REPORTABLE

CASE NO.: A 186/2009
IN THE HIGH COURT OF NAMIBIA

In the matter between:

S J G **APPLICANT**

and

S G C
RESPONDENT

CORAM: **NAMANDJE AJ**

Heard on: 28 September 2010

Delivered on: 12 October 2010

JUDGMENT

NAMANDJE, AJ.: [1] The applicant and the respondent entered into a marriage on the 15th of November 2002 at Windhoek in the Republic of Namibia. One minor child was born during the subsistence of "*the marriage*" between the parties. At the time of the

conclusion of the marriage between the parties the applicant was still lawfully married to his first wife.

[2] While the applicant alleges that he has, prior to his marriage with the respondent, informed her of his existing marriage with his first wife and that he did not know that the effect thereof is that his marriage with the respondent would be unlawful, the respondent denies that she was informed at the relevant time. There is therefore in that respect a dispute as to whether the applicant innocently got married to the respondent not knowing the unlawfulness nature thereof and whether the respondent knew prior to the marriage that the applicant was and remains married to his first wife. As motion proceedings are about deciding legal issues based on common facts this question cannot be decided on the papers in view of such a dispute.[1]

[3] The applicant after being advised by his legal practitioner of the invalidity of the marriage brought this application in which he seeks the following relief:

"*(i) Declaring the marriage between the applicant and the respondent, solemnised on 15th of November 2002 in Windhoek null and void ab initio.*

(ii) That Josef Richard Szalontai, a minor child born of the putative marriage between the applicant and the respondent is a legitimate child of the applicant and the respondent.

(iii) Custody and control of the minor child, Josef Richard Szalontai be awarded to the respondent subject to the applicant's rights of reasonable access.

(iiii) That the applicant pays an amount of N$3,100.00 per month as maintenance in respect of the minor child, Josef Richard Szalontai, and that he places the minor child on his medical aid scheme and he shall

1 See National Director of Public Prosecutions v Zuma, 2009 (2) SA 277 (SCA) at p 290.

further be responsible for all medical expenses.

(v) That applicant's half share in the property situated at Erf 3894, Willibald Kapunene Street, Katutura, Windhoek be donated to Josef Richard Szalontai, the minor child and the applicant transfer his half share, and sign all such documents necessary to cause the transfer of his half share into the name of the minor child.

(vi) Further and/or alternative relief."

[4] The respondent while not opposing the annulment of the marriage filed a counter application in which she seeks the following relief:

"(i) Declaring that certain of the consequences of a valid marriage be attached to the putative marriage between the parties: matrimonium putativum. In particular, that the following consequences be attached to it that:

(a) The parties shall be deemed to have been married in community of property; and

(b) They own their property under a joint estate.

(ii) Such joint estate be divided equitably among the parties.

(iii) Applicant pay maintenance in respect of respondent in the amount N$3,500.00 until she is self-supporting or remarries.

(iiii) The applicant pays the cost of this application.

(v) Further and/or alternative relief."

[5] Mrs Angula acts for the applicant while Ms Bassingthwaighte acts for the respondent. The court is indebted to counsel for their useful submissions. The parties were in agreement that the relief pertaining to the declaration of the marriages as null

and void and the relief relating to the maintenance and custody and control of the minor child should be granted as prayed for subject to few amendments.

[6] The remaining issues of contention between the parties pertain to the relief sought by the respondent under paragraphs 1, 1.1, 1.2, 2 and 3 of the respondent's counter application. Broadly speaking the respondent is seeking in her counter application a declaratory order that the parties' marriage be regarded as a putative marriage with certain favourable consequences to her.[2] The applicant too if regard is had to the relief sought in terms of paragraph (ii) of his notice of motion also seeks the declaration of the marriage as putative save that he only seek such relief in respect of the legitimization of the minor child and is opposed to the division of the estate and payment of maintenance to the respondent on the basis of the concept of a putative marriage.

[7] It is trite that a marriage solemnised whilst one of the parties thereto is still a party to an existing valid marriage is null and void. Over the years however the common law, with the influence of canon law,[3] has developed and recognised the concept of a putative marriage in terms whereof certain limited legal consequences flow from an invalid marriage.[4] Such consequences are broadly property rights and certain consequences relating to children.

[8] The requirements of a putative marriage are that:

(i) There must be *bona fides* in the sense that both or one of the parties

2 She claims the division of the "*joint estate*" and further seeks an order to be maintained by the respondent in the amount of N$3,500.00 per month until she is self-supporing or she remarries.

3 See Moola and Others v Aulsebrook N.O. and Others, 1983 (1) SA 687 (N) at 690.

4 See Mograbi v Mograbi, 1921 AD 275; *Ex Parte L* (Also known as A), 1947 (3) SA 50 (C); W v S and Others, 1988 (1) SA 475 (N); Naicker v Naidoo, 1959 (3) SA 768 (N); Shields v Shields, 1959 (4) SA 16 (W).

must have been ignorant of the impediment to the marriage;

(ii) The marriage must be duly solemnised;

(iii) The marriage must have been considered lawful in the estimation of the parties or of that party who allege the *bona fides.*[5]

[9] The concept of a putative marriage notwithstanding the fact that the above requirements are met only benefits the innocent party in the form of the division of the joint estate in cases where the parties thereto had not excluded the community of property by an antenuptial contract and further if there was no existing community of property between one of the parties to the marriage and a third party.[6]

[10] The philosophy of and the ratio behind the concept of a putative marriage are twofold namely, to serve as a device to mitigate the harshness of annulment of the marriage to the innocent party and more particularly to mitigate the harshness of annulment to children born of that marriage.[7] It is clear from a number of authorities that the main and the most important consideration for the existence of the concept of a putative marriage has been mitigation of the harshness of the annulment to the children.[8] The innocent party's interest, in my opinion, has been secondary. This is ostensibly because the courts in our jurisdiction are primarily, in this context, concerned with the best interest of the children. The innocent party on the other hand can have other recourses to mitigate the harshness.[9]

5 See Moola and Others-*supra* at 690 E.

6 See Zulu v Zulu and Others, 2008 (4) SA 12 (D) at p 15 - 16.

7 See Moola-*supra* at 693 G – H.

8 See Moola-*supra* at 690.

9 To institute a delictual claim, if he/she, suffered damages, against the party that wrongfully induced him/her to enter into an invalid marriage to his/her prejudice. See Snyman v Snyman, 1984 (4) SA 262 (W).

[11] It begs a question whether in the present day Namibia the concept of putative marriage still remains relevant given the positive legislative intervention, particularly the enactment of the Children's Status Act.[10] The Children's Status Act essentially puts children born out of wedlock on the same legal footing with the children born in wedlock.[11] Consequently, the main socio-legal consideration for the existence of the concept of putative marriage has been rendered nugatory[12] as children born out of wedlock are legitimate.

[12] The historical approach to the concept of putative marriage, in my opinion, should fall into disuse as there are no more substantial and compelling reasons for such a concept. Public policy considerations demand, I am of the view, a relook at such an artificial legitimization of some consequences from an invalid marriage. If a marriage is found to be invalid in terms of the law, a somewhat pigmentation of certain consequences flowing therefrom with a legal colour would be confusing in legal sense. However, as the concept itself appears not to be incompatible with any statute or the Namibian Constitution, regard being had to the provisions of Article 66 thereof,[13] it may still remain part of our common law although there appears not to be a need for such a concept any longer.

[13] The parties are *ad idem* that the applicant was married to his first wife at the time

10 Act 6 of 2006.

11 This court has also found that the classification of children born out of wedlock as illegitimate at common law as only having been part of our law until the date of coming into force of Namibian Constitution. See Frans v Paschke and Others, 2007 (2) NR 520 (HC).

12 The main consideration was the protection of the children born of the annulled marriage from being regarded as illegitimate.

13 Article 66 provides as follows:

"*(1)Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.*

(2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods."

of the conclusion of their marriage. What is lacking however are the allegations whether that marriage is in community of property or not. In our law, unless the contrary is proved any marriage is presumed to have created community of property and of profit and loss.[14] The respondent therefore bears the onus to prove the contrary, which she failed to do. That being the case, with reference to the Zulu-case *supra* at p 15 - 16, this court is not in a position to declare the parties' invalid marriage as putative as there was an existing community of property between the applicant and his first wife at the time of conclusion of the marriage between the parties.

[14] As for the minor child, there need not be this court's assistance through the concept of a putative marriage in a bid to mitigate the harshness to the child as he is in terms of our present law legitimate as if he was born in wedlock. The order sought by the applicant in that regards shall therefore not be granted as it is not necessary. Further the agreed maintenance of the child by the applicant in the amount of N$3,100.00 per month is favourable to the child, I believe.

[15] As far as costs are concerned, in the circumstances of this case, I am of the opinion that I should use my discretion not to make any order of costs. I believe it will be fair and just for each party to bear his/her own legal costs.

[16] Accordingly in the result, I make the following orders:

(1) The respondent's counter application is dismissed.

(2) The applicant's application is granted only in the following terms:

(i) The marriage between the applicant and the respondent, solemnised on 15 November 2002 in Windhoek is declared null and void *ab initio*.

(ii) Custody and control of the minor child, J R S is awarded to the respondent subject to the applicant's rights of reasonable access.

(iii) That the applicant pays an amount of N$3,100.00 per month as maintenance in respect of the minor child, J R S.

(iiii) That applicant's half share in the property situated at Erf 3894, Willibald Kapunene Street, Katutura, Windhoek is donated to J R S, the minor child and applicant shall transfer his half share, and sign all such documents necessary to cause the transfer of his half share into the name of the minor child.

14 See Brummund v Brummund's Estate, 1992 NR 306 (HC) at 310 I – 311 A.

NAMANDJE, AJ.

MRS ANGULA

ON BEHALF OF THE APPLICANT:

INSTRUCTED BY: LORENTZ ANGULA INC

ON BEHALF OF THE RESPONDENT: MS N BASSINGTHWAIGHTE

INSTRUCTED BY: UNIVERSITY OF NAMIBIA LEGAL AID CLINIC