

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

(1) REPORTABLE: NO/~~YES~~
(2) OF INTEREST TO OTHER JUDGES: NO/~~YES~~
(3) REVISED.
10/12/2020

CASE NO: 3113/2019

In the matter between:

RABALAO KLAAS NTLHANE

APPLICANT

and

MOGOJE MMAPHEFO GRACE

RESPONDENT

JUDGMENT

NAUDE AJ:

- [1] The Applicant brought an application in terms whereof he applies that the house situated at [...] Province be declared to be a proceed of an inheritance from the estate of his late brother, Rabalao Madumetja Elias (herein after "the Applicant's brother") and be excluded from the division of the joint estate between the Applicant and Respondent.
- [2] The Applicant's brother passed away on 16 December 2012 in Pietermaritzburg. The Applicant's brother was self-employed and practiced as an optometrist in Newcastle. When he died, the Applicant's mother received funds from an Old Mutual Insurance Policy as beneficiary. At that time, the Applicant was employed by the Chief Albert Luthuli Local

Municipality in Carolina. The Applicant was financially struggling. The Applicant's mother gave the Applicant money, which she received from the Old Mutual Policy as beneficiary to purchase a house alternatively to build one.

- [3] An amount of R450 000.00 (Four Hundred and Fifty Thousand Rand) was deposited into the Applicant's bank account by his mother during April 2013. The Applicant utilized the money to buy a vacant stand at [...], Limpopo Province on 3 May 2013. The said stand was bought for the sum of R85000.00 (Eighty Five Thousand Rand). The balance of the amount received was used to build a house on the stand.
- [4] The Applicant and Respondent were in a relationship during this period. After the completion of the house, the Applicant and Respondent moved in together and lived in the house as husband and wife.
- [5] The Applicant and Respondent were married to each other on 24 August 2013 in terms of the **Recognition of Customary Marriages Act 120 of 1998**, in community of property and which marriage was dissolved by a decree of divorce on 18 February 2019 in the Middelburg Regional Court. The decree of divorce order stipulated, amongst other relief, that "the division of the joint estate shall be divided equally".
- [6] The Applicant contested the divorce proceedings and states as follows in his founding affidavit "*I contested the existence of the marriage between ourselves; however the court ruled in favour of the Respondent and declares[d] that there was a customary marriage between us*". The Applicant did not file a counter-claim in the divorce proceedings.
- [7] The Respondent argued that as a result of the decree of divorce, there is no longer any *lis* between the parties and the aspect of division of the joint estate has been dealt with. The matter is *res judicata*. The Applicant is now seeking to have the matter of the division of the joint estate, re-adjudicated, in an irregular fashion by way of this application.
- [8] The Respondent in response argued that the Applicant cannot bring an application for rescission of judgment in that the Applicant was present during the divorce proceedings. According to the Applicant's counsel this

application is brought in terms of **Section 5 of the Matrimonial Property Act, Act 88 of 1984.**

- [9] **Section 7(2) of the Recognition of Customary Marriages Act 120 of 1998** stipulates as follows:-

"A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage."

The marriage relationship between the parties was therefore in community of property.

- [10] **Section 5 of the Matrimonial Property Act, 88 of 1984, stipulates as follows:-**

"Inheritances, legacies and donations excluded from accrual

(1) *An inheritance, a legacy or a donation which accrues to a spouse during the subsistence of his marriage, as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his estate, except in so far as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise.*

(2) *In the determination of the accrual of the estate of a spouse a donation between spouses, other than a donation mortis causa, is not taken into account either as part of the estate of the donor or as part of the estate of the donee."*

- [11] **Section 5** falls under **Chapter 1 of the Matrimonial Property Act, 88 of 1984**, which chapter deals with the accrual system. **Section 5** is applicable to marriages out of community of property in terms of an antenuptial

contract by which community of property and community of profit and loss are excluded and which was entered into after the commencement of this Act without the accrual system having been expressly excluded by the antenuptial contract. This section is not applicable to marriages in community of property. The Applicant's argument in this regard is misplaced and not correct. In my view **Section 5 of the Matrimonial Property Act 88 of 1984** is not applicable in this application.

- [12] The *res judicata* doctrine prohibits the reconsideration of a case already finally determined by a Court. As stated by the Constitutional Court in ***Thwala v S* 2019 (1) BCLR 156 (CC), at paras 10 and 16:**

"The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter."
(See also ***S v Molaudzi* 2015 (8) BCLR 904 (CC)**)

- [13] The defence of *res judicata* raised by the Respondent in these proceedings accordingly calls for an examination of the issues that were before the Regional Court in the divorce proceedings together with the issues that arise in the current litigation proceedings.
- [14] In the divorce summons and particulars of claim the Respondent (Plaintiff in the divorce action) pleaded that the marriage was concluded on the 24th of August 2013, in terms of customary marriage and the said marriage still subsists. The Plaintiff further pleaded primary care and residence in respect of the minor child, maintenance payable in respect of the minor child and rehabilitative maintenance for the Respondent, the grounds of breakdown of the marriage and that the Applicant (Defendant in the divorce action) is a member of a retirement fund administered by the Municipal Gratuity Fund.
- [15] There was no case made or argued as to what constituted to form part of the marriage in community of property. As already stated here above, the Applicant did not institute any counter-claim. There was no claim by either

party for forfeiture of the patrimonial benefits of the marriage by the Applicant, nor by the Respondent, including any interest which the Applicant or Respondent has or may have in the immovable property, which property is situated at 1989 Pokes, Phokanoka Street, Marble Hall, Limpopo Province (herein after "the property"). The Respondent only claimed for the division of the joint estate.

- [16] As highlighted by the Supreme Court of Appeal in ***Aon South Africa (Pty) Ltd v Van den Heever NO and Others 2018 (6) SA 38 (SCA)***, at paras **22 and 23**, *res judicata* deals with a situation where the same parties are in dispute over the same cause of action and the same relief. In that regard, the SCA has summarised the current state of the law in respect of *res judicata* as follows -

" Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio res judicata has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (eadem res and eadem petendi causa) in both the case in question and the earlier judgement.

Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgement on which reliance is placed. Where the plea of res judicata is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) at 6690 , 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of res judicata. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis ... Relevant considerations will include questions of

equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in Bertram v Wood (1893) 10 SC 177 at 180, 'unless carefully circumscribed, [the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals'."

- [17] The crux of the issue in the current proceedings is around whether the property forms part of a proceed of an inheritance and whether the property forms part of the joint estate or should be excluded from the joint estate.
- [18] In my view, to grant the relief sought by the applicant in these proceedings will be entirely unlike the findings made by the Court in the previous proceedings involving the divorce action.
- [19] I conclude that the claim and the relief sought by the Applicant in these proceedings will not involve the reconsideration of the issues that were determined by the Court in the previous litigation involving the divorce. The current proceedings involve the same parties, and the issue arises from the divorce proceedings but it is not the same cause of action, and in my view, the same relief is not sought. Even if the relief sought by the Applicant in these proceedings is related to the relief that was sought in the previous proceedings, I am satisfied that the elements of *res judicata* in the form of estoppel are not present. The *point in limine* of *res judicata* raised therefore cannot succeed.
- [20] In dealing with the application before me, I must first consider what the consequences flowing from a marriage in community of property are. Community comes into being by operation of law as soon as the marriage is solemnised. In the case of ***Estate Sayle v Commissioner for Inland Revenue 1945 AD 388*** the court held that a marriage in community of property means that the spouses become joint owners in undivided half shares of the assets they possess at the time of their marriage as well as of all assets acquired by them during the subsistence of their marriage. The merging of the properties takes place automatically by virtue of the parties being married in community of property.

[21] The general rule is that all the assets that the spouses had before the marriage as well as assets they accumulate after entering into the marriage fall into the joint estate. At the moment of conclusion of the marriage, the ownership of the assets pass *ex lege* to the joint estate and the normal rules as to the passing of ownership do not apply. It is trite, however, that spouses may retain a separate estate in that certain exceptions do exist where assets do not fall into the joint estate. This would include, *inter alia*, assets excluded in a will or donation agreement, assets subject to a *fideicommissum*, non- patrimonial compensation, et cetera. As for liabilities, it is clear that pre-nuptial liabilities form part of the joint estate without any exception.

[22] It was argued by the Respondent's counsel that there is no proof that the deceased, the Applicant's brother, left a valid Last Will and Testament and the only inference that the court can draw is that the deceased' brother then passed away, intestate. It was further argued that in the absence of any other proof whether the deceased brother had a wife, children etc., it is safe to assume that whereas the deceased brother indeed had living biological parents as the Applicant states in his founding affidavit "my parents", that the parents of the deceased were the sole heirs of the estate in terms of **Section 1(1)(d)(i) of the Intestate Succession Act 81 of 1987**.

[23] **Section 1(1)(d)(i) of the Intestate Succession Act 81 of 1987** stipulates as follows:-

"(d) is not survived by a spouse or descendant, but is survived-

(i) by both his parents, his parents shall inherit the intestate estate in equal shares."

[24] In the present matter, the Applicant did not make out a case in his papers that he was an *heir* in any estate, from which inheritance the immovable property was attained. The Applicant specifically states *"When he died he left some funds for my mother as part of the legacy of his estate. Those funds were form Old Mutual Insurance Policies wherein she was a beneficiary."*

[25] The only inference I can draw from the facts before me is that the Applicant's mother, alternatively parents inherited from the Applicant's brother and not the Applicant. The Applicant's mother then gave the Applicant an amount of R450 000.00 as the applicant specifically states in his founding affidavit " *out of self-pity, my mother, out of the proceeds of an Old Mutual policy, she gave me money to which she instructed me to purchase a house and or built[d] one.*"

[26] It is common cause that the R450 000.00 was not excluded from the marriage in community of property in a will or donation agreement. If the spouses, the testator or the donor did not pertinently exclude the inheritance or donation from the consequences of the recipient's in community of property estate, then it is not automatically excluded from such joint estate. In the result neither the R450 000.00, nor the property obtained with the R450 000.00 is excluded from the marriage in community of property. The property situated at 1989 Pokes Phokanoka Street, Marble Hall therefore forms part of the joint estate between the Applicant and the Respondent.

[27] I therefore make the following order:-

1. The Application is dismissed with costs.

M. NAUDE
ACTING JUDGE OF
THE HIGH COURT

APPEARANCES:

HEARD ON: 14 OCTOBER 2020

JUDGMENT DELIVERED ON: 10 DECEMBER 2020

For the Applicants: Mr. K Kekana

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