

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

CASE NO 1372/2019

Date heard: 30/04/2020

Date delivered: 23/06/2020

In the matter between

MUSTAFA MOHAMED N.O.

APPLICANT

(In his capacity as duly appointed Executor

of the deceased estate of M[.] D[...] B[...]

ID no 370[...])

and

V[...] G[...] Z[...]

1st RESPONDENT

ABSA BANK LIMITED

2nd RESPONDENT

EASTERN CAPE DEVELOPMENT CORPORATION

3rd RESPONDENT

MASTER OF THE HIGH COURT

4th RESPONDENT

JUDGMENT

ROBERSON J:

[1] It was agreed that this application would be heard without oral submissions, in view of the Covid-19 crisis.

[2] The application is brought in terms of the *actio communi dividundo* (the *actio*). The applicant is the executor in the intestate estate of the late M[...] D[...] B[...] (the deceased) who died on 17 July 2014. The deceased was formerly married to the first respondent in community of property. They were divorced on 24 February 2009 and a settlement agreement was made an order of court.

[3] The deceased and the first respondent were joint owners of the immovable property described as Erf 1[...] H[...] Retreat, Nelson Mandela Metropolitan Municipality, Division of Port Elizabeth, Province of the Eastern Cape (the property). Clause 3 of the settlement agreement provided for the division of assets. Clause 3.1 provided as follows:

3.1 Immovable property: 3[...] T[...] Street, Rowallan Park, Port Elizabeth

3.1.1 It is recorded that the immovable property situated at 3[...] T[...] Street, Rowallan Park, Port Elizabeth ("the property") is by virtue of the marriage in community of property registered in the joint names of the Plaintiff and the Defendant and that the said property is subject to a mortgage bond registered over the property in favour of Absa Bank ("Absa Bank").

3.1.2 The parties agree that the Plaintiff shall be entitled to retain the property as her sole and absolute property and that the Defendant shall have no right or claim in respect of the said property.

3.1.3 The Plaintiff shall be solely liable for the repayment of the mortgage bond registered over the property and the Plaintiff hereby indemnifies the Defendant against any claim(s) whatsoever by Absa Bank under the said mortgage bond. The Plaintiff will immediately supply the Defendant with the necessary documentation in order to release him from the obligations towards Absa Bank.

3.1.4 The Defendant shall, when called upon to do so, sign all such documents and do all such things as may be required in order to transfer his undivided half share in the property to the Plaintiff in accordance with sub-clause 3.1.1, which transfer will be

done as soon as possible after granting of the order of divorce, but not later than 90 (ninety) days from granting of the divorce order.

3.1.5 The Plaintiff shall be solely liable for payment of all costs in connection with the transfer of the Defendant's undivided half share in the property to the Plaintiff, as above.

[4] It is common cause that the transfer of the deceased's half share in the property to the first respondent has never been registered in the Deeds Office. It is the applicant's position that the deceased estate is still the owner of a half share in the property and is entitled to utilise the *actio* to attain a termination of the joint ownership and an equitable division of the property. The first respondent has opposed the application.

[5] Gorven J set out the principles of the *actio* in *Matadin v Parma and Others* [2010] ZAKZPHC 18 (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 old authorities including Voet and van Leeuwen and has been recognized ever since. The underlying rationale is that every co-owner of property may insist on a partition 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. If the co-owners cannot agree on the manner in which the property is to be divided between them, the court is empowered to make such order as appears to be fair and equitable in the circumstances. Where the property is not physically capable of subdivision such an order may, for example, entitle one of the co-owners to obtain the whole of the property upon payment of a certain sum. If this is not appropriate, or possible, the court may order the property to be sold and the proceeds to be divided amongst the co-owners according to their shares. One well recognised mode of doing this is a sale by public auction and a division of the proceeds. The court may make any equitable adjustment if one of the co-owners has, for example, benefited financially from the property or incurred expenses in respect of the property."

[6] The distribution proposed by the applicant is a sale of the property by public auction, alternatively through an estate agent, and after payment of the amount owing to the second respondent and municipal charges, the remaining proceeds of the sale are to be divided equally between the deceased estate and the first respondent.

[7] In his founding affidavit the applicant set out the history of the ownership of the property. It was purchased by the first respondent in 1994 and transferred into her name. She thereafter married the deceased who by virtue of the marriage in community of property became a joint owner of the property. The first respondent had been granted a loan by the second respondent to purchase the property and over time further loans were granted, some of which were granted to the first respondent and the deceased as joint owners. The loans were secured by mortgage bonds. The third respondent also loaned money which was secured by a mortgage bond but it has not submitted a claim against the estate.

[8] Following the divorce the first respondent did not carry out her obligation to effect transfer of the deceased's half share to her, with the result that the deceased estate is still the registered owner of a half undivided share in the property. The deceased estate is liable for payment of the amount owing to the second respondent, which amount is currently R669 402.82 together with interest thereon at the rate of 9% per annum.

[9] The applicant states he is in a predicament because the deceased estate has to be administered and finalised but at this stage only a 50% share in the property can be sold. A half share in a residential property, so he stated, either would not be sold or would sell far below a fair value. Consequently the estate cannot be finalised. He has a duty to the estate's beneficiaries and creditors to do so. The applicant's attorneys wrote to the first respondent, giving her an opportunity to purchase the deceased estate's half share in the property or to sign a power of attorney allowing the applicant to sell the whole property. No response was received. The applicant also unsuccessfully attempted to contact the occupants of the property.

[10] The applicant expressed the view that the only way the predicament can be resolved is a termination of the joint ownership of the property and an equitable division.

[11] In her answering affidavit the first respondent said that she did not deny the contents of the founding affidavit. I had difficulty understanding precisely what the grounds of her opposition were. She said that the second respondent was required to avoid reckless lending and had extended loans to her when it was not prudent to do so. She said that if clause 3.1.4 was not severed from the settlement agreement, then after 90 days she and the deceased were jointly and severally liable to the second respondent. She appeared to accept that the deceased estate was liable for 50% of the debts. She said that the third respondent is owed R113 000, bringing the total to R886 402.82. The municipal valuation of the property is R770 000. If the property was sold in order pay the debts, the applicant's powers, so she stated, were cancelled by the insolvency of the deceased estate.

[12] The first respondent went on to say that the applicant should allow the court to appoint a liquidator and divide the joint estate "as stated in clause 2 of the Divorce Decree". Paragraph 2 of the divorce order recorded that the settlement agreement was made an order of court. The first respondent further said that she would be prejudiced if 50% of her pension interest was paid to the applicant. There was no mention of her pension interest in the settlement agreement. She concluded by asking for an amendment to paragraph 2 of the divorce order as follows: "that a liquidator be appointed to adjudicate the joint property and divide the proceeds among the parties equally from the date of marriage until the dissolution of the marriage."

[13] Despite the request for this relief in the answering affidavit, the first respondent's heads of argument took a different turn. A point in limine challenging the locus standi of the applicant was raised. This was that the deceased no longer had an interest in the property as a result of clause 3.1.2 of the settlement agreement. The joint ownership, so it was submitted, was terminated by the

settlement agreement. Following the divorce order incorporating the terms of the deed of settlement, the deceased, in terms of clause 3.1.2, had no further right or claim in the property. Joint ownership was therefore in dispute.

[14] Both parties referred to the decision in *Fischer v Ubomi Ushishi Trading CC and Others* 2019 (2) SA 117 (SCA), a matter involving similar circumstances. Mr and Mrs Haynes, the second and third respondents, were previously married in community of property, and were joint owners of an immovable property. When they divorced, an agreement that the immovable property was awarded to Mrs Haynes was made an order of court. The court found that the agreement, although binding on the parties, did not by itself vest ownership of Mr Haynes' half share. The vesting of ownership in Mrs Haynes required an endorsement on the title deed in terms of s 45 (bis) (1) (a) of the Deeds Registries Act (at paragraph [18]). This was not done and Mr Haynes was still reflected in the Deeds Registry as a co-owner. Fischer, a creditor of Mr Haynes, in the court a quo sought unsuccessfully to execute against Mr Haynes' half share in the property. He was unsuccessful on appeal because although ownership of the half share had not vested in Mrs Haynes, her personal right to enforce registration of the half share preceded Fischer's claim.

[15] The effect of this decision is that ownership of the deceased's half share in the property has not yet vested in the first respondent.

[16] In *Fischer* it was accepted that Mrs Hayne's acquisition of ownership was derivative, arising as it did from the settlement agreement. At paragraph [19], the court stated:

“That derivative acquisition of ownership in land requires registration, has been the position at common law for more than a century.”

It went on to refer to the following passage in *Lucas' Trustee v Ismail and Amod* 1905 TS 239 at 242:

“..... the general rule of our law is that real rights in land can only be validly constituted by registration *coram lege loci*. There are well recognised exceptions to

that rule, such as, for instance, acquisition of ownership to land by prescription, or of an interest in land by marriage in community of property, and so on. But none of those exceptions apply in the present case. Hence the general rule governs, and the real right which is sought to be established is, it appears to me, in the same position as a right of ownership or right of mortgage or a claim to some portion of the *dominium* cut off and separated from it so as to create a servitude. In such cases the right can only be validly constituted by registration.”

[17] In reliance on this passage, it was submitted on behalf of the first respondent that the exception of an interest in land by marriage in community of property could be invoked. The settlement agreement and the order in which it had been incorporated were binding despite the fact that transfer had not been effected via the Deeds Registry (presumably meaning transfer of the deceased’s half share). I think that this submission overlooks the fact that it was the deceased who acquired joint ownership through the marriage in community of property, not the first respondent. Her acquisition of ownership was derivative when she purchased the property.

[18] It was further submitted that the failure of both parties to act in ensuring transfer of the deceased’s half share to the first respondent could not mean that the deceased’s non-existent interest in the property was resurrected. Again this submission overlooks that as a matter of law presently the deceased estate is a joint owner of the property.

[19] The position therefore remains that the property is jointly owned by the first respondent and the deceased estate, as represented by the applicant.

[20] It was submitted on behalf of the applicant that the requirements for a termination of joint ownership and a division had been met. The property is jointly owned and the applicant representing the deceased estate may insist on a termination and division. The first respondent has not agreed to divide and the

applicant is entitled to approach the court to order a division (see *Robson v Theron* 1978 (1) SA 841 (A) at 855A-F).

[21] In a memorandum to the parties I expressed the prima view that the applicant could not claim a division of the property by way of the *actio* because in terms of the settlement agreement which was made an order of court the first respondent was awarded the property and the deceased was to have no right or claim to the property. The settlement agreement and court order could not be reversed so that the deceased estate retained its half share in the property instead of it being transferred to the first respondent. I also stated that *Fischer* made it clear that the deceased's half share in the property had not yet vested in the first respondent. I expressed the view that the appropriate remedy was an application to enforce the first respondent's obligations in terms of the order and that such an order could be made under "further or alternative relief. I also suggested that the parties should be able to reach agreement along the lines proposed by me, alternatively that the first respondent should agree to carry out her obligations in terms of the order so that the transfer could take place. I accordingly requested further submissions.

[22] In further heads of argument the applicant persisted in submitting that the estate could obtain relief through the *actio*. It was re-iterated that the property was still jointly owned and that there is no agreement on a method of termination. Reliance was now placed on an interpretation of the order which incorporated the terms of the settlement agreement. Reference was made to the judgment in *Eke v Parsons* 2016 (3) SA 37 (CC) at paragraph [29] where the following was said (footnote omitted):

"Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the

judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.””

[23] It was submitted that the agreement which was made an order of court recognised that there was a mortgage bond registered over the property in favour of the second respondent. Although the first respondent acquired the right to transfer of the deceased's share, this right was not unconditional. She was required to release the deceased from his obligations towards the second respondent. On a proper interpretation of the order she would only be entitled to transfer upon complying with her obligations in terms of the order. The first respondent would not have been able to transfer the deceased's share in the property without the approval or consent of the second respondent. Reference was made to s 26 of the Deeds Registries Act 47 of 1937 (the Act), read with s 16 of the Act. The section which applies in these circumstances is s 45 bis of the Act, the relevant portions of which provide:

Endorsement of deeds on divorce, division of joint estate, or change of matrimonial property system

(1) If immovable property or a lease under any law relating to land settlement or a bond is registered in a deeds registry and it-

(a) formed an asset in a joint estate of spouses who have been divorced, and one of them has lawfully acquired the share of his or her former spouse in the property, lease or bond; or

(b)

the registrar may, on written application by the spouse concerned and accompanied by such documents as the registrar deems necessary, endorse on the title deeds of the property or on the lease or the bond that such spouse is entitled to deal with such property, lease or bond, and thereupon such spouse shall be entitled to deal therewith as if he or she had taken formal transfer or cession into his or her name of the share of the former spouse or his or her spouse, as the case may be, in the property, lease or bond.

(2) (a) If immovable property referred to in subsection (1) is hypothecated under a registered mortgage bond, the provisions of subsections (2), (3) and (4) of section 45 shall *mutatis mutandis* apply.

[24] Section 45 of the Act provides:

Transfer or cession by means of endorsement

(1) If immovable property, a lease under any law relating to land settlement or a bond, which forms an asset in a joint estate is registered in a deeds registry and the surviving spouse has lawfully acquired the share of the deceased spouse in the property, lease or bond, the registrar shall on written application by the executor in the estate of the deceased spouse and by the surviving spouse save where the surviving spouse has signed as executor, accompanied by such other documents as may be prescribed, endorse on the title deeds of the property or on the deed of lease or on the bond that the surviving spouse is entitled to deal with such property, lease or bond, and thereupon such spouse shall be entitled to deal therewith as if he or she had taken formal transfer or cession into his or her own name of the share of the deceased spouse in the property, lease or bond.

(2) If the immovable property mentioned in subsection (1) is hypothecated under a registered mortgage bond the endorsement provided for in the said subsection shall not be made unless-

(a) such bond is cancelled; or-

(a)*bis* the said property or the share of the deceased spouse therein is released from the bond; or

(b)

(c) a written consent (which shall be in duplicate, in the prescribed form and signed by the survivor and the legal holder of the bond) to the release of the estate of the deceased spouse from liability under the bond and to the substitution of the survivor as sole debtor in respect thereof, is produced to the registrar together with the bond.

(3) The registrar shall, in any case of release and substitution in terms of paragraph (c) of subsection (2), when he or she endorses on the title deeds of the property that the survivor is entitled to deal therewith-

- (a) make in the appropriate register an entry setting forth that the estate of the deceased spouse is released from liability in respect of the obligation secured by the bond and that the survivor has become sole debtor in respect of the bond; and
- (b) endorse on the bond that the estate of the deceased spouse is released from liability in respect of the obligation secured thereby and that the survivor has become sole debtor in respect of the bond.

(4) As from the date of the endorsement on the title deeds of the property in terms of subsection (1), the estate of the deceased spouse shall be absolved from any obligation secured by the bond and the survivor shall become sole debtor in respect thereof in the same manner as if he had passed the bond at that date and, if the bond is a bond to secure future debts, the immovable property thereby mortgaged will secure any further or future advances which are made by the mortgagee of the bond to the survivor.

(5) Any reference in this section to a bond shall include a charge in favour of the Land and Agricultural Bank of South Africa or any Department of State.

[25] It was submitted that the first respondent failed to release the deceased (and thereafter the estate) from the obligation towards the second respondent. She does not qualify for the transfer loan with the consequence that the estate will not be released from its obligations towards the second respondent. The first respondent herself stated in her affidavit that any further loan from the second respondent would amount to reckless lending. Implementation of the agreement and court order is, so it was submitted, a relative impossibility and it seemed clear from the first respondent's affidavit that enforcement of her obligations in terms of the order is a virtual impossibility. The second respondent will not agree to a transfer of the property without the outstanding loan being paid and further has not consented to the transfer of the property without the full outstanding balance being paid.

[26] It was further submitted that it could not have been the intention of the parties that the first respondent could obtain transfer of the deceased's share without complying with her obligations in terms of the agreement. The order, properly interpreted, insofar as it relates to forfeiture of the deceased's rights in the property, could only have related to the proceeds of or equity in the property. If the court were to find accordingly, it would be justified in ordering termination of the joint ownership, payment of the outstanding amount on the bond, and should there be any residue, such should be paid to the first respondent.

[27] In *Unlocked Properties 4 (Pty) Ltd v A Commercial Properties CC* [2016] ZAGPJHC 373 (29 July 2016) Meyer J had to deal with a defence of impossibility of performance. The applicant, the purchaser of an immovable property, applied for an order of specific performance against the respondent, the seller, to transfer the immovable property to the applicant. There was a mortgage bond over the property and there was a shortfall between the purchase price and the amount owing on the bond. The seller stated that it did not have the financial means to provide a guarantee making up the shortfall or to provide a guarantee to the bank to enable cancellation of the bond.

[28] Meyer J referred to certain authorities dealing with this defence, and stated at paragraph [7]:

“The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation.”

At paragraph [9] Meyer J also referred to LAWSA Vol 5 (1) First Reissue paragraph 160 where it is stated:

“The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the

impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract.”

Further, at paragraph [13] Meyer J stated:

“The fact that the property is burdened with a limited real right of security in favour of the bank, ‘matters little’. Because of its accessory character, a mortgage is extinguished by discharge of the principle debt. The seller is under an obligation to discharge his debt owed to the bank in order for transfer of the property to pass to the purchaser free from the burden. The impossibility on which the seller relies is peculiar to itself because of its personal financial situation and incapability of securing payment of the full debt owed to the bank, and not absolute. Such obligation can, in general, be performed. The seller’s personal incapability does not render the contract void. The defence of impossibility of performance has not been established.”

[29] Although it is the applicant, and not the first respondent, who has raised impossibility of performance by the first respondent, the principles relied upon in *Unlocked Properties* apply in the present matter. The impossibility relied upon by the applicant on behalf of the first respondent is in my view relative or subjective. The applicant relies upon the first respondent’s alleged inability to obtain a fresh loan and to pay the outstanding balance on the bond. This inability is peculiar to the first respondent and therefore not absolute. The first respondent’s reference to reckless lending on the part of the second respondent does not change this position.

[30] MeyerJ’s view that the fact that the property is burdened with the security in favour of the bank “matters little” is also applicable in this matter. In terms of the settlement agreement and court order the first respondent undertook liability for repayment of the bond so that the endorsement on the title deed could take place. If she failed to do so it did not mean that her obligation had been extinguished.

[31] I further do not agree with the interpretation of clause 3.1 of the settlement agreement submitted on behalf of the applicant. The deceased unreservedly agreed that the first respondent would be entitled to retain the property as her sole and

absolute property and abdicated any right or claim in respect of the property. As between the parties the first respondent assumed liability for repayment of the bond and an interpretation that the deceased only forfeited the equity in the property does not accord with the clear wording of the clause. It could not be interpreted to mean that if the first respondent did not pay the bond and bring about transfer, the award of the property to the first respondent was reversed. As stated by Meyer J, the mortgage bond in favour of the second respondent is accessory in character and would be extinguished if the first respondent carried out her obligations in terms of the order so that endorsement on the title deed could take place.

[32] Insofar as the applicant relies on the *actio*, I am of the view that the deceased and consequently the estate had no locus standi to claim a division of the property. The property was dealt with in the settlement agreement and order and the deceased in my view abandoned any personal claim against the first respondent for a division of the property in terms of the *actio*.

[33] Brief submissions were made on behalf of the first respondent in response to my request. They were:

“1.First respondent must submit the divorce decree and the settlement agreement to the second respondent.

1.The second respondent must update the details in the loan agreement as of the first respondent.

3. The applicant’s application be dismissed as he has no locus standi with costs.

4. The respondent to pay the second respondent’s debt within a period of 12 months from the date of the order.”

[33] These submissions seem to propose an arrangement to be reached between the first and second respondents, to ensure the endorsement on the title deed in favour of the first respondent and to allow the first respondent some time to settle the debt owing to the second respondent. The second respondent did not appear in the matter and obviously has not been given notice of this proposed arrangement, given the relief claimed in the notice of motion, which, if granted, would have resulted in at least partial payment of the amount owing on the bond. It would however be in everyone’s interests if the first respondent was to carry out her obligations in terms of

the order as soon as possible. The second respondent may well institute action against the estate and the first respondent, which could result in the property being declared executable and sold in execution.

[34] Nonetheless it follows from what I have said above that the application cannot succeed. With regard to costs, I see no reason to depart from the general rule that costs follow the result. Submissions made on behalf of the first respondent were of little assistance, and it appears that the effect of *Fischer* was misunderstood. However the first respondent was obliged to come to court and oppose the application and I have found against the applicant on all the grounds on which his claim in his representative capacity were based.

[35] The following order will issue:

The application is dismissed with costs.

J M ROBERSON
JUDGE OF THE HIGH COURT

Heads of argument for the applicant prepared by Adv R Raubenheimer, instructed by Vezi de Beer Incorporated, c/o Pagdens Attorneys, Port Elizabeth.

Heads of argument for the first respondent prepared by Mr T Mabini, Mabini Incorporated Attorneys, c/o Lexicon Attorneys, Port Elizabeth.

Judgment delivered electronically by email by arrangement.