

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:2023-046589

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

Date: 27 November 2023 E van der
Schvff

In the matter between:

RN APPLICANT

and

RPJ RESPONDENT

JUDGMENT

Van der Schvff J

[1] This application was enrolled in the urgent family court. The primary relief sought by the applicant is the termination of the parties' joint ownership of the parties' immovable property. The applicant, in addition, seeks an order to the effect that:

- i. The respondent is to pay 50% of the outstanding arrears on the bond payments being R45 487.00 into the bond account to bring the arrears up to date;
- ii. The property as the first option to be sold on written receipt of a written offer to purchase the property by the current lessors occupying the property in terms of the current lease agreement for an amount no less than the outstanding bond on the property;
- iii. In the event that the current lessors are unwilling or unable to buy the property for the property to be placed on the open market for sale at an amount not less than the outstanding bond amount, for a further period of 6 months

[2] The parties are embroiled in divorce litigation. The divorce is not contested, but the immovable property is the source of the only remaining contentious issue between the parties. In the particulars of claim and counterclaim, respectively, both parties seek the termination of the co-ownership of the property.

[3] The applicant, RN is the plaintiff in the divorce proceedings. In the particulars of claim to the divorce action, The applicant submitted that it would be just and equitable for the parties to obtain two evaluations from estate agents and to sell the property on the open market for an amount equal to two valuations, after payment of the outstanding bond and any costs associated with the net-proceeds of the sale of the Property for her to set off any claim for the improvements to the immovable property.

[4] The respondent in this application, RPJ, is the defendant in the divorce action. He instituted a counterclaim in the divorce proceedings wherein he sought to terminate the joint ownership of the immovable property. He avers in the counterclaim that the plaintiff refuses to terminate the joint ownership, alternatively that the parties cannot agree on the *modus* of terminating the joint ownership. He invokes the *actio communi dividundo* and seeks the appointment of a receiver with the power to sell

the property, and, after paying all the liabilities in respect of the property, to divide the net proceeds between the parties.

[5]

[6] The respondent, who always serviced the bond while the applicant used her salary for other family expenses, unilaterally decided to cease making payments towards the bond. The account subsequently fell in arrears. The applicant took positive steps to address the problem to mitigate the consequences of the respondent's reckless decision.

[7] The applicant concluded a lease contract, and she utilises the lease to pay the bond and arrears due on the bond. In terms of the lease agreement, the lessee will pay the outstanding balance and arrears due on the bond 'on or before 1 August 2023'.

[8] The bondholder directed correspondence to the parties, which she interprets as a threat to foreclose the bond. The correspondence dated 17 October 2023 was the catalyst for this urgent application. The applicant claims that the application for termination and division is urgent because the bondholder 'is on the verge of taking legal enforcement steps against both me and the Respondent for the arrears, which will have dire consequences for us as joint owners'.

[9] The correspondence reads as follows:

'Refer to the above account number and the telephone discussion the current arrears states on your Bond account are as follows R54971.84 monthly instalments R16616.14 due on the 03/11/2023. Kindly Provide us with a proposal of how the arrear

amount will be paid as we can consider arrangement with you to pay the arrears over a period of time this will be subject to approval' (sic.)

Urgency

- [10] It is trite that before a court pronounces on the merits of an application brought in the urgent court, it first needs to consider whether the application is indeed so urgent that it must be dealt with on the urgent court roll. The establishment of a dedicated Family Court in this Division did not change this position.
- [11] Before a court considers the merits of the matter, the question needs to be asked whether the applicant will fail to obtain substantial redress in due course if the matter is not heard in the urgent court. The reasoning that should underpin the decision of not only enrolling a matter in the urgent court but also the degree to which truncation of timelines should be considered if a matter is considered to be urgent was set out in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*.¹
- [12] The applicant did not make out a case for urgency. She failed to indicate how she could not obtain redress in due course if the application were enrolled in the ordinary course. Considering that the matter is enrolled in the Family Court, the matter is already bound to be heard in the ordinary course much sooner than it would have been heard if it had to be enrolled on the general opposed motion roll.
- [13] The matter does not deserve to be dealt with as one of urgency on truncated timelines. Doing so would undermine the integrity of the judicial process and could potentially flood the court with applications framed as urgent without substantive justification. Striking a matter from the roll for lack of urgency should not be conflated with dismissing an application. The application stands to be struck from

¹ 1977 (4) SA 135 (W) 136C-137G.

the roll to be enrolled on the ordinary family court roll. As a result, I need not consider the striking-out application.

Costs

[14] The general rule is that costs follow success. Counsel for the respondent requested a punitive costs order be granted and even moved for an order *de bonis propriis*. I am, however, of the view that the parties' interest will best be served if costs are costs in the divorce action. I fail to understand the respondent's reasoning for obstructing the only viable option of preventing or at least reducing the potential of financial harm the parties face because their bond is in arrears.

ORDER

In the result, the following order is granted:

- 1. The application is struck from the roll.**
- 2. Costs are costs in the divorce action.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. A. Strauss
Instructed by:	Coetzee Attorneys
For the respondent:	Adv. M. A. Kruger
Instructed by:	Scholtz Attorneys

Date of the hearing:

21 November 2023

Date of judgment:

27 November 2023