

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2019/02608

In the matter between:

DENISE (nee COSGROVE) MOONGO

PLAINTIFF

and

JOHANNES MOONGO

DEFENDANT

Neutral Citation: *Moongo v Moongo* (HC-MD-CIV-ACT-OTH-2019/02608) [2024]
NAHCMD 198 (30 April 2024)

Coram: UEITELE J

Heard: 03, 04 and 05 April 2024

Delivered: 30 April 2024

Flynote: Law of Persons — Divorce proceedings — Validity of a marriage — He who asserts, proves, and not he who denies — Births, Marriages and Deaths Registration Act 81 of 1963 — Marriage Act 25 of 1961.

Summary: The plaintiff instituted divorce proceedings against the defendant, seeking amongst other orders, an order for the restitution of conjugal rights, failing which a final order of divorce. The defendant opposed the divorce action on the basis that the marriage between him and the plaintiff was never registered, and the marriage certificate issued to them was an error due to the plaintiff not being in possession of certain documents, including, but not limited to proof of the plaintiff not being married in the United Kingdom, at the time when they (the plaintiff and the defendant) solemnized their marriage in Oranjemund.

In adjudicating the action, the court was tasked with ascertaining whether the marriage concluded between the plaintiff and the defendant on 25 August 2005 constitutes a valid civil marriage.

Held that: the standard of proof in a civil case is the well-known preponderance (balance) of probabilities. This requires of the party on whom the *onus* lies, in order to be successful, to satisfy the court that he or she is entitled to succeed on the claim or defence, as the case may be.

Held that: a valid marriage has to be preceded by and performed with certain solemnities. The mere consent of the parties expressed in the presence of witnesses does not, with us, effect a valid marriage. Our law requires that among other things, the contract of marriage must be entered into before a recognised official.

Held further that: where the evidence of cohabitation and repute is allied to evidence of a ceremony of marriage having been initially celebrated between the parties, the presumption that the parties were validly married is very strong indeed and will be displaced only by clear contrary evidence.

Held further that: registration of a marriage is not essential to the validity of the marriage. The absence of a marriage register, in this case, is thus of no consequences.

It is equally clear that the production of a birth certificate or a 'certificate of marital status', if there is such a document, is not essential to the validity of a marriage. What the law requires is that a marriage officer must only solemnize a marriage once he or she is satisfied about the identities of the parties whom he is marrying and of the fact that they were not married before.

Held further that: the defendant has failed to place before this court clear evidence to rebut the presumption of a valid marriage between him and the plaintiff.

ORDER

1. It is declared that the marriage between the plaintiff and the defendant is a valid marriage.
2. The bonds of the marriage concluded between the plaintiff and the defendant are hereby dissolved.
3. The settlement agreement concluded between the plaintiff and the defendant on 27 February 2024 and filed of record is made an Order of Court.
4. The defendant must pay the plaintiff's costs of suit on an attorney and client scale, and the costs must include the plaintiff's travelling costs from and to the United Kingdom and the costs of four days accommodation in Namibia.
5. The Registrar of this court must bring a copy of this judgment to the attention of the Prosecutor-General and the Registrar of Births, Marriages and Deaths.
6. The matter is regarded as finalised and removed from the roll.

JUDGMENT

UEITELE J:

Introduction

[1] On 12 June 2019, Ms Denise Moongo, born Cosgrove, (I will, in this judgment, for ease of reference, refer to her as “the plaintiff”) instituted a divorce action against Johannes Moongo (I will, in this judgment, for ease of reference refer to him as “the defendant”). In the particulars of claim, the plaintiff sought an order for the restitution of conjugal rights, failing which a final order of divorce, custody of the minor children born of the marriage between the parties, maintenance at the rate of N\$1500 per month per child, division of the joint estate and costs of suit.

[2] On 20 March 2020, the defendant filed a plea in opposition to the plaintiff’s action. The defendant opposed the action on the basis that the marriage was not registered, and that no marriage ceremony took place between the parties and that the marriage certificate was issued to the parties erroneously.

[3] On 01 December 2023, the defendant amended his plea, still denying that a valid marriage was concluded between him and the plaintiff. In paragraph 2 of the defendant’s amended plea dated 24 November 2023 but filed and served on 01 December 2023, the defendant denied the existence of a valid marriage relationship between him and the plaintiff as follows: (I quote verbatim from the amended plea)

‘2.1 The defendant admits that the plaintiff and the defendant had the intention to marry each other, and did set a date for this marriage at the magistrates’ Court in Oranjemund.

2.2 The initial date for the plaintiff and the defendant to marry was scheduled for 15 August 2005.

2.3. Due to the plaintiff not being in possession of certain documents (including, but not limited to proof of the plaintiff not being married in the United Kingdom, as well as the plaintiff’s full birth certificate), the above date was vacated.

2.4 On 25 August 2005, the plaintiff was still not in possession of the documents for the parties to be married. However, the officer at the Oranjemund Magistrate Court agreed to issue a marriage certificate on good faith that the plaintiff would produce the outstanding documents and thereafter register the marriage in registry to validate the marriage.

2.5 The plaintiff never submitted those documents.

2.6 During or about 2018, the defendant tried to retrieve a copy of the marriage certificate from the Ministry of Home Affairs and Immigration and was informed by the Ministry of Home Affairs and Immigration that there was no record of the parties ever having been married. Therefore, the purported marriage was never recognized in terms of the laws governing civil marriages in Namibia.

2.7 It is for this reason that the defendant pleads that no valid marriage between the parties in this matter was ever entered into.’

[4] In addition to denying that a valid marriage was concluded between him and the plaintiff, the defendant attached a letter dated 31 August 2022 from the Ministry of Home Affairs and Immigration (the Ministry) in which letter the Ministry allegedly confirmed that the defendant is regarded as single and never married.

[5] On 04 December 2023, the plaintiff replicated to the defendant’s plea and denied the defendant’s allegations. In amplification of the denials, she pleaded that the wedding initially scheduled for 15 August 2005 was postponed due to the fact that she had come

down with pneumonia. The parties were married on 25 August 2005. She expressly denied that she was not in possession of the relevant documentation to prove that she was not married in the United Kingdom and her full birth certificate. In this respect, she averred that the parties had to provide all of the documentation 2-3 weeks prior to them securing a date for the wedding ceremony and prior to them obtaining permission to enter Oranjemund.

[6] As regards the defendant's allegation that the Ministry allegedly confirmed that the defendant was single, the plaintiff pleaded that the defendant misrepresents what the Ministry stated by omitting the rest of the information from the Ministry in its letter dated 31 August 2022, which letter was admitted into evidence as exhibit "D". In this letter, the Ministry, amongst other matters, stated that:

'... marriages are only registered in the Population register after receipt of marriage registers from the Marriage Officers who have solemnized such marriages. In this particular case [that is the marriage between the plaintiff and the defendant], we have not been able to trace the actual marriage register, despite a diligent search. We do note however, that the couple has a child together who was born on 4/10/2012. During the birth registration of the child the mother and father acknowledged that they were married (at Oranjemund on 25/08/2005). It is possible that the marriage register was not submitted to the Ministry. This however does not indicate that the marriage was not solemnized.'

[7] After a lengthy process of case management and other side skirmishes, I called a pre-trial conference hearing for 12 December 2023. After the pre-trial conference a pre-trial order was issued. In terms of the pre-trial order, the parties agreed that the issues of fact to be resolved during the trial are whether the plaintiff failed to provide the relevant and necessary documentation legally required to enter into a valid marriage in terms of Namibian law on the day of the marriage ceremony. They furthermore, agreed that the questions of law to be resolved during the trial are:

(a) Whether the defendant has presented sufficient evidence to rebut the presumption of a valid marriage, and if so, whether the parties were validly married.

(b) In the event that the defendant rebuts the presumption of validity of the marriage, whether a putative marriage should be declared between the plaintiff and defendant.

[8] The parties further agreed that the following aspects were not in dispute and they could be regarded as admitted namely:

(a) That the parties attended a marriage ceremony on 25 August 2005 at Oranjemund before Magistrate Evelyn Winkler, in the company of two witnesses Wilma Hartung and Nadia (surname unknown).

(b) That at the aforementioned ceremony, the parties were handed a marriage certificate signed by the Magistrate, reflecting that the parties were married on 25 August 2005 without an antenuptial contract at Oranjemund in the District of Luderitz.

(c) That during the marriage, three children were born to the parties and that the plaintiff shall have custody of the three children, subject to the defendant's right of reasonable access

(d) That during the marriage the parties jointly acquired a property situated at Erf 2216 Paul van Harte Weg, Khomasdal, Windhoek, which they co-own in equal shares under title deed T 160/2013.

(e) The abovementioned property is secured against a registered bond in favour of First National Bank of Namibia Limited and is subject to a pending action to recover the outstanding amount and to declare the property specially executable.

The issue in dispute

[9] The issue in dispute in this matter is the validity of a marriage concluded between the plaintiff and the defendant.

[10] The standard of proof in a civil case is the well-known preponderance (balance) of probabilities. This requires of the party on whom the *onus* lies, in order to be successful, to satisfy the court that he or she is entitled to succeed on the claim or defence, as the case may be.¹ The *onus* of establishing a case in accordance with this standard is on the party who makes the assertion since, if a person claims something from another in a court of law, he or she has to satisfy the court that he or she is entitled to such relief. "He who asserts, proves, and not he who denies, since a denial of a fact cannot naturally be proved, provided that it is a fact that is denied and that the denial is absolute."²

[11] The person who makes the claim and accordingly bears the onus of proof, is invariably the plaintiff. However, there are situations in which the defendant bears the onus. This ordinarily happens when the defendant is not content with a mere denial of the claim against him but sets up a special defence. In respect of the special defence the defendant becomes the claimant. For the special defence to succeed, the defendant must satisfy the court that he or she is entitled to succeed on it.³ It is on this authority that I directed that the defendant had the duty to begin.

The defendant's testimony

[12] I summarise the evidence which the defendant placed before the court, in support of his claim that no valid marriage was concluded between him and the plaintiff, as follows: The defendant and the plaintiff lived in Rosh Pinah but on 25 August 2005 they went to the Magistrates' Court in Oranjemund so that they could get married. The defendant testified that prior to their marriage ceremony, on 25 August 2005, there was a prior date on which they were supposed to get married which date was supposed to be 15 August 2005. However, the wedding ceremony would not continue because the plaintiff did not have the necessary documentation and only had her passport in her possession. The plaintiff was asked to produce and provide the Magistrates Court with a certificate of her marital status from the United Kingdom as well as her birth certificate.

¹ *Pillay v Krishna* 1946 AD 946 952- 953.

² *Pillay v Krishna supra* 951; and *Van Wyk v Lewis* 1924 AD 438 444.

³ *Pillay v Krishna supra* 952.

[13] The Magistrate called the plaintiff to enquire if she had the documents and she indicated that she did not have the required documents in her possession. This resulted in the wedding date of 15 August 2005 being vacated. The plaintiff later informed the defendant that, she had made arrangements with someone from the Magistrates' Court in Oranjemund and that they could proceed to get married on 25 August 2005.

[14] On 25 August 2005, they went to the Oranjemund Magistrates' Court so as to get married. Upon arriving at the Magistrates' Court they were introduced to the Magistrate who was a coloured lady. The Magistrate proceeded to write out the marriage certificate and indicated to them that they will have to come back to the Magistrates' Court/Office and sign the registration papers once all the requested relevant documentation were obtained from the plaintiff. The Magistrate indicated that the registry would only be completed and signed once the requested documentation were received.

[15] The defendant further testified that on 25 August 2005, the plaintiff organised two women who were unknown to him to sign the relevant documentation as their witnesses. The plaintiff was to return to the Magistrates' Court to provide the requested documentation and fill out the necessary paper work. Despite the absence of some documentation, the Magistrate on that day gave them a marriage certificate and they proceeded back to Rosh Pinah. A few weeks after the marriage, the Magistrate's Office would constantly call the plaintiff requesting her to take the required documentation to that Magistrates' Office but neither he nor the plaintiff went back.

[16] In cross-examination, the defendant admitted that on the day in question he signed at least two different documents in the presence of the Magistrate and two other witnesses, and the two witnesses and the plaintiff also signed the documents. He, however, disavowed any knowledge of what those documents were. He also conceded that they had to apply, in advance, to get a date for the wedding and that they applied to get permission to enter Oranjemund. In response to a question from the court as to what the Magistrate said to them on that day (that is, 25 August 2005), he testified that

the Magistrate did not ask him or the plaintiff any questions, she (the Magistrate) just handed to them the marriage certificate.

[17] The defendant called two further witnesses namely an officer from the Ministry and the Executive Director in the office of the Judiciary. In my view the evidence of these two officials do not assist in determining the issue that confronts me.

The plaintiff's testimony

[18] I summarise the evidence which the plaintiff placed before the court in support of her claim as follows: During the year 2004, she was employed by Rosh Pinah Zinc Mine in Rosh Pinah as a Wellness Manager. The defendant was on a work placement completing his electrical apprenticeship also at Rosh Pinah Zinc Mine in Rosh Pinah. Their paths crossed during November 2004 when the defendant went to the plaintiff's office for HIV test and from thereon they became acquaintances. She testified that during the winter of 2005 they travelled together to Cape Town and at Table Mountain in Cape Town the defendant proposed to marry her. She testified that the defendant even called her father in the United Kingdom for permission to marry her. The two got engaged and decided to tie the knot and according to the allegations by the plaintiff they (without concluding an antenuptial contract) married each other at Oranjemund on 25 August 2005. Ms Cosgrove thereafter adopted Mr Moongo's surname.

[19] The plaintiff testified that, before they could get married, they had to apply to the Magistrate in Oranjemund to be allocated a wedding date. They had to provide the Magistrate with all the necessary documents before the wedding date would be confirmed and allocated. She testified that she faxed through all the necessary documents to the Magistrates' Office in Oranjemund. This includes copies of her passport and birth certificate. She stated that she is very meticulous and was in possession of all the necessary documents (her passport and her birth certificate).

[20] She accordingly denied that the wedding ceremony was postponed from 15 August 2005 on account of her not being in possession of the necessary documentation. She emphatically stated that the wedding ceremony was postponed

on account of the fact that she had come down with pneumonia. She testified further that the wedding ceremony was elaborate. The Magistrate asked her and the defendant certain questions and thereafter, they signed two documents which she assumed was the marriage register and a declaration that she was never married before.

[21] She tendered into evidence as exhibit "B p1 to p5" photographs depicting her and the defendant (Exhibit B-p1); the defendant (Exhibit B-p2); a person whom both the plaintiff and the defendant identified as one of the witness (Exhibit B-p3); the plaintiff (Exhibit B-p4) signing documents on that day and also a photograph of the Magistrate (Exhibit B-p5) completing a document resembling the marriage certificate. She testified that after they signed the documents, the Magistrate proceeded to complete the Marriage Certificate which she handed over to them. She testified that the ceremony took place in the presence of two witnesses.

[22] In cross examination, she testified that on a question from the defendant's counsel, she could recall that the declaration was made under oath and that the Magistrate only issued the Marriage Certificate to them after she and the defendant exchanged wedding vows. She further testified that between 2005 and 2012, she and the defendant lived as husband and wife and three children were born to them. When they registered the children's births at the Ministry, they declared that they were married to each other. She further testified that she obtained a permanent residency permit from the Ministry of Home Affairs and Immigration valid for a period of two years on the strength of her marriage to the defendant. The plaintiff further alleges that during August 2006, she and her 'husband' moved to the United Kingdom and settled in Liverpool. The defendant obtained a spousal visa on the strength of his marriage to her. When they applied for the loan to purchase the house in Khomasdal, they had to submit their marriage certificate as proof of their marriage in community of property.

[23] It is against the background of the evidence that I summarised in the preceding paragraphs that this court is called upon to decide the issue of whether the plaintiff and the defendant entered into a valid civil marriage relationship, which was allegedly

solemnized on 25 August 2005. Before I decide that question I will briefly set out the legal principles relating to marriages in our law.

The legal principles

[24] In our law, marriage is a union of one man with one woman to the exclusion, whilst it lasts, of all others. Hahlo⁴ argues that the word ‘marriage’ denotes either the act or ceremony by which a marriage is brought into existence (the act of marriage, wedding) and the resulting marriage relationship. The learned author further argues that marriage is a contract in that it is based on the consent of the parties, but it is not an ordinary contract, because:

‘Firstly, the consent of the parties is not sufficient to create a marriage tie: the co-operation of a marriage officer appointed by the State is required. Secondly, unlike other contracts marriage cannot be entered into subject to a *dies* or *condictio*. Thirdly, a marriage cannot be dissolved by mutual consent of the parties: only death or a decree of a competent court can put an end to it. Fourthly the ends of marriage cannot be fully expressed in terms of legal rights and duties. They include community of life and procreation of children ... The act of marriage are therefore, so far from being an ordinary private contract is a juristic act, *sui generis*, and the relationship which it creates is not an ordinary contractual relationship but involves a status of public character.’

[25] A valid marriage has to be preceded by and performed with certain solemnities. The mere consent of the parties expressed in the presence of witnesses does not, with us, effect a valid marriage. Our law requires that, among other things, the contract of marriage must be entered into before a recognised official.⁵ Section 12 of the Marriage Act prohibits a marriage officer to solemnize a marriage without the production of identity document or any other satisfactory proof of identity.

[26] In *Ge v Ge*⁶ this Court set out the requirements for a valid marriage as follows:

⁴ H.R Hahlo. *The South African Law of Husband and Wife*. 3rd ed p 33-34.

⁵ See s 11(1) of the Marriage Act, 1961 (Act 25 of 1961) and also *Vitamin Distributors v Chungebryen* 1931 W.L.D. 55.

⁶ *Ge v Ge* (I 208/2016) (2017) NAHCNLD 58 (delivered on 23 June 2017).

'The basic statutory requirements for a valid marriage in Namibia are that;

- a) there should be mutual consent of 7 the parties;
- b) the parties must be majors or be permitted to marry under the law;
- c) parties must not be of the same sex;
- d) both parties must be single and/not married to any other person;
- e) must be solemnized by a registered marriage officer; and
- f) must be celebrated in the presence of witnesses.'

[27] If any of the above is absent, the marriage can be annulled on the basis of it being void. Other grounds on which a marriage can be annulled or declared void include vices which affect the free consent of a party, such as insanity, intoxication, duress, intimidation, mistake or fraud. The marriage is said to be void if it did not comply with the above requirements. However, it can also be cancelled if it is voidable. What this means is that a marriage is valid until it is annulled for lack of compliance or in contravention of certain requirements.

[28] Section 42 of the Births, Marriages and Deaths Registration Act⁷ provides that:

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

⁷ Births, Marriages and Deaths Registration Act 81 of 1963.

(3) Every such certificate signed by the Secretary, registrar, or marriage officer, or magistrate, as the case may be, shall in all courts of law and public offices be prima facie evidence of the particulars set forth therein.'

[29] The courts in South Africa⁸ have ruled that the registration of a marriage, though required by statute in the public interest and for the purpose of proof, is not essential to the validity of the marriage. The courts went on and stated that where, for example, a marriage has been solemnized in terms of the Marriage Act⁹ but the marriage register has for some or other reason not been completed, the Director-General of the Interior (the equivalent of the Executive Director of the Ministry of Home Affairs and Immigration who is also the Registrar of Births, Marriages and Deaths in our case), may, after submission of such proof and after such enquiries as he may deem necessary, direct that the prescribed register with regard to the marriage be completed.

[30] In *Fitzgerald v Green*¹⁰, Kotze, J.P, decided, after a close review of the somewhat conflicting Roman-Dutch authorities, that under our law 'a marriage can be established by evidence of cohabitation and repute', the learned judge said:

'The ordinary mode of proving a marriage is no doubt by production of the register or a certified extract from it, but that it is not essential, however desirable it may be, for it is not the only way in which a marriage can be legally established It can be proved in different ways, as, for instance, by the evidence of witnesses, who were present at the marriage ceremony, or by satisfactory evidence of cohabitation and repute.'

[31] In *Ex parte L (also known as A)*¹¹, it was held that, where the evidence of cohabitation and repute is allied to evidence of a ceremony of marriage having been initially celebrated between the parties, the presumption that the parties were validly married is very strong indeed and will be displaced only by clear contrary evidence.

⁸ *Ex Parte Efron Et Uxor* 1940 CPD 199. See also *Gada v Gada* Case Number: 24141/2000 delivered on 29 May 2006.

⁹ Marriage Act 25 of 1961.

¹⁰ *Fitzgerald v Green* 1911, E.D.L. 432, at pp. 452 – 459.

¹¹ *Ex parte L (also known as A)*, 1947 (3) SA 50 (C).

[32] In view of the authorities that I set out in the preceding paragraphs, Ms Angula's (who appeared for the defendant) argument that, in the absence of a marriage register or marriage certificate or both a marriage register and marriage certificate, it is impossible to prove the existence of valid marriage, is misplaced.

Discussion

[33] From the evidence presented to court it appears to be common cause that the parties consented to get married. They attended to a marriage officer (the Magistrate in Oranjemund) for the purposes of getting married, they lived together as man and wife for a period that lasted for at least 11 years during which period cohabitation took place and three children were conceived and born between the parties. It must be accepted that by virtue of the cohabitation and the manner in which the parties conducted themselves, they were known as a married couple. This was confirmed by the defendant himself. This is no doubt evidence of cohabitation and repute.

[34] In line with s 42(2) of the Births, Marriages and Deaths Registration Act and what was held in *Fitzgerald v Green*, the ordinary mode of proving a marriage is no doubt by production of the register or a certified extract from it. In this matter an extract from the marriage register namely a marriage certificate was produced. It thus follows that in this matter the evidence of cohabitation and repute is allied to the evidence of a ceremony of marriage having been initially celebrated between the parties, creating a very strong presumption that the parties were validly married. That presumption will be displaced only by clear contrary evidence.

[35] What is also clear is that, in our law, registration of a marriage is not essential to the validity of the marriage. The absence of a marriage register in this case is thus of no consequences. It is equally clear that the production of a birth certificate or a 'certificate of marital status', if there is such a document, is not essential to the validity of a marriage. What the law requires is that a marriage officer must only solemnize a

marriage once he or she is satisfied about the identities of the parties whom he is marrying and of the fact that they were not married before.

[36] There is direct evidence in this matter that both the plaintiff and the defendant satisfied the Magistrate (by providing their passports to her) as regards their identities. The probabilities, that the parties signed the declaration contemplated under s 12 of the Marriages Act before the Magistrate, favours the plaintiff's testimony more than they favour the defendant's testimony. I therefore come to the conclusion that the defendant has failed, to place before this court, clear evidence to rebut the presumption of a valid marriage between him and the plaintiff. I therefore find that, the plaintiff and the defendant were validly married on 25 August 2005 at Oranjemund.

[37] The defendant admitted to his adultery and the plaintiff maintained that she has not condoned the defendant's adultery. The defendant has in fact further admitted that, apart from his adultery, he has entered into a marriage with a third party which, on the basis of my finding that the parties were validly married is a bigamous marriage. On this basis the plaintiff is entitled to an order dissolving the bonds of marriage subsisting between her and the defendant.

[38] My finding that the defendant was validly married to the plaintiff has consequences for the defendant and the consequences are these. Firstly, the defendant may have committed the crime of bigamy when he married his current partner while these proceedings were pending. Secondly, his current 'marriage' is in terms of our law of no force or effect, it is an invalid marriage. As a result of these consequence, this court cannot turn a blind eye to the defendant's action and will thus have to refer this matter to the relevant authorities (the Prosecutor General and the Registrar of Births, Marriages and Deaths Registration) for them to take the appropriate action in accordance with the law.

Cost

[39] What is left is the question of costs. The basic rule is that, except in certain instances where legislation otherwise provides, all awards of costs are in the discretion of the court.¹² It is a well-established rule of our law that the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and equitable one¹³. There is also, of course, the general rule, namely that costs follow the event, that is, the successful party must be awarded his or her costs. This general rule applies unless there are special circumstances present.

[40] In the present case, counsel for the defendant argued that whatever the finding of this court the plaintiff must be ordered to pay the defendant costs because she allegedly refused to surrender the marriage certificate when the defendant sought it for the purposes of instituting divorce proceedings. I am not persuaded by that submission. I say so for the following reasons. The plaintiff testified and this testimony has not been controverted that, when she decided to relocate to the United Kingdom, they had agreed that the defendant would follow her and join the family after six months. He never did and she testified that she later discovered that the reason why he never joined the family was that he was living an adulterous life with another woman.

[41] It is upon the discovery of the defendant's adultery that she instituted divorce proceedings during 2019. When the plaintiff instituted divorce proceedings, the defendant pleaded and denied the validity of the marriage allegedly because no wedding ceremony took place, but he never instated a counterclaim. The plaintiff concedes that she refused to provide the defendant with the original marriage certificate, but testified that the reason why she refused to provide the original marriage

¹² *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

¹³ See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045. 9 2003 (6) SA 588 (TPD) at 592B-D 17.

certificate to the defendant was for her to explain the differences in her surnames on her documents.

[42] As I indicated, the plaintiff instituted divorce proceedings during the year 2019 and the defendant has since inception of the divorce proceedings denied the existence of a valid marriage even after the parties had agreed to resolve the ancillary matters and also in the face of the realization that the relationship between him and the plaintiff has irretrievably broken down. During the process of case management the plaintiff made all attempts to testify by video link leading to an interlocutory application which the defendant opposed.¹⁴ After her application to adduce her evidence by video link was refused, she resolved to travel from the United Kingdom to Namibia to testify at these proceedings.

[43] I am therefore of the view that having resolved all the ancillary matters and having admitted that the relationship between them was irretrievably broken down, it was unreasonable, unjustifiable, oppressive of the defendant to insist that no valid marriage existed between him and the plaintiff on the basis that the plaintiff had allegedly not submitted all the documents necessary to conclude a valid marriage. The basis on which the defendant denied the existence of a valid marriage was from its inception doomed to fail. I accordingly hold that the defendant has not placed any special circumstances before me that requires me to depart from the general rules relating to costs. The plaintiff is thus entitled to the costs of this action.

[44] In *South African Bureau of Standards v GGS/AU (Pty) Ltd*¹⁵ Patel, J stated:

'Clearly there must be grounds for the exercise of the Court's discretion to award costs on an attorney and client scale. Some of the factors which have been held to warrant such an

¹⁴ *Moongo v Moongo* (HC-MD-CIV-ACT-OTH-2019/02608) [2023] NAHCMD 521 (22 August 2023).

¹⁵ *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T).

order of costs are: that unnecessary litigation shows total disregard for the opponent's rights (*Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (II)* 1946 TPD 226 at 236); that the opponent has been put into unnecessary trouble and expense by the initiation of an abortive application (*In re Alluvial Creek Ltd* 1929 CPD 532 at 535; *Mahomed Adam (Pty) Ltd v Barrett* 1958 (4) SA 507 (T) at 509B-C; *Lemore v African Mutual Credit Association and another* 1961 (1) SA 195 (c) at 199; *Floridar Construction Co (SWA) (Pty) Ltd v Kries* (supra at 878); *ABSA Bank Ltd (Voklskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (c) at 268D-E); that the application is foredoomed to failure since it is fatally defective (*Bodemer v Hechter* (supra at 245D-F)) or that the litigant's conduct is objectionable; unreasonable, unjustifiable or oppressive.'

[45] I am of the view that the defendant's conduct in this matter is objectionable; unreasonable, unjustifiable, oppressive and that it warrants me to exercise my discretion to award costs on an attorney and client scale, and the costs must include the plaintiff's costs of travelling from and to the United Kingdom and the cost of four days accommodation in Namibia.

[46] For the reasons set out in this judgment I make the following order.

1. It is declared that the marriage between the plaintiff and the defendant is a valid marriage.
2. The bonds of the marriage concluded between the plaintiff and the defendant are hereby dissolved.
3. The settlement agreement concluded between the plaintiff and the defendant on 27 February 2024 and filed of record is made an Order of Court.
4. The defendant must pay the plaintiff's costs of suit on an attorney and client scale, and the costs must include the plaintiff's travelling costs from and to the United Kingdom and the costs of four days accommodation in Namibia.

5. The Registrar of this court must bring a copy of this judgment to the attention of the Prosecutor General and the Registrar of Births, Marriages and Deaths.
6. The matter is regarded as finalised and removed from the roll.

UEITELE SFI
Judge

APPEARANCES

PLAINTIFF:

U Katjipuka-Sibolile
Of Nixon Marcus Public Law Office,
Windhoek

DEFENDANT:

E N Angula
Of AngulaCo Inc,
Windhoek