



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. CA 139/2023

Date of hearing : 22 November 2024

Date delivered : 13 May 2025

In the matter between:

JOHANNA GERTRUIDA CLOETE

Appellant

And

GERRIT ANTONIE CLOETE

Respondent

JUDGMENT

MAJIKI J:

[1] The appellant appeals against the whole judgment of the Regional Court, Port Elizabeth. In the main, she was found to have breached the terms of the deed of settlement which was part of her divorce order. As a result, she was ordered to permit the sale of property known as Erf 3581, Hunters Retreat, Sherwood, Port Elizabeth (the property). The property is jointly owned by the appellant and the respondent by virtue of their marriage of 35 (thirty-five) years, in community of property and profit and loss. The said marriage ended in divorce on 24 February 2022. The deed of settlement (in which the appellant was cited as the defendant and the respondent was cited as the plaintiff) gave them respective exclusive rights, with conditions, to the property. The appellant had been in occupation of the main dwelling in the property in terms thereof. The respondent had a right to occupy the second dwelling, the flat and any income derived from its rental. In the course of time, after divorce, the parties had obtained reciprocal orders in terms of section 6 of the Domestic Violence Act 116 of 1998 (protection orders) and the respondent moved out of the second dwelling. The appeal is opposed by the respondent.

[2] The respondent in the *court a quo* launched an application in the main seeking the following orders: -

'1. That the first respondent be compelled to permit the sale of the property known as Erf 3581, Hunters Retreat, Sherwood, Port Elizabeth Municipality in the province of the Eastern Cape which is situated at 46 Hampshire Road, Sherwood, Gqeberha, (the 'Property')

IN THE ALTERNATIVE:

That it is declared that the joint ownership of the parties in the Property is terminated, in terms of the actio communi dividundo;

2. *That, unless the applicant and first respondent reach agreement in writing within 1 (ONE) month from date of the order, on all aspects related to the sale of the Property and/or termination of the co-ownership, then and in such event, Joelene Brown of BBV Attorneys shall be appointed as liquidator (the 'liquidator')*

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4.3

4.4 *That immediately after the registration of the transfer of the Property into a purchaser's name and after all costs relating to the marketing, sale and transfer of the Property including (but without limitation) estate agents' commission, any amount which may be owing to the second respondent (in terms of the Loan Agreement and Mortgage Bond) and the liquidator's fees have been paid:-*

4.4.1 A 50% portion of the net proceeds of the sale of the Property is to be paid to the applicant; and

4.4.2 A 50% portion of the net proceeds of the sale of the property is to be paid to the first respondent, subject to paragraph 9 below ...'

[3] The grounds of appeal are summarily as follows:

3.1 The magistrate erred in finding that the respondent's unfettered right to occupation had been breached in that: -

3.1.1 The court's findings are silent in respect of how or based on which facts the court concluded that there was a breach of the agreement, alternatively, the court made conclusions that were not logically related to the preceding facts.

3.1.2 The court incorrectly found that the existence of reciprocal protection orders, setting out boundaries of movement by the appellant and the respondent, inhibited the respondent's right to unfettered occupation.

3.1.3 The court failed to consider that the property has two main gates and the respondent always had access to the gate to the second dwelling and it was under his control.

3.2 The magistrate erred in applying principles and policy considerations in the matrimonial context to parties after divorce, including history of verbal abuse in the family unit. Further, the magistrate applied the clean

break principle where parties had an agreement in respect of the assets upon divorce.

- 3.3 The magistrate erred in granting an order that has an effect of varying the terms of a previous order, without the respondent having met the requirements for the variation of the order. The magistrate also failed to have regard to the principle of finality of settlement agreements that have been made court orders.
- 3.4 The magistrate erred by in disallowing the admission of the appellant's further affidavit, setting out events that occurred after the filing of the replying affidavit, with evidence that contradicts the findings of the court, thereby prejudicing the appellant.
- 3.5 The magistrate erred in failing to apply the Plascon Evans principle in determining factual disputes in the papers.

After the filing of the notice of appeal the magistrate furnished further reasons for judgment. Among others that, the appellant had confirmed the change of remote control, by so doing the respondent was prevented from entering the premises. Consequently, there was a further ground of appeal that was raised in the heads of argument.

The appellant submitted that, a month after divorce, the respondent had sought to have the property sold and had stated that the application would be launched, objectively breach was not reason for the application.

BACKGROUND

[4] It is common cause that on 4 December 1986 the litigants married each other in community of property. They have two major children. The property was registered in their names on 10 December 2014, a mortgage bond was registered over the property in favour of the First National Bank. Clause 2 of the deed of settlement is the subject of the dispute between the litigants.

[5] It is also common cause that at the time of the divorce and after, the relationship between the litigants became acrimonious. That resulted them in obtaining reciprocal protection orders. The appellant cried of the respondent's verbal, emotional and psychological abuse whilst the respondent similarly complained of a tumultuous relationship. Furthermore, correspondence was exchanged between them, setting out various complaints against each other regarding access to the property. The relevant contents of the correspondence will be referred to later in the judgment.

[6] Clauses 2 and 3 of the deed of settlement read: -

2.1) The immovable property situated at 46 Hampshire Road, Sherwood, Gqeberha shall not be sold unless a mutual agreement to sell the property has been reached.

2.2) The plaintiff will continue to be solely liable for the mortgage/bond payments, municipal rates, taxes and water consumption charges in respect of the property.

2.3) The defendant will have a full, unfettered right to occupy the main dwelling on the property until her death or until the sale of the property, subject to the following condition: -

(a) The defendant will not be permitted to allow a romantic partner to take occupation with her in the main dwelling.

2.4) The plaintiff shall have an exclusive right to any income derived from the renting out of the second dwelling, and will have a full, unfettered right to occupy the second dwelling (the flat) on the property until his death or the sale of the property, subject to the following condition: -

(a) The plaintiff will not be permitted to allow a romantic partner to take occupancy with him in the second dwelling (the flat).

2.5) If either party breaches the above conditions imposed on their rights of occupation in respect of the property, then the other party may demand that the property be sold. Should a consensus to sell the property not be reached, the aggrieved party shall be entitled to an order by the Magistrates' court that has jurisdiction, to compel the other party to permit the sale and do whatever necessary to effect the registration of transfer of the property. Notwithstanding the value of the property, both parties consent to the jurisdiction of the magistrates' court in the event that it is necessary to enforce the rights contained in this clause.

B. MOVABLE PROPERTY

2.6) The motor vehicles registered in each party's name at the date of this agreement shall become the sole and exclusive property in such party's individual and separate estate, and the other party shall not have any claim whatsoever to any

such vehicles after finalization of the divorce. It is expressly recorded that the Mercedes Benz with registration numbers FNM 134 EC and the Renault with registration numbers DLY 346 EC will become the sole and exclusive property of the defendant.

2.7) The furniture and other household items will be distributed upon divorce as per the table in annexure 'B' hereto. Items appearing in the column on the left will become the property of the plaintiff and the items appearing in the column on the right will become the property of the defendant.

3. SPOUSAL MAINTENANCE AND SUPPORT

3.1) The plaintiff will pay the defendant an amount of R7 000.00 (seven thousand rand) per month from 1 March 2022, not later than the 7th day of every month, until the date of the defendant's death.

3.2) The amount in 3.1 above will increase by the rate of 5% (five percent) every 12 (twelve months, with the first increase taking effect on 1 March 2003.

3.3) The defendant will remain on the medical aid of the plaintiff until the date of her death.

3.4) The plaintiff will be liable to pay for the insurance of the two motor vehicles of the defendant, namely the Mercedes Benz with registration number FNM 134 EC and the

Renault with registration number DLY 346 EC, for as long as the defendant remains the lawful owner of the vehicles, provided that there is no prohibition imposed by insurers making it impossible for the plaintiff to insure the vehicles due to the age thereof. In the event that it is impossible to insure the vehicles comprehensively, the vehicles shall be insured against third party liability.

3.5) The defendant will remain as a 50% (fifty percent) beneficiary on the life policy of the plaintiff.'

[7] As it appears in clauses 2.3 and 2.4 the property consists of the main dwelling and the flat. The respondent and one child, Antonie occupied the flat, they had their keys for the access to the flat.

[8] In the *court a quo* the respondent had sought the orders on two grounds; that the appellant breached conditions pertaining to his rights of occupation, set out in the deed of settlement. Further, that the *actio communi dividundo* entitled him to obtain an order terminating the joint ownership in the property. He no longer wished to be a joint owner of the property, that was communicated to the appellant in the letters of 8 June 2022 and 1 September 2022. In terms thereof no co-owner of a property is obliged to remain a co-owner against his/her will. If the co-owners were unable to agree to the method of division of the property, then either party could approach court for an order terminating joint ownership.

[9] According to the respondent, the correspondence between respective attorneys recorded how the appellant denied him unfettered occupation to the second dwelling. He was of the view that the letter from the appellant's

attorneys dated 22 March 2022 sought confirmation of when he was to vacate the property. However, the said letter specifically referred to the main dwelling. On 25 March 2022 his attorney's response, among others, recorded that the deed of settlement neither gave the appellant exclusive occupational rights to the property nor did it indicate that the respondent should vacate the property; the appellant had, without justification, refused numerous requests from the respondent to have the property sold; and accordingly, the sale of the property by mutual agreement was therefore unattainable. The appellant's attorney's response confirmed that she did not agree to the sale of the property and she intended to exercise her lifelong right to occupy the main dwelling.

[10] According to the respondent by 8 June 2022 it had become completely intolerable for him to reside in the property due to the appellant's harassment and psychological abuse. That culminated in them obtaining reciprocal protection orders. He had to vacate the property and he sought alternate accommodation. The respondent gave the appellant an option to purchase the respondent's share in the property at the then market value. On 2 July the appellant unilaterally changed the remote frequency of the gate to the property, he could not access the property, even though he had a right to the second dwelling. He sent an email directly to the appellant stating, '*the front house us [sic] exclusively mine I hereby highlight that I will not tollirate [sic] any interference to [sic] my right or I will institute action.*

[11] The appellant responded on the same date to the said letter. The contents of the said letter were at the centre of the respondent's allegation of breach of the deed of settlement in the court *a quo*. The same contents largely formed the basis of the magistrate's finding that the respondent's right to occupy the property had been interfered with. It is necessary to state the relevant parts of the said letter, from the second paragraph it states: -

‘As previously communicated you have been advised to cease communicating directly to myself without working through my legal representation, again kindly adhere to this request.

The occupant of the “carport/garage/dwelling” (our biological son) has evacuated the “front house” and according to my assumption, as no form of communication was received from my legal representation that Mr A Cloete is required to return for whatever reason he may deem necessary. As per “Final Decree of Divorce” I have taken the lawful precautions to safeguard the property by limiting access to the property.

This was done in the best interest since about 23:45 on Friday night the 01/07/2022 an unknown person entered the property and I had to get assistance from my neighbour. As per “Final Decree of Divorce” access is not in any form denied and as stated kindly make an appointment in advance should you require to revisit the dwelling.

Any form of forced entry will be seen as a criminal act and dealt with accordingly...’

[12] The appellant filed a counter-application, together with her answering affidavit. In the counter-application, the appellant in the main, sought a declaratory order for a lifelong usufruct or *habitio* to be registered in her favour, against the title deed of the property. In the alternative, she sought that an actuarial scientist be appointed at the respondent’s cost, to calculate and submit a report on the value of her right to occupy the main dwelling over the remaining term of her life expectancy. Thereafter, the respondent be ordered to pay her the amount so determined, prior to the sale of the property. In addition

to that, after the sale of the property, she would be entitled to half the value of the property. In the further alternative, that a receiver and liquidator be appointed for the joint estate as at the date of divorce, with certain mentioned powers, with a view that the then joint estate be divided between the appellant and the respondent.

[13] In answer to the main application, the appellant firstly raised points of law, stating that the respondent was not entitled to the relief he sought. Firstly, that the court *a quo* did not have jurisdiction to grant the relief terminating the joint ownership in terms of the *actio communi dividundo*. The respondent's application was not instituted under divorce legislation. It constituted new litigation, the value of the property was more than the court's jurisdictional limits. Further, if the relief were to be granted, it would amount to an irregular variation of clause 3 of the settlement agreement, which was subsequently made a court order. The law is not settled on whether the *actio communi dividundo* may overrule an order of court that expressly states that the immovable property shall not be sold, unless a mutual agreement to sell the property had been reached. The court *a quo* is not competent to develop common law.

[14] On the merits she averred that she agreed to the terms of the deed of settlement, recorded in paragraph 6 above, because she was under the impression that, in addition to the monthly financial support and medical aid cover, she would have a lifelong right of occupation to the property. She calculated her right to occupy the property to be about R12,000.00 (twelve thousand rand) a month, that being the market related rental for similar properties. As a result, she did not claim the assets of the joint estate which included five vehicles, the property, the respondent's members interest in Cras Security Services CC and any other investments the respondent might have had

at the time of divorce. She received irregular commission-based earnings from her employment as an estate agent, which earnings she entirely spent towards the household.

[15] The respondent had abused her from the time he had an extra marital affair, which conduct became worse after the divorce. The respondent was then still living in the main dwelling. She believed that he wanted her to leave the property, even then. Eight days after divorce she applied for a protection order, once the respondent received it, he also applied for a protection order against her. In terms of the protection order she obtained, the respondent had no access to the main dwelling. The respondent made false allegations against her, including that she was having an affair, he duplicated a screenshot of her WhatsApp conversation with one Dawie to give the impression that she was in constant contact with the said man. He also denied paternity of their adult daughter born from their marriage, Annette, and falsely accused the appellant's father, stating that he used to abuse the respondent by withdrawing money from the latter's bank account.

[16] The respondent and their son, Antonie, had keys of the flat and the remote control to the gate they used to access the flat. She also viewed the application as a continuation of the respondent's attempt to create a false narrative of the true circumstances between them. The respondent also incited Antonie to commit acts of domestic violence against her, she had to obtain a protection order against Antonie too.

[17] Furthermore, it would be unjust and prejudicial to her, considering her rights flowing from her marriage in community of property, if the court would grant the relief sought against her, in respect of the property but exclude the value of the remaining assets of the joint estate, at the time of divorce. In the

conditional counter-application she prayed for just and equitable relief. Furthermore, the respondent's application seeking the sale of the property conflicts with the principle that parties have a duty to obey court orders. His insistence to sell the property also constitutes contempt of the court order.

[18] According to the appellant, the court *a quo* was empowered to determine whether clause 2 of the deed of settlement had been breached only. She disputed that she breached any of the clauses of the deed of settlement, she neither lived with a romantic partner nor interfered with the respondent's unfettered right to occupy the flat. She had, for a day or two, reprogrammed one of the automated main sliding gates to the property because there had been a security breach at the property. However, she did not interfere with the second main gate giving access to the flat. She did not have a key to that gate and the flat. Antonie and the respondent no longer resided in the premises, the respondent left the flat on 6 April 2022 to live with a romantic partner. The flat would only secure him with a place of residence, in the event he would face financial hardship or break up with his girlfriend.

[19] On 1 July 2022 at about 23h45 she found the one gate to the property wide open with the security lights in the garden switched off or disconnected. The garden was very dark and she heard someone running in the garden. She lived alone and had to wake up her neighbour, Mr Van Niekerk. Mr Van Niekerk patrolled her garden and saw no one, but there was a tall man who stood down the road staring in the direction of the property. Mr Van Niekerk filed a confirmatory affidavit in this regard. She was concerned that the remote might have fallen into the hands of a person who could cause harm to her or the property. The next morning the respondent attempted to enter the premises through the gate whose remote had been reprogrammed, which she found suspicious. The respondent could have and was advised to obtain the key for

the second gate. All this account was furnished by her legal representatives in a letter dated 7 July 2022.

[20] In her replying affidavit to the respondent's answer to her counter-application, she expanded on her submissions and stated that the relief sought by the respondent in the main application was contrary to the one already given in the divorce action, it constituted a re-opening of that action. The said relief should also be met with the fate of the principle of *res judicata*. It was only if the court made an order in favour of the respondent in the main application that she sought conditional relief in the counter application, on just and equitable grounds, by considering the surrounding circumstances and implications of having the matter reopened at to the instance of the respondent.

[21] She also replied that the deed of settlement was annexed to the divorce summons, was initially drafted by the respondent's attorneys of record. The final deed of settlement was substantively in the same or similar terms to the said initial draft. The respondent had created an impression that he would not attempt to deprive her of her rights to occupation of the premises until they both agreed to sell the property. He said he would vacate the premises and continue to pay the expenses relating to the property.

[22] He misrepresented the debts of the joint estate and the value of his interest in the business to her. He cornered her to agree to the terms of the settlement agreement. She then gave instructions to her legal representative that the divorce and settlement agreement had to be finalised expeditiously. If sale was an option, the appointment of an estate agent would have been provided for, considering that she was also an estate agent, she would have insisted on a term for sole mandate. His threats, verbal and emotional abuse had not ceased.

[23] In retrospect, she realised that the respondent always intended to have the property sold shortly after divorce. That is supported by the fact that on 25 April 2022 in an answering affidavit to the appellant's application for protection order, the respondent recorded that he was the sole owner of the property and the deed of settlement only conferred the appellant with the right to occupy the main dwelling. Further, he said he gave his legal representative an instruction to apply for an order for the sale of the property.

[24] Regarding the consent of the bond holder to the registration of her personal right, she said that she would not be prevented from seeking its consent alternatively, if the court were to grant the relief, it would have made an order that the registration was subject to her obtaining the said consent. The respondent could also register his personal right to the second dwelling. He could even sue her for loss of income if he had a basis to state that she was depriving him of renting out the flat. Her calculation of the value of rental of the main dwelling was done by a qualified mathematician. As for unlawful enrichment, it would not apply where there was fair value compensation in exchange for the abandonment of a personal right.

[25] Regarding the respondent's reference to Antonie, Antonie would not be impartial, he was employed by and financially reliant on the respondent. Her relationship with Antonie deteriorated to such an extent that he assaulted her during 2022. His affidavit was introduced as new evidence in the replying affidavit and she was advised that she had no right to a further reply.

[26] In his replying affidavit the respondent first addressed the appellant's counter-application. He raised several points *in limine* and subsequently provided his answers. The first point *in limine* relates to the issue of the division of the joint estate, he said it is *res judicata*. The deed of settlement was entered

into voluntarily and it was subsequently made an order of the court. The appellant could not revisit divorce proceedings. The second one relates to the registration of a usufruct or habitio against the property. The bondholder had not given consent in terms of section 65(3) of the Deeds Registries Act 47 of 1937. The relief is therefore incompetent. Thirdly, the usufruct could not be registered without considering his rights of ownership and occupation in the flat.

[27] The fourth one is that the appellant would not be entitled to further compensation for her right to occupy. The property's proceeds of sale ought to be divided equally only. The mutual rights to occupy the property would terminate upon the sale of the property. Alternatively, he would also be entitled to further compensation for his right of occupation to the flatlet, otherwise the appellant would be unfairly enriched. Furthermore, the appellant did not furnish any expert evidence to support the amount she claimed to be in respect of the monthly rental in respect of the main dwelling.

[28] Regarding the appellant's points in limine, he stated that in the deed of settlement they both consented to the jurisdiction of the regional court, if one of them refused to consent to the sale of the property. Their dispute arose post-divorce, about the terms of the deed of settlement. Furthermore, he disputed that the magistrate's order varied the deed of settlement, the *actio communi dividundo* is a common law remedy that was available to him as a co-owner. It is often relied upon in post-divorce litigation where parties remained co-owners of a property, but subsequently only one party wanted to sell the property, the other was refusing. It does not amount to contempt of court. He denied that the appellant would suffer any prejudice, she would get her share of the proceeds of sale. However, if the court would grant the relief sought by the appellant in

the counter-application, he would be prejudiced. The said relief would be unjust, whilst the relief sought by him was fair, just and equitable.

[29] He said he amassed the assets in the joint estate. The appellant spent her earnings on herself and her pleasures. Noteworthy, Antonie, in his supporting affidavit annexed to his replying affidavit, said he contributed financially, towards the second dwelling. The respondent denied that he misled the appellant in any way or enticed her with lifelong occupation so that she would not seek the division of the joint estate. The deed of settlement was drafted by her legal representatives. It was beneficial to her, in addition to the right to occupation, she received 2 (two) luxury vehicles, he paid for their insurance, he also paid spousal maintenance as appearing in paragraph 6 (six) above. There was no basis for the launch of proceedings for contempt of court order.

[30] The appellant made it impossible for him or Antonie to live in the flat, she was extremely abusive but that was settled through protection orders that were finalised by mutual consent. He denied that the appellant did not interfere with the second main gate giving access to the flat, he said she padlocked the side gate and did not provide him with a key and had, on several occasions, threatened to open a criminal case against him if he attempted to access the property. Regarding what the appellant stated that, she as an estate agent would have sought sole mandate, that would have been untenable because she enjoyed living in main dwelling of the property, without paying for anything.

[31] The affidavit by Antonie is more about his own relationship with the appellant. It is also not relevant to the issues between the litigants in the appeal. The magistrate made no reference to it in her judgment as well.

THE FINDINGS OF THE COURT A QUO

[32] The magistrate found that the respondent established that the appellant had breached the respondent's unfettered right of occupation provided for in the deed of settlement. In the main judgment it appears that the magistrate based the said finding on the fact that there were reciprocal protection orders, the magistrate reasoned that the protection order against that respondent restricted his right of occupation. In making the said finding the magistrate also linked that with the need to apply the clean break principle that, there was a need for finality in litigation. The magistrate set out the principle in *Plascon-Evans*. Thereafter, the magistrate quoted from a decision in *Mahala v Nkombombini and another* 2006 (5) SA 524 (SE) as follows:

'that approach (Plascon-Evans) is possibly not entirely satisfactory for a matter such as the present... a more robust approach is sometimes required and the court should then grant the order if it is satisfied that there is sufficient clarity regarding the issues to be resolved for the court to make the order prayed for'.

The magistrate concluded that the appellant had confirmed that she changed the remote for security reasons, that resulted in the respondent not being able to access the property.

[33] However, in the reasons for judgment (supplied after the filing of the notice of appeal) the magistrate, after restating the principle in *Plascon-Evans*, stated that the appellant had confirmed that she changed the remote, there was no need for referral of the matter for the hearing of oral evidence. That alone showed the breach of the respondent's unfettered right of occupation, the reciprocal protection orders further exacerbated the breach.

[34] In the main judgment the magistrate found that because the appellant had alleged that there was continuous verbal and domestic abuse, in the matrimonial context, following policy considerations, the protection orders were destructive to family life. In answer to the ground of appeal that the magistrate had applied the clean break principle post-divorce, the magistrate in the reasons for judgment stated that the deed of settlement arose from the divorce, the principles relating to marriage and divorce could not be separated.

[35] The magistrate's reasoning in the main judgment, was based on the breach of right to occupy the property, followed by demand to sell and when there was no consensus. In the reasons for judgment the magistrate stated that since the litigants were divorced, they were joint owners of the property, the respondent could have been successful even under *actio communi dividundo*. Finally, regarding the failure to admit the supplementary affidavit, the magistrate said there was no formal application for its admission in terms of rule 55 (1)(a) of the Magistrates Court Act 32 of 1944.

[36] The issue for determination in the appeal is whether the magistrate's finding that the appellant had breached the terms of the deed of settlement was correct.

EVALUATION

[37] The magistrate and both counsel in this court, correctly set out the legal principles relevant to interpretation. The magistrate however, in the application of those principles was of the view that, in the matrimonial context, policy considerations come into play. She considered the application of the clean break principle and referred to the parties' reciprocal protection orders. Ultimately, the court *a quo* found that the respondent's '*right to unfettered occupation*' had

been breached and granted an order that ‘*the notice of motion is accordingly successful*’.

[38] The interpretation of clauses 2.3 to 2.5 of the deed of settlement is fundamental to the appeal.

[39] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraphs 18 the court stated:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’,¹⁶ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[40] *In Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) the Constitutional Court, at paragraph [28], in dealing with the interpretation of statutes said the following:

‘A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).’*

[41] The Supreme Court of Appeal, in *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) cautioned against utilising the principles enunciated in *Endumeni Municipality* as an open-ended permission to pursue undisciplined and self-serving interpretations. The court went on further at paragraph 50 to state:

‘Endumeni simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a

contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.'

[42] At paragraph [51], in the context of contracts, the court commented:

'Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.'

[43] Clauses 2.3 to 2.5 of the deed of settlement regulated the parties' living arrangements, post-divorce. Whilst the rights flowing from clauses 2.3 and 2.4 differ, the clauses, in their construction, are identical. Accordingly, for the purposes of this analysis, it is necessary to repeat only clause 2.3 :

'2.3) The Defendant will have a full, unfettered right to occupy the main dwelling on the property until her death or until the sale of the property, subject to the following condition:-

- a) *The Defendant will not be permitted to allow a romantic partner to take occupancy with her in the main dwelling.* [Own emphasis.]

[44] Clause 2.5, in turn, provides that if either party breaches “*the above conditions imposed on their rights of occupation*”, the other party may demand that the property be sold.

[45] Plainly, two aspects arise. Firstly, the parties’ respective rights of occupation flowing from clauses 2.3 and 2.4; and secondly, the express conditions imposed on those rights.

[46] If regard is had to the plain wording of the clauses, read in context, and mindful of the principles of interpretation as set out above, this court must agree with the appellant that the condition imposed on the parties’ respective rights of occupation, is the prohibition of a particular party’s occupation *together with* a romantic partner.

[47] The wording of clause 2.5 is purposive. The deed of settlement envisaged a situation where two people, involved in an acrimonious divorce, would thereafter reside on the same property, *albeit* in separate dwellings. Clause 2.5 affords the parties a reciprocal remedy to demand that the property be sold if the other party takes up residence with a new romantic partner. The parties must have viewed that as irreconcilable with their envisaged living arrangements. Had it been the parties’ intention to trigger the invocation of clause 2.5 upon a breach of the right of occupation, clause 2.5 would have stated as much.

[48] The alleged breach relied upon by the respondent pertained to his right of occupation only. That being the case, the remedy provided for in clause 2.5 was not available to him. On this basis alone, the appeal must succeed.

[49] Even if regard is also had to the appellant's act of changing the remote, it must immediately be said that respondent, failed to establish a breach of his right to occupy the second dwelling.

[50] The respondent in the founding affidavit in support of his case relied mostly on the correspondence exchanged between or on behalf of the appellant and him. At first, he believed that in the letter of 22 March 2022 the appellant sought confirmation of when he was to vacate the property when she had referred to the second dwelling. He also relied on the letter that the magistrate also put much emphasis on, advising that she changed the remote frequency of the gate to the property. He concluded that his unfettered access to the property was interfered with, even though he had a right to the second dwelling. From the replying affidavit it became common cause that the flat could be accessed through another gate. He however said the appellant had locked it with a padlock.

[51] In the appellant's letter she said she took lawful precautions to safeguard the property by limiting access to the property, she did so in the best interest, because of the incident that happened. Nevertheless, access was not in any form denied, she requested the respondent to make an appointment in advance if he wished to visit the dwelling. The appellant's version in the answering affidavit was that she reprogrammed one of the automated main sliding gates to the property because there had been a security breach at the property. The submission on behalf of the respondent was that, the said averment was a

measure to manage and fix what was stated in the letter. However, from the respondent's application for interdict and the replying affidavit in the court *a quo*, the issue of the existence of an alternate entrance became settled.

[52] The magistrate made no reference to the fact that the two versions were inconsistent in the judgment. The magistrate, incorrectly in my view, considered the protection order and the fact that the appellant in her letter had said she changed the remote frequency and concluded that she denied the respondent access to the property. Firstly, the magistrate did not have regard to everything that was said in the said letter together with the context thereof. Furthermore, it is not clear as to what extent the magistrate had regard to the appellant's version.

[53] Even the magistrate's reasoning in relation to the clean break principle, which will be reverted to later, seems to be based on the existence of the reciprocal protection orders. The respondent's case was never that the existence of protection orders had an effect on his right of occupation. In his replying affidavit in the application for protection order, he included a prayer that the appellant should be ordered not to enter the second gate to gain access to the parking associated with the flat. Contrary to the magistrate's reasoning in his replying affidavit in the court *a quo*, he criticized the appellant for bringing up the merits of the protection order, in his view, the issues raised in the protection order applications were resolved by the granting of reciprocal protection orders. The appellant, in her answering affidavit to the application in the court *a quo*, said, she applied for a protection order eight days after divorce, the respondent was still leaving in the main dwelling. In the said proceedings she had sought that the respondent should not enter the main dwelling or patio between the two dwellings.

[54] The magistrate correctly referred to the legal principle in *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (2) All SA 366 (A) paragraph 9 in relation to resolving disputes of fact as follows:

‘ It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact... ’

However, above principle was not applied.

[55] Access to the property ought not to have been confined to the main dwelling only, but the finding be inclusive of the flat. The magistrate ought to have pronounced on the appellant's version about not denying access to the flat and state reasons for rejecting that version. The respondent agreed that the flat had a separate gate. Despite the communication in the letter, which this court views as having been a matter of poor articulation, the appellant consistently averred that she did not interfere with the flat entrance gate. She did not even have the key to that gate. Furthermore, there was subsequent communication that advised the respondent to obtain and use the key to the said gate to access the flat. These being motion proceedings, this court finds no basis for rejecting her version. This court has no reason to hesitate to accept it. Therefore, on the application of the principle in *Plascon Evans* the respondent's access in terms of the deed of settlement could not have been breached.

[56] The magistrate erred in over-emphasizing the part of the appellant's letter that said, she limited access to the property, the respondent should make an appointment when visiting the property. In the same letter she recorded that she was not denying access to the property. What she alleged in her answering affidavit appears to be rather a better articulation of what she did and the explanation for her saying access was not denied than a measure to fix what was in the letter. The respondent in his founding affidavit did not say anything about the separate gates and why he could not use it to access the flat. These facts were within his knowledge at the time of the filing of the founding affidavit. Instead, he created an impression that, even though he had a right to the second dwelling, he was not able to access the entire property.

[57] In my view, on application of the above principles, the version that the second dwelling could still be accessed through the second date should have been accepted. This court finds her version not to have been farfetched. Even without the admission of the video footage, the magistrate had sufficient facts on which to determine the matter. This court makes no pronouncement on the issue relating to the admission of the footage. It then follows that the appellant should have been found not to have breached the terms of the deed of settlement.

[58] Regarding the application of the clean break principle after divorce, there was no basis for the magistrate to consider the existence of the protection orders. The said orders were not part of the respondent's case.

[59] According to the magistrate's reasons for judgment, the respondent would have been successful under the *actio communi dividendo*, as well. The magistrate seemed to have supported this by stating that the appellant and the respondent were joint owners, post-divorce. During argument, the submissions relating to the legal principles regarding settlement agreements were correctly

set out on behalf of the respondent. The one being that once the court was satisfied that the parties to the agreement freely and voluntarily concluded the agreement and that they were *ad idem* as to its terms, the court would be entitled to make the agreement an order of the court and the parties would be bound by the terms thereof.

[60] In terms of clauses 2.1 and 2.5 of the deed settlement, the property would only be sold if there was mutual agreement and upon demand, following a breach of the conditions stipulated in the deed of settlement. The issue of jurisdiction is also provided for if a party sought to compel the sale following a breach envisaged in clause 2.5 of the deed of settlement. The respondent's case in relation to the *actio communi dividundo* was on separate ground that he was entitled to the relief, he no longer wished to be a joint owner of the property. This court agrees with the interpretation that, the said relief falls outside of the provisions of the deed of settlement. The facts around it were not part of the magistrate's reasons. The action based on the *actio communi dividundo* would have had to be considered starting from the issue of jurisdiction to the legal requirements relating to the facts alleged and proved.

[61] In relation to the counter-application the magistrate found that the application was incompetent because section 65(3) of the Deeds of Registry Act had not been complied with. The appellant did not include the counter-application in her grounds of appeal. Considering that the appellant sought the relief in the counter-application only if the respondent was successful in the main application, this court deems it unnecessary to deal with the counter-application.

[62] In the circumstances, the appeal must succeed. The costs will follow the result.

In the result,

1. The appeal hereby succeeds.
2. The order of the court *a quo* is hereby set aside and replaced as follows:
‘The application is hereby dismissed with costs’
3. The respondent is hereby ordered to pay the costs of appeal.

B MAJIKI
JUDGE OF THE HIGH COURT

BANDS J:

I agree:

I BANDS
JUDGE OF THE HIGH COURT

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