

Notes

Co-ownership: Risks, benefits, and avoiding pitfalls

1. The co-ownership of immovable property

Co-ownership arises where two or more persons jointly acquire immovable property and hold ownership together. Each co-owner holds an undivided share in the whole property, rather than a physically distinct portion.

Co-owners are jointly responsible for the property as a whole. This means they share equal responsibility for obligations relating to the property and share in the benefits and risks associated with ownership, subject to any agreement regulating their respective shares.

2. How co-ownership of immovable property arises

Co-ownership may arise in a number of ways, including the following:

Inheritance

Where more than one person inherits an undivided share in immovable property in terms of the will of a deceased owner.

Marriage in community of property

Spouses married in community of property share a joint estate. Neither spouse may act unilaterally in relation to immovable property without the written consent of the other. Where such spouses acquire immovable property, it is registered in both their names.

Agreement

Two or more persons may agree to purchase immovable property together, either in equal undivided shares or in defined percentages. This typically involves pooling financial resources to pay a deposit and obtain mortgage finance. Co-ownership is often used for investment properties, but may also be used where parties jointly purchase a home, sometimes with one party effectively paying 'rent' to the other.

This update focuses primarily on the responsibilities and risks associated with voluntarily entering into a co-ownership arrangement.

3. The agreement of sale and mortgage finance

Where an agreement of sale results in co-ownership, all co-owners must sign the agreement. If applicable, the agreement should clearly record the percentage share each purchaser will acquire.

If the purchasers make use of mortgage finance, all purchasers reflected in the agreement of sale must apply jointly for the bond and will be parties to the mortgage loan agreement. Co-

Notes

owners are jointly and severally liable for the bond debt, meaning the lender may recover the full outstanding amount from any one of them in the event of default.

4. Benefits of co-ownership

Co-ownership offers a number of potential advantages:

- Combined financial resources may allow access to a wider range of properties.
- Ongoing costs such as maintenance, repairs and renovations are shared.
- Acquisition costs, including legal fees, transfer duty, transfer fees and bond registration costs, are divided between the co-owners.
- Reduced individual financial pressure may allow for faster bond repayment or capital for other investments.
- A co-owner may sell their share, subject to legal and contractual consequences.

It is important to note that although co-owners may agree on their respective ownership shares, and these are reflected in the title deed, lenders will still require all bondholders to be jointly and severally liable for the full mortgage debt.

5. Risks associated with co-ownership

Despite its advantages, co-ownership carries significant risks:

- Additional legal costs may be incurred in drafting a co-ownership agreement.
- Each co-owner may be held liable for the full costs of the property if another defaults.
- One co-owner's financial difficulties may force an unwanted sale.
- Early exit from the arrangement may be costly.
- Co-ownership may affect future borrowing capacity.
- Financial strain may damage personal relationships.
- Disputes commonly arise where a co-owner defaults on bond payments, fails to contribute to maintenance, or wishes to sell their share.
- A co-owner generally requires the consent of the other co-owners to make decisions affecting the property, such as improvements or alterations.

6. Safeguarding against the pitfalls of co-ownership

Legal advice is essential before entering into a co-ownership arrangement. A properly drafted co-ownership agreement is critical and should address, at minimum, the following:

- Occupation of the property
- Consequences of death of a co-owner
- Sale of the property and pre-emptive rights
- Default on bond or other payments

Notes

- Division of profits or losses on sale
- Responsibility for securing finance
- Unequal contributions to deposits
- Maintenance obligations
- Payment of municipal charges and taxes
- Use of the property as security for further borrowing

7. Remedies available to co-owners

Any co-owner may seek division of jointly owned property. As a general rule, parties must attempt to resolve disputes amicably before approaching court. Where agreement cannot be reached, a co-owner may institute the *actio communi dividendo*.

The underlying principle is that no co-owner is obliged to remain in co-ownership against their will. The court has wide discretion and may order division in kind, award the property to one co-owner subject to compensation, or direct that the property be sold and the proceeds divided. Where division is not feasible, a liquidator may be appointed. In appropriate circumstances, the court may postpone division or sale.

8. *Claassen v Quenstedt and Others*

The importance of a co-ownership agreement was illustrated in *Claassen v Quenstedt and Others*. The parties jointly purchased a property but did not conclude a co-ownership agreement. Following the breakdown of their relationship, disputes arose regarding occupation, costs and division of proceeds.

The court held that:

- A co-owner in lawful occupation cannot be compelled to pay rent to another co-owner unless rental income is generated.
- Net sale proceeds must be divided equally in the absence of agreement.
- Co-ownership must be distinguished from partnership; where no partnership exists, claims prescribe after three years.
- The litigation could have been avoided had a co-ownership agreement been concluded.

9. Conclusion

Co-ownership can be an effective, but it requires careful planning.

Prospective co-owners should obtain legal advice and regulate their relationship contractually before signing an agreement of sale. A well-drafted agreement protects both the property investment and the relationship between the parties.