

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

Case Number: 2024-014513

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

5 MAY 202

In the matter between:

I[...] M[...] R[...]

Applicant

and

N[...] M[...] D[...]

First Respondent

FIRST NATIONAL BANK LIMITED

Second Respondent

JUDGMENT

INTRODUCTION

[1] The applicant and the first respondent are married to each other in accordance with the customary law as envisaged in section 3 of the Recognition of Customary Marriage Act, Act 120 of 1998 as amended. The parties are however in the process of being divorced from each other which divorce proceedings are

pending. Apart from the ordinary relief claimed in divorces, I am advised that the applicant is also seeking an order of forfeiture of all benefits against the first respondent.

[2] The applicant in this application makes application for an order in the following terms:

- a. An order compelling the first respondent to (a) co-operate with the applicant to sell the immovable property situated at 2[...] F[...] C[...], K[...] G[...], K[...] (***“the Property”***) and (b) to sign all and any documents required to sell and transfer the property.
- b. In the alternative that the Sheriff of this Court he authorised to sign the intended documents on her behalf.

[3] At the commencement of the hearing, I noticed that the first respondent appeared in person. The applicant on the other hand was represented by both attorney and counsel. I invited the first respondent to indicate whether she wished to proceed with the matter alternatively apply for a postponement of the application to allow her to secure legal representation. I took some time to explain to her the potential consequences of proceedings with the matter in person and I was satisfied that she appreciated the explanation offered to her. Notwithstanding, she firmly declined the invitation and insisted that she is willing and able to proceed to represent herself.

[4] It was on this basis that I then proceeded the matter.

[5] The applicant and the first respondent were married to each other on 12 January 2008. However, during or about 2019, the marriage relationship irretrievably broke down, leading to the institution of divorce proceedings.

[6] The applicant alleges that the conditions in the common home forced him to seek accommodation elsewhere which he did, but not before the applicant and the first respondent reached agreement that she would be responsible for payment of the bond instalments, the levy account and the municipal charges relating to the property. The rationale behind the alleged agreement, I am told, is that the first

respondent was gainfully employed, earning a salary of approximately R50,000.00 per month and that it was not possible for the applicant to assume and continue with the financial obligations of both the property in question as well as the expenses to his new place of residence.

[7] When the applicant realised that the first respondent did not comply with her payment obligations, as agreed to with the applicant, he again approached her, and a further purported agreement was reached in terms of which the property would be sold. The first respondent however failed to provide her co-operation in that she refused to allow viewings of the property, and she also refused to sign various documents provided to her by the property to achieve a sale of the property.

[8] Due to the non-payment of the monthly bond instalments, the second respondent issued summons against the applicant and the first respondent, and I am told that an application for summary judgment is eminent. Consequently, there is some degree of urgency to the application.

[9] At the commencement of the hearing, I invited the applicant's counsel to identify the specific "right" which the applicant seeks to enforce in compelling the first respondent to sell her undivided half share in the property. I extended this invitation because, upon a reading of the papers, the basis of the applicant's asserted right was not apparent. On my interpretation of the papers, the applicant appeared to rely either on the alleged agreements concluded between the parties. However, the first respondent disputes the existence of both agreements and, applying the *Plascon-Evans* principle, I am bound to accept her version. The applicant also failed to place any extrinsic evidence before the court to support the existence of either of the alleged agreements.

[10] Under the heading "THE APPLICANT'S RIGHT" the applicant alleges that:

"5.1 I am the lawful joint owner of the property as is evident from a copy of the title deed in respect of the said immoveable property. Furthermore, Quick Sell Plan Customer Mandate, City of Johannesburg Tax Invoice and agreement of levies in particular corroborate my assertion of my joint ownership of the property.

5.2 I have currently been occupying the property for almost 10 years and have paid all the outstanding levies and municipal costs levied against the property.”

[11] Not satisfied that I have the power to direct the first respondent to sell her interest in the property, especially under circumstances where there is a pending divorce action and in respect of which a claim for forfeiture is raised, I extended an invitation to the parties to file supplementary heads on the issue in question. I received supplementary heads from the applicant but nothing from the first respondent.

[12] The argument(s) advanced by and on behalf of the applicant in the supplementary heads of argument goes as follows. The conclusion of a customary marriage is governed by the Recognition of Customary Marriages Act 120 of 1977 (“***the RCMA***”) read together with the Matrimonial Property Act, Act 88 of 1984 (“***the MPA***”). The MPA primarily address spouses married in community of property, outlining their powers and limitation. All customary marriages where there is one husband and one wife, in terms of the RCMA are married in community of property and the provisions of the MPA are applicable to the present scenario, more specifically section 16 of the MPA.

[13] Section 16 of the MPA provides:

“16. **Want of consent, and suspension of powers of spouse.**

(1) When a spouse **withholds the consent** required in terms of subsection (2) or (3) of section 15,¹ or section 17,² or when that consent, **can**

¹ Section 15 of the MPA provides:

“15 Powers of spouses

- (1) Subject to the provisions of subsection (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.
- (2) Such a spouse shall not without the written consent of the other spouse –
 - (a) alienate, mortgage, burden with a servitude or confer any other real right in any immoveable property forming part of the joint estate;
 - (b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immoveable property forming part of the joint estate;
- (3) A spouse shall not without the consent of the other spouse-
 - (a) alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate”

for any other reasons not be obtained, a court may on the application of the other spouse give him leave to enter into the transaction without the required consent if it is satisfied, in the case where the consent is withheld,

that such withholding is unreasonable or, in any other case, that there is good reasons to dispense with the consent.

(2) **If a court is satisfied that it is essential for the protection of the interest of a spouse in the joint estate, it may on the application of that spouse suspend for a definite period or and indefinite period any power which the other spouse may exercise under this chapter.**”

[14] Section 16 deals with registration and endorsement of immovable property ownership when parties are married in community of property. The primary purpose of section 16 is to regulate how immovable property is registered when spouses married in community of property acquire, alienate, or otherwise deal with immovable property. It ensures that, when one spouse acquires or disposes of immovable property, the joint estate is properly reflected in the Deeds Registry records — thereby protecting the integrity of the joint estate and third parties dealing with it. In short, it requires that ownership of immovable property vesting in the joint estate be recorded as such; it provides that when a spouse, in their own name, acquires immovable property, it is deemed to be acquired on behalf of the joint estate (unless stated otherwise); it requires endorsements on title deeds to indicate that the property is part of the joint estate and it promotes certainty for third parties and ensures that the property is properly protected under the joint estate.³

[15] The applicant further submits that he is entitled to approach this court for the requested relief in terms of section 34 of the Constitution to have any dispute resolved before court. I am not convinced that section 34 of the Constitution is of any assistance in the present matter. There is no objection to the applicant approaching this court.

² Section 17 of the MPA relates to litigation by or against spouses, not relevant to the present application.

³ Govender v Ragavayah NO and Others 2009 (3) SA 178 (D); Ex Parte Menzies et Uxor 1993 (3) SA 799 (C); Klerck N.O v Van Zyl and Maritz NNO 1989 (4) SA 263 (SE)

[16] I am further referred to **J.N.O v M.N.O.**⁴ wherein WISIMEKI J *inter alia* re-stated the applicable principles as:

- [6]. 1. **No co-owner is normally obliged to remain a co-owner against his will.** As a general rule a co-owner is entitled to have co-ownership terminated by invoking action-communi dividundo. (Robson v Thereon 1978 (1) SA 841 SA 841 (A)).
2. **Courts come to the rescue of parties who are co-owners and who for one reason or the other are unable to agree on the method of termination:** where one party refuses to terminate the joint ownership or where the two agree to terminate but the other refuses to comply with the terms of the agreement.
3. Courts, however, assist where there is joint ownership and proper facts have been placed before them. **The courts follow methods which are fair and equitable to the parties."**

[17] I must immediately state that, although the facts in **J.N.O v M.N.O** (*supra*) are not directly on all fours with the present matter, I am nonetheless of the view that the principles articulated therein are applicable. I remain of the opinion, as expressed during the hearing, that the urgency of selling the property, particularly in light of the actions taken by the second respondent, is beyond question. In my view, this matter calls for the court's intervention to assist the parties in establishing a method that is fair and equitable to all concerned, including the minor children. I am also mindful of the pending divorce action, in which issues have been raised that overlap with those arising in this application. I wish to make it clear that I do not intend to make any findings that would pre-empt or impact upon the issues to be determined in the divorce action.

[18] In coming to the ultimate judgment herein I consider the following facts:

- a. The second respondent has already commenced with legal action against the applicant and the first respondent in foreclosing on the immoveable property and an application for summary judgement is eminent.
- b. The first respondent is a senior technologist at Eskom.

⁴ (27314/13) [2014] ZAGPPHC 264 (12 February 2014)

c. The first respondent has been making payment of the monthly insurance instalments and the monthly expenses of the two minor children as well as all unidentified household expenses.

d. The first respondent herself realised that there is a possibility that they, may lose the property and therefore, she submitted to the second respondent a distressed debt application, which application I assume was unsuccessful since the second respondent is seeking summary judgement against the parties.

e. The first respondent is the owner of three other immoveable properties, one of which consists of a vacant stand and the remaining two properties being occupied by other tenants, the details of which the first respondent do not disclose. The conclusion of the legal process in terms of which the property is to be sold and any subsequent attempts to have the first respondent and the minor children evicted should they chose to remain in occupation, is slow and tedious process, affording sufficient time to make alternative housing arrangements and potentially allowing the divorce proceedings to conclude.

f. Neither of the applicant or the first respondent approached the Magistrate's Court for an order compelling the other party to continue to make payment of the monthly bond instalments and ancillary expenses related to the house.

g. There are a myriad of disputes of fact on these papers that I am unable to resolve.

[19] I pause to state that the first respondent raised a point *in limine* of *lis pendens* with reference to the pending divorce action and requested me to stay this application until such time that the said action is resolved. For present purposes I will assume that all the requirements to establish the objection have been complied with. It is trite that once the requirements to the point *in limine* has been established that a factual presumption arises that the second proceedings is *prima facie* vexatious. The party who instituted the second proceedings must satisfy the court that, despite all the elements being present, the balance of convenience and equity require the case

to proceed. Further, that I have an overriding discretion to order a stay even if all the elements are not present.⁵

[20] The applicant on the requirements of irreparable harm and balance of convenience alleges that the first respondent will not suffer any prejudice if she was to be compelled to agree to the sale of the property. To the contrary, it is alleged that the sale of the property will ensure that both parties receive their share in and to the property whereas the second respondent at present seems to be the sole winner. I say this without any financial detail having been disclosed as far as the intended sale of the property is concerned. On the other hand, a refusal of the relief claimed will result in a judgement being entered against the parties and amongst other consequences, affecting their credit worthiness.

[21] The first respondent's only contention of harm is that she and the minor children will be deprived of their common home. The submission must be rejected. The house is being foreclosed upon by the second respondent and by the looks of it, the second respondent is likely to succeed, since both parties agree that the bond instalments are in arrears. At least in this respect there is a possibility that the parties may at least receive some dividend should the property be sold for more than what is owed to the second respondent.

[22] For all of the aforesaid reasons I am of the view that the applicant has satisfied me that (a) I have the power to receive the application and grant the relief prayed for, (b) that in the exercise of my discretion I refuse to uphold the *in limine* point of *lis pendens* and (c) allowing the relief claimed but with the caveat that the proceeds of the sale once the indebtedness of the second respondent is settled, must be retained in trust pending the final determination of the divorce proceedings.

RELIEF

[23] In the result I make the following order:

⁵ Ceasarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and others [2013] 4 All SA 509 (SCA); 2013 (6) SA 499 (SCA)

- a. The first respondent is directed and ordered, to provide her co-operation with the intended sale of the immovable property situated at 2[...] F[...] C[...], K[...] G[...], K[...] (***“the Property”***) , including but not limited to, within a period of 3 (three) days of service of this judgement and order on her, together with any and all documents requiring her signature to allow for the effective sale of the property, to sign such documents and to allow for viewings of the property.
- b. In the event of the first respondent, at the request of the Sheriff of this Honourable Court failing and or refusing to sign the documents in question, then and in such event the Sheriff of this Honourable Court is authorised to sign the documents on her behalf.
- c. This order applies equally to the transfer documents required to give transfer of ownership to the purchaser of the property, whether the property is sold through private treaty alternatively through a sale arranged by the second respondent and resulting the successful sale of the property.
- d. The net proceeds from the sale of the property, after settlement of the second respondent's indebtedness and all ancillary costs, if any, shall be retained in the trust account of the applicant's attorneys of record, pending the final determination of the divorce proceedings instituted under case number 2022-017322. The proceeds shall thereafter be distributed to the parties entitled thereto, in the proportions determined by the divorce court, alternatively in accordance with such terms as may be agreed to between the parties in writing.
- e. Each party is directed and ordered to pay their own costs.

S AUCAMP
ACTING JUDGE OF THE HIGH
COURT JOHANNESBURG

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 5 May 2025*

HEARD ON: **12 MARCH 2025**

DATE OF JUDGEMENT: **5 MAY 2025**

For the Applicant:

Adv D Moodliyar

instructed by Leseka Attorneys F3 Midview Building Thandani Office Park
22 Invicta Road, Carlswald

For the Respondent:

The First Respondent in Person

For the Second Respondent:

No participation and no Appearance