and would be dealt with at a pending Rule 43 application brought by the respondent.
30. The respondent referred to the applicant's three properties that are listed in the antenuptial contract as excluded assets. Two are still owned by him, and she contended that he earns income from them. In respect of one, the applicant contended in reply that it belongs to his ex-wife and "we unfortunately have not gotten around to transferring the ownership. She lives therein and pays the bond on the property". In respect of the other, he denied receiving income from it as his parents reside therein, but did not dispute that its value is approximately R2 030 000.00. He admitted that the third property had been sold during 2020 for the amount of R4 million. He averred that the proceeds were used to settle part of the bond on the property now occupied by his parents. As that property was purchased in 2007

for the amount of R1 290 000.00, his explanation only accounts for a fraction of the R4 million proceeds. He did not deny that the balance is available for investment to earn interest or dividends on shares, nor did he explain how it is now invested. He simply retorted that this capital amount is not relevant to the present application.

31. The applicant is employed as a finance manager at Standard Bank. He contends that the respondent's income exceeds his income. It is neither necessary nor possible to resolve that issue in this application. However, it is clear that she has a dependent son living with her, that she presently receives no interim maintenance from the applicant, and that, on the evidence available, the applicant's capital resources appear to considerably exceed hers.
32. Both parties referred to the respondent's intention to apply in terms of Rule 43 for interim maintenance to be paid by the applicant. It was apparent from the submissions made on their behalf that by the time of hearing this application, the Rule 43 application had been launched, but not yet determined.

Discussion

33. As the party who took responsibility for making the monthly bond repayments, the applicant might have insisted on the Sunningdale property being registered solely in his name. Instead, he and the respondent purchased the property jointly and caused equal undivided shares to be registered in both names.
34. It is common cause that there is a significant disparity between the respective contributions made by the parties to the expenses related to the Sunningdale property.
35. This is not unusual in a marriage where the property in question serves as the marital home. While it is not clear from the papers whether the applicant has been the major breadwinner throughout the marriage, the fact that he assumed responsibility for the cost of the couple's accommodation is a compelling indicator that he may well have been, and that he took on this responsibility as a discharge (or partial discharge) of the reciprocal duty of support between spouses owed to the respondent. That he does not seek recovery of the bond instalments (i.e. of the respondent's half share therein) fortifies this indication.
36. These circumstances differentiate the co-ownership of the Sunningdale property from a situation in which the parties, during their marriage, may have acquired and held co-owned properties as investments or for a commercial purpose.
37. It raises the question whether the co-owners are entitled, as of right, to terminate their co-ownership by way of the *actio communi dividundo*.
38. The availability of the action received detailed attention in the judgment of Wallis JA in *Municipal Employees Pension Fund and Others v Chrisal Investments (Pty) Ltd*[3].

38.1. Wallis JA's judgment sets out examples that may create co-ownership of property[4] and that co-ownership may be either free or bound co-ownership, explaining that "in bound co-ownership the existence of the co-ownership arises from a legal relationship between the parties other than the co-ownership

itself. In other words, there is a legal relationship between them going above and beyond the fact that they happen to be the co-owners

of property. The co-ownership arises from and is constituted as a consequence of that relationship. It is not the source of the

relationship between the parties"[5].

38.2. Wallis JA listed examples of extrinsic legal relationships that give rise to bound co-ownership[6]: "It may arise as a matter of law from the fact that the parties have entered into a particular relationship. An example of this is a marriage in community of property, where the common law, as varied by the Matrimonial Property Act 88 of 1984, imposes co-ownership upon the parties to the marriage. Another is the co-ownership of the common property in a sectional title development, by virtue of the provisions of s 16(1) of the Sectional Titles Act 95 of 1986. It may arise from an act such as the execution of a trust deed by the founder of a trust and the acceptance by the trustees of office under that deed. Another possibility is an agreement between the co-owners, as in a partnership or the constitution of a universitas. In the case of trust deeds, partnership agreements and constitutions the parties are usually free to vary their terms and the terms of the relationship between the co-owners."

38.3. After a comprehensive analysis of various authorities, including academic literature, case law and comparative law, Wallis JA held[7]:

"... the distinction between free and bound co-ownership is that in the former the co-ownership is the sole legal relationship between the co-owners, while in the latter there is a separate and distinct legal relationship between them of which the co-ownership is but one consequence. Co-ownership is not the primary or sole purpose of their relationship, which is governed by rules imposed by law, including statute, or determined by the parties themselves by way of binding agreements. The relationship is extrinsic to the co-ownership, but is not required to be exceptional. In other words, it requires no special feature for the co-ownership consequential upon the relationship to qualify as bound co-ownership. ...

...

There is no closed list of instances of bound co-ownership. If the relationship gives rise to bound co-ownership the co-ownership will endure for so long as the primary extrinsic relationship endures. Once it is terminated then, as in *Menzies and Robson v Theron*, it will become free co-ownership and be capable of being terminated under the *actio*. I consider the facts of this case in accordance with those principles."

39. Mr Abduroaf, who appeared for the applicant, submitted that in comparison to the bound co-ownership of property by spouses married in community of property referred to in the judgment, by default, in a marriage where the parties contracted out of community of property, then property owned jointly by the parties is held in free co-ownership (and can be terminated at any time by way of the *actio communi dividundo*).
40. I do not regard Wallis JA's judgment to support this binary distinction between different matrimonial property regimes. Indeed, he rejected the proposition that the starting point is that in co-ownership the availability of the *actio* is implied by law, so that it must be excluded unambiguously, and held[8] "... It puts the cart of a conclusion — 'This is free co-ownership' — before the horse of the question — 'Is this free or bound co-ownership?'. The common law is that the *actio* is always available in the case of free co-ownership and never available in bound co-ownership. In any particular case the question of the proper characterisation of the co-ownership arises at the outset. Only once it has been answered can one decide what the common law attributes of the co-ownership are."
41. In the present matter the parties' co-ownership of the Sunningdale property arises from and is constituted as a consequence of their marriage relationship. All of the applicants' other immovable property is held solely in his own name. But for his marriage to the respondent, he would not have shared ownership with her. The Sunningdale property was purchased for and occupied as the parties' marital home. Independently of the matrimonial property regime chosen by the parties, and as matter of law, a reciprocal duty of support arose between them from the moment of their marriage i.e. a legal relationship exists between the parties other than the co-ownership itself.
42. In my view, taking account of the facts summarised above, the marriage relationship (despite being out of community of property) renders the parties' co-ownership of the Sunningdale property as bound co-ownership, and for so long as the parties remain bound to each in marriage - which is their primary 'extrinsic relationship' - their co-ownership endures. It can be terminated only when the marriage is dissolved.
43. Even if my finding characterising the parties' co-ownership (and deferring the termination of the co-ownership) is wrong, it does not follow that it is equitable that the property must be sold as prayed for by the applicant.
44. Where physical division of the property is not possible or is impractical, as in the present matter, the Court has a wide equitable discretion to order alternative appropriate relief [9]: in exercising that discretion the Court has regard to the particular circumstances of the case, what is most to the advantage of all the co-owners, and what they prefer[10], although the Court is not bound by the parties' proposals on division.

45. It is an accepted principle that it may be equitable to award the property to one of the co-owners, subject to compensation to the other co-owner.[11] The sale of the common property by public auction is merely one of the methods that may be employed in dividing a common property between the owners. Before the proceeds of a sale are divided among the joint owners, they are entitled to have all accounts in respect of the property adjusted inter se because, when community of property comes to an end, then all the obligations in respect of that community should also be terminated through fulfilment. In fact there is a debate of account between the joint owners in respect of the property they own jointly and are now seeking to divide between them.[12] This debate can and must take place if the Court awards the property to one of the co-owners, with any consequential adjustment to compensation payable to the other co-owner.
46. In this matter, for reasons that follow, the Court is not yet equipped to give an order, as it should, that is suitable to the circumstances of the parties concerned.
47. The affidavits filed by the parties have alerted the Court to the possibility (and I put it no higher than that) of the respondent setting off against the payment that may be due to her from her accrual claim the cost of acquiring the applicant's half share of the property. The termination of co-ownership by way of one co-owner buying the other co-owner's share of the property is a potentially equitable mode of division. However, the Court cannot now determine the fairness and feasibility of such an arrangement without knowledge of the market value of the Sunningdale property, the equity in the property, the size of the award that the respondent will receive on account of her accrual claim upon divorce, her capacity to fund a mortgage bond (if required) from her own resources, and the amount and duration of any spousal maintenance that should be paid by the applicant to the respondent (if any), which may supplement her capacity to afford a mortgage bond. These elements will only be determined at the hearing the divorce action.
48. If I now disregard potential modes of division alternative to the sale of the Sunningdale property, I would be fettering my own discretion, with potentially inequitable results.
49. For this reason also, I hold that the termination of the co-ownership and all relief ancillary thereto should be determined simultaneously with the issues in the divorce action.
50. On behalf of the applicant, Mr Abduroaf submitted that an order to this effect would be prejudicial to the applicant, who must continue to pay the monthly mortgage bond, and he may be obliged to do so for a protracted period until a court date is allocated by the Registrar.
51. To mitigate the prejudice of which the applicant complains, I secured the approval of the Acting Judge President for a preferential trial date for the hearing of the divorce action (upon which the parties have agreed) and the simultaneous hearing of the issues in this matter, all of which I refer to trial as provided in the order hereunder:

51.1. The application is postponed for hearing as a trial in the fourth division simultaneously with the divorce action under case number 15064/2023 on 4 November 2024.

51.2. The affidavits filed of record in this application shall stand as the parties' respective pleadings.

51.3. All directives issued in the case management of the divorce action shall apply equally to the further conduct of the trial of this matter.

51.4. All questions of costs stand over for later

determination.

GORDON-TURNER AJ

ACTING JUSTICE OF THE HIGH COURT

Appearances Counsel for Applicant Adv Muahammad Abduroaf Attorney Representing the Respondent Mr Charl May BDP Attorneys

[1] Robson v Theron 1978

(1) SA 841 (A) at 845 H

[2] Robson v Theron supra at 856H – 857D.

[3] 2022 (1) SA 137 (SCA)

[4] At paragraph [19]

[5] At paragraph [22]

[6] At paragraph [24]

[7] At paragraphs [46] and [47]

[8] At paragraph [51]

[9] Robson v Theron supra at 856H – 857A

[10] Ibid at 855C

[11] Ibid at 855E

[12] Rademeyer and Others v Rademeyer and Others 1968

(3) SA 1 (C) at 14B-C

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