IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 8053/2013

Date heard: 29 October 2014

Date of judgment: 05 November 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

M[...] C[...] Y[...] Applicant/Defendant

and

P[...] T[...] Respondent/Respondent

JUDGMENT

A.M.L. PHATUDI J:

Introduction

[1] The order the applicant seek is set out in the notice of motion as follows:

> 'A. Rescinding the Final Order of Divorce which was granted by the above Honourable Court on 8th April 2013 under case number 8053/2013;
>
> B. Declaring that the Settlement Agreement purportedly signed by the parties on the 7th February 2013 and 15th February 2013, to be null and void;

C. Substituting the Final Order of Divorce to read:

(1) THAT the bonds of marriage subsisting between plaintiff and defendant be and are hereby dissolved.

(2) THAT each party is to retain their own separate estates in line with their matrimonial regime of a marriage out of community of property and out of community of profit and loss.

D. Directing the Respondent to pay the costs of this application on scale as between Attorney-and-Own-Client'

[2] An order made by Molopo-Sethosa J on the 6 August 2014, in which she ordered postponement of the matter to 27 October 2014[1] with an order mulcting the respondent with wasted costs on attorney and own client scale, made me to enquire as to what made the court to so order.

[3] Mr Seabi, the applicant's counsel, submits in response to my enquiry that the matter was so postponed due to the respondent's failure to file heads of argument as prescribed by the Rules and Practice Directive of this court. Counsel places on record that the judge found non-compliance by the respondent inacceptable.

[4] The respondent's attorney, Mr S Magaga, was present in court on the 6 August 2014 when the court granted the respondent an indulgence by postponing the matter to enable the respondent to file heads of argument.

[5] The respondent, once more, now before me, failed to file the heads of argument. On my enquiry from Mr Magaga as to why the respondent failed to file such heads of argument, he informs the court that he failed to file such heads due to his maternal uncle's death. He places on record from the bar that his uncle died on 03 October 2014. He then had to attend to the burial of his uncle.

[6] He accepted that he has no reasonable explanation as to why such heads of argument were not filed between 06 August and 03 October 2014 respectively.

[7] It is directed in terms of the Practice Manual of this division that '[t]he applicant must serve and file heads of argument within 15 days from the date of completion of the index and the respondent must serve and file heads of argument within 10 days from the date on which the applicant's heads of argument are served'[2]

[8] The applicant has since filed his heads of argument on 25 April 2014. The respondent ought to have filed her heads of argument as early as 14 May 2014. The applicant's failure to file heads of argument as directed prompted the court to postpone the matter on 6 August 2014 to 27 October 2014. The respondent further

failed, with no acceptable explanation, to file heads of argument by the latest, 6 October 2014. The respondent had 6 months at her disposal to file heads of argument. Failure to file the said heads of argument in the six months period may warrant an investigation as to the conduct of Mr Magaga by the Law Society of the Northern Provinces. I am further of the view that Mr Magaga should not claim any fees from his client which he may have incurred from the 6 August 2014 to date including appearance fees for both the 6 August and 27 October 2014 respectively.

[9] Due to an unacceptable explanation submitted from the bar, I dismissed the respondent's request for further indulgence. The applicant's counsel submitted that the respondent has no prospects of success in the matter and further that the matter can be finalised on the papers as they stand.

Factual background

[10] The applicant was the defendant in the main divorce action. The respondent/plaintiff had caused issue of summons initiating the divorce proceedings. It is common cause that personal service was effected on the applicant/defendant. The decree was granted incorporating a document purporting to be a settlement agreement. The applicant denies having signed the "settlement agreement".

[11] It is common cause that the parties got married to each other on 5 April 1990. Their marriage was solemnised at Bizana Magistrate Court, Eastern Cape Province (then Transkei former TBVC state). Their marriage was governed by Transkei Marriage Act 21 of 1978.[3] The provisions of section 39 of the said Act were endorsed as set out in the Civil Marriage Register which the applicant annexed as "MCY1" to his founding affidavit. The applicant further contends that their marriage was out of community of property and out of profit and loss of which the respondent denies.

The Law

[12] Transkei, as one of the former TBVC states within the Republic of South Africa prior to 1994, obtained its independence in 1976. It had powers to legislate its own laws. Marriage Act 21 of 1978, also referred to as Transkei Marriage Act was enacted and assented to on 12 February 1979. Section 39 of the Marriage Act provides as follows:

> '39(1) Subject to the provisions of subsection (2), a marriage contracted in terms of the provisions of this Act shall produce the legal consequences of a marriage out of community of property and of profit and loss
>
> (2) It shall be competent for the parties to any intended civil marriage who desire that community of property and of profit and loss shall result from their marriage -

(a) to enter into an ante nuptial contract which provides for community of property or of profit and loss; or

(b) to declare jointly before a magistrate or marriage officer, at any time prior to the solemnization of such civil marriage and substantially in the prescribed form, that it is their intention and desire that community of property and of profit and loss shall result from their civil marriage,

And thereupon such community shall, subject to the laws relating to the registration of ante nuptial contracts, result in accordance with the provisions of such ante nuptial contract or declaration, as the case may be: Provided that the provisions of such an ant nuptial contract or a declaration in terms of paragraph (b) shall not -

(i) Apply to land held in individual tenure under quitrent conditions which shall be excluded from such community; or

(ii) In any way affect the material power of the male party to such civil marriage.'

[13] It is clear from the reading of section 39 that the marriage regime of parties who got married in the former Transkei state was automatically out of community of property and of profit and loss.[4] If the parties intended that community of property and of profit and loss (in community of property) govern their marriage, then such parties were obliged to enter into an ante nuptial contract to that effect.[5]

[14] The marriages governed in terms of various marriage Acts promulgated by the TBVC states remained in force even after the democratic Republic of South Africa. Parties to such marriages were, and still are at liberty to change their matrimonial systems. The change of matrimonial system may be effected upon application to the High Court in terms of section 21(1) of the Matrimonial Property Act 88 of 1984.[6]

[15] The Matrimonial Property Act further provide, as set out in section 21(2) (a) that:

> '(2)(a) Notwithstanding anything to the contrary in any law or the common law
>
> contained, but subject to the provisions of paragraphs (b) and (c) , the spouses to a marriage out of community of property -
>
> > (i) Entered into before the commencement of this Act in terms of an ante nuptial contract by which community of property and community of profit and loss are excluded; or
> >
> > (ii) Entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,
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> may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration in a registry within two years after the commencement of this Act or, in the case of a marriage contemplated in subparagraph (ii) of this paragraph, within two years after the commencement of the said Marriage and Matrimonial Property Law Amendment Act, 1988, as the case may be, or such longer period, but not less than six months, determined by the Minister by notice in the *Gazette*, of a notarial contract to that effect.'

Evaluation

[16] The respondent stated in her answering affidavit that 'I registered our marriage that took place in Bizana on 05 April 1990 at the Department of Home Affairs and it was computerised ... When I showed them the one that was hand written from Bizana, I was told that they want a computerised marriage certificate, then I had to register our marriage ...'[7]

[17] In my evaluation of the evidence pertaining to the parties' matrimonial system and considering the respondents contention that their marriage is the one in community of property has no merit. The respondent conceded that their marriage concluded in Bizana on 05 April 1990 still subsisted. I am not certain that when she contends that she caused computerised of their marriage, she thought that such "registration" caused their

marriage to be one "in community of property".

If she so contends, then such "registration" did not comply with the provisions of section 21(1) of the Matrimonial Property Act. The said "change" was not affected by the competent court. The parties' marital system concluded in terms of section 39-of the Transkei Marriage Act remained out of community of property and of profit and loss.

Settlement agreement

[18] I now deal with the settlement agreement purportedly signed by both parties. The applicant denies having agreed to the terms set out in the settlement agreement. He further denies having attested his signature thereon. The copy he annexed as "MCY2" does not have the signature where the defendant ought to have signed.[8]

[19] On the other hand, the respondent stated that 'the applicant was served with summons by the sheriff on 20 February 2013. I came back with a return of service, summons and a settlement which was signed bv the applicant. ..'[9] She further stated that 'I was told by the Clerk/Registrar of the court that the applicant did not sign at the allocated signature block where he supposed to sign.'[10] She then caused a copy of summons and settlement agreement to be faxed through to the Sheriff in Mount Ayiiff for the applicant/defendant to sign where it was marked with a cross. She annexed a copy of the settlement agreement purportedly signed by the applicant marked "PY1"[11] The said agreement is the one incorporated with the decree of divorce granted on 08 April 2013.

[20] On my perusal of "PY1", it appears that the unsigned portion as depicted on "MCY2" has been signed. I further note that the person who signed on the defendant slot did so on 15 February 2013 and at Pretoria. The inscription purportedly made on 15 February 2013 does not corroborate the respondent's version.

[21] The respondent's version is that she returned possibly from Mount Ayiiff, with a return of service of the summons, the summons, (presumably the original for the court's file) and a settlement agreement duly signed by the applicant after the 20 February 2013. If indeed the said settlement was not signed as depicted by the Registrar of this court, and if indeed a copy thereof was faxed back for signature, then the signed "settlement agreement" should have been signed neither earlier than 20 February 2013[12] nor later than 27 February 2013 when same was faxed back to her.[13]

[22] The respondent's version is improbable and stands to be rejected on that leg alone. As to whether the signature that appear on "PY1" purporting to be that of the defendant, the respondent failed to adduce evidence that the applicant is the person who attested the signature on the document. I cannot agree more with M Seabi's submission that there is no evidence adduced from the person who attended to the

respondent's request to take the settlement for the applicant's signature at the time when she faxed the documents to that effect. In the absence of the evidence corroborating the respondent's version to the fact that the applicant signed the settlement agreement, I am left with no option but to accept the applicant's version.

[23] It is trite that costs follow the event. The applicant succeeds with his claim. He is thus entitled to his costs. I am unable to agree with Mr Seabi that the respondent ought to be mulcted with costs on attorney and own client on the matter. I, however, am inclined to grant cost on attorney and client with regard to the application for condonation of non-compliance with the Rules and Practice Manual of this division in as far as the heads of argument are concerned.

In the result, the following order is made.

Order:

1. The application for condonation of non-compliance with the submission of the respondent's heads of argument is dismissed with costs on attorney and client.

2. The decree of divorce incorporating the settlement agreement granted on 8 April 2013 is hereby set aside and replaced with the following.

(i) The bonds of marriage subsisting between Plaintiff and Defendant be and are hereby dissolved.

(ii) That each party is to retain their own separate estates in line with their matrimonial regime of out of community property and of profit and loss envisaged in terms of section 39 of the Transkei Marriage Act 21 of 1978.

3. The settlement agreements purportedly signed by both parties on 7 and 15 February 2013 respectively are declared null and void.

4. The respondent is to pay costs of this application on a party and party scale.

A.M.L. Phatudi

Judge of the High Court

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1 Clause 13.12(5) of the Practice Manual of North Gauteng High Court that came into effect on 1 July 2012 provides that 'No opposed application may be postponed to another opposed motion court date. Instead, a new date of hearing must be applied for.'

2 Practice Manual; Clause 13.9 (2): 2.3

3 Founding Affidavit - paragraph 4.1 - 4.5 at paginated page 5 and 6; Answering Affidavit – paragraph 9 at paginated page 27

4 Section 39(1) of Marriage Act 21 of 1978 (Transkei)

5 Section 39(2)(a) of Marriage Act 21 of 1978 (Transkei)

6 21 (1) 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.

7 Answering Affidavit – paragraph 9 paginated page 27

8 Settlement agreement - MCY2 - paginated page 13 - 18 at page 18

9 Answering Affidavit - paragraph 5 paginated page 25

10 Ibid

11 Settlement agreement PY1 - paginated page 40 - 45 at page 45

12 Answering Affidavit - paragraph 5 paginated page 25

13 Answering Affidavit - paragraph 8 paginated page 26