IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 6027/2023

Date of hearing: 21 November 2023

In the matter between:

BAAREQ KADER Applicant

and

KAASHIEFA MODACK First Respondent

THE STANDARD BANK OF SOUTH AFRICA Second Respondent

Judgment handed down on: 24 November 2023

JUDGMENT

JAMIE, AJ

[1] This is an application in which the applicant seeks the following relief:

> *"1. That the co-ownership in the immovable property known as ERF 5617 Goodwood, Cape Town, more commonly known as 75 Nelson Street, Goodwood, Cape Town, Western Cape, should be terminated as set out hereunder;"*

[2] The remaining relief sought by the applicant in respect of the manner of disposal of the property is not relevant to this judgment and I do not deal therewith, save to record that the applicant also seeks an order that the first respondent is ordered to pay the costs of this application on an attorney-client scale in the event that she opposes the relief sought.

[3] The applicant describes himself as a major male Project Manager currently residing at San Le Zar, 144 Joubert Street, Goodwood, Cape Town, Western Cape.

[4] The first respondent is Kaashiefa Modack**,** described as an adult female Senior Project Administrator in the employ of the City of Cape Town, currently residing at 75 Nelson Street, Goodwood, Western Cape.

[5] The second respondent is the Standard Bank of South Africa Limited, the holder of a mortgage bond in respect of the property. It took no part in these proceedings.

[6] The application is brought under the *actio communi dividundo* to terminate the joint ownership of the property and to have the court order the method of disposal of same.

[7] In the founding affidavit, beside the allegations about the joint ownership of the property, the applicant's desire to terminate such ownership, and the unsuccessful attempts made to obtain the first respondent's consent thereto, the only allegations made in relation to the relationship between the parties is the following:

> *"9. The respondent [i.e. the first respondent] and I were married on 21 April 2001 in accordance with Shariah Islamic Law and on 5 November 2018, we decided to terminate the marriage in accordance with Shariah Islamic Law.*
>
> *10. On 10 April 2007 and during our marriage we jointly purchased the immovable property and did so with the assistance of a home loan granted by Standard Bank Limited."*

[8] In fairness to the applicant I should point out that the founding affidavit also contains the following averments in relation to a request for the applicant to the first respondent that she purchase his half share of the property:

> *"16. On 03 November 2021 the first respondent replied to my request and stated that she does not consent to my request and further that I would have to approach a court for an order terminating the joint ownership. I attach hereto a copy of the aforementioned response by the first respondent, marked as Annexure '**BK4'."***

[9] Although the content of annexure BK4 was not specifically drawn to the court's attention in the founding affidavit, a perusal of same indicates that it is a letter or email dated 3 November 2021 from the first respondent to the applicant in which the following is stated:

> *"As we are co-owners, I will need to consent to the sale of the house, alternatively a court will need to order that the house be sold. I do not give consent to sell the house. My reasons are mostly not to destabilise the children any further by having to find new accommodation, moving them away from their home, their comfort and safe space and also as a sale will mean accommodation below what they are currently accustomed to and mean settling in a completely different area. This will further destabilise them."*

[10] As is apparent from what I have said above, nowhere in the founding affidavit does the applicant refer to the fact that he and the first respondent have children born from their marriage, or that the children are residing at the property.

[11] In the answering affidavit these facts are however placed before the court. In this regard the answering affidavit states the following:

> *"7. Pursuant to our divorce, myself and the Applicant concluded a divorce settlement agreement dated 14 September 2018. In terms of this divorce agreement, which agreement was endorsed by the offices of the Family Advocate, the Applicant agreed to tender a total of* ***R20 055.00*** *towards the maintenance and upkeep of our*

*children. Annexed hereto marked **"KM2"** is the endorsed agreement.*

8. *Further, in terms of the agreement, the parties agreed that the immovable property will remain equally co-owned. The agreement goes further to state how the property will be inherited by our children in the event of our death.*

9. *I submit that this gives credence to the fact that at the time of agreement, the parties were ad idem regarding the following factors:*

   9.1 I would be residing in the property with our 4 children.

   9.2 Given that we have 4 children, all of whom were attending school in the area it was in the best interest of our children to remain in their home. At present, three of our children are still attending schools in the area. One child has attained majority.

   9.3 The parties intended to maintain stability for the children.

   9.4 The Applicant was always well aware that I would not be able to financially afford alternative accommodation, that is still the case.

   9.5 The parties agreed that the status quo in terms of paying the bond repayment for the bond and loans would remain in place in order to ensure that both parties were contributing

towards the joint property and keeping a roof over the heads our children (sic).

10. I submit that the agreement in place is binding on the parties and still very much remains a contract between the parties. It is clear that a termination of the agreement between the parties will cause severe prejudice to me and to our children."

[12] Annexure KM1 to the answering affidavit is a Divorce Certificate (No. 10283) issued by the Muslim Judicial Council of South Africa and signed by the Head of Department of its Social Development Department. It is dated 5 November 2018.

[13] The aforementioned annexure KM2 to the answering affidavit comprises a covering sheet dated 14 February 2022 from the Family Advocate in respect of proceedings between the parties, initiated by the first respondent, under case number 1591/2022, in this Court. Attached thereto is the divorce settlement agreement between the parties.

[14] This agreement, in relevant part, states or records the following:

14.1. The parties were married according to Muslim Rites on 21 April 2001 and the marriage was dissolved by order of the Muslim Judicial Council on 5 July 2018 and became final on 16 September 2018.

14.2. It is agreed that custody of the four children, who it is recorded are the biological children of the parties, will be granted to the first

respondent "*who will reside with the children at 75 Nelson Street, Goodwood, 7460 (the Residence)".*

14.3. Applicant will contribute an amount of R6 000,00 per month toward the bond in respect of the property.

14.4. First respondent would contribute an amount of R3 900,00 per month in respect of the bond and a housing loan, and R3 800,00 per month in respect of utilities due to the City of Cape Town.

14.5. The property will remain equally co-owned by the applicant and the first respondent. Any spouse or offspring resulting from a new marriage, cannot inherit any portion of the property. In the event of either party's death, the 50% of the deceased's portion will go straight to the children resulting from the parties' marriage.

[15] The agreement was signed by the parties on 14 September 2018.

[16] When this matter was called before me on 9 November 2023, I drew the parties' attention to the judgment of the Supreme Court of Appeal in *Municipal Employees' Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others*[1]. Neither party had addressed the judgment in their heads of argument and I directed them to do so. The matter stood down for this purpose and came before me again on 21 November 2023 after the parties had filed additional heads of argument in line with the Court's direction.

[17] The *Municipal Employees'* case concerned a complex series of agreements between one party (Adamax) and the Municipal Employees'

[1] 2022 (1) SA 137 (SCA)

Pension Fund (MEPF) in relation to a shopping centre. The crisp question for determination by the Court was whether Adamax was entitled, in terms of the *actio communi dividundo,* to demand the sale of the underlying properties that were the subject of the agreements.[2]

[18] It was in this context that the Court invoked the distinction between free and bound ownership, a concept that had not until then received definitive treatment in our law. With reference to what is often described as the *locus classicus* in relation to the *actio*, *viz Robson v Theron,*[3] the Court referred to the dictum from that case to the following effect:

> *"No co-owner is normally obliged to remain a co-owner against his will."* (Emphasis in *Municipal Employees'*)[4]

[19] The Court then went on to say the following, which I consider to be the *ratio decidendi* of the judgment:

> *"[45] Accordingly,* [Robson] *casts no light on how to determine whether co-ownership is free or bound. The case is not authority for the general proposition that no co-owner may be compelled to remain a co-owner against their will. That ignores the context and the careful qualification that this is 'normally' the position. Bound co-ownership is precisely the case where a co-owner is obliged to remain such against their will, unless and until the tie that creates the bound co-ownership has been severed."*

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[2] At para 2
[3] 1978 (1) SA 841 (A)
[4] At para 43 quoting Robson at 856 H to 857 A

[46] In summary therefore, I conclude, in accordance with the authorities discussed above, that the distinction between free and bound co-ownership is that in the former the co-ownership is the sole legal relationship between the co-owners, while in the latter there is a separate and distinct legal relationship between them of which the co-ownership is but one consequence. Co-ownership is not the primary or sole purpose of their relationship, which is governed by rules imposed by law, including statute, or determined by the parties themselves by way of binding agreements. The relationship is extrinsic to the co-ownership, but is not required to be exceptional. In other words it requires no special feature for the co-ownership consequential upon the relationship to qualify as bound co-ownership. Whether it is depends upon the terms upon which the relationship was constituted. The mere fact that co-owners decide to exploit their co-ownership commercially will not of itself constitute the co-ownership as bound co-ownership. That will depend upon the nature and terms of the commercial agreement between the parties and matters such as the provision made for its termination.

[47] There is no closed list of instances of bound co-ownership. If the relationship gives rise to bound co-ownership the co-ownership will endure for so long as the primary extrinsic relationship endures. Once it is terminated then, as in Menzies and Robson v Theron, it will become free co-ownership and be capable of being

terminated under the action. I consider the facts of this case in accordance with those principles."

[20] Thereafter, and upon a consideration of the facts in line with the principles identified, the Supreme Court of Appeal concluded that the relationship between the parties did indeed lead to a situation of bound co-ownership and that the *actio* was accordingly not available.

[21] The applicant in this matter, who was represented by Mr Titus, accepted, as he had to, the authority of *Municipal Employees'* but sought to distinguish it on the basis that, in the instant case, the primary extrinsic relationship between the parties had been severed by the divorce order.

[22] I am unable to agree.

[23] In *Martrade Shipping and Transport GmbH United Enterprises Corporation and MV 'Unity'*[5] the Supreme Court of Appeal restated the correct approach to the construction of a court order, emphasising that the process was the same as with other documents:

> *"[2] The principles which apply to the interpretation of court orders are well-established. Trollip JA observed in Firestone South Africa (Pty) Ltd v Gentiruco AG that the same principles apply as applied to construing documents. Thus,*
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> *'..(T)he court's intention is to be ascertained from the language of the judgment or order as construed according to the usual, well-known rules... Thus, as in the case of a document, the judgment or*

[5] [2020] ZASCA 120 (2 October 2020)

order and the court's reasons for giving it must be read as a whole to ascertain its intention.'

[3] The starting point, is was held in Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and others, is to determine the manifest purpose of the order. This was endorsed by the Constitutional Court in Eke v Parsons. This court, in Natal Joint Municipal Pension Fund v Endumeni Municipality, described the process of interpretation as involving a unitary exercise of considering language, context and purpose. It is an objective exercise where, in the face of ambiguity, a sensible meaning is to be preferred to one which undermines the purpose of the document or order." (Footnotes omitted)

[24] I will consider the 'divorce order' in line with the above principles. In so doing, I bear in mind that the 'order' is not one issued by a court of law, but instead by the Muslim Judicial Council. I am, however, of the view that this makes no material difference to the manner in which one must approach the construction of the document, and its ultimate interpretation.

[25] In this regard and with reference to the extracts from the 'order', or agreement, the following emerges:

25.1. It was agreed between the parties at the time of the divorce that custody of the children would be granted to the first respondent, and that she would reside with the children at the property.

25.2. The agreement made provision for each party to contribute in specified amounts to the payments in respect of the property.

25.3. Under the heading ‘PROPERTY’ it is stated that the property will be distributed as follows:

25.3.1. The property will remain equally co-owned by the parties;

25.3.2. No spouse or offspring resulting from a new marriage could inherit any portion of the property, and in the event of either party’s death, his or her share would be inherited by the children.

[26] Taken as whole, I am of the view that the manifest intention of the parties to be ascertained from the document as a whole, and considering its language, context and apparent purpose, is as follows:

26.1. The parties would remain as co-owners of the property.

26.2. Such co-ownership would subsist, at least, until the parties no longer had a legal obligation to provide accommodation for the children, or the last of them to require such accommodation.

[27] In my view, a construction of the agreement, such as that contended for by Mr Titus, that, notwithstanding its terms, the applicant was entitled to invoke the *actio* here in order to sell the property, on the basis that he no longer wished to, or could afford to, remain a co-owner, would be destructive of the very purpose of the agreement, which was to provide a safe and stable environment for the children.

[28] I need to deal with two contentions by Mr Titus.

[29] The first is that my construction would force the applicant to remain a co-owner in perpetuity, which he submitted would be unlawful. He did so on the authority of *Robson.*

[30] I disagree that my construction requires the parties to remain co-owners in perpetuity. As I have indicated above, a reasonable construction of the agreement is that the parties are required to remain co-owners while the children are in need of, and legally entitled to, accommodation being provided by their parents. While the termination date of such need, and hence obligation, may be lengthy and uncertain (as to when it will come to an end), it is not perpetual.

[31] Mr Titus' second and principal contention was that, while the parties' co-ownership of the property might have been a bound one, the principal extrinsic relationship between them, *viz* the marriage, came to an end in 2018, whereupon the co-ownership became a free one, entitling the applicant to invoke the *actio.* I disagree.

[32] In my view, the principal extrinsic relationship between the parties, as evidenced by the agreement, was not their marital relationship, but commenced at the end thereof, with the conclusion of the divorce agreement. That brought into existence a new relationship between them, no longer regulated by Shariah law, but now regulated by the agreement which they had freely entered into and which was to regulate, not their marriage, but the consequences thereof, post-divorce.

[33] As I have already found, the primary purpose of the divorce agreement, insofar as the property was concerned, was clearly aimed at providing a safe and stable environment for the children. The parties, to their credit, recognised this and thus included the terms that I have discussed above in their divorce agreement.

[34] The parties clearly intended their relationship post the divorce to be regulated by the divorce agreement. The fact that such was intended to be a long-term arrangement is evidenced by the provisions relating to the distribution of the property, in particular upon the death of one or the other of the parties.

[35] Accordingly, in my view, while the co-ownership of the property prior to the divorce was also a bound one, in accordance with the Shariah rules of the marriage between them, it remains so after the divorce, but is now regulated not by the rules of Shariah but by the terms of the agreement. This conclusion is, in my view, on all fours with the principles, and the application thereof, in the *Municipal Employees'* case.

[36] For the aforesaid reasons, I find that the co-ownership between the parties of the property post the divorce is one of bound ownership and the *actio* is accordingly not available to the applicant while the parties' primary extrinsic relationship subsists, as regulated by the divorce agreement.

[37] One final argument by Mr Titus was that my construction of the agreement left the applicant with no remedy to put an end to the agreement. I disagree. If the applicant felt that the agreement stood to be interpreted on

the basis contended for by him, it was open to him to seek a declaratory order from the court in that regard. He could also, in my view, have brought an application, akin to that in the case of a divorce order granted by a court, to vary same on the basis of changed circumstances. He is thus not left without a remedy.

Conclusion

[38] For all of the aforesaid reasons, the application must fail. As regards costs, the applicant initially sought costs against the first respondent on an attorney-client basis. He wisely did not persist with such claim. Ms Essa, who appeared for the first respondent, did not ask for a punitive costs order. In my view, costs should follow the event.

[39] I accordingly make the following order:

[1] The application is dismissed.

[2] The applicant is ordered to pay the first respondent's costs.

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I JAMIE
ACTING JUDGE OF THE HIGH COURT

For the Applicant:	Adv A Titus
Instructed by:	Mr M Adams Mujahid Adams Attorneys
For the Respondent:	Adv N Essa
Instructed by:	Mr N Parkar Parkar Attorneys Inc.