REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/44428

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

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DATE SIGNATURE

In the matter between:

K, M **Applicant**

and

M, T **Respondent**

JUDGEMENT

Headnote – application to terminate co-ownership of a house and division of the net proceeds
A father and mother of a minor daughter were jointly registered as co-owners and a bond was obtained in both names too – the applicant mother sought the termination
It was common cause that the applicant would bear no financial burden nor take ant responsibility for the house and the respondent father would undertake all burdens alone – the house was acquired as an investment for their minor daughter which was to be presented to her when she became an adult.

Both parties were not averse to a termination of the co-ownership as they were divorced and not on good terms – the respondent resisted a sale of the house because of inadequate equity in the property, inclusive of the sum he claimed to have expended on its upkeep – a dispute of fact existed about his stewardship and the true revenue derived from letting the property

Held: a declarator issues that the property is held in trust by the parties for their daughter
Held: it was apparent that the parties co=ownership was in their roles as trustees for their daughter and the disposal of the property had to be subject to a consideration of her best interests – if a sale at this time destroyed the investment it was inimical to her best interests
Held Further: it was not obvious from the papers filed that it was appropriate that the respondent deduct his disbursements to calculate the equity in the property and it was necessary that this entitlement be established; similarly, the equity could only be calculated once a debatement and statement of the respondent's stewardship had occurred
According, Held: the parties were ordered to arbitration to debate the statement of account of the respondent and to determine if he was entitled to include his disbursements in that calculation, whereafter the parties were to either agree how to deal with the property or approach then court on amplified papers for further relief.

A second controversy existed because at the time of the purchase, and the lodging of the deed of transfer the parties were described as married in community of property when they had been divorced – to regularise that a rule nisi was issued to the registrar of deeds to show cause why a correction should not be effected, and if supported, to indicate what formula would be acceptable to the registrar

No costs were ordered.

Sutherland J

Introduction

[1] The ostensible issue in this case is a dispute over a house, Erf […], Solandpark, in respect of which applicant and first respondent are the registered owners in equal shares. The applicant wants it to be sold and half the proceeds given to her. The first respondent resists that relief. [1]

[2] Behind this issue lies several larger and more complex issues, foremost among which is a counter-claim by the first respondent seeking to enforce the terms of an oral agreement between the parties concerning, in effect, the beneficial ownership of the property residing in their daughter N and the two parents undertaking to act as trustees in her interest, in respect of the property.

[3] Other issues include the possibility of a need to rectify a deed of sale and a deed of transfer of the property to accurately describe the parties as divorced and not married in community of property, and the propriety of the respondent accounting to the applicant for his stewardship of the property.

The facts and circumstances giving rise to the dispute

The acquisition of the property and the oral agreement to hold it for N

[1] The second respondent did not participate.

[4] The parties were married in community of property on 12 April 2006. N was born on 24 July 2006. The parties separated about September 2006. N has lived with the applicant at all times.

[5] A divorce order was granted on 5 November 2007. The applicant alleges it was done without her knowledge. She does not, however, wish to have it rescinded. For the purposes of this case, the circumstances of the dissolution *per se* are not critical, however, her alleged ignorance thereof remains pertinent to certain aspects of her case.

[6] On 6 August 2008 the property was purchased. It is common cause that the idea to purchase the property was the first respondent's idea, and he invited her to be co-owner.

[7] The applicant in her founding affidavit says:[2]

> " When the property was purchased it was our intention ….that the property would be a form of an investment for N, but these intentions ended with the marriage. It was agreed [that] the first respondent would be responsible for looking after the property…."

[8] The first respondent in his Answering affidavit[3] relates that after the divorce he left the country to work for some time. To cater for any adverse eventualities befalling him whilst abroad, he conceived the idea of buying a house for the 'security' of N. He approached the applicant who agreed to register the house in both their names. But for

[2] FA14-15/8.5
[3] AA 105/11.1 -11.3

the bank refusing to register N as the owner because she was a minor, the property would not have been registered in the parties' names at all.

[9] The probabilities of the applicant being ignorant of the divorce order is to some extent corroborated by the fact that in the deed of sale and, axiomatically, on the deed of transfer they are described as being a married couple and married in community of property. That description is obviously an error, but the conveyancers could only have relied on information given to them by the parties. How the wrong information was given is not explained.

[10] More puzzling is the notion of the applicant that the agreement to jointly hold the property as an investment for N only held good for the duration of the marriage. This contention is made again by the applicant in her replying affidavit when she avers that N has no rights to the transfer of the property.[4] However, the agreement, itself, is in no way dependent on the fact of their marriage being extant. On the common cause agreement to be trustees of their daughter's investment, the only significant relationship between the parties is their parenthood of N, which merely explains their decision to jointly have charge of the sole asset. Neither a former marriage nor an existing marriage makes any difference and it could not have been a tacit term of the agreement, had they indeed still been married at the time of the purchase. Moreover, as regards the divorce of 5 November 2007 the applicant says nothing of when and how she came to believe the marriage had terminated.

[4] RA 167/20.2

[11] In my view, it seems at best problematic that she was in truth ignorant of the divorce. But even if she was ignorant, her ignorance contributes nothing towards the validity or duration of the co-ownership of property to be held for the benefit of her daughter. In my view, the protestation of ignorance of the divorce has been made purely to set up the spurious idea that the agreement concerning N was somehow dependent on her belief that the parties were still married at the time of purchase and has now lapsed. The contention does not endeavour to address the logical consequences of such an agreement lapsing. It would not follow that she has now an unfettered personal interest in the property and N's interest has been eliminated.

[12] It is common cause that she never paid any money towards the purchase or upkeep of the property, despite her being a co-bondholder with the second respondent. Her sole contribution is lending her creditworthiness to the bond application. Indeed, the applicant's motivation in this litigation is, to a large extent, dictated by the fact that as a co-mortgagee in respect of this property she is being thwarted in her efforts to raise another bond for a property of her own. No personal benefit could have accrued to the first respondent by obtaining her agreement to be a co-owner at the time (ie after the divorce) if the common intention was that the property was an investment for N; on the contrary a post-divorce co-ownership is consistent with the idea of both parents being co-trustees. On the probabilities, the only possible advantage to the first respondent by their co-ownership would have been the enhanced creditworthiness of two mortgagees, a commitment the applicant would only have made if it was N rather than the respondent who was to be the substantive beneficiary. Whether they were married or

not could make no difference to that matter. The respondent does seek to resile from the agreement that the property is to be held for N, and thus does not stand to be accused of a ruse to boost his creditworthiness in seeking co-ownership.

[13] The upshot is that:

13.1. It is common cause that the property was acquired with N as the *de facto* beneficial owner, and the two parents as co-owners exercising rights of ownership in her interest.

13.2. The notion that such an agreement terminated because the parties' marriage was dissolved is rejected as being implausible.

[14] There is a contention advanced on behalf of the applicant that any enforcement of the oral agreement would in some way violate the provisions of the Alienation of Land Act 68 of 1981, which provides that the disposal of land can be effected only in terms of written agreements. This notion is, in my view, misdirected. The performance of the terms of the oral agreement do not trespass into the realm regulated by the Alienation of Land Act. N has of course no real rights to the property. She does have by way of accepting the benefits of the *Stipulati Alteri* (which is what the oral agreement is) a personal right against each parent. Whether her rights are honoured by a voluntary transfer of the property to her or by paying her the value of the property is not a matter of legal significance.

The Dispute about ending the co-ownership

[15] Between 2008 and 2018 a lot of water has flowed under the bridge of the fractious relationship between the parties. It is unnecessary to trudge through all of the spats. It suffices to say that both parties are, in principle, in favour of dissolving the co-ownership so that they can be spared having to deal with one another. The applicant has an additional motive as addressed above.

[16] The problem that arises however is how that dissolution might be accomplished, and no less important, whether it can be accomplished without harming N's financial interest in the property. A disposal of the property that leaves N with Nothing is inconsistent with their undertaking to hold the investment on her behalf.

[17] The applicant's proposal is to sell the property and divide the proceeds. The respondent argues that a sale at this moment will not produce any proceeds to divide. His figures are not admitted, but the applicant cannot, unless there is a statement and debatement of the respondent's stewardship, offer a substantive rebuttal.

[18] The respondent says that the house was bought for R621,500 in 2008. The sum outstanding on the bond, now, is R548,126.57. In addition, he claims that he has expended over the past ten years sums, as yet to be verified, in excess of R600,000 on the bond and on maintenance. The sums received as rental are unclear and a dispute

of fact exists about the periods during which the property was rented out. The respondent claims that his expenditure should be a cost to be refunded to him in the event of a sale. If that were to take place, on these sums, if taken to be accurate, there might be no free residue at all to divide up. Upon this premise the respondent resists a sale at this time. His stance is that no step should be taken that may prejudice the investment that N will have as hers to control when she becomes an adult; ie in 2024, six years from now.

[19] The assumption that the respondents expenditure is a legitimate deductible expense from the "investment' which will accrue to N is not well made, at least not on these papers. Presumably, the principal idea is that when the house is handed to N, it will be free of any residual debt, whether to the bondholder or to the respondent. Given the sum of the bond outstanding and the remaining six-year timetable, that prospect is by no means obvious to me. More likely, is a handover of a property that remains incumbered, but in which there is significant equity.

[20] Of course, whether now or in the future, any free residue from a sale which is available for distribution and received by each party as trustee for N, shall have be expended in N's interest, whether in a new investment or otherwise.

[21] Until the true current value of the house is independently established no sensible decision can be made; ie to sell now in the reasonable expectation of producing a free residue or to defer a sale until such time as a profit can be made or hand over the asset

to N. That exercise cannot be carried out in these proceedings. An appropriate procedure shall have to designed to obtain this information.

[22] In the circumstances it seems to be appropriate that the calculation be referred to an independent person for a statement and debatement of account and for a determination of whether or not the sums expended by the respondent in terms of any contractual rights that flow from the oral agreement entitle such disbursements to be deducted by him. Upon the determination of those facts, the parties may either agree on a course of action or again approach the court for appropriate relief.

Ancillary issues

[23] As alluded to above, there is a need for a rectification of the deed of transfer. Both the deed of transfer and the agreement of sale have patent defects. In my view, the most sensible way to resolve that is to issue rules nisi on interested parties to show cause why the rectification of the deed of transfer should not take place. In my view, it is unnecessary to cause the agreement of sale also to be rectified.

Costs

[24] In my view, the appropriate outcome in this litigation is to make no order as to costs.

The Order

1. It is declared that an oral agreement between the applicant and the first respondent exists. in terms whereof they acquired the fixed property, being erf […] Solandpark, (the property) as trustees for the benefit of their daughter N, a minor.

2. A decision on the question of the dissolution of the registered co-ownership of the property by the applicant and first respondent is deferred until such time as the following has been completed:

   (i) The applicant and first respondent shall submit to an adjudicative process to be conducted by an independent third party, either chosen by agreement between them within 90 days of date of this judgment, or failing timeous agreement, appointed by the Chairman of the Johannesburg Attorneys association.

   (ii) The third party shall determine the issues specified in this order, in a procedure determined at the discretion of that third party, which procedures are appropriate to the circumstances and which serves expeditiousness and sparing of costs.

(iii) The third party shall determine the present market value of the property and whether a sale is likely to result in a free residue after all outstanding costs are paid.

(iv) The third party shall determine what rental revenue has been received and how these funds have been utilised.

(v) The third party shall determine whether the first respondent is entitled to claim a refund of any of the disbursements which are proven to have been made by him in respect of the property.

(vi) The third party shall submit a report to the applicant and the first respondent.

(vii) Upon receipt of the report, the applicant and the first respondent shall endeavour to reach agreement on the question of whether or not to dispose of the property, and failing agreement, may approach the court, on notice to one another, on these papers suitably amplified, for further relief.

3. A rule nisi shall issue to the Second respondent, and to the Registrar of Deeds, returnable on 2 October 2018, to show cause why the deed of transfer should not be rectified to reflect that the applicant and the first respondent were not married to one another after 5 November 2007, and if no objection is raised thereto, the

Registrar of Deeds is directed to put forward the form and content of an amendment satisfactory to the second respondent to give effect to such rectification.

4. There is no order as to costs.

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Roland Sutherland
Judge of the High Court
Gauteng Local division, Johannesburg

Heard: 6 June 2018
Judgment: 11July 2018

For the Applicant:
Adv N S Nxumalo,
Instructed by Tshabalala Attorneys

First Respondent in person.