CATHERINE HENDRIKA MYBURGH versus COMMERCIAL BANK OF NAMIBIA

CASE NO. FA 6/98 Teek, J., *et* Gibson,

J., *et* Silungwe, J.

2000.05.08

CIVIL PRACTICE

MARRIAGE IN COMMUNITY OF PROPERTY: Woman married in community of property - *locus standi* to sue or be sued -Married Persons Equality Act No. 1 of 1996 -Articles 10(3) (no discrimination on grounds of sex), 14(1) (Right to marry and entitlement to equal rights during marriage and at its dissolution) and 16(1) (Right to acquire, own or dispose of movable of immovable property) of the Constitution - Common Law rule that denied women married in community of property capacity to sue or to be sued abrogated by the Constitution at date of Independence.

CASE NO.
FA 6/98

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CATHERINA HENDRIKA MYBURGH APPELLANT

And

COMMERCIAL BANK OF NAMIBIA RESPONDENT

CORAM: TEEK, J. et GIBSON, J. et SILUNGWE, J.

Heard on: 1999.03.30

Delivered on: **1999.07.30**

JUDGMENT:

SILUNGWE. J.: This is an appeal to the Full Bench against a summary judgment given by Mtambanengwe, J., in favour of the respondent for N$l 15,927.92, with interest thereon and an order for costs.

The respondent and the appellant were Plaintiff and Defendant, respectively, in the Court *a*

quo. Mr Heathcote represents the appellant and Mr Frank appears for the respondent.

Briefly stated, the facts of the case are that the respondent is a registered bank and the appellant is an adult female married in community of property to a Mr Pieter Johan Myburgh (at Okahandja in March 1987).

On October 21, 1993, the respondent and the appellant entered into a written loan agreement under which the respondent "lent and advanced" to the appellant the sum of N$ 107,139.13, with interest, repayable by monthly instalments.

Paragraphs 5, 6 and 8 of the respondent's particulars of claim allege that -

"5. The Defendant failed to pay her monthly instalments punctually on due date ...

1) On August 21, 1996, the Defendant was in arrears with her monthly instalments in the amount of N$43,698.10 and the total amount outstanding being N$ 115,927.92 therefore became due and payable in terms of clause 6.1 of Axinexure 'A'.

2) Notwithstanding written demand having been given to the Defendant on 2 September 1996 demanding payment of the outstanding balance, the Defendant either failed or refused to make any payment to the plaintiff...

Wherefore the Plaintiff claims :

(a) Payment of the amount of N$l 15,927.92.

In his Rule 32(3)(b) affidavit, the appellant's husband deponed in paragraphs 5 and 6 as follows:

> "5. My interest in this matter arose from the fact that I am married in community of property to the Defendant and any judgment for the payment of monies will be binding on the communal estate in which I have a material interest.
>
> 6. Save for denying the correctness of the amount of money allegedly still indebted towards the plaintiff under the agreement, the Defendant admits the plaintiffs cause of action and the particulars founding same as alleged in the Plaintiff s Particulars of claim."

The thrust of this matter, as reflected in the Notice of Appeal, is that -

3) the Learned Judge erred in finding that the respondent was entitled to sue the appellant for a contractual debt where the appellant was married in community of property; i.e that the Learned Judge erred in finding that the Appellant had *locus standi* to be sued; and/or

4) the Learned Judge found that the Appellant is a*publica mercatix;* and/or

3. the Learned Judge had regard to the Opposing Affidavit of the Appellant in order to determine whether the Appellant is a *publico, mercatrix* or not, whereas such allegation should have been made in the Respondent's Particulars of Claim and confirmed under oath in terms of the provisions of Rule 32.

In considering this matter, the starting point is, of course, the first ground of appeal. At common law, the general rule is that a woman who is married in community of property has no *locus standi in judicio.* Thus, actions pertaining to the joint estate must be instituted by, or against, the husband, in his capacity as its administrator; and actions concerning the wife personally must be instituted by, or against, him in his capacity as her guardian. See *Sandell v Jacobs* 1970 (4) SA 630 (SWA). And so, irrespective of whether or not she is assisted by her husband, the wife is the wrong person to sue or be sued *(Pretorius* v *Hack* 1925 TPD 643). There are, however, exceptions to the general rule, for instance, a *publica mercatrix* (public trader) has *locus standi in judicio* in all matters concerning her trade, business or profession and may sue or be sued in her own name without her husband's assistance: *SA Mutual Fire & General Insurance Co Ltd* v *Bali* NO 1970 (2) SA 696 (A) at 710.

Relying on the common law, Mr Heathcote contends (subject to a few exceptions which, it is said, are inapplicable to this case) that the appellant, being a woman married in community of property, cannot be sued for a contractual debt, not even if she were duly assisted by her husband, on the ground that she has no *locus standi.* It is further contended that the common law was still applicable at the time that the agreement was entered into, and when the respondent's cause of action arose. Consequently, the contention goes on, the Married Persons Equality Act, Act No. 1 of 1996 (hereafter referred to as the Act) which came into force on July 15, 1996, is not applicable to this case, on account of section 2(2) of the Act which provides that -

> "2.(2) The abolition of the marital power by paragraph (b) of the subsection (1) shall

not affect the legal consequences of any act done or omission or fact existing before such abolition."

In his response, Mr Frank, for the respondent, submits, *inter alia*, that the appellant could be sued pursuant to section 9(5) of the Act as the summons was issued when the Act was already in operation. Furthermore, Mr Frank continues, the constitution in effect abolished the marital power in terms of Articles 10, 14 and 16.

In the first place, I propose to examine the provisions of the Supreme Law which came into force in February 1990. The relevant articles, which have already been enumerated, relate to Equality and Freedom from Discrimination (Art. 10); Family (Art. 14); and Property (Art. 16). These Articles read (in so far as they are relevant):

"10(1) All persons shall be equal before the law.

(2) No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or ecomic status."

"14(1) Men and women of full age, without any limitation due to race ... shall have the right to marry and found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.

5) ...

6) ..."

"16(1) All person shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs and legatees ... (2) ..."

(emphasis is provided). These constitutional provisions will now be looked at closely.

Article 10(1) provides for the principle of equality before the law and confers the right to equal protection and benefit of the law which right is primarily concerned with differentiation; whereas Article 10(2) prohibits various types of discrimination, including discrimination on the basis of sex. These two Sub-Articles have recently been the subject of interpretation by the Supreme Court in the case of Michael Andreas Miiller v The President of the Republic of Namibia and the Minister of Home Affairs Case No. 2/98 (yet unreported). There, the Court observed that the approach of our Courts towards Article 10 of the Constitution should be as follows:

(a) ARTICLE 10(1)

(The exposition of the Sub-Article concerned an impugned piece of legislation and is for this reason inapt for the purposes of the present case).

(b) ARTICLE 10(2)

The steps to be taken in regard to this sub-article are to determine -

(i) whether there exists a differentiation between people or categories of people;

(ii) whether such differentiation is based on one of the enumerated grounds set out in the Sub-Article;

(iii) whether such differentiation amounts to discrimination against such people or categories of people; and

(iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of Article 23 of the Constitution.

An examination of (i), (ii), (iii) and (iv) under (b) above, vis-a-vis the case under consideration, unmistakably evinces that there is a marked differentiation between husband and wife; that the differentiation amounts to discrimination against the wife on the basis of sex; and that the differentiation (not being consonant with the anti-apartheid and the pro- affirmative action provisions of Article 23) is unconstitutional.

Article 16 does not only guarantee the right of men and women to marry without let or hindrance, but it also promotes sex equality by guaranteeing spouses' entitlement "to equal rights as to marriage, during marriage and at its dissolution." This Article distinctly outlaws any sex-based discrimination, as does Article 10(2).

In any event, I would venture to say (although this has not been ventilated in argument), that discrimination which impinges upon human dignity violates Article 8(1) which guarantees respect for human dignity. See *Kauesa v Minister of Home Affairs*, Case No. A 125/94 (unreported at p.51); *Prinsloo* v *van der Linde* 1997(3) SA 1012 (CC); *Thomas Namunjepo and Others v The Commanding Officer, Windhoek Prison and The Minister of Prisons and Correctional Services*, Case No SA 3/98.

It is important to recognise that inherent human dignity is at the heart of human rights in a free and democratic society. As O'Regan, J., aptly observed in *S v Makwanyane*, 1995 (3) S 391 (CC); 1995(6) BCLR 665 (CC):

> "Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worth of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched ..."

Indeed the right to equality is premised on the notion that every person possesses equal human dignity.

Drawing comfort from Article 66, which makes provision for Customary and Common Law, Mr Heathcote argues that Common Law rules relevant to this matter survived until their abolition by section 2(2) of the Married Persons and Equality Act, supra.

Mr Frank, however, submits that at Independence, and with the coming into force of the Constitution, the common law, which had limited the legal capacity of women married in community of property, was abolished by the Constitution.

In order to determine whether or not the relevant common law rules survived the Constitution, it is necessary to look at Article 66 which reads:

> "66(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.
>
> (2) Subject to the terms of the Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods."

As we are here concerned only with the common law, my observations will naturally be confined to this branch of the law.

Articles 66(1) makes it quite clear that for any rule of the common law of Namibia in force at the time of Independence to have remained valid, it must not have fallen foul of the Constitution or any other statutory law. The question which immediately arises is whether the common law rule in question did or did not violate the Constitution. In the light of what has already been discussed above, the categorical answer is that the Constitution was violated with the result that the said common law rule at once became unconstitutional.

The clear picture that emerges is that the common law rule that made women married in community of property victims of incapacity to sue or be sued was swept away by the

Constitution at Independence. Further, the promulgation of the Married Persons Equality Act is, in my view, not only a re-affirmation of the Constitutional abolition of discrimination based on sex, as an *abundante cautela* legislative measure for the avoidance of doubt, but that it is also designed to give content to the Affirmative Action provisions of Article 23(2) and (3); and to the Principles of State Policy pertaining to the promotion of the welfare of the people, as enshrined in Article 95(a), whose goal is the enactment of legislation to ensure equality of opportunity for women who have hitherto been the victims of special discrimination; and the advancement of persons within Namibia (inclusive of women) who have been socially, economically or educationally disadvantaged by the legacy of past discriminatory laws and/or practices. Another part of the picture is that women married in community of property have *locus standi* to sue or be sued. It follows, therefore, that the learned trial judge did not err in his finding that the appellant had *locus standi.*

In consequence, I find it unnecessary to consider in any detail the second ground of appeal as to whether the appellant is a *publico mercatrix,* since this is now merely of academic interest. However, it suffices to say that if it were not for the fact that I have found that the Constitution clothed the appellant with *locus standi* to sue or be sued, I would inevitably have come to the conclusion that, on the facts of the case, she evidently fits the bill of a *publico mercatrix.*

As regards the third ground of appeal, to wit, that the allegation that the appellant is a *publico mercatrix* should have been reflected in the Respondent's Particulars of

Claim, and confirmed on oath in a verifying affidavit, this is now completely redundant in view of what has been said concerning the first ground.

There is a further ground of appeal which hinges on the appellant's counterclaim. The ground states that the learned Judge held that the appellant had not complied with the provisions of Rule 32 in setting out her defence (i.e., counterclaim) to the respondent's claim in that (although the Learned Judge found that there was evidence that the respondent had interfered with the contractual rights of the appellant's husband, he held that there was no evidence of a contractual relationship between the appellant and the respondent, whereas there was a contractual relationship in the form *ofastipulatio alteri* between the appellant and her husband and/or the respondent.

The appellant's defence (counterclaim) was grounded on the following (paraphrased) facts:

Having entered into sale agreements with the respondent, she was obliged to insure a truck and trailer ("vehicle") that she had purchased. She then arranged for insurance cover of the vehicle by allowing her husband to add it to his (company's) list of vehicles that he kept insured. During or about April 1995, the respondent withdrew her husband's overdraft facility on his current account with immediate effect. The insurance company (FGI Namibia) then cancelled her husband's insurance policy in respect of the vehicles previously insured by it. Her husband was unable to obtain any insurance with regard to the aforesaid vehicle, or to arrange for alternative insurance in respect of the vehicles that she had to insure. In her husband's affidavit, he deposed that he verily believed that his inability to effect alternative insurance was due to some action taken by the respondent.

Subsequent to this, her vehicle was involved in a collision with the result that it was irreparably damaged, the damage being in excess of N$ 150,000.00.

It is not in dispute that the respondent did interfere with the contractual rights of the appellant's husband, and the Court *a quo* so found. What is in issue is whether the respondent interfered with the appellant's contractual rights.

Mr Heathcote submits that the evidence deposed to by the appellant's husband and confirmed by her, clearly indicates that the respondent interfered with the appellant's right to claim from the insurance company. He goes on to say that the fact that the husband insured the vehicle on his insurance policy and paid the insurance premium is of no consequence. For this reason, it is submitted that a *bona fide* defence (in the form of a counterclaim) exists which should be adjudicated upon simultaneously with the claim in convention.

Mr Frank's reply, which, on the facts, is well founded, is that best, the appellant's husband could only say that he verily believed that the respondent's conduct caused his inability to arrange for alternative insurance in respect of the appellant's vehicle and that the husband's belief is no basis for a counterclaim. "Even if he were to establish his belief, that belief, by itself, would not constitute a defence": *Caltex Oil SA Limited v Webb and Another,* 1965 (2) SA 914 (N) at 917H. The fact that the appellant confirms the husband's affidavit is to no avail.

To be able to proceed with the counterclaim, all that the appellant was required to do was to show that, as a result of the respondent's conduct, she (and not her

husband) had not been able to obtain an alternative insurance cover for her vehicle. This she lamentably failed to do. It was not enough to prove that the respondent had interfered with the husband's

contractual rights. Indeed, Mr Heathcote properly concedes that there was nothing to stop the appellant from insuring her vehicle with another insurance company.

Obviously, there is no factual basis in support of the alleged counterclaim and so the Court *a quo* did not fall into error in its finding that the respondent had not interfered with the appellant's contractual rights.

The final ground of appeal is that the Learned Judge erred in not exercising his discretion in favour of the appellant in that (1) there is indeed a contractual relationship to be inferred from the alleged facts between the appellant and the respondent; and/or (2) that the appellant can still raise a plea of prescription against the respondent's claim (in part or as a whole).

As for the first part of this ground, it is uncalled for to consider it in any detail in view of what I have held in respect of the penultimate ground, save to say that there are, in reality, no facts from which the inference sought can be drawn.

Coming to the last part of the ground, Mr Heathcote argues at the outset that although the point of prescription was not specifically raised in the opposing affidavits of the appellant, it is a specific ground of appeal and that, regard being had to the particular nature and procedure in summary judgment proceedings, the Court is clearly able and bound to deal with the issue. To prop up his submission, he draws attention to the case *of Cole v Government of the Union of South Africa,* 1910 AD 263 and to section 17 of the Prescription Act, No 68 of 1969 which reads:

"17 PRESCRIPTION TO BE RAISED IN PLEADINGS

party to litigation who invoke prescription shall do so in the relevant document filed of record in the proceedings; provided that a court may allow prescription to be raised at any stage of the proceedings."

Mr Heathcote points out that the first instalment became due, owing and payable, on November 21, 1993; that no payment had been made for the period February 1994; and that the summons was served between February 10 and April 21, 1997 - a period of more than 3 years after the cause of action was completed and the debt became due and payable.

7) A court shall not of its own motion take notice of prescription.

Mr Frank's reaction is that the question of prescription is a desperate attempt by the appellant to avoid summary judgment, and that this is being raised for the first time on appeal. The Court *a quo*, he continues, did not deal with it as this was not raised at the appellant's trial and so the Court could not, in any event, deal with it *mero motu.*

Mr Frank contends that the appellant's attempt to raise this issue on the basis of the late payment of the first instalment, although ingenious, is clearly fallacious and ignores that the fact that the latter payments took place, thereby indicating an acceptance of her indebtedness; and also ignores the fact that even in these proceedings, it is admitted that the appellant is indebted to the respondent in terms of the loan agreement already referred to, the only issue being the amount of indebtedness. As the running of prescription is interrupted by an express or tacit acknowledgement of liability by the Debtor and begins to run afresh from the day of such acknowledgement, it is clear that the defence of prescription is of no avail

8) A

to her. See section 14 of the Prescription Act. Referring to Annexure "B" to the particulars of claim, Mr Heathcote shows that interest was paid; instalments were paid; and so also were the

arrears. It is thus clear, he asserts, that these payments, as well as the admission of liability, destroy any hope that the appellant may have in raising this defence.

In *Cole's* case already referred to, it was observed that -

> "The duty on an appellate tribunal is to ascertain whether the Court below came to the correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves not unfairness to the party against whom it is directed, the court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset."

I am in agreement with the observations made in that case. In the present matter, it is common cause that the defence of prescription is not covered by the pleadings. Further, facts upon which the legal point depends are not common cause neither are they clear beyond doubt. There is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. As I see it, consideration of the legal point on appeal would, in all probability, cause

unfairnes s to the respondent. ***Cassim*** v ***Kadir,*** 1962 (2) SA 473 (N) at 478 is to be contrasted.

Having considered the submissions given by both learned counsel on the point under discussion, I find a great deal of merit in what Mr Frank has had to say. In any event, Mr Heathcote concedes, properly in my view, that the defence of prescription is weak. In the circumstances (inclusive of what has been said in the preceding paragraph), it is unavoidable that the defence of prescription must fail.

In conclusion, I make the following order:

the appeal is dismissed with costs.

SILUNGWE, J.

I agree.

TEEK, J.P.

I agree.

<u>ON BEHALF OF THE APPELLANT</u>	**ADV R HEATHCOTE**
Instructed by:	**Van Wyk, Maritz & Partners**

<u>ON BEHALF</u>	**<u>RESPOND</u>**	**Instructed by:**	**SC PF Koep**
<u>OF THE</u>	**<u>ENT</u>**	**ADV T FRANK**	**& Co**