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# REAL ESTATE ALERT

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### A judicial reminder to take heed of the provisions in your co-ownership agreement | Part 1: Right of co-owner to claim partition of property

The term *co-ownership* denotes that two or more persons own property in undivided shares. Such a co-owner does not become entitled to a physical portion of the property but owns an undivided share in and to the whole property. Where two persons co-own a property, each of them owns an undivided one-half share in and to such property. The relationship between such two persons who co-own a property is thus referred to as a co-ownership.

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## A judicial reminder to take heed of the provisions in your co-ownership agreement | Part 1: Right of co-owner to claim partition of property

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**The term co-ownership denotes that two or more persons own property in undivided shares. Such a co-owner does not become entitled to a physical portion of the property but owns an undivided share in and to the whole property. Where two persons co-own a property, each of them owns an undivided one-half share in and to such property. The relationship between such two persons who co-own a property is thus referred to as a co-ownership.**

As captured by the Roman law maxim *communio est mater rixarum*, meaning *co-ownership is the mother of all disputes* - this type of relationship has been the root of many disputes, resulting in the need to partition the co-owned property.

In terms of the common law, no co-owner is normally obliged to remain a co-owner against his will.

This is the basic notion underpinning the legal remedy *actio communi dividundo*, which enables any co-owner to approach a court for the appropriate relief, including the partition of the property and the manner in which same must be partitioned after due consideration of all the circumstances.

Once the co-owned property has been partitioned, the legal relationship between the former co-owners ceases to exist.

However, this common law right to claim the division of property is only available to a co-owner in a *free co-ownership*. A free co-ownership comes into existence when it is the only legal relationship between the co-owners. Where there is an underlying

relationship between the co-owners, separate from their co-ownership of the property, such co-ownership constitutes a *bound co-ownership*.

The distinction between the two types of co-ownerships became apparent in the recent judgement handed down in the case of *Municipal Employees' Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others (792/19)* [2020] ZASCA 116.

The Municipal Employees' Pension Fund (MEPF) purchased a 55% interest in a shopping centre business owned by a group of companies controlled by Adamax Property Projects Menlyn (Pty) Ltd (Adamax). This purchase included a 55% share in each of the immovable properties on which the shopping centres are situated and the cession and assignment of the rights and obligations in 55% of the leases concluded in respect of the shopping centres. Together this resulted in the transfer to the MEPF of a 55% interest in the letting enterprise purchased by it. The parties concluded, *inter alia*, a sale of property agreement and a detailed co-ownership agreement encompassing the manner in which the business would be jointly conducted.

Subsequent to the conclusion of the sale to the MEPF, Adamax, as co-owner, wished to partition the properties on which the shopping centres are situated by placing same in the hands of a liquidator to be sold and the proceeds to be divided between the co-owners. The MEPF refused to partition, resulting in Adamax approaching the high court for an order granting such partition on the basis of the *actio communi dividundo*. The order sought was granted.

## A judicial reminder to take heed of the provisions in your co-ownership agreement | Part 1: Right of co-owner to claim partition of property...continued

An essential difference between a free and bound co-ownership highlighted by the court is the manner in which the relationship may be terminated.

On appeal to the SCA, Wallis J stressed the significant importance of first establishing the type of co-ownership that existed between the parties. An essential difference between a free and bound co-ownership highlighted by the court is the manner in which the relationship may be terminated. In a free co-ownership, any co-owner may demand at any time that the co-ownership be terminated and the co-owned property be divided among the co-owners. In a bound co-ownership, the co-ownership can only be dissolved when the primary relationship is terminated.

Having analysed both the agreements concluded between the parties in detail, the court found that the primary relationship between the parties was their commercial relationship in respect of the letting enterprise. The co-ownership agreement contained detailed provisions for the conduct of the business relationship and the duration thereof. There was an express provision that the co-ownership will endure for an indefinite period unless terminated in accordance with the specific provisions contained in the co-ownership agreement. The court further found that the nature of

the relationship between the parties was therefore governed by the co-ownership agreement and that the co-ownership of the properties was subordinate to this primary relationship.

The court accordingly concluded that the *actio communi dividundo* could not be relied on in this instance as the co-ownership between the parties constituted a bound co-ownership and is governed by the co-ownership agreement.

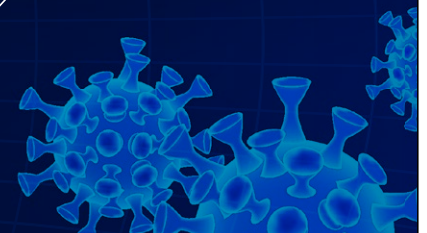
The continued existence of the co-ownership may not only be in the interest of a co-owner (as was the case for the MEPF) but is also of significant importance to a funder. A co-ownership agreement therefore not only governs the intrinsic relationship between the co-owners but must additionally have due regard to other interested parties, in a manner which balances the interests of all.

In **Part 2** we aim to highlight the specific funding provisions to be considered when drafting a co-ownership agreement in respect of a letting enterprise.

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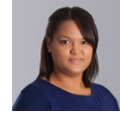
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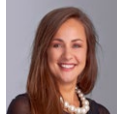
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