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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2025-157715

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVIEWED: YES/NO

06 March 2026
DATE

SIGNATURE

In the matter between:

T[...] M[...] N[...]

Applicant

And

Y[...] N[...]

Respondent

JUDGMENT

Vosloo De Witt AJ:

Order

[1] In this matter I make the following order:

1. *The Applicant and the First Respondent's joint ownership in the immovable property situated at Unit [...], The J[...], 1[...] J[...] Avenue, M[...] E[...], Johannesburg ("the Immovable Property") be terminated in the*

following manner:

1.1 *That the Applicant and the Respondent shall, within 5 (five) days of this order, each appoint a reputable estate agent operating within the area of the Immovable Property in order that they may each obtain a valuation of the Immovable Property;*

1.2 *That the Applicant and the Respondent shall accept the average of the two valuations obtained by each of them from the aforesaid estate agents as the reasonable market value of the Immovable Property;*

1.3 *That the Immovable Property shall be offered for sale on the open market within 1 (one) month of the date of this order, at the above*

determined reasonable market value and that the Applicant and the Respondent shall be both entitled to market the Immovable Property;

1.4 *In the event that the Immovable Property is not sold within 4 (four) months of the date of this order at a price higher than or equal to the reasonable market value referred to above, that the Immovable Property is sold by public auction to the highest bidder;*

1.5 *That the Respondent be ordered to co-operate with the sale of the Immovable Property in terms of this order, including, but not limited to, providing access to the Immovable Property at all reasonable times to estate agents and prospective purchasers for viewing purposes;*

1.6 *the Applicant and the Respondent shall sign all such documents and take all steps as required in order to conclude the sale agreement and to effect transfer of each of their undivided shares of the Immovable Property into the purchaser's name. In the event that either of the parties fail to sign such documents on request, the Sheriff*

of the High Court in whose jurisdictional area the Immovable Property is situated shall be entitled to sign such documents or take such steps on such party's behalf;

1.7 Applicant and the Respondent shall each be entitled to payment of the net proceeds from the sale of the Immovable Property in equal shares upon the registration of transfer into the name of the purchaser and that a receiver or a liquidator is appointed to monitor the distribution of the proceeds of the sale in terms of any order made, should this be required by the above Honourable Court.

1.8 That the net proceeds shall be the selling price of the Immovable Property, less the total of the following expenses incurred, namely:

1.8.1. the commission due to the estate agent who was the effective cause of the sale, alternatively, should the property be sold on public auction, the auction fees payable in terms of the sale;

1.8.2. the costs of obtaining any compliance certificates in terms of the Immovable Property, including any electrical and/or gas compliance certificates;

1.8.3. the costs of obtaining a rates clearance certificate;

1.8.4. any other costs (of whatsoever nature) necessary or required to in order to successfully conclude the sale of the Immovable Property.

1.9. The Applicant may appoint the conveyancer in order successfully to conclude the sale of the Immovable Property; and

1.10. The Respondent shall pay the costs of this application on the party and party scale B, which costs can be deducted from any sum to be paid to the Respondent from the proceeds of the sale of the Immovable Property.

[2] The reasons for the order follow below.

Introduction

- [3] This is an opposed application in terms of which the Applicant seeks an order under the *actio communi dividundo*.
- [4] The applicant and the respondent were previously married and were divorced on the 2nd of March 2022 in the Gauteng Division, Pretoria High Court.
- [5] From the marriage there are two minor children born currently aged 6 years and 11 months.
- [6] The parties entered into a written agreement of settlement, which agreement was made an order of court.
- [7] In terms of the settlement agreement the Respondent and the minor children, who were in her primary care, remained in occupation of the former matrimonial home; and
- [8] The settlement agreement stated in clause 9.1 that the property was bought as the parties primary residence and matrimonial home. It further made provision in clause 9.5 that the Respondent would continue to reside in the property and that the applicant would be responsible for the payments towards the property "*for as long as the plaintiff and the minor children reside in the immovable property and such payments are made as part of the defendant's maintenance obligations to the plaintiff and the minor children*".
- [9] The present application arises from a variation of the primary care arrangements, in terms of which the minor children were placed in the primary care of the Applicant during 2025.
- [10] The Applicants and Respondents representatives filed heads of argument which were quite helpful to the court.

[11] Argument advanced by Ms Bezuidenhout for the Applicant were that the parties were free co-owners of the property. It was further argued that the circumstances under which the Respondent remained in the abovementioned property have changed since the minor children were placed in his primary care in 2025, when a variation to the settlement agreement was ordered, and there for the change in the primary residence is not an interim status.

[12] The Applicant made several attempts to negotiate termination of the ownership of the property in question while the Respondent vacillates between agreement and disagreement. This is evident from various correspondences, the latest being an email dated 18 February 2026 wherein the Respondent states "*I have some viewings this evening with potential buyers after work for them.*"

[13] The Applicant states that no "locked-in" co- ownership has been created under the settlement agreement and consequently he seeks an order terminating the joint-ownership.

[14] The Respondents rely on a *pactum de non dividundo*.

[15] Mr van der Merwe for the Respondent stated that there is a difference between bound or free co-ownership and that the settlement agreement reached between the parties created a bound co-ownership.

[16] Counsel for the Respondent argued that when the parties purchased the property that it would become and remain the children's "*habitual and primary residence for many years*" and therefor that the parties agreed that their co-ownership could only come to an end by mutual agreement and after consulting the children on such termination.

- [17] The respondents also referred to the settlement agreement and argued that the property was purchased while the parties were married as a home for the minor children and that the parties are in fact in a bound co-ownership.

Analysis

- [18] Considering the submissions by counsel for both parties. The undisputed fact that is that the property was purchased as the matrimonial home, nothing in the settlement agreement prevents the selling of the property or specifically indicates an agreement to bound-co-ownership. The marriage relationship between the parties (which was one out of community of property with the accrual) came to an end on the 2nd of March 2022 and therefor the argument by the Respondent that the parties are bound co-owners of the property stand to be rejected by the court.
- [19] The minor children no longer reside in the property as the settlement agreement upon which the Respondent relies has been varied by the court and the primary care and residence of the children have now been placed with the Applicant.
- [20] The settlement agreement specifically stated that the applicant would be responsible for the payments towards the property "for as long as the plaintiff and the minor children reside in the immovable property and such payments are made as part of the defendant's maintenance obligations to the plaintiff and the minor children". The minor children are now in his care.
- [21] The *actio communi dividundo* is the common law remedy for the termination of joint ownership in property. No co-owner is normally obliged to remain a co-owner against his or her will. The action is available for the division of joint property where co-owners cannot agree, and may be brought by a co-owner irrespective whether co-owners possess the joint

property jointly or any one is in possession. This Court has a wide equitable discretion in making a division of joint property.

[22] The *actio communi dividundo* does not apply where bound co-ownership exists.

[23] “Bound” co-ownership, by contrast, arises where the shared property is tied to another underlying legal relationship, such as marriage in community of property, a universal partnership or a contractual agreement restricting division.

[24] The Respondent contends that such restriction exists in the present matter in the form of a *pactum de non dividundo* contained in the settlement agreement.

[25] For the *pactum de non dividundo* to be enforceable, the intention of the parties to restrict the termination of co-ownership must be clear and unequivocal.

[26] A *pactum de non dividundo* will not readily be inferred and must appear either expressly or by the necessary implication from the agreement.

[27] The relationship between the parties came to an end when the divorce was granted. The settlement agreement regulated the relationship between the parties in so far as it related to the property in question. In *PN v AE* 2024 JDR 3989 (WCC) and *Kader v Modack* 2023 JDR 4592 (WCC), the courts emphasised that co-ownership between spouses or partners cannot necessarily be unravelled independently of those relationships.

[28] I am not convinced by the Respondents argument that the settlement agreement is “cast in stone” nor that bound co-ownership came into existence as a result thereof.

[29] It is undisputed that the settlement agreement has been varied by the court to place the children in the Applicants primary care.

[30] The starting point must be the wording of the settlement agreement itself.

Upon plain reading of the settlement agreement I cannot find that the parties intention was to create a bound co-ownership.

[31] In my view the agreement regulates occupation and maintenance not ownership. It cannot be interpreted as creating a *pactum de non dividundo*.

[32] Co-ownership is not a permanent state of affairs. The Supreme Court of Appeal in *Robson v Theron* 1978 (1) SA 841 (A) affirmed the principle that “no co-owner is normally obliged to remain such against his will.” This foundational rule underpins the *actio communi dividundo*. It provides a co-owner with a legal mechanism to compel division of the jointly owned property when agreement cannot be reached.

[33] The continued joint ownership of the property has become a source of ongoing conflict between the parties.

[34] It would be inequitable to compel the applicant to remain indefinitely bound to co-ownership of the property in circumstances where the underlying basis for such arrangement has ceased to exist.

[35] The most practical and equitable solution is there for the sale of the property and the division of the proceeds.

[36] In the matter *Erasmus v Pienaar* 1984 (4) SA 9 (T) it was confirmed that the court has a wide equitable discretion when ordering division.

[37] The Respondent opposed the application on the basis that a *pactum de non dividundo* existed.

[38] Having considered the submissions of the parties, I am satisfied that the Applicant has been substantially successful.

[39] There is no reason why costs should not follow the result.

Conclusion

[40] For the reasons above I grant the order as set out above.

A Vosloo –De Witt

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **6 March 2026**

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DATE OF ARGUMENT:	02 March 2025
DATE OF JUDGMENT:	06 March 2025