



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No. 470/2013

In the matter between:-

NOMBUYISELO SIHLONGONYANE

Applicant

and

MHOLI JOSEPH SIHLONGONYANE

1nd Respondent

SANELIWIWE GAMA

2nd Respondent

Neutral citation:

*Nombuyiselo Sihlongonyane v Mholi Joseph
Sihlongonyane & Another (470/13) [2013] SZHC262
(25th October 2013)*

Coram:

HLOPHE J

For the Applicant:

MISS. L. Ngcamphalala

For the Respondent:

MR. J. Simelane

Date heard: 18/10/2013

Date delivered: 25/10/2013

SUMMARY:

Applicant and respondent married by civil rites, in community of property – Respondent allegedly dissipating marital assets – Order of court giving applicant power to deal with marital assets granted – in exercise of such power, applicant institutes application proceedings seeking return to her of marital car – Respondent contending car not part of joint estate as it was a gift or donation to him- position of the law on the effect of donation to the joint estate – Items donated to any of the Parties to a marriage in Community of Property form part of the joint estate – Application granted with costs.

JUDGMENT

- [1] The Applicant instituted these proceedings seeking inter alia an order of this court operating with immediate and interim effect calling upon the Respondents to show cause why they should not be ordered to surrender to the applicant a certain motor vehicle merely described by its registration numbers as **ESD295BM**. There was also sought an order of court authorizing the deputy sheriff as assisted by the Royal Swaziland Police to attach the said motor vehicle and take it into safe custody until notified otherwise by the applicant.
- [2] It merits mention to say that the above orders are framed in a peculiar manner because normally after one would have prayed for an order compelling the Respondents to surrender the motor vehicle concerned, he

would have prayed that in the event of the Respondent's failing to surrender the said motor vehicle, the deputy sheriff as assisted by the Royal Swaziland Police was being authorized to attach, wherever may be found, the said motor vehicle, and keep same under his custody, pending finalization of the matter.

- [3] I must be quick to point out that notwithstanding my said observations, the orders sought do not detract from the reality that those are in essence the orders being sought by the applicant, despite the inaccurate wording.
- [4] The facts of the matter are common cause and are that the applicant and the First Respondent are husband and wife, married in terms of civil rites and in community of property. Although their said marriage is currently undergoing some strife, it is still in place, it not having been dissolved.
- [5] Owing to the fact that the applicant was a pastor, responsible for a certain church, he was given as a gift or a donation a motor by the church members. It is said this was in recognition of the good work he had done for the said church. This motor vehicle had since then been used as a family car until sometime when the marital relationship deteriorated between them, resulting in the husband allegedly leaving the marital home, allegedly to stay with what has been termed a mistress. He denied this latter aspect even though the reality remains that the marital relationship is undergoing a serious strain.
- [6] According to the applicant the gift in question formed part of the joint estate. The First Respondent disputes this and avers that the motor vehicle concerned belongs to him and him alone as it was his own personal gift. A

personal gift, he contends does not in law form part of the joint estate. It is true of course that the Applicant contends the opposite.

- [7] After the marital relationship between the two had deteriorated, the First Respondent had, at least according to the applicant, started secretly dissipating assets of the joint estate, allegedly in exercise of the marital power, which according to her was allowing him somehow to deal as he pleased with the assets of the joint estate.
- [8] Consequent to this observation, the applicant approached the High Court challenging the actions of the First Respondent as the husband. At the heart of the application concerned was a challenge on the exercise of marital power by the First Respondent as the husband, it being contended same was in violation of the equality principle enshrined in the constitution and was to that extent unconstitutional.
- [9] It is common cause that the high court, which was constituted in a Full Bench for hearing the matter, came to a conclusion to the effect that the First Respondent was not entitled to exercise marital power as he pleased or to the exclusion of the Applicant. In fact according to the Applicant, she was equally given power to control the assets of the joint estate.
- [10] It is allegedly whilst the said matter was pending in court that the applicant noted that the First Respondent had allegedly sold the motor vehicle in question to the Second Respondent. She had always taken the motor vehicle concerned to be communal or marital property. When this was done she claims not to have been consulted nor agreed thereto. She alleges that the

Second Respondent is a sister in law to First Respondent, as she was a sister to First Respondent's alleged new girlfriend, who the Applicant alleges he was staying with since he moved out of their marital home. Of course the First Respondent denies that he was now staying with the so-called mistress, the sister to the Second Respondent. He further denies having sold the motor vehicle to the Second Respondent, even though the applicant alleges she had actually discovered that the First Respondent had also attempted to effect transfer of ownership of the said motor vehicle to the Second Respondent, when she went to check the records at the Motor Registry.

[11] The Second Respondent, although served with the court process which sought *inter alia* an order of court calling upon the First Respondent to surrender the motor vehicle to the Applicant, whilst at the same time authorizing the Deputy Sheriff to attach same and keep it in his possession pending notification by Applicant, the Second Respondent chose not to enter a notice of intention to oppose and in fact chose not to oppose the application at all. I therefore take it that the Second Respondent is not concerned with what order the court grants and its conduct is indicative of a party that will abide a decision of the court.

[12] It was agreed during the hearing of the matter that the question in this matter is whether or not the vehicle in question is part of the joint estate or remains the First Respondent's private property as alleged. It was agreed that if I find that same was part of the joint estate, then I would have to grant the reliefs sought and if I were to conclude that it did not form part of the joint estate, then that would mean I should dismiss the application.

[13] The position of our law is long settled that where parties are married in terms of civil rites and in community of property they pool their assets together to form what is known as a joint estate. It does not matter how the property was acquired for it to form part of the joint estate. In fact that position applies equally to those assets owned by each one of the parties as at the time of the marriage just as it does to those acquired after the marriage shall have occurred. See in this regard such cases as *DE WET N.O. v JURGENS 1970 (3) SA 38 (AD) and LOCK VS. KEERS 1945 TPD AT 116*

[14] In *SPINTEX SWAZILAND (PTY) LTD VS. MOTSA & 11 OTHERS, HIGH COURT CASE NO. 2142/2012*, this court put the position as follows:-

“Because of the nature of their marriage, the first and second respondents are joint owners of their assets. Although the second respondent has not been accused of having participated in the fraud that is the subject of the action instituted by the applicant against them in case 2140/2012, the second respondent clearly has, in law, at least a substantive interest in the joint property which is the subject of this application. It is not just a 50% interest as stated by them in their opposing papers. Again it is immaterial or irrelevant how the property of the joint estate was acquired.”

[15] The last sentence I can safely say registers the general position which has some exceptions to it. Although the First Respondent contended in his papers that because the motor vehicle concerned was a gift or donation to him in

recognition of the work he had done for the church concerned, it was his personal property excluded from the joint estate, that does not seem to be the position of our law which is by now settled; being that all properties acquired during the tenancy of the marriage in community of property, becomes or forms part of the joint estate. In fact according to **Hahlo, The South African Law Of Husband And Wife, 4th Edition, 1982 Publication**, it was stated that where there was an express condition attaching to a gift or a donation to the effect, that same does not form part of the joint estate, such a property, is excluded from such an estate. To put it elegantly, it is only property donated or given to the recipient under an express condition it was not to form part of the joint estate that would be excluded from it. The position was put as follows in the said book at page 224:-

“Property which a third party gives or bequeaths to one of the spouses with the proviso that it shall be excluded from the community does not fall into the joint estate.”

The cases of *Ex parte Bear & Sack 1926 WLD 240*; and *Ex Parte Kock 1939 CPD 357* are supportive of this position as well.

[16] There was no allegation nor even suggestion, that when the motor vehicle concerned was given or donated to the First Respondent, who was married to the applicant at the time, there was a condition attaching to it to the effect that it was going to be exempted from forming part of the joint estate. This means that the general position to the effect that property acquired by one of the parties to a marriage forms part of the joint estate where it is not specifically provided otherwise, is applicable in the matter at hand.

[17] Although the applicant was insistent that a gift or donation is per se excluded from the joint estate, I was not referred to any authority for this position, and I did not find any.

[18] As indicated above, if I come to the conclusion that the donation or gift concerned, which is in the form of the motor vehicle, forms part of the joint estate, I then should grant the application. Having found this to be the case, I should grant the Applicants application and I hereby do so.

[19] Accordingly I order that the *rule nisi* issued by this court on the 8th day of May 2013, be and is hereby confirmed. Costs are to follow the event on the ordinary scale.

N. J. HLOPHE
JUDGE OF THE HIGH COURT