

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO.: 3022/02

REPORTABLE

In the matter **ex parte** application of :

LEON OWEN SANDERS

First Applicant

ID NUMBER : 731215 5158 084

and

JUNE ESTHER SANDERS (born ADAMS)

Second Applicant

ID NUMBER : 720530 0288 089

JUDGMENT DELIVERED ON 19 JUNE 2002

DENZIL POTGIETER, A.J.

I made the following order in this matter on 13 June 2002 with reasons to follows :

- "1. That leave is granted to applicants in terms of Section 21(1) of Act 88 of 1984 to enter a Notarial Contract in terms similar to the draft attached to applicants' affidavit which is*

marked "A" in the papers before this court.

2. *That the marriage of first and second applicants shall, from the date of registration of the said Notarial Contract, be governed by the terms of the Notarial Contract.*
3. *That such Notarial Contract shall be lodged for registration at the Deeds Office, Cape Town, within three months of the date of this order.*
4. *That this order shall not affect the rights of creditors of the Applicants' joint estate and that such creditors shall be entitled to execute against the Applicants' assets in respect of debts incurred prior to the registration of the Notarial Contract."*

The reasons now follow.

The Applicants have applied for leave to register postnuptially, a notarial contract changing their proprietary regime in terms of section 21(1) of the Matrimonial Property Act No. 85 of 1984 ("the Act"). The application is not opposed.

Applicants indicate in their founding affidavit that they were both previously married and when they discussed their proposed marriage they decided to get married out of community of property because First

Applicant, the husband, is a businessman and Second Applicant did not wish to incur any liability for his debts. Prior to the marriage First Applicant consulted an attorney for the purpose of preparing an antenuptial contract. The necessary fees were paid in a substantial amount and the attorney informed First Applicant that it would take a few days to register the contract. The marriage was solemnized on 19 January 1996 on the understanding that it would be out of community of property. The attorney never contacted the parties again. It was only when the parties attempted to purchase an immovable property during March 2002 that the matter was raised again, since they were then informed that no antenuptial contract had ever been registered with the result that their marriage was in fact in community of property. Attempts to locate the attorney who was supposed to have attended to the registration of the antenuptial contract proved fruitless. First Applicant had forgotten the attorney's details and the premises where the attorney's offices were situated, were vacated. That attorney obviously failed to attend to the registration of the antenuptial contract. First Applicant also ascertained from his present attorneys that the fee which he had paid was exorbitant.

The present situation is causing the parties prejudice and interferes with certain transactions which First Applicant has to conclude in regard to his business. A copy of the envisaged notarial contract is annexed to the papers and its effect is basically to exclude any community of property or profit and loss between the parties and to apply the accrual system in terms of Chapter 1 of the Act to the marriage.

The Applicants clearly made out a case on the merits of the application for the relief sought in the Notice of Motion. There are, however, certain procedural difficulties which need to be considered. Notice of the application was given to all creditors and was published in editions of both the Cape Times and Burger newspapers as well as the Government Gazette, but no notice was given to the Registrar of Deeds in terms of Section 97(1) of the Deeds Registries Act No. 34 of 1947. The notice in the Government Gazette, moreover, only gave 11 days notice of the application.

The practice followed in this Division in matters of this nature is set out in the matter of **Ex Parte Lourens et Uxor & 4 Others 1986(2) SA 291 (C)**. It is necessary to analyse this decision in some detail. In accordance with the decision, 2 weeks notice must be given in various publications including the Government Gazette, of the

intention to bring the application. As pointed out a shorter notice was given in the Government Gazette in this matter. Furthermore, the following dictum appears at 293B of the decision, namely *“[n]otice of the application must be given to the Registrar of Deeds in terms of s97(1) of the Deeds Registries Act 47 of 1937.”* No further discussion follow in regard to this requirement. The judgment expressly indicates that it only regulates the procedure to be followed in matters of this nature so as to ensure some uniformity. At p. 292 H-I of the decision the court remarks that *“[i]t seemed desirable to have some uniformity regarding the procedure to be followed because there are likely to be a number of these applications in future.”* The court then sets out the *“factors which [were] taken into account in deciding upon the procedure to be followed...”* and prefaces the prescribed procedure with the following remark at p. 293A *“... the following guidelines should be adhered to, save in exceptional circumstances”*. At p. 294C the court points out that there *“may be other problems which arise when such applications are brought and they will have to be solved as and when they do”*. The decision purports neither to be exhaustive to deal with issues of substantive law such as the proper interpretation of s97(1). It is also relevant to point out that in at least one of the applications considered by the Court, it is apparent from the report of the Registrar of Deeds that the matter also concerned the envisaged registration of immovable properties dealt with in the postnuptial agreement in question. This differs from the circumstances of the present matter where no such act of registration is envisaged.

As pointed out, the learned Judge did not discuss the effect of section 97(1) of the Deeds Registries Act the present context where leave is sought to register a notarial contract changing the spouses’ matrimonial regime postnuptially. It is necessary for purposes of the present matter to consider that issue. Section 97(1) provides as follows:

“97(1) Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days’ notice before the hearing of such application and such registrar may submit to the court such report thereon as he may deem desirable to make.”

It is of particular importance in the instant case to determine the ambit of the section and the effect of a failure to comply with its terms. In this regard it is relevant to note that the section entails both a duty to give notice and a prescribed notice period. There is authority to the effect that non-compliance with the seven day notice period can be condoned or put differently that this provision is merely directory (**Ex parte Micklewright 1941 GWLD 5; Smith v Weston 1961(1) SA 275 (W); Jones ‘Conveyancing in South Africa’ (2 ed.) p. 14 & 79; Newall ‘The Law and Practice of Deeds Registration’ (2 ed) p. 50**). This interpretation and approach make logical sense and avoid the absurdity which would follow should the notice period provision be given its literal meaning and such notice period be required as an absolute prerequisite to all applications to court. It is in my view the correct interpretation.

Insofar as the provision imposing a duty to give notice is concerned, it is clearly couched in language indicating that compliance with its terms is mandatory or peremptory. No contrary intention can be gleaned from either the context of the

provision or from the Deeds Registries Act as a whole. This would mean that where a particular matter falls within the ambit of s97(1) “... *the Legislature intended that the prerequisites laid down by that section be fulfilled... Non-compliance cannot be condoned*” (**Ex parte Motherloe (Law Society, Transvaal, Intervening 1996(4) SA 1131 (T) at 1137 H-I**). This interpretation accords with the purpose of the provision, namely to allow Registrars of Deeds an opportunity to submit a report expressing their views on applications where relief is sought envisaging “*the alteration of registered documents*” (**Haviland Estates (Pty) Ltd & Another v McMaster 1969(2) SA 312 (A) at 319 H**) or “*to ensure that there be no interference by the Courts with the functions of the Registrar or the practice of his office without due notice and report from*” (**Smith v Weston supra at 279 E**). In the latter matter the provisions of section 97(1) were held to be directory. In my view, however, to hold that the duty to give notice is merely directory and therefore need not be complied with, would render this salutary purpose nugatory and would deprive the court of having the benefit of the views of Registrars of Deeds in appropriate cases falling within their field of endeavour. It would also contradict a practice that has a long history and which was articulated in the section (**cf Newall op. cit. supra**). A failure to strictly comply with the provision is, however, not automatically fatal and as pointed out by the court in **Maharaj & Others v Rampersad 1964(4) SA 638 (A) at 646 C**:

“The enquiry, I suggest, is not so much whether there has been “exact” “adequate” or “substantial” compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though

the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance. Cf. J.E.M. Motors Ltd v Boutle and Another, 1961(2) SA 320 (N) at pp. 327-8."

I am in respectful agreement with the view expressed by Van Dijkhorst, J. in **Ex parte Motherloe (supra at 1138 D-E)** that this move away from a strictly legalistic approach ought to be welcomed.

The question whether there had been compliance with the notice provision in a particular case, must be decided in the light of the purpose of the provision which is as stated in effect to allow the Registrar of Deeds an opportunity to respond and submit a report in an appropriate case. It might, for example, be that prior notice could be dispensed with in urgent matters and interim relief granted subject to subsequent proper notice being given to the Registrar of Deeds or even that relief granted in the absence of prior notice could become final should the Registrar of Deeds not utilise an opportunity allowed to respond (**cf Ex parte MacDonald 1944 EDL 123**).

Although I am not bound by that decision it is appropriate to point out that it follows, in my view, that the decision in **Smith v Weston supra**, was wrongly decided to the extent that it could be interpreted as holding that not only the notice period but also the duty to give notice contained in s.97(1), are directory. The court in that matter did not expressly deal with any distinction between those two aspects of the section.

The issue that remains to be decided is whether the present application falls within the ambit of s.97(1) thus necessitating notice being given to the Registrar of Deeds. The operative part of the section relevant to the present enquiry is whether the application is *“for authority or an order involving the performance of any act in a Deeds Registry”*. Newall (**op. cit. supra**) points out that *“where it is a question affecting land, a detailed report is generally required”*. Applications *“affecting land”* would clearly fall within the ambit of the section. This would also be the case in applications envisaging *“alterations of registered documents”* (**Haviland Estates v McMaster supra; Ex parte Saiga Properties 1997(4) SA 716 (E) at 720 J - 721 A**). The section would not, in my view, apply to an application *“to determine the rights inter se or the status of parties, even though the result is that the Registrar will thereafter be called upon to perform an act in a Deeds Registry in the normal execution of his duties”* as in the present case (**Smith v Weston supra at 279F**). The parties own no immovable property. The application therefore does not affect land and no alteration of any existing records in the Deeds Registry is envisaged. This seems to distinguish the present matter from some of the applications dealt with by the Court in **Ex parte Lourens et Uxor supra**. The present application accordingly does not fall within the ambit of s.97(1) and no notice is required to be given to the Registrar of Deeds. The failure to give 14 days notice in the Government Gazette is condoned in the circumstances of the case. There was, in my view, substantial compliance with this procedural requirement.

In the result the order set out at the commencement of this judgment was granted.

DENZIL POTGIETER, A.J.