REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 259/2012

In the matter between:

RUUSA NDAPEWA SHIPANGA **APPLICANT / PLAINTIFF**

and

MARTIN KALI SHIPANGA **RESPONDENT / 1ST DEFENDANT**

SISCO KALULU **2ND DEFENDANT**

CONSOLIDATED WITH CASE NO: Case no: I 3962/2012

MARTIN KALIE SHIPANGA **PLAINTIFF**

and

ELIUS KAUTWIMA **DEFENDANT**

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Neutral citation: *Shipanga v Shipanga* (I 259/2012) *Shipanga v Kautwima* (I 3962/2012) [2014] NAHCMD 318 (30 October 2014)

Coram: MILLER, AJ

Heard: 4 August 2014

Delivered: 30 October 2014

Flynote: Constitutional law – Statutory enactment remain in force until they are declared unconstitutional. A declaration of unconstitutionality does not operate retrospectively.

ORDER

In the result the application is dismissed with costs which will include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER, AJ:

[1] This is an application brought at the instance of the plaintiff to amend certain allegations made in amended particulars of claim. The application is opposed by the

first defendant.

[2] Mr Heathcote SC assisted by Ms Schneider appear for the plaintiff. The first defendant is represented by Ms Schimming-Chase.

[3] The action instituted by the plaintiff against the first defendant is one for a decree of divorce and certain ancillary relief. The previous amendment of the particulars of claim and the present application raises the issue as to whether the marriage solemnized between the parties on 2 December 1995 at Oshigombo is a marriage in community or on which is out of community of property.

[4] It is common cause between the parties that the marriage is governed by Section 17(6) of Proclamation 15 of 1928. The section reads as follows:

> "17(6) A marriage between Natives contracted after its commencement of the Proclamation, shall not produce the legal consequence of a marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife, it shall be competent for the intending spouses at any time within one month prior to the celebration of such marriage to declare jointly before a magistrate, native commissioner or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community that community of profit and loss shall result from that marriage and thereupon such community shall result from their marriage."

[5] On the pleadings as they presently stand it is the plaintiff's case that the marriage is

one in community of property, based on the allegation that the parties had made that declaration mentioned in the provision the section 27(b) and in conformity with its requirements. The allegation is denied by the first defendant.

[6] The present application seeks to establish a further ground upon which it is alleged that the marriage is one in community of property. The amendment sought reads as follows:

"AD PARAGRAPH 6 THEREOF

By inserting the existing sub-paragraphs 6.4 and the existing paragraph 7, the following text and re-numbering the existing paragraphs of the particulars of claim chronologically.

"7. Alternatively to the above, and by virtue of what is pleaded hereunder the plaintiff and the first defendant are married to each other in community of property.

8. In the event of the Court finding that the Native Administration Proclamation ("the Native Proclamation") No 15 of 1928 is not unconstitutional, alternatively that section 17(6) of the Native Proclamation is not unconstitutional and, consequently, the parties are not married in community of property, and subject to what is pleaded hereunder, the marriage of the plaintiff and the first defendant does not have the legal consequence of a marriage in community of property, due to the provisions of section 17(6) of the Native Administration Proclamation No 15 of 1928.

9. The Native Administration Proclamation No 15 of 1928 (hereinafter the "Native Proclamation") did not form part of the Namibian Law when the plaintiff and the first defendant were married, for the following reasons –

9.1 Article 140(1) of the Namibian Constitution determines that

"Subject to the provisions of this Constitution, all laws where were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court."

9.2 Prior to Independence, the provisions of section 17(6) of the Native Proclamation, replaced the Namibian common law relating to the propriety consequences of marriages entered into without an Ante Nuptial Contract. It replaces it only in respect of people classified as "natives" as per the provisions of section 25 thereof. Section 25 defines the word "native" to include "any person who is a member of any aboriginal race or tribe of Africa." The parties are both members of the tribe of Africa.

9.3 Had it not been for the provisions of the Namibian Constitution referred to herein, the provisions of the Native Proclamation and in this matter specifically section 17(6) thereof – would have been applicable to both the plaintiff and the first defendant.

9.4 Since the advent of the Namibian Constitution the Native Proclamation and the provisions of section 17(6) thereof, offended against the Fundamental Human Rights contained in Articles 10(1) and (2), as well as Articles 8(1) and (2) and Article 14(1) of the Namibian Constitution. By virtue of the provisions of Article 5 of the Constitution, Articles 10, 8 and 14 are enshrined in Chapter 3 of the Constitution.

9.5 Since the advent of the Namibian Constitution, the Native Proclamation and specifically the provisions of section 17(6) thereof –

9.5.1 negated the essential content of the Fundamental Human Rights of the plaintiff, as enshrined in Article 10(1) and (2), Article 8(1) and (2) and Article 14(1) of the Constitution and/or

9.5.2 limited and/or restricted the plaintiff's aforesaid Fundamental Human Rights and/or

9.5.3 were not limitations authorised by the Namibian Constitution, as envisaged in Article 22 thereof' and/or

9.5.4 was not law of general application; and/or

9.5.5 was aimed at only specific individuals; and/or

9.5.6 differentiated on the basis of race and/or ethnic origin and is thus discriminatory."

10. Accordingly, the Native Proclamation and in particular section 17(6) thereof did not pass Constitutional muster and was null and void and of no legal force and effect as from 21 March 1990."

11. When the plaintiff and the first defendant were married on 2 December 1995, they purportedly married in terms of section 17(6) of the Native Proclamation. On such date the aforesaid statutory provision as not valid in Namibia. Instead, the only Constitutional law applicable at that stage, was the common law of Namibia. The common law of Namibia provides that, in the absence of a specific agreement, parties are married in community of property."

12. It is found that the plaintiff and the first defendant did not enter into a valid agreement determining their property rights, then the plaintiff and the first defendant are married in community of property.

13. Only in the event of the Court finding that a valid agreement was indeed entered into between the plaintiff and the first defendant, which governed the situation whether the plaintiff and the first defendant were married in or out of community of property, than in that event, the plaintiff pleads that the said agreement contained the terms as set out in paragraphs 6 above.

AD THE PLANTIFF'S PRAYERS FOR RELIEF

By inserting, prior to the existing prayer (a), another prayer (a) containing the text hereunder, and re-numbering the subsequent prayers chronologically.

(a) It is declared that the plaintiff and the first defendant were married in community of property to each other on 2 December 1995 by virtue of what is contained in annexures "POC1, POC2 and POC3 hereto.
(b) Alternatively, and in the event of court finding that the plaintiff and the first defendant were not so married, then an order in the following terms:

(i) The Native Proclamation No 15 of 1928 is declared unconstitutional and consequently null and void as with the effect from 21 March 1990; alternatively,

(ii) The provisions of section 17(6) of the Native Proclamation No 15 of 1928 as declared unconstitutional and consequently null and void as with effect from 21 March 1990.

(iii) It is declared that the plaintiff and the first defendant were married in community of property to each other on 2 December 1995."

[7] I mention that because the issue of the constitutionality of the relevant proclamation was raised. The Attorney General was sought to be joined as a second respondent for the purposes of their application. I am indebted to Mr Nkiwane of the office of the Government Attorney for the submissions he provided.

[8] The basis upon which the first defendant opposes the application raises a crisp point and reads as follows:

"1. The proposed amendments will cause the particulars of claim to contain averments which are irrelevant and vexations in that:

1.1 The Native Administrative Proclamation 15 of 1928 ("the Proclamation') and more specifically section 17(6) thereof forms part of Namibian legislation and not part of the common law.

1.2 The Proclamation as part of Namibian law immediately before the date of Namibia's independence.

1.3 When the parties married on 2 December 1995, the Proclamation had not been repealed or amended by an act of Parliament or declared unconstitutional by a competent Court.

1.4 In terms of Article 140(1) of the Namibian Constitution the unconstitutionality, if any, the Proclamation will have no retrospective effect, and as such it will not promote the plaintiff's case in any manner.

1.5 The proposed amendment will further severely prejudice the first defendant in that he will have to expend resources and time in defending a point of law which, even if the plaintiff succeeds on, can have no retrospective effect, and as such serve no purpose in advancing the plaintiff's case."

[9] The question is simply whether a law, and by that I mean a statutory enactment, once it is declared to be unconstitutional is invalid from the time that the Constitution came into operation or whether the invalidity extends only from the date that the law was declared to be unconstitutional.

[10] Although the heads of argument prepared by the plaintiff's legal practitioners deals fully with an argument that section 17(6) of the Proclamation does not comply with the constitutional principles contained in the Constitution, in argument before me the sole issue was whether or not a declaration of unconstitutionality operates respectively in the sense I mentioned earlier.

[11] The relevant provisions of the constitution which bear upon the determination of the issues are Article 140, Article 66 and Article 25 (1) (a) & (b). They read as follows:

"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.

Article 25 provides as follows:

"Enforcement of Fundamental Rights and Freedoms

(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;

(b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply."

[12] The Articles contained in the constitution was considered by the Supreme Court in the matter of *Myburgh v Commercial Bank of Namibia* NR 255, in a judgment written by Strydom CJ. The learned Chief Justice dealt with the question in a passage on p.262 J

– p264 A. It reads as follows:

"In our Constitution art 66(1) as it deals with a specific situation which is not made subject to any other provisions, is clearly the dominant provision to which art 140(1) is subject. If the words 'all laws' contained in art 140(1) is given the meaning contented for by Mr Grobler so as to include also the common law, it would be inconsistent and incompatible with the clear provisions of art 66(1) and art 140(1), as the subordinate article, must therefore give way what is provided in art 66(1).

Regarding art 25 it seems to me that sub-art (1) has the same effect upon law made by Parliament and subordinates legislatures is so far as that law abolishes or abridges any fundamental right or freedom, which art 66(1) has on the common law, namely that to the extent to which such law abolishes or abridges the fundamental rights and freedoms it would be invalid. Apart from the wording of the sub-article that is in my opinion also confirmed by the deeming provision set out in the proviso in sub-art (a). As to the effect and possible meaning of a 'deeming' clause see S v Rosenthal 1980 (1) SA 65 (A).

In this regard it was necessary to create a deeming clause in the circumstances where a Court has decided to exercise its power and to afford a legislature the opportunity to correct any defect in the impugned law. That can obviously only occur where such law is still in being and as a law which abolishes or abridges one of the fundamental rights or freedoms is invalid to that extent, according to sub-art (1), a deeming clause which would revive sub law as necessary.

Coming to sub-art (b) it seems to me that when interpreted in context with arts 66(1) and 140(1) that there is no conflict in this regard. Article 66(1), as previously pointed out, renders invalid any part of the common law to the extent to which it is in conflict with the Constitution. As also pointed out, this occurred when the Constitution took effect. The article does not require a competent Court to declare the common law unconstitutional and any declaratory issued by the competent Court would be to determine the rights of parties where there may be uncertainty as to what extent the common law was still in existence and not to declare any part of the common law invalid.

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That has already occurred by operation of the Constitution itself where there is conflict. Seen in this context it follows that the words 'any law' in art 25(1) (b) and 'all laws" in art 149(1) can only refer to statutory enactments and not also the common law because in the first instance such laws, which were in force immediately before Independence, remain in force until amended, repealed or declared unconstitutional by a competent Court. The Constitution therefore set up different schemes in regard to the validity or invalidity of the common law when in conflict with its provisions and the statutory law. In the latter instance the statutory law immediately in force on Independence remains in force until amended, repealed or declared unconstitutional.

In *Government of the Republic of Namibia v Cultura 2000* 1993 NR 328 (SC); 1994 (1) SA 407 (Nms), Mohamed J discussed art 140(1) and said the following at 335E (NR); 413I (SALR):

'Article 140(1) deals with laws which were in force immediately before date of independence and which had therefore been enacted by or under the authority of the previous South African Administration exercising power within Namibia. Such laws are open to challenge on the grounds that they are unconstitutional in terms of the new Constitution. Until such a challenge is successfully made or until they are repealed by an Act of Parliament, they remain in force.'

[13] Upon my reading and understanding of this passage a statutory enactment in contrast to the common law, remains in force until it is rejected or declared unconstitutional and such declaration as in the case of a repeal does not operate retrospectively. It is my view that the drafters of the Constitution envisages that the effect of a declaration of constitutionality shall have the same effect as a repeal of the statutory instrument. If that were not so the two scenarios would have been dealt with differently. As it is they are dealt with in the same breath so to speak without any attempt at differentiation.

[14] Mr Heathcote sought to rely on the judgment of this Court in *S v Huseb* 2012 (1) NR 13c (HC). That judgment in which I concurred was written by Smuts J. It is no

support for the argument advanced by Mr Heathcote because it is concerned with an entirely different situation. In essence that ratio of the Haseb judgment is that once a low or portion of it is declared unconstitutional, an appeal against such a declaration does not revive that statute or the unconstitutional portion thereof pending the finalisation of the appeal. We are not concerned with that situation in the instant case.

[15] There is in our law one distinction from what was said by Strydom CJ in the Myburgh case (supra) and that concerns enactments which violate Article 8 of the constitution. Such statutory enactments were held to be invalid from the advent of the Constitution. *Namunjepo and Others v The Commanding Officer Windhoek Prison and Another* 1999 NR 271 SC; Ex Parte Attorney General, Namibia In Re Corporal Punishment by Organs of the State 1991 NR 178 SC; *Engelbrecht v Minister of Prisons and Correctional Services* 200 NR 230

[16] In their heads of argument counsel for the plaintiff sough to make the point that Section 17(6) of the Proclamation constitutes “degrading” treatment within the ambit of Article 8 of the Constitution. The point was not raised in argument before me. Arguably section 17(6) of the Proclamation is unconstitutional on the basis that it infringes other provisions of the Constitution, and I express no view on that. It does not provide for degrading treatment in my view. In conclusion Article 17(6) of the Proclamation was a law in force on the date the marriage between the parties was solemnized and governs the patrimonial consequences of the marriage. To allow the amendment will be a futile exercise.

[17] In the result the application is dismissed with costs which will include the costs of one instructing and one instructed counsel.

P J Miller

Acting Judge

APPEARANCES

APPLICANT / PLAINTIFF:	Mr R Heathcote, SC
	Assisted by: Ms H Schneider
Instructed by:	FISHER, QUARMBY & PFEIFFER
RESPONDENT / 1ST DEFENDANT:	Ms E Schimming-Chase
Instructed by:	ELLIS SHILENDGUDWA INC.