



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

Case No: 12635/2023P

In the matter between:

PATIENCE THABILE MDLETSHE

PLAINTIFF

and

BALDWIN THULANI MDLETSHE

1ST DEFENDANT

NELISIWE GLORIA MDLETSHE

2ND DEFENDANT

REGISTRAR OF DEEDS, KWAZULU-NATAL

3RD DEFENDANT

**MINISTER OF JUSTICE & CONSTITUTIONAL
DEVELOPMENT**

4TH DEFENDANT

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

5TH DEFENDANT

ORDER

1. The matter is struck off the motion court roll. It is referred to the trial court roll.

2. The plaintiff is ordered to pay costs on party and party, scale C.

JUDGMENT

Mngadi J

[1] This matter serves before me for hearing on the opposed motion court roll for hearing of a stated case. The papers consist of a stated case in form of Rule 33 (1), summons with particulars of claim and annexures thereto and the Plea. The parties have filed heads of argument.

[2] The parties are Patience Thobile Mdletshe, the plaintiff. Raldwin Thulani Mdletshe an adult male, first defendant. Nelisiwe Gloria Mdletshe an adult female, second defendant. The Registration of Deeds, Kwa-Zulu Natal, the third defendant. The Minister of Justice and Constitutional development, the fourth defendant. The President Republic of South Africa, the 5th defendant. The litigation is pursued by the plaintiff and the first and second defendants. These defendants oppose the relief sought by the plaintiff.

[3] The plaintiff seeks relief in the following terms, and costs against 4th and 5th defendants. In the particulars of claim:

1. It is declared that the alienation and registration of transfer from first defendant to second defendant on 9 May 1988 of Erf 5[...] K[...] is (property) is void *ab initio* and is hereby set aside.

2. Third defendant is authorised and directed to immediately register the transfer of the property to the plaintiff and first defendant in joint and undivided shares with first and second defendants to sign necessary transfer documents, failing which, the Sherriff to do so.

3. It be declared retrospectively from the date of commencement that section 11 (4) of the Matrimonial Property act 88 of 1984 is unlawful and invalid as it violates the plaintiff's right to equal protection and benefit of the law, directly and indirectly unlawfully discriminates against the plaintiff on the basis of gender which effect that the provisions of sections 11 and 12 of the matrimonial Property Act shall apply to all marriages which were not dissolved by death or divorce as at the ate of commencement of the Act.

4. Pending confirmation of the declaration of invalidity by the Constitutional Court, the declaration shall operate with immediate effect.

[4] In the Particulars of Claim the claim is set out as follows: The plaintiff and second defendant married to each other in community of property, which marriage still subsists on 5 March 1983. On 10 September 1987 the plaintiff purchased the property form Kwa-Zulu Housing Corporation as per attached Deed of of Grant (copy attached) and the property formed part of the joint estate of the parties. On 9 May

1988 the first defendant without the consent or knowledge of the plaintiff caused the property to be transferred to the second defendant which the plaintiff discovered in 2019. The second defendant caused a mortgage bond to be registered on the property in favour of the KwaZulu Finance Corporation. The second defendant during 1995 caused the property to be transferred to the late Nonhlanhla Joyce Mdletshe who in turn during 2005 transferred the property to the second defendant. The second defendant upon transfer of the property to her caused it to be mortgaged to Standard Bank which mortgage bond was cancelled on 13 July 2020.

[5] The plaintiff, further stated as follows: The first defendant alienated and transferred the property from the joint estate without her consent in the exercise of marital power in existence at the time of the conclusion of the marriage and not abolished when the provisions of Section 11(4) of the Marital Property Act 88 of 1984 (the Act) were enacted and it abolished marital power in marriages concluded after its commencement, which renders the provisions of Section 11 (4) of the Act constitutionally invalid.

[6] The first and second defendants pleaded as follows: They admitted the marriage between plaintiff and first defendant. They denied that the property was purchased by the plaintiff. They stated that the property was purchased by their parents and it was later transferred to their late brother Patrick Sipho Mdletshe. It constituted a family home to be held as such. It never formed part of the joint estate of the plaintiff and the first defendant. This was at all material issues known to the plaintiff.

[7] The stated case in the section 'agreed facts' it is stated as follows:

'Agreed Facts

Plaintiff and first defendant are married to each other in community of property. The marriage was concluded on 5 May 1983, prior to the commencement of the Act on 1 November 1984. The property, erf 5[...] K[...] was acquired and registered in the name of the first defendant. On 18 May 1989 first defendant caused the transfer of the property to the second defendant his biological sister. Plaintiff and defendant separated during 2019.'

[8] Rule 33 provides:

'(1) The parties to any dispute may after institution of proceedings agree upon a written statement of the facts on a form of a special case for the adjudication of the court.

(2) (a) Such statement shall set forth the facts agreed upon, the question of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed an advocate and an attorney on behalf of each party or, where a party sues or defends personally by such party

(b)...

(c) ...

(3) ...

(4) ...

(5) ...

(6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded to the trial and the court may give without hearing any evidence.

[9] The so-called stated case contains factual contentions which have not been agreed to by the parties. The pleadings' principal factual contention is whether the property when acquired and subsequent thereto formed part of the joint estate of plaintiff and first defendant. The plaintiff contends that the issue whether Section 11(4) of the Act is constitutionally valid or not, a decision on it, shall result in the resolution of the dispute between the parties in its entirety because it allowed first defendant to transfer the property without the consent of the plaintiff.

[10] The first and second defendants as a preliminary point in their heads of argument and in oral argument argued that it was irregular to place the matter in the motion court roll as it should be tried as an action.; it raises factual disputes for which it is necessary to lead oral evidence; it was never agreed between the parties to convert the matter to be dealt with in the form of an application and the plaintiff unilaterally enrolled the matter in the motion court roll for hearing.

[11] The plaintiff, in my view, is obsessed to have Section 11(4) of the Act declared constitutionally invalid. The transfer the plaintiff seeks that it be set aside took place on 9 May 1988. The plaintiff claims that she discovered it in 2019. She has not explained how it happened that it took her thirty (37) years for her to discover alienation and transfer of an immovable property forming part of the joint estate. The plaintiff has not claimed that the alienation and the transfer caused diminution from joint estate and that she would not have agreed to the alienation and transfer of the property. She also does not tender return of what was paid in return of the property to the joint estate.

[12] The plaintiff seeks declaration of invalidity of s11(4) of the Act with retrospective effect. It is doubtful that enactment not regulating a position prior to its enactment can be declared retrospectively invalid to a date prior to its enactment. The plaintiff seeks declaration of s11 (4) of the Act as constitutionally invalid retrospectively to a date when the Constitution had not been enacted. These issues need to be addressed by the plaintiff to demonstrate that a decision on the stated case is necessary to resolve the dispute between the parties.

[13] The plaintiff in addition has not taken any issue with the subsequent transfers of the property in particular the latest transfer of the property to the second defendant. The copies of the annexures from the Deeds Registrar's office are illegible and the Registrar of Deeds has not filed any report. Lastly, the plaintiff if the property never formed part of the joint estate, has not explained how the declaration as invalid of section 11(4) of the Act will resolve the dispute between the parties.

[14] It shall in my view serve no purpose to make a decision on whether Section 11(4) of Act is constitutionally valid or not before the resolution of the factual dispute between the parties. It would be an academic exercise. The question of law must arise from the facts and be meant for resolution of the facts.

[15] The plaintiff has not utilised the provisions of rule 33(4) which provides: 'If, in any pending action it appears to the court *mero motu* that there is a question of law or facts which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such

manner as it may deem fit and may order all further proceedings be stayed until such question has been disposed of and the court shall on the application of any party make such order unless it approves that the questions cannot conveniently be decided separately.’ See *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) at 31C.

[16] The plaintiff's reliance on Rule 33 (1) is misconceived. Rule 33(1) requires that the case must be confined to agreed facts from which to decide the question of law. The parties make their different contentions relating to the question of law on the agreed facts. In this case, the parties are not in agreement with facts on which to decide the question of law. Secondly, apart from the agreed facts, the parties must agree to proceed in terms of Rule 33 (1). The first and second defendants contend that they are not in agreement with proceeding in terms of Rule 33(1) by means of a stated case without leading of evidence. The parties must be *ad idem*, the plaintiff cannot unilaterally force the issue. The plaintiff on her own insists on separation of issues and on proceeding by means of a stated case, but she is not entitled to do so.

[17] It is ordered as follows:

1. The matter is struck off the motion court roll. It is referred to the trial court roll.
2. The plaintiff is ordered to pay costs on party and party, scale C.

Mngadi J

APPEARANCES

Case Number: 12635/2023P

For the Plaintiff: Mr Mhlaba
 Instructed by: Mhlaba Attorneys
 PINETOWN

For the first and second Defendants: Mr Mpanza.
 Instructed by: Mpanza & Associates
 GLENWOOD, DURBAN

For Third Defendant None
 Instructed by: Registrar of Deeds
 PIETERMARITZBURG

For 4th and 5th Defendants None
 Instructed by: State Attorney
 PIETERMARITZBURG

Heard : 21 April 2026

Judgment delivered on: 05 May 2026

