REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: A 22/ 2013

[L…….] [M…….] **APPLICANT**

And

[J…….] [M…….] **1ST RESPONDENT**
MAHARERO TRADITIONAL AUTHORITY **2ND RESPONDENT**
THE MINISTER OF GENDER EQUALITY AND CHILD WELFARE **3RD RESPONDENT**
THE MINISTER OF REGIONAL AND LOCAL GOVERNMENT, HOUSING AND RURAL DEVELOPMENT **4TH RESPONDENT**
THE ATTORNEY GENERAL **5TH RESPONDENT**

Neutral citation: *Mbaisa v Mbaisa* (A 22-2013) [2015] NAHCMD 181(05 August 2015)

Coram: MILLER AJ

Heard: **2-6 June 2015**

Delivered: **05 August 2015**

Flynote: Customary law- Marriage conducted under the Ovaherero Customary law – Marriage annulled by the community court – Allegations of Universal partnership as a basis to equally share in the joint estate – Essentials of a partnership set out – Applicant not establishing that there is a tacit Universal Partnership – Constitutionality of customary law questioned – Applicant to be returned back to parents house after annulment of marriage – Such customary law not proven to be contrary to article 8,10 and 16 of the Namibian Constitution.

ORDER

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1. The application is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.
2. The first respondent's counter-application is also dismissed.

JUDGMENT

MILLER AJ: [1] The applicant and the first respondent were married to each other on February 1965 under the customary law of the Ovaherero Traditional community. During the subsistence of the marriage, five children were born of the marriage and the parties also acquired properties in the form of livestock, vehicles as well as immovable properties. Their marriage was annulled by the Maharero Community Court on 28 July 2011 on the grounds of adultery, because the first respondent married a second wife, who is related to the applicant, under customary law of the Ovaherero. As part of the annulment order, the following was also ordered:

- ‘That the marriage between the two parties is formally nullified;
- Mr [M…….] was ordered to compensate his wife by paying her 80 head of cattle;
- The defendant) Mr [J……..] [M…….] was ordered returned his former wife to her family from where she originated in compliance with Herero Customary practices;
- (The complainant) Mrs [L…….] [M……..] objected to the third order as she prefers to stay within the common homestead contrary to the Herero customary practices which dictates that the husband is in charge of the werf inclusive of the former common homestead;
- As such the Complainant Mrs [L……..] [M……..] was authorised by the Maharero Community Court to seek readdress further as per request.’

[2] The application before court, dated 27 February 2013 is brought on the basis that the first respondent did not comply with the order from the community court. The relief sought reads:

> ‘1. Declaring as unconstitutional and invalid in terms of article 66(1) read with articles 10 and 8 of the constitution of the republic of Namibia the customary practice(s) on which respondent relies, after the dissolution of the customary marriage/union, to deprive applicant of the 50% share of the customary marriage/union joint estate.
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> 2. Declaring customary marriage/union between applicant and respondent a tacit universal partnership entitling parties thereto equal shares of the customary marriage estate on dissolution of the marriage/union.
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> 3. Declaring the refusal of respondent to share equally with Applicant the customary marriage/union estate after dissolution of the marriage/union between the applicant and respondent a violation of applicant’s rights to dignity, property, equality and not to be discriminated against on the basis of sex as stipulated in the Constitution of the Republic of Namibia.
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> 4. Confirming the dissolution of the customary marriage between the applicant and the respondent by the Customary Court.

5. Setting aside the order of the Customary Court regarding the division of the customary marriage/union estate between applicant and respondent.

6. Directing respondent to share equally with applicant the estate of the customary marriage/union between the applicant and respondent.

7. Directing respondent, if he chooses to oppose this application, to pay the costs thereof;

8. Granting applicant further and/or alternative relief.'

[3] The applicant's basis for seeking such an order from this court is because the first respondent to date has not complied with the community court's order and that it was due to the respondent's adulterous conduct that the marriage between them was annulled. The gist of this application is to order the respondent to divide the joint estate equally based on an alleged tacit universal partnership that resulted from the customary marriage. The applicant alleges that she has a rightful share in the assets and that she contributed to the joint estate as a wife for the benefit of the family and the children and that she is entitled to half share of the estate. Accordingly, the first respondent's refusal to comply with the community court order of the 28 July 2011 is a violation of her constitutional rights, to wit, article 8, 10, 16 read with article 66(1) of the Namibian constitution. It is further applicants case that a specific customary law that is relied on contravenes her rights in terms of article 8 and 10 and that in terms of Article 80(2) of the Namibian Constitution, the High Court has inherent jurisdiction to hear this matter and not the Magistrate's court despite the remedies provided by the Community Courts Act, 2003.

[4] The first respondent opposed the application on 28 June 2013 but the 2 - 5th respondents did not oppose the application. The first respondent proceeds on three grounds for his opposition which can be summarized as follows:

a) That the specific custom on which the respondents rely to deny the applicant her 50% share has not been identified and no factual basis has been set out for its existence;

b) That no basis has been established for the high court to pronounce itself on a decision of a community court if, it terms of the Community Court's Act 10 of 2003, an appeal should be made to the Magistrate's Court;

c) That no facts establish the existence of a universal partnership between the applicant and the respondent and no basis for the proposed equal division of the estate has been established.

[5] The first respondent denies the principal allegations of not complying with the annulment order and further alleges that it is the applicant who, to date, refuses to move from the homestead as ordered and that an eviction order is being sought as a counterclaim to this application. The first respondent states that he has already complied with the community court order in that the heads of cattle ordered was given to the applicant who also refuses to remove same from the kraal. An existence of a Universal partnership is denied on the basis that the customary marriage does not automatically bring about the existence of a partnership and further that no evidence is before court to sustain such allegations.

Issues that falls for determination by the court

[6] The application was subjected to Case management and in terms of the Case Management report dated 28 January 2014, the following issues need to be determined by the court:

1. Is the customary marriage that subsisted between the applicant and 1st respondent a tacit universal partnership?
2. If the said marriage constitutes a tacit universal partnership, what are the proprietary consequences of such partnership?

3. In the event this Honourable court finds that there was no universal partnership and applicant is not entitled to claim half of the estate in issue, will the rights of applicant, as stipulated in article 8, 10 and 16 of the Namibian constitution read with article 66(1) of the constitution of Namibia, not be violated?'

[7] It is clear from the issues above that the court is called upon to determine firstly whether or not a universal partnership existed between the applicant and the first respondent. That determination will cure the question of the parties' proprietary rights. The second question is whether the customary practice violates the Namibian constitution, in that the order as granted by the Community court violates the applicant's rights to dignity, property and equality.

The status of customary marriages before a court of law

[8] Our Namibian law recognizes two types of Marriage, ie the civil law marriages and the customary law marriages. The former is solemnized under state law and the consequences flowing therefrom are enforceable before a court of law and the parties duties and obligations are codified by the Married Person's Equality Act 1 of 1996 (MPEA). Customary marriages, on the other hand, are conducted according to the customary laws of various communities and the consequences flowing therefrom are relates to the specific community and thus different from the next community. The obligations of the parties are in terms of the relative customary laws and such marriages are not enforceable before a court of law. The type of marriage that parties engage in is a matter of choice and the system chosen should be able to resolve disputes arising out of the chosen union. Some of the significant protections accorded by the Constitution on customary unions is under article 12 (1)(f) where no court may compel partners from a marriage by customary law to give testimony against each other and article 66(1) which allows the practicing of a custom to the extent that it does not conflict with the constitution or any other law. An allegation that a customary law conflicts with the constitution shall be proved by the applicant before such custom may be declared unconstitutional.

Was there a universal partnership between the applicant and the respondent?

[9] Universal partnerships of all property which extend beyond commercial undertakings were part of Roman-Dutch law and still form part of our law. A universal partnership of all property does not require an express agreement. Like any other contract, it can also come into existence by tacit agreement, that is, by an agreement derived from the conduct of the parties. The requirements for a universal partnership of all property, including universal partnerships between cohabitees, are the same as those formulated by Pothier for partnerships in general. Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached. [1]

[10] In the recent judgment of *Behrenbeck v Voigts*[2] , the court pointed out that a plaintiff who relies on the existence of a partnership agreement bears the onus to establish that the terms of the agreement conform to what is in law required to establish a partnership agreement. These requirements are the following:

a) An undertaking by each party to bring into the partnership money, labour or skill.
b) The object must be to carry on a business for the joint benefit of all the parties.
c) The common object must be to make profit.[3]

[11] In addition the parties to the agreement must share in the profits and the losses. In the case of *Butters v Mncora*[4], the Supreme Court of appeal had to determine whether a universal partnership existed between the parties. Brand JA stated:

'The three essentials are, firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or

[1] 2012(4) SA 1 (SCA).
[2] I 746/2014) [2015) NAHCMD 72 (23 March 2015)
[3]Amlers Precedents of Pleadings; 7th Edition at page 308.
[4]At 5D-F.

skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts.'

[12] A universal partnership concluded tacitly has frequently been recognised in our Courts of law as between a man and a woman living together as husband and wife but who have not been married by a marriage officer.[5] As in all such cases, the court searches the evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement. In any analysis of the evidence the most important considerations are thus whether either party said or did anything to manifest his or her intention and, if so, what the reaction of the other was. Where the tacit agreement that is relied on is one of universal partnership, the cardinal intention of both parties must be to share in the profits of the subject matter alleged to be covered by the agreement.

[13] The applicant states that her contribution was in the form of labour, time and skill as a house wife and mother and that she bound herself by working on the farm and caring for the parties' children and grandchildren. It is further her allegation that the farms and other assets were used for the joint benefit of the parties, their children and grandchildren and that the object of the partnership was to accumulate as many assets as possible especially more livestock and vehicles so as to generate profit therewith. Counsel on behalf of the applicant argued that since the parties were married for over 40 years, it can be adduced from their conduct that they conducted their affairs as partners. Contrary to this, counsel on behalf of the first respondent submits that the proprietary consequence of customary marriages does not lead to the creation of a

[5]Frank and Another // The Chairperson of the Immigration selection board 1999 NR 257 at 268F-H.

Universal partnership and that her contribution was as a result of her common law duty to support the first respondent as a wife. Accordingly, more evidence has to be brought as to the applicant's contributions to the alleged partnership.

[14] I agree with counsel for the first respondent that, although the contribution to the household has been held to be a significant factor, the applicant has failed to specifically identify her role in a partnership. Evidence such as the work that she had to do on the farm was not identified and the extent to which she might have helped the first respondent in the upkeep of the farm. Without the evidence of her contribution, it becomes difficult to determine the share that she is entitled to because it is trite that distribution in a partnership is based on each partners contribution.[6] No such evidence is before court. In fact, on the applicants own version, neither party has established how much they both contributed to the alleged partnership.[7]

[15] The other requirements also then fall through the cracks because there is no evidence before court that the partnership was for the joint benefit of the partners. The first respondent admits that he carries on a large farming operation on behalf of all his siblings in the [M…….] family in his capacity as head of that family and it is accepted that it is a profit making business. From the papers, it seems like the [M…….] family is a big family and that the farming activities are for the benefit of all the siblings under the first respondent's responsibility. If the partnership exists, to whose benefit is the income and how has it been distributed? There is no evidence to show that there was even an expectation that the profits are to be shared. The order of 28 July 2011 goes against the existence of a partnership by ordering that the applicant be returned to her parent's home with only 80 heard of cattle. The inference drawn is that the applicant does not have any share in the joint estate. The argument that the applicant will be left with nothing does not assist her much because these are the consequences of choosing firstly the type of marriage and without having an enforceable agreement to share.

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[6] See *Behrenbeck v Voigts* (I 746/2014) [2015) NAHCMD 72 (23 March 2015), para 11.
[7] Para 26 of the Applicant's Heads of Arguments.

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[16] In my view, the first respondent failed to discharge the onus on her.

Is the Customary law practiced by the 1st respondent unconstitutional?

[17] Smuts J stated in *Tjingaete v Lakay NO* that the applicant must prove the customary law in question, ie the content of the customary law and its observance and its effect.[8] Accordingly, a way in which this can be done would be to tender evidence on customary law and the customs in question. Article 66(1) reads:

> '(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 law or common law does not conflict with this constitution or any other statutory law.'

[18] The applicants case is that the customary law practiced by the first respondent is against article 8, 10 and 16 of the Namibian constitution in that the custom dictating that the applicant be returned home at her age of 71 treats her as the first respondent's 'commodity'. The submissions made on behalf of the applicant paints a picture that the unconstitutionality stems from the fact that the parties, being married for over 40 years, and that since the acquired property, the order that the applicant be returned to her parent's house is against her right to dignity as a woman and that she is being denied her right to use and stay on the property that she called home for the past 40 years. The first respondent submits that there is no iota of evidence showing any violation of any of the constitutional provisions. The applicant does however not identify or prove the customary law alleged. No evidence on affidavit was produced to establish the existence of the customary law.

[19] I pointed out during submission to counsel on behalf of the applicant that consequences arising from the choice of marriage should not be used as a basis for a constitutionality test. I am not convinced that the customary law practices is contrary to article 8 since no evidence was led to show that the applicants dignity has been damaged. No evidence was further led to show that any form of discriminatory practices

[8](A 34/2014) [2014] NAHCMD 178 (11 June 2014)Para (27)-(29).

on grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status has been practiced on the applicant. Moreover, no evidence has been adduced to show that article 16 has been violated since there is no proof of any disposition of property belonging to the applicant. In fact the applicant does not even state what properties belonged to her, entirely or jointly, during the subsistence of the marriage with the first respondent. Furthermore, the applicant is drawn to the principles in the case of *Shipanga v Shipanga*[9] in that the constitution does not apply retrospectively, in that customary law could only be declared as being unconstitutional from the date of independence and not as back as 1965 when the parties got married.

First respondent's counterclaim

[20] As part of the application, the first respondent seeks an eviction order. Section 23 of the Community Courts Act 10 of 2003 provides for the enforcement of orders of community courts if an order of a community court is not satisfied within the period specified by that community court. The person in whose favour it was given may register the order at the Magistrate's Court by lodging with the clerk of such Magistrate's Court a copy of the order of the community court duly certified as such by the clerk of the community court. Once that has been registered with the magistrate's court, it is then upon the first respondent to seek an order from the magistrate's Court. In that sense, the application now being brought before me is premature and the first respondent should follow the procedure prescribed by law.

[21] In the result, the following order is made:

1. The application is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel;
2. The first respondent's counter-application is also dismissed.

[9] (I 259/2012) Shipanga v Kautwima (I 3962/2012)[2014] NAHCMD 318 (30 October 2014).

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PJ Miller

Acting

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APPEARANCE:

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Of	Legal Assistance Centre, Windhoek
1ST RESPONDENT	TJ Frank SC (Assisted by RL Maarsdorp)
Instructed by	LorentzAngula Inc, Windhoek