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

CASE NO: 5576/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

SIGNATURE: Naude-Odendaal J

DATE: 05/06/2024

In the matter between:

N[...] J[...] D[...] P[...]

PLAINTIFF

and

L[...] M[...] P[...] (BORN S[...])

DEFENDANT

JUDGMENT

NAUDE-ODENDAAL J:

[1] This is a divorce action. The parties were married to one another on or about the 10th of January 2015 in terms of Customary Law in community of property. The customary marriage was never registered. The parties were neither in a subsisting customary marriage with any other person at the time nor at present.

[2] The parties then married each other on the 23rd day of October 2015, in terms of civil law. In terms of the civil law marriage, the parties were married to each other out of community of property, out of community of profit and loss and the accrual system was expressly excluded as provided for in Chapter 1 of the Matrimonial Property Act, Act 88 of 1984 from the civil law marriage they intended to be solemnized between them. An ante-nuptial contract was signed by both parties in the presence of a notary public, Mr. Cornelius Johannes Nel on the 13th day of October 2015 and was consequently registered in the deeds office on the 30th of October 2015.

[3] The parties did not apply to any High Court in terms of Section 21 of the Matrimonial Property Act, Act 88 of 1984 for leave to change the matrimonial property system of their proposed marriage.

[4] It is common cause between the parties that the marriage relationship between them has irretrievably broken down, although they differ in their reasons for the breakdown, and that there is no prospect of the restoration of a normal marriage relationship between them. There were no children born from the marriage relationship between the parties.

[5] The court was requested to determine whether the parties were married to one another on the 10th of January 2015 in terms of Customary Law in community of property which marriage still subsists and that in the event the court finds that the parties were married to one another in terms of Customary Law, whether the ante-nuptial contract entered into between the parties is valid and enforceable or not.

[6] **Section 10 of the Recognition of Customary Marriages Act, 120 of 1998** stipulates as follows:-

"10. Change of marriage system

(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of any marriage which is in community of property as contemplated in subsection (2).

(4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage. "

[7] In essence, the section allows spouses in a monogamous customary marriage, who are not married to any other party - either in civil or customary law - to marry each other under civil law. The provision is important because despite the full legal recognition of customary marriages in South African law today, individuals still combine customary and civil marriages. (See Meyer and Rudolph Policy and Procedure Manual 82; SALC Project 90 - Paper 7447.)

[8] Despite the conclusion of both a customary and civil marriage, individuals may not view these dual marriages as creating separate and distinct legal marriages. Rather, the intention is often to conclude a marriage which is then celebrated in different forms. In this regard, customary marriages are often described as a "process" rather than a single legal event. The customary law marriage celebrations often culminate in a "white wedding" with a church ceremony and having the

marriage registered as a civil marriage. In my view, this was the case in the present matter.

[9] The Recognition Act does not specify the consequences of a civil marriage on the existing customary marriage. A basic rule of statutory interpretation is that the headings of legislation are part of the enactment and may be referred to in establishing the meaning of ambiguous provisions. (See **Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD 13 24; De Ville Constitutional and Statutory Interpretation 157**) Section 10 is entitled "Change of marriage system". The word "change" is defined as "*something that may be substituted for another thing of the same type*". This suggests that the customary law marriage is made into something different, namely a civil marriage. This lends credence to the interpretation that the civil law marriage terminates the customary law marriage, which now becomes a civil marriage. (See **The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?** by F. Osman, par 3.2.1 page 10)

[10] The interpretation that the civil marriage replaces the customary marriage negates the possibility of a dual marriage with different proprietary consequences for the two marriages. What remain to be addressed are the proprietary consequences of the new civil marriage. Section 10(2) provides:

"When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage."

[11] In the reportable judgment in the matter of **Reilly Nchadi Tumelo Mphosi v Theophilus Ramakokomo Mphosi, Limpopo High Court, Polokwane, Case Number 1142/2014, Muller J at para 20-23** held as follows:-

"[20] The aim of Section 10, in my view, is intended to mean that the conclusion of a civil marriage extinguishes the customary marriage by the operation of law and brings an end to the proprietary consequences of the

customary marriage in community of property or in terms of an antenuptial contract, if an antenuptial contract was entered into. To require of the spouses first to dissolve their subsisting customary marriage by decree of divorce, as provided in section 8, before they may enter into a civil marriage on the ground of irretrievable breakdown of the marriage relationship between them, which is the only basis upon which the customary marriage, in casu, may be dissolved where there is no such breakdown, is simply absurd and against the clear meaning of section 10(1). The contention that section 10 should be interpreted to allow the proprietary consequences of a customary marriage to continue even after the spouses remarried in terms of a civil marriage, cannot be accepted. A duly solemnized civil marriage which complied with all the formal requirements of a civil marriage in terms of the Marriage Act and nothing less, is contemplated. The customary marriage comes to an end and with it also the proprietary consequences of that marriage. It is, moreover, totally repugnant to the idea of a civil marriage that a customary marriage can co-exist with a civil marriage.

[21] A civil marriage is in community of property, unless a prenuptial contract provides otherwise. The legal position of the parties to the customary marriage who elected to conclude a civil marriage is similar to parties married in community of property who divorced and subsequently remarry out of community of property in terms of an antenuptial contract with the exclusion of the accrual system as contemplated by the Matrimonial Act.

[22] Neither section 7(5) of the Act, nor section 21 of the Matrimonial Act finds application. Section 7(5) is applicable to a subsisting customary marriage. When the civil law marriage came into being, the spouses were unable to change the matrimonial property system of the customary marriage which has come to an end. Prior permission is not required as contemplated by section 7(5) of the Act or section 21 of the Matrimonial Act, for the execution and registration of an antenuptial contract in respect of their proposed civil law marriage.

[23] Section 10 contains no provision making it compulsory for spouses to apply to change their matrimonial property system in terms of section 21 of the Matrimonial Act, before they may enter into an antenuptial contract in terms whereof the proprietary consequences of their proposed civil marriage will be governed. An antenuptial contract takes effect on the date of the civil marriage and is effective against third parties upon registration in the deeds office."

[12] The parties in the present matter from the onset had the intention and agreed to follow and live a western world lifestyle. It was the parties intention from the moment of their engagement (and probably even before) to have a white western world wedding. The Defendant was further fully aware of the implications and consequences of entering into the antenuptial contract as the terms and consequences of the antenuptial contract was fully explained to her during the parties' consultation with Mr. Nel. In other words it can be said that the parties had a meeting of minds in respect of the marital regime that would govern the proprietary consequences of their marriage. The antenuptial contract was entered into freely and voluntarily.

[13] In my view, there was one continuous marriage between the parties. The civil marriage replaced the customary marriage and the antenuptial contract that was signed prior to entering the civil marriage governs the proprietary consequences of the marriage between the Plaintiff and the Defendant.

[14] The parties would however remain jointly liable for debts incurred prior to the change in the proprietary system. The Defendant's argument in denying the validity of the ante-nuptial contract to claim a portion of the estate of the Plaintiff upon divorce, should be dismissed and the ante-nuptial contract entered into freely and voluntarily, should be upheld.

[15] The last issue remaining is the Defendant's claim for rehabilitative maintenance in the amount of R35 000.00 per month for a period of three years. At the Rule 43 proceedings the court ordered the Plaintiff to pay the Defendant maintenance in the amount of R12 000.00, *pendente lite*. The first payment was to

be made on or before the 7th of September 2021 and thereafter on or before the 7th day of each succeeding month. The matter came before me on 26 February 2024, approximately 30 months later. The divorce proceedings were instituted on the 29th of August 2019. Surely by now, the Defendant should have been rehabilitated and be in a position to maintain herself as at the time of this judgment, the Plaintiff has been maintaining her for approximately 33/34 months. In my view, the Defendant's claim for rehabilitative maintenance should be dismissed.

[16] In the result, I therefore make the following order:-

1. It is declared that the antenuptial contract executed by the parties on 13 October 2015, and which antenuptial contract was registered on 30 October 2015, is valid and binding.
2. A decree of divorce is granted and the marriage relationship between the parties is dissolved.
3. Each party to pay his/her own legal costs.

M. NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

HEARD ON : 26 FEBRUARY 2024

JUDGMENT DELIVERED ON : 5 JUNE 2024.

This judgment was handed down electronically by circulation to the parties'

representatives by email. The date and time for hand-down of the judgment is deemed to be **5 JUNE 2024 at 10h00**

FOR THE PLAINTIFF

: Adv. R. Ferreira

INSTRUCTED BY

: Corrie Nel & Kie Attorneys
Polokwane
Polokwane
lawtypist@cnilaw.co.za

FOR THE DEFENDANT

: Mrs. M.C. De Klerk

INSTRUCTED BY

: DDKK Attorneys
mdk@ddkk.co.za
pa3@ddkk.co.za