



REPORTABLE

CASE NO: SA 17/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MALAKIA LUKAS NAKUUMBA

Appellant

and

LINDA IPINGE

First Respondent

FRIEDA NAKUUMBA

Second Respondent

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: 15 November 2021

Delivered: 1 March 2022

Summary: A businessman, Mr Nakuumba, whilst lawfully married in community of property to the first woman (Ms Ipinge), entered into an adulterous relationship with the second woman (Ms Nakuumba) and subsequently purported to marry the latter without divorcing Ms Ipinge. He cohabited with Ms Nakuumba for some 37 years and lived with and made home with her as if they were married and raised a large family, she being the main care giver of the children including those sired by Mr Nakuumba with other women. When he sought to evict Ms Nakuumba from a common home, she counter sued him - claiming that she was his universal partner in the substantial estate

he had amassed. Ms Ipinge who throughout that time remained married to Mr Nakuumba was not cited in the universal partnership proceedings. The High Court found in favour of Ms Nakuumba, holding that she was an equal partner in the estate built up by Mr Nakuumba. The court *a quo* then ordered an equal division of the universal partnership estate it found existed between Ms Nakuumba and Mr Nakuumba.

Ms Ipinge in the meantime sued Mr Nakuumba for divorce and sought an order that the marriage, contracted in the north of Namibia and therefore subject to s 17(6) of the Native Administration Proclamation 15 of 1928 was a marriage in community of property. Ms Nakuumba was not cited in those divorce proceedings. The High Court granted an order of divorce, held that the marriage was in community of property and ordered a division of the joint estate.

Mr Nakuumba challenged both outcomes on appeal to the Supreme Court. The universal partnership appeal was heard first. The Supreme Court upheld the High Court's order of a universal partnership in favour of Ms Nakuumba but excluded certain properties separately owned by the partners and not forming part of the universal partnership.

On appeal to the Supreme Court in respect of the outcome of the divorce proceedings, it was submitted on behalf of Mr Nakuumba that the universal partnership order ought not to have been granted without the participation of Ms Ipinge who remained married in community of property to Mr Nakuumba; that since neither woman was a party to proceedings involving the other, neither was bound by the outcome of the proceedings in which she did not participate; that the failure to join Ms Ipinge to the universal partnership proceedings made those a nullity; that a universal partnership with a man lawfully married to another woman in community of property was not possible in law – a proposition based on a first instance decision of a provincial division of the High Court of South Africa. Based on these alleged irregularities, the Supreme Court was asked to permit Mr Nakuumba to file an application to reverse its earlier decision in the universal partnership dispute in terms of art 81 of the Namibian Constitution; and if that succeeds, to review and set aside the High Court's order in the divorce

proceedings and that both the universal partnership dispute and the divorce action be remitted to the High Court to be heard afresh in a consolidated action.

Having permitted Mr Nakuumba to file an art 81 application and a review in terms of s16 of the High Court Act 16 of 1990, the Supreme Court rejected the proposition that a universal partnership was not legally competent on the facts of this case, that there was no manifest injustice occasioned to either party to justify invocation of art 81 and that since it was dependent on a finding that the universal partnership proceedings were a nullity, the relief seeking review of the divorce proceedings fell away; that the appeal against the divorce order had no merit and fell to be dismissed.

Mr Nakuumba ordered to pay costs in the application and the appeal.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA and HOFF JA concurring):

Introduction

[1] The matter before us is in two parts. The first is an application for this court to review and set aside its earlier decision now reported as *MN v FN* 2019 (4) NR 1176 (SC) (the application). That matter came as an appeal to this court from a judgment and order of the High Court (Van Wyk AJ) in consolidated case No. I 450/2015. The second is an appeal against a judgment and order of the High Court (Angula AJ) in the case of *Ipinge v Nakuumba & another* (I 1833-2011) [2020] NAHCMD 45 (11 February 2020) (the appeal).

[2] The parties to the application are a man, Mr Nakuumba, as applicant, and two women - one of whom (Ms Ipinge) he was lawfully married to at some point; and the other a woman (Ms Nakuumba) he cohabited with and entered into a bigamous marriage with whilst married to the first mentioned woman.

[3] The parties to the appeal are Mr Nakuumba and Ms Ipinge who had sued him for divorce and obtained an order from the High Court declaring their marriage to be in community of property.

[4] The application is a sequel to an order of this court (Damaseb DCJ, Mainga JA and Hoff JA) given on 9 June 2021 when the appeal was called before this court - with reasons in *Nakuumba v Ipinge* (SA17-2020) [2021] NASC (14 June 2021) inviting Mr Nakuumba to, at his instigation, by application:

[4] . . . set out the grounds [on] which he concludes that the judgement of this court reported as *MN v FN* 2019 (4) NR 1175 (SC) should be set aside in terms of article 81 of the Namibian Constitution.

[5] Simultaneously [to] . . . set out the grounds [on] which he seeks to set aside the judgment of the High Court in case number I 1833/11 handed down on 11 February 2020, in terms of section 16 of the Supreme Court Act 1990.'

[5] In the way proceedings evolved, it was clear that if Mr Nakuumba fails in his bid to have this court revisit its impugned decision, the appeal, which was 'stood down to a future date' on 9 June 2021, will have to be determined as it was ripe for hearing, both sets of heads of argument having been filed.

Litigation history

[6] After having cohabited with her since 1976, in 1988 Mr Nakuumba entered into an invalid marriage with Ms Nakuumba whilst he was still lawfully married to Ms Ipinge since 1970. In other words, Mr Nakuumba had lived together with Ms Ipinge as husband and wife only for a period of about six years.

[7] Relying on that invalid marriage and her personal contribution over 37 years to the business success of Mr Nakuumba, Ms Nakuumba instituted proceedings in the High Court in 2015 seeking a declarator for the existence of a universal partnership between her and Mr Nakuumba and an equal division of the universal partnership assets between them. The High Court (Van Wyk AJ) granted a declarator confirming the existence of a universal partnership and ordered division of the partnership assets in equal shares. On appeal by Mr Nakuumba against that order, this court on 15 November 2019¹ made an order in the following terms:

- (a) A universal partnership had come into existence between the appellant and the respondent from the date of their cohabitation in 1976.
- (b) The universal partnership between the appellant and the respondent is dissolved as from the date of this order.
- (c) The specific assets identified in this judgment as such shall fall within the personal ownership of the individual parties.
- (d) The property of the universal partnership shall exclude the assets determined in para (c) of this order.
- (e) The sole ownership in the property, to wit Erf 353 Oshakati is confirmed by this order to vest in the respondent from the date of this order.
- (f) The Director of the Law Society or her representative is hereby appointed receiver from the date of this order and shall within 90 days of such date effect the equal division of the universal partnership property determined in para (d) of this order.
- (g) The receiver shall determine an equitable and reasonable process to ensure the respondent's access to Erf 353 Oshakati including that the transfer of sole ownership in the property is effected forthwith.

¹ *MN v FN* 2019 (4) NR 1176 (SC) at 1206A-F (hereafter '*MN v FN*').

- (h) The receiver shall make an award effecting the equal division of the universal partnership property and submit such award to the High Court within 14 days of the date of the award for confirmation as an order of court.
- (i) The costs of the receiver shall be on the account of the universal partnership property.
- (j) Costs in this matter, occasioned by one instructing and one instructed legal practitioner are granted to the respondent.'

[8] In the proceedings that resulted in that order, Ms Ipinge was not a party.

[9] In summary, Ms Nakuumba was successful in proving a universal partnership against Mr Nakuumba while Ms Ipinge established that she was married in community of property to him.

[10] Mr Nakuumba contests both outcomes. The result he ultimately seeks is that there was no universal partnership with Ms Nakuumba and that he was not married in community of property to Ms Ipinge. That is what is at the heart of this long-drawn out litigation which seeks both a reversal of this court's previous decision in favour of Ms Nakuumba and the High Court's finding that he was married in community of property to Ms Ipinge.

The appeal

[11] The appeal arose from an order of the High Court that:

- '(a) The marriage between the plaintiff [Ms Ipinge] and the defendant [Mr Nakuumba] is hereby dissolved and a final order of divorce is granted.

- (b) Division of the joint estate.
- (c) Forfeiture of the benefits arising from the marriage in community of property in favour of the plaintiff.
- (d) That Mrs Essie Herbst is hereby appointed as Receiver for the purpose of taking all steps necessary to give effect to the order of division of the joint estate and the general forfeiture order with the powers, rights and functions as provided for in the plaintiff's amended particulars of claim.
- (e) The defendant bears the costs of the appointment of the Receiver.
- (f) The defendant to pay plaintiff's costs of suit, which costs includes the costs of one instructing and one instructed counsel.'

[12] Mr Nakuumba noted an appeal against that order and his principal complaint is that the learned judge *a quo* misdirected herself in holding that the marriage between him and Ms Ipinge was in community of property.

Art 81 and s 16 of the High Court Act invoked

[13] When the appeal was called before us, Mr Heathcote on behalf of Mr Nakuumba argued that if this court on appeal were to confirm that his client's marriage to Ms Ipinge was in community of property, it will affect Ms Nakuumba's rights under the universal partnership as upheld by this court in *MN v FN*. On the other hand, Mr Heathcote added, since Ms Ipinge was not a party to the *MN v FN* proceedings and in so far as the legal conclusion therein may affect her rights, she cannot be bound by the decision of this court in that case. Conversely, assuming she was not properly served although cited, Ms Nakuumba cannot, on the same juridical basis, be bound by a finding adverse to her rights in the appeal.

[14] The alleged potential conflicts advanced on behalf of Mr Nakuumba were mooted for the first time in the heads of argument on appeal and persisted with in oral argument. It was contended on his behalf that, because of the potential conflicts, the appeal should not be heard and that this court first considers an anterior question: whether the Supreme Court's judgment in *MN v FN* should be revisited given the possibility that it might confirm the High Court's conclusion that Mr Nakuumba's marriage to Ms Ipinge is in community of property.

[15] The Supreme Court was thus invited on behalf of Mr Nakuumba to consider setting aside its previous decision in *MN v FN* on the premise that allowing it to stand might result in an injustice.

[16] At the hearing of the appeal, Mr Boesak who appeared for Ms Ipinge shared the concern raised by Mr Heathcote about the potential conflicts. But more importantly, since Ms Nakuumba was not a participant in the appeal, she had had no opportunity to address the court on whether a judgment in which she is a beneficiary should be set aside.

[17] Taking into account the parties' submissions on appeal, we were satisfied that to determine the merits of the reliance on art 81 at the hearing of the appeal would not be a path that leads to justice. Instead, we considered it to be in the interest of justice, especially because the parties made common cause, that Mr Nakuumba be afforded the opportunity to properly ventilate the concerns he had about the potential conflicts arising from this court's decision in *MN v FN* and the consequences of a marriage in community of property in the event that the court *a quo's* finding is upheld on the appeal.

[18] It was for those reasons that we decided not to hear the appeal on the merits on 9 June 2021 and to allow Mr Nakuumba to lay the factual and legal basis on affidavit for a proper and comprehensive consideration of the legal issues as between him and Ms Ipinge and Ms Nakuumba.

The application

[19] On 21 July 2021, Mr Nakuumba filed an application seeking the following relief:

- '(a) An order that the above Honourable Court invokes its powers pursuant to Article 81 of the Namibian Constitution to reverse its decision in *MN v FN* Case No. SA 28/2017 (now reported under case *MN v FN* 2019 (4) NR 1175 (SC)), which was rendered on 15 November 2019, on the basis that it is a nullity;
- (b) In the event that the order in prayer 1 above is granted, that the above Honourable Court, pursuant to the provisions of Section 16 of the Supreme Court Act, 1990 review and set aside the decisions of the High Court in Case No. I 1833/2011, per her ladyship Angula AJ, delivered on 11 February 2020, and Case No. I 450/2015 and per her ladyship Van Wyk AJ, delivered on 21 April 2017;
- (c) That both cases referred to in prayer 2 above be remitted to the High Court for trial *de novo* as consolidated matters before a Judge other than the Judges who rendered those decision;
- (d) Further and/or alternative relief.'

Pleadings in the application

[20] Mr Naakumba's core complaint in the application is that the universal partnership dispute and the divorce action should have been heard in one proceeding. He contends that such failure resulted in a failure of justice. He asserts that since neither woman participated in proceedings involving the other, neither is bound by the

outcome of the case in which she was not a party. In fact, he maintains, the failure of the courts (both *a quo* and on appeal) to ensure that Ms Ipinge who was lawfully married to him was made party to the universal partnership dispute, rendered those proceedings a nullity and of no force and effect.

[21] Mr Nakuumba also points to what he considers to be a potential conflict arising if there were two judgments of this court having a bearing on his estate - one finding a universal partnership and the other that he was married in community of property. The gravamen of this complaint is that the liquidators of the two (different) estates would be required to lay claim to the same assets creating legal uncertainty as to who was entitled to what assets.

[22] In her filings, Ms Ipinge made common cause with Mr Nakuumba as to the legal impossibility of a universal partnership whilst there was an extant marriage in community of property between her and Mr Nakuumba. According to Ms Ipinge, Ms Nakuumba could not in law lay claim to the joint estate between her and Mr Nakuumba and that Ms Nakuumba could only lay claim to Mr Nakuumba's half-share of the joint estate in community of property.

[23] Ms Nakuumba too opposed the application and relies exclusively on points of law to defeat the application. These are *locus standi*, foundational failure, hypothetical, premature and academic. These will be set out *seriatim*.

[24] Ms Nakuumba maintains that Mr Nakuumba has no *locus standi* to seek relief relying on a legal interest possibly enjoyed by Ms Ipinge in the universal partnership dispute. On this view, since Ms Ipinge had not brought an application asserting the

alleged legal interest, *locus standi* cannot in law arise by proxy or in the form of a derivative action of the kind launched by Mr Nakuumba. According to Ms Nakuumba, in so far as he seeks to predicate his application on Ms Ipinge's interests, Mr Nakuumba failed to show a 'direct and substantial interest' in the subject matter and the outcome of the application.

[25] Ms Nakuumba also states that Mr Nakuumba's reliance on 'nullity' of the Supreme Court's order in the universal partnership dispute is misplaced as the court was fully aware of the earlier marriage and that the matter was litigated by the parties with that full knowledge.

[26] Ms Nakuumba further avers that the application was launched on the assumption that this court might dismiss the appeal and uphold the High Court's finding that the marriage was in community of property. According to Ms Nakuumba, until that happens, the perceived conflict is hypothetical and premature.

The foundation for the art 81 application

[27] According to art 81 of the Constitution:

'A decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.'

[28] Apart from the allegation that the impugned proceedings in *MN v FN* are a nullity *ab initio* Mr Nakuumba's art 81 application is anchored on the allegation that both the High Court and this court - fully aware that there was a potential marriage in community of property - proceeded to determine the matter. It is suggested that in

both for the proceedings should have been halted, the universal partnership dispute and the divorce action consolidated into one action and the respective claims and interests of the parties determined comprehensively and once - so as to avoid conflicting findings of fact and law.

Test for art 81

[29] It is necessary that I point out at the outset that the art 81 reversal power is not an appeal. It is not aimed at correcting decisions of the Supreme Court which are later found to be wrong. The power exists to correct cases of serious injustice occasioned to parties through no fault of their own. It is now trite that for the court to invoke its art 81 reversal power it must be satisfied that its earlier decision was demonstrably a wrong application of the law to the facts which resulted in an indefensible and manifest injustice.²

[30] This approach accords broadly with comparable jurisdictions as discussed in *Likanyi*. It was more recently restated by the United Kingdom Supreme Court in *Her Majesty's Attorney General v Crosland*³ where the court observed in relation to its decisions which are alleged to have been vitiated by unfair procedural error:

' . . . as exemplified by *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, and described by Lord Browne-Wilkinson at p 132D-F . . . this exceptional power to revisit or review is not an appeal. It is limited to serious procedural error (in that case apparent bias) and admits no challenge to findings of law or fact, or the egregious exercise of discretion.'

Submissions in the application

² *S v Likanyi* 2017 (3) NR 771 (SC) paras [53], [58] - [59] (hereafter '*Likanyi*').

³ [2021] UKSC 58 para 35.

[31] On behalf of Mr Nakuumba, Mr Heathcote argued that the judgment in *MN v FN* clearly implicates the rights sought to be asserted by Ms Ipinge in the appeal as there can clearly not be a universal partnership between Mr Nakuumba and Ms Nakuumba, in the event of a finding that the marriage between Ms Ipinge and Mr Nakuumba was in community of property. That, it is said, is a legal impossibility, unless some of Mr Nakuumba's is somehow excluded from the joint estate and the alleged universal partnership is in respect of that property only. Counsel submitted that the incongruous situation looms large on the horizon in the appeal, considering the judgment in *MN v FN*.

[32] Mr Heathcote contended that the only manner in which the inevitable conflict can be undone is if all three parties are heard in the same proceeding and the respective claims of the parties determined comprehensively.

[33] On behalf of Ms Ipinge, Mr Boesak submitted that the decision in *MN v FN* is a nullity and therefore should be set aside because Ms Ipinge who had a direct and substantial interest in the order sought there was not served.

[34] Mr Boesak echoed Mr Heathcote's submission that a universal partnership could not in law have eventuated in favour of Ms Nakuumba because of Ms Ipinge's pre-existing marriage in community of property to Mr Nakuumba.

[35] For their submissions, both Mr Heathcote and Mr Boesak placed great store by the South African High Court decision in *Zulu v Zulu & others*⁴, where it was held that

⁴ 2008 (4) SA 12 (D).

the pre-existence of a valid marriage in community of property would render a subsequent universal partnership impossible in law.

[36] Ms Ipinge supports Mr Nakuumba's posture that this court in *MN v FN* erred in finding a universal partnership in favour of Ms Nakuumba and that, consequently, it must be reversed and set aside. The only difference is that Ms Ipinge's counsel did not support the order sought on behalf of Mr Nakuumba that the High Court's order declaring that she was married in community of property to Mr Nakuumba be reviewed and set aside in terms of s 16 of the Supreme Court Act 16 of 1990.

[37] Mr Marais for Ms Nakuumba did not support the *ratio* in *Zulu*. According to counsel, if the reasoning in *Zulu* is followed, a first marriage in community of property would effectively preclude proof of a universal partnership. It would also mean that there can be no universal partnership or putative marriages in cohabitation relationships which co-exist with marriages in community of property because property which already forms part of a joint marital estate cannot form part of a universal partnership with another person. Counsel added that the approach in *Zulu* is clearly wrong and that the circumstances in *MN v FN* were not unique and going forward parties that find themselves in that type of relationship need to be protected.

[38] Mr Marais concluded that the judgment in favour of Ms Nakuumba is far from a nullity and that, if Ms Ipinge had any claim or remedy, such lies against Mr Nakuumba (and not Ms Nakuumba) and is limited to Mr Nakuumba's half-share in the universal partnership estate taking into consideration his share of the partnership, once divided and distributed.

Art 81 application considered

[39] It must be apparent that the main ground on which this court is asked to reverse its previous decision is that its finding of a universal partnership in *MN v FN* is in law incongruous with the existence of a marriage in community of property between a purported universal partner and a third party. That view is supported by Ms Ipinge. The authority for that proposition is two first instance decisions - from South Africa⁵ and Namibia,⁶ the latter following its SA counterpart.

[40] The facts of *Zulu* are not dissimilar to the facts of the universal partnership dispute. In *Zulu*, a woman who lived in a bigamous relationship with a man already married in community of property to another woman – being made to believe that he was unmarried - upon the death of the man claimed that she had because of the cohabitation formed a universal partnership with the man. She wanted to share in the assets of the joint estate the man jointly owned with another woman by virtue of a marriage in community of property.

[41] In *Zulu*, Hugo J was alive to the fact that the issue was one of first impression. Hugo J's *ratio* is captured in the following passage (at 15H-J and 16A-D):

'The applicant also alleges that she and the deceased intended to form a universal partnership. With regard to the partnership, the essential elements of a partnership are:

- (a) That each of the partners brings something into the partnership, or binds himself/herself to bring something into it, whether it be money, or labour or skill;
- (b) that the business should be carried on for the joint benefit of both parties;

⁵ *Zulu case*.

⁶ *S v S* 2011 (1) NR 144 (HC).

(c) that the object should be to make profit; and

(d) that the contract between the parties should be a legitimate contract.

In order for the agreement of partnership to be valid all four requirements must be met. As the deceased was previously married in community of property, the contract between himself and the applicant was not lawful and the deceased must have been aware of same. Therefore not only would the contract of partnership have lacked an essential element, namely that it must be lawful, the deceased could never have intended to create a community of property or a universal partnership with the applicant. There is also no proven object to make a profit. In the circumstances no universal partnership and no community estate existed between the applicant and the deceased.

In our law where a spouse is induced to enter into a void marriage when unbeknown to such spouse the marriage is void, such a spouse has a right to claim damages resulting from such inducement. See *Snyman v Snyman* 1984 (4) SA 262 (W). In the circumstances the only claim which the applicant could have against the estate of the deceased is a claim for damages.' (My underlining).

[42] I wish to make some comments on *Zulu*. It is suggested there that because the husband was married in community of property he could not form a universal partnership. In other words, that the pre-existing marriage in community of property rendered another contract unlawful. But why? I can understand why the husband could not enter into another marriage purporting to be in community because bigamy is a crime.

[43] But on our facts why could Mr Nakuumba not, whilst cohabiting with Ms Nakuumba, in respect of the joint assets with the wife, form a partnership with Ms Nakuumba if under the existing common law he could alienate the assets jointly owned with the wife in community of property?

[44] In 1976 when Ms Nakuumba's universal partnership came into existence, Ms Ipinge who was married to Mr Nakuumba in community of property, was subject to his marital power in terms of the common law. The marital power of a husband over the wife married in community of property was only abolished in 1996 by s 2(1)(b) of the Married Persons Equality Act 1 of 1996 (the MPEA). Subsec (2) of s 2 states that 'The abolition of the marital power by paragraph (b) of subsec (1) shall not affect the legal consequences of any act done or omission or fact existing before such abolition.'

[45] The suggestion that a marriage in community of property precludes a universal partnership is difficult to reconcile with the concession that a person in the shoes of Ms Nakuumba has, as postulated in *Zulu* and supported by Mr Nakuumba and Ms Ipinge in these proceedings, a damages claim. If she has a claim for damages it is against the joint estate⁷. If she has a contractual claim the innocent spouse is equally liable. Happily, this unfortunate state of affairs - as concerns contracts entered into by an errant spouse - has since been ameliorated by s 7 of the MPEA which now requires spousal consent for alienation of joint property of spouses married in community of property.

[46] Whichever way one approaches the matter, I am not persuaded that there is a practical difference between the damages claim adumbrated in *Zulu* and *S v S* and reliance on a universal partnership against a person married to another in community of property. *Zulu* is rather short on the reasons for the proposition that a universal partnership agreement is 'unlawful' when a person alleged to have entered into it is already married in community of property.

⁷ *Boedelscheiding* is not part of our law, See paras [54] – [57] below.

[47] How does the illegality arise as suggested in *Zulu*? Carried to its logical conclusion, the *ratio* of *Zulu* implies that if a marriage is out of community of property, there would be no obstacle to a spouse to a putative marriage forming a universal partnership with a person with whom he or she is in an adulterous (bigamous) marriage. In other words, because the spouses have separate estates and the interests in the universal partnership of the third party attaches only to the separate estate of the philandering spouse.

[48] For us to make sense of *Zulu*, it has to be accepted that it is not the fact of the pre-existing marriage but the nature of the marital regime that renders the universal partnership unlawful. That reasoning is not persuasive where (as in Ms Ipinge's case) a husband married in community of property was competent to deal with the assets of the joint estate (including the wife's half share) even to her prejudice.

[49] A debt against a joint estate could be contractual or delictual. I therefore propose to consider what the law is as regards the liability of spouses married in community of property for debts incurred by the other spouse. That exercise will demonstrate the practical inutility between the proposed damages claim and the reliance on the contractual claim of a universal partnership.

[50] Implied in the solution proposed in *Zulu* and *S v S* is the premise that the innocent spouse to a valid in community of property marriage is not liable for the debts (contractual or delictual) incurred by the guilty bigamous spouse. That premise becomes unsustainable if the innocent spouse married in community of property is

jointly liable with the philandering spouse for what in *Zulu* and its Namibian counterpart *S v S* is referred to as 'damages'.

Contractual damages

[51] It is common ground that Ms Nakuumba placed reliance on a universal partnership that she formed with Mr Nakuumba in or about 1976. Since at that time Mr Nakuumba and Ms Ipinge were married in community of property, the latter was subject to his marital power which made him competent under the common law to bind the joint estate.

[52] In the context of a marriage in community of property, the marital power is a husband's legal power over his wife and her property in a civil marriage. By virtue of the marital power a husband could, without his wife's knowledge or consent, alienate or encumber property, moveable or immovable, which forms part of the joint estate. The universal partnership relied on by Ms Nakuumba predates 1996 and the marital power over the person and property of the wife was only repealed in 1996.

[53] The effect of the above is that Mr Nakuumba was not barred in law to represent the joint estate with Ms Ipinge in concluding the universal partnership in 1976. This fact is irreconcilable with the suggestion that it was unlawful for Mr Nakuumba and Ms Nakuumba to form a universal partnership.

Delictual damages

[54] It will be recalled that the *ratio* in *Zulu* relied on by Mr Nakuumba and Ms Ipinge is that Ms Nakuumba's recourse is a claim for delictual damages. For a very long time there raged a very intense academic debate about the liability of an innocent spouse

in a marriage in community of property for the delicts committed by the other spouse. That debate, which is today of academic interest only, is neatly captured by Hahlo in his 4th edition of *The South African Law of Husband and Wife* (at p230-238). Suffice it to say that academic opinion is broadly split into two schools of thought.

[55] The one school of thought takes the view that an innocent spouse to a marriage in community of property is not liable for such delicts and that a third party's recourse lay in the guilty party's half-share of the joint estate – the so-called doctrine of *boedelscheiding*. The second school of thought, which rejects *boedelscheiding*, is that where persons are married in community of property, there is only one indivisible estate during the subsistence of the marriage and that an injured third party is entitled to execute against the joint estate - which includes the half-share of the innocent spouse.

[56] The debate is now settled. In *Erikson Motors (Welkom) Ltd v Scholtz, NO*⁸ Kloppers J held that the joint estate is liable in full for the delict of one spouse, and that where the spouses are married in community of property there is only one estate which can be surrendered. The matter was revisited in *Opperman v Opperman*.⁹ It was held that where a wife married in community of property has committed a delict, the person who is entitled to delictual damages is entitled to demand satisfaction from the joint estate.

[57] In *Du Plessis v Pienaar NO & others*¹⁰ the South African Supreme Court of Appeal held that in respect of debts incurred by one of them a creditor may look to the

⁸ 1960 (4) SA 791 (O).

⁹ 1962 (3) SA 40 (N).

¹⁰ 2003 (1) SA 671 (SCA).

estates of both debtors for the recovery of the debt. *Du Plessis* was quoted with approval in *Malcolm Wentzel v Discovery Life Limited & others: In Re Botha & others NNO v Wentzel*.¹¹

[58] As Boberg¹² writes:

‘While criminal penalties, being relatively small, pose few problems today, the modern equivalent of this issue is liability for delictual damages, which could easily reduce a fair-sized joint estate to bankruptcy. The conundrum of how the wrongdoing spouse is to meet his liability, when the only resources available to him are those of the joint estate, while the immunity of the innocent spouse is simultaneously preserved, has not yet been resolved. Probably the interests of the innocent spouse will just have to be sacrificed on the altar of universal community.’

[59] In support, the author cites the following observation from Hahlo: ¹³:

‘If this prognostication should come true, the unhappy result will be that an innocent wife, via her half-share in the community, may have to help pay for the damage caused by her husband’s adultery, seduction, or murder. However, it may well be that this is what our universal community, which implies community of debts as well as assets, is all about. If so, spouses who marry each other in community of property take each other “for better or worse” in every sense of the phrase.’

[60] It is therefore settled that at common law parties married in community of property are jointly liable for the debts (contractual or delictual) incurred by one of them.

[61] The fact that the innocent wife to a marriage in community of property is not shielded from claims against the husband for wrongfully inducing another woman to

¹¹ 2021 (6) SA 437 (SCA).

¹² PQR Boberg *The Law of Persons and the Family* (1970) at p189-190.

¹³ HR Hahlo *Husband and Wife* 4 ed (1975) at p238.

enter into an invalid marriage with him, in my view demonstrates the unsoundness of the approach that a claim of universal partnership cannot be enforced against a joint estate arising from the conduct of the husband. *Zulu* in SA and *S v S* in Namibia are therefore wrongly decided and should not be followed in Namibia.

[62] Once it is accepted (a) that on the present facts Ms Nakuumba has a legally cognizable claim in delict, and (b) that such a claim is enforceable against the joint estate between Ms Ipinge and Mr Nakuumba, it escapes me why the existence of a prior marriage in community between Mr Nakuumba and Ms Ipinge is a bar to the formation of a universal partnership between Ms Nakuumba and Mr Nakuumba. In other words, the confirmation on appeal by this court of the existence of a universal partnership in favour of Ms Nakuumba does not impose on Ms Ipinge a legal liability (or burden) which she would not otherwise have.

[63] It is therefore a moot point that Ms Ipinge was not a party to the proceedings in this court when the universal partnership dispute was heard and determined. Reversing the earlier decision so that she participates in the appeal will not help Ms Ipinge escape liability in law *vis-a-vis* Ms Nakuumba.

[64] For the present art 81 application to succeed based on *Zulu*, we will be agreeing that a judgment of this court is wrong based on a statement of the law pronounced by a first instance court in a foreign jurisdiction. An approach which might very well not enjoy the support of higher courts in that jurisdiction based on the concerns I have pointed out about the reasoning supporting it. That certainly is not a good basis for this court reconsidering a previous decision which, as I have shown, does not disclose any manifest injustice to a party.

[65] In the exercise of the discretion whether or not to invoke art 81 in respect of the universal partnership appeal already determined by this court, it is not an insignificant consideration that the consequential relief Mr Nakuumba seeks if art 81 is invoked, is that the High Court's order in the divorce proceedings be reviewed and set aside and that the divorce action be heard *de novo*.

[66] Mr Heathcote did not address the full implications of such a course and how it would work in practice. More so since, during oral argument, he took the court in his client's confidence and placed on record that Mr Nakuumba had in the meantime remarried. If the divorce proceedings are set aside, Mr Nakuumba would still be legally married to Ms Ipinge. What about the marriage he entered into in the meantime? Does it thereby become a nullity? Does the new wife become a party to the proceedings to be heard *de novo*?

[67] In addition, I am persuaded by Mr Marais' argument that the approach adopted in *Zulu* has the potential to leave a lot of women who cohabit with married men and raise families with them without an effective remedy and give succor to patriarchy and perpetuate inequality based on gender. A phenomenon which, as a society, we have made great advances against since Independence through, for example, the MPEA.

[68] Mr Marais' submission finds resonance with a view expressed in an academic article¹⁴ on the institution of universal partnership in which the author makes the following important observations (which I agree with) about that contract:

¹⁴ L Hager *The dissolution of universal partnerships in South African law: lessons to be learnt from Botswana, Zimbabwe and Namibia* (2020) p 1-2.

- (a) The contract is increasingly becoming a remedial measure to assist parties in putative marriages, cohabitation situations and customary marriages when otherwise by the application of the strict laws of marriage, they would have no remedy;
- (b) The institution of universal partnership should be more liberally applied by the courts to assist unmarried cohabiting persons who are often without a remedy in the absence of legislative intervention;
- (c) A 'reformatory, progressive and liberal application of the universal partnership . . . may certainly allow our courts to protect . . . vulnerable parties' in domestic relationships;
- (d) The universal partnership is 'constantly developing, adapting and finding application in our law'.

[69] The courts have a duty, given that the universal partnership is a creation of the common law, to adapt it to changing circumstances so as to protect vulnerable persons who may otherwise suffer grave injustice.

[70] The facts of the present case demonstrate why it is important to take a liberal and progressive approach to the institution of universal partnership as opposed to the doctrinaire approach adopted in *Zulu*. Facts which this court found established in the universal partnership appeal.

[71] Mr Nakuumba married Ms Ipinge in 1970. He deserted her in 1976 when he started an intimate relationship with Ms Nakuumba who was 24 years old. Ms

Nakuumba had at the time been an employee of Mr Nakuumba's. He introduced her to his mother as his 'second wife in terms of tradition'. They moved in together and lived as 'husband and wife' from then onwards. He filed for divorce from Ms Ipinge and thought he was divorced when in 1988 he conducted a 'church wedding' with Ms Nakuumba believing he was divorced. As it turned out a divorce decree was never granted.

[72] During the time that she lived with Mr Nakuumba, Ms Nakuumba worked for long hours without a salary in contributing to his business success. She took care of the home while Mr Nakuumba built up a successful business empire. Ms Nakuumba contributed her labour, skills and commitment towards what she believed to be the family business and not that of an employer. She most importantly took care of an extraordinarily large family of about 50 people under one roof which included their own children and those of Mr Nakuumba with other women. Mr Nakuumba and Ms Nakuumba only became estranged in or about 2015.

[73] In my view, the finding of a universal partnership in favour of Ms Nakuumba is not against established legal doctrine; but even if it were it would have been an appropriate case to depart from such doctrine. I say it is not against doctrine because, as *Zulu* shows, the issue remains unsettled by the highest courts in the Roman-Dutch tradition. On the contrary, as Mr Marais for Ms Nakuumba correctly pointed out, the High Court's decision in *V v De Wet NO*¹⁵ is likely the bellwether of the trajectory of the law in that jurisdiction. In that case, a first instance judge held that if a couple married out of community of property could establish a universal partnership it should be possible for a mistress to establish a similar contract in a similar manner.

¹⁵ 1953 (1) SA 612 (O).

[74] Should it make a difference that the mistress is that of a man already married in community of property? *Zulu* suggests it does, but I do not agree. The common law should make a decisive break with our patriarchal past and infuse ethos that promotes equal value to the woman's contribution within the home setting.

[75] I am satisfied that there is no manifest injustice apparent on the record to invoke art 81 of the Constitution. Therefore, Mr Nakuumba's assertion - with which Ms Ipinge makes common cause - that this court's conclusion that Ms Nakuumba concluded a universal partnership with Mr Nakuumba is wrong in law - is without substance and is accordingly rejected.

[76] That disposes of the first leg of the grounds on which the art 81 application has been brought. The remaining one is that Ms Ipinge's non-joinder to the universal partnership dispute between Mr Nakuumba and Ms Nakuumba rendered the proceedings a nullity and therefore liable to be set aside - both in the High Court and in this court.

[77] The anchor for that ground is the common cause fact that Ms Ipinge was not served with the proceedings in the universal partnership dispute. This ground need not detain us. I have already explained that Mr Nakuumba was in law capable of alienating the joint estate he had with Ms Ipinge. It follows that, even if Ms Ipinge was affected by a judgment of this court granted in her absence, it makes no difference to the validity of such judgment, because in terms of the common law, the husband administered the joint estate and could, without Ms Ipinge's knowledge or consent, conclude contracts which were binding on both.

[78] I thus agree with Mr Marais' submission that Ms Ipinge's non-joinder - both in the High Court and in this court - to the universal partnership dispute between Mr Nakuumba and Ms Nakuumba - is of no consequence.

[79] It follows from that conclusion that the second ground supporting Mr Nakuumba's application, supported by Ms Ipinge, for art 81 review also has no merit. It becomes unnecessary to consider if the High Court's judgment and order in the divorce proceeding Ms Ipinge must be reviewed in terms of s 16 of the Supreme Court Act.

[80] What remains to be considered therefore is the appeal.

The appeal

[81] In the appeal, the only issue that falls to be considered is whether Mr Nakuumba and Ms Ipinge were married in or out of community of property. The High Court concluded that the marriage was in community of property. That finding is largely based on credibility findings made by the trial judge in relation to the versions of the protagonists. The question is, did the High Court approach the issues on wrong principle or commit a misdirection which would justify this court to interfere?

The law

[82] This court does not lightly interfere with a trial court's findings of fact. It does so only in exceptional circumstances.¹⁶ In *S v Hangu*,¹⁷ this court cited with approval

Dhlumayo, with the caveat:

¹⁶ *R v Dhlumayo & another* 1948 (2) SA 677 (A) (*Dhlumayo*); *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) paras 37 - 41.

¹⁷ 2016 (1) NR 258 (SC) para 60.

'This approach is not intended to relieve this Court from [its] obligation to carefully consider the evidence because, as a court of appeal, it has other advantages that the trial court does not have in considering the evidence.'

Application of law to facts

[83] It was common cause that the marriage between Ms Ipinge and Mr Nakuumba was solemnised north of the Police Zone on 10 December 1970 at Onesi, Omusati Region. The marriage was thus subject to the Native Administrative Proclamation 15 of 1928 (the Proclamation). According to s 17(6) of the Proclamation:

'A marriage between Natives, contracted after the commencement of this proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.'

[84] The effect of this legislative provision has been correctly set out in *Mofuka v Mofuka*.¹⁸ Maritz J stated the legal position as follows:

'The effect of this section on the legal consequences of civil marriages between Blacks contracted after 31 July 1950 in the area defined as the "Police Zone" is significant. No longer does community of property follow unless excluded - rather, the converse applies: The marriage is out of community of property, unless declared or agreed otherwise.'

¹⁸ *Mofuka v Mofuka* 2001 NR 318 (HC).

[85] Maritz J dealt with the proof of the agreement and stated it as follows:

‘Secondly, the parties must prove that they have entered into an agreement concerning their matrimonial property system either expressly or by implication. To say that they had come to some or other understanding or that that was their impression or intention would not be enough. The Court must be satisfied that, on the evidence, it is probable that the parties concluded an agreement prior to their marriage.’

[86] Once the court is satisfied that the parties had entered into an agreement concerning the matrimonial property regime, and that they had agreed so prior to their marriage, and even though no other terms were agreed upon, it will be presumed that the parties intended their marriage to be governed by the ordinary minimum terms applicable to the specific property regime.

[87] During the trial *a quo*, exhibit ‘A’, being a duplicate marriage certificate was accepted into evidence. In terms of exhibit ‘A’, the marriage between Mr Nakuumba and Ms Ipinge was officiated by a pastor, P Nambundunga, at Onesi, Omusati Region. In addition to the marriage certificate, Ms Ipinge caused to be admitted into evidence, without any objection, certified copies of other exhibits as follows:

- (a) Exhibit “B” – being a declaration under section 22(3) of Native Administration Act, 1927. “B1” is a sworn translation thereof. That declaration on the face of it shows that the parties wished to marry in community of property.
- (b) Exhibit “C” – being a duplicate original marriage register and exhibit “C1” which is a sworn translation thereof.
- (c) Exhibit “D” – being a certificate of Banns of Marriage and exhibit “D1” being a sworn translation thereof.

(d) Exhibit "E" – being another certified copy of the original marriage register and Exhibit "E1" being a sworn translation thereof.

[88] Ms Ipinge testified that their marriage is one in community of property as evidenced by exhibit 'B', being a declaration purportedly made by the parties on 20 November 1970 and recording their intention to marry in community of property. Ms Ipinge testified that Mr Nakuumba proposed to her that they be married in community of property and she agreed thereto. According to her, they also declared to the pastor, when asked, that they wanted to get married in community of property.

[89] According to Mr Nakuumba, he did not know the documents nor who wrote them. He maintained that the signature appearing on the purported declaration was not his and that he did not make such a declaration. Mr Nakuumba further testified that he did not know who completed the declaration.

[90] According to Ms Ipinge, she was present when the declaration was written and signed. In her testimony she, however, became confused and inconsistent when questioned whether Mr Nakuumba was present when the declaration was written out and signed.

[91] On behalf of Mr Nakuumba it was contended that Ms Ipinge's evidence is unreliable and her version contradictory and that Mr Nakuumba's version regarding the exhibits was to be preferred. On behalf of Ms Ipinge, it was submitted that in weighing which version should prevail, consideration should be given to the advanced age of the parties at the time that the evidence was given and the fact that the marriage in question was contracted 49 years ago. It was argued that it was

reasonable for there to be inconsistencies in the evidence of both parties and any such inconsistencies must however be considered in the context of the remaining evidence, including the documentary evidence.

[92] It was apparent to the trial judge who saw and heard the witnesses that Ms Ipinge relied on what is stated or appearing on the documents instead of recalling in precise detail who wrote where. Equally, it was obvious that she could not recall precisely how the document was created. The trial judge nevertheless found Ms Ipinge's evidence to be reliable and credible and consistent with the declaration admitted in evidence evidencing that the duo made a joint declaration that they intended to marry in community of property.

[93] In deciding which version to accept, the trial judge took into account the advanced age of the two parties and the passage of time since the marriage was contracted – a factor inhibiting effective memory. The court was however satisfied that Ms Ipinge's version of events was more probable than that of Mr Nakuumba. It was fortified in that conclusion by the surrounding circumstances such as that the documentary evidence supported her version. The court *a quo* found the documentary evidence to corroborate Ms Ipinge's version. A written declaration purporting to have been made by the parties was admitted in evidence from which it is apparent that Ms Ipinge, Mr Nakuumba and the pastor signed it.

[94] Besides, the court *a quo* found that Mr Nakuumba did not dispute Ms Ipinge's testimony that he proposed that they be married in community of property. He merely denied the existence of the documents produced by her.

[95] On the contrary, as regards, Mr Nakuumba, the court found his version improbable. He, according to the trial judge, implausibly denied that he signed the documents proving the marriage. In other words, he denied that he signed the marriage register whilst admitting to the marriage certificate. His version was therefore rejected and that of Ms Ipinge accepted.

[96] In the trial judge's assessment of the evidence as a whole, the duo concluded an agreement prior to the marriage and jointly declared before a marriage officer, which declaration was reduced in writing, expressing their joint intention and desire to be married in community of property. As such the court *a quo* concluded that the parties did enter into a marriage which is in community of property in terms of s 17(6) of Proclamation 15 of 1928.

[97] Mr Nakuumba has not demonstrated that based on the probabilities of the case, the High Court's conclusions are clearly wrong. On the contrary, I am satisfied that the trial court properly, cautiously and correctly approached the evidence of the protagonists and the findings it made cannot be faulted in the absence of material misdirection.

[98] The appeal therefore fails and costs must follow the result.

Order

[99] I propose the following order:

Art 81 application

(a) The application seeking the reversal and review of the Supreme Court judgment and order in *MN v FN* (SA-2017-28) [2019] NASC 602 (15 November 2019) is refused, with costs against the applicant (Mr Nakuumba) in favour of respondent Ms Frieda Nakuumba, to include costs consequent upon the employment of one instructing and two instructed legal practitioners. There is no order of costs against the applicant in favour of respondent Ms Linda Ipinge.

The appeal

(b) The appeal against the judgment and order of the High Court in case No. I 1833/2011 delivered on 11 February 2020 is dismissed, with costs in favour of the respondent Ms Linda Ipinge; such costs to include costs consequent upon the employment of one instructing and two instructed legal practitioners.

MAINGA JA

HOFF JA

APPEARANCES:

APPELLANT:

R Heathcote (with him G Narib)

Instructed by Sisa Namandje & Co Inc

FIRST RESPONDENT:

AW Boesak (with him LN Ihalwa)

Instructed by Legal Aid

SECOND RESPONDENT:

J Marais SC (with him JP Ravenscroft-Jones)

Instructed by Theunissen, Louw & Partners