THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 54061/2014

DATE OF HEARING: 14 MAY 2015

DATE OF JUDGMENT: 29 MAY 2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

……………………… DATE ………………………… SIGNATURE

In the matter between:

WALTER NWANE MMAMPANE First Applicant

LISBETH NOMADUBA MMAMPANE Second Applicant

and

DERNEY DIKGOMO MMAMPANE nee MOSHITOA Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

1. In D v D (15402/2010) [2013] ZAGPJHC 194 (10 May 2013) Miltz AJ stated the following:

“*Marriage in community of property carries major implications for ownership of the parties’ assets, liability for their debts as well as their capacity to enter into legal transactions. Community of property entails the pooling of all assets and liabilities of the spouses immediately on marriage, automatically and by operation of law. The same regime applies to assets and liabilities which either spouse acquires or incurs after entering into the marriage. The joint estate created by marriage in community is held by the spouses in co-ownership, in equal, undivided shares*.”

(See Boberg’s Law of Persons and the Family (2nd ed) at page 185 and also HR Hahlo, The South African Law of Husband and Wife (5th ed) at 157 to 158).

“*The natural consequence of holding the parties to their marriage agreement is that on divorce the joint estate will be divided equally between them unless a forfeiture order is made. In such event the value of the assets in the joint estate that must be divided will be determined at the date of the divorce*.”

See Matthee v Koen 1984 (2) SA 543 (C). This is the usual position when the divorced parties give effect to the order for division of the joint estate. In this case however the parties failed to effect to the order for division of the joint estate since 2001 and now approach the court for the relief sought.

2. The first applicant and the respondent were married to each other in community of property and were divorced by the then North Eastern Divorce Court, held at Pretoria on 2 August 2001. The divorce order reads as follows:

"*That the bonds of marriage subsisting between the Plaintiff and the Defendant be and are hereby dissolved.*

That the joint estate shall be divided.

That custody of Barlican Makgase, the one minor child of the marriage, is awarded to the plaintiff until the end of the 2001 school year, whereafter the plaintiff is to have access to the minor child at all reasonable times.

That the matter of maintenance for the minor child for the year 2002 is referred to the Maintenance Court.

That the plaintiff is responsible for all reasonable educational expenses of the minor child."

3. The first and second applicants were married to each other on 18 September 2002 by way of civil marriage, also in community of property. The applicants apply for an order as follows:

1. "*Declaring that the Respondent is entitled to half of the joint estate between her and the first applicant as it was on the 02nd of August 2001.*

2. *That the parties are ordered to appoint an independent valuator jointly to determine the market value of the property known as erf [….], Pretoria as it was in August 2001.*

3. *That the value determined by an independent valuator is final and binding on the parties.*

4. That the Respondent is ordered to pay the costs of this application.

5. *Further and/or alternative relief*."

4. The first applicant alleges that the court has jurisdiction to hear this application because both parties reside within the jurisdictional are of the court and because the estate which forms the basis of the application is worth more than R300 000.00. He says that after the divorce the joint estate was never formally divided as no liquidator was appointed and there was no agreement on how the estate wold be divided.

5. The respondent vacated the former common home prior to the divorce and removed some of the movable assets of the joint estate and only left the first applicant with some movables which he says, he had apparently inherited from his parents. After the respondent left with the assets taken by her the first applicant accepted all movable assets had been divided when the decree of divorce was granted. The only asset in the joint estate which is not divided is the former common home, known as [.....], Pretoria. The Deed of Transfer No. T90537/99 annexed to the founding papers reflects the first applicant and the respondent as joint owners.

6. The first applicant says that the only asset in the joint estate is the immovable property and that the respondent is entitled to one half of such property however contends that the respondent can only share in the value of the property as at the date of divorce. The respondent contends that she is entitled to one half of the property as it currently stands. The first applicant says that neither he nor the respondent took any steps to divide the property,

save for the movable assets. The property was never sold and it has remained in the names of both parties.

7. The first applicant says that when the second applicant moved into the property, and after their marriage in community of property, the items listed in the joint estate between him and the respondent consisted of approximately 13 movable items, mainly kitchenware and the 4 bedroom house. This is listed in an annexure to the founding papers. The first applicant then annexes a second list of assets wherein he lists some 52 items of movable assets presumably to show what he and the second applicant have amassed during their marriage. I find this to be of no relevance to the issues herein, except to note that the house (property) does not form part of the second list.

8. The first applicant states further that he and the second applicant made massive improvements on the property. During 2012 the applicants wanted to change the title deed into their names but could not do this without the consent and co-operation of the respondent. It is no surprise, because the respondent was, and still is, a joint owner of the property. Upon consulting an attorney they were advised to approach the respondent and pay her one half of the value of the property in order to obtain her consent. The first applicant states that he instructed a valuator to value the house as it was in 2001 and upon receiving a valuation of R20 000.00 ne instructed his attorney to make a formal offer to the respondent. What appears quite clearly is that the initial advice sought and obtained was to pay the respondent one half of the value of the house, and not the value as at date of divorce.

9. Needless to say the respondent reacted through her own attorneys that she disputed the valuation and that she would obtain her own valuation. The first applicant noted that the respondent failed to raise any issue about the date of valuation at that stage. The respondent obtained a valuation which is not annexed to the papers but her attorney wrote and mentioned the sum of R75 000.00 as at 2002 and R185 000.00 as at 2012, without the improvements thereon. I find it difficult to understand how the valuator arrived at a valuation without the improvements, in the absence of the valuation. In any event the stance adopted by the respondent in her attorney's letter is that the value to be taken into account would be the current value.

10. The first applicant disputed the valuation of the respondent as also her claim to share in the property as at current value and suggested that they jointly approach the Law Society for assistance. On 4 October 2013 the respondent approached the Regional Court for the Regional Division of Gauteng and obtained an order in terms of which an attorney of this court, doing business as Batseba Trust was appointed as receiver and liquidator of the joint estate, with powers to distribute the assets and to institute legal proceedings, appoint attorneys and counsel and sign all such documents necessary to give effect to division of the joint estate.

11. The liquidator wrote to the first applicant suggesting that he "exercise a buy-out option" failing which he would be compelled to sell the property. The first applicant respondent informed the liquidator that he intended to bring the current application and he should be given an opportunity to do so before the liquidator proceeded. The liquidator agreed and gave the first applicant an

extension until 16 June 2014. Despite the application only having been brought in 2015 the liquidator has not taken any action.

12. Because the liquidator has knowledge of the first applicant's intention to proceed with this application, albeit more than a year later, I exercised my discretion against dismissing the application for non-joinder of the liquidator. On the basis of the above allegations the first applicant, supported by the second applicant, says that they are entitled to the relief sought.

13. The respondent's version is largely aimed at telling the court that she was forcibly removed from the former common home and "delivered to her parents' home" without her clothes and she was only given two sewing machines. She further states that there is another matrimonial home as well, a motor vehicle, a pension fund interest and provident fund that have not been divided. The situation is clearly untenable and it is shocking that the parties have not resolved the differences since the divorce in 2001.

14. In my view the applicants have not made out a case for the relief sought. On their own version they happily went about bringing massive alternations to the property, whilst knowing that one half of the property belonged to the respondent. They cannot now complain about the improvements they effect to the house. On the other hand event if they did not bring about any improvements on the property, it is my view that the respondent would still be entitled to share in the value of the property at current value. The first applicant cannot sit back and claim that only he is entitled to benefit in the current value but the respondent can only have her share in the value as at

2001. Whether the first applicant and perhaps the second applicant would have a claim against the respondent for unjust enrichment for the increase in value brought about by the improvements is not an issue before me to decide.

15. The fact remains that the respondent is entitled to one half of the property at current value and one half whatever other assets the liquidator may find as having been part of the joint estate at the time of divorce. The only remaining issue to determine is the question of costs. Given the facts herein, and the fact that the first applicant, whilst knowing that the house was registered in both his name and that of the respondent, he nevertheless went about improving the property as if he had every right to do so. Only when the shoe pinched and he realised that he could only transfer the house into his name and the second applicant, he embarked on strategy to get the respondent out of the picture by offering her what he in his mind thought was her right. I am of the view that costs must follow the result.

16. Consequently, I make the following order: The application is dismissed with costs.

AVVAKOUMIDES, AJ

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Representation for Applicants:

Counsel:	R. B. Mpela
Instructed by:	Schurmann Joubert Attorneys

Representation for the Respondent:

Counsel:	M. Pompo
Instructed by:	Seleka Attorneys