

LAW, RACE AND GENDER

MOVING TOWARDS EQUALITY IN MARRIAGE AND INHERITANCE

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THE *BERENDT* CASE

Up to now, the manner in which the property of a deceased person is distributed has depended largely on race. The rules which apply depend on a complex interplay of race and (for a black person) the part of Namibia where the person resides, whether that person was a spouse in a civil or customary marriage, and what marital property regime applied.

Namibia's 1996 country report under the Convention on the Elimination of all Forms of Racial Discrimination conceded the problems in the country's system of inheritance: *"The system applicable to whites and coloureds is clear and easy to understand. There are detailed provisions regulating the succession and administration of these estates. The estates are administered under the supervision of a specialist office, that of the Master of the High Court. The law regulating the estates of blacks who die without leaving a will (the vast majority of cases) is a mass of confusion. There is no proper system of administration, nor is the administration properly supervised. It is difficult to ascertain who the heirs are and this uncertainty is exploited by unscrupulous persons who enrich themselves at the expense of the deceased's immediate family, particularly women and children."*

The 2003 case of *Berendt v Stuurman* has changed all that by invalidating the law that gives black estates second-class status. This case held that several sections of the appallingly-named "Native Administration Proclamation 15 of 1928" are unconstitutional violations of the prohibition on racial discrimination in Article 10. These complicated provisions treated the estates of deceased blacks as if they were "Europeans" in some circumstances, while decreeing in other circumstances that they should be distributed according to "native law and custom". Parliament has been given a deadline of 30 June 2005 to replace these offensive sections with a new regime.

The *Berendt* case also struck down the legal provision which gives magistrates power to administer "black estates" while other estates go to the more specialised jurisdiction of the Master of the High Court. Parliament must fix this problem by June 2005 as well. In the meantime, as an interim measure, heirs of black estates can choose the magistrate or the Master as an administrator, as they prefer.

The *Berendt* case takes the same line as the recent *Moseneke* case in South Africa, where the court said: “ *It is an affront to all of us that people are still treated as ‘blacks’ rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour.*”

The *Berendt* case has helped to speed up the removal of some of the last legal vestiges of apartheid in Namibia.

THE MOFUKA CASE

Another legal remnant of apartheid concerns the rules about marital property regimes for civil marriages.

The matrimonial property regime applicable to most civil marriages in Namibia is “**in community of property**”. Spouses who want a different system can enter into an antenuptial contract before the marriage takes place. An antenuptial contract is a special written agreement which is concluded before the marriage and registered at the office of the Registrar of Deeds.

But, because of the influence of Namibia’s apartheid history, the position on marital property is different for some black persons in Namibia. The “Native Administration Proclamation 15 of 1928” makes a different rule for civil marriages between “natives” north of the old “Police Zone” which take place on or after 1 August 1950. These marriages are automatically “**out of community of property**” unless a declaration establishing another property regime was made to the marriage officer before the marriage took place.

This set of opposing rules has created confusion for some couples. Some couples were misinformed about the property consequences of their marriages, while others were not aware of the correct procedures to follow to produce the result they intended.

However, the recent *Mofuka* case may give some relief to couples disadvantaged by this legal holdover from the apartheid years. This case has confirmed that couples may conclude a private ante-nuptial agreement between themselves which will regulate the property consequences of the marriage between the two of them. Such a private

agreement will not have any force against third parties, but it might help to determine the relative property rights of the spouses if they divorce or if one of them dies.

These private agreements can be made orally, and they can even be implied agreements which took shape in the course of discussions of the consequences of the marriage with the pastor before the wedding.

The *Mofuka* case made it clear that this informal type of antenuptial agreement can be binding between parties to a marriage which is governed by the Native Administration Proclamation, just as in the case of other couples in a civil marriage. This ruling may provide some relief to couples who would otherwise be severely disadvantaged by the application of the Native Administration Proclamation.