

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-MOT-GEN-2017/00154

In the matter between:

ANASTASIA SHAFETANGE AMUNYELA

APPLICANT

and

POMBILI NATANGWE AMUNYELA

1ST RESPONDENT

PENDAPALA TANGENI AMUNYELA

2ND RESPONDENT

Neutral Citation: *Amunyela v Amunyela and Another* (HC-MD-CIV-MOT-GEN-2017/00154) [2019] NAHCMD 146 (14 May 2019)

Coram: MASUKU J

Heard on: 8 August 2018

Delivered on: 14 May 2019

Flynote: Putative marriage – Effect thereof – Marriage to be held to be in community of property – Effect on children to be taken into consideration.

Non-Joinder – As of convenience – As of necessity – Party with direct or substantial interest in the matter to be cited – Failure to join party may be fatal – court applying *Maseko v Commissioner of Police and Others* and finding that it would, in the circumstances, be improper to dismiss application for non-joinder.

Summary: This is an opposed application in which the applicant seeks an order declaring the marriage between the applicant and the Late Phillip Amunyela, solemnised on 8 August 1996 in England, null and void *ab initio*. That the marriage be declared to be a putative marriage in favour of the applicant and the consequences thereof be as one in community of property.

Declaring that the applicant is entitled to half share of the estate of the Late Phillip Amunyela as well as costs of the application. Respondents raising special plea of non-joinder and that application be dismissed on that ground. Applicant arguing that that the application before court has nothing to do with the children for the reason that what the applicant seeks is a declarator of the marriage as putative and that this has nothing to do with the children as heirs to the deceased but to do with the status of the deceased's marriage to the applicant.

Held: that the respondents' siblings, born from the loins of their father, have an interest in this matter and that they should have been cited as parties to the application.

Further held: that their inheritance from their father stands to be imperilled and that for that they may not receive anything from their father's estate if the order sought by the applicant is granted, without the said children not being afforded an opportunity to participate in the proceedings.

Held That: The law relating to joinder can be said to be well settled now, namely that a party who has a direct and substantial interest in a matter has to be cited and served with the proceedings in issue, failing which an injustice may well be perpetrated.

Further held that: the deceased's children who were not cited nor served in this matter were necessary parties and not merely parties to be joined if at all, for the purpose of convenience and that they have a direct and substantial interest in the proceedings, necessitating that they should be joined.

Court finding that it is improper to dismiss an application for non-joinder and that the proper order is to postpone or to stay the proceedings to enable the joinder to be effected.

Court upholding the special plea for non-joinder and awarding costs in favour of the respondents.

ORDER

1. The point of law in *limine* regarding the non-joinder of the heirs of the Late Mr. Phillip Amunyela and to have Naapopye Phillip Junior Amunyela, properly represented in these proceedings is upheld.
2. The applicant is ordered to pay the costs attendant to this order.
3. The matter is removed from the roll to enable the applicant to attend to the matters referred to in para 1 above, if so advised.

JUDGMENT

MASUKU J:

Introduction

[1] This is an opposed application in which the applicant has approached the court seeking the following relief:

- '1. Declaring the marriage between the applicant and the Late Phillip Amunyela, solemnised on 8 August 1996 in England, null and void *ab initio*.
2. That the marriage be declared to be a putative marriage in favour of the applicant and the consequences thereof be as one in community of property.
3. Declaring that the applicant is entitled to half share of the estate of the Late Phillip Amunyela.
4. Costs of the application.'

The parties

[2] The applicant, an adult female, is an employee of the Government and is based in Windhoek. In her founding affidavit, she states that she acts in this matter in her capacity as the executrix in the Estate of the Late Phillip Amunyela. Notwithstanding that she was appointed as the Executrix in the said estate, she appointed Ms. Doris Hans-Kaumbi in the office of the administrator of the estate.

[3] The first respondent is Pombili Natangwe Amunyela, who is described as an intestate heir of the late Phillip Amunyela. The second respondent is Pendapala Tangeni Amunyela, another intestate heir of the deceased estate. It is the applicant's contention that no relief is sought against these respondents, who have only been cited for the interest they may have in the order sought.

Background

[4] As indicated in the notice of motion quoted above, the main relief sought by the applicant is a declarator that her marriage with the deceased be declared a putative marriage and therefore null and void from the instance. She deposes that on 8 August 1996, she was joined in matrimony with the deceased in England, according to the laws of that country. She further deposes that she and her late husband regarded their marriage as one in community of property as evidenced by a marriage certificate annexed to the application.

[5] The applicant further deposes that when she met her late husband, she was studying in London. Having returned to Namibia that year, she again went back to London and then married the deceased in London in August 1996 as aforesaid. It is her evidence that her husband told her about his previous marriage and that he had separated from his previous wife, who lived with the children of the union in the common home, and he lived elsewhere with a family member.

[6] The applicant states that the deceased loved and cared for her deeply and showed a remarkable degree of commitment to her and they lived happily as husband and wife. Her husband then passed on and after his internment, she was made aware that although he was divorced when she got married to him, he however remained married to his first wife at the time of their marriage in London in 1996.

[7] The applicant states further that there was one major asset in the deceased's estate, namely property described as Erf. No. 392, Academia, Windhoek, which would be sold to her if the respondents, who are major heirs, could sign their respective certificates of consent. They, it is alleged, are reluctant to sign the said certificates of consent.

Basis of application

[8] The basis for the main relief sought, according to the applicant, is that she was given legal advice to the effect that her marriage to the deceased was void *ab initio*, as at the time of them contracting the marriage, the deceased was, unbeknown to her, legally married to another woman. It is her case that she was unaware of the previous marriage and did not know at the time of its celebration that there was a legal impediment thereto.

[9] The applicant further deposes that in her state of knowledge of the facts at the time, she and her husband considered the marriage to have been in community of property and that they acquired and owned assets jointly in the common estate. It is her further contention that if the marriage is not regarded as a putative marriage, she stands to be on the wrong end of the stick for the reason that she stands to lose the benefits of the joint estate, yet she did not at the time know of the true marital status of the deceased, which he did not fully or accurately disclose to her.

The respondents' opposition

[10] The respondents firstly raised a point of law *in limine*. The answering affidavit is deposed to by the 1st respondent and the 2nd respondent filed a confirmatory affidavit. The 1st respondent, in his answering affidavit claims that the siblings, born from the loins of his father, have an interest in this matter and that they should have been cited as parties to the application.

[11] The respondents contend further that if the other heirs are not joined to these proceedings, then their inheritance from their father stands to be imperilled and they may not receive anything from their father's estate if the order sought by the applicant is granted, without the said children being afforded an opportunity to participate in the proceedings.

[12] The 1st respondent accordingly prays that the application should be dismissed with costs for non-joinder. I will comment on the propriety of the relief sought by the respondents in the event I agree with the respondents that the deceased's other children should have been joined to the proceedings.

[13] On the merits, the respondents, while admitting that the marriage between the applicant and their late father was null and void *ab initio*, they deny that the said 'marriage' should be treated and declared by the court to have been a putative marriage. The respondents deny that the applicant laboured under a *bona fide* belief that the deceased had divorced the respondents' mother.

[14] In this regard, the respondents allege that their parents were engaged in very acrimonious divorce proceedings around 1998 and 1999. Furthermore, the respondents contend, the deceased was prosecuted and found guilty of having committed the crime of bigamy. They find it hard to believe that the deceased would not, in the circumstances, have told the applicant of these material happenings in his marital life.

[15] The respondents further attached a power of attorney signed by the deceased empowering Mr. Louw, a legal practitioner, to appear before the Registrar of Deeds to give effect to the purchase of the deceased's half share by the respondents' mother of a property situate at 16 Pullman Street. They claim that the applicant signed this power of attorney as a witness and also initialled the other pages. Among the contents of the document in question, is that it records that the deceased had been divorced from the respondents' mother in April 1999. It is on the foregoing bases that the respondents contend the applicant knew that the deceased had been previously married.

[16] The respondents further admit that they refused to sign the consent to sell 50% of the property situated at Spinoza Street to the applicant. This they did because the said property is the biggest asset in their father's estate. They contend further that the valuation of the property that accompanied the consent form they were asked to sign, is not satisfactory as it is not market related and "is way too low." I will not traverse the other allegations by the respondents in opposing the application.

[17] I now turn to deal with the point of law *in limine*, namely that of non-joinder.

Non joinder

[18] The parties extensively argued this point and took disparate positions and dug their heels therein. Ms. Kirsten-Garbers was of the view that the deceased's heirs had an interest in the matter and had, as a matter of law, to be joined to the proceedings. She contended further that the argument by the applicant that the other children of the deceased had signed consents to the transfer of the property is neither here nor there for the reason that the court is not properly and fully informed as to the circumstances surrounding their appending signatures to the consent forms.

[19] Ms. Angula returned the fire in equal measure. She argued that the application before court has nothing to do with the children for the reason that

what the applicant seeks is a declarator of the marriage as putative and that this has nothing to do with the children as heirs to the deceased but to do with the status of the deceased's marriage to the applicant.

[20] I do not intend to be nor am I required to try and reinvent the wheel. The law relating to joinder can be said to be well settled now, namely that a party who has a direct and substantial interest in a matter has to be cited and served with the proceedings in issue, failing which an injustice may well be perpetrated.

[21] It has been stated also that when it comes to joinder of parties, there are two classes. Joinder as of necessity and joinder as a matter of convenience.¹ In the former case, failure to join a party may be held to be fatal. Ms. Kirsten-Garbers argued that the position of the deceased's children who were not cited nor served in this matter were necessary parties and not merely parties to be joined if at all, for the purpose of convenience.

[23] In *Standard Bank v Maletzky*² the court expressed itself as follows on the question of joinder of parties:

'The failure to join necessary parties is a fundamental flaw in the proceedings and will inevitably prejudice both the three respondents but also the administration of justice itself.'

[24] I do not agree with Ms. Angula that this is a case that has nothing to do with the children and that it is a case to deal with adult issues, namely marriage, which is not a concern of the parties. I say so for the reason that although the children may not have a role to play in the issue of the validity or otherwise of the marriage, it is important to consider that the case and the relief sought does not end with the declarator that the marriage is putative.

¹ Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, Vol I, Juta & Co., 5th ed, 2009 at p. 208.

² *Standard Bank v Maletzky* 2015 (3) NR753 (SC) para [54].

That finding, if endorsed by the court, has direct implications for the children in respect of what they stand to inherit from the estate.

[25] In the instant case, it is clear that the applicant does not only seek a declarator, as mentioned above, but also an order dealing with the proprietary consequences of the marriage, which necessarily have a bearing on the interests of the deceased's children. In this regard, I am of the considered view that they have a direct and substantial interest in the proceedings, necessitating that they should be joined.

[26] In order to illustrate this point, I will refer to *Ngubane v Ngubane*³ to which Ms. Kirsten-Garbers referred the court albeit in respect of a separate issue. In that case, a man had contracted two marriages by civil rites and his second wife sought to have the marriage between the parties declared null and void, which declaration the man did not oppose. The parties' children were not cited nor served with the papers nor had a *curator ad litem* been appointed to represent their interests although they were minors.

[27] This, the court found was improper because although they may not have been parties to the marriage, the declaration of invalidity had a direct bearing on their status, as they stood to be declared illegitimate. The court accordingly set aside the previous order granted, precisely for the reason that the children had a direct and substantial interest in the order granted but had not had their voice projected in the matter, yet a stigma was attached to them.

[28] In the same vein, I am of the considered view that the considerations applied in that case should apply with equal force in the instant case. Although the deceased's children do not have a direct interest in the issue of the validity of the marriage, the findings thereon have the potential to bear decisively on their right to inherit from the estate of their late father. I therefore find that they are parties to be joined of necessity and failure to join them is fatal.

³ *Ngubane v Ngubane* 1983 (2) SA 770 (T).

[29] Ms. Angula argued that the need to serve these heirs was dispensed with in view of the fact that they signed consents to the transfer. Ms. Kirsten-Garbers' argument, was a different kettle of fish altogether. She mentioned that the fact that those parties have signed certificates of consent is not, on its own sufficient. She reasoned that it is important for the court to know the circumstances surrounding the signatures appended.

[30] I agree with Ms. Kirsten-Garbers in her submissions. First, although she did not mention this, I am of the view that the issue of the signing of the certificates of consent amounts to placing the cart before the horse. I say so because the certificates of consent could only become effectual once the marriage between the parties has been properly declared by the court to be a putative marriage. It is, in my view, a precipitous exercise to have caused the intestate heirs of the estate to sign the certificates in the absence of an appropriate declarator, thus second-guessing the court on what it will say on the matter.

[31] Secondly, Ms. Kirsten-Garbers is eminently correct in saying that the circumstances surrounding the signing of the certificates is unknown to the court. Questions regarding issues of reality of consent should not be allowed to engulf and torture the court's mind. I do not think that there would have been any harm on the part of the applicant to have served the application on the heirs, having properly cited them. In that case, they would signify their attitude clearly to the court and in the face of the allegations made by the applicant in her founding affidavit.

[32] The court, as we speak, is not privy to the nature of the information that was placed at the disposal of the heirs in question, before they appended their signatures, recording their consent. If their consent was to the granting of the prayers sought in the notice of motion, that may have been a horse of a different colour, for that would have served to show that the said heirs were aware of what order was sought and more importantly, the grounds upon which that order was predicated. I accordingly agree with Ms. Kirsten-Garbers on her submission in this regard.

[33] In her heads of argument, Ms. Kirsten-Garbers submitted as follows: 'The rights of all the heirs are therefore at stake and it is not clear from the papers before the court whether the three major heirs who have indeed signed the consents were fully appraised of their rights and legal position before they have signed same.'⁴The issue of signature of such documents is, in my view of great moment and it is important for the court to be satisfied regarding the circumstances in which the consents were filed, particularly that the signatories had, before appending their respective signatures, had the benefit of legal advice and fully comprehended what their rights were and the effect of giving their consent.

[34] In this regard, I interpose to observe that a reading of the various certificates of consent filed by the applicant in support of its case that it was not important to cite and serve the absent heirs, shows that they were signed in September and October 2016, respectively. This was long before this application, which was instituted in May 2017, could be filed. It is accordingly pertinent, as indicated above, to know what information the heirs who signed had at their disposal before appending their respective signatures aforesaid.

[35] I now come to the last leg of Ms. Kirsten-Garber's argument. This relates to the child born of the union between the applicant and the deceased. She submitted that the child, is a minor and the applicant is the one who signed on that child's behalf. I do not harbour any misgivings that like any well-intentioned parent would, she has the interests of the minor child at heart. Where she is a beneficiary of the consent and at the same time signs for and on behalf of the minor child, issues of conflict invariably arise.

[36] In the *Ngubane* case, it was held that in such cases, it was important that the minor children, who stand to be affected by the order made, should be properly represented by a *curator ad litem*, and who, in exercise of the exacting duties of his or her office, will bring an independent judgment to bear on the matter and particularly ensure that at the end of the day, the signature

⁴ At para 12 of the Respondents' heads of argument.

appended, if so advised, appropriately caters for the rights and interests of the minor child. This is stainless jurisprudence in my view that will serve to disabuse the court's mind of any pollutants that may be regarded as affecting the reality of consent.

[37] In the *Ngubane* case, the court found that because the order made had been delivered without a curator having been appointed to look into and to consider the rights and interest of the minor children, particularly the likelihood that they would be relegated to a status of illegitimacy. I accordingly adopt this reasoning as accurately reflective of the proper and cautious approach to such matters.

[38] I accordingly find that the court cannot, in the circumstances, rely on the certificate of consent signed by the applicant, for and on behalf of her minor child in the circumstances. By so saying, I have to make it categorically clear that the court is not imputing any bad faith or chicanery on the part of the applicant. Far from it. The demands of the law and fairness require this court to adopt that cautious approach.

Appropriate relief

[39] Ms. Kirsten-Garbers is correct in her submissions, the other question is whether she is also correct that the proper order to issue, is to dismiss the application in the circumstances. This is what the respondents prayed for in their papers, in the event the point relating to joinder is upheld. Is that a proper and fair order?

[40] This is a question that fell for determination, amongst other questions, in *Endude v The Chairperson of the Okavango East Communal Land and Others*,⁵ in which Ms. Angula, appeared for the applicant. The court, in determining that question, referred to *Maseko v Commissioner of Police and*

⁵ *Endunde v The Chairperson of the Okavango East Communal Land Board and Others* (HC-MD-CIV-MOT-GEN-2016/00384) [2018] 113 (27 November 2018).

Others,⁶ where the approach to this question was settled by court finding that it is improper to dismiss an application for non-joinder. The court found that the proper order is to postpone or to stay the proceedings to enable the joinder to be effected. I adopt the reasoning in that case.

[41] The order for dismissal of an application in these circumstances, would be harsh in the extreme and would not, in my considered view, be in alignment with the primary and overriding objectives of judicial case management, which, amongst other things, seek to dispose of matters speedily and cost effectively, on their real merits⁷, eschewing the taking of technical points to derail determining the matter on the central issues.

Conclusion

[42] I have accordingly come to the conclusion that Ms. Kirsten-Garbers is eminently correct in her submissions. In the first place, the heirs to the deceased's estate, should have been served with the application and allowed, with the benefit of legal advice, where appropriate and with a full knowledge and understanding of the allegations in support of the relief prayed for, to sign their certificates of consent if so minded or advised. Secondly, it appears to me that it is imperative that the issue relating to the minor child and the appointment of a *curator ad litem*, as canvassed in the judgment, be attended to before any order along the lines prayed for, may be granted.

Order

[43] In view of the views and conclusions to which arrived above, I am of the considered view that the following order is condign:

1. The point of law in *limine* regarding the non-joinder of the heirs of the Late Mr. Phillip Amunyela and to have Naapopye Phillip Junior Amunyela, properly represented in these proceedings is upheld.

⁶ *Maseko v Commissioner of Police and Others* (1778/09) [2011] SZHC 66 (17 January 2011).

⁷ Rule 1 (3) of the High Court Rules of Namibia.

2. The applicant is ordered to pay the costs attendant to this order.
3. The matter is removed from the roll to enable the applicant to attend to the matters referred to in para 1 above, if so advised.

T.S Masuku
Judge

APPEARANCES:

APPLICANT: MS. E. ANGULA

Of Angula Co. Windhoek

RESPONDENT: MS. H. KIRSTEN-GARBERS
On Instructions of Fisher, Quarmby & Pfeifer