

CASE NO .A 108/93

In the matter between

MARION ELKE SCHLENTHER

(previously **HOEBEL**, previously

SASSA born **NIETNER**)

APPLICANT

and

FRANK JEROME HOEBEL

RESPONDENT

CORAM: FRANK, J.

HEARD ON: 1993-04-26

DELIVERED ON: 1993.05.18

JUDGMENT

FRANK, J.: Applicant seeks an order compelling

Respondent to sell a certain property and certain ancillary relief to give effect to the main relief claimed. The basis for the relief claimed is an agreement (which was made an order of court) entered into between the parties at their divorce.

In Hermanides v Pauls 1977 (2) SA 450 (O) Steyn J (as he then was) held that the following clause in a similar agreement did not entitle the Applicant to an order compelling the Respondent to sell the property:

"3. The defendant undertakes that when the house, which the parties presently occupy, is sold, plaintiff will be entitled to half of the nett proceeds thereof".

In the present matter the consonant clause reads as follows:

"8. That the proceeds of the sale of the named property, whenever the sale is to take place, be divided in equal shares between the parties."

In the Hermanides case supra, the Court determined the meaning of the clause with regard to the surrounding circumstances pertaining at the time the agreement was entered into. These were, inter alia; the parties were married out of community of property and reference to a selling date was specifically excluded at the Respondent's insistence who did not want to bind him to any date and expressly refused to have even a reasonable time stipulated. The Court had a look at the circumstances because the clause in itself was not unambiguous. Even if I am wrong in this it is clear the agreement now under consideration is not unambiguous if seen in its context. The relevant clauses of the agreement read as follows:

"5. That the defendant's house situated at No 9 Wasserbok Street, Windhoek, be made available to the plaintiff and the named children to reside therein until such time as the youngest child reaches the age of 21 years or •the Plaintiff remarries, which ever event occurs soonest.

7. That the sale of the erf on which the property is situated and registration of

transfer will not take place without the consent of the Plaintiff.

8. That the proceeds of the sale of the named property, whenever the sale is to take place, be divided in equal shares between the parties."

It is thus clear that the "whenever" can refer to various possibilities. It may refer to "an uncertain future eventuality, and that it is in that sense, almost synonymous with 'if'" (See Hermanides Case, supra at 453 H) . It may refer to either the eventualities contemplated in clause 5 or it may even refer to the due date of payment to Applicant of the half share of the proceeds.

From the agreement itself it appears that the Applicant was claiming a division of the joint estate in the divorce proceedings. This, by necessary implication, means that the parties were married in community of property. Even if this does not follow by way of necessary implication this is common cause on the papers and reference can be had thereto due to the fact that the clause under consideration is not unambiguous as pointed out above.

It is further common cause that the Applicant has remarried and that she and the children moved out of the house.

It is in my view clear that Applicant renounced her real right in the property (by virtue of the marriage in community of property) and exchanged it for a personal right against Respondent which she attempted to protect and

circumscribe in the agreement. Unlike the Applicant in the Hermanides case, supra the origin of her claim to a share in the property does not lie in the agreement alone but flowed from her marriage. Thus instead of taking her share immediately she protected herself by (a) living in the property with her children until either they or she did not need the property anymore (majority or remarriage) and (b) retaining the right to veto any intended sale by Respondent thus ensuring control as to the size of her share of the profits. It must also be born in mind that there is no question in the present case of Respondent averring that the omission as to the exact date of sale was due to his insistence in this regard.

In my view, in the present case, an implication necessarily arises that the Applicant would be entitled to her share of the proceeds within a reasonable time of the eventualities described in clause 5. Applicant foregoed immediate entitlement to her share in the property for the right to live in it and as she no longer lives in it she is entitled to her share. It would, furthermore in my view, be easy to formulate an implied term to the effect ~~said~~ out so as to make it clear and exact and with sufficient precision. Counsel for Applicant contended that the following term entered between clauses 6 and 7 would meet all the requirements and I agree with her:

"Subject to clause 7 hereof the named property shall be sold within a reasonable time after the occurrence of either of the events described in clause 5 above."

In the result I grant an order in terms of paragraphs (a), (b) and (c) of the Notice of Motion.



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Advocate for the Applicant:

Adv S. Vivier-Turck

Instructed by:

P.F.Koep & Co

Advocate for Respondent:

Adv R. Totemeyer

Instructed by:

Muller & Brand