



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-MOT-GEN-2016/00239

In the matter between:

HERMAN KONRAD

PLAINTIFF

and

SHANIKA NDAPANDA

DEFENDANT

Neutral citation: *Konrad v Shanika* (HC-MD-CIV-MOT-GEN-2016/00239) [2019]
NAHCMD 366 (24 September 2019)

Coram: PARKER AJ

Heard: 17 & 25 April, 14 May, 2, 3, 4 & 16 July, 7, 8 & 20 August, 2
& 12 September 2019

Delivered: 24 September 2019

Flynote: Practice – Close of plaintiff’s case – Court applying trite test – Whether the court acting reasonably satisfied that plaintiff establishing prima facie case requiring answer from defendant – Where plaintiff has made out prima facie case and defendant’s defence peculiarly in defendant’s knowledge, absolution not appropriate remedy – On the evidence court concluding that plaintiff made out prima facie case upon which court could or might find for plaintiff – Court taking into account also Supreme Court’s instruction in an appeal decision that court should hear oral evidence in motion proceedings court dismissing absolution application.

Summary: Practice – Close of plaintiff’s case – Applicant instituting motion proceedings to declare his second marriage to respondent null and void because of existence of earlier marriage to a different person – Respondent counter claiming that her marriage to be a putative marriage – Court dismissing motion proceedings on the basis of existence of real dispute of facts of which applicant was aware – On appeal, Supreme Court instructing court to hear oral evidence on the basis that public policy, equity and fairness to both parties demand that declaration not the invalidity of the marriage and that of the putative marriage raised, should be determined in tandem and not in isolation – Supreme Court deciding that court should have the opportunity of seeing and hearing the witnesses before coming to a conclusion – Court concluding that on the evidence at this stage it is necessary to call on applicant to respond under oath or by affirmation – Consequently, absolution application dismissed.

ORDER

1. The application for absolution from the instance is hereby dismissed.
2. The matter is postponed to 25 September 2019 at 10h00 for status hearing and for the allocation of dates for continuation of trial of this matter and the trial of the matter in Case No. 2018/00094, transferred from Ueitele J.

JUDGMENT

PARKER AJ:

[1] This case has done the marathon – from the High Court to the Supreme Court and back to the High Court. It is a motion proceeding, in which the applicant (Mr Herman Konrad) seeks a declaration that the marriage between the applicant and the respondent solemnized on the 7th September 1992 in Windhoek is null and void *ab initio*; and costs of suit (if opposed). Respondent (Ms Ndapanda Shanika) opposes the application and seeks the following order:

- ‘2.1 That the marriage be declared putative in favour of the Respondent and the consequences thereof be as one in community of property.
- 1.2 Declaring that Respondent is entitled to half of the assets by virtue of the marriage in community of property.
- 1.3 In the event that the aforesaid prayers fail, an order directing the Applicant to pay maintenance with respect to the Respondent in the amount of N\$3 500.00 per month for as long as the Respondent is alive.’

[2] The application was dismissed with costs on the basis that applicant chose to proceed by way of motion when he knew in advance that there would be a material dispute of facts. That application was heard on 7 February 2013, and judgment delivered on 16 March 2017. On appeal by Konrad, the Supreme Court in *Herman Konrad v Shanika Ndapanda* Case No.SA 21/2017 (judgment delivered on 28 February 2019) did not agree with the High Court, and remitted the matter to the High Court ‘to be placed under judicial case management for resolution, *taking into account the views expressed in (the) this judgment*’, *per* Shivute CJ. (Italicized for emphasis and for reasons that will become apparent in due course)

[3] In that regard, the Supreme Court directed the High Court ‘to exercise its discretion informed, amongst other things, by the need to resolve the matter justly, expeditiously, efficiently and cost effectively’ in terms of r 67 of the rules of court. The matter was referred to trial in terms of the rules of court.

[4] In the instant proceedings, after respondent (Ms Shanika Ndapanda) *qua* plaintiff closed her case, Ms Angula, counsel for applicant (Mr Herman Konrad) *qua* defendant, brought an application for absolution from the instance ('absolution application'). The absolution application was argued by Ms Walenga for applicant, and Ms Shikale for respondent.

[5] In determining the absolution application I have taken into consideration – as it is my duty so to do – the views expressed by the Supreme Court (see para 2 of the instant judgment). As I see it, the most significant views of the Supreme Court – for our present purposes – are found in paras 11, 12, 14, 15 and 16 of the Supreme Court judgment, and I find it necessary to rehearse them here:

'[11] The proposition that the validity of the marriage should be decided separately from the claim for a putative marriage cannot be accepted as correct for the following reasons. It is trite that the concept of a putative marriage has been recognized at common law as a measure to provide some relief to an innocent party (who had entered into an invalid marriage without the knowledge of its invalidity). Some of the legal consequences that flow from an invalid marriage include property rights and where applicable rights pertaining to children born during the union. Although the respondent did not make a formal application to have the 'marriage' declared a putative marriage, in substance she raised the issue in her answering affidavit. The allegations she made gave rise to the finding of a dispute of fact by the court *a quo*. It is therefore essential that the issue of the validity of the second marriage should be decided in context and not in a vacuum.

'[12] A broader consideration of the circumstances surrounding the solemnization of the second marriage and the proprietary implications of the parties should be undertaken during the determination of the question whether or not the marriage was a nullity. The bona fides of the parties to the marriage is certainly a relevant consideration in this context. The issue that has arisen in the present case where a respondent's rights under a putative marriage may be adversely affected should the matter be decided in a piece meal fashion is likely to arise in future cases as there may well be parties to marriages who find themselves in circumstances similar to those of the respondent. As a matter of public policy, equity and fairness to both

parties to the union, it is imperative that the declaration of the invalidity of a marriage and that of a putative marriage, if properly raised, should be determined in tandem and not in isolation.'

'[14] While it is within the discretion of the court *a quo* to have dismissed the application since it could not be decided on affidavit, it does not follow that the application will always be dismissed with costs in such a case. There may be circumstances that will persuade a court not to dismiss the application but to order the parties to trial together with a suitable order as to costs. Also, in a proper case and where the dispute between the parties can be determined speedily it might even be proper to invoke the provisions of the rules of court as to the hearing of oral evidence.

'[15] The court should have the opportunity of seeing and hearing the witnesses before coming to a conclusion based entirely on affidavits.

'[16] The exercise of the court's discretion in Rule 67 should be read with the overriding objective of the court rules to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable. By dismissing the case the court *a quo* left the issue as to 'putative marriage' and the proprietary rights of the parties unresolved despite the disputes being alive in the court. In this instance the court *a quo* failed to resolve the real issues in dispute justly, efficiently and cost effectively as far as practicable.'

[6] The test for absolution from the instance has been settled by the authorities. The principles and approaches have been followed in a number of cases. They were approved by the Supreme Court in *Stier and Another v Henke* 2012 (1) NR 370 (SC). There, the Supreme Court stated:

'[4] At 92F-G, Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of an appellant's (a plaintiff's) case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H:

"... when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which

a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)"

[My Emphasis.]

'Harms JA went on to explain at 92H - 93A:

"This implies that a plaintiff has to make out a prima facie case — in the sense that there is evidence relating to all the elements of the claim — to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4 ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (*Gascoyne* (loc cit)) — a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice. . . .'

[7] Thus, in *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015), Damaseb JP stated as follows on the test of absolution from the instance at the close of plaintiff's case:

'The test for absolution at the end of plaintiff's case

[25] The relevant test is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. The reasoning at this stage is to be distinguished from the reasoning which the court applies at the end of the trial; which is: 'is there evidence upon which a Court ought to give judgment in favour of the plaintiff?'

[26] The following considerations (which I shall call 'the Damaseb considerations') are in my view relevant and find application in the case before me:

- a) Absolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law;
- b) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff had made out a case calling for an answer (or rebuttal) on oath;
- c) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;
- d) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;
- e) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.'

[8] The Supreme Court in *Herman Konrad v Shanika Ndapanda* rejected as incorrect counsel's 'proposition that the validity of the marriage should be decided separately from the claim for a putative marriage'. The Supreme Court decided, 'therefore,' that it is 'essential that the issue of the validity of the second marriage should be decided in context and not in a vacuum' (at para 11 of the Supreme Court judgment, quoted in para 5 above). And, what is more, the Supreme Court instructed at para 12 of its judgment (quoted in para 5 above), 'A broader consideration of the circumstances surrounding the solemnization of the second marriage and the proprietary implications (for) of the parties should be undertaken during the determination of the question whether or not the marriage was a nullity?'

[9] This court has heard from plaintiff 'the circumstances surrounding the solemnization of the second marriage ('the 1991 marriage') and the proprietary implications (for) of the parties'. It is, therefore, important that the court hears the

version of Konrad about the circumstances surrounding the solemnisation of the second marriage and the proprietary implications (of) for the parties'. This is where, I should point out, the Damaseb considerations come into sharper focus in their application to the facts of the instant case. In that regard, I accept Ms Shikale's submission that upon the Supreme Court's decision and instructions referred to in para 2 above, the bona fides of the parties cannot reasonably be determined without the applicant being put on his defence to testify in the face of respondent's evidence which this 'court as trier of fact is bound to accept as true.....unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand'. (See para (e) of the Damaseb considerations, quoted in para 7 above.). But I do not find the evidence led by and on behalf of plaintiff to be 'incurably and inherently so improbable and unsatisfactory as to be rejected out of hand'.

[10] Let us look at a summary of the requirements of a putative marriage ('the *Burge* requirements') (see *Moola and Others v Aulsebrook N.O. and Others* 1983 (1) SA 687 (N) at 691). They are these:

- '(a) there must be bona fides in the sense that both or one of the parties must have been ignorant of the impediment to the marriage;
- (b) the marriage must be duly solemnised;
- (c) the marriage must have been considered lawful in the estimation of the parties, or of that party who alleges the bona fides.'

[11] Plaintiff's evidence sought to satisfy the requirements in paras (a) and (c) of the *Burge* requirements (see para 10 above). Satisfaction of para (b) is not disputed, and is indisputable. In her cross-examination-evidence, Shanika's categorical answer to the cross-examiner's categorical question as to whether she knew Konrad and Ms Shipanga were married was that she did not know. That evidence, therefore, stood unchallenged at the close of plaintiff's case.

[12] Then, there is the plaintiff's evidence that at the Magistrates' Court before the marriage officer, Konrad pronounced before the marriage officer (ie the learned

magistrate) that he was not married. Konrad repeated this before the pastor who blessed the 1992 marriage in 1999. Konrad's counsel put to Shanika that what Konrad meant was that he was not married then to Shanika not that he was not married to anybody else. Only Konrad can tell the court what he meant. Shanika was not in Konrad's head. 'The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff had made out a case calling for an answer (or rebuttal) on oath'. See para (e) of the Damaseb considerations in para 7 of this judgment. As I say, the defence relied on by Konrad is peculiarly within Konrad's knowledge while Shanika has made out a case calling for an answer (or rebuttal) on oath or by affirmation from Konrad. (See para (e) of the Damaseb considerations.)

[13] These pieces of evidence stood undemolished at the close of plaintiff's case, and I do not find them to be 'so incurably and inherently improbable and unsatisfactory as to be rejected out of hand'. It must be remembered, the Damaseb considerations tell us in para (e) (see para 7 of this judgment),

'Perhaps, most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.'

[14] No doubt Shanika's evidence 'gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or her cause of action and destructive of the defence; and so,' *absolution is an inappropriate remedy*' (see para (d) of the Damaseb considerations in para 7 of this judgment). (Italicized for emphasis) Shanika's evidence on the point gives rise to more than one plausible inference, and it is in her favour, namely, that she was not aware that Konrad was married to someone else, and it is destructive of the defence version that she knew because she attended the aforementioned wedding celebration. The result is that absolution is not at this stage 'an appropriate remedy'. And as I have noted *ad nauseam*, this court must act pursuant to the Supreme Court decision that '[A]s a matter of public policy, equity and fairness to both parties to the union, it is

imperative that declaration of the invalidity of (the) a marriage and that of a putative marriage, if properly raised, should be determined in tandem and not in isolation’.

[15] Based on the foregoing reasoning and conclusions, in my judgment, on the plaintiff evidence, coupled with the Supreme Court decision in *Herman Konrad v Shanika Ndapanda*, ‘absolution is not an appropriate remedy’. (*Dannecker, loc cit*)

[16] But that is not the end of the matter. The submission of Konrad’s counsel is this:

‘Regardless of whether the requirements are met, the concept of a putative marriage only benefits the innocent party in terms of the division of the joint estate in cases where the parties thereto had not excluded the community of property by an ante nuptial contract and if there was no existing community of property between one of the parties of the marriage and a third party (my emphasis added).’

[Underlining in the original]

[17] In support of this proposition of law, counsel refers to footnote 5. Footnote 5 reads: ‘*ibid* para 10.’ Footnote 4, which is before footnote 5, reads: ‘S v S 2011(1) NR 144 para 8’; and so, footnote 5 refers to footnote 4 as the one that has just been mentioned, that is, S v S is the *ibidem*. I quote hereunder the entire para 10 of S v S:

‘[10] In this matter the plaintiff would be entitled to maintenance, but she has to prove that she is in need of maintenance for herself. Furthermore, the defendant has to be able to pay such maintenance. In respect of the first issue, namely entitlement to maintenance, it is evident that she did not prove that she needs a specific amount of money based on the particular needs that she may have. She is employed. What she in fact did is to clothe her liabilities as ‘maintenance’, although was not maintenance at all. According to her she incurred debts and currently has severe financial liabilities as a result of money that she borrowed either from her pension fund or from Old Mutual for specific purchases and expenditures of herself and the defendant during the marriage and which she now has to repay. That is clearly not maintenance. The plaintiff should in my opinion have instituted claims against the defendant as ancillary relief on another basis. She could for example have claimed for money provided by her to him during the marriage over and above the contribution for which she was liable, or that there existed a universal partnership between them for which she

borrowed money and is entitled to repayment of what can be found that he owes her. That is the sort of claim that should have been made by the plaintiff in her particulars of claim and which could have been decided on at a later state as ancillary relief on the basis of the *Vahekeni* case. She did not do that, but claimed maintenance.'

[18] Paragraph 10 in *S v S* cannot be authority for the proposition of law, which counsel wishes to advance. That being the case, it follows irrefragably that I shall respectfully pay no heed to *S v S* in that regard. Be that as it may, it would seem counsel submits that even if the court were in the end to declare the 1992 marriage as putative, it will not assist Ndapanda in her claim, so long as the 1981 marriage is in community of property and is subsisting. That may or may not be so; but that should not bother this court at this stage of the proceedings.

[19] In the words of Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (A) at 92E-F,

' . . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).)'

[20] Besides – and this is significant – if it is the position of Konrad that even if this court were in the end to declare the 1992 marriage as putative, it will not assist Shanika in her claim, so long as the 1981 marriage is in community of property and is subsisting, it is inexplicable why that position was not placed before the Supreme Court when Konrad's counsel moved the appeal. In any case, the Supreme Court had the affidavits before it, and yet it instructed this court to consider hearing oral evidence. Ms Shikale appeared to make such submission. In my opinion, at this stage of the proceedings in this court, it is not open to this court to overlook the Supreme Court's decision in *Herman Konrad v Shanika Ndapanda* and disregard that Court's express instructions. If the law adverted to by Konrad's counsel is applicable and binding on this court, the Supreme Court would not have instructed this court to hear oral evidence and reason that '[A]s a matter of public policy, equity

and fairness to both parties to the union, it is imperative that the declaration of the invalidity of the marriage and that of a putative marriage, if raised properly, (as has been done in this case) should be determined in tandem and not in isolation'. (Supreme Court decision in *Herman Konrad v Shanika Ndapanda* at para 12) I have also taken into account Ms Shikale's submission that Ndapanda has abandoned the claim for maintenance.

[21] Taking into account the evidence led so far and plaintiff's abandonment of the maintenance claim and considering these contextually with the Supreme Court decision in *Herman Konrad v Shanika Ndapanda*, I conclude that plaintiff has made out a prima facie case to survive absolution (see *Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (A) at 92E-F).

[22] As Damaseb JP said in *Dannecker* (see para 7 of this judgment), '[A]bsolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law'. But I have found that Ndapanda has made out a prima facie case; and so, Ndapanda should not be lightly shut out where the defence relied on by the Konrad is peculiarly within Konrad's knowledge while the plaintiff has made out a case calling for an answer or rebuttal on oath or by affirmation from Konrad. (See *Dannecker loc cit* and at para 7 of this judgment.) This court should not allow Konrad 'to invoke the absolution procedure to avoid coming into the witness box to answer (to) uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case' (see *Dannecker loc.cit.* and at para 7 of this judgment).

[23] I conclude that plaintiff has passed the mark set by the Supreme Court in *Stier v Henke*, which is that for plaintiff to survive absolution, plaintiff must make out a prima facie case upon which the court could or might find for plaintiff, and remembering also that the 'reasoning at this stage (that is, at the close of plaintiff's case) is to be distinguished from the reasoning which the court applies at the end of the trial; which is : 'Is there evidence upon which a Court ought to give judgment in favour of the plaintiff?' (*Dannecker v Leopard Tours Car & Camping Hire CC*, approving *Ruto Flour Mills (Pty) Ltd v Anderson* (2) SA 307 (T) at 309E-F)

[24] Based on these reasons, I hold that the occasion has not arisen for the court to make an order in the interest of justice granting absolution from the instance at the close of plaintiff's case (see *Etienne Erasmus v Gary Erhard Wiechmann and Fuel Injection Repairs & Spares CC* (I 1064/2011) [2013] NAHCMD 214 (24 July 2013) at para 18); whereupon, I am disinclined to make an order granting absolution from the instance.

[25] In the result, I make the following order:

1. The application for absolution from the instance is hereby dismissed.
2. The matter is postponed to 25 September 2019 at 10h00 for status hearing and for the allocation of dates for continuation of trial of this matter and the trial of the matter in Case No. 2018/00094, transferred from Ueitele J.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF: E ANGULA
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FIRST DEFENDANT: L SHIKALE
Of Shikale & Associates, Windhoek