

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

CASE NO: 36581/2020

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE: 21/02/2023

In the matter between:

D[....]1 S[....]1 L[....] A[....]

Applicant

(Born Clarke ID [....])

And

D[....]2 [....]2 P[....] J[....]

First Respondent

(ID [....])

FIRST NATIONAL BANK

Second Respondent

JUDGMENT

MAKUME, J:

[1] This is an application in terms of the principles of *Actio Communi dividundo*. The Applicant and the Respondent are married out of community of property with exclusion of the accrual system.

[2] They are in the process of a divorce. During their marriage they acquired property in Greenstone Modderfontein jointly. A bond is registered over that property in favour of the second Respondent FNB.

[3] The Applicant seeks an order terminating the joint ownership of the property with the Respondent and that the property be sold either by private treaty or by Public auction. The Respondent lives on the property on which there are or has been tenants.

[4] The Applicant was until recently employed as an operations manager at First National Bank. She resigned in April 2022 and was paid out her pension benefits in the amount of R1.5 million.

[5] The parties are agreeable that the joint ownership be terminated and that the property be sold. It is only the terms and condition that the parties do not agree on.

[6] It has also been brought to the attention of Court that the second Respondent has foreclosed on the Bond Account and obtained an order declaring the property specially executable. There is also a judgment by the Home Owners Association for arrear levies

THE DISPUTE

[7] It is common cause that the first Respondent in his Answering Affidavit is agreeable and consents to all the issues prayed for by the Applicant save for the prayer of the Applicants in the notice of motion which reads as follows:

“Directing that for as long as the first Respondent retains the sole use (with or without a tenant) occupation and benefits of the property, the first Respondent is to timeously pay all applicable municipal, water and other charges, costs and amounts relating to or associated with the property as well as amounts payable in terms of *inter alia* any contractual obligation, until such time as the first Respondent no longer has the sole use occupation and benefit of the property, alternatively those expenses if paid by the Applicants are to be reimbursed to the Applicant upon transfer of the said property.”

[8] The dispute has accordingly been narrowed. What the first Respondent says is that he should be allowed to live on the property for free and enjoy occupation at the expense of the joint asset. This cannot be correct.

[9] There is evidence that when the Applicant was still living on the property with the first Respondent the rates and taxes including bond repayments were paid out of the rental received from tenants.

[10] There is also evidence to the effect that the Respondent has been obstructive in allowing for the property to be marketed for sale since the Applicant vacated. He has also not made any attempt to rent out the flats to enable him to be able to pay the bond and other expenses related to the property.

[11] He is enjoying occupation of a large property and should pay for such stay. The Applicant is paying for her own living where she is and it is only fair that he should pay. In the result I make the following order:

ORDER

1. The co ownership of the Applicant and the first Respondent in respect of the immovable property situated at [...] B[...] C[...]. Waterstone Park, Greenstone Hill, Johannesburg, being Portion E1, Stand 0001793 ("the property") is hereby terminated.

2. The property is to be sold on the open market for the amount of not less than R3,200 000.00 (Three Million and Two Hundred Thousand Rand) The advert advertising such sale shall be visible for 3 months from date of this order being served on the first Respondent.

3. The costs relating to or associated with the property (bond, levies, rates, taxes, water and electricity) are to be shared equally between the Applicant and the first Respondent during the first three (3) months that the property is placed on the open market.

4. If after three (3) months the property being on the open market it has not been sold, then the flats on the property must be rented out and the property must remain on the open market for a reduced amount after consideration by attorneys Wilsenach van Wyk Goosen & Bekker and consultation with Estate Agents until the property is in.

5. The net proceeds received in respect of the sale of the property shall be kept in an interest bearing account with Wilsenach van Wyk Goosen & Bekker for the benefit of the Applicant and the Respondent pending the final determination of the divorce action between the parties.

6. Messrs Wilsenach van Wyk Goosen & Bekker Attorneys are hereby granted the authority to direct and effect the sale and disposal of the property including the power and authority to solely negotiate and agree on the terms and conditions for the sale of the property.

7. The Applicant and the first Respondent shall co-operate fully in respect of the marketing, sale and disposal of the property, by signing all the necessary documents to give effect to the sale of the property and renting out the flats on the property.

8. Pending registration and transfer of the property into such purchaser's name, that Wilsenach van Wyk Goosen & Bekker Attorneys, are empowered and authorised to administer the property, including the power and authority to let out

the property on such terms and conditions as it may determine, and to receive the monthly rental income in respect of the flats on the property in its trust account, to distribute the rental income towards the costs of the property (bond, levies, rates and taxes, water and electricity).

9. Any shortfall in respect of the monthly costs associated with the property will be shared equally between the Applicant and the first Respondent and any surplus in respect of the rental income of the property must be kept on trust at Wilsenach van Wyk Goosen & Bekker Attorneys until the final determination of the divorce action;

10. The first Respondent is to remain in occupation of the main house of the property pending the sale of the property to enable him to continue maintaining the property for the purposes of letting and ensuring that it is retained in a state which would ensure that it may be sold at a realistic price;

11. The Applicant and the first Respondent are equally responsible for the arrears of the costs associated with the property, being the FNB bond account, City of Johannesburg account (rates, taxes, water) and Waterstone Park Owners Association account (levies, charges, penalties), taking into account the amounts that the First Respondent already paid towards the arrears.

12. Each party to pay their own costs in respect of this application.

Dated at Johannesburg on this day of February 2023

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING: 25 JANUARY 2023

DATE OF JUDGMENT: FEBRUARY 2023

FOR APPLICANT: ADV KLOEK

FOR RESPONDENT: ADV DEBBI THEODORDI