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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: **101/2022**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

OLEHILE CALVIN MAROGOA

Applicant

And

KAMOGELO SALAMINA MAROGOA

First Respondent

JUNIOR RASEROLE MAROGOA

Second Respondent

THE REGISTRAR OF DEEDS, BLOEMFONTEIN

Third Respondent

JUDGMENT BY: C REINDERS, J

HEARD ON: 15 SEPTEMBER 2022

DELIVERED ON: 24 JANUARY 2023

[1] The applicant and the first and second respondents (hereafter “the respondents”) are the joint owners of two immovable properties situated in

Bloemfontein. The third respondent is the Registrar of Deeds, Bloemfontein. This is an application for the termination of the said joint ownership.

[2] The applicant moves for an order that the respondents be compelled to sign a document titled “EXCHANGE AGREEMENT” in terms whereof the joint owners would exchange their interests in the properties (“the exchange document”), alternatively that the court orders that the immovable properties be sold by means of public auction and the nett proceeds be divided between the parties in accordance with their one third shares in the properties.

[3] The respondents opposed the relief claimed and filed a counter-application, praying in essence that a liquation and distribution account in terms whereof the three of them became joint owners, be set aside. The relevance hereof lies therein that the two immovable properties belonged to the biological mother of the respondents. Their mother passed intestate on 15 July 2015 and was married to the applicant at the time. The three of them jointly inherited the properties and registration was effected in their names on respectively 28 November 2019 and 27 January 2022.

[4] It is trite that where property is owned in joint ownership, each such co-owner has an undivided share therein. The share need not be equal. As a general rule, every co-owner would be entitled to have such co-ownership terminated with the *actio communi dividundo*.¹

[5] A party merely has to allege and proof the existence of the joint ownership and a refusal by the other to agree to the termination or /and inability to agree in respect of the method of termination (or an agreement to terminate but refusal to comply therewith). A respondent (defendant) does not have a plethora of defences once any of the above requisites has been proven. The general rule is that a court has a wide discretion and would follow a method that is fair and equitable to both parties. This would include for example a sale by public auction and division of the nett amount, in appropriate cases an allocation of the property to one owner subject

¹ Robson v Theron 1978 (1) SA 841 (A)

to payment of compensation and even a private auction restricted to co-owners and division of the nett amount.²

[6] In this matter it is common cause that the parties are co-owners of the properties. The relationship between the applicant and respondents are however strained as is evident from the papers. The applicant wishes to have the joint ownership terminated. Notwithstanding the exchange document suggested and prepared by the attorneys for the applicant as far back as 2020, the respondents had been (and still are) dissatisfied therewith, however have failed to make any counter-proposal. The parties do not agree in respect of the manner in which the co-ownership should be terminated.

[7] At the commencement of the proceedings respondents formally withdrew the counter-application. The result thereof is that the *causa* of how the parties became co-owners is not at issue any further and as the papers stood before me there is no prospect that the registration of the properties into the names of the parties be unsettled or affected. As the counter-application has been withdrawn, nothing further needs to be said about it by me save to mention that *prima facie* I was not of the view that it would ever be clothed with success.

[8] The result is therefore that no valid defence is proffered in respect of the relief sought by applicant in its notice of motion. The respondents' opposition on the papers to both the propositions in the exchange document as well as the alternative relief claimed by the applicant (that the properties be sold by public auction), is premised on their then view that the applicant should not have been an heir to the properties at all.

[9] The applicant in its founding affidavit explains that it was proposed to the respondents that a fair and equitable division would be an exchange of the properties with the result that applicant be the sole owner of one of the two properties, and the respondents the joint owners of the other property. The applicant sets out extensively how the calculations were done to achieve the proposed division

² Robson v Theron *supra*
Kruger v Terblanche 1979 (4) SA 38 (T)

of the joint ownership as suggested in the exchange document. To this extent the applicant obtained two valuation reports (sworn affidavits) from registered valuers to determine the value of the properties. The written exchange document was drafted in 2020 and a copy thereof was provided to the respondents for their consideration. The applicant annexes several electronic communications wherein the respondents were requested to tender alternative options for termination of the joint ownership, but avers that no response for a suggested solution was forthcoming. The communication included an indication to the respondents that the applicant would be moving for the orders as indicated in its notice of motion, including a punitive cost order.

[10] The first respondent, as deponent to the answering affidavit, states amongst others that due to the strained relationship as aforementioned, she is uncomfortable with the fact that the applicant has appointed at his discretion valuers to determine the reasonable market values of the properties. She has doubts about the figures provided and harbours a suspicion that the same might not be accurate, however she would “take comfort and have confidence in the valuations of the property (*sic*) in a situation where a second valuations of the properties is undertaken by evaluators independent of the Applicant.”

[11] I am to consider a method to terminate the joint ownership in a manner which is fair and equitable to all parties. On face value the exchange document entails a method that seems to be not only fair, but would avoid the situation of a public auction resulting in an outcome which might in all probabilities be less beneficial to the parties. It is common cause that both properties were from the commencement of the joint ownership (and still are) leased to tenants. The parties not only have the benefit of the income so generated, but in the manner suggested by the applicant, still retain ownership of a property. However, taking into account the objections raised by the respondents, it is my considered view that the alternative relief claimed by the applicant that the properties be sold by public auction, would in the circumstances be fair and equitable to the parties. Having so concluded, the respondents’ insistence that valuers be appointed would in my view serve no purpose.

[12] The respondents tendered the costs in relation to the withdrawal of the counter-application. The applicant in its notice of motion and during oral submissions moved for a cost order on a scale as between attorney and client. It was submitted that the respondents' non-responsive attitude, despite constant requests for proposals as to a fair and equitable termination of the joint ownership of the immovable properties, warrants such a punitive order. Although I frown upon the said conduct of the respondents In exercising my discretion, I intend granting the usual cost order.

[13] Accordingly the following order will issue:

1. The joint ownership of Applicant and the First and Second Respondents held in respect of the immovable properties ("the properties") described as:

1.1 Section 33 of Plan [...] situated at Portion [...], Erf [...], Bloemfontein, Mangaung Metropolitan Municipality, Free State, held in terms of Deed of Transfer [...](**"MAR-HEI"**);

1.2 Section 1 of Plan [...] situated at Portion [...] Erf [...], Bloemfontein, Mangaung Metropolitan Municipality, Free State, held in terms of Deed of Transfer [...](**"ANRIUS"**)

is terminated.

2. The properties shall be sold by public auction without a reserve price within a period of **sixty (60) days** calculated from date of the granting of this order and Applicant is authorized to take all reasonable measures to give effect to this order.

3. The conditions of sale per public auction shall include that:

3.1 The Applicant as well as the First and Second Respondents shall be at liberty to bid for the properties and to purchase it at the sale.

3.2 The expenses of advertising the properties and of the sale shall be paid from the proceeds of the sale.

3.3 The nett proceeds of the sale shall be divided equally between the Applicant and the First and Second Respondents, who are all ordered to give transfer to the purchaser pursuant to the said sale.

4. The costs of this application to be paid by the First and Second Respondents jointly and severally, the one paying, the other to be absolved.

C REINDERS, J

On behalf of applicant:	Adv HJ Cilliers
Instructed by:	MV Mdluli
	c/o Hendre Conradie Inc
	(Rossouws Attorneys)
	BLOEMFONTEIN

On behalf of respondents:	Adv Z Nyezi
Instructed by:	Mazibuko & Wezi
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