Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 2664/2012

In the matter between

BLOSSOM NONTYATYAMBO PAKATI	Applicant
and	
TERESA HEASLEY N.O. IN RE: **ESTATE LATE** **SOBANTU CUSSEL CURNICK PAKATI** **ESTATE NO. 6822/2011**	First Respondent
NWABISA OLGA PAKATI	Second Respondent
PATIENCE NOMONDE PAKATI	Third Respondent
SANDILE PROFESSOR PAKATI	Fourth Respondent
THE MASTER OF THE HIGH COURT	Fifth Respondent

JUDGMENT

REVELAS J,

[1] The applicant, a widow, seeks declaratory orders to the effect that her marriage to her deceased husband ("the deceased") who died on 9 October 2011, was in community of property, that his estate is to devolve according to the South African common law, and that the applicant is

entitled to half of the joint estate consequent upon the marriage between herself and the deceased.

[2] Prior to this application, the applicant brought another application in December 2011, seeking to set aside the deceased's will on the basis that he was not of sound mind when he executed his will. The deceased's will was signed on 5 August 2010. In terms of this will, four persons benefited, namely the applicant, the second, third, and fourth respondents. These three respondents were respectively two daughters of the deceased from a former marriage and his son from his marriage to the applicant. The applicant inherited an immovable property in Butterworth where she lived and which she says was the common home (a statement contested by the second respondent). She also inherited all the livestock, furniture and household effects thereon. The second and third respondents inherited immovable properties in Zwide and Kwazakhele. The fourth respondent inherited a shop in Kwazakhele. The three other children born from the marriage between the applicant and the deceased were not mentioned in the will.

[3] The first respondent, as nominee of Sanlam Trust was the executrix the deceased's estate. She deposed to an affidavit in which she pointed out *inter alia*, that the deceased had another will which was signed on 19 December 2006. This will, a copy of which was attached to the answering papers is almost identical to the later will, in that the beneficiaries and

bequests therein are the same. Obtaining an order in terms of the applicant's application to have the deceased's will set aside, would have had little effect on the bequests made in it, because his previous one would have been revived. In any event, the applicant withdrew the application challenging the validity of the will and tendered the costs. She then decided to challenge the matrimonial property regime applicable to her marriage to the deceased, and launched the present application.

[4] The respondents brought an application for the substitution of the first respondent, the executrix of the deceased's estate, with Ms Karen Lotter, also from Sanlam Trust, since the Master had replaced Ms Heasly with Ms Lotter as executrix. The application is granted since there is no opposition thereto and it has no bearing on the merits of this application.

[5] The applicant alleged that when she and the deceased were married on 5 February 1970 before a magistrate, they never intended to be married out of community of property. She said that "*we wanted to have a normal marriage in community of property, hence we were married before magistrate. We were never asked by the Magistrate whether we wanted our marriage to be in or out of community of property".* A copy of the marriage certificate, which appears to have been issued at the time, reflects that the marriage between the applicant and the deceased was contracted out of community of property.

[6] According to the applicant, she and her husband only discovered that they were indeed married out of community of property during the course of their marriage. Then, after 1994, she said that she heard over a radio broadcast that "*old marriages would be changed by the Department of Home Affairs to be normal marriages in community of property".* She and her husband then went to the Department of Home Affairs and the Magistrate's Court "*to make sure that our marriage was one in community of property in terms of the Common Law"* and were issued with another marriage certificate, which she attached to her founding affidavit. No reference as to whether the marriage was in or out of community of property is reflected on this certificate. Another abridged marriage certificate was attached to her replying affidavit. This second abridged marriage certificate also did not reflect any facts of that nature either. These two certificates were issued in 2010 and 2012 respectively, more than a decade after 1994 and the alleged radio broadcast. The last marriage certificate was issued after the deceased's death.

[7] If the applicant and the deceased indeed acted as the applicant alleged and succeeded in changing their matrimonial property regime, she ought to have been in possession of some reliable documentary proof that their matrimonial property regime had been amended. In the absence of such proof, the veracity of the applicant's version of how she and her husband had made efforts to be married in community of property is highly questionable. Moreover, the deceased disposed of his property in

no less than two wills, drafted by attorneys, in a manner consistent with someone married out of community of property, as reflected in the first marriage certificate attached to the applicant's founding affidavit.

[8] The applicant also acknowledged that the marriage was contracted out of community of property by virtue of the provisions of section 22(6) of the Black Administration Act, No. 38 of 1927 ("the act") which was repealed on 2 December 1988 by section 1(e) of the Marriage and Matrimonial Property Act, No. 3 of 1988. In terms of section 22(6) of the act, marriages between black persons were deemed to be, and were automatically out community of property. If the prospective parties to a marriage covered by the act chose to be married in community of property, such parties were required to make a joint declaration of their intention to be married in community of property to a magistrate, commissioner or marriage officer, thirty days prior to the marriage.

[9] There can be no doubt that the applicant was married to the deceased out of community of property as their marriage certificate clearly states.
As I understand the applicant's case, she also argues that because she and the deceased had always desired to be married in community of property, had made certain efforts to achieve that end, and the act had had been repealed, she was entitled to relief sought in her notice of motion. Her argument envisages that the repeal of the act retrospectively (and automatically), reversed the matrimonial property

regime applicable to her marriage. Faced with the irrefutable legal position, that the repeal of the act did not apply retrospectively to marriages contracted before 1988 (as her own), she argued that the aforesaid interpretation of the consequences of the repeal of the act, was discriminatory on the basis of her race, and therefore unconstitutional and unlawful.

[10] With the repeal of the act, the Legislator could never have intended that marriages out of community of property would automatically be rendered in community of property. Marriage being a private matter between two people, founded on consent, it requires little imagination to predict what the response would have been if persons who were married out community of property prior to December 1988, and who chose to be so married, suddenly found themselves married in community of property through the unilateral action by the State, after 1988. There are clear commercial, economical and other obvious considerations, not to mention common sense, which militate against the aforesaid interpretation favoured by the applicant.

[11] Parties who wished to jointly change their matrimonial property regime were entitled (after 1984), to obtain an order from the Supreme Court and later, the High Court, to that effect in terms of section 21(1) of the Matrimonial Property Act, No.88 of 1984. That is still the position. Counsel for the respondents also reminded me that the same result could

be achieved administratively (without an application to the Supreme Court) for a two-year period that followed immediately after the promulgation of Act 88 of 1984. The applicant and her husband did not avail themselves of any of these opportunities. There is no basis in law or fact upon which I can find for the applicant. In the circumstances, the application must fail.

Costs

[12] The respondents argued that the applicant brought two ill-conceived and vexatious applications in an attempt to lay her hands on a bigger slice of the deceased's estate, causing the respondents (including the executrix of the estate) to incur costs to resist the application. It was submitted on their behalf that an adverse costs order should be made against the applicant in these circumstances. In my view, the applicant was ill-advised, rather than vexatious in bringing the present application. I am not inclined to make a punitive costs order against her.

[13] The following order is made:

(1) The first respondent is substituted herein by KAREN LOTTER N.O. (*in re* The Estate of the late SOBANTU CUSSEL CURNICK PAKATI Estate no. 6822/2011).

(2) The application is dismissed.

(3) The applicant is ordered to pay the costs of the respondents on a scale as between party and party.

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E Revelas
Judge of the High Court
5 March 2013

Counsel for the Plaintiff:	Adv MW Nobatana Port Elizabeth
Instructed by:	Silas Nkanunu & Van Loggerenberg Port Elizabeth
Counsel for the 1st; 2nd and 3rd Respondents:	Adv NJ Mullins Port Elizabeth
Instructed by:	Strauss Daly Attorneys Port Elizabeth
4th Respondent:	DN Ndlovu & Associates Port Elizabeth
Date Heard:	6 December 2012
Date Delivered:	5 March 2013