IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No. 36/2015

In the matter between:

ROSTA MAMBA **Appellant**

And

FRANCES JOYCE MAMBA (Nee Zulu) **Respondent**

Neutral Citation: *Rosta Mamba vs Frances Joyce Mamba (Nee Zulu) (36/2015)* [2015] SZSC 11 (09 December 2015)

Coram: S. B. Maphalala AJA
M. D. Mamba AJA
N. J. Hlophe AJA

Date Heard: 09 November 2015

Date Handed Down: 09 December 2015

Summary

Appellant (s Applicant *a quo)* instituted application proceedings seeking an order declaring two marriages between the person she described as her late husband (deceased) and the first and second Respondents, void ab initio on account of their being allegedly bigamous

After filing an Answering Affidavit, current Respondent (as second Respondent then) obtained leave to file a counter claim in which she sought an order declaring that the Respondent was not entitled to claim from the deceased's estate on the basis of Community of Property. Current Respondent contended she contributed to the acquisition of all the assets of the deceased's estate. Before these applications could be heard, was found evidence indicating or suggesting that the deceased's marriage to Appellant was dissolved in 1980 at the Siteki Magistrates Court.

After hearing oral evidence the court *a quo* found that the marriage between the Appellant and the deceased was indeed dissolved as alleged and that the Applicant became aware of same in the 1980's. Court came to the conclusion that Appellant (as Applicant) had no *locus standi in judicio* to bring the proceedings she did seeking the reliefs she sought. Court dismissed the Appellant's application and granted the counter application. It directed that Respondent was entitled to 50% of the deceased's estate apparently on the basis of a universal partnership that existed between her and her husband.

Appellant was dissatisfied with the judgment and noted the current appeal against the decision of the court *a quo*.

This court held that the court *a quo's* decision cannot be faulted and it dismissed the appeal with costs.

JUDGMENT

HLOPHE AJA

[1] On the 30th June 2015 the court *a quo* handed down a judgment in which it dismissed an application filed by the Appellant (then Applicant) who had sought an order declaring the marriages of the then first and second Respondents to the late James Pinaff Mamba (the deceased) null and void on account of their being allegedly bigamous.

[2] The Appellant was dissatisfied with the said judgment and noted an appeal against same to this court contending inter alia that the court *a quo* had erred in dismissing the said application because the marriage between the deceased and the respondent herein was bigamous. It was contended as well that the court *a quo* should not have found that the marriage between the deceased and the Applicant was dissolved when considering that there was no proof of service of the divorce summons on her and the members of the deceased's family still regarded her as a wife to the deceased. It was contended further that the court *a quo* erred in finding that Applicant had no *locus standi in judicio* to challenge the validity of Respondent's marriage to the deceased when considering that the

evidence before the court *a quo* showed that the proprietary consequences of the marriage were never determined by the divorce court despite that the evidence before court allegedly showed that the bulk of the deceased's estate accrued before the divorce in 1980. There are several other grounds for the appeal which are to be revealed and dealt with in the paragraphs that follow.

[3] By means of background, the Appellant contended before the court *a quo* that in 1962 she was married to one James Pinaff Mamba in accordance with Civil Rites and in Community of Property. The said marriage she alleged, was never dissolved and subsisted until the death of the deceased in 2005. She says that in or around 1964, their marriage underwent a strain as a result of which they became estranged until sometime after 1980. During this separation she got involved in a love relationship with another man from which three children were born.

[4] Whereas she says that when she came back she reestablished or revived her marital relationship with the Applicant, this seems not to be supported by the facts in view of what was to transpire later on. It suffices to mention without going into the details as yet, that it was to transpire and actually ended up being found by the court *a quo*, that she was divorced

by the deceased around 1980. This aspect I shall, as indicated above, revert to later on in the appropriate context.

[5] The Appellant contended further that during the subsistence of their said marriage, her husband had gone on to contract the two marriages complained of to the first and second respondents alleging that the said marriages were bigamous. She therefore sought to have the said marriages declared *void abinitio*. It should be mentioned that the deceased's marriage to the current Respondent was alleged to have been in terms of Civil Rites and in Community of Property like that of the Appellant before it. That of the deceased to the second Respondent in the court *a quo* was said to have been in terms of Swazi Law and Custom.

[6] It is apparent that the order sought was bound to have long term effect if granted when considering that with the deceased no longer there, the issues of inheritance in his estate were now live and real. In short an order against the then first and second Respondents would have meant that she would be exclusively entitled to that portion of the estate reserved by law for the surviving spouse, while the then Respondents would have no share in the said estate unless they were able to establish some universal partnership or any ground which would in law entitled them to such share as found to be appropriate.

[7] Only the current Respondent opposed the application with the then second to fourth Respondents not even entering their Notices of Intention to oppose it. The Respondent in her papers claimed to have just become aware that the Applicant and the deceased were married to each other. This she says was after the death of the deceased and at the time there was a dispute with regards his burial place. It is common cause the Appellant had approached this court and sought to interdict the current Respondent from burying the deceased, insisting that she was the one entitled to do so by virtue of her alleged marriage.

[8] By way of comment, there seemed to be very little the Respondent could say to resist the Appellant's application. It was not until she filed a counter application having, attained leave to do so, that the application hitherto pending in court between them took a different turn.

[9] In this counter application the then first Respondent sought an order declaring that the then Applicant was not entitled to inherit from the estate of the late James Pinaff Mamba on the basis of Community of Property. There had also been sought an alternative order namely, that upon the Appellant deserting the deceased, the Community of Property between them had ceased to exist.

[10] At the heart of this counter application was the contention that the Appellant could not claim the existence of any Community of Property between herself and the deceased because their marriage lasted for a very short while (about two years to be precise) with no assets belonging to their joint estate in existence at the time. All the assets presently belonging to the deceased's estate were said to have been acquired with her participation and contribution. In fact she detailed how and when all the immovable assets belonging to the deceased's estate were acquired by herself and the deceased including the movable assets in the form of the cars.

[12] She clarified as well that when she married the deceased in terms of Civil Rites and in Community of Property in 1967, she was not aware that he was already married. For these reasons, she claimed that the Appellant was not entitled to claim under Community of Property because there was simply no such Community of Property between her and the deceased. She contended that the legal position is that each one of the parties to a joint estate should one way or the other contribute to the joint estate for there to be said to be Community of Property. In other words there should be a contribution to the joint estate by either of the parties.

[12] Her argument went further to say that in the case of the Appellant whatever Community of Property there was between the two of them ceased to exist when she allegedly deserted the deceased and went to stay with the man who fathered her other three children born out of wedlock. She contended this was the position of the law.

[13] The matter was ripe and was due for trial, when the Respondent says she stumbled upon a certain document which was more a statement of account from Attorneys Scot-Smith which was addressed to the deceased, James Pinaff Mamba, seeking to have him pay fees in a matter referred to as: *Yourself/Rosta Mamba (Nee Mthunzi).* The letter called upon the addressee therein to settle the statement of account in the cited matter. Because of this she was able to recall that on at least two different occasions in the past she had heard from both the deceased and the Applicant herself, that the latter had at some stage divorced the Applicant.

[14] The letter in question was dated the 10th December 1980 and it prompted her to carry out her own investigations. In doing so she went to the Siteki Magistrates Court. Her investigations then revealed that whereas a court order together with a court file containing all the relevant papers could not be found, there was found a 1980 court register in which there was

registered details of a divorce case between one James Pinaff Mamba and Rosta Mamba (Nee Mthunzi) as Case No. 65/1980. According to this register, the outcome or result in the matter was the grant of a decree for divorce as prayed for. It further recorded the ground for the divorce to be the said Rosta Mamba (Nee Mthunzi's) adultery.

[15] Although it had initially not been pleaded, when an application was made for leave to lead evidence so as to prove the divorce, the court *a quo* directed that oral evidence in that regard be led. From this exercise the court *a quo* found that the marriage between the two was dissolved sometime in 1980. This was after, although initially denying knowledge or awareness of the divorce, it was to later come out under cross examination that Applicant was aware of the dissolution of the marriage that had existed between the two of them. It transpired she had only expressed her wonder how this had come about given that she had not been served with the summons. In her own words she wondered if one could be divorced in absentia. The court *a quo* then found that she was aware of the divorce against her and she had chosen not to challenge it by way of rescission for over two decades. Her contention that she had been allowed by her in laws to sit next to the head of the deceased's mother's corpse and that of the deceased himself during each of their burials could not in law substitute for a marriage where there was legally none. This

having happened the next consideration was what effect it had on the matter particularly the question of the Applicant's *locus standi in judicio*.

[16] It was argued that in the main application brought to court by her, Appellant had no *locus standi in judicio* to bring same because she was not a wife to the deceased and therefore had no cognisable interest that could be protected by law. In those circumstances it was argued she had no business concerning herself with how the deceased had married who including the legal standing of such a marriage. The court *a quo* agreed with the Respondent on this score and found that the Applicant had no *locus standi in judicio*. This necessitated that the application by the Applicant be dismissed, which the said court went on to do.

[17] On the counter application the court *a quo* agreed with the Respondent. It ordered that the Applicant was not entitled to claim from the estate of the late James Pinaff Mamba on the basis of Community of Property. The Appellant was also ordered to pay the costs of both the main application and the counter application.

[18] It was as a result of these findings and orders of the High Court that the Applicant noted the appeal forming the subject matter of these proceedings. In his Notice of appeal the Appellant contended as follows in summary:-

(i) The court *a quo* should not have dismissed the Appellant's application because the marriage between the late James Pinaff Mamba and the Respondent herein was void ab initio as it was bigamous.

(ii) It was erroneous for the court *a quo* to have held that the Appellant was divorced notwithstanding that there was no proof that the summons had been served on her taken together with the fact that the members of the deceased's family still regarded her as wife to the latter.

(iii) The court *a quo* erred in finding that the Appellant had no *locus standi in judicio* to contest the validity of the Respondent's marriage when the evidence before court showed that the proprietary consequences of the marriage were never determined

by the divorce court, and the bulk of the deceased's estate was shown to have accrued before 1980.

(iv) It was an error for the court *a quo* to hold that if the issue of the matrimonial assets was not adjudicated upon during the hearing of their divorce it meant that they each wanted to keep whatever assets each had in his or her possession. This it was argued was contrary to the principles of the common law which provides that proprietary consequences have to be pronounced by the divorce court.

(v) The court *a quo* erred when it held that the Respondent was entitled to a half share of the deceased's estate when there never was an application for universal partnership by the Respondent. In the alternative to this ground it was contended that the court *a quo* erred in law to have found that the Respondent was lawfully married to Pinaff Mamba so as to inherit a half share.

[19] It is apparent that in order to determine this appeal this court has to ask itself the following questions as provoked by the grounds of appeal as paraphrased above from his estate.

19.1 Was it correct for the court *a quo* to find that there was no locus *standi in judicio* for the Appellant given that the marriage between the late James Pinaff Mamba and the Respondent was apparently bigamous?

19.2 Should the court *a quo* have found that the Appellant was divorced by the deceased during his life time despite that the former claims not to have been served with the summons initiating the divorce proceedings?

19.3 Should the court *a quo* have found that there was no locus *standi in judicio* by the Appellant notwithstanding that the proprietary consequences of the divorce were never determined in the face of the evidence that the major portion of the deceased's assets was acquired before their divorce in 1980?

19.4 Was it proper for the court *a quo* to conclude that by not insisting on an order determining the question of the proprietary consequences of the marriage, the parties intended that each party was to keep the assets in his possession notwithstanding the principles of the common law which allegedly require that the court expressly pronounces itself on this question?

19.5 Was it open to the court *a quo* to award the respondent a half share of the deceased's estate notwithstanding that there was no specific prayer for a universal partnership?

19.6 As an alternative to the foregoing question (that is the one at 19.5 hereinabove) could the court lawfully find the existence of a lawful marriage between the two so as to result in the Respondent getting a half share from the deceased's estate?

[20] This court must now answer the above questions in determining this appeal.

(a) Was it correct for the court *a quo* to find that the Appellant had no locus *standi in judicio* given that the marriage between the late James Pinaff Mamba and the Respondent was apparently bigamous?

[21] There can be no doubt that the court *a quo* correctly found on the facts before it that the marriage between the Appellant and the late James Pinaff Mamba was dissolved in 1980 as a result of proceedings that were instituted by the deceased at the Siteki Magistrates Court. When

instituting the current proceedings before the court *a quo* the Appellant alleged that she was doing so on the basis of the marriage in terms of Civil Rites and in Community of Property which she claimed existed between her and the deceased contracted on the 08th January 1962 at Hlatikhulu.

[22] It should be clear that if this alleged marriage was no longer in existence the Appellant was not entitled to institute the said proceedings in pursuit of the reliefs she sought. If it was not open to the Appellant to do so it follows that like any other ordinary member of the public, her actions would amount to nothing but those of what has come to be known as a "busy body" which is a phrase in law used to describe one who would busy himself or herself with issues that do not concern him or her. If the Applicant would concern herself and develop an interest in the marital relationships of other people including the validity or otherwise of their marriages when these issues have no bearing on her, it would mean that she is a busy body and the court should not entertain her. This court having found therefore that there was no longer a marital relationship between her and the deceased she was not entitled in law to challenge the marriage between the deceased and the Respondent herein.

[23] The position of our law is now settled that a person who institutes proceedings must have an interest in the subject matter of those proceedings. In ***Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151*** it was said that this interest must be an interest in the right of the subject matter. Clearly in the matter at hand the Appellant has no interest in the lawfulness or otherwise of the first Respondent's marriage to the deceased given that her own marriage to the latter which would have given her such an interest or right was dissolved more than three decades ago.

[24] I therefore agree with the court *a quo* that whether the marriage between the deceased and the first Respondent was bigamous or not is none of the Appellant's business as such an issue cannot be raised by her. The court *a quo* can therefore not be faulted for having come to the conclusion it did in this regard, which was to dismiss the main application.

(b) Should the court *a quo* have found that the Appellant was divorced by the deceased during his life time despite that the former claims not to have been served with the summons initiating the divorce proceedings?

[25] The determinant to this question is not whether the appellant was served or not with the summons but whether there does exist an order of court dissolving the marriage hitherto existing between the two of them. I do not think that anyone can realistically dispute that the court *a quo* correctly found that the marriage that once existed between the two was dissolved in 1980. It became clear before the court *a quo* that the Appellant herself became aware of the dissolution of her marriage to the deceased during the latter's lifetime but would not challenge the decree for divorce. The court a quo can therefore not be faulted for having found that the Appellant was divorced during the deceased's lifetime and that she acquiesced to the dissolution of the said marriage. This is because the order granted by the learned Magistrate on this point remains in place to date.

[26] A party who becomes aware of an adverse order granted against him and accepts its operation without challenging it is in law taken to have acquiesced thereto. Referring to the Judgment in ***Buck v Parker 1980 TS 1100 at 1106***, the court *a quo* found that the Appellant had acquiesced to the divorce order issued by the Siteki Magistrates Court. The wrongdoing by the court a quo, I cannot fathom in this regard and therefore it came to a correct decision on this point.

(c) **Should the court *a quo* have found that there was no locus standi in judicio by the Appellant notwithstanding that the proprietary consequences of the divorce were never determined in the face of the evidence that the major portion of the deceased's assets was acquired before their divorce in 1980?**

[27] I do not think that the appeal ground in this regard sets out the accurate picture as articulated by the evidence adduced before the court *a quo* both in terms of the affidavits filed of record and that orally led. There was no evidence by the Appellant that the major portion of the deceased's assets was acquired prior to 1980. Not only was there no attempt by the Appellant to lead evidence in this regard, it is true that not a single asset was proved by the appellant to have been acquired during the subsistence of her marriage to the deceased. The Appellant would not clarify this despite the Respondent having asserted that all the assets in the deceased's estate were acquired with her contribution by the deceased.

[28] It was found by the court *a quo* that the appellant had acquiesced to the decree for divorce and the consequences flowing there from when taking into account the fact that in her own evidence she became aware of the existence of the divorce decree way back in the 1980's and did nothing about it until the deceased died. It will be borne in mind that in this

matter the order granted by the Siteki Magistrates Court was recorded in the following words,

"decree for divorce granted as prayed".

We cannot lose sight of the fact that normally a decree for divorce, particularly one based on adultery, often goes together with an order for forfeiture against the Defendant.

[29] Whatever the position here, there should be no faulting the court *a quo* in concluding that the only reasonable inference to draw from the Appellant's conduct after becoming aware of the divorce decree against her, is that she acquiesced to such order. She was also confirming that she had no interest in whatever proprietary consequences flowing from the said marriage. If not, she surely would have timely raised that during the lifetime of the deceased so that same could have been dealt with. Her conduct could only strengthen the position adopted by the Respondent that unlike her, she (the Appellant) had made no contribution to the deceased's estate. It is a fact Respondent had mentioned how almost all the assets were acquired jointly by her and the deceased, without such being challenged by the Appellant, through the leading of appropriate evidence.

[30] Consequently I again can find no fault on the part of the court *a quo* as regards this aspect of the grounds of appeal and argument and I can do no more than confirm that having acquiesced to the decree for divorce the Appellant could not avoid the natural consequences of that order.

(d) Was it proper for the court *a quo* to conclude that by not insisting on an order determining the question of the proprietary consequences of the marriage, the parties intended that each party was to keep the assets in his possession notwithstanding the principles of the common law which allegedly require that the court expressly pronounces itself on this question?

[31] The answer to this question should be similar to the foregoing one considering the doctrine of acquiescence which I have no doubt was applicable when taking into account the conduct of the Appellant who despite becoming aware of the existence of the divorce order or decree did not raise the question of her entitlement to any portion of the assets of a possible joint estate. I say a possible joint estate bearing in mind that there have been made allegations of her not having contributed anything to the joint estate despite the first Respondent having come out to allege

and therefore prove how all the assets were acquired with her contribution when Appellant contributed nothing to the deceased's estate.

[32] The position is now settled that Community of Property arises from the parties to a marriage pooling together their resources. See in this regard the passage as quoted by the court *a quo* in ***Edelstein v Edelstein 1952 (3) SA1 at 10,*** which I agree expresses the correct position of our law

(e) Was it open to the court *a quo* to award the respondent a half share of the deceased's estate notwithstanding that there was no specific prayer for a universal partnership?

[33] The undisputed facts of the matter before the court *a quo* showed the first Respondent therein as having contributed immensely in the acquisition of the assets of the deceased estate. There should be little doubt if any that from this joint acquisition there was established universal partnership which presupposes that each one of the parties to it is entitled to a half of it. This being the case it is clear that universal partnership is a notion that arises *ex lege*.

[34] It is apparent therefore that when the Respondent instituted the counter application asking for a declaratory order that the Applicant was not

entitled to claim from the estate Late James Pinaff Mamba on the basis of community of property, given that she was the one who contributed to it and not the Appellant, she was indirectly saying that the relationship between her and the deceased culminated in a universal partnership in which she was entitled to a half share of the estate. The Appellant having been found to have acquiesced that the deceased's estate formed part of the universal partnership, can no longer raise a question about such property at this point.

[35] This being the case it is clear once again that the court *a quo* cannot be faulted for its decision in the matter before it.

(f) As an alternative to the foregoing question (that is the one at (e) above) could the court lawfully find the existence of a lawful marriage between the two so as to result in the Respondent getting a half share from the deceased's estate?

[36] In my understanding, the order of the court *a quo* was not based on the lawfulness or otherwise of the marriage than it was on the existence of a universal partnership between the Respondent and the deceased. I have already stated that the status of that marriage is not a matter to be

determined at the instance of the Appellant as the latter has no locus *standi in judicio* to do so taking into account the dissolution of her marriage to the deceased some two to three decades ago

[37] My endeavour to answer the foregoing questions has in my view disposed of the appeal by concluding that given the peculiar circumstances of this matter the Judgment of the court *a quo* dismissing the main application and granting the counter application cannot be faulted. The application was properly decided. Accordingly it follows that the Appellant's appeal cannot succeed and should be dismissed. Considering the conduct of the Appellant in instituting these proceedings and concealing the fact that the marriage relied upon had been dissolved and also going on to note a questionable appeal I am convinced this is a matter where the costs have to follow the event. Having said that I hereby make the following order:-

37.1 The Appellants' appeal be and is hereby dismissed.

37.2 The Judgment of the court a quo stands.

37.3 The Appellant is to pay the costs of this appeal.

N. J. HLOPHE
ACTING JUSTICE OF APPEAL

I Agree

S. B. MAPHALALA

ACTING JUSTICE OF APPEAL

I also Agree

M. D. MAMBA
ACTING JUSTICE OF APPEAL

For the Appellant: Mr. M. E. Simelane

For the Respondent: Miss. W. Ali