

Love and the Law: Cohabiting? Get Your House in Order Now

“All you need is love... and a good lawyer.” (Anonymous)

February, with its Valentine’s Day chocolates, roses and declarations of undying love, should be a month for romance, not legal niceties. But in the real world, love and the law are inextricably linked because any relationship’s structure and consequences are inevitably governed by legal principles. Losing sight of that can expose you to unnecessary angst, dispute, and litigation.

A recent High Court fight between an estranged couple over their jointly-purchased dream house illustrates this neatly.

Broken dreams, and a fall out over the house

A couple’s four-year romantic relationship saw them living together first in her mother’s house and then in his apartment. They then decided to buy a house together with the idea of making their relationship more permanent.

Unfortunately, that dream came to nought – their relationship ended a month after the property purchase, leaving only one of them to live in the house and to pay all the ongoing costs while they decided what to do next.

In due course they fell out over how to end the co-ownership and how to adjust their respective claims for past and future property costs.

Their dispute reached the High Court, which ordered firstly that the co-ownership be terminated. This was necessary, because no co-owner can be forced against their will to remain a co-owner where the relationship between the co-owners has deteriorated to such an extent that it can’t continue.

Then, using an old Roman law remedy still in use today (the “actio communi dividundo”) the Court dealt with both the division of the property, and the adjustment of the various financial claims between the parties. As is usually the case, these were complex and intertwined after years of cohabitation.

Johannesburg

Unit 7, Visiomed Office Park, 269 Beyers Naude Dr, Northcliff 2195.

Tel: 011 431 3739

Email: admin@duplooyinc.co.za

Hermanus

3B Village Lane, Hemel & Aarde Village, Sandbaai, 7200

Tel: 028 316 3707

Email: info@dpincct.co.za

Importantly, the Court noted a modern move away from the traditional principle that the property should necessarily be sold by public auction to the highest bidder, towards a much more flexible approach based on the Court having a wide discretion to ensure a fair and practical outcome in each case.

Thus, having considered all the circumstances, wishes and claims of both parties, the Court ordered that the ex-partner living in the house has a first option (valid for 60 days) to buy the other's half share at valuation. If he doesn't, he must offer it for sale on the open market at a fair and reasonable market-related price. If there's still been no sale after 6 months, the Sheriff of the High Court becomes a "receiver and liquidator" and has 4 months to auction the house. The bond, costs and parties' related financial claims will be settled from the proceeds as directed by the Court.

"Co-ownership is the mother of dispute" – But it needn't be

"Co-ownership is the mother of dispute" ("communio est mater rixarum") is another old Roman law concept mentioned by the Court. It confirms that joint ownership has always, since ancient times, inherently provided fertile ground for instability and dispute.

But that needn't be so. An upfront agreement between joint owners, whether their arrangement is grounded in a commercial or a personal relationship, can hugely reduce the risks of later uncertainty, disagreement and litigation.

Put as much detail into your agreement as you can, including a detailed process of how to end your co-ownership if required. Litigation – with its delay, expense, and uncertain outcomes – should never be embarked on lightly. As the Court wryly quoted from a previous decision, "a court cannot perform miracles". It will of course do its best to craft the fairest possible outcome for both parties, but avoiding the dispute altogether is always a better option for everyone involved.

P.S. Don't forget your cohabitation agreement

As a final thought, if you are living with your life partner, you should have a full cohabitation agreement to cover not only your co-ownership arrangement, but also all the other financial and personal aspects of your relationship that would normally be governed by our marriage laws.