CASE NO.: I 543/06

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PAUL IITA NAKASHOLOLO APPLICANT

and

LAHYA MAGANO NAKASHOLOLO RESPONDENT

CORAM : PARKER, A J

Heard on : 17 March 2006

Delivered on : 31 March 2006

JUDGMENT

PARKER, A J:

[1] In this matrimonial suit, the plaintiff claims an order for the restitution of conjugal rights, and failing compliance therewith a final order of divorce, further and/or other relief, and costs of suit, if the applicant defends the action. The applicant has applied in terms of rule 33(4) for an order in the following terms:

1. That the question as to whether or not the parties are married in or out of community of property be separated from the remainder of issues under the above case number; and

2. That evidence on the question as to whether or not the parties are married in or out of community of property be heard first and separately from the remainder of issues under the above case number.

3. That the question as to whether or not the parties are married in or out of community of property be determined *in initio litis*.

4. That the remainder of issues be postponed to a date to be arranged with the registrar of the above Honourable Court.

5. That the costs of this application be costs in the cause, save for any costs of opposition.

[2] Having heard Mr. Schickerling, counsel for the respondent, and Ms De Jay, counsel for the applicant, and by agreement between the parties, the order was granted. That being the case, the only issue that falls to be determined is the question whether the parties are married in community of property or out of community of property. The quintessential background of the issue lies in the Native Administration Proclamation, 1928,[1] which is no stranger to the courtrooms of this Court. It is otiose to go into the history and ramifications of the Proclamation, for any discussion of the

[1] Proclamation No. 15 of 1928.

wider aspects of the Proclamation and the regulations made thereunder has always created more heat than light. At any rate, our present concern is with s. 17(6) of the Proclamation. Nevertheless, it may be important to note that s. 17 was intended to regulate, in a more orderly manner, common law marriages between 'black' persons ("natives") that followed upon customary law marriages, which are polygamous or potentially polygamous. In any case, certain crucial subsections of s. 17 have never been brought into operation. Section 17(6) was brought into force, but it never applied to a very large part of Namibia.

[3] It is common cause between the parties that s. 17(6) of the Proclamation regulates the proprietary consequences of their marriage. It is also common cause that at the time of the conclusion of their marriage, both partners were domiciled in what was known as Ovamboland, and the marriage was solemnized there, which is beyond the so-called "Red Line". Section 17(6) provides as follows:

> A marriage between natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.

[4] For the sake of clarity, I will continue to refer to the applicant in the main matter as the applicant, and the respondent as the respondent. As I have said above, the only question for me to determine is simply this: whether the parties are married in community of property or not. An answer to this question is principally factual, hence the necessity to receive oral evidence. The substance of s. 17(6) is simply as follows: "Black" persons who marry by civil marriage north of the "Red Line" (which includes the Oshana Region, the Region in which the parties' marriage was concluded), will be married out of community of property. The intending spouses may, however, at any time within one month prior to the solemnization of the marriage declare jointly to a marriage officer that they wish to be married in community of property. Thus, unless 'black' persons who marry north of the "Red Line" make such declaration, they will be married out of community of property, but not by antenuptial contract.

[5] The question is: did the parties jointly make such declaration one month before the conclusion of the marriage? To answer the question it may be necessary to go back some 18 months before 11 September 2004, the date of the parties' marriage. In her evidence, the respondent testified that she and the applicant were supposed to have married in September 2003, but it was not to be because the applicant had, in her words, "to clean up his profile" with the Church where they were to marry because the applicant was already married. I understood this to mean that there were certain religious impediments, which the applicant had to surmount before the Church could marry them. She said that before the date of the aborted marriage ceremony, she wanted to know from the applicant how they were going to be married, was it to be in

community of property or out of community of property? She said, under cross-examination that she favoured being married in community of property because she believed "in the unity of the family", and for her, unity of marriage means to be married in community of property. The answer respondent got from the applicant was "these are matters to discuss and decide when we get to the marriage day." She testified that she brought the matter up the second time before the parties' marriage in September 2004. But the answer of the applicant was the same as the first one he gave to her in 2003. In her evidence, the respondent agreed that the matter was discussed only two times, i.e. before the day of the solemnization of the marriage; but, for her, the exchanges on those two occasions constituted discussions. I agree with her.

[6] She testified further that before the solemnization of marriage of the parties, Pastor Frans Imene (RW2), who married them, put the question to them as to how they wanted to be married, in community of property or out of community of property. It is not in dispute that the question was not directed to any one in particular. Ms De Jay, counsel for the applicant belaboured this point at some length: she raised it with almost all the witnesses. I fail to see the significance of the enquiry. It is an irrefragable fact that the Pastor could have directed the question to the intending spouses only. According to her, the applicant answered, "in community of property". There appears to be some debate on whether the word "we" was used. In my view it does not matter whether the applicant answered with a long sentence like "we wish to be married in community of property" or just with the phrase "in community of property". In both answers the import or signification of the answer could not have

been lost on the questioner and the ‘marriage witnesses’; it is unmistakably clear. It is important to note that according to the respondent, the question and answer happened before they signed some papers, which Pastor Imene described as important Government papers. I take it that it occurred before the intending parties signed the marriage register, i.e. before the solemnization of the marriage. It is not in dispute that only the applicant answered; what is in dispute is the exact answer that the applicant gave upon hearing the question. I shall return to this issue in due course. The respondent further testified under cross-examination that she, the applicant, Ms Nandago (RW3) and Mr. Hauwanga (RW4) (the two marriage witnesses) were seated in a row, facing Pastor Imene, about two meters away. She said she did not say anything because she agreed with the answer the applicant had given. She strenuously kept her position that the answer was “in community of property”, and, under cross-examination, she was not shaken from that position.

[7] Pastor Frans Imene (RW2), the pastor who solemnized the marriage in Ompundja in the Onguta Parish of the Lutheran Church, was the next to testify on behalf of the respondent. His testimony appeared to corroborate the respondent’s evidence in all material respects. He testified that he put the question, “How do you want to be married?” The response he received from Paul Nakashalolo, i.e. the applicant, was “in community of property”. After such declaration, he solemnized the marriage. As I said previously, the timing of the solemnization of the marriage is crucial in terms of s. 17(6) of the 1915 Proclamation.

[8] The next person to testify for the respondent was Ms Maria Nandago (RW3) (one of the 'marriage witnesses'). According to her, the question by Pastor Imene, "How are you going to be married?" was answered by the applicant: "We are going to marry in community of property." Ms De Jay did not put any questions to her. The last witness for the respondent was Mr. Sylvanus U. Hauwanga (the other 'marriage witness'). He testified that both applicant and the respondent are his friends. According to him, Pastor Imene asked, "How are you going to be married, in community of property or out of community of property?" According to him, the answer the applicant gave was, "We are going to marry in community of property." Under cross-examination, he kept his position unshakably that the applicant answered, "We are going to marry in community of property." The questions and answers were conducted in the Oshiwambo language.

[9] The applicant gave evidence on his own behalf; there was no other witness that testified on his behalf. I will deal with the significant part of his evidence, which is germane to the debate about the matrimonial property regime. He confirmed the respondent's evidence that he and respondent were supposed to have married in September 2003. In his evidence in-chief the applicant said that when he discussed the issue of the matrimonial property regime with the respondent they were going to marry under, the respondent was "strict that we marry out of community of property and I agreed with that." This discussion took place before the aborted marriage in September 2003. Another discussion occurred just before the marriage in September

2004. According to him, on this occasion, too, his intention was to marry out of community of property.

[10] The applicant testified further that Pastor Imene did ask the question, “Are you going to marry in or out of community of property?” His answer was one, lone word, “Yes”. When asked by his counsel why he only said, “Yes”. His answer was, “to marry out of community of property.”

[11] From the evidence presented before me, I find the following: (1) The respondent was candid and forthright, and forthcoming with her answers. I found her to be a credible witness. I cannot say the same of the applicant. He was evasive, and he gave me the distinct impression that he was using ambiguity to conceal the truth. I did not find his evidence credible. (2) I found Pastor Imene, Ms Nandago and Mr. Hauwanga to be credible witnesses. They were not evasive; their evidence was veracious. They have nothing to gain by lying. Indeed, Mr. Hauwanga testified that he is a friend of both the applicant and the respondent. The affidavit by Pastor Imene and Ms Nandago are also significant : they were made in May 2005, i.e. about eight months after the conclusion of the marriage, when the events were still fresh in their memories. (3) I find that the applicant did not answer “Yes” to Pastor Imene’s question, because the answer is not only ambivalent but absurd and meaningless, and so it would have drawn a quick reaction from Pastor Imene as a “Yes” could not have answered his question – a person who has been solemnizing marriages since 1995. (4) I find that the applicant’s answer was that he and the respondent were going to marry

in community of property. As mentioned previously, it is not in dispute that it was the applicant who answered the question that was directed to the intending spouses. It is my view that it was a joint statement expressing the joint intention and desire of the intending parties.

[12] Mr. Schckerling, counsel for the respondent, referred me to a case, which according to him, is on all fours with the present matter. The case is *Josephine Nangula Mofuka v Teofilus Mofuka*,[2] and this Court heard it. The case went on appeal to the Supreme Court.[3] I do not think the present case is on all fours with *Mofuka* – either in the High Court or the Supreme Court. A reading of the two judgments reveals very glaring and significant dissimilarities between *Mofuka* and the case before me, particularly on three supremely crucial facts that were presented in *Mofuka* and in the case before me, as far as evidence goes. First, in *Mofuka*, the question of whether the parties had entered into an agreement respecting their matrimonial property system prior to their marriage featured prominently. The issue of a prior agreement does not feature in the case before me. Second, in *Mofuka*, it was not the intending parties who told the Pastor what matrimonial property regime they wanted to be married in; it was the Pastor who told them what the regime was going to be. That is not what happened in the case before me. Third, in *Mofuka* no declaration was made to the Pastor before the solemnization of the marriage, which is not what happened in the present case.

[2] Case No. (P) I 379/2000. (Unreported).
[3] *Teofilus Mofuka v Josephine Nangula Mofuka* Case No.: SA 2/2002. (Unreported)

[13] At any rate, it is worth noting that the judgment of Maritz, J (as he was then) was overturned on appeal, particularly in relation to the crucial decision that he took ordering that, as between plaintiff (respondent) and the defendant (appellant), the marriage has the effect of one concluded in community of property.

[14] The important question now is this: can the following conclusions be reached, based on my findings stated above? (1) The intending parties did declare jointly before the marriage officer that they wished to be married in community of property. (2) If they did so declare, did they do so before the solemnization of the marriage? (3) The marriage officer did attest to such declaration, if it was made.

[15] It is my decision that the parties did declare (i.e. "make known"[4] or "announce openly" or "state explicitly"[5], to the marriage officer, Pastor Imene, that they wished to be married in community of property within the meaning of s. 17(6) of the Proclamation 15 of 1928. As I said previously, it does not matter whether the applicant replied, "in community of property," as the respondent and Pastor Imene testified, or he replied, "We are going to marry in community of property" as Ms Nandago (RW3) and Mr. Hauwanga (RW4) testified. The matrimonial property regime at play is unmistakably "in community of property".

[16] I conclude also that the intending spouses, expressing their common intention and desire, made the declaration jointly. It is significant to note that the respondent did

[4] See *Swart v Vosloo* 1965 (1) SA 105 (A) at 115.
[5] *The Concise Oxford Dictionary*, 10th ed.

not contradict the applicant. And that is how the person to whom the declaration was made, to wit, the marriage officer, Pastor Imene, a marriage officer with such a long experience in these matters, took it to be; otherwise he would have asked the respondent also to respond. In this connection, I further come to the conclusion that the marriage officer, who is the authority authorized to attest such declaration, did so attest. Unlike statutory prescriptions in other legislation, e.g. the Wills Act,[6] the prescription in the Proclamation does not lay down any formal way in which a marriage officer should attest such declaration. He did attest, i.e. he did bear witness to[7] the declaration by the intending parties. It is important to note that the original Marriage Certificate filed of record does have on it a place where one could indicate whether the marriage is in community of property or out of community of property. It may even be said that the marriage officer's affidavit (Exhibit) confirms what he attested.

[17] Finally, it cannot be controverted that the declaration was made prior to the solemnization of the marriage. In terms of the Proclamation, a declaration must be made one month prior to the solemnization of the marriage. There is ample evidence to show that the declaration by the intending spouses was made before the solemnization of their marriage in Pastor Imene's office.

[18] Ms De Jay, counsel for the applicant, sought to show that the parties intended to marry out of community of property because the applicant is the only one who is

[6] The Wills Act, 1953 (Act No. 7 of 1953), s 2.
[7] *Concise Oxford Dictionary*, 10th ed.

servicing the mortgage on the matrimonial home, i.e. by paying the monthly instalment on the house loan. But, the respondent testified that when at one time she wanted to contribute, the applicant said he did not need any assistance. Counsel also sought to show that each of the spouses has his or her bank account. But, the respondent testified that she contributed by buying household goods, e.g. groceries for the matrimonial home. I do examine this evidence only because it was brought up; otherwise, nothing done after the solemnization of marriage counts. The *ipssisima verba* of Proclamation No. 15 of 1928 are very clear. What counts is essentially the making of a joint declaration by the parties to the marriage officer one month prior to the solemnization of the marriage in question that the intending spouses wish to marry in community of property. The attestation of the marriage officer of the declaration is a secondary matter as evidenced by the fact the that provision containing this act is put in parentheses, to signifying its subsidiarity in the scheme of things.

[19] In the result, I have come to the conclusion that the applicant and the respondent are married in community of property.

[20] Mr. Schickerling submitted that the costs of this application should be awarded to the respondent because the applicant knew he could not find any support for his contention, and also he persisted in his position that the marriage is out of community of property at the pre-trial conference. I cannot agree with Mr. Schickerling. This has been an extremely arguable matter whose resolution will undoubtedly conduce to the expeditious conclusion of the main matter.

[21] The judgment of the Court is that the applicant and the respondent are married in community of property, and the order of the Court is that costs shall be costs in the cause.

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PARKER, AJ

ON BEHALF OF THE APPLICANT	Ms Anneen De Jay
Instructed by:	Shikongo Law Chambers
ON BEHALF OF THE RESPONDENT	Adv J Schickerling
Instructed by:	Engling, Stritter & Partners