



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

7 JUNE 2023

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DATE

Case Number: 54837/2020

**DEUTSCHER GENOSSENSCHAFTSUND
RAIFFEISENVERBAND e.V.1/GERMAN
COOPERATIVE AND RAIFFEISEN
CONFEDERATION [DGRV]**

Applicant

and

**TEBOHO MOTSEKHOANE SEJAKE
and another**

First Respondent

JUDGMENT

SC VIVIAN AJ

1. This is an application for sequestration. The Applicant is a non-governmental organisation formed in terms of the laws of Germany. It conducts developmental programmes in South Africa. It is fully funded and financed from German public funds.
2. The First Respondent is a former employee of the Applicant. The Applicant says that she misappropriated money from it. The Applicant laid a charge against the First Respondent. It also issued summons against her for an amount of almost R1 million. The First Respondent entered an appearance to defend the action, but did not file a plea. Default judgment was granted against her. A warrant of execution was issued against the First Respondent. The sheriff attempted to execute the warrant but rendered a *nulla bona* return of service, meaning that the sheriff was unable to locate assets to satisfy the warrant.
3. The Applicant says that it has subsequently found that the First Respondent in fact stole even more money than it initially realised. Accordingly, the debt owed to it is greater than the judgment debt.
4. The failure to pay the judgment debt is an act of insolvency. However, the Applicant says that after receiving the *nulla bona* return, it became aware that the First Respondent is married to the Second Respondent in community of property. It says this on the basis that a search conducted at the Deeds Office did not reveal that an antenuptial contract had been registered. It points out that it did find that immovable property is registered in the name of the Second

Respondent and that the search showed that this immovable property was registered on the basis that the Second Respondent is married out of community of property.

5. Only the Second Respondent opposes the application. The basis of his opposition is that he is married to the First Respondent out of community of property. Attached to his answering affidavit are copies of the Respondents' marriage certificate and their antenuptial contract. These reveal that the Respondents signed the antenuptial contract on 23 September 2004 before a notary public. This provided for their marriage to be out of community of property. They were married on 1 November 2004. The Antenuptial Contract was registered at the Johannesburg Deeds Office on 18 January 2005.
6. Section 86 of the Deeds Registries Act (Act 47 of 1937; "DRA") provides that antenuptial contracts must be registered in the manner and within the time provided for in Section 87, failing which it: *"shall be of no force or effect as against any person who is not a party thereto."*
7. Section 87(1) of the DRA provides:

"An antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow."
8. The three-month period expired on 23 December 2004. The antenuptial contract was accordingly registered outside of the time period allowed by Section 87(1).

9. Section 88 of the DRA allows the Court to: “... *authorize postnuptial execution of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage, and may order the registration, within a specified period, of any contract so executed.*”

10. Siwendu J explained:

“Section 88 caters for a scenario where the parties to a marriage agreed to an antenuptial contract before the marriage, but did not execute and register same timeously. It allows the parties to approach the court for the postnuptial registration of the antenuptial contract. Although executed and registered after the marriage, it will have a retrospective effect if sanctioned by the court.”¹

11. The effect of these provisions of the DRA is that an antenuptial contract that has not been registered is of no force or effect against any person who is not a party thereto, but is enforceable *inter partes*.²

12. The Second Respondent says that the Respondents were unaware of the fact that their antenuptial contract was registered late. He learned of this fact when his answering affidavit in this application was being prepared. The Respondents accordingly launched an *ex parte* application on 25 February 2021 (“the related application”), in which they seek a declaratory order that their antenuptial contract is binding and of force against third parties, alternatively an order allowing for the late registration of the antenuptial contract.

¹ LNM v MMM (2020/11024) [2021] ZAGPJHC 563 (11 June 2021) at para 48

² *Ex parte* Spinnazze and another NNO 1985 (3) SA 650 (A) at 666 C

13. The Respondents served a copy of the related application on the Applicant. The Applicant has subsequently intervened and opposes that application. I was informed from the bar that although the affidavits have been exchanged in the related application, neither party has filed heads of argument and accordingly a date for hearing has not yet been allocated.
14. The Applicant's counsel recorded in his initial heads of argument that the Applicant had approached the Deputy Judge President for an order that the two applications be heard together. He says that the Second Respondent's legal representative objected on the basis that this application was still undefended and opposing affidavits had yet to be filed. On the strength of this, the Deputy Judge President ruled that each matter should be dealt with on its own and according to the state and progression of the papers filed therein.
15. The Second Respondent's counsel informed me that she was not on brief at the time. She took an instruction from her attorney, who apparently did not agree with the recollection of the Applicant's counsel.
16. In any event, the Applicant's counsel's recollection does not show that the Deputy Judge President made a ruling that, on a consideration of the evidence in this application, it could be heard before the related application. And, even if he did, that would be an interlocutory ruling which is subject to variation on the basis of the facts before me.
17. I have not been referred to a case in which the parties signed an antenuptial contract prior to their marriage and the antenuptial contract was registered, but

outside of the three-month period.³ I have also not found such a case. It may be, as the Second Respondent's counsel submits, that the **Oudekraal** principle applies and that the fact of registration of the antenuptial contract means that it is valid until registration is set aside.⁴ Or it may be, as the Applicant's counsel submits, that the express wording of Section 86 has the effect that the **Oudekraal** principle is excluded and that the antenuptial contract is not enforceable against third parties. In that event, the Court has the power to extend the date for registration of the antenuptial contract, which would have retrospective effect. Or it may refuse to do so.

18. However, the related application is not before me. As matters stand, I know that the Respondents are married, but it is in dispute whether their marriage is in or out of community of property.
19. The dispute as to whether the Respondents are married in or out of community of property is material to this application. This is because Section 17(4)(b) of the Matrimonial Property Act (Act 88 of 1984; "the MPA") provides:

"An application for the sequestration of a joint estate shall be made against both spouses: Provided that no application for the sequestration of the estate of a debtor shall be dismissed on the ground that such debtor's estate is a joint estate if the applicant satisfies the court that despite reasonable steps taken by him he was unable to establish whether the debtor is married in community of property or the name and address of the spouse of the debtor."

³ It is suggested in the Applicant's supplementary heads of argument that LNM v MMM, *supra*, is in point. I do not agree. That case concerns a contract that was concluded post-nuptially and then registered at the Deeds Office. Siwendu J declared the contract to be void because it was concluded post-nuptially.

⁴ See Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

20. The Applicant's case is that the Respondents are married in community of property. Accordingly, it cited both Respondents in the application. Although the relief sought in the notice of motion is not clear, Mr Minnaar, who appeared for the Applicant, indicated that he would move for an order in terms of one of two draft orders uploaded by the Applicant. Primarily, the Applicant seeks an order sequestering the joint estate of the Respondents. This approach is correct on the Applicant's version, namely that the Respondents are married in community of property.
21. On the other hand, if the Respondents are married out of community of property, then the Second Respondent is wrongly cited in these proceedings. The appropriate order would be for the estate of the First Respondent to be sequestered.
22. The proviso to Section 17(4)(b) of the MPA was introduced into Section 17(4)(b) by Section 11 of the Insolvency Amendment Act (Act 122 of 1993). The intention of the legislature is to ensure that "... *both spouses in a marriage in community of property received notice of an application for sequestration, unless this was practically impossible.*"⁵
23. Even prior to the amendment, the full bench in **Detkor** held that where there is doubt as to the marital status of the Respondent, the Court may not grant an order for sequestration.⁶ This must be so: sequestration affects a person's status. Even a provisional sequestration order has profound effects.

⁵ Absa Bank Ltd t/a Trust Bank v Goosen 1998 (2) SA 550 (W) at 552 B

⁶ Detkor (Pty) Ltd v Pienaar 1991 (3) SA 406 (W) at 411 I

24. Accordingly, I agree with the Second Respondent's counsel that this matter cannot proceed before the related application is finalised. I will accordingly remove the matter from the roll.
25. The matter is not out of the hands of the Applicant. As it is a party to the related application, it can ensure that it is enrolled for hearing as soon as reasonably possible, either before or together with this application.
26. In respect of costs, the Second Respondent is seeking an indulgence. He has also given no explanation for his failure to timeously progress the related application. Accordingly, I intend to order the Second Respondent to pay the wasted costs occasioned by the removal of the matter from the roll.
27. For the avoidance out doubt, I record that nothing in this judgment should be read as deciding whether a proper case for sequestration is made out, whether against the First Respondent or against the Respondents jointly. That is a matter for the Court to consider at a future hearing.
28. I accordingly grant the following order:
 - 28.1. The application is removed from the roll.

28.2. The Second Respondent is ordered to pay the wasted costs occasioned by the removal from the roll.

Vivian, AJ
Acting Judge of the Gauteng Division of the High Court of South Africa

APPEARANCES:

FOR THE PLAINTIFF: JR Minnaar

FOR THE DEFENDANT: KA Slabbert

Date of hearing: 30 May 2023

Date delivered: 7 June 2023