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

JUDGMENT

Case No: 50/2024

In the matter between:

B[...] P[...] M[...] **APPLICANT**

and

J[...] K[...] **RESPONDENT**

Coram: Khoza AJ
Heard on: 14 July 2025
Delivered on: 25 February 2026

Summary: Marriage in community of property – immovable property forming part of joint estate – alleged agreement for acquisition of former spouse's undivided half-share – non-compliance with section 2(1) of the Alienation of Land Act 68 of 1981 – alleged agreement void – parties remain co-owners – termination of co-ownership –

sale of property ordered – equitable allocation of municipal liabilities between the parties.

ORDER

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1. It is declared that the respondent did not lawfully acquire the applicant's undivided half-share in the immovable property situated at Erf 4[…], Eersterivier, and that the parties remain co-owners thereof in equal undivided shares.
2. The parties' co-ownership of the property is terminated.
3. The property shall be sold on the open market at a market-related price by an estate agent to be agreed upon between the parties within 15 (fifteen) days of this order, failing which the estate agent shall be appointed by the Chairperson for the time of the Cape Town Attorneys' Association on written request by either party.
4. The estate agent is authorised to market and sell the property at the best obtainable price, subject to confirmation by both parties, which confirmation shall not be unreasonably withheld.
5. In the event of a dispute regarding the acceptance of an offer, either party may approach this Court on the same papers, duly supplemented, for appropriate relief.
6. The respondent shall grant the estate agent reasonable access to the property for purposes of valuation, marketing, and effecting a sale.
7. Pending transfer of the property,
    a. The respondent, as the party in sole occupation since the divorce, shall be solely liable (as between the parties) for all municipal rates, taxes, service charges and utilities accruing from the date of the divorce to date of transfer;
    b. The respondent shall indemnify the applicant against any claim by the relevant municipality arising from such charges;

c. The respondent shall, within 30 (thirty) days of this order, take all reasonable steps to engage the municipality with a view to determining the full extent of the outstanding municipal indebtedness and to prevent further escalation thereof, including the conclusion of any reasonable payment arrangement pending transfer.

8. From the proceeds of the sale:
   a. The reasonable costs of the sale, including estate agent's commission and conveyancing fees, shall be paid;
   b. Any outstanding municipal charges and amounts required to procure a rates clearance certificate shall be paid; and
   c. To the extent that any portion of the municipal debt relates to the period of the respondent's sole occupation after divorce, such portion shall be debited solely against the respondent's share of the net proceeds.
9. In the event that the net proceeds are insufficient to discharge the outstanding municipal indebtedness, the respondent shall be liable for any shortfall attributable to the period of his sole occupation after divorce and shall indemnify the applicant in respect thereof.
10. Paragraphs 7 to 9 of this order regulate the rights and obligations of the parties as between themselves and do not affect the rights of the relevant municipality arising from any judgment obtained against both parties.
11. Each party shall sign all documents and do all things necessary to give effect to this order. Failing compliance within 7 (seven) days of written demand, the Sheriff of this Court is authorised to sign such documents on behalf of the defaulting party.
12. The respondent shall pay the costs of this application, including counsel's fees on Scale B.

JUDGMENT

Khoza AJ

Introduction

[1] This application concerns the status of immovable property forming part of the parties' former joint estate, the alleged acquisition of one party's undivided share following divorce, and the consequences that flow therefrom.

[2] The applicant seeks an order directing that the immovable property situated at Erf 4[…], Eersterivier, more fully described as […] O[…] Road, Stratford Green, Eersterivier ("the property"), be sold on the open market and that the net proceeds be divided equally between the parties. The relief is framed as one giving effect to the decree of divorce granted on 13 January 2010, in terms of which the parties' marriage in community of property was dissolved and the joint estate, which included the immovable property, was to be divided equally.

[3] The respondent opposes the application on the basis that he has already lawfully acquired the applicant's undivided half share in the property and that the parties' co-ownership has accordingly terminated.

Factual background

[4] It is common cause that the parties were married to one another in community of property. On 13 January 2010, a decree of divorce was granted, dissolving the marriage. The property formed part of the joint estate. The divorce order contemplated that the joint estate be divided and that the immovable property be sold, with the proceeds to be divided equally between the parties. Notwithstanding the divorce order, the property was never sold on the open market. The title deed remains registered in the names of both parties.

[5] During the period between 2015 and 2016, correspondence was exchanged between the parties' respective erstwhile attorneys concerning a possible settlement of the division of the property. The respondent contends that an agreement was reached in terms of which he would acquire the applicant's undivided half-share for a sum initially proposed at R30 000.00 and later agreed at approximately R33 229.00.

[6] The respondent avers that he paid the agreed amount by instalments and that the full amount was paid by 2016. The applicant disputes that any valid sale of her half-share was concluded and denies that the respondent lawfully acquired her interest in the property.

[7] It is common cause that no transfer of the applicant's share was registered and that no endorsement of the title deed took place. The property remains jointly registered.

[8] The property has been occupied by the respondent since the parties' separation. Municipal charges and rates have accumulated over time, and both parties are reflected as liable for such charges by virtue of their continued joint ownership and registration. The applicant contends that the failure to effect a lawful division of the property had resulted in ongoing prejudice to her, including exposure to escalating municipal debt.

The parties' submissions

The applicant's case

[9] The applicant contends that she remains a co-owner of the property and that the respondent had not validly acquired her undivided half share. She submits that the divorce decree required the sale of the property and division of the proceeds equally between the parties, and that the respondent has taken no steps to rescind or vary that order. Although the respondent initially disputed that he had been served with the divorce order, that contention was abandoned at the hearing of this application.

[10] Contrary to the respondent's allegation, the applicant disputes that any binding agreement of sale was concluded. She relies on the absence of a written deed of alienation in compliance with section 2(1) of the Alienation of Land Act 68 of 1981 ("the Alienation of Land Act"). She submits that any alleged "buy-out" of her share by the respondent is legally invalid.

[11] The applicant also submits that the correspondence exchanged between attorneys did not constitute a binding contract of sale and, in any event, the measures proposed in that correspondence were not complied with in the manner contemplated by the aforesaid statutory provision. She contends that the respondent produced no proof of payment in accordance with the alleged terms of the agreement of sale.

[12] Further, the applicant emphasises that she continues to suffer prejudice because of the property remaining jointly registered, including exposure to substantial municipal charges. She submits that the only practical means of giving effect to the divorce order and terminating the ongoing prejudice is for the property to be sold on the open market and the proceeds divided equally between the parties.

[13] On costs, the applicant contends that the respondent's opposition has been unreasonable and that a punitive costs order is warranted.

The respondent's case

[14] At the hearing, the respondent abandoned reliance on two defences initially raised in the answering affidavit, namely that he had not been served with the divorce summons or decree, and that the applicant did not contribute to the upkeep of the property.

[15] The respondent submits that the matter turns on a single issue: whether he lawfully acquired the applicant's half share in the property pursuant to an agreement reached between the parties. He contends that settlement negotiations culminated in an agreement that he would acquire the applicant's share for R33 229.00, which amount he had paid in full by 2016. He argues that the applicant did not squarely deny receipt of the monies and that her challenge is confined to the alleged absence of proof of payment.

[16] The respondent further submits that the Alienation of Land Act does not apply in the present circumstances. He argues that the division of the parties' proprietary relationship is governed by the divorce order and that it was unnecessary to conclude a separate deed of alienation in order to give effect to that order.

[17] In this respect, the respondent relies on section 45 of the Deeds Registries Act and contends that endorsement in terms of that provision is the appropriate mechanism to reflect the acquisition of a former spouse's share following divorce. He submits that section 45, read with section 16 of that Act, obviates the need for a conventional deed of sale between the parties.

[18] In the alternative, should the Court grant an order directing the sale of the property, the respondent submits that there is no basis to direct that he bears all transfer-related costs, and that such costs should be borne jointly or from the proceeds of the sale. The respondent opposes a punitive costs order.

The issue to be determined

[19] This case turns on a single issue: whether the respondent lawfully acquired the applicant's undivided half-share in the property following the divorce.

[20] If the respondent did lawfully acquire the applicant's share, the parties' co-ownership has terminated, and the applicant is not entitled to an order directing the sale of the property. However, if the respondent did not lawfully acquire the applicant's share, the parties remain co-owners. In that event, the applicant is entitled to seek termination of the co-ownership, including by way of an order directing that the property be sold and the proceeds divided.

Legal principles

[21] It is trite that, upon a marriage in community of property, the spouses become co-owners in equal undivided shares of the assets forming part of the joint estate. Upon divorce, the joint estate falls to be divided equally unless otherwise ordered.

[22] It is equally well-established that no co-owner may ordinarily be compelled to remain in co-ownership against his or her will. Where co-owners cannot agree on the manner of division, the law recognises the *actio communi dividundo*, in terms of which a co-owner may seek termination of co-ownership.

[23] The underlying rationale, as expressed in the matter of *Robson v Theron* 1978 (1) SA 841 (A) at 855A in that every co-owner of property may demand partition of the property at any time. In determining the appropriate mode of division, a court enjoys a wide equitable discretion, including the power to order that the property be sold and the proceeds divided between the co-owners (*Estate Rother v Estate Sandig* 1943 AD 47 at 53).

[24] Section 2(1) of the Alienation of Land Act provides:

> "No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority".

[25] Section 1 defines "alienate" in relation to land as:

> "sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and alienation has a corresponding meaning."

[26] The statutory scheme thus requires that an alienation of an undivided share in immovable property be reduced to writing and signed as prescribed.

[27] Ownership in law is conveyed by registration in a deeds registry in terms of section 16 of the Deeds Registries Act 47 of 1947, save as otherwise provided in that Act or in any other law. Section 45 *bis* of the Deeds Registries Act makes provision for the endorsement of title deeds in certain circumstances following divorce and division of the joint estate.

[28] It is against this legal framework that the respondent's alleged acquisition of the applicant's undivided half-share in the property falls to be considered.

Preliminary points

[29] The respondent's opposition to this application is founded on the contention that, following the divorce, the parties concluded an agreement in terms of which he purchased the applicant's undivided half-share for an agreed amount, which (he avers) was paid in full by 2016. Before dealing with this legal issue, it is necessary to address two preliminary points.

[30] It is common cause on the papers that an amount of R33 229.00 was paid to the applicant. The applicant does not unequivocally deny receipt of that amount. Her challenge in the affidavits is directed primarily at the absence of proof of payment in accordance with the alleged settlement terms and at the absence of a written agreement.

[31] During the hearing, counsel for the applicant submitted from the bar that the amount in question was paid in respect of arrear maintenance rather than as consideration for the purchase of the applicant's undivided half-share in the property. This was, however, not pleaded in the affidavits. No evidence was produced to support the existence of arrear maintenance or to establish that the amount was paid in discharge of such an obligation.

[32] It is trite that a party must stand or fall by its papers. A factual dispute advanced from the bar, which finds no support in the affidavits, cannot create a genuine dispute of fact. The submission that the amount related to arrear maintenance accordingly carries no evidential weight.

[33] The material placed before the Court reflects that negotiations took place between the parties' respective attorneys regarding the purported buy-out of the applicant's half-share and that specific amounts were proposed and discussed. The

amount of R33 229.00 corresponds with the figure reflected in the correspondence exchanged between the attorneys.

[34] However, it is not necessary to determine the matter on that factual basis. Even if I were to accept, for purposes of this analysis, that the amount of R33 229.00 was paid pursuant to the alleged agreement for the sale of the applicant's half-share, the decisive question remains whether such arrangement constituted a valid alienation of land as contemplated in section 2(1) of the Alienation of Land Act.

[35] The second issue relates to the contention by the respondent that the applicant did not plead a specific section of the Alienation of Land Act with which the alleged transaction failed to comply, and that this omission deprived the respondent of the opportunity to answer.

[36] This submission cannot be sustained. The validity of a purported alienation of land is governed by statute. The issue is one of law arising from the facts placed before the Court. A party's failure to refer to a specific statutory provision does not preclude the Court from applying the correct legal principles.

[37] The respondent also relies on the definition of "contract" in the Alienation of Land Act, which refers to a deed of alienation under which land is sold against payment of an amount of money in more than two instalments over a period exceeding one year. That definition relates specifically to instalment sale agreements regulated by the Act.

[38] The formal requirement in section 2(1) of the Alienation of Land Act applies to any alienation of land, irrespective of whether payment is made in instalments or in a lump sum. The question whether the purchase price was payable over more than one year is not determinative of the application of section 2(1). More particularly, the question is whether the arrangement relied upon by the respondent constituted a valid alienation of land in compliance with section 2(1).

Analysis of the decisive issue

[39] The starting point is the proper characterisation of the arrangement relied upon by the respondent. On his own version, the parties agreed that he would acquire the applicant's undivided half-share in the immovable property in exchange for payment of an agreed amount. In substance, this constitutes a sale of an undivided share in land. An undivided share in land falls squarely within the definition of land in section 1 of the Alienation of Land Act.

[40] Section 2(1) provides that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority. This requirement is peremptory.

[41] The consequence of non-compliance with section 2(1) is settled. An agreement which does not comply with the prescribed formalities of that provision is of no force or effect, it is *void ab initio* and cannot confer a right of action. This position was authoritatively decided in *Johnston v Leal* 1980 (3) SA 927 (A) at 939A and was subsequently confirmed by the SCA in *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 (2) SA 400 (SCA) at para 6.

[42] In this case, the respondent does not rely on a deed of alienation signed by the parties recording the alleged sale of the applicant's undivided half-share. He relies on correspondence exchanged between the parties' respective attorneys, including communication marked "without prejudice", and references to proposed settlement terms. No written agreement signed by or on behalf of the parties embodying the material terms of a sale of the applicant's half-share has been produced.

[43] Even if I were to accept, for purposes of this analysis, that a consensus was reached on the purchase price and that the amount was indeed paid pursuant thereto, the statutory requirement remains that the alienation be contained in a deed of alienation signed as prescribed in section 2(1) of the Alienation of Land Act. In the absence of such compliance, the alleged agreement cannot have legal force.

[44] It follows that the respondent's reliance on section 45*bis* of the Deeds Registries Act does not avail him. That provision regulates the endorsement of title deeds in circumstances where one spouse has lawfully acquired the share of the other following divorce and division of the joint estate. It provides a procedural mechanism to record an acquisition in the deeds registry. It does not dispense with, nor override, the statutory requirements governing the validity of an alienation of land.

[45] Section 45*bis* of the Deeds Registries Act presupposes that one spouse has lawfully acquired the share of the other. In the absence of a valid deed of alienation complying with section 2(1) of the Alienation of Land Act, there is no lawful acquisition capable of endorsement. It follows that the respondent did not acquire the applicant's undivided half-share in the property, and he cannot do so simply by endorsement of the title deed under the Deed Registries Act.

[46] Accordingly, the parties remain co-owners of the property in equal undivided shares. The applicant is entitled to seek termination of the co-ownership and implementation of the division of the joint estate as contemplated in the divorce order.

Further relief sought by the applicant

[47] I now deal with two further aspects of the relief sought. The first is an order that the property be placed on the open market at a price as close as possible to R900 000.00, being the market value as at November 2023, in terms of the valuation report placed before me. That valuation is now more than 2 (two) years old. In the circumstance where property values are subject to fluctuation and where a considerable period has lapsed since then, it would not be appropriate to fix a judicially prescribed sale price based on outdated information. It is preferable that the property be sold at a market-related price determined at the time of sale.

[48] The second relief concerns the applicant's requests for a punitive costs order against the respondent. Such orders are reserved for exceptional circumstances, including instances of mala fides, dishonesty, vexatious conduct or abuse of process. While the respondent's defence has not succeeded, I am not persuaded that his conduct meets the high threshold required for a punitive costs order. The dispute turned largely on legal interpretation. In the circumstances, an order for costs on the ordinary party and party scale is appropriate.

Order

[49] In light of the above findings, the following order is made.

1. It is declared that the respondent did not lawfully acquire the applicant's undivided half-share in the immovable property situated at Erf 4[…], Eersterivier, and that the parties remain co-owners thereof in equal undivided shares.
2. The parties' co-ownership of the property is terminated.
3. The property shall be sold on the open market at a market-related price by an estate agent to be agreed upon between the parties within 15 (fifteen) days of this order, failing which the estate agent shall be appointed by the Chairperson for the time of the Cape Town Attorneys' Association on written request by either party.
4. The estate agent is authorised to market and sell the property at the best obtainable price, subject to confirmation by both parties, which confirmation shall not be unreasonably withheld.
5. In the event of a dispute regarding the acceptance of an offer, either party may approach this Court on the same papers, duly supplemented, for appropriate relief.
6. The respondent shall grant the estate agent reasonable access to the property for purposes of valuation, marketing and effecting a sale.
7. Pending transfer of the property,
    a. The respondent, as the party in sole occupation since the divorce, shall be solely liable (as between the parties) for all municipal rates, taxes, service charges and utilities accruing from the date of the divorce to the date of transfer;

b. The respondent shall indemnify the applicant against any claim by the relevant municipality arising from such charges;

c. The respondent shall, within 30 (thirty) days of this order, take all reasonable steps to engage the municipality with a view to determining the full extent of the outstanding municipal indebtedness and to prevent further escalation thereof, including the conclusion of any reasonable payment arrangement pending transfer.

8. From the proceeds of the sale:

   a. The reasonable costs of the sale, including estate agent's commission and conveyancing fees, shall be paid;

   b. Any outstanding municipal charges and amounts required to procure a rates clearance certificate shall be paid; and

   c. To the extent that any portion of the municipal debt relates to the period of the respondent's sole occupation after divorce, such portion shall be debited solely against the respondent's share of the net proceeds.

9. In the event that the net proceeds are insufficient to discharge the outstanding municipal indebtedness, the respondent shall be liable for any shortfall attributable to the period of his sole occupation after divorce and shall indemnify the applicant in respect thereof.

10. Paragraphs 7 to 9 of this order regulate the rights and obligations of the parties as between themselves and do not affect the rights of the relevant municipality arising from any judgment obtained against both parties.

11. Each party shall sign all documents and do all things necessary to give effect to this order. Failing compliance within 7 (seven) days of written demand, the Sheriff of this Court is authorised to sign such documents on behalf of the defaulting party.

12. The respondent shall pay the costs of this application, including counsel's fees on Scale B.

GSS KHOZA

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the applicant:	Adv E R Mentoor II
Instructed by:	Borchards Attorneys Incorporated
Counsel for the respondent:	Adv L Matiso
Instructed by:	Gqada Nyongo Attorneys Incorporated