IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case number: 20255/2012

In the matter between:

ROLF BRUNO DUBS **Plaintiff**

and

KIM MARY DUBS [neé ANDERSEN] **Defendant**

JUDGMENT DELIVERED THURSDAY, 23 AUGUST 2012

Le Grange, J:-

[1] This is as an action for divorce in which the main dispute centres around two properties which are registered in the names of both parties as co-owners. These two properties are adjacent to each other at 45 and 43 Granula Place, Sunset Beach, Milnerton in the City of Cape Town ("herein after referred to as No. 45 and No. 43 respectively").

[2] The Plaintiff in terms of his Particulars of Claim as Amended alleges the purchases of the properties were joint ventures in terms of which the parties are entitled to division of the proceeds *pro rata* to their respective contributions. The Defendant in her Further Amended Plea denies that she and the Plaintiff concluded an oral agreement to form a joint venture or that they concluded any agreement which incorporated the alleged terms. The Defendant in amplification of her denial further alleges the Plaintiff donated to her the monetary value of an undivided one half share in No. 45 and No. 43 and any expenses of the property paid by the Plaintiff were paid as part of his spousal duty of support.

[3] The only issue that needs to be decided, by agreement between the parties, is whether the Defendant is entitled to a 50% share of the net proceeds or value of the two properties upon termination of the co-ownership. This decision is based either on whether the Plaintiff donated the said shares or whether the two properties were acquired on the basis of a joint venture; and upon termination of said venture, either party may share in the proceeds or value of the properties *pro rata* to each party's contribution to the acquisition, maintenance and improvement of the two properties.

[4] Mr T Möller appeared for the Plaintiff and Ms J S Anderssen for the Defendant.

[5] Two witnesses testified for the Plaintiff. The Plaintiff himself and an attorney, Michael Kotze, the conveyancer in respect of the transfer of the half share in 43 Granula Place to the Defendant.

[6] The Defendant decided not to testify or to call any witnesses.

[7] Mr Möller argued in the main that the evidence on behalf of the Plaintiff and the manner in which he viewed the nature of co-ownership is neither inherently improbable, nor untrue or unlikely. He further argued that on the proven facts and in the absence of any evidence from the Defendant, the matter falls to be decided in favour of the Plaintiff.

[8] Ms Anderssen's principal submissions were that the Plaintiff failed to discharge the onus of proving the existence of the joint venture agreements as claimed. According to her the Plaintiff failed to prove that there was an agreement as alleged between the parties and in fact testified the opposite. Furthermore the Plaintiff, despite his expectation that the parties would share in the profit of the properties in accordance with their *pro rata* contributions, did not declare this expectation to the defendant, did not ask her to pay a share of the purchase price or the property expenses, and did not keep a record of expenditure. It was also submitted that the Plaintiff failed to establish a *prima facie* case and it was therefore not necessary for the Defendant to testify.

[9] The relevant facts underpinning the Plaintiff's case can be summarised as follows: In respect of No. 45, he made a written offer to purchase the property, subject to the condition that he sells one of his Blaauwberg Heights flats. According to the Plaintiff, during April 1996, the estate agent had asked whose names should appear on the deed of sale as the purchaser/s. This came about as he was obliged to waive the condition relating to the usual 72 hour clause under which he initially made the offer. It was at that point he asked the Defendant, in order to give her an opportunity to buy the property, whether she was prepared to pay 50% of the expenses of the property, to which she agreed. He then informed the estate agent that the house also belonged to his wife. It is not in dispute that the Plaintiff paid the purchase price in respect of No. 45 and most of the expenses of the property.

[10] The Plaintiff testified that as far as he was concerned that which belongs to him remains his and what belongs to the Defendant remains her property. He also indicated that he never asked for financial assistance from the Defendant and assumed that she would re-pay the money she owed him when she could. According to him (the Plaintiff) the Defendant had certain Old Mutual retirement annuities policies and he expected her to pay him whenever these matured. The Plaintiff admitted that the sum total of the conversation when he offered her the opportunity regarding No. 45 to acquire ownership as long as she contributes 50/50 was very brief and the topic had never been broached again.

[11] In respect of No. 43, the Plaintiff testified that he had bought the property with his pension monies. According to him the property was initially registered in his name. His further evidence is that the Defendant acquired a half share at a later stage by virtue of a transfer to this effect, although the Plaintiff disavows any recollection of having signed either a deed of sale, or the power of attorney necessary to affect the transfer. According to the Plaintiff during 2003 he and the Defendant had a discussion regarding her buying a half share in No. 43. This discussion apparently arose after the Defendant proposed they develop the said property and in return she would then buy a half share, which funds the Plaintiff could utilise towards the proposed development. The Plaintiff's version is that nothing ever came of this. He apparently became aware of the transfer to the Defendant in December 2010 upon attending at the Deeds Office, where he saw the deed of transfer. The further evidence of the Plaintiff is that both parties began to contribute towards the costs of building and eventually completed the house which now stands on No.43.

[12] The Plaintiff was extensively cross-examined. He admitted that the conversation in respect of No. 45 was a very quick one as there was, as he says, less than half an hour left before the expiry of the "72 hour clause" as previously mentioned. According to the Plaintiff there was only time for a 'yes or no' answer. The Plaintiff conceded that he did not make any arrangements with the Defendant as to how she would fund or finance her half share of the property. He admitted that he never mentioned to her that he expected her to

use her Old Mutual retirement annuity to pay her half share. He also conceded that he did not discuss with the Defendant what contributions she would make to their expenses as he did not know what she earned.

[13] The Plaintiff's assertion that he bought No. 43 with his pension funds was put in question. It was pointed out by counsel for the Defendant that funds from the bond account registered against No. 45 was instead used. The plaintiff was adamant that he did not sell or donate a half share in No. 43 to the Defendant. In fact in answer to a question by his counsel as to whether he had donated a half share in the property to the Defendant, he replied "*the first time (I found out that she was a registered owner of a half share), I went in December 2010 to the deeds office. I had a big shock. Something was wrong.*" When asked what discussions he had had with the Defendant before she bought a half share in No. 43 he testified that they had "*never discussed that she would own a half share*" and that the Defendant had told him that "*if she could buy a half share she would pay 50% of the costs to build*".

[14] In cross-examination it was put to the Plaintiff that the Defendant would testify that during 2004 she drove him to the offices of an attorney for the purpose of executing the documents necessary to proceed with the transfer. The Defendant denied this statement despite the evidence given by attorney Kotze. According to Kotze, he prepared the deed in respect of the Defendant's acquisition of a half share in No. 43. Moreover, Kotze testified

that from the deed of sale it is obvious the transfer was premised on a sale and not a donation. Kotze further stated that if the cause were a donation it would have been reflected as such on the deed of transfer. According to Kotze's version there would be no reason to simulate a donation as a sale as there would be no donations tax involved between spouses. The expertise of Kotze in respect of this portion of his evidence was raised by counsel for the Defendant. There can be little doubt as to the fact that Kotze is a senior attorney and did indeed deal on a regular basis with these types of transactions. Kotze also admitted that a transfer based on sale can be done without the purchase price having been paid depending upon the terms of the sale. He was unable to comment what the position was in respect of the sale in question. He testified that the power of attorney authorising the transfer of the half share to the Defendant was witnessed by two employees in his practice at the time.

[15] Under cross-examination the Plaintiff confirmed that he is very prudent with money and dislikes debt. In fact he stated that he married the Defendant out of community of property without the accrual due to his fear that he may incur the obligations of a spendthrift wife, as this had been the position with his former wife. He admitted that the Defendant was very prudent in this respect and he trusted her.

[16] In the absence of any evidence on the part of the Defendant, the only version is that of the Plaintiffs to consider whether the terms of the two joint ventures as pleaded have been proven on a balance of probabilities.

[17] In terms of the first joint venture the following terms were *inter alia* pleaded, that:

17.1 The defendant would join the plaintiff in purchasing No. 45 Granula Place (as improved) for R605 000;

17.2 The plaintiff's funds, which included the proceeds from the sale of a Blouberg Heights flat which was registered in his name, would be used to acquire No. 45 Granula Place;

17.3 The parties would contribute equally to the costs of future maintenance and reasonable improvements of the property; and

17.4 Upon termination of the joint venture the parties would share in the value of the property *pro rata* to their respective contributions as from acquisition to termination of the joint venture.

[18] On the Plaintiff's own version the conversation where the alleged terms of the joint venture were discussed took place very quickly and only a 'yes or no' answer was required from the Defendant. In fact, he testified that he

cannot recall that the issue was ever discussed again. The Plaintiff admitted that no specific arrangements were made as to how the Defendant would finance her half share in the property. His expectation that she would one day in the future use her Old Mutual retirement annuity to pay her half share was also not discussed with her. He further admitted that they never discussed what contributions the Defendant would make to the expenses as he did not know what she earned. It was admitted that he made all the payments and thought that they would discuss it when the Defendant received her retirement annuity funds. In considering the Plaintiff's evidence as a whole in respect of No. 45, it is in my view evident that the probabilities do not support the Plaintiff's claim that a joint venture agreement existed and upon termination of said venture either party may share in the proceeds or value of the properties *pro rata* to each party's contribution to the acquisition, maintenance and improvement of the two properties. Put differently, on the Plaintiff's own version, he failed to discharge the onus of proving the terms of the first agreement as pleaded by him.

[19] As mentioned previously, the Defendant elected not to testify. There is no evidence before me as to what the Defendant's understanding was of the arrangement between the parties in respect of No. 45. Moreover, the Defendant in her Claim in Reconvention as Amended filed a counter-claim for an order to determine the specific method of division of the said two properties. The underlying basis for such a claim in law is that the co-owners cannot agree on the method of division of the joint properties. The Defendant

alleged this to be the case in her pleadings. In paragraph 6 of her Claim in Reconvention as Amended, the following was alleged "*...The parties are unable to agree on the method of termination of the joint ownership of these immovable properties.*" The Plaintiff in his pleadings specifically denied this and put the Defendant to the proof thereof. The Defendant thus had to prove on a balance of probabilities that firstly, in the event the parties were to retain joint ownership they either were unable or would be unable to agree on the method of termination of the joint ownership. And secondly, to place sufficient evidence before the Court to enable it to properly exercise its discretion as to whether the method of division sought by the Defendant is just and equitable. In this regard see Robson v Theron 1978 (1) SA 842 AD at 857D. No such evidence was placed before me by the Defendant. Having regard to the particular circumstances of this case and in the absence of sufficient evidence I find it inappropriate to exercise my discretion in making a division of the No. 45, being the joint property, that is most preferred or advantageous to both of them. It follows that the Defendants Claim in Reconvention as amended cannot succeed.

[20] In respect of the second joint venture claim, the Plaintiff pleaded that the parties had agreed *inter alia* that:

20.1 The defendant would buy an undivided half share in No. 43 Granula Place (a vacant plot) from the plaintiff for R300 000;

20.2 The parties would contribute equally to the building costs as

well as any future reasonable improvements or maintenance of the improvement; and

20.3 Upon termination of the joint venture the parties would share in the value of the property *pro rata* to their respective contributions as from acquisition to termination of the joint venture.

[21] In respect of No. 43, what is of significance is that the deed of transfer registering the Defendant's half share of the property refers to a deed of sale. The Defendant's version was put to the Plaintiff. According to the Defendant, she took the Plaintiff to the attorneys' office for the purpose of executing the deed necessary to proceed with the transfer. In terms of the title deed, the Defendant acquired her half share in the property by virtue of a sale having been concluded between the parties. The Plaintiff denied that he signed this deed of sale at the attorneys' office. Despite this denial, the signed deed remains in direct contrast to the assertions made by the Defendant that her half share was a donation. Kotze's evidence can also not be ignored. On his version it would not have benefitted either party to have simulated a sale when the parties in fact intended it to be a donation, as there would have been no tax payable. In this respect Counsel for the Plaintiff referred to section 56(b) of the Income Tax Act, 58 of 1962.

[22] In considering the objective evidence of the deed of sale, taking into account the marriage regime of the parties and his prudent approach to his financial affairs, it is inherently unlikely that the Plaintiff would have donated a half share of the property in question to the Defendant. The probabilities rather favour the Plaintiff's version. Moreover, the contention by the Plaintiff's counsel that the records the Defendant kept of who contributed what in respect of the improvements at No. 43 indicating that she expected some reckoning to take place at some time in the future, cannot be ignored. The surrounding evidence in respect of No. 43 does in my view constitute at the very least an informal division agreement based on the *pro rata* contribution towards the acquisition as well as the improvement and maintenance of the properties. On a conspectus of the evidence, the Plaintiff's uncontested evidence sufficiently demonstrates that he had no intention to make a gift or donation of a half share of No. 43 to the Defendant. For these reasons, I am satisfied that the Plaintiff on a balance of probabilities has proven his claim in respect of No. 43. It follows that Claim B of the Plaintiff must succeed. For the same reasons as recorded in paragraph [19] the Defendant's Claim in Reconvention cannot succeed.

[23] In respect of costs, the ordinary rule is that costs should follow the event. In this instance the Plaintiff was only partially successful. In view of this I consider a more just and equitable costs order to be one where each party should pay its own costs.

[24] In the result the following order is made:

24.1 The Plaintiff's Claim A is dismissed and Claim B succeeds. The Defendant's Claim in Reconvention as Amended is dismissed.

24.2 Each party to pay its own costs.

LE GRANGE, J