NOT REPORTABLE

CASE NO: SA 77/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MOSES SHAMBWILA	**Appellant**
and	
TULIMEKE ELIZABETH MUNDJULU	**Respondent**

Coram:	MAINGA JA, HOFF JA and FRANK AJA
Heard:	**5 June 2018**
Delivered:	**27 July 2018**

Summary: In the court *a quo*, the appellant instituted divorce proceedings against the respondent wherein the appellant sought a divorce decree, the restitution of conjugal rights failing which, a decree of divorce and orders relating to the custody and maintenance of the minor children. The respondent defended the action and filed a counterclaim seeking similar orders including maintenance in the sum of N$2 500 per month in respect of the minor children. Prior to the hearing in the court *a quo*, parties agreed that the matter would proceed only on the one issue of whether their marriage was in community of property or out of community of property. The parties further agreed that other issues would be determined at a later stage. This position was communicated to the judge *a quo*.

Despite the agreement, the court *a quo* not only determined that the parties were married in community of property but also granted a final order of divorce, awarded the custody and control of the minor children to the respondent subject to the appellants reasonable access. The court also ordered the appellant to pay N$2 500 per month per child for child maintenance which maintenance had to increase at the rate of 10% annually. The court further granted an order relating to the division of the estate and a costs order against the appellant.

Disgruntled with the judgment and orders of the court a quo, the appellant timeously noted an appeal against the judgment. However, the appellant failed to comply with the rules of this Court resulting in the appeal being regarded as withdrawn. The appellant thus filed a condonation application for the non-compliance with the rules and sought the reinstatement of the appeal.

This court *held,* for the condonation application to succeed, the appellant must give a reasonable explanation for the delay and satisfy this court that there are reasonable prospects of success on appeal.

This court found that the court *a quo* committed irregularities by deciding issues that were not placed before it by agreement by the parties. In the light of irregularities committed by the court *a quo* it would not serve justice not to reinstate the appeal.

An important question before this court was whether the court *a quo* was wrong in its finding that the proprietary consequences of the marriage between the parties was that of a marriage in community of property.

This court *held* that every marriage is presumed to be in community until the contrary is proven. However, a community of profit and loss does not exist where same is excluded by an ante nuptial contract or where s 17(6) of Proclamation 15 of 1928 applies.

Held, an agreement on the matrimonial property regime is valid and enforceable *inter partes*.

Held, a judge a quo has advantages which this court does not have in that he has the opportunity to hear and see witnesses and observe their demeanour. As such, an appeal will not overrule the finding of facts unless it is clear that the judge was wrong.

This court found that evidence of Pastor Avia corroborated that of the respondent in all material respects rather than the version of the appellant.

The order of the court *a quo* is set aside and substituted by an order that the marriage between the parties is a marriage in community of property and of profit and loss. As a result, the appeal being partially successful, the appellant is ordered to pay costs occasioned by the hearing to determine the proprietary consequences of the marriage between the parties and no order is made in respect of the costs on appeal.

In the result, parties are to approach the Registrar of the High Court (Northern Local Division) to request a status hearing from the managing judge to give directions as to the further progress of the matter.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and HOFF JA concurring):

[1] The parties to this appeal are married to each other. The appellant (as plaintiff) instituted divorce proceedings in the court *a quo* against the respondent (defendant *a quo*). In addition to seeking the restitution of conjugal rights (and

failing which a divorce) certain ancillary relief was also sought which included orders that related to the custody and control as well as the maintenance of the parties' two minor children. The respondent defended the action and filed a counter claim seeking a restitution order (and failing which a divorce) against the appellant and certain ancillary relief such as the custody and control of the minor children and maintenance in the sum of N$2 500 per month in respect of the minor children. Both parties further pursued certain proprietary claims against one another.

[2] At the hearing of the matter, the court *a quo* was informed that the parties had agreed to proceed on a certain basis. The matter would proceed on one issue only, namely, the dispute between the parties whether their marriage was in community of property or out of community of property. That a welfare report would be obtained in respect of the dispute in respect of the custody and control of the minor children and that this aspect (custody) would be determined together with the other remaining issues at a later stage and subsequent to the determination of the patrimonial regime governing the marriage. The judge *a quo* had no issue with this approach (which would have been in line with rule 63(c) of the High Court Rules) and the parties called their witnesses to support their respective cases and argued the issue. The court *a quo* gave a judgment and found that the parties were indeed married in community of property and granted a final order of divorce, awarded the custody and control of the minor children to the respondent subject to the appellants reasonable access, ordered the appellant to pay N$2 500 per month per child maintenance which maintenance had to increase at the rate of 10% annually, as well as further orders relating to the maintenance of the children, the division of the estate and a costs order against the appellant.

[3] The appellant filed a notice of appeal against the judgment timeously but thereafter did not timeously comply with certain rules of this Court[1] resulting in the appeal being regarded as withdrawn. The appellant thus filed an application to this court seeking condonation for the non-compliance with the rules and the reinstatement of the appeal.

[4] For the condonation application to succeed, the appellant must give a reasonable explanation for the delay and satisfy this court that there are reasonable prospects of success on appeal.[2]

[5] From the record, and as is apparent from what is stated above in summary form, the court *a quo* committed irregularities. It dealt with issues that were not placed before it by agreement by the parties and which approach it sanctioned. Thus, the questions of the custody and control and maintenance of the minor children were not placed before it. Notwithstanding, the court *a quo* granted a final order in this regard which even exceeded the respondent's claim (maintenance of N$2500 in respect of both children).

[6] Further, both parties' claims were premised on malicious desertion by the other, and a restitution order (as prayed for by both parties) was a prerequisite prior to a final divorce order. A restitution order is a necessary preliminary step where the divorce is sought on the grounds of malicious desertion.[3] In any event,

---

[1] Rule 5(4)(a), filing of the power of attorney, Rule 5(5)(b), filing of the appeal record and Rule 8(2), payment of security of costs.
[2] *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552F.
[3] *Duncan* 1937 AD 310 at 316, *Coetzee* 1945 WLD 122 at 123, *Mitchell* 1922 CPD 435 and *Marwitz* 1940 SWA 20.

in view of the agreement between the parties as sanctioned by the court *a quo* a restitution order or divorce would only follow subsequent to the determination of the proprietary consequences of the marriage. Neither party, however took issue with the final order of divorce granted *a quo*, presumably as neither of them is prejudiced by the order, as the resolution of the remaining issues are not dependent on this decree of divorce, I do not intend setting it aside despite it having been granted irregular.

[7] It follows, that in respect of the aforementioned irregularities which all appears on the record, and those which the appellant intended raising on appeal that more than reasonable prospects has been established but an unassailable appeal. With such position it would not serve justice to, with reference to criticism of the reasons for the failure to adhere to the time limits, not reinstate the appeal. I must however state that the explanation, especially as to the late filing of the record, evidences a lackadaisical approach to the rules and also raises questions as to the veracity of the allegations in respect of certain steps taken to have the record compiled timeously and had the prospects of success not been virtually unassailable in respect of the issues mentioned above a reinstatement order would not have been appropriate.

[8] What still needs to be decided is whether the issue which was the only one that served before the court *a quo* was wrongly decided, ie whether the court *a quo* was wrong in its finding that the proprietary consequences of the marriage between the parties was that of a marriage in community of property.

[9] In terms of the common law, a community of property and of profit and loss comes into being as soon as a marriage is solemnised.[4] Furthermore, every marriage is presumed to be in community until the contrary is proven.[5] Community does not take place where this is excluded by an ante nuptial contract (not of relevance in this matter) or where s 17(6) of Proclamation 15 of 1928 excludes this. This section, insofar as relevant to the present appeal, reads as follows:

> 'A marriage between natives, . . . , shall not produce the legal consequences of a marriage in community of property between the spouses: provided that . . . 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, native commissioner or marriage officers (who is hereby authorised to attest to such declaration) it is their intention and desire that the community of property and of profit and lost shall result from the marriage, and thereupon such community shall result from the marriage . . . .'

[10] It is common cause between the parties that they are 'natives' as defined in the proclamation and that the person (pastor) whom they saw about two weeks prior to their marriage and who solemnised their marriage, was a marriage officer. Thus, but for a declaration by them that they intended and desired to be married in community of property, they will not be so married. Appellant's position was that there was no such declaration and that the marriage was thus one out of community of property. Respondent's position was the converse. The court *a quo* found in favour of the respondent and held the marriage was one in community of property.

[11] The court *a quo* rejected the version of the appellant who was the sole witness in his case and accepted the version of the respondent as corroborated by

[4] *Rautenbach v Groenewald* 1911 TPD 1148 at 1149.
[5] *Mograbi* 1921 AD 274 and *Edelstein v Edelstein NO* 1952 (3) SA 1 (A).

the marriage officer (pastor Avia). It must be borne in mind that the judge *a quo* had advantages this court does not have. He saw and heard the witnesses, could observe their demeanour and the manner in which they conducted themselves and where there had been no misdirection on the facts this court will not overrule him unless it is clear that he was wrong. If it is merely doubtful whether he was correct, his findings will not be disturbed.[6]

[12] Both parties sought to invoke their conduct subsequent to the marriage in support of their respective stances. Thus evidence was led as to who paid for what and their arrangements in this regard. In my view, the evidence in this regard does not support either position but is of a neutral nature. The marriage created a reciprocal duty of support and the fact that one may have purchased more than the other must also be seen in the context that one earned more than the other. [7]

[13] The parties went to see Pastor Avia, whom appellant knew from before, because the priest at the village church where they intended to marry was not a recognised marriage officer, to inquire from Pastor Avia whether he would conduct their marriage ceremony. Pastor Avia explained to them the difference between marrying in community and out of community of property and then asked them which regime they desired. According to the appellant, he informed the pastor that that they would marry out of community of property. Both the respondent and Pastor Avia's testimony is to the contrary.

[14] According to Pastor Avia, he asked the respondent whether she knew that the appellant was married previously and she informed him that she knew. He

[6] *Rex v Dhlumayo* 1948 (2) SA 677 (A) at 705-706, *Vermeulen v Vermeulen* 2014 (2) NR (SC).
[7] *Union Government v Warneke* 1911 AD 657 at 663.

then explained to them the difference between marriages in and out of community of property. Subsequent thereto, he asked them what property regime they wanted. They both indicated that they wanted to be married in community of property. He then got them both to sign a declaration to this effect. This declaration according to him was forwarded with the marriage particulars after the wedding to the Ministry of Home Affairs as it is the relevant Ministry for the purposes of record-keeping in this regard. The declaration could not be traced at the Ministry and they must have lost it. He explained under cross-examination that it is the policy of the church which he serves, not to solemnise marriages out of community of property unless the prospective spouses provide the marriage officer with, at least, a letter from a lawyer to the effect that the lawyer had been consulted in this regard. He thus denied that appellant (or the parties) informed him that they intended to marry out of community of property. Had they informed him so, he would either have insisted on the letter from the lawyer or failing such letter, would have advised them to get married in front of a magistrate outside the area of jurisdiction of the Proclamation. The submission that the pastor was testifying as to his usual procedure and mistakenly assumed he had adhered to this usual procedure in respect of the marriage between the parties because it is unlikely that he could remember all the weddings he solemnised does not wash. Firstly, he knew the appellant personally and, secondly, he surely would have remembered if he was informed that the marriage would be out of community of property as he testified that in his experience as a marriage officer, this choice is a rare one and he cannot recall more than 4 or 5 cases where parties opted for this choice.

[15] The evidence of Pastor Avia corroborates that of the respondent in all material respects. The criticism levelled at the evidence based on discrepancies as to exactly when the declaration was signed does not in any serious manner discredit the evidence of the pastor or the respondent. It must be borne in mind that the parties would be bound by an agreement conveyed to the pastor even if they did not sign the declaration. The declaration is needed to make it effective as against third parties.[8] In short, I cannot fault the court *a quo* in accepting the respondent's version (as corroborated by Pastor Avia) in this regard as having been established on the probabilities.

[16] It follows that the attack on the judgment *a quo* on this score (that the marriage was in community of property) cannot be sustained.

[17] As indicated, the appeal must succeed in respect of the orders granted *a quo* not related to the proprietary regime of the marriage. Whereas this was not really disputed in the submissions on behalf of the respondent in this court, the stance taken in the heads of argument was that as maintenance and custody orders could always be altered, appellant could and should use this route if he really felt aggrieved by these orders. I cannot agree. Firstly, the parties did not have to present evidence on this score and did not address the court a quo at all as far as these issues were concerned. It was not an issue placed in front of the court *a quo*. Secondly, these orders can only be changed if the circumstances leading to them change and up to that time appellant must simply accept the order, eg pay double the amount of maintenance claimed by respondent. In any event, to have made orders in total disregard of the agreement between the

---

[8] *Pollard v Registrar of Deeds* 1903 TS 353 at 356, Ex Parte Kloosman 1947 (1) 342 (T) at 347. See also *Mofuka v Mofuka* 2001 NR 318 HC.

parties (and at least implicitly sanctioned by the court *a quo*) and the *audi alterim* rule amounted to a vitiating irregularity and there's no basis to allow it to stand. Apart from this, the orders are clearly prejudicial to appellant.

[18] When it comes to costs, the court *a quo* correctly found against the appellant on the only issue that it had to decide at the hearing, namely the proprietary regime applicable to the marriage. It follows that the respondent is entitled to the costs of that hearing as she was successful in respect of the issue that had to be determined.

[19] As far as the appeal is concerned, the respondent opposed all aspects thereof and although appellant has not succeeded in establishing that the court *a quo* erred in its finding that the marriage was in community of property he has been successful in his attack on the other orders granted by the court *a quo*. At the hearing of this appeal counsel for respondent however conceded that the orders a quo other than the finding relating to the marriage being in community of property cannot stand. Arguments on appeal thus virtually exclusively focussed on the issue of the proprietary consequences of the marriage. The appeal can thus be termed to be partially successful. In the circumstances I am of the view that each party should pay its own costs on appeal and the order I make reflects this position.

[20] In the result I make the following order:

(a) The appeal is reinstated;

(b) The appeal succeeds partially: the finding of the court *a quo* as to the proprietary consequences of the marriage between the parties is upheld, but all the other orders of the court *a quo* are set aside;

(c) The judgment of the court *a quo* is set aside and substituted with the following order:

(i) A final order of divorce is granted;

(ii) It is declared that the parties' marriage is a marriage in community of property and of profit and loss;

(iii) The costs occasioned by the hearing to determine the proprietary consequences of the marriage between the parties is to be borne by the plaintiff;

(d) The parties are to approach the Registrar of the High Court (Northern Local Division) to request a status hearing from the managing judge to give directions as to the further progress of the matter.

(e) No order is made in respect of the costs of the appeal.

____

FRANK AJA

____

MAINGA JA

HOFF JA

APPEARANCES

APPELLANT:	I Visser Instructed by Dr. Weder, Kauta & Hoveka Inc
RESPONDENT:	E M Angula Of AngulaCo Inc