

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

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Before His Lordship Mr Justice Labuschagne AJ on 5 April 2024

Case No: 81131/2018

In the matter between:

T[...] K[...] Applicant

and

N[...] M[...] P[...] Respondent

JUDGMENT

[1] This is an opposed motion that proceeded by default in the unopposed motion court on 2 April 2024. Full papers were exchanged and the applicant had filed heads as well.

[2] The applicant and the respondent were married in community of property on 4 June 2004. In 2008 divorce proceedings commenced and the parties were divorced on 20 October 2008. The court order dated 20 October 2008 provides firstly for the dissolution of the marriage. Secondly, specific assets in the common estate were awarded to the applicant. These include the movables in her possession, a television set which the respondent had to deliver to the applicant, a motor vehicle, all policies in the name of the applicant and an amount of R410 000.00 which the applicant had already received from the respondent's pension.

[3] The applicant and the respondent are the co-owners of immovable property which was not expressly referred to in the divorce order. The applicant applies in terms of Rule 42(1)(b) for an order in the following terms:

“1. That the court order granted by the above Honourable Court under case number 41023/2008 be varied and add (sic) the following terms:

1.1 That the immovable property described as Erf [...], Dorandia Ext. 7, Pretoria, Gauteng Province be sold and the proceeds be shared equally between the parties;

1.2 That both parties should endeavour to sign documents for the sale of the immovable property.

2. That should the respondent fail within 7 (seven) days of granting this order to take the necessary steps, the sheriff be authorised to take such steps on the respondent’s behalf.

3. That the respondent be ordered to pay occupational rent in the amount of R517 500.00 (Five hundred and Seventeenth Thousand Five Hundred Rand).

4. Costs of suit.

5. Further and/or alternative relief.”

[4] In 2018 the parties tried to negotiate a contract in terms of which the applicant would sell her interest in the immovable property to the respondent, but this came to naught.

[5] The respondent has remained in the property from the date of divorce. The applicant feels aggrieved and is seeking “*occupational rent*”.

[6] Although this application was launched in 2018, there is no explanation in the papers as to why this matter comes to court only in 2024. There is no explanation for the delay between 2008 up to 2018 as to why the parties did not resolve their dispute regarding the commonly owned immovable property.

[7] It is a requirement for relief under Rule 42 that an application to correct or supplement a court order should be brought within a reasonable time. (See: *Mostert v Nedbank* 2014 JDR 0760 (KZP) at par [4]).

[8] Rule 42 is an exception to the general rule that a court is *functus officio* after it has pronounced on a matter by means of a judgment.

[9] Rule 42(1)(b) provides that a court may rescind or vary any order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. In *T v B* [2018] ZAFSHC 133 the Free State High Court stated the following at [26]:

“[26] Notwithstanding the general rule, our highest courts have also recognised a number of exceptions to the general rule which are not all inclusive and may be extended to meet the constraints of the particular case. These courts weighed up the principle of finality of judgments against what is just, equitable and sound in law. These exceptions include:

(a) Supplementing of judgment: the principal judgment or order may be supplemented in respect of accessory or consequential matters, for example costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant;

(b) Clarification of judgment: the court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the ‘sense and substance’ of the judgment or order.”

[10] It is further impermissible to utilise Rule 42 for purposes of changing the import and substance of the order granted.

[11] In this instance, the relief sought by the applicant does not flow from the particulars of claim that gave rise to the order. At best an order directing the division of the joint estate could be argued, but the parties had already recorded those aspects of such division in the court order that was granted upon dissolution of the marriage. The applicant did not seek occupational rent in the divorce. That claim arises from time that has passed subsequent to the court order. Subsequent conduct

cannot form the basis of an application to supplement or amend a court order retrospectively. The court was simply unaware of facts yet to occur. To add relief not claimed would amount to the granting of relief in an un-pleaded case. That is impermissible. It suffices to state that the relief sought is not competent in terms of Rule 42(1)(b) as the additions are not true additions. They change the import of the order granted. And they are based on subsequent facts.

[12] The Rule 42 application was therefore not brought within a reasonable time and substantively it fails to establish a basis for the relief sought. This does not mean that the applicant is without a remedy.

[13] When a marriage in community of property is dissolved by divorce, that puts an end to the joint estate. A plaintiff may claim for a division of the joint estate or may claim for a forfeiture of the benefits arising from the marriage in community of property. In this instance, neither of the aforesaid took place. However, the division of the joint estate flows as a matter of law from the decree of divorce, whether an order is granted directing the division or not. (See: K[...] v K[...] 1979(4) SA 12 (T) at p 15 H).

[14] Regardless of whether an order is granted directing that the joint estate be divided upon divorce or not, the estate is then divided into equal shares between the parties after all the debts of the joint estate have been paid. (Ibid).

[15] The applicant's contention that she is entitled to occupational rent is a claim related to an accounting between co-owners when there has been a delay in effecting the division of the joint estate. The respondent contends that he alone has, since 2008, been paying all the expenses including the bond payments, maintenance and municipal and utility costs related to the property. This makes it apparent that the parties will require an accounting process which neither party has claimed in these proceedings.

[16] The applicant tried to motivate alternative relief for a declarator that the joint estate be divided. As already pointed out, such a division must occur as a matter of law upon the decree of the divorce, whether there is a specific order to that effect or not. The relief is therefore unnecessary.

[17] The applicant and the respondent have all the rights and obligations that flow from joint ownership.

[18] Counsel for the applicant prepared helpful supplementary heads of argument. The applicant readily concedes that the dispute about the sale of the immovable property is one that can be resolved by employing the *actio communi dividundo*. The applicant however contends that, where she has multiple causes of action, it is her choice which one to exercise. The proposition is correct, but the remedy chosen is not available to the applicant insofar as she has not established an entitlement to relief under Rule 42.

[19] The court order granted is not in need of clarification as it is not obscure, ambiguous or otherwise uncertain. In order to supplement an order, the applicant must establish an oversight or omission by the court. There was none as far as the intended additions are concerned. They arose because the parties could not agree on the fate of the property after the court order was made.

[20] I therefore make the following order:

1. The application is dismissed.
2. No order as to costs.

LABUSCHAGNE, AJ