



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT

Reportable

Case No: 642/2018

In the matter between:

JACQUES LE ROUX MARAIS N.O.

FIRST APPELLANT

SIVUVUYANI JULIAN SHONGWE N.O.

SECOND APPELLANT

and

KGOMOTSO COMFORT MAPOSA

FIRST RESPONDENT

KGOTHATSO THEODOR LEDWABA

SECOND RESPONDENT

MOKGOHU MARTHA LEDWABA

THIRD RESPONDENT

SEEPUNT EIENDOMME CC

FOURTH RESPONDENT

REGISTRAR OF DEEDS, CAPE TOWN

FIFTH RESPONDENT

COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION

SIXTH RESPONDENT

**Neutral citation:** *Marais N.O. and Another v Maposa and Others* (642/2018)  
[2020] ZASCA 23 (25 March 2020)

**Coram:** PETSE DP, MBHA, VAN DER MERWE, PLASKET and  
NICHOLLS JJA

**Heard:** 10 March 2020

**Delivered:** 25 March 2020

**Summary:** Matrimonial Property Act 88 of 1984 – spouses married in community of property – donation of asset of joint estate requires consent of spouse in terms of s 15(3)(c) – consent not given – whether consent deemed to have been given in terms of s 15(9)(a).

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## ORDER

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Binns-Ward J sitting as court of first instance):

1 Mr Jacques Le Roux Marais and Mr Sivuvuyani Julian Shongwe are substituted as appellants for the late Ms Ephania Mogogodi Broodie.

2 The first, second and third respondents are directed to pay the costs of the application for substitution, including the costs of two counsel.

3 The appeal is upheld.

4 The first, second and third respondents are directed to pay the appellants' costs, including the costs of two counsel.

5 The order of the court below is set aside and replaced with the following order.

'(a) The transfer of 25 percent each of the members' interest in the fourth respondent to the first, second and third respondents is declared void.

(b) The first, second and third respondents are directed to sign all necessary forms and documentation within five days of the date of this order to re-register the members' interest currently in their names into the name of the joint estate of the late Mr Samuel Broodie and the late Ms Ephania Mogogodi Broodie, and to enable the sixth respondent to rectify its records to reflect that the joint estate is the sole member of the fourth respondent, failing which the Sheriff for the district of Cape Town is authorized to sign all necessary forms and documentation in order to give effect to this order.

(c) The first, second and third respondents are directed to pay the applicant's costs, including the costs of two counsel.'

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## JUDGMENT

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**Plasket JA (Petse DP, Mbha, Van der Merwe and Nicholls JJA concurring)**

[1] Ms Ephenia Mogogodi Broodie was the executrix of the estate of the late Mr Samuel Broodie when she brought an urgent application in the Western Cape Division of the High Court, Cape Town. At the time of the death of Mr Broodie on 4 December 2016, he and Ms Broodie had been married for almost 50 years. Their marriage was one in community of property. Ms Broodie launched the application after she discovered that 75 percent of her and Mr Broodie's joint estate's members' interest in the fourth respondent, Seepunt Eiendomme CC (Seepunt), had, without her knowledge and consent, been transferred in equal 25 percent proportions to the first, second and third respondents, Ms Kgomotso Comfort Maposa, Mr Kgothatso Theodor Ledwaba and Ms Mokgohu Martha Ledwaba respectively.

[2] Ms Broodie sought an order setting aside the transfer of the members' interest to the first to third respondents, as well as certain interim relief. The interim relief was granted by agreement at an early stage in the proceedings. When the matter finally came before Binns-Ward J for determination on the merits, he dealt with a number of preliminary issues that do not have to be revisited in this appeal. He also separated the two principal issues on the merits. They were, first, the effect of Ms Broodie's lack of consent on the validity of the transfer, in terms of s 15 of the Matrimonial Property Act 88 of 1984, and, secondly, whether the transfer was effected fraudulently by Ms Ledwaba and at a time when Mr Broodie lacked capacity.

[3] Binns-Ward J dismissed the claim based on Ms Broodie's lack of consent, holding that, in terms of s 15(9)(a) of the Matrimonial Property Act, she was deemed to have consented to the transfer. He referred the 'fraud and capacity' issue to trial. Ms Broodie applied for and was granted leave to appeal to this court. That leave was restricted to the grounds relating to 'the import and effect of section 15(9) of the Matrimonial Property Act'.

[4] Ms Broodie died on 26 March 2019, subsequent to the judgment having been delivered. (Both she and Mr Broodie died intestate.) At the hearing of the appeal, an application was brought for an order substituting, as appellants, the current joint executors of the estate of Mr Broodie for Ms Broodie. That application was opposed

by the first to fourth respondents. I shall deal with it before proceeding to deal with the central issue in this appeal – the validity of the transfer.

### **The application for substitution**

[5] Rule 15(1) of the Uniform Rules of Court provides that proceedings do not terminate solely because of the ‘death, marriage or other change of status’ of a party, ‘unless the cause of such proceedings is thereby extinguished’. Rule 15(3) provides that when a party dies or is no longer capable of acting as such, ‘his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted’.

[6] Mr Jacques Le Roux Marais, as a duly appointed executor of the estate of Mr Broodie, brought an application in terms of rule 15 for the substitution of himself and his co-executor, Mr Sivuvuyani Julian Shongwe as appellants, in the stead of Ms Broodie in her capacity as executrix of the estate of Mr Broodie. An application, which was not persisted with, was also brought ostensibly for the substitution of Mr Charles Duke Broodie, the executor of the estate of Ms Broodie, in the stead of Ms Broodie in her personal capacity. No more need be said of this.

[7] It appears that when Ms Broodie died, the Master was prevailed upon to appoint joint executors, one nominated by the Broodie family and the other nominated by the Ledwaba family. Mr Marais was nominated by the Broodie family and Mr Shongwe was nominated by the Ledwaba family.

[8] In his founding affidavit, Mr Marais stated that Mr Shongwe was requested to consent to be substituted as an appellant but he responded by saying that he had decided ‘to stay neutral in this matter and not appear to take sides in a dispute involving beneficiaries in the common estate’. He was approached again but maintained his position, adding that he would not change it ‘unless compelled by a court order’.

[9] It is unfortunately necessary to say something about Mr Shongwe's attitude. When he was appointed as an executor, he was not appointed to champion one of the disputing parties. He was appointed to act in the best interests of the estate. On the face of it, a very substantial asset of the estate has been donated in circumstances that, at the very least, raise suspicion as to that transaction's validity. It was not open to, or prudent of Mr Shongwe to assert a position of 'neutrality'. I would have expected him to have agreed to be substituted as an appellant without hesitation.

[10] Despite having filed opposing papers, the respondents abandoned their opposition at the hearing of the appeal. It was argued on their behalf, however, that in the event of the appeal being dismissed, Mr Marais ought to be ordered to pay the costs *de bonis propriis*. As this was never raised in the papers, with the consequence that Mr Marais never had the opportunity to deal with it, the argument was not properly before us and can safely be ignored.

[11] I am satisfied that Mr Marais ought to be substituted as an appellant. I also take the view that, despite his unacceptable abdication of his duty as an executor, Mr Shongwe should be substituted as an appellant too. The opposition to what ought to have been a formality was unreasonable, with the result that Ms Maposa, Mr Ledwaba and Ms Ledwaba must bear the costs of the application. While Seepunt, represented by Ms Ledwaba, also purported to oppose the application, in view of the result of the appeal, there is no reason why it should have to pay any costs. I shall make the appropriate order at the end of this judgment.

## **The central issue**

### ***Background***

[12] In this account of the background to the application before Binns-Ward J, I set out facts deposed to by Ms Broodie in her founding affidavit that are either common cause, are not placed in dispute or cannot effectively be disputed. I shall later consider Ms Ledwaba's version including what she knew of the circumstances of the marriage of Mr and Ms Broodie.

[13] Mr and Ms Broodie were married on 26 April 1967. Ms Broodie said in her founding affidavit that, together, they accumulated immovable property, worked

together as a team and owned and ran a depot from which paraffin was sold. They appear to have built up a substantial estate over the years.

[14] The biggest asset in their joint estate was the members' interest in Seepunt. It owned a building in Sea Point, Cape Town. The most recent valuation of the building placed a value of about R20 million on it. The building also generates rental of approximately R75 000 per month. Mr Broodie acquired the members' interest in Seepunt on 20 April 2001.

[15] Ms Broodie believed that Ms Ledwaba was employed by Mr Broodie as a bookkeeper. That is disputed. Ms Ledwaba said that she was never formally employed but played an active part in the management of some of Mr Broodie's businesses. Ms Broodie became aware of the relationship between Mr Broodie and Ms Ledwaba in 1989 and, in 1993, she found out that Mr Broodie had fathered two children – the first and second respondents – by Ms Ledwaba.

[16] Mr Broodie began to display signs of ill-health in 2013. He appears to have become forgetful and, at times, confused. In early 2014, it was determined that he had suffered a stroke. As his mental health deteriorated, he withdrew from active involvement in his businesses.

[17] It is common cause that on 12 May 2014, 75 percent of the members' interest in Seepunt was transferred from Mr Broodie to Ms Ledwaba and her two children, each acquiring 25 percent. Ms Broodie said that this donation was effected without her knowledge and without her consent. She was most surprised that Mr Broodie had not spoken to her about the donation.

[18] Ms Broodie only became aware of the donation in November 2016. That was about two and a half years after it had occurred and shortly before Mr Broodie died on 4 December 2016.

### ***The Matrimonial Property Act***

[19] Section 11 of the Matrimonial Property Act abolished the common law rule to the effect that, unless an antenuptial contract provides otherwise, the husband in a

marriage exercises marital power over his wife. Section 12 provides that one of the effects of the abolition of marital power was ‘to do away with the restrictions which the marital power places on the capacity of a wife to contract and to litigate’.

[20] Chapter III of the Act concerns marriages in community of property. Its first section, s 14, makes provisions for the natural consequence of the abolition of marital power, namely equality between spouses. It states:

‘Subject to the provisions of this Chapter, a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act.’

[21] Section 15, the section with which this appeal is concerned, is headed ‘Powers of spouses’. Its focus is on the commercial relationships of spouses and third parties. Section 15(1) provides that ‘[s]ubject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse’.

[22] Section 15(2), the first subsection to which s 15(1) is subject, sets out a number of transactions that not only require the consent of the non-contracting spouse, but his or her written consent. The list includes, by way of example, entering into ‘any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate’<sup>1</sup> and a spouse binding himself or herself as a surety.<sup>2</sup>

[23] Section 15(3), the second subsection to which s 15(1) is subject, also requires the consent of the non-contracting spouse to the transactions that it lists, but consent to these transactions need not be in writing. Section 15(3)(c) provides, for instance, that a spouse may not, without the consent of the other spouse, ‘donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which

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<sup>1</sup> Section 15(2)(b).

<sup>2</sup> Section 15(2)(h).

is not contrary to the provisions of subsection (2) or paragraph (a) of this subsection'.<sup>3</sup> Section 15(8) provides that '[i]n determining whether a donation or alienation contemplated in subsection (3)(c) does not or probably will not unreasonably prejudice the interest of the other spouse in the joint estate, the court shall have regard to the value of the property donated or alienated, the reason for the donation or alienation, the financial and social standing of the spouses, their standard of living and any other factor which in the opinion of the court should be taken into account'.

[24] The consent required by s 15(3), as well as for most of the transactions listed in s 15(2), may be given after the event: the non-contracting spouse may ratify the transaction provided that this is done within a reasonable time.<sup>4</sup> Consent is not required in respect of certain of the transactions listed in s 15(2) – such as a spouse binding himself or herself as a surety – if those transactions are 'performed by a spouse in the ordinary course of his profession, trade or business'.<sup>5</sup>

[25] Section 15(9), which is central to this appeal, deals with the consequences of a transaction requiring consent being entered into without consent. It states: 'When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section . . . and-

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions . . . it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3) . . . ;

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3) . . . and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.'

[26] The effect of s 15 may be summarized as follows. First, as a general rule, a spouse married in community of property 'may perform any juristic act in connection

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<sup>3</sup> 'Section 15(3)(a) concerns the alienation, pledging or other burdening of 'furniture or other effects of the common household forming part of the joint estate'.

<sup>4</sup> Section 15(4).

<sup>5</sup> Section 15(6). See *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander* 1997 (4) SA 66 (SCA).



with the joint estate without the consent of the other spouse'.<sup>6</sup> Secondly, there are exceptions to the general rule. In terms of ss 15(2) and (3), a spouse 'shall not' enter into any of the transactions listed in these subsections without the consent of the other spouse. Subject to what is said about the effect of s 15(9)(a), if a spouse does so, the transaction is unlawful, and is void and unenforceable.<sup>7</sup> This, it seems to me, flows from what Innes CJ, in *Schierhout v Minister of Justice*,<sup>8</sup> called a 'fundamental principle of our law', namely, that 'a thing done contrary to the direct prohibition of the law is void and of no effect'.<sup>9</sup> Thirdly, if a listed transaction is entered into without the consent of the non-contracting spouse, that transaction will nonetheless be valid and enforceable if the third party did not know and could not reasonably have known of the lack of consent. While the consent requirement is designed to provide protection to the non-contracting spouse against maladministration of the joint estate by the contracting spouse, the 'deemed consent' provision in s 15(9)(a) is intended to protect the interests of a bona fide third party who contracts with that spouse.<sup>10</sup>

[27] Section 15 thus seeks to strike a balance between the interests of the non-consenting spouse, on the one hand, and the bona fide third party, on the other. Whether the legislature has struck an appropriate balance has been fiercely debated by academic writers, but is an issue that does not have to be engaged with in this judgment.<sup>11</sup> In *Sishuba v Skweyiya and Another*<sup>12</sup> the context in which s 15, and s 15(9)(a) in particular, is to be interpreted was set out as follows:

'These provisions seek to regulate marriages in community of property after the abolition of marital power. They must be interpreted and applied within this context – one in which "the

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<sup>6</sup> B van Heerden, A Cockrell and R Keightley *Boberg's Law of Persons and the Family* (2 ed) (1999) at 188.

<sup>7</sup> *Amalgamated Bank of South Africa Bpk v Lydenburg Passasierdienste BK en Andere* 1995 (3) SA 314 (T) at 322F-I; *Bopape and Another v Moloto* 2000 (1) SA 383 (T) at 386J-387A; *Sishuba v Skweyiya and Another* [2008] ZAECHCG 25; 2008 JDR 0593 (E) paras 19-20. See too L Steyn 'When a Third Party "Cannot Reasonably Know" that a Spouse's Consent to a Contract is Lacking' (2002) 119 *SALJ* 253 at 253.

<sup>8</sup> *Schierhout v Minister of Justice* 1926 AD 99 at 109.

<sup>9</sup> See, in the context of s 15 of the Matrimonial Property Act, *Sishuba v Skweyiya and Another* (note 7) para 20.

<sup>10</sup> Van Heerden, Cockrell and Keightley (note 6) at 191.

<sup>11</sup> See for instance, Van Heerden, Cockrell and Keightley (note 6) at 193, who argue that the protection given to third parties by s 15(9)(a) at the expense of non-contracting spouses has been 'taken too far' and J S McLennan 'The Perils of Contracting with Persons Married in Community of Property' (2000) 117 *SALJ* 367 at 368 who says that 'the legislature has effectively cast the burden of the equality of spouses onto third parties'.

<sup>12</sup> Note 7 para 17.

restrictions which the marital power places on the capacity of a wife to contract and to litigate” have been abolished; in which “a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts that lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act”; and in which proper effect must be given to the fundamental right of everyone to equality before the law and the equal protection and benefit of the law.’

[28] A third party to a transaction contemplated by ss 15(2) or (3) that is entered into without the consent of the non-contracting spouse is required, in order for consent to be deemed and for the transaction to be enforceable, to establish two things: first, that he or she did not know that consent was lacking; and secondly, that he or she could not reasonably have known that consent had not been given. In terms of the general principle that the party who asserts a particular state of affairs is generally required to prove it,<sup>13</sup> the burden of bringing s 15(9)(a) into play rests on the party seeking to rely on the validity of the transaction.<sup>14</sup>

[29] The reference to reasonableness in the phrase ‘cannot reasonably know’ imports an objective standard into the proof of this element: it must be established with reference to the standard of the reasonable person, in terms of what the reasonable person would do in the circumstances and the conclusion that the reasonable person would draw.<sup>15</sup>

[30] In other words, a duty is placed on the party seeking to rely on deemed consent to make reasonable enquiries. Van Heerden, Cockrell and Keightley say:<sup>16</sup>

‘Lack of actual knowledge on the part of the third party is a straightforward enough stipulation and capable of determination. But “cannot reasonably know” is more problematic. It must imply that the third party is under some sort of obligation to enquire about the status of the person with whom he or she is contracting. The third party is called upon, it is submitted, to take reasonable steps to ascertain whether the person with whom he or she is dealing is married

<sup>13</sup> *Pillay v Krishna and Another* 1946 AD 946 at 951-952.

<sup>14</sup> *Distillers Corporation Ltd v Modise* 2001 (4) SA 1071 (O) para 4.

<sup>15</sup> *Distillers Corporation Ltd v Modise* (note 14) para 5.

<sup>16</sup> Note 6 at 191. See too Steyn (note 7) at 256 who says: ‘The word “cannot” in the phrase “cannot reasonably know”, I submit, implies that a duty is cast upon the third party to take reasonable steps to investigate whether, in the circumstances, consent is required and, if so, whether it has been obtained.’

and, if so, whether they have obtained whatever consent may be necessary for the particular transaction.’

The authors make the point that the third party may not do nothing, because then s 15(9)(a) would be meaningless.<sup>17</sup> To put it at its lowest, the third party is ‘put on enquiry’.<sup>18</sup>

[31] The views of the academic writers are in harmony with the views expressed in various high court judgments. For instance, in *Visser v Hull and Others*,<sup>19</sup> Dlodlo J, after referring to the views of Steyn,<sup>20</sup> held:

‘I agree with Professor Steyn that a third party is expected to do more than rely upon a bold assurance by another party regarding his or her marital status. An adequate inquiry by the third party is required. If this proposition and interpretation of the liability of third parties is accepted, then it could be argued that the third parties in the case under consideration should have made the necessary inquiries into the current state of the applicant and the deceased's marital status.’

The same conclusion was reached in *Sishuba v Skweyiya and Another*,<sup>21</sup> with reference to the views of Van Heerden, Cockrell and Keightley replicated in para [30] above.

[32] I endorse the views expressed in the cases to which I have referred, as well as the views of the academic writers upon which they are based: a duty is cast on a party seeking to rely on the deemed consent provision of s 15(9)(a) to make the enquiries that a reasonable person would make in the circumstances as to whether the other contracting party is married, if so, in terms of which marriage regime, whether the consent of the non-contracting spouse is required and, if so, whether it has been given. Anything less than this duty of enquiry, carried out to the standard of the reasonable person, would render s 15(9)(a) a dead letter. It would not protect innocent spouses from the maladministration of the joint estate and would undermine the Matrimonial Property Act's purpose of promoting equality in marriages in community of property.

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<sup>17</sup> Note 6 at 191 fn107.

<sup>18</sup> J D Sinclair *An Introduction to the Matrimonial Property Act 1984* (1984) at 20.

<sup>19</sup> *Visser v Hull and Others* [2009] ZAWCHCC 77; 2010 (1) SA 521 (WCC) para 8. See too *Yonda Investments CC v Rohr and Another* [2014] ZAGPPHC 275; 2014 JDR 1031 (GNP) para 24.

<sup>20</sup> Note 7 at 256.

<sup>21</sup> Note 7 para 22.

**The facts**

[33] In what follows, I set out relevant facts deposed to by Ms Ledwaba. In terms of the *Plascon-Evans* rule,<sup>22</sup> the facts deposed to by her, unless they are uncreditworthy, far-fetched or untenable, are to be accepted for purposes of determining whether a case has been made out for the relief claimed by Ms Broodie. For present purposes, I shall accept them at face value rather than deal with the argument raised on behalf of the appellants that her version is not, in important respects, creditworthy and ought to be rejected on the papers.

[34] Ms Ledwaba said in her answering affidavit that she met Mr Broodie in 1986 and they became involved in a personal relationship in that year. She knew at the time that he was married and had three children but did not know whether he was married civilly or by custom. During 1988, Ms Ledwaba and Mr Broodie purported to enter into a customary union. As Mr Broodie and Ms Broodie were married civilly, the result was that the customary union was invalid, although Ms Ledwaba did not know this until after these proceedings had been initiated.

[35] Ms Ledwaba stated that Mr Broodie told her that he had told Ms Broodie about the customary union. This is, to an extent, consistent with Ms Broodie's evidence that she found out about the relationship between Ms Ledwaba and Mr Broodie in 1989. It is not clear from the papers precisely what Ms Broodie knew of the nature of the relationship.

[36] Two children were born of the union. Ms Maposa was born on 21 November 1989. Her brother, Mr Ledwaba, was born on 11 May 1993. Ms Broodie's evidence was that she found out that Mr Broodie had fathered two children by Ms Ledwaba in 1993.

[37] Ms Ledwaba resigned from her employment as a nurse and became increasingly involved in administering one of Mr Broodie's businesses, a paraffin distribution business in Dennilton. She also began to study and in due course completed a Master of Business Administration degree.

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<sup>22</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[38] During the late 1990s, Ms Ledwaba said, Mr Broodie first broached the topic of providing for their children in the event of his death. He wanted to provide for both of his families separately by giving each of them different properties and businesses. A few years later, in 2001, he acquired the members' interest in Seepunt. She said in this regard:

'I pause to advise that although the Deceased was registered as the sole member of the CC, in accordance with the usual patriarchal manner in which he conducted all his business dealings, we verbally agreed that the members' interest in the CC actually belonged to our children and myself, although it would only be registered in our names on a date to be agreed between the Deceased and myself. Although we did not discuss such issue, [there] can be no doubt that it was tacitly or impliedly agreed that we could immediately demand to be registered as the members of the CC in the event of his death.'

She conceded that she and Mr Broodie never entered into a written agreement of donation in respect of the members' interest in Seepunt.

[39] During 2013, Ms Maposa asked when her portion of the members' interest in Seepunt would be transferred to her. This led to a meeting, on 7 January 2014, attended by Mr Broodie, Ms Ledwaba and their two children, at which it was agreed that 'the Deceased would forthwith transfer 75% of his members interest to our children and me, with each of us to receive a members interest of 25%'. It was also agreed that Ms Ledwaba 'would take all necessary steps to procure such registration'. Subsequent to this agreement she 'duly acquired the necessary documentation, arranged for the completion thereof by all parties concerned and submitted it to the CIPC, whereupon my children and I became the registered members of the CC on 12 May 2014'.

### ***Was the donation valid?***

[40] Section 15(3)(c) only requires the non-contracting spouse's consent if the donation concerned 'does not and probably will not unreasonably prejudice' his or her interests. Section 15(8) provides the means to determine this issue.

[41] The donation of 75 percent of the members' interest in Seepunt constitutes the lion's share of the joint estate. In effect, the respondents claim an asset valued at R20

million for themselves, leaving a residue of perhaps two or three million Rand for Mr Broodie's 'first family'. I bear in mind that the reason given by Ms Ledwaba for Mr Broodie's donation was to make provision, equally it would appear, for both of his families. This donation certainly does not do that but rather benefits Ms Ledwaba and her children in a disproportional manner as compared to Mr Broodie's children by Ms Broodie. These factors, on their own, lead me to the conclusion that the donation certainly prejudiced the interests of Ms Broodie, and therefore required her consent.

[42] It is not in dispute that Ms Broodie never consented to the transfer of 75 percent of the members' interest in Seepunt to Ms Maposa, Mr Ledwaba and Ms Ledwaba. As neither Ms Maposa nor Mr Ledwaba have claimed to have made any enquiries in terms of s 15(9)(a), and because Ms Ledwaba, in terms of the agreement, took charge of the transaction and acted on their behalf, it is to her conduct that one must look to determine whether Ms Broodie's consent may be deemed to have been given.

[43] Ms Ledwaba knew from the outset of her relationship with Mr Broodie that he was married and had children. She stated that Mr Broodie never discussed his marriage to Ms Broodie with her, and she never raised the issue with him. She 'barely knew the applicant's name' and she 'certainly had no knowledge as to whether or not she and the deceased were married according to civil rights or entered into a customary marriage, and if the former, whether they were married in or out of community of property'. On the basis of this factual foundation she asserted that she 'did not know, and in light of the nature of my relationship with the Deceased, could not have been expected to know, that he was married in community of property'.

[44] On Ms Ledwaba's own version, she does not get out of the starting blocks. She admitted that she knew that Mr and Ms Broodie were married but she made no enquiries as to how they were married and whether Mr Broodie required Ms Broodie's consent to the donation. Her counsel conceded that she did not even ask Mr Broodie if he had discussed the transfer with Ms Broodie. As she made no enquiries despite her knowledge that Mr Broodie was married, she did not, on her own version, establish that she, as a reasonable person, could not have known that the transaction was entered into without Ms Broodie's consent. The result is that the appeal must succeed and the transaction must be set aside, with the consequence that the members'

interest in Seepunt reverts to the joint estate of Mr and Ms Broodie. In the light of this conclusion, there is no basis for a costs order, either in the court below or on appeal, to be made against Seepunt.

### **The order**

[45] I make the following order.

1 Mr Jacques Le Roux Marais and Mr Sivuvuyani Julian Shongwe are substituted as appellants for the late Ms Ephania Mogogodi Broodie.

2 The first, second and third respondents are directed to pay the costs of the application for substitution, including the costs of two counsel.

3 The appeal is upheld.

4 The first, second and third respondents are directed to pay the appellants' costs, including the costs of two counsel.

5 The order of the court below is set aside and replaced with the following order.

'(a) The transfer of 25 percent each of the members' interest in the fourth respondent to the first, second and third respondents is declared void.

(b) The first, second and third respondents are directed to sign all necessary forms and documentation within five days of the date of this order to re-register the members' interest currently in their names into the name of the joint estate of the late Mr Samuel Broodie and the late Ms Ephania Mogogodi Broodie, and to enable the sixth respondent to rectify its records to reflect that the joint estate is the sole member of the fourth respondent, failing which the Sheriff for the district of Cape Town is authorized to sign all necessary forms and documentation in order to give effect to this order.

(c) The first, second and third respondents are directed to pay the applicant's costs, including the costs of two counsel.'

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**C Plasket**  
**Judge of Appeal**

## APPEARANCES

For the appellants:

S Gundelfennig SC and E de Lange

Instructed by:

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