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**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: 20872/2021

In the matter between:

NOELIOT NOSIWAPHI MENZIWA

APPLICANT

And

NONKULULEKO PRISCILLA NDOKWANA

First Respondent

JIKELEZA JAMES MENZIWA

Second Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN

Third Respondent

Heard: 30 August 2022

Delivered: 28 October 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be 27 October 2022 at 10h00.

JUDGMENT

INTRODUCTION

[1] This is an application in which the applicant seeks an order declaring a sale agreement in respect of an immovable property known as Erf No. [...] Nkcaza Street, Khayelitsha, situated in Cape Town, Western Cape Province, concluded

between the first respondent and the second respondent, unlawful, null and void *ab initio*. The applicant also seeks an order that the subsequent registration of transfer of ownership of the property into the names of the first respondent by the third respondent is declared null and void *ab initio*. In addition, the applicant seeks an order directing the third respondent to deregister such registration of transfer of ownership of the property from the name of the first respondent into the name of the second respondent in accordance with the provisions of the Deeds Registry Act 47 of 1937.

FACTUAL BACKGROUND

[2] The facts giving rise to this case can be summarised briefly as follows: The applicant and the second respondent, her husband, were allegedly married by customary union in 1980. Five major children were born out of their marriage. On 10 July 2010, unbeknown to the applicant, the first respondent and the second respondent (applicant's husband) concluded an agreement of sale in respect of an immovable property known as Erf [...] Khayelitsha, situated in Cape Town for the sum of R84 000. The applicant was unaware of the sale, and she did not consent to the sale of this property as envisaged in section 15 of the Matrimonial Property Act 88 of 1984 ("the MPA"). The applicant learnt of the sale later in 2010 after receiving a call from her son, Sonwabile Menziwa, advising that the first respondent demanded that they vacate the property in question because she is the owner thereof. At that time, the applicant was in the Eastern Cape. She then travelled to Cape Town to attend to this problem. Upon her arrival, she sought the assistance of the street committee members, but their intervention drew a blank.

[3] Subsequently, the applicant approached the Minister of Children and People with disability, who in turn referred the applicant to the Women's Legal Centre in Cape Town. The Women's Legal Centre discussed the dispute with the parties, and the decision that was taken at this institution is being disputed. According to the applicant, the Women's Legal Centre mediated the conflict, and an agreement was reached that the applicant would refund the first respondent the purchase price and thereafter have the house transferred to her name. The applicant's application is supported by a confirmatory affidavit of Selina Bhoto a street committee member

who asserted that at the street committee meeting, it was agreed that the applicant would refund the first respondent the purchase price of the property. Thereafter, the house was to be transferred into the name of the applicant. The applicant avers that notwithstanding the settlement reached at the Women's Legal Centre, the first respondent proceeded to institute eviction proceedings against her. She defended the eviction application, and the first respondent never pursued the application further.

[4] The applicant states that consistent with the agreement reached at the Women's Legal Centre, she paid the first respondent R55 000, the total purchase price for the property. Notwithstanding, the first respondent instituted another application in 2020 for the eviction of the applicant from the property and all who held title under her. She opposed the application, and the same was postponed pending the outcome of this application. The applicant relies on section 15(2)(a) and (b) of the MPA, which provides that a spouse married in community of property shall not, without the written consent of the other spouse, alienate any right in any immovable property without the written consent of the other.

[5] The first respondent opposed the application and disputed that the matter was mediated or that there was an agreement that the applicant would refund her the purchase price. The first respondent disputed that the agreement was concluded in contravention of section 15(2) of the MPA as alleged by the applicant because the second respondent expressly stated that he was unmarried at the time the impugned sale agreement was concluded. According to the first respondent, the property's purchase price was R84 000, calculated as follows: R55 000 was for the purchase price of the property, and R29 000 was for the transfer costs. She asserted that she paid the total sum of R84 000, to the second respondent's attorneys to transfer the property into her name. The first respondent disputed that the Women's Legal Centre mediated the matter. She also refuted the fact that there was an agreement reached between them.

[6] The first respondent further averred that the applicant was fully aware that the property was sold to her and that the applicant did not challenge the sale agreement since 2012 when the matter was discussed at the Women's Legal Centre. The

applicant only brought this application 13 years later and only after the second respondent died. Notwithstanding the two eviction applications she brought against the applicant, the first respondent contends that the applicant did not bring any application while the second respondent was still alive. According to the first respondent, the applicant is not honest with this court in that she waited for the second respondent to pass away before she could bring this application.

[7] The first respondent denied that the sum of R55 000 that the applicant paid her was a refund for the house's purchase price. Instead, the first respondent averred that at the meeting held by the street committee members, it was resolved that since tenants were staying in the property, the applicant could not benefit from the rental as she was not the owner of the property. According to the first respondent, it was agreed at that meeting that the applicant must give her the rental money, which she did. The second respondent denied that the said payments were for the refund of the purchase price of the house. To this end, the first respondent attached the affidavit of Isaac Pani, a street committee member who confirmed the first respondent's averments.

PRELIMINARY POINTS

[8] The first respondent opposed the application and raised two preliminary points. *First*, the first respondent disputed that the applicant was married to the second respondent by customary union. To this end, the first respondent disputed that the applicant has locus standi in this matter. The first respondent also contended that it is not clear in the applicant's founding affidavit whether the applicant's purported marriage to the second respondent was negotiated and entered into or celebrated in accordance with customary law. To her knowledge, the applicant was not married to the second respondent. Furthermore, the second respondent expressly confirmed that he was unmarried when the sale agreement was concluded.

[9] *Secondly*, the first respondent raised the non-joinder of the Master of the High Court and the executor of the second respondent's deceased estate as her second preliminary point. The first respondent alluded to the fact that she was informed that

the second respondent (the applicant's husband) passed away towards the end of 2021. After the passing of the second respondent, the applicant conveniently instituted these proceedings. The first respondent contended that the applicant should have cited the executor of the second respondent's deceased estate as a party in these proceedings, as the second respondent is central to this application. For the sake of completeness, I will consider these preliminary issues sequentially.

DOES THE APPLICANT HAVE LOCUS STANDI?

[10] At the hearing of this application, the first respondent's legal representative argued that the applicant's application was doomed to fail because the applicant failed to prove the existence of a customary marriage under the provisions of the Recognition of Customary Marriages Act 120 of 1998 ("the RCMA") between herself and the now deceased second respondent at the time when the agreement was concluded. It was also submitted that the applicant failed to seek an order in these proceedings declaring the existence of a valid marriage between herself and the second respondent. It was further contended that the applicant does not have the requisite standing to pursue this litigation ostensibly to declare the agreement null and void.

[11] In response, the applicant's legal representative submitted that the non-registration of a customary marriage in terms of the RCMA does not invalidate a marriage concluded according to indigenous law and customs. Counsel argued that the first respondent was aware of the subsistence of a marriage relationship between the applicant and the second respondent. The court was referred to the founding affidavit of the first respondent in the eviction application at Khayelitsha Court, in which the first respondent stated that before the applicant moved into the property in dispute, the applicant resided in the Eastern Cape with her husband. It was only after her attention was drawn to the provisions of the MPA, so the contention proceeded, that the first respondent began to dishonestly deny the existence of a marriage relationship between her and the second respondent.

[12] Section 4(1) of the RCMA imposes a duty on spouses of a customary marriage to ensure that their marriage is registered. According to section 4(2) of the

RCMA, either spouse may apply to the registration officer in the prescribed form for the registration of their customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require to satisfy himself as to the existence of the marriage. Section 4(4)(a) of the RCMA states that a registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobola agreed to and any other particulars prescribed. A certificate of registration of a customary marriage in terms of section 4(8) of the RCMA, constitutes *prima facie* proof of the existence of a customary marriage and of the particulars contained in the certificate.

[13] Section 4(3) of the RCMA provides those customary marriages concluded before the coming into operation of the RCMA had to be registered with the Department of Home Affairs before 15 November 2002. Section 4(3)(a) of the RCMA initially limited the registration period to one year after the coming into operation of the Act, but this period was extended. See GN 1228 GG 22 839 of 23 November 2001. Section 4(9) of the RCMA states that failure to register a customary marriage does not affect the validity of that marriage. However, the consequence of failing to register a customary marriage is that the parties forfeit the *prima facie* proof of the existence of the marriage that the certificate would bring in terms of section 4(8) of the Act. See *ND v MM* (18404/2018)[2020] ZAGPJHC 113 (12 May 2020) at para 10.

[14] It is axiomatic that an unregistered customary marriage makes it difficult to prove that a marriage exists without the relevant marriage certificate. In *Mgenge v Mokoena and Another* (4888/2020) [2020] ZAGPJHC 58 (21 April 2021) at para 12, the court noted, and quite correctly, in my view, ‘that one consequence of failing to register a customary marriage would be that absent a marriage certificate it would be difficult for either spouse in their interactions with third parties and government departments (and similar organisations), to establish the subsistence of the marriage and his/ her marital status. In contrast, possession of a marriage certificate constitutes *prima facie* proof of the marriage.’ The court noted further that ‘registration of the customary marriage thus provides for public certainty about the relevant spouses’ marital status.’

[15] Ordinarily, spouses are required to produce a marriage certificate whenever their marital status is challenged. In this case, the parties were allegedly married in 1980. Their marriage was not registered as required by section 4 of the RCMA. Five children were born in their marriage. All five children have since attained the age of majority. Before his passing, the now-deceased husband filed a confirmatory affidavit that he was indeed married to the applicant by customary law rites. In his confirmatory affidavit, he stated that he was not married to the applicant when he concluded the impugned sale agreement as he mistakenly believed that his customary marriage to the applicant was not legally recognised as a valid marriage. He was unaware that customary marriages enjoyed the same recognition as civil marriages. For this reason, he stated that he was unmarried when he sold the house to the first respondent. Nonetheless, in his confirmatory affidavit, he asserted that he was indeed married to the applicant by customary tenets.

[16] The applicant also obtained an affidavit from Mr Mbishe Menziwa, the younger brother of the second respondent. Mr Menziwa declared that the applicant and the second respondent were indubitably married to each other by customary marriage and that their marriage existed until the demise of the second respondent. Mr Menziwa also confirmed that the marriage between the applicant and the second respondent was concluded in 1980 in the Eastern Cape.

[17] Any valid marriage in terms of our law must be proved to the court's satisfaction. This proof must be by way of the best evidence available. It is a well-established practice in our courts to require documentary proof of the marriage where this is possible. The best evidence must always be given to prove a marriage. However, where it is not practicable for such a party to obtain a copy of the marriage certificate, such a marriage may be proved in other ways, for instance by evidence of witnesses who attended the marriage ceremony or by evidence of cohabitation and repute which creates a rebuttable presumption that there was a valid marriage. See *AO v MO* (Case No. 73754/14) (3 February 2017) at paras 11 and 12.

[18] In my view, the evidence that the applicant tendered on the papers is overwhelming that a marriage was concluded between the applicant and the deceased. See *Mabuza v Mbatha* 2003 (4) Sa 218 (C). The evidence of the

applicant, corroborated by the uncle and the deceased is sufficient to satisfy this court that indeed, the deceased was married to the applicant. From that marriage, five children were born. Therefore, the first respondent's first preliminary point must fail.

THE NON-JOINDER OF THE EXECUTOR OF THE SECOND RESPONDENT

[19] As far as this preliminary point is concerned, Mr Mlamleli who appeared for the first respondent submitted that the applicant should have cited the executor of the second respondent's estate as the second respondent is central to this application and that such failure renders the applicant's application defective. In response, Mr Mapoma who appeared for the applicant argued on behalf of the applicant that an executor was not appointed for the deceased (second respondent) in this matter as the deceased did not own or possess any property upon his death and that he did not leave a will behind.

[20] In my view, the joinder of the executor in a case like this is critical. The deceased was married to the applicant in community of property. The Recognition of Customary Marriages Amendment Act 1 of 2021, which came into operation on 1 June 2021, among others, amended section 7 of the RCMA that all marriages, which were entered into before or after the enactment of the RCMA, are regarded as in community of property unless such consequences are specifically excluded by the spouses in an antenuptial contract. There can be no doubt that the order the applicant seeks, if granted will also benefit the second respondent's deceased estate. Crucially, in the notice of motion, the applicant, among others, seeks an order directing the third respondent (the Registrar of Deeds) to deregister the registration of transfer of ownership of the property from the name of the first respondent into the name of the second respondent (the deceased).

[21] In my view, it was inherently necessary to join the Master of the High Court, particularly the executor of the deceased estate, in these proceedings as they have a substantial and direct interest in the matter. When the application was instituted, the applicant was aware that the second respondent has died. Notwithstanding, the

applicant failed to join the Master of the High Court or the executor of the second respondent.

[22] It is trite that an executor is responsible for the administration of the deceased's estate. In terms of section 26 of the Administration of Estates Act 66 of 1965, the executor is charged with the custody and control of the property in the deceased estate. He is entrusted with a responsibility to safeguard the interest of beneficiaries and creditors in the estate. Only the executor can conclude juristic acts on behalf of the deceased estate. I believe the executor of the second respondent's deceased estate has a legal interest in this matter and should have been joined in these proceedings. If he was not appointed, the applicant should have reported the estate to the Master of the High Court, who would have appointed an executor.

[23] The order sought by the applicant will likely affect the interests of third parties. As the Supreme Court of Appeal aptly noted in *Gordon v Department of Health, Kwazulu Natal* 2008 (6) SA 522 (SCA) at paras 9 and 11, that as far as joinder is concerned, 'the issue was whether the party sought to be joined had a direct and substantial interest in the matter. If the judgment or order of the court could not be sustained and carried into effect without necessarily prejudicing the interests of the party who had not been joined, he had a legal interest in the matter and had to be joined.'

[24] I find it very strange that the deceased was cited in these proceedings in his personal capacity, notwithstanding that at the time when this application was launched, the second respondent (the deceased) was long deceased. In my mind, the failure of the applicant to join the executor of the second respondent's deceased estate is fatal to the applicant's application and warrants the dismissal of this application. Even if the applicant succeeded in her application, it would be legally impermissible for this court to order that the property be transferred into the name of the second respondent, who has since died.

[25] Under normal circumstances, this finding would lead to the end of the dispute. However, I deem it prudent to consider the matter on its merits. This approach, in my view, conforms with the Constitutional Court's guidance provided by Ngcobo J in *S v*

Jordan & Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 652 (CC) at para 21; See also *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others* 2017 (3) SA 95 (SCA) at para 38. To my mind, this approach ensures that all the disputed issues raised by the parties in this court are ventilated. It is that approach that I will follow in this matter.

PRINCIPAL SUBMISSIONS OF THE PARTIES ON THE MERITS

[26] Before I briefly describe the parties' submissions on the merits, I deem it expedient to set out the wording of the relevant statutory enactment relied upon by the parties. The applicant relies on section 15(2)(a) of the Matrimonial Property Act 88 of 1984, which provides as follows:

“(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, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;
(b) enter 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.”

[27] Meanwhile, the first respondent relies on section 15(9)(a-b) of the Matrimonial Property Act, which provides as follows:

When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16(2), and –

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the

power concerned of the spouse has not been suspended, as the case may be;

(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), or that the power concerned has been suspended, as the case may be, 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.

[28] Mr Mapoma contended on behalf of the applicant that the agreement entered by the first and the second respondent involved the alienation of immovable property. As such, it was impermissible in law for the second respondent to alienate the said property without the applicant's consent. Counsel contended that the marriage between the applicant and the second respondent was in community of property. Thus, the agreement purportedly concluded between the first and the second respondent is unlawful, void *ab initio*, and cannot confer any legally enforceable right. Mr Mapoma relied on the Supreme Court of Appeal Judgment of *Marais N.O and Another v Maposa and others* 2020 (5) SA 11 (SCA), para 26, where the court found that a transaction concluded contrary to sections 15(2)(a) and (b) of the MPA is unlawful, void, and unenforceable. This is so because the provisions of section 15(1) and (2) (a-b) of the MPA are peremptory and not discretionary.

[29] Meanwhile, Mr Mlamleli submitted on behalf of the first respondent that the first respondent did not know that consent was required when she concluded the agreement with the second respondent. Furthermore, counsel argued that the second respondent failed to disclose to the first respondent and the conveyancing attorneys that he was married in community of property to the applicant. In fact, when asked about his marital status, the second respondent expressly stated that he was unmarried. It was contended that these assertions are corroborated by the signed sale agreement and the title deed. Moreover, the second respondent deposed to a confirmatory affidavit affirming the version of the first respondent that he was not married when the sale agreement was concluded. Even though, factually, the applicant did not give consent, so the contention proceeded, section 15(9)(a) of

the MPA protects the first respondent as the applicant's consent is deemed to have been given, with the result that the transaction is valid and enforceable.

ANALYSIS

[30] This case in my view, hinges on the application of section 15(2) and section 15(9) of the MPA. Our Constitution requires a purposive approach to statutory interpretation - See *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) at paras 22-23. Section 39(2) provides that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) at para 91, the court found that this section introduced a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport, and objects of the Bill of Rights.

[31] In cognisance to the requirement of interpreting legislation in conformity with constitutional values, I consider first the provisions of section 15(2) of the MPA within the context of this case. It is well-established in our law that when spouses are married in a community of property, all spouses' assets are merged, either obtained before or after the marriage's conclusion, in one joint estate. See *Ex Parte Menzies et Uxor* 1993 (3) SA 799 (C) 808. The joint estate belongs to the spouses in undivided and indivisible half-shares and is known as tied co-ownership. See *Corporate Liquidators (Pty) Ltd and Another v Wiggill and Others* 2007 (2) SA 520 (T) at 526D-F.

[32] Section 14 of the MPA abolished marital power and granted spouses married in community of property equal powers to administer the joint estate and incur debts that bind the joint estate. The section provides as follows:

Subject to the provisions of this Chapter, 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.

[33] Section 14 grants spouses the so-called *concurrent* administration of the joint estate. See Van Schalkwyk N, *General Principles of Family Law* 5ed, (2014) at 225 – 226. The concurrent administration is two-pronged. *First*, it consists of an independent administration of an estate in which a spouse may deal freely with the joint estate without the consent of the other. For instance, a spouse may buy household necessities without the other spouse's consent. The *second* leg of administration envisaged in section 14 is a joint administration. In this instance, the spouse needs the other spouse's consent to conclude or effect a transaction. The acts for which both spouses' consent is required are those which are of such importance that unilateral action could lead to serious friction. It is the joint administration that is the bone of contention in this matter.

[34] It is common cause that the second respondent entered into the sale agreement of the house without the applicant's written consent. When so doing, the second respondent acted in conflict with the express provisions of section 15(2)(a-b) of the MPA. Subject to the provisions of section 15(9)(a) of the MPA, the sale agreement between the applicant and the second respondent is unlawful and is void and unenforceable. The issue, therefore, is whether the first respondent brought herself within the protection afforded to third-party purchasers by section 15(9)(a) of the MPA. If she has not, the sale is a nullity for want of the applicant's consent. If she has, the applicant is deemed to have consented to the sale and is valid.

[35] The MPA does not prescribe how it must be established whether the third party could reasonably have known that consent was required or not given. See Cronje and Heaton, *South African family Law* 2ed (2004) at 81. However, in *Distillers Corporation Ltd v Modise* 2001 (4) SA 1071 (O) at para 36, the court held that the use of the word "reasonably" implies that an objective test must be used. Thus, this matter must be considered from the point of view of a reasonable person in the first respondent's position.

[36] In *Mulaudzi v Mudau and Others* (1034/2019) [2020] ZASCA 148 (18 November 2020) para 11, the Supreme Court of Appeal pointedly found that a third party to a transaction contemplated by sections 15(2) or (3) that is entered into without the consent of the non-contracting spouse is required, for consent to be deemed and for the transaction to be enforceable, to establish two things: *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. See *Marais N.O and Another v Maposa and Others* 2020 (5) SA 111 (SCA) at para 28.

[37] In *casu*, the applicant relied on *Visser v Hull and Others*, 2010 (1) SA 52 (WCC) at para 8, where Dlodlo J, as he then was, found that a third party is expected to do more than rely upon a bold assurance by another party regarding his or her marital status. The learned justice noted that an adequate inquiry by the third party is required. In the same way, it was submitted on behalf of the applicant that the first respondent could not be allowed to rely upon the bald assurance of the second respondent regarding his marital status as she was under a legal obligation to make inquiries or take reasonable steps to ascertain whether the second respondent was married.

[38] I agree with the applicant's counsel that ordinarily, inquiries must be made by a third party who relies on section 15(9) of the MPA. However, the facts of this case, in my view, stand on a different footing. The undisputed facts gleaned from the applicant's affidavit are that the applicant was living in the Eastern Cape and not with the second respondent in Cape Town. According to the applicant, she learnt of the house sale from his son while she was in the Eastern Cape. After receiving this information, she immediately travelled from the Eastern Cape to Cape Town to deal with the matter. Upon her arrival, she sought the attention of street committee members.

[39] Significantly, when the impugned sale agreement was concluded, the second respondent informed the first respondent that he was unmarried. The second

respondent also stated that he was unmarried when he signed the sale agreement. The deed of transfer dated 25 November 2010, signed in Cape Town, referred to the second respondent as unmarried. Moreover, the second respondent deposed to a confirmatory affidavit in which he asserted that when he concluded the sale agreement with the first respondent in 2010, he stated that he was not married as he laboured under the impression that customary marriage is not recognised in our law.

[40] In my view, this information cumulatively lends credence to what the first respondent stated from the outset, that the deceased was not married to the applicant to her knowledge. A reasonable third party in the first respondent's position would have accepted that the second respondent was unmarried. To my mind, the second respondent could not reasonably have known that the deceased (second respondent) was married when the sale agreement was concluded. The averments of the applicant that the first respondent knew of the marriage are not supported by the facts placed before court. In these circumstances, the first respondent could not reasonably have been expected to make further inquiries about whether the second respondent had consented to sell the property as suggested by the applicant. The second respondent regarded himself as unmarried. He informed his attorneys, who transferred the property and the applicant that he was unmarried. This is evidenced by the formal documents that he signed. The first respondent was reasonably made to believe that the second respondent was not married.

[41] The fact that the first respondent may have seen the second respondent with the applicant is inconsequential. Crucially, the alleged customary marriage between the parties was not registered. Even if the first respondent had inquired with Home Affairs department about the marital status of the second respondent, Home Affairs would have informed her that the second respondent was not married. The second respondent's confirmatory affidavit that he was unmarried corroborates the version of the first respondent.

[42] To my mind, the provisions of section 15(2) of the MPA are subject to section 15(9) of the Act. To this end, the observation of the Supreme Court of Appeal in *Marais N.O and Another v Maposa and Others* are apposite. The court stated:

“The effect of section 15 may be summarised as follows. First, as a general rule, spouse married in community of property ‘may not 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 ss 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 void and unenforceable.”

[43] Therefore, my conclusion is that the first respondent did not know that the second respondent (the deceased) was married when the impugned sale agreement was concluded and could not reasonably have known this. That being so, the ‘deemed consent’ standard envisaged in section 15(9) of the MPA is triggered. Although factually, the applicant did not give consent, section 15(9)(a) of the MPA protects the first respondent. The result is that the applicant’s consent is deemed to have been given, with the result that the sale agreement is valid and enforceable. As it was correctly observed in *Marais*, ‘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 s 15(9)(a) is intended to protect the interests of a bona fide third party who contracts with that spouse.’

[44] In the result, the following order is granted:

44.1 The applicant’s application is hereby dismissed.

44.2 The applicant is ordered to pay the costs of this application, which shall include the costs of counsel.

LEKHULENI JD
JUDGE OF THE HIGH COURT