

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-ACT-MAT-2019/03183

In the matter between:

**RUBEN SHEEHAMA**

**PLAINTIFF**

And

**SELMA SHEEHAMA (BORN GOTLIEB)**

**DEFENDANT**

**Neutral citation:** *Sheehama v Sheehama* (HC-MD-CIV-ACT-MAT-2019/03183)  
[2022] NAHCMD 253 (20 May 2022)

**Coram:** Schimming-Chase J

**Heard:** 20 January 2022

**Delivered:** 20 May 2022

**Flynote:** Husband and Wife – Divorce – Matrimonial regime – Stated case and adjudication upon points of law and facts – Plaintiff alleging that parties married out of community of property – Marriage certificate stating that the parties were married ‘with antenuptial contract’ – No antenuptial contract registered in terms of the Deeds Registries Act, 47 of 1937 – Agreed facts not showing that an agreement was concluded between the parties that their marriage was one out of community of property.

Native Administrative Proclamation, 15 of 1928 – Inscription in marriage register stating that the parties' marriage was subject to 'Section 15 of 1928' – Parties married in Windhoek – Section 17(6) of Proclamation 15 of 1928 accordingly not applicable to the parties.

**Summary:** Plaintiff and defendant were married to each other in Windhoek in 1978. Plaintiff instituted divorce proceedings in July 2019. In his particulars of claim plaintiff alleged that he and defendant were married out of community of property. He based this allegation on, inter alia, the fact that the parties' marriage certificate indicated that the parties were married 'with antenuptial contract', despite the fact that an antenuptial contract had not been registered in terms of s 87(1) of the Deeds Registries Act, 47 of 1937. Plaintiff further relied on the marriage officer's entry in the parties' marriage register that their marriage was subject to 'section 15 of 1928', an apparent reference to s 17(6) the Native Administration Proclamation, 15 of 1928.

Conversely the defendant denied that the parties agreed to be married out of community of property and asserted that they were married in community of property. Emphasis was placed on the title deed registered in respect of certain immovable property owned by the parties, wherein the parties were described as being 'married in community of property to each other'.

The parties agreed to refer this issue for adjudication via stated case in terms of rule 63 of the rules of court.

*Held that;* as the parties were married in 1978 in Windhoek, which does not fall within the Police Zone, the provisions of s 17(6) did not apply to them and their marriage did not have the consequence of being one out of community of property in terms of the aforementioned provision. The marriage officer's inscription in the marriage register that the parties' marriage is subject to Proclamation 15 of 1978 is not of much assistance under the circumstances without further evidence.

*Held further that;* where a dispute exists as to whether the parties are married in or out community of property, the party who alleges a marriage out of community of property would bear the onus to prove that an antenuptial contract was concluded between the parties, and on presentation of an antenuptial contract duly executed between the

parties, prima facie evidence would exist that the parties are married out of community of property.

*Held further that;* plaintiff referred to the contents of the marriage certificate and marriage register as evidence of the parties' intention to marry out of community of property which defendant disputed. This was insufficient. Plaintiff had also signed an affidavit which expressly indicated that the parties were married in community of property.

Accordingly, plaintiff had failed to discharge the onus to prove that the parties are married out of community of property.

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### ORDER

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1. It is declared that marriage concluded between the plaintiff and the defendant is one in community of property.
2. The plaintiff is to pay defendant's costs of suit in these proceedings.
3. The matter is postponed to 27 June 2022 at 15h30 for a status hearing.
4. The parties are directed to deliver a joint status report on or before 21 June 2022 dealing with the further conduct of this matter in light of order 1 above, inclusive of the delivery of any amended pleadings, if necessary.

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### RULING ON STATED CASE IN TERMS OF RULE 63

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SCHIMMING-CHASE J:

#### Introduction

[1] The parties were married to each other at Windhoek on 15 September 1978.

They both wish to dissolve their marriage. What complicates their matched desire to end the marital relationship, is their disagreement as to which marital regime has governed their marriage for the past 43 years.

[2] The respective relief sought by each party insofar as their proprietary rights are concerned is subject to the marital regime which governs their marriage. Being at variance as to whether they are married in or out of community of property, the parties agreed to refer this issue for adjudication via stated case in terms of rule 63 of the rules of court.

### Background

[3] The plaintiff is Mr Ruben Sheehama, a pensioner residing at Erf 5922, Namutoni Street, Katutura, Windhoek (referred to interchangeably as “the immovable property” and “the property”). He instituted divorce proceedings during July 2019. In his particulars of claim he alleged that he and the defendant were married out of community of property and attributed the deterioration of the marriage to the defendant’s conduct which he alleged amounts to malicious desertion on the part of the defendant.

[4] The immovable property in which the plaintiff currently resides is at the centre of the dispute between the parties. It is registered in both their names according to the title deed, and it is indicated on the document that they are married to each other in community of property.

[5] The plaintiff seeks, inter alia, an order confirming that he and the defendant are married out community of property, and an order directing the defendant to take the necessary steps to have the immovable property transferred solely into the plaintiff’s name as his sole and exclusive property. In an alternative claim and in the event that it is found that the parties are married in community of property, the plaintiff seeks a specific forfeiture order of the defendant’s benefits arising from the marriage in community of property in respect of the immovable property owned by the parties.

[6] The defendant, Mrs Selma Sheehama<sup>1</sup>, is also a pensioner who resides at Erf

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<sup>1</sup> The defendant’s surname was incorrectly cited as ‘Shehama’. Her surname is correctly spelled in this

3814, 8 Manheim Street, Otjomuise, Extension 8, Windhoek, having moved out of the immovable property some 30 years ago in 1992.

[7] In her plea the defendant denied that she and the defendant were married out community of property. She alleged that they were in fact married in community of property. She also denied that she was responsible for the breakdown in the parties' marriage. In her counterclaim, she accused the plaintiff of marital misconduct which drove her out of the marital home. She in turn seeks a specific forfeiture order of the plaintiff's benefits arising from the marriage in community of property in respect of the immovable property owned by the parties.

The facts agreed on by the parties in terms of rule 63(2)<sup>2</sup>

[8] It is common cause between the parties that they were married to each other on 15 September 1978 in Windhoek which marriage still subsists. The duplicate marriage certificate<sup>3</sup> records the parties as being 'married with antenuptial contract'. It is also common cause that no antenuptial contract was registered as required by s 87(1) of the Deeds Registries Act, 47 of 1937.

[9] An extract of the marriage register issued by the then Department of Bantu Administration and Development<sup>4</sup> states the following at paragraph 22 'Remarks: Community of property excluded in terms of Section 15/1928'.

[10] The parties purchased the immovable property situate at Erf 5922, Katutura, Windhoek. The purchase was financed through a loan in the amount of N\$4,317.46.<sup>5</sup> On 24 November 1998, the property was registered in both parties' names. The deed

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judgment.

<sup>2</sup> It should be noted that other agreed facts were included in the rule 63(2) statement. However, only those facts relevant to the determination of the marital regime between the parties have been included in this ruling. There were also additional issues that the parties wished to be determined via stated case, but those issues were not agreed on and are better suited to be dealt with during the parties' testimony for purposes of the divorce proceedings.

<sup>3</sup> Annexure "A" to the parties' rule 63(2) statement.

<sup>4</sup> Annexure "B" to the parties' rule 63(2) statement. A sworn translation of the original extract which is in the Afrikaans language is attached as annexure "C" to the parties' rule 63(2) statement.

<sup>5</sup> See annexure "D" to the rule 63(2) statement titled 'Deed of Sale and Loan Agreement'.

of sale as well as the mortgage bond reflects that the plaintiff and the defendant are married in community of property.

[11] The title deed registered in respect of the immovable property bearing registration no T 4801/1999<sup>6</sup> also reflects the parties' marital regime to be one in community of property. The plaintiff paid the monthly bond payments for the property.

#### Plaintiff's submissions

[12] Ms Janke appearing for the plaintiff contended that based on the objective facts and documents available, it is apparent that the parties were married out community of property.

[13] In this regard, Ms Janke submitted that the marriage officer's intention in making reference to 'section 15 of 1928' in the marriage register was in fact to refer to s 17(6) of Proclamation 15 of 1928, which was in line with the parties' intention to be married in accordance with Proclamation 15 of 1928. This specific inscription made it apparent that the parties were alive to and aware of the provisions of the Proclamation. It is noted at this stage that the marriage officer's evidence is not available.

[14] With regard to the reference in the title deed that the parties are married in community of property, it was argued that as pleaded by the plaintiff, the title deed does not confirm the parties' marital regime, but rather confirms that the parties are registered as co-owners of the immovable property.

[15] It was pointed out by Ms Janke that it is not disputed that the plaintiff also registered a second mortgage bond over the immovable property on 11 April 2000.<sup>7</sup> According to the plaintiff, and for purposes of the marriage out of community of property, the defendant is not held liable for the debt which arose from the second bond.

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<sup>6</sup> Annexure "E" to the parties' rule 63(2) statement.

<sup>7</sup> See annexure "I" to the parties' rule 63(2) statement being a copy of the register mortgage bond with registration no. B 2300/2000.

### Defendant's submissions

[16] Ms Shikale appearing on behalf of the defendant submitted that the marriage officer's reference to 'section 15 of 1928' is absurd as same does not exist. In any event, it was argued that s 17(6) of Proclamation 15 of 1925 is not applicable to the parties' marital regime as they were married in Windhoek in 1978. It was further submitted that the description on title deed and other documents that the parties are 'married in community of property to each other' is confirmation of the parties' marital status.

[17] In this regard, and as part of the mortgage bond registration process in respect of the property, it was pointed out that the plaintiff himself signed a power of attorney<sup>8</sup> dated 11 April 2000 (for purposes of the second mortgage bond registered over the property), which recorded that the parties are married in community of property. Additionally, an affidavit was deposed to by the plaintiff on 12 April 2000, indicating the parties' marital regime as being in community of property'.<sup>9</sup> The defendant did not append her signature to this affidavit.

### Discussion

[18] As a general rule under our common law, all marriages concluded under the common law create communal property and are thus in community of property, unless expressly excluded in terms of an antenuptial contract.<sup>10</sup> Thus every marriage is presumed to be in community of property unless the contrary is proved.

[19] A further exception to the general rule is created by s 17(6) Proclamation 15 of 1928, which essentially provides that a marriage concluded between Black Namibians north of the Police Zone is by default a marriage out of community of property, unless the parties specifically agree to the contrary a month prior to the marriage.<sup>11</sup> Since

<sup>8</sup> Annexure "J" to the parties' rule 63(2) statement.

<sup>9</sup> Annexure "K" to the parties' rule 63(2) statement.

<sup>10</sup> H R Hahlo *The South African Law of Husband and Wife* 3 ed p 208 and the authorities collected at fn 4. See also *Edelstein v Edelstein No and Others* 1952 (3) SA 1 (A) at 10A.

<sup>11</sup> *Mofuka v Mofuka* 2001 NR 318 (HC) at 322B-C; *Valindi v Valindi* 2009 (2) NR 504 at 510D; *S K v S L* (I 1996/2016) [2019] NAHCMD 45 (07 March 2019) para 2.

1 August 1950 s 17(6) only applies to marriages between Black Namibians concluded north of the Police Zone.<sup>12</sup>

[20] Our Supreme Court in *Mofuka v Mofuka* had occasion to consider the principles governing matrimonial regimes within our jurisdiction. Strydom ACJ discussed the principles thus:

' . . . it is in my opinion necessary to bear in mind the following principles. Firstly, that once the parties are married they cannot thereafter change the proprietary consequences of their marriage, also not in regard to each other. The following was stated in Honey v Honey, 1992 (3) SA 609 (WLD) at 611 A- D, namely:

'In terms of our common law, subject to an exception to which reference will be made later, parties to a marriage cannot by postnuptial agreement change their matrimonial property system. In *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 224 Innes CJ phrased the rule thus:

"Apart from statute, then, community once excluded cannot be introduced, and once introduced, cannot be excluded, nor can an antenuptial contract be varied by a postnuptial agreement between the spouses, even if confirmed by the death of one of them. The only exception to the rule is afforded by an underhand deed of separation either ratified, or entitled at the time to ratification under a decree of judicial separation."

The exception referred to by Innes CJ does not apply in the present instance. . . .

Secondly, the parties must prove that they have entered into an agreement concerning their matrimonial property system either expressly or by implication. To say that they had come to some or other understanding or that that was their impression or intention would not be enough. The Court must be satisfied that, on the evidence, it is probable that the parties concluded an agreement prior to their marriage. . . .<sup>13</sup> (emphasis added)

[21] The parties were married in 1978 at Windhoek, which does not fall within the Police Zone. The provisions of s 17(6) would therefore not apply to the plaintiff and the

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<sup>12</sup> The Police Zone is the area enclosed within an imaginary line drawn through Namibia, extending from the Atlantic Ocean to Botswana in a generalised northward-arching semicircle. It is defined in the First Schedule to Proclamation 26 of 1928.

<sup>13</sup> *Mofuka* supra at 5E-6A.



defendant. The marriage officer's inscription in the marriage register that the parties' marriage is subject to Proclamation 15 of 1978 is also of no consequence under the circumstances and does not assist the plaintiff. In this regard, no evidence from the pastor who made the inscription was available.<sup>14</sup>

[22] Where a dispute exists – as is the case before this court – as to whether the parties are married in or out community of property, the party who alleges a marriage out of community of property would bear the onus to prove that an antenuptial contract was concluded between the parties, and on presentation of an antenuptial contract duly executed between the parties, prima facie evidence would exist that the parties are married out of community of property.<sup>15</sup>

[23] It is the plaintiff's case that the parties are married out of community of property. He buttresses this contention by relying on the parties' duplicate marriage certificate which states that they are married 'with antenuptial contract', which according to him is indicative of the parties' intention at the time of their nuptials as to the marital regime which was to govern their marriage. This is of course contested by the defendant, who alleged that at all material times the parties were married in community of property, and that there was no intention or agreement to be married out of community of property.

[24] The parties did not conclude a written antenuptial contract. In the absence of a written antenuptial contract, the plaintiff has an onus to prove on a balance of probabilities the existence of an informal antenuptial contract and its terms.<sup>16</sup>

[25] It was contended on behalf of the plaintiff that the conduct of the parties did not evince any intention to have been married in community of property. In support of this assertion, it was argued that the only asset that the parties jointly own is an immovable property, and that the property is not owned by the parties by virtue of the marriage in community of property, but by virtue of registration, arising out of the title deed. It was asserted in this regard that the fact that the actual contract itself is not available does

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<sup>14</sup> *Valindi v Valindi* 2009 (2) NR 504 (HC) at 512 C-D.

<sup>15</sup> H R Hahlo *The South African Law of Husband and Wife* (supra) at 208-209; P A van Niekerk *A Practical Guide to Patrimonial Litigation in Divorce Actions* (Issue 5 - September 2003) at 1-2.

<sup>16</sup> *Odendaal v Odendaal* 2002 (1) SA 763 (W) para 2.

not change the parties' intention. The parties intended to be married out of community of property as evidenced by the duplicate marriage certificate and marriage register.

[26] In amplification it was pointed out that the defendant deserted the plaintiff in 1992, in that she left the common home, and never returned to date. Since 1992, a period of more than 30 years has lapsed, and the parties have not lived together nor have they acted in community of property.

[27] As was stated in *Mofuka*,<sup>17</sup> the parties must prove that they entered into an agreement concerning their matrimonial property regime either expressly or by implication. Intention alone is insufficient to satisfy the court that the parties had concluded an antenuptial contract. The court must be satisfied that it is probable on the evidence that the parties concluded an agreement prior to their marriage.

[28] The plaintiff has not placed any evidence before this court apart from the contents of the marriage certificate and marriage register to show that such an agreement was concluded between the parties prior to the marriage. It was also held in *Valindi v Valindi*<sup>18</sup> that the fact that the pastor did not testify could have been decisive.

[29] In *S K v S L*,<sup>19</sup> the court was faced with a similar scenario in that the title deeds in question described the parties as being married in community of property, a fact which the defendant relied on to assert her case that the parties were married in community of property. The court held that the fact that the descriptions on the title deeds of the said properties indicated that the parties are married in community of property is not sufficient to persuade this court that the parties are indeed married in community of property. I agree with this finding on the facts presented in that case.

[30] In this matter, and as earlier mentioned in this judgment, the plaintiff registered a second mortgage bond over the immovable property. As part of the registration process the plaintiff signed a power of attorney and deposed to an affidavit.

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<sup>17</sup> *Supra* at 5I-6A.

<sup>18</sup> At 512C.

<sup>19</sup> *S K v S L* (I 1996/2016) [2019] NAHCMD 45 (07 March 2019) para 45.

[31] The affidavit is titled 'Affidavit Marriage in Community of Property'. The pertinent portions of the affidavit are reproduced below:

'We, the undersigned, RUBEN SHEEHAMA  
Born on 20 November 1950

and

SELMA SHEEHAMA  
Born on 06 December 1957

spouses married to each other in community of property

hereby make oath and say:-

1. We were married to each other at Windhoek on 15 September 1978, on which date I the said husband was domiciled in Namibia and we annex hereto a copy of our marriage certificate.
2. ...
3. No antenuptial or postnuptial contract was ever entered into between us which would have effect of excluding or severing community of property.  
... (emphasis added)

[32] The affidavit concludes with the signatures of two parties and contains a signed certificate by the commissioner of oaths.

[33] Insofar as the plaintiff submitted that the parties conducted themselves as if they were married out of community of property and further that he was under the bona fide belief that he was married out of community of property (as alleged in his amended particulars of claim) his conduct in signing the power of attorney and deposing to an affidavit confirming that he was married in community of property to the defendant flies in the face of this allegation.

[34] Even if the plaintiff had in fact been under the bona fide belief that the parties

were married out of community of property, it is peculiar that he would perpetuate what to him was an incorrect state of affairs, by declaring under oath that the parties were in fact married in community of property, and then doing nothing to change the state of affairs until the divorce proceedings commenced.

[35] It is to be noted that the defendant denied that he signed the power of attorney and the affidavit. On 19 September 2006, the plaintiff deposed to a further affidavit wherein he stated that the affidavit signed on 12 April 2000 was not signed by the defendant, but rather by one Sara Vilho 'who claimed to be acting as my wife at the time'. Although he pointed out in the affidavit that monies deducted from his wife's account should be repaid to her, the plaintiff's conduct in this regard is not lost on the court. The plaintiff clearly had opportunities over the years to correct the inscriptions on the title deed via affidavit, and to allege that he and the defendant were married out of community. He instead contented himself with the allegation that the affidavit was signed by a woman who is not his wife, and only raised the issue of the proprietary consequences of the marriage once action was instituted.

### Conclusion

[36] Based on the stated facts before the court, I find that the plaintiff has failed to discharge the onus in proving that the parties were married by antenuptial agreement. The determination here is the proprietary regime operating between the parties at the time the marriage was concluded. The plaintiff in the deed of sale and mortgage bond, indicated that he and the defendant were married in community of property. The same inscription is contained in the title deed. The plaintiff also confirmed this in the power of attorney and the affidavit referred to (which he deposed to in 2006), and which he signed. Their marriage therefore does not on the facts, produce the legal consequences of a marriage out community of property.

[37] Accordingly, the following order is made:

1. It is declared that marriage concluded between the plaintiff and the defendant is one in community of property.

2. The plaintiff is to pay defendant's costs of suit in these proceedings.
3. The matter is postponed to 27 June 2022 at 15h30 for a status hearing.
4. The parties are directed to deliver a joint status report on or before 21 June 2022 dealing with the further conduct of this matter in light of order 1 above, inclusive of the delivery of any amended pleadings, if necessary.

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EM SCHIMMING-CHASE

Judge

APPEARANCES:

PLAINTIFF:

J Janke

Of Sisa Namandje & Co, Windhoek.

DEFENDANT:

L Shikale

Of Shikale & Associates, Windhoek.