

SOUTH AFRICA / JUDGMENT

M.R v M.T (HCA38/2022) [2024] ZALMPPHC 45 (6 May 2024)

[2024] ZALMPPHC 45

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Mathabathe

CASE / FILE NUMBER

HCA38/2022

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

LIMPOPO DIVISION,

POLOKWANE

CASE NO: HCA38/2022

1. Reportable: Yes/No

2. Of interest to other

judges: Yes/No

3. Revised

In

the matter between:

M[...]

Z[...]

R[...] APPELLANT

And

M[...]

A[...]

T[...] RESPONDENT

JUDGEMENT**KGANYAGO J**

- [1] The appellant had instituted divorce proceedings against the respondent claiming (i) a final decree of divorce; (ii) and no order as to division of the joint estate on account of the parties having entered into a marriage out of community of property, to the express exclusion of the accrual system. According to the appellant's particulars of claim, the parties were married to each other out of community of property on 27th January 2015. The parties have also entered into an antenuptial contract (ANC) on 27th January 2015 which was registered on 11th February 2015.
- [2] The respondent had defended the appellant's divorce action, and had also filed a claim in reconvention. In her claim in reconvention, the respondent had stated that the parties were married to each other on 25th July 2009 in terms of the Recognition of the Customary Marriages Act 120 of 1998. The parties on 27th January 2015 changed their matrimonial regime in terms of section 10 of Act 120 of 1998 to civil marriage in terms of Marriage Act 25 of 1961, and concluded an invalid antenuptial contract as the marriage was already in place. The grounds of its invalidity were that the antenuptial contract was not sanctioned by the High Court; did and did not record the net commencement value of the parties' respective estate/separate properties.
- [3] The respondent agreed with the applicant that the marriage relationship between the parties has irretrievably broken down and there exist no prospects of restoration of a normal marriage relationship between them. The respondent is seeking
- (i) decree of divorce; (ii) equal division of the joint estate; (iii) and an order that the antenuptial contract is invalid and unenforceable.
- [4] At the commencement of the trial, the parties' counsel agreed that the parties were married to each other in terms of the Recognition of Customary Marriages Act during 2009. That the parties went on to change their matrimonial regime in terms of section 10 of the Customary Marriages Act from customary marriage to civil marriage during 2015.
- [5] The court a quo was called upon to determine whether the ANC was valid since there was no High Court order to change the matrimonial regime, and also that the ANC did not record the parties' net commencement value of their assets. That the issues raised by the defendant did not require oral evidence. The parties further agreed that the matter should proceed on the basis that there was irretrievable breakdown of the marriage between them. Further that they will address the court during their closing arguments on the outstanding legal issues. That the issue whether the parties have concluded a customary marriage before the 2015 civil marriage was not a critical issue to be decided by the court a quo, but the critical issue was the validity of the ANC. Further that the onus was on the respondent since she was the one challenging the validity of the ANC.

- [6] The respondent testified that she and the appellant were married to each other by traditional marriage during 2009, which they changed to civil marriage during 2015. The marriage relationship between her and the appellant had irretrievably broken down, and there exist no prospects of restoration of a normal marriage relationship. The last time she and the appellant had stayed together as husband and wife was during 2019.
- [7] Even though at the commencement of the trial the parties have agreed that the determination of the validity of the customary union was not that critical, the respondent was cross-examined at length about the validity of the customary union between her and the appellant. It was put to the respondent that the lobola negotiations were not concluded on 25th July 2009 since the minutes of the lobola negotiations shows that it was agreed that they were still going to have a day on which the negotiations were going to be finalised when certain outstanding things will be brought. The respondent stated that the lobola negotiations were finalised when the full amount was paid on 25th July 2009, and that the only outstanding things were the bringing of the cow and Richelieu brandy by the appellant's family.
- [8] The respondent conceded that that their initial agreement or understanding was that she and appellant will eventually enter into a civil marriage rites. The respondent conceded that she is the one who had made an appointment with a notary regarding the ANC, but that those attorneys were suggested to her by the appellant. Further that she is the one who had laid out the process that then resulted in the drafting of the ANC. That concluded the evidence of the respondent and she closed her case.
- [9] The appellant took the witness stand and testified under oath. He testified that he and the respondent were married to each other by civil rites. Ahead of their marriage they have concluded an ANC, which they have both signed it. His wife's sister-in-law and brother-in-law have both signed the ANC as their witnesses. The customary union between him and the respondent was not concluded on the day of the lobola negotiations, because it has always been their intention to enter into a civil marriage. In his understanding, the customary marriage between him and the respondent was going to be concluded on the day an ox and other outstanding things were brought to the respondent's homestead. Before you go to Home Affairs Department to sign the civil marriage, you first had to observe the proper cultural processes. He had been living with the respondent as husband and wife since 2009.
- [10] The appellant was cross-examined and he conceded that during 2009 he paid the lobola amount in the sum of R20 000.00. On finalisation of the negotiations, there will be an ox which will be slaughtered, and his emissaries (appellant's) will take a portion of that ox as well as sorghum beer to the appellant's homestead. He and the respondent have been staying together since 2005. The appellant denied that the lobola negotiation started in 2007 and concluded in

2009. The appellant disputed that in 2015 when he and the respondent signed the ANC before a notary, they have already entered into a customary marriage. That concluded the evidence of the appellant, and he closed his case.
- [11] The court a quo found in favour of the respondent, made orders finding that (i) the customary union between the appellant and respondent contracted on 25th July 2009 was declared to be valid and effect in terms of the Recognition of Customary Marriages Act 120 of 1998; (ii) the civil marriage contracted on 27th January 2015 was declared null and void; (iii) decree of divorce was granted; and (iv) equal division of the joint estate. The appellant is appealing against the whole of the judgment and order of the court a quo.
- [12] The parties are agreement that their marriage relationship has irretrievably broken down and there is no prospect of restoration of a normal marriage relationship, and are therefore seeking a decree of divorce. What was contentious was the ANC. Even though the parties during their oral evidence in the court a quo have spent quite some time on whether they intended their matrimonial regime to be customary or civil, they were not seeking any relief on that issue. The respondent in her plea had stated that the parties have entered into a customary marriage on 25th July 2009 which marriage regime was changed on 27th January 2015 in terms of section 10 of the Recognition of the Customary Marriages Act 120 of 1998 into a civil marriage. Counsel for the respondent had submitted that the parties were entitled to change their matrimonial regime. Therefore, the issue whether the parties were married by customary or civil rites was no longer contentious, except for the validity of the ANC.
- [13] The court a quo in its judgment has found that there were two issues to be determined which were (i) whether a valid customary marriage was concluded between the parties on 25th July 2009; and whether the parties' subsequent civil marriage out of community of property concluded on 27th January 2015 was valid. The issues which the court a quo has determined, were issues which were not in dispute. From the parties' papers and opening address, the issue which the court a quo was called upon to determine was the validity of the ANC. The court a quo in its judgment never dealt with this issue. Order 1 and 2 of the judgment of the court a quo, were orders which the parties never sought. The remainder of the orders granted by the court a quo were based on orders which were never sought by the parties.
- [14] In *Fischer and Another v Ramahlele and Others*[1] Theron JA and Wallis JA said:
- "[13] Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in pleadings or affidavits which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to basic human rights guaranteed by our Constitution for 'it is impermissible for a party to rely on a constitutional complaint not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for*

the court to determine that dispute and that dispute alone.

- [14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting, or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or approach to a case that has not previously occurred to the parties. However, it is for the parties to determine whether they wish to adopt a new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or to call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones and compel them to deal with matters other than those they have formulated in pleadings or affidavits”.
- [15] Counsel for both parties in their opening address have made it clear to the court a quo that the critical issue to be determined was the validity of the ANC, and that even if there was a slight difference in relation to the conclusion of the customary marriage and civil marriage, that rift was not a critical issue to be decided by the court. Counsel for the respondent even went further to state that the parties were entitled to change their marriage from customary to civil marriage. The parties have defined the nature of the dispute to be adjudicated by the court a quo, and it was for the court a quo to determine the dispute pleaded and identified by the parties, and not beyond that.
- [16] The court a quo has failed to determine the dispute identified by the parties, but chose to deal with issues that were not in dispute. The court a quo has therefore misdirected itself and on that point alone the appeal stands to be upheld. The question is whether this matter should be remitted back to the court a quo to deal with the issue of the validity of the ANC since it was never dealt with. Both parties are in agreement that their marriage relationship has irretrievably broken down and there are no reasonable prospects of restoration of a normal marriage relationship between them. It will therefore be in the best interest of justice and the parties if the appeal is finalised without remitting it back to the court a quo.
- [17] The requirements for a valid ANC is that both spouses must sign the ANC before a notary, and in the presence of two witnesses. The appellant and the respondent have signed their ANC before a notary and two witnesses. There are no issues whether the two witnesses were competent or not. The ANC was signed on 27th January 2015 the same date the parties entered into their civil marriage, and was duly registered on 11th February 2015. The parties ANC read as follows:

“The parties declared that since they have agreed to enter into marriage with each other and intend that such marriage be so concluded between them, they have agreed and now therefore contract with each other:

1. That there shall be no community of property, or profit and loss, between them, but that he or she respectively retain and possess all his or her estate and effects, movable and immovable, in possession, reversion, expectancy or contingency, as fully and effectually as if the said intended marriage did not take place.
2. That the marriage shall not be subject to the accrual system in accordance with chapter I of the Matrimonial Property Act 88 of 1994.
3. That the one of them shall not be answerable for the debts and engagement of the other of them, whether contracted before or after the said intended marriage.
4. That all inheritances, legacies, gifts, or bequests, which may devolve upon, or be left, given or bequeathed to either of them, shall be the sole and exclusive property of him or her upon or to whom the same shall devolve, or be left, given or bequeathed.
5. That each of them shall be at full liberty to dispose of his or her property and effects by will, codicil or other testamentary disposition, as he or she may think fit, without the hinderance or interference in any manner of the other of them”.

[18] The ANC regulates the parties’ matrimonial regime whilst the marriage is still in force. In *B v B*[2] Kgoele AJA said:

“The primary objective of the ANC is not to create obligations, but to determine the matrimonial property system between spouses by excluding or varying the normal patrimonial consequences of the marriage. Regarded in this light, the ANC is by no means a contract”.

[19] The appellant and the respondent had determined their matrimonial property system as per their signed ANC. The court take judicial notice that in black culture, it is normal for the parties to first negotiate lobola and finalise those negotiations before the parties goes to conclude their civil marriage in church or at the Home Affairs. When they go to church or Home Affairs to conclude their civil marriage it does not mean that they are changing their matrimonial regime from customary to civil. What it entails is that the parties have first observed their custom before concluding the civil marriage. It is also common in black culture for lobola negotiations to take some years before they are formally concluded. It is therefore not surprising that the parties have commenced their lobola negotiations on 25th July 2009, but only concluded their civil marriage on 27th January 2015.

[20] In terms of section 3 of the Recognition of Customary Marriage Act[3] the requirements for a valid customary marriage are that the prospective spouses must be above the age of 18 years; must both consent to be married to each other under customary marriage; and the marriage must be negotiated and entered into or celebrated in accordance with customary law. There is no evidence that parties have consented to be married to each other under

customary marriage. In fact, they have both testified that it was their understanding/intention that they were going to enter into a civil

marriage. Even the minutes of the lobola negotiations shows that on the day the R20 000.00 which was the lobola amount was paid, there were some outstanding things which were postponed for a future date. From the record of the proceedings in the court a quo, it does not appear when those outstanding things were complied with. Whether they were ever complied with or not, it was not a bar to the parties to enter into a civil marriage. It was therefore not surprising that the parties have agreed that the issue to be determined by the court a quo was the validity of the ANC.

[21] A party that is challenging an ANC must show that the ANC is contradictory and incoherent. In terms of the wording of clause 1 of the parties' ANC, their estate was nil at commencement of their civil marriage, contrary to what the respondent had pleaded in her claim in reconvention that it did not record the net commencement value of the parties' respective estate. There was no change in the appellant's and respondent's matrimonial regime, and it was not necessary for the parties to approach the high court when they concluded their ANC. The respondent when testifying in the court a quo, did not seriously challenge the validity of the ANC. No evidence was presented in what way was the ANC contradictory or incoherent if ever it was. This court is therefore satisfied that the parties have determined their matrimonial property system as per their ANC, and the respondent has failed to show in what respect is their ANC is invalid. The appellant's and respondent's

ANC concluded on 27th January 2015 and registered on 11th February 2015 remain intact and enforceable. It follows that the appeal stands to be upheld.

[22] In the result, the following order is made:

22.1 The appeal is upheld with costs on party and party scale.

22.2 The order of the court a quo is set aside and replaced with the following:

“(a) A final decree of divorce is granted;

(b) No order as to division of the joint estate on account of the parties having entered into a marriage out of community of property – to the express exclusion of the accrual system;

(c) Each party to pay his/her own costs”.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

I AGREE

MATHABATHE AJ

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the appellant: Adv K Ramarumo

Instructed by:

Legodi Attorneys

Counsel for the respondent: Phooko ME

Instructed by:

Moloko Phooko Attorneys

Date heard:

1st March 2024

Electronically circulated on: 6th May 2024

[1] [2014] ZASCA 88; 2014 (4) SA 614 (SCA); 2014 3 All 395 (SCA) (4 June 2014) at paras 13 and 14

[2] [2022] ZASCA 123; 2023 (1) SA 381 (SCA) (22 September 2022) at para 8

[3] 120 of 1998

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