

In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No :685/13

In the matter between :

Brandon Edward Cook
Mark Peter Edwards

First Applicant
Second Applicant

and

Dean Richard Bolton
Jason Bruwer
The Lazy Boy Trust
Shiniade Mary Kenworthy

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

Judgment

Lopes J

[1] This is an application in which the applicants seek the dissolution of a partnership agreement and an order that the sole asset of the partnership be sold in accordance with an offer to purchase annexed to the founding papers.

[2] It is common cause that during 2007 the applicants and the first and second respondents concluded an oral partnership agreement. In terms of the partnership agreement :

- (a) they were to acquire an immovable property described as 3 Brettonwood Lakes, Brettonwood Coastal Estate, (in extent 2 hectares), ('the property'), as an income generating asset and capital investment;
- (b) the parties agreed to share equally in all the profits and losses of the partnership;
- (c) the partners agreed to use the Lazy Boy Trust ('the trust'), the third respondent in this application, as a vehicle for owning the property on behalf of the partners. It was intended that the trust deed of the trust would be amended to reflect each of the four partners as equal income and capital beneficiaries of the trust;
- (d) the purpose of the partnership was to purchase the property and thereafter sell it for a profit.

[3] Pursuant to the foregoing and on the 4th September 2007 the trust acting on behalf of the partners purchased the property for R2 050 000. The property was transferred to the trust on the 5th May 2008. In accordance with the partnership agreement the property was rented out from the 5th May 2008. However, on the 28th October 2010 the tenant vacated the property and a tenant could not be found for approximately two years. In due course the applicants

were made trustees of the trust. The fourth respondent was at the time already a trustee. The second respondent was not made a trustee because his estate had been sequestrated at the time. Although it was the clear intention of the parties to the partnership that the four of them be beneficiaries of the trust, due to an oversight the trust deed was not amended in that regard.

[4] Towards the latter half of 2011 the partnership began to experience difficulties because of the lack of a tenant and arrears accumulated on the bond, the levies payable in respect of the development and rates in respect of the property. The applicants then agreed that the property would be sold, and although the first respondent initially resisted the idea he eventually agreed that the property should be put up for sale. The property was accordingly put on the market at the end of 2011 or early in 2012 with a view to selling it, paying off the outstanding amounts and distributing the profits among the partners.

[5] On the 15th December 2012 an offer was eventually received for R2,2 million including a cash deposit of R500 000 and the proceeds of a mortgage bond of R1,7 million. Various disputes then arose with the first respondent who did not wish to have the property sold. His stance ultimately precipitated this application with the applicants seeking a declaratory order that the partnership is dissolved and making provision for the sale of the property and the distribution of the proceeds to the partnership's various creditors.

[6] The first respondent resists the dissolution of the partnership and the sale of the partnership asset on the basis that the offer which has been made is too low, and that he will be prejudiced as a result of the sale of the property.

[7] In the matter of *Drummond v Dreyer* 1954 (1) SA 306 (NPD) the court was faced with the problem where the parties wished to terminate the joint ownership of a property but were unable to agree on a method. The court eventually decided that an order would be granted permitting one of them to sell the property by public auction. The court, having considered all the objections of the party opposed to the sale of the property stated at page 308 A :

‘Now I am by no means unmindful of the weight of these contentions, both those of the applicant and the respondent. But it is obvious that the Court cannot perform miracles, and it seems to me that the points the parties raise in this regard reflect risks which must of necessity be taken by joint owners of the property who desire a dissolution of the joint ownership and are not able to agree on the terms of the dissolution. It is, I think, accepted law that no owner of property can normally be compelled to remain such against his will, and it follows that an owner desiring to terminate his ownership is entitled to do so. The ideal way of doing it is, of course, by agreement, and it is a matter of astonishment to me that these parties, who are presumably business people, or at least are advised by business people, should have been unable, in the time which has elapsed, to arrive at a solution of their difficulties acceptable to both of them. However, that is what has happened, and it seems that there remains now only the last resort, namely a sale by public auction, which is, by and large, the most satisfactory way of arriving at the market value of a property such as this.’

[8] As was the case in the *Drummond* matter, the first respondent in this matter has put forth numerous other possible solutions to the problem, for example, that he buys the property himself, that he has other creditworthy persons to replace the applicants as guarantees to the bond on the property, etc. I find myself in the unenviable position in which Selke J found himself in having to cut the Gordian knot in such a way as to cause the least prejudice to either party.

[9] The most obvious solution is simply to follow what was done by Selke J and to order that the property be sold by public auction without reserve. However, it is notorious that sales in execution do not always fetch the best value of the property being sold. In the current depressed property market this effect may even be exaggerated. The first respondent has impressed upon me a recent newspaper article extolling the virtues of the estate in which the property is situated. He has also pointed out the fact that the municipal valuation of the property is R3 000 000, well in excess of the offer which has been made on the property. The newspaper article refers to the estate as being an exception to the downtrend in the South African property market, and as having phenomenal sales during 2012. The article reports that the sales team at the estate as 'being inundated with requests to view plots and already established homes on the estate'. If all this were true, it is strange that the agent who secured the proposed purchaser for the property was unable to secure a better deal, particularly when she has a mandate to sell with the sales office of the estate.

[10] As matters stand the partnership has been dissolved. The only partnership asset is the property. Only one offer has been made in the last approximately 11 months during which active steps have been taken to market the property. The first respondent having consented to the sale of the property (albeit at what he refers to as a market related value), one would have expected him to have, by now, attempted to implement the various solutions he now presses upon me as being reasonable, and as constituting a reason why I should not authorise the sale of the partnership asset.

[11] I am mindful of all these considerations and particularly mindful of the potential prejudice to the erstwhile partners if the sale is not to proceed. The prospective buyer has already expressed concern at the delays occasioned by the first respondent's refusal to agree to the sale, and there is an imminent danger that the sale could fall through because of the first respondent's refusal to sign the necessary papers.

[12] In all the circumstances I grant the following order :

1. It is declared that the partnership which formerly existed between the first and second applicants and the first and second respondents ('the partners') is dissolved;
2. the partnership asset, namely the immovable property described at 3 Brettonwood Lakes, Brettonwood Coastal Estate, in extent 2 hectares ('the property') is to be sold in accordance with the offer to purchase

annexed to the applicants' founding affidavit in this application as annexure 'A'

3. the partners are required to sign all documents and do whatever is necessary to facilitate the sale and transfer of the property in accordance with the offer to purchase, including but not limited to facilitating :
 - (i) the cancellation of the mortgage bond;
 - (ii) the completion of the sale agreement;
 - (iii) the transfer of the immovable property to the purchaser.
4. in the event of any of the partners failing or refusing to comply with the order in paragraph 3 above within seven days of the service of this order upon them, the Sheriff of this Court is authorised and directed to sign all documents and do whatsoever is necessary to facilitate the sale and transfer of the property on behalf of that partner in accordance with the offer of purchase, including but not limited to facilitating the matters set out in paragraph 3 above;
5. the proceeds of the sale are to be used to discharge the partnership liabilities in respect of :
 - (i) the mortgage bond with Standard Bank;
 - (ii) the management accounts with Brettonwood Estates;
 - (iii) any outstanding amounts in respect of rates, levies and utilities.
6. once the bondholder, management accounts, rates, levies and utilities have been paid, the remainder of the proceeds of the sale are to be

held in the applicants' attorney's (Shepstone & Wylie) account, pending a debatement of the partnership account, alternatively, in the absence of agreement on such debatement, pending appropriate legal proceedings for a debatement and payment out to the parties of what is due to them;

7. the first respondent is directed to pay the applicants' costs of this application.

Date of hearing : 12th February 2013

Date of judgment : 14th February 2013

For the Applicants : Ms Pudifin-Jones (instructed by Shepstone& Wylie)

For the First Respondent : In person