

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 71753/2018

REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**
REVISED.
14 JUNE 2022

In the matter between:

BRENDA MINNÉ

Plaintiff

and

MARTHINUS CHRISTOFFEL MINNÉ

First Defendant

DENNA MINNÉ

Second Defendant

FIRST RAND BANK LIMITED

Third Defendant

THE CHIEF REGISTRAR OF DEEDS

Fourth Defendant

JUDGMENT

NEUKIRCHER J:

[1] This is an action based on the *actio communi dividundo* for the termination of joint ownership of an immovable property situated at Farm Ruimsig 265, Portion 21, IQ District, Gauteng Province (the Property). It is common cause that the property is registered at the Deeds Office in the names of the plaintiff and 1st defendant¹ jointly in terms of Deed of Transfer T[....].

[2] The 3rd defendant² and the 4th defendant³ are cited insofar as they have an interest in the outcome of this case but no direct relief is sought against them.

[3] The 2nd defendant is married to the 1st defendant in community of property and she is the plaintiff's mother. In this judgment, all references to "the defendants" is a reference to the 1st and 2nd defendant only.

COMMON CAUSE

[4] At the commencement of this trial, the following was common cause:

4.1 that there is a "*joint ownership of the property*"⁴;

4.2 that the plaintiff is entitled to a termination of the joint ownership;

4.3 that the defendants counterclaim has been withdrawn and the defendants have tendered the party and party costs consequent upon that withdrawal.

IN DISPUTE

[5] The following issues are in dispute and to be adjudicated upon:

5.1 the extent of and share in the joint ownership;

5.2 the manner in which the joint ownership should be terminated;

¹ Her father

² First Rand Bank Ltd (FNB) who is the bond holder

³ The Registrar of Deeds (the Registrar)

⁴ Per the Joint Practice Note filed by the parties on 31 May 2022

5.3 the scale of costs pursuant to the withdrawal of the counterclaim⁵; and

5.4 the overall costs of suit.

THE PLEADINGS

[6] The pleadings in this matter have been amended on several occasions. Although it is the latest amended particulars of claim and plea that are to be adjudicated upon, the pre-amendment pleadings provide context for the argument regarding the division of the proceeds of the Property, and the method of division.

[7] In her original suit, the plaintiff alleged the following:

7.1 that she and the defendants are the registered joint owners in equal and undivided shares in 2 immovable properties, of which the Property is one⁶;

7.2 that the Property is held by the Plaintiff and the defendants jointly in terms of the Deed of Transfer No. T[...];

7.3 that the Property was purchased by the plaintiff and the defendants on 6 July 2003 for R2 150 000-00;

7.4 that the property is presently used by the defendants as their primary residence;

7.5 that the plaintiff wishes to terminate the joint ownership.

[8] The Plaintiff has proposed a method of termination which she has detailed in her suit and which ultimately will mean that she will see 50% of the proceeds in the Property and the defendants the other 50%.⁷

⁵ The plaintiff asks for punitive costs

⁶ The second property is situated at Erf [...], Riverside Road, Stilbaai Wes, Western Cape. Although this suit includes a prayer for the term of the joint ownership of this property as well, a subsequent amendment deleted that prayer.

[9] In a first amendment of the particulars of claim, the plaintiff re-iterated her stance regarding the equal joint ownership between herself and the defendants by suggesting relief that would see a division of any proceeds of the sale of the property being divided into 1/3 equal parts between them.

[10] In their plea, filed after the above first amendment, the defendants allege that:

10.1 the 1st defendant paid an amount of R1 100 000-00 towards the acquisition of the Property with the balance being paid by an entity called BCM (Supplies CC).

10.2 the plaintiff made no contributions towards the purchase of the Property.

[11] The defendants ask that the claim be dismissed with costs.

[12] In October the plaintiff then amended her particulars of claim again. In this she alleges, simply that the plaintiff and the 1st defendant are the registered owners in equal and undivided shares and that the property was purchased by plaintiff, 1st defendant and 2nd defendant on 6 July 2003 for R2 150 000-00

[13] In their amended Plea the defendants now plead that:

“2. It is admitted that the parties are the registered joint owners of the property but the First and Second Defendants plead that such joint ownership is held on the basis that the property [is] co-owned in equal share[s] of 33,33% each. In addition, the co-ownership of the parties in such immovable property, stems from and was paid with:

2.1 an amount of R1 100 000 ... from the 1st Defendant; and

2.2 the balance was paid by BCM Supplies CC, ..., which forms the subject matter of the counterclaim hereinafter.

The First and Second Defendants plead that the Plaintiff made no contributions toward the purchase of the property as described in paragraph 9 of the Particulars of Claim. The contributions as set out above need to be taken into account when termination of joint-ownership is made. Anything to the contrary is denied.”

[14] The plea simply seeks an order that the claim be dismissed with costs. There is no counterclaim by the defendants⁸. On this basis, the trial proceeded and the plaintiff and the 1st defendant each testified.

THE EVIDENCE

[15] The plaintiff presently resides in a property owned by her, 1st defendant and 2nd defendant, in the Western Cape. The Western Cape property does not form any part of the present dispute between the parties.

[16] The Property was purchased as an investment property, in which the plaintiff, her son, 1st defendant and 2nd defendant would reside. According to the Tax Invoice dated 18 March 2003 from Bento Inc, the conveyancers, the purchase price of R2 150 000-00 was financed as follows:

- a) R1 150 000-00 via FNB bond; and
- b) a deposit of R 1 230 293-63.

There is no indication on any paperwork or document placed before me who paid the deposit, but the 1st defendant testified that he financed this through the sale of a property he and 2nd defendant owned in Erf 517 Fairland CC.⁹

[17] According to the Offer to Purchase (OTP), dated July 2003, the Property was purchased from Equestrian Property Investments (Pty) Ltd and reflects the

⁸ That having been withdrawn by notice dated 3 March 2022 which was only served on 1 June 2022 being 4 court days before trial

⁹ This is borne out by the OTP which provides in effect that the sale of this property is a condition of the purchase of the Property.

purchasers as the plaintiff, the 1st defendant and the 2nd defendant. It does not reflect the actual percentage in which they hold their ownership.

[18] The Title Deed reflects only plaintiff and 1st defendant as the registered owners of the Property. The evidence that this was incorrect was an email from the 1st defendant, dated 31 January 2019, to Monica from Dykes Van Heerden Attorneys stating:

“Ek sal u hulp in die opsig baie waardeer aangesien daar n belange persentasie foutiewelik aangedui word wat baie dringend reggestel moet word...”

It appears that all the paperwork pertaining to the transfer of the Property was directed to the 1st defendant only and thus it appears that he was the one in charge of the transaction. He also testified that he drafted the letters and emails directed to the seller and conveyancer. He however proffered no explanation for the discrepancy between the 50/50 ownership reflected in the Title Deed and the 1/3 each share that forms the basis of the defendants' defence.

[19] The fact is, and it is borne out by the evidence and the documents placed before me, that subsequent to the plaintiff requesting a termination of the joint ownership in 2016, the 1st defendant had informed the plaintiff of the 1/3 each ownership in the correspondence he directed to her, and all discussions regarding a division of equity had been dealt with on this basis. This is confirmed by the pre-amended Particulars of Claim. The latest amendment asks for a 50/50 division because the plaintiff states that she was informed by her attorneys that the Title Deed reflects that she has a 50% ownership, and therefore she is entitled to 50% of the proceeds of any sale.

[20] The plaintiff lived in the property with her son and the defendants from its purchase in 2003 until ± 2011 when she moved out. According to her, the bond payments were paid via debit order each month from a bank account in the name of BCM Supplies (Pty) Ltd (BCM)¹⁰. According to the evidence, the 1st defendant was

¹⁰ Previously BCM Supplies CC in which the plaintiff held 100% membership. This was later

then placed on semi-retirement¹¹ and there was a subsequent dispute as regards the shareholding in BCM – full details of which were not placed before me – but which saw an order granted under case number 26448/2019 on 25 February 2022 that the plaintiff was to pay the 1st defendant R185 795-00 for his 5% shareholding in BCM.

[21] It is apparent from the documentation that:

21.1 according to BCM's previous accountants, M G Taute, BCM's general ledgers and financial records indicate that BCM paid for the Property's expenses on behalf of its members/shareholders i.e. the plaintiff and the 1st defendant;

21.2 since the year ended 28 February 2013 up to the year ended 28 February 2017, BCM held these expenses in its books and the expenses were not allocated to the loan accounts of the two shareholders;

21.3 that from year end 28 February 2018 onward, the bond expense¹² was allocated according to a 1:2 ratio – 1/3 to the loan account of the plaintiff and 2/3 to the loan account of the 1st defendant.

[22] According to the plaintiff, the 2018 financial statements of BCM have not been signed and she has instructed her new accountants¹³ to revise those to reflect the correct state of affairs i.e that a 1:1 ratio is to be used when allocating the Property's expenses in accordance with the Title Deed. It bears mentioning that, while the plaintiff has indicated that BCM's financial statements for the years ending 2018 to 2021 have been submitted to SARS already, those were not placed before this court. A letter from Omnium states:

“According to our knowledge and records, bond payments for the above mentioned property was allocated in a ratio of 1:1 to the loan accounts of B.

amended so that the plaintiff held a 95% shareholding and the 1st defendant a 5% shareholding

¹¹ The exact manner in which the retirement came about and was effected is in dispute and is not relevant to the present issues

¹² An amount of R9 362-96 per month

¹³ Omnium Tac & Accounting CC (Omnium)

Minné and M.C. Minné for the financial years ending February 2018 to February 2020.

Furthermore we confirm the resignation of M.C.Minné dated 1 September 2019, As from this date payments made on behalf of the above mentioned property are allocated in full to the loan account for M.C.Minné.”

[23] It is thus the position of:

23.1 the plaintiff, that the equity division in the Property should reflect the position stipulated in the Title Deed i.e 50/50; and

23.2 the defendants, that the actual agreement between the parties is reflected in the OTP and all the correspondence i.e that the equity division should be 1/3 each. The defendants also maintain that the deposit of R1,1 million should first be deducted from any net equity from the sale of the Property and whatever the remaining balance is should only then be divided 1/3 each between the parties.¹⁴

The Legal Position

[24] The general principles pertaining to an *actio communi dividundo* are set out in **Robson v Theron**¹⁵ as the following:

24.1 no co-owner is normally obliged to remain a co-owner against his will;

24.2 the action is available to those who own specific tangible things (*res corporales*) in co-ownership, irrespective of whether the co-owners are partners or not, to claim division of the joint property;

24.3 the action¹⁶ may be brought by a co-owner for the division of joint property where the co-owners cannot agree to the method of division.;

¹⁴ The evidence is that there is only an amount of approximately R100 000-00 still owing on the FNB Bond. Given that the first demand to divide the co-ownership was made in 2016, this is not surprising

¹⁵ [1978] 2 All SA 264 (A); 1978 (1) SA 841 (A) at 857

24.4 it is for purposes of the action immaterial whether the co-owners possess the joint property jointly or neither of them possesses it or any one of them is in possession thereof;

24.5 the action may be used to claim as ancillary relief payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property;

24.6 a court has a wide discretion in making a division of joint property. The wide equitable discretion is substantially identical to the similar discretion which a court has in respect of the mode of distribution of partnership assets among partners as described by *Pothier*.

[25] In **Robson** the court decided that where two partners dissolve a partnership by agreement and one partner *de facto* retains the goodwill of the partnership for his own use and benefit, the retiring partner is entitled under the common law, by virtue of either the *actio pro socio* or the *utilis actio communi dividundo*, to payment of his half share of the goodwill from the continuing partner. The court then analysed the requirements of an *actio pro socio* and those of the *actio communi dividundo*¹⁷ and, decided that the goodwill of a professional practice cannot subsist by itself but must be attached to the practice. Where it is impossible to divide the goodwill between the parties or to cause it to be auctioned and to have the proceeds divided between the parties, the Court will place a valuation on the goodwill, with due regard to the particular circumstances concerning its value at the date of dissolution, and order payment of half that amount to the retiring partner. On the facts of that matter, the court then placed a value on the goodwill¹⁸ and deducted an amount for the opening goodwill of the partnership.

[26] The defendants argue that a similar adjustment should be made in this matter – this is that the deposit of R1,1 million should be deducted as an opening contribution by the defendants towards the purchase of this property. However, what

¹⁶ Although in *Matadin v Parma and others* [2010] JOL 25834 (KZP), the action was heard and decided in motion proceedings

¹⁷ Both being available to these parties

¹⁸ Which is an asset in the partnership

this particular argument loses sight of is firstly that the *actio pro socio* cannot be used as a comparable remedy as its requirements differ, secondly that goodwill is an asset in a partnership and its value is relevant to the value of the partnership (which is not the case here).

[27] In **Matadin v Parma and others**¹⁹ the court restated the principles applicable to the *actio communi dividundo* and stated the following as regards the equitable division of the property:

“[9] The question is whether any equitable adjustment needs to be made for the benefit to the first respondent and one of the daughters of the deceased having occupied the property, the receipt of rentals by the applicant and the claim by the applicant to have paid certain of the rates and that of the first respondent that the husband of the occupying daughter and she have paid municipal charges. The applicant, as co-owner, was clearly entitled to occupy a portion of the property. This she has done by way of the tenant occupying the outhouse and paying rentals to her. As regards the payment of expenses, there is not sufficient clarity on exactly how much has been paid by each party or in respect of what obligations the payments have been made on the papers. This is not a matter which requires oral evidence since the property is a modest one and the expense of such a course would in all probability take up all or most of the proceeds of the sale. In any event, neither party has requested such a measure. The courts, after all, have a wide discretion and I do not believe it necessary to make any adjustments in respect of expenses incurred or benefits of occupation enjoyed.”

[28] What is important here is the restatement of the principle that a court enjoys a wide discretion to order the distribution that it deems just and equitable.

[29] The starting point of the present matter is whether the court should apply a 1/3; 1/3; 1/3 distribution ratio or a 50:50 ratio.

¹⁹ [2010] JOL 25834 (KZP)

[30] According to the defendants the 1/3 each ratio is clear from the OTP and several emails between the plaintiff and 1st defendant starting with the plaintiff's request on 19 April 2016 to sell the Property (as she was struggling to obtain financing to purchase a property in the Western Cape because of her existing obligations²⁰). Her request to sell was met by the following email from the 1st defendant dated 14 May 2016:

“..... Tog stem ek saam dat die besluit om n derde aandeel aan jou te registreer tans die verkeerde besluit was aangesien die beginsel uiters eensydig van aard is.....” (my underlining)

Other than the evidence that plaintiff simply accepted the 1st defendant's word that she held a 1/3 share in the Property, the remainder of that sentence (as underlined by me) was not explained.

[31] The plaintiffs evidence was that all subsequent correspondence and her additional letters and the pre-amended Particulars of Claim were based on the understanding (as informed by 1st defendant) that she held a 1/3 share in the Property. It was only when she was shown the Title Deed, and received legal advice, that she realised her share was in fact, 50%.

[32] There is no evidence before me as to how the alleged arrangement and alleged agreement regarding the 1/3 ownership/division came about. There is also no evidence before me as to why this was not specified in either the OTP or in the Title Deed.

[33] It is common cause that the defendants do not seek rectification of the Title Deed. Mr Paige-Green has submitted, the Title Deed is a jural act that has been incorporated into a written document and this reflects the true position of the parties and no evidence may be led to contradict this.

[34] But this submission, whilst certainly attractive, is not strictly speaking correct: Section 102 of the Deeds Registration Act 47 of 1937 defines “owner” inter alia as “*the person registered as the owner*”, but it

²⁰ With regard to the Property and the Stilbaai Property

“... does no more then give a special meaning to the word “owner” whenever that word is used in the Act. It does not in any way alter the general legal meaning of owner, nor subvert the general principles governing the registration of ownership which underline the deeds registries system. It should not, in my view, be read to mean that whoever is registered in the Deeds Office as the legal owner of the property is in fact the legal owner. Had it been the intention of the Legislature to change the common law to that effect, it would have said so clearly.....”²¹ (my emphasis)

[35] This is not, however, surprising as there are several examples of a person acquiring ownership in an immovable property without their title being registered, of which one is parties married in community of property. In that instance, and by operation of law, if one spouse is the registered owner of an immovable property at commencement of the marriage the other upon conclusion of the marriage, automatically acquires a share in that ownership even without due registration thereof. As is stated in **Ex Parte Menzies et Uxor supra**, “[t]he immediate consequence is obviously that the nominal title to immovable property previously registered in either spouse’s name in the Deeds Registry no longer accords with the true ownership position.”²²

[36] But the point is the following: even though the Title Deed to the Property only reflects the plaintiff and the 1st defendant as the owners, in actual fact, the 2nd defendant is also the owner of the Property by virtue of her marriage in community of property to the 1st defendant. Thus, the effect of that is that the defendants hold a combined equal share in the Property. More succinctly put, and if one were compelled to reduce this to ratios, it would mean that the plaintiff holds 50% share in the property, and the defendants the other 50%.²³

[37] Whilst the OTP certainly mentions the names of the parties as the purchasers of the Property, it gives no enlightenment as to the portions in which the acquisition and their ownership was to be registered.

²¹ Ex parte Menzies et Uxor [1993] 4 All SA 455 9c) a 460 -461

²² At pg 461

²³ See Ex Parte Menzies et Uxor and the explanation of the consequences of a marriage in community of property via-à-vis the ownership of an immovable property at pg 461 to 466

[38] There is also a dearth of information as to the instructions given to the conveyancer when the Property was to be transferred in 2003. Given that it was common cause in this trial, and admitted by the 1st defendant in his evidence, that the correspondence pertaining to the acquisition and registration of the Property were directed to him and responded to by him solely, I would have expected some enlightenment. But the only information before me comes some 13 years ex post facto in an email.

[39] Given that the defendants do not seek rectification of either the OTP or the Title Deed and that these are the written recordings of the intention of the parties at the time of the registration, I am of the view that they reflect the true position.

[40] Even if I am incorrect on this, I am still of the view that the parties should share in the net proceeds of the Property on an equal basis as:

40.1 even accepting that the defendants paid the deposit on the Property, it is not disputed that BCM paid the monthly bond instalments. It is common cause that plaintiff was, for a period of 3 years²⁴, the sole owner of BCM and then relinquished 5% of the shareholding to the 1st defendant. The fact that the books of accounting of BCM do not correctly reflect the true position as to the allocation of monies to the loan accounts simply means that the accounting records are not instructive regarding the true extent of the parties' loan accounts in BCM and cannot be used to accurately reflect their respective contributions;

40.2 the defendants have been living in the property since 2011. In this time, it is common cause that the bond account with FNB has been reduced to just under R100 000 from an initial bond of R1,1 million;

40.3 the defendants have placed no information before me as to any monies expended by them on the maintenance and upkeep of the Property.

[41] Thus, in my view, and in line with the approach taken in **Matadin v Parma** *supra*, it would be just and equitable were any equity in the Property to be divided as follows:

²⁴ ie the first 3 years after acquisition of the Property

41.1 to the plaintiff: 50%

41.2 to the defendants: 50%

[42] It is also common cause that the court has the discretion to follow a method of distribution that is fair and equitable to all parties. This could, *inter alia*, include a sale by public auction and division of the net amount²⁵, allocation of the property to one co-owner subject to payment by the other of compensation²⁶, or a private auction restricted to the co-owners, and division of the net amount²⁷.

[43] The plaintiff has, in her final amended Particulars of Claim, set out the method upon which she submits the Property should be divided. This includes its valuation by 3 independent estate agents, providing the defendants with first option to purchase the property for the average valuation of the 3 estate agents, or putting the property on the open market or the appointment of a liquidator to dispose of the Property.

[44] The defendants have not put anything before this court as an alternative, nor have they made any submissions to the effect that the plaintiff's proposals are unreasonable.

[45] Given all the above factors, I am of the view that the plaintiff has been wholly successful in her suit and there is thus no reason to deprive her of her costs. However, there was argument that the costs of the withdrawal of the counterclaim should be given on a punitive scale as the withdrawal came mere days before this hearing and the counterclaim is in fact simply vexatious given that a separate application for substantially the same relief was heard and finalized on 25 February 2022 in the plaintiff's favour. I am not of the view that the counterclaim was vexatious. Its earlier disposal simply meant that it could not continue. The fact is that the Notice indicating the Counterclaim was withdrawn was communicated to the plaintiff in March 2022 already which long before preparation for this trial

²⁵ Estate Rather v Estate Sandig 1943 AD 47

²⁶ Robson v Theron (supra)

²⁷ Kruger v Terblanche 1979 (4) SA 38 (T)

commenced – its formal service was simply in compliance with the Rules of this Court. I therefore find that punitive costs are not justified in these circumstances.

[46] Accordingly the order I grant is the following:

1] The co-ownership of the Plaintiff and the 1st and 2nd Defendants' in the immovable property situated at Farm Ruimsig, 265, Portion 21, IQ District, Gauteng Province (the Property) is hereby terminated.

2] The value of the property will be determined on the average of three independent estate agents' valuation thereof.

3] The value to be paid over to the parties shall be the following: 50% to each of the plaintiff on the one hand and the 1st and 2nd defendants on the other hand, of the net equity in the property after deduction of the following amounts: any amount owing in respect of the bond on the Property; any amount owing to the Local Municipality for purposes of obtaining any clearance certificate(s); any costs relating to the marketing, sale and transfer of the Property including estate agents' commission and/or auction costs and/or liquidator's fees and conveyancer's fees.

4] The division of the equity in the Property shall be effected in the following manner:

4.1 the 1st and 2nd defendants have until 29 July 2022 at 16h00, to communicate their decision to the plaintiff or her appointed legal representative, whether they intend to purchase the plaintiff's 50% in the Property or not;

4.2 in the event that the 1st and 2nd defendants elect to purchase the plaintiff's 50% share in the Property, the plaintiff's 50% share shall be transferred and registered in the 1st and 2nd defendants name (and in accordance with the provisions of the Deeds Registries Act 47 of

1937) against payment of the net amount calculated as set out in paragraph 3 supra;

4.3 alternatively, and in the event that the 1st and 2nd defendants elect not to, or are unable to, purchase the plaintiff's 50% share in the property parties will ensure that the property is placed on the open market for sale and sold within 90 days thereof;

4.4 further alternatively to 4.1, 4.2 and 4.3: in the event that the property is not sold within the 90-day period set out in 4.3 supra, the Plaintiff may cause the property to be sold on auction for a reserve price of not less than the amount set out in paragraph 2 supra, or an amount as agreed by the plaintiff, the 1st defendant and the 2nd defendant. The Plaintiff shall have 90 days within which to place the property on auction.

4.5 further alternatively to 4.1, 4.2, 4.3 and/or 4.4 supra: in the event that the property is not sold on public auction for the reserve price, or a price as agreed by both parties then a liquidator, as agreed to between the parties or as appointed by the Legal Practice Council in the event that they cannot agree, shall be appointed to attend to the disposition of the property.

5] The plaintiff, the 1st defendant and the and 2nd defendant are ordered to cooperate fully with respect to the marketing, sale, disposal and transfer of the Property by timeously and upon demand doing all things and signing all documents necessary to give effect to paragraph 4 supra.

6] The Plaintiff is entitled to appoint the transferring attorneys to give effect to the sale and/or transfer of the property.

7] The sheriff of the area where the property is situated, is authorised and directed to take any steps and do all such things in the Plaintiff and the 1st

and 2nd defendants stand in the event that either the Plaintiff and/or 1st and 2nd defendants fail and/or refuse and/or neglect to do so themselves.

8] The 1st and 2nd defendants are ordered to pay the plaintiff's costs of suit.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 JUNE 2022

Appearances:

For the Plaintiff	: Adv Paige-Green
Instructed by	: McTaggart Labuschagne Incorporated
For the Defendants	: Mr Niedinger
Instructed by	: WNA Attorneys Incorporated
Date heard	: 7 and 8 June 2022
Date handed down	: 14 JUNE 2022