



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

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

HC-MD-CIV-ACT-OTH-2018/00094

In the matter between:

HERMAN KONRAD

APPLICANT

and

NDAPANDA SHANIKA

RESPONDENT

HERMAN KONRAD

1st PLAINTIFF

HILDE SHIPANGA

2nd PLAINTIFF

and

NDAPANDA SHANIKA

DEFENDANT

Neutral citation: *Konrad v Shanika* (HC-MD-CIV-MOT-GEN-2016/00239;
Konrad, Shipanga v Shanika (HC-MD-CIV-ACT-OTH-
2018/00094) [2020] NAHCMD 259 (30 June 2020)

Coram: PARKER AJ
Heard: 17 & 25 April, 14 May, 2, 3, 4 & 16 July, 7, 8 & 20 August, 2, 14 & 24 September 2019; 18, 19 & 20 February, 27 May 2020
Delivered: 30 June 2020

Flynote: Marriage – Putative marriage – Validity of second marriage and claim of it being putative marriage in issue – In that regard the validity of the second marriage should be decided in context and not in a vacuum – The circumstances surrounding the solemnization of the second marriage and the proprietary implications for the parties should be undertaken when determining whether or not second marriage a nullity – Court held that requirements of putative marriage as respects second marriage proved – Court held further that first marriage in community of property subsisting between applicant and second plaintiff and so court unable to find that the putative marriage is in community of property – As to the action, putative marriage existed for about 28 years with innocent party left in the matrimonial home for all those years – Court taking into account the fact that respondent (defendant) not occupying the property as a licensee – On the considerations of justice and fairness court ordering guilty party (applicant first plaintiff) of putative marriage to pay to innocent party (respondent/defendant) 25 per cent of the market value of the property upon respondent/defendant giving up occupation thereof.

Summary: Marriage – Putative marriage – Validity of second marriage and claim of it being putative marriage in issue – Applicant instituting motion proceedings to declare his second marriage to respondent null and void *ab initio* because of existence of first marriage to second plaintiff in community of property – Respondent counter claiming that her marriage be declared putative marriage – Court holding that requirements of putative marriage proved – Meanwhile applicant (first plaintiff) and his first wife (second plaintiff) instituting action proceedings to evict respondent (defendant) from the matrimonial home of first marriage – Court unable to find putative marriage to be in community of property – Court ordering guilty applicant to pay to innocent respondent 25 per cent of the market value of the property home upon her ceasing to occupy the property in which she has lived for 28 years before the court's order to evict her therefrom.

ORDER

Case No. 2016/00039 and Case No. 2018/00094

1. The marriage between Herman Konrad and Ndapanda Shanika is declared to be null and void *ab initio*.
2. The said marriage between Herman Konrad and Ndapanda Shanika is declared further to be a putative marriage.
3. The parties (ie Herman Konrad and Ndapanda Shanika) shall at their own joint cost commission a property valuer, registered as such under any applicable legislation, to estimate how much the property Erf No. 7171 Extension 17, Lemon Street, Shandumbala, Katutura, Windhoek, is reasonably worth and thereafter Mr Herman Konrad must pay to Ms Ndapanda Shanika's legal practitioner of record in favour of Ms Ndapanda Shanika 25 per cent of the value of the property reasonably arrived at by the said property valuer.
4. Within 14 days after the legal practitioner of record of Ms Ndapanda Shanika has acknowledged receipt of the full and final payment of the amount payable in accordance with para 3 of this order, Ms Ndapanda Shanika must give up occupation of the said property forthwith.
5. There is no order as to costs.
6. Case No. 2016/00239 and Case No. 2018/00094 are considered finalized and are removed from the roll.

JUDGMENT

PARKER AJ:

[1] The background to the instant matter has been articulated in paras 1-3 of the court's judgment in the abortive absolution from the instance application instituted by applicant Konrad after the close of the case of respondent Shanika. In the rest of this judgment, I shall for the sake of clarity refer to applicant as Konrad, and respondent as Shanika in that fashion, and first plaintiff as Konrad, second plaintiff as Shipanga, and Shanika as defendant in the action, also in that fashion. I shall use the parties' names interchangeably with their party titles where the context permits. The date of the judgment in respect of the absolution application ('the absolution judgment') is 24 September 2019.

[2] It is worth noting that while the conclusion of Case No. 2016/00239 ('the application') was in the pipeline, it was instituted Case No. 2018/00094 ('the action proceeding') in which Konrad is first plaintiff and Ms Hilde Shipanga second plaintiff against Ms Ndapanda Shanika as defendant. It is worth noting this. It was only after the Supreme Court judgment in *Konrad v Ndapanda (Shanika)* 2019 (2) NR 301 (SC) where the Supreme Court instructed the court to hear oral evidence that Shanika instituted what is basically a counter application, as Ms Angula, counsel for Konrad, reminded the court. Thus case No. 2016/00239 consists of an application and a counter application.

[3] Konrad is the applicant in the application, and Shanika the respondent. Case No. 2018/00094 was removed from the roll of Ueitele J who was seized with case No. 2018/00094 and transferred to my roll to be adjudicated upon together with case No. 2016/00239 because the outcome of case No. 2016/00239 has substantial and direct effect on case No. 2018/00094, in the sense that the decision on the former is capable of disposing of the latter.

[4] For the sake of clarity, I shall consider the application first (Case No. 2016/00239) and thereafter the action (Case No. 2018/00094). Ms Angula is counsel for Konrad, and Ms Shikale counsel for Shanika.

Case No. 2016/00239

[5] Under the application, the most important question to answer is this: Does the 1992 marriage between Konrad and Shanika qualify as putative marriage? It is important at the outset to throw some light on this matter in order to illuminate the dark edges of the matter; and in doing so, I cannot do any better than to instill from what I said in the para 1-3 of the absolution judgment.

[6] The Case No. 2016/00239 consists of Konrad's application and Shanika's counter application. The order Konrad prays the court to grant is a declaratory order, that is, a declaration that the marriage between Konrad and Shanika is null and void *ab initio*. Shanika on the other hand seeks a declaratory order and a directive order in the following terms, namely –

- (a) that the marriage be declared putative in favour of the respondent and the consequences thereof be as one in community of property;
- (b) declaring that respondent is entitled to half of the assets by virtue of the marriage in community of property; and
- (c) 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.

[7] In the absolution judgment (see para 10 of that judgment) I considered the *Burge* requirements of putative marriage; and 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; and
- (c) the marriage must have been considered lawful in the estimation of the parties, or of that party who alleges the bona fides.

[8] After setting out the *Burge* requirements, I proceeded to consider Shanika's evidence to see if it satisfied the *Burge* requirements thus in paras 11-14, and came to the conclusion in para 15 thereof. For the sake of completeness I repeat those paragraphs here:

[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*)'

[9] The dismissal of the absolution application leads to the irrefragable conclusion that as far as Shanika's evidence stood, there was evidence upon which the court, applying its mind reasonably, could or might find for Shanika (see *Stier and Another v Henke*) 2012 (1) NR 370 (SC), para 4) and to the conclusion that Shanika has at the close of her evidence made out a *prima facie* case (see para 21 of the absolution judgment). It follows that Konrad bore the evidential burden in order to combat the *prima facie* case made by Shanika. (H.J. Erasmus, *Superior Court Practice* (1994) at B1-291; and P J Schwikkard, *Principles of Evidence* (1997) at 393; and the cases there cited)

[10] Ms Angula submitted that Shanika's case remained prima facie, and that Shanika should not have expected Konrad to give oral evidence (in the witness box) in support of Shanika's case. With respect, Ms Angula misses the point. As I have said in para 10, Konrad bore the evidential burden in order to combat the prima facie case made by Shanika. In the absence of evidence from Konrad, the prima facie proof would become conclusive proof and, thereby, Shanika would have discharged her onus, entitling her to judgment. (See *Minaar B Van Rooyer N.O.* (27788/04 [2013] ZAGPPHC 375 20 November 2013) The crucial question to answer is, therefore, this. Has Konrad placed before the court any evidence capable of blocking the prima facie proof from becoming conclusive proof? That is the question.

[11] Let us see the evidence Konrad placed before the court. In that regard it is worth noting that Konrad did not enter the witness box to give evidence. The only evidence adduced in support of his case was that of Shipanga. Shipanga testified that at the material time, she cohabited with Konrad who worked on the Farm Benton Sand Stein ('the farm') as a brickmaker. She stated that Shanika also stayed on the farm with her boyfriend, Katukoka. Shanika denied this in her evidence. She said she visited the farm on one occasion only; and her mission was to collect money as maintenance for their child.

[12] On the probabilities, I think Shanika's evidence that she never lived on the farm is not true. She lied in order to stand steadfast on her evidence that she did not know Shipanga until when she, on Konrad's instruction, invited Shipanga to the wedding in Windhoek of Shipanga's daughter, Mekondjo. But, of course, the fact that she lied as regards this piece of evidence does not, without more, lead to the conclusion that her evidence that she did not at the material time know that Konrad was married to Shipanga when Shanika and Konrad married in 1992 is false. The sayings *semel mentitus*, *semper mentitus* and *falsum in uno*, *falsum in omnibus* have no application in our law of evidence. (P.J. Schwikkard, *Principles of Evidence* (1997) at 378; and the case there cited)

[13] Shipanga's evidence before the court is that photographs were taken at the wedding ceremony. No such photographs were placed on the record. She testified further that some other persons who are alive attended the ceremony but none of

them was called as witness by Konrad to support his case. The court's attention was drawn to these failures by Ms Shikale in her submission. I make no adverse inference from these failures. I only note that such evidence could have assisted the court. In any case, all these pieces of evidence pale in weight in the face of the evidence of the circumstances surrounding the solemnization of the 1992 marriage and the religious blessing of it which the Supreme Court felt were important for this court to take into account when considering Shanika's averment of putative marriage and the validity of the 1981 marriage. (*Konrad v Ndapanda (Shanika)* 2019 (2) NR 301 (SC), para 12) Consequently, it is to the circumstances surrounding the 1992 marriage that I now direct the enquiry.

[14] On the totality of the evidence I make the following findings: Before the solemnization of the 1992 marriage, the learned magistrate (ie the marriage officer) asked Konrad and Shanika if either of them was in an existing marriage. Konrad answered first, and he answered that he was not. Shanika also answered that she was not. There is no evidence from Konrad tending to show that he did not understand the learned magistrate's question or that the question was ambiguous. Therefore, any suggestion by Konrad's counsel put to Shanika in her cross-examination-evidence that Konrad understood the learned magistrate's question to mean whether Konrad and Shanika were already married to each other is, with respect, self-serving and an attempt at grasping at straws which do not exist. It must be remembered – and this is crucial – the 1992 marriage was not the first marriage Konrad had entered into before a marriage officer. On that suggestion by Konrad's counsel, I had this to say in the absolution judgment:

'[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.'

[15] I said in the absolution judgment, 'only Konrad can tell the court what he meant'. Konrad has failed or refused to tell the court what he understood of the

marriage officer's question and what his answer 'No' meant. For my part, I hold that in the circumstances the marriage officer's question was straightforward and unambiguous, and the marriage officer understood the import and significance of Konrad's answer; and that is why the marriage officer went ahead to solemnize the 1992 marriage. It is not, as I have found previously, that the 1992 marriage was Konrad's first marriage before a marriage officer.

[16] Before the marriage officer in 1992 and before the pastor who blessed the 1992 marriage in 1999, Konrad stated he was not in any subsisting marriage with another woman. The evidence of Ms Teopolina Kamati, (a respondent witness) was that she knew Konrad and Shanika. She testified that the marriage of Konrad and Shanika was blessed by Pastor Jefta Ihambo at the Elcin Parish on 30 January 1999. There was another marriage ceremony in the church that day. Kamati stated that on that date, she was asked by the respondent to go and be her witness. In the church office, Pastor Ihambo asked the respondent first if she had been married before and she said, 'No'. The pastor thereafter asked the applicant if he was married and he also said, 'No'. They were further asked if they knew or were aware of anything that could possibly hinder them from getting married and having their marriage blessed, and they both answered, 'No'.

[17] The evidence surrounding the solemnisation of the marriage between Konrad and Shanika by the learned magistrate/marriage officer in 1992 and the subsequent religious blessing of that marriage in 1999 by Pastor Ihambo carries great weight in all this and in favour of Shanika. If Konrad had evidence in 1992 that Shanika was aware of his marriage in 1981 to Shipanga and that marriage was subsisting in 1992, he was offered more than an ample and unhindered opportunity to have told the learned magistrate/marriage officer. He did not take the offer. He had a second opportunity – equally unhindered and ample – in 1999 to have told Pastor Ihambo in 1999. On this occasion, too, he did not take the offer.

[18] The respondent's evidence about the circumstances surrounding the solemnization of the 1992 marriage and the religious blessing of that marriage in 1999 is cogent and it has remained unchallenged and undemolished; and *a fortiori*, I have no good reason to reject that evidence as false.

[19] The words of H J Erasmus in his work *Superior Court Practice*, (1995) at p B1-51 vindicate the conclusion I have reached. The learned author wrote:

‘Where the application is referred to oral evidence it can be justifiably expected of the respondent, if he has any confidence in his own version, to reiterate that version in oral evidence and to submit that version to be tested by cross-examination. Where there is a strong *prima facie* case in favour of the applicant at the close of his case, the court is entitled to draw an adverse inference against the respondent should he fail to testify in support of the allegation in his opposing affidavit that the applicant has no case whatsoever’.

[20] For the purposes of the instant proceeding, replace ‘respondent’ with Konrad and ‘opposing affidavit’ with Konrad’s affidavits. The result is that Konrad has failed to combat the *prima facie* case made by Shanika by, if he has any confidence in his own version, reiterating that version in oral evidence and submitting that version to be tested by cross-examination. (H J Erasmus, *Superior Court Practice* (see para 18 above)). Consequently, I feel no doubt in my mind, *pace* Ms Angula, in concluding that the *prima facie* proof that Shanika was ignorant of the impediment of the 1981 marriage when she entered into the 1992 marriage becomes conclusive; and, accordingly Shanika has discharged her onus, entitling her to judgment (see para 10 above).

[21] It follows that Shanika is entitled to the declaration in para (a) of the relief that she seeks. I now proceed to consider para (b) of the relief she prays for. Under para (b), the question is this: Is Shanika entitled to half of the assets (of Konrad) by virtue of Shanika’s averment that the putative marriage is marriage in community of property?

[22] I issued an order on 26 February 2020 (‘the 26 February 2020 order’) whereby in para 3, I ordered as follows:

- ‘1. The legal practitioners are to file their heads of argument on or before **22 March 2020**.
2. The set down date for oral submissions is: **28 April 2020**, at **10H00**.
3. On top of any submissions counsel wish to make, counsel are asked to address the court on the legal consequences that could flow, if the second marriage,

between Mr Herman (Konrad) and Ms Ndapanda (Shanika), were, upon consideration of the evidence placed before the court, adjudged to be a putative marriage.'

[23] Having searched the nook and cranny of the submission of Ms Shikale, I think the essence of Ms Shikale's submission as respects para 3 of the 26 February 2020 order can be factorized as follows:

(1) As respects the principle that where putative marriage is proved the consequences thereof should benefit the innocent party should not dissipate where there exists community of property between one of the parties to the putative marriage and a third party because, according to counsel, a declaration of putative marriage 'serves as a device to mitigate the harshness of the annulment of the marriage to the innocent party'.

(2) It is not respondent's position that applicant created a new community of property regime through the putative marriage. Since Konrad is the guilty party, the effect of the declaration of putative marriage must operate against him and in favour of Shanika being the innocent party; and the court in that regard, should grant Shanika a certain favourable consequences of the community of property that persists between Konrad and his wife Shipanga.

(3) The High Court has the power to develop the common law; and this is one of the matters where such development is required.

(4) One way of developing the common law, according to counsel, is for the court to 'consider apportioning the value of the immovable property (Erf No. 7171 Extension 17, Lemon Street, Shandumbala, Katutura, Windhoek) ('the property') on the basis of equity'.

[24] Ms Angela's submission is essentially this:

(1) The concept of a putative marriage, notwithstanding the fact that the *Burge* requirements (see para 7 above) are met, only benefits the innocent party in the form

of the division of the joint estate in cases where the parties to the putative marriage have not excluded the community of property by an antenuptial contract, and, further, if there was no existing community of property between one of the parties to the putative marriage and a third party.

(2) Konrad and his first wife Shipanga are legally married, and the marriage subsists and in community of property, and therefore, no consequence of in-community of property can flow from the marriage with Respondent. That marriage is, in any event, null and *void ab initio*.

(3) Taking into account the principles enunciated in *Zulu v Zulu and Others* 2008 (4) SA 12 (D), the respondent is in fact only entitled to damages, computed in accordance with the requirements laid down by *Snyman v Snyman* 1984 (4) SA 763 (C) as a result of the void marriage and not division of the joint estate, and more specifically the division of the immovable property, Erf 717 Katutura, Extension 17, Windhoek. Division of such property will be unjust and prejudicial to the applicant's first wife. Counsel relied on *S v S* 2011 (1) NR 144 (HC), too.

(4) Counsel submitted further that Ms Shikale's submission that the court should develop the common law in order for Shanika to gain some benefit in the property on the basis of equity should be rejected by the court on the basis that Shanika has not pleaded equity, and furthermore, that the court, unlike the courts in South Africa, has no power to develop the common law *ex propria motu*. In that regard, counsel submitted, if this court were to develop the common law to the extent of declaring the putative marriage in community of property when there exists the 1981 marriage in community of property, that will produce untold disastrous consequences for the law.

[25] Ms Angula's submission calls for an examination of the cases she referred to the court. I start with the Namibia case: *S v S*. This case has no application in the instant proceeding. The reason is simple. Namandje AJ argued in para 11 of the judgment that 'the main socio-legal consideration for the existence of the concept of putative marriage has been rendered nugatory as children born out of wedlock are legitimate'. Consequently, Namandje AJ concludes in para 12: 'The historical approach to the concept of putative marriage, in my opinion, should fall into disuse

as there are no more substantial and compelling reasons for such a concept.’ With the greatest deference to the learned judge in *S v S*, I should say, my noble and honourable Namandje AJ missed the point when he held that ‘this court is not in a position to declare the parties’ invalid marriage as putative.....’. Why? According Namandje AJ in para 13, because ‘there was an existing community of property between applicant and his first wife at the time of the conclusion of the marriage between the parties (the second marriage)’, as if, as the Namandje AJ reasoned, the existence of putative marriage depended upon whether there existed community of property as the matrimonial property regime in an existing marriage to which one of the parties to the subsequent marriage is a party. Indeed, the reasoning by Namandje AJ runs counter to the authorities on the requirements of putative marriage which Namandje AJ himself was prepared to accept and apply (see paras 7 and 8 of the judgment in *S v S*).

[26] In any event, the Supreme Court in *Konrad v Ndapanda (Shanika)*, para 11, held:

‘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.’

[27] It follows that *S v S* is, with respect, bad law; and so, I am not bound to follow it. See the discussion in *Chombo v Minister of Safety and Security* (I 3882/2013 [2018] NACHMD para 57-68 on the principle of *stare decisis* with reference to judgments of the court in paras 57-68 thereof.

[28] Next are the South African cases. The most crucial points to make at the threshold are these. *Snyman v Snyman* and *Zulu v Zulu* were decided by High

Courts in South Africa. Those courts are, therefore, not at a comparable level with the Supreme Court. Furthermore, I may apply them if I consider the principles and the reasoning therefor to be persuasive for our present purposes.

[29] *Zulu v Zulu* followed the holding by *Snyman v Snyman*. Both these cases are not persuasive. Indeed, they are distinguishable inasmuch as they are not expressly on point as respects the issue in hand in the instant matter. Furthermore, I see that they were decided on the particular facts of the cases the courts there were presented with.

[30] The pith and marrow of Ms Angula's submission as respects any proprietary consequences of putative marriage is what is eloquently and clearly stated in para 23 (1) above. In short, for Ms Angula, even where putative marriage is proved, the benefits that the innocent party may gain therefrom may include the division of the joint estate only where the parties to the putative marriage have not (a) excluded the community of property by an antenuptial contract, and (b) where 'there was no existing community of property between one of the parties (to the putative marriage) and a third party'. And Ms Angula's authority is *S v S* which in turn relies on *Zulu v Zulu*.

[31] Relying on the *Zulu v Zulu* principle in the instant matter, Ms Angula is urging that the benefits that Shanika may gain from the proved putative marriage between her and Konrad do not include the division of the joint estate because there already exists community of property between Konrad and Shipanga arising from their 1981 marriage. And counsel's authority is *S v S*, which I have held is bad law, whose authority in turn is *Zulu v Zulu*; and, as I have said above, *Zulu v Zulu* relies on *Snyman v Snyman*. But why should *Zulu v Zulu* and *Snyman v Snyman*, South African High Court cases, have the the last word on putative marriage in the court? Ms Angula did not say. In that regard, it is important to note – felicitously – that on the judicial parade grounds in Namibia, it is only the commanding voice of the Supreme Court that must bring all the judicial troops on the parade grounds to obedient attention.

[32] Of course, I accept Ms Angula's submission that to order a division of the joint estate would prejudice Shipanga, who I consider to be an innocent party in Konrad's marital escapades.

[33] In any case, Ms Shikale submitted that it is not Shanika's case that Konrad create a new community of property regime (as if that was legally possible in the circumstance of this matter). It is Shanika's prayer that the established putative marriage should have flowed from it 'certain favourable consequences to her'. Counsel submitted that owing to public policy, fairness and equity, the court must move towards finding a solution that aims at achieving a more satisfactory result. The favourable consequence that should flow from the proved putative marriage is, Ms Shikale, submitted, the court apportioning the value of the immovable property on the basis of equity. On this point, I accept Ms Angula's submission that Shanika has not pleaded equity.

[34] I have proposed previously that *Zulu v Zulu* and *Snyman v Snyman* should not have the last word on putative marriage in Namibia, considering the fact that the courts in those cases are at a comparable level with the court, and what they say are not persuasive all on the facts and in the circumstances of the instant matter. The burden of this court, as Ms Shikale appears to suggest in her submission, is to do fairly and justly that which the court is competent to do on the facts and circumstances of the case. Indeed, in *Konrad* (SC) para 16, the Supreme Court urged this court 'to resolve the real issues in dispute justly, efficiently and cost effectively as far as practicable'; of course, not on the basis of equity. The key words are 'as far as practicable'.

[35] For the avoidance of doubt, I should say, I do not intend to develop the common law; neither do I intend to do equity. What I wish to do is to exercise the inherent power of the court, and in that regard, do that which, in my view, is fair, reasonable, and in the circumstances and on the facts of the case, also practicable. And what is more, on the basis of the inherent power of the court I am entitled to grant any order that is not 'contrary to an express provision of an Act of Parliament' (see *S v Strowitzki* 2003 NR 145 (SC), approving *Sefatsa and Others v Attorney General, Transvaal* 1989 (1) SA 821 (A)); and, what is more, so long as community

of property is not created for the putative marriage. The proposal made by Ms Shikale is, therefore, generally attractive on the face of it.

[36] The essence of what I intend to do is another compelling reason why *Zulu v Zulu* and *Snyman v Snyman* are of no assistance on the point under consideration. To rest on *Zulu v Zulu* and *Snyman v Snyman* and argue that Shanika's remedy lies only in an action for damages is to urge on the court a procrustean scheme that would enforce conformity, without due regard to the differences in the circumstances and facts of *those South African cases* and the instant matter. Hugo J stated in *Zulu v Zulu* at 3, '...in the circumstances, the only claim which applicant could have against the estate of the deceased is a claim for damages'. But Shanika appears not to be interested in suing for damages. She cannot be forced to come to the seat of judgment of the court through one door only, as those two South African cases propose.

[37] Consequently, I am inclined to pursue a practical but just, efficient and cost effective resolution of the dispute (see *Konrad v Ndapanda (Shanika)* SC para 16) in the following manner. A qualified property valuer, registered as such in terms of any applicable legislation, should be commissioned by the parties (ie Konrad and Shanika) at their joint cost to estimate how much the property is worth reasonably on the market. The monetary value of the property the valuer arrives at should be divided into two halves; a half representing the monetary share of the joint estate accruable to Konrad as far as the property is concerned. The half of that amount should in turn be divided into two halves. The product thereof should be the amount that Shanika is entitled to receive from Konrad. In my view this is just, efficient, cost effective and practical. I agree with Ms Angula that Konrad is not before the court to be punished. This solution is surely not aimed at punishing Konrad, but doing justice.

[38] In the solution, I cannot see my way clear in getting into the maze of calculating what each one of them contributed to the purchase of the property and its development; who bought what fence for the property; who bought what aluminium roofing sheets; who paid for what builder; who collected the rentals in respect of the property and for what period and what they did with the rentals? The reason is

simply. The evidence on these aspects are a twist in the wind; two-dimensional, insufficient, and above all, not cogent.

[39] In my opinion, each one of them did what they could do as husband and wife to buy the property and develop it; Konrad voluntarily bringing Shanika to live on the property for the purpose of putting a roof over the head of his wife and for the wife to look after Konrad's children from another woman; and Shanika being of the honest and innocent belief that she was contributing to upgrading their matrimonial home through renovation of it in order for it to attain a high market value. And it must be remembered, this court is not called upon to grant a final order of divorce. Their marriage is not valid in the eyes of the law.

[40] Some might say that what I propose has not been done before. My response is this. First, I think this court is competent and entitled to make an appropriate order that is fair, just, reasonable, and practicable, so long as such order does not offend any case law that is binding on this court and so long as the order is not expressly prohibited by written law. Second, I can do no better than to repeat what Denning LJ said in similar circumstances in *Packer v Packer* [1953] 2 ALL ER 127 at 22:

'What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.'

Case No. 2018/00094

[41] As I said previously, case No. 2018/00094 is an action proceeding. It is basically an ejectment proceeding. Plaintiff's pray the court for the following order:

- (a) an order ejecting the defendant from the Erf. 7171, extension 17, Lemon Street, Shandumbala, Katutura, Windhoek ('the property');
- (b) costs of suit;
- (c) further and/or alternative relief.

[42] Case No. 2016/00239 and Case No. 2018/00094 are unseverably bound to each other, as I have said previously. The only relevant distinguishing feature is that Shipanga, the only applicant witness in Case No.2016/00239 and who is not a party to that case, is the second plaintiff in Case No. 2018/00094; and, as I have said previously, she is Konrad's wife in the 1981 marriage. The findings of fact, the application of the principles of law to those facts, and the conclusions I have reached in the end apply with equal force to Case No. 2018/00094, too, the context allowing.

[43] Having considered Ms Angula's submission that Konrad contributed 95 percent to the value of the property, including purchasing it and developing it, and Shanika has remained on the property since 1992, I should say this; and it is very important to take it in to account in the present enquiry. We should not lose sight of the crucial fact that Shanika has not been occupying the property as a licensee. As I have said above, Konrad voluntarily brought her to live on the property as his wife, and the property then became their matrimonial home – at least in the honest and innocent belief of Shanika that she was lawfully married to Konrad, as I have found previously. That is also Ms Shikale's submission.

[44] As far as the law is concerned, Shanika is, therefore, entitled to occupy and live on the property until the court said otherwise. And that, I should underline, is the purpose of the proceedings in Case No. 2016/00239 and Case No. 2018/00094. Thus, up to the date of the order below Shanika is so entitled to occupy the property. The fact that it took Konrad (in the motion proceedings) some 24 years and Konrad and Shipanga (in the action proceedings) some 26 years to act when the irrefragable evidence indicates clearly that both Konrad and Shipanga were well aware that Shanika had taken occupation of the property at the latest as from 1992 and lived there continuously should count heavily in Shanika's favour and against Shipanga. After all, the principle is *vigilantibus non dormientibus iura subveniunt*. The result is that Shanika cannot be ordered to leave the property immediately at the throw of a hat, as it were, as if Shanika was a licensee on the property.

Costs (Case No. 2016/00329 and Case No. 2018/00094)

[45] What remains is the matter of costs in both Case No 2016/00239 and Case No. 2018/00094. In Case No.2016/00239 Konrad has succeeded in the declaratory order he prayed the court to grant. Shanika on her part has also succeeded in the declaration she sought respecting putative marriage as part of the principal relief she sought. The other part is a declaration as to her entitlement 'to half of the assets by virtue of the marriage in community of property'. The court has declined to make such order. Shanika's alternative relief is a direction as to her entitlement to N\$3 500 per month as maintenance for the rest of her natural life. I decline to grant such an order, too, because the marriage between Konrad and Shanika is void *ab initio*.

[46] Ms Angula submitted that the case has been protracted since 2016. She said Shanika had been advised since 2016 that the 1992 marriage was illegal and yet she persisted in her case; and only brought into the application her claim that the 1992 marriage be adjudged a putative marriage after the aforementioned Supreme Court decision in February 2019. For these reasons, Ms Angula argued that it would be unfair if Konrad was ordered to pay costs. She urged the court to take into account also that while Shanika is represented by the Ministry of Justice's Legal Aid facility, Konrad is not. He has private legal representation. Ms Shikale's submission contrariwise is that Konrad should be mulcted in costs, and that Konrad is not in the same financial position as Shanika. She said that Konrad gains rentals from the property and other property elsewhere.

[47] In the main, the parties have shared the honours substantially equally. As respects Case No. 2018/00094, Konrad and Shipanga have succeeded in the relief of eviction of Shanika from the property but Shanika is to be given an amount of money by Konrad for her to leave the property. In the circumstances and all things considered, it appears to me to be fair, just and reasonable to make no order as to costs against any party.

[48] I should add in peroration: For this circus, the ring master's circus has come to an end, as far as this court is concerned.

Conclusion: Case No. 2016/00239 and Case No 2018/00094

[49] In the result, I order as follows:

Case No. 2016/00039 and Case No. 2018/00094

1. The marriage between Herman Konrad and Ndapanda Shanika is declared to be null and void *ab initio*.
2. The said marriage between Herman Konrad and Ndapanda Shanika is declared further to be a putative marriage.
3. The parties (ie Herman Konrad and Ndapanda Shanika) shall at their own joint cost commission a property valuer, registered as such under any applicable legislation, to estimate how much the property Erf No. 7171 Extension 17, Lemon Street, Shandumbala, Katutura, Windhoek, is reasonably worth and thereafter Mr Herman Konrad must pay to Ms Ndapanda Shanika's legal practitioner of record in favour of Ms Ndapanda Shanika 25 per cent of the value of the property reasonably arrived at by the said property valuer.
4. Within 14 days after the legal practitioner of record of Ms Ndapanda Shanika has acknowledged receipt of the full and final payment of the amount payable in accordance with para 3 of this order, Ms Ndapanda Shanika must give up occupation of the said property forthwith.
5. There is no order as to costs.
6. Case No. 2016/00239 and Case No. 2018/00094 are considered finalized and are removed from the roll.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF:

E Angula
Of AngulaCo Inc.
Windhoek

FIRST DEFENDANT:

L Shikale
Of Shikale & Associates
Windhoek