



NOT REPORTABLE

CASE NO: SA 17/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MLN

Appellant

and

**LI
FN**

**First Respondent
Second Respondent**

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: 09 June 2021

Order: 09 June 2021

Reasons: 14 June 2021

REASONS

DAMASEB DCJ (MAINGA JA and HOFF JA concurring):

[1] On 9 June 2021, we had before us an appeal by the appellant (MLN) against the judgment and order of the High Court handed down on 11 February 2020, in the following terms: ¹

1. The marriage between the plaintiff and the defendant is hereby dissolved and a final order of divorce is granted.
2. Division of the joint estate.
3. Forfeiture of the benefits arising from the marriage in community of property in favour of the plaintiff.
4. That Mrs Essie Herbst is hereby appointed as Receiver for the purpose of taking all steps necessary to give effect to the order of division of the joint estate and the general forfeiture order with the powers, rights and functions as provided for in the plaintiff's amended particulars of claim.
5. The defendant bears the costs of the appointment of the Receiver.
6. The defendant to pay plaintiff's costs of suit, which costs includes the costs of one instructing and one instructed counsel.'

[2] MLN noted an appeal against that order and his principal complaint is that the learned judge *a quo* misdirected herself in holding that the marriage between him and the first respondent (LI) was one in community of property, when it was out of community of property.

Litigation History

[3] In 1988, MLN entered into an invalid marriage with the second respondent (FN) whilst he was still lawfully married to LI since 1970. Relying on that putative marriage and her personal contribution over 37 years to the business success of MLN, FN

¹ *Ipinge v Nakuumba* (I 1833/2011) [2020] NAHCMD 45 (11 February 2020) para 40

instituted proceedings in the High Court in 2015 seeking a declarator for the existence of a universal partnership between her and MLN and an equal division of the universal partnership assets between them. The High Court granted a declarator confirming the existence of a universal partnership and ordered division of the partnership assets in equal shares. On appeal by MLN against that order, this court on 15 November 2019 made an order in the following terms:²

- '(a) A universal partnership had come into existence between the appellant and the respondent from the date of their cohabitation in 1976.
- (b) The universal partnership between the appellant and the respondent is dissolved as from the date of this order.
- (c) The specific assets identified in this judgment as such shall fall within the personal ownership of the individual parties.
- (d) The property of the universal partnership shall exclude the assets determined in para (c) of this order.
- (e) The sole ownership in the property, to wit Erf 353 Oshakati is confirmed by this order to vest in the respondent from the date of this order.
- (f) The Director of the Law Society or her representative is hereby appointed receiver from the date of this order and shall within 90 days of such date effect the equal division of the universal partnership property determined in para (d) of this order.
- (g) The receiver shall determine an equitable and reasonable process to ensure the respondent's access to Erf 353 Oshakati including that the transfer of sole ownership in the property is effected forthwith.

² *MN v FN* 2019 (4) NR 1176 (SC), at 1206 A-F (hereafter '*MN v FN*').

- (h) The receiver shall make an award effecting the equal division of the universal partnership property and submit such award to the High Court within 14 days of the date of the award for confirmation as an order of court.
- (i) The costs of the receiver shall be on the account of the universal partnership property.
- (j) Costs in this matter, occasioned by one instructing and one instructed legal practitioner are granted to the respondent.'

[4] In the proceedings that resulted in that order, LI was not a party. Similarly, although she was cited as a defendant in the proceedings which led to the present appeal, FN did not take part therein and was, as a result, not a participant in the appeal now before this court.

[5] On appeal, Mr Heathcote argued on behalf of MLN that the outcome of the present appeal as regards division of the joint estate, if the marriage is confirmed to be in community of property, will affect FN's rights under the universal partnership as found by this court in *MN v FN*. Since LI was not a party to the *MN v FN* proceedings, the argument went, in so far as it may affect her rights, she cannot be bound by the decision of this court in that case. Conversely, assuming she was not properly served although cited, FN cannot on the same juridical basis be bound by a finding adverse to her rights in the present appeal.

[6] Those potential conflicts, which MLN contends might result in an injustice to either woman or himself, were mooted for the first time in MLN's heads of argument on appeal and persisted with in oral argument at the hearing of the appeal. It was

contended that before the appeal is heard on the merits, the anterior question to be answered is whether this court's judgment in *MN v FN* should be revisited given the possibility that the court might confirm the High Court's conclusion that MLN's marriage to LI is in community of property.

[7] According to Mr Heathcote, considering that this court is superior to the High Court, the judgment and order of the court *a quo* is subject to it. The consequence is that potentially there would be difficulty determining, in respect of which of MLN's property, the division of the joint estate that was ordered *a quo*. Counsel also submitted that, in the light of the finding of a universal partnership in *MN v FN*, there would possibly be a three-way division involving MLN and the two women. That counsel submitted would be legally untenable.

[8] Mr Heathcote further submitted that since this court's judgment in *MN v FN* is not binding on LI, she is not obliged to give effect to it. In other words, if either LI or FN disobeys an order adverse to her interests but given in proceedings to which she was not a party, she cannot lawfully be held to be in contempt of court.³ Because there was a specific finding by this court regarding the property which vests in the universal partnership, and regard being had to the order of the court *a quo* for division of the joint estate without delimiting the extent of the division, Mr Heathcote argued that two judgments from this court might conflict or produce an inconsistent result.

³ A judgment by a competent court is conclusive proof of facts directly in issue and decided by the court, only as between the parties to the proceedings. It does not have that consequence as between a party to proceedings and one who was not: Sir JF Stephen, *A digest of the Law of Evidence 3 ed (1877)* at art 41,42,44

[9] The court was thus invited by MLN's counsel to consider setting aside its previous decision in *MN v FN* on the premise that allowing it to stand might result in an injustice.

[10] Mr Boesak for LI shared the concern raised by Mr Heathcote about the potential conflicts. Mr Boesak had however not had enough opportunity to prepare considered argument on the question whether this court's decision in *MN v FN* should be revisited and be set aside in terms of art 81 of the Constitution on the test developed by this court in *S v Likany*⁴. But more importantly, since FN is not a participant to the present appeal, she has had no opportunity to address the court on whether a judgement in which she is a beneficiary should be set aside. To have proceeded to determine the reliance on art 81 in her absence or without her participation would not be a path that leads to justice.

[11] We therefore considered it to be in the interest of justice, especially because the parties made common cause, that MLN be afforded the opportunity to properly ventilate the concerns he has about the potential conflicts arising from this court's decision in *MN v FN* and the consequences of a marriage in community of property in the event that the court *a quo*'s finding is upheld in the present appeal. A proper factual and legal basis should be laid on affidavit for this court to properly adjudicate that issue.

⁴ 2017 (3) NR 771 (SC).

[12] In any event, rule 29 of the rules of this court empowers the court 'in matters of procedure and practice' and 'for sufficient cause shown' to 'give such directions as it considers just and expedient under the circumstances'.

[13] It was for the above reasons that we made the order handed down on 09 June 2021 in the following terms:

1. That the court does not hear the appeal on the merits at this stage.
2. That the matter be stood down to a future date for argument on whether or not this is an appropriate case for the Supreme Court to invoke its jurisdiction in terms of Article 81 of the Namibian Constitution.
3. The applicant shall serve and file his application supported by a founding affidavit on the first and second respondents within 30 days.
4. In the application, the applicant shall set out the grounds upon which he contends that the judgement of this court reported as *MN v FN* 2019 (4) NR 1175 (SC) should be set aside in terms of article 81 of the Namibian Constitution.
5. Simultaneously, the applicant shall also set out the grounds which he seeks to set aside the judgment of the High Court in case number I 1833/11 handed down by [the High Court] on 11 February 2020, in terms of section 16 of the Supreme Court Act of 1990.
6. The respondents shall file their answering affidavits within 30 days from the date the application is received.
7. The applicant shall file his replying affidavit within 15 days from the date that the answering affidavits are received.

8. In the event that any of the respondents do not want to participate in this proceeding, she/they shall inform the other parties as well as the Registrar of the Supreme Court, stating that they will abide the decision of this court.
9. As soon as the replying affidavit has been filed, the Chief Justice or any Judge designated by him shall give the parties directions as to the further conduct of the matter.'

[14] We considered it necessary to furnish these brief reasons for the record, particularly for the benefit of FN so that she and her legal advisors fully appreciate the context and the reasons for the order. Should the Chief Justice choose to constitute the court differently when the matter is ultimately heard, the members of that panel will understand the context in which the order was made.

DAMASEB DCJ

MAINGA JA

HOFF JA

APPEARANCES:

Appellant:

R Heathcote (with him G Narib)
Instructed by Sisa Namandje & Co Inc.
Windhoek

First Respondent:

AW Boesak (with him LN Ihalwa)
Instructed by: Legal Aid