REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2020/00095

In the *ex parte* application of:

ERHARD VAN DER MERWE **1ST APPLICANT**

ELSABE VAN DER MERWE **2ND APPLICANT**

Neutral Citation: *Ex parte Application of Erhard Van der Merwe* (HC-MD-CIV-MOT-GEN-2020/00095) [2021] NAHCMD 232 (10 May 2021)

CORAM: MASUKU J
Heard: **Determined on the papers**
Delivered: **10 May 2021**
Reasons: **14 May 2021**

Flynote: Constitutional law – Article 140 – s 17(6) of the Deeds Registries Act 47 of 1937 and its application in Namibia prior to independence – effect of ante nuptial agreements concluded in South Africa pre independence – whether the legal consequences of marriages contracted in South Africa before the independence of Namibia can be regarded as 'governed by the law of any country other than Namibia'.

The 1st applicant' a Namibian by birth, moved to South Africa and there married the 2nd applicant in Johannesburg, South Africa in 1988 prior to Namibia's independence. The couple entered into an ante nuptial agreement, which was registered in the deeds registry in Johannesburg. In 2017, they

relocated to Namibia. The applicants approached the court complaining that financial institutions in Namibia regard the said marriage as one contracted in a country other than Namibia, yet the marriage and the ante-nuptial contract are valid in Namibia because Namibia formed part of the Republic of South Africa before independence. The applicants hold the view that at the time they entered into the ante-nuptial contract the Deeds Registries Act applied to Namibia as its territory was included under the realm of 'Republic'. They therefor sought a *declarator* to that effect. The net effect would be that anything done under this law prior independence should be construed as having been done by an official in Namibia.

Summary: Held that: the ante nuptial contracts entered into in Johannesburg in 1988 and registered in the Johannesburg deeds registry, must be deemed to have been entered into within the Republic, which included the territory of South West Africa as it then was.

Held further that: the laws regulating the registration of ante nuptial contracts applied to Namibia at the time and were in turn thus valid in Namibia.

Held that: Article 140 of the Namibian Constitution renders the actions of the administrative officers before independence effective to the extent that they are deemed to have been the actions of the Government of the Republic of Namibia in so far as there has not been any law passed do declare such law to be invalid and/or a court decree declaring the said law or action unconstitutional.
The court found in favour of the applicant and granted the relief sought.

ORDER

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1. That a rule nisi be and is hereby issued, returnable on **24 June 2021** at **08:30**, calling on all/any interested parties to show cause (if any), on a date and time to be allocated by this Honourable Court why an order in the following terms should not be made final: Declaring that:

1.1 The registration of the Applicants' Ante-Nuptial Agreement No. H 640/1998 by the Registrar of Deeds, Johannesburg in the Republic of South Africa on 10 February 1988 is, by virtue of the provisions of Article 140(3) of the Namibian Constitution as read with section 1 (the definition of "Republic") and section 87(1) and (2) of the Deeds Registries Act, 47 of 1937, deemed to have been done by the Registrar of Deeds of Namibia and is for all intents and purposes of full force and effect in Namibia; and

1.2 The legal consequences of the marriage concluded between the applicants, on 30 January 1990 and arising from their Ante-Nuptial Agreement No. H 640/1988 registered by the Registrar of Deeds in the Republic of South Africa on 10 February 1988 are not governed by the law of any country other than Namibia, as envisaged in section 17(6) of the Deeds Registry Act, 1937, as amended.

2. Ordering and directing that the rights of all/any creditors having any claim(s) against either of the Applicants, which arose prior to the date on which this order is issued, shall not be affected or prejudiced by execution of the Notarial Contract referred to in order 2 or 3 above;

3. Ordering and directing the applicants to publish this Order in 2 local newspapers and simultaneously therewith also in the Government Gazette.

JUDGMENT

MASUKU J:

Introduction

[1] This is an application that served before me on motion court. Mr. Schickerling, who was briefed to appear for and on behalf of the applicants,

addressed the court at length in a captivating manner during the hearing. Judgment in the matter had to be reserved on account of the issues at play and the relief sought, which was novel, as will be evident below.

[2] Because I took the position that the issues raised were novel and involved, requiring at the same time, the court venture into new legal territory, I requested the applicants' legal practitioners to submit some written heads of argument in order to assist the court in the determination of the matter, particularly if the relief sought should be granted.

[3] The heads of argument, which are voluminous, covering about 57 pages, were later submitted on the applicants' behalf. This was some weeks after the oral hearing and by this time, a date for delivery of the judgment had not been indicated as the court awaited the delivery of the written heads of argument which would be key in determining the date of delivery, in line with the guidelines for delivery of judgments and rulings in this court.

[4] As the cruel hand of fate would have it, the matter, due to the heavy and continuous flow of the caseload, fell through the administrative cracks in my chambers. It was retrieved, and inevitably so, by the unfailing and uncompromising provisions of rule 132. It was at that stage that it dawned on the court that the matter awaited judgement. The court thereupon fixed this day for delivery.

[5] I accordingly express my sincere apologies to the parties and the legal practitioners for the delay occasioned. It would not have been out of order, and certainly not a sign of bad manners, for the applicants' legal practitioners to have given my research assistant a 'jolt' by sending a missive, reminding the court of the judgment. That said, the judgment is ready for delivery and the reasons for the judgment follow.

The parties

[6] The applicants are Mr. Erhard Van Der Merwe and Mrs. Elsabe Van der Merwe. They are husband and wife, respectively and they reside in

Windhoek within the jurisdictional area of this court. I shall refer to both Mr. and Mrs. Van der Merwe as 'the applicants'.

Relief sought

[7] The applicants approached this court seeking the following relief, as captured in their notice of motion:

'1. That a rule nisi be issued calling on all/any interested parties to show cause (if any), on a date and time to be allocated by this Honourable Court why an order in the following terms should not be made final: Declaring that:

1.1 the registration of the Applicants' Ante-Nuptial Agreement No. H 640/1998 by the Registrar of Deeds, Johannesburg in the Republic of South Africa on 10 February 1988 is, by virtue of the provisions of Article 140(3) of the Namibian Constitution as read with section 1 (the definition of "Republic") and section 87(1) and (2) of the Deeds Registries Act, 47 of 1937, deemed to have been done by the Registrar of Deeds of Namibia and is for all intents and purposes of full force and effect in Namibia; and

1.2 the legal consequences of the marriage concluded between the applicants, on 30 January 1990 and arising from their Ante-Nuptial Agreement No. H 640/1988 registered by the Registrar of Deeds in the Republic of South Africa on 10 February 1988 are not governed by the law of any country other than Namibia, as envisaged in section 17(6) of the Deeds Registry Act, 1937, as amended.

1. alternatively to 1 above;
    a. Condoning the applicants' non-compliance with the provisions of section 87(20 of the Deeds Registries Act, Act No. 47 of 1937, (as amended);
    b. Authorising the Registrar of Deeds, Windhoek, to register an authenticated copy of the applicants' Ante-Nuptial Agreement No. H 640/1988 ("EVDM 3") and registered by the Registrar of Deeds, Johannesburg, Republic of South Africa on 10 February 1988 in the Deeds Registry of Namibia by the Registrar of Deeds of Namibia as having the effect of an Ante-Nuptial Agreement concluded between the Applicants in the Republic of Namibia as envisaged in section 87(2) of the Deeds Registries Act, 1937.
2. Alternatively; to 2 above;

a. Granting leave to the applicants in terms of section 88 of the Deeds Registries Act, 1937, to enter into the applicants' intended Notarial Postnuptial Contract 'EVDM 4") and having the effect of an Ante Nuptial Contract.
b. Authorising the Registrar of Deeds, Windhoek to postnuptially register the applicants' intended notarial postnuptial contract ("EVDM 4") and having the effect of an ate nuptial contract concluded between the Applicants in the Republic of Namibia, in the Deeds Registry of Namibia;
c. Ordering and directing such registration in 3.1 above shall be effected within 60 days from the date of this order;
d. Ordering and directing that the rights of all/any creditors having any claim(s) against either of the Applicants, which arose prior to the date on which this order is issued, shall not be affected or prejudiced by execution of the Notarial Contract referred to in order 2 or 3 above;

4 Ordering and directing the applicants to publish this Order in 2 local newspapers and simultaneously therewith also in the Government Gazette;

5 Such further and alternative relief as this Honourable Court may deem fit.'

Background

[8] In the founding affidavit deposed to by Mr. Van der Merwe, and duly confirmed by his wife, the following is the factual matrix that results in them approaching the court for the relief they seek. The applicants were joined in matrimony in Johannesburg, South Africa on 30 January 1988. Their marriage was out of community of property and this fact is reflected on the marriage certificate filed in support of the application.

[9] It is important to mention at this nascent stage that Mr. Van der Merwe is a Namibian citizen by birth, having been born in Lüderitz, in this Republic. At the time of the marriage, the applicants were permanently resident and domiciled in South Africa. They however, relocated to Namibia in August 2017.

[10] Because of their wish to have their marital regime to be out of community of property or profit or loss, they were advised at the time of their marriage, that they should enter into an ante-nuptial contract, ('ANC'), which would have to be registered in terms of the law. The applicants duly entered into the ANC on 22 January 1988 in Johannesburg and it was registered by the Registrar of Deeds for Johannesburg on 10 February 1988 under Antenuptial Contract No. H 640/1988.

[11] It is the applicants' case that their ANC fully complied with all the relevant provisions and formalities of the law at the time, namely, the Deeds Registries Act, 1937, 'The Act'). The allegation is not gainsaid and will be accepted as correct. A duly authenticated copy of the ANC was filed with the papers before court, together with a sworn translation thereof.

[12] It is the applicants' case that at the time when they entered into the ANC and when it was registered in Johannesburg in the Deeds Office, s 87(1) of the Act still referred to 'the whole Republic', which included the territory that is now known as Namibia.

[13] The applicants further depose that they have not registered or filed a copy of their ANC with the Registrar of Deeds in Namibia for the reason that the Deeds Registry in Johannesburg, where the ANC was duly registered, is a deeds registry as contemplated by the provisions of the Act.

[14] It is the applicants' case that there are problems that are encountered by them and similarly circumstanced individuals when either spouse is desirous of purchasing property in Namibia. The Financial Institutions 'fiercely and formalistically'[1] insist on the application of s 17(6) of the Act.

[15] In this regard, the financial institutions require individuals desirous of purchasing landed property in Namibia and who are married in terms of a marriage the legal consequences of which are governed by the law of any country other than Namibia, to be assisted by their spouses in executing any deed or other document required or permitted to be executed or registered in

[1] Paragraph 14.1 of the founding affidavit.

the Deeds Registry. If not assisted, they require consent of the spouse, as prescribed by the said s 17(6) of the Act.

[16] In this connection, further contend the applicants, when either of them want to acquire or dispose of property, the other spouse is required to co-sign whatever documents are necessary for that purpose, including suretyship agreements. The financial institutions accordingly have no regard for the ANC, even when it is drawn to their attention. These actions, contend the applicants, serve to imply that they are married in community of property much against the marital regime opted for by the parties as evidenced by the ANC.

[17] The applicants further allege that a distinction should be drawn between ANCs concluded and registered before the independence of Namibia and those concluded post-independence. Those executed before independence, so the applicants contend, such as theirs, which was executed and registered in Johannesburg, the registry in Johannesburg, in terms of the law was within the 'Territory' defined as 'Republic', which included the Territory of South West Africa'.

[18] The applicants further contend that the provisions of the Art 140(1) and (3) of the Constitution, bear resonance in this regard because they provide that all laws which were in force before the date of independence remain in force until they have either been repealed or amended by an Act of Parliament. Furthermore, they deem anything done under the said laws, including the Act, prior to independence, to have been done by an official of the Republic of Namibia.

[19] It is accordingly the applicants' case that with the foregoing provisions in mind, it becomes as clear an noon day that their ANC, although executed and registered in South Africa, this is when Namibia, as it is today, formed part of the Republic and the ANC registered in Johannesburg remains valid and effectual as if it was registered by the Registrar of Deeds for Namibia.

[20] The applicants proceeded to make allegations based on legal advice, related to the other alternative relief sought in their notice of motion. I do not, at the present moment deem it necessary to detail all the allegations and submissions made in relation to the alternative relief. I may have to do so if I am of the considered view, after considering the legal submissions filed, that no case has been made out for the granting of the main relief sought in the notice of motion recorded above.

Determination

[21] I find it imperative first of all, to record the court's appreciation to Mr. Schickerling for the submission of heads of argument that are not only extremely helpful to the court, but are the model of clarity, drafted with scholarly precision and are extremely detailed. The court expects no less from its officers, although it does receive less in some cases.

[22] Having said this, I should also tender my apologies to Mr. Schickerling that on account of time constraints and the busy schedule of this court, I am unable, in this judgment to tease out all the issues and to consider and determine them to the minute detail that he did. If there be any error or imperfection in this judgment, it should point towards the presiding judge than counsel.

[23] I would, accordingly encourage Mr. Schickerling, for the sake of posterity on this particular subject, to find a local journal, where the heads of argument may, in modified form, be published. Unfortunately, it is not possible, in a judgment such as this, to cover the extensive historical, legal and legislative terrain that Mr. Schickerling painstakingly did.

The law

[24] As early as 1952, Van den Heever JA recognised the presumption that marriages are in community of property, with the onus resting on the person alleging contrariwise, to prove otherwise.[2] This followed upon the writings of

[2] *Edelstein v Edelstein* 1952 (3) SA 1 (AD).

Voet, who stated that 'Universal community is the normal matrimonial proprietary regime.'[3]

[25] Percival Ganes, who translated The Selective VOET being a commentary on the Pandects states that:

'By custom spouses may elect the law of their marriage. – By our customs furthermore all dotal agreements are to be kept which are contrary to natural reason and honour and morals and which have not been discountenanced by statute or custom.[4]

[26] Later, the same author states that, 'Contracts may create community where it does not exist, or exclude it where it does exist. Agreements are further common today among us and other people by which either a universal community of all goods between spouses is brought in and when it had not been brought by statute, or on the other hand that the community which springs from statute because of lack of agreements is shut out in whole or in part.'

[27] Much later, Moodly J remarked as follows in *RP v PP*[5]:

'The primary matrimonial property system which automatically applied to a civil marriage was that of community of property with marital power. . . This proprietary regime of the marriage could however be varied to one of out of community if the parties concluded an antenuptial contract in which they expressed their intention to marry out of community, and agreed to exclude community of property, and profit and loss from the marriage.'

[29] It is accordingly well settled that according to Roman Dutch common law, which is also the law of Namibia, save to the extent modified by legislation, marriages are generally considered to be in community of property. It is only in those cases where the parties thereto provide otherwise that the marriages can be regarded to be out of community of property. The

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[3] Page 244 para [32].
[4] P 188, section 19.
[5] *RP v PP* 2016 (4) SA 266 (KZP),

ANC is the general medium in which the wish of the parties to be married out of community is expressed. This is without prejudice though to the situation in Namibia where all marriages North of the Red Line, are by law considered to be out of community of property.

Legislative history

[30] It is common cause, in this case, that the parties excluded community of property and profit and loss by not only executing the ANC, but they also, in compliance with the Act, caused the ANC to be lodged and registered in the Deeds Office if Johannesburg in 1988 before the independence of Namibia. In this leg, a short examination will be made of some of the pieces of legislation that have a bearing on the question for determination.

[31] In 1972, section 1 of the Deeds Registries Amendment Act, No. 3 of 1962, came into force. This was on 1 June 1972. In terms of that provision, an amendment was effected in section 1 by the substitution of para (a) with the following:

'*(a)* There shall be deeds registries at Cape Town, Kingwilliamstown, Kimberly, Vryburg, Pietermaritzburg, Pretoria, Bloemfontein and Windhoek, each to serve its respective area as defined in the Second Schedule.' (Emphasis added).

As a result of this amendment, the Deeds Registry in Windhoek was recognised as a separate deeds registry within the Republic.

[32] Section 102 of the same Act was also amended to provide the following definitions:

'*Territory means the territory of South West Africa;*
'Government' includes the administration of the Territory'
'provincial administration' includes the Administration of the Territory'
'*Republic' includes the Territory' and*
'state' includes the Administration of the Territory'.

[33] Section 102A of the Act introduced by s 13 of the Deeds Registries Amendment Act, 1972 made provision for the following:

'. . . this Act and any amendment thereof, save sections 70 to 70*bis* inclusive, and sections 84 and 85, shall also apply to the territory of South West Africa, including the Eastern Caprivi Zipfel.'

It is thus clear, from the above quoted provision that the amendments made in South Africa, were made applicable as well to the Territory, which is now Namibia.

[34] Section 3(1) of the Deeds Registries, Amendment Act, 1953, amended s 87 by adding the following subsection (6) to the said section:

'(6) For the purposes of this section "Union" shall include the Territory of South West Africa'

and

'The provisions of sub-sections (1) and (5) of section eighty seven of the principal Act as extended by sub-section (1) hereof shall be deemed to have come into operation on the first day of February 1920.'

[35] After this, there was a comprehensive amendment of s 87 of the Act. This came in the form of the Deeds Registries Amendment Act, 1965. The new s 87 read as follows:

'87(1) An antenuptial contract executed <u>in the Republic</u> shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow.
(2) An antenuptial contract executed outside the Republic shall be attested by a notary or otherwise be entered into in accordance with the law of the place of its execution, and shall be registered in a deeds registry within six months after the date of its execution or within such extended period as the court may on application allow.

(3) Registration of an antenuptial contract in any one registry in the manner prescribed in this section shall be effective as registration for the whole Republic: Provided that if any transaction in connection with which evidence of such contract is necessary takes place in a deeds registry other than that in which such contract has been registered, a copy of such contract certified by the registrar of the place of registration or a notary public shall be recorded and filed in such first-mentioned deeds registry,

(4) For purposes of this section 'Republic' shall include the Territory of South-West Africa.' (Emphasis added).

[36] There is no doubt that when the applicants registered their antenuptial contract in 1988, the above provisions were in force. As such, the antenuptial contract entered into in Johannesburg, was entered into within the Republic, which included the Territory of South West Africa. For that reason, it appears to me that the said antenuptial contract was also valid and effective in the then South West Africa, namely, now the Republic of Namibia. The Deeds Registry in Johannesburg was a registration office in the Republic.

[37] If any further force is required for the conclusion above, it is to be found in the works of the learned author Nel[6], who reasons as follows:

'An antenuptial contract must be notarially executed if executed in the Republic and must be registered in a deeds registry "within three moths after the date of its execution registered. . . For purposes of section 87 the term "Republic" includes the territory of South West Africa. This practice will change when South West Africa becomes independent.'

[38] I accordingly agree with Mr. Schickerling for the applicants that in the instant case, the antenuptial contract entered into by the applicants was entered into in terms of the laws that also applied in this territory at the time. It was accordingly valid and applicable to Namibia. This validity and applicability would not have sleight of hand, been lost during and post the attainment of independence by Namibia.

[39] Article 140 (1) and (3) of the Constitution, read as follows:

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[6] H. S. Nel, Jones' Conveyancing in South Africa, 4th ed, 1991, p 370.

'(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.'

'(3) Anything done under such laws prior to the date of Independence by the Government, or by Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission referred to in Article 112 hereof shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.'

[40] I am of the considered view that the above provisions, read together, recognise and render effective all the acts that were done by the previous administration and its officers. They are all deemed to have been actions of the Government of the Republic of Namibia, unless the said actions were repudiated by an Act of Parliament or the law repealed or amended by an Act of Parliament, or subsequently declared unconstitutional by the courts of this country.

[41] In this particular connection, it becomes plain that the actions by the previous Government of South Africa or its officials, which includes, for present purposes the registration of the applicants' ANC are rendered valid as there is no law that was passed that effectively ordained them to be unlawful, unconstitutional or in anyway repugnant.

[42] The registration of the applicants' ANC, should, for that reason be recognised and given effect to. Any other decision, requiring that what was at the time a valid and lawful act, carried out by a Government official should merely because Namibia became in independent country and for no other reason, invalid would unduly and negatively affect people's rights obtained before independence. For that reason, I would hold the view that to be perverse.

[43] Support for the above legal conclusion seems to aided by the reasoning of the Supreme Court in *Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another*[7]. At paragraph 55, Strydom AJA, writing for the majority of the court, reasoned as follows in dealing with Art. 140 of the Constitution:

'Sub article (2) deals with the vesting of such powers created by the existing laws. Where in such laws there is reference to the government or a minister or other official of the Republic of South Africa, it shall be deemed to be a reference to the government of Namibia or a corresponding minister or official. Sub-article (3) deems anything done under these laws by the government of South Africa, to have been done by the government of Namibia or a corresponding minister or official. . .'

[44] The reasoning by the Supreme Court above, is compelling and in my view speaks with equal force to the facts of this matter. As this country, at the time when the antenuptial contract was entered into, formed part of 'the Republic', and the deeds registry in Johannesburg, where the registration was done, was recognised in this territory, then the said ANC is valid in Namibia and must be regarded as having been registered by an official of the Government of the Republic of Namibia.

Implications of s. 17(6) of the Act

[45] The next issue for determination relates to the implications of the provisions of s 17(6) of the Act. In particular, the question to be answered is whether the legal consequences of the applicants' marriage in South Africa in 1988, before the independence of Namibia, and arising from the ANC, are governed by the laws of any country other than Namibia.

[46] Section 17(6) of the Act, reads as follows:

'When immovable property or a bond is registered in the name of –

(a) a woman who has married since the registration was effected; or

[7] *Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another* 2012 (2) NR 566 (SC)

(b) a woman who at the date of the registration was married out of community of property or whose marriage was at the date governed by the law of any country other than the Union or the territory of South West Africa, and who has since been widowed or divorced,

it shall be competent for the registrar on the written application of such woman (assisted where necessary by her husband) and on production of the relevant deed and of proof to his satisfaction of the change in her status, to record such a change "on such deed and in the registers: Provided that where there are two or more interdependent deeds, all such deeds shall be produced for endorsement.'

[47] It is a fair summation to say that the above provision appears to have been designed to enable women to request the registrar of deeds to make endorsements on their mortgage bonds or title deeds regarding the change in their statuses. The endorsements would be made in the event either of a marriage or dissolution of the marriage, whether by death of the spouse or by divorce.

[48] The provision was substituted by the promulgation of s 3 of The Deeds Registries Amendment Act, Act No. 2 of 1996, whose wording has the following rendering:

'(6) A person married in terms of a marriage the legal consequences of which are governed by the law of any country other than Namibia –

(a) shall be assisted by his or her spouse in executing any deed or other document required or permitted to be executed or registered in the deeds registry or required or permitted to be produced in connection with any such deed or document; or

(b) shall produce the consent of his or her spouse to such execution, registration, or production,

unless the assistance or consent of his or her spouse is in terms of this Act or any other grounds considered by the registrar to be unnecessary.'

[49] It must be pertinently observed that when the applicants' antenuptial contract was registered in Johannesburg, the above provision was not in force

and the law as previously applied, it would seem fair to deal with the ANC in accordance with that law.

[50] Having said this, it important to mention that there were pieces of legislation introduced in South Africa and which would potentially have had an effect on the applicants' position. The first is the Matrimonial Property Act, 1984. Section 23 of the said Act. The net effect of this legislation is that when the applicants' ANC was registered, the proprietary consequences of their marriage entered into before the coming into force of the Married Persons Equality Act, 1996, such as that of the applicants, the proprietary consequences of their marriage, both the Matrimonial Property Act and the Married Persons Equality Act, was exactly the same and it was under the Matrimonial Affairs Act of 1953.

[51] It is perhaps important at this stage, to have regard to a case that was decided by this court and which could potentially have a bearing on the instant case. This was *ZS v ES*[8] where the parties had been married before the advent of the Matrimonial Property Act, 1984 in Pietermaritzburg by ANC. It was also registered in terms of the Act. The ANC stated that there shall be no community of property or of profit or loss *inter partes*.

[52] Furthermore, the agreement recorded that should any legislation come into force in South Africa by which the accrual system shall become applicable, then such system shall not be enforced by one party to the marriage, against the other.

[53] The plaintiff subsequently instituted proceedings in this court for a decree of divorce and other ancillary relief, including the division of the estate in terms of the s 7(3)(a) of the Divorce Act, 1970. The defendant raised some exceptions, one of which was based on the contention that where there is an ANC, the common law rule that the proprietary consequences of the marriage are governed by the domicile of the husband does not apply and one should have regard to the terms of the ANC and that s 7(3) (a) did not apply. The court rejected the first exception.

[8] *ZS v ES* 2014 (3) NR 713 (HC).

[54] I am of the considered view that the judgment must be considered in its proper context. First, sight should not be lost of the fact that it was decided in the context of an exception. The test in exceptions is set out in *Van Straten v Namibia Financial Institutions Supervisory Authority*[9] namely that where it is alleged that the action discloses no cause of action, the court proceeds on the presumed basis that the facts alleged in the plaintiff's pleadings are correct. If a decision is made at the end of the entire case, the outcome may have been different.

[55] I am of the considered view as well that the court's attention does not appear to have been drawn to the fact that the registration of the ANC in that matter was prior to the independence of Namibia and as I have found in this case, was therefor valid and effectual in this jurisdiction as well.

[56] It would also appear that the court was not directed to the effect of the provisions of Art 66 and 140 of the Namibian Constitution and with which I have dealt with in part above. This is probably understandable as the matter was decided and the judgment made at the stage of an exception. Had the court's attention been drawn to the above provisions, it may well have reached a different conclusion on the matter.

[57] In the instant matter, the court is seized with a case in which the applicants concluded an ANC, which was duly registered in South Africa and was thus valid in the Territory of South West Africa, as Namibia was then known. It was concluded after the Matrimonial Property Act, 1984 had been promulgated and as such, the proprietary consequences of the marriage were the same in both Namibia and South Africa.

[58] In the premises, I come to the ineluctable conclusion that the fact that the marriage was solemnised in South Africa and the ANC was concluded and registered in Johannesburg, within the Republic, which included Namibia at the time, cannot be said to have been a marriage governed by the law of

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[9] *Van Straten v Namibia Financial Institutions Supervisory Authority* 2016 (3) NR 747 (SC) at 755-6, para 18.

any other country than Namibia, as envisaged in s 17(6) of the Deeds Registries Act, referred to above.

Conclusion

[59] In view of the analysis and conclusions reached above, I am of the considered view that the applicants have made out a case for the relief they seek in the main. They are thus eminently entitled to the issuance of the rule *nisi* prayed for. I am, in the premises not required to deal with the alternative relief sought, considering that I am satisfied to their entitlement to the main relief prayed for.

Order

[60] I accordingly hold the view that the order that will be issued below is merited and that a compelling case for the granting thereof has been made by the applicants in this matter. The following order is therefor appropriate, namely:

1 That a rule nisi be and is hereby issued, returnable on **24 June 2021** at **08:30**, calling on all/any interested parties to show cause (if any), on a date and time to be allocated by this Honourable Court why an order in the following terms should not be made final: Declaring that:

1.1 The registration of the Applicants' Ante-Nuptial Agreement No. H 640/1998 by the Registrar of Deeds, Johannesburg in the Republic of South Africa on 10 February 1988 is, by virtue of the provisions of Article 140(3) of the Namibian Constitution as read with section 1 (the definition of "Republic") and section 87(1) and (2) of the Deeds Registries Act, 47 of 1937, deemed to have been done by the Registrar of Deeds of Namibia and is for all intents and purposes of full force and effect in Namibia; and

1.2 The legal consequences of the marriage concluded between the applicants, on 30 January 1990 and arising from their Ante-Nuptial Agreement No. H 640/1988 registered by the Registrar of Deeds in the

Republic of South Africa on 10 February 1988 are not governed by the law of any country other than Namibia, as envisaged in section 17(6) of the Deeds Registry Act, 1937, as amended.

2. Ordering and directing that the rights of all/any creditors having any claim(s) against either of the Applicants, which arose prior to the date on which this order is issued, shall not be affected or prejudiced by execution of the Notarial Contract referred to in order 2 or 3 above;

3. Ordering and directing the applicants to publish this Order in 2 local newspapers and simultaneously therewith also in the Government Gazette.

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T. S. MASUKU

Judge

APPEARANCE:

APPLICANTS: J. Schickerling
Instructed by Van der Merwe-Greef Andima Inc.