

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 25548/2019

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

In the matter between:

R[...], E[...] (born L[...])

APPLICANT

AND

R[...], R[...]

RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

[1] The present matter concerns the application of the *actio communi dividundo* in circumstances where divorcing spouses, unable to reach agreement, remain bound in co-ownership of their former matrimonial home in Northcliff, Johannesburg. The case highlights the delicate balance courts must maintain: to uphold the principle that no co-owner may be compelled to remain such against their will, while at the same time ensuring that premature allocations do not undermine the patrimonial regime governing the marriage.

[2] The Applicant and Respondent were married out of community of property with application of the accrual system. They co-own a property in Northcliff, Johannesburg, which served as the matrimonial home. In 2019 the Respondent vacated the property, leaving the Applicant in occupation. She avers that from that time she has single-handedly paid the mortgage bond, rates, taxes, and other expenses, while the Respondent has resisted all genuine efforts to place the property on the market.

[3] Frustrated by the impasse, the Applicant approached the Court seeking termination of co-ownership, sale of the property, and additional relief. The latter included a preferential payment of R449 529.03 to herself before division of proceeds, a compulsory 50% contribution by the Respondent to monthly expenses pending sale, and attorney-and-client costs.

[4] The Respondent, having abandoned his counterclaim, does not oppose termination of co-ownership or the sale of the property. His opposition is confined to the ancillary relief, which he argues is premature, inconsistent with the Rule 43 maintenance order, and unwarranted in law.

[5] It is evident that the relief sought in prayers 1 to 7 of the notice of motion is not in dispute. Both parties accept that co-ownership cannot continue and that the property must be sold, with the proceeds secured pending finalisation of the divorce.

[6] The issues that remain contested relate to the Applicant's request for preferential reimbursement of R449 529.03 in respect of expenses she claims to have carried since 2019, as well as her demand that the Respondent contribute 50% of the ongoing property expenses, including bond repayments, rates, and taxes, pending transfer of the property. She also seeks an order for costs on the attorney-and-client scale.

[7] The Respondent specifically opposes the relief sought in prayers 8 to 10 of the Applicant's notice of motion. He avers that he has not abdicated his responsibility toward the expenses of the jointly owned property. On his version, those expenses,

particularly the mortgage instalments, were expressly included in the Applicant's financial disclosure filed during the Rule 43 proceedings before Siwendu J.

[8] The Respondent argues that in those proceedings, the Applicant listed the bond repayment as part of her claimed "maintenance requirements." The Court, after considering the matter, ordered the Respondent to contribute R20 000 per month pendente lite in favour of the Applicant and the minor children. The Respondent's position is that this global amount was intended to cover both the household maintenance and a proportionate contribution to the property expenses. To suggest otherwise, he argues, is to ignore the context and effect of the Rule 43 order. He therefore maintains that he is already contributing indirectly to the bond and related costs, and that it would be inappropriate for this Court to superimpose additional obligations under the guise of partition proceedings.

[9] The governing principles of the *actio communi dividundo* are well established. No co-owner may be compelled to remain in co-ownership against his or her will, and a court has wide equitable discretion to make a division of the property¹. This right may be exercised even while divorce proceedings are pending, as co-ownership exists independently of marriage and survives its dissolution. The task of the court, however, is not to use partition proceedings to effect a premature patrimonial adjustment but rather to ensure a fair and equitable division consistent with the broader matrimonial regime.

[10] Applying these principles, the termination of co-ownership and the sale of the property are uncontroversial. The real difficulty lies with the ancillary relief sought. The Applicant contends that equity requires she be reimbursed in the amount of R449 529.03 from the proceeds of the sale to reflect the expenses she has carried since 2019. While her financial burden is acknowledged, to grant such reimbursement now would be to anticipate the accrual calculation that properly belongs at the conclusion of the divorce. To do so risks distorting the patrimonial balance between the parties. A fairer course is to direct that the net proceeds of the sale be retained in trust until the accrual can be determined and implemented at trial.

¹ *Robson v Theron* 1978 (2) SA 305 (A) at 319.

[11] The second aspect of the dispute is the Applicant's request that the Respondent contribute 50% of the ongoing property expenses pending sale. The Respondent resists this on the basis that he already contributes to the household through the Rule 43 order, in terms of which he pays monthly maintenance of R20 000. He avers that this amount includes provision for property expenses, as the Applicant herself listed the bond instalments in her maintenance needs.

[12] I am mindful, however, that while the Applicant may have factored property expenses into her needs for maintenance purposes, the benefit in the property itself, and its ultimate accrual value, cannot be conflated with maintenance for the minor children. The Respondent's obligation to maintain his children is distinct from his rights and obligations as co-owner of the immovable property.

[13] On a proper application of equitable principles, both co-owners should bear their proportionate share of expenses required to preserve the joint asset. It would be inequitable for the Applicant alone to continue funding the bond, rates, and taxes when the Respondent remains a co-owner and stands to benefit from the net proceeds. Accordingly, an interim contribution toward the property expenses is warranted, notwithstanding the Rule 43 order, which serves a different purpose. Such contribution ensures fairness between co-owners without trespassing upon the maintenance jurisdiction of the divorce court.

[14] The final issue concerns costs. The Applicant seeks attorney-and-client costs on the basis of the Respondent's conduct. The general rule is that such punitive costs are reserved for instances of vexatious or reprehensible behaviour. While the Respondent has not been cooperative in reaching agreement on the property, his opposition to the contested relief is neither frivolous nor vexatious. In my view, costs should follow the ordinary course, on a party-and-party scale.

[15] In conclusion, the equitable remedy of the *actio communi dividundo* allows this Court to bring an end to an untenable state of involuntary co-ownership without prematurely interfering with the accrual system that governs the parties' patrimonial consequences. The appropriate order is that the property be sold, the bond

discharged from the proceeds, and the net proceeds preserved in trust pending the finalisation of the divorce action and the accrual calculation.

[16] The Applicant's claim for preferential reimbursement is dismissed. The Respondent is directed to contribute 50% of the ongoing property expenses, including the bond, rates, and taxes, until transfer of the property. Costs shall be awarded on the ordinary scale.

[17] As a result the following order is made:

1. The co-ownership of the property, more fully described as Portion 2 of Erf 1[...] Northcliff, City of Johannesburg, Gauteng ("the property") be terminated;
2. The property be placed on the open market at the value of R2 100 000.00 (Two Million One Hundred Thousand Rand);
3. Failing the sale of the property, as stated in prayer 2 above, within 3 (three) months of the granting of this order, that the property be placed on auction with a reserve of R1900 000.00 (one million and nine hundred thousand rands);
4. The Respondent be directed to sign all necessary documents to give effect to the sale of the property, whether on the open market or by auction, within 24 (twenty-four) hours of such documents being presented to him, failing which the Sheriff of this Honourable Court is authorised and directed to sign the documents in the Respondent's stead;
5. The mortgage bond registered against the property as security with First National Bank under account number 3[...] be cancelled and that the bond cancellation fees be paid out of the proceeds of the sale of property;

6. The net proceeds after the mortgage bond have been cancelled, be placed into the trust account of the transferring attorneys, namely Christo Mulder Attorneys;

7. Pending the sale of the property, the Respondent is directed to make payment of 50% of the monthly bond instalments, rates and taxes and maintenance costs in respect of the property;

8. The Respondent is ordered to pay the costs of the application on party and party scale

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

DATE OF HEARING: 20 August 2025

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