**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

HC-MD-CIV.MOT-GEN-2020/00078

In the matter between:

**ANNA PANDULENI HAMUPOLO** **APPLICANT**

and

**JONAS HAMUPOLO SIMON *N.O.*** **1ST RESPONDENT**
**THE MASTER OF THE HIGH COURT** **2ND RESPONDENT**
**THE MINISTER OF HOME AFFAIRS** **3RD RESPONDENT**

**Neutral Citation:** *Hamupolo v Simon* ***NO.*** (HC-MD-CIV-MOT-GEN-2020/00078) [2022] NAHCMD 37 (08 February 2022).

**CORAM:** **MASUKU J**
**Heard:** 02 August 2021
**Delivered:** 08 February 2022

**Flynote:** Law of Persons – marriage in community of property in terms of the Native Administration Proclamation of 1928 – declaration to be made by parties to the marriage – effect of not complying with the provision – Practice – disputes of fact in motion proceedings and how they are resolved – Rules of Court – rule 69 – filing of counter-applications.

**Summary:** The applicant approached the court seeking a declarator that her marriage to her deceased husband was in community of property. This was based on allegations on oath, confirmed by witnesses the date of the marriage, she and her husband appeared before the marriage officer and made a declaration before the marriage officer that they choose to be married in community of property. The respondent denied that they were married in community of property because they did not provide the written declaration in terms of the Native Administration Proclamation of 1928.

*Held*: that motion proceedings are not designed primarily to resolve disputes of fact. Where a dispute of fact arises, a final order can be granted only if the facts alleged by the applicant are admitted by the respondent, together with facts alleged by the latter which justify the granting of such an order. If however, the respondent's version consists of bald, uncreditworthy denials, or raises fictitious disputes of fact, is palpably implausible or clearly untenable, the court may be justified to reject them on the papers.

*Held that*: a respondent seeking to file a counter-application, should do so in line with rule 69 and in that connection file a notice of motion accompanied by an affidavit to which the other parties may respond. A respondent may not purport to raise the counter-application in its answering affidavit.

*Held further that*: the Native Administration Proclamation requires that a party should make declaration more than a month before the solemnization of the marriage. Where as in this case, the declaration required in s 17(6) of the Proclamation is made on the day of the solemnization of the marriage, the marriage cannot be held to be in community of property for lack of compliance with the Proclamation.
*Held*: that the reason behind the requirement that the declaration be made a month before the solemnization of the marriage was to afford the so-called 'natives' to whom the provisions applied time to reflect on the choice to marry in community of property, which was generally not in line with their customs and usages.

The application was dismissed with costs for lack of compliance with the provisions of section 17(6) of the Proclamation of 1928.

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**ORDER**

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1. The Applicant's application is dismissed.
2. The Applicant is ordered to pay the costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

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**JUDGMENT**

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**MASUKU J:**

Introduction

[1] Death, regardless of how it eventuates, has a remarkable ability. Once it rears its ugly head and strikes a victim, it is capable, in the twinkling of an eye, and without much ceremony, of transforming family into formidable foes; siblings into mere acquaintances; relatives into strangers; friends into sworn enemies and a heaven into a living hell.

[2] This situation often becomes exacerbated in those cases where the deceased was a person of means. The insurance of leaving a last Will and Testament does not always provide the panacea it would have been expected to by the deceased. Where there is no last Will and Testament, the situation may be even more grave, with each person affected seeking to make a killing out of the deceased's death.

[3] This case is no different. The deceased, who was married to the applicant, died intestate. The aftermath of his death brewed and degenerated into a red-hot dispute between his widow on the one hand, and some of his off-spring born before

the marriage from one or other union. The dispute centres on the marital regime the applicant and her husband contracted, and quite predictably, the proprietary consequences attaching thereto.

[4] For her part, the applicant states that she was married in community of property to the deceased. This is denied by the executor of the estate, one of the deceased's sons. The dispute, it would seem, has resulted in some property being taken away from the applicant because the executor took the view that she was, on account of the marital regime he believes applies, not entitled to those properties.

[5] Seriously aggrieved by the events described above, the applicant approached this court essentially seeking the following relief:

'1. Setting aside the Executor's and/or his agent's decision to the effect that the marriage that subsisted between the Applicant and the late Thinana Hamupolo is one out of community of property.
2. Declaring and ordering that the Applicant and the late Thinana Hamupolo declared before the marriage officer and before solemnization of their marriage that they intended to get married in community of property and were thus married in community of property.
3. Interdicting and restraining the First Respondent from filing a Liquidation and Distribution Account until such a stage that this matter is finalised.
4. Interdicting and restraining the Master of the High Court from accepting alternatively considering any Liquidation and Distribution Account in the estate of the Late Thinana Hamupolo with the Master's Reference being No. 1412/2013 and in all, interdicting and restraining the Second Respondent from in any way dealing with the estate of the Late Thinana Hamupolo until such a stage that this matter is finalised.
5. Costs of suit jointly and severally only against those respondents who choose to oppose this application.'

[6] At the heart of this judgment, is a decision as to whether the applicant has made out a case for the relief she seeks, as stated above. I must mention even at this early stage that the interdicts sought in paragraphs 3 and 4 obtained while the matter underwent adjudication. The court is thus not seized in this judgment with determination of the interdicts as their operation has since fallen away. The question for determination is one, namely, whether the applicant has demonstrated to the

court that she was married to the deceased in community of property, contrary to the allegations by the 1st respondent to the contrary.

The parties

[7] The applicant is Mrs. Anna Panduleni Hamupolo, an adult female resident of Ohendjele Village in the Oshana Region of this Republic. The 1st respondent is Mr. Jonas Hamupolo Simon, a male adult Namibian. He is cited in his capacity as the executor of the estate his late father, Mr. Thanana Hamupolo. He resides in Ongwediva, Oshana Region. The 2nd respondent is the Master of the High Court cited in her official capacity. The 3rd respondent is the Minister of Home Affairs, duly appointed as such by the President of the Republic of Namibia.

[8] The applicant was represented by Ms. Shikale, whereas the 1st respondent was represented by Ms. Kahengombe. The Government respondents, being the Master and the Minister of Home Affairs, respectively, did not join issue in this matter. It must be assumed that they abide by the decision of the court.

[9] For ease of reference, I will refer to Mrs. Hamupolo as ‘the applicant’. Because the other respondents do not oppose the relief sought, this effectively leaves the 1st respondent as only the party contesting the relief sought. I will accordingly refer to the 1st respondent as ‘the respondent’. Where it is necessary to refer to the other respondents, I will refer to them as ‘the Master’ and the ‘the Minister’, respectively. The late Mr. Hamupolo will be referred to as ‘the deceased’.

Background

[10] The background to this matter and the nature of the dispute has been briefly captured in the introductory paragraphs of this judgment. In essence, the applicant was married to the deceased on 22 December 1999 at the Ongwediva Parish in the Oshana Region. No children were born from the union.

[11] On 21 May 2013, the deceased ascended to the celestial jurisdiction and after some time and having received advice, the applicant reported the deceased’s death

to the Master's office. This appears, from the applicant's papers, to have taken place after some of the property from the estate had been distributed in terms of customary law. The applicant was later appointed as an executrix. She, in turn, appointed an agent to conduct the process of winding up the estate on her behalf. In the course of time, and for reasons that are not relevant to the judgment, the applicant was removed as the executrix.

[12] The respondent was thereafter appointed as the executor of the estate. He proceeded on the basis that the marital regime of the applicant and the deceased was out of community of property and this is the wedge that has drawn the parties into this dispute. The applicant complains that she has been deprived of many properties that form part of the joint estate as a result of the contention that she denies, namely, that she was married to the deceased out of community of property. It is this dispute that is the subject matter of the judgment.

The parties' contentions

[13] The applicant claims that on the date of her marriage, the marriage officer, Pastor Nehemiah Sheefeni, who solemnized the marriage, explained to her and her husband together with their witnesses the marital regimes allowed by law in Namibia. It is her case that she and her husband, after enquiries from the Pastor, each in his or her own turn, indicated that they wished to be married in community of property. This followed what the Pastor who informed them that he could only marry them in community of property in any event because they did not have an ante-nuptial contract. Certain forms were then completed after which the marriage ceremony then proceeded in earnest.

[14] It is the applicant's further case that her efforts to obtain the declaration required in terms of s 17(6) of the Native Administration Proclamation of 1928, ('the Proclamation',) after the deceased's death proved futile. Although the marriage register had been filed with the Ministry of Home Affairs, '(the Ministry'), a copy of the declaration required by the Proclamation could not be located by the Ministry's officials. The applicant insists, that notwithstanding the loss of the declaration she

was asked together with her husband on the date of marriage which regime they chose and they opted for one in community of property.

[15] The version deposed to by the applicant is confirmed by an affidavit deposed to by Pastor Sheefeni, who states that he is a Pastor in the employ of the Evangelical Lutheran Church in Namibia, based in the Oshana Region. He confirms that he conducted the marriage ceremony between the applicant and the deceased on 22 December 1999.

[16] It is his case that before the marriage ceremony, he invited the bride and the groom, together with their witnesses to his office. He there informed them of the two marital regimes in Namibia, namely in or out of community of property. He enquired from them, beginning with the deceased and both, in turn informed him that they wished to be married in community of property.

[17] The Pastor further confirmed that he thereafter completed all the requisite forms, including the declaration in terms the Native Administration Proclamation. He later transmitted all the relevant documents, together with the declaration to the Ministry as he does not keep copies. Lastly, Pastor Sheefeni deposes that he could not have possibly married the couple out of community of property for the reason that they did not have an ante-nuptial contract with them when they came for the solemnization of the marriage.

[18] He concludes his affidavit with a firm statement that, 'I thus certainly confirm that the late Thinana Hamupolo and the Applicant were married to each (*sic*) in community of property in that they indeed declared their wish to so get married.' The applicant's version in this connection, is also confirmed by Ms. Mirjam Johannes who on the day of the wedding, served as the applicant's maid of honour. She confirms the version deposed to by both the applicant and Pastor Sheefeni as she states that she was present when the parties served before the Pastor in his office before the solemnization of the marriage.

[19] In his answering affidavit, the respondent contends that the applicant has not produced the declaration required in terms of the Proclamation and states that in the

absence of such declaration, it is improper for the court to adjudicate on this matter. He vehemently denies that the couple was married in community of property and states that the declaration could not be produced by the applicant because it was never signed and sent to the Ministry.

[20] The respondent further punches holes in the version deposed to by the Pastor and suggests that it is incorrect because the marriage took place more than 20 years ago yet he remembers the details very well but does not have any document to support his version. The respondent further states that the deceased never told him together with his siblings that there existed a joint estate between him and the applicant.

[21] The respondent then stated the following:[1]

> 'I am further advised that the only version before court is that of the applicant and myself. There is no version of my late father and the only evidence is the law as it currently is, that in the absence of a declaration in terms of section 17(6) of the Native Proclamation 15 of 1928, the marriage between the parties is out of community property.'

[22] The respondent further opines that in a situation such as this, 'the law should take precedence over the conduct of the parties in any given situation.'[2] All in all, the respondent opposed the grant of the relief sought and submitted that the application should be dismissed with costs.

[23] Ms. Shikale, for the applicant argued that the application is merited and should succeed because there is no requirement in terms of the law that the declaration required in terms of the Proclamation must be in writing. It was her contention that in the instant case, the declaration was done. The fact that the Ministry could not locate it, should not deprive the applicant of the relief she seeks, especially in the light of the confirmatory affidavit by the Pastor.

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[1] Paragraph 21.2 of the answering affidavit.
[2] Paragraph 22 of the answering affidavit.

[24] Ms. Kahengombe, for her part argued that the application should be dismissed on the basis that there is a dispute of fact, which cannot be resolved on the papers. She argued further that the dispute was foreseeable and once it became apparent, the applicant should have invoked the provisions of rule 67 by applying for the dispute to be referred to oral evidence. Lastly, it was argued on the respondent's behalf that there is no decision to be reviewed by the court. It was Ms. Kahengombe's further contention that the decision by the Master to accept the consequences of the marriage to have been based on a marriage out of community of property cannot in law be reviewed by the court.

Determination

[25] I am of the considered view, in this connection, that the first issue to be disposed of relates to what the respondent calls a counter-application in his papers. The respondent, in his answering affidavit, purported to seek relief of his own without filing an application therefor. Rule 69 deals with counter applications and requires the party bringing the counter-application, to comply with the time periods set out in the rule relating to applications.

[26] It is accordingly clear that an applicant in a counter-application, must file the said application, consisting of a notice of motion and an affidavit supporting that application. The respondent to the counter-application must be afforded time to deal with the counter-application as would be the case in an ordinary application.

[27] This was not done by the respondent in this matter. As such, there is no counter-application properly so-called, to be dealt with in these proceedings. The court will accordingly be confined to dealing with the application and the basis of the opposition, which are properly before court. The rules even when generously interpreted, do not conceive a fusion of two applications, namely an application and a counter-application in one answering affidavit. This is so because the answering affidavit is designed and dedicated to dealing pound for pound with the allegations contained in the founding affidavit. The cutting of corners in this regard, is not acceptable, even if it may seem convenient.

[28] I now turn to deal with the live matters before court. From a reading of the papers filed by the parties, there are many contentious issues that have been traversed. It is however, not necessary for the court to delve into all those issues when proper regard is had to the substance of the application, considered in the full light of the relief sought. There are allegations and counter-allegations regarding the removal of property by one from the other, the delay caused in the administration of the estates by the applicant and the reasons for her removal as executrix.

[29] Interesting as these issues may be, they however add nothing, in my considered view, to the resolution of the real dispute pending before court, namely the marital regime that the parties to the marriage adopted for their marriage. In this connection, despite what the respondent says, the court has to consider the version deposed to by the applicant, the Pastor and Ms. Johannes, on the one hand, and the version deposed to by the respondent on the other.

[30] In resolving that dispute, it is important to mention that the invocation of the *Plascon-Evan's* rule is necessary.[3] The rule was explained by Harms JA in *Kgori Capital v Director of Public Prosecutions*[4] in the following language:

'Motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common facts. Unless the circumstances are special, they cannot be used to resolve factual disputes because they are not designed to determine probabilities. Where in motion proceedings disputes of fact arise on affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such an order. It may be difficult if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[31] The question that immediately follows is this – on which side of the divide referred to above, do the contents of the respondent's affidavit fall? Do they not consist of allegations that would justify the disputed issue(s) being determined on the

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[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[4] *Kgori Capital Ltd v The Director of Public Prosecutions* Crim App No. CLCGB-033-19 (Delivered on 26 July 2019), para 16.

respondent's version or they consist of bald, unsubstantiated and uncreditworthy denials that are clearly untenable so as to be rejected out of hand, in favour of the version deposed to on oath by the applicant?

[32] I am of the considered view that properly considered, there is actually no dispute of fact raised in the respondent's papers. All that the respondent does in his answering affidavit, is to raise a bald denial, accompanied by a bare assertion in the absence of any factual foundation to the effect that the marriage between the parties was out of community of property. He does not say that he was present during the wedding, especially during the pre-wedding session in the Pastor's office deposed to by the applicant.

[33] All that the respondent appears to rely on is what he claims the deceased told him during the latter's lifetime, namely that the marriage was out of community of property. This is first class text book hearsay evidence. It is, as a matter of law, inadmissible and the court exercises no discretion in that regard.

[34] The applicant's version is deposed to on oath and as I dare say, there are no factual allegations that are deposed to by the respondent that would create a dispute of fact properly so called. The applicant was a participant in the whole ceremony, from start to finish, as it were. Her version is corroborated in material terms by her maid of honour. More importantly, it has also been confirmed by the Pastor, who presided over the marriage ceremony, including the preliminary enquiries that had to be carried out before the marriage ceremony commenced.

[35] First, the respondent does not directly engage the full contents of the affidavits of the Pastor and Ms. Johannes at all. As such, their allegations of fact remain unchallenged and must be accepted. Secondly, it is necessary to mention that both these witnesses, especially the Pastor, has nothing to gain by deposing to an untruth under oath.

[36] I must also mention for the record that there is also no evidence placed before court which shows or suggests, even remotely, that the Pastor had an ulterior motive in deposing to the facts he did in the affidavit filed, other than to set the record

straight. He appears to me, from the facts, to be an independent witness, who deposed to the affidavit matter-of-factly, and if I may add, without demur by the respondent.

[37] It may be argued that Ms. Johannes is a friend to the applicant and would have a reason to falsify the evidence of what happened. This cannot however be the case as no such allegation has been made in the papers. Had such an allegation been made, Ms. Johannes would have been entitled to respond to the allegations, which may, depending on what is said, raise a real dispute of fact. That is certainly not the case.

[38] The inevitable result, in the circumstances, is that in terms of the law, this issue must be resolved in the applicant's favour because firstly, the respondent does not raise any genuine dispute of fact. Even if he did, the allegations made in the answering affidavit are clearly uncreditworthy denials, so far-fetched as to be untenable. They are therefor liable to be rejected on the papers.

[39] As such, I am satisfied that the applicant's case that she was married in community of property has been established on the papers and I am entitled to find for her in that regard. This conclusion is however, subject to one further issue that will be interrogated below.

[40] I now turn to the Proclamation. It reads as follows:

'A marriage between Natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of a 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, marriage officer (who is hereby authorised to attest to such declaration) that it is their intention and desire that community of property and profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.'

[41] A reading of the said provision suggests that a marriage between 'natives' shall not produce legal consequences of a marriage in community of property, unless the intending spouses, one month before the marriage is solemnized, make a joint declaration before a marriage officer that they wish the legal consequences of their marriage to be in community of property.

[42] In *Mofuka v Mofuka*[5] the Supreme Court stated the following:

'Secondly, the parties must prove that they have entered into an agreement concerning their matrimonial property system either expressly or by necessary 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.'

[43] What is deposed to by the applicant and confirmed by both the Pastor and Ms. Johannes, as having happened in the Pastor's office, in my view, subject to what I say below, complies with the requirements of provisions of the Proclamation as adumbrated by the Supreme Court in *Mofuka,* quoted above. I am satisfied, even though the deceased is not here to confirm, that on the evidence, it is probable that the parties concluded an agreement prior to their marriage.

[44] The Pastor's evidence is to the effect that he completed all the necessary documents, including the declaration and forwarded the documents to the Ministry. The Ministry, though served with the papers, did not explain what happened to them. They may have been misplaced by the Ministry but this cannot, on its own serve to prejudice the applicant when the evidence before court suggests that the parties did make a declaration before their marriage and in front of a marriage officer, who confirms that evidence on oath.

[45] The one issue which however presents insuperable difficulty for the applicant, even if her version of events, as confirmed by her witnesses was to be accepted, is that the proceedings where the declaration was made, do not comply with the Proclamation.

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[5] *Mofuka v Mofuka* 2003 NR 1 (SC), p 5I-J.

[46] From my reading and understanding of the relevant provision, the declaration must be made 'at any time within one month previous to the celebration of such marriage'. (Emphasis added). This means that parties who wish the proprietary consequences of their marriage to be in community of property must make the declaration a month before the date of marriage.

[47] From the affidavits filed by the applicant and the Pastor, it is clear as noonday from what they depose, that the declaration was made on the date of the marriage but before the solemnization of the marriage. In this connection, Ms. Johannes deposes that 'Pastor Sheefeni had during the morning of 22nd of December 1999 ushered the late Thinana Hamupolo, the Applicant, myself and the late Thinana's Hamupolo's witness whose name I cannot recall to the church office.'[6] It is where the parties, according to her, made the declaration regarding the marital regime.

[48] The Pastor, himself says the following regarding this very issue in his affidavit:

'I in particular confirm that the late Thinana Hamupolo and the Applicant had registered to get married on the 22nd December 1999. I was at the time that pastor at the church. I confirm that before we proceeded to the church where I would solemnize the marriage, I ushered the late Thinana Hamupolo, the Applicant and their witnesses in my office.' He proceeds to state that it is in the office that the declaration regarding the marital regime was made. This evidence is also consistent with what the applicant herself deposed in her founding affidavit.

[49] It is accordingly clear that the declaration purportedly made by the parties, purportedly in terms of the Proclamation, was made on 22 December 1999 and this was in the Pastor's office before the marriage was solemnized. On any calculation, the period of one month before the solemnization of the marriage was not complied with, even on the applicant's version. In the premises, it appears to me that this is not a proper case in which the declarator should be made in the applicant's favour.

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[6] Para 4 of Ms. Johannes' confirmatory affidavit.

[50] Where the parties to a marriage are the so-called ‘natives’, and there is no suggestion that the parties in this matter are not, they have to comply with the provisions of the s 17(6) of the Proclamation. This includes compliance with the requirement that they make the declaration not less than a month before the solemnization of the marriage. Where they do not comply with that requirement, as in this case, the marriage cannot be said to be in community of property. It remains one out of community of property.

[51] It would seem to me that there must have been a reason for the requirement of the parties to a marriage making a declaration a month before the marriage is solemnized. What comes to mind is that marriage in community of property may have been foreign to the customs and usages of the couple to be married. As such, they needed to reflect for some time before the date of the marriage.

[52] The making of the declaration was thus not designed to be a process that takes place on the spot and just minutes before the solemnization of the marriage, without time for a proper and sober reflection of the consequences in advance.

[53] As such, I am of the considered view that the applicant’s case is doomed to fail. She and her late husband did not comply with the provisions of the Proclamation and as such, the marriage cannot be declared to have been one in community of property. The proprietary consequence of the marriage must accordingly be those of a marriage out of community of property.

Conclusion

[54] In the premises, and having regard to the discussion and conclusions reached, I am of the considered view that the application cannot succeed. There is, in the circumstances no need, given the above conclusion, to consider any other matter that may have been raised by the respondent in the matter.

Order

[55] It appears that the proper order that is to follow in the circumstances, is the following:

1. The Applicant's application is dismissed.
2. The Applicant is ordered to pay the costs of the application.
3. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

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| APPLICANT: | L. Shikale<br>Of Shikale & Associates |
| FIRST RESPONDENT: | S. Kahengombe<br>Of Samuel & Company |