

DUBE, PETER JAMES

Applicant

and

HLAKO, NARE RACHEL

Respondent

SUMMARY OF THE JUDGMENT

NGALWANA AJ:

It is trite that a reasonably foreseeable real dispute of fact militates against the institution of legal proceedings by way of motion or application. A court has 3 options where motion proceedings are instituted in such circumstances: 1) to dismiss the application, or 2) on application refer the matter to oral evidence by deponents to affidavits that have been filed on record, or 3) refer the matter to trial (in this case, the founding affidavit serves as particulars of claim, the answering affidavit as a plea and the replying affidavit as a replication).

In casu, the applicant sought an order that, amongst others, joint ownership in the property he holds with the respondent be terminated, the property be sold by auction and the proceeds of the sale be applied to refund the applicant's mortgage bond settlement to Absa Bank. It was common cause that the parties were in a long term relationship but had no children together. They acquired and lived together in the property. The applicant avers the parties are "*no longer an item*" whilst the respondent avers they concluded a traditional marriage a few years ago. Consequently, the respondent asserts that there exists a real dispute of fact which cannot be satisfactorily determined without the aid of *viva voce* evidence.

On the question whether there was real dispute of fact the court noted that neither party had made application for a referral to oral evidence. The court stated that a real or genuine dispute of fact does not arise simply by an allegation to that effect being made. More is required. The court stated that 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.

The court found that the respondent had failed to plead sufficient facts as would *prima facie* establish the existence of a traditional or customary marriage. It was noted that it was not

evidence of the existence of a valid customary marriage that a respondent must advance but rather sufficient averments that tend to show *prima facie* that a customary marriage exists. The allegations of the existence of a customary marriage were found to be too vague and insubstantial to found a factual dispute that warrants a referral to *viva voce* evidence.

As regards the merits of the application, the court stated that the relief sought 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 was described in *Robson v Theron* 1978 (1) SA 841 (A) 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 property (at 854H-855A). Its basic underlying notion is that no co-owner is normally obliged to remain such against his or her will.

The court found that the respondent did not dispute that the property is jointly owned by her and the applicant, that the applicant has been paying the mortgage bond, and that he settled the balance of R56 409.59. She did not dispute the value placed upon the property by the applicant. While she alleged that she has contributed to settling “*all accounts [she] receives for consumption charges and levies on the property*” she advanced 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 the court stated that it could find no lawful obstacle to exercising its discretion in favour of granting the relief sought.

The court took the view 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 had couched his prayers) being a separate and self-standing order that precedes the disposition. If it were to stand 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.

The property thus was ordered to be disposed by agreement between the parties; the proceeds of the sale of the property were to be divided equally between the parties after Absa bank had been refunded on the bond.