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REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NUMBER: 11329/2013

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

.....
DATE

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SIGNATURE

In the matter between:

DUBE, PETER JAMES

Applicant

and

HLAKO, NARE RACHEL

Respondent

JUDGEMENT

NGALWANA AJ

Introduction

[1] The applicant seeks an order that:

- 1.1 the parties' joint ownership be terminated forthwith in Portion 42 of erf [.....], Registration Division I. R., Province of Gauteng, situated at [.....], Friendship Town Houses, [.....], Gauteng Province ("the property");
- 1.2 the property be sold by public auction or, in the alternative, by private auction through any auction company appointed by either party within 15 days of the Court Order to that effect;
- 1.3 the nett proceeds from the sale of the property be applied first towards refunding the applicant's mortgage bond settlement to Absa Bank Ltd under mortgage bond number [.....] in relation to the property in the total amount of R56 409.59, and the balance to be divided equally between the parties;
- 1.4 costs of suit in the event of opposition.

The Facts

- [2] The common cause facts (to the extent relevant) are these:
- 2.1 The parties have been in a long term intimate relationship which, according to the respondent, has endured since 1997.
 - 2.2 Their intimacy with each other has produced no children.
 - 2.3 They acquired the property jointly in July 2001 for a consideration of R68 000.00 and it was officially registered in their names jointly in May 2002.
 - 2.4 They then lived together on the property.
 - 2.5 Following the respondent's seeking and obtaining a protection order against the applicant in September 2011 on allegations of domestic violence, the applicant vacated the property and started renting elsewhere.
 - 2.6 The respondent continues to live on the property unburdened by mortgage payments and rent.
 - 2.7 The applicant has been paying the bond since inception. He settled the balance of the bond in full during 2010 after receiving pension and provident fund monies. The balance of the bond was R56 409.59.

2.8 The applicant continues to pay for municipal services in relation to the property, now valued at “over R400 000.00”.

The Parties' Respective Submissions

[3] The applicant says because he and the respondent are, since September 2011, “*no longer an item*”, he wants their joint ownership of the property terminated, the property sold on auction and the proceeds applied as described above.

[4] The respondent baulks at this, saying she and the applicant “*concluded a traditional marriage in May 2006*”. In support of this averment she invokes a lobola agreement and alleges that she and the applicant “*went through the normal traditional ceremony joining [them] as husband and wife*”. Consequently, she asserts, there exists a real dispute of fact which cannot be satisfactorily determined without the aid of *viva voce* evidence. So, she asserts further, it is inappropriate to have sought recourse by way of motion proceedings. She then says the application must for that reason be dismissed, and that “*a special punitive cost order be granted against the Applicant as the Applicant's Application constitutes nothing more than a deliberate and calculated attempt to prejudice [her] by not placing all the relevant facts before this Honourable Court*” as regards the existence of a traditional marriage or customary union.

- [5] That was the position the respondent adopted in her answering papers. In argument, however, Counsel for the respondent was less sanguine as regards dismissal of the application. While baulking at referral of the alleged dispute of fact to oral evidence, he was keen on the matter being referred to trial so that the respondent could *“lead exact particularised evidence of the procedures followed and the exact dates involved in the formation of the marriage”*.

Is There A Real Dispute of Fact?

- [6] The notion that a reasonably foreseeable real dispute of fact militates against the institution of legal proceedings by way of motion or application is trite. If motion proceedings are instituted in such circumstances, the Court has one of three options: (1) dismiss the application, or (2) on application¹ refer the matter to oral evidence by deponents to affidavits that have been filed of record, or (3) refer the matter to trial (the founding affidavit serving as particulars of claim, the answering affidavit as a plea and the replying affidavit (if any) as a replication) where evidence can also be introduced from persons who have not deposed to affidavits.

- [7] There is no application by either party for a referral to oral evidence. In fact, the respondent’s Counsel murmured demurely against it and then sought to persuade the Court from the Bar that a referral to trial might

¹ It has been found that it is undesirable for a Court *mero motu* to refer a matter to *viva voce* evidence: see *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) at 56F-57B

be the right option. The applicant would have neither option entertained.

[8] A real or genuine dispute of fact does not arise simply by an allegation to that effect being made. More is required. The respondent must set out matter which tends to establish the materiality of the facts being pleaded, and cannot validly avoid the relief sought by simply alleging, without more, the existence of a customary marriage.

[9] It is clear that the respondent prefers the relatively more elaborate process of divorce proceedings contemplated in section 8 of the Recognition of Customary Marriages Act, 120 of 1998 which confers upon a Court the power, *inter alia*, to grant a decree of divorce on the ground of the irretrievable breakdown of the marriage and to grant maintenance orders. But there must first be a marriage to dissolve. On the papers the respondent has failed to plead sufficient facts as would *prima facie* establish the existence of a traditional or customary marriage. Lest this be misunderstood, it is important to stress that it is not the evidence of the existence of a valid customary marriage that the respondent must advance; it is rather sufficient averments that tend *prima facie* to show that a customary marriage exists.

[10] Pleading co-habitation is not enough. The respondent was required to have pleaded at least some of the elements of a customary marriage that she says exists. Alleging simply that she “*went through the normal*

traditional ceremony” is too vague and insubstantial and thus insufficient to give rise to the kind of dispute of fact that should be referred to oral evidence or trial.²

[11] Two of the crucial elements of a customary marriage that have been identified by the Courts include (1) the handing over of the bride by her family to the groom’s family (*ukusiwa kukamakoti emzini ehamba noduli*) and (2) *ukuyalwa kukamakoti ngoomama noodade bomyeni* (the “*coaching*” or “*grooming*” of the bride by the groom’s female relatives).³ The respondent alleges neither. She cannot now seek to establish by way of *viva voce* evidence at trial a case she has not pleaded or made out in her papers.⁴

[12] I am thus satisfied that the allegation of the existence of a customary marriage is too vague and insubstantial to found the sort of factual dispute that warrants a referral to oral evidence or trial.

The Merits

[13] As regards the merits of the application, the relief sought is not a novel one. It is founded on the *actio communi dividundo* which originated in Roman law, was adopted in Roman-Dutch law as the *actie van deeling* or *actie van scheydinge*, and cascaded to our present law. It

² *King William’s Town Transitional Local Council v Border Alliance Taxi Association* 2002 (4) SA 152 (E) at 156I-J

³ *Motsoatsoa v Roro and Another* [2011] 2 All SA 324 (GSJ) at para [19]

⁴ *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 205D-206B

was described in *Robson v Theron*⁵ as having two purposes, namely, (1) division of joint property and (2) payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property⁶. Its basic underlying notion is that no co-owner is normally obliged to remain such against his will.

- [14] The respondent does not dispute that the property is jointly owned by her and the applicant. She does not dispute that the applicant has been paying the mortgage bond and that he settled the balance of R56 409.59. She does not dispute the value placed upon the property by the applicant. While she alleges that she has contributed to settling “*all accounts [she] receives for consumption charges and levies on the property*” she advances no evidence of this. Her elevation of what the applicant terms “*an intimate relationship*” to the status of marriage in community of property by reason of a customary marriage is vague and insubstantial. In the circumstances I can find no lawful obstacle to exercising the Court’s discretion in favour of granting the relief sought.

Appropriate Orders

- [15] It seems to me that the termination of joint ownership must necessarily be an instance of, and arise from, the disposition of the property, rather than (as the applicant has couched his prayers) being a separate and self-standing order that precedes the disposition. If it were to stand

⁵ 1978 (1) SA 841 (A)
⁶ At 854H-855A

alone, the danger is conceivably that the order may be interpreted as terminating the respondent's share in the property (since the order is in the applicant's favour) resulting in her being nudged out of entitlement to a share in the proceeds of the sale of the property. Since Judges are not Shakespearean Soothsayers, it is always best to craft orders in ways that live little room for disparate interpretations that may give rise to further tiff and litigation.

[16] In the result, I make the following orders:

1. The parties may by agreement dispose of the property either by public auction or by private auction within such reasonable period as may be agreed between them, thereby bringing joint ownership of the property to an end.
2. Failing agreement between the parties as regards the manner of the disposition of the property or the reasonable period within which this must be done, the applicant may within 20 days of this order dispose of the property by private or public auction, whichever is convenient for him.
3. The nett proceeds from the sale of the property must be applied first towards refunding the applicant's mortgage bond settlement to Absa Bank Ltd under mortgage bond number [.....] in

relation to the property in the total amount of R56 409.59, and the balance must be divided equally between the parties.

4. The respondent must pay the applicant's costs on a party and party scale.

V Ngalwana
Acting Judge of the High Court

Appearances

For the applicant: DZ Kela
Instructed by: Ndumiso P Voyi Inc

For the respondent: M Traub
Instructed by: Jouberts Attorneys

Date of hearing: 25 November 2013

Date of judgment: 28 November 2013