

## *FAIR DIVISION OF PROCEEDS ON TERMINATION OF CO-OWNERSHIP: LONG AFTER DIVORCE, HUSBAND ARGUES HIS CONTRIBUTIONS EXCEEDED THOSE OF EX-SPOUSE*

*K.A v A.E and Another* (15857/24) [2024] ZAWCHC 392 (27 November 2024)

In our law, persons who co-own immovable property may apply to court for an order terminating co-ownership. Where the co-ownership is a result of an underlying legal relationship between the parties (such as an extant or previous marriage), the relationship between them goes beyond their co-ownership of the property. In such an instance, different considerations for a fair division may be relevant. The judgment illustrates our courts' approach to 'free' as opposed to 'bound' co-ownership when parties seek to terminate the co-ownership – years after the co-owners had divorced.

*The judgment can be viewed [here](#).*

### FACTS

KA and AE were married under Islamic law on 6 February 2000. The marriage was terminated on 19 May 2008 by Talaq. During the tenure of the marriage, they jointly purchased a property for R320 000.

The property is mortgaged to Absa Bank. At the time this matter was heard, the remaining balance under the bond was approximately R175 000 and the municipal valuation R2 320 000.

After their separation, KA remained on the property with their two children. AE paid the bond and municipal accounts, as part of his maintenance obligation. AE had moved out in 2006 already.

KA remarried in 2013, and her new husband took up residence with her on the property. They took over payment of the bond and the municipal account.

During 2024, both KA and AE sought to terminate their joint ownership of the property. KA initially offered her half share in the property to AE at a fair market value price. AE rejected this offer and argued that she was not entitled to any ownership rights. He nonetheless offered her R150 000, which KA rejected. Thereafter KA proposed that the property be sold and the proceeds divided equally after the necessary deductions. EA did not react to the counterproposal.

KA launched these proceedings for an order terminating the co-ownership by virtue of the *actio communi dividundo*. KA alleged that she had maintained and improved the property and that she effected about R550 000 in improvements and restoration work to the property over the years.

AE did not oppose the termination of the joint ownership of the property, but contended that this relief could not be granted without evidence of each party's contribution in respect of the purchase, maintenance, repairs of the property. He opposed the division of the sale proceeds on an equal basis, alleging that he had contributed more than KA. In this regard he stated that they had purchased the property jointly because he was self-employed and did not have an established credit record at that time. KA was employed as a legal secretary. He paid a deposit of 25% of the property's purchase price and other related costs, including the bond.

KA, in reply, advised that there was no actual dispute concerning the respective contributions towards the bond and maintenance of the property. AE made payments towards the bond since February 2000 and stopped paying in 2013. She made the bond payments from 2013 until February 2024. She made improvements, renovated the property, and incurred costs in an amount of some R550 000.

### HELD

*The actio communi dividundo*

- The *actio* is a Roman law remedy enabling co-owners to demand and resolve disputes over the division

of jointly owned property.

- A court has a discretion to make an order that the property must be sold; or may assign the property to one co-owner in exchange for compensation from the other co-owner(s). If practical, the court may also order the property to be subdivided.
- The remedy frees a co-owner from enforced co-ownership.

*Distinguishing free and bound co-ownership*

- Bound co-ownership is a result of an underlying legal relationship between the parties. In other words, there is a legal relationship between them going above and beyond their co-ownership of the property. In contrast, in the case of free co-ownership, the only legal relationship between the parties is the co-ownership of the thing.
- Extrinsic legal relationships creating bound co-ownership could arise as a matter of law when parties enter into particular relationships. For example, a marriage in community of property, where the Matrimonial Property Act 88 of 1984, imposes co-ownership upon the parties to the marriage. Another is the co-ownership of the common property in a sectional title development through the provisions of s 16(1) of the Sectional Titles Act 95 of 1986. It was explained by our courts as follows: - "... 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...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 it becomes free co-ownership and be capable of being terminated under the *actio*."
- Applying these considerations to the present matter, it was clear that:
  - The parties' co-ownership of the property arose from and was constituted as a consequence of their marriage relationship. AE's other immovable property was held solely in his name. But for his marriage to the KA, he would not have shared ownership with her. The property was purchased for and occupied as the parties' marital home. Independently of the matrimonial property regime chosen by the parties, and as a matter of law, a reciprocal duty of support arose between them from the moment of their marriage, i.e. a legal relationship existed between the parties other than the co-ownership itself.
  - All extrinsic legal relationships binding the parties had ended. The marriage by Islamic rites terminated in 2008, and the parties' obligation to maintain and support the children also ended when the latter attained majority.
- KA was therefore correct in contending that the property ownership began as bound co-ownership but was now free, and its division could be determined under the *actio communi dividundo*.

*The alleged unequal contributions*

- KA contended that she was entitled to half the property, which claim AE disputed, claiming that his financial contributions to the property was more substantial as he paid the initial deposit, the bond, the municipal charges, and the costs of maintenance and repairs.
- This contention could not be upheld:
  - Firstly because the evidence before the Court was that he did pay all of those costs before 2013, but when KA remarried, she undertook to pay them, and she did.
  - Secondly, there existed a deeper-seated objection to AE's allegations that she had not made equal contributions during their marriage and subsequently, in any event, it was not KA but her new husband who had made the payments. These allegations were archaic and unpalatable in a constitutional dispensation based on human dignity and equality because it depreciated a spouse's role in a marriage based on pure financial contributions during the tenure of the

marriage.

The Supreme Court of Appeal stated about twenty years ago, in the context of a redistribution order in section 7(3) of the Divorce Act of 1979, that the traditional role of a housewife, mother and homemaker should not be under-valued because it is not measurable in terms of money. KA's evidence was in any event that she worked.

- Our courts have also stated it as follows: "It has to be borne in mind that the joint ownership of the property...does not stem from a commercial transaction, where the transaction can be unraveled with mathematical precision with reference to the financial input of each co-owner. The property in the present matter was purchased and owned by the parties during a marriage relationship..."
- In any event, in this matter, it appears that there was an equal contribution to the payment for, maintenance and upkeep of the property. She contributed to the property in cash and kind, the former, her direct financial contributions, and the latter encompassing all of the other duties required of her during the co-ownership of the property from the date of her marriage to AE, to the date that it no longer existed

#### CONCLUSION

KA was entitled to a half share of the property.