

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

Case No: 14649/2019

18/11/2019

In the matter between:

L[....] P[....] M[....]

Applicant

and

M[....] E[....] B[....]

Respondent

JUDGMENT

MNGQIBISA-THUSI, J

[1] The applicant, L[....] P[....] M[....] seeks the following relief:

- 1.1 an order compelling the respondent, M[....] E[....] B[....], to allow a valuator to value a property situated at [....] ("the property") within 10 days of the order;
- 1.2 an order directing that, once a valuation of the property is obtained, the respondent to buy out the applicant's half share in the property, alternatively, that the property be sold on the open market and the proceeds thereof be divided equally between the parties;

- 1.3 an order directing the Family Advocate to investigate the best interests of the parties' minor child, P[....] E[...] D[....] M[....], and report to the court on the best interests of the minor child with regard to the respondent's rights of contact;
- 1.4 pending finalisation of the investigation by the Family Advocate, that it be ordered that the respondent will have contact rights with the minor child every alternative Saturday from 09h00 -17h00 and every alternative Sunday from 09h00-17h00, with the respondent collecting the minor child from the applicant's residence and returning him to the same residence;
- 1.5 an order that the respondent pay maintenance in the amount of R5 000.00 per month for the minor child.

[2] The following facts are common cause:

- 2.1 the applicant and the respondent were in a relationship from around 2008 and had been living together until they separated during September 2018;
- 2.2 during 2010 there were lobola negotiations between the parties' families which culminated in the respondent paying lobola in the amount of R4, 000.00 to the applicant's family, with a balance of R12, 000.00 still remaining. In December 2012 a balance of R12, 000.00 was paid over to the applicant's family and there was a celebration held by both families;
- 2.3 from the relationship the minor child was born on 13 July 2012;
- 2.4 during the currency of the relationship the parties obtained a joint mortgage loan and bought the property.

[3] In her founding affidavit and in support of the relief sought for the valuation and selling of the property, the applicant alleges that both parties contributed equally to the monthly instalment of the property.

[4] The respondent is opposing the granting of the relief sought by the applicant and also filed a counter-application.

[5] In the counter-application the respondent seeks, pending the determination of

his counter-application in which he seeks an order granting him leave to register a purported customary marriage between himself and the applicant which was allegedly concluded in 2012 in terms of the Recognition of Customary Marriages Act 120 of 1998 within 14 days of the order, for the ma[n application to be dismissed. In support of this claim the respondent alleges that after he paid lobola for the applicant, there was a celebration of a customary marriage which the parties concluded. The respondent further alleges that in seeking the relief sought in her application, the applicant is trying to evade the consequences of a customary marriage in order to unduly benefit from their relationship and the years spent living together.

- [6] In his answering affidavit the respondent alleges that the applicant is not entitled to be granted the relief relating to payment of maintenance as he already supports the minor child. He further alleges that the instalments for the loan were paid solely by him from inception until February 2019 , albeit they were paid from the applicant's bank account in which he used to transfer the instalment amount.
- [7] In her replying affidavit, the applicant denies that the parties had concluded a customary marriage as she had no intention of entering into a marriage with the respondent. The applicant further denies, as alleged by the respondent, that she did not contribute towards the payment of the instalments for the property.
- [8] Counsel for the respondent submitted that in her replying affidavit, the applicant foresaw that there was a factual dispute particularly with regard to whether the , parties had concluded a customary marriage which has implications with regard to the property and that the applicant should have sought a referral to oral evidence to determine whether or not a customary marriage was entered into.
- [9] The respondent's Counsel argued that a determination of the status of the parties' relationship before their separation has an impact on how the property should be dealt with and the parties' parental rights and obligations with regard to the minor child. Counsel further submitted that the applicant's application should be dismissed and the determination of the counter-application should be postponed and the matter be referred for oral evidence for the adjudication

of whether or not a customary marriage exists between the parties.

- [10] As correctly pointed out by counsel for the respondent, there is clearly a factual dispute with regard to whether after the lobola was paid, the parties concluded a customary marriage. This is reflected in the respondent's answering affidavit, inclusive of his counter-application.
- [11] Where there are material disputes of fact on the papers it is trite that an application should not proceed by way of motion, but rather by way of action. The applicant did not seek a hearing of oral evidence. In such circumstances, the appropriate order must be to dismiss the application. In *Stellenbosch Farmers' Wine, y Ltd v Stellenvale Winery (Pty) Ltd* (1957 (4) SA 234 (C) at 235 E-G, the court held that where there is a dispute of facts, final relief should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order. See also *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428-429; *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) at 56F-57B).
- [12] I am satisfied that a factual dispute exists on whether a customary marriage was entered into by the parties, which cannot be determined on the papers and that this issue should be referred to oral evidence. Once a determination is made on the status of the parties' relationship, the other issues relating to the parties' rights with regard to the property and their rights and obligations with regard to the minor child can be determined.
- [13] In light of the view I have taken, on reserving judgment I ruled that the minor child should remain in the primary care of the applicant and that the respondent have contact rights with the minor child every alternative Saturday and Sunday from 09h00 to 17h00, until the Family Advocate has made recommendations with regard to the respondent's contact rights, pending a determination of the status of the parties' relationship. I further ordered that the respondent should continue maintaining the minor child.
- [14] In the result the following order is made:
1. The issue of whether or not a customary marriage exists between the parties is referred to oral evidence.

2. Prayer 3 of the applicant's notice of motion is granted;
3. The application, except for paragraph 3 of the applicant's notice of motion, is dismissed.
4. The counter-application is postponed *sine die*.
5. The minor child is to remain under the primary care of the applicant pending a determination of the status of the parties' relationship;
6. The respondent to have rights of contact with the minor child every alternative Saturday and Sunday from 09h00 to 17h00, pending the Family Advocate 's recommendations.
7. Costs are reserved.

NP MNGQIBISA-THUSI
Judge of the High Court

Appearance

For Applicant: Advocate N Nortje (instructed by ML Schoeman)

For the Respondents: Advocate KTM Mabusela (instructed by Risenga Attorneys)