REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/11024

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED. NO
DATE: 11 June 2021

In the matter between:

L[....] N[....] M[....]1 Applicant

and

M[....]2 M[....]3 M[....]4 Respondent

JUDGMENT

SIWENDU J

Introduction

[1] In this application, the Court is called upon to determine whether there was a valid customary marriage between the applicant and the respondent in terms of s 3(1) of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA).[1] If

[1] Section 3(1) of the Act provides as follows:
'For a customary marriage entered into after the commencement of this Act to be valid—
(a) the prospective spouses—

the Court finds there was a valid customary marriage, it must determine the marital regime regulating it. In particular, the Court is called upon to determine whether the contract executed by the parties on 23 September 2019, and registered at the Deeds of Registry on 7 October 2019, is valid and binding.

[2] The applicant, Ms M[....]1, is 32-years old. She resides at [....] A[....] Street, Bryanston. She has a child from a previous relationship who resides with her at the property. The respondent, who is in his early fifties, is employed as a General Manager at MTN (Pty) Ltd in F[....]. He had two previous marriages and other relationships from which he has four children. He recorded the same address as the applicant as his residential address.

[3] The applicant seeks an order declaring that: (1) there is a valid customary marriage between her and the respondent; (2) the marriage was in community of property; and (3) the antenuptial contract entered into by the parties on 23 September 2019 is null and void. Ancillary to the standing of the antenuptial contract is a determination of the marital regime regulating the marriage, if one is found to exist.

[4] The respondent opposes the application on account that the relief sought by the applicant is not competent. He disputes that the applicant has enforceable rights or that her rights have been infringed, warranting the order sought. In particular, he disputes that: (1) there is a valid customary marriage; and (2) he consented and intended to marry the applicant by customary law. In the alternative, and, if the Court finds there was a valid customary marriage, the respondent claims that the marriage is out community of property by virtue of the antenuptial contract concluded on 23 September 2019. He contends that the antenuptial contract is valid and regulates the matrimonial property regime, as one out of community of property and with accrual. Accordingly, the respondent seeks to have the antenuptial contract enforced in the alternative relief, while the applicant seeks to have it declared null and void.

Background

(i) must both be above the age of 18 years; and
(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.'

[5] The background to the application is largely common cause. I observe at this early stage that the stance by the respondent was that he would not address all the factual averments in the applicant's affidavit, but only those facts pertaining to the antenuptial contract, and the customs and traditions observed in terms of customary law. The applicant and respondent observe isiXhosa and Xitsonga traditions and cultural practices.

[6] The applicant and the respondent met on 16 April 2019 and instantly commenced a whirlwind romantic relationship. On 27 April 2019, within two weeks of meeting each other, the respondent introduced the applicant to his family in Limpopo. On 28 April 2019, the respondent's family handed the applicant and the respondent a letter to deliver to the applicant's family. The letter, requesting the applicant's hand in marriage, was handed to the applicant's father the same day of their return to Johannesburg.

[7] A month later, on 25 May 2019, *lobola* negotiations commenced between the two families at the applicant's home in Soweto. The negotiations, a payment of R50 000, and an exchange of gifts between the families, were embodied in a written agreement between the two families. There is written confirmation of the amount of *lobola* received on 26 May 2019, signed by representatives and/or emissaries from both families.

[8] All this culminated in an agreement of a date for a ritual/ceremony on 15 June 2019. The applicant claims that this ritual and ceremony started on 14 June 2019 when her family slaughtered a sheep to welcome the respondent as a son in law. Bile was smeared on both of them as a symbol of a binding customary marriage. On 15 June 2019, celebrations and a ceremony followed the ritual. The applicant included in her founding affidavit the invitation below which reads:

A TRADITIONAL WEDDING CELEBRATION

L[....] & M[....]2

15 JUNE 2019

Mr Churchill Nkosi M[....]1 and the late Nomfanelo Zoliswa M[....]1 request the honour of your presence at the traditional wedding of their daughter

L[....] M[....]1

&

M[....]2 M[....]4

son of

Mrs Girlie Mirriam M[....]4

SATURDAY, 15 JUNE 2019

Venue: 946 Mbata Drive, White City, Jabavu, Soweto

GPS coordinates: (…)

Time: 12:00 PM

For more information kindly contact:

Ms Lumka M[....]1 (…) / Mr Nkululeko M[....]1 (…)

[9] On 28 June 2019, the applicant claims that she, emissaries, and an entourage travelled to Limpopo, where she was handed over to the respondent's family as the respondent's wife. A sheep was slaughtered to introduce the applicant's arrival to the respondent's family and his ancestral line. The formal handing over ceremony to the respondent's family occurred on 29 June 2019. She stayed with the respondent's family until they returned to Johannesburg.

[10] According to the respondent, further customary celebrations took place at the applicant's home in the Eastern Cape on 26 and 27 December 2019. The applicant refuted this. She claimed that when they attended birthday celebrations together, they did so as husband and wife. None of the family members attended the event. She contended that all the necessary wedding celebrations were concluded between May and June 2019.

[11] The applicant claims that in August 2019, after the conclusion of the customary marriage, she and the respondent discussed the patrimonial consequences of their relationship. The respondent had concerns about his other children and now wanted to protect their interests in the event of his death. He also wanted to protect the applicant's proprietary interests against potential claims by his ex-wives. The parties approached Michael Krawitz & Company Attorneys, who drew up and registered the antenuptial contract referred to above.

[12] The antenuptial contract records that: (1) the parties are unmarried; (2) there is no community of property and no profit and loss between them; (3) the net value of the respondent's estate is R10 million, on the other hand, the net value of the applicant's estate is nil; (4) the marriage is subject to accrual; and (5) the half share in the property in Bryanston and the Mercedes Benz C250 D are donated to the applicant.

[13] According to the applicant, marital difficulties between the parties started in March 2020. She alleges that the respondent had an extra-marital affair. As a result, she asked the respondent's mother to intervene. Instead, on 22 March 2020, the respondent's mother and sister attempted to evict the applicant from the property she shared with the respondent. The respondent's mother allegedly called on the applicant's father to fetch her as she was no longer welcome at the marital home. There was a second attempt to evict the applicant from the house in May 2020. On 2 May 2020, the applicant was arrested under case number 14/05/2020 on a charge of 'theft under domestic violence'. As I understand from the papers, there are pending criminal charges, including a charge of trespassing, against the applicant.

[14] The applicant claims that on her release, the respondent attempted to evict her from the marital home again. The applicant also claims to have received a number of calls from the police based in Soweto asking her to vacate the house or face arrest. The respondent does not dispute the turmoil, save to say that some of the aspects are *sub judice*.

[15] Even though the applicant disputed that she is gainfully employed, or that her business is trading, the respondent claims that the applicant is a business owner and is also a 51% shareholder in a company established in 2019. When they first met,

she had a lot of debts incurred before the relationship. The applicant does not dispute the debts incurred in her personal capacity, or that the respondent settled the debts on her behalf. The respondent claims that he sought to protect the interests of his children in the event of his death, and he was not comfortable being married by customary law without an antenuptial contract.

[16] The respondent claims that when he and the applicant discussed their marriage, they agreed that they would not marry in terms of customary law because of its proprietary consequences. The essence of the respondent's defence is that, despite the celebrations, it was understood by all and sundry that a civil marriage would take place between the parties in due course. He claims that the various events were pre-celebrations and observances of cultural practices in anticipation of a civil marriage to be concluded in November 2020. They were a mark of respect for their families and their ancestral line. The respondent states that their shared intention was to conclude a civil marriage governed by an antenuptial contract.

[17] In August 2019, the respondent purchased a 1.11 carat diamond engagement ring, and a platinum and diamond wedding band (valued at R165 000 and R29 000 respectively) for the applicant, and an 18 carat wedding ring for himself, valued at R17 000. He claims that the purchase was in anticipation of a civil marriage in the following year, in November 2020. Needless to say, the civil marriage has not occurred and the customary marriage was not registered.[2]

[18] On the other hand, in reply, the applicant claims that the rings were purchased in June 2019. One of the rings had cracked and had to be adjusted for size. When the parties received the rings, they held a ring blessing prayer with a priest and wore the rings immediately thereafter, from 4 August 2019. She claims that the respondent provided the Court with valuation slips, rather than receipts in proof of the purchase. She attached the proof of purchase to her replying affidavit.

[19] The applicant disputed that the antenuptial contract was entered into in anticipation of a civil marriage in November 2020. She claims that discussions about

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[2] Section 4(1) of the RCMA provides: 'The spouses of a customary marriage have a duty to ensure that their marriage is registered.' In terms of s 4(3)(b) it must be registered within a period of three months
after the conclusion of the marriage. However, this must be read with subsection 4(9) which states, 'Failure to register a customary marriage does not affect the validity of that marriage.'

obtaining legal advice to conclude the antenuptial contract commenced on 2 August 2019, rather than 5 August 2019, *after* they concluded the customary marriage. Her contention is that even though they wanted the marriage to be in community of property, they only agreed to change the marital regime after the conclusion of the customary marriage.

[20] The applicant and the respondent first approached STBB Attorneys. The applicant's version is that, by this time, she and the respondent knew that they were married under customary law. When they sought the advice of STBB Attorneys, they were informed that they needed to launch a court application to obtain a court order permitting the registration of the antenuptial contract. Her version is that because they ostensibly wanted the antenuptial contract to secure her interest in the matrimonial home, they both agreed that entering into an antenuptial contract after the marriage would not make a difference. They did not want to incur the legal costs of a court application. She claims that they agreed to apply the antenuptial contract terms *retrospectively* to their marriage.

The existence of a customary marriage

[21] The main contention before the Court is the meaning to be attributed to the events and celebrations between 27 April 2019 to 29 June 2019. The respondent contends that the letter was delivered merely as an indication of his intention to marry and to commence *lobola* negotiations. He argues that the rituals did not bind the parties in a customary marriage, and that the celebratory events did not constitute a customary wedding. He claims that he had no intention to marry under customary law, and did not consent to a marriage by customary law.

[22] The applicant claims that it was only after she consulted with her attorneys that she learnt that the antenuptial contract was null and void. It is trite in law that an antenuptial contract must be executed before the marriage. It must be registered within three months after the date of its execution (or within a period as a court may

allow) as per s 87 of the Deeds Registries Act 47 of 1937 (the Deeds Registries Act).[3] I return to this aspect later in the judgment.

[23] I start by addressing the question of whether the applicant is entitled to seek declaratory relief. Ms Makapela, (for the respondent) argued that the court in *Proxi Smart Services (Pty) Ltd v Law Society of South Africa*,[4] in dealing with declaratory orders, stated that a court will not grant relief where there is a financial commercial or derivative interest which is not only indirect but also hypothetical, abstract or academic. She also argued that the court, in an earlier decision in *Ex parte Noriskin*,[5] took the principle further and held that a court will not grant such an order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined in legislation or statute The argument is not sustainable and unfortunately portrays the applicant as a 'gold-digger', without a proper foundation.

[24] I agree with Mr Thompson (for the applicant) that the question of whether the applicant is married or not is important. A marriage has personal and public consequences, and there are legal reciprocal duties flowing from it. A determination of the applicant's status is not only a question that affects the applicant's right to dignity, but, as the facts demonstrate, it directly implicates her right to equality and protection under the law.

[25] Given what has transpired between the parties (and particularly the charges the applicant now faces before the Magistrate's Court for theft and trespassing) a declaration of her legal status affects not only the question of her patrimonial rights in her current relationship, but her defence in the pending cases. This is apart from the effect on her future rights – including the freedom to form another relationship, marry, and freely determine the marital regime of her next marriage, should she wish to do so in future. In view of the respondent's denial and the circumstances under which he does so, the question of the applicant's marital status has substantial

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[3] Section 87(1) of the Deeds Registries Act provides: 'An antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow.'
[4] *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP); [2018] ZAGPPHC 333.
[5] *Ex parte Noriskin* 1962 (1) SA 856 (D).

consequences for her. I find it is a question cognisable by the Court and a declaratory order is an appropriate relief.

[26] The second issue is whether the parties concluded a valid customary marriage in terms of s 3(1) of the RCMA. That question pivots on the respondent's assertion that he intended something other than a customary law marriage. Ms Makapela contends that an essential requirement under s 3(1)(a)(ii) of the RCMA is that the parties must not only consent to the marriage, but that they must also consent to a marriage *under customary law*.[6]

[27] The argument advanced by the respondent engages the question of whether, despite his denial, an intention to conclude a customary marriage can be imputed to him. It is a factual question and a question of law.

[28] On the question of consent, I have taken account of the caution by the Constitutional Court in *MM v MN & Another*[7] where, albeit in the context of a polygamous marriage, the court observed that—

'…courts must understand concepts such as "consent" to further customary marriages within the framework of customary law, and must be careful not to impose common-law or other understandings of that concept. Courts must also not assume that such a notion as "consent" will have a universal meaning across all sources of law.'

[29] I pause to mention that when the decision in *MM v MN* is read together with the SCA's decision in *Mbungela v Mkabi*,[8] both cases point to the open, generous, flexible communal spirit of customary law, which when correctly embodied, places a high premium to the right to dignity and the community beyond narrow individualistic interests.

[30] To my mind, having regard to the facts before me, even within the bounds of the flexibility generally recognised under customary law, all the markers and essential rituals necessary to form a customary marriage were performed in this case. While there may be subtle differences in the customs and practices relating to

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[6] See note 1 above.
[7] *MM v MN & Another* 2013 (4) SA 415 (CC); [2010] ZAGPPHC 24 para 49.
[8] *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA); [2019] ZASCA 134.

the conclusion of a customary marriage, the respondent has not alluded to any particular Xitsonga customs which differentiate the parties' celebrations from the customs followed to conclude a valid customary marriage. In addition, even though this was not imperative, there was a 'handing over' of the applicant to the respondent's family. The parties cohabited shortly before and after these celebrations at the Bryanston property.

[31] Despite the attempt to recast the events as merely cultural observances and celebrations, and thus downplay their significance, the invitation to the customary celebrations on the 15 June 2019 is inconsistent with the respondent's version. It was framed as *'a traditional wedding celebration'* involving both parties' families. Over and above this, the respondent's affidavit includes amorous WhatsApp exchanges between him and the applicant on 5 August 2019, a month after the celebrations. In one of the intimate exchanges, the applicant refers to the respondent as *'my husband'* and the respondent refers to the applicant as *'my wife'* in reply. There is no evidence that the respondent refuted this reference, corrected the applicant, or that they were made in jest. He accepted her as his *'wife'*.

[32] Apart from the above, what defeats the respondent's denial of the customary marriage, are the emails of his communication with STBB Attorneys (the first lawyers the parties consulted). The letter from Mr Tony Newell of STBB attorneys to the respondent is revealing. Mr Newell informs the respondent, in a clear acknowledgement that there was a marriage between the parties, that: '*I think you need to register your marriage with Home Affairs as we will probably need to attach a copy of the certificate to the Court Application…*' On 5 August 2019, the respondent informed the attorneys in a reply that he would send documents to *'kick start the court application'* the next day. Contrary to the respondent's denial, the facts show that he knew, was aware of, and accepted that he and the applicant had concluded a valid customary marriage.

[33] As at 5 August 2019, the respondent and the applicant knew that an application to the High Court would be necessary to register the antenuptial contract. They sought to circumvent a need for a court application to change the marital regime. They approached different law firm, Michael Krawitz & Company Attorneys

to assist them. The parties instructed Mr Krawitz, the attorney/notary assisting them, that they were not married. I deal with this fully later in the judgment.

[34] I also note that the respondent has been married and divorced on two previous occasions. I expect that he would be *au fait* with the legal consequences of a marriage and dissolution thereof. His conduct demonstrates nothing to support a lack of consensus and/or a lack of consent about entering the customary marriage. To the contrary, it demonstrates the manifestation of his consent in all respects. I find his denial of the customary marriage implausible, untenable, and it falls to be rejected. Accordingly, I hold that as of 29 June 2019, the respondent had consented and concluded a valid customary marriage with the applicant as envisaged in s 3(1) of the RCMA.

The antenuptial contract

[35] The last issue concerns the validity and standing of the antenuptial contract, and the ancillary question of which matrimonial property regime governs the customary marriage. The parties consistently refer to an 'antenuptial contract' throughout these proceedings. It will become evident in the judgment that such a reference is a misnomer. The applicant even referred to the antenuptial contract as an *'amendment'* or a *'variation*' of the existing matrimonial property regime.

[36] The legal issues raised necessitate that I revisit the provisions of the Deeds Registries Act, the Marriage Act 25 of 1961 (the 'Marriage Act'), the Matrimonial Property Act 88 of 1984 (the 'MPA'), and the RCMA. It is also necessary to consider the relevant case law. Thereafter, I consider their cumulative effect on customary law marriages, and decide on the validity of the so-called 'antenuptial contract' at issue.

[37] The proprietary consequences of the customary marriage concluded by the parties are regulated by s 7(2) of the RCMA.[9] A customary marriage will be in

[9] Section 7 of the RCMA provides:
'(1) …
(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses 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 customary marriage which is in community of property as contemplated in subsection (2).'.

community of property and profit and loss, unless specifically excluded by the parties in an antenuptial contract. I pause to mention that the consequence of this provision is to place customary marriages on the same regulatory footing as a civil law marriage. I also note that the subsection preserves the proprietary interest of pre-existing partners, in that the community of property regime *will not apply* where one of them has a pre-existing marriage or partner. Given the undisputed fact that the respondent was a divorcee, and that the applicant was not married, the customary marriage was one in community of property and with profit and loss by operation of law. If parties wish to avoid the consequences of a marriage in community of property, then they must *specifically exclude* these consequences by concluding an antenuptial contract.

[38] Section 86 read with s 87 of the Deeds Registries Act are relevant in this regard, and state that:

'86. Antenuptial contracts to be registered—

An antenuptial contract executed before and not registered at the commencement of this Act or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section eighty-seven, and unless so registered shall be of no force or effect as *against any person who is not a party thereto.* [Emphasis added]

87. Manner and time of registration of antenuptial contracts—

(1) An antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow.'

[39] It is trite in law that an antenuptial contract can only be entered into by the parties *before* the marriage. As set out in *Wille's Principles of South African Law*—

'Such a contract, whether in writing or not, is always binding on the parties themselves after the marriage (Grotius 2.12.4, Voet 23.4.2, *Ex parte Weight and*

Weight 1906 TS 709; *Fisher v Fisher* 1911 WLD 71) but it has no force or effect against any person unless it has been duly registered in a deeds registry.'[10]

[40] The result is that, although an antenuptial contract may not have been executed and registered in terms ss 86 and 87, it is valid and binding between the married parties. However, it is of no force or effect as against any person who is not a party to it.[11]

[41] This brings me to the standing of the 'antenuptial contract'. Based on the papers before me, conversations about the execution and registration of the antenuptial contract commenced around 2 August 2019, *after* the customary marriage was concluded. These facts have relevance on whether there is a valid antenuptial contract in law in terms of the legislative requirements.

[42] Despite the statutory provisions and requirements, Ms Makapela argued that I must rule that the marriage is one out of community of property (with the inclusion of the accrual system) on account of the contract executed on 23 September 2019. She argued that I should follow the court's decision in *SMS v VRS*[12] and find that the antenuptial contract is a *'postnuptial contract*'.

[43] In that case, the parties concluded a customary marriage, followed by a civil marriage under the Marriage Act four years later. At the time of entering into the civil marriage, the parties had verbally agreed to be married out of community of property, with the exclusion of the accrual system. A contract embodying this verbal agreement was subsequently registered at the Deeds Registry a month after the civil marriage was concluded. The validity of the contract was disputed at the divorce proceedings. The court deemed the '*verbal agreement'* between the parties to be an '*informal ante-nuptial contract'*, and held that the subsequent civil marriage was out of community of property.[13] It further held that it was binding on third parties, due to the fact that the contract was registered within three months of its execution, i.e. that

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[10] F du Bois *Wille's Principles of South African Law* 5 ed at 109.
[11] See *S v S* [2015] ZAKZDHC 43; also reported as *KS v MS* 2016 (1) SA 64 (KZD). See also *Ex parte Minister of Native Affairs In Re Molefe v Molefe* 1946 AD 315 at 318.
[12] *SMS v VRS* [2019] ZALMPPHC 5. Counsel for the respondent contended that the facts in *SMS v VRS* are on all fours with those of the present matter, but for the fact that the proceedings in that matter were divorce proceedings.
[13] Ibid paras 20-21.

they complied with the stipulated time periods under the Deeds Registries Act, calculated from the date of the civil marriage.

[44] The decision in *SMS v VRS* is based on an interpretation of s 10 of the RCMA, which envisages a change of the marriage system by entering into a marriage in terms of the Marriage Act.[14] Although the court referred to the contract as a 'postnuptial' contract for the sake of convenience, it treated the contract between the parties in *SMS v VRS* as an antenuptial contract registered postnuptially. Thus, the court in *SMS v VRS* enforced the contract without a preceding court order authorising the registration of the antenuptial contract postnuptially.

[45] Yet, s 88 of the Deeds Registries Act states that:

'Notwithstanding the provisions of sections eighty-six and eighty-seven the court may, subject to such conditions as it may deem desirable, authorize *post-nuptial execution* of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage, and *may order the registration*, within a specified period, of any contract so executed.' [Emphasis added]

[46] Section 88 must be distinguished from s 89 of the Deeds Registries Act which deals with the registration of postnuptial contracts. Section 89 provides:

'89. Registration of postnuptial contracts—

(1) The provisions of sections 86 and 87 shall *mutatis mutandis* apply in respect of—

(a) …

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[14] Section 10 of the RCMA provides—
'(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.'

(b) a contract in terms of section 21 of the Matrimonial Property Act, 1984.

(2) …'

[47] Accordingly, Section 89(1)(b) must be read together with s 21 of the MPA and, in this case, the RCMA. Section 21(1) of the MPA states that:

'A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that—

(a) there are sound reasons for the proposed change;

(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change,

order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.'

[48] The difference between s 88 and s 89 (read with s 21(1)), and their respective effects, is nuanced. Section 88 caters for a scenario where the parties to a marriage agreed to an antenuptial contract ***before*** the marriage, but did not execute and register same timeously. It allows the parties to approach the court for the postnuptial registration of the antenuptial contract. Although executed and registered *after* the marriage, it will have a *retrospective* effect if sanctioned by the court. The court has the power to set conditions to such a registration.

[49] On the other hand, s 89 of the Deeds Registries Act envisages a scenario where parties accepted a marriage under one matrimonial property regime, but wish to alter their regime to another. In that instance, if sanctioned by the court, the effective date of the change will be from the date of the registration of the contract,

hence the reference to a 'postnuptial contract'. Under both s 88 and s 89, a court ***must*** authorise both (1) the *execution* and (2) the *registration* of contract.[15]

[50] Accordingly, in conjunction with s 7(2) of the RCMA referred to in paragraph [37] above, which requires parties to a customary marriage to specifically exclude the community of property and profit and loss by executing an agreement to this effect, s 7(5) of the RCMA integrates the requirements contained in s 21(1) of the MPA in the process regulating the change of the marital regime.[16] Consequently, in my view, whether parties conclude a customary marriage or a civil marriage, and in line with the constitutional and legislative intent to place customary marriages on par with all other marriages, the legal requirements for (1) the registration; and (2) the alteration of matrimonial regime after a marriage, remain the same.

[51] The provisions of s 89 of the Deeds Registries Act, read with s 21(1) of the MPA, were applicable to the circumstances of the parties in this instance. The parties could only enter into a postnuptial contract, as opposed to an antenuptial contract. On the evidence, there was no agreement between the parties ***prior*** to their marriage specifically excluding marriage in community of property. By misleading the attorneys, the parties impermissibly registered an antenuptial contract. The parties failed to comply with the requirements for the valid registration of a postnuptial contract, which would have been the correct procedure to follow.

[52] Mr Thompson argued, based on a longstanding decision of this court in *Honey v Honey*,[17] that parties may not postnuptially amend their marital regime without complying with the legislative requirements, even if only between themselves. In *Honey*, although the postnuptial contract was notarially executed, it was not sanctioned by the court in terms of s 21(1) of the MPA. The court held the

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[15] Sections 88 and 89 may further be distinguished from the circumstances envisaged in s 87 of the Deeds Registries Act. Section 87 permits the registration of an antenuptial contract (with the leave of a court) after the lapse of the stipulated three-month period, but only where the antenuptial contract was already executed before the marriage. Section 87 is not applicable in these circumstances, given that the antenuptial agreement was entered into between the parties after the customary marriage was concluded and only executed thereafter.

[16] Section 7(5) of the RCMA provides: '(5) Section 21 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse.'

[17] *Honey v Honey* 1992 (3) SA 609 (W).

contract to be invalid not merely against third parties, but also between the parties *inter se*.[18]

[53] The approach in *Honey v Honey* was followed in a more recent case of *SB v RB*,[19] where the court stated that, despite the potential for absurd consequences in the case before it, '[t]he *Honey* decision cannot be criticised in the current legislative milieu…' I observe further that the court in *SB v RB* made reference to 'the immutability principle'. According to *Lawsa*, 'The immutability system means that all postnuptial variations by spouses of the matrimonial property regime are invalid and contracts concluded between the parties on that basis cannot be enforced, even as between the parties themselves.'[20] One of the exceptions to the principle being the registration of a postnuptial contract with the leave of the court, in accordance with the provisions of s 21(1) of the MPA.

[54] Having regard to the overall legislative scheme governing marriages, customary marriages and civil unions, I do not consider myself bound by *SMS v VRS.* The cases are distinguishable. As I understand from the respondent's papers, the *'antenuptial agreement*' was intended to bind third parties, as he sought to protect the applicant from potential claims by his ex-wives and to provide for his children. Therefore, it could not have been merely an *'informal arrangement*' between them. A further distinction is that the parties were married once, and by customary law. There was no subsequent civil marriage entered into between the parties. Section 10 of the RCMA, which forms part of the foundation for the decision, does not apply.

[55] I find that an acceptance of Ms Makapela's argument would nullify the current legislative scheme, render the legal certainty and protections afforded by it meaningless, and open the floodgates of litigation.

[56] The only pathway to the registration of a postnuptial contract after marriage is with the leave of the court. The court must sanction both the execution and

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[18] In *EA v EC* [2012] ZAGPJHC 219, the court had to determine the validity of an amendment/revocation of an antenuptial contract. The amendment/revocation was purportedly effected in terms of a tacit universal partnership. Relying on the decision in *Honey v Honey* (note 21 above), it found that even with the mutual consent of the parties, this could not be done without the leave of the court.

[19] *SB v RB* [2014] ZAWCHC 56; [2015] 2 All SA 232 (ECLD, George) para 35.

[20] *Lawsa* Vol 28(2) 3 ed para 124.

registration thereof. Any act by the parties purporting to postnuptially change their matrimonial property regime without the leave of the court is invalid and *void ab initio*. Further, a variation or amendment which seeks to alter the regime, must adhere to the requirements set out in s 89.

[57] Accordingly, I agree with Mr Thompson that the applicant and the respondent knew that an application in terms of s 21 of the MPA to change their matrimonial property regime would be a necessary but costly affair, and sought to circumvent the prescribed procedure in the manner set out above.

[58] I find that the so-called antenuptial contract executed on 23 September 2019 and registered on 7 October 2019 invalid and *void ab initio*. The matrimonial property regime governing the customary marriage between the parties is one in community of property and profit and loss.

Costs

[59] Mr Thompson argued I should award costs against the respondent on an attorney and client scale as a mark of the Court's displeasure. Despite the favourable outcome, a serious consideration for the Court is that the respondent and the applicant misled an officer of the court. Although disclosed by the applicant, the conduct warrants the censure of the Court. Accordingly, the applicant is entitled to half of her legal costs.

Accordingly, the following order is made:

1. On 29 June 2019 the applicant and the respondent concluded a valid customary marriage in community of property and of profit and loss as envisaged by s 3 of the Recognition of Customary Marriages Act 120 of 1998.

2. The antenuptial contract registered by the applicant and the respondent on 7 October 2019 with the Deeds Registry, Johannesburg, is declared null and void for the failure to comply with s 89 of the Deeds Registries Act 47 of 1937, read with Matrimonial Property Act 88 of 1984.

3. The respondent is liable for 50% of the applicant's party and party costs.

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JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 11 June 2021.

Date of hearing:	29 April 2020
Date of judgment:	11 June 2021

Appearances:

Counsel for the applicant:	CE Thompson
Attorney for the applicant:	Martin Vermaak Attorneys
Counsel for the respondent:	L Makapela; S Qagana
Attorney for the respondent:	Victor Nkhwashu Attorneys