



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2016/00239

In the matter between:

HERMAN KONRAD

APPLICANT

and

SHANIKA NDAPANDA

RESPONDENT

Neutral citation: *Konrad v Ndapanda* (HC-MD-CIV-MOT-GEN-2016/00239)
[2017] NAHCMD 80 (16 March 2017)

Coram: PARKER AJ

Heard: 7 February 2017

Delivered: 16 March 2017

Flynote: Practice – Applications and motions – Dispute of facts – Effect – Where litigant chooses to proceed by way of motion knowing that genuine and material dispute of facts will arise, the application may be dismissed with costs – Principles in *Mineworkers Union of Namibia v Rössing Uranium Limited* 1991 NR 229 applied.

Summary: Practice – Applications and motions – Dispute of facts – Effect – Where litigant chooses to proceed by way of motion knowing that genuine and material dispute of facts will arise, the application may be dismissed with costs – Applicant instituted motion proceedings in a claim for nullity of marriage – On the papers

applicant knew in advance that there will be a genuine and material dispute of facts, nevertheless he chose to go by way of motion – Court found that the applicant ran the risk of having his case dismissed with costs which is a fundamental principle to all notice of motion proceedings – On that basis court dismissed the application with costs.

ORDER

The application is dismissed with costs.

JUDGMENT

PARKER AJ:

[1] The applicant has come to court by way of notice of motion for the following relief:

- '1. Declaring the marriage between the applicant and the respondent solemnized on the 7th September 1992 in Windhoek null and void ab initio.
2. Cost of this application (if opposed).'

[2] The applicant, represented by Ms Nguasena-Katjaerua, relies on an affidavit he deposed to in support of the application; and there is also an affidavit by the applicant's first wife as part of the founding papers.

[3] The respondent, represented by Ms Shikale-Ambondo, is the applicant's second wife, that is, the wife applicant married when apparently applicant's marriage to the first wife was still subsisting. Respondent has also filed an answering affidavit in which, among other things, she disputes material and relevant facts. Applicant avers that he informed respondent that his marriage to the first wife had not been

dissolved and that respondent said she was not averse to it. The first wife throws in the spanners: she contends in her affidavit that respondent knew that applicant was married to her. Respondent persists in her denial. In sum, I find that respondent's denial raises a genuine and material dispute of facts. And those facts are relevant as regards the question whether the applicant and respondent, or at least one of them, contracted the marriage in good faith and whether the respondent is an innocent party, having been ignorant of the impediment to their marriage, as she contends. (See HR Halho, *The South African Law of Husband and Wife*, 5th ed (1985), p 111-116)

[4] On the papers I have no doubt in my mind that applicant knew in advance that there would be a genuine and material dispute of facts; and so, he could not go by way of motion. He has, nevertheless, gone by way of motion. In that case he has ran the risk of having his case dismissed with costs. See *Mineworkers Union of Namibia v Rössing Uranium Limited* 1991 NR 299 at 302D where Levy J stated:

'A principle which is fundamental to all notice of motion proceedings is that if a litigant knows in advance that there will be a material dispute of fact, the litigant cannot go by way of motion and affidavit. If he nevertheless proceeds by way of motion he runs the risk of having his case dismissed with costs. *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A).'

[5] In the instant case the applicant has gone by way of notice of motion knowing in advance that there will be a material dispute of facts and therefore he cannot go by way of motion and affidavit. He has, nevertheless, proceeded by way of motion; and so, upon the authority of *Mineworkers Union of Namibia v Rössing Uranium Limited*, applicant's case should be dismissed with costs. It is for this reason, I suppose, that it is safe to institute claims for nullity of marriage by way of action proceedings rather than motion proceedings. (CJM Nathan, *South African Divorce Handbook* (1970), p 49-50, where the learned author discusses 'Actions for nullity of marriage')

[6] As I have said previously, applicant chose to proceed by way of motion when he knew in advance that there will be a material dispute of facts. Applicant has ran

the risk of having his case dismissed with costs; and it is so dismissed; whereupon, I make the following order:

The application is dismissed with costs.

C Parker
Acting Judge

APPEARANCES

APPLICANT: E Nguasena-Katjaerua
Of AngulaCo. Inc., Windhoek

RESPONDENT: L N Shikale-Ambondo
Of Shikale & Associates, Windhoek