



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG**

Reportable

HIGH COURT CASE NO:12399/14

In the matter of:

ZUKILE MALCOLM RENFREW MBETE

FIRST APPLICANT

NONI YONKE MBETE

SECOND APPLICANT

VS

REGISTRAR OF DEEDS PIETERMARITZBURG

RESPONDENT

JUDGMENT

Heard on: 27 October 2014
Delivered on: 27 October 2014
Edited on 4 November 2014

D. Pillay J

[1] This application is for an order in terms of s 87(1) of the Deeds Registries Act 47 of 1937 (the Act) for the registration in the deeds registry of an antenuptial contract executed between the first and second applicants on 5 December 2013. The parties were married without an antenuptial contract on 15 December 2013. By some mishap between the attorneys and their agents the antenuptial contract was lost and therefore not lodged in the deeds registry for registration. This application

was brought urgently as the applicants have purchased immovable property and applied for bond finance.

[2] I drew the attention of Mr Essop who appeared for the applicants to practice directive 17 of the Practice Manual: KwaZulu-Natal D9-9. The directive applies to applications for a change in the matrimonial regime. It imports into the practice in this division the Cape practice laid down in *Ex Parte Lourens et Uxor* 1986 (2) SA 291 (C). I struck the matter off the roll.

[3] Mr Essop returned later with an arm load of authorities to persuade me otherwise. I considered the authorities and remained unconvinced. Given the urgency of the matter I stood it over to today (Monday 27 October 2014) for an application in compliance with the practice directive.

[4] Mr Essop returned today with an order in which Jappie DJP granted an application in terms of s 87(1) in *Lisa Carolyn Stead and Other v Registrar of Deeds Pietermaritzburg* case no. 8092/13 unreported 29 August 2013 in which the facts were similar to this case. In *Stead* the applicants had executed an antenuptial contract on 14 June 2000. The notary had issued a protocol number. The applicants were unaware that the antenuptial contract had not been registered as a result of the out copy being lost. The omission came to light in 2013 when the applicants were about to register transfer of a property. Since his order in that matter the learned Deputy Judge President has changed his view.

[5] This application falls to be dismissed for the following reasons:

Section 87 provides:

‘Manner and time of registration of antenuptial contracts-

(1) 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.’

[6] This section caters for court applications to be brought when 3 months expire after an antenuptial contract was executed but before the parties were married. Mr Essop submitted that that cannot be a proper construction of s 87(1) because if the 3

months expire it is easier to execute a fresh antenuptial contract than to apply to court for an extension. Whilst that may be so in practice, the legislation had to provide for extensions in situations in which the 3 months had expired to avoid the time restriction being unduly oppressive and therefore irrational.

[7] Turning to the cases to which Mr Essop referred, in *Ex Parte Plows et Uxor* 1947 NPD 122 the parties were issued with a marriage certificate that reflected that they were married by antenuptial contract. The contract was tendered for registration but was rejected for minor technical deficiencies. Unknown to the parties it was not relodged. Consequently, it was not registered within the period permitted for registration. In 1945 the parties discovered for the first time that the antenuptial contract had not been registered. The court granted the application. That case differs from this in the material respect that there was extrinsic evidence that the parties intended to be married by antenuptial contract. Furthermore creditors were not prejudiced because the marriage certificate reflected that they were married by antenuptial contract.

[8] In *Ex Parte Van Blerk* 1938 CPD 133 in which the court granted an application in terms of s 87(1) the only issue was whether one days' notice of the application to the registrar of deeds was sufficient. The facts of that case were not reported. Consequently, it is of no assistance in this case.

[9] In *Ex Parte Purcell* 1943 EDL 333 the court granted the application in more dubious circumstances. A fellow airman advised the applicants that they could enter into an antenuptial contract at any time within three months of marriage. Notwithstanding the lack of notice to the registrar of deeds in terms of s 97 and corroboration by the airman the court was satisfied on the mere statements of the applicants and granted the application in terms of s 87(1).

[10] Other cases that came to my attention were *Ex Parte Hersch et Uxor* 1946 TPD 548; *Ex Parte Joffe et Uxor* 1946 TPD 548. They were applications in terms of s 88 of the Act which regulates postnuptial execution of antenuptial agreements. The full bench in the erstwhile Transvaal Provincial Division disagreed with the full bench

in the Cape in *Ex Parte Orford and Others* 1920 CPD 367 in which the head note read:

‘The relief given by the courts in allowing antenuptial contracts to be executed and registered after marriage is confined to cases where it is proved that the parties did in fact agree before marriage to exclude community. The mere allegation of the spouses themselves that they agreed before marriage to exclude community is not sufficient proof of such agreement.’¹

[11] The TPD then proceeded to align itself with the full bench decision of this division in *Ex Parte Winwood* 1946 (1) PH (B) 1931 which stated:

‘I do not understand whence the Cape Provincial Division derived the power to refuse to accept the sworn testimony of credible witnesses and, *a fortiori*, to refuse in advance. Besides, the rule denies the relief to spouses in those cases in which they agree on the terms in private and no other witness exists.’²

[12] The head note in *Ex Parte Hersch* summarises the requirements for an s 88 application to be:

‘to register postnuptially a contract having the effect of an antenuptial contract, there is no inflexible rule requiring the refusal of relief merely on the ground that, the parties do not produce extrinsic evidence, that is additional to their own sworn declarations on the conclusion, before marriage, of the contract and of the terms thereof relative to the matter of community. A rigid insistence on the fullest disclosure by the parties of all possibly relevant facts is, however, inevitable: only after such disclosure is it possible for the court to be satisfied under the general balance of probabilities that the alleged agreement, with its specified terms, was concluded. In certain cases the court hearing the application may not be satisfied solely on the allegations by the parties themselves.’

[13] All these judgments predate the Matrimonial Property Act 88 of 1984 which must be read conjunctively with the Act. This is all too apparent in s 89 of the Act

¹ See also *Ex Parte Hersch* at 555-556

² See also *Ex Parte Hersch* at 557

which provides for registration of postnuptial contracts. It imports into the Act s 20 and 21 of the Matrimonial Property Act.

[14] In this case the applicants who are currently married without an antenuptial contract seek to change their matrimonial regime so as to be married with an antenuptial contract. Effectively they seek to register an antenuptial contract postnuptially. This they cannot do under s 87. They may invoke s 88 provided they comply with the practice directive. The practice directive makes it abundantly clear that *Ex Parte Lourens* applies. The applicants are therefore required to follow the directive by giving notice to the registrar and by advertising in the government gazette and in local newspapers at least two weeks before the application is heard.

[15] Emphatically this requirement is not to slight the applicants, the notary or the legal representatives whose *bona fides* the court has no reason to doubt. The court is duty bound to protect the interests of absent creditors. Given the high level of corruption in modern society, granting s 87(1) applications without some extrinsic evidence opens the procedure to abuse and fraud. Even if such extrinsic evidence is available I doubt that the Matrimonial Property Act will permit s 87(1) applications being granted without compliance with *Ex Parte Lourens*.

[16] The application is dismissed.

D. Pillay J

APPEARANCES

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