

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 292/2022

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
	
<u>29-08-2024</u> DATE	<u>PD. PHAHLANE</u> SIGNATURE

In the matter between:

NATASJA MELINDA ROODT N.O

Plaintiff

And

[.....]

First Defendant

(born)

[.....]

Second Defendant

(previously) (born)

REGISTRAR OF DEEDS, PRETORIA

Third Defendant

MASTER OF THE HIGH COURT, PRETORIA

Fourth Defendant

MARLE BOTHA

Fifth Defendant

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected herein and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 29 August 2024

Judgment

PHAHLANE, J

Introduction.

[1] The plaintiff herein acting in her capacity as the executrix of the deceased estate of the late Mr. [.....], instituted these action proceedings for purposes of determining ownership of the fixed property situated in Valhalla, Pretoria, so that she can be in a position to liquidate and distribute the deceased's estate. The matter is opposed by the second defendant only. The Plaintiff seeks an Order in the following terms:

1. *"That the REGISTRAR OF DEEDS, PRETORIA be directed to amend its records and endorse the title deeds of the below-mentioned property, to reflect that:*
 - 1.1 *The Second Defendant's ownership of an undivided half share in the immovable property known as Erf [.....], City of Tshwane Metropolitan Municipality, Gauteng measuring 1486 square metres, held by Deed of Transfer No. [.....] situated at [.....] Road, [.....], Pretoria ("the property") terminated on 15 December 1995, being the date of the divorce between herself and the late Mr. [.....] with identity number [.....] ("the deceased").*
 - 1.2 *The deceased and the First Defendant each became owner of an undivided half share in the property on 16 November 1996, being the date of marriage between the First Defendant and the deceased; and*
 - 1.3 *The First Defendant became the sole owner of the property on 29 November 2020, being the date of the deceased's demise.*
2. *Costs of suit.*
3. *Further and/or alternative relief".*

Common cause facts and Factual background.

[2] It is common cause that: -

- (a) The deceased and the second defendant (“the ex-wife”) were married in community of property. While married, they acquired immovable property which was then registered on 8 November 1991 in both their names, with each owning an undivided half share in the property.
- (b) The deceased and the ex-wife got divorced on 15 December 1995 but had prior to the divorce on 6 December 1995, entered into a settlement agreement, which provided, *inter alia*, for the division of their joint estate. A decree of divorce incorporating the settlement agreement was then granted.
- (c) Subsequent to the divorce, the ex-wife moved out of the property and the deceased continued to reside at the property and continued to pay for the: **(i)** mortgage loan in respect of that property **(ii)** maintenance and upkeep of the property; and **(iii)** monthly municipal utilities in respect of the property. The ex-wife disputes this in her plea.
- (d) On 16 November 1996 the deceased married the first defendant (“the widow”) in community of property. The widow moved into the property and resided there with the deceased, and they used the property as their matrimonial home throughout their marriage. On 20 March 2008 the deceased and the widow concluded a “Joint Will” in which the deceased bequeathed his entire estate to the widow, and thus entitling her to acquire the deceased's undivided half share in the property upon his death. The deceased and the widow remained married to each other for twenty-four (24) years until the death of the deceased on 29 November 2020.
- (e) On 25 January 2021, the Master of the High Court issued a letter of executorship and appointed the plaintiff as the executor and authorised her to liquidate and distribute the joint estate of the deceased and the widow.

[3] Subsequent thereto, the property was placed on the open market for sale and the plaintiff as the executor of the deceased’s estate was presented with an offer to purchase. The fifth defendant was the intended purchaser of the property in terms of the Deed of Sale. It was only after the offer to purchase was made that the plaintiff

realized that the property was still registered in the name of the deceased and the ex-wife.

- [4] The plaintiff avers that this was an oversight on the part of the deceased because after the divorce, the deceased seemingly failed to comply with the provisions of section 45bis of the Deeds Registries Act, 47 of 1937 ("the Deeds Act"), to have the property endorsed by the Registrar to reflect on the title deed that the property was solely owned by the deceased after the divorce.

4.1 The plaintiff contends that in accordance with the divorce settlement agreement, the deceased took ownership of the ex-wife's undivided half share in the property after paying her in respect of her half share of the joint estate. The plaintiff took the witness stand and gave *viva voce* evidence in support of her case.

The Evidence

- [5] The plaintiff is an employee at FNB Fiduciary Services and has been holding the position or title of the deceased estate manager for more than 17 years. Apart from overseeing the administration of the deceased estate as part of her duties, she is also responsible for assisting the estate administrators with the interpretation of Wills. As the executor of the deceased's estate in the current matter, she received various documents, including the Joint Will of the deceased and the widow, which they signed on 20 March 2008 in Pretoria.

5.1 She testified that in terms of clause 2 of the Joint Will, the deceased as the first dying spouse bequeathed his estate to the widow as the surviving spouse - thus entitling the widow to inherit his entire estate. The Joint Will further stipulates how the estate should devolve in case the last dying spouse does not leave a further Will, in which case, the estate is to be divided in three equal shares to his daughter and two brothers.

- [6] What stands out in this Joint Will is that the deceased refers to the property as "My Property" ("*My Eiendom*"), which according to the witness means that the deceased is the owner of the property. Clause 2 provides as follows:

“2. Ons bemaak die boedel van die eerssterwende van ons aan die langsliewende van ons mits hy of sy in die lewe is op die sewende dag na die dood van die eerssterwende van ons. Indien hierdie bemaking in gebreke bly of indien die langsliewende van ons nie 'n latere geldige Testament nalaat nie, bemaak ons in enige sodanige geval ons onderskeie boedels, soos volg:

(a) Ek, die Testateur, bemaak my boedel soos volg;

(i) in gelyke dele aan my dogter [.....], my broer [.....] en my broer [.....] of die langsliewendes van hulle, die volgende:

- my vaste eiendom gelee te [.....] Valhalla”

- [7] The plaintiff further testified that in order to complete the liquidation distribution account, the property had to be sold because the widow wanted it to be sold because she is elderly. Accordingly, the property was placed on the open market and the deed of sale was entered into between herself as the executor of the deceased estate and the fifth defendant. She explained that the fifth defendant is currently staying in the property and has been paying monthly occupational rent into the trust account of the conveyancer.
- [8] She testified that after receiving the offer to purchase the property, she referred the documents to the conveyancer to draw up the contract between the parties, and the conveyancer pointed out that the property was still registered in the name of the deceased and the ex-wife. She approached the widow and informed her of the situation and the widow indicated that she was under the impression that she was the sole owner of the property in terms of the Joint Will and was not aware of this unfortunate circumstance.
- [9] She also testified that prior to receiving the offer to purchase, her office was not aware that the property was registered in the name of the ex-wife or that her name was on the Title Deed. She went back to the conveyancer to seek advice and a solution to rectify

the problem, and the conveyancer suggested that the easiest and quickest solution would be to approach the ex-wife to have her sign the offer to purchase.

9.1 According to her, the conveyancer suggested that the name of the ex-wife be included in the deed of sale because she is referred to as the owner and registered as such in the Deeds Office as confirmed by the Title Deed.

9.2 She stated that this created a problem for her as the executor of the deceased estate because in order to give effect to the registration of the property into the name of the new buyer, the ex-wife also needed to sign the deeds of sale.

[10] One of the documents at her disposal in dealing with the deceased's estate was the divorce settlement agreement, and upon perusal thereof, she noticed that the fixed property was not included in the settlement agreement. There was however a Schedule attached to the settlement agreement which according to her, reflected how the fixed property should be dealt with. She stated that according to the Schedule, the property was allocated to the deceased, but the deceased failed to notify the registrar of deeds that he is divorced and change ownership of the property into his name alone. She explained that this was an oversight on the part of the deceased, and that it was not uncommon that when people get divorced and the other party takes over the property, the party taking over the property forgets to notify the registrar to update its register.

[11] The witness testified that she took the conveyancer's advice and on 22 April 2021, Ms Kruger who was the estate administrator at the time, sent an email to the ex-wife to explain to her that they have received an offer to purchase on the property and they needed her to sign the offer because the property was still registered in her name, and to further inform her that she will not be receiving any financial benefit for assisting because the issue was supposed to have been dealt with after her divorce.

11.1 She further testified that on 4 May 2021, the ex-wife responded to this email stating that she needed to determine and ascertain the exact ownership of the property before the sale, and also requested a complete copy of the deceased's Will to examine it. Her request to have a copy of the deceased Will was declined due to the Protection of Personal Information Act ("POPI Act") and as provided for in terms of the Administration of Estates Act. She said on 13 May 2021, the ex-

wife sent a further email in which she claimed full ownership of the property and threatened to institute legal proceedings so as to be granted sole ownership of the property.

11.2 She also testified that on 24 May 2021, the ex-wife sent yet another email requesting the Title Deed; copies of the municipal documents; and information pertaining to the expenses and upkeep of the property because she was unable to obtain same from the local municipal office. Further that on 31 May 2021, the ex-wife sent an email claiming to be the exclusive owner of the property.

11.3 Around 13 July 2021, Ms Kruger from FNB sent an email to the ex-wife purely as a settlement proposal that the widow wanted to split ownership of the property, but the ex-wife declined the offer. She explained that the widow did not want to put up a fight with the ex-wife anymore because she wanted the administration of the estate to be concluded so that she could go on with her life. This email was responded to on 16 July 2021 wherein the ex-wife still claimed full ownership of the property and alleged to have had an investment partnership with the deceased in respect of the property.

[12] The plaintiff testified that during the administration of the deceased estate, she found that the property related costs such as rates and taxes; bond repayments and home insurance; water and electricity were paid by the deceased, and are currently paid for by the widow, and the homeowners association is covered by the estate. She stated that the deceased's estate was advertised for thirty days in terms of section 29 – in respect of debtors and creditors of the deceased estate, and that no one came to make a claim against the estate.

12.1 Neither did the ex-wife approach her to claim that she was the owner of the property or try to stop her from administering the estate of the deceased. She said the ex-wife only made a claim to the property after being approached and told of the predicament that the property was still registered in her name and the name of the deceased. She confirmed that a decision to sell the property was per the instruction of the widow as the sole beneficiary of the Joint Will, and that the fifth defendant was allowed to move into the property to avoid the property from being vandalized because it was vacant at the time.

[13] The plaintiff stated that the deceased and the ex-wife had in terms of the settlement agreement, intended that the deceased should retain the property because the deceased made cash payments to the ex-wife in relation thereto, for the benefit of his sole and exclusive ownership to the property. She explained that the intention of the parties is evident from the documents she received from the deceased's attorney, which I will deal with later in the judgment.

[14] Under **cross-examination**, she confirmed that Ms Kruger was the estate administrator, and was supposed to report to her regarding her duties. She confirmed that as the executor, she was responsible for the winding up of the estate, but she was not aware of the letter sent by Ms Kruger to the ex-wife on 13 July 2021 in which it is noted that the widow does not want to contest ownership of the property – and explained that she did not see the letter before it was sent. She testified that she received legal advice that the property formed part of the deceased estate and that is why the matter had to be brought to court.

14.1 The witness was accused of bringing this matter to court in “an attempt to fix the problems caused by someone at FNB after the fifth defendant was allowed to move into the property without the consent of the ex-wife”. It was then put to her that the property does not belong to the estate because the only portion that fell into the estate is the half share of the deceased, and she refuted that and stated that nothing untoward was done by the widow or Ms Kruger, or in the administration of the estate.

14.2 She confirmed that although clause 4 of the settlement agreement deals with the “division of the movable assets” – according to the schedule and Mr Ehlers' proposal in his correspondence with the ex-wife's attorney, the amount of R24 940.00 paid to the ex-wife was in respect of the immovable property which had to remain with the deceased. Mr Ehlers is the attorney who represented the deceased at the time of the divorce.

[15] The plaintiff testified that Mr Ehlers' documents were found together with the deceased's other documents and that Mr Ehlers could not be traced. In this regard, **Mrs**

Jessican van der Westhuizen, a candidate attorney at Glover Kannieappan Inc. (ie. The plaintiff's attorney) testified that in an effort to get hold of Mr Ehlers, she called his office number that was on the letterhead, but the number was no longer in service. On 21 September 2023, she wrote an email to the LPC to enquired if Mr Ehlers was still practicing as a legal practitioner, and requested to be provided with his contact details because she could not reach anyone on Mr Ehlers' numbers. The LPC responded in a letter dated 11 October 2023 that Mr Ehlers is no longer practicing and has been registered by the LPC as a non-practising attorney. She testified that she personally instructed the tracing agent, Mr Andre Taljaard from KGB Security to trace Mr Ehlers and unfortunately, nothing came of it.

[16] **Mr Hendrick Johannes Lombardt**, the widow's son, also testified in support of the plaintiff's case. He testified that his mother moved into the property in 1996 before getting married to the deceased and resided there until the deceased passed away. He said his mother vacated the property after the death of the deceased and is currently living with him in Vryheid in KZN due to her old age, safety and for health reasons.

16.1 He discovered documents at the house of the deceased when they were packing and emailed them to the plaintiff before the dispute could even arise. He also found a bank statement reflecting the bond amount which was apparently deducted from the deceased bank account - and the bank statement did not reflect the name of the ex-wife. There was also a deposit slip with the deceased's handwriting in respect of the settlement amount of R99 470.45 towards the property.

16.2 He explained that the deceased was already on pension shortly before making the payment and had indicated that he would be paying off his bond after receiving his pension money.

16.3 He testified that the Homeowners insurance documents do not make reference to the ex-wife, and the widow is currently paying for the insurance by debit order. Further that the statements from Tshwane municipality do not reflect the name of the ex-wife and that the tenants staying in the property pay for water and electricity directly to the municipality.

16.4 He confirmed that the deceased maintained the property during the course of his marriage to the widow and made improvements and major renovations to the property.

Issues in dispute

- [17] The dispute in this matter relates to ownership of the property. It is undeniable that the winding up of the deceased estate has remained in limbo since 2021 because the parties are at loggerheads with regards to ownership of the property.
- [18] The ex-wife contends that she is entitled to 50% of the property by virtue of having had been married to the deceased in community of property. She stated in her plea that the widow became entitled to the deceased's quarter share when he became deceased and is currently entitled to a half-share in the property.
- [19] This court is called upon to determine who the owner of the property is, more specifically pertaining to the period in time directly at the divorce of the deceased and the ex-wife.
- [20] The plaintiff testified that in addition to the divorce settlement agreement, she also received documents from the deceased's attorney which I referred to above. These are correspondence between Mr Ehlers and the ex-wife's attorney at the time of the divorce. It is not in dispute that Mr Ehlers was involved in the negotiations leading up to the drafting of the divorce settlement agreement. It is also not in dispute that these documents reflect the similar terms of the divorce settlement agreement between the deceased and the ex-wife and formed part of the discovered documents.
- [21] Mr Wagener appearing for the second defendant ("the ex-wife") in the current matter raised an objection against Mr Ehlers' documents and argued that they constitute hearsay since Mr Ehlers, as the author, was not available to testify in respect of those

documents. He further argued that the court should only consider them as documents found from the deceased, and that no value should be placed on them.

[22] On the other hand, Ms Denichaud appearing for the plaintiff referred to the decision in ***University of Johannesburg v Auckland Park Theological Seminary and Another***¹ (“the UJ case”) and submitted that it was imperative that the court considers the documents because they are relevant extrinsic evidence which show the contextual background, negotiations, proposals, and the circumstances which led to the conclusion of the settlement agreement. She further submitted that in compliance with the provisions of section 3(1)(c) of Act 45 of 1988², in the interest of justice, the court must have regard to these documents in order to interpret the terms of the settlement agreement.

22.1 With specific reference to section 3(1)(c) of the hearsay rule, Ms Denichaud submitted that Mr Ehlers’ documents are admissible in circumstances where the court has regard to the following:

(i) the nature of the proceedings – that these are civil proceedings which relates to the interpretation of the settlement agreement, and that it is in the

¹ [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) (11 June 2021).

² section 3(1)(c) of Act 45 of 1988 of the Law of Evidence Amendment Act 45 of 1988 provides as follows:

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
 - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings.
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to –
 - (i) the nature of the proceedings
 - (ii) the nature of the evidence
 - (iii) the purpose for which the evidence is tendered
 - (iv) the probative value of the evidence
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends
 - (vi) any prejudice to a party which the admission of such evidence might entail
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice

interest of justice to have regard to the documents because they support and assist in the interpretation of the settlement agreement.

- (ii) the nature of the evidence – this relates to the correspondence between two attorneys who settled the divorce and negotiated the terms of the settlement agreement in circumstances where Mr Ehlers acting for the deceased wrote to the ex-wife's attorney who was responsible for drafting the settlement agreement in accordance with the terms set out by Mr Ehlers. It was submitted that the nature of the evidence supports the contention that it is in the interest of justice to have regard to the documents.
- (iii) the purpose for which the evidence is tendered – the purpose is to give a clear picture of what was in the joint estate, and further solve the problem and the uncertainty created by the settlement agreement. It was submitted that the interest of justice favours the purpose for which the documents are presented.
- (iv) the probative value of the evidence – it was submitted that the probative value of the evidence is high in that it completely dispels any question or doubt as to the interpretation of the settlement agreement, and that it is in interest of justice that the documents be considered and taken into account.
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends – in this regard, the plaintiff and her two witnesses testified that they tried to get hold of Mr Ehlers and could not trace him. Mrs van der Westhuizen testified that her efforts to trace Mr Ehlers were unsuccessful and was informed by the LPC that Mr Ehlers is no longer practicing, and informed by Mr Taljaard from KGB Security that he could also not locate Mr Ehlers. It was submitted that nothing else could have been done to bring Mr Ehlers to court, considering that the POPI Act prevented any personal information such the identity number of Mr Ehlers from being disclosed as testified to by Mrs van der Westhuizen that this contributed to the difficulty in tracing Mr Ehlers.

(vi) any prejudice to a party which the admission of such evidence might entail –

in this regard, it was submitted that allowing the documents would not prejudice the ex-wife because her version/construction of the settlement agreement that she owns 50% of the property is contrary to the express terms of the settlement agreement. The basis of this submission is that if she could have taken sole ownership of the property after the divorce, then the document would have prejudiced her and proved a contrary version to the one she is currently making.

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice –

it was submitted that it is in the interest of justice to allow all the documents to assist the court in the interpretation of the settlement agreement.

[23] Having heard submissions made by both parties, and considering the principles laid down in the ***UJ case***, I ruled that it was in the interest of justice that the plaintiff refers to the contents of the documents in her evidence – and the documents were as such, admitted into evidence. The court further took into account that the intrinsic evidence would assist in determining the true rights of the parties.

[24] This court was also mindful of the submission made on behalf of the plaintiff – that without the court's intervention, the executor would not be able to liquidate and distribute the deceased's joint estate, and the beneficiary in the deceased's Joint Will, being the widow, would not be able to get an inheritance.

The proper approach to interpretation and evaluation.

[25] In order to determine ownership of the property at the time of the divorce, the court must interpret the settlement agreement which was made an order of court and incorporated into the decree of divorce. The Preamble of the settlement agreement

clearly indicates that the parties came to an agreement that it was their intention to have a division of the joint estate. In principle, this ordinarily means that the joint estate had to be completely and equally divided between the parties at the time of the settlement.

[26] The settlement agreement does not say anything about the immovable property. The only relevant clause which seems to be the bone of contention as it relates to the meaning and intention of the parties in respect of the division of the joint estate is clause 4. This clause makes reference to the division of movable assets ("**roerende bates**") which relates to cash payment of the sum of R24 940 which was to be made by the deceased to the ex-wife within a period of three months. On the other hand, there is an express statement at clause 7 which stipulates that the parties will have no claim against each other in future.

[27] Mr Wagener argued that Mr Ehlers' documents and settlement agreement did not change the status of the immovable property since the ex-wife owned half of the property by virtue of having had been married to the deceased in community of property. He further argued that "the deceased was represented by an attorney during the divorce – and that if the parties had intended the property to be transferred to the deceased, his attorney would have gone to the deeds office to ensure that the endorsement in terms of section 45bis was made".

27.1 He however conceded that Mr Ehlers' documents indeed mentions that the property should go to the deceased. He specifically stated as follows: "It is true that the letter of Mr. Ehlers suggests that the division of the property would be that the deceased would keep the property".

27.2 He submitted that the letter of Mr. Ehlers is in conflict with the settlement agreement, considering that Mr Ehlers was not in court to explain why there was a conflict, hence, the submission was made that his documents constitute hearsay.

[28] Ms Denichaud on the other hand argued that the crux of the interpretation of the settlement agreement is related to Mr Ehlers' documents and it was imperative that

the court considers **(a)** the text of the settlement agreement; **(b)** the purpose of agreement; **(c)** the contextual evidence that is presented; **(d)** the factual matrix; **(e)** the circumstances leading to the conclusion of the settlement agreement; and **(f)** the knowledge of those who negotiated and produced the settlement agreement. She submitted that all these aspects are made clear from the contents of Mr Ehlers' documents which the court has to consider.

28.1 Counsel further submitted that the parole evidence rule also does not exclude the court from having regard to these documents. The basis of this submission is that the court in the *UJ case* also recognised that the interpretation rule within the parole evidence rule does not preclude the contextual evidence which gives context and background to the contract which can be used by the court in its interpretation of that contract, and when seeking to ascertain whether the circumstances give rise to the intention of the parties at the time of the conclusion of the contract.

[29] She submitted in her heads of argument that the interpretation rule which determines when, and to what extent extrinsic evidence may be adduced to explain the meaning of the words contained in a written agreement does not preclude contextual evidence which gives context and background to the agreement which can be used by a court in its interpretation of that agreement, and when seeking to ascertain whether the circumstances give rise to the intention of the parties at the time of the conclusion of that agreement.

[30] The principles laid down in the *UJ case* are as follows:

- (a) A holistic approach must be followed. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.
 - i. From the text of the settlement agreement, there is no description of the assets, such as furniture or household items. Similarly, it does not describe the immovable property. However, the text clearly says that there must be a division of the joint estate when regard is had to the preamble. What the text

does not say is how that division has to take place. Accordingly, the text is not helpful in this regard.

- ii. The court explicitly pointed out that **context and purpose** must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. In the present case, there is no confusion or ambiguity of the terms or of the language in the settlement agreement because there is no description of the immovable property. At the very least, all the court has to decide on is the meaning of the words: “division of the joint estate” as it appears from the settlement agreement. The court will do this by having regard to the next aspects which I discuss hereunder.
- (b) A court interpreting a contract has to – from the onset – consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract³. In respect of the current matter, in order to determine true ownership of the property, the true nature of the rights flowing from the resettlement agreement; and what was decided by the parties at the time of the divorce, the court has to undertake the unitary exercise of interpreting the settlement agreement in light of the aspects that I have just highlighted.
- i. With regards to **the factual matrix** of this matter, the property was bought in 1991, and the deceased and the ex-wife lived in the property for four (4) years before they were divorced. One of the important factors to be considered is the fact that after the divorce, the deceased remained in the property and the ex-wife moved out of the property.
 - ii. Another important factor to consider, as submitted on behalf of the plaintiff, is the twenty-eight (28) years that was spend in the property by the deceased and the widow. It is indisputable that during these 28 years, at no stage before the deceased’s death did the ex-wife claim ownership of the property – otherwise this would have been raised, either in her pleadings or during argument. In my view, this indicates that the deceased was vested with ownership of the property.

³ Para 73 of the UJ case.

- iii. With regards to **the purpose of the settlement agreement**, it is accepted that the nature of the divorce proceedings is to bring an end to the marital relationship. In this regard, Ms Denichaud argued that the purpose cannot include the purpose of what the ex-wife is contending for – ie. that she and the deceased can continue holding on to the property and remain co-owners of a matrimonial home post-divorce.
 - iv. She submitted that if this notion were to be allowed, it would fly in the face of the purpose of the settlement agreement which says that the joint estate must be brought to an end, and the parties can no longer co-own the property after the divorce.
 - v. As indicated *supra*, the ex-wife alleged in an email dated 16 July 2021 that she “owns the complete property which was purchased in partnership with the deceased as an investment”. This aspect was never pleaded, and neither did the ex-wife produce any documents or evidence to rebut and confirm her investment partnership or external agreement of ownership outside the realm of the joint estate. In the absence of any evidence, this version of what the ex-wife is contending for, falls to be dismissed because it has no merit.
 - vi. Mr. Wagener argued that in terms of clause 7 of the settlement agreement, nothing had to happen with the immovable property because the deceased and the ex-wife co-own the property. I do not agree with this argument because it disregards the preamble of the settlement agreement⁴ and one of the principles in the ***UJ case*** which relates to having regard to the contextual evidence that is presented, and the circumstances which led to the conclusion of the settlement agreement.
- (c) One of the aspects to be considered in terms of the ***UJ principle*** is that the parties would have to adduce evidence to establish the context and purpose of the relevant contractual provisions⁵. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded.

⁴ See para 25 *supra*.

⁵ See para 67 of the *UJ case*.

- i. With regards to the matter at hand, it is not in dispute that the Mr Ehlers' documents reflect the intention that the division of the estate meant that the deceased should keep the property. Not only was this intention the only aspect reflected in the documents, but the terms or rather all the clauses of the settlement agreement are repeated in the corresponding paragraphs in Mr Ehlers' documents marked as annexures "A2" and "A3" respectively.
- In this regard, **paragraph 2** of "A3" which relates to the rights of the father and access to the minor child is the exact replication of **clause 1** of the settlement agreement.
 - **Paragraph 3** of "A3" is also the exact replication of **clause 2** of the settlement agreement dealing with maintenance of R300 for the minor child.
 - **Paragraph 8** of "A3" is the exact replication of **clause 3** of the settlement agreement dealing with the ex-wife's waiver to claim spousal maintenance.
 - **Paragraph 6** of "A2" and **Paragraph 6** of "A3" dealing with **50%** of the pension fund interest to be paid to the ex-wife is also found in **clause 5** of the settlement agreement.
 - **Paragraph 7** of "A3" is the exact replication of **clause 6** of the settlement agreement which states that each party should pay their own legal fees.
 - **Paragraph 4** of "A3" and **Paragraph 4** of "A2" are also replication of **clause 3** of the settlement agreement. These relates to the cash payment of R24 940 by the deceased to the ex-wife as indicated above⁶.

[31] As far as clause 4 of the settlement agreement is concerned, the plaintiff contends that referral to the amount of R24 940 takes into account the immovable property because a 50% - 50% split was made and accounted for in "A2". This is so because it is clear from these documents, with particular reference to paragraph 3 of "A2", including the schedule admitted as annexure "A4" which reflects the calculation of all the items which formed part of the assets, what the value of the joint estate was. The total value of the

⁶ At para 26.

joint estate was R103 480.00 and dividing this amount equally between the parties meant that the residue for each party would be R51 740.

31.1 However, the schedule and the documents reflect the total value of the deceased's portion of the joint estate being R76 580, which includes the property, and that of the ex-wife being R26 800. In order to achieve equal division of the joint estate, the deceased had to compensate the ex-wife with R24 940 so that she could reach the amount of R51 740 which would have placed them on equal footing. That amount was paid to the ex-wife and accordingly, this meant that the joint estate was divided equally on a 50% - 50% basis. Hence clause 4 of the settlement agreement, as well as paragraph 4 of "A2" and the last portion of "A4" reflected that ***"man moet vrou betaal: R24 940"***.

31.2 In the circumstances, I find that the immovable property fell within the joint estate and was allocated to the deceased upon divorce in terms of the settlement agreement.

[32] It is important to note that the documentary and factual evidence presented by the plaintiff remained unchallenged because the ex-wife elected not to avail herself to testify, and there was no version from her that was put to the witnesses. With this in mind, I take note that she would have been the perfect person to tell the court of their intention; the negotiations leading up to the conclusion of the settlement agreement; and what exactly was concluded between herself and the deceased – since Mr Ehlers' whereabouts is unknown, and the deceased is not alive to tell the court what their intentions were in respect of the settlement agreement, and specifically with regards to the property. It is for this reason that the constitutional court in the ***UJ case*** highlighted the importance of considering extrinsic evidence, which in this case clearly shows what was to happen with the property.

[33] One of the aspects which this court had to carefully consider in determining ownership of the property and the true nature of the rights of the parties, was correspondence between the ex-wife and Ms Kruger from FNB.

[34] The plaintiff stated at paragraph 19.3 of her particulars of claim that after the divorce, the deceased continued to pay for the **(a)** mortgage loan in respect of the property registered in favour of the sixth defendant; **(b)** maintenance and upkeep of the property; and **(c)** the monthly municipal utilities in respect of the property. This evidence was corroborated by Mr Lombard who testified that the deceased paid the bond every month and used his pension money to settle the bond; that he paid for rates, taxes and the monthly owner's insurance; that he paid for maintenance and upkeep of the property – and not the second defendant. The evidence of these witnesses as it relates to bond settlement, was further confirmed by an ABSA bank deposit slip marked as annexure E1, in which the deceased made payment of R99 470.45 in respect of the property. The ex-wife denied this in her plea without giving any counter evidence.

[35] Having said that, logic dictates that if the property really belonged to her as she claims, she would not have had any difficulty obtaining the municipal documents and information pertaining to the expenses and upkeep of the property - as she explained in her email dated 24 May 2021.

[36] Most importantly, to show that the property does not belong to her, she specifically stated in her email dated 4 May 2021 that she wanted to ***“ascertain the exact ownership of the property”*** before the property could be sold. It is clear from this email that the ex-wife was not even saying that she is the owner of the property or claiming a part thereof. She just wanted to investigate ownership and only started claiming full ownership in her email dated 13 May 2021.

36.1 Counsel on behalf of the plaintiff correctly submitted that this clearly indicates that the ex-wife was never the owner of the property, and she knew it, because it was only after being approached and informed of “an oversight” that – her name was on the title deed – that she used the opportunity to claim the property as her own.

[37] The plaintiff testified that after receiving emails from the ex-wife on 31 May 2021 and 16 July 2021 in which she claimed full ownership of the property, the widow was tired

of the back and forth surrounding the issue of the property and did not want to put up a fight with the ex-wife anymore because she wanted the administration of the estate to be finalized, and accordingly decided to make an offer to the ex-wife to have a share in the property, and even gave her the supporting documents to explain and expedite the finalisation of the estate.

37.1 In this regard, the plaintiff testified that the ex-wife was soliciting a bribe and wanted to be compensated for her signature, as can be seen on the email of 29 July 2021.

37.2 The emails from the ex-wife speak volumes about her behaviour and the great lengths she would go to, in order to get her hands on the property that she knows has been allocated to the deceased in terms of the settlement agreement.

37.3 In her email dated 16 July 2021 in which she alleged to have had an investment partnership with the deceased in respect of the property, she stated that she has obtained the deceased's death certificate. Further stated as follows: *"Wills and Testaments are part of the public domain, but require my physical presence, or someone having my power of attorney to go to the Masters' Office to obtain one"*.

37.4 On 29 July 2021 the ex-wife sent an email to the plaintiff and stated the following:

"As my repeated request for a certified copy of the Will has been ignored, even though part of Public Domain (sic), I must conclude that the contents thereof could or will compromise whatever situation has arisen by your administration of the deceased estate. I will therefore obtain a copy by other means, which will delay the matter even more, and further costs to my claim for compensation, should I decide to do so, not excluding existing occupational rent.

Further, please note for the record, that I hold "FNB Fiduciary Pty Ltd" responsible for any and all expenses, loss, damage and/or legal transgressions or causing prejudicial and detrimental loss of rights and interests in the execution of the matter, should any occur.

As a consideration of intent, be advised that I am going to contact the occupants/purchaser of the property for their details of events pertaining to their situation".

[38] Not only did the ex-wife claim sole ownership of the property, but she went as far as accusing Ms Kruger and FNB of fraud and threatening to institute legal action and also demanded compensation. This is evident from one of her emails in which she stated the following: *"I need to optimize my own interests to the fullest extent, possibly considering legal action for compensation, although preferably, the bank with its vast experience and resources may suggest an alternative solution to satisfy all concerned and thereby maintain its reputation"*.

[39] What is more worrying and questionable about the attitude of the ex-wife, which in my view is a serious red flag, is reflected in her email dated 29 September 2021 addressed to the plaintiff where she clearly tells the plaintiff to be dishonest and that the plaintiff should allocate the property to her so that she can sell the property to the prospective buyer. The following is noted at paragraph 2 of her email:

".... you are free and able to do the following:

2.1 As the executor of the estate, to issue myself with the letter stating that I'm the sole legal owner of the property and may register it as such.

2.2 I could then sell the property to Mrs. Botha at an unbiased valuation.

2.3 Your obligation as executrix would be concluded and nobody and or the bank be accused of fraud.

*Take note that I have made the effort to source your personal e-mail address so that you may implement my recommendation as your own, thereby redeeming your integrity and standing amongst your peers. You can of course inquire from your legal department as to the legal validity of this course of action **without disclosing the source.***

If this "suggestion" is not accepted before Wednesday 13 October 2021, I would have no alternative but to report the matter to first, your superiors, and or the Fraud Division of the law".

[40] The above emails clearly strengthen the submission made on behalf of the plaintiff that the ex-wife is not the sole owner of the property, and neither does she own half share

of the property when regard is had to the documents of Mr Ehlers; the evidence of the plaintiff; the rights and the negotiated intention at the time, which ultimately led to the drafting of the settlement agreement.

40.1 Furthermore, this court takes into account the contents of clause 2 of the Joint Will in which the deceased used the possessive pronoun of describing the property as “my property” (“*My Eiendom*”) to indicate that the property belonged to him, otherwise, one would have expected him in his Will, to say “the joint property co-owned....”

[41] While it was submitted on behalf of the plaintiff that the court should take a dim view of the stance taken by the ex-wife, Mr Wagener on the other hand conceded that the emails were unfortunate and embarrassing, and stated that: *“there were nasty emails from my client, I must admit – I’m not proud of it. There is some kind of needle between FNB and the second defendant – and that is why we are here in court”*.

[42] It is rather shocking, to say the least, that in an attempt to get her hands on the property and claim it as hers, the ex-wife would go to such lengths to manipulate and threaten the executor of the deceased’s estate. What is more worrying is that, when she was not successful with her threats, she tried to facilitate a bribe, and wanted to be compensated by stating that the bank has vast resources, - and when that did not work, she then came up with a plot that she had masterminded, and presented it to the plaintiff to take to her superiors, and gave her an ultimatum, and make threats that if the plaintiff does not comply with the suggestion she made, she would report her to her superiors and to the fraud division.

[43] The threats did not end there because according to the plaintiff, when her attorney wrote to the ex-wife to request her physical address so that she could be served with court documents, she threatened the plaintiff’s attorney with legal action. The plaintiff said to date, the ex-wife has not instituted any legal proceedings against either herself, her attorney or FNB.

- [44] In what seem to be another attempt to have a share in the deceased's property when her threats could not work, the ex-wife now claims 50% of the property by virtue of having had been married to the deceased in community of property. This is a drastic change to her stance, having regard to what she was initially contending for in all her emails where she claimed full ownership of the property. She stated in her plea that the widow is currently entitled to half-share in the property⁷. This is similar to what the widow offered her in the settlement proposal sent to her on 13 July 2021 which she refused and demanded full ownership of the property.
- [45] The court takes into account the plaintiff's evidence and counsel's submission that in an attempt to settle the matter, the widow made a proposal only because she wanted to avoid litigation; legal fees; stress and discomfort of a trial, but the ex-wife completely refused that offer and insisted on full ownership, just to come to court and claim what she was originally offered.
- [46] I have thoroughly considered all the circumstances in this matter, and having had regard to the contents of the emails from the ex-wife, I agree with Ms Denichaud's submission that the ex-wife is being opportunistic in her approach, and wanted to claim the property that was never hers in the first place. I further concur with her that the ex-wife cannot contend for co-ownership as she did in her plea because that would be contrary to the terms and purpose of the settlement agreement. Similarly, it would be contrary to clause 7 of the settlement agreement which stipulates that the parties will have no claim against each other in future. Consequently, I am of the view that co-ownership in the property came to an end at the time when the joint estate was divided, and I find that the ex-wife does not have a claim and is not entitled to have any claim in the property.
- [47] Having considered the matter before me and applying the above principle, and having heard submissions by both parties, it is my considered view that payment of the amount of R24 940 in clause 4 of the settlement agreement brought an end to all co-ownership

⁷ See para 18 above.

in the joint estate because it was made in exchange for the deceased to have sole and exclusive ownership of the immovable property and to retain the property. Accordingly, it is my considered view that the deceased became the sole owner of the property at the time of the divorce.

[48] With regards to costs, Ms Denichaud pressed for attorney and client costs, and argued that since the plaintiff in this matter is the executor of the deceased estate – by law, the deceased estate will bear the legal costs, and it will be prejudicial to the widow because she is the only beneficiary of the deceased estate. She further argued that the ex-wife was informed on more than three occasions that if the matter was to be pursued in court due to her frivolous actions, punitive costs would be sought against her, taking into account that when the plaintiff's attorney, Mr Glover, asked her on several occasions to provide him with her physical address so that she could be served with court documents, she refused.

[49] In some of her emails in response to Mr Glover, her response was: ***"keep your nose out of my business"***. In another email, her response was: ***"you have no case"***. In another email, she stated that her ***"address is not relevant because Mr Glover has no case, and the matter will be handled by the Bank's Ombudsman"***. She even went to an extent of stating that Mr Glover's behaviour is an embarrassment to the legal profession, and that she would institute harassment proceedings. All her emails were in response to a simple request that she should provide her physical address so that she could be served with legal documents. She was also warned of the costs order that

[50] It was submitted that the actions of the second defendant (the ex-wife) were ***mala fide***, – taking into account that she refused to give her address to be served; opposed this matter and filed a plea, knowing that she would not come to court to testify. I agree with this submission and accordingly, the costs should follow the Order, and the second defendant should pay the costs on attorney and client scale.

[51] In the circumstances, the following order is made:

1. *"The REGISTRAR OF DEEDS, PRETORIA is directed to amend its records and endorse the title deed of the below-mentioned property, to reflect that:*
 - 1.1 *The Second Defendant's ownership of an undivided half share in the immovable property known as Erf [.....], City of Tshwane Metropolitan Municipality, Gauteng measuring 1486 square metres, held by Deed of Transfer No. [.....] situated at [.....] Road, [.....], Pretoria ("the property") terminated on 15 December 1995, being the date of the divorce between herself and the late Mr. [.....] with identity number [.....] ("the deceased").*
 - 1.2 *The deceased and the First Defendant each became owner of an undivided half share in the property on 16 November 1996, being the date of marriage between the First Defendant and the deceased; and*
 - 1.3 *The First Defendant became the sole owner of the property on 29 November 2020, being the date of the deceased' demise.*
2. *The second defendant is ordered to pay the costs on an attorney and client scale.*



PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Judgment Delivered : 29 August 2024