

DONATING ASSETS TO CARE FOR A SECOND FAMILY ON DEATH: MUST THE CURRENT SPOUSE CONSENT?

Marais N.O. and Another v Maposa and Others (642/2018) [2020] ZASCA 23 (25 March 2020)

Where A, married in community of property to B, donates valuables to C with whom he was in a longstanding relationship and with whom he had a second family, what must C show to a court that the donation was valid despite the fact that B had no knowledge thereof? The Matrimonial Property Act states that where parties are married in community of property each can in general deal with assets as they please, except that consent from the other is necessary in certain instances, such as a donation. However, it also provides that where one spouse acts in contravention hereof in a transaction with a third party, that transaction will be deemed to be valid, despite the absence of the consent, if the third party could not reasonably have known that such consent was necessary but not obtained.

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs Broodie got married in 1967 in community of property and, over the years, accumulated a substantial estate. The biggest asset was members' interest in Seepunt CC (the CC) which owned a building in Sea Point, Cape Town, valued at the time of the proceedings at approximately R20 million. Mr Broodie acquired the members' interest in the CC in April 2001.

Mr Broodie and Ms Ledwaba met in 1986 and a relationship developed from which two children were born (Ms Maposa and Mr Ledwaba.). Ms Ledwaba knew that Mr Broodie was married and had three children but did not know whether he was married in terms of civil laws or by customary union.

In 1988 Ms Ledwaba and Mr Broodie purported to enter into a customary union. (As Mr and Mrs Broodie were married in terms of civil laws, the purported customary union was invalid, although Ms Ledwaba did not know this at the time.) According to Ms Ledwaba, Mr Broodie advised her that Mrs Broodie knew about the customary union. Ms Ledwaba later resigned from her employment as a nurse and became increasingly involved in administering one of Mr Broodie's businesses. She also began to study and in due course completed an MBA.

During the late 1990s, according to Ms Ledwaba, Mr Broodie first broached the topic of providing for their children in the event of his death. He wanted to provide for both of his families separately by giving each of them different properties and businesses.

Ms Ledwaba said that although Mr Broodie was registered as the sole member of the CC, in accordance with the usual patriarchal manner in which he conducted all his business dealings, they had verbally agreed that the members' interest in the CC actually belonged to her and their children and that it would be registered in their names on a future date to be agreed upon. When, during 2013, one of their children, Ms Maposa, enquired when her portion of the members' interest in the CC would be transferred to her, a meeting was scheduled between Mr Broodie, Ms Ledwaba and their two children and it was agreed that Mr Broodie would forthwith transfer 75% of his member's interest to the two children and Ms Ledwaba, each to receive a 25% share. It was also agreed that Ms Ledwaba would do the necessary to procure such registration and this was subsequently effected. It was also, during 2013, that Mr Broodie began to display signs of ill-health: he became forgetful and, at times, confused. In early 2014, it was established that he had suffered a stroke. As his mental health deteriorated, he withdrew from active involvement in his businesses.

Mrs Broodie became aware of the relationship during 1989 and knew, by 1993, of the two children fathered by her husband. She was under the impression that Ms Ledwaba was employed by Mr Broodie as a bookkeeper although Ms Ledwaba disputed this and stated that she was never formally employed but played an active part in the management of some of Mr Broodie's businesses.

The 75% membership interest change was effected without Mrs Broodie's knowledge or consent. She only became aware thereof in November 2016, some 2½ years later, and shortly before Mr Broodie's death.

Mr Broodie passed away in 2016. Mrs Broodie was the executrix in his estate and in that capacity brought an urgent application in the Western Cape Division of the High Court, Cape Town, seeking an order setting aside the transfer of the members' interest to Ms Ledwaba and her children. The claim was dismissed. It was held that, in terms of section 15(9)(a) of the Matrimonial Property Act (the "MPA"), Mrs Broodie was deemed to have consented to the transfer. Mrs Broodie then applied for and was granted leave to appeal to the Supreme Court of Appeal on this issue only (other issues raised in the High Court regarding possible involvement of fraud was referred to trial and part of the appeal).

Mrs Broodie passed away in March 2019, subsequent to the High Court judgment having been delivered (both she and Mr Broodie died intestate (i.e. with no Will in place)). At the appeal hearing, the new joint executors in the estates of Mr and Mrs Broodie were substituted.

HELD

The Matrimonial Property Act

- The MPA provides that *'a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act.'* The latter reference referring to the position before the MPA became operational, a time when men still held the marital power.
- Section 15 of the MPA is headed *'Powers of spouses'*. Its focus is on the commercial relationships of spouses and third parties. Section 15(1) provides that *'[s]ubject 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), the first subsection to which section 15(1) is subject, sets out a number of transactions that not only require the consent of the non-contracting spouse, but his or her written consent. The list includes, by way of example, entering into *'any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate'* and a spouse binding himself or herself as a surety.
 - Section 15(3), the second subsection to which section 15(1) is subject, also requires the consent of the non-contracting spouse to the transactions that it lists, but consent to these transactions need not be in writing. Section 15(3)(c) provides, for instance, that a spouse may not, without the consent of the other spouse, *'donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to the provisions of subsection (2) or paragraph (a) of this subsection'*. Section 15(8) provides that *'[i]n determining whether a donation or alienation contemplated in subsection (3)(c) does not or probably will not unreasonably prejudice the interest of the other spouse in the joint estate, the court shall have regard to the value of the property donated or alienated, the reason for the donation or alienation, the financial and social standing of the spouses, their standard of living and any other factor which in the*

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opinion of the court should be taken into account’.

- The consent required by section 15(3), as well as for most of the transactions listed in section 15(2), may be given after the event: the non-contracting spouse may ratify the transaction provided that this is done within a reasonable time.
- Consent is not required in respect of certain of the transactions listed in section 15(2) - such as a spouse binding himself or herself as a surety - if those transactions are *‘performed by a spouse in the ordinary course of his profession, trade or business’*.
- Section 15(9), which is central to this appeal, deals with the consequences of a transaction requiring consent being entered into without consent. It states: *‘When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section . . . and -*
 - a) *that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions . . . it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3) . . . ;*
 - b) *that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3) . . . and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.’*
- The effect of section 15 may be summarised as follows.
 - First, as a general rule, a spouse married in community of property may perform any juristic act in connection with the joint estate without the consent of the other spouse.
 - Secondly, there are exceptions to the general rule. In terms of subsections 15(2) and (3), a spouse *‘shall not’* enter into any of the transactions listed in these subsections without the consent of the other spouse. Subject to what is said about the effect of section 15(9)(a), if a spouse does so, the transaction is unlawful, and is void and unenforceable.
 - Thirdly, if a listed transaction is entered into without the consent of the non-contracting spouse, that transaction will nonetheless be valid and enforceable if the third party did not know and could not reasonably have known of the lack of consent. While the consent requirement is designed to provide protection to the non-contracting spouse against maladministration of the joint estate by the contracting spouse, *the ‘deemed consent’* provision in section 15(9)(a) is intended to protect the interests of a *bona fide* third party who contracts with that spouse.
- Section 15 thus seeks to strike a balance between the interests of the non-consenting spouse, on the one hand, and the *bona fide* third party, on the other.
- A third party to a transaction contemplated by subsections 15(2) or (3) (i.e. entered into without the consent of the non-contracting spouse as required) needs to establish two things before the consent may be deemed to exist and for that transaction to be enforceable:
 - First, that he or she did not know that consent was lacking; and
 - Secondly, that he or she could not reasonably have known that consent had not been given.

- In terms of the general principle that the party who asserts a particular state of affairs is generally required to prove it, the burden of bringing section 15(9)(a) into play rests on the party seeking to rely on the validity of the transaction. The reference to reasonableness in the phrase '*cannot reasonably know*' imports an objective standard into the proof of this element: it must be established with reference to the standard of the reasonable person, in terms of what the reasonable person would do in the circumstances and the conclusion that the reasonable person would draw.
- This means that a duty is placed on the party seeking to rely on deemed consent to make reasonable enquiries. The third party is called upon to take reasonable steps to ascertain whether the person with whom he or she is dealing with, is married and, if so, whether they have obtained whatever consent may be necessary for the particular transaction.
- Anything less than this duty of enquiry, carried out to the standard of the reasonable person, would render section 15(9)(a) a dead letter. It would not protect innocent spouses from the maladministration of the joint estate and would undermine the MPA's purpose of promoting equality in marriages in community of property.

Was the donation valid?

- Section 15(3)(c) only requires the non-contracting spouse's consent if the donation concerned '*does not and probably will not unreasonably prejudice*' his or her interests (and section 15(8) provides the means to determine this issue).
- The donation of 75% of the members' interest in the CC constitutes the lion's share of the joint estate of Mr and Mrs Broodie. This fact, together with the fact that Ms Ledwaba stated that Mr Broodie's donation was intended as part of a plan to make equal provision for both of his families, should clearly have established in Ms Ledwaba's mind that the donation did not have this effect. Rather, it benefitted Ms Ledwaba and her children in a disproportional manner as compared to Mr Broodie's other family.
- These factors, on their own, leads one to conclude that the donation certainly prejudiced the interests of Mrs Broodie and therefore required her consent, which was never obtained.
- The facts further showed that neither Mrs Maposa nor Ms Ledwaba made any enquiries in terms of section 15(9)(a). Ms Ledwaba knew from the outset of her relationship with Mr Broodie that he was married and had children, but made no enquiries as to how they were married and whether Mr Broodie required Mrs Broodie's consent to the donation. She admitted that she did not ask Mr Broodie if he had discussed the transfer with Mrs Broodie. As she made no enquiries despite her knowledge that Mr Broodie was married, she did not, on her own version, establish that she, as a reasonable person, could not have known that the transaction was entered into without Mrs Broodie's consent.

CONCLUSION

As a result, the appeal had to succeed and the transaction had to be set aside.