JOSEFINA NANGULA MOFUKA V TEOFILUS MOFUKA
CASE NO. (P) I 379/2000

2001/12/14

Maritz, J.

NATIVE LAWW AND CUSTOM

Native Administration Proclamation – s. 17(6) – application only to area defined as "Police Zone" - civil marriage by blacks in that area – proprietary consequences of – no declaration before marriage officer or magistrate – marriage out of community of property

Antenuptial contracts – liberty of intending spouses to contract on matrimonial regime applicable inter se after marriage – such agreement enforceable as between parties – no formalities required for enforceability of such contract inter se.

CASE NO. (P) I 379/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOSEFHINA NANGULA MOFUKA Plaintiff

versus

TEOFILUS MOFUKA Defendant

CORAM: MARITZ, J.

Heard on: 2000/05/19

Delivered on: 2001/12/14

JUDGMENT

MARITZ, J.: In this pending action for a divorce and ancillary relief, the Court, on the application of counsel for the defendant, ordered in terms of Rule 33(4) that the question whether or not the

marriage between the parties has been contracted in or out of community of property be decided separately from any other issue on the pleadings.

The plaintiff alleges that that she is married to the defendant in community of property. That allegation is denied by the defendant, who, as plaintiff-in-reconvention pleads that the marriage was contracted out of community of property. Asked on what basis he so asserts, he pleads as follows:

> "The parties are black and their marriage was solemnized north of the police zone in terms of section 17 (6) of the Native Administration Proclamation No.15 of 1928 as amended. In terms of the said section, marriages between Blacks are automatically out of community of property, unless the intending spouses made a declaration one month prior to the marriage before a Magistrate or a marriage officer that they want their marriage to be in community of property. No such declaration was made."

It is common cause that the parties were married to one another at Onawa in Ovamboland on 1 September 1995; that it was a civil marriage solemnized by a marriage officer according to the formalities prescribed by the Marriage Act, 1963 and that the parties are both

"Blacks" for purposes of the definition of that word (previously "Native") in s.25 of the Native Administration Proclamation, 1928.

The matrimonial property regime applicable under common law to a civil marriage has been summarised by Watermeyer, CJ in *Ex parte Minister of Native Affairs: In re Molefe v Molefe,* 1946 AD 315 at 318:

> "In the case of a legal marriage, where no question of domicile outside of the Union is involved, the proprietary rights of the spouses resulting therefrom, must be governed by the common law of South Africa except in so far as specific provisions have been introduced by statute, which alter the common law. At common law a husband and wife can, as between themselves, by an ante-nuptial agreement, regulate their proprietary rights after marriage. Such an agreement is binding between the spouses, but is of no effect so far as persons not party thereto are concerned, unless it is duly entered into and registered in accordance of the law governing ante-nuptial contracts. (See secs. 86 and 87 of Act 47 of 1937.) If they do not regulate their proprietary rights by ante-nuptial agreement, then community of property and community of profit and loss will come into existence between them …".

The Western concept of a civil marriage and the legal consequences thereof were foreign to the indigenous peoples of Southern Africa during the pre-colonial era. Theirs was one of (potentially) polygynous

customary unions concluded without formal officiation according to the traditions of each tribe and cemented by bridewealth agreements between the families of the partners in such unions. The arrival of European colonial powers in Southern Africa and their “mission to ‘civilize’ their colonies (T.W. Bennet, *Application of Customary Law in Southern Africa*, 1985, p.138) had a far reaching impact upon African customary legal systems. A choice was given to members of those indigenous groups to conclude civil marriages. The personal and proprietary consequences of those marriages were, however, not only foreign to the indigenous people but, if so contracted, had the potential to cause serious prejudice other parties in existing customary unions.

Hence, uncoordinated attempts were made prior to 1928 to address those concerns by legislation (see: JMT Labuschagne: “Spanningsveld tussen die Psigo-Kulturele en die Juridiese: Opmerkinge oor die Vermoënsregtelike Gevolge van Gemeenregtelike Huwelike tussen Swartes”, THRHR, 1995, p.302 at 303-304). From 1 January 1929 the position was comprehensively regulated in South Africa by s.22 of the Native Administration Act, 1927. Being a mandated territory of the Republic of South Africa at the time, the legislative authorities in the then South West Africa soon followed suit with the promulgation of the Native Administration Proclamation, 1928. Section 17 dealt with

"Marriage" in almost identical terms as s. 22 Act 38 of 1927 (RSA). However, whereas s. 22 became of force and effect in South Africa from the beginning of 1929, s. 17 of Proclamation 15 of 1928 did not. In terms of s.27 of the Proclamation, the Administrator had to fix the date on which it would commence by notice in the *Gazette* and he could exclude from application in such notice any specified part or provision of the Proclamation "which shall thereupon not apply until brought into operation by a further notice". When the Administrator brought the Proclamation into operation with effect from 1 January 1930 by Government Notice 165 of 11 December 1929, he expressly excluded Chapter IV (which contains s.17). That chapter, with all the legislative intentions to protect customary unions, was never applied in Namibia. That is, except for ss. 17(6) and 18(3) and (9), which were applied with effect from 1 August 1950 only to the area north of the "Police Zone" as defined in the first schedule to the Proclamation. That area includes Ovamboland.

Section 17(6) of the Proclamation (as amended by s.6 of Act 27 of 1985) provides as follows:

> "A marriage between Blacks, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the

> spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage."

It is on this section that the defendant relies for his contention that the marriage between the plaintiff and him is one concluded out of community of property. The plaintiff apparently relies on the common law and an agreement that the marriage would be in community of property for her contentions to the contrary. Neither counsel referred the Court to any authorities for their conflicting submissions. I must also add that the plaintiff did not challenge the constitutionality of s. 17(6) (notwithstanding the expression of an intention to do so in an affidavit filed in an earlier rule 43 application) and did not attack the validity of GN67 of 1954 or the retroactive effect thereof on the pleadings or in argument. Hence, those questions do not arise for decision and I shall refrain from expressing any view thereon. I remind myself of the *caveat* expressed by Dumbutshena, AJA in *Kauesa v Minister of Home Affairs and Others*, 1996 (4) SA 965 (NmS) at 974D-E:

> “Before leaving this aspect of the appeal we consider it appropriate to refer to what was said by Bhagwati J (as he then was) in M M Pathak v Union (1978) 3 SCR 334 in relation to the practice of the Supreme Court of India:
>
> > 'It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case.'
>
> We respectfully endorse those words, particularly when applied to constitutional issues, and commend such a salutary practice to the Courts of this country. Constitutional law in particular should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time.”

The legislative intention behind the promulgation of the subsection, according to Bennet, *op. cit.*, p.155 (dealing with an almost identical s.22(6) of the RSA Act), was to ensure that “the parties to the marriage would not be caught unawares by a property system with which they would be unfamiliar”.

The effect of this section on the legal consequences of civil marriages between Blacks contracted after 31 July 1950 in the area defined as the “Police Zone” is significant. No longer does community of property follow unless excluded – rather, the converse applies: The marriage is out of community of property, unless declared or agreed otherwise.

After a careful and authoritative analysis of s. 22(6) of the RSA Act, Watermeyer, CJ concluded as follows in *Ex parte Minister of Native Affairs: In re Molefe v Molefe, supra,* at 320:

> "The proprietary rights of native spouses who contract a valid marriage at a time when no customary union subsists between the husband and another woman, and who do not make a declaration in terms of sec. 22 (6) of Act 38 of 1927, will, except in so far as there is a specific statutory provision, depend upon whether or not parties have entered into any ante-nuptial agreement with regard to their proprietary rights after marriage. If they, have entered into such an ante-nuptial agreement then their proprietary rights will depend upon the legal effects, whatever they may be, of such agreement. If they have not entered into any such ante-nuptial agreement then, since community of property, and of profit and loss, does not result from marriage, each spouse retains, subject to any statutory provision, the ownership of his or her own property, but the control of the property of the spouses vests in the husband by virtue of his marital power."

Those remarks apply, *mutatis mutandis*, to s. 17(6).

The plaintiff testified on the circumstances surrounding her marriage with the defendant. It is apparent from her evidence that, even if it is assumed that she and the defendant had been entitled to do so, they

did not make a joint declaration to a magistrate or marriage officer as contemplated in s.17(6). Being Blacks domiciled and married in Ovamboland after 31 July 1950, the proprietary consequences of their marriage are regulated by that section. Their marriage, not producing the legal consequences of marriage in community of property between the spouses, is therefore one out of community of property.

But is that the end of the enquiry in view of her evidence that she and the defendant had agreed that their marriage would be in community of property? I think not. Two further questions arise in that regard: Can the parties agree prior to the conclusion of their marriage that, as between them, the matrimonial property regime would be different to the one applicable by law to their marriage? If so, did the parties enter into such an agreement?

It is trite that in common law, the parties are at liberty to enter into such an agreement. Authority for that proposition has again been confirmed in *Ex Parte Spinazze & Another NNO*, 1985 (3) SA 650 (A) at 651 B where Mr Justice Corbett stated as follows:

> "An antenuptial contract which has not been registered or properly registered, though of no force or effect against persons not party thereto, is valid *inter partes*. Where one of the parties

> to the contract has died, then obviously the contract would be operative as between the estate of the deceased party and the surviving party or parties. It would determine, *inter partes*, their property rights. ... It is clear that in terms of section 86 of the Act an antenuptial contract not registered in the manner and within the time mentioned in section 87 is of no force or effect against any person who is not a party thereto. Having regard, however, to the common law and the legislative background to the Act (which I have sketched above), an antenuptial contract, which has not been so registered, is valid and effective as between the parties thereto. (See Hahlo: "*Law of Husband and Wife*" 5th ed (1985) at 261 to 262.) Indeed, it seems likely (though it is not necessary to decide this point and though ss 86 and 87 deal with written antenuptial contracts ... that even a verbal antenuptial contract, if properly proved, would have such validity inter partes: see *Pollard & Pollard v Registrar of Deeds*, 1903 TS 353 at 356 –7; *Fisher v Malherbe & Rigg & another* (supra at 19); *Ex Parte Kloosman et uxor,* 1947 (1) SA 342 (T) at 347; Hahlo (op cit at 261 –2)."

Similar remarks have been made in the earlier citation from the Molefe-case, *supra*, (at 318). See further: *Lagesse v Lagesse*, 1992 (1) SA 173 (D).

Do parties to a civil marriage regulated by s.17(6) have the same liberty? That they have such liberty, even if they have not made a declaration under s.17(6), has been expressly held by Watermeyer, CJ

in Molefe's-case when he said (at 320): "The proprietary rights of native spouses who contract a valid marriage at a time when no customary union subsists between the husband and another woman, and who do not make a declaration in terms of sec. 22 (6) of Act 38 of 1927, will, except in so far as there is a specific statutory provision, depend upon whether or not parties have entered into any ante-nuptial agreement with regard to their proprietary rights after marriage. If they, have entered into such an ante-nuptial agreement then their proprietary rights will depend upon the legal effects, whatever they may be, of such agreement." (emphasis added).

That is apparently also what McCreath, J alluded to in *Koza v Koza*, 1982 (3) SA 462 (T) at 463E-G when he said:

> "The appellant and the respondent, who are both Blacks as defined in the Black Administration Act 38 of 1927, were married to each other on 9 July 1972. As no declaration had been made by the parties prior to the marriage as provided in s 22 (6) of the said Act the marriage did not produce the legal consequences of marriage in community of property. There is no suggestion of any other ante-nuptial agreement having been entered into between the parties with regard to their proprietary rights after marriage, or that anything else occurred which would subject their proprietary rights to the operation of native law and custom."

In so far as s.17(6) brought about an amendment of the common law applicable to civil marriages, such amendment is not presumed to sweep wider than what is expressly or by necessary implication provided for in the section itself (see: *Johannesburg Municipality v. Cohen's Trustees*, 1909 TS 811 at 818, *Seluka v. Suskin and Salkow*, 1912 TPD 258 at 265 and *Casserley v. Stubbs*, 1916 TPD 310 at 312). So, for instance, did the amendment of the common law by s. 17(6) not affect the marital powers a husband had in marriage (compare e.g. *R v Silas,* 1958 (3) SA 253 (E) and *South African Mutual Fire & General Insurance Co Ltd v Bali, N.O.* 1970 (2) SA 696 (A) at 704) – that is until the abolition thereof by s. 2 of the married Persons Equality Act, 1996. So too, did the amendment not affect the liberty of the intending spouses to agree before the conclusion of the marriage what the proprietary consequences thereof will be as between themselves. Obviously, and for the same reasons applicable to the converse situation in marriages between persons who are not affected by s.17(6), such an agreement will not affect third parties. In *Mathabathe v Mathabate*, 1987 (3) SA 45 (W) at 51 C-D, Stegmann, J said in relation to such unregistered informal antenuptial contracts:

> "The latter antenuptial contracts were of no concern to third parties. As far as third parties were concerned, a marriage between white persons domiciled in South Africa, regulated only

> by and informal or unregistered antenuptial contract, was no different from a marriage in community of property and of profit and loss and from which the marital power was not excluded. Third parties had to conduct their business with the spouses on that basis. Nevertheless, as between the parties, such an antenuptial contract was valid, effectual and enforceable to the extent that the rights of third parties were not affected."

To be binding on the parties, such an antenuptial contract need not be registered. It need not even be in writing. In *Mathabathe's*-case, it was pointed out that the use of the term "antenuptial contract" may be relatively broad or relatively narrow – and the Judge suggested an even wider meaning. Referring to the Molefe-case, he held on 52 H-J:

> "It is apparent from the context that throughout this passage the learned Chief Justice was using the expression 'antenuptial agreement' to refer to an agreement which, expressly or by tacit common intention of the parties, dealt with proprietary rights. Nevertheless there is in my view no reason why the expression 'antenuptial contract' should not in an appropriate context be used in a still broader sense to refer to a pre-marital agreement which does not deal with proprietary rights expressly or tacitly and which leaves them to be dealt with by implication of law."

and at 51H to I:

> "There is no reason why the expression 'antenuptial contract' should not also, when used in an appropriate context, be understood to be used in a broader sense still. Such broader sense may, as Mr Nel contends, be one which includes every kind of pre-marital agreement concluded between intending spouses with a view to bringing about the marriage itself or regulating any aspect of it. Every seriously intended promise of marriage, or contract of betrothal, or engagement to be married, has potential legal consequences and is literally an 'antenuptial contract' when that expression is used, as it properly may be, to refer to every kind of pre-marital agreement."

It is within the context of wider meaning of the expressions that the Plaintiff's evidence should be examined. The plaintiff testified that, when asked by the marriage officer (the pastor of a local church) whether their marriage should be one contracted in or out of community of property, both of them answered that it should be in community of property. Under cross-examination, she gave somewhat of a different explanation. She testified that the pastor had explained to them that the marriage would be one in community of property and, in layman's terms, what the effect thereof would be. According to her, they were married on that understanding. The defendant did not testify.

In the absence of any rebutting evidence by the defendant, I must conclude that the plaintiff proved on a balance of probabilities that she and the defendant expressly agreed prior to the conclusion of their marriage that the proprietary consequences thereof *inter se* would be that of a marriage concluded in community of property. In the alternative, and in any event, they impliedly and by conduct so agreed when, accepting the marriage officer's explanation that the marriage will be concluded in of community of property, they proceeded with the solemnization thereof.

In the result, the following order is made on the issue to be determined under Rule 33(4) in the pending divorce between the parties:

1. The marriage between the plaintiff and the defendant on 1 September 1995 at Onawa in Ovambo has been concluded out of community of property but, as between the plaintiff and the defendant, the marriage has the effect of one concluded in community of property.

2. The costs in relation to this issue will stand over for determination at the end of the case.

MARITZ, J.