Republic of South Africa

Paragraphs 1-17 and 34-71 reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 1990/2017

Before: The Hon. Mr Justice Binns-Ward
Hearing: 7 and 12 December 2017
Judgment: 19 February 2018

In the matter between:

EPHENIA MOGOGODI BROODIE N.O. (In her capacity as the executrix of the estate of the late SAMUEL BROODIE appointed by the Master of the High Court, Johannesburg under ref. no. 904/17)	Applicant

and

KGOMOTSO COMFORT MAPOSA (neé LEDWABA)	First Respondent
KGOTHATSO THEODOR LEDWABA	Second Respondent
MOKGOHU MARTHA LEDWABA	Third Respondent
SEEPUNT EIENDOMME CC	Fourth Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	Fifth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Sixth Respondent

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JUDGMENT

BINNS-WARD J:

Introduction

[1] The applicant is the widow of the late Samuel Broodie, to whom I shall refer as 'the deceased'. They were married to each other on 26 April 1967. The marriage was in community of property, in terms of s 22(6) of the Black Administration Act 38 of 1927. The deceased died intestate on 4 December 2016. By letters of executorship granted by the Assistant Master of the High Court, Johannesburg, on 18 January 2017, the applicant was appointed as the executrix of the joint estate of herself and the deceased. In that capacity she instituted the current application on Friday, 3 February 2017.

[2] The applicant sought an order that the registered transfer by the deceased, on 12 May 2014, of a 25 per cent member's interest in Seepunt Eiendomme CC ('the close corporation') to each of the first, second and third respondents, respectively, be declared unlawful and void, together with an order interdicting those respondents from alienating or encumbering their registered interests in the close corporation pending the determination of the application for the declaratory relief. An interdict *pendente lite* in similar terms was also sought against the close corporation itself (which was cited as the fourth respondent). Costs were sought against the first, second and third respondents on the attorney-client scale.

[3] The third respondent is a woman with whom the deceased had a longstanding extramarital relationship that commenced in or about 1986 and continued until his death. The deceased even went through the rites of a customary marriage with the first respondent in 1988. It was common ground at the hearing that the putative customary marriage between the deceased and the third respondent was legally invalid by virtue of his pre-existing civil marriage with the applicant. Two children were born of the relationship between the deceased and the third respondent. They have both since reached adulthood. They were joined in the proceedings as the first and second respondents, respectively.

[4] The close corporation has at all material times been the registered owner of fixed property in Regent Road, Sea Point, on which stands a building that is let out to various tenants for mixed commercial and residential purposes. The deceased was the

only registered member of the close corporation during the period 2001 to 12 May 2014. As he was based in Gauteng, the deceased entrusted the administration of the close corporation's affairs during most of that period to a firm of attorneys in Cape Town. An attorney, Mr Meyer de Waal, and a secretary, Ms Heila du Toit, were the persons at the firm most closely involved in dealing with the close corporation's business on the deceased's behalf. Mr de Waal's mandate was terminated in May 2012. It is apparent from the correspondence exchanged at that time and the fact that she had accompanied the deceased to a meeting concerning the close corporation's affairs at the attorneys' offices on 17 May 2012 that the third respondent had by that stage become closely involved in the management of the deceased's interest in the corporation.

[5] On 12 May 2014, a 25 per cent member's interest in the close corporation was registered in the names of each of the first to third respondents. The deceased remained as the registered holder of the residual member's interest, with the result that from that date each of the four of them held an equal registered holding in the close corporation.

[6] The application to have the registration of the transfer of the member's interest in the close corporation to the first, second and third respondents set aside is advanced on three grounds. The applicant contends that the transfer was invalid because - (i) it occurred without her consent, and thus in breach of sub-secs 15(2) and/or (3) of the Matrimonial Property Act 88 of 1984; (ii) it had been fraudulently procured by the third respondent; [1] and (iii) the deceased had lacked the necessary mental capacity to appreciate the nature of his actions when the transfer was effected.

History of the litigation to date

[7] The application for the interim interdictory relief was set down for hearing as an urgent matter on Monday, 6 February 2017.

[8] An order was taken by agreement before Van Staden AJ on 6 February 2017 postponing the hearing of the application for the declaratory relief to 24 April 2017, with directions on the exchange of papers and heads of argument. The agreed order

[1] The claim based on what has loosely been described as 'fraud' is actually more accurately described as one founded on an allegation of theft or misappropriation. It has various aspects to it, including the allegation that the third respondent must have misrepresented to the Companies and Intellectual Property Commission that the deceased was party to the transfer of the member's interest. As will appear, precise characterisation of the basis of the claim is not necessary for present purposes and I have therefore found it convenient to adopt the label used by the applicant and her legal representatives in the judgment.

also incorporated interim interdictory relief substantially in accordance with the notice of motion. The directions recorded the applicant's intention to supplement her founding papers on or before 24 February 2017, noted that the first to fourth respondents did not concede her entitlement to do so, and indicated that the applicant would therefore seek the required leave. The direction that the respondents would deliver their answering papers by 17 March 2017 carried the implication that the respondents might respond provisionally to any material in the supplementary founding affidavits contingently on the admission of such affidavits with their agreement, or notwithstanding their opposition. Costs of the proceedings on 6 February 2017 were stood over for later determination.

[9] The applicant did not comply with the timetable incorporated in the directions given on 6 February 2017. She applied for the introduction of her supplementary affidavit (*jurat* 8 March 2017) in terms of an application that was delivered on 9 March 2017. The respondents' answering papers were delivered on 31 March 2017.

[10] The application was not heard on 24 April 2017, as the applicant wished to file a set of replying papers. An order by agreement was taken from the Judge President further postponing the matter to 28 June 2017. The applicant was directed to file her replying affidavits by 12 May 2017. The costs of the proceedings on 24 April were also stood over for later determination.

[11] In the event, the applicant's replying papers were delivered only on 8 June 2017. The hearing of the application was thereafter further postponed to 22 August 2017 in terms of an order taken by agreement before Dlodlo J on 21 June 2017. The costs occasioned by that postponement were also stood over for later determination.

[12] On 28 June 2017, the first to third respondents gave notice of their intention to apply at the hearing on 22 August to strike out various parts of the applicant's replying affidavits, including those parts that cross-referenced to the applicant's supplementary founding affidavit, *jurat* 8 March 2017, which, the notice to strike out noted, had not (yet) been admitted by the court.

[13] By notice dated 8 August 2017, the applicant indicated her intention to apply at the hearing of the application on 22 August for the admission of a further replying affidavit by herself, *jurat* 10 August 2017.

[14] The hearing of the application did not proceed on 22 August, however. The matter was further postponed for hearing on 24 October 2017, with the respondents being given until 22 September to deliver any responses they might wish to the aforementioned supplementary founding and replying affidavits delivered by the applicant. The costs incurred in respect of the abortive set down of the matter for hearing on 22 August were stood over for later determination. (The applicant contended in written argument that the terms of the order made in August impliedly admitted her aforementioned supplementary affidavits. The order was taken by agreement. The respondents, however, contended that the provision in it for the delivery of responses had been merely to facilitate the hearing of the matter without further delay should the court decide in October to admit the applicant's supplementary affidavits. At the hearing before me the applicant's counsel did not seem to persist with the contention advanced in the heads of argument, and appeared, advisedly so in my view, to accept that the admission of those affidavits still had to be decided.)

[15] The applicant had in the meantime brought an application under the same case number as the current matter for an order directing the respondents to produce certain of the close corporation's financial documentation and to provide an accounting in respect of the corporation's business from 1 March 2012. An order was also sought placing the corporation under the management of an independent third party pending the hearing of the main application. That application was determined by Hlophe JP on 5 September 2017, and appears to have taken on a life of its own with the subsequent delivery by the respondents of an application for leave to appeal. Leave to appeal was refused on 26 October. The only reason for referring to the application decided by Hlophe JP is because the costs of the proceedings before the Judge President on 5 September 2017 were stood over for determination in the current proceedings.

[16] In what by then had become typical of the conduct of the main application, papers were not delivered in accordance with the timetable fixed in terms of the order postponing the hearing to 24 October 2017. Presumably in consequence of that, the hearing was put off yet again when Dlodlo J made an order on that date postponing the application *sine die*. There is no record in the court file that the registrar issued a copy of the order made on 24 October. The endorsement by the judge's registrar on the file cover suggests that no order was made as to costs.

[17] The matter was then set down by special arrangement for hearing on 7 December 2017, when it came up before me.

[18] There were a number of preliminary issues for decision; namely, the respondents' application for striking out and the applicant's applications to introduce the aforementioned supplementary founding and replying affidavits. There was also an issue concerning the introduction of an affidavit by an assistant director in the Department of Home Affairs concerning the matrimonial property regime of the marriage between the applicant and the deceased, which the applicant had obtained only during November 2017. A copy of the declaration made by the applicant and the deceased in terms of s 22(6) of Act 38 of 1927 confirming that their marriage was contracted in community of property – an issue in contestation in the main application – was attached to the affidavit. The respondents had also taken a point of non-joinder, contending that the applicant was a necessary party in her personal capacity.

[19] The affidavit by the assistant director was admitted at the beginning of the hearing, against the opposition of the respondents. I indicated at the time that my reasons for admitting the affidavit would be furnished in this judgment. They follow.

Reasons for admitting the affidavit of the assistant director: Home Affairs

[20] The evidence that the applicant and the deceased had been married in community of property was centrally relevant, being dispositive of a contentious question that was fundamental to the applicant's standing in respect of the claim advanced on the basis of the allegation that the registration of the member's interest in the close corporation in the names of the first to third respondents had occurred contrary to sub-secs 15(2) or (3) of the Matrimonial Property Act. As mentioned, the marriage between the applicant and the deceased had been contracted in terms of the Black Administration Act. In order for it to be in community of property, the parties to the marriage would have had to make a declaration, as contemplated in terms of s 22(6) of the Act.

[21] The record of the declaration made by the applicant and the deceased was kept by the Department of Home Affairs as part of the population register maintained by the Department in terms of the Identification Act 68 of 1997.[2] The population register is

[2] See s 5 read with s 2 of the Identification Act. In terms of s 8(e), the population register contains in respect of every citizen and permanent resident '*the particulars of his or her marriage contained in the*

not accessible to members of the public, save with the special consent of the Director-General. [3] The Department had informed the applicant that it would produce a certified copy of the declaration only if subpoenaed to do so. The applicant accordingly procured the issue and service of a subpoena. The affidavit by the assistant director was made in compliance with the subpoena. It proclaimed itself to be a '*Declaration in terms of Section 212 of the Criminal Procedure Act …, Section 23 of the Identification Act … and Civil Proceedings Act (Act 25 of 1965 – Sections 18, 19 and 20)*'.

[22] The respondents' counsel contended that the procurement of the subpoena had been an irregular step because the rules of court do not make provision for the procurement of evidence by subpoena in motion proceedings. I agree that it was irregular in the circumstances for the applicant to have procured the issue of the subpoena. Faced with the quandary presented by the Department's position, the applicant should have sought directions from the court. I have no doubt that had it done so, effective directions would have been given to facilitate the procurement of the evidence. However, in the peculiar circumstances, where obtaining the evidence had plainly been in the interests of justice, as it consisted of officially recorded material that was conducive to the proper determination of a fundamental issue in the case, I considered this to be an instance in which substance had to prevail over form. I was therefore willing to overlook the irregularity.

[23] The admission of the affidavit did not occasion any cognisable prejudice to the respondents. The argument that they should be entitled to interrogate the information contained in the affidavit was decisively rebutted by the provisions of s 23 of the Identification Act, to which the deponent referred. As mentioned, a copy of the declaration in terms of s 22(6) of Act 38 of 1927 made by the applicant and the deceased was attached to the affidavit. The Director-General is empowered in terms of s 23(1) of the Identification Act to make reproductions of any document from which the population register is compiled. Section 23(2) provides: '*A reproduction referred to in subsection (1) shall, notwithstanding anything to the contrary contained in any other law, for all purposes be deemed to be the original document from which it was*

relevant marriage register or other documents relating to the contracting of his or her marriage, and such other particulars concerning his or her marital status as may be furnished to the Director-General'.

[3] See ss 6 and 21 of the Identification Act.

reproduced. and a copy of such reproduction which has been certified by the Director-General as a true copy, shall in any court of law be conclusive proof of the contents of the relevant original document' (underlining supplied).[4]

[24] The respondents also objected to the affidavit on the grounds that the attesting commissioner of oaths' qualification to commission the affidavit did not appear on the face of the document, as required in terms of reg. 4(2) of the Regulations Governing the Administering of an Oath or Affirmation.[5] I was not persuaded that there was any merit in the point.

[25] The commissioner's full names and business address were printed below his signature. The endorsement by the attesting commissioner also indicated that he was a 'director'. In the context of the document read as a whole, it was discernible from his address that the commissioner's position as a director was in the Department of Home Affairs at its head office. All officers in the administrative, professional, clerical, technical or General A and General B Divisions of the Public Service occupying a post with a salary scale the minimum notch of which is equivalent to or higher than the minimum notch of salary level 2 applicable in the Public Service have been appointed as commissioners of oaths *ex officio*.[6] There are 16 salary levels in the Public Service.[7] The top four levels (levels 13-16) apply in respect of the senior management service. It is common knowledge that the most senior ranks in the Public Service comprise of the directors-general, deputy directors-general, chief directors and directors, or

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[4] In terms of s 4 of the Identification Act the Director-General is authorised to assign his powers and functions under most provisions of the Act (including s 23) to an officer in the public service. The deponent averred at para. 3 of the affidavit that he had '*been authorized by the Director-General in terms of the Identification Act … to exercise and perform duties relating to these records* [i.e. the original registrations in respect of all births, marriages and deaths in the Republic of South Africa] *conferred or imposed upon by* (sic) *the Director-General'*.

[5] Made in terms of s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 and published under GN R 1258 in GG 3619 of 21 July 1972, as subsequently amended, *inter alia*, by GN 1648 published in GG 5716 on 19 August 1977. Regulation 4(2) provides:
The commissioner of oaths shall –
(a) sign the declaration and print his full name and business address below his signature; and
(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his office ***ex officio****.*

[6] See item 49 in the schedule to the 'Designation of Commissioners of Oaths in Terms of Section 6' made by the Minister of Justice and published under GN 903 in GG 19033 of 10 July 1998, as subsequently amended on various occasions, most recently by GN 1255 published in GG 40346 of 14 October 2016.

[7] Determined by the Minister in terms of reg. 47 of the Public Service Regulations, 2016, published in Regulation Notice 877 published on 29 July 2016. The Minister's determinations are published in the handbooks contemplated by s 42 of the Public Service Act 103 of 1994.

positions with different appellations having equivalent ranking to one or other of the aforementioned. The probability is therefore that the attesting commissioner of oaths is in the senior management service and therefore very comfortably above salary level 2. In the absence of proof to contrary, I considered this to be a matter in which the maxim *omnia praesumuntur rite esse acta* should be applied.

Non-joinder

[26] The non-joinder point fell away when Mr *Guldenpfennig* SC, who (together with Mr *Ferreira*) appeared for the applicant, placed on record that the applicant would abide by the judgment of the court in her personal capacity. (The applicant had sought in any event to advance the case in her personal capacity in certain sections of the founding papers in which she purported to invoke an entitlement under the Maintenance of Surviving Spouses Act.[8])

Admission of supplementary founding and further replying affidavits

[27] It is convenient now to consider the applicant's applications for the admission of her supplementary founding affidavit (*jurat* 8 March 2017) and her further replying affidavit, *jurat* 10 August 2017. In deciding these matters the court is called upon to exercise a true discretion on the given facts, bearing in mind that the interests of the administration of justice are ordinarily best served by observance of the rules concerning the number of sets and sequence of affidavits in motion proceedings. That is why the adequacy of the explanation offered for any deviation from the rules is always an important consideration. Another obviously important factor to be weighed is the prejudice (if any) that might be occasioned to the other party by the deviation. As Holmes J held in *Milne NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N), at 65, fairness should be done to both sides. In principle I share the view expressed by Williamson J in *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W), at 604A-E, that if there is an explanation that negatives any suggestion of mala fides or culpable remissness for the failure to put the evidence before the court at the earlier stage, courts should incline towards allowing the affidavits to be filed.[9]

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[8] Act 27 of 1990.

9 See *Zarug v Parvathie* NO 1962 (3) SA 872 (D). at 873H-874D for a discussion of the generally applicable principles with reference to the authorities. See also *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board, and Others* 2001 (2) SA 675 (C), at para 24.2.

[28] The intention to deliver a supplementary founding affidavit was presaged in the founding affidavit. At paragraph 17 of the founding affidavit the applicant explained that, because of the perceived need for the interim relief sought in the notice of motion to be obtained on an urgent basis, she had not had sufficient opportunity to gather all the evidence she wished to place before the court in support of the claim for the setting aside of the transfer of the member's interest to the first, second and third respondents. She was awaiting documents from the close corporation's auditors and from the Companies and Intellectual Property Commission. She indicated that she would wish to supplement the founding papers 'in order to file affidavits dealing with the first to third respondents' fraud, unlawful conduct and matters germane thereto'.

[29] As matters transpired, the applicant was not able to obtain the documentation that she had hoped to get. The supplementary affidavit set out her allegations concerning the circumstances in which this happened, and included various further allegations in support of her allegation that the third respondent had abused her position to defraud the deceased out of the member's interest in the close corporation. It contained nothing of substance to supplement the case already made out that the applicant had not consented to the alienation of the member's interest, which, as will appear presently, is the only substantive matter for determination before me in these proceedings.

[30] Bearing in mind that there was a two pronged application before the court – one for interim relief and the other for final relief – and that the founding papers made it clear that the contemplated supplementary papers would canvas the final relief, and would be delivered in a manner that would allow the respondents to answer that part of the application once the founding papers were in a complete state, I do not consider that the principle that an applicant must make its case out before the respondent is called upon to answer was substantively detracted from. A plausible reason for the course adopted by the applicant had been set out in the initial founding affidavit. As it was, the respondents held back from delivering their answering papers until the founding papers had been completed. I consider that the objection to the admission of the supplementary affidavit was unduly technical in the circumstances and lacking in substantive merit. The supplementary affidavit will accordingly be admitted.

[31] The first to third respondents treated of the supplementary founding papers very superficially in the answering affidavit that was made on their behalf by the third

respondent. It was asserted that this was done on the basis that they were under no obligation to deal with their content before they were admitted. I do not agree that that was so. In my view it was implicit in the terms of the order made by Van Staden AJ, to which the respondents agreed, that they would provisionally deal with the content of the supplementary founding papers. Had they understood that any other course had been intended they could have been expected to have delivered their answering papers before the founding papers were supplemented and to have objected to the production of the supplementary papers when they came to hand. Instead, they took the period of 15 days for the delivery of their answering papers from the date of the delivery of the applicants' supplemented founding papers. It was quite unacceptable for the respondents, if they thought they had not been bound to provisionally answer the supplementary founding papers, to have been privy to the matter continuing with further exchanges of paper in terms of a series of further orders obtained from the court without having the issue of the admissibility of the supplemented papers that the court had provisionally authorised the applicant to deliver determined first. The respondents were in any event afforded a further opportunity to respond to the supplemented founding papers by the order, described above, made on 22 August 2017.[10] As matters have turned out, the respondents' failure to engage in any depth with the supplementary founding papers did not affect the determination of the applicant's case based on s 15 of the Matrimonial Property Act, which, as will appear, was separated as the only substantive issue for determination in this stage of the proceedings. To the extent necessary, the case based on allegations of fraud can be fully ventilated in the context of the directions that will be given if the applicant's case based on the separated issue is dismissed.

[32] In her further replying affidavit, *jurat* 10 August 2017, the applicant responded to the denial by the respondents of her allegation that she had been married in community of property by virtue of having made a declaration in terms of s 22(6) of the Black Administration Act. In paragraph 140 of her answering affidavit the third respondent had averred that she had been unable 'to present documentary evidence in support of [her] allegations', and she requested that the question be referred for determination on oral evidence. The applicant put in a copy of her original marriage

[10] See paragraph [14] above.

certificate, which bore a stamp imprint indicating that the marriage was in community of property in terms of 22(6), under the further replying affidavit. She also explained the complicated bureaucratic process that she had had to negotiate to obtain the document. I would have had no difficulty in admitting the affidavit in the circumstances. As it is, the issue has been overtaken by the admission of the affidavit by the Assistant Director of the Department of Home Affairs discussed earlier.

The respondents' application to strike out

[33] The first to third respondents applied to strike out substantial parts of the applicant's replying papers. I do not intend to traverse that application in detail. Suffice it to say that a considerable part of the matter to which objection was taken concerned the case founded on allegations of fraud or misappropriation, which, as will appear, were not dealt with in the principal hearing before me. I have been persuaded that only the following parts of the applicant's replying papers should be struck out on the grounds that the content thereof is inadmissible hearsay or is scandalous, vexatious and/or irrelevant:

i. The following words in para. 89 of the applicant's replying affidavit, *jurat* 7 June 2017: '*and the Third Respondent did not resign, she was fired by her employer at the time, I was told*'.

ii. The following words in para. 89 of the applicant's replying affidavit, *jurat* 7 June 2017: '*as is all of the Third Respondent's evidence. She has specifically lied to hide her fraud and falsification*'.

iii. The entire affidavit of Peter Potjie Ledwaba, *jurat* 30 May 2017.

In view of the very limited success that the respondents enjoyed in their application for striking out and the little time spent on the application at the hearing, I shall make no order as to its costs.

Separation of issues

[34] At the hearing, the applicant's counsel conceded that the allegations of fraud or the alleged mental incompetence of the deceased could not be determined without oral evidence. They requested the court to determine the case based on the effect of the Matrimonial Property Act, and if the applicant did not succeed on that basis, to refer the other bases for it for determination on oral evidence. The respondents' counsel was

content to argue the matter on the narrow basis suggested, but contended that if the application did not come home on the statutory question, it should be dismissed because the contingent request by the applicant's counsel for a reference of the other bases to oral evidence lacked a proper foundation.

Claim based on lack of consent in terms of the Matrimonial Property Act

[35] Section 15 of the Matrimonial Property Act 88 of 1984 provides as follows insofar as pertinent in the current case:

> **Powers of spouses**
>
> (1) Subject 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.
>
> (2) Such a spouse shall not without the written consent of the other spouse-
>
> (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;
>
> (b) enter 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;
>
> (c) alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;
>
> (d) … ;
>
> (e) … ;
>
> (f) … ;
>
> (g) as a purchaser enter into a contract as defined in the Alienation of Land Act, 1981 (Act 68 of 1981), and to which the provisions of that Act apply;
>
> (h) … .
>
> (3) A spouse shall not without the consent of the other spouse-
>
> (a) … ;
>
> (b) … ;
>
> (c) 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 is not contrary to the provisions of subsection (2) or paragraph (a) of this subsection.
>
> (4) The consent required for the purposes of paragraphs (b) to (g) of subsection (2), and subsection (3) may, except where it is required for the registration of a deed in a deeds

registry, also be given by way of ratification within a reasonable time after the act concerned.

(5) The consent required for the performance of the acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection (2) shall be given separately in respect of each act and shall be attested by two competent witnesses.

(6) The provisions of paragraphs (b), (c), (f), (g) and (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.

(7) … .

(8) In 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.

(9) 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.

[36] The third respondent averred in the first instance that the member's interest in the close corporation had been acquired and held by the deceased for her and their two children; in other words, as I understood the argument articulated by the respondents' counsel, that the deceased had never been the beneficial owner of the member's interest in the close corporation. However, insofar as might be held, contrary to that contention, that the deceased had been the owner, it was contended that the applicant had consented to the donation of the member's interest to the first to third respondents; alternatively, that those respondents did not know and could not reasonably have known that the deceased had been married in community of property or that she had not consented to such donation.

[37] The third respondent testified that she had been aware, when she went through the process of contracting a customary marriage with the deceased in 1988, that he was

already married to the applicant, but had not given any consideration to the nature of the preceding marriage. The applicant called the third respondent's claim to have been through any marriage rites with the deceased into question. It is indeed peculiar on the third respondent's version that she would not have expected to be introduced to the deceased's first wife had she been properly married under customary law. I do not think, however, that there is any proper basis to reject her evidence on affidavit that she went through the formalities of a customary marriage. As mentioned, the third respondent accepts, in the light of her subsequent discovery that the marriage between the deceased and the applicant was a civil one, that her subsequent putative customary marriage was invalid.

[38] There is also no reason to reject the third respondent's evidence that the deceased was the father of the first and second respondents and had paid for their education at private schools and university. In the context of the applicant having elected to prosecute a claim for final relief on paper, the court must also accept the third respondent's evidence about how the deceased divided his time between his two family households, spending approximately half his time living with third respondent in Dennilton and the other half with the applicant in Shoshanguve, over the applicant's testimony that he overnighted in Dennilton (where he had a business) only once a week, at most. Moreover, the evidence of Mr de Waal and Ms du Toit (who made supporting founding affidavits) corroborates the third respondent's evidence that she was closely engaged with the deceased's proprietary affairs up until at least 2012.

[39] Against that background, the third respondent's evidence that the deceased had informed her that he would make separate provision for his two families, and, in that context, that the Sea Point property was earmarked for his family by the third respondent, is by no means inherently improbable, at least conceptually. Accordingly, whilst its truth might be tested should the case based on fraud go to oral evidence, it must be accepted for the purposes of the determination on the papers of the case based on the Matrimonial Property Act.

[40] The third respondent's evidence that the deceased did not ever hold a beneficial proprietary interest in the close corporation is farfetched, however. The notion that the deceased would hold the registered member's interest only nominally but subject to an agreement that he might have exclusive and unfettered enjoyment of the income defies credulity. There could be no conceivable purpose in the member's interest being

registered in the name of the deceased in such circumstances if, as the third respondent sought to explain, it was subject to the right of the first, second and third respondents to claim registration of their alleged aliquot shares in their own names whenever they wished. Any such arrangement is also difficult to reconcile with the deceased's allegedly agreed exclusive entitlement to the net profits of the close corporation. It is, furthermore, completely inconsistent with the deceased's conduct. If he were merely the nominal holder of the registered member's interest, one would have expected him (and, indeed, the third respondent) to have communicated that information to the attorneys appointed to administer the close corporation's affairs over a period of nearly 11 years. The deceased's appropriation of the profits during the period in which the administering attorneys kept the close corporation's financial records shows that a considerable portion thereof was paid to the Broodie Family Trust, of which the applicant and her children are the only beneficiaries. The family meetings attended by the first, second and third respondents and the deceased in January 2014 described by the third respondent are also inconsistent with the scheme that the third respondent claims had been put in place in 2001 before the deceased acquired the Sea Point property. The subsequent transfer of 75 per cent, rather than 100 per cent, of the member's interest to the respondents is similarly incongruent. No explanation has been offered as to why the deceased would have retained 25 per cent of the member's interest registered in his own name.

[41] The third respondent's evidence concerning an agreement with the deceased at the time that the interest in the close corporation was acquired in the deceased's name in 2001 that he would hold it on her behalf is also difficult to square with the content of correspondence addressed, ostensibly by the deceased, but sent from the third respondent's email address, to Mr Meyer de Waal in April 2012, in which instructions for the transfer of the fixed property into the deceased's name were given and ignorance was expressed that at the time of acquisition the property had been registered in the name of a close corporation.[11] If the deceased had not appreciated that the property

[11] The following statement was made in an email to Meyer de Waal, copied to 'Heila', dated 17 April 2012, and sent from the email address of 'martha ledwaba', marthaledwaba@yahoo.co.uk, but signed in the deceased's name: '*... it just came to my attention that See Punt Eiendomme was registered as a CC and that it owed annual returns from 2009 and as a result it has been de-registered. As a way forward, I've already paid the outstanding amounts and currently getting it restored. In that regard all I'm asking from you is that if you've got the original CC/CK documents, I will need to attain ownership of them during my above mentioned visit to Cape Town.*' (Annexure HT2 to the affidavit of Heila du Toit *jurat* 6 March 2017.)

was held through a close corporation, as the correspondence purports to convey, he could hardly have entered into the arrangement with the third respondent that she has alleged.

[42] It is not necessary to make a determination on these questions, however, because an acceptance *ex hypothesi* of the third respondent's claim that she and her children obtained the proprietary interest in the close corporation in 2001, in accordance with her version, would not detract from the notion that its acquisition at that stage would have been by way of a donation by the deceased. Moreover, the donation would have been of the interest in the close corporation; *not*, as the respondents' counsel argued, of the funds used to acquire it. The deceased did not give the respondents the money to acquire the member's interest. He acquired it himself - not as the respondents' agent, but, on the respondents' version, for the purpose of giving it to them.

[43] In the result, insofar as the case falls to be decided with reference to the effect of s 15 of the Matrimonial Property Act, the transfer of the registered member's interest to the respondent must be treated as a donation within the meaning of s 15(3).[12] (I think it is clear enough, when one reads the section as a whole, that the disposition by a spouse of the member's interest in a close corporation for consideration qualifies as an 'alienation' governed by s 15(2)(c), whilst a disposal of such an interest for no consideration would be a 'donation' or 'alienation without value' as contemplated by s 15(3)(c).) It is immaterial for the purpose of deciding the case, whether the disposition occurred in 2001 as the third respondent would have it, or in 2014 when the transfer of the member's interest into the respondents' names was registered. There is nothing on the papers to suggest that the state of the respondents' knowledge concerning the legal character of the deceased's marriage with the applicant differed in 2014 from what it had been in 2001.

[44] Mr *van der Merwe* argued on behalf of the respondents that the onus was on the applicant to establish that she had not consented to the donation and, if she succeeded in doing so, also to show that the respondents should have known about the marriage in community of property and of the absence of her consent to the donation. These being motion proceedings, determining the established facts is governed by the well-

[12] Whether it actually was a donation or not would be affected by the determination of the applicant's allegations of fraud and/or lack of contractual capacity.

known evidentiary rules for deciding cases on paper.[13] Those apply in the same way irrespective of whether the incidence of the onus is on the applicant or the respondent.[14]

[45] In relation to the question whether the applicant had not consented, the answer must be in the applicant's favour unless it can be said the respondents have raised a genuine dispute of fact in answer to her averment that she did not. As to the determination of the matter raised by the respondents' reliance on s 15(9)(a), their evidence that they did not know that the deceased was married to the applicant in community of property is by no means farfetched and must therefore be accepted as a given fact. Whether they could not reasonably have known that the donation was being effected contrary to those provisions requires a 'juristic evaluation'. The conclusion is one of law based on the established facts; cf. *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC), at para. 50-53. The incidence of the onus therefore bears no practical significance.

[46] The third respondent has not offered any evidence to directly counter the applicant's assertion that she did not consent to the donation of the member's interest. She has, however, pointed to the fact that the documentary records of the search conducted by the applicant's attorneys that uncovered evidence of the registration of the member's interest in the respondents' names indicated that the information had been obtained during June 2016, several months before the deceased's death. The third respondent contends that the applicant's failure thereafter to immediately contest the legality of the transfer supported the inference that she had tacitly consented to, alternatively, ratified the donation.

[47] In my judgment the inference that the third respondent would have the court draw in this regard is not sustainable. The evidence makes it clear that the applicant

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[13] *Plascon-Evans Paints (Tvl) Ltd. v Van Riebeck Paints (Pty) Ltd.* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 at 634E-635C (SALR); and see also *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (1) SACR 361 (SCA); 2009 (2) SA 277; [2009] 2 All SA 243; 2009 (4) BCLR 393, at para. 26-27. The incidence of the onus would be pertinent only to determine whether the facts established applying the rule in *Plascon-Evans* justify the relief that has been sought; in other words, in determining whether the requirements for the grant of the remedy have been satisfied.

[14] *Ngqumba and Another v State President and Others; Damons NO and Others v State President and Others; Jooste v State President and Others* [1988] ZASCA 23; 1988(4) SA 224 (A), at 259C-263D (SALR), approving the following statement by Kannemeyer J in the court a quo: '*The approach laid down in Plascon-Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (AD) is not concerned with the question of onus. It determines the evidence upon which an application on notice of motion must be decided when there is a conflict of fact on the affidavits*'.

and her family were disapproving of the deceased's relationship with the third respondent, and hostile to and unaccepting of her and the first and second respondents. Any supposition that in those circumstances the applicant would have consented to a significant donation by the deceased to the respondents would be farfetched. The very fact that the applicant had apparently engaged attorneys to investigate the member's interest in the close corporation is fundamentally irreconcilable with the notion that she had consented to its alienation. On the respondents' version, it would have been unlikely that the deceased would have sought the applicant's consent. They described his conduct of his affairs as 'patriarchal', implying that he would have made the decision to give the member's interest in the close corporation without regard to the applicant's views. Indeed, a conspectus of the papers suggests that the deceased kept his dealings with the affairs of his respective households with the applicant and the third respondent conspicuously discrete. In all these circumstances the applicant's evidence that she did not consent to the donation falls to be accepted.

[48] The applicant averred that she became aware of the registration of the member's interest in the respondents' names only sometime in November 2016. Having regard to the search undertaken by her attorneys in the middle of the year, that seems improbable. It is not, however, necessary to determine the date on which she obtained the knowledge. I shall assume for present purposes that she learned of the facts in late June 2016, as contended by the respondents. I am not persuaded that the applicant's failure to institute proceedings or protest the transfer of the member's interest as soon as her attorneys had confirmed the fact established that she had ratified the donation. In my view, the provisions of s 15(4) of the Matrimonial Property Act,[15] which posit that the required consent might be 'given by way of ratification within a reasonable time after the act concerned', contemplate an express ratification, or conduct unambiguously indicative of an intention to ratify; not mere passivity in the face of knowledge of the alienation. One cannot do what is required to be done within a reasonable time by doing nothing at all, unless the particular inaction falls to be assessed in the context of an obligation, if one is possessed of the relevant facts, to act within a given time in the circumstances.[16] Implying the requirement of an express act

[15] See para. [35] above, for the text of the provision.

[16] The position is fundamentally distinguishable from that which obtained in *Naidoo and Another v Naidoo and Others* [2008] ZAKZHC 73 (29 September 2008); [2009] JOL 22674 (N), in which the respondents, who sought to avoid a settlement agreement entered into by their spouses on the grounds

of ratification or conduct unambiguously indicative of ratification would, moreover, be appropriate having regard to the fact that the relevant provisions of s 15(4) create an exception to the general rule that an act done contrary to the law is incapable of ratification.

[49] In the circumstances of the current case, accepting, as I do, that the applicant would have been entitled in her personal capacity to institute proceedings for the return of the donated interest in the close corporation to the joint estate,[17] she was not obliged to act immediately. The five months that may have passed between the search of the close corporation's public records and the death of the deceased would not have stood in the way of the applicant to institute recovery proceedings; her claim would not have been extinguished by prescription. It is impossible then to conceive how her mere inactivity during that period could, without more, have constituted a ratification of the donations.[18] In short, the established facts do not support a conclusion that the applicant (in her personal capacity) ratified the acts of donation by the deceased.

Section 15(9)(a) of the Matrimonial Property Act

[50] The findings made thus far bring a consideration of the respondents' reliance on s 15(9)(a) of the Matrimonial Property Act to the fore.[19] That provision deems the transaction concerned to have been entered into with the required consent if the person to whom the disposition was made did not know and reasonably could not have known that it was effected contrary to s 15(2) or (3). It has already been found that the respondents did not know that the applicant and the deceased were married in community of property. It is also apparent that they did not make any enquiries into the matrimonial property regime of the deceased and the applicant. The question is

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that they had not consented thereto, were held, on account of their knowledge of the settlement negotiations and presence at the signing of the deed, to have tacitly consented by failing to protest at the time. They had also signed the transfer documentation to enable the terms of the settlement agreement to be carried out. (The judgment in *Naidoo* was reversed on appeal for reasons unconnected with the point taken by the respondents in reliance on s 15 of the Matrimonial Property Act; see *Naidoo NO and Others v Naidoo and Another* [2010] ZAKZPHC 41; 2010 (5) SA 514 (KZP).)

[17] See *Bopape and another v Moloto* [1999] 4 All SA 277 (T), 2000 (1) SA 383.

[18] The applicant could not competently have ratified the donations after the death of the deceased for that would have prejudiced the rights of the other intestate heirs to the deceased estate; cf. the discussion in *Smith v Kwanonqubela Town Council* [1999] ZASCA 58; [1999] 4 All SA 331 (A); 1999 (4) SA 947, at para 12-13.

[19] See para. [35] above, for the text of the provision.

whether they reasonably could not have known that that disposition was being effected contrary to s 15(3).

[51] The enquiry is an objective one, and falls to be determined with reference to the knowledge that the reasonable person in the position of the respondents would have been expected to have or have obtained. The determination is not an abstract exercise. It takes place with reference to the facts of the given case. Van Coppenhagen J gave a useful rehearsal of the concept of the reasonable person in this context in *Distillers Corporation Ltd v Modise* [2001] ZAFSHC 2; 2001 (4) SA 1071 (O) at para. 5. The learned judge stressed that caution should be exercised by courts not to put the standard unrealistically too high. That approach corresponds in substance, I think, with that reflected in *S v Bochiris* 1988 (1) SA 861 (A), at 865G, where the Appellate Division (per Nicholas AJA), in a conceptualisation subsequently cited with approval by the Constitutional Court,[20] described the reasonable man as 'the embodiment of the social judgment of the Court, which applies "common morality and common sense to the activities of the common man".'

[52] The applicant's counsel argued that s 15(9)(a) puts persons in the position of the respondents under a duty of enquiry. In this regard they placed considerable emphasis on certain dicta in the judgment in *Visser v Hull* [2009] ZAWCHC 77; 2010 (1) SA 521 (WCC), which, if read in isolation from the facts of that case and the actually quite narrow basis for the decision in that matter, might be understood to place quite an onerous duty of enquiry on a third party in any transaction to which s 15(2) and (3) of the Matrimonial Property Act applies. In *Visser*, the 'guilty' spouse had, without the knowledge or consent of his wife, to whom he was married in community of property, sold the family home in the village of McGregor to two of his blood relatives and their spouses. He declared in the transfer papers that he was unmarried, but the court held that in a small close knit community the purchasers could not but have been aware of the relationship between the guilty and innocent spouses and of the fact that the innocent spouse had been living in the property for many years and that the couple's children were raised there.

[53] A proper reading of the judgment in *Visser* shows that the learned judge (Dlodlo J) accepted that what might be expected from the outside parties in a

[20] In *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620, at para. 52.

transaction affected by s 15(2) or (3) depended on the peculiar circumstances of the case. So, at para. 11, he held:

> The circumstances or the property in question might sometimes provide an answer. The third person's special knowledge concerning the marital circumstances of the spouse with whom he contracts, could conceivably also be a factor. Looking at the circumstances of this case, it was argued that the third parties had special knowledge since they were closely related to the deceased husband with whom they had contracted for the purchase of the house. I accept this submission. In my view, the Respondents knew very well that the transaction was being conducted behind the Applicant's back. They connived with the deceased and the purpose was obviously to prejudice the Applicant's interests on this asset of the joint estate. They did not take any steps at all in satisfying themselves about the nature of marriage between the deceased and the Applicant. It is reasonable to have expected them even to come and ask the Applicant and/or any of her children. They could also have asked the members of the community. McGregor is a very small place where everybody knows virtually everything about each other. It was easy to find out. They never investigated because they knew that they were assisting their relative (the deceased) to succeed in compromising the interests of the Applicant in this matrimonial asset.

It is clear therefore that in *Visser* the court found the outside parties to have been complicit in the fraudulent conduct of the seller of property in the joint estate. A third party in that position could never hope for protection in terms of s 15(9)(a); his conduct would be about as far removed from the standard of the reasonable man as could be imagined.

[54] Semenya AJ rejected a similar undiscriminating reliance on *Visser* by the applicant in *M v M and Others* [2015] ZALMPHC 4 (30 November 2015),[21] notwithstanding the distinguishable circumstances of the case. In *M*, the 'guilty' spouse sold fixed property to the second respondent that he had acquired by deed of grant shortly before his marriage in community of property to the applicant. The deed of grant reflected his marital status as single and, when concluding the deed of sale, he falsely made a 'declaration confirming status' indicating that he was single. The learned acting judge held (correctly in my respectful view) that the second respondent, who had no independent knowledge of the seller's circumstances, was reasonably

[21] Also reported as *PM v TM* 2016 JDR 0171 (GP).

entitled in that context to accept that he did not require spousal consent to conclude the transaction.[22]

[55] What might in *Visser* be construed as suggesting that a third party is always under a duty of independent enquiry into the alienating spouse's marital status, even in the face of representations by the alienating spouse,[23] must be understood in the context of the factual matrix of that case. As discussed earlier, the facts in *Visser* were such that the purchasers of the family home could not reasonably have been taken in by the seller's representation. Indeed, as also mentioned earlier, the court in *Visser* actually found that the purchasers had been complicit in the seller-spouse's dishonesty. Whether a third party may reasonably rely on the alienating spouse's representations concerning his marital status or legal capacity to conclude the affected transaction will depend on the facts of the given case.

[56] In *Distillers Corporation v Modise* supra, the court held that a third party, which did not have knowledge of the marital status of the defendant who had bound himself in its favour as surety, was entitled to be satisfied on the basis of the incorporation in the deed of suretyship of a representation by the defendant that '*Ek/ons verklaar hiermee dat die waarborgakte deur myself/onsself voltooi is of in ons teenwoordigheid voltooi is, en dat ek/ons regtens bevoeg is om dit te verly*',[24] that the defendant had the legal authority to enter into the contract. The judgment in *Distillers Corporation* was subjected to stringent criticism by the academia in an article by Professor L Steyn**,** *When a third party 'cannot reasonably know' that a spouse's consent to a contract is lacking* 119 (2002) SALJ 253**.**

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[22] In *M*, the court accepted an argument that s 15(9)(a) gave rise to 'a presumption' in favour of the third party that the other spouse had given the requisite consent for the transaction; an interpretation to which I am, with respect, unable to subscribe. It seems clear to me, however, that the outcome of the case did not depend on the attributed existence of 'the presumption', but rather on the court's evaluation of what might reasonably have been expected of the second respondent in the circumstances. In my judgment s 15(9)(a) is, like s 15(6), in essence, a proviso to s 15(2) and (3); see *Strydom v Engen Petroleum Ltd* [2012] ZASCA 187; [2013] 1 All SA 563 (SCA); 2013 (2) SA 187, at para. 14-15 and *Gounder v Top Spec Investments (Pty) Ltd* [2008] ZASCA 52; [2008] 3 All SA 376 (SCA); 2008 (5) SA 151, at para. 17.

[23] At para. 8 of *Visser* the learned judge remarked '*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*'.

[24] 'I/we hereby declare that the deed of suretyship has been completed by me/us, or in our presence, and that I am/we are legally empowered to enter into it.' (My translation.)

[57] Professor Steyn expressed the opinion that the learned judge had misconstrued s 15(9)(a) and consequently placed the bar for third parties to obtain the protection afforded by the provision too low. In Steyn's view, there is always a duty of enquiry on a third party entering into any transaction of the nature to which s 15(2) and (3) apply. According to Steyn (at p. 256) –

> 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. This duty was overlooked by the court in the *Distillers Corporation* case.
>
> As already mentioned, according to Van Coppenhagen J's formulation of the test for liability, the matter must be considered from the point of view of a reasonable person and the conclusion must be arrived at which a reasonable person would have reached (at 1075H–I). This may be correct as far as it goes, but it does not go far enough. The third party must also take the steps which a reasonable person would take to investigate whether consent is required and, if so, whether it has been obtained. This is necessary because the third party must be satisfied that the reasonable person cannot know that consent is lacking.

Steyn cites the writings of a number of other academic writers in support of her thesis that the provision puts a positive duty of enquiry on third persons contracting with a 'spouse'. Reference to the other sources in fact suggests widespread uncertainty amongst the writers about the precise import of s 15(9)(a).[25] Professor Steyn herself suggested that its wording might be improved to promote clarity. It is therefore not without significance that the judgment in *Distillers Corporation* and the criticism it

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[25] S Jacobs and L Steynberg, in an article entitled *Artikel 15(9)(A) van die Wet op Huweliksgoedere 88 Van 1984 – Betekenis van "Nie redelikerwys kan weet nie"* 2003 (66) THRHR 510, at p. 514, identified two schools of thought on the construction and application of s 15(9)(a). They state:

[Dit wil] *dus voorkom of daar basies twee standpunte is oor wat presies van 'n redelike persoon (soos bedoel in a 15(9)(a) van die Wet) in die posisie van die eiser verwag kan word:*
(a) Die handelsverkeer mag nie onnodig ingeperk word nie en daarom kan 'n gewone besigheidsman (soos in die feite van hierdie saak) hom bloot verlaat op 'n kliënt se mededelings, sonder om verdere ondersoek te loods (Van Wyk [Van Wyk, *Gemeenskap van goedere en aanwasbedeling volgens die Wet op Huweliksgoedere, 1984*, 1985 *De Rebus* 22] *en Sinclair* [June Sinclair *An introduction to the Matrimonial Property Act 1984* (1984)] *); en*
(b) die gewone besigheidsman kan nie met 'n algemene, niksseggende verklaring (soos in Modise die geval was) tevrede wees nie, maar moet verdere en meer ekstensiewe ondersoek doen (Schäfer ["Matrimonial Property" Family law service vol 1 29] *en Visser en Potgieter* [*Inleiding tot die familiereg* (1998) 128]*).*
(*Eng*. '[It would] therefore appear that there are basically two standpoints about what precisely might be expected of a reasonable person (as contemplated in s 15(9)(a) of the Act):
(a) Commercial dealings must not be unnecessarily restricted and therefore an ordinary businessman (as on the facts of the *Distillers Corporation* case) is entitled to rely entirely on the customer's representations without undertaking further investigation (Van Wyk and Sinclair); and
(b) The ordinary businessman cannot be satisfied with a general non-particularised declaration, but must undertake further and more extensive investigation (Schäfer and Visser and Potgieter).' My translation.)

elicited have not conduced to any amendment of the provision in the intervening 15 years since her note was published .

[58] In my view the criticism of the judgment in *Distillers Corporation* fails to take sufficiently into account that the provisions of s 15 are centrally directed at imposing obligations *inter se* on the parties to a marriage in community, not on outside parties. It seems clear that a transaction entered into by one of the spouses contrary to the provisions of s 15(2) or (3) is not *ipso facto* void, as would ordinarily be the case in a contract concluded in breach of a prohibitory statutory provision. Those transactions referred to in sub sec 15(4) are amenable to ratification, and all of the listed transactions are potentially liable to imputed validity in terms of s 15(9)(a).

[59] As noted by Professor Steyn, certain provisions in s 15, in particular subsections (6) and (9)(a), are 'to balance the interests of the third party with those of the non-contracting spouse and, on a more fundamental level, to minimize any disruption caused by the consent provisions to the free flow of commercial trade'.[26] The provisions of s 15(9)(a) afford protection to a third party who does not know that the affected transaction is being entered into contrary to the provisions of s 15(2) and (3) and whose ignorance in the circumstances is understandable and excusable. They do not place the third party under a duty of enquiry in every case.

[60] The phrase 'does not know' in s 15(9)(a) posits a factual situation. If the third party does know that transaction is being entered into contrary to the scheme of s 15, then he or she cannot derive any protection from s 15(9)(a). If the third party was not ignorant, one does not reach the second leg of the test for protection in terms of s 15(9)(a). Passing the first leg (which is entirely fact based) engages the second leg, which calls for an answer to the question whether the established ignorance was reasonable in the peculiar circumstances. That is the import of the phrase '*and* cannot reasonably know'.[27]

[61] The object of s 15(9)(a) would be nugatory if an enquiry by the third party was required in every case. The third party would be called upon to require production of a marriage certificate before entering into any of the transactions covered by s 15(2) and (3), or to make enquiries at the Department of Home Affairs; for that is the obvious

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[26] Op cit supra, at p. 253.

[27] Italicisation for emphasis.

nature of the indicated enquiry if the effect of the provision is that a third party is always put on enquiry irrespective of any representation that the contracting spouse might have made. Such a requirement would not only stultify commerce, it would also detract from the intended empowering effect of ss 14 and 15(1) of the Matrimonial Property Act for women married in community of property. I do not consider that such a requirement can properly be imputed on a proper construction of the provision. Most of the commentators appear to accept as much, but they are not agreed about what exactly is required because what is required falls to be determined by the criterion of reasonableness - something that does not lend itself to definition in the abstract. I would therefore reiterate that whether an enquiry by the third party is indicated, and if so, its nature, will be determined by the peculiar circumstances of the given case. Any representation made by the contracting spouse and the context in which it is made are relevant considerations in determining what might reasonably be expected of the third party.[28]

[62] In my view any assessment of what might reasonably be expected of a third party must take into account that social norms and the law do not expect persons to regulate their dealings on the basis of suspecting illegality or fraud on the part of those with whom they transact. In the absence of good reason to believe otherwise, there is something almost in the nature of a presumption that people conduct themselves honestly and in accordance with the law; cf. e.g. *Gates v Gates* 1939 AD 150, at 155, where Watermeyer JA noted that the reasonable mind is not so easily convinced by allegations of criminal or immoral conduct 'because in a civilised community there are moral and criminal sanctions against illegal and immoral conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal'. Those sentiments reflect the prevailing social (and legal) norm that everyone is, in general, entitled to treat with third parties accepting their bona fides.

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[28] In *Sishuba v Skweyiya* [2008] ZAECHC 25 (6 March 2008) Plasket J expressed the view that s 15(9)(a) placed a duty of enquiry on the third party. It seems to me, however, from the learned judge's reference, without disapproval, in the pertinent passage of his judgment to *Distillers Corporation* and his pointing out that the respondent in the case before him had not, amongst other matters that she could have raised, suggested that there had been any misrepresentation by the contracting spouse, that he would have allowed that in the circumstances of a given case the need for or extent of enquiry might be affected by the representations made by the contracting spouse. See especially para. 21-26 of the judgment.

[63] In my judgment the actions of the deceased in proposing and purporting to contract a customary marriage with the third respondent necessarily implied a representation by conduct that he was lawfully entitled to enter into such a union.[29] In other words, in the context of the given facts, where the deceased had made no secret of his existing prior marriage with the applicant, his conduct constituted a representation to the third respondent that there was no impediment to his ability to contract a co-existing second marriage with her. The deceased's conduct implied a representation to the third respondent that his first marriage was a customary marriage. The essence of the third respondent's evidence is that the deceased's conduct gave her no reason to suspect that he was not ordering his life in accordance with North Ndebele tradition and custom. Nothing appears to have been done to disabuse her about the validity of her putative marriage to the deceased. Knowing of the relationship between the deceased and the third respondent and of the children born of it, the applicant does not appear to have done anything to confront the deceased or the third respondent about it in the ensuing years before the donation in issue was made.

[64] I do not think that it was incumbent on the third respondent in such circumstances to investigate the legal character of the deceased's first marriage before she accepted the donation. Adopting the approach applied in *Distillers Corporation* and *M* supra, I am unable to hold that the third respondent acted unreasonably by failing to challenge or interrogate the deceased's representation. In the result I have concluded on the papers that the third respondent's position is protected by s 15(9)(a) of the Matrimonial Property Act and it is deemed that the donation was made with the consent required in terms of s 15(3).

[65] The position of the first and second respondents is materially indistinguishable for relevant purposes from that of the third respondent. They were reasonably entitled to accept in the circumstances that they were the issue of a customary marriage between

[29] The applicant delivered an affidavit by a professor in the law faculty at the University of South Africa, which raised various questions about the extent to which the process of the conclusion of the third respondent's putative customary marriage complied with the requirements for a customary union in accordance with Northern Ndebele customs and traditions. It is not necessary for the purposes of deciding this part of the case to determine issues of compliance. It is accepted that the union was invalid because of the deceased's pre-existing civil marriage. Whatever questions might be raised about the orthodoxy of the customary marriage process that the third respondent went through with the deceased, I have no reason, when determining the question on paper, not to accept the third respondent's evidence that she believed herself to have been party to a customary marriage with him in consequence of having gone through the processes she described..

the deceased and their mother and that their father was entitled to dispose of his property accordingly.

Further disposal of the case consequent upon the upholding of the respondents' reliance on s 15(9)(a)

[66] The respondents' counsel submitted that in the event of my reaching such a conclusion the application should be dismissed. Mr *van der Merwe* contended that the alternative bases for the claim, namely fraud[30] or lack of mental capacity, should not be referred for determination on oral evidence because a prima facie case on those grounds had not been made out by the applicant. I take a different view. It is undesirable, in the context of the decision that I have come to in this respect, that I should expatiate about why I consider that the applicant has said enough on the papers to warrant the issues of fraud and lack of mental capacity being sent to trial. I would not wish anything I might have to say in that regard to colour the further proceedings that will ensue. Suffice it to say that in paragraph 261 of her answering affidavit the third respondent expressly acknowledges her recognition that the case for the setting aside of the registration of the member's interest in the respondents' names was brought by the applicant '*relying on three grounds being fraud, alternatively, the lack of mental capacity of the Deceased alternatively she never consented thereto*'.[31] The bases for the case on each of those grounds were indeed made out cognisably in the founding papers. Whether the claim should be sustained on the basis of fraud or lack of mental capacity is not up for decision in this stage of the proceedings.

[67] It seems to me that to refer the claims based on the allegations of fraud and the deceased's lack of capacity to oral evidence on the papers would conduce to an untidy hearing. Their efficient disposal would be better addressed if they were sent to trial after an exchange of pleadings.

[68] Mr *van der Merwe* stressed, however, that the applicant's resort to motion proceedings in this matter had been inappropriate because material disputes of fact had been manifestly foreseeable. He submitted that this was also in itself reason enough to dismiss the application entirely. I agree that the disputes of fact that have emerged on

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[30] See note 1 above.

[31] In his heads of argument, Mr *van der Merwe* submitted that it was '*clear from the founding papers that the principal ground upon which* [the applicant] *relies …is that* [the] *transfer was fraudulent*.'

the papers were foreseeable and that, save for the application for interim relief, motion proceedings were not indicated. Indeed, whether the applicant was well-advised to have sought the determination of even the separated question on the papers is open to doubt. Whether to dismiss the application, as might well have been appropriate in the circumstances (cf. *Standard Bank of SA Ltd v Neugarten and Others* 1987 (3) SA 695 (W) at 699A-B), or send the matter to trial is a decision to be made in exercise of the court's discretion.

[69] In the current matter there are extant interdicts in place that were plainly intended to regulate matters until the final determination of the dispute. If the application were to be dismissed and proceedings in respect of the two undecided bases for the applicant's claim to be pursued in action proceedings to be instituted *de novo*, the extant interdicts would lapse. That would, no doubt, precipitate a re-run of the applications for interim relief to afford the applicant extended protection pending the final determination of the case in the freshly instituted main case proceedings that would inevitably follow. This would be inconvenient and impose unduly on judicial resources. I have therefore determined to direct that the outstanding issues should go to trial, with the notice of motion and the relief prayed for in terms of paragraphs 2 – 4 thereof to stand as the simple summons.

Reserved costs and related matters

[70] The applicant will be ordered to pay the respondents' wasted costs, if any, in respect of the abortive set down of the application for hearing on 24 April, 21 June and 22 August 2017, respectively. Costs of the proceedings on 6 February 2017 and those reserved in terms of the order made by Hlophe JP on 5 September 2017 will be further reserved for determination by the court seized of the trial. The interim interdicts granted in favour of the applicant on 6 February and 5 September 2017 shall remain in force pending the determination of the action.

[71] The following orders are made:

(a) The applicant's supplementary founding affidavit, *jurat* 8 March 2017, and her further replying affidavit, *jurat* 10 August 2017, and the accompanying papers are admitted.

(b) The following parts of the applicant's replying papers are struck out:

i. The following words in para. 89 of the applicant's replying affidavit, *jurat* 7 June 2017: '*and the Third Respondent did not resign, she was fired by her employer at the time, I was told*'.

ii. The following words in para. 89 of the applicant's replying affidavit, *jurat* 7 June 2017: '*as is all of the Third Respondent's evidence. She has specifically lied to hide her fraud and falsification'*.

iii. The entire affidavit of Peter Potjie Ledwaba, *jurat* 30 May 2017.

There is no order as to costs in the striking out application.

(c) The claim based on the deceased's non-compliance with the consent requirements in terms of s 15 of the Matrimonial Property Act 88 of 1984, which was argued as a separated issue on 7 and 12 December 2017, is dismissed.

(d) The applicant is directed to pay the respondents' costs incurred in respect of the separated issue, subject of the order made in terms of paragraph (c) above.

(e) The determination of the claim based on the allegations of fraud and the alleged mental incapacity of the deceased is referred to trial on the following directions:

i. The notice of motion and the relief sought in terms of paragraphs 2 – 4 thereof shall stand as the simple summons and the first to third respondents' notice of opposition shall stand as their notice of intention to defend as the first to third defendants in the action.

ii. The applicant shall, as plaintiff in the action, within 20 days of the date of this order deliver a declaration, in which the grounds for the claim shall, save otherwise with the consent of the defendants or the leave of the court, be limited to those founded in the allegations of fraud and the deceased's lack of mental capacity contained in the applicant's supplemented founding papers.

iii. The applicant shall procure that a copy of this order together with a copy of the applicant's declaration shall be served by the Sheriff on each of the fourth, fifth and sixth respondents, who shall be entitled to plead thereto as the fourth, fifth and sixth defendants in the action if so advised.

iv. The further exchange of pleadings and pre-hearing procedures, including discovery and the request for and provision of trial particulars, shall be regulated by the Uniform Rules of Court in respect of action proceedings and the judicial case management practices of this Court.

v. The interim interdicts granted in favour of the applicant on 6 February and 5 September 2017, respectively, shall remain in force pending the determination of the action, or the deemed dismissal of the application in terms of paragraph (h) below.

(f) The applicant is ordered to pay the first to third respondents' wasted costs, if any, in respect of the abortive set down of the application for hearing on 24 April, 21 June and 22 August 2017, respectively.

(g) Subject to paragraph (h) below, the costs of the proceedings on 6 February 2017 and those reserved in terms of the order made by Hlophe JP on 5 September 2017 are further reserved for determination by the court seized of the trial, together with the costs of the application that have not been determined by paragraphs (d) and (f) of this order.

(h) In the event of the applicant failing to deliver a declaration as directed in terms of paragraph (e)(ii) above within the period therein stipulated, the application shall thereupon be deemed to have been dismissed with costs, including the costs further reserved in terms of paragraph (g) above.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	S. Guldenpfennig SC A. Ferreira
Applicant's attorneys:	Van Wyk Fouchee Inc Paarl Heyns and Partners Inc Cape Town
First to Third Respondents' counsel:	Dirk van der Merwe
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