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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 42712/2018

REPORTABLE: *NO*

OF INTEREST TO OTHER JUDGES: *NO*

REVISED: *Yes*

Date: *14th September 2022*

In the matter between:

S [....]1, D [....] A [....]

Plaintiff

and

S [....]2 (born R [....]), H [....]

Defendant

Heard: 20 April 2022 – The ‘virtual hearing’ of this opposed application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 14 September 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 14 September 2022.

Summary: Practice – Judgments and orders – variation of – *actio communi dividundo* – divorce order 'by default' against defendant at variance with relief claimed in summons – Defendant applying in terms of Rule 42(1)(a) for judgment to be varied so that judgment accord with relief sought in summons - Rule 42(1)(a) operates where order granted by court different to the one sought by plaintiff – also an order is granted erroneously if it is vague – application granted.

ORDER

(1) The Order of this Court (per Malungana AJ) dated 16 February 2021 be and is hereby varied in terms of Uniform Rule of Court 42(1)(a) by the deletion of prayer (3) of the said order in its entirety and by the replacement thereof by the following orders:

‘(3) It is confirmed that the joint ownership of the parties in the immovable property known as Erf [...], Malvern East Extension, Germiston, situate at [...] S [...] Road, Malvern East, Germiston (the Germiston property), is terminated in terms of the *actio communi dividundo*.

(4) Unless the plaintiff and the defendant reach agreement in writing within one month from date of this order, on all aspects related to the termination of the co-ownership, then and in such event, a liquidator is to be appointed by the attorney representing the plaintiff and the attorney representing the defendant. If agreement cannot be reached between the attorneys representing the parties on the liquidator to be appointed, they should each nominate two possible candidates, and the Court will appoint from such nomination the liquidator.

(5) In the event of a liquidator being appointed, each party shall be liable in equal shares for the liquidator's fee.

(6) The liquidator shall be empowered and directed to give oversight and effect to the following, that:

- (a) The property be valued by an independent valuer.
- (b) 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.
- (c) A firm of Attorneys, to be nominated by the Liquidator at his sole discretion, shall be appointed as conveyancers for both parties, who will give effect to the sale as follows, namely:
 - i. The collection of the full purchase price.
 - ii. The cancellation and discharge of the mortgage bond (if any).
 - iii. The discharge of any further obligations on the property in respect of rates, taxes, estate agent's commission, and the like.
 - iv. The distribution to both parties of the net residue to be determined in accordance with the provisions of [33.4.4] below.
 - v. 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 agent's commission, any amount which may be owing to the plaintiff as allegedly being equivalent to any amount paid by the plaintiff in excess of his half share of the costs of the Germiston Property, but also taking into account any benefit derived by him from the property such as rent-free occupation thereof or the collection of rental from tenants (if any), and the liquidator's fees, have been paid —a 50% portion of the net proceeds of the sale of the property is to be paid to the plaintiff; a 50% portion of the net proceeds of the sale of the property is to be paid to the defendant.

(7) For so long as the plaintiff resides in the property, he 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.

(8) 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.

(9) 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.

(10) The defendant's counterclaim (claims b, c and d) is postponed *sine die*.

(11) Each party shall bear his / her own costs of the action to date.'

(2) There shall be no order as to costs relative to the defendant's application in terms of Rule 42(1)(a) for the variation of this Court's order of 16 February 2021.

JUDGMENT

Adams J:

[1]. I shall refer to the parties in this opposed application as they were referred to in the original divorce action between them. The defendant is the applicant in this application and she applies for a rescission of the divorce order which was granted against her 'by default' on 16 February 2021. The plaintiff is the respondent in this

application. In the alternative, the defendant applies for a variation of the said divorce order so as to provide in effect for her right of ownership in and to an undivided share in immovable property jointly owned by her, together with the plaintiff, to be dealt with in accordance with the correct applicable legal principles. The order that was granted against her by this Court (per Malungana AJ) was in the following terms: -

‘(1) A decree of divorce is hereby issued.

(2) The co-ownership that exist between the parties in respect of the property situated at Erf [...], Malvern East Extension, Germiston (the Germiston property), is terminated.

(3) The Germiston property will be placed on the market for sale, and the net proceeds thereof will be divided equally between the parties, subject to payment to the plaintiff as a first charge, of an amount equivalent to an amount paid by him in excess of his half share of the costs of the said property.’

[2]. As already indicated, the defendant applies firstly for a rescission of the said Court order in its entirety. I intend giving short thrift to that application by the defendant for the simple reason that, howsoever one views this matter, no case is made out by the defendant for such relief. The defendant accepts and concedes that the marriage relationship between the parties had become irretrievably broken down by the time the divorce order was granted during February 2021. This then means that the defendant does not have a ‘*bona fide* defence’ to the plaintiff’s claim for a divorce order and there is no reason why that order should be set aside. The point is simply that the divorce order itself cannot and should not be rescinded – there is no legal basis to do so. Moreover, it cannot possibly be said that, all things considered, the divorce order was erroneously sought or erroneously granted and therefore the said order cannot be rescinded in terms of Uniform Rule of Court 42(1)(a), which is discussed in more detail in the next paragraph.

[3]. There is however much more to be said about the defendant's alternative application for a variation of the said order. And the rest of this judgment will focus on that application for variation, which the defendant brought in terms of the provisions of Rule 42(1)(a) of the Uniform Rules of Court, which provides as follows:

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‘(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;’

[4]. The case of the defendant is that prayers (2) and (3) of Malungana AJ's order was erroneously granted because it was at variance with the order sought by the plaintiff in his particulars of claim issued on 15 November 2018. The particulars of plaintiff's claim, in the relevant part, reads that the plaintiff prays for an order in the following terms: -

‘Claim B

1. An order that the co-ownership of the Germiston Property be terminated.
2. An order that the above Honourable Court appoints a liquidator in order to sell the Germiston property and divide the net proceeds realised from the sale of the Germiston Property equally between the parties after payment to the plaintiff as a first charge, of an amount equivalent to any amount paid by the plaintiff in excess of his half share of the costs of the Germiston Property.
3. Cost of suit only in the event of opposition.
4. Further and/or alternative relief.’

[5]. It may be apposite at this point to cite in full the alternative relief sought by the defendant in her amended notice of motion, which indicates that an order in the following terms is applied for in this application: -

‘(2) Alternatively, that the order handed down by the above Honourable Court in case number 42712/2018 on 16 February 2021 be varied in that paragraphs 2 & 3 of the order be deleted, and be substituted with the following:

“(2) Plaintiffs application for relief sought in prayers 2, 3, 4, 5, 6, 7 & 8 of the draft order attached to Plaintiffs notice of set town, and submitted to court on 29 January 2021, is refused. The parties may, upon due notice, set the matter down for the adjudication of the relief sought by Plaintiff in prayers 2.2.1, 2.2.2, 2.2.3, 3 and 4 in Claim A and prayers 1, 2, 3 and 4 in Claim B in Plaintiff's Particulars of Claim, alternatively, any amendment thereof, and prayers b, c, d and e in Defendant's counterclaim”.’

[6]. In a nutshell, what the defendant seeks is to have set aside prayers 2 and 3 of Malungana AJ's order (*supra*), which deals with the immovable property jointly owned at present by the defendant and the plaintiff in equal undivided shares. And, as indicated above, this relief is sought on the basis that prayers 2 and 3 were erroneously granted in that it was at variance with what the plaintiff sought in his particulars of claim. Once these orders are set aside, then the defendant would require an order in terms of which the adjudication of these issues, as well as a host of other issues not dealt with at all by the Divorce Court, be postponed *sine die*, to be dealt with at a date in the future.

[7]. At first blush, there is no merit in the defendant's case for the setting aside of order 2 of the said court order, in terms of which the co-ownership that exist between the plaintiff and the defendant in respect of the Germiston property, was terminated. This order accords one hundred percent with a part of the relief sought by the plaintiff as per his particulars of claim. Therefore, insofar as the defendant alleges that that part of the order was erroneously granted because it was at variance with

what the plaintiff sought in his particulars of claim, she is wrong. There is no such discrepancy between the order sought and the order granted. That portion of the order therefore cannot be set aside or varied.

[8]. Moreover, the plaintiff's case for this relief was based on the *actio communi dividundo*, which remedy was discussed in *Robson v Theron*¹, in which the Appellate Division held 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 JP)

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, Advyssen*, 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

¹ *Robson v Theron* 1978 (1) SA 841 (A);

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).'

[9]. The plaintiff's cause of action for the relief based on the *actio communi dividundo* was properly pleaded by the plaintiff, who, for example, alleges in para 10 of his particulars of claim that, in light of the irretrievable breakdown of the marriage relationship, it is no longer practical, economical and/or sensible for the parties to remain co-owners of the Germiston property. The particulars of plaintiff's claim therefore conclude that it would be just and equitable for the Court to order that the Germiston property be sold by a liquidator appointed by the Court and that the net proceeds realised from the sale be divided equally between the parties after payment to the plaintiff, as a first charge, of any amount paid by the plaintiff in excess of his half share of the costs of the said property.

[10]. Accordingly, it cannot possibly be suggested that the Divorce Court erred in granting the said order. It therefore cannot and should not be set aside or varied.

[11]. The same cannot however be said as regards prayer 3 of Malungana AJ's order, which deviated – in a material respect – from the order which the plaintiff intended seeking as per his particulars of claim. I am therefore of the view that the order 3 was granted erroneously. And I say so for a number of reasons as more fully set out in the paragraphs which follow. In that regard, I also place reliance on the decision in *First National Bank of South Africa Ltd v Jurgens and Others*², in which this Court held that Rule 42(1)(a) finds application where an 'applicant has sought an

² *First National Bank of South Africa Ltd v Jurgens and Others* 1993 (1) SA 245 (W);

order different from that to which it was entitled under its cause of action as pleaded'. I find myself in agreement with the reasoning of this Court in that matter.

[12]. The point is that a litigant, such as the plaintiff *in casu*, was bound by the case pleaded by him. The plaintiff was therefore constrained to act within the parameters set out in his particulars of claim, and the relief ultimately sought by him from the Court should reside within the four corners of the relief sought as per the prayers to the particulars of claim. If not, then who's to say that the defendant would not have opposed the relief sought because it differs from the relief sought as per the summons. In this matter, the relief granted as order 3 of the order of Malungana AJ was not foreshadowed in the particulars of claim. Therefore, the said order was granted erroneously.

[13]. The main difference between the order sought by the plaintiff in his original particulars of claim and the order granted by Malungana AJ relates to the appointment of a *Receiver and Liquidator*. Importantly, the order issued by the Court on 16 February 2021 made no reference to such an appointment. The order was also granted in very broad and general terms, and no directions were given as to who would be responsible for placing the property on the market, and neither was a direction given as to how the proceeds were to be divided or how the so-called 'excess contributions to the costs of the property' by the plaintiff was to be calculated or who, for that matter, would quantify such costs. As rightly pointed out by the defendant, this is another reason why that portion of the order was erroneously granted and should be varied. In that regard, Mr McDonald, who appeared on behalf of the defendant, referred me to *Solidarity and Another v Black First Land First and Others*³, in which the Supreme Court of Appeal referred with approval to *Eke v Parsons*⁴, and held as follows: -

'[10] One of the primary functions of a court is to bring to finality the dispute with which it is seized. It does so by making an order that is clear, exacts compliance, and is capable of being enforced in the event of noncompliance.'

³ *Solidarity and Another v Black First Land First and Others* (163/2020) [2021] ZASCA 26 (24 March 2021);

⁴ *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 73 – 74;

[14]. Applying the *ratio decidendi* in *Solidarity*, I reiterate that the order 3 of Malungana AJ was granted erroneously – it is not an order which is clear; it does not exact compliance and is not capable of being enforced without more.

[15]. This may be an opportune juncture at which to deal with the principles relating to Rule 42(1)(a), which gives the court a discretion to vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby at the instance of, *inter alia*, the party affected by such order or judgment. It has been held that the purpose of rule 42(1)(a) is to correct expeditiously an obviously wrong judgment or order⁵. Once the court holds that an order was erroneously sought or granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order;⁶ it is not necessary for a party to show good cause for the rule to apply.⁷

[16]. I have already indicated that, in my view, order 3 of the Order of Malungana AJ was granted erroneously. It is also common cause that the said order was granted in the absence of the defendant, who undoubtedly is a party affected by same. That portion of the Order therefore falls squarely within the ambit of rule 42(1)(a) and it stands to be varied. The question is how.

[17]. The defendant submitted that the order should be amended so as to provide for the adjudication of that dispute be postponed *sine die* for decision by the Court at a later date. I disagree. I do not think that the interest of justice would be served by a further postponement of the issue, the crux of which relates to the manner in which the ‘partition’ in respect of the Germiston property is to be managed. It is so that, as ordered by this Court during February 2021, the co-ownership of the said property by the defendant and the plaintiff should be terminated. Moreover, there can be little doubt that the best way in which to give effect to that termination is to put the property on the market and for the proceeds of the sale to be shared and distributed fairly and equitably between the parties, taking into account the contributions made

⁵ *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471 E – F;

⁶ *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 220 F - G; also see *Rossitter and Others v Nedbank* (96/2014) ZASCA 196 (1 December 2015);

⁷ *Bakoven, supra*, 471H; also see *Mutweba v Mutweba* 2001 (2) SA 193 (Tk) at 199 I - J; *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at 597I – 598B;

by each of them to the upkeep of the said property and to the other costs relating thereto, whilst at the same time having regard to any benefit any of the parties may have derived or is still deriving from the property. It also seems logical that the best way to implement this process of 'partition' would be to appoint a *Receiver and Liquidator*, with the necessary powers to deal specifically with the sale of the property.

[18]. As alluded to above, and as was held in *Robson v Theron*⁸, the Court has a wide equitable discretion in making a division of the joint property, having regard, *inter alia*, to the particular circumstances, which is most to the advantage of all the co-owners and what they prefer.

[19]. I therefore intend fashioning an order which will give effect to the foregoing.

[20]. There is one last issue which I need to deal with and that relates to the defendant's assertion that Malungana AJ did not adjudicate or deal in any way with the relief sought by the plaintiff under his claim A, excepting only the granting of the decree of divorce, nor with the defendant's counterclaim for maintenance and for payment in terms of the provisions of chapter 1 of the Matrimonial Property Act. The plaintiff's claim A was also for payment by the defendant of maintenance for the children born of the marriage between the parties. The defendant contends that that issue is still very much alive and should have been dealt with by the Divorce Court, but it did not do so. That is therefore, so the defendant contends, also an issue which ought to be dealt with by this Court in its variation of the previous court order.

[21]. There are, in my view, two difficulties with this contention by the defendant, Firstly, at the hearing of the matter before Malungana AJ on 29 January 2021, the plaintiff seemingly did not pursue this claim against the defendant and, in my view, the said claim was abandoned by the plaintiff, who was fully within his rights to do so. This is evidenced by the fact that the draft order proposed by the plaintiff on the said date made no reference at all to this claim. That, therefore appears to have spelled the end of that issue. Secondly, all three the children had reached the age of majority by the time the summons was issued during November 2018, and it remains

⁸ See FN 1 *supra*;

open to them to pursue whatever maintenance claims they believe they have against either of their parents.

[22]. Accordingly, I do not believe that the plaintiff's claim A is extant – the decree of divorce was granted and the claims for maintenance for the children have been abandoned.

[23]. As regards the defendant's counterclaim, there is, in my view, merit in her contention that, whilst same was very much alive and extant when the matter served before Malungana AJ, it was not dealt with by him in any way. He did not accept the counterclaim, nor dismissed it, when he was under a duty to do so. Therefore, so the defendant contends, insofar as the counterclaim was not dealt with by the Court, its order was erroneously granted and should be varied so as to address – in one way or the other – the defendant's counterclaim.

[24]. The matter came before Court on 29 January 2021 as an undefended divorce action, the defendant's defence having been struck out by order of this Court (per Senyatsi J) dated 2 September 2020, which order reads as follows: -

‘(1) The [defendant's] defence to the [plaintiff's] claim in the main action is struck;

(2) The [defendant] is directed to pay the costs of this application.’

[25]. As correctly submitted by Mr McDonald, this order in effect struck out the defence of the defendant to the plaintiff's main claim. It does not deal, in any way, with the defendant's counterclaim, which, in my view was and remained alive and extant by the time Malungana AJ heard the matter as an unopposed divorce action on 29 January 2021. He also did not deal with the counterclaim in his judgment and order of 16 February 2021, when he should have done so. It bears emphasising that, as submitted on behalf of the defendant, whilst her defence to the plaintiff's claim was struck out by the order of this court dated 2 September 2020, the counterclaim was not struck out, and was left in limbo also by the Court on 16 February 2021, when the judgment on the unopposed divorce action was handed down.

[26]. The foregoing, in my view, translate into an order which was erroneously granted by this Court on 16 February 2021, which, in turn, means that rule 42(1)(a) finds application. The defendant is accordingly entitled to an order varying the previous court order so as to deal with the counterclaim, which is at present hanging in the air. In that regard, I am in agreement with the defendant that the way in which that should be done is to order that those outstanding issues raised in the counterclaim should be postponed *sine die*, to be adjudicated and decided upon by the court on a later date. Unless off course the parties are able to reach a settlement on those outstanding issues.

[27]. I therefore intend varying the previous court order accordingly.

Conclusion and Costs

[28]. For all of the foregoing reasons, the judgment and the order of this Court dated 16 February 2021 stand to be varied in terms of rule 42(1)(a). It was clearly granted erroneously in the absence of the defendant, who is an affected party.

[29]. I am of the view that the defendant's application was brought to correct an obviously incompetent order. Neither the defendant, nor the plaintiff can be blamed for the errors in the said court order. It thus seems unfair to mulct either party with costs. Consequently, there shall be no order as to costs.

Order

[30]. Accordingly, I make the following order: -

(1) The Order of this Court (per Malungana AJ) dated 16 February 2021 be and is hereby varied in terms of Uniform Rule of Court 42(1)(a) by the deletion of prayer (3) of the said order in its entirety and by the replacement thereof by the following orders:

‘(3) It is confirmed that the joint ownership of the parties in the immovable property known as Erf [...], Malvern East Extension, Germiston, situate at

[....] S [....] Road, Malvern East, Germiston (the Germiston property), is terminated in terms of the *actio communi dividundo*.

(4) Unless the plaintiff and the defendant reach agreement in writing within one month from date of this order, on all aspects related to the termination of the co-ownership, then and in such event, a liquidator is to be appointed by the attorney representing the plaintiff and the attorney representing the defendant. If agreement cannot be reached between the attorneys representing the parties on the liquidator to be appointed, they should each nominate two possible candidates, and the Court will appoint from such nomination the liquidator.

(5) In the event of a liquidator being appointed, each party shall be liable in equal shares for the liquidator's fee.

(6) The liquidator shall be empowered and directed to give oversight and effect to the following, that:

(a) The property be valued by an independent valuer.

(b) 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.

(c) A firm of Attorneys, to be nominated by the Liquidator at his sole discretion, shall be appointed as conveyancers for both parties, who will give effect to the sale as follows, namely:

i. The collection of the full purchase price.

ii. The cancellation and discharge of the mortgage bond (if any).

iii. The discharge of any further obligations on the property in respect of rates, taxes, estate agent's commission, and the like.

iv. The distribution to both parties of the net residue to be determined in accordance with the provisions of [33.4.4] below.

v. 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 agent's commission, any amount which may be owing to the plaintiff as allegedly being equivalent to any amount paid by the plaintiff in excess of his half share of the costs of the Germiston Property, but also taking into account any benefit derived by him from the property such as rent-free occupation thereof or the collection of rental from tenants (if any), and the liquidator's fees, have been paid —a 50% portion of the net proceeds of the sale of the property is to be paid to the plaintiff; a 50% portion of the net proceeds of the sale of the property is to be paid to the defendant.

(7) For so long as the plaintiff resides in the property, he 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.

(8) 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.

(9) 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.

(10) The defendant's counterclaim (claims b, c and d) is postponed *sine die*.

(11) Each party shall bear his / her own costs of the action to date.'

(2) There shall be no order as to costs relative to the defendant's application in terms of Rule 42(1)(a) for the variation of this Court's order of 16 February 2021.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON: 19th April 2022 – The 'virtual hearing' of this opposed application was conducted as a videoconference on *Microsoft Teams*.

JUDGMENT DATE: 14th September 2022

FOR THE PLAINTIFF: Advocate Eddmond Nhutsve

INSTRUCTED BY: Canario Cornofsky Attorneys,
Glenvista, Johannesburg

FOR THE DEFENDANT: Attorney Ben McDonald

INSTRUCTED BY: Ben McDonald Attorney, Pretoria