

SOUTH AFRICA / JUDGMENT

Lesenya v Ngwenya (61306/2014) [2018] ZAGPPHC 502 (6 July 2018) [2018] ZAGPPHC 502

COURT

North Gauteng High Court, Pretoria

BEFORE

Maakane

CASE / FILE NUMBER

61306/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 61306/2014

6/7/2018

In

the matter between:

RADIKGOMO

PETRUS

LESENYA

Applicant

and

KEDIBONE

ANNA NGWENYA

(MACHEKE)

Respondent

JUDGMENT

MAAKANE AJ

INTRODUCTION:

- [1] In this application, Applicant seeks against Respondent, an order and or relief set out in his notice of motion as follows:

[1.1] "That HA Marais of HA Marais Trustees CC be appointed as a liquidator of the joint estate of the Applicant and the Respondent to the extent that no agreement can be reached between the two parties regarding the immovable property situated at/ known as 161 Jensen Road, The Orchards X10, Pretoria, Gauteng and held under

Deed of Title T68233/2004.

[1.2] That the liquidator be authorised and empowered to collect all debts due to the joint estate, with specific reference to the immovable property, and to realize either by public sale or private agreement such assets as referred to in paragraph 1 above;

[1.3] That the liquidator be authorised to distribute the proceeds of the joint estate referred to in paragraph 1 above equally among the parties;

[1.4] That the liquidator be granted such powers as are necessary to enable him to deal with the property referred to in paragraph 1 above in a manner he deems fit;

[1.5] That the cost of this application be paid out of the proceeds of the joint estate save where the Respondent opposes the application

and such opposition is unsuccessful, in which event costs be paid by the Respondent;

[1.6] That the above Honourable Court grants the Applicant any further and/or alternative relief "

[2] Respondent opposes the application and has raised mainly two defences, namely:

[2.1] Termination of joint ownership of immovable property can only be done by way of action (and not application) and find its basis on the actio communi dividundo.

[2.2] In any event the parties have reached a settlement agreement regarding termination of the joint ownership. However, Applicant fails and or refuses to sign the necessary documents in order to give effect to the settlement agreement between them.

BACKGROUND:

[3] During or around 2001, Applicant and Respondent were in a love or romantic relationship. It also appears that from this relationship, one minor child was born.

[4] On or about 17 September 2003, the parties jointly purchased immovable property situated at and or described as 161 Jensen Road, The Orchards Extension 10, Pretoria.

[5] The purchase price of the property appears to be approximately R250,000.00. In purchasing the property the parties obtained necessary finance from the Standard Bank of South Africa ("the bank"). To this day, the bank has a registered mortgage bond over the property. It is therefore important to mention that the bank has not been joined or cited in this application.

[6] After registration of the property, each party made a contribution towards the monthly repayments of the bond due to the bank. As to the exact amount and or contribution by each, is a matter of dispute between the parties.

[7] The property was subsequently registered in the name of both parties under Title Deed Number T68233/2004. It is common cause therefore

that both parties are joint owners of the immovable property.

[8] Initially the parties were living together under the same roof with their minor child and another child of the Respondent from a previous relationship.

[9] Unfortunately, the relationship between the parties strained and gradually deteriorated and was eventually terminated. As a result of this, Applicant moved out and sought alternative accommodation. He left Respondent in occupation of the property. This was about June 2007.

[10] From the pleadings, it is abundantly clear that the parties are ad idem that joint ownership of this property is to be terminated. It also appears to be common cause that it will be fair and equitable

that Applicant's share be transferred to Respondent, on such terms and or conditions to be agreed between them.

[11] Unfortunately, the parties have been unable to agree on the exact terms and conditions on or subject to which such transfer is to take place.

[12] It is as a result of this that the Applicant ultimately launched this application, seeking the relief set out in his notice of motion to which I have referred.

PARTIES ARGUMENT AND SUBMISSIONS:

[13] As I have pointed out, Respondent first raises a point in limine, which is to the effect that Applicant has adopted a wrong procedure. She argued that the remedy available to the Applicant is the *actio communi dividundo*, which by its nature means that action and not motion procedure, is the route to be followed.

[14] In the second place, she argued that the continuous allegation and reference by Applicant in his affidavits to a "joint estate" is completely wrong as there was never a joint estate between the parties. For this reason, there cannot be an appointment of a liquidator of the joint estate as the parties were never married.

[15] Lastly, she argued that in any event, the parties have reached an agreement between themselves regarding the division. In this regard she referred to a draft settlement document attached to the answering affidavit as Annexure "A".

[16] Counsel for Applicant on the other hand argued and persisted in his argument that Applicant is indeed entitled to approach this Court by way of motion, as he did. In this regard, he submitted that he is placing reliance on the general provisions of Rule 6 of the Uniform Rules of this Court, which provides for motion and or application procedures.

[17] He further argued that the proposed or draft settlement document Annexure "A" has not been signed by Applicant. For this

reason the document cannot be said to be a settlement agreement. His submission was therefore that the parties have not reached settlement as alleged by Respondent.

LEGAL POSITION:

[18] It is so that in our legal system joint ownership is possible and legally permissible. Each owner has a right to share in the property

of which he or she is a co-owner. The various shares of respective co-owners need not be equal.

[19] It is also trite law that a person cannot be forced to remain a co- or joint owner. For this reason, it is trite law that any co-owner has a right to have co-ownership terminated by placing reliance on the action *communi dividundo*.

Robinson v Theron 1978 (1) SA 841 (A);

Trojan Exploration Co. (Pty) Ltd v Rustenburg Platinum Mines Ltd [1996] ZASCA 74; 1996 (4) SA 499 (SCA)

[20] A co-owner seeking termination of ownership has to approach the Court by way of an action and must allege and prove the following:

[21] The existence of joint ownership;

[21.1] Refusal by other co-owners to agree to the termination of the joint ownership alternatively or the method or terms of such termination.

[21.2] Facts which the Court can take into account in determining a just and equitable manner in which the co-ownership is to be terminated.

Amler: Precedents of Pleadings – 7th Edition at pages 244 to 245

[22] *Actio communi dividundo*, forms part of our law and originates from the Roman Law. Roman Law made specific provision for causes of action under different circumstances, depending on the relief sought and the nature of the dispute between parties. As the name suggests, the *actio* means that the relief must be sought by way of action and not motion as Applicant in this matter did.

[23] It is so that Rule 6 of the Uniform Rules of this Court makes provision for applications. However, the entitlement to proceed by way of motion does not apply without qualification. There are specific instances where *suet*, procedure is not permissible. The *actio communi dividundo*, as is the case herein is one such instance.

[24] I therefore find that the Applicant was not entitled to proceed by way of application. He took and persisted in a wrong procedure. The correct course was to issue summons.

[25] I find it also important to point out that the parties herein were never married to each other. While they jointly bought and became

co-owners of the immovable property, there was no joint estate between them.

[26] For that reason seeking the appointment of a liquidator of the parties' joint estate where such a joint estate never came into existence,

cannot be legally justified.

[27] It was common cause throughout the hearing that a wrong procedure was followed, the correct order will be the dismissal of the application.

However, even if the application was to be dismissed, each of the parties still retains their right and entitlement to once again

approach the court by way of action, for the relief based on *actio cummuni dividundo*. In other words therefore such an order will not take away or remove or affect the rights of any of the parties in that regard.

COSTS

[28] The normal approach is that costs must follow the outcome. However, the Court does have a discretion to make any appropriate costs order, taking into account the general circumstances of each case, such as the conduct of the parties.

[29] In this case, Applicant was warned that relief based on *action cummuni dividundo* can only be sought by way of action and not motion. His attention was also drawn to the fact that there was no joint estate between the parties and therefore, no justification exists, for the seeking of and the appointment of a liquidator.

[30] Despite these warnings, Applicant persisted in his application to the last day. He persisted in this argument even on the day of the hearing of the matter.

[31] Be that as it may, as I have pointed out the Court does have a wide discretion in this regard, including the scale on which costs are to be paid. I could not find any malice or *mala tides* on any of the parties.

[32] For these reasons, I do not find any reasons for deviating from the normal approach in making an appropriate costs order.

ORDER

1. Consequently, I make the following order:

The Application is dismissed with costs.

S S MAAKANE

Acting Judge of the

High Court of South Africa

Gauteng Division, Pretoria

APPEARANCES:

For the Applicant: Adv. R Rafedile

Instructed by:

Ehlers Fakude Inc.

Pretoria

For the Respondent: Adv. A Nell

Instructed by:

Moldenhauer Attorneys

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