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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable / Not Reportable
Case no: 15331/2023

In the matter between:

M[...] M[...]

Applicant

and

E[...] M[...]

First Respondent

**STANDARD BANK OF SOUTH AFRICA
LIMITED**

Second Respondent

Coram: Honourable Madam Justice Slingers

Heard: 25 August 2025

Delivered: 16 September 2025

ORDER

- (i) The parties' joint ownership of the property situated at Erf 5[...] Mitchell's Plain, situated at No. [...] P[...] Street, Watergate, Mitchells Plain, Western Cape is terminated.
- (ii) Mohamed Esack Mohammed ('Mohammed'), an attorney of this Honourable Court is appointed as a Receiver and Liquidator with the following powers and functions:
 - a. To sell the property to either of the parties for a purchase price he deems to be a true market value;
 - b. To sell the property either by public auction or by private treaty on such terms and conditions, as they seem to him most beneficial;
 - c. To afford both parties the opportunity to make presentations to him about any matter relevant to these duties and to order the manner in which the proceeds of the property should be divided;
 - d. To sell the property provided that he has given both parties four (4) weeks' notice of his intention to do so;
 - e. To sign any documents as may be necessary to effect transfer of the property sold from the person in whose name it is registered to the Purchaser thereof;
 - f. To afford both parties personally or duly represented, the opportunity to make such representation to him about the identity of the Purchaser as well as the purchase price of the property, including but not limited to;
 - i. The time and/or manner in which the property to be realised;
 - ii. The price for which the property should be realised and the sequence in which the property should be realised.
 - g. To engage the services of any suitable qualified person or persons to assist him in determining the true market value of the property and to pay such person the reasonable fees which may be charged by him/her;

- h. To call upon either party to produce any books, statements, invoices, records and documentation which he may reasonably require;
 - i. To pay all debts in respect of the property;
 - ii. To distribute the net proceeds accruing from the sale of the property between the parties, in equal share, or alternatively as he deems fit based on any representations made by the respective parties;
 - i. The parties are to present objective evidence of the applicant's arrear maintenance obligations to Mohammed who shall then decrease the application's portion of the proceeds of the sale of the property to the same extent of her arrear maintenance obligations and pay this amount towards her arrear maintenance obligations;
 - j. To be entitled to apply to the Honourable Court for any further directions that he may consider necessary; and
 - k. To pay reasonable fees as per the prescribed tariff and to apportion such fees between the parties, in equal shares.
- (iii) The costs of the application will be borne by the respondent on scale B.

JUDGMENT

Introduction

[1] This is an application in terms of the *actio communi dividundo*. In *Robson v Theron*¹, the court summarised the principles of the common law applicable to the *actio communi dividundo* as follows:

- (i) no co-owner can be obliged to remain a co-owner against their will;
- (ii) the *actio communi dividundo* is available to those who own specific tangible things, irrespective of whether the co-owners are partners or not, to claim division of the joint property;

¹ 1978 (1) SA 841 (A)

- (iii) the action may be brought by a co-owner for the division of the joint property where the co-owners cannot agree to the method of division;
- (iv) for the purposes of the *actio* it is immaterial whether the co-owners possess the joint property jointly or neither of them possesses it or if only one of them is in possession thereof;
- (v) the action may be used to claim ancillary relief payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property; and
- (vi) a court has a wide discretion in making a division of joint property.

Background

- [2] The parties married on 10 March 2001 in terms of Muslim rites. During the course of their marriage, they purchased the property known as [...] P[...] Street, Watergate, Mitchells Plain situated at Erf 5[...] Cape Town, Mitchell Plain (**‘the property’**). Thus, both parties are the registered owners of the property.
- [3] The parties’ marital relationship did not endure and the applicant vacated the property during 2021. The parties divorced on 21 February 2022 while remaining co-owners of the property.
- [4] The respondent has since remarried and currently resides on the property with the parties’ two minor sons and his new wife.²
- [5] The relief sought clearly impacted on the parties’ minor children. However, when the matter came before me, the application had not been served on the Office of the Family Advocate. Consequently, on 7 February 2025, I gave an order postponing the matter *sine dies* and directed that the Office of the Family Advocate investigate whether the applicant’s proposal that the minor children

² The court is informed that the new wife only resides two days a week on the property. No confirmatory affidavit was obtained from her. One of the parties’ sons turned 18 in August and is no longer a minor but remains dependent on the parties.

reside with her was consistent with their best interests³ and whether prayer 2 of the applicant's notice of motion would be contrary to the best interests of the children.⁴ Furthermore, the Office of the Family Advocate was requested to set out what conditions, if any could be imposed should the relief set out in prayer 2 of the notice of motion be granted to ensure that the best interests of the minor children are taken into account.

- [6] The Office of the Family Advocate duly filed its report, for which the court is indebted. This report records that:

*'17. It was quite evident during the enquiry conducted that the co-parenting relationship between the parties is acrimonious, dysfunctional and highly conflictual. There was a total lack of communication and tremendous amount of hostility between the parties. It is noteworthy that the continuous allegations and mistrust that exists between the parties' has impacted on the parties' co-parenting relationship.'*⁵

- [7] During consultation with the family advocate, the parties' one son, 'Y' expressed the view that he would want to remain residing with the respondent. While he is amenable to exercising contact with the applicant, he would prefer for such contact to take place at the maternal aunt's residence. He further expressed that he would not want to be uprooted from his current home.⁶

- [8] The parties' second son, 'I' also indicated that he wants to remain primarily resident with the First Respondent. Although 'I' indicated that he would like to exercise contact with the applicant, he, just as with 'Y', would like this contact to take place at the maternal aunt's place. Similarly, he would not want to be uprooted from his current home.

³ The nature of the applicant's relationship with the minor children was not clear from the papers.

⁴ Prayer 2 is attached hereto as annexure 'A'.

⁵ Paragraph 17 of the Family Advocate's report

⁶ The parties' minor children are aged 16 and 18 years' old

- [9] The family advocate recommended that if the court determines that the property be sold, that it ensure that the minor children not be left destitute. Furthermore, it noted that the parties should recognise that the minor children may be unhappy to leave the home they know but that residing with the primary caregiver at a different residence could ameliorate this concern.
- [10] Although both parties were invited to comment on the report by the family advocate, neither one elected to do so.

Discussion

- [11] The applicant approached the court for assistance when her proposal that the property be sold and the proceeds thereof be equally divided amongst her and the respondent was rejected. Her alternative proposal that either of the parties buy out the other one's share in the property was similarly rejected.
- [12] The applicant is fearful that she will suffer economic loss and harm if her application is refused. She envisages the possibility that the respondent will fail to service the bond payments regularly, rendering the property subject to default judgment proceedings and judicial execution. This could not only result in the property being sold at a discounted price, but could also negatively impact on the parties' credit rating which would increase their difficulty in obtaining new/ additional financing which would impact negatively on different areas of their lives.
- [13] The respondent made no counter-proposals to the applicant and opposed the application. It appears from his answering affidavit that he is of the view that he is entitled to hold onto the property indefinitely without having to compensate the applicant for her share therein.

[14] In support of his position, the respondent states that he supported the applicant and the family for the duration of their marriage. In opposing the application, the respondent states that he cannot afford to purchase the applicant's share of the property as his work has suffered lately and his income from his own business is not stable.⁷ Furthermore, should the property be sold, he will not be able to afford alternative accommodation for himself and the parties' children.

[15] Notwithstanding the respondent's positive averments that the applicant did not contribute to the purchase or maintenance of the bond payments, it is evident from his answering papers that he only qualified for bond approval necessary to purchase the property on the joint income of both parties. In his answering affidavit, the respondent states that he:

'... was only able to afford to purchase a home for our family with the use of a bond which I could only obtain if the Applicant signed as a co signatory on the bond. This allowed the house and the bond to be placed in both our names...'

[16] The respondent also concedes that the applicant contributed towards the bond account but alleges that her total contribution was R5 266.60. No documentary proof is attached in support of this averment. The applicant estimates her contribution towards the bond payments during the period from 1 September 2019 to November 2021 to be R95 167.00. In support hereof, the applicant attached her bank statements recording the deduction of the bond payments from her salary.

[17] In 2019, the second respondent, who is the bond holder, attached the property after the parties failed to make their bond payments as required. In July 2023, the applicant was informed that the bond payments were once again in arrears. In August 2023, the applicant received further correspondence which showed that the bond arrears had increased.

⁷ The respondent started his own plumbing business in 2018.

- [18] It is evident from the papers that the respondent had recent difficulty with the upkeep of the bond and had fallen into arrears with the bond payments. Although the respondent had settled the arrears it is clear that his financial situation is far from stable.
- [19] The uncertainty of the respondent's financial position clearly shows that the applicant's fear of financial loss and harm is not without merit.
- [20] There is a real possibility that the property would again be subject to execution proceedings which would be prejudicial not only to the parties but also to their minor children. It would benefit neither party if the respondent is once again unable to keep up with the bond payments and the house is subjected to judicial attachment and execution. This would result in a forced sale of the property at a price below market value and would impact negatively on both parties' credit rating. Furthermore, it could expose the respondent and the minor children to possible eviction proceedings.
- [21] It is apparent from the Family Advocate's report that the parties cannot meaningfully communicate with one another in a non-acrimonious manner. This underscores the position that the applicant cannot be forced to remain a co-owner of the property with the respondent.
- [22] The applicant meets the necessary requirements for the granting of the *actio communi dividundo* in that:
- (i) she is a co-owner of the property;
 - (ii) she does not wish to remain a co-owner of the property; and
 - (iii) there is no agreement that the parties would not divide the property.⁸

⁸ *Matadin v Parma and Others* (4638/2009) [2010] ZAKZPHC 18 (7 May 2010)

[23] In the circumstances, I am satisfied that the applicant has made out a case for the relief she seeks in terms of the *actio communi dividundo*.

[24] The respondent avers that the applicant is in arrears with her maintenance obligations in terms of a parenting plan they concluded. This court has not been presented with any objective proof evidencing the extent, if any, of the applicant's arrear maintenance obligations.⁹

[25] As the applicant also seeks the appointment of a Receiver and Liquidator, both parties will be presented with an opportunity to show the extent, if any, of the applicant's arrear maintenance obligations which can be accounted for in the distribution of the proceeds of the sale of the property.

[26] In the circumstances, I make the following orders:

- (iv) The parties' joint ownership of the property situated at Erf 5[...] Mitchell's Plain, situated at No. [...] P[...] Street, Watergate, Mitchells Plain, Western Cape is terminated.
- (v) Mohamed Esack Mohammed ('Mohammed'), an attorney of this Honourable Court is appointed as a Receiver and Liquidator with the following powers and functions:
 - a. To sell the property to either of the parties for a purchase price he deems to be a true market value;
 - b. To sell the property either by public auction or by private treaty on such terms and conditions, as they seem to him most beneficial;
 - c. To afford both parties the opportunity to make presentations to him about any matter relevant to these duties and to order the manner in which the proceeds of the property should be divided;

⁹ The court was presented with the respondent's calculation of the applicant's arrear maintenance. However, such calculation on its own, does not constitute objective evidence of the applicant's arrear maintenance.

- d. To sell the property provided that he has given both parties four (4) weeks' notice of his intention to do so;
 - e. To sign any documents as may be necessary to effect transfer of the property sold from the person in whose name it is registered to the Purchaser thereof;
 - f. To afford both parties personally or duly represented, the opportunity to make such representation to him about the identity of the Purchaser as well as the purchase price of the property, including but not limited to;
 - i. The time and/or manner in which the property to be realised;
 - ii. The price for which the property should be realised and the sequence in which the property should be realised.
 - g. To engage the services of any suitable qualified person or persons to assist him in determining the true market value of the property and to pay such person the reasonable fees which may be charged by him\her;
 - h. To call upon either party to produce any books, statements, invoices, records and documentation which he may reasonably require;
 - i. To pay all debts in respect of the property;
 - ii. To distribute the net proceeds accruing from the sale of the property between the parties, in equal share, or alternatively as he deems fit based on any representations made by the respective parties;
 - i. The parties are to present objective evidence of the applicant's arrear maintenance obligations to Mohammed who shall then decrease the application's portion of the proceeds of the sale of the property to the same extent of her arrear maintenance obligations and pay this amount towards the applicant's arrear maintenance obligations;
 - j. To be entitled to apply to the Honourable Court for any further directions that he may consider necessary; and
 - k. To pay reasonable fees as per the prescribed tariff and to apportion such fees between the parties, in equal shares.
- (vi) The costs of the application will be borne by the respondent on scale B.

HM SLINGERS
JUDGE OF THE HIGH COURT

Appearances

For applicant: Mr. S Chotia
Instructed by: J Ramages Attorneys

For respondent: Adv. S Peer

Annexure A

That Mohamed Esack Mohammed (**'Mohammed'**), an attorney of this Honourable Court is appointed as a Receiver and Liquidator with the following powers and functions:

- a. To sell the property to either of the parties for a purchase price he deems to be a true market value;
- b. To sell the property either by public auction or by private treaty on such terms and conditions, as they seem to him most beneficial;
- c. To afford both parties the opportunity to make presentations to him about any matter relevant to these duties and to order the manner in which the proceeds of the property should be divided;
- d. To sell the property provided that he has given both parties four (4) weeks' notice of his intention to do so;
- e. To sign any documents as may be necessary to effect transfer of the property sold from the person in whose name it is registered to the Purchaser thereof;
- f. To afford both parties personally or duly represented, the opportunity to make such representation to him about the identity of the Purchaser as well as the purchase price of the property, including but not limited to;
 - i. The time and/or manner in which the property to be realised;
 - ii. The price for which the property should be realised and the sequence in which the property should be realised.
- g. To engage the services of any suitable qualified person or persons to assist him in determining the true market value of the property and to pay such person the reasonable fees which may be charged by him/her;
- h. To call upon either party to produce any books, statements, invoices, records and documentation which he may reasonably require;
 - i. To pay all debts in respect of the property;

- ii. To distribute the net proceeds accruing from the sale of the property between the parties, in equal share, or alternatively as he deems fit based on any representations made by the respective parties;
- i. The parties are to present objective evidence of the applicant's arrear maintenance obligations to Mohammed who shall then decrease the application's portion of the proceeds of the sale of the property to the same extent of her arrear maintenance obligations and pay this amount towards the applicant's arrear maintenance obligations;
- j. To be entitled to apply to the Honourable Court for any further directions that he may consider necessary; and
- k. To pay reasonable fees as per the prescribed tariff and to apportion such fees between the parties, in equal shares.