

SUMMARY OF THE JUDGMENT

MARITAL STATUS: AVOID THESE PITFALLS WHEN CONCLUDING AGREEMENTS

Broodie NO v Maposa and Others (1990/2017) [2018] ZAWCHC 18 (19 February 2018)

Most people are generally aware that in some large transactions, if they are married in community of property, they require the consent of their spouse. Less are aware that without such consent, the property transfer or donation could be invalid; and even fewer are aware of the fact that where a third party transacted with such a spouse in good faith, it is possible that the law will deem that there was consent. This judgment is a case in point where a man, married in community of property, donated shares in a CC that owns a property in Sea Point, to another woman with whom he had a longstanding affair.

The spouse did not consent to the donation and the question arose whether it could be deemed that the requisite consent was in place. A cautionary note for anyone dealing in agreements with someone who is married in community of property.

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

FACTS

Mrs Broodie married Mr Broodie in 1967 in community of property (in terms of section 22(6) of the Black Administration Act 38 of 1927).

During his lifetime, Mr Broodie also had a longstanding relationship with one Mrs Maphosa and they had two children who at the time of the proceedings, were already major children. Mrs Maphosa advised the Court that she and Mr Broodie concluded a marriage in terms of customary rites. (It was common cause at the hearing that the putative customary marriage between the deceased and Mrs Maphosa was legally invalid by virtue of Mr Broodie's pre-existing civil marriage with Mrs Broodie.)

Mr Broodie lived between the two households; neither of his female partners however were happy with his relationship with the other.

Mr Broodie died intestate in December 2016. Mrs Broodie was appointed as the executrix of the joint estate of herself and Mr Broodie. In that capacity she instituted the current application. She sought an order that the transfer by Mr Broodie (in 2014) of a 25% member's interest in Seepunt Eiendomme CC ('the CC') to each of Mrs Maphosa and her two children be declared unlawful and void.

The CC owned fixed property in Sea Point on which is a building that is let out to various

tenants for mixed commercial and residential purposes. Mr Broodie was the only registered member of the CC during the period 2001 to May 2014.

The application to have the registration of the transfer of the member's interest in the CC set aside was advanced on three grounds, namely: (i) it occurred without Mrs Broodie's consent, and was thus in breach of subsection 15(2) and/or (3) of the Matrimonial Property Act 88 of 1984 ('MPA') and invalid; (ii) it had been fraudulently procured by Mrs Maphosa; and (iii) Mr Broodie had lacked the necessary mental capacity to appreciate the nature of his actions when the transfer was effected.

The law

Section 15 of the MPA provides as follows insofar as pertinent in the current case:

Powers of spouses

(1) Subject 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.

(2) Such a spouse shall not without the written consent of the other spouse-
(a) alienate, ... any immovable property forming part of the joint estate;
(b) enter into any contract for the alienation, ... in immovable property forming part of the joint estate;
(c) alienate, cede or pledge any shares, ... or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;

...

(3) A spouse shall not without the consent of the other spouse-
(a) ... ;
(b) ... ;
(c) 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.

(4) The consent required for the purposes of paragraphs (b) to (g) of subsection (2), and subsection (3) may, except where it is required for the registration of a deed in a deeds registry, also be given by way of ratification within a reasonable time after the act concerned.

(5) The consent required for the performance of the acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection (2) shall be given separately in respect of each act and

shall be attested by two competent witnesses.

(6) ...

(7) ...

(8) ...

(9) 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.

HELD:

Donation

- On the facts it appeared that the acquisition of the member's interest in the CC was by way of a donation by the deceased of an interest in the CC, as no money was paid in respect of it.

For purposes then of deciding on the applicability of section 15 of the MPA, the transfer of the member's interest to the Maphosas must be treated as a donation within the meaning of section 15(3). It was clear enough from a reading of the section as a whole, that the disposition by a spouse of the member's interest in a close corporation for consideration qualifies as an 'alienation' governed by section 15(2)(c), whilst a disposal of such an interest for no consideration would be a 'donation' or 'alienation without value' as contemplated by section 15(3)(c).

Lack of consent and deemed consent

- The facts support a deduction that Mrs Broodie did not consent to the transfer of the shares.
- But to this Mrs Maphosa replied that that she did not know that Mr Brodie was married to Mrs Broodie in community of property. She argued therefore that the provisions of section 15(9) found application.
- Section 15(9) deems a transaction concerned to have been entered into with the required consent if the person to whom the disposition was made did not know and reasonably could not have known that it was effected contrary to section 15(2) or

(3). It has already been found that the Maphosas did not know that the marriage between Mr and Mrs Broodie was one in community of property. It was also apparent that they did not make any enquiries in this regard. The question was then whether they reasonably could not have known that that disposition was being effected contrary to section 15(3).

- To answer that question a Court will have reference to the knowledge that the reasonable person in the position of the Maphosas would have been expected to have or have obtained. On the facts, the Court answered this question in the negative arguing that:
 1. One must remember that the provisions of section 15 are centrally directed at imposing obligations *inter se* on the parties to a marriage in community, not on outside parties. A transaction entered into by one of the spouses contrary to the provisions of section 15(2) or (3) is not *ipso facto void*, as would ordinarily be the case in a contract concluded in breach of a prohibitory statutory provision.
 2. Those transactions referred to in subsection 15(4) are amenable to ratification, and all of the listed transactions are potentially liable to imputed validity in terms of section 15(9)(a). These sections, in particular subsections (6) and (9)(a), are 'to balance the interests of the third party with those of the non-contracting spouse and, on a more fundamental level, to minimize any disruption caused by the consent provisions to the free flow of commercial trade'. The provisions of s 15(9)(a) afford protection to a third party who does not know that the affected transaction is being entered into contrary to the provisions of s 15(2) and (3) and whose ignorance in the circumstances was understandable and excusable. They do not place the third party under a duty of enquiry in every case.
 3. The phrase 'does not know' in section 15(9)(a) posits a factual situation. If the third party does know that the transaction is being entered into contrary to the scheme of section 15, then he or she cannot derive any protection from section 15(9)(a). If the third party was not ignorant, one does not reach the second leg of the test for protection in terms of section 15(9)(a).
 4. The object of section 15(9)(a) would be nugatory if an enquiry by the third party was required in every case. The third party would be called upon to require production of a marriage certificate before entering into any of the transactions covered by section 15(2) and (3), or to make enquiries at the

Department of Home Affairs; for that is the obvious nature of the indicated enquiry if the effect of the provision is that a third party is always put on enquiry irrespective of any representation that the contracting spouse might have made. Such a requirement would not only stultify commerce, it would also detract from the intended empowering effect of sections 14 and 15(1) of the MPA for women married in community of property. Such a requirement cannot properly be imputed on a construction of the provision. Whether an enquiry by the third party is indicated, and if so, its nature, will be determined by the peculiar circumstances of the given case.

- In the present matter, it was not incumbent on Mrs Maphosa to investigate the legal character of Mr Broodie's marriage before she accepted the donation; and it cannot be said that Mrs Maphosa acted unreasonably by failing to challenge or interrogate Mr Broodie's representations to her.
- In the result, Mrs Maphosa's position was protected by section 15(9)(a) of the MPA and the Court held that it had to be deemed that the donation was made with the consent required. The position of Maphosa's two sons is materially indistinguishable.

Further disposal of the case consequent upon the upholding of the Maphosas' reliance on s 15(9)(a)

Mrs Broodie also alleged in her papers that the deceased was not of sound mind at the time that he made the donations. These issues, the Court held, had to be dealt with in a trial and the further adjudication of the matter was referred for trial.

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