Court File

IN THE SUPREME COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 13128/2006

DATE: 11 DECEMBER 2008

In the matter between:

JANE THELMA MILLS PLAINTIFF

and

WILLIAM IGNATHEUS MILLS DEFENDANT

JUDGMENT

THRING, J:

The plaintiff's claim against the defendant in this matter is in the form of a partition suit or *actio communi dividundo*. They are the joint owners in equal undivided shares of certain immovable property in Durbanville to which I shall refer as "the property". She claims in her particulars of claim:

> "(a) An order that the joint ownership of plaintiff and defendant in the immovable property situated at 8 Blue Crane Street, Goedemoed, Durbanville, described as Erf 4667, Durbanville, be terminated;

(b) An order that plaintiff's half share in the immovable property be transferred to defendant and registered in defendant's name against payment by defendant to plaintiff of a sum equal to half the fair and reasonable market value of the immovable property;

(c) Alternatively to paragraph (b) above, that this Honourable Court shall determine a just and equitable method of terminating the joint ownership between the parties'

(d) Costs of suit;

(e) Further and/or alternative relief."

In paragraph 6 of her particulars of claim she avers that:

"Subdivision of the immovable property is impracticable and plaintiff pleads that it is just and equitable that her half share in the immovable property be transferred to defendant and registered in his name, against payment by defendant to plaintiff of a sum equal to half the fair and reasonable market value of the immovable property."

The defendant admits in his plea that it would be impracticable to subdivide the property, but denies the rest of the allegations in paragraph 6 of the plaintiff's particulars of claim. All the other allegations made by the plaintiff in her particulars of claim are admitted by the defendant in his plea.

The defendant has a claim in reconvention. He avers that during or about 1997 the parties concluded an oral or, alternatively, tacit agreement with each other in terms of which:

(a) The property would be registered in their joint names;

(b) The defendant would provide the capital with regard to the property or would finance its purchase, and would make disbursements in respect of the property from time to time, including the bond repayments, the bank administration costs, the bond interest payments, the rates and taxes, the maintenance costs and the cost of improvements;

(c) The plaintiff would pay to the defendant on demand one half of all such disbursements.

This is denied by the plaintiff. The defendant goes on to

allege that he made such disbursements, totalling R745 050,20. This amount was reduced during the trial to R741 316,45 and still later to R654 155,76. The plaintiff admits that the defendant made certain payments in respect of the property, but denies that they amounted to any of these sums. She admits that she did not contribute to any of these disbursements.

It has been agreed that the present market value of the property is R1 million. The balance presently owing under the mortgage bond is agreed to be R121 093,86. The purchase price of the property when it was acquired in August, 1997 was R183 200.

The plaintiff and the defendant both gave evidence, but no other witnesses were called.

The factual disputes in this matter are legion, but those which are relevant are fortunately relatively few. Before dealing with them, I propose to set out what is common cause or not in dispute between the parties. It is the following:

1. The parties were married to each other out of community of property, and with exclusion of the accrual system, in 1990. On the 12th October, 2006 their marriage was

dissolved by order of this Court. A consent paper which they had entered into was incorporated into the divorce order, but for some reason the property was not dealt with or even mentioned in the consent paper.

2. The property was registered in the joint names of the parties on the 1st October, 1997. At the same time a mortgage bond securing their joint indebtedness to a bank in the sum of R250 000 was registered over the property, but it seems that only R183 000 of this amount was actually borrowed.

3. From late 1997 until September or October, 2004, the parties lived together on the property as their matrimonial home, together with their minor daughter. Then the plaintiff left the property and she has not lived there since.

4. When the property was purchased in 1997 the defendant paid the sum of R19 104,63 as a deposit on the purchase price and in respect of a *pro rata* payment of rates. From 1997 to date, the defendant has made payments of capital and interest on the mortgage bond, amounting in all to the sum of R288 672,71.

5. The plaintiff made no contribution to any of these disbursements.

6. The present market value of the property, as I have said, is R1 million and the balance presently owing under the bond is R121 093,86.

The only relevant factual issues on which evidence was led are:

(A) The existence or otherwise of the agreement which is relied upon by the defendant, and, if it existed, the terms thereof and,

(B) The amount disbursed by the defendant from time to time on:

(i) rates and taxes in respect of the property.

(ii) maintenance and improvement of the property.

As to issue (A) above, the alleged agreement, the plaintiff, in her evidence, denied that she and the defendant had at any time concluded such an agreement. She also denied that the defendant had ever asked her to pay anything to him pursuant to such an agreement. She also testified that the defendant

was well aware that she was quite unable to pay one half of the amounts involved out of her meagre income and resources. She says that as she saw it, the defendant agreed to have the property registered in their joint names as a mark of his love for and commitment to her, and to provide her with some financial security. There was never any agreement, she says, that she would contribute anything to the purchase price of the property or to the bond repayments or to the other disbursements which are claimed by the defendant.

Although there are certain weaknesses in the plaintiff's evidence, one of which being her over-readiness to accuse the defendant of lying, the plaintiff made a fairly good impression on me as a witness. She was consistent in her evidence, was unshaken in cross-examination and was not evasive. Where necessary she made concessions in the defendant's favour. She is an intelligent person, with a good memory for detail. Making due allowance for her obviously strong antipathy for the defendant, I found her to be a generally reliable and credible witness.

The same cannot be said for the defendant. Of his type, he was one of the worst witnesses I have ever seen. He is a teller of tall tales, some taller than others. In the witness box he was unbelievably garrulous and, even worse, evasive.

Time and time again during his evidence he shied away from difficult questions, bolting uncontrollably in almost any irrelevant direction, as long as it was away from the question which he had been asked, in order to distance himself, with somewhat desperate glibness on occasion, from inconvenient facts. He was argumentative, sententious and arrogant. His attempts, when pressed to explain glaring improbabilities in his evidence, were sometimes almost ludicrous and almost invariably unconvincing. Repeatedly during his evidence he could be observed trimming his sails to whatever wind he perceived might be blowing, or might be about to blow in the witness box. His evidence crawls with contradictions and inconsistencies. When driven into a corner he did not hesitate, in a transparently dishonest manner, for example, to place the blame for a large number of missing documents on the plaintiff and/or on his own attorneys. I find that the defendant's evidence is really not worthy of very much credence. Wherever his evidence differs from that of the plaintiff, I reject it as false and prefer hers.

It is common cause that on the issue of the alleged agreement, the defendant bears the *onus*. I have no hesitation in finding, on the basis of my credibility findings, that the defendant has failed to discharge that *onus*. Moreover, his version on this issue seems to me to be most improbable in the circumstances

and is inconsistent with his subsequent failure to take any steps to enforce the alleged agreement, even after the plaintiff had left him in 2004. I conclude that it has not been established by the defendant on a balance of probabilities that such an agreement was ever concluded between the parties.

Turning next to issue (B)(i) above, the amount expended by the defendant on rates and taxes in respect of the property. On his behalf a statement, apparently emanating from the relevant local authority, was produced, which reflects two payments totalling R57 489,68. The accuracy of this information was not challenged in cross-examination, and the plaintiff conceded in her evidence that it was "more or less correct". I conclude in the circumstances that the defendant has succeeded in establishing, on a balance of probabilities, that these payments were indeed made by him as he alleges.

Issue (B)(ii) above relates to the amounts expended by the defendant from time to time on the maintenance and improvement of the property. The plaintiff concedes that the defendant made certain disbursements in this regard. It seems that additions and alterations were made to the house, which had the effect of extending it considerably. Repairs and maintenance were also carried out. The plaintiff paid for none of this. It was all paid for out of the defendant's pocket. The

value of the property has increased more than fivefold from the R183 200 which was paid for it in August, 1997, when it was acquired by the parties, to its present value of R1 million. No doubt this increase is largely attributable to the rise in the property market which has taken place over the last ten years, but it has not been suggested that part at least of the increase in value is not due to the maintenance and improvements carried out on the property by the defendant over the years.

The plaintiff says that she kept a book in which she recorded the amounts spent on maintenance and improvements between September, 1997 and March, 1998. This, she says, was the only period during which such work was done until she left the defendant in 2004. She says that the total amount spent as recorded by her in this book, amounted to approximately R98 000. She left the book behind when she left the house, she says. It was not produced by the defendant in evidence. I accept the plaintiff's evidence in this regard.

On the strength of her evidence I find that the defendant has proved that he spent approximately R98 000 on useful maintenance and improvements to the property during the relevant period. I am also prepared to accept in his favour that the effect of this work was to add value to the property in an approximately commensurate amount. As for the balance

allegedly disbursed by the defendant, there is really only his own uncorroborated evidence which in my view is worthy, as I have said, of very little credence for the reasons which I have mentioned. On this issue, also, the *onus* rests on the defendant. In my view he has failed to discharge it. The documents on which he seeks to rely in this regard are largely illegible or unsatisfactory, being in many instances mere copies of quotations for work and/or materials issued by various suppliers and contractors. None of them have been called as witnesses. None of these documents have been properly proved. Invoices are few and far between. In some cases the defendant had to concede in cross-examination that some of the documents related to other properties and were of no relevance to the present dispute. No paid cheques were produced. The defendant's excuse was that "all" his documents had been stolen from him by the plaintiff and destroyed by her. This rings feebly hollow and I reject it as false. When challenged on payments which he said had been made by him in cash, he repeatedly averred that evidence of such payments could be found in his bank statements, yet none were produced in evidence.

Moreover, many of the documents relied on by the defendant, had been tampered with in his own handwriting. In effect he asked the Court simply to take him largely at his word in

finding that he had made the numerous alleged disbursements concerned. I am not prepared to do that for the reasons which I have mentioned relating to his credibility. I conclude that the sum total of the defendant's disbursements in respect of maintenance of and improvements to the property amounted to R98 000 and that the effect thereof was to increase its market value in a commensurate amount.

To sum up so far, I find that the alleged agreement relied on by the defendant has not been proved; that the defendant made payments totalling the sum or R57 489,68 in respect of rates and taxes on the property and totalling R98 000 in respect of maintenance of and improvements to the property, which latter payments had the effect of increasing the market value of the property in a commensurate amount. So much for the facts.

As long ago as 1884 Lord De Villiers, C J laid down one of the basic principals applicable in an *actio communi dividundo* as follows in Dickson v Stagg, [1884] (3) SC 115 at 116:

> "It is quite true that under the ordinary law one of two or more co-proprietors is entitled to claim a partition of the land, but that rule is subject to exceptions, one of those exceptions being that

where it was impracticable or inequitable to allow such a partition, the Court would in such a case make such an order as the justice of the equity of the case might require."

That dictum was quoted with approval in the Appellate Division by de Wet, C J in Estate Rother v Estate Sandig, 1943 AD 47 at 53, where the learned Chief Justice added:

"The discretion of the Court is a wide one..."

In *ex parte* Sewpaul & Another: in re v Jumanee & Others, 1947(3) SA 299 (DCLD) Henochsberg, A J as he then was, went further. At 301 to 302 he said the following:

"There is no doubt that a co-owner of immovable property cannot be compelled to remain such against his will. Failing in amicable agreement he is entitled to a partition but if a partition would lead to loss or injustice, some other form of relief may be substituted. Scheffermann & Others v Davies N.O. (1944, NPD 20). In partition proceedings the Court is bound to consider the equities of the case, Motala v Estate Lockhat & Another (1945, NPD 351). Where it is impracticable or inequitable to

allow a partition, the Court will make such an order as justice or the equities of the case may require. The discretion of the Court is a wide one. Estate Rother v Estate Sandig (1943 AD 47)."

See, also, Bedessi v Estcort Rural Licensing Board & Others, 1970(3) SA 211 (N) at 214 C to E and van der Merwe, "Sakereg", 2nd Edition, 386 to 390. In Robson v Theron, 1978(1) SA 841 (AD), Joubert, J A spoke at 855 E of a Court's power in exercising its equitable discretion to:

> "...award the joint property to one of the co-owners provided that he compensates the others....."

At 857 C the learned Judge of Appeal said of the *actio communi dividundo*:

> "This action may also be used to claim as ancillary relief payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property."

It is clear from these authorities that where, as here, it is accepted that it is impracticable to divide the property physically between the parties, the Court must make such

order "as the justice or the equity of the case might require" (Estate Rother v Estate Sandig, supra, *loc. cit.*). Indeed, this is in essence what the plaintiff seeks in paragraph 6 of her particulars of claim and what the defendant asks for in paragraph 14 of his claim in reconvention. It is agreed to he is to acquire the plaintiff's undivided half share in the property. What is in dispute is the amount of compensation, if any, which he must pay to her in respect thereof.

In my view the plaintiff's principal prayer in this regard, prayer (b) of her particulars of claim, which I have quoted above, i.e. transfer of her undivided half share in the property to the defendant against payment to her of one half of the present market value of the property, that is to say the sum of R500 000, would not accord with either the justice or the equity of the case. Such an order might be appropriate in a case where none of the co-owners of a particular property had contributed anything to its acquisition, upkeep or improvement, or where all the co-owners had contributed equally, but that is clearly not the case here. On her own admission, the plaintiff has at no time contributed anything to the acquisition, maintenance or improvement of the property, other than to clean the house and tend the garden as a housewife; and no attempt was made in the evidence to put a monetary value on her labours in that regard. On the other hand, on what is

partly common cause and partly on the basis of my findings, the defendant has made and will have to make the following useful disbursements with respect to the acquisition, maintenance and improvement of the property: deposit and *pro rata* rates: R19 104,63; capital and interest due under the mortgage bond to date: R288 672,71; rates and taxes: R57 489,68; maintenance of and improvement to the property R98 000; balance owing on the bond: R121 093,86; total: R584 361,06.

In my judgment the justice and equity of the case require one half of the above aggregate sum to be deducted from the sum representing one half of the present market value of the property before the latter sum is paid over to the plaintiff by the defendant. On this basis, the plaintiff is entitled to be paid the sum of R207 819,47, being R500 000 less R292 180,53.

As for costs, the plaintiff's claim in convention has been in substance successful, whilst the defendant's claim in reconvention has not. That being so, the plaintiff must be awarded her costs, both in convention and in reconvention.

In the result, I make the following order:

1. The parties' joint ownership of the immovable property

situated at 8 Blue Crane Street, Goedemoed, Durbanville, described as Erf 4667, Durbanville, is terminated.

2. The plaintiff is ordered to do all things and to sign all documents as may be necessary to effect transfer into the defendant's name of her undivided half share in the said property against payment to her by the defendant of the sum of R207 819,47.

3. The costs of effecting the aforesaid transfer shall be borne by the parties equally.

4. Subject to the above, the defendant's claim in reconvention is dismissed.

5. The defendant is ordered to pay the plaintiff's costs, both in convention and in reconvention.

THRING, J