

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO: 1078/2019

DATE HEARD: 20/02/2020

DELIVERED:05/05/2020

In the matter between

C[...] G[...]

APPLICANT

and

A[...] E[...] G[...]

1ST RESPONDENT

ABSA BANK LIMITED

2ND RESPONDENT

JUDGMENT

ROBERSON J:-

[1] On 6 December 2013 in the Regional Court, Port Elizabeth, the applicant and the first respondent (Mr G[...] and Mrs G[...]), formerly married in community of property, were granted a decree of divorce, incorporating the terms of a settlement agreement Mrs G[...] was the plaintiff and Mr G[...] was the defendant in the action.

[2] There was one minor child born of the marriage, L[...], who was born on 13 December 1998. Mrs G[...] was awarded primary care of L[...], who was to reside primarily with her, and the parties were to be co-holders of parental responsibilities and rights. For the purposes of this judgment, the further relevant terms of the settlement agreement were the following:

"8 MAINTENANCE FOR THE MINOR CHILDREN (sic)

8.1 As and for maintenance of the minor _children (sic), the Defendant undertakes to pay to the Plaintiff a total of amount of R1 000.00 per for the minor child (sic), until 18 Birthday (sic). The said maintenance will be paid out of the rent of the flat at the fixed property of the parties (Par 11.3.2). Each party shall have the right to approach the Maintenance Court with an application for a variation of the maintenance order should there be a change in either party's circumstances.

8.2 The maintenance _payable by the Defendant shall increase annually on the anniversary date of the Order of divorce by a percentage equivalent to the CPIX.

8.3 The Defendant will maintain the minor child on his medical aid and will be liable for all excess amounts not covered by the medical aid.

"

8.4 The parties agree that the said R1 000.00 will cover all school fees, the expenses for books, the expenses for school clothes and expenses for extra mural activities."

11 IMMOVABLE PROPERTY

11.1 The parties record that they are the joint owners of immovable property situated at 81 L[...] C[...], Uitenhage, that consist (sic) of a house and a flat.

11.2 The immovable property will 'stay on the name of both the parties, until such a time that the parties decide to sell the property. If the property is sold , the profit will be shared 50/50.

11.3 The Plaintiff will reside in the mentioned house, without paying any rent, subject to the following:

11.3.1 The Plaintiff shall pay all water , electricity and municipal fees on the said property;

11. .3.2 The Plaintiff shall endeavour to rent out the flat to generate the maximum income from it. The Plaintiff shall keep the amount of R1 000.00 (as in par. 8.1) from rent generated for the maintenance of the minor. child. In the event that the flat is not rented out / no income is generated from the flat, the Defendant will pay the aid amount / difference in the maintenance to the Plaintiff. If the flat is rented out f r more than the mentioned maintenance, the difference in rent will be shared between the parties."

[3] In this application Mr G[...] seeks an order terminating the joint ownership of the immovable property mentioned- in clause. 11 (the property) together with other relief relating to the manner in which the division of the property is to take place. Mrs G[...] opposed the application. Absa Bank did not appear and according to Mr G[...] the bond on the property in favour of Absa has been paid up.

[4] Mr G[...] has brought his application utilising the *actio communi dividundo* (the *actio*).

[5] In *Robson v Theron* 1978 (1) SA 841 (A) the *actio* was discussed as follows at

855A-F:

"The basic . notion underlying the. *actio communi dividundo* is that no co-owner is normally obliged to remain such against his will. Van Leeuwen, *Censura Forensis*, 1.4.27.1. Accordingly when co-owners are desirous of having their joint property divided and the share of each allotted to them in severalty , they may agree to the division among themselves without having recourse to judicial proceedings.

'Where there are co-owners who have agreed to divide then the only relief that one can claim from the other is an action for specific performance in terms of that agreement. Secondly if there is a refusal on the part of one of the co-owners to divide then the other co-owner can go to Court and ask the Court to order the other to partition. Again, if the parties agree that there is to be a partition but the parties cannot agree as to the method or mode of partition, the Court is asked to settle the mode in which the property is to be divided'

(*Ntuli v Ntuli* , 1946 T.P.D. 181 at p. 184 , per BARRY , J.P.).

The Court has a wide equitable discretion in making a division of the joint property, having regard, *inter alia*, to the particular circumstances, what is most to the advantage of all the co-owners and what they prefer. Bort, *Advysen*, 19; Van Leeuwen, *Censura Forensis*, 1.4.27.5; Voet, 10.3.3. It is interesting to note that the modes of division referred to by the Roman-Dutch jurists are substantially identical to the modes of distribution of partnership assets as described by *Pothier*. Cf. *De Groot*, 3.28 6. Thus where it is impossible, impracticable or inequitable to make a physical division of the joint property, the court in exercising its equitable "discretion may award the joint property to one of the co-owners provided that he compensates the others, or cause the joint property to be put up to auction and the proceeds divided among the co-owners. Voet , 10.3.3, read with Voet , 10.2,22 - 28; *De Groot*, 3.28 8; Van Leeuwen, *R.H.R.*, 4.29.3; Van Zutphen, *Practyke de Nederlantsche Rechten*, sub voce *scheydinge* no. 7; Wassenaar *Practyck Judicieel* cap. 7. no. 45; Pause, *Observationes Tumultuariæ Novæ*-, vol. 1, no. 77. Cf. *Estate*

Rother v Estate Sandig, 1943 AD 47 at pp. 53 - 54; *Drummond v Dreyer* , 1954 (1) SA-306 (N) ."

[6] In his founding affidavit Mr G[...] said that the initial motivation for Mrs G[...] continuing to reside in the property was to provide a home for L[...]. It was envisaged that once he finished school the property would be sold and the proceeds would be divided. Since the divorce Mrs G[...] has continued to reside in the property with L[...] and has paid her financial commitments in respect of the property. Mr G[...] has paid the insurance on the property.

[7] According to Mr G[...] one Ms S[...] d[...] P[...] has resided at the property with Mrs G[...] for the last five years, and provides financial support for Mrs G[...]. Mr G[...] believes that Mrs G[...] and Ms d[...] P[...] are life partners.

[8] Mr G[...] stated that he no longer wishes to be a joint owner of the property. He first requested Mrs G[...] to agree to the sale of the property when L[...] turned 18 years, but Mrs G[...] refused the request. During 2018 Mr G[...] attorneys wrote to Mrs G[...] advising her of his wish to sell the property and provided her with the option to purchase his half of the property or to place the property on the open market for sale. Mrs G[...] attorneys responded, referring to the settlement agreement and pointing out that the net profit of a sale could only be shared if the parties decided to sell the property. Mrs G[...], so it was stated, was currently unwilling to agree to the sale of the property.

[9] Further efforts made by Mr G[...] through his attorneys, including providing Mrs G[...] with a written consent to the sale of the property on the open market, and warning her of an approach to the High Court for relief, proved unsuccessful.

[10] Mr G[...] annexed to his affidavit various valuations of the property by estate agents, including some provided by Mrs G[...]. In her attorneys' letter to which the valuations were attached, it was stated that other than a sale pursuant to the offer made through the agency of Mrs G[...] brother, Mrs G[...] had no intention of selling the property.

[11] In Mrs G[...] answering affidavit she said that L[...] is now a major but is not self- supporting. He has employment but is unable to afford his own accommodation and resides with her, rent free. He does make a small contribution to the cost of food but is otherwise dependent on her and Mr G[...]. Mr G[...] has a seven year old grandson (the child of his son from a former marriage) and this child also sides with Mrs G[...]. She has assumed responsibility for his care and maintenance, without any contribution from his parents, who have effectively abandoned him, or from Mr G[...].

[12] Ms d[...] P[...] does live at the property but Mrs G[...] said she was not her life partner. Ms d[...] P[...] pays all the household expenses while Mrs G[...] attends to household chores and takes care of L[...] and Mr G[...] grandson. Mrs G[...] said that if it were not for Ms d[...] P[...] contribution, she (Mrs G[...]), L[...] and the grandchild would be in dire straits. Mrs G[...] receives income from the flat on the property but utilises it to pay for electricity, water and municipal fees, with nothing left over for her use.

[13] According to Mrs G[...], at the time of the divorce she was traumatised and worried about the future. She had no qualifications, no form of support, nowhere to go and a 5 year old child to support. The settlement agreement was prepared by Mr G[...] attorneys and the wording of clause 11 of the settlement agreement was carefully considered by her and Mr G[...]. At the time of the divorce they were renting a property in Queenstown and Mr G[...] knew that if she had remained there she would not have afforded the rent. He further knew that she intended to move to the property in Uitenhage, which was fully paid, in order to have security of tenure.

[14] Mrs G[...] said she has decided not to sell the property and maintains that Mr G[...] wants to sell because it suits him at present and that he has no regard for the persons who will be adversely affected if the property is sold. She relies on clause 11.2 of the settlement agreement and maintains that the words in clause 11.2 "if the property is sold the profit will be shared 50/50" mean that the property may in fact not be sold. She relies further on Mr G[...] responsibility to maintain L[...] and his grandson.

[15] With regard to the valuations of the property, Mrs G[...] said that because of the poor state of the economy it is likely that the valuations are generous and unrealistic

[16] With regard to the relief sought by Mr G [...], Mrs G[...] said that in terms of the *actio* a court may order a subdivision of the property.

[17] In reply Mr Gouws denied that his attorneys had prepared the deed of settlement and said it had been prepared by Mrs Gouws' counsel and attorney. He did not dispute the allegations concerning Lourens' circumstances and his grandson, and maintained that they were irrelevant for the purposes of the application. With regard to subdivision, Mr Gouws said that it would be prejudicial to him because he would be unable to sell a subdivided share in the property.

[18] The chief ground of opposition at the hearing of the application was that the settlement agreement was made an order of court. Should the court order the termination of the joint ownership and division of the property, such order would conflict with the existing court order in relation to clause 11.2 of the settlement agreement. The parties have not decided to sell the property and Mrs G[...] has in fact objected to the sale. Accordingly, so it was submitted, the court did not have jurisdiction to entertain the application. Mr G[...] had proceeded on

the wrong cause of action. He should have applied for a variation of the court order, which until then remains in existence.

[19] The approach on behalf of Mr G[...] was that a co-owner may demand partition of the common property at any time. Clause 11.2 of the settlement agreement did not, so it was submitted, change the position and Mr G[...] could not be forced remain in perpetual co-ownership against his will.

[20] I do not think that the existence of the court order can be ignored. In this regard I refer to the judgment of van Zyl ADJP (as he then was) in *Ex Parte: PJLG and another; In re: PJLG and another* [2013] 4 All SA 41 (ECG) where he said at paragraph [32] (footnotes omitted):

"What emerges from this is that the making of an order in terms of an agreement as envisaged in section 7(1) [of the Divorce Act 70 of 1979] brings about a change in the status of the rights and obligations of the parties to the settlement agreement. The reason for this lies in the fact that the terms of the agreement are incorporated in an order of court. The granting of the consent judgment is a judicial act. It vests the settlement agreement with the authority, force and effect of a judgment.

"When a consent paper is incorporated in an order of Court by agreement between the parties in a matrimonial suit it become part of that order and its relevant contents then form part of the decision of that Court ... and must be construed upon that basis."

[21] In my view the starting point is the interpretation of clause 11.2 of the settlement agreement and the effect of it being made an order of court. The order should be interpreted in accordance with the underlying contractual arrangement. In this regard I refer to the judgment of Gorven J in *Matadin v Parma and Others* [2010] ZAKZPHC 8 (7 May 2010) at paragraph [2] as follows (footnotes omitted):

"The basis for the application is well recognised in our law. The cause of action invoked by the applicant is the *actio communi dividundo*. This was recognized by the Id authorities including Voet and van Leeuwen and has been recognized ever sine . The underlying rationale is that every co-owner of property may insist on a parti ion of the property at any time unless there is an agreement between the co-owners not to do so within a certain period. Even if there is an agreement to constitute perpetual joint ownership, the. co-owner may demand partition at any time"

[22] it is so that clause 11.2 of the settlement agreement sets a time before which may not sell the property. That time is when they decide to sell. However Mrs G[...]' construction of the clause (and order) as meaning that the property ay never be sold is not a sensible interpretation and is in conflict with a co-owner' right to demand partition at any time. In other words clause 11.2 cannot mean that she can withhold her agreement to sell in perpetuity. That would lead to the absurd result that Mrs G[...] and the other occupants of the property could live there indefinitely while Mr G[...] is unable to exercise any rights of co-ownership, including t e right to utilise the *actio*. I am therefore of the view that the clause, as incorporated in the order, does not take away Mr G[...] right as a co-owner to invoke the *actio*. In the absence of any other restriction on the sale of the property, the court order could not deprive Mr G[...] of his right as a co-owner to claim a division. clause 11.2 is unfortunately worded but in my view it was envisaged that the property would be sold at some point in the future and the proceeds divided equally.

[23] A further consideration was the submission on behalf of Mr G[...] that Mrs G[...] failed to exercise the discretion she had to determine when she would decide to sell the property, *arbitrio bona viri*.

[24] In *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at paragraphs [24] and [25] the following was said:

'[24] In sum I am of the view that, save, perhaps, where a party is given the power to fix its own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable. Second, as has been said above, there is an additional reason for holding that the clause under discussion is valid. Of course, in some cases providing for discretionary determinations there may be no enforceable contract until the determination is made. But when made an unconditional contract comes into being.

[25] All this does not mean that an exercise of such a contractual discretion is necessarily unassailable. It may be voidable at the instance of the other party. It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bona viri* (cf *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 70 (A) at 707A - B; *Moe Bros v White* 1925 AD 71 at 77; *Holmes v Goodall & Williams Ltd* 1936 CPD 35 at 40; *Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 (3) SA 583 (C) at 591G - H; and *Remini v Basson* 1993 (3) SA 204 (N) at 2101 - J). In his commentary on the Digest *Windscheid Lehrbuch des Pandektenrechts* 7th ed vol 2 at 407 maintains that such a rule existed in Roman law. He relies, *inter alia*, on D 50.17.22, which certainly appears to provide analogous support for his view. It reads (the same translation):

'One must in general approve of the principle that wherever in actions of good faith the condition of someone is placed in the power of his master or of his procurator, then this power is to be regarded as equivalent to the power of the decision of a good man.'

[25] Whether or not the exercise of such a discretion is made *arbitrio bono viri* "requires a determination of whether it was exercised both reasonably and honestly." (Per Swain JA in *Mount Amanzi Share Block Limited v Body Corporate of Windsor Heights Sectional Title Scheme and Others* (537/2016) [2017] ZASCA 38 (29 March 2017) at paragraph [31].)

[26] In my view Mrs G[...] effective failure/refusal to decide to sell the property is unreasonable. She and Mr G[...] have been divorced now for more than six years. She has enjoyed the benefit of residing in the property for all that time, and seems to have adjusted her domestic life accordingly, including allowing Ms d[...] P[...] to live there, life partner or not. It is however to her credit that she takes care of Mr G[...] grandchild.' Her attitude suggests that she intends to maintain this arrangement indefinitely. There is also an element of capriciousness in her attitude, in that according to her attorneys' letter attaching the valuations (see paragraph [10] above) she seemed amenable to the sale of the property but only through the agency of her brother. Her attitude in my view clashes with the intention of the parties expressed in clause 11.2 of the settlement agreement and is not fair to Mr G[...] who is effectively deprived of his rights flowing from co-ownership. He is entitled to challenge this exercise of her discretion and in so doing , to seek to enforce the terms of the court order, which Mrs G[...] has not honoured. Further at paragraph [32] of *Ex Parte: PJLG and another* (supra) van Zyl ADJP said (footnote omitted):

'the most important benefit which accrues to the parties by reason of this change in the status of their rights and obligations under the settlement agreement, is that the court retains authority over its own orders to ensure that the terms thereof are complied with. This in turn gives the parties the right to approach the court for appropriate relief in the event of a failure by one of them to honour the terms of a consent order. Accordingly, by agreeing to their settlement being made an order of court , both parties effectively commit themselves to comply with the terms thereof and be subjected to sanction by the court should they fail to do so.'

[27] The relief which Mr Gouws is seeking may be achieved either in terms of the *actio* or by challenging the exercise of Mrs Gouws' discretion. The result will be the same. And either way there will be no conflict with the court order, properly interpreted.

[28] The second ground of opposition raised at the hearing was that clause 11.3 of the settlement agreement, now incorporated in the decree of divorce, contains maintenance orders in favour of Mrs G[...] and L[...]. Mrs G[...] right to live in the property without paying rent, so it was submitted, was a maintenance order, even if not expressly stated as such. The keeping of R1 000 of the rent money from the flat for maintenance for L[...] was similarly a maintenance order. In terms of s 8 of the Divorce Act a maintenance order can only be varied in terms of that section.

[29] I do not agree that clause 11.3, as incorporated, is a maintenance order in either respect. Clause 11 was clearly intended to deal with the property and its use, until such time as the property was sold. Mrs G[...] entitlement to live on the property without paying rent was merely an incident of the agreement regarding the property. This entitlement was not unencumbered. She was to pay the municipal charges, which an owner or occupier is obliged to do. Moreover it would be difficult to quantify the benefit of living in the property without paying rent, and the corresponding obligation of Mr G[...] to pay maintenance to Mrs G[.]. Section 7 (1) of the Divorce Act provides that a court may make an order with regard to the division of assets or the payment of maintenance by one party to another. I cannot see how an agreement that one party lives in the property rent free can constitute the payment of maintenance by the other party, as envisaged in the section.

[30] With regard to maintenance for L[...], clause 8 of the settlement agreement provided for the maintenance of L[...]. Clause 11.3.2 did not oblige either parent to pay maintenance for L[...]. It was merely a means by which the R1 000 per month maintenance would be paid if the flat was rented out. If no rent

[31] It follows that Mr G[...] is entitled to the claim partition of the property. The rest of the relief claimed related to the method of division. It provides an opportunity for the parties to agree on the terms of the division failing which a liquidator is to be appointed. Mr Mark Rossouw has consented to such an appointment. The liquidator's proposed powers are in my view reasonable and will be incorporated in the order. The further terms of the order sought are also in my view reasonable and were not challenged in the event of me granting termination of the joint ownership of the property. The only counter suggestion was a subdivision of the property. I agree that this would not be practical for the reasons given by Mr G[...]. An order that one or other of the parties should buy the other's half share would also not be feasible and was not proposed by either party. The intention of the parties in any event was that the property be sold and the profits equally divided.

[32] In the event of the application succeeding, Mr G[...] sought costs on the attorney and client scale. It was submitted that the application had been necessitated as a result of Mrs G[...] lack of co-operation and further that she had not raised any valid grounds for opposing the application. In my view a punitive costs order is not warranted. The settlement agreement was made an order of court by consent when both parties were aware of its terms. I do not think that Mrs G[...] was vexatious in opposing the application and relying on the court order. There was a further prayer that the taxed costs should be deducted from Mrs G[...] 50% share of the proceeds of the sale of the property. In my view such an order would be improper and in essence would be tantamount to *parate executie*.

[33] The following order will issue:

[33.1] It is declared that the joint ownership of the parties in the immovable property known as Erf 7[...] Uitenhage, in the area of the Nelson Mandela Metropolitan Municipality Division of Uitenhage, Eastern Cape Province situated at 81 L[...] C[...], Uitenhage (the "Property") is terminated, in terms of the *actio communi dividundo*;

[33.2] Unless the applicant and first respondent reach agreement in writing within1 (ONE) month from date of this order, on all aspects related to the termination of the co-ownership, then and in such event, Mr Mark Rossouw is appointed as a liquidator;

[33.3] In the event of a liquidator being appointed, each party shall be liable in equal shares for the liquidator's fee;

[33.4] The liquidator shall be empowered and directed to give oversight and effect to the following that:

[33.4 1] The Property be valued by an independent valuer, recommended by the Chairperson of the Institute of Estate Agents, in Uitenhage or Port Elizabeth (unless the parties are able to agree to the appointment of a valuer forthwith);

[33.4 2] Immediately upon receipt of such valuation, that the Property shall be placed on the open market to be sold at the valuation price, by an estate agent or estate agents of the liquidator's choice;

[33.4.3] That Goldberg & De Villiers Incorporated shall be appointed as conveyancers for both parties, who will give effect to the sale as follows, namely:

[33.4.3.1] The collection of the full purchase price;

[33.4.3.2] The cancellation and discharge of the mortgage bond;

[33.4.3.3] The discharge of any further obligations on the Property in respect of rates, taxes, estate agent's commission and the like; and

[33.4.3.4] The distribution to both parties of the nett residue to be determined in accordance with the provisions of paragraph 33.4.4 below;

[33.4.4] Immediately after the registration of the transfer of the Property into a purchaser's name and after all costs relating to the marketing , sale and transfer of the Property including (but without limitation) estate agents commission , any amount which may be owing to the second respondent (in terms of the Loan Agreement and Mortgage Bond) and the liquidator's fees have been paid-

[33.4.4.1] A 50% portion of the net proceeds of the sale of the Property is to be paid to the applicant; and

[33.4.4.2] A 50% portion of the net proceeds of the sale of the Property is to be paid to the first respondent.

[33.5] For so long as the first respondent resides in the Property, the first respondent is ordered and directed to pay timeously all water, electricity and municipal fees in respect of the Property *alternatively* and in the event that the Property is vacant, that the applicant and first respondent be liable to pay, in equal portions, all applicable water, electricity and municipal and other charges, costs and amounts relating to, or associated with, the Property until such time as the Property has been transferred;

[33.6] The parties are directed to give their full co-operation in order to facilitate the marketing, sale and/or disposal of the Property, including giving the estate agent/s access to the Property for viewings and signing all documents necessary to give effect to the sale and registration of the Property;

[33.7] The Sheriff is authorised and directed to take any steps and do all such things that the parties have been directed to take and/or do in the parties' stead in the event that any of the parties fail/refuse and/or neglect to do so themselves. This includes signing any documentation in respect of and to give effect to the sale and registration of the Property;

[33.8] The first respondent is to pay the costs of the application.

JM ROBERSON

JUDGE OF THE HIGH COURT

Appearances

Applicant: Adv M Morgan, instructed by Adeline Deysel Attorneys, Port Elizabeth.

First Respondent: Adv S Louw, instructed by Rayno Peo Attorneys, Port Elizabeth

Judgment delivered by email by arrangement.