**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

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

In the matter between:

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| **ANASTASIA SHAFETANGE AMUNYELA** | **APPLICANT** |
| and | |
| **POMBILI NATANGWE AMUNYELA** | **1ST RESPONDENT** |
| **PENDAPALA TANGENI AMUNYELA** | **2ND RESPONDENT** |
| **PHILLIP NAAPOPYE JUNIOR AMUNYELA** | **3RD RESPONDENT** |
| **DAVID FILLIPUS** | **4TH RESPONDENT** |
| **CAROLINE AMUNYELA** | **5TH RESPONDENT** |
| **FRIEDA FILLIPUS** | **6TH RESPONDENT** |

**Neutral Citation:** *Amunyela v Amunyela and others* (HC-MD-CIV-MOT-GEN-2017/00154) [2021] NAHCMD 363 (9 August 2021)

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| **Coram:** | MASUKU J |
| **Heard on:** | **21 October 2020** |
| **Delivered on:** | **9 August 2021** |

**Flynote**: Putative marriage – Effect thereof – Marriage to be held to be in community of property – Onus on respondent to disprove - only if parties prove the marriage to be

in community of property - marriage out of community of property - no material evidence to prove marriage in community - even if you are not aware of impediment at the time of the marriage, once you become aware the marriage is no longer putative.

**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 regarded those in community of property.

The marriage was concluded in the United Kingdom and it was regarded as one out of community of property in terms of the laws of the United Kingdom. The applicant failed to prove that they conducted their marriage as one in community of property.

It is clear that the marriage concluded between the parties was out of community of property as governed by the laws of the United Kingdom. The initial registration of the properties, in Ruacana, both reflect the marital regime as one ‘out of community of property’. The change effected on the properties occurred after the deceased has passed on.

The respondent’s provided evidence that the applicant had signed a power of attorney as a witness on the last page and she has also initialed the first page thereof, she further initialed each page of the deed of transfer and signed as a witness on the last page thereof, where it is also clearly stated that the deceased was divorced from Ms. Amukwa in terms of an order of divorce in the High Court of Namibia dated 16 April 1999.

Held: that on a balance of probabilities, the respondents’ version is more probable in comparison to the applicant’s and the applicants version thus stands to be rejected.

The application for the marriage between the applicant and the late Phillip Amunyela, was to be declared null and void and for a declaration of the applicant’s purported marriage to the said Mr. Amunyela, was thus dismissed with costs.

**ORDER**

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1. The marriage between the Applicant and the Late Phillip Amunyela, solemnised on 8 August 1996 in England, is hereby declared to be null and void *ab initio*.
2. The application for the marriage between the Applicant and the Late Phillip Amunyela to be declared to be a putative marriage in favour of the Applicant is hereby refused.
3. The Applicant is ordered to pay the Respondents' costs.
4. The matter is removed from the roll and is regarded as finalised.

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**JUDGMENT**

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**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, is Mrs Anastasia Shafetange Amunyela the widow of the Late Phillip Amunyela, acting in her capacity as the executrix in the Estate of the Late Phillip Amunyela. She is in the employ of the Office of the Prime Minister, Windhoek.

[3] The first and second respondents are Mr. Pombili Natangwe Amunyela and Mr. Pendapala Tangeni Amunyela, who are described as intestate heirs of the late Phillip Amunyela. The third, fourth, fifth and sixths respondents were joined to these proceedings by an court order dated 7 November 2019 and they are Mr. Phillip Naapopye Junior Amunyela, Mr. David Fillipus, Ms. Caroline Amunyela and Ms. Frieda Fillipus who are also described as intestate heirs of the late Phillip Amunyela.

[4] The applicant, is represented by Ms. M. Angula. The first and second respondents are represented by Mr. N. Tjombe. The third to sixths respondents are cited herein merely due to the direct and substantial interest they have in the matter and did not enter any appearance to oppose the application and will thus be considered content with abiding by the court's decision.

Background

[5] The applicant and the late Phillip Amunyela (hereinafter referred to as the 'deceased') were joined in matrimony on 8 August 1996, in England. One child was born from the said marriage, to wit, Mr. Phillip Naapoye Junior Amunyela. The deceased passed away intestate, on 29 November 2014 at Windhoek. At the time of his death, the deceased was the biological father of six children. The additional five respondents in this matter are the biological children of the deceased.

[6] It is common cause that at the time that the applicant and the late Phillip Amunyela got married, the deceased was still married to Ms. Selma Amunyela (born Amukwa), hereinafter referred to as 'Ms. Amukwa'. The deceased and Ms Amukwa caused the bonds of their marriage to be dissolved on 16 April 1999 by a decree of divorce issued by this court.

[7] The applicant alleges that although her marriage with the deceased was governed by the laws of England, they regarded their marriage as one in community of property. She further alleges that she was under a *bona fide* belief that the deceased was divorced from his previous wife and 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. The applicant further deposes that she was only informed of the fact that the deceased was still married to Ms Amukwa after the burial of the deceased.

[8] The applicant experienced difficulties with the administration of the deceased's estate after her appointment as the executrix of the deceased's estate. She solicited the assistance of a legal practitioner to hold her hand in the administration of the estate. She was then informed by the said legal practitioner, Ms. Hans-Kaumbi that Erf. No. 392, Academia, Windhoek, which is the major asset in the estate of the deceased would be sold to her and the major heirs in the estate would need to consent thereto.

[9] Three of the heirs consented thereto in writing. The first and second respondents refused to give their consent. The applicant in her capacity as the guardian of Phillip Amunyela junior, then a minor, signed a written consent for sale on his behalf on 20 September 2016.

Basis of application

[10] 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,* at the time of contracting their marriage. This is because 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 celebration of her marriage to the deceased that there was a legal impediment thereto.

[11] 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 is set 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 Law

[12] The principles governing marriages are clear and they acuminate to this: once a marriage is solemnised whilst one of the parties thereto is still a party to an existing valid marriage, then such marriage is null and void. However that position has since evolved and the law has recognised what is in law referred to as a putative marriage. Loosely interpreted, it refers to a 'marriage' of a person who was unaware that his or her spouse was legally married at the time of the marriage and married him or her in good faith. As such, the law regards the marriage as valid and attaches certain legal consequences to it.

[13] The case of *Moola and Others v Aulsebrook NO and Others*, has laid out the requirements for a marriage to be regarded as a putative marriage, namely:

> '(i)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;
> (ii) The marriage must be duly solemnised;
> (iii) The marriage must have been considered lawful in the estimation of the parties or of that party who alleges the *bona fides.*[1]'

[14] The concept of a putative marriage notwithstanding, the fact that the above requirements are met only benefits the innocent party in the form 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. This is also the case if there was no existing community of property between one of the parties to the marriage and a third party.[2]

[15] In terms of our law, unless the contrary is proved, a marriage is presumed to be in community of property and profit and loss. The onus thus rests on the respondents to prove the contrary or in other words it rests on the respondents to disprove the contentions being averred by the applicant regarding the proprietary consequences of the marriage.[3]

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[1] *Moola and Others v Aulsebrook NO and Others* 1983 (1) SA 687 (N) at 690 E.
[2] *Zulu v Zulu and Others*, 2008 (4) SA 12 (D) at p 15 - 16.
[3] *SJG v SGC* (A 186/2009) (HC) delivered on 12 October 2010 at page 6-7 para13.

[16] The respondents' main contention in this case is that there is no way the applicant can allege that she was unaware of the marriage that subsisted between the deceased and his former wife, Ms. Amukwa. As such, they move the court to find that the marriage between the applicant and their father cannot be regarded in law as a putative marriage.

Issues between the parties

[17] The only issues that seem to be common cause between the parties is the fact that the applicant and deceased were married to each other in England on 8 August 1996 and that the deceased was charged and convicted of bigamy.

[18] The following are facts in dispute between the parties:

18.1 The marriage regime that governed the marriage between the applicant and the deceased;

18.2 Whether or not the applicant was at the time of the conclusion of the marriage aware of the impediment to their marriage;

18.3 Should the marriage be treated as one in community of property?

The applicant's case

[19] I will now proceed to consider the respective parties' cases as presented in their affidavits in so far as the issues in dispute between the parties are concerned.

[20] The applicant contends that in her discussions with the deceased, the latter mentioned a previous wife and informed her that they had been separated as at the time he was living with a family member and that the common home was occupied by Ms. Amukwa and her children.

[21] She contends that she was under a *bona fide* belief that the deceased was divorced from his previous wife. She deposed that the deceased demonstrated love, care and commitment towards her, their relationship and their new family. In this regard, they did everything together as husband and wife and she thus had no reason to doubt him or think of him as being dishonest. After the burial of the deceased was

the only time she was made alive to the fact that the deceased although divorced at the time, was married to his first wife, Ms. Amukwa when they got married.

[22] After the death of the deceased the applicant was appointed as executrix. In execution of her duties to have the major asset in the estate sold, the major heirs were reluctant to sign the consent forms. It is this reluctance that brings this matter to court.

[23] The applicant states that she was advised that the marriage between herself and the deceased is a putative marriage owing to the fact that she was not aware that the deceased was married to someone else at the time of their marriage. She emphasised that she was *bona fide* and ignorant of the marriage that existed between the deceased and Ms. Amukwa.

[24] She concludes by stating that the deceased and herself considered their marriage to be in community of property and they had jointly dealt with it as such. It would be unfair if the marriage is not considered to be in community of property, as she would be severel*y* prejudiced thereby, she further contends. She deposes that she remained innocent and unaware of the previous marriage. The declaration by the court that marriage be regarded as one in community of property *w*ould not prejudice Ms. Amukwa, as the parties *w*ere already divorced at the death of the deceased. Furthermore, if their marriage is not declared a putative marriage, she would be deprived of the benefits of the joint estate that existed for many years.

The respondents' case

[25] The respondents are adamant that the applicant was not acting under the *bona fide* belief that the deceased was divorced from their mother, being Ms. Amukwa. They contend that the applicant must have at least during the year 2006 (if not earlier), become aware of the fact that the deceased was still lawfully married Ms. Amukwa, at the time that she got married to him.

[26] The respondents rely on the fact that if the applicant alleges that they lived so closely together and shared everything, then it would be surprising that the deceased failed to inform her of the protracted and antagonistic divorce proceedings between

Ms. Amukwa and deceased during 1998 and 1999. This culminated in the deceased's conviction of bigamy during the year 2000. The respondents contend that in the circumstances, it is inconceivable that the applicant would only have become aware of the marriage during the burial.

[27] Attached to the final order of divorce dated 16 April 1999, is a settlement agreement that was made an order of court as per the annexure "PA2". In terms of clause 4.2 of the settlement agreement, Ms. Amukwa was entitled to reside in the immovable property at 16 Pullman Street, Windhoek (their common home) for a period of three years from the date that the final divorce order was granted, until such time that she remarries, whichever event would occur first. Clause 4.3 of the said agreement states that upon the occurrence of any of the events referred to in clause 4.2, Ms. Amukwa shall immediately vacate the said immovable property whereafter same shall be sold and the net profits flowing from the sale shall be equally shared between the parties.

[28] During the year 2006, Ms. Amukwa purchased her half share in and to the Pullman Street property from the deceased. On 3 November 2006, the deceased granted a power of attorney to transfer, attached thereto as annexure "PA3". It authorised Mr. Tobias Johannes Adrian Louw (a conveyancer) to appear before the Registrar of Deeds, Windhoek regarding the transfer of the property. The deceased proceeded to *inter alia* declare that:

'WHEREAS I, PHILLIP AMUNYELA, Born on 7 July 1961 and SELMA SHIGUNDA AMUKWA, Born on 11 November 1967, were married in community of property to each other, were divorced in terms with an Order of Divorce in the High Court of Namibia dated 16 April 1999

AND WHEREAS the transferee is entitled to an undivided half share in the immovable property by virtue of the marriage in community of property and is further entitled to the other undivided half share in the immovable property by virtue of the Deed of Sale dated 3 November 2006 . . .'

[29] It is respondents' further case that the applicant signed this power of attorney as a witness on the last page and she has also initialed the first page thereof, thereby acknowledging that she was aware of the contents thereof. The applicant also initialed every page of the deed of transfer and signed as a witness on the last page thereof. It is also clearly stated (on the second page) that the deceased was divorced from Ms. Amukwa in terms of an order of divorce in the High Court of Namibia dated 16 April 1999. It is through this uncontroverted evidence that respondents allege that the applicant knew from at least since 2006 that the deceased was married to Ms. Amukwa at the time of her marriage to the deceased.

[30] The respondents contend that the Spinoza Street property is the biggest asset in the estate. It is further their case that they and their siblings understand that there is a cash deficit in the estate as a result whereof the said immovable property has to be sold in order for them to be able to inherit from the deceased. The respondents state that they and the other siblings are not in agreement with the valuation of the property that has accompanied the letter of Ms. Angula and the consent forms – it is not market related and is way too low.

[31] The respondents deny that the union between the deceased and the applicant was in community of property and lawful and that they dealt with their respective assets as such. The respondents' contention is that the description of the applicant's matrimonial property regime differs in respect of Erf 8 and Erf 195 Ruacana, which are properties that the applicant and the deceased co-owned and purchased on 24 October 2014 and 22 October 2014, respectively from Erf 392 Academia.

[32] Attached as annexures thereto are deeds of transfer T3035/2015 and T3036/2015, respectively, marked as annexures 'PA5' and 'PA6. In these documents, the applicant and the deceased are reflected as persons married out of community of property by reason of ownership in divided half shares. These documents were not amended at any stage.

[33] The respondents are accordingly adamant that no joint estate could ever have come into existence between the parties as they were never lawfully married. If the court declares the marriage between the applicant and the deceased to be a putative

marriage, contends the respondent, the only child sired from the marriage (who is still a minor), and the deceased's other children would be severely prejudiced.

Determination

[34] The first requirement to be considered when dealing with a putative marriage is that one or both parties must not have been aware of an impediment to the marriage. The second and third requirements do not seem to factor in the adjudication of this matter since they are not in dispute.

[35] The applicant contends she only became aware of the impediment after the burial of the deceased and that was in December 2014. She signed documentation that relates to the divorce proceedings between the deceased and the Ms. Amukwa during 2006, this being the power of attorney and the Deed of Sale. The applicant alleges that she signed the documentation as a witness and she did not read the contents of the documentation.

[36] Frankly, there is a signature of the applicant at the bottom of the each page of the said documents that related to the Deed of transfer of the half share of Ms. Amukwa. It is however not a requirement for a witness generally to have knowledge of the contents of a document he or she witnesses. This, is, however, not just an ordinary witness. She signed documents that had a serious bearing on her husband and his marital status at the time. Her claim that she was not aware of the deceased's marital status, when she signed these documents rings hollow and I find that the respondent's version that she must have known at that time must be accepted.

[37] More specifically on page 2 of the deed of transfer, it states that the deceased and Ms. Amukwa were divorced in terms of an order of divorce in the High Court of Namibia dated 16 April 1999. The applicant initialed this page. It thus appears incorrect to find that the applicant's version is probable and thus acceptable in the circumstances. The probabilities in this case, in my considered view, favour the respondents' case.

[38] It should also not sink into oblivion that the applicant, in her own version, states that the deceased told her that he was separated from his wife. It is a matter of common sense that a separation is a different phenomenon from a divorce. Parties may live in separation for years but remain tied by the bonds of marriage if they have not been lawfully severed. It was thus incumbent on the applicant to make further enquiries from the deceased when he volunteered the information about separation before she committed herself.

[39] I am of the considered view, in any event, considering the version put up by the respondents that the matter should be resolved in their favour. This is so because of the application of the well-known *Plascon-Evans* rule, namely that where a factual dispute arises, the respondent's version should carry the day, unless the facts alleged by the respondent are so far-fetched or can be said to be contrived.

[40] The Plascon Evans rule was explained in the *Kauesa*[4] matter as follows:

'The Plascon-Evans Rule postulates that in deciding disputes of fact in application proceedings, those disputes should be adjudicated on the basis of the facts averred in the founding affidavits which have been admitted by the respondent together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant unless a denial by the respondent is not such as to raise a real genuine *bona fide* dispute of fact or a statement in the respondent's affidavit is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers. This approach remains the same irrespective of the question which party bears the onus of proof in any particular case.'

[41] The respondents cited the learned author, Jacqueline Heaton[5] who states that as soon as both parties become aware of the defect, the relationship automatically ceases to be a putative marriage. On a mature consideration of the case as presented by the parties, it appears to be a wholesome conclusion that if it is held in her favour that the applicant, at the time of the conclusion of her marriage to the deceased, was not unaware of the impediment, this ignorance did not last forever. She should and did however, become aware of the divorce order in 2006 as evidenced by her initials and signature of the deed of transfer and she let matters ride.

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[4] *Kauesa v Minister of Home Affairs and Others* 1994 NR 102 (HC) at 108 G-J.

[5] Jacqueline Heaton and H. Kruger (2015) South African Family Law, 4th Ed. Lexis Nexis.

[42] The parties purchased two immovable properties in Ruacana during October 2014. Their marital regime on both these deeds of transfer, which were properly signed by them, was reflected to be ‘out of community of property’. In the applicant's replying affidavit, she stated that she became the exclusive owner of the Spinoza Street property during 2001. The property was subsequently endorsed on the advice of the bank and the conveyancer to the effect that the parties were married in community of property.

[43] According to her this endorsement was done to enable the deceased and her to jointly register a bond over the property for the improvements thereon. She alleges that she was later advised that the endorsement is incorrect because the marriage between the deceased and she is one governed by the laws of the United Kingdom as reflected on the two Ruacana properties (a marriage "out of community of property").

[44] It is not necessary to make any firm finding in this regard but, in my considered, the probabilities are, from the foregoing, strongly suggestive that the marriage concluded between the parties was out of community of property, as governed by the laws of the United Kingdom. The initial property registration of the properties in Ruacana both reflect the marital regime to have been ‘out of community of property’. The changes effected on the properties occurred after the deceased had passed on. I say no more of this issue in view of the consequence of the finding above regarding the putative marriage.

Conclusion

[45] In the premises, and having regard to the discussion above, I am of the considered view and hold that the applicant became aware of the impediment to their marriage, at the latest, in 2006. In any event, the *Plascon – Evan’s* rule,[6] when applied, favours the respondents in this case.

[6] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623; 1984 2 All SA 366 (A).

[46] I accordingly affirm, as stated above that on a balance of probabilities, that the respondent's version is more probable in comparison to the applicant and the applicant's version thus stands to be rejected.

Costs

[47] There exist no factors as to why the ordinary principle applicable to costs should not apply. Thus costs should follow the event, in which case the applicant is bear the costs of this application.

Order

[48] Having regard to the discussion and conclusion above, it appears to me that the following order commends itself as being appropriate to issue in this matter, namely:

1. The marriage between the Applicant and the Late Phillip Amunyela, solemnised on 8 August 1996 in England, is hereby declared to be null and void *ab initio*.
2. The application for the marriage between the Applicant and the Late Phillip Amunyela to be declared to be a putative marriage in favour of the Applicant is hereby refused.
3. The Applicant is ordered to pay the Respondents' costs.
4. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

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|---|---|
| APPLICANT: | M. Angula<br>Of Angula Co. Windhoek |
| 1st and 2nd RESPONDENT: | N. Tjombe<br>Of Tjombe-Elago. Windhoek |