

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2020/04539

In the matter between:

FESTUS TILIINDJE MUPETAMI
VICTORIA SONDY MUPETAMI

FIRST PLAINTIFF
SECOND PLAINTIFF

and

MASTER OF THE HIGH COURT
VILHO SHIVUTE MUPETAMI

FIRST DEFENDANT
SECOND DEFENDANT

Neutral citation: *Mupetami v Master of the High Court* (HC-MD-CIV-ACT-OTH-2020/04539) [2023] NAHCMD 125 (17 March 2023)

Coram: MILLER AJ

Heard: 24 - 25 January 2023

Delivered: 17 March 2023

Flynote: Recognition of Certain Marriage Act 81 of 1991 – Section 2 (1) of the Recognition of Certain Marriages Act – Marital regime of marriages contracted outside Namibia – Registration and recordal of marriages concluded outside Namibia by a Magistrate – Swapo Family Act, Act 1977 finds no application – Zambian Law

accordingly applies – In the absence of any evidence being led pertaining to the property regime in Zambia, the claim stands to be dismissed.

Summary: The first and the second plaintiffs are the children of the late Anna Ndinela Mupetami (the deceased), who passed away on 4 November 2016. At the time of her demise, the deceased was married to the second defendant, who was subsequently appointed as the executor of the estate. The deceased left no valid will, thus, the estate is to be wound up as an intestate estate. The major asset in the estate of the deceased is a residential property in Windhoek-West described as Erf No. 8169 (a portion of Erf No. 1980, Windhoek). The title deed No. 6356/2002 reflects that the deceased and the second defendant are the owners of the property in undivided shares.

The first defendant directed that the intestate estate of the deceased should devolve on the basis that the marriage contracted between the deceased and the second defendant was a marriage in community of property. It is common cause that the marriage was contracted in Lusaka, Zambia on 6 May 1978, at a time when the deceased and the second defendant were in exile.

The plaintiffs, thus, instituted action proceedings against the defendants, in terms of which they seek an order setting aside the first defendant's decision that the second defendant and the deceased were married in community of property, directing that the estate is to be distributed as if the second defendant and the deceased were married out of community of property and directing that the plaintiffs' costs of suit be paid out of the deceased's estate. The second defendant defended the action and pleaded that he and the deceased were married in Zambia, at the time when they were in exile, but in fact were domiciled in Namibia. Thus, the laws of Namibia should apply and not the laws of Zambia.

Held that, on the evidence presented, there is nothing to indicate that the marriage between the deceased and the second defendant was concluded in terms of the Swapo Family Act. Instead, the evidence establishes that the marriage was concluded in terms of the laws of Zambia.

Held that, a further difficulty for the plaintiffs is s 3(2) of the Act, which requires the registration of the marriage and the recordal thereof by a magistrate in terms of the provisions of the Births, Marriages and Death Registration Act 81 of 1963.

Held that, it was not established on any basis that the laws of Namibia find application in the property regime consequent upon the conclusion of the marriage. If anything, the laws of Zambia find application.

ORDER

1. The plaintiffs' claim is dismissed.
2. Costs shall be costs in the estate.
3. The matter is finalised and removed from the roll.

JUDGMENT

MILLER AJ:

Introduction

[1] The first and the second plaintiffs are the children of the late Anna Ndinelao Mupetami (the deceased), who passed away on 4 November 2016.

[2] At that time the deceased was married to the second defendant, who was subsequently appointed as the executor of the estate.

[3] Having left no valid will, the estate is to be wound up as an intestate estate.

[4] The major asset in the estate of the deceased is a residential property in Windhoek-West described as Erf No. 8169 (a portion of Erf No. 1980, Windhoek).

[5] The title deed No. 6356/2002 reflects that the deceased and the second defendant are the owners of the property in undivided shares.

[6] The first defendant directed that the intestate estate should be wound up on the basis that the marriage between the deceased and the second defendant should be regarded as having been a marriage in community of property.

[7] It is common cause that the marriage was contracted in Lusaka, Zambia on 6 May 1978, at a time when the deceased and the second defendant were in exile.

The Pleadings

[8] In their amended particulars of claim, the plaintiffs seek the following orders:

‘1. Setting aside the First Defendant’s decision that the Second Defendant and the deceased were married in community of property;

2. directing that the estate is to be distributed as if the Second Defendant and the deceased were married out of community of property;

3. directing that the Plaintiffs’ costs of suit be paid out of the deceased’s estate.’

[9] The factual basis which underpins the prayers being sought is that:

(a) The marriage was contracted in Zambia.

(b) Consequently the laws of Zambia govern the property regime.

(c) The laws of Zambia do not recognise the concept of a marriage in community of property.

[10] The first defendant took no part in the proceedings.

[11] The second defendant opposed the relief being sought. The second defendant pleaded that he and the deceased were married in Zambia at the time when they were in exile, but in fact were domiciled in Namibia. Thus, so the argument goes the laws of Namibia should apply and not the laws of Zambia.

[12] At the commencement of the trial, counsel for the plaintiffs in a complete about turn to what is contained in the pleadings, proceeded on the basis that the laws of Namibia are applicable. Counsel argued that at the time of the marriage, both the deceased and the second defendant were domiciled in Namibia. Their place of domicile, so the argument went, was that according to the laws of Namibia, the marriage was to be regarded as being a marriage out of community of property.

[13] The argument advanced by the second defendant is that in terms of the laws of Namibia all marriages shall be in community of property, save for certain exceptions, none of which were proved.

The Issue Determined

[14] In order to determine the correct position, it is necessary to consider the provisions of the Recognition of Certain Marriages Act, Act 18 of 1991 (the Act).

[15] Section 2(1) of the Act applies to marriages contracted outside Namibia before 21 March 1990 and contracted in terms of the provisions of the Family Act. The Family Act is the Swapo Family Act of 1977, which is an Annexure to the Act.

[16] It is important to bear in mind the fact that the marriage must be one contracted in terms of the Family Act and meets the requirements which appear in Article 7 of the Family Act. On the evidence presented, there is nothing to indicate that the marriage between the deceased and the second defendant was concluded in terms of the Family Act. Instead, the evidence establishes that the marriage was concluded in terms of the laws of Zambia.

[17] Even if I were to assume that the provisions of the Family Act govern the marriage, the provisions of Articles 47 and 48 of that Act apply. Respectively, they read as follows:

'Article 47

The property which has belonged to either spouse at the time of marriage shall remain his/her own and he/she shall retain the right to manage it and dispose of it independently.

Article 48

The property acquired by the spouses through work in the course of the marriage shall be their joint property.'

[18] The evidence establishes that the immovable property I referred to above was acquired by the deceased and the second defendant subsequent to their marriage and registered in both their names in undivided shares.

[19] A further difficulty for the plaintiffs is s 3(2) of the Act, which requires the registration of the marriage and the recordal thereof by a magistrate in terms of the provisions of the Births, Marriages and Death Registration Act 1963 (Act 81 of 1963).

[20] I accordingly conclude that it was not established on any basis that the laws of Namibia find application in the property regime consequent upon the conclusion of the marriage.

[21] If anything, the laws of Zambia find application. No evidence was tendered on that issue.

[22] In the result, I make the following orders:

1. The plaintiffs' claim is dismissed.
2. Costs shall be costs in the estate.
3. The matter is finalised and removed from the roll.

K MILLER
Acting Judge

APPEARANCES

PLAINTIFFS:

U KATJIPUKA-SIBOLILE

Of Nixon Marcus Public Law Office, Windhoek

2ND DEFENDANT:

A KAUMBI

Of Ueitele & Hans Inc., Windhoek