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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO:50056/11

DATE:05/02/2013

In the matter between:

D S

1st Applicant

MJS S

2nd Applicant

and

G R M

Respondent

JUDGMENT

MNGQIBISA-THUSI, J

[1] The applicant seeks an order:

1.1 declaring the customary union concluded between the first applicant and the respondent on 30 June 2007 as null and void;

1.2 that the property, if any, obtained between the parties during the subsistence of the

customary union be dealt with as if it was obtained by partners in a partnership;

1.3 That the assets and liabilities accrued during such customary union to be the joint property and liabilities of the partners; and

1.4 Costs.

[2] From the evidence before the court it appears that the first and second applicant entered into a civil marriage on 15 September 1987 and the marriage still subsists. During 2007 the first applicant, with the consent of the second applicant, paid lobola for the respondent and they lived together at a different house from that of the first and second applicant. It would appear that when the three parties agreed that the first applicant should marry the respondent by customary law, all three parties bona fide believed that the customary marriage to the respondent was valid.

[3] It is submitted by the first applicant that he has recently learned that his marriage by custom to the respondent is void in that his marriage to the first applicant still subsists.

[4] The first applicant now seeks an order declaring his marriage to the respondent null and void and that the property acquired by the first applicant and the respondent be dealt with as if they were in partnership. In this regard I would assume that the applicant is referring to what is known as universal partnership.

[5] The first applicant does not dispute that at the time he and the respondent entered into a customary marriage, he and the second applicant were already in a civil law marriage. The respondent does not oppose the declaration of the customary marriage as being void.

However, the respondent is opposing the relief claimed with regard to the immovable property

in which she lives and which is registered in both the applicants' names and has counterclaimed and is seeking an order that there should be a division of assets, both immovable and movable, acquired by the parties.

[6] In her answering affidavit to the applicant's application the applicant alleges that in 2006 before lobola was paid, she and the first applicant acquired vacant land on which they intended to build her house which was subsequently built. She alleges that the applicants had convinced her that the house should be registered in their names since they had a marriage certificate. That she contributed to the building of the house and is therefore entitled to half the value of the house. This allegation is however denied by the applicants.

[7] Where one or both parties are unaware that at the time they entered into a marriage with a defect which renders their marriage void and both bona fide believed that they are lawfully married, such marriage is a putative marriage. Although void ab initio, the law does attach some proprietary consequences to it when it is dissolved. If both parties to the putative marriage are bona fide they are deemed to be married in community of property.

[8] In this matter it is common cause that both parties in good faith believed that they were lawfully married and therefore their 'marriage would be regarded as having been in community of property. The other side of the coin is that the marriage could be regarded as a universal partnership, relief sought by the first applicant in prayer 2, with each party contributing in cash or kind into the universal estate for the benefit of the partners. In this regard also on the dissolution of the partnership, if there is no prior agreement as to how the partnership assets would be shared, each partner is entitled to an equal share of the estate irrespective of the value of his or her contribution.

[9] Therefore in the interest of justice as between the parties, I am of the view that the respondent is entitled to a half share of her and the first applicant's 'joint estate'.

[10] With regard to costs, I am of the view that both parties have been substantially successful and that each party should pay its own costs.

[11] In the premises the following order is made:

1. The purported customary marriage between the first applicant and the respondent is declared null and void.
2. The joint estate of the first applicant and the respondent's purported customary marriage is to be divided equally.
3. Each party to pay his or her costs.

N.P MNGQIBISA-THUSI,

Judge of the High Court