

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

Case No: 031666/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
.....
DATE	SIGNATURE

In the matter between

N D

Applicant

And

M D

Respondent

Neutral citation: *ND v MD* (Case No: 031666/2022) [2023] ZAGPJHC 662 (07 June 2023)

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. This matter concerns the immovable property described as Erf [...], Lenasia South Extension [...], Johannesburg, and located at [...] [...] Street, Lenasia South, Johannesburg. Some 20 years after the parties' divorce, the property, an asset of their joint estate, remains unsold and the proceeds unshared. In the main application, Ms D asks that joint ownership of property be terminated. Mr D opposes that relief but counter-applies, in the event that it be granted, for compensation in respect of amounts said to have been invested in the property over the years.
2. In my judgement, the counter-application is inadequately particularised and substantiated and falls to be dismissed. By contrast, the main application is established on the papers and an order detailed in paragraph below is to be granted.

THE PROCEEDINGS

The marriage and divorce

3. The parties were married in community of property on 09 July 1989.
4. The property – the former matrimonial home – was purchased and registered in both parties' names on 13 January and 08 August 2001 respectively.
5. At Ms D's instance, a decree of divorce dissolving the parties' marriage was granted on 03 December 2002. The court order incorporated a deed of settlement dated 26 May 2002 that recorded, under a heading "*DIVISION OF THE ASSETS*" and subheading "*IMMOVEABLE ASSETS*", that:

"The Defendant [Mr D] shall reside at the immovable property situated at [...] [...] Street, Lenasia South Extension [...].

In the event the property should be sold, the Plaintiff shall receive half of the proceeds the sale."

6. It is not in dispute on the papers that, at all times during the ensuing two decades, Mr D has resided at the property.

Attempts to dispose of the property

7. On 27 May 2022 Ms D's attorneys wrote to Mr D asserting that their client was a 50% owner of the property, noting that she sought "*her 50% share of the proceeds of the former matrimonial home*", proposing either that the property be sold on the open market with each party to receive 50% of the proceeds or that Mr D pay to Ms D 50% of an independent valuation of the property and recording that, absent agreement on either part of the proposal, "*our client will have no option but to pursue an application in the High Court in order to secure her share of the proceeds of the former matrimonial home.*"
8. Mr D's attorneys responded to Ms D's attorneys on 19 July 2022 claiming that their client had serviced a home loan over the years in respect of which he was entitled to claim a contribution from his former wife, contending that he had effected improvements to the property in relation to which she had been unjustifiably enriched and proposing a mechanism for the disposal of the property and the division of the proceeds, being that an estate agent be mandated to sell the property and that Mr D's claims against Ms D be deducted from her portion of the proceeds of the sale of the property.
9. On 20 July 2022 Ms D's attorneys replied to Mr D's attorneys rejecting the suggestion of reimbursement for any alleged improvements to the property and reiterating the proposal advanced in the letter of 27 May 2022.

10. It appears that Mr D was not agreeable to either part of that proposal.

The affidavits

11. The notice of motion in the main application is dated 04 October 2022. It is supported by a founding affidavit deposed to by Ms D on 29 September 2022. Much of what is contended for in the founding affidavit is not in dispute on the papers:

11.1. What Ms D recounts regarding the parties' marriage on 09 July 1989, the birth of their three children, the purchase and registration of the property in both their names, the registration of a mortgage bond over the property, Mr D's role as breadwinner, Ms D's role as homemaker and mother, the breakdown of their marriage, the emergence of an intolerable atmosphere within the matrimonial home that adversely affected the children, her vacation of the home with the children, that "*the respondent refused to contribute any amount whatsoever towards the maintenance for myself or our children, despite his obligations and duty to do so*", that Ms D was not legally represented in the divorce proceedings whereas Mr D was so represented and refused any reasonable settlement agreement proposed by the applicant is "*noted*" and thus not pertinently disputed by Mr D.

11.2. Indeed, the following averments by Ms D are not disputed by Mr D:

11.2.1. *"I had vacated the former matrimonial home";*

11.2.2. *"I was unemployed was solely maintaining the children through the assistance of family and friends";*

11.2.3. *"I required an order for maintenance for the children";* and

11.2.4. *"[t]he respondent was legally represented, and I was not."*

11.3. It is common cause that the deed of settlement was entered into on 26 May 2002, was made an order of court and provided for a division of the parties' assets, the custody and maintenance of their children, a division of Mr D's pension fund interests and *"the sale of the former matrimonial home and the manner in which the proceeds of such sale ought to be dealt with."*

11.4. Whereas Ms D's testimony is that, in desperate financial straits, she agreed to permit Mr D to remain in the home until such time as he found alternative accommodation but that the property was to be offered for sale within a reasonable period of time, Mr D asserts a contractual entitlement to remain in the home for so long as he wishes, save only

that, if and when the property is sold, there is to be a division of the proceeds of that sale.

- 11.5. Mr D admits that “[t]o date the respondent has neither vacated the former matrimonial home nor has it ever been placed on the open market in order for it to be sold.”
- 11.6. Mr D does not dispute Ms D’s account of efforts to sell the property so as to share in the proceeds of the sale, including that in September 2007 he refused either to place the property on the market or to pay her more than R50,000 for her undivided one-half share in the property.
- 11.7. Equally, it is not in issue between the parties that, after several years and various attempts to resolve the issue with Mr D, Ms D ‘gave up’ due to a lack of funds necessary to continue negotiating with or litigating against him.
- 11.8. It is not contested on the papers that Mr D remarried in community of property in 2020 and that he and his new wife continue to reside in the home.
- 11.9. Exchanges of letters and other interactions between the parties and their respective attorneys between May and July 2022, including those

outlined in paragraphs to above, are noted and thus not pertinently disputed on the papers.

11.10. Mr D does dispute Ms D's concluding submissions that:

11.10.1. she enjoys a legal right to have her co-ownership of the home terminated as prayed for in the notice of motion;

11.10.2. she enjoys a legal right to enforce the provisions of the deed of settlement which provide for the sale of the home;

11.10.3. he has declined to purchase her undivided one-half share in the home whether for a market-related price or at all; and

11.10.4. it is just and equitable that the home be sold and the proceeds be distributed between the parties in accordance with law.

12. Mr D gave notice of intention to oppose the main application on 02 November 2022.

13. Mr D's answering affidavit was delivered on 17 January 2023. Its answers to Ms D's averments are outlined in paragraph above. In support of the counter-application referred to in paragraph below, moreover, it contends that any order that the property be sold should be subject to conditions based on allegations

that *“I have made payment of the mortgage bonds registered over the property, which bonds have now been fully repaid also substantially improved the property during the period in which I have resided in it and tendered to the general maintenance of the property during such period.”* Amounts are listed and added up in an annexure to the answering affidavit. Mr D claims an entitlement *“to payment of the sum of R616,744 out of the proceeds of the sale before the net proceeds are divided in equal shares between the applicant and myself.”*

14. On the same day (17 January 2023) Mr D delivered a notice of conditional counter-application in which the court is called on to declare that he is entitled to payment of a sum of R616,744 out of the proceeds of any sale of the property and to order Ms D to pay the costs of the counter-application.
15. Ms D’s replying affidavit was delivered on 02 February 2023. As appears therefrom, Ms D’s replies to Mr D’s contentions include that:
 - 15.1. *“the courts support the clean-break principle when it comes to divorce and ... upon a proper interpretation of the settlement agreement and the clause relating to our former matrimonial home, it was always envisaged and understood between us that the former matrimonial home would be sold and the proceeds thereof divided equally between us”;*
 - 15.2. *“[s]hould the respondent’s incorrect interpretation be accepted and the former matrimonial home not be sold (which was always our intention),*

the result is that I will be tethered to the respondent and his whims for the rest of my days and that is simply non-sensical”;

15.3. *“[t]he respondent on anyone’s version is the only person who has derived any benefit from our former matrimonial home. ... Had the respondent sold the matrimonial home earlier as was intended he would not have incurred such exorbitant expenses”;* and

15.4. *“the provisions of the settlement agreement do not provide for any set offs and/or deductions, this was never the agreement.”*

The submissions

16. On 24 February 2023 counsel for Ms D, Siobhan Meyer, delivered a practice note, heads of argument, list of authorities and chronology of events in the main application and the counter-application. The heads of argument submit that:

16.1. the interpretation of the deed of settlement contended for by Mr D is in conflict with Ms D’s rights as co-owner to demand ‘partition’ of the property at any time. Her desire no longer to be a co-owner of the former matrimonial home, coupled with the provision of the deed regulating the division of the proceeds of a sale of the property, suffices for purposes of the relief sought in the main application; and

- 16.2. Mr D's counter-application is meritless in that it is not provided for in the deed and any decisions to renovate the home were taken without consulting with or securing the consent of Ms D. Mr D has had exclusive use and enjoyment of the home for two decades. And it lay within his power to bring that arrangement to an end at any time.
17. On 23 March 2023 counsel for Mr D, Nathan Segal, delivered a practice note, heads of argument and list of authorities in opposition to the main application and in support of the counter-application. The heads of argument submit that:
- 17.1. *"it was agreed that [Mr D] would be entitled to reside in the property for so long as he desired and that it could not be sold until he wished to vacate the property."* Supportive of that interpretation of the deed of settlement is the fact that he has resided in the property for some 20 years, a submission for which reliance is placed on *Shacklock*.¹ If the dispute in regard to interpretation cannot be resolved *"without the hearing of extrinsic evidence as to what passed between the parties on the subject of the property"*, it is submitted in the alternative that the dispute should be referred to oral evidence in terms of rule 6(5)(g); and
- 17.2. if Ms D is entitled to the relief sought by her in the main application, *"the respondent has instituted a conditional counterclaim in which he claims the expenses incurred by him in respect of the property"*. Reliance is

¹ *Shacklock v Shacklock* 1949 (1) SA 91 (A) 101

placed on *Robson*² for the proposition that “[a] co-owner is entitled to claim the expenses incurred by him in respect of the property.” In the further alternative, it is submitted that any dispute as to the value of the expenses incurred by Mr D should be referred to oral evidence.

18. In response to a directive issued by this court, counsel for the parties delivered a joint practice note on 22 May 2023.

GENERAL PRINCIPLES

19. The *actio communi dividundo* is available to a co-owner seeking termination of joint ownership of property where the co-owners are unable to agree to the method of its division. The basic notion underlying this action is that a co-owner is not ordinarily obliged to remain such against her will.³
20. The court enjoys a wide discretion to order the division of joint property on terms that it deems just and equitable,⁴ having regard to the facts and circumstances of the case, what is to the advantage of the co-owners and what each of them would prefer, including that the property be put up to auction and the proceeds be divided among the co-owners.⁵

² *Robson v Theron* 1978 (1) SA 841 (A) 857C

³ *Id* 855A; 856H

⁴ *Minne v Minne and others* 2022 JDR 1851 (GP) [28], [42]

⁵ *Robson supra* 855C-F

21. The action may also be invoked to claim, as ancillary relief, payment of *praestationes personales* or ‘personal items for payment’ relating to profits enjoyed or expenses incurred in connection with the joint property.⁶ In this regard, *Rademeyer*⁷ is authority for the proposition that “a possessor has the right to sue the owner for the expenses incurred in making necessary and useful improvements and no restriction is placed upon this right where the possessor is also part-owner of the property he has improved.”
22. Vindicating the right is however subject to stringent requirements in respect of proving any such claim:

*“It is in the first place necessary to establish the nature of the improvements in order to determine whether they are necessary or useful. It is also necessary to determine the extent of such improvements because, without doing so, it would not be possible to determine to what extent the value of the property has been enhanced by the improvements and it is necessary to determine the cost of the improvements because, if the value of the property has been enhanced to an amount greater than the cost of the improvements, then the plaintiffs can only claim the cost of the improvements and not the enhanced value of the property. If, on the other hand, the cost of the improvements exceeds the amount by which they have enhanced the value of the property, then the plaintiffs can only claim an amount equal to the enhanced value of the property.”*⁸

⁶ *Id* 857C

⁷ *Rademeyer and others v Rademeyer and others* [1968] 3 All SA 105 (C) 114

⁸ *Id* 115

23. Relevant to the enquiry is also whether an equitable adjustment is required in respect of the benefit derived by a party on account of having occupied the property.⁹
24. Where there is insufficient evidence of what each party has contributed towards the property, a referral to oral evidence may nonetheless not be appropriate where the value of the property is modest and the costs of further litigation would likely consume the proceeds of sale.¹⁰

THE ISSUES

The claim for division

25. At the hearing, Ms Meyer submitted that, on the clean-break principle and having regard to the provisions of the deed of settlement, her client is entitled to an order in the terms set out in the notice of motion. On a purposive interpretation, bearing in mind that the agreement was intended to bring about a parting of ways, the deed should be read as having permitted Mr D to reside in the former matrimonial home for no longer than a reasonable period of time. In her submission, no purpose would be served by a referral to oral evidence since the parties – the only potential witnesses – have recorded their respective versions in the affidavits.

⁹ *Matadin v Parma and others* [2010] JOL 25834 (KZP) [9]; *Minne supra* [27]

¹⁰ *Id*

26. Mr Segal countered that it had been open to the parties to leave any sale of the property entirely at Mr D's discretion and, construed objectively, that is what they recorded in the deed of settlement. In his submission, that construction is reinforced by their post-contractual conduct; and factors such as any differential in the parties' bargaining power or legal representation are irrelevant for purposes of the deed's proper interpretation. Thus, the main application should be dismissed with costs *alternatively* the dispute as regards the meaning of the deed should be referred to oral evidence.
27. It may be observed that the deed of settlement is not a model of clarity and a degree of uncertainty exists as regards the duration of Mr D's permissible occupation of the former matrimonial home.
28. But the deed must be read contextually and purposively, having regard to the fact that it was intended to regulate a division of the parties' joint estate. The preamble records that the parties "*agree that the marriage between them has broken down irretrievably and that there is no prospect of the continuation of a normal marriage relationship*" and "*wish to reduce to writing what has been agreed upon in principal in regard to the division of assets*". There is then the heading "*DIVISION OF THE ASSETS*" and subheading "*IMMOVEABLE ASSETS*". So, clause 1 is directed at the division of the property; not its retention.
29. It would not make sense to favour a construction of that clause that would stymie either party's desire to disentangle the affairs of the parties. In particular, I incline

against an interpretation that would permit one party unilaterally to thwart any attempt to dispose of and divide the proceeds of a primary asset of the joint estate. A more sensible reading of the deed would allow Mr D to remain in occupation of the former matrimonial home for no more than a reasonable period of time, having regard to such time as would enable him to make orderly alternative arrangements.

30. I should add, although neither party contended for such a provision, that it would require no judicial strain to imply a tacit term of the deed of settlement to that effect.
31. As regards post-contractual conduct, the manner in which parties to a contract carry out their agreement may form part of the contextual setting in which the meaning of a disputed term is to be ascertained.¹¹ But the use of such evidence is subject to provisos.¹² First, the evidence must be indicative of a common understanding of the term. Second, it may be used not to add to or alter the words used by the parties – as in a claim for rectification of the contract – but (only) as an aid to their proper construction; i.e., a guide to an objective determination of the meaning of the words recorded in the term.¹³ Proviso 2 is not *“an invitation to harvest evidence, on an indiscriminate basis, of what the parties*

¹¹ *Unica Iron and Steel (Pty) Ltd and another v Mirchandani* 2016 (2) SA 307 (SCA) [21]

¹² *Urban Hip Hotels (Pty) Ltd v K Carrim Commercial Properties (Pty) Ltd* [2016] ZASCA 173 [21]

¹³ *Comwezi Security Services (Pty) Ltd and another v Cape Empowerment Trust Ltd* [2012] ZASCA 126 [15]

did after they concluded their agreement".¹⁴ Third, the evidence must be used as conservatively as possible.¹⁵ In this case, the parties' conduct is at best equivocal – recall the evidence noted in paragraphs and above – and does not establish a common intention that "[Mr D] would be entitled to reside in the property for so long as he desired and that it could not be sold until he wished to vacate the property."

32. In the result, I find the construction of the deed of settlement for which Mr D contends to be unsustainable.
33. Nor would any purpose be served by acceding to Mr Segal's belated request that there be a referral to oral evidence of any disputed issue. In the exercise of my discretion on this score, I consider that it would not be in the interests of the parties or justice for there to be further offshoots to this litigation. After two decades, it is time for the parties to move on with their lives.
34. In the circumstances, the main application should succeed.

The counterclaim for compensation

35. It was submitted by Mr Segal that, were I minded to order a disposal of the property, I should find the amounts listed in the annexure to the answering

¹⁴ *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) [48]

¹⁵ *KPMG Chartered Accountants (SA) v Securefin Ltd and another* 2009 (4) SA 399 (SCA) [39]

affidavit to constitute necessary or useful improvements to the property such that Mr D should be compensated for them out of the sale proceeds. When questioned on the fact that such amounts are not substantiated by records or supported by expert opinion, Mr Segal responded that they are not pertinently disputed on the papers. He did however fairly concede that, *ex facie* the list, not all such amounts appear to relate to improvements to the property. Indeed, the (cryptic) descriptions of several of the amounts suggest that they relate to maintenance items, utilities, consumables and the like. Be that as it may, Mr Segal handed up three draft orders outlining various alternative forms of relief in the main application and the counter-application.

36. In response, Ms Meyer submitted that the deed of settlement made no provision for Mr D's recovery of any such amounts. In any event, no case is made out on the papers that the amounts listed in the annexure relate to necessary or useful improvements to the property. Even had such a case been made out, moreover, the record contains no consent by Ms D to the investment of monies in such improvements. In her submission, the counter-application should be dismissed with costs.
37. The deed of settlement is indeed silent on liability for any necessary or useful improvements to the property, a factor consonant with an interpretation that Mr D's occupation of the former marital home would be of limited duration.

38. In principle, though, he would enjoy a claim at common law for compensation in respect of amounts shown to have been invested in improvements demonstrated to be necessary or useful.
39. But the answering papers do not make out a case that the amounts listed in the annexure were in fact expended on improvements to the property that were either necessary or useful. And I do not consider maintenance items, utilities, consumables and the like to fall within the ambit of such improvements.
40. Notably, Mr D presents no evidence of the value – as opposed to the cost – of any such improvement. There is a list of amounts – mostly estimates – said to have been paid over the years. In fact, so half-hearted and reactive is the counterclaim that it may be open to doubt whether it is advanced in good faith.
41. In any event, motion proceedings are not well suited to determining a claim such as that for which Mr D contends.
42. This ought to have been clear to Mr D at the time of delivering his answering papers or, at the latest, his submissions.
43. It is not the practice in this division to allow a claimant in motion proceedings to ‘hedge bets’ by seeking a referral in the alternative to relief. An applicant confronted with disputes of fact on the papers should elect whether to proceed on motion or to seek a referral to oral evidence or trial. Such an election should be

made without delay, generally in its replying affidavit or heads of argument.¹⁶ The suggestion that I should select as between three draft orders underscores Mr D's failure to make such an election and exposes the counter-application to dismissal.

44. In the circumstances, the counter-application should fail.

The outcome and order

45. I do not understand Mr D to take issue with the terms of Ms D's draft order should I be minded to grant the main application and to dismiss the counter-application. In the exercise of my discretion, I supplement that order in certain respects, including as provided for in paragraphs and below .

46. In the circumstances, I grant the following order:

46.1. The parties' co-ownership of the immoveable property described as Erf [...], Lenasia South Extension [...], Johannesburg, and located at [...] [...] Street, Lenasia South, Johannesburg (the property), is terminated on the terms set out below:

¹⁶ *Law Society, Northern Provinces v Mogami and others* 2010 (1) SA 186 (SCA) [23]: “[a]n application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail ...”; *ABSA Bank Ltd v Molotsi* [2016] ZAGPJHC 36 [23]

- 46.1.1. Forthwith after grant of this order, each party shall appoint an estate agent and furnish the other party with written notice of such appointment.
- 46.1.2. The parties shall forthwith instruct the estate agents to appoint and mandate an auctioneer, duly authorised under the Property Practitioners Act 22 of 2019, on behalf of the parties jointly, to sell the property by public auction for the highest available price on the terms and conditions provided for in the auctioneer's then current standard mandate document (the mandate).
- 46.1.3. The auctioneer shall be instructed on behalf of the parties to discharge the mandate diligently and expeditiously.
- 46.1.4. The auctioneer shall be instructed on behalf of the parties to pay the gross proceeds of any such sale into the trust account of the applicant's attorneys of record, the details of which shall be provided by the parties to the auctioneer for that purpose.
- 46.1.5. On receipt of such proceeds into their trust account, the applicant's attorneys of record shall deposit the proceeds into an interest-bearing trust account in terms of section 86(4) of the Legal Practice Act 28 of 2014.

46.1.6. Forthwith after receipt of the proceeds, the applicant's attorneys of record shall make payments therefrom, from time to time, of the following amounts in the following order of preference;

46.1.6.1. the auctioneer's commission and attendant auctioneering costs arising from the sale of the property in terms of the mandate;

46.1.6.2. the amount owing to the mortgagee, if any, under any mortgage bond registered over the property at the date of transfer of the property to the purchaser thereof;

46.1.6.3. the cost of securing electrical and gas compliance certificates in respect of the property at the date of transfer of the property to the purchaser thereof;
and

46.1.6.4. the balance thereof to be shared equally between the applicant and the respondent.

46.1.7. The applicant's attorneys of record, or their nominee, shall be instructed on behalf of the parties diligently and expeditiously

to attend to the transfer of the property to the purchaser thereof.

46.1.8. The parties are directed to cooperate with each other, their attorneys of record and/or the auctioneer in respect of the sale and transfer of the property, including by duly and timeously signing all documents and/or taking all other steps necessary to give full effect to this order.

46.1.9. In the event that either party refuses or fails to comply with any part of this order, the sheriff of the area in which the property is situated is authorised and directed, in his or her stead, to sign any document and/or take any other step necessary to give full effect to this order.

46.1.10. The respondent is ordered to pay the costs of the application initiated by the applicant on or about 04 October 2022.

46.2. The conditional counter-application initiated by the respondent on or about 17 January 2023 is dismissed with costs.

This judgment is handed down electronically by uploading it to the file of this matter on CaseLines. As a courtesy, it will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is 07 June 2023.

Counsel for Applicant:	Advocate S Meyer
Instructed By:	Van Zyl Johnson Inc
Counsel for Respondent:	Advocate N Segal
Instructed By:	NR Taylor Attorneys
Date of Hearing:	30 May 2023
Date of Judgment:	07 June 2023