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Legal update 12 of 2020: Case law on marital regime matters

Introduction

There are two recent cases relating to the effect of marriage and how transactions must be conducted with persons married in community of property and those married in terms of Customary law. Below are summaries of these cases and insight into how we establish if a person is married and what we require as proof of the marriage, should they come across in claims on the Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund. We have also included more detail on the cases in the document.

Summaries

Case 1: Marais N.O & Another vs Maposa & Others [2020] ZASCA 23 (25 March 2020)

Validity of donation of asset of the joint estate without the consent of the other spouse

- **The finding:** A spouse married in community of property must obtain the consent of the other spouse when donating an asset of the joint estate to a third party. Should the donating spouse not have obtained the necessary consent, a third party who receives the donation must prove that he/she reasonably believed the consent was not required (i.e. the donating person is not married in community of property) or that the consent was obtained, for the transaction to be valid.
- **How we deal with this:** A person who is married in community of property does not need consent of his/her spouse to apply for membership of our retirement funds, but if that person wants a non-retirement fund investment policy, then he/she must obtain consent from his/her spouse. Momentum Metropolitan Life Limited, as an insurer, asks a person seeking a non-retirement fund policy to confirm if he/she is married in community of property and that consent to enter the policy (including the consent to transfer and withdraw from the policy) was obtained from the non-contracting spouse.

Case 2: Mlamla vs Rubushe & Others (CA04/2020) [2020] ZAEC (17 June 2020)

Validity of customary marriage in the absence of the handing over of the bride by her family to the groom's family

- **The finding:** Where parties have consented to a customary marriage and agreement has been reached at negotiation stage by the two families for the beginning of such marriage, the handing over of the bride becomes superfluous. The handing over of the bride cannot be compared to goods being delivered to the marital home.
- **How we deal with this:** Where parties were married in terms of customary law, but did not register their marriage (i.e. there is no marriage certificate), we request a copy of the lobola letter supported by written statements of the family representatives who can

confirm that lobola negotiations took place and that the marriage was celebrated.

Case 3: Monyepao vs Ledwaba & Others [2020] ZASCA 54 (27 May 2020)

Does a customary marriage become dissolved by a subsequent civil marriage to another person?

- **The finding:** A customary marriage may only be dissolved by the death of a party to the marriage or a decree of divorce issued by a court in terms of the Divorce Act. A subsequent marriage to another person by way of civil marriage does not dissolve the customary marriage and such subsequent civil marriage will be invalid.
- **How we deal with this:** When dealing with conflicting claims (where more than one person is claiming to be the spouse of a deceased member), we request a copy of the marriage certificate and, if any party claims the marriage of the other with the deceased has been dissolved, we request a copy of the divorce order.

More detail of the cases

Case 1: Marais N.O & Another vs Maposa & Others [2020] ZASCA 23 (25 March 2020)

Validity of donation of asset of the joint estate without the consent of the other spouse

The appellant was the wife of Mr Broodie, who was a businessman and died in 2016. Mrs Broodie was the executrix of Mr Broodie's estate and she had launched an application to the Supreme Court of Appeal (SCA) to set aside the donation of 75% of the member interest in Seepunt Eiendomme CC (the business) to Ms Ledwaba and her two children (the Respondents) when she died. Following her death, Mrs Broodie was substituted in the proceedings by the executor of her estate, Mr Marais. The SCA had to decide whether the donation of 75% of the member interest in the business made by Mr Broodie was valid, given that Mrs Broodie had not given consent to the donation.

The undisputed facts were that Mr Broodie was married to Mrs Broodie in community of property in 1967. Mr Broodie started a relationship with Ms Ledwaba in the 1980s and two children were born out of that relationship. Mr Broodie took ill in 2013 when he started becoming forgetful and confused, and he suffered a stroke in early 2014. The transfer of 75% of the member interest in the business took place in May 2014. Mrs Broodie only became aware of the transfer in November 2016 and Mr Broodie died a month later. Ms Ledwaba submitted that she was married to Mr Broodie in terms of customary law. Although the court did not delve into detail around this point, it pointed out that the marriage was nullified by the fact that he was already married to Mrs Broodie in terms of a civil marriage.

Ms Ledwaba also submitted that Mr Broodie had always wanted to provide for her and her children in the same manner that Mrs Broodie and her children would be provided for in the event of the death of Mr Broodie. She argued that this was the reason why Mr Broodie made the donation of 75% of the member interest in the business to her and her children before his death.

The SCA found the following:

- Section 15(1) of the Matrimonial Property Act provides that subject to the provisions of subsections (2), (3) and (7) a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.
- Section 15(2) sets out a number of transactions that require not only the consent of the non-contracting spouse but require that it be in writing. This includes transactions involving immovable property in the joint estate and a spouse binding him/herself as surety.
- Section 15(3) sets out transactions that require consent but not necessarily in writing. This includes that a spouse may not donate any asset in the joint estate or alienate such asset without value, excluding an asset of which the donation or alienation will not unreasonably prejudice the interests of the other spouse.
- Section 15(9) provides that where a spouse enters into a transaction without the required consent of the other spouse, and the third party did not know or could not reasonably have known that there is no consent of the other spouse, it is deemed that the transaction was entered with the required consent. If the spouse knew or ought to have reasonably known that he/she would not

obtain the consent required and if the transaction results in the joint suffering loss, an adjustment shall be made in favour of the non-contracting spouse upon the division of the joint estate.

- A third party involved in a transaction that requires consent can only have the transaction upheld if they prove that they did not know there was no consent and they could not reasonably have known that consent was required.
- The donation of 75% of the member interest in the business constitutes the lion's share of the joint estate (i.e. about R20 million) and leaves R2 million to R3 million for Mr Broodie's family. This clearly benefits Ms Ledwaba's family to the detriment of Mrs Broodie and her children in a disproportionate manner and goes against the reasons for the donation advanced by Ms Ledwaba. It prejudiced the interests of Mrs Broodie and therefore her consent was required.
- Ms Ledwaba conceded that she entered the relationship with Mr Broodie knowing he was married. She failed to enquire about his marital regime and to enquire about whether he had obtained Mrs Broodie's consent for the donation.
- For the above reasons, the donation was set aside by the SCA and the court ordered that 75% of the member interest in the business must revert back to Mr and Mrs Broodie's joint estate.

Case 2: Mlamla vs Rubushe & Others (CA04/2020) [2020] ZAEC (17 June 2020)

Validity of customary marriage in the absence of the handing over of the bride by her family to the groom's family

On 26 January 2012, a ritual called *utsiki* (ceremony for welcoming the bride to her marital home) was performed for the appellant at the deceased's home. This marks the consummation of the marriage where the bride is given a new name, which her in-laws will use to address her. The appellant was given a new name and she was fed with *isiphanga* and was given bile juice to symbolise that she was welcome by her marital ancestors. After the ceremony, the appellant and the deceased lived together in their home. They attended family gatherings together and she was welcomed by her in-laws.

The marriage between the parties started to disintegrate in 2014, when the appellant discovered that the deceased was involved in an extra-marital affair. In January 2015, the deceased left the common home and he died in March 2018. In July 2018, the appellant went to the office of the Master of the High Court seeking letters of appointment as the deceased's executrix. She was asked to produce a marriage certificate but did not have one. She then approached the Department of Home Affairs to ask them to register the marriage but she could not succeed, as the deceased's family refused to depose to affidavits confirming she was married to the deceased.

The deceased was a member of the National Fund for Municipal Workers (the Fund). When the appellant contacted the Fund to enquire about the benefits payable, she was advised that the deceased was believed to have died unmarried and a portion of the benefit had already been paid to the deceased's mother. This triggered her application to the High Court for an order declaring her marriage to the deceased valid.

The High Court dismissed her application on the grounds that the handing over of the bride is a requirement for a valid customary marriage and had not been done in her case. She then applied on to a full bench of judges in the same court to have the matter taken on appeal.

The issue for determination on appeal was whether the handing over of the bride to the bridegroom's family is a prerequisite for a valid customary marriage in terms of section 3 of the Recognition of Customary Marriages Act (the Act). Therefore, the issue relates to the interpretation of section 3 (1)(b) of the Act which provides: "*For a customary marriage entered into after the commencement of this Act to be valid the marriage must be negotiated and entered into or celebrated in accordance with customary law*".

The court found that:

- It is common cause that the appellant and the deceased were over 18 years old and they had both consented to the marriage.
- The interpretation of section 3 (1)(b) of the Act revolves around the handing over of the bride by her family to the bridegroom's family.
- The appellant argued that the welcoming of the bride ceremony and being given a new name by her in-laws at

her marital home constituted the handing over of the bride. Therefore, as her argument went, the handing over of the bride and consummation of the marriage took place on 26 January 2012.

- The deceased's mother and her other family members (the Respondents) argued that the handing over of the bride involves both the family of the bride and the bridegroom. As the appellant's family was not present at the ceremony of 26 January 2012, there was no handing over of the bride and therefore no valid marriage.
- In the past, customary unions were discriminatory in nature and did not afford equal opportunities to both parties to the union. The woman was always in an inferior position to her husband. The interpretation of the section must therefore reflect the commitment to strive for a society based on social justice.
- Therefore, a purposive interpretation of the section will be in line with the spirit and purport of the constitution to give effect to democratic values of our society.
- Section 3(1)(b) of the Act does not expressly require the handing over of the bride by her family to the family of the bridegroom. The section requires negotiation of the marriage between the two families and consummation or celebration of the marriage.
- The requirement of handing over of a bride was a requirement of customary law before the commencement of the Act.
- Customary law cannot be stagnant in a dynamic changing society. It evolves and develops to meet the changing needs of the community and will continue to evolve within the context of its values and norms consistently with the Constitution.
- Where parties have consented to a customary marriage and agreement has been reached at negotiation stage by the two families for the beginning of such marriage, the handing over of the bride becomes superfluous. The handing over of the bride cannot be compared to goods delivered to the marital home.
- The appellant was recognised by her in-laws as the deceased's wife. Prior to the disintegration of her marriage she was always welcome at the deceased's home for family gatherings. Even when the marriage started to disintegrate the Respondents endeavoured to assist the appellant and the deceased to fix things in their marriage on a couple of occasions.
- In the circumstances, the court found that a valid customary marriage existed between the appellant and the deceased.

Case 3: Monyepao vs Ledwaba & Others [2020] ZASCA 54 (27 May 2020)

Does a customary marriage become dissolved by a subsequent civil marriage to another person?

The SCA dealt with an appeal from the Polokwane High Court concerning the assets of the estate of the deceased, Mr Phago, who died intestate (without leaving a will). Two women, Ms Monyepao and Ms Ledwaba, were claiming to be married to Mr Phago. The outcome sought by Ms Monyepao was for the court to declare that Ms Ledwaba's marriage to Mr Phago was terminated before the date of his death, and the outcome sought by Ms Ledwaba was for the court to declare that Ms Monyepao's marriage was invalid, as she was still married to Mr Phago on the date of his death.

The Polokwane High Court (first court to hear the matter) ruled in favour of Ms Monyepao and Ms Ledwaba took the matter on appeal to the same court, which ruled in favour of Ms Ledwaba on appeal. That resulted in Ms Monyepao referring the matter to the SCA. In her Notice of Motion (which states the party's desired outcome) Ms Monyepao requested the SCA to make the following order:

- That the customary marriage between Mr Phago and Ms Ledwaba had been dissolved in February 2008, alternatively, that Ms Ledwaba's patrimonial (monetary) benefit of that marriage be forfeited to Mr Phago's estate;
- That the immovable property occupied by Ms Ledwaba and her minor child be awarded to her minor child; and
- That the Master of the High Court be directed to revoke Ms Ledwaba's appointment as co-Executor of Mr Phago's estate, and that Ms Monyepao be appointed the sole executor of the estate.

In short, the facts were that Mr Phago married Ms Ledwaba in June or July 2007 in terms of customary law. Ms Monyepao alleged that the marriage lasted until February 2008 and Ms Ledwaba disputed this, arguing that

their marriage continued even after Mr Phago had an extra-marital relationship with Ms Monyepao.
Ms Monyepao alleged that she got married to Mr Phago between July and August 2010 but Ms Ledwaba disputed this on the basis that she was still married to Mr Phago and the 'required procedure' for Mr Phago to marry a second wife was not followed to validate the second marriage.
Ms Monyepao further alleged that Ms Ledwaba was not married to Mr Phago on the date of his death, as she married Mr Kwele by way of civil marriage on 26 November 2009. Ms Ledwaba admitted to her civil marriage to Mr Kwele but argued that the marriage was nullified by the existence of her first marriage to Mr Phago in terms of customary law.

The SCA found that:

- There is no factual basis to find that Ms Ledwaba's marriage to Mr Phago was terminated by divorce in February 2008. For the customary marriage to have been dissolved, before Mr Phago's death, there should have been a decree of divorce issued by a court as required by section 8 of the Recognition of Customary Marriages Act. Section 8(1) provides that a customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage. Ms Monyepao did not allege or even prove that a divorce order was granted for the dissolution of Mr Phago and Ms Ledwaba's marriage. Therefore, the SCA could not order that the marriage had been dissolved in February 2008.
- Regarding Ms Monyepao's argument that Ms Ledwaba's civil marriage to Mr Kwele nullified her customary marriage to Mr Phago, the SCA had already ruled in another matter before (*Ntshituka v Ntshituka & Others*) that a civil marriage between A and B that was entered into while A was married to C in terms of customary law was a nullity. The same position applied to the current matter and that means that Ms Ledwaba's marriage to Mr Kwele was null and did not affect the validity of her marriage to Mr Phago.
- Regarding the outcome sought by Ms Monyepao that Ms Ledwaba forfeits the patrimonial benefits of her marriage to Mr Phago, the SCA turned to section 8(4) of the Recognition of Customary Marriages Act which provides that when a court grants a decree of divorce in respect of a customary marriage, it has the powers contemplated, *inter alia*, in section 9 of the Divorce Act. Section 9(1) of the Divorce Act provides as follows:

  "*When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.*"

  It is clear that the power of a court to order forfeiture of patrimonial benefits arises only when the court is granting a decree of divorce. Furthermore, the request for forfeiture can only be made by a party to a marriage in divorce proceeding, not by an outsider such as Ms Monyepao. As the proceedings before the court (including the first Court that heard the matter) are not divorce proceeding, Ms Monyepao has no standing and the court does not have jurisdiction to grant this order.
- Regarding Ms. Monyepao's request that the court direct that the immovable property occupied by Ms Ledwaba and her minor child be awarded to her minor child, the SCA found that Ms Monyepao did not make out a case in her papers before the court.
  The court also found that Mr Phago's estate must be liquidated and distributed like any other deceased person's estate where they have died without a will.
- Ms Monyepao requested that Ms Ledwaba's appointment as co-executor be revoked so that she may be the sole executor of the estate, presumably on the basis that Ms Ledwaba's marriage to Mr Phago terminated before his death. Since the court found that Ms Ledwaba's marriage continued until the date of Mr Phago's death, this too was rejected by the court.

The appeal was dismissed by the SCA.

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