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

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: 1199/2011
Date heard: 19 - 21 Sept 2012
28 Aug 2013

Date delivered: 25 March 2014

In the matter between:

BRENDA CLAASSEN	**Plaintiff**
vs	
ANDREW ERNEST QUENSTEDT	**First Defendant**
SA HOME LOANS	**Second Defendant**
THE REGISTRAR OF DEEDS	**Third Defendant**

JUDGMENT

SUMMARY: Land - termination of joint ownership - *Actio communi dividundo* differentiates between partnership and ordinary joint ownership which does not include partnership. Therefore, no party can claim protection from the provisions of section 11(d) of the Prescription Act 68 of 1969, in respect of improvements *et al,* on property owned in terms of joint ownership other than a partnership.

TSHIKI J:

A) INTRODUCTION

[1] The institution of co-ownership harbours a conflict between the rights of individual owners and the entity or collectivity that is formed by the individual co-owners. Hence the maxim which says "*communio est mater rixarum*" [co-ownership is the mother of disputes]. (***Wille's Principles of South Africa Law 9th ed by Francois du Bois et al p 558***). The issues to be dealt with in this judgment centre around and deal pertinently with the adverse consequences of co-ownership.

[2] The first two parties (plaintiff and first defendant) who are hereinafter referred to as the parties are the registered joint owners in equal and undivided shares of the immovable property known as [……]. The property is held by them jointly in terms of the Deed of Transfer no […..]. A mortgage bond is registered over the property in favour of the second defendant, serving as security for a loan made by the second defendant to the plaintiff and the first defendant. The first two parties were lovers when they bought the property in July 2013. The purchase price was funded by the payment of a deposit of R80 000.00 which was paid by the first defendant. When the parties bought the property, they had intended to marry each other after they had been living as a couple since 1997. The parties are in agreement that their joint ownership in the property should be terminated, but have been unable to reach agreement in regards to the method of termination of joint ownership. It is, *inter alia*, for that reason that this Court was approached by way of the present action for a solution of the parties' predicament.

[3] The second defendant's interest in this action stems from the fact that a mortgage bond is registered over the property in its favour, serving as security for a

loan given by the second defendant to the plaintiff and the first defendant. Whereas the third defendant is cited herein as an interested party in the subject matter of this action.

B) ISSUES

[4] According to the plaintiff, it was an express, alternatively tacit, further alternatively implied term of their agreement as joint owners of the property, that the parties would account fully to each other regarding the expenses incurred in respect of the property. Alternatively and by virtue of their relationship as joint owners of the property, the parties are legally obliged to account to each other in that regard. The plaintiff contends that such account is to be premised on the following express, alternatively tacit, further alternatively implied agreement between the parties, that the proceeds from the sale of the property be applied as follows:

[4.1] settlement of the outstanding bond;

[4.2] payment of the estate agent's commission;

[4.3] payment of any outstanding municipal rates and taxes;

[4.4] provision for any direct expenses, expended by either party in respect of necessary improvements to the property;

[4.5] reconciliation of any monies paid to either plaintiff or first defendant from the proceeds of the registration of any mortgage bonds over the property; and

[4.6] the balance to be divided equally between the parties.

[5] On the contrary, first defendant denies the plaintiff's contention in the above paragraphs. He avers that during or about June 2003 at Port Elizabeth, the parties entered into an oral agreement in terms of which they jointly purchased the property

in issue. It was an express, alternatively tacit, alternatively implied term of the agreement that each of the parties would equally share in the net profit of the property and would contribute equally to the expenses incurred to purchase the property, to maintain the property and to improve it. Such expenses would include, *inter alia*, the following:

[5.1] the deposit paid to purchase the property;

[5.2] the bond repayments;

[5.3] improvements and maintenance to the property; and

[5.4] rates and taxes for the property.

[6] Both parties agree that the property be evaluated by an independent valuer appointed by the Chairperson of the Institute of Estate Agents and that the property be sold and that certain amounts to be paid as follows:

[6.1] according to the plaintiff:

[6.1.1] that the property be sold at the valuation price and the conveyancers responsible for that task be those of the plaintiff's attorneys;

[6.1.2] that after the collection of the full purchase price, that the mortgage bond in favour of the second defendant be cancelled and discharged;

[6.1.3] that any further obligations on the property in respect of rates, taxes, and estate agent's commission be discharged;

[6.1.4] that the net residue of the amount be distributed to both parties;

[6.1.5] that in the event of the valuation not being agreed upon and the parties failing to reach an agreement as to the amounts due to them:

[6.1.5.1] that each party render to the other a full account, supported by vouchers, of all expenses incurred in respect of the property, and how he/she proposes the net proceeds are to be divided;

[6.1.5.2] debate of the said accounts;

[6.1.5.3] division of the net proceeds of the sale of the property between the parties in accordance with the Court's final finding on such account; and

[6.1.5.4] that the first defendant be ordered to pay costs of suit.

[7] First defendant's averments in this regard are that it would be just and equitable that:

[7.1] the property be evaluated by the Chairman of the Board of Evaluators in Port Elizabeth;

[7.2] that the following amounts be deducted from the said evaluation:

[7.2.1] the deposit paid of	R	80 000.00
[7.2.2] payment towards the bond repayments	R	583 878.69
[7.2.3] paid in respect to the improvements to the house	R	104 661.61
[7.2.4] paid towards rates and taxes for the property	R	47 304.44
TOTAL	R	815 844.74

[8] First defendant filed a counter claim in line with the suggestions claimed in para [7] above which he also prayed that the Court make an order in that regard.

[9] First defendant amended his plea on the amount of R815 844.74 in paragraph 2.9 of his plea to read that "the receiver shall deduct from the purchase price received for the property the amount as determined by the Court" and asked for the costs of suit.

[10] Plaintiff further filed a special plea to the first defendant's counter claim contending that the first defendant's claim for the amounts claimed which were due before the 11th November 2011 have prescribed. This is so, according to her, because any amounts that would have become due by the plaintiff, as a consequence of joint ownership, became due, owing and payable on the date such expenses were incurred by the first defendant. Accordingly, the bond repayments, improvements and rates and taxes to the extent that any such claims arose prior to 11th November 2008 have prescribed because three years had expired since they became due. This is in terms of section 11(d) of the Prescription Act, 68 of 1969 (the Act) which provides that the period of prescription of debts shall be three years in respect of any other debt other than those where the Act of Parliament provides otherwise.

[11] It would be appropriate for me to first deal with the plaintiff's plea of prescription to the first defendant's counter claim wherein he claims payment from the plaintiff for the total amount of R815 844.74. This amount is the alleged contribution due by the plaintiff to the first defendant for the amounts which she should have paid to the first defendant for their joint property described above.

[12] In response to the plea of prescription first defendant contends that their joint ownership of the property is a partnership, a specific form of partnership known as joint owners. Section 13(1) of the Act proves as follows:

> "(1) If-
>
> (a) …
>
> (b) …
>
> (c) ….
>
> (d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or
>
> (e) …
>
> (f) …
>
> (g) …
>
> (h) …
>
> (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,
>
> the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph
>
> (i)."

[13] *Mr Pretorius* for the first defendant relies on the decision in ***Van Staden v Venter*** 1992(1) SA 552 (A) wherein he quotes verbatim the headnote on page 554F which reads:

> "*Held*, further that there could be no doubt as regards the Legislature's intention; a partner who had a claim against his co-partner arising from the partnership relationship should not be prejudiced by the passage of time in respect of the non-enforcing of the action; the normal consequences of such passage of time in the form of prescription should not apply as against him."

[14] According to the first defendant, and for the above reasons and on the strength of what has been said above in the ***Van Staden v Venter*** decision *supra*, the plaintiff's special pea has no merit and therefore cannot succeed.

[15] In ordinary co-ownership, two or more persons own one or more objects simultaneously, not in physical portions but in abstract undivided shares. If A & B are co-owners of a farm, none is entitled to a physical part of the farm but each to an undivided share in the whole farm. Section 34 of the Deeds Registries Act 47 of 1937 expressly provides that land held in co-ownership must be registered in the names of the co-owners. In view of the fact that no co-owner is obliged to remain a co-owner against his or her will, in the absence of an agreement to the contrary, any co-owner may demand partition of the common property at any time. If partition is not possible or would bring about some complications or prejudice to any of the parties the Court can grant an order for the sale of the property and divide the money equally amongst the owners. (***Wille's Principles of South Africa Law 9th ed*** **by Francois du Bois *et al* p561-562**).

[16] This form of co-ownership is governed by the *actio communi dividundo*. In ***Robson v Theron*** 1978(1) SA 841 (A) at 854G-H Joubert JA explains the *actio communi dividundo* as follows:

> The *actio communi dividundo* is an action which originated in Roman law and was subsequently adopted in Roman Dutch law. Its chief characteristics appear from *Voet*, 10.3.1 quoted in Gane's translation as follows:
> "This action for the division of common property is a mixed, a two-sided and a *bona fide* action. By it those who hold property in common, generally by particular title, claim to have it divided and personal items of payment made good. It is available, that is to say, to those who hold common property in undivided shares. This is so whether the property is common between them in a partnership or **without a partnership** D.10.3.2; whether they possess it, or neither of them or only one of them is in possession …" (My emphasis)

[17] It is clear from the above extract from *Voet* that even the Roman and Roman Dutch jurists made a differentiation between the joint ownership and *societas* (partnership) in their application of the *actio communi dividundo*. Not every community of interest constitutes a partnership (see ***Oblowitz v Oblowitz*** 1953(4) SA 426).

[18] When I read the papers in the present case I had thought that the main parties herein are *ad idem* on the fact that their co-ownership of the property is in simply terms referred to as joint ownership which in my view and for the reasons to follow, is completely different from a partnership. As a matter of law co-ownership in itself cannot be equated with partnership, the latter being a term of wider ambit. Partners may very well be co-owners of the property owned by them, but the converse does not apply in the absence of evidence clearly establishing this. (See ***Oblowitz v Oblowitz*** 1953(4) SA 426 at 433 (A-B). De Villiers JP, In ***Oblowitz*** case *supra*, quotes Lindley at page 433F-G on Partnership, where he differentiates between the two terms as follows:

> "1. Co-ownership is not necessarily the result of agreement while partnership is.
> 2. Co-ownership does not necessarily involve community of profit and loss while partnership does.
> 3. One co-owner can without the consent of the others alienate his interest in the property jointly owned, whereas a partner cannot.
> 4. One co-owner is not as such the agent of the others, whereas a partner is.
> 5. Co-ownership need not exist for the sake of gain or profit, whereas that element is fundamental to the legal conception of a partnership."

[19] It follows from the above explanation especially paragraph 5 that, in view of the fact that the relationship created by the plaintiff and first defendant in our case

does not exist for gain or profit, and it is simply a joint ownership of the property in issue and nothing more. Therefore, their joint ownership of the property cannot be regarded as a partnership, and there is no evidence that they intended the co-ownership of their property to be a partnership. There is no evidence that their object was to make and share profits which is a characteristic that can only be attributed to a partnership and not a joint ownership.

[20] Throughout the duration of the parties' relationship, first defendant has always been aware of the fact that the money due to him by the plaintiff had not been paid to him. He never took any steps or effort to demand payment of the money, this notwithstanding the fact that he was also aware of the breakdown of their relationship. Therefore, for the reasons stated above and in the absence of any other challenge to the plaintiff's plea of prescription against first defendant's counter claim, plaintiff's plea of prescription must succeed. It, therefore, follows that the first defendant's claim in respect of the following payments or deposits towards the joint ownership of their property totalling R815 844.74 has since prescribed in terms of section 11(d) of the Prescription Act 68 of 1969.

[21] I now have to deal with the merits of the action. *Mr Friedman* has contended that the first defendant, notwithstanding the protestations of the plaintiff has had sole occupation and has resided in the property since their parting of ways in March 2007. He contends further that, first defendant refuses to move out of the property and neither does he pay rent. The answer to the plaintiff's concerns above is simple being that the first defendant stays in his property and has a right to do so. I would understand if the plaintiff's concern was that the first defendant is making money by

staying in the house which money, he does not share with the plaintiff. Evidence led shows that first defendant is responsible for the maintenance of the property and I cannot, even for a moment, expect him to pay both rent and bond instalments for his own property. In any event, he pays the bond repayments for the house, and I am of the view that, other than the bond repayments first defendant should be responsible for the maintenance of the house in which he occupies and stays in it alone. However, plaintiff as one of the co-owners of the house has a legal responsibility to pay for the rates and taxes for the property as well as for the bond repayments which do not form part of the period whose claim has prescribed in terms of the first defendant's counter claim.

[22] It is common cause that the plaintiff and the first defendant want their joint ownership of their house to be terminated. It was necessary for both of them to approach this Court for assistance in view of their inability to find an amicable solution to their disagreement. The only solution in my view, is to make an order on suitable terms as to how they should go about in giving effect to the termination of the co-ownership. I have read the terms suggested in the plaintiff's prayer on page 4 of the pleadings and I agree that they are ideal for a suitable order in this case. A Court has a wide equitable discretion in making a division of the joint property. The wide equitable discretion is substantially identical to the similar discretion which a Court has in respect of the mode of distribution of partnership assets amongst partners. In ***Rademeyer and Others v Rademeyer and Others*** 1968(3) SA 1 (C) at 14B-C Van Zijl J stated:

> " … The sale of the common property by public auction is merely one of the methods that may be employed in dividing a common property between the owners. Before the proceeds of a sale are divided among the joint owners, they

> are entitled to have all accounts in respect of the property adjusted *inter se* because, when community of property comes to an end, then all the obligations in respect of that community should also be terminated through fulfilment. In fact there is a debate of account between the joint owners in respect of the property they own jointly and are now seeking to divide between them."

[23] It therefore follows that the Court in its order in this regard should give an order that is suitable to the circumstances of the parties concerned. In my view, the order I intend making herein will take care of every eventuality relative to the parties' circumstances. (See also: ***Emslie v Brophy*** 2010 JDR 0669 (GSJ) – case no 16240/2008)

[24] However, the question of costs should be dealt with separately and after having considered all the relevant facts. I must say though that on the merits there is no party who has convinced me that he has succeeded and is entitled to be awarded costs in this case. In my view, they both approached the Court after it was clear that no amicable solution was possible. Plaintiff has succeeded in her special defence of prescription which is against first defendant's counter claim and for that alone she is entitled to get her costs. They both tried to settle the matter but could not reach an amicable solution. This was expected of people who initially intended to marry but ended up not doing so. In the circumstances of this case it would not be in the interests of justice to award costs against any of the parties except with regard to the issue of the special plea which I have dealt with *supra*.

[25] In the result, I make the following order:

[25.1] It is declared that; the joint ownership of the parties in the immovable property known as [……..], Eastern Cape Province ("the property"), held by them jointly in terms of Deed of Transfer No [……..], be terminated;

[25.2] That, unless the parties reach agreement in writing within a month from date of the order referred to in paragraph 1 above on all aspects related to the termination of the co-ownership, then and in such event, paragraph [25.3] to [25.6] shall apply;

[25.3] That in giving effect to the termination order referred to in paragraph [25.1] above (should the parties not reach agreement as provided in paragraph [25.2] above) an order be made in respect of the property as follows, namely that:

[25.3.1] the property be valued by an independent valuer, appointed by the Chairperson of the Institute of Estate Agents, Port Elizabeth (unless the parties are able to agree to the appointment of a valuer forthwith);

[25.3.2] immediately upon receipt of such valuation, an open mandate be given on the Multi Listing Agency ("MLS") to sell the property at the valuation price within 21 days from date of a mandate been given on the MLS;

[25.3.3] the conveyancing of the property be attended to by the applicant's attorneys as conveyancers for both parties, failing which any other attorneys agreed to by the parties, who will give effect to the sale as follows, namely:

[25.3.3.1] the collection of the full purchase price;

[25.3.3.2] the cancellation and discharge of the mortgage bond in favour of the second defendant;

[25.3.3.3] the discharge of any further obligations on the property in respect of rates, taxes, estate agent's commission and the like; and

[25.3.3.4] the distribution to both parties of the net residue as to be determined in accordance with the provisions of prayers [25.4] to [25.6] below;

[25.4] In the event of:

[25.4.1] the valuation not being agreed upon; and/or

[25.4.2] the property not being sold within such 21 day period; and/or

[25.4.3] the parties failing to reach an agreement as to the amounts due to them respectively;

that each party render to the other a full account, supported by vouchers, of all expenses incurred in respect of the property, and how he/she proposes the net proceeds are to be divided;

]25.5] Debate of the said accounts;

[25.6] Division of the net proceeds of the sale of the property between the parties in accordance with the Court's final finding on such account;

[25.7] The first defendant is ordered to pay costs occasioned by the filing, opposition and argument of the special plea of prescription.

[25.8] On the merits, each party is to pay its own costs.

[26] Any of the parties may apply to this Court on the same papers for an amendment of prayers [25.2] – [25.6] and only if it is necessary to do so.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

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