REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,
MAIN DIVISION, WINDHOEK

PRACTICE DIRECTIVE 61

Case No.: HC-MD-CIV-MOT-GEN-2021/00291

In the matter between:

LIYAN SHENG **APPLICANT**

and

THE MASTER OF THE HIGH COURT **1st RESPONDENT**
MAGED MICHAIAL KAMEL ELTELEMY **2nd RESPONDENT**
BANK WINDHOEK LIMITED **3rd RESPONDENT**

Neutral citation: *Sheng v The Master of the High Court* (HC-MD-CIV-MOT-GEN-2021/00291) [2022] NAHCMD 45 (11 February 2022)

Coram: Oosthuizen J
Heard on: **8 February 2022**
Delivered: **11 February 2022**

COURT ORDER

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1. The Applicant and Michel Kamel Shenouda Eltelemy (hereinafter “the deceased”) are both not “Native” persons in terms section 17(6) or any other provision of the Native Administration Proclamation 15 of 1928.

2. Section 17(6) of the Native Administration Proclamation 15 of 1928 is not applicable to the marriage between the Applicant and the deceased.

3. The Applicant and deceased never concluded and signed an Ante-Nuptial Contract (ANC) before their marriage.

4. The marriage between the Applicant and the deceased, solemnised at Katima Mulilo, Republic of Namibia on the 12th April 2013, is in community of property.

5. The Applicant is legally entitled to half share of the deceased's estate.

6. An order setting aside any decision or process undertaken on the basis that the marriage between the Applicant and the deceased was out of community of property.

7. Cost of suit.

8. The matter is removed from the roll and is regarded as finalised.

REASONS

OOSTHUIZEN J:

[1] This application revisits an archaic legislative provision in our law concerning marriages between ‘Natives’ north of the ‘red line’.

[2] Section 17(6) of the Native Administration Proclamation 15 of 1928 was brought into force north of the Police Zone in Northern Namibia with effect form 1

August 1950. Sections 23 to 27 apply elsewhere in Namibia with effect from 1 January 1930.[1]

[3] Section 17(6) of the Proclamation inter alia provides that a marriage between 'Natives' shall not produce the legal consequences of a marriage in community of property between the spouses unless the intending spouses have jointly declared before a magistrate one month prior to the marriage that it is their intention that community of property, profit and loss shall result from their marriage.

[4] Section 25 provides that a 'Native' shall include any person who is a member of any aboriginal race or tribe of Africa. It further provided for persons residing in certain areas like Native reserves or Native locations, under the same conditions as a Native, to be regarded as Natives for the purposes of the Proclamation.

[5] In the application under consideration the applicant is a Chinese national residing in Namibia and her former husband, the late Michel Kamel Shenouda Eltelemy, was an Egyptian by birth with Namibian Citizenship through naturalization. They were married in Katima Mulilo (north of the red line and part of the police zone) on 12 April 2013. Their marriage certificate informs that they were married 'Out of Community of Property' without stating a reason therefor. It is common cause that the applicant and deceased never concluded an ante nuptial contract and neither made a joint declaration one month before their marriage that they wanted to be married in community of property.

[6] The applicant's late husband died on 26 October 2013.

[7] On 10 September 2007 he bequeathed his house in Katima Mulilo and the residue of his estate to his son, the second respondent. The Will is not in dispute. Third Respondent is Bank Windhoek Limited, the appointed executor.

[8] First Respondent is the Master of the High Court who opined that the marital regime of the deceased is a marriage out of community of property unless a written declaration provided for in Section 17(6) of the Proclamation; a sworn affidavit of the

[1] Republic of Namibia, Annotated Statutes.

marriage officer in terms of Section 17(6) of the Proclamation or a court order confirming the marriage as one in community of property, is provided.

[9] Neither the applicant nor the deceased were ‘Natives’.

[10] No evidence was tendered that they lived under the same conditions as Natives (which in itself would have been a near impossibility in current societal reality).

[11] There was no logical or legal basis to define the marriage as one out of community of property at the time of the marriage. Neither does there exist such a basis or reason now.

[12] The marriage of the applicant and deceased was not a marriage between 'Natives'.[2]

[13] The Native Administration Proclamation in para [2] finds no application.

[14] In reaching the conclusions in paragraphs [9] to [13] of this judgment, I have considered and compared the judgments mentioned in footnote 2.

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GH Oosthuizen

Judge

[2] 1. *Matheus v Matheus* (I101/2013) [2017] NAHCNLD 104 (30 October 2017), paragraphs [22] to [27];
2. *Nakashololo v Nakashololo* 2007 (1) NR 27 (HC);
3. *Valindi v Valindi and Another* 2009 (2) NR 504 (HC);
4. *R v Radebe and Others* 1945 AD 590;
5. *Brummund v Brummund;s Estate* 1992 NR 306;
6. *Mofuka v Mofuka* 2001 NR 318 (HC);
7. *Mofuka v Mofuka* 2003 NR 1 (SC); and
8. *Total Namibia v OBM Engineering and Petroleum* 2015 (3) NR 733 (SC), paragraphs [18] to [23].

APPEARANCES:

APPLICANT:	MR. K. GAEB Of Sisa Namandje inc., Windhoek Namibia
RESPONDENTS:	MR. V. LUTIBEZI Of K. Kamwi Law Chambers, Windhoek Namibia