

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.81/2019

In the matter between:

MAFA MOSHOESHOE

APPELLANT

AND

'MASEEISO MOSHOESHOE

RESPONDENT

CORAM : DR. K. E. MOSITO P.
DR P. MUSONDA AJA
DR J VAN DER WESTHUIZEN AJA

HEARD : 20 OCTOBER 2020

DELIVERED : 30 OCTOBER 2020

SUMMARY

Marriage — Divorce — Proprietary rights — Parties married in community of property - Marriage in community of property — Legal Capacity of Married Persons Act, 2006 - the legal effect of the property allegedly alienated by the respondent on the division of the joint estate.

Appeal - Pension interest of member by operation of law vesting in joint estate, to which parties entitled as at date of divorce — Divorce Act 70 of 1979, ss 7(7)(a) and (8).

JUDGEMENT

K.E. MOSITO P

Background

[1] This matter came before us as an appeal against the order of the High Court (Sakoane J). The parties had previously obtained a divorce order in respect of a marriage in which had been married in community of property. Arising out of the dispute as to the method of the division of the joint estate, the parties approached the High Court, seeking an order for division of the joint estate. The High Court ordered that the estate be divided equally. This, the court ordered without first considering the value of the property alleged to have been alienated by the respondent as well as its economic value of the property. This is an appeal against that decision.

Parties

[2] On 29 April 1994 the parties entered into a civil marriage. They were formerly married in community of property. The marriage between the parties had always been an unhappy one since 1994 when the appellant started being unfaithful. In 2007, the respondent deserted the plaintiff. Upon her desertion, she took with her the sum of M185, 960.00 (One hundred and eighty five thousand, nine hundred and sixty Maloti. On 12 November 2008 the marriage was dissolved by the High Court at the suit of the respondent. The divorce order granted by the High Court did incorporate a provision as to the division of the joint estate.

Factual matrix

[3] The parties have a matrimonial house at Hillsvieiw in Maseru Urban Area. The house is situated on Plot No.12292-083. It is valued at M1,555,000.000 (One Million, Five hundred and Fifty-five Thousand Maloti). The parties also agree that the house should be sold and the proceeds thereof be equally divided between them. The High Court later ordered the parties to divide their joint estate. The High Court had to determine whether an order for division of the estate should state clearly, the monetary and/or any adjustments that had to be effected during the division of the estate by the liquidator(s).

[4] After the divorce, the appellant paid for the bond against the matrimonial house in the sum of M74 949.24 (Seventy four thousand, nine hundred and forty nine Maloti, and twenty four lisente).

[5] On 12 November 2019, the High Court made the following order:

- (a) Movable property shall be divided equally between the parties.
- (b) The house shall be sold and the proceeds thereof shall be divided equally between the parties.
- (c) There is no order as to costs.

Dissatisfied with the above order, the appellant approached this Court on appeal. He advanced five ground of appeal against the judgment. The appeal is opposed by the respondent.

Issues for Determination

[6] The primary issue in this appeal concerns the proper interpretation and application of the Legal Capacity of Married Persons Act, 2006 (the Act) regarding the legal effect of the property

allegedly alienated by the respondent on the division of the joint estate.

The law

[7] It is a trite principle of our law, and for which no authority is necessary that, one of the natural consequences of a marriage in community of property is that spouses married in community of property automatically become bound co-owners of immovable property in their joint estate. On dissolution of the marriage the reverse follow automatically. Ever since the abolition of marital power through the ***Legal Capacity of Married Persons Act, 2006*** (the Act) and within the meaning of s8(1)(b) of the Act, either spouse is able to perform legal acts involving the joint estate within parameters set by ss 7, 11 and 12 of the Act. A wife married in community of property has the same powers with regard to the joint estate as previously enjoyed by the husband. Generally speaking, either spouse can perform a legal act involving the joint estate.

[8] In the case before us, Advocate Lesaoana for the appellant, relied on such cases as ***Brookstein v Brookstein***.¹ This case was decided, against the background of the then existing legislation in South Africa. The area of matrimonial property law is one in which our courts should be very cautious not to religiously follow South African judicial precedent.

[9] The development of the matrimonial property law in South Africa and Lesotho is also was quite different from that in England, England never had a matrimonial property regime in the

¹ Brookstein v Brookstein 2016 (5) SA 210.

Continental sense. In English law as it developed, spouses were regarded as one person in law, that person being the husband.²

[10] The question of maintenance, and the means of enforcing it in English law, also developed along different lines to that in South Africa and Lesotho. The South African and Lesotho matrimonial property law, as it was received from the Roman-Dutch system, applies in general, the system of total community of property, the exception being those cases where parties elected to be married with an antenuptial contract. Consequently, for those cases where the parties were married in community of property, the Courts did not have occasion to have regard to whether the wife could possibly have acquired a beneficial interest in any of the matrimonial property.

[11] The English system in this regard had to resort to the creation of implied or constructive trusts. It was this absence of any beneficial interest in matrimonial property which in England led to the statutory changes giving the Courts the power to make lump sum provisions, financial provisions and then subsequently redistributions of property. In South Africa, the need for this statutory redress was only in relation to those marriages which did not follow the general principle of community of property, namely where, as a result of an antenuptial contract, the wife (in most cases) found herself on divorce, without anything to show for the contribution which she might have made during the course of the marriage. Insofar as maintenance is concerned, as stated above,

² Blackstone's Commentaries on the Laws of England 4th ed (1771) Book 1 chap 15 at 442. Also Hahlo The South African Law of Husband and Wife 5th ed at 9.

there was also a difference in principle between the English and Continental systems.

[12] Certainly in South Africa and Lesotho, following the Roman-Dutch system, there is the reciprocal duty of support. Typically it is the husband who, out of his income, provides his wife and family with support, and in return, the wife's primary duty is to perform her traditional role as wife and mother by managing the household and looking after the children of the marriage. Whether the wife is under a legal duty to help her husband in his business or on his farm, depends on the circumstances.

[13] In the matter of ***Van Gysen v Van Gysen***³, Tebbutt J also dealt with the proportions in which family assets may be divided. The learned Judge rejected the view that, where the Court is concerned only with the capital assets of the parties, one should simply divide them between the parties. Furthermore, the learned Judge confirmed that, for the reasons set out in the judgment, one-third could not be the division in every case, whether it be a re-distribution of assets, or maintenance, or both which is in issue.

[14] The law of Lesotho on matrimonial property regime is to be found in the Legal Capacity of Married Persons Act. Section 3 of the Act provides for the abolition of marital power that obtained both under the common law and customary law. However, s3(4) of the Act is clear that, the Act does not affect the legal consequences of any act or omission made which existed before commencement

³ Van Gysen v Van Gysen 1986 (1) SA 56

of the Act. Section 5 of the Act provides for the equal power of spouses in respect of the property of the joint estate.

[15] The juristic competencies of a spouse are regulated by s7 of the Act. Section 7(7) (a) of the Act, enjoins the court to determine the value of property donated or alienated without the consent of another spouse. Section 8(1)(b)(i) of the Act, enjoins the court to determine whether the joint estate has suffered an to what extent, as a result of the unilateral actions of the one spouse in respect of the joint estate. It follows therefore that, where, upon dissolution of the marriage, one party complains that the other spouse has alienated property of the joint estate, it is the court and not the liquidator, who determines that issue upon division of the joint estate. Section 8(2)(b)(i) of the Act, enjoins the court to have regard to the economic value of the property alleged to have been alienated.

[16] It is with the above legal principles that I proceed to consider the grounds of appeal before us.

Evaluation of the appeal

[17] I now turn to consider the appeal before us. The first and second ground of appeal advanced by the appellant are that the court a quo did not consider the value of the property alleged to have been alienated by the respondent as well as its economic value of the property. It was common cause before us that the court did not consider the value of the property alleged to have been alienated by the respondent as well as its economic value of the property. However, Mr. Matoane for the respondent contended that, all that was required was for the estate to be

divided in equal shares in line with what the learned author, Mr Maqutu had written in his book, **Contemporary Family Law of Lesotho**, at p204.

[18] I do not agree with Mr. Matooane's submission on this point. In my opinion, when the learned author wrote the book in 1992, the Act had not yet been enacted. The Act was enacted in 2006. The reliance on the book is therefore misplaced. It follows that the first and second grounds of appeal must succeed.

Disposition

[19] It follows that the order of the court directing that the property be equally divided without first determining the value of the property alleged to have been alienated by the respondent as well as its economic value of the property was an error enough to set aside the court a quo's decision of 20 November 2018.

Costs

[20] This being a matrimonial dispute, I am inclined not to order costs in this appeal.

Order

[21] In the result, the following order is made:

[a] The appeal succeeds.

[b] The court a quo's decision of 20 November 2018 is set aside.

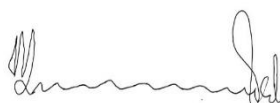
[c] There will be no order as to costs.



DR K.E.MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree



DR P MUSONDA

ACTING JUDGE OF APPEAL

I agree



DR J VAN DER WESTHUIZEN

ACTING JUDGE OF APPEAL

For the Appellant : Adv T.A Lesaoana

For the Respondent : Messrs T Matoane KC

