# WHEN THE DIVORCE ORDER SAYS ONE THING AND THE DEEDS OFFICE RECORDS ANOTHER

## Mohamed N.O v VGZ and Others (1372/2019) [2020] ZAECPEHC 20 (23 June 2020)

*This judgment deals with an interesting factual scenario. What is an executor of a deceased estate to do where the deceased is reflected as co-owner of a property although the deceased previously agreed, in a divorce order, that his half share in the property would go to his wife? His wife, however, failed to effect transfer as was required in the divorce order. The executor argued that the wife did not comply with that condition of the divorce and that the property therefore had to be sold and the proceeds divided between her and the estate. Was this the correct avenue to follow?*

*The Judgment can be viewed here.*

## FACTS

Mr Mohamed is the executor in the intestate estate of the late Mr Z. The deceased (Mr Z) was formerly married to Mrs Z in community of property. They were divorced in 2009 and a settlement agreement was made an order of court. At the time of the divorce, Mr and Mrs Z owned a property together in undivided shares and a bond was registered over the property. The order provided, amongst other things, that Mrs Z shall be entitled to retain the property as her sole and absolute property and that Mr Z shall have no right or claim in respect thereof. In addition, Mrs Z would be solely liable for the repayment of the mortgage bond registered over the property. Mrs Z had to immediately supply Mr Z with the necessary documentation in order to release him from the obligations towards the bank. Mr Z further had to, when called upon to do so, sign all such documents and do all such things as required in order to transfer his undivided half share in the property to Mrs Z. Transfer had to be effected within 90 days of the order.

Transfer of the deceased's (Mr Z's) half share in the property to Mrs Z was never registered in the Deeds Office. Mr Mohamed, the executor in Mr Z's estate, approached the Court for assistance as he was unable to finalise the estate whilst the half share in the property was still registered in the name of the deceased and the liability in respect of the bond remained. The executor argued that the half share still belonged to the deceased's estate as Mrs Z, by not complying with the 'conditions' of the divorce order, forfeited her right to the property – i.e. the 'conditions' to effect transfer and arrange the bond substitution were not complied with. He suggested therefore that the property be sold and the proceeds divided equally between the deceased estate and Mrs Z.

The executor wrote to Mrs Z, giving her an opportunity to purchase the deceased estate's half share in the property or to sign a power of attorney allowing the executor to sell the whole property. No response was received. The executor also unsuccessfully attempted to contact the occupants of the property.

Mr Mohamed thus approached the Court with an *actio communi dividundo* to terminate the joint ownership.

Mrs Z opposed the application. She essentially argued that due to the provisions of the settlement agreement, the deceased and or his estate, no longer had any interest in the property and that the executor therefore did not have *locus standi* to bring the action. She also insinuated that, were she to request the bank to make her the sole debtor under the bond, that would constitute reckless lending and the bank was unlikely to agree thereto.

## HELD

- The underlying rationale of the *actio communi dividundo* (the *actio*) is that every co-owner of property may insist on a partition of the property at any time unless there is an agreement between the co-owners not to do so within a certain period. Even if there is an agreement to constitute perpetual joint ownership, the co-owner may demand partition at any time. If the co-owners cannot agree on the manner in which the property is to be divided between them, the court is empowered to make such order as appears to be fair and equitable in the circumstances. Where the property is not physically capable of subdivision such an order may, for example, entitle one of the co-owners to obtain the whole of the property upon payment of a certain sum. If this is not appropriate, or possible, the court may order the property to be sold and the proceeds to be divided amongst the co-owners according to their shares. One well recognised mode of doing this is a sale by public auction and a division of the proceeds. The court may make any equitable adjustment if one of the co-owners has, for example, benefited financially from the property or incurred expenses in respect of the property.

- It was clear that ownership of the deceased's half share in the property had not yet vested in Mrs Z, despite the divorce order. What was required, was registration thereof in the deeds office by virtue of the provisions in the Deeds Registries Act.

- The fact was that the deceased had unreservedly agreed that Mrs Z would be entitled to retain the property as her sole and absolute property and abdicated any right or claim in respect of the property. As between the parties, Mrs Z assumed liability for repayment of the bond and an interpretation that the deceased only forfeited the equity in the property does not accord with the clear wording of the clause. It could not be interpreted to mean that if Mrs Z did not pay the bond and bring about transfer, the award of the property to her would be reversed.

- The existence of the mortgage bond in this context mattered little. In terms of the settlement agreement and court order Mrs Z undertook liability for repayment of the bond so that the endorsement on the title deed could take place. If she failed to do so it did not mean that her obligation had been extinguished. The mortgage bond in favour of the bank was accessory in character and would be extinguished if Mrs Z carried out her obligations in terms of the order so that endorsement on the title deed could take place.

- Insofar as the executor relied on the *actio*, it therefore had to be found that neither the deceased nor the deceased estate had *locus standi* to claim a division of the property. The property was dealt with in the settlement agreement and order and the deceased abandoned any personal claim against Mrs Z for a division of the property in terms of the *actio*.

## CONCLUSION

The application therefore failed.

*(The executor should rather have proceeded with an application to enforce Mrs Z's obligations.)*



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