

THE HIGH COURT OF SWAZILAND

MKHULULI PETER HLOPHE

1st Applicant

LINDIWE PRECIOUS HLOPHE (nee GININDZA)

2nd Applicant

And

THE REGISTRAR OF DEEDS N.O.

1st Respondent

THE ATTORNEY GENERAL N.O.

2nd Respondent

Civil Case No. 3022/2005

Coram: S.B. MAPHALALA-J

For the Applicants: MR. L. HOWE

For the Respondents: MR. B. DLAMINI

JUDGMENT

(28th October 2005)

[1] Before court is an application on motion in the long form that the antenuptial contract of the 1st Applicant and 2nd Applicant be registered postnuptial in terms of the Deeds Registry's Act.

[2] The Respondents have not filed any opposing affidavits but it was argued on their behalf by Crown Counsel Mr. B. Dlamini from the bar, that 1st Respondent cannot register the said contract before it had been properly executed.

[3] Mr. Howe appearing for the Applicant contended that this situation is covered by Section 85 of the Act. The said Section reads as follows:

"Postnuptial execution of antenuptial agreement

Notwithstanding the provisions of Sections 83 and 84, the court may, subject to the conditions as it may deem desirable, authorise 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".

[4] Sections 83 and 84 read in extenso as follows:

"Antenuptial contracts to be registered.

83. An antenuptial contract required to be registered under Section 84 executed before and not registered at the commencement of this Act, or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in Section 84, and unless so registered shall be of no force or effect as against any person who is not a party thereto.

Manner and time of registration of antenuptial contracts.

84. (1) An antenuptial contract executed in Swaziland shall be attested by a notary public and shall be registered in the Deeds Registry within three months after the date of its execution or the commencement of this Act, whichever may be the later date, or within such extended period as the court may on application allow. (2) An antenuptial contract entered into by an intended husband domiciled in Swaziland at the time of the marriage executed elsewhere than within Swaziland shall be attested by a notary public, or otherwise be entered into in accordance with the law and practice of the country in which is executed and shall be registered in the Deeds Registry within six months after the

date of its execution, or the commencement of this Act, whichever may be the later date, or within such extended period as the court may on application allow.

(3) An antenuptial contract registered in accordance with the provisions of subsection 92) shall have in Swaziland the same force and effect as if it had been executed before a notary public in Swaziland.

(4) An antenuptial contract, which has been registered in a public office outside Swaziland in accordance with the law and practice of the country within which the public office is situated, may be registered in the Deeds Registry at any time on lodgement of a signed original (or a copy certified as being a true copy of the original by, or on behalf of, the registering officer of the public office) together with a copy of the contract certified by a notary public which copy shall, after registration of the contract, be filed of record as the Registry duplicate.

[5] The requirements for a court to authorize postnuptial execution and registration of an antenuptial agreement having the effect of an antenuptial contract are set out in Hahlo, Husband and Wife, at page 254 as follows:

"a) Requirements

Three requirements must be satisfied before the court may authorize the postnuptial execution and registration of a contract having the effect of an antenuptial contract under Section 88:

- i) the parties must have agreed upon the terms of the contract before their marriage;
- ii) they must show good reason why they failed to execute the contract in proper form before their marriage; and
- iii) they must have acted with reasonable promptitude after discovering the necessity for an application to court".

[6] By the phrase "subject to the conditions as it may deem desirable," in Section 85 the authors Jourbert et al, The Law of South Africa, First Re-issue at paragraph 227 stated that the order usually contain a provision protecting the rights of creditors which often involves the publication of the order in one or other form (see Hahlo (supra) at page 276).

[7] The relevant averments in 2nd Applicant's confirmatory affidavit in paragraphs 6 to 10 thereof are as follows:

6. First and Second Applicant entered into a marriage contract on or about the 5th February 2005. Prior to our marriage we agreed that the marriage would be out of community of property by way of antenuptial contract.

7. The contract was entered into by both myself and the second Applicant my wife (Lindiwe Precious Hlophe nee Ginindza) and a certificate confirming the same was issued by a Notary Public. A copy of the certificate together with the contract is annexed hereto marked "ESI and 2" respectively.

8. The attorneys we instructed namely Maphanga, Howe, Masuku, Sibandze proceeded to assist us with the service of Paul Mhlaba Shilubane to attend to register the antenuptial contract with the Registrar of Deeds. However we were advised by them in terms of the law, an order is now required in view of the fact that the time prescribed in terms of the Deeds Registry Act for registration of the antenuptial contract has expired.

9. We have however been advised that in terms of the Deeds Registry's Act, it is possible for us to register the contract postnuptially and it is for this reason that the application is being made.

10. I therefore submit that at all times the second Applicant and myself have always wished to be married in terms of the antenuptial contract annexed hereto and the position has not changed.

[8]The above cited paragraphs in my considered view satisfy the requirements outlined by Hahlo (supra) in paragraph [5] above of this judgment, viz requirements (i), (ii) and (iii).

[9] In the result, the application is granted in terms of prayer 1 of the Notice of Motion.

S.B. MAPHALALA

JUDGE