



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG**

Case No: AR 385/16

In the matter between:

ZANYANA MONICA MASONDO

APPELLANT

and

MSIZI JOEL MASONDO

FIRST RESPONDENT

GOVERNMENT EMPLOYEES PENSION FUND

SECOND RESPONDENT

THEMBA ARCHIBALD NGXINGWENI

THIRD RESPONDENT

Coram : Vahed et Poyo Dlwati JJ

Heard : 13 June 2016

Delivered : 21 June 2016

ORDER

On appeal from the Durban Regional Court, Mr S B Msani sitting as a court of first instance:

‘The appeal is dismissed with costs

JUDGMENT

POYO DLWATI J

[1] This is an appeal against the decision of the Durban Regional Magistrates' Court dismissing the appellant's application to vary an order it made on 30 October 2013, with costs.

[2] The appellant and the first respondent were married to each other in community of property on 18 November 1983. Exhibit 'A' which is a copy of their marriage certificate handed in as evidence in the court *a quo* reflects this much. Attached to the marriage certificate is an extract from the marriage register (also referred to as the declaration) signed by both parties on the date of their wedding and this was marked as Exhibit 'B'. In paragraph 14 of Exhibit 'B', the following is endorsed: 'In community of property and of profit and loss in terms of Section 22(6) of Act No.38 of 1927'.

[3] During October 2012, the appellant instituted divorce proceedings against the first respondent. Paragraph 4 of the particulars of claim attached to the summons reads as follows:

- '4.1 The parties were married to each other in Durban by civil rights on 18 November 1983.
- 4.2 By virtue of section 22(6) of the Black Administration Act No.38 of 1927; as amended, civil marriages of black persons entered into prior to the commencement date of the Marriage and Matrimonial Property Law Amendment Law Act 3 of 1988 are regarded as being marriages out of community of property.
- 4.3 The Marriage and Matrimonial Property Law Amendment Act 3 of 1988 came into operation on 2 December 1988.
- 4.4 The parties did not conclude a joint written declaration within one month prior to their marriage to the effect that it is their intention and wish that their marriage should be in community of property.

- 4.5 The parties have not changed the matrimonial system applicable on their marriage.
- 4.6 As such parties are married to each other, out of community of property’.

[4] Prior to the date of hearing of the divorce proceedings correspondence was exchanged between the appellant’s (Mr Nzimande) and the first respondent’s (Mr Buthelezi) legal representatives regarding, amongst other issues, the matrimonial regime applicable to the marriage and the division of the joint estate of the parties. One such correspondence is a letter dated 24 July 2013 from Mr Nzimande addressed to Mr Buthelezi and the second line of that letter reads:...we confirm having now taken instructions from client who accepts the extract can be regarded as the required declaration.’ It was common cause between the parties that this was in reference to the extract from the marriage register attached to the marriage certificate.

[5] Thereafter, on 30 October 2013 during the divorce proceedings, Mr Nzimande, applied, which application was granted, for the amendment of paragraph 4 of the plaintiff’s particulars of claim to read that the parties were married to each other by civil rights on 18 November 1983 in community of property. After the appellant’s evidence was led the learned magistrate made the following order:

- ‘1. Order of decree of divorce is granted.
- 2. No order as to costs.
- 3. The joint estate shall be divided equally.
- 4. The Plaintiff’s pension fund is to be endorsed 50 percent in favour of the defendant against the Government Employees Pension Fund’.

[6] Apparently, after the divorce proceedings the parties could not agree on how the joint estate was to be divided and an application was launched for the appointment of the third respondent as the liquidator of the joint estate. The third respondent did not take any part in these proceedings. Before that application could be heard the appellant launched an urgent application in the

Durban High Court seeking to interdict the third respondent from liquidating the joint estate until an application to vary the court order, dated 30 October 2013, could be made.

[7] Subsequently and on 4 June 2014, the appellant launched an application in the Durban Regional Court seeking the following order:

‘That the decree of divorce order granted in favour of the applicant on 30 October 2013 under case number RC 4890/12 is hereby varied and to order and/or declare as follows:

- a. That the marriage relationship that existed between the parties is declared to have been ‘Out of community of property’.
- b. That the bonds of marriage subsisting between the plaintiff and the defendant be and are hereby dissolved;
- c. That there is no division of estate and/or pension interest;
- d. That there is no order as to costs.’

[8] The gist of the appellant’s claim in the court *a quo* was that it was incorrect for her attorney to have sought an amendment in the particulars of claim that her marriage was in community of property whereas it was out of community of property. She contended that she was never advised of this amendment beforehand and further it was wrong as it sought to change her marriage regime from one out of community of property to one in community of property without complying with the provisions of the Matrimonial Property Act 88 of 1984 (‘the MP Act’). She further contended that in terms of section 22 of Act 38 of 1927 her marriage was out of community of property as they (she and the first respondent) had not signed a declaration or otherwise 30 days prior to their date of marriage. She therefore sought the variation of the order so that her marriage would remain out of community of property and that she did not have to pay the first respondent half of her pension interest accumulated with the second respondent.

[9] The application was opposed by the first respondent and he pointed out various inconsistencies in the appellant’s affidavit and to the affidavit the

appellant had made in her interdict application to the Durban High Court. These were also in contradiction of the various concessions made by Mr Nzimande to Mr Buthelezi. Perhaps it is important to note at this stage that the appellant was represented by another attorney. The respondent further drew the court's attention to the contents of the marriage certificate and the marriage register as alluded to in paragraph 2 above. The respondent further averred that the parties had agreed in 2013, prior to the date of divorce that their marriage was in community of property. This fact, the respondent averred, was also supported by the fact that the title deed of their immovable property, situated at 12 Aloe Road, Amanzimtoti, described them as being married in community of property. Furthermore, all of the negotiations that subsequently followed regarding the division of the joint estate were premised on the fact that the marriage was in community of property.

[10] The learned magistrate, after having considered the lengthy arguments presented to him by both parties dismissed the application with costs. It is that decision that is the subject of this appeal. However, before dealing with the merits of the appeal, the appellant applied for condonation for the late delivery of the appeal record. This, she averred, was due to the fact that there were delays by Sneller Recordings in producing a transcribed record of the proceedings. The application was not opposed by the first respondent. We were satisfied that the delay was sufficiently explained and we granted the application for condonation.

[11] The main ground of appeal was that the learned magistrate had erred in accepting that the marriage between the parties was one in community of property. He ought to have taken cognisance of the fact that section 22 of Act 38 of 1927 read with section 35 of the KwaZulu Act on the Code of Zulu Law No.16 of 1985 provides that a civil marriage between Black citizens shall

‘produce the legal consequences of a marriage out of community of property between the spouses: Provided that the intending spouses may, at any time within one month prior to the celebration of such marriage, declare jointly before any Commissioner or Magistrate or other marriage officer ... that it is their intention and desire that community of property and of profit and loss shall be included in their marriage’.

The other grounds are interlinked to this ground and I will therefore deal with the issues simultaneously.

[12] As correctly found by the learned magistrate, the parties had agreed prior to the date of the divorce proceedings that their marriage was one in community of property contrary to what was initially averred in the particulars of claim. This seems to have been borne out by the marriage certificate itself which indicates this much and the marriage register which seems to have been produced by the first respondent during the course of the settlement negotiations between the parties. This, it seems to me, was the reason why Mr Nzimande applied for the amendment of the particulars of claim. It therefore cannot be argued that the amendment of the particulars of claim was tantamount to an amendment of the parties’ matrimonial regime as contemplated in section 21 of the MP Act.

[13] As the amendment was supported by the production of the marriage certificate and the marriage register signed by both parties, it put to rest the issue of the marriage regime between the parties. It therefore was not open to the learned magistrate to make a finding about the marriage regime as it was not in issue. That the marriage register was not signed one month prior to the marriage is neither here nor there. The fact of the matter is that it was signed before they got married. The important factor, and I am of the view that this was the intention of the legislature, is that both parties had declared their intention to

be married in community of property by signing the declaration prior to them getting married. And as alluded to earlier, it was not open to the learned magistrate to require evidence in this regard as it was not an issue before him. As the issue was not canvassed at trial, it is therefore not justiciable on appeal¹.

[14] Furthermore, the evidence was that the parties had, throughout their marriage, conducted their affairs as though they were married in community of property. This was evidenced by the fact that when the respondent had resigned from his employment at the Department of Education, he used some of his pension benefits to buy a motor vehicle for the appellant. This was never disputed by the appellant. Furthermore the title deed of their Amanzimtoti residence reflects their marriage regime to be one of in community of property, a fact which was never disputed until the divorce proceedings.

[15] Finally when the appellant was giving evidence during the divorce proceedings in the court *a quo*, she was asked whether it was correct that she had no objection to the records of the Government Employees Pension Fund (second respondent) being endorsed to reflect the respondent's share in the said fund and her response was 'no problem'. It is therefore disingenuous for the appellant to put blame on anyone at this stage that she was never privy to what the consequences would be once the decree of divorce was granted. In my view, she knew that there would be a division of the joint estate and hence the issue of their marriage regime was never at issue. In any event, the learned magistrate could only vary his court order if any of the circumstances mentioned in section 36(1) of the Magistrates Court Act 32 of 1944, as amended, existed.² I am satisfied that these do not apply in this matter.

¹See: *Mostert v Old Mutual Life Assurance Company (SA) Ltd* 2001 JDR 0681 SCA at para 20

² S 36(1) The court may, upon application by any person affected hereby, or, in cases failing under paragraph (c), *suo motu* –

[16] As the essential function of an appeal court is to determine whether the court below came to a correct conclusion³, in this instance it did. Accordingly, the learned magistrate, correctly in my view, dismissed the application to vary the order of 30 October 2013. There is no misdirection that he committed and in the circumstances, the appeal must fail.

[17] Order

I propose the following order:

‘The appeal is dismissed with costs’

I agree

POYO DLWATI J

VAHED J

Date of Hearing	: 13 June 2016
Date of Judgment	: 21 June 2016
Counsel for Appellant	: Mr Sarjoo
Instructed by	: N M Sithole & Associates
Counsel for Respondent	: Mr Buthelezi
Instructed by	: Buthelezi Incorporated

(a) rescind or vary any judgment granted by in the absence of the person against whom that judgement was granted,

(b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;

(c) correct patent errors in any judgment on respect of which no appeal is pending;

(d) rescind or vary any judgement in respect of which no appeal applies.

³ See: Quatermark Investments (PTY) Ltd v Mkhwanazi and another 2014 (3) SA 96 SCA at para 20