



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

Reportable

Case no: A283/2024

In the matter between:

J[...] G[...] S[...]

APPELLANT

and

S[...] E[...] S[...]

FIRST RESPONDENT

ABSA BANK LIMITED

SECOND RESPONDENT

THE SHERIFF OF THE HIGH COURT, STRAND

THIRD RESPONDENT

SHAMEEZ SILJEUR

FOURTH RESPONDENT

LEE MARC CAMERON ALLOYS

FIFTH RESPONDENT

Coram: SHER J, MANGCU-LOCKWOOD J, BHOOPCHAND AJ

Heard: 10 October 2025

Delivered: 17 November 2025

Summary: Leave to enter into a transaction to alienate immovable property belonging to the joint estate in a marriage in community of property. The application of section 16(1) of the Matrimonial Property Act, 88 of 1984, and

the provisions of the National Credit Act, 34 of 2005 considered. The common law remedy of the *actio communi dividundo* held not to be applicable. Appellant showed good cause in the Court *a quo* to dispense with the spouse's consent, whilst the latter's withholding of consent was unreasonable. The appeal is upheld.

ORDER

1. The Appellant's application to adduce further evidence on appeal is granted.
2. The appeal is upheld, and the order of the Court *a quo* is set aside and replaced with the following order:
 - 2.1 The Applicant is granted leave under section 16(1) of the Matrimonial Property Act, 88 of 1984, to enter into a transaction to alienate, i.e., to sell the property described as erf 1[...] (held under deed of title T[...]), Strand, also known as 3[...] R[...] Street, Rusthof, Strand ('the property').
 - 2.2 The First Respondent is directed to take all such steps and sign all such documentation (including but not limited to the deed of sale) as may be required, in law, to ensure that the property is sold, transferred to and registered in the name of any *bona fide* purchaser who offers to purchase it at a price exceeding the reserve price of R800 000 as set by the Western Cape High Court on 13 December 2024), currently being Paxar Trading (Pty) Ltd which has offered to purchase the property for R990 000 (nine hundred and ninety thousand rand).
 - 2.3 If the First Respondent should fail, neglect, or refuse to comply with paragraph 2.2 above within five (5) business days of being requested to do so in writing (and such failure, neglect, and/or refusal is confirmed on oath by the conveyancer), the Sheriff of the High Court, Strand (i.e., the Third Respondent) is hereby authorised and directed to do such things and sign such documentation as may be necessary to give effect to the order in terms of paragraph 2.2 above.

- 2.4 The costs of the application (including the costs of Counsel on Scale A) shall be paid on a party and party basis from the net proceeds of the sale after the balance outstanding on the bond registered over the property, the bond cancellation costs, the Second Respondent's legal fees, the costs incurred to obtain the necessary certificates of compliance to pass transfer, municipal rates, taxes, and/or service charges, the estate agent's commission, and any other expenses as may be necessary to be incurred to secure the transfer of the property as provided for in paragraph 2.2 above are paid.
- 2.5 Should there be any remaining funds, they are to be transferred to and held in the trust account of the Appellant's attorney pending the division, if any, of the joint estate. To the extent that the net proceeds of the sale are insufficient to pay the costs of the application, they shall be paid from the First Respondent's equitable share of the joint estate upon division.
3. First Respondent shall be liable for the costs of the appeal including the costs of Counsel on Scale A, and shall be recovered in whole or in part, as the case may be, from the First Respondent's equitable share of the joint estate upon division.
- .

JUDGMENT

Bhoopchand AJ (Sher et Mangcu-Lockwood JJ concurring):

[1] This appeal addresses the legal authority of a spouse married in community of property to dispose of immovable property which forms part of the joint estate in a situation where the other spouse withholds consent. It involves the application of the relevant provisions of the Matrimonial Property

Act 88 of 1984 (‘Matrimonial Property Act’, ‘MPA’) and the National Credit Act, 34 of 2005 (‘National Credit Act’, ‘NCA’). As will be explained later in this judgment, the common law remedy of the *actio communi dividundo* did not apply to the relief sought by the Appellant in his application before the Court *a quo*.

[2] The Appellant and the First Respondent (‘the couple’) are co-owners of Erf 1[...], Strand, also known as 3[...] R[...] Street, Rusthof, Strand (‘the property’), in accordance with their marital regime. In 2014, the Second Respondent extended a loan pursuant to a loan agreement to facilitate the acquisition of the property. A mortgage bond (‘the bond’) was registered over the property in favour of the Second Respondent.

[3] The Appellant and the First Respondent defaulted on their loan payments during 2021, concurrently with the First Respondent leaving the property with the couple’s minor daughter on the 9th of March of that year. The Appellant has instituted divorce proceedings against the First Respondent, and the matter is currently in the pre-trial stage. On 19 July 2023, the Second Respondent, ABSA Bank, obtained judgment in this Court against the couple in the amount of R536 241.37, being the balance that was then due and owing in respect of monies loaned and advanced, as secured by the bond. The property was also declared specially executable, and the Court directed that it be sold with a minimum reserve price of R910,000. The municipal valuation of the property ranged between R1.3 million and R1.4 million. The execution of the Court order was formally suspended for a period of six months to allow the Appellant and the First Respondent the opportunity to negotiate and finalise a private sale of the property. The Appellant and the First Respondent were ordered to pay the Second Respondent’s costs on an attorney and client scale as incurred until 6 October 2022. The First Respondent was ordered to pay the Second

Respondent's costs incurred after 6 October 2022. The reason for the differential cost order granted against the Appellant and the First Respondent is unexplained.

[4] The sale in execution of the property occurred on 5 June 2024. The Sheriff obtained a single bid at the auction for R500 000. Shortly thereafter, on 14 June 2024, the Appellant received a private offer from the Fourth and Fifth Respondents to acquire the property for R980 000. The Appellant's legal representatives approached the First Respondent the following day to request her consent to the transaction. She declined to give it. The Appellant signed the offer to purchase on 17 June 2024. During this impasse, the Second Respondent stated its intention to initiate an application in terms of Rule 46A(9)(d) of the Uniform Rules of Court ('URC') to reduce the reserve price from R910,000 to R500,000, thereby facilitating the sale to the bidder who had made that offer on auction. The Appellant approached the Court urgently to order the First Respondent to consent to the sale of the property. The Court *a quo*'s decision to dismiss his application without an order as to costs is the subject of this appeal. The Appellant appeals the entire judgment and order delivered by the Court *a quo* on 4 September 2024.

[5] In the interim, the Fourth and Fifth Respondents had extended their offer to purchase the property to 31 August 2024. The Second Respondent indicated that it would reinstate the loan agreement only if the arrears and its legal costs had been paid and proceeded with its application to reduce the reserve price on the property. The Fourth and Fifth Respondents then withdrew their offer to purchase the property. A new purchaser, Paxar Trading (Pty) Ltd, stepped into the breach with an offer of R990 000 for the property, with the offer remaining open until the conclusion of this appeal. The Second Respondent obtained an order reducing the minimum reserve price to R800 000 on 13 December 2024.

[6] In his founding papers in the application, the Appellant detailed the circumstances leading to it, outlined his communications with the First Respondent concerning the necessity for a private sale of the property, analysed her reasons for declining to consent to the sale of the property and substantiated the basis for the relief he sought. The Appellant explained that after the First Respondent departed from the property, the Appellant requested her permission in 2022 to let out the property to tenants to enable him to make the loan payments. She declined his request. He has sought the First Respondent's permission to sell the property since 12 March 2023.

[7] According to the Appellant, the First Respondent presented the Appellant with multiple reasons for refusing to sell the property, including her intention to pursue alternative arrangements with the Second Respondent and consider other options to prevent the sale of the property to provide a secure home for the couple's daughter. The First Respondent rented accommodation elsewhere but returned to reside at the property in July 2024. Following her return, she did not make any financial contributions toward the loan or property expenses. The Appellant also discontinued payments on the loan following the loss of his employment.

[8] The Appellant provided details of the escalating debt on the loan agreement to the Court *a quo*. The amount owing was R749 549.30, including arrears of R301 686.79. The legal costs owing to the Second Respondent amounted to R113 901.34. If the property had been sold for R500 000, the joint estate would accordingly have faced a shortfall of R436 450.64, inclusive of legal costs. The Appellant asserted that such a situation would have been detrimental to both the joint estate and the interests of the couple.

[9] The First Respondent, in her answering papers, and seemingly oblivious of her participation in the judgment obtained by the Second Respondent or its implications, insisted that the property formed part of the joint estate, the division of which would be addressed during the couple's divorce proceedings. She asserted that the property functioned as the primary residence for her and her daughter. The termination of joint ownership of the property would substantially affect their living arrangements, overall well-being, financial stability, and income. As the sole and most affordable housing option available, the property was essential to them. She did not have access to alternative accommodation. She asserted that she would be able to pay the loan from 1 September 2024 onward, a commitment she communicated to the Second Respondent and its legal representatives.

[10] She contended that the Appellant had wilfully denied her and her daughter access to the home between 2021 and 2024. She was unable to pay for legal advice as the Appellant had cancelled her legal policy. The Appellant received rental income from the property but declined to share the income or pay the loan. He had wilfully and negligently failed to honour his financial obligations over their fifteen-year marriage.

[11] The First Respondent outlined the effects of losing the property on her as well as her daughter. She sought to attribute the Appellant's actions as acts of economic and financial abuse under the Domestic Violence Act. She referred to an arrangement the Appellant had concluded with the Second Respondent in July 2021 to continue paying the loan and to pay in excess to settle the arrears. He did not do so, resulting in the loan falling further into arrears. The Appellant owned two other properties in the Northern Cape that could have been sold to cover the outstanding arrears that had accumulated on the loan. There was, in addition, movable property that could be sold to cover the shortfall. The First

Respondent alluded in her correspondence with the Appellant's legal representatives that she suffered declining hearing loss and other health challenges and was unsure how much longer she would be able to continue doing the work she did.

[12] In reply, the Appellant asserted that the factual allegations presented by the First Respondent were either inaccurate or immaterial to the application. The Appellant submitted supporting evidence and reaffirmed the occasions on which he requested the First Respondent's consent to terminate the joint ownership of the property. The First Respondent's decision not to proceed with a private sale of the property was vexatious and unreasonable, considering the Rule 46A order. This position adversely affected both the joint estate and the Appellant's associated interests. It was reasonably foreseeable that the property could have been sold before the conclusion of the divorce proceedings. Furthermore, the Second Respondent's proposed application to reduce the reserve price for the property's sale was expected to result in the termination of their co-ownership. Therefore, the pending divorce action did not influence the impending loss of the property.

[13] The Appellant contested the First Respondent's claim that terminating their joint ownership would jeopardise her financial stability and result in substantial hardship for herself and their daughter. The First Respondent did not submit any evidence before the Court *a quo* to substantiate her assertions regarding significant impacts on her income and livelihood, lack of access to alternative office space, or the necessity of renting a workspace. The proceeds of the private sale would settle the loan, allow for the rescission of the default judgment, improve their credit record and permit the First Respondent to rent property, which she had done without difficulty for three years between 2021 and 2024, without the disadvantage of a bad credit record. The Appellant argued

that the First Respondent had confused the criteria a Court must consider when terminating joint ownership with those relevant to an eviction application. Therefore, the impact of terminating joint ownership on their daughter was not pertinent to the present application. It was further submitted that an equal division of proceeds from the private sale, after settling outstanding debts and legal costs, would be both fair and equitable. The proceeds could be used for the daughter's maintenance needs.

[14] The Appellant stated that the First Respondent was unable to substantiate her assertion that she had communicated with the Second Respondent or third parties. Furthermore, she failed to provide evidence regarding her monthly income, her capacity to service the loan instalments, or her ability to remit his proportional share of the property. He stated, with supporting evidence, that on 19 August 2024, the Second Respondent, through its attorney, communicated its position that reinstatement of the loan agreement would only occur upon settlement of the full arrears and legal costs.

[15] The Appellant denied having rented out the property to anyone. Upon obtaining financing from the Second Respondent, the couple entered into an agreement stipulating joint liability for the repayment of instalments. The First Respondent discontinued payments in 2021 following the loss of his employment. He further denied engaging in any acts of domestic violence towards the First Respondent or perpetrating financial or economic abuse against her. He refuted sole responsibility for the loan repayments. His other properties have been listed for sale. The collective value of the movable assets jointly owned would not suffice to cover the outstanding arrears. He further disputed the relevance of the Domestic Violence Act and the Children's Act to the application.

[16] The Second Respondent's position regarding the sale of the property under the rule 46A order, as well as its position regarding the reinstatement of the loan agreement upon payment of the arrears and the legal costs, was repeated in the confirmatory affidavit of the Appellant's attorney, deposed to on 20 August 2024.

[17] The relief sought by the Appellant in the Court *a quo* was to terminate the couple's co-ownership of the property and to direct the First Respondent to cooperate in facilitating its sale, transfer and registration into the name of the prospective buyers by private sale against payment by them of R980 000. The Appellant also sought that the net proceeds of the sale be divided equally between him and the First Respondent after the debt on the property had been settled.

THE COURT A QUO'S JUDGMENT

[18] The Court *a quo* framed the central issue to be whether the First Respondent's refusal to grant consent was unreasonable, or whether the Appellant had established sufficient grounds to proceed without such consent. The Court undertook a thorough examination of the First Respondent's arguments. The Court held that the First Respondent had presented substantive, credible, and *bona fide* disputes of fact regarding the reasonableness of her refusal to provide consent. Furthermore, it found that the First Respondent had experienced economic and financial abuse perpetrated by the Appellant, resulting in what was described as a 'constructive loss of a home' for both the First Respondent and her daughter.

[19] As the Second Respondent had not participated in the proceedings, the Court *a quo* held that it was unable to determine that the letter from its attorney,

relied upon by the Appellant, had excluded the First Respondent's request to establish a payment plan for settling arrears and legal costs. The Court *a quo* expected the Second Respondent to submit an explanatory affidavit in support of the Appellant's application, confirming that the First Respondent had sought a payment arrangement pursuant to the National Credit Act. The Court *a quo* was of the view that the attorney responsible for the letter did not demonstrate an understanding or acceptance of the debt recovery principles outlined in the Act. While the letter reflected the attorney's perspective, the Court *a quo* did not recognise it as representing the position of the Second Respondent. The Court determined that the Second Respondent had failed to address the First Respondent's request for a payment plan. Consequently, it dismissed the application.

THE APPEAL

[20] The Appellant challenged the entirety of the judgment and order issued by the Court *a quo*. The Appellant contended that the Court *a quo* made errors in three principal respects: firstly, by imposing an evidentiary burden on the Appellant to provide proof regarding the Second Respondent's stance on the alleged rejection of the proposed payment plan and the potential reinstatement of the loan agreement; secondly, by failing to acknowledge the potential prejudice to the joint estate should the property be sold pursuant to the writ of execution; and thirdly, by not accepting that the First Respondent was unable to reinstate the loan agreement without the Appellant's consent. The Appellant argued that the Court *a quo* gave greater weight to the unsupported assertions made by the First Respondent concerning her request to the Second Respondent for the development of a payment plan, instead of affording proper

consideration to the allegations presented in his affidavits, which were corroborated by contemporaneous correspondence.

[21] The principal questions for determination in this appeal are whether the Court *a quo* erred as the Appellant asserts, whether the First Respondent's refusal to consent to the sale of the property was unreasonable in the circumstances, particularly given the sequence of events involving the cancellation of the loan agreement, the granting of a Rule 46A order for the sale and subsequent offers to purchase the property, and whether the Appellant had sufficiently motivated his application to dispense with the First Respondent's consent.

[22] The Appellant applied to introduce supplementary evidence on appeal and to amend the notice of appeal. The proposed additional evidence comprises the founding affidavit in support of the Second Respondent's application under Rule 46A(9), two affidavits filed by the Appellant in opposition to the Rule 46A(9) application, as well as an affidavit from the new purchaser who submitted an offer to acquire the property. The Appellant further applied to amend the notice of appeal, requesting that the order sought exclude the Fourth and Fifth Respondents and incorporate the price proposed by the new purchaser.

[23] Pursuant to section 19(b) of the Superior Courts Act 13 of 2013, the appellate court possesses the discretion to admit new evidence. The affidavits submitted by the Appellant were not accessible when his application was considered by the Court *a quo*.¹ The evidence is material and directly relevant to the adjudication of the appeal, particularly as it pertains to the Second Respondent's application for the establishment of a new reserve price consistent with the bid received by the Sheriff, as well as the specifics regarding the new

¹ *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2007 (6) SA 169 (CC), para 33, *Simpson v Selfmed Medical Scheme and Another* [1994] ZASCA 191; [1995] 2 All SA 124 (A), paras 23-24

offer to purchase the property. The proposed amendment to the Appellant's notice of appeal also revised the relief sought to incorporate the new evidence. Permitting both the introduction of this evidence and the amendment to the notice of appeal would serve the interests of justice.

ASSESSMENT

THE APPLICABLE LAW

The Actio Communi Dividundo does not apply

[24] The Appellant misconstrued the legal basis upon which a spouse married in community of property can alienate immovable property if the other spouse does not provide consent. The Appellant argued that this appeal concerns the interplay between the common law as regards co-ownership, the Matrimonial Property Act, the NCA and Rule 46A of the URC. The Appellant employed the terms 'co-ownership' and 'termination of co-ownership' with limited specificity, drawing upon the principles of *actio communi dividundo* and its connection to the Matrimonial Property Act. He contended that it was necessary to satisfy the requirements of the *actio*, thereby demonstrating that the First Respondent is unreasonably withholding her consent. The authoritative case on the termination of co-ownership, *Municipal Employees' Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others ('MEPF')*,² dispels the approach adopted by the Appellant. The Appellant correctly identified the type of co-ownership of the property as that of bound co-ownership, and that is where any reliance on the *actio* ends.

² *Municipal Employees' Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others* [2020] ZASCA 116; [2020] 4 All SA 686 (SCA); 2022 (1) SA 137 (SCA). For the application of the principles in *MEPF* see also: *Kader v Modack and Another* [2023] ZAWCHC 183, *P.N v A.E* [2024] ZAWCHC 266, *K.A v A.E and Another* [2024] ZAWCHC 392.

[25] The basic principle underlying the termination of co-ownership was enunciated as follows in *Robson v Theron*.³

‘No co-owner is normally obliged to remain a co-owner against his will.’

[26] In paragraphs 45, 46, and 51 of *MEPF*, Wallis JA conducted an extensive overview of the distinction between free and bound co-ownership, explained the difference between the two and their legal consequences, as follows:

‘...Bound co-ownership is precisely the case where a co-owner is obliged to remain such against their will, unless and until the tie that creates the bound co-ownership has been severed.’⁴

‘...In summary therefore, I conclude, in accordance with the authorities discussed above, that the distinction between free and bound co-ownership is that in the former the co-ownership is the sole legal relationship between the co-owners, while in the latter there is a separate and distinct legal relationship between them of which the co-ownership is but one consequence. Co-ownership is not the primary or sole purpose of their relationship, which is governed by rules imposed by law, including statute, or determined by the parties themselves by way of binding agreements. The relationship is extrinsic to the co-ownership, but is not required to be exceptional.’⁵

‘...The common law is that the actio is always available in the case of free co-ownership and never available in bound co-ownership. In any particular case the question of the proper characterisation of the co-ownership arises at the outset. Only once it has been answered can one decide what the common law attributes of the co-ownership are.’⁶

[27] In paragraph 24 of the *MEPF* judgment, Wallis JA noted that a marriage in community of property imposes co-ownership upon the parties to the marriage:

³ *Robson v Theron* 1978 (1) SA 841 (A)

⁴ *MEPF* at para 45

⁵ *Id* para 46

⁶ *Id* para 51

‘...South Africa recognises various sources of extrinsic legal relationships giving rise to bound co-ownership. It may arise as a matter of law from the fact that the parties have entered into a particular relationship. An example of this is a marriage in community of property, where the common law, as varied by the Matrimonial Property Act 88 of 1984, imposes co-ownership upon the parties to the marriage.’⁷

[28] The Appellant and the First Respondent, who are married in community of property, are joint, bound co-owners of the property, which remains indivisible until the dissolution of their marriage by divorce or death. Where parties are married in community of property, they do not hold property in co-ownership in the ordinary, free, or unbound sense. Instead, they share a joint estate, which is a legal *universitas* managed jointly (or by one spouse with consent). Division of the joint estate is governed by the divorce process under the Divorce Act 70 of 1979, not common-law remedies. The married couple are allowed to alienate their belongings jointly, by agreement, and to seek the Court’s assistance in securing a disposal of communal assets if one party refuses to consent. That should not be confused with a right to terminate co-ownership of unbound property upon divorce or death. The remedy provided by the *actio communi dividundo* was accordingly not available to the Appellant, and its invocation in the application and this appeal as a prerequisite to applying the provisions of the Matrimonial Property Act, and references to the termination of co-ownership of the property and termination thereof, on this basis, are bad in law.

Section 16(1) of the Matrimonial Property Act

[29] Under section 15(2)(a) of the Matrimonial Property Act, a spouse married in community of property is not permitted to alienate or mortgage any immovable property forming part of the joint estate without the written consent

of the other spouse. Section 16(1) of the Matrimonial Property Act states that when a spouse withholds the required consent under section 15(2), a court may, on the application of the other spouse, grant permission for the spouse to enter into the transaction without the consent if it is satisfied that, in cases where consent is withheld, such withholding is unreasonable or, in other circumstances, that there is good reason to dispense with the consent. The Court *a quo* was correct in law when it confined its findings to section 16(1) of the Matrimonial Property Act. All that the Appellant needed to show was that the First Respondent's withholding of consent was unreasonable and that there was good reason to dispense with it.

[30] Section 15(2)(f) of the Matrimonial Property Act states that a spouse in a marriage in community of property is not permitted to enter into a credit agreement which is governed by the provisions of the National Credit Act without the written consent of the other spouse. Reinstating the loan agreement, which will bind the joint estate anew, thus requires the consent of both spouses.

The National Credit Act

[31] The loan and mortgage agreements entered into by the couple with the Second Respondent, which registered the mortgage bond over the property as security, constituted a credit agreement in terms of the NCA.⁸ Under section 129(3) of the National Credit Act, the Appellant and the First Respondent could, at any time before the Second Respondent cancelled the loan agreement, reinstate it by paying the Second Respondent all overdue amounts along with the permitted default charges and reasonable costs of enforcing the agreement

⁸ *Nkata v Firststrand Bank Limited and Others* [2016] ZACC 12; 2016 (4) SA 257 (CC) para 3,

up to the time of its reinstatement. The loan agreement was not reinstated by this means, nor was it even cancelled.

[32] Pursuant to section 129(4)(b), neither the First Respondent nor the Appellant was entitled to reinstate the credit agreement with the Second Respondent following the Court order enforcing it. The Court order dated 19 July 2023 mandated payment of the debt under the loan agreement and explicitly identified the property as subject to execution. The Registrar was duly authorised to attach and facilitate the sale of the property in satisfaction of the judgment, leading to its auction by the Sheriff. As the property remained unsold, section 129(4)(a) was not applicable. The record does not indicate that the Second Respondent terminated the credit agreement under section 129(4)(c). However, the available evidence demonstrates that the credit agreement was not eligible for reinstatement, as the requirements of section 129(4)(b) had been met.⁹

ERRORS AND MISDIRECTIONS

Bona Fide defence

[33] The Court *a quo* had to determine the Appellant's application within the context of the 19 July 2023 order and its consequences. This Court understands from the wording of the order that the First Respondent was represented when it was granted, and it was obtained with her consent, i.e., by agreement between the parties. She was thereafter barred by section 129(4)(b) from reinstating the credit agreement with the Second Respondent. Much of her answering affidavit

⁹ Id para 131. The circumstances in this matter are distinguishable as the Appellant in *Nkata* had reinstated the credit agreement.

and her argument before this Court concerned her attempts to reinstate the loan agreement, recount the relationship between the Appellant and herself that led to their default in making payments since 2021, and her efforts to preserve the property for her daughter. In pursuit of the foregoing, she did not provide an answer to the key allegations made by the Appellant in his founding affidavit. These included the correspondence between the Appellant's legal representatives and the First Respondent seeking her consent to sell the property privately, and the benefit that would accrue to the joint estate from a private sale.

[34] The Court *a quo*'s finding that the First Respondent had raised genuine and *bona fide* disputes of fact regarding the reasonableness of her refusal to consent to the sale of the property is not supported by the content of the First Respondent's answering affidavit. The First Respondent did not address the Appellant's allegations point by point, preferring to give her view of the matter without referencing the founding affidavit. She denied that the Appellant had sought or obtained her consent for the proposed private sale of the property. However, the correspondence attached to the founding affidavit and her response show that her denial was incorrect. She also failed to address the significant benefit that would arise for the joint estate from a private sale. Although it was irrelevant once the order of 19 July 2023 was granted, the First Respondent's alleged attempts to reinstate the loan agreement were unsubstantiated by any evidence. Furthermore, the First Respondent did not challenge any of the contemporaneous documentary evidence regarding the Appellant's efforts to obtain her consent for a private sale, nor the position of the Second Respondent as communicated by its attorney to the Appellant.

[35] A genuine and *bona fide* dispute of fact exists when the Court is satisfied that the party claiming to raise the dispute has, in her answering affidavit,

seriously and unambiguously addressed the fact said to be disputed. The Court *a quo* did not specify the disputes of fact apart from commenting on the four forms of abuse allegedly suffered by the First Respondent. The Appellant had not anticipated any disputes of fact, considering that the application arose from the need to protect the interests of the joint estate and to prevent it from being saddled with a financial burden where that could be avoided. The First Respondent had not disputed any of the material allegations in the Appellant's founding affidavit. Consequently, the Court *a quo* was constrained to accept the allegations in the founding affidavit as proved. The Court *a quo* erred in finding that the First Respondent had raised real, genuine, and *bona fide* disputes of fact regarding the reasonableness of her refusal to give consent to the sale of the property.

Evidentiary burden

[36] The Court *a quo* found that there was sworn evidence indicating that a payment plan under the relevant legislation (the NCA) had been requested. However, the First Respondent made unsubstantiated allegations without documentary proof that she had pursued the Second Respondent to develop a plan to bring the payments under the loan agreement up to date. Regarding the First Respondent's evidence, the Court *a quo* considered that a 'simple' letter addressing this matter in correspondence between unrelated parties was insufficient to constitute proof. The Court *a quo* was likely referring to the email exchanged between the attorneys of the Second Respondent and the Appellant, in which the Second Respondent's attorney reiterated their client's position concerning the reinstatement of the loan agreement.

[37] The Court *a quo* expected an affidavit from the Second Respondent confirming its position regarding any payment plan proposed by the First

Respondent. In motion proceedings, the party alleging a fact, in this case the First Respondent, bears the evidentiary burden to produce sufficient supporting evidence. The mere allegation by the First Respondent that a payment plan was requested under section 129(3) of the NCA without any substantiating documentary proof thereof, did not impose a duty on the applicant, the Appellant, to obtain an affidavit from a third party, the Second Respondent, to refute it. When a party such as the Appellant in this case presents credible documentary rebuttal, such as correspondence from the bank's attorney, the evidentiary burden is considered discharged. In the circumstances, the Court *a quo*'s finding that the Appellant bore the onus of proving the bank's refusal was procedurally flawed and inconsistent with the principles established in *Plascon-Evans*.¹⁰

[38] Where a respondent is cited but not implicated in the relief sought, and does not participate in the proceedings, there is no procedural obligation on that respondent to answer allegations that are bald, speculative, or irrelevant to the core dispute. In this case, the Second Respondent was not the subject of the relief sought and did not take part in the application. The First Respondent's unsubstantiated allegation concerning a proposed payment plan therefore did not impose any evidentiary or procedural obligation on the Second Respondent to respond. The evidentiary burden remained with the First Respondent, and her failure to meet it rendered the allegation insufficient to shift the burden of rebuttal to the Appellant or the Second Respondent. The Appellant correctly submitted that the Second Respondent was already in possession of a judgment authorising it to sell the property in execution. It had no interest in the outcome of the application, nor would it have unnecessarily expended resources under

¹⁰ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 620 (A)

the circumstances. The Court *a quo* erred in shifting the evidentiary burden from the First Respondent to the Appellant.

Prejudice to the joint estate

[39] The Appellant contended that the Court *a quo* failed to consider the prejudice to the joint estate if the property was sold for less than R990 000, particularly if it was sold for R500 000 to the highest bidder at the auction convened by the Sheriff of the Court. The Second Respondent had applied to the Court to review the minimum reserve price and set it at R500 000. The Court adjusted the minimum reserve price to R800 000 in December 2024. There was no indication that this minimum price would be achieved in an auction sale held by the Sheriff.

[40] On the date when the appeal was heard, we were informed by the Appellant's Counsel that the amount owing to the Second Respondent was R811,091.01, including legal costs of R87,258.62. A private sale of the property to the new purchaser would yield R990,000. A further amount of about R50,000 would need to be paid as commission to the estate agent for the private sale, leaving roughly R130,000 to be divided in the joint estate upon divorce.

[41] Extinguishing the debt and legal costs owed to the Second Respondent and making a profit in these circumstances is clearly advantageous for the joint estate, the parties' interest in the joint estate, and the best interests of their daughter. The Court *a quo* acknowledged these arguments but erred in failing to consider the prejudice to the joint estate if the property was sold at auction rather than privately.

Reinstatement of the loan agreement requires the Appellant's written consent.

[42] The Appellant also contends that the Court *a quo* failed to consider that reinstating the loan agreement securing the bond would activate the provisions of sections 15(2)(a) and (f) of the Matrimonial Property Act. As a result, the First Respondent could not reinstate the loan agreement without the Appellant's written consent. The First Respondent neither sought the Appellant's written consent nor applied to have his consent dispensed with under section 16(1) of the Matrimonial Property Act. The Appellant had already indicated that he would not give his consent to reinstate the loan agreement. Without the Appellant's consent, any effort by the First Respondent to reinstate the loan agreement would be futile. The Court *a quo* erred in this regard as well.

The First Respondent's submissions

[43] The First Respondent was unable to secure legal representation despite this Court providing her with leads she could pursue and urging her to do so when the hearing of this appeal had to be postponed on 25 April, and 30 May 2025. She argued the appeal without legal assistance. The Court recognises the detailed submissions made by the First Respondent in her argument and her determination to retain the property, even though the private sale offered an outcome advantageous to her and her daughter. She mentioned, among other things, her salary of R29 000 per month, her intention to obtain a R250 000 loan from an unnamed source to help her reduce the loan arrears, her offer to pay out the Appellant his share of the amount that would be realised in a private sale, the Second Respondent's reluctance to negotiate with her, unclear messages regarding a payment plan communicated by bank staff, her attempt to verify if the loan agreement had been cancelled, and who was responsible for opposing the application for default judgment.

[44] The First Respondent asked this Court to order the Second Respondent to accept her proposal for a payment plan and to reinstate the loan agreement. The First Respondent was advised that this is not the kind of order this Court can grant. She was further informed that the purpose of an appeal is to determine whether the Court *a quo* erred or misdirected itself on issues identified by the Appellant, and that it was not permitted to go beyond the record of proceedings in the Court *a quo* (except for new evidence properly presented to this Court). None of the issues raised by the First Respondent in argument were part of the record. The Court was unable to consider these issues or the documents the First Respondent sought to submit.

[45] In the final analysis, the Court remains convinced that the First Respondent, the joint estate, and the couple's daughter will be better off if the property is sold through private treaty. The First Respondent could request to have any blacklisting lifted and to start anew, securing a home for herself and her daughter without the burden of debt tightening around her. She did not present any significant submissions in the Court *a quo* or in this Court to justify her withholding of consent. On the contrary, the case presented by the Appellant was overwhelmingly persuasive, leading the Court to conclude that an order should be made dispensing with the First Respondent's consent for the private sale of the property. The appeal must therefore be upheld.

THE RELIEF SOUGHT BY THE APPELLANT

[46] The Appellant provided a draft order which specified the relief he requested, and should be granted on appeal. In the first place, the Appellant requested an order terminating the co-ownership of the property. For the reasons set out in this judgment, granting such an order would be inappropriate as the couple's marriage has not yet been dissolved. The correct order to make would

be to grant the Appellant leave to proceed with the transaction to alienate the property in accordance with standard conveyancing and Deeds Office procedures and dispensing with the First Respondent's consent for such alienation. The First Respondent will be ordered to sign the necessary documentation to facilitate the private sale of the property; failing that, the task will fall to the Sheriff of the Court. The order will also recognise, as the Appellant requested, the reserve price set by the Court in December 2024 and the purchase price offered by the new buyer.

[47] The Appellant requested that, once the sale proceeds are used to settle the debt owing on the loan agreement and related costs, including the Second Respondent's legal costs, transfer costs, and municipal arrears, they be divided equally between the Appellant and the First Respondent. Such an order is also inappropriate before the termination of the joint estate by divorce. The order should include a provision that if any proceeds remain after the private sale of the property, and the Appellant's costs of the application and this appeal are paid, the remaining funds, if any, should be held in the trust account of the Appellant's attorney pending the couple's divorce.

COSTS

[48] The Appellant requested an adverse cost order against the First Respondent. A costs order between spouses married in community of property is not enforceable in the usual way, as it would mean one half of the estate paying the other half. The Court retains the discretion to award costs against a spouse who conducts litigation unreasonably. The Appellant's legal costs in the application and this appeal will be paid from the proceeds of the private sale of the property once all other expenses related to the sale are settled. If the

couple's marriage ends (e.g., divorce), the Appellant may enforce the costs order against the First Respondent's share of the estate during division.

CONCLUSION

[49] The Appellant unsuccessfully applied in the Court *a quo* to enter into a private transaction to alienate the property jointly owned by the couple under their marital regime. He has succeeded on appeal. The Court *a quo* erred in accepting that the First Respondent's withholding of consent for the private sale of the property was reasonable and that the Appellant did not provide good reason to dispense with her consent. In the premises, I propose the following order.

ORDER

1. The Appellant's application to adduce further evidence on appeal is granted.
2. The appeal is upheld, and the order of the Court *a quo* is set aside and replaced with the following order:
 - 2.1 The Applicant is granted leave under section 16(1) of the Matrimonial Property Act, 88 of 1984, to enter into a transaction to alienate, i.e., to sell the property described as erf 1[...] (held under deed of title T[...]), Strand, also known as 3[...] R[...] Street, Rusthof, Strand ('the property').
 - 2.2 The First Respondent is directed to take all such steps and sign all such documentation (including but not limited to the deed of sale) as may be required, in law, to ensure that the property is sold, transferred to and registered in the name of any *bona fide* purchaser who offers to purchase it at a price exceeding the reserve price of R800 000 as set by the Western Cape High Court on 13 December 2024), currently being Paxar Trading (Pty) Ltd which has offered to purchase the property for R990 000 (nine hundred and ninety thousand rand).
 - 2.3 If the First Respondent should fail, neglect, or refuse to comply with paragraph 2.2 above within five (5) business days of being requested to do

so in writing (and such failure, neglect, and/or refusal is confirmed on oath by the conveyancer), the Sheriff of the High Court, Strand (i.e., the Third Respondent) is hereby authorised and directed to do such things and sign such documentation as may be necessary to give effect to the order in terms of paragraph 2.2 above.

- 2.4 The costs of the application (including the costs of Counsel on Scale A) shall be paid on a party and party basis from the net proceeds of the sale after the balance outstanding on the bond registered over the property, the bond cancellation costs, the Second Respondent's legal fees, the costs incurred to obtain the necessary certificates of compliance to pass transfer, municipal rates, taxes, and/or service charges, the estate agent's commission, and any other expenses as may be necessary to be incurred to secure the transfer of the property as provided for in paragraph 2.2 above are paid.
- 2.5 Should there be any remaining funds, they are to be transferred to and held in the trust account of the Appellant's attorney pending the division, if any, of the joint estate. To the extent that the net proceeds of the sale are insufficient to pay the costs of the application, they shall be paid from the First Respondent's equitable share of the joint estate upon division.
3. First Respondent shall be liable for the costs of the appeal including the costs of Counsel on Scale A, and shall be recovered in whole or in part, as the case may be, from the First Respondent's equitable share of the joint estate upon division.

A BHOOPCHAND
Acting Judge of the High Court

I agree, and it is so ordered.

M SHER

Judge of the High Court

I agree,

N MANGCU-LOCKWOOD

Judge of the High Court

Appearances:

Appellant's Counsel: H Beviss-Challinor

Appellant's attorneys: Beviss-Challinor Attorneys

First Respondent: In person