

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1468/2012

In the matter between:

ALMA MIEZE (born KAVEZEPA)

PLAINTIFF

and

PHILLIP MAANDERO MIEZE

DEFENDANT

Neutral citation: *Mieze v Mieze* (I 1468-2012) [2013] NAHCMD 181 (28 June 2013)

Coram: UNENGU, AJ

Heard: 8, 9 and 15 April 2013

Delivered: 28 June 2013

Flynote: Land – occupation – lease under the resettlement project of the Ministry of Lands and Resettlement in terms of section 41 (2) of the Agricultural (Commercial) Land Reform Act, 6 of 1995 – lease becoming part of the joint estate by virtue of marriage in community of property – upon divorce of spouses, wife cannot have the husband evicted from the Unit.

Summary: The plaintiff is seeking an order in this Court for the eviction of the defendant from whom she had divorced, from a farming Unit she obtained from the Ministry of Lands and Resettlement through a resettlement project. The plaintiff and the defendant were married in community of property and took occupation of the property as a farming Unit for both of them. It is trite law that the right of occupation of the farming Unit under the lease agreement, became an asset of the joint estate by virtue of the marriage in community of property. Therefore, the plaintiff does not have the power to eject the defendant from the farming Unit. However, the Ministry of Lands and Resettlement can terminate or cancel the right of the defendant as a co-lessee with the plaintiff and have the defendant evicted from the farming Unit.

ORDER

1. The claim of plaintiff for an order ejecting the defendant from Unit A of farm Nautabis No 268 is dismissed.
2. Plaintiff pays the costs.

JUDGMENT

UNENGU, AJ:

[1] The plaintiff Alma Mize (born Kavezepa) instituted this action against her former husband Mr Phillip Maandero Mize, in which action she is claiming for an order ejecting the defendant from Unit A of Farm Nautabis No 268 with costs of the suit.

[2] On his part, the defendant is resisting the claim of the plaintiff and alleges in his plea to the particulars of claim that the Ministry of Lands and Resettlement has entered into a lease agreement of the said Unit with both of them, namely him and the plaintiff for a period of 99 years. He denied that he resides on the farm because of his marriage with the plaintiff and that it was never the intention of the parties to the lease agreement that he would vacate the farm upon divorce. In conclusion the

defendant pleads that plaintiff has no legal basis to eject him from the farm and requests the Court to dismiss the plaintiff's claim with costs.

[3] During the trial Ms Hans-Kaumbi of Ueitele & Hans Inc represented the plaintiff meanwhile, Mr Mbaeva of Mbaeva & Associates acted on behalf of the defendant.

[4] The facts of the matter are fairly common cause between the parties. It is not in dispute that the defendant and the plaintiff were husband and wife married in community of property, when the plaintiff, an employee of the Ministry of Lands and Resettlement, on 2 August 2001, applied to be resettled on Farm Nautabis No 268, Unit A, measuring 1534ha, which is situated in the Khomas Region.

[5] The name of the defendant appears on page 2 in paragraph 10 of the application form filled in by the plaintiff as her family member together with names of other family members who seem to be the children of the plaintiff and the defendant.

[6] It is further common cause that by letter of allocation with a reference no 88/03/02 R/K signed by the Chairman National Resettlement Committee, The Permanent Secretary and the Minister for the Ministry of Lands and Resettlement, the plaintiff was informed that her application for resettlement on farm Nautabis No 268, Unit A measuring 1534ha in Khomas Region was successful and was requested to report herself to the Regional Resettlement Committee to take occupation of the unit within 30 days of receipt of the letter.

[7] Thereafter, a Memorandum of Agreement of Lease was entered into between the Government of the Republic of Namibia represented by the Minister of Lands and Resettlement, this time the Honourable Alpheus /Gou-o-!na !Naruseb and the plaintiff (lessee) with the defendant signing as a witness. The date of signing this memorandum, is not clear from the document.

[8] Further, it is not in dispute that the plaintiff and the defendant moved to the farm and took occupation of the Unit allocated to them, albeit in the name of the

plaintiff. However, doom struck and as a result, their marriage was dissolved on 24 June 2011 by this Court.

[9] The defendant, pursuant to the dissolution of their marriage, was requested by the plaintiff to vacate the Unit, but refused to do so. The Permanent Secretary for the Ministry of Lands and Resettlement, Madam Lidwina Shapwa by letter dated 16 September 2011 informed the defendant that the farming Unit he was occupying was allocated to the plaintiff and as such she remained the rightful lessee of same, therefore, he must leave. She advised the defendant to apply on his own for resettlement in a prescribed form. The aforesaid request by the Permanent Secretary was ignored and to date he is still in occupation of the Unit.

[10] That is, therefore, that because of the refusal of the defendant to vacate the Unit that the plaintiff has decided to approach this Court seeking an order as prayed for in the particulars of claim.

[11] During oral testimony, both the plaintiff and the defendant confirmed in material respects what they have stated in their pleadings. Very little did they deviate from the pleadings on issues which I consider to be less important to the issues in dispute between them.

[12] Mr Sikopo, a witness called by the plaintiff, in his evidence, concentrated more on the procedure to follow when applying for a resettlement Unit in the Ministry of Lands and Resettlement. He also explained the policy on the resettlement project of the Ministry. Mr Sikopo told the Court that a married couple may jointly or individually apply for resettlement. He said that once one of the couple has applied for a Unit and is successful, that couple's partner is precluded from applying for another Unit in his or her name. A couple is entitled to one Unit while they are still married. Further, Mr Sikopo testified that the Ministry entered into a lease agreement with the plaintiff alone because plaintiff is the person who applied for resettlement.

[13] As already indicated above, the plaintiff and the defendant were married in community of property which marriage was still valid and subsisting at the time they were allocated the farming Unit by the Ministry.

[14] In the book of South African Law of Husband and Wife¹ the author RH Hahlo teaches what the regime community of property is and what it entails: He says 'community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares. During the subsistence of the marriage the shares of the spouses are indissolvably tied up'. These are some of the attributes of a marriage in community of property regime which the plaintiff and the defendant chose the day they exchanged the vows. They had a choice if they wished to marry out of community of property in which case they were required to marry by an *antenuptial* contract.

[15] It is again trite law that the joint estate consists of all property and rights of the spouses which belonged to either of them at the time of the marriage or which were acquired by either of them during the marriage² (emphasis added). The plaintiff in this matter was granted a right of lease over the property (the subject matter) while she was still married to the defendant, therefore, in my view, that right formed part of an asset of the joint estate, not as a separate asset to which she alone had ownership.

[16] As stated already, it is further common cause between the parties that the plaintiff applied for resettlement and a resettlement farm was allocated to her. Now, the bone of contention in the matter is whether the leasehold granted to the plaintiff over the farming Unit, formed part of the joint estate or was a right granted to the plaintiff alone as the person who applied for it, to the exclusion of the defendant. Further, does that right granted to her give her the authority or power to evict the defendant from the farming Unit upon the dissolution of marriage?

[17] As the solution to the dispute in this matter was a matter of law not of facts, I directed counsel for the plaintiff and the defendant to prepare written heads of argument in which they would concentrate on the issue of whether or not the right of the leasehold acquired by the plaintiff formed part of the joint estate. If necessary, to

¹ Fifth Edition at 157-159

² The South African Law of Husband and Wife Fifth Edition at 161

support their arguments with authority. Counsel complied with the request. Both filed written heads of argument which they supplemented with oral submissions.

[18] As authority, Ms Hans-Kaumbi, counsel for the plaintiff referred the Court to the Married Persons Equality Act³. This Act did not alter the requirements for the regime of a marriage in community of property. The Act only abolished the marital power the husband had over his spouse and made both spouses equal partners and as such a wife in a marriage of in community of property no longer needs consent from her husband to perform certain juristic acts. Now wives may buy houses and motor vehicles through financial institutions which powers they did not possess before the Married Persons Equality Act was enacted.

[19] But, the Act still places some limitations on spouses to a marriage in community of property – these are provided for in sections 10 and 11 of the Act for which consent from the other spouse is required. Other than abolishing the marital power⁴, granting equal powers⁵ to spouses married in community of property and authorising a spouse (wife) to perform certain juristic acts without the consent of the other spouse under certain circumstances, the Married Persons Equality Act did not amend the common law regarding the requirements of a marriage in community of property. Counsel did not refer the Court to any case law on the aspect of the consequences of their regime and its effect on the leasehold granted to the plaintiff while still married to the defendant.

[20] Mr Mbaeva, counsel for the defendant, in both his written heads and verbal argument also did not refer the Court to any case law. He referred to the Constitution of Namibia⁶ which provides, amongst others, that ‘men and women of full age, without any limitation....shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution’.

³ Act 1 of 1996 sections 6 and 7

⁴ Section 2

⁵ Section 5

⁶ Article 14(1)

[21] In *Moremi v Moremi and Another*⁷, the applicant, Pitse Petrus Moremi, married the first respondent in community of property on 19 June 1979 and took up residence together on the premises, which was their matrimonial home for many years.

[22] On 9 November 1998 the applicant and the first respondent were divorced on the basis of a division of their joint estate. Before their divorce, they stayed on the premises by virtue of a residential permit which the applicant obtained in February 1977 for the renting of the premises from the East Rand Bantu Affairs Administration Board under the Bantu (Urban Areas) Consolidated Act 25 of 1945 and the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters.

[23] On 12 November 1998 the applicant, Pitse Petrus Moremi, launched an application against his wife, Ms Moremi as first respondent and the Greater Germiston Council, as second respondent, for an order ejecting the first respondent from the dwelling situated on the premises.

[24] The applicant's (Mr Moremi) case was that, he alone, as the holder of the residential permit became the 'lessee' of the premises thereunder and that the first respondent's (his wife) entitlement to reside on the premises with him was entirely derived from her capacity as his dependant. He alleged further, that the first respondent was not privy to the 'lease' embodied in the residential permit or party to the statutory lease which replaced it and that the first respondent acquired no right of residence by virtue of any status, capacity or title other than as his dependant. Therefore, in consequence of the divorce, he said, the first respondent ceased to be his dependant and for that reason she did not have the right to remain in occupation of the premises (emphasis added).

[25] Schabot, J in dealing with the matter said the following⁸: 'There is authority that, as a matter of law, upon the marriage of the parties in community of property, the right of occupation of the premises under the residential permit became an asset

⁷ 2000(1) SA 936 (WLD)

⁸ At 939J-940B

held by the applicant and the first respondent jointly in their common estate, although the residential permit remained in the name of the applicant alone. See *Toho v Diepmeadow City Council and Another* 1993(3) SA 679 (W) at 685J-686E; Du Plessis and Olivier (1994) SA Publiekereg/Public Law 182. In this matter, it is the statutory lease and not the residential permit which is in issue and in my view, there could perforce be no question that the lessee's rights derived from the statutory lease became part of the parties' joint estate, and the *Toho* case at 698D-H (in which Stegmann, J applied the judgment in *Persad v Persad and Another* 1989 (4) SA 685 (D) is authority for this conclusion'. After hearing evidence, Schabot, J dismissed the application.

[26] I am in agreement with and approve of the principles of law applied in *Moremi* case above. The facts in the present matter and those in *Moremi* case are similar, although the lease in the present matter was granted to the plaintiff by the Ministry of Lands and Resettlement in terms of the Agricultural (Commercial) Land Reform Act⁹. The fact of the matter is that, the plaintiff and defendant were married in community of property to each other. Upon being married as such, they acquired one single joint estate consisting of assets, (including rights, in this matter, the leasehold over the farm Nautabis No 268 Unit A), which they acquired before and during the marriage. The plaintiff and the defendant became co-owners of the right in the lease of the farm in undivided half shares the day the leasehold was granted. I have no doubt in my mind that the legal principles applied in the *Moremi* matter are also applicable to this matter.

[27] Counsel for the plaintiff, who also represented the plaintiff during the divorce proceedings, informed the Court that the lease of the farm did not form part of the order for the forfeiture of the benefits arising from community of property, for the reasons that the leased property, was not an asset of the joint estate of plaintiff and defendant. Therefore, on the authority of *Moremi* case and the cases referred to therein, I am of the view, that the plaintiff does not have the power to eject the defendant from the property which both of them are still leasing from the Ministry.

⁹ Act No 6 of 1995

[28] I have looked at the authority referred to by Ms Hans-Kaumbi with regard *locus standi*. I agree that the plaintiff obtained possession of the property, but if the law applied in the *Moremi* case is applied to the facts of this matter, it is clear that the plaintiff does not possess the property alone but together with the defendant as the right to lease the property formed part of the joint estate which defendant did not forfeit (his half share) at the dissolution of their marriage. It is for the Ministry of Lands and Resettlement to terminate or cancel the right of the defendant as a co-lessee with plaintiff of Unit A of farm Nautabis No 268 and have him ejected therefrom, not the plaintiff.

[29] Consequently, I make the following order:

1. The claim of plaintiff for an order ejecting the defendant from Unit A of farm Nautabis No 268, is dismissed.
2. Plaintiff pays the costs.

EP Unengu
Acting Judge

APPEARANCE

PLAINTIFF:

D Hans-Kaumbi

Of Ueitele & Hans Inc, Windhoek

DEFENDANT:

T Mbaeva

Of Mbaeva & Associates