CASE NO.: SA 2/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TEOFILUS MOFUKA APPELLANT

And

JOSEFINA NANGULA MOFUKA RESPONDENT

CORAM: STRYDOM, A.C.J., TEEK, J.A., *et* O'LINN, A.J.A.

HEARD ON: 03/10/2003

DELIVERED ON: 20/11/2003

APPEAL JUDGMENT

STRYDOM, A.C.J.: The respondent sued the appellant for a divorce and claimed in her Summons that the appellant had maliciously and constructively deserted her. In her Particulars of Claim she alleged that the parties were married on 1 September 1995, at Onawa, Ovamboland, and that the marriage was in community of property. The appellant entered appearance to defend and filed a plea and counterclaim where he, in

turn, alleged that the respondent had deserted him. In his plea the appellant denied respondent's allegation that the parties were married in community of property and in his counterclaim the appellant specifically alleged that the marriage was out of community of property. In an application for further particulars the respondent requested the appellant to state on what basis it was alleged that the marriage of the parties was out of community of property. The appellant furnished the following reply, namely:

> "AD PARAGRAPH 1:
>
> 1.1 The parties are black and their marriage was solomized (sic) north of the police zone in terms of Section 17(6) of the Native Administration Proclamation No. 15 of 1928 as amended. In terms of the said section, marriages between blacks are automatically out of community of property, unless the intending spouses made a declaration one month prior to the marriage before a Magistrate or a marriage officer that they want their marriage to be in community of property. No such declaration was made."

At the trial the appellant applied in terms of Rule 33(4) that the issue concerning the matrimonial property rights of the parties be determined separately from the other disputes. It seems that the appellant was optimistic that if this stumbling block was out of the way there was a good chance that the other issues could be settled. Appellant's application was successful and the learned Judge *a quo* then proceeded to hear evidence only in so far as that evidence was relevant to the question whether the marriage of the parties was in or out of community of property.

The respondent testified and various documents were handed in such as the marriage certificate of the parties as well as an extract from the marriage register and an affidavit,

signed by the parties some time after their marriage, wherein it was declared that they were married in community of property. This affidavit became necessary when the parties sold the immovable property of the respondent.

The appellant did not testify and after judgment was reserved by the learned Judge he subsequently made the following order, namely:

> "1. The marriage between the plaintiff and the defendant on 1 September 1995 at Onawa in Ovambo has been concluded out of community of property but, as between the plaintiff and the defendant, the marriage has the effect of one concluded in community of property.
>
> 2. The costs in relation to this issue will stand over for determination at the end of the case."

The effect of the order was that although the Court found that, as far as third parties were concerned, the marriage was out of community of property, the Court also found that the respondent proved that *inter* se the parties had agreed, prior to the marriage, that the proprietary system of their marriage would be one of in community of property. Appellant appealed against this order on the basis that the Court wrongly concluded that the respondent proved on a balance of probabilities that there was such an express agreement or, that an agreement was concluded impliedly and by the conduct of the parties.

It is clear that the appeal does not lie against that part of the order in which the Court found that, as far as third parties were concerned, the marriage was out of community of property. As there was also no cross-appeal in regard to this finding it follows that that part of the order remains intact.

At the hearing of the appeal Mr. Shikongo, who appeared on behalf of the respondent, applied for condonation of the late filing of the respondent's Heads of Argument. Mr. Smuts, who appeared for the appellant, did not oppose the application and condonation was granted.

In the Court *a quo* one of the main issues for decision was whether section 17(6) of Proclamation No. 15 of 1928 (the Proclamation) regulated the proprietary consequences of the marriage of the parties, and if so, what the effect of this section would be on those rights. In argument before us it was accepted by Counsel that the parties were, at the time of the conclusion of the marriage, both domiciled in Ovamboland and that the provisions of the section indeed applied to the marriage. This section provides as follows:

> "17(6) A marriage between Blacks, contracted after the commencement of this Proclamation, shall not produce the legal consequences of 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 or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from this marriage."

It was pointed out by the learned Judge *a quo* that in terms of sec. 27 of the Proclamation, the Administrator of the then South West Africa had the power to fix a date by notice upon which the Proclamation would commence and that he could exclude, in such notice, any part or provision of the Proclamation. The Proclamation became law on 1st January 1930 with the exclusion of Chapter IV, which contained sec. 17. Secs. 17(6) and 18(3) and (9) only became law on 1 August 1950 and only in respect of the area north of the "Police Zone" as defined in the first Schedule to the Proclamation. It was common cause that Ovamboland was included in this area.

The learned Judge further pointed out that sec. 17(6) was almost identical to sec 22(6) of Act 38 of 1927, applicable in South Africa, and from that it follows that interpretations of sec 22(6) by Courts in South Africa, have persuasive value when it comes to the interpretation of sec. 17(6) of our Proclamation. For the sake of completeness I must mention that sec. 22(6) was repealed by Act 3 of 1988 with the effect that after 2 December 1988, all such marriages concluded without an antenuptial contract were automatically in community of property and of profit and loss. See The Law of Marriage, Vol. 1 by J.D. Sinclair, p229.

The Court a quo in my opinion, correctly found that sec. 17(6) applied to the marriage of the parties and correctly summarized the effect of the section on the proprietary rights of their marriage. On p 131 of the judgment the following was stated by the learned Judge, namely:

> "The effect of this section on the legal consequences of civil marriages between Blacks contracted after 31 July 1950 in the area defined as the

'Police Zone' is significant. No longer does community of property follow unless excluded – rather, the converse applies: The marriage is out of community of property unless declared or agreed otherwise. After a careful and authoritative analyses of s. 22(6) of the RSA Act, Watermeyer, CJ concluded as follows in *Ex parte Minister of Nat*ive *Affairs: In re Molefe v Molefe*, supra, at 320:

> 'The proprietary rights of native spouses who contract a valid marriage at a time when no customary union subsists between the husband and another woman, and who do not make a declaration in terms of sec. 22(6) of Act 38 of 1927, will, except in so far as there is a specific statutory provision, depend upon whether or not parties have entered into any ante-nuptial agreement with regard to their proprietary rights after marriage. If they have entered into such an ante-nuptial agreement, then their proprietary rights will depend upon the legal effects, whatever they may be, of such agreement. If they have not entered into any such ante-nuptial agreement then, since community of property, and of profit and loss, does not result from marriage, each spouse retains, subject to any statutory provision, the ownership of his or her own property, but the control of the property of the spouses vests in the husband by virtue of his marital power.'

Those remarks apply, *mutatis mutandis*, to s. 17(6)."

After discussing and analyzing various authorities the Court, referring to Ex Parte Spinazze & Another, 1985 (3) SA 650 (A), pointed out that in common law parties were at liberty to enter, prior to their marriage, into agreements which would, as between themselves, change their matrimonial property regime to be different from that applied by law in regard to third parties. This, the Court found, was also open to parties whose marriage property regime was regulated by the provisions of sec. 17(6) of the Proclamation. (See in this regard Molefe's-case, *supra*, at page 320 and Koza v Koza, 1982 (3) SA 462 (T) at page 463 E-G.) Although these cases dealt with the interpretation of sec. 22(6) of the RSA Act it is clear that, because of their similarity,

there is no basis to interpret sec 17(6) of the Proclamation differently or to hold that its effect, in regard to marriages regulated by it, will be different from those of sec 22(6).

There is no doubt that the learned Judge *a quo*, in a well reasoned judgment, and after analyzing various relevant authorities, correctly stated the law applicable to marriages regulated by sec. 17(6) of the Proclamation. This is also the case in regard to the common law, in as far as that law is applicable to the marriage of the parties. As previously stated both Counsel also accepted this. Counsel for the appellant however submitted that the evidence did not support a finding that the parties, prior to their marriage, entered into an agreement either expressly or by implication, concerning the proprietary consequences of their marriage. That being the case, and bearing in mind the provisions of the Proclamation, it follows that the marriage of the parties was one out of community of property. Alternatively it was submitted that the respondent did not prove on a balance of probabilities that the marriage was one in community of property.

Before dealing with these submissions 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. See further the other cases referred to in the Honey-case, *supra*, at p.611.

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. See generally: Ex Parte Jacobson ET Uxor, 1949 (4) SA 360 (CPD); Ex Parte Moolman ET Uxor, 1947 (3) SA 686 (EDLD) and Ex Parte Kleinschmidt ET Uxor, 1952 (3) SA 761 (OPD).

Thirdly, and once the Court is satisfied that the parties had entered into an agreement concerning the matrimonial property system, and that they had agreed so prior to their marriage, and even though no other terms were agreed upon, the Court would presume that the parties intended their marriage to be governed by the ordinary minimum terms applicable to the specific property regime. See Ex Parte Swart and Swart, 1953 (3) SA 22 (TPD) at 24 F – G. In the present instance nothing more would therefore be necessary than for the respondent to prove, on a balance of probabilities, that prior to their marriage, the parties had agreed to be married in community of property. The

effect of such an agreement would be that, as between the parties, the marriage would be regarded as in community of property with the sharing of profit and loss.

Turning now to the evidence of the respondent the impression that one gets is that neither she, nor the Pastor that married the parties, were aware of the effect of sec. 17(6) on the proprietary regime of marriages concluded in Ovamboland. The respondent testified that the Pastor informed the parties that all marriages contracted in Ovamboland were, without more ado, in community of property. That was precisely the opposite of what would be the result in the absence of any antenuptial agreement.

The findings of the Court *a quo* were that the respondent proved on a balance of probabilities that there was an express agreement between the respondent and the appellant, concluded prior to the marriage, to the effect that *int*er se the marriage regime of the parties would be one in community of property. Alternatively the Court concluded that the parties impliedly and by conduct agreed so when they accepted the marriage officer's explanation and they proceeded with the solemnization of the marriage.

These findings were based on the evidence of the respondent when she testified that when the parties were asked by the marriage officer whether their marriage should be one in community of property or out of community of property they both replied that it should be in community of property. The Court found that they were married on that understanding. The Court's finding that there was an express agreement, seems to me, to be based on this evidence of the respondent whereas the alternative finding is again based on the evidence given by the respondent under cross-examination when she said

that neither she nor the appellant said anything but that the situation was explained to them by the Pastor who solemnized their marriage.

Referring to the evidence, Mr. Smuts submitted that there was no direct evidence of an express agreement between the parties. Counsel said there was also no evidence of any discussions between the respondent and the appellant concerning what marriage property regime they intended for their marriage. Counsel further pointed out that it was never the case of the respondent to rely on a prior antenuptial contract. Mr. Smuts was able to make this submission because the arguments raised by Counsel in the Court *a quo* formed part of the record which was placed before this Court. It seems that the respondent's main defence, at that time, was that although the parties were married in Ovamboland neither of them were domiciled there so that sec. 17(6) did not regulate the property regime of the parties. Reliance was also placed, by Mr. Shikongo, on certain documents which were handed in and I shall refer more fully thereto at a later stage. This line of defence perhaps also explains the imprecise, and sometimes lackadaisical way, in which questions were asked and the evidence of the respondent was given concerning the issue whether there was indeed an agreement whereby the parties had resolved to marry in community of property. An example of this is to be found on page 49 of the record where Counsel for the respondent asked the following questions and received the following answers:

> "Q: Any time of the conclusion of the marriage at the ceremony itself was (sic) there any questions asked with regard to your desires, that's both yourself and your husband as to marriage in or out of community of property? ---There was (sic) questions .

> And was there an answer given by either yourself or the husband with regard to this question? --- Both of us answer(sic).
>
> Both of you answered, what did you answer? --- We answer (sic) what we was (sic) asked by the pastor.
>
> And what was it, was it in or out of community? --- In community of property."

The above evidence was given in examination in chief and it seems to me that it was on this evidence that the Court *a quo* found that there was an express agreement between the parties to the effect that they wished their matrimonial property regime to be one in community of property and that this agreement was entered into prior to the marriage of the parties. Mr. Shikongo also relied on the above excerpt and argued that it clearly indicated that the questions were asked and the answers were given before the solemnization of the marriage. I do not agree with Counsel. The word 'any' is unspecific and coupled with the words 'of the conclusion of the marriage at the ceremony' could mean a number of things and does not exclude the possibility that the questions were asked after the vows were taken. At the very least the evidence is ambiguous and does not amount, in my opinion, to prove on a balance of probabilities that this happened before the marriage was contracted. More so if one thinks with what ease it would have been possible to determine whether the parties so agreed and whether they did so prior to the marriage.

Further doubt is cast on this evidence when it is compared with the evidence given by the respondent in cross-examination. It emerged, during cross-examination by Mr. Angula, that the parties saw the marriage officer, i.e. the Pastor, on two occasions. The first time was about a week before the solemnization of the marriage. The purpose of this was seemingly to determine the date for the marriage and to ensure the services of the Pastor. The respondent testified that the date for the marriage was set for a week hence and nothing further happened on this occasion. This was therefore not the occasion on which any questions, relating to the marriage property regime, were asked. As to what happened at the marriage itself, the evidence of the respondent is as follows:

> "Q: Now the day when you went in the pastor's office can you tell the Court what happened there to get married? --- We enter (sic) into the pastor's office and he told us about the marriage conditions.
>
> What marriage conditions did he tell you? --- The pastor told us Nangula and Mofuka today you are <u>now</u> one person. And he say (sic) if something happened between you today, if your husband die today then the whole property will be inherited by the wife. And if your wife passed (sic) away then the husband will inherited (sic) the property.
>
> Yes what else? --- It's all what he say (sic). And the witness who witnessed our wedding and they also sign there in the office.
>
> So when the pastor told you these conditions your witnesses were also present? --- Yes.
>
> So as I understand, it was the pastor who told you what your marriage conditions would be? --- Yes
>
> It was not you or your husband who told the pastor what you want your marriage conditions to be? --- No the pastor self told us those conditions. (my emphasis)."

This evidence given by the respondent under cross-examination can hardly be reconciled with her evidence in chief that she and her husband replied to questions, by the pastor, that they wanted their marriage to be in community of property. There is no indication in the evidence of the respondent that there was more than one occasion when the marriage property regime was brought up. The only occasion, so it seems to me, was this occasion when the pastor told them, albeit mistakenly, that their marriage property regime would be in community of property. More particularly the last answer from the excerpt, set out above, leaves little room for any other construction. Whether the fact that the parties, without any objection, continued with the solemnization of their marriage, would amount to an implied agreement to be married in community of property, seems to me doubtful. However I need not decide this issue because I am of the opinion that Mr. Smuts' submission that what took place in the office was after the marriage was already solemnized is, judged from the evidence, a probability and at least so ambiguous that it cannot be said to prove on a balance of probabilities that an agreement, express or by implication, was entered into prior to the marriage.

Also in regard to this evidence there is again no specific indication as to when this explanation was given by the pastor. It is at least clear that this explanation was not given in the church, where one supposes the marriage vows were taken, but in the office of the pastor. The witnesses were also present at that time and they signed there, presumably the marriage register. It was also then, and at that venue, that the respondent signed the marriage certificate. This is something which did, in all probability, only happen after the marriage was solemnized. This is further confirmed by what the pastor said namely that "…Nangula and Mofuka today you are <u>now</u> one

person." (my emphasis). This, so it seems to me, could only have been said once the parties were unified through their marriage with each other.

I have therefore come to the conclusion that the respondent did not prove on a balance of probabilities that she and the appellant, prior to their marriage, concluded, either expressly or by implication, an agreement whereby they had decided that the matrimonial property regime of their marriage would be one in community of property.

Under the circumstances the fact that the appellant did not give evidence did not assist the respondent. However I would like to say that I find it strange that the appellant, who initiated the Rule 33(4) proceedings, elected not to give evidence and to assist the Court in coming to a conclusion on the issue. As shown above it does not follow that failure by the one party to prove his or her case would necessarily result in a judgment in favour of the opposing party. This, so it seems to me, is a further factor which should be considered by the Court when application is made to determine one or other aspect of a case separately from the other issues involved.

I have previously referred to certain documents which formed part of the case of the respondent. These are a Full Marriage Certificate issued by the Ministry of Home Affairs, an extract from the Marriage Register, issued by the same Ministry and an affidavit signed by both parties which, according to the evidence of the respondent, was required by the Bank at the time when the parties sold the house of the respondent.

Paragraph 17 of the Full Marriage Certificate requires an indication whether the marriage was 'Within or Without Antenuptial Contract'. In the blank space left for the

answer it was recorded that the marriage was ‘within antenuptial contract’. In evidence the respondent denied this and said that the marriage was contracted without antenuptial contract. Paragraph 17 of the Marriage Register again required an indication as to whether the marriage was ‘By/without antenuptial contract’. The words written in were ‘By antenuptial contract’. However it seems that certain unauthorized changes were made and now the word ‘widhouts’ also appears in the blank space. Neither of these documents assist the case of the respondent, in fact they tend to prove the opposite.

The affidavit relied on was in all probability drafted by the Bank and it is clear from the wording thereof that the draftsman was unaware of the effect of section 17(6) of the Proclamation on the matrimonial property regime of the parties, because it stated in the affidavit that the absence of any antenuptial or postnuptial contract resulted in the marriage being in community of property. At best for the respondent the affidavit may reflect what the parties thought, at the time, the position in regard to their matrimonial property regime was, but would, in the light of what I have found, not tip the scales in favour of the respondent.

I am mindful of the fact that my finding that the respondent did not prove on a balance of probabilities that there was an antenuptial contract, whereby the matrimonial property regime of the parties was regulated *inter partes,* amounts to an order of absolution of the instance which leaves the door open to the respondent to again attempt, if so advised, to prove such an agreement. Mr. Smuts conceded that this was so.

Concerning the costs in the Court *a quo* it was there ordered to stand over for determination at the end of the case. It is not clear whether the appellant also appealed

against this order but in my opinion there is no basis to interfere with the order and it should be left undisturbed.

Another matter which I want to mention, concerns the record of appeal. In this case, as in many other cases which came before us, the arguments raised by Counsel in the Court *a quo,* were typed and formed part of the appeal record. In certain cases even the Heads of Argument and the application for leave to appeal were so included and formed part of the record. This is totally unnecessary and only adds to the costs of an appeal. Where it is necessary that such documents or argument, or part thereof, should be placed before this Court, the party wishing to do so can address a specific request to the party who is responsible for the record, that it be included in the Court record. This Court will in future exclude such costs from its costs order by denying the successful litigant, if he or she was responsible for the compiling of the record, such costs. If this does not have the required effect this Court will consider ordering the Legal Practitioner, responsible for the compiling of the record, to pay such costs.

In the present instance I will make no special order as to these costs. The arguments raised by Counsel in the Court *a quo* were relatively short, and, as was pointed out by me, Mr. Smuts was able to argue that it was never the case of the respondent to rely on an agreement *int*er *partes.* It further seems to me that, with the exception of the learned Judge, none of the parties was alert to the fact that proof of an antenuptial agreement could regulate the matrimonial property regime, at least as far as the parties were concerned, without it complying with the statutory requirements. From the argument it was clear that the attention of the appellant's Counsel was timeously drawn to this

possibility by the learned Judge and he was given the opportunity to address the Court in that regard.

In the result the following order is made:

1. The appeal succeeds to the following extent:

    1.1 That part of the order of the Court *a quo* ordering that, as between plaintiff (respondent) and the defendant (appellant), the marriage has the effect of one concluded in community of property, is set aside.

    1.2 An order of "absolution of the instance" is substituted for that of the Court a quo in regard to the aforesaid issue.

2. The matter is referred back to the Court *a quo* for leading of evidence and decision on the remaining outstanding issues, including the issue of whether or not the matrimonial property regime as between the parties is in community of property or not, should the plaintiff/respondent decide to reopen this matter.

3. The plaintiff/respondent is ordered to pay the costs of appeal.

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STRYDOM, A.C.J.

I agree.

_____
TEEK, J.A.

I agree.

_____
O’LINN, A.J.A.
/mv

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