

SOUTH AFRICA / JUDGMENT

R.M v T.M (1142/2014) [2018] ZALMPPHC 22 (29 November 2018) [2018] ZALMPPHC 22

COURT

Limpopo High Court, Polokwane

BEFORE

G.C Muller

CASE / FILE NUMBER

1142/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: 1142/2014

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

29/11/18

SIGNATURE:

In

the matter between: R[...]
N[...] T[...]
M[...]
PLAINTIFF
And
T[...]
R[...]
M[...]
DEFENDANT

JUDGMENT

MULLER J:

- [1] This is a divorce action. The court was requested by the parties to determine a dispute separately in terms of rule 33(4) prior to the rest of the disputes in the action.
- [2] This issue is of importance and will serve to curtail the litigation.[1] It was agreed between the legal representatives that the dispute which was outlined in the plaintiffs' practice note be determined on the basis of certain common cause facts.
- [3] The common cause facts are that plaintiff and the defendant:
- (a) were married to each other in community of property in terms of customary law on 7 October 2006;[2]
 - (b) were neither in a subsisting customary marriage with any other person at the time nor at present.
 - (c) proposed to conclude a marriage in terms of the Marriage Act[3] and entered into an antenuptial contract with each other on 3 December 2010 in terms whereof they agreed that there will be no

community of property or community of profit and loss between them with exclusion of the accrual system as provided for in Chapter 1 of the Matrimonial Property Act, Act 88 of 1984[4] from the marriage they intended to be solemnized between them.[5]

- (d) entered into the proposed civil marriage with each other on 10 December 2010.
- (e) did not apply to any High Court in terms of section 21 of the Matrimonial Act for leave to change the matrimonial property system of their proposed marriage.

[4] The court was requested by agreement to determine the following question:

"1. Whether or not the ante-nuptial contract entered into between the parties on 3 December 2010 is valid having regard to the fact that the parties were at the time already married to each other in terms of Customary Law which marriage was concluded on 7 October 2006 in community of property;

2.The interpretation of Section 10(2) of the Recognition of Customary Marriages Act, Act No 120 of 1998." [6]

- [5] The contention on behalf of the plaintiff is that during the subsistence of a marriage relationship, the parties were unable to change the matrimonial system applicable to their marriage. It is argued that without prior permission being granted by a court to change the matrimonial system from a marriage in community of property to marriage out of community of property, in terms of section 21 of the Matrimonial Act, the antenuptial contract concluded by the parties is invalid.
- [6] The defendant argued that the parties are entitled to conclude a civil marriage if they are married in terms of customary law and not married to anyone else, with a view to replacing the customary marriage with a civil marriage in terms of section 10(1) of the Act. It is contended that section 10(2) of the Act grants the parties the right to conclude an antenuptial contract without having to apply to change the matrimonial property system of their customary marriage in community of property to a civil marriage out of community of property in terms of section 21 of the Matrimonial Act.
- [7] Section 211(1) of the Constitution recognises the institution, status and role of traditional leadership, according to customary law. Linked to this provision is section 211(3) which provides that a court must apply customary law when customary law is applicable, subject the Constitution and any legislation that specifically deals with customary law. The Bill of Rights provides for legislation recognising marriages concluded under any tradition[7] or a system of personal and family law under any tradition.[8] It also preserves the right of any one to use the language and to participate in the cultural life of their choice[9] and allows persons belonging to a cultural, religious or linguistic community to enjoy their culture, practise their religion and use their language.[10] These rights may not infringe the foundational values enshrined in section 7(1) of the Constitution.[11] The Act gives effect to the Constitution by giving recognition to customary law as a living and continually evolving integral part of South African law.[12]
- [8] The Act, on a different level, is also a means by which gender equality is achieved in customary marriages. It is unequivocal in stating that:
- "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law." [13]
- [9] Marriage as an institution is deeply engrained in our society.[14] Customary law marriages, were, apart from certain statutory exceptions, regarded as *contra bonos mores* mainly because of their polygamous nature by colonial powers and the Roman Dutch common law. [15]

- [10] Civil marriages in contrast to a customary marriages .are monogamous. A civil law marriage concluded in terms of the Marriage Act is a legally recognised voluntary "union of one man with one woman, to the exclusion, whilst it lasts, of all others." [16] The co-operation of a duly appointed marriage officer appointed in terms of the Marriage Act is required to bring such a marriage into existence. [17]
- [11] The purpose of Act is to reform customary law by giving recognition to customary marriages and to make provision for the requirements for valid customary marriages as well as the registration of such marriages. [18] It provides for equal status and capacity of spouses in such marriages and regulate the proprietary consequences of customary marriages, as well as the dissolution of such marriages. [19]
- [12] It is a fundamental tenant of statutory interpretation that words in a statute should be given their ordinary grammatical meaning, unless to do so would result in an absurdity. [20] In addition, the statutory provisions must be interpreted purposively, and in their proper context, consistently with the Constitution to preserve their constitutional validity, where reasonably possible. [21]
- [13] Customary marriages, since the Act came into force, are marriages with equal status to that of a civil marriages for all purposes. [22] Section 2(1) and (2) of the Act reads that:
- "(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage. [23]
- (2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage."
- [14] Section 2, therefore, gives statutory recognition to marriages which are concluded in terms of customary law. [24] The Act, in addition, also acknowledges that the indigenous African peoples in South Africa are at liberty conclude monogamous civil marriages in terms of the Marriage Act which is available to all members of the population irrespective of race, nationality or religion. [25] A person who entered into a civil marriage may not conclude a customary marriage. [26] Section 3(2) provides:
- "Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such a customary marriage."
- [15] The proprietary consequences of a customary marriage are given effect to in section 7. Section 7(1) and (2) which were declared unconstitutional stated:
- "(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law. [27]

"(2) The proprietary consequences of a customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage[28]

[16] Subsection (5) reads:

(5) Section 21 of the Matrimonial Property Act, 1984 (Act No 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse."

[17] A peculiar provision is contained in section 10 which permits spouses of a subsisting customary marriage to conclude a civil marriage, provided they are in a monogamous customary marriage with each other. Section 10 states:

"(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984) apply, in respect of any marriage which is in community of property as contemplated in subsection (2)".

[18] The underlying rationale for the inclusion of section 10 in the Act, it seems, is to afford spouses to a customary marriage, for the benefit of the wife, the option to convert a potentially polygamous marriage regime into a monogamous marriage by allowing them to conclude a civil marriage.[29]

Section 8 states:

"(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage."[30]

[19] The provisions of section 10 appears to be inconsistent with the provisions of section 8. It will be anomalous if spouses married in terms of customary law in community of property is permitted to conclude a civil marriage without the customary marriage first having been dissolved.[31] It will be plainly be contrary to the general scheme disclosed by the context of the statute.[32] It was stated in *Hatch v Koopoomal*:[33]

"As I read Venter's case and the decisions on which it is founded, the degree of absurdity or repugnance is of importance as it bears upon the intention of the enactment under discussion. If, examining results, you find absurdity or repugnance of a kind, which, from a study of the enactment as a whole, you conclude the Legislature never could have intended, then you are entitled so to interpret the enactment as to remove the absurdity or repugnance and give effect to the intention of the Legislature"[34].

[20] The aim of section 10, in my view, is intended to mean that the conclusion of a civil marriage extinguishes the customary marriage by the operation of law and brings an end to the proprietary consequences of the customary marriage in community of property or in terms of an antenuptial contract, if an antenuptial contract was entered into. To require of the spouses first to dissolve their subsisting customary marriage by decree of divorce, as provided in section 8, before they may enter into a civil marriage on the ground of irretrievable breakdown of the marriage relationship between them, which is the only basis upon which the customary marriage, in casu, may be dissolved where there is no such breakdown, is simply absurd and against the clear meaning of section 10(1). The contention that section 10 should be interpreted to allow the proprietary consequences of a customary marriage to continue even after the

spouses remarried in terms of a civil marriage, cannot be accepted. A duly solemnized civil marriage which complied with all the formal requirements of a civil marriage in terms of the Marriage Act and nothing less, is contemplated. The customary marriage comes to an end and with it also the proprietary consequences of that marriage. It is, moreover, totally repugnant to the idea of a civil marriage that a customary marriage can co-exist with a civil marriage.[35]

[21] A civil marriage is in community of property, unless a prenuptial contract provides otherwise.[36] The legal position of the parties to the customary marriage who elected to conclude a civil marriage is similar to parties married in community of property who divorced and subsequently remarry out of community of property in terms of an antenuptial contract with the exclusion of the accrual system as contemplated by the Matrimonial Act.

[22] Neither section 7(5) of the Act nor section 21 of the Matrimonial Act finds application. Section 7(5) is applicable to a subsisting customary marriage.[37] When the civil law marriage came into being, the spouses were unable to change the matrimonial property system of the customary marriage which has come to an end. Prior permission is not required as contemplated by section 7(5) of the Act or section 21 of the Matrimonial Act, for the execution and registration of an antenuptial contract in respect of their proposed civil law marriage.

[23] Section 10 contains no provision making it compulsory for spouses to apply to change their matrimonial property system in terms of section 21 of the Matrimonial Act, before they may enter into an antenuptial contract in terms whereof the proprietary consequences of their proposed civil marriage will be governed. An antenuptial contract takes effect on the date of the civil marriage and is effective against third parties upon registration in the deeds office.

[38]

[24] Community of property provides each spouse with an undivided and indivisible half-share in all property and liabilities of the joint estate.[39] The execution of the antenuptial contract, in my judgment, do not adversely affect the interest of existing creditors. The spouses remain jointly liable for liabilities incurred during the subsistence of the customary marriage in community of property.

In the result I make the following order:

ORDER

1. It is declared that the antenuptial contract executed by the parties on 3 December 2010 is valid.
2. The plaintiff is ordered to pay the costs of the separated issues.

G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

1. For the Plaintiff

: M.C De Klerk

2. For the Defendant

: M Haskins SC

3. Date of hearing

: 22 November 2018

4. Date of judgment delivered : 29 November 2018

[1] An order was made in terms of rule 33(4) that this dispute be determined before any other dispute.

[2] In terms of the Recognition of Customary Marriages Act 120 of 1998. (Hereinafter called "the Act"

- [3] In terms of the Marriage Act, Act 25 of 1961. Hereinafter called the "Marriage Act"). Also referred to as a "civil marriage".
- [4] (Hereinafter called "the Matrimonial Act".
- [5] The contract was executed on 3 December 2010 prior to the civil marriage and duly registered on 11 January 2011.
- [6] The interpretation of section 10(2) will provide the answer to the first question.
- [7] s15(3)(a) of the Constitution states: "This section does not prevent legislation recognising- (i) marriages, concluded under any tradition, or system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."
- [8] Fn 7.
- [9] s 30 of the Constitution.
- [10] s 31(1)(a) of the Constitution.
- [11] s 7(1) declares: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the right of all people in our country and affirms the democratic values of human dignity, equality and freedom."
- [12] *Alexkor Ltd and Another v The Richtersveld Community and Others*
- [2003] ZACC 18; 2004 (5) SA 460 (CC) para 51-56. Customary law may be established by reference to writers on customary law as well as other authorities and sources. Customary must not be considered through the prism of the common law.
- [13] s 6 of the Act. See also Bakker P "The validity of a customary under the Recognition of Customary Marriages Act 120 of 1998 with reference to sections 3(1)(b) and 7(6)-Part I" 2016 THRHR 231 232.
- [14] *Fourie and Another v Minister of Home Affairs and Another*
- [2003] ZACC 11; 2003 (5) SA 301 (CC) para 12; *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*
- [2005] ZACC 19; 2006 (1) SA 524 (CC) para 24; 63-68.
- [15] *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307 -309; *Ismail v Ismail* 1983 (1) SA 1006 (AD) 1024C-F; 1026B-C.
- [16] *Mashia Ebrahim v Mohamed Essop* 1905 TS 59 61; *Seedat's Executors v The Master (Natal)* supra 309; *Nkambula v Linda* 1951 (1) SA 377 (AD) 381A.

[17] In addition, certain formal requirements must be met in terms of the Marriage Act. The requirements for the validity of customary

marriages are less formal and no duly appointed marriage officer is a requirement. See *M v K* (2017/2016) ZALMPPHC 62 (7 November 2018) para 27; 34.

[18] *Gumede v President of Republic of South Africa and Others* 2009 (3) SA 152 (CC) para 24.

[19] See the preamble to the Act.

[20] *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 543; *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) para 37; *Cool Ideas 1186 CC v Hubbard and Another* 2014 SA 474 (CC) para 28.

[21] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*

[2007] ZACC 12; 2007 (6) SA 199 (CC) para 5; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) para 24.

[22] If all the formal requirements referred to in s 3 are met. See also Maithufi PIP 'The requirements of validity and proprietary

consequences of monogamous and polygynous customary marriages in South Africa: Some observations" 2015 De Jure 261.

[23] The date of commencement was 5 November 2000.

[24] Customary law as defined in s 1: "means the custom and usages traditionally observed among the indigenous African peoples of South Africa and which formed part of the culture of those peoples."

[25] Section 8(2) of the Civil Union Act 17 of 2006 prohibits a person in a civil union to conclude a marriage under the Marriage Act or the Act.

[26] s 10(4) of the Act.

[27] s 7(1) was declared unconstitutional in *Gumede v President of Republic of South Africa and Others* supra para 59.

[28] The inclusion of the words 'entered into after the commencement of this Act' was also declared unconstitutional at the same time.

[29] The Summary of the Provisions of the Bill contained in the Memorandum on the Objects of the Recognition of Customary Marriages

Bill, 1998 states in paragraph 3.10: "Clause 10 governs change of marriage system. A couple in a subsisting customary marriage may therefore remarry under the Marriage Act, 1961, but, if they are already parties to a civil marriage, they may not validly contract a subsequent customary marriage. These provisions assume that, although open-ended, potentially polygamous marriage may be converted into a monogamous marriage, to allow the reverse would seriously prejudice the position of the wife."

[30] The parties will not be barred from relying on other grounds like insanity or presumption of death for instance.

[31] Also that two marriage regimes may exist side by side if the customary marriage is not dissolved by decree of divorce.

[32] *Venter v R* 1907 TS 914-915.

[33] 1936 AD 190.

[34] 209.

[35] In *Nkambula v Linda* supra 381D-E the court stated: "This definition seems to me to accept as a simple fact the proposition that in respect of a man or a woman bound by civil marriage the law cannot recognise the bond of another "association of a man and a woman in a conjugal relationship." See also Horn J and Janse van Rensburg AM "Practical implications of the recognition of customary marriages" 2002 *Journal for Juridical Science* 54 65. See also Bennett TW *Customary Law in South Africa* (Juta & Co Ltd Claremont 2004) 238.

[36] s 10(2) of the Act.

[37] s 7(5) is applicable to spouses in customary marriages who wished to change the matrimonial property system of a subsisting customary

marriage. Section 21 of the Matrimonial Act sets out the powers of the court and the procedural requirements to change the matrimonial

property system of such subsisting marriage.

[38] s 87(1) of the Deeds Registries Act, Act 47 of 1937. It is also not a postnuptial contract.

[39] *De Wet NO v Jurgens* 1970

(3) SA 38 (A) 460-470; *Mazibuko and Another v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA) para 48.

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Prepared on 12 October 2026 · Esheria