IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**NO**

Application no: **5071/2018**

In the matter between:

GIDEON PETRUS BRITZ Applicant
(Identity number: […])

and

GEORGE ANTONIO GONSALVES SEQUEIRA Respondent
(Identity number: […])

CORAM: DAFFUE, ADJP

HEARD ON: 27 FEBRUARY 2020

JUDGMENT BY: DAFFFUE, ADJP

DELIVERED ON: 20 MARCH 2020

I INTRODUCTION

[1] Two brothers-in-law are at loggerheads with each other. The disputes are much more extensive than the dispute the court is requested to adjudicate in this application, to wit whether joint ownership of an immovable property should be terminated with appropriate further relief. The immovable property, situated in the sectional title scheme, River Lodge, in the district of Parys (herein later referred to as "the property") was bought as a holiday home. The property is entitled to two exclusive use areas referred to as boat garages.

II THE PARTIES

[2] Applicant is Mr Gideon Petrus Britz, an adult businessman. Mr MW Verster of BMV Attorneys, Bedfordview appeared for applicant at the hearing of the application.

[3] The respondent is Mr George Antonio Gonsalves Sequeira, an adult man presently residing on the property, as has been the case the last four years. Adv MP van der Merwe SC appeared for the respondent on instructions of Pretoria attorneys, Barnard & Patel Inc.

III THE RELIEF CLAIMED

[4] The relief claimed in the notice of motion can be summarised as follows:

4.1 That the joint ownership of the applicant and respondent in the property be terminated.

4.2 In the event of respondent wishing to acquire applicant's undivided half-share in the property, he shall pay against registration of transfer "the difference between the amount of R1.5 million and the total amount required by Standard Bank to procure the cancellation of mortgage bond number SB4493/2007 registered in its favour," with further orders that respondent shall pay all outstanding accounts due the local authority and the body corporate as well as the fees and transfer duty to procure transfer of applicant's undivided half-share of the property in his name.

4.3 In the alternative to respondent purchasing applicant's undivided half-share, the property shall be sold by public auction to the highest bidder subject to a reserve price of R3 million in which case the amount required by Standard Bank to procure cancellation of the aforesaid mortgage bond shall constitute a first charge against the sale proceeds, whereafter the balance shall be divided equally subject to adjustments pertaining to payment of the accounts due to the local authority and the body corporate.

4.4 A costs order is sought against the respondent.

[5] I wish to point out at this stage that the quoted portion of the notice of motion contained in paragraph 2.1 thereof differs from the alternative relief sought. In the alternative prayer it is requested that the Standard Bank bond has to be paid in full as a first charge from the gross proceeds of the property. When the difference in wording was pointed out to Mr Verster during oral argument he immediately recognised the “mistake” which would be to the respondent’s advantage if an order was granted in terms of this paragraph.

[6] Contrary to the relief sought in the notice of motion, Mr Verster concluded his written heads of argument with suggestions to the court as to what relief should be granted. Such relief is contrary to that set out in the notice of motion. He suggests that the sale of the property should be by public auction to the highest bidder subject to a reserve price of R3 million, but goes much further by seeking an order that the parties must jointly appoint an auctioneer within 10 days from the court order and if they cannot agree, the applicant will be entitled to appoint his own auctioneer. The idea is then that the proceeds of the auction be dealt with as provided for in the alternative prayers of the notice of motion briefly summarised above. However, Mr Verster is of the view that the auctioneer should have wide-ranging powers such as receiving oral, written and documentary evidence from the parties pertaining to improvements made as alleged by the respondent as well as the value thereof and also regarding the

rental payable by respondent as alleged by applicant. The auctioneer should also be entitled to inspect documents, books and records and to interrogate any witnesses and allow cross-examination of witnesses and thereafter to make determinations regarding payment of the improvements and division of the net proceeds. In Mr Verster's view the auctioneer's determination should be final and binding on the parties.

[7] I pointed out to Mr Verster during oral argument that the notice of motion did not provide for the appointment of an auctioneer or receiver, but over and above that, the wide-ranging powers to be granted to such person would cause much more disputes and dissatisfaction than could be imagined. Even if I would be prepared to appoint a receiver or auctioneer in the exercise of my discretion, I would no doubt refuse to grant such person the extended powers sought by Mr Verster. Wallis, JA considered the powers of a liquidator appointed upon dissolution of a partnership in *Morar NO v Akoo*[1] and concluded as follows:

"[25] For those reasons K Pillay J was correct to refuse to grant Mr Morar the powers of interrogation that he seeks. The power to order an interrogation is an exceptional power and I can find no basis upon which it is one that courts can confer upon liquidators of partnerships. If that is a shortcoming the remedy must lie in legislation."

IV THE COUNTER APPLICATION

[8] Although not identified as such, the counter application is in essence a conditional counter application. It is clear that

[1] 2011 (6) SA 311 (SCA) at para 25

respondent seeks the dismissal of the main application, but if it is not dismissed, that it be stayed and the adjudication thereof held in abeyance pending the finalisation of the action instituted by respondent against applicant and other parties in the Pretoria High Court under case number 31395/2019 ("the Pretoria action").

V CRISP ISSUE ABOUT TERMINATION OF JOINT OWNERSHIP

[9] I shall deal with the legal principles pertaining to termination of joint ownership as well as the facts in this matter herein later. Suffice to say that if the property was the only *nexus* between the parties *in casu*, it would be a straightforward matter. Termination of the parties' joint ownership would have been a foregone conclusion insofar as every co-owner is in principle entitled to have the joint-ownership terminated. A co-owner is not obliged to remain a co-owner against his/her will as succinctly stated in *Robson v Theron*.[2] However, as indicated herein, *in casu* the factual issues are not that straightforward as several other relationships are intertwined.

VI MATERIAL UNDISPUTED FACTS

[10] The following material facts are undisputed:

[2] 1978 (1) SA 841 (A) at 856H

10.1 Both parties are majors and have either reached the normal retirement age or is close to retirement. Applicant is 65 years old and respondent 62.

10.2 Applicant is married to respondent's sister and they are not only relatives, but were business associates as well.

10.3 *Ex facie* the title deed they bought the property on 2 March 2002 for the amount of R180 000.00. They also received cession of the aforesaid two exclusive areas, the boat garages, in 2017 when this right was valued at R10 000.00.

10.4 Respondent was employed by Mandla Bricks and Blocks CC until 2016, although there is a dispute as to how and precisely when the employment relationship was terminated.

10.5 Respondent has member's interests in three close corporations, to wit:
(1) 33% in Mandla Bricks and Blocks CC;
(2) 25% in Lintel Suppliers CC and
(3) 20% in Labour Secretaries CC.

10.6 Applicant, his wife and children hold the remainder of the shares in the three close corporations.

10.7 The business activities of the close corporations expanded over the years, but notwithstanding the fact that the close corporations continue with business

activities under the control of the applicant, his wife and children, respondent did not receive any financial benefits for his member's interests in the close corporations and no agreement was reached in respect of the purchase of respondent's interests.

10.8 The respondent's dissatisfaction with the aforesaid state of affairs led to the institution of action against the three close corporations as well as all the other members thereof in which action he claims R8 million in respect of his member's interests in Mandla Bricks and Blocks, R10 million in respect of Lintel Suppliers CC and R4 million in respect of Labour Secretaries CC. This relief is claimed in the Pretoria action. In their counterclaim in the Pretoria action the fourth to eight defendants in their capacities as members of the three close corporations claim the following:

"1. That it be declared in terms of section 36(1) of the Close Corporations Act, no 68 of 1984, that the Plaintiff shall cease to be a member of the First, Second and Third Defendants respectively;

2. That the First, Second and Third Defendants be ordered to acquire the Plaintiff's respective member's interests and loan accounts against them against payment of the respective amounts set out below;

   a. First Defendant – R100 000.00;

   b. Second Defendant – R600 000.00;

   c. Third Defendant – R100 000.00."

10.9 No doubt, there is a huge dispute between the parties pertaining to the value of respondent's member's interests and loan accounts in the aforesaid close corporations. On applicant and his family's version, the interests and loan accounts are worth R800 000 in total. The offer of R100 000.00 by third defendant (Labour Secretaries CC) appears to be incorrect insofar as the financial statements of this CC, REP4 to the replying affidavit, show that respondent has a credit loan account of R688 573.00. This relates directly to registration of the mortgage bond by Standard Bank over the property. It is common cause that the co-owners are not liable for this debt, but the CC. The registration of the bond and the book entry pertaining to the loan account serve as proof of the intertwined relationship between the parties.

10.10 The parties are in agreement that the trust relationship between them has been destroyed completely, although they differ as to who caused this.

10.11 Respondent has been occupying the property on a permanent basis since January 2016. Since then applicant (and his family) did not have the use and/or enjoyment of the property to which he would otherwise be entitled as co-owner.

10.12 Although the respondent admitted a buy-back option and proposals made in this regard, it is apparent that the parties agreed in principle that respondent would

dispose of his member's interests in the three close corporations and that he would acquire the option to receive applicant's undivided half-share in the property in addition to a cash payment for his member's interests and loan accounts in the close corporations. However, no final figures have been agreed upon. Therefore, on applicant's own version, respondent would be entitled, if a firm agreement could be reached, to acquire applicant's undivided half-share in the property over and above cash to be paid to him as part of the deal to obtain respondent's member's interests and loan accounts.

10.13 Respondent was in arrears with payment of the levies charged by the body corporate in an amount in excess of R100 000.00, but has made payments to the body corporate since the issue of the application and also entered into an agreement with it to settle the arrears in certain instalments.

10.14 Applicant is regarded as a wealthy person that does not need the proceeds of his half-share in the property in order to survive financially. This aspect will be afforded little attention in arriving at a conclusion.

10.15 Initially respondent put the property on the market and instructed estate agents to find a purchaser. His initial view was that the property and the member's interests in the close corporations should be dealt with separately.

10.16 Respondent had a change of heart during the course of the proceedings, bearing in mind that the application was instituted already in 2018, *i.e.* nearly two and a half years earlier, insofar as he has obtained new advice from his new attorneys to the effect that the application for termination of the joint ownership in the property should either be held over pending finalisation of the Pretoria action, or at best for applicant, all disputes between them should be dealt with simultaneously in one court action.

VII ACTION OR APPLICATION PROCEDURE

[11] The termination of joint ownership is brought about by the institution of the *actio communi dividendo.* Mr Van der Merwe took the point that the application could not succeed based on the technicality that action procedure should have been followed. He relied in this regard on an unreported judgment of Maakane, AJ in *Lesenya v Ngwenya*.[3] I do not agree with the conclusion arrived at by the learned acting judge. It is true that parties seeking termination of joint ownership often make use of action procedure, but there is no reason why application procedure may not be utilised if material factual disputes are not foreseen. It is not uncommon for parties who agree that their joint ownership should be terminated, merely to disagree as to the manner in which this should take place. Based on the common cause facts, it is often possible for a court in the exercise of its

[3] Lesenya v Ngwenya (Macheke) 2018 JDR 1039 (GP), a judgment delivered on 6 July 2018

discretion to order an appropriate order to ensure a just and equitable outcome. In my view nothing sinister should be read into the Roman word "*actio*" which obviously means "action." Monetary claims are generally instituted by way of action, but nothing prohibits a creditor from initiating application procedure in a case where no material factual disputes are foreseen in order to obtain judgment in respect of money due and payable. Application procedure is cheaper and less time-consuming than action procedure. No court should be so pragmatic to refuse relief where a clear-cut case has been made out, but application procedure used instead of action procedure. It is apparent from *Lesenya v Ngwenya* that serious factual disputes were encountered pertaining to the terms and conditions applicable to the transfer of applicant's share to the respondent. In that case the respondent relied on a draft settlement agreement which was not signed by the applicant, whilst the applicant insisted that no settlement agreement was entered into between the parties as alleged by the respondent.

[12] In all fairness to Mr Van der Merwe, he conceded quite readily that it would be possible for a party to claim termination of joint ownership and appropriate further relief by way of application procedure. However, he insisted that applicant could not do so *in casu*, bearing in mind the foreseen factual disputes and the principles applicable to the adjudication of opposed applications.

VIII TERMINATION OF JOINT OWNERSHIP

[13] Co-owners have undivided shares in the property, the subject of the joint ownership. The shares need not be equal, but *in casu* the parties own the property in equal shares. Unless other arrangement are made, all co-owners are entitled to use the joint property reasonably and in proportion to their shares. If the property is let, they are entitled to share in the profits in accordance with their proportionate shares in the property. The co-owners are also obliged to pay the expenses applicable to the property in the same *ratio* as their proportionate shares.

[14] I mentioned earlier that in principle every co-owner is entitled to have the joint ownership terminated. The *locus classicus* insofar as the dissolution of partnerships and/or termination of joint ownership is concerned, is *Robson v Theron.*[4] I keep in mind the applicable principles, but is not necessary to deal with this judgment any further.

[15] Harms[5] sets out the requirements to be alleged and proven by a party claiming termination of co-ownership as follows:

> "A party claiming termination of co-ownership must allege and prove:
> (a) the existence of joint ownership;
> (b) a ground for termination of joint ownership such as a refusal of the other owners to agree to termination, inability to agree on the method of termination, or an agreement to terminate and the other owners' refusal to comply with it;

[4] Loc cit at 855H – 857D
[5] Harms, Amler's Precedents of Pleadings, 9th ed p 228, with reference to several authorities including Robson v Theron

(c) facts upon which the court can exercise its discretion as to the method of termination. The method must be fair and equitable to all parties. Examples include:

(i) division of the property if it can be done physically and legally;

(ii) sale by public auction and a division of the net amount;

(iii) allocation of the property to one co-owner subject to payment of compensation to the other; and

(iv) a private auction restricted to the co-owners, and division of the net amount."

[16] Not many defences can be raised against the claim of a co-owner to have the joint ownership terminated.[6] It is therefore possible for an applicant in application procedure to allege and successfully prove the requirements for termination of joint ownership. Mr Van der Merwe submitted that in utilising application procedure applicant attempted to avoid being cross-examined. Applicant was also blamed for using bullying tactics in an attempt to intimidate respondent. I indicated during argument that I did not agree with Mr Van der Merwe's submissions pertaining to the first issue mentioned, but shall refer to the second issue later.

[17] In *Coetzee v Coetzee*[7] the full bench granted an order pertaining to the subdivision of a farm owned in joint ownership, subject to various conditions including statutory consents and approvals. *In casu*, subdivision is not an issue at all.

[6] Harms at 228

[7] [2016] 4 All SA 404 (WCC) at para 45

IX RELIANCE ON SECTION 26 OF THE CONSTITUTION, THE PROPERTY BEING THE PRIMARY RESIDENCE OF THE RESPONDENT

[18] Mr Van der Merwe relied upon rule 46A of the Uniform Rules of Court which sets out the circumstances to be considered when immovable property is to be declared specially executable. In this regard he referred to the fact that the property is occupied by the respondent, his spouse, as well as his mentally disabled sister. He extensively quoted from *Firstrand Bank Ltd v Folscher & another and similar matters*[8] and *Absa Bank Ltd v Ntsane.*[9] The issue was also more recently dealt with by the full bench in *Absa Bank Ltd v Mokebe and related cases.*[10] However, and notwithstanding the importance attached to a debtor's right to a roof over his/her head, I am not persuaded that this defence holds any water *in casu*. If the property is sold, and bearing in mind respondent's entitlement to payment for his member's interests in the close corporations, he would have sufficient money to buy a decent dwelling house to ensure a roof over his and his next-of-kin's heads.

X *HABITATIO*

[19] Respondent also relies on a defence based on a lifelong right of *habitatio*. This right, even if it was orally agreed upon, was not put in writing and signed by the parties and was in any case not registered against the title deed. This defence is baseless.

[8] 2011 (4) SA 314 (GNP) at 332C – 333D
[9] 2007 (3) SA 554 (TPD)
[10] 2018 (6) SA 493 (GJ) paras 51 - 66

Section 2(1) read with the definitions of "alienate" and "land" contained in s 1 of the Alienation of Land Act[11] is clear. On respondent's version the right was apparently donated to him. He did not purchase it and he also did not acquire it by way of an exchange. The deed of alienation should have been in writing and signed by the parties or their agents, duly authorised thereto. Land includes any interest in land such as *habitatio*.

XI THE INTERTWINED RELATIONSHIPS BETWEEN APPLICANT AND RESPONDENT

[20] I am satisfied that the undisputed facts and those relied upon by the respondent which I am prepared to accept insofar as they are neither far-fetched, nor untenable are such that the main application should be stayed pending finalisation of the Pretoria action. If the main application is granted at this stage, either by granting leave to respondent to purchase applicant's undivided half-share in the property as set out in the notice of motion, or directing the property to be sold by public auction, respondent would be at a clear disadvantage *vis-a-viz* applicant. Respondent, who is 62 years old, does not have the necessary financial resources to purchase applicant's share, or to put in an offer to purchase the property on a public auction. Applicant knows this, even making an issue about respondent's financial inability. In the same breath, applicant, his wife and children who hold the remainder of the members' interests in the three close corporations have embarked upon a process preventing

[11] 68 of 1981 and Janse van Rensburg and another v Koekemoer and others 2011 (1) SA 118 (GSJ) paras 16 - 20

respondent from receiving any benefits from the three close corporations for the last four years.

[21] I have referred in paragraph 10.9 above to respondent's loan account in Labour Secretaries CC and the Standard Bank bond registered over the property. No doubt, this is proof of the intertwined relationship between the parties. Applicant alleges in his founding affidavit that the bond has to be paid as a first charge and that the net proceeds should be divided between the co-owners. The clear impression is created that the co-owners incurred the Standard Bank debt. In reply applicant admits that the CC borrowed the money from Standard Bank to purchase a property in Alrode. This explains the loan accounts. It is evident that a sale of the property will cause respondent to receive much less than he is entitled to unless the loan account is simultaneously paid out to him. This is not what applicant intends to do and no offer was made in this regard.

[22] Mr Verster reiterated that respondent elected to remain in occupation of a luxurious property without complying with his financial obligations. However, his client and his next-of-kin are directly responsible for the fact that respondent has difficulty complying with his financial obligations such as paying the body corporate's levies and rates and taxes, not to mention making a living. Mr Verster submitted that prior to the Constitutional Court judgment in *Mokone v Tassos Properties CC & another*[12] our courts had consistently refrained from staying proceedings on equitable grounds. He correctly pointed out that the

[12] 2017 (5) SA 456 CC

Constitutional Court in *Mokone* had developed the common law, *inter alia* indicating that proceedings may be stayed on grounds dictated by the interests of justice.[13] The Constitutional Court held as follows in *Mokone*[14]:

"[70] … It seems unjust to require Ms Mokone to be uprooted and her business brought to a halt or destroyed in circumstances where the purchaser might not have been an innocent player when it purchased or took transfer of the leased premises……

[71] It is not as though Ms Mokone is entitled to remain on the leased premises free of charge. … as will be noted from my characterisation of the cause of action, the eviction proceedings are not seeking to enforce payment of arrear rental, nor is the eviction grounded on failure to pay rent."

[23] In my view *Mokone* is applicable to the facts *in casu*. Applicant is prepared to get rid of his one half undivided share of the property and for respondent to obtain that, alternatively that the property be sold at a public auction. He does not want full ownership of the property. However, making use of bullying tactics he and his family have closed the financial taps of the three close corporations in order to prevent respondent from receiving financial benefits. This has been going on for the last four years.

[24] Mr Verster also relied on *De Nys v De Kock NO,*[15] but this judgment rather support respondent's case and not applicant. The court concluded as follows:[16]

[13] Ibid paras 67 & 68
[14] Ibid paras 70 & 71
[15] 2019 JDR 0002 (WCC)
[16] Ibid para 24

> "It [De Nys] avers that in the event that it succeeds on appeal and the directive that it is to close its restaurant daily by 18h00 is set aside, it will then be able to make application to the body corporate for permission to retain its gas and water installations on the common property, and were the Court not to come to its aid by making an interim Order staying the operation of the entire adjudication order, it could then be compelled to remove these installations, which would in effect result in its not being able to operate its restaurant at all. This would effectively emasculate its statutory right of appeal."

[25] If the court allows the property to be sold by public auction, respondent would lose the right to put in an offer as he is not financially in a position to do so at this stage. However, once he receives what is due to him, even on applicant's version, he might be in a much better position to compete in an open market with prospective buyers.

[26] Mr Verster submitted that the facts in *Wales v Myburgh*[17] "are almost on all fours with the contentions raised by the respondent herein." In that case the court refused to stay the proceedings. The facts are materially different and I do not agree with Mr Verster's submission. In *Wales* the respondent sought a temporary stay of the eviction proceedings instituted by the applicant pending the outcome of an action which has already been instituted. In that action respondent *inter alia* sought a lifelong right to the property to the extent that she was entitled to be accommodated by the applicant at the residence, alternatively to accommodation of similar ilk.[18]

[17] 2018 JDR 1718 GJ
[18] Ibid para 2

[27] In *Wales* the respondent's defence to the eviction application was that, notwithstanding the fact that the property was registered in the name of applicant, she had become owner thereof, either because of an oral agreement of donation, secondly an oral agreement of compromise, or thirdly, arising out of the oral agreement, a lifelong right to the property which she considered a real right that had to be registered in her name.[19] The court emphatically stated that all three defences raised by respondent in her answering affidavit, which arose out of an oral agreement, were unsustainable in law because it was not permissible to transfer immovable property by way of an oral agreement.[20] It is apparent why the court evicted respondent from the property in *Wales*. She just did not raise any sustainable defence. I indicated above that respondent could not rely on the alleged right of *habitatio.* The same reasoning was applied by the learned judge in *Wales*. Mrs Myburgh had absolutely no prospects of success in her action against the registered owner of the property.

[28] Mr Van der Merwe requested me to dismiss the main application with costs. I am not prepared to do that insofar as it remains a general rule that every co-owner is entitled to have joint ownership terminated. I have set out the facts upon which I decided to adjudicate the dispute and I do not intend to repeat all the facts again. I exercise my discretion to stay the main application pending the finalisation of the Pretoria action.

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[19] Ibid para 13
[20] Ibid para 14

XI CONCLUSION

[29] Although the parties' trust relationship has been broken down irretrievably notwithstanding the fact that they are brothers-in-law and applicant is married to respondent's sister, the accepted facts are such that it would not be just and equitable to order the termination of the joint ownership which would include the method of termination at this stage.

[30] The main application should not be dismissed, but merely stayed pending finalisation of the proceedings in the Pretoria action.

[31] Bearing in mind the general rule pertaining to a party's entitlement to termination of joint ownership, I am of the view that, notwithstanding substantial success achieved by respondent, it would be fair and just if the adjudication of costs is reserved. It is possible that the trial court may find that respondent's claims are excessive and totally unsubstantiated and that he is entitled to no more than the amounts set out in defendants' counterclaim in the Pretoria action. If that is the case, respondent may not be in a position to make an offer to buy the property if it is to be sold by public auction or to purchase applicant's half-share in the property.

XII ORDERS

[32] The following orders are made:

1. The main application is stayed and the adjudication thereof held in abeyance pending finalisation of the action instituted by respondent against applicant and others in the Pretoria High Court under case number 31395/2019.

2. Costs are reserved for later adjudication if so required.

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J P DAFFUE, ADJP

On behalf of Applicant	:	Mr MW Verster
Instructed by	:	BMV Attorneys c/o Rossouws & Conradie Inc BLOEMFONTEIN
On behalf of Respondent	:	Adv MP van der Merwe SC
Instructed by	:	Barnard & Patel Inc c/o Etienne Visser Attorneys BLOEMFONTEIN