

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
RULING ON APPLICATION TO RE-OPEN CASE**

CASE NO: I 1833/2011

In the matter between:

LINDA IPINGE

PLAINTIFF

and

MALAKIA N LUKAS

FIRST DEFENDANT

FRIEDA NAKUUMBA

SECOND DEFENDANT

Neutral citation: *Ipinge v Lukas* (I 1833/2011) [2018] NAHCMD 106 (23 April 2018)

CORAM: ANGULA AJ

Heard: 8 December 2016

Order issued: 1 March 2017

Reasons delivered: **23 April 2018**

Flynote: Civil Procedure — Admissibility of Documentary Evidence — applicable principles — the admission of documentary evidence when the issue for determination is; whether the parties were married in community of property or out of community of property in terms of section 17 (6) of the Native Proclamation 15 of 1928 — the manner of admission of such evidence — nature of the evidence to be adduced.

Admissibility of Documentary Evidence —Objections to admission of evidence — the manner in which objection must be raised and law relating to admission of documentary evidence in terms of section 18, 20 and 34 of the Civil proceedings evidence Act.

Application to re-open case —applicable principles — the conduct of civil proceedings — appropriate time to raise objections — the prejudice to parties— objection should be brought timeously.

Summary: The issue for determination is whether the plaintiff and first defendant are married in or out community of property. The parties agreed that the marriage was solemnised between them on 10 December 1970, 47 years ago. In addition to the marriage certificate, the plaintiff cause to be admitted into evidence, without any objection, certified copies of a declaration under section 22(3) of Native Administration Act 1927, a duplicate original marriage register and a certificate of Banns of Marriage. The Plaintiff testified and trial proceeded. At the end of the Plaintiff's case, first defendant applied for absolution from the instance which was denied, and thereafter the first defendant testified.

In the application for absolution, first defendant objected to the admissibility of documentary exhibit handed into account. At no time during the proceedings did

first defendant object to the admission of the exhibits handed in as evidence. The first respondent's rights were not reserved with regard to the admissibility or authenticity of the exhibits and during cross-examination counsel for the first respondent proceeded to extensively cross-examine the plaintiff as to the contents of the exhibits. The plaintiff was permitted to bring his application to re-open her case limited to documentary evidence led into evidence only. The first defendant opposed the application for plaintiff to re-open her case.

Held — that section 18 of the Civil Proceeding Evidence Act prescribes the admissibility of a public document into evidence without the need to call the public official to testify about the content of the document. A certified copy received from such public officer is sufficient to be admitted into evidence.

Held — that section 20 of the Act clearly deals with the admissibility of official records without the need to call the official to testify as regard to the content of the document. A copy of an official document may be produced into evidence if certified by the head of the department in whose custody or control the document is or by an officer in the service of the state authorized by such head to certify such a document.

Held — that a document is original if, according to the substantive law and issues raised in the trial, it is the documents whose contents have to be proved. A party is required to produce the original document only if he seeks to prove its content. But the existence of a status or relationship created by a document may be proved by oral or any other evidence. Oral evidence by a marriage officer remains the best evidence to prove that a marriage between two parties did take place. A marriage certificate is the most convenient evidence however it is not the best evidence.

Held — that although the first defendant, on his own version, is only challenging the "quality" of the evidence produced and not that the evidence is inadmissible, the

manner in which the challenge was advanced is not in accordance with rules of conducting civil proceedings as set out in rule 1 (2) and (3) of this court. The conduct of civil proceedings must give effect to the provision of Article 12(1) of the Namibian Constitution. The objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively and as far as practicable.

Held — that the objection should have been brought at the time when the documents were tendered for admission into evidence. This is particularly important to enable the plaintiff to respond thereto timeously and appropriately. This was not done. Instead, the first defendant waited for the plaintiff to close her case before he raised an objection in respect of the documentary exhibits tendered.

Held — that the lack of proper certification and authentication of the documentary evidence, if any, would severely prejudices both parties. The documentary evidence would be of great assistance to the parties and to the court and may be the best evidence the case will allow.

The application for leave to re-open plaintiff's case was granted.

ORDER

1. The applicant is granted leave to re-open her case and lead evidence (including documentary evidence) in respect of the exhibits A to E (already) before Court.
 2. The applicant is ordered to pay the costs of the respondents of opposing the application for leave to re-open case, such costs to include the costs of one instructing and one instructed counsel.
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3. Should any of the parties require reasons for the order granting leave to the applicant to re-open her case, they are to give notification thereof in writing within ten (10) days from the date of this order.
4. The matter is postponed to a date to be arranged by the court in consultation with the parties for continuation of the trial.

REASONS

ANGULA AJ:

Introduction

[1] On 1 March 2017, I issued an order granting plaintiff leave to re-open her case and lead evidence (including documentary evidence) in respect of the Exhibits A to E (already admitted into evidence before Court). I ordered the plaintiff to pay the costs of the respondents in opposing the application for leave to re-open the case, such costs to include the costs of one instructing and one instructed counsel. I indicated in the order that any party wishing to be furnished with reasons for the order, should indicate their desire within 10 days of the said order.

[2] By letter dated 9 March 2017, addressed to the Judge's Research Assistant and within the time indicated in the order, the first defendant indicated his desire to be provided with reasons for the order. On 14 March 2017, I was informed that the reasons were requested. Given that I had already vacated the office of Court, I struggled to obtain the file. The file was provided to me on 29 August 2017, and

further delay in providing the reasons is regretted and I hereby apologise to the parties for the delay in providing the reasons. Following below are those reasons.

Background

[3] I shall refer to the parties using the citation appearing on the appeal. The plaintiff in this matter has instituted an action against the defendant, for a divorce, division of the joint estate, general forfeiture and payment of spousal maintenance in the amount of N\$1 000 per month and costs.

[4] The first defendant defends the action and at the proceedings for the first time, conceded the adulterous relationship. The plaintiff decided to only lead evidence on the central issue of whether the marriage between the parties is in or out community of property and whether the first defendant should pay the plaintiff maintenance in the amount of N\$1 000.

[5] At the close of plaintiff's case, the first defendant brought an application for absolution from the instance contending that the plaintiff has not made out a case that the marriage is in community of property. The main grounds for the application for absolution is that plaintiff's evidence regarding the manner in which certain documentary exhibits were executed is entirely unreliable, contradictory and lack specificity.

[6] The second ground advanced is that certain documentary exhibits "B", "C", "D" and "E" are not admissible to prove their contents because the plaintiff has not produced the original documents to rely on the truth of the factual allegations contained in the documentary exhibits. The plaintiff, so it was contended, has thus failed to prove that the marriage between the parties is one in community of property.

[7] Prior to defendant's testimony and before the application for absolution was argued, the plaintiff indicated that she may seek leave of court to re-open plaintiff's case in order to tender evidence particular to the exhibits objected to. I directed that the plaintiff consider such an avenue after I had made a ruling in the application for absolution. I subsequently dismissed the defendant's application for absolution with costs in the cause. I did not give reasons and directed to give reasons at the end of the case.

[8] Thereafter the defendant testified, was cross examined and re-examined. It became apparent to the plaintiff that the challenged exhibits and the manner in which the exhibits were challenged would prejudice the plaintiff's case. The plaintiff indicated that plaintiff's rights in terms of Article 12(1) would be infringed should the matter proceed without affording the plaintiff an opportunity to address the court on the admissibility of the exhibits in question.

[9] On 23 November 2016, I ordered that the plaintiff file her application for leave to reopen her case. The application for leave to reopen the case is opposed by the defendant. It is against this background that I made the order for which reasons are sought.

The application for leave to re-open the case

[10] It is common cause that the issue for determination is whether the plaintiff and first defendant are married in or out of community of property. The parties agreed that the marriage was solemnised between them on 10 December 1970, 47 years ago. Exhibit A, being a duplicate marriage certificate was accepted into evidence. In terms of exhibit A, the parties were married by a certain P Nambundunga at Onesi, Omusati region.

[11] In addition to the marriage certificate, the plaintiff cause to be admitted into evidence, without any objection, certified copies of other documents exhibits as follows:

Exhibit "B" – being a declaration under section 22(3) of Native Administration Act, 1927 and "B1" is a sworn translation thereof.

Exhibit "C" – being a duplicate original marriage register and exhibit "C1" is a sworn translation thereof.

Exhibit "D" – being a certificate of Banns of Marriage and exhibit "D1" is a sworn translation thereof.

Exhibit "E" – being another certified copy of the original the original marriage register and Exhibit "E1" is a sworn translation thereof.

[12] The documents were discovered in terms of rule 28(7) of this court. Against the backdrop of events that took place some 47 years ago, the plaintiff in her testimony confirms that she and the first defendant were married at Onesi in community of property. A marriage certificate (exhibit A) was accepted into evidence to confirm the marriage as has become practice in this court. The plaintiff further testified that their marriage is one in community of property and a joint declaration, exhibit "B", was handed into evidence as the declaration made by the parties on 20 November 1970.

[13] The plaintiff testified and pointed out that the respective signatures on exhibit "B" is indeed hers and that of the first defendant. The plaintiff pointed out her own signature and identified the signature of the first defendant. The contested exhibit "B" is in the Afrikaans language, but the sworn translation thereof read as follows:

'To the marriage officer Paavo Nambundunga
Onesi P O Ondangwa
Owambo, S.W.A

Dear Reverend,

To us, Malakia Lukas and Linda Ipinge, the marriage in community of property and the law of inheritance resulting therefrom were explained.

We herewith inform you that it is our intention and wish that our marriage must result in community of property and of profit and loss.

Onesi, 20 November 1970

[2 signatures]

[14] The duplicate marriage register, exhibit C, is written out by hand and indicates the names of the parties, together with two witnesses and is stamped that the marriage between the parties is one in community of property in terms of article 17(6) of Proclamation 15 of 1928.

[15] During the testimony of the first defendant, it became apparent that neither of the parties have a clear recollection of the circumstances surrounding their marriage. The first defendant challenged the authenticity and validity of the duplicate marriage certificate (exhibit A) which was admitted into evidence and which plaintiff did not dispute. The first defendant disputes the accuracy of his date of birth as recorded on Exhibit A. It is common cause that the parties admitted the marriage itself as pleaded. First defendant also disputed the signature on Exhibit B.

[16] The application for leave to re-open the evidence as required is accompanied by an affidavit filed by plaintiff's legal practitioner of record. In this affidavit, the plaintiff's legal practitioner states as follows:

'During the evidence in chief, the counsel for the first defendant did not object to the admission of the exhibits into evidence. The first respondent's rights were not reserved in regard to the admissibility or authenticity of the exhibits and during cross-examination the counsel for the first respondent proceeded to extensively cross-examine the applicant on the contents of the exhibits.'

[17] The plaintiff's legal practitioner says that she personally visited the Ministry of Home Affairs and established that the Permanent Secretary is the correct person to be subpoenaed, together with police officer who certified the exhibits before court. She also indicated that the documents are in the possession of the Ministry of Home Affairs.

[18] According to the plaintiff, the evidence sought to be introduced is relevant, material and of significant weight to the issues for determination in this matter, and as such, would benefit the parties and the court. The plaintiff also contended that there is no prejudice to the first defendant and none was pleaded.

[19] The plaintiff states that the application was necessitated by the first defendant who brought up the admissibility of the evidence at such a late stage and due to the conduct of the first defendant challenging the content of exhibit A, which was admitted. It is common cause that the plaintiff took a position that the exhibits are in any event properly admitted and it is the best evidence available to prove the issue in dispute, but intends to have the original documents brought from the Ministry's record to put the challenge raised by the first defendant to rest.

[20] In opposition to the application, first defendant contends that the court and the plaintiff's legal practitioner misconceived his objection. To place the first defendant's opposition into perspective, although it is not ordinarily suitable, I quote the entire clarification of the objection verbatim as follows:

‘26. It is apparent both from the exchanges between the parties during the course of the trial and the queries from the court that this aspect of the first defendant’s case is not well understood and the applicable legal principles not well appreciated. It is for this reason necessary for me to set out on an elementary basis the nature of the first defendant’s objection. This aspect was argued in greater detail during the first defendant’s application for absolution from the instance but it appears that it was not well understood.

27. In the founding affidavit filed in support of the application for leave to reopen in paragraph 9.2, it is alleged that one of the main grounds for the application for absolution from the instance was the alleged inadmissibility of exhibits B, C, D and E. The question of admissibility is repeated in paragraph 18 of the founding affidavit and again in paragraph 22 of the founding affidavit. In paragraph 22, the deponent states the following:

“The first respondent however did not object to the admissibility of the exhibits and cross-examined on the said exhibits and dealt with them in his evidence in chief”

28. It seems to be the understanding of the plaintiff and her legal representatives that the first defendant’s objection relates to admissibility of the relevant exhibits, per se. That is not the first defendant’s objection. The first defendant’s objection is founded on the relevant provisions of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965) (“Civil Proceedings Evidence Act”) dealing with public documents and official documents and further dealing with the exception to the hearsay rule. This was made clear during argument in the application for absolution from the instance. I shall try herein to explain the subtlety of the first defendant’s objection which the plaintiff simply does not seem to appreciate.

29. The first defendant does not maintain that the relevant exhibits are inadmissible per se. The exhibits are admissible based on the provisions of Rule 28(7). There is no dispute that the relevant copies were discovered by the plaintiff, and as such they remain admissible under that Rule.

30. The first defendant’s objection is that the documents which were discovered do not prove the facts in dispute, in other words they cannot be relied upon to prove the facts in

dispute due to the fact that there has been non-compliance with the material provisions of the Civil Proceedings Evidence Act.

31. The dispute in the present case is whether there was a marriage in community of property. The path the plaintiff chose to prove that fact was to produce certified copies of the relevant exhibits. This is not enough.

32. In order to prove that fact in dispute and having chosen the above path plaintiff was required to produce documents according to the provisions of the Civil Proceedings Evidence Act. This was addressed also during argument in the application for absolution from the instance. Basically, she had to comply with the provisions of section 18 of the Civil Proceedings Evidence Act, if her case is that these are public documents. She had to comply with the provisions of section 20 of the Civil Proceedings Evidence Act if her case is that these are official documents.

33. There are two aspects:

33.1 Whether the copies which were handed up as exhibits are true copies of the original documents. In this regard, first defendant's case is that the requirements of sections 18 and 20 of the Civil Proceedings Evidence Act were not complied with. In other words, there is no proof before court as required in terms of those provisions that the documents which were handed up in evidence are what they purport to be, that is, certified copies of or extracts from public documents or certified copies of or extracts from official documents. In both instances, the Civil Proceedings Evidence Act requires specific steps to be taken that should be complied with before such a document can be accepted as such certified copies. This was not done and that is the inadequacy of the plaintiff's case.

33.2 We now know that the documents were not signed and certified as true copies by the officer to whose custody the original is entrusted as required by section 18 or by the Head of Department in whose custody or under whose control such document is or by any officer in the service of the State authorized by such Head, as required in section 20 of the Civil Proceedings Evidence Act.

33.3 In the affidavit filed in support of the application for leave to reopen, it is now clear from paragraph 7 that the documents were certified by a Police Officer. This proves the basis for the objection of the first defendant that the provisions of section 18 and 20 of the Civil Proceedings Evidence Act were not complied with. This point could simply have been conceded and from the outset, absolution from the instance could have been conceded and plaintiff could have commenced with the case *de novu*, but plaintiff chose to oppose the absolution from the instance and now seeks an opportunity to address an inadequacy in her evidence which she vehemently denied that it exists, during the stage of absolution.

33.4 The second point is that the documentary exhibits do not comply with the requisites of sections 33 to 37 of the Civil Proceedings Evidence Act, that is, regarding the authorship of the documents to deal with the concerns arising from rule against hearsay. It is clear from the Civil Proceedings Evidence Act that on that score, the original document has to be produced unless the production of the original is specifically excused by the Court.

33.5 These are substantive laws applicable that each counsel advising his client ought to know of. From the outset, the first defendant's case was that the marriage was out of community of property and plaintiff was alerted of that case, in the plea and when the draft pre-trial order was filed. Plaintiff ought to have taken steps to prove her case by admissible evidence. She has failed to do so, and now seeks an indulgence from the court to produce evidence which was available at the time before she closed her case, but which she failed to produce.'

[21] From the above, it is quite clear that the first defendant contends that the exhibits admitted into evidence may not be relied upon to prove the fact that the marriage is one in community of property. First defendant contends that the plaintiff chose to prove her case by merely producing the relevant exhibits, and that is not enough. For the sufficiency of plaintiff's case, the exhibits need to prove, by mere production thereof, that there exists a marriage in community of property between the parties. In order to prove such allegations, so the arguments goes, the

documents needs to be firstly admitted in terms of the provisions of section 18 or 20 of the Civil Proceeding Evidence Act 25 of 1965 and the original documents need to be produced.

[22] It is common cause that the first defendant's case is that the marriage is out of community of property. First defendant did not provide the basis for such a plea. It is therefore essential for the court to consider all the evidence relevant to the issue, including documentary evidence.

[23] The first defendant in an affidavit deposed to by his legal practitioner, contend that "it was open to the first defendant at the end of the trial to argue and challenge the adequacy of the evidence to pass the threshold required for the evidence to be relied upon on proof of what they state". (My emphasis)

[24] I now deal with the law relating to the objection raised by the first defendant in respect of the exhibits.

'The Judges and Sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.'¹

[25] The General rule in respect of admissibility of documentary evidence is as follows:

'No evidence is ordinarily admissible to prove the contents of a document except the original documents itself.'²

[26] Section 18 of the Civil Proceedings Evidence Act 25 of 1965 as amended states as follows:

'18. Certified copies of or extracts from public documents admissible in evidence

¹ Hoffmann Zeffert, the South African law of Evidence, fourth edition, p114.

² Hoffmann Zeffert *supra*, p590.

- (1) Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, any copy thereof or extract therefrom proved to be an examined copy or extract or purporting to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, shall be admissible in evidence.
- (2) Such officer shall furnish such certified copy or extract to any person applying therefor, upon payment of an amount in accordance with the tariff of fees prescribed by or under any law or, if no such tariff has been prescribed, an amount in accordance with such tariff of fees as the Minister in consultation with the Minister of Finance may from time to time determine.'

[27] Section 20 of the Act, which applies to official documents, states as follows:

20. Certified copies of or extracts from official documents sufficient

- (1) Except when the original is ordered to be produced any copy of or extract from any document in the custody or under the control of any State official by virtue of his office, certified as a true copy or extract by the head of the department in whose custody or under whose control such document is or by any officer in the service of the State authorized by such head, shall be admissible in evidence and be of the same force and effect as the original document.
- (2) Any such copy or extract may be handed in by any party who desires to avail himself thereof.
- (3) No such copy or extract shall be furnished to any person except upon payment of an amount in accordance with the tariff or fees prescribed by or under any law or, if no such tariff has been so prescribed, an amount in accordance with such tariff of fees as the Minister in consultation with the Minister of Finance may from time to time determine.'

[28] Section 18 prescribes that public documents in the proper custody may be produced into evidence by producing certified copies or extracts by the officer in whose custody the original has been entrusted. It permits the admissibility of a public document into evidence without the need to call the public official to testify about the content of the document. A certified copy from such public officer is sufficient to be admitted into evidence.

[29] Section 20 clearly deals with the admissibility of official records without the need to call the official to testify as regard to the content of the document. A copy of an official document may be produced into evidence if certified by the head of the department in whose custody or control the document is or by an officer in the service of the state authorized by such head to in fact certify such document.

[30] A document is original if, according to the substantive law and issues raised in the trial, it is the documents whose contents have to be proved.³ A party is required to produce the original document only if he seeks to prove its content. But the existence of a status or relationship created by a document may be proved by oral or any other evidence.⁴ The best evidence to prove a marriage is the oral evidence of the marriage officer and marriage certificate is the most convenient evidence.⁵

Application of the law

[31] On the basis of what is stated in section 18 and 20 of the Act, the first defendant is in fact challenging the admissibility of the exhibits produced by the plaintiff. He contends that the exhibits were not correctly certified by the correct

³ Hoffman, Zeffert p393, *supra*.

⁴ See p393, *supra*.

⁵ *R v Mbonambe* 1949 (3) SA 558 (N), p560.

officer and there is no proof that the exhibits are true copies of the original documents. In his exact words: “there is no proof before court as required in terms of those provisions that the documents which were handed up in evidence are what they purport to be, that is, certified copies of or extracts from public documents or certified copies of or extracts from official documents”.

[32] In my opinion such a challenge should have been lodged timeously when the documents were tendered into evidence to enable the plaintiff to adequately respond thereto.

[33] On the other hand, counsel for the first defendant argues that the documentary exhibits are admissible but cannot be relied upon to prove the content thereof (that is that the parties are married in community of property) unless the original documents are produced. If this is the correct premise of the first defendant’s objection, then the first defendant accepts that the documents are admissible. It is not clear from the submission made by counsel for the first defendant what he contends is the basis of such admissibility.

[34] Furthermore, it is uncertain whether the first defendant accepts that the documentary exhibits do not comply with section 18 or 20 of the Act nor the basis upon which it is alleged that the documents are admissible per se. The plaintiff is seeking to reopen her case to clarify these uncertainties and to put to rest the objections so raised by the first defendant.

[35] A marriage register and any declaration filed therewith by the marriage officer, is kept in term of section 2 of Births, Marriages and Deaths Registration Act 81 of 1963. Section 40- 42 of the Act provides as follows:

'40. (1) The marriage officer solemnizing any marriage, the parties thereto and at least two competent witnesses shall sign a register and a copy of the register of such marriage in the prescribed form before they leave the premises where the marriage took place.

(2) The said marriage officer shall keep the copy of the register with his records and shall, within three days from the date of the marriage, transmit the original register to the Secretary, for record.

Searches and issue of certificates

42. (1) It shall be the duty of the Secretary, registrar and of every marriage officer or magistrate upon receipt by him of a written application from any person and upon payment of the prescribed fee, (if any) to cause search to be made in any births, deaths or marriage register which is in terms of this Act or a law relating to the registration of births, marriages or deaths which was in force in the Republic in the custody of such officer, and, subject to the provisions of subsection (4), and of any regulation, to issue a certified copy in the prescribed form of any entry contained in such register or in any document attached to such register.' (My emphasis)

[36] A certified copy is issued from the custody or under the control of the Secretary in terms of section 42 of the Birth, Marriage and Death Registration Act. The production of the original documentary exhibits is necessary if the plaintiff's case solely relies on the documentary evidence to prove a fact in issue.

[37] The question is whether a party required proving the consequence of the marriage must produce documentary evidence as proof of such fact. In other words, what is the best evidence to prove that the marriage between the parties is either in or out of community of property? The simple answer to this is the direct oral evidence of the parties.⁶ Documentary evidence may be produced to prove the

⁶ *Mofuka v Mofuka* 2001 NR 318 (HC), p322: See also *Koza v Koza* 1982 (3) SA 462 and *Ex parte Spinazze v Another* NNO1985 (3) SA 65 (A).

consequence of the marriage if the original document is tendered which prove the fact of the marital consequence of the marriage.

[38] Documentary evidence may be admitted as secondary evidence in such a case where the document merely serve to prove some fact which is capable of proof by other means other than the documents itself. In this case, the plaintiff led the existence of a declaration (exhibit B) to prove that it exists. The declaration was not tendered into evidence to prove its content but rather that it was made.

[39] I agree that first defendant can argue the weight of the evidence, reliability and credibility of the plaintiff's evidence at the end of the plaintiff's case in an application for absolution from the instance. It is therefore undisputed that the plaintiff tendered *prima facie* evidence during her testimony requiring the first defendant to answer thereto.

[40] The plaintiff gave direct oral evidence when she testified that the marriage between the parties is in community of property and the parties had made a declaration to the marriage officer that the marriage is in community of property. The plaintiff testified that she and the first defendant had signed the declaration in the presence of the marriage officer. The plaintiff pointed out her own signature and that of the first defendant on the declaration.

[41] I will consequently not decide the issue of reliability, credibility or weight of evidence in the course of this application to reopen the plaintiff's case, considering that it is not the correct stage to do. I agree with first defendant's counsel that such issues are better determined at the end of the trial.

[42] I now proceed to deal with the provisions of section 34 of the Civil Proceedings Act for completeness, which states as follows:

'34. Admissibility of documentary evidence as to facts in issue

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided-

(a) the person who made the statement either –

- (i) had personal knowledge of the matters dealt with in the statement; or
- (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings-

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof provided to be a true copy.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as a witness.'

[43] Section 34 dispense with the need to receive direct oral evidence of a fact in issue if the evidence in issue can be affirmed in a document itself, subject thereto that the statement in the document is made by a person with personal knowledge thereof or the statement forms part of the continuous record. In other words, oral evidence of what is contained in the document is inadmissible unless the original document is produced.⁷

[44] Although the first defendant, on his own version, is only challenging the "quality" of the evidence produced and not the admissibility of the evidence itself, I frown upon the manner in which the challenge was advanced. The objection raised by the first defendant is not in accordance with rules of conducting civil proceedings as set out in rule 1 (2) and (3) of this court. The conduct of civil proceedings must give effect to the provision of Article 12(1) of the Namibian Constitution. The

⁷ *Le Roux v Pieterse NO and Others* (607/2010) [2012] ZAECGHC 74; 2013 (1) SACR 277 (ECG) (27 September 2012). See also *S v Swanepoel* (508/2007) [2008] ZASCA 8; [2008] 4 All SA 389 (SCA) (18 March 2008).

objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable.

[45] The weight to be attached to admissible evidence is a separate issue from admissibility of evidence. The challenge or objection of the first defendant goes to the root of the admissibility of evidence instead of quality of the evidence.

[46] It is important to pause and remark here that the proceedings were adjourned at the instance of the first defendant to enable the first defendant's counsel to inspect the actual certified copies of the documents. After such inspection, the proceedings continued without any objection from the first defendant. One would have expected the first defendant at that stage to object in order to prevent the introduction or consideration of the inadmissible content.

[47] The marriage register is in the custody of Home Affairs, and a copy thereof was produced in evidence by the plaintiff certified by a police officer and stamped by someone at Home Affairs. The first defendant is attacking the certification of the documents by a police officer, and in general the authenticity of the documents produced. He disguised his attack under the challenge of 'quality' of evidence.

[48] As I indicated earlier, the challenge should have been brought at the time when the documents were tender for admission into evidence. This is particularly important to enable the plaintiff to respond thereto appropriately. This was not done. Instead, the first defendant waited for the plaintiff to close her case and then raised objection in respect of the documentary exhibits tendered.

[49] The lack of proper certification and authentication of the documentary evidence, if any, would severely prejudice both parties. It is my considered view that the plaintiff's case should be opened to enable the court to make a finding on this issue. As stated before herein, I do not consider it appropriate at this stage to

make any pronouncement on the “quality” or reliability of evidence adduced until after the testimony of the witnesses intended to be called.

[50] I further took into account the fact that the marriage between the parties occurred approximately 47 years ago. I expect the witnesses to have difficulty in recalling the facts and circumstances under which the marriage was solemnized. The documentary evidence would be of great assistance to the parties and to the court, and may very well be the best evidence the nature of this case will allow.

[51] In the application for leave to reopen her case, the plaintiff seeks an indulgence from the court, and as such, the plaintiff should ordinarily carry the costs of the application.

[52] In this regard, it was for the aforesaid reasons that I made the following order:

1. The applicant is granted leave to re-open her case and lead evidence (including documentary evidence) in respect of the exhibits A to E (already) before Court.
2. The applicant is ordered to pay the costs of the respondents of opposing the application for leave to re-open case, such costs to include the costs of one instructing and one instructed counsel.
3. Should any of the parties require reasons for the order granting leave to the applicant to re-open her case, they are to give notification thereof in writing within ten (10) days from the date of this order.
4. The matter is postponed to a date to be arranged by the court in consultation with the parties for continuation of the trial.

E M ANGULA
ACTING JUDGE

APPEARANCES:

Plaintiff: A VAN VUUREN
 instructed by Kirsten & Co Inc., Windhoek

First Defendant: G NARIB
 instructed by Sisa Namandje Legal Practitioners, Windhoek