THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 564/2016(ECM)

In the matter between:

SANGO PATEKILE HOLOMISA **APPELLANT**

and

BUKELWA NOLIZWE HOLOMISA **RESPONDENT**

Neutral citation: *Patekile Holomisa v Nolizwe Holomisa* (564/2016) [2017] ZASCA 64 (29 May 2017)

Coram: Cachalia, Tshiqi, Saldulker and Dambuza JJA and Mbatha AJA

Heard: 16 May 2017

Delivered: 29 May 2017

Summary: Civil marriage solemnized in December 1995 in the erstwhile Transkei: the Marriage Extension Act 50 of 1997 did not alter the matrimonial property regime of parties who married without an ante-nuptial contract after 27 April 1994: marriage out of community of property.

ORDER

On appeal from: Eastern Cape Division, Mthatha High Court, (Smith J and Renqe AJ sitting as court of appeal):

1 The appeal is upheld.
2 The order of the High Court dismissing the appeal is set aside and in its stead the following order is substituted:
   a) The appeal is upheld and the order of the Regional Court is substituted to the limited extent that paragraph 4 is deleted;
   b) The defendant's counterclaim is dismissed.

JUDGMENT

Tshiqi JA (Cachalia, Saldulker and Dambuza JJA and Mbatha AJA concurring):

[1] The issue in this appeal is whether a civil marriage between the appellant and the respondent, solemnized on 16 December 1995, in Mqanduli, an area located in the erstwhile Transkei, Eastern Cape, was in or out of community of property. The issue arose in a divorce action initiated by the appellant (as plaintiff) in the Regional Division of the Eastern Cape, Mthatha, in which he alleged that the marriage relationship was out of community of property. The respondent (as defendant) in her plea alleged that the marriage was in community of property whereas in his plea to the respondent's counterclaim he stated that they were married in terms of s 39(1) of the Transkei Marriage Act 21 of 1978 (the Transkei Act) – and that the marriage was consequently out of community of property. The parties were in agreement that the marriage relationship had broken down irretrievably with no prospects of the restoration of a normal marriage relationship between them. In the regional court the

parties settled all issues relating to parental responsibilities towards their minor children, but could not reach agreement on their matrimonial property regime.

[2] On the day of the hearing the respondent did not appear in court and was not represented. Before hearing evidence, the regional magistrate invited the appellant's legal representative to address the court on the legal consequences of the Marriage Extension Act 50 of 1997 (the Extension Act) on the matrimonial property regime of the parties. After hearing argument on this issue, it found that the retrospective operation of the Extension Act meant that all marriages concluded without an ante-nuptial contract after 27 April 1994, in the former TBVC areas were deemed to be South African marriages. It further held that the Transkei Act was 'either amended or repealed impliedly' by the Extension Act and that consequently the parties were married in community of property and profit and loss. The court consequently made the following order:

'1)...

2) Decree of divorce is hereby granted;

3) The two minor children shall primarily reside with the plaintiff, defendant shall have reasonable contact;

4) By virtue of the ruling by the court that the marriage is in community of property, division of the joint estate is ordered;

5) Each party to pay its own costs.[1] '

[3] The appellant appealed to the High Court, Eastern Cape, Mthatha, contending that the regional court erred in concluding that the Extension Act had the effect that all marriages concluded without an ante-nuptial contract in the erstwhile Transkei, after 27 April 1994 were in community of property. The high court found in favour of the appellant on this issue and said that '[t]he notion that the legislature may by statute, and with retrospective effect, alter the matrimonial property regime of married couples, is fundamentally repugnant to the tenets of our matrimonial jurisprudence and Chapter 2 of the Constitution'. It found it difficult 'to conceive of any justification

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[1] [1] The order does not deal with the maintenance of the minor children but in response to a question from the bench in this court, the appellant's representative stated that the appellant is responsible for the maintenance of the children.

for such a draconian provision in a free and open democratic society'. It thus concluded that the retrospective operation of the Extension Act did not have the effect of altering the matrimonial property regimes of parties whose marriages were solemnized after 27 April 1994.

[4] Having determined that issue, which was the only matter it had to resolve in the appeal, the high court mero motu went further and said that '[t]he respondent's contention that the appellant failed to adduce sufficient evidence to establish that the marriage was solemnized in terms of the Transkei Act, however, ha[d] greater merit and compel[led] thorough consideration'. The court then referred to the following evidence which it said was the appellant's testimony regarding the issue of domicile:

'Mr Mgxaji: Where do you reside?

Witness: I reside in Xongxo [Ngqungqu] administrative area in Mqanduli.

Mr Mgxaji: Where are you employed?

Witness: I am employed as a member of Parliament in Cape Town.

Mr Mgxaji: And it is correct that in between your being in Cape Town and [Ngqungqu] you stay in Cape Town?

Witness: Yes, when Parliament is in session I stay in Cape Town, when it is not, I stay in Mqanduli

Mr Mgxaji: Is it correct that in this divorce action you are suing the defendant who is Bukelwa Nolizwe Holomisa?

Witness: That is correct

Mr Mgxaji: Is it correct that you and the defendant married each other on 16 December 1994 out of community of property [and] profit and loss, [and] such marriage [still] subsists?

Witness: That is correct.'

The Court concluded that the above evidence 'fell far short of establishing that either he or the respondent was domiciled in the territory of the former Republic of Transkei', and that consequently the appellant could not claim that s 39(1) of the Transkei Act was applicable. On this basis it dismissed the appeal. This appeal is with the leave of this court.

[5] The appellant contends, correctly, in my view, that the high court erred in considering the domicile of the parties as this issue was not raised in the appeal and was common cause between the parties. The respondent, in her counterclaim

admitted that 'the plaintiff is domiciled within the area of jurisdiction of this court [regional court]'. Once the high court found that the Extension Act did not alter the matrimonial regime of parties who married in terms of the Transkei Act after 27 April 1994, it was not necessary for it to deal with any other issue. The evidence by the appellant – on which the high court based its conclusion – that domicile was not established, was not led to prove the domicile of either party, but was led to establish the regional court's jurisdiction in the divorce proceedings. Counsel for the respondent properly accepted this in this court.

[6] However, she contended that the issue pertaining to the matrimonial property regime of the parties had not been properly ventilated in the regional court and urged this court to refer the matter back to that court so that more evidence could be led on this aspect. In the alternative, Counsel submitted that s 7(3) of the Divorce Act 70 of 1979 was unconstitutional in that it did not allow the respondent and other vulnerable women married in terms of the Transkei Act, without an ante-nuptial contract, to seek a redistribution of the husband's assets, as was afforded to women married in terms of s 22(6) of the Black Administration Act 38 of 1927.

[7] The first contention can be disposed of easily on the basis that no purpose will be achieved by referring the matter to trial: First, the marriage certificate of the parties – which was not placed before the regional court, and which Counsel agreed would be placed before the regional court if the matter was referred to it – showed that the marriage was out of community of property. Second, it is common cause that the marriage was solemnised in Mqanduli, which is within the territory of the erstwhile Transkei, and the Transkei Act was applicable at the time of the conclusion of the marriage. The respondent in her counterclaim agreed that the appellant was domiciled in that area. A referral of the matter to trial would thus not rescue her case.

[8] The constitutional argument must also fail: It was raised for the first time in this appeal and it was not traversed at all in the pleadings. A court will not allow a new point to be raised for the first time on appeal unless it was covered by the pleadings.[2]

[2] *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA); [2000] 3 ALL SA 181 (A) para 30; *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 39.

Secondly, s 39(2)*(a)* and *(b)* of the Transkei Act provided that parties who did not wish to marry out of community of property could make a declaration to that effect, jointly before a magistrate or a marriage officer at any time before the solemnisation of the marriage or could conclude an ante-nuptial contract. The respondent did not make the election and there is no evidence to suggest that she wished to do so but was unable to. The court cannot make a new contract for the parties[3] and is thus obliged to enforce the terms of their marriage contract. For those reasons the appeal must succeed. The appellant agreed to forego the costs of the appeal and there will thus be no costs order against the respondent.

[9] I make the following order:

1 The appeal is upheld.

2 The order of the High Court dismissing the appeal is set aside and in its stead the following order is substituted:

   a) The appeal is upheld and the order of the Regional Court is substituted to the limited extent that paragraph 4 is deleted;

   b) The defendant's counterclaim is dismissed.

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Z L L Tshiqi

Judge of Appeal

[3] *Bath v Bath* (952/12) [2014] ZASCA 14 (24 March 2014) para 20.

APPEARANCES

For the Appellant:	S Mgxaji
Instructed by:	Mgxaji Incorporated, Mthatha
	Matsepe Incorporated, Bloemfontein
For the Respondent:	E Crouse
	Mbuyisa Neale Attorneys
	Legal Aid South Africa, Bloemfontein