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

CASE NUMBER:15857/24

In the matter between

K[redacted] A[redacted] **APPLICANT**

and

A[redacted] M[redacted] E[redacted] **FIRST RESPONDENT**

REGISTRAR OF DEEDS **SECOND RESPONDENT**

JUDGMENT

Date of hearing: 14 November 2024

Date of judgment: 27 November 2024

BHOOPCHAND AJ:

1. The Applicant and the Respondent were married under Islamic law on 6 February 2000. The marriage was terminated on 19 May 2008 by *Talaaq*. During the tenure of the marriage, the Applicant and Respondent[1] jointly purchased a property at [redacted]

[1] The Second Respondent provided a report, but has no further role in this application. Fo ease of reference, the First Respondent shall be referred to as the Respondent unless the context indicates otherwise.

T[redacted] Road Ottery ("the property") for R320 000. The property is mortgaged to Absa Bank, the remaining balance being approximately R175 000. The current municipal valuation is R2 320 000. After their separation, the Applicant remained on the property with the couple's two children. The Applicant states that the Respondent paid the bond and municipal accounts as part of his maintenance obligation. He moved out in 2006.

2. The Applicant remarried in 2013, and her husband took up residence with her on the property. The Respondent stopped paying maintenance. The Applicant and her husband paid the bond and the municipal account. The bond payments were made to the Respondent as he initiated the debit order. The Applicant alleges that she maintained and improved the property. The Applicant contends that she effected about R550 000 in improvements and restoration work to the property over the years she occupied it. Sometime this year, the Applicant and her spouse decided to relocate elsewhere. The Respondent had since rented out the property.

3. The Applicant and the Respondent desire to terminate the joint property ownership. The Applicant offered her half share in the property to the Respondent at a fair market value price. The Respondent denied that the Applicant was entitled to any ownership right but offered her R150 000 for her share. The Applicant rejected the offer. The Applicant, in turn, proposed that the property be sold and the proceeds divided equally after the necessary deductions. The Respondent did not react to the counterproposal. The parties are unable to finalise the division of the property as they cannot agree on how the property should be divided and the method of terminating the joint ownership.

4. The Applicant contends that she cannot be forced to remain a co-or joint owner. She has the right to terminate her ownership through the *actio communi dividundo*. Applicant contends that one recognised mode of achieving division is for the Court to appoint a Receiver and Liquidator ("receiver") with powers to divide the property or the proceeds of its sale. Applicant proposed the names of two attorneys for appointment under defined powers and functions. The

Applicant was advised that a party claiming termination of co-ownership had to allege and prove the existence of the joint ownership, the refusal of other owners to agree to the termination of joint ownership, the inability to agree on the method of termination, an order or agreement to terminate and the other owners' refusal to comply with it. The facts upon which a court can exercise its discretion as to how to terminate the joint ownership The general rule is that the Court will follow the method that is fair and equitable to all parties.

5. The Respondent was advised that the *actio communi dividundo* is usually instituted by action proceedings and only on an application if there are no material factual disputes. He alleges that there are real, genuine, bona fide, and material factual disputes between him and the Applicant in respect of their contributions to the property. He was advised that the material disputes are better ventilated in action proceedings. The Applicant chose to launch an application aware of the existence of these factual disputes. Therefore, the Plascon Evans Rule, which favours the Respondent in application proceedings, would be applicable. Respondent was advised that "if a party has knowledge of a material and bona fide dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed". He was further advised that a receiver cannot take over the function of the Court in deciding factual disputes, and, as such, it would not be appropriate to appoint one.

6. Respondent does not oppose the termination of the joint ownership of the property but contends that this relief cannot be granted alone. It should be granted with an order as to the division of the proceeds of the sale of the property between the parties that is fair to both parties after the Court hears evidence in respect of each party's contribution in respect of the purchase, maintenance, repairs, etc. of the property.

7. Respondent opposes the appointment of a receiver. The appointment will be expensive and must be deducted from the sale proceeds. Respondent also opposes the choice of receiver. Respondent would prefer selling the property

privately and not on a public auction. The former option will allow the parties more room to negotiate the selling price and agent's commission. He opposes the division of the sale proceeds on an equal basis as he contributed more to the purchase and maintenance costs relating to the property, including deposit payments, bond payments, bond costs, municipal account payments, maintenance and repairs to the property.

8. Respondent states that he and the Applicant purchased the property jointly because he was self-employed and did not have an established credit record at that time. The Applicant was employed as a legal secretary. The law firm the Applicant worked for did the transfer of the property. He paid a deposit of 25% of the property's purchase price and other related costs, including the bond. He paid the monthly bond, municipal accounts, upkeep and property maintenance. The Applicant made no payments towards the property.

9. Respondent characterises the amount paid by the Applicant's current husband as rent rather than bond payment. The Respondent asserts that he did not pay the monthly bond and municipal accounts instead of maintenance for the Applicant and his children. He did not want his children to relocate and considered it in their best interests to keep some stability in their lives, considering that their parents had recently divorced.

10. After the Applicant had remarried, he met her at a coffee shop. They talked about the joint property and the way forward since she remarried. The Applicant allegedly confirmed that she had not made any financial contributions to the property but asked if it would be okay if she and her new husband stayed there. He agreed because his children's interests are paramount, and he did not want to put them through a relocation. They agreed that her husband would pay the municipal accounts and an amount equivalent to the bond as rent. The applicant's husband paid the municipal account directly, and the rental was added to the Respondent's account.

11. The rental amount was well below a market-related rental of about R10 000 for the property. As a gesture of goodwill and considering the children's interest, the monthly rental payable remained at R5000 for ten years, after which it decreased to R6000. There were about three times when the Applicant's husband did not make the municipal payments timeously, which caused the water supply at the property and his residence to be cut off because his identity number was on the municipal accounts of both properties.

12. No Court had ordered him to pay maintenance. He continued to pay for his children's school fees, medical aid, clothing, groceries, and physical needs like he did when he and the Applicant were still married. He says he paid a monthly sum between R5000 -R7000 voluntarily to the Applicant before she remarried. The last rental and municipal account payment made by the Applicant was in November 2023. The Applicant and her husband vacated the property. They did not notify him that they would be leaving. They left the property unlocked and without a handover. He obtained the keys from a neighbour after a few weeks. He is repairing the property at his own cost to make it liveable again. Whilst the property was empty, vagrants squatted there. He had to ask his employees to live there. The employees do not pay rent- just electricity. The cost of repairing the property to a liveable state exceeds R185,000. He has been paying the monthly bond payments and municipal accounts since November 2023. He states that the market value is usually higher than the municipal value. Both children have now reached maturity.

13. Respondent denies that the Applicant made any improvements to the property. He is uncertain how the maintenance of his children is relevant to the termination of the joint ownership. He maintained the property. When the Applicant enjoyed the discounted rental, he had to pay R15000 monthly rent. Respondent alleges that the Applicant could not prove that she (and not her husband) made the improvements and restoration work in the sum of R550 000. He will respond when the Applicant provides the invoices evidencing the amounts spent.

14. The Applicant, in reply, summarised the Respondent's answer and concluded that there was no actual dispute concerning the respective contributions towards the bond and maintenance of the property. The Respondent made payments towards the bond since February 2000 and stopped paying in 2013. She made the bond payments from 2013 until February 2024. She made improvements, renovated the property and incurred costs totalling R550 000. The Applicant contended that she and the Respondent contributed to the property. The property is registered in both their names in equal shares. There was no need to proceed on action as there was no dispute of facts.

15. Applicant asserts that the Respondent conceded to the termination of the joint ownership of the property, which should be the end of the matter. The Applicant repeated her contention that a receiver should deal with the distribution of the proceeds of the property's sale according to the powers and functions defined by the Court. The Respondent's objection to the choice of receiver is ill-founded for two reasons. He has not suggested an alternative, and his criticisms of Applicant's nominees because they had a previous working relationship with the Applicant's attorney cannot be sustained. The nominees are officers of the Court and are expected to abide by the law and this Court's directions.

16. The Applicant admitted that the property was purchased jointly as the Respondent did not have a credit score and that she worked at the attorney firm that attended to the transfer. She persists in saying she is entitled to her half-share of the property. The Applicant denied declaring that she had not contributed financially to the property. She and the Respondent agreed that she would continue occupying the property and pay the bond, municipal accounts and electricity. It was irrelevant that the payments were made from her husband's account. The amount paid to the Respondent was not a rental payment. The Respondent consistently refers to joint ownership in his answer but denies her entitlement to half a share of the property.

17. The Applicant asserts that it was irrelevant there was no maintenance order. The Respondent's contention that he paid for the children's medical aid, school fees, clothing, groceries, and their physical needs conflicted with his denial that the bond and municipal services payments were maintenance payments towards the Applicant and the children (before she remarried). Applicant stated emphatically that the Respondent was obliged to maintain the children. Applicant corrected the facts relating to her vacating the property. She left on 1 March 2024. The last bond payment she made was for February 2024. She did not need to inform the Respondent of her pending departure as she co-owned the property. The Respondent's allegation that she left the property unlocked is contradicted by his subsequent statement that he could only access the property after he obtained the keys from a neighbour. She ensured the property was left satisfactorily, although the garage door and gate were no longer automated. She was informed by the neighbours that the Respondent began knocking down walls after she left. He had reduced it to an unliveable state.

THE *ACTIO COMMUNI DIVIDUNDO*

18. The *actio communi dividundo* is a Roman law remedy enabling co-owners to demand and resolve disputes over property division. A court can order the property to be sold or assign the property to one co-owner in exchange for compensation from the other co-owners. If practical, the court can also order the property to be subdivided. The remedy frees a co-owner from enforced co-ownership.

19. The judgment of Wallis JA in *Municipal Employees Pension Fund and Others v Chrisal Investments (Pty) Ltd*,[2] is a comprehensive exposition of the *actio communi dividundo*. It provides examples of co-ownership of property and expounds on 'free' or 'bound' co-ownership. Bound co-ownership arises from a

[2] Municipal Employees' Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others (792/19) [2020] ZASCA 116; [2020] 4 All SA 686 (SCA); 2022 (1) SA 137 (SCA) (1 October 2020) ("MEPF")

legal relationship between the parties other than the co-ownership itself. In other words, there is a legal relationship between them going above and beyond their co-ownership of the property. The co-ownership arises from and is constituted as a consequence of that relationship. It is not the source of the relationship between the parties.[3]

20. Extrinsic legal relationships creating bound co-ownership could arise as a matter of law when parties enter into particular relationships. 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. Another is the co-ownership of the common property in a sectional title development through the provisions of s 16(1) of the Sectional Titles Act 95 of 1986. Bound co-ownership could arise from the execution of a trust deed by the founder of a trust and the acceptance by the trustees of office under that deed. Another example is an agreement between the co-owners in a partnership or the constitution of a *universitas*. In trust deeds, partnership agreements and constitutions, the parties are usually free to vary their terms and the terms of the relationship between the co-owners.[4]

21. After a panoptic analysis of various authorities, including academic literature, case law and comparative law, Wallis JA held 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

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3 MEPF at para 22

4 MEPF at para 24

exceptional. In other words, it requires no special feature for the co-ownership consequential upon the relationship to qualify as bound co-ownership. ..."[5]

22. The Learned Judge of Appeal continued:

"There is no closed list of instances of bound co-ownership. If the relationship gives rise to bound co-ownership, the co-ownership will endure for so long as the primary extrinsic relationship endures. Once it is terminated, then, as in *Menzies*[6] and *Robson v Theron*[7], it will become free co-ownership and be capable of being terminated under the actio."[8]

23. In a recent decision premised upon the parties' unequal contributions to the expenses related to a co-owned property in a marriage out of community of property, this Court applied the principles explained in *Municipal Employees Pension Fund and Others v Chrisal Investments (Pty) Ltd* to the facts of that case.[9] Counsel appearing for the Applicant submitted that in comparison to the bound co-ownership of property by spouses married in community of property, by default, in a marriage where the parties contracted out of community of property, the joint property is held in free co-ownership and can be terminated at any time by way of the *actio communi dividundo*.

24. Gordon-Turner AJ did not regard Wallis JA's judgment to support the binary distinction between different matrimonial property regimes. She contended that the learned Judge of Appeal had rejected the proposition that the starting point is that in co-ownership, the availability of the *actio* is implied by law, so that it must be excluded unambiguously, and explained that "... It puts the cart of a conclusion — 'This is free co-ownership' — before the horse of the question — 'Is this free or

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5 MEPF at para 46
6 Ex Parte Menzies et Uxor 1993 (3) SA 799 (C) at 810G-811G
7 Robson v Theron 1978 (1) SA 841 (A) at 854G-855H
8 MEPF at para 47
9 P.N v A.E (20081/2023) [2024] ZAWCHC 266 (16 September 2024)

bound co-ownership?'. The common law is that the *actio* is always available for free co-ownership and never in bound co-ownership. In any particular case, 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."[10]

25. Gordon-Turner AJ determined that the parties' co-ownership of the property arises from and is constituted as a consequence of their marriage relationship. The Applicant's other immovable property was held solely in his name. But for his marriage to the respondent, he would not have shared ownership with her. The property was purchased for and occupied as the parties' marital home. Independently of the matrimonial property regime chosen by the parties, and as a matter of law, a reciprocal duty of support arose between them from the moment of their marriage, i.e. a legal relationship existed between the parties other than the co-ownership itself. In the Judge's view, after taking account of the facts in that case, the marriage relationship, despite being out of community of property, rendered the parties' co-ownership of the property as bound co-ownership. For as long as the parties remain bound to each other in marriage - their primary 'extrinsic relationship' - their co-ownership endures. It can be terminated only when the marriage is dissolved.

EVALUATION

26. The affidavits filed in this application, which devolved into an eloquent exchange of legal argument, raised but a single reference in the Respondent's written argument about whether the property was free or bound. Still, it elicited significant debate in the oral argument. The Respondent relied upon it in response to the Court's suggestion that applying the fair and equitable principle to the primary relief sought by the Applicant would mean that the default position should be an equal property division.

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[10] MEPF at para 51

27. By all accounts, all extrinsic legal relationships binding the parties had ended. The marriage by Islamic rites terminated in 2008, and the parties' obligation to maintain and support the children also ended when the latter attained majority. The Applicant contended that the property began as bound co-ownership but was now free, and its division could be determined under the *actio communi dividundo*. The Court agrees.

28. The question is whether the Applicant has satisfied the requirements for the *actio communi dividundo,* namely proof of the co-ownership of the property with the Respondent, that she no longer wishes to be co-owner, and the parties have not agreed upon the mode of division of the property. The Applicant provided a copy of the title deed, which indicated that they took a joint transfer of the property on 28 May 2002. The Respondent admitted that he also sought termination of the joint ownership of the property. All that remains is for the Court to determine the mode of division of the property.

29. The Applicant contends that she is entitled to half the property, and the Respondent disputes the contention. Their respective reasons were summarised earlier in this judgment. The Respondent accepts that there is co-ownership of the property and that joint ownership should be terminated. The Respondent disputes that the proceeds of its sale should be divided equally. He contends that the extent of each party's contribution to and the benefits derived from the joint property can only be determined through oral evidence as the disputes are incapable of resolution on the papers. The Applicant does not agree. The Respondent contended that the Applicant should have proceeded by instituting an action rather than an application.

30. The Applicant denies that she was obliged to seek relief through an action procedure. She contended that the Respondent's allegations did not constitute a genuine dispute on any material question of fact. There was no reason for incurring the delay and expense of a trial. The Respondent's answering affidavit does not

disclose a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard.[11] where a dispute of fact has arisen on the affidavits, and there is no request for referral to oral evidence, the Court will only grant a final order if those facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with those facts alleged by the Respondent justify such an order.[12] A Court cannot be hamstrung by unworthy tactics to impede or delay justice when a robust and common sense approach may resolve a dispute on motion proceedings.[13]

31. The Respondent's contentions that his financial contribution to the property is more substantial as he paid the initial deposit, the bond, the municipal charges, and the costs of maintenance and repairs do not withstand scrutiny. These allegations cannot be sustained. The evidence before the Court is that he did pay all of those costs before 2013, but after the Applicant's remarriage, she undertook to pay them, and she did. The amount is too coincidental to be regarded as rental rather than what it was, i.e., the bond payments. There is, however, a deeper-seated objection to the Respondent's allegations.

32. The Respondent's allegation that the Applicant could not provide evidence that she, and not her husband, made improvements and restoration work to the sum of R550 000, that the Applicant's husband made the bond payments to Respondent's bank account, and that he had paid the expenses of the property during the subsistence of the marriage are archaic and are unpalatable in a constitutional dispensation based on human dignity and equality. The deprecation of a spouse's role in a marriage can no longer be endured because of allegations that they did not contribute financially to the acquisition of property during the tenure of the marriage. The Court has purposefully strayed from characterising these disputes as gender-based disputes as they could conceivably arise in same-gender situations. Legal practitioners must advise their

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11 Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd

12 Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) 623 (SCA) at 634 H-I

13 Soffiantini v Mould 1956 (4) SA 150 (E) at 154 G-H

clients that these allegations and arguments will not withstand the Court's scrutiny when it is required to apply the fair and equitable principle to determine a dispute.

33. The Supreme Court of Appeal stated about twenty years ago, in the context of a redistribution order in section 7(3) of the Divorce 70 of 1979, that the traditional role of a housewife, mother and homemaker should not be under-valued because it is not measurable in terms of money.[14] The Applicant's evidence was, in any event, that she worked. In another decision of this Court, Van Zyl AJ stated in the context of the facts of that case:

"It has to be borne in mind that the joint ownership of the property in this matter does not stem from a commercial transaction, where the transaction can be unravelled with mathematical precision with reference to the financial input of each co-owner. The property in the present matter was purchased and owned by the parties during a marriage relationship..."[15]

34. The Respondent's version does not dispute the bond; municipal charges, maintenance, improvements and repairs to the property were paid after 2013. He attempts to distinguish between payments made by the Applicant's husband and the Applicant and attributes bond payments as a rental. The Court has already rejected the latter contention. The Respondent's contention that he paid the deposit on the property is regarded as his contribution to a joint and indivisible marital relationship. The Court is, therefore, in a position to decide the matter on the papers as it finds that the Respondent raises no genuine dispute of fact that requires the dismissal of this application either for want of referral to oral evidence or through raising it in an application procedure rather than by action. The probabilities overwhelmingly favour the specific factual findings that follow.[16]

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14 Bezuidenhout v Bezuidenhout 2005 (2) SA 197 (SCA)

15 Z.I v W.I and Another (13142/2022) [2023] ZAWCHC 95 (9 March 2023) at para 29

16 South Peninsula Municipality v Evans and Others 2001 (1) SA 271 (CPD) at 283 F-I

35. The Court finds that the Applicant is entitled to a half share of the property for the reasons already canvassed, namely that she contributed to the property in cash and kind, the former, her direct financial contributions, and the latter encompassing all of the other duties required of her during the co-ownership of the property from the date of the parties marriage to the date that there no longer existed any further extrinsic legal relationship that bound them, i.e., the reciprocal duty to maintain the children after the latter had reached the age of majority.

36. Having decided that the Applicant is entitled to a half share of the property, the next issue to be determined is how the property should be divided, i.e., by actual division if that is possible, or by ordering that one party purchase the property or allocating the property to one party and ordering the other to pay the equivalent of the half share to the other, or by sale on the understanding that the parties would be entitled to a half share of the proceeds of the property. The parties themselves are agreed that the property should be sold. The Respondent prefers that it be sold privately rather than in an auction.

37. The Applicant suggested the appointment of a receiver. Now that the Court has determined that the proceeds of the sale of the property are divided or shared equally, there is no longer a need for a receiver. The Respondent was averse to the appointment of a receiver and to the choices submitted by the Applicant. The property contains a single dwelling, and the municipal valuation does not justify the expense of appointing a receiver. The Court agrees with the Respondent's contentions in this respect. The Applicant has not identified a legal basis or source of the Court's power to appoint a receiver.[17] The Court understood that the Applicant would not pursue this ancillary relief if the Court ordered that the sale proceeds be divided equally between the Applicant and the Respondent after all necessary expenses were settled, including the mortgage bond settlement. These aspects would ordinarily be handled as part of a conveyancer's obligations in transferring the property.

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[17] Morar NO v Akoo and Another [2011] 4 AllSA 617 (SCA) in the context of the dissolution of a partnership.

38. The Court requested the parties submit their draft orders, assuming they would prevail. The Court has considered the respective submissions and found both inadequate and unhelpful. The Applicant failed to provide a minimum selling price for the property or a timeline for its sale. There is no reason why the parties cannot agree among themselves on the logistics involved in the further conduct of the matter now that the Court has decided on the co-ownership of the property. The Respondent's Counsel provided a terse draft requesting the application be dismissed and stating that the Applicant should pay the costs. The Applicant's Counsel asked for costs on a punitive scale. The latter prayer was unmotivated, and the Court is averse to making that order. The Applicant has been largely successful, and there is no reason why she should not be entitled to her costs. The late filing of the Applicant's replying affidavit and written argument was not raised as an issue at the hearing on 14 November 2024. To the extent that the Court is required to do so, the application for condonation is granted.

ORDER

1. The joint ownership between the Applicant and the First Respondent in respect of the property described as erf [redacted] Ottery situated at and more commonly known as [redacted] T[redacted] Road, Ottery, Western Cape ('the property") is hereby terminated,
2. The property shall be sold by private treaty at market value, the sale of which shall be by agreement between the Applicant and the First Respondent,
3. The proceeds of the sale, after the deduction of all amounts encumbering the property and the costs of selling it, shall be shared equally between the Applicant and the First Respondent,
4. The Applicant and/or the First Respondent may apply to this Court through the chamber book for any further directions necessary to conclude the private sale of the property,
5. The First Respondent shall pay the costs of this application, including the cost of Counsel.

Ajay Bhoopchand

Acting Judge of the High Court

Western Cape Division

Cape Town

Judgment was handed down and delivered to the parties by e-mail on 27 November 2024.

Applicant's Counsel: Advocate A Titus

Instructed by A Fotoh & Associates Inc

Counsel for the Respondent: M Botha

Instructed by ZS Incorporated