

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 208/2016

In the matter between:

YANBIN GE

PLAINTIFF

and

OLIVIA NDEUHALA GE (born AMUPADHI)

DEFENDANT

Neutral citation: *Ge v Ge* (I 208/2016) [2017] NAHCNLD 58 (23 June 2017).

Coram: CHEDA J

Heard: 27 March 2017

Delivered: 23 June 2017

Flynote: Matrimonial – Divorce – A marriage which although solemnized and registered but is not consummated is voidable and is a nullity. All benefits which accrued from such a marriage are of no force or effect as the parties revert back to their previous positions.

Summary: Plaintiff instituted divorce proceedings against defendant. One of the grounds for divorce was that defendant had refused him conjugal rights from the time of the marriage to date. The marriage was, therefore, not consummated. In his

particulars of claim, plaintiff averred that defendant was refusing him conjugal rights. Defendant denied this and instead stated that it was plaintiff who was in fact refusing her the said rights. She also stated that he was even refusing her to visit him at his house. The parties had been married for 5 years without consummating the marriage or living together. Defendant gave evidence and showed that plaintiff had refused to consummate the marriage.

ORDER

1. The marriage contracted by the parties on the 28 October 2011 at Outapi Magistrate Court is nullified;
 2. All the benefits which accrued to the parties as a result of this marriage are cancelled as being of no force or effect.
 3. Each party must pay its own costs.
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JUDGMENT

CHEDA J:

[1] On the 2nd September 2016, an action for divorce proceedings was instituted by plaintiff through Messrs Dr. Weder, Kauta & Hoveka Inc. in particulars Ms Kishi against defendant. Plaintiff is a Chinese national and a businessman in Okahao, Omusati Region, Namibia, while defendant is an adult lady presently a student at Hifikepunye Pohamba Campus of the University of Namibia residing in Ongwediva, Oshana Region, Namibia.

[2] The parties were joined in matrimony on the 28 October 2011 at Outapi, Omusati Region by a Magistrate. The said marriage was out of community of property and it still subsists. There were no children born out of this union and no property was acquired during its existence.

[3] Plaintiff listed the following as grounds for divorce being that:

1. the defendant has refused the plaintiff conjugal rights;
2. she failed to discuss issues pertaining to the parties marital relationship;
 1. she shows no serious intention to continue with the marital relationship;
 2. she does not communicate meaningfully with the plaintiff;
 3. she solicits unnecessary quarrels with the plaintiff;
 4. she shows no love and/or affection for the plaintiff; and
 5. she does not respect the plaintiff.'

[4] In his prayer, he sought an order for Restitution of Conjugal Rights and that in the event of defendant's failure to comply, then a final order and costs of suit should be granted.

[5] On the day of the hearing for the application for a Restitution of Conjugal Rights, I observed the following that:

- a) plaintiff is a Chinese national;
- b) he could not speak and/or converse in English or Oshiwambo (a local language) and was using a translator from a Chinese language to English and *vice versa*;
- c) he did not understand Oshiwambo / local language; and
- d) defendant is a Wambo, speaks English and Oshiwambo.

[6] This struck me as odd as it appeared that no meaningful communication was likely to result from the two parties. This scenario raised suspicion in me and I decided to delve further into this marriage.

[7] I then exercised my judicial discretion and ordered that defendant appear in court to clarify the issue surrounding this marriage as plaintiff had a problem in communicating in English and Oshiwambo.

[8] The exercise of a discretion is part of our law as was stated in *Janse Van Rensburg v Wilderness Air Namibia (Pty) Ltd* (SA 33/2013) [2016] NASC (11 April 2016) which adopted the reasoning in *R v Security of State for the Home Development, Ex parte Salem* [1999] UKHL8; (1999 2 ALL 42 (HLE) at 470 where Lord Slynn of Hadley stated:

‘The discretion to hear disputes, even in the area of Public Law, must however be exercised with caution...’.

[9] The principle regarding the exercise of judicial discretion was formulated in the celebrated case of *ES v AC* (SA 57/2012) [2015] NASC 11 (24 June 2015) where the Supreme Court identified a range of factors to determine when the discretion should be exercised. They are that:

- a) the nature and extent of the practical effect that any possible order might have;
- b) the importance of the issue;
- c) the complexity of the issue; and
- d) the fullness or otherwise of the argument advanced.

[10] This principle seems to have taken root not only in our jurisdiction, but, also in the SADC jurisprudence as was as recently stated in *The President of the Republic of Botswana & 3 others v National Amalgamated Local Central Government and Parastatal Union & 6 others MAHGB 000635/15 (Botswana Appeal Court)*. In that court, Damaseb, AJA (as he then was) referred to *S v Moitumelo Molefe 1968-1970 BLR 100 at 104* where Young CJ stated:

‘In this connection I may mention that the decisions of the South African courts, or those of any other foreign country (including the U.K.,...) are not binding on the courts in Botswana; but such decisions may have very substantial persuasive value, especially those of South Africa where the common law is also Roman-Dutch law and those of the United Kingdom, because of the very great influence of English law on all branches of law in this country.’ (my emphasis)

[11] Damaseb AJA, clearly stated the extent South African authorities persuaded other jurisdictions, Namibia not exempted. The issue involved in this matter

involves public interest and policy. There was, therefore, a need for a judicial discretion to be exercised which I did.

[12] I therefore, directed that defendant appear in court in order to explain the circumstances surrounding this marriage which altogether appeared unusual.

[13] Defendant appeared in court on the 27 March 2017 as per the court order and gave evidence. She speaks both English and Oshiwambo. Her evidence was that she used to work as a shopkeeper in plaintiff's shop in Okahao. She fell in love with him and they solemnized their marriage on the 28 October 2011, at Outapi, Namibia. She stated that, although, they got married, plaintiff refused to sleep with her and did not financially support her. She however, continued to receive her salary as an employee.

[14] It was also her evidence that he refused to sleep with her from the time they got married to date. She further stated that whenever, she went to his home he chased her away as he stated that his relatives were in the house. In short, he did not want his relatives to meet or see her. She is no longer employed by plaintiff as she is now pursuing her studies at Hifikepunye Pohamba Campus of the University of Namibia. Defendant left employment on her own volition and they are living apart as they have always done.

[15] What has been established is that the parties were married to each other and they have never had sexual intercourse. The basic statutory requirements for a valid marriage in Namibia are that:

- a) there should be mutual consent of 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.

[16] If any of the above is absent, the marriage can be cancelled on the basis of being void. 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 set aside for lack of non-compliance or in contravention of certain requirements.

[17] In Namibia and indeed under common law a marriage is adjudged to be voidable, on the following grounds if:

- a) it is a marriage by a minor who contracted a marriage without the consent of his/her parents or guardians;
- b) it is a marriage contracted under duress;
- c) it is a marriage contracted by fraud or misrepresentation by a party which misled the other into marriage;
- d) a woman entered into a marriage when she was already pregnant by another man, which fact was not known to her husband; and
- e) where one of the parties was impotent at the time of the marriage.

The list is in exhaustive.

[18] In *casu* what is in dispute is whether a marriage is void or voidable by virtue of nonconsummation or not. Plaintiff in his particulars of claim alleges that, defendant has refused him conjugal rights. However, defendant on the other hand contradicted him by stating that it is plaintiff who has refused her conjugal rights and has refused her entrance to his house/home as he did not want his relatives to see her.

[19] This has continued for over 5 years. She further stated that he was not financially supporting her. She has since left his employment and is started a career in teaching at University of Namibia.

[20] The question which falls for determination is whether or not failure to consummate a marriage renders it invalid. Since defendant was unrepresented, I found it necessary to request a legal practitioner to argue for her on that point as there are no Namibian authorities in this area. I requested Ms. Horn to act *amicus*

curiae and she agreed and I must express my gratitude for her time, research and submissions in this matter.

[21] It is trite that in many traditions and statutes of civil or religious law, consummation of a marriage is the first official act of sexual intercourse between married people. It is this act which seals the contract of marriage. The Chambers Dictionary, Chambers Harrap Publishers Ltd 1993 defines “consummate” as follows:

‘Consummate – to raise to the highest point; to perfect or finish; to make (marriage) legally complete by sexual intercourse. Complete, supreme or perfect of its kind; skilled or competent. -*Adv* **consummately** – perfectly; with accomplishment. -*n* **consummation** – the act of completing; perfection; the act of sexual intercourse which makes a marriage legally valid.’ (my emphasis)

[22] The consequences of failure to consummate are even made clearer in Collins Dictionary of Law (C) W-J. Stewart 2006 where the learned authors defined it thus:

‘Consummation of marriage: sexual intercourse between married persons after their marriage by the insertion of the penis into the vagina. Inability to consummate because of impotence or refusal to consummate is a ground for nullity of the marriage.’ (my emphasis)

[23] In my view, herein lies the confirmation and solidification of a valid marriage. Ms Kishi submitted that marriage is indeed a contract, but, should not be viewed as an ordinary contract as its existence depends on the fulfilment of other formalities such as the necessity for its registration and solemnization by a registered marriage officer therefore not necessarily consummation.

[24] I disagree with counsel on the basis that in our law, one of the reasons for a divorce is refusal of conjugal rights. Surely if refusal of conjugal rights is such a crucial and determining factor in the existence of a marriage, why should lack of consummation be held otherwise.

[25] She further argued that the courts should move away from the traditional requirements and meaning of marriage in other words adapt a new approach. She

further submitted that consummation should not be a requirement for the validity of a marriage in Namibia as some countries have abandoned it. This argument is equally shared by Ms Horn. However, counsel did not state what this institution should be called in the absence of consummation.

[26] What I can glean from their arguments is that both counsel not in so many words agree that the marriage was not consummated. The cardinal question is what is the effect of this failure to consummate. From the authorities cited, a marriage is not void *ab initio* on the grounds of non-consummation, but, is, voidable. Therefore, what calls for interrogation is whether this marriage is voidable or not.

[27] Ms Horn's submission is that from her research she established that for a marriage to be valid the following requirements should be met namely that:

- a) all the formalities need to be adhered to;
- b) there should be voluntary consent;
- c) the parties should have the required capacity to enter into the marriage; and
- d) should be solemnized by a competent and recognised marriage officer.

[28] She further stated that there is no statutory requirement that the validity of a marriage carries consummation as a requirement. She also stated that there are no common law grounds either.

[29] The court is very grateful for her invaluable research and submissions. It seems to me that this is a novel question in this jurisdiction which requires me to wade through these murky waters of this legal question.

[30] I had the privilege to peruse a Botswana case, *Muzwiduma v Muzwiduma* F 178/2005 (delivered on 12/11/2007) wherein Masuku J at para 24 opined that failure to consummate a marriage as a result of a party's willfulness should not be used as a ground for nullity. In as much as this is a foreign judgement, I adopt the same reasoning, but, go further and say that the deliberate act should not be available to any party who creates a condition which makes it impossible for an innocent party to fulfil its obligation as this would be a constructive non-performance.

[31] From the evidence gleaned it is clear to me that it is plaintiff who has been making it impossible for consummation to take place. For that reason his willfulness cannot be used to benefit him.

[32] In *casu*, the parties did not consummate their marriage for years. It, therefore, stands to reason that the marriage lacked completeness. In as much as it was and solemnized and registered, lack of consummation renders it voidable.

[33] It is not in dispute that consummation is an integral and necessary ingredient of a marriage. It is from the said consummation that conjugal rights which if they are withheld form a ground for divorce. If, it was not an important ingredient, then I do not see how it would qualify as a ground for divorce. The fact that it is a legally recognised element it stands to reason that failure to fulfil it renders the marriage a nullity.

[34] The fact that a marriage institution is an interpersonal relationship that is intimate in its very nature and is sexually acknowledged by the parties is proof that it is an important cog in the marital wheel and of which without it, there would be no positive matrimonial movement. This element is lacking in this marriage, although it was valid at inception. From the conduct of the parties it is clear to me that it is defendant only who had a serious intention of entering into a legal marriage. The same cannot be said of plaintiff. His refusal to share his home and life including introducing her to his family and above all refusing her conjugal rights is proof that he was not genuine in entering into this supposed Holy matrimony.

[35] Plaintiff conduct misled defendant into believing that they were entering into a genuine marriage. Plaintiff misrepresented a material fact and got her to perform the motions of a marriage. This marriage was not *bona fide*.

[36] In my mind, lack of consummation, therefore, renders the marriage voidable and a nullity. The reason being that, if there is no consummation in a marriage refusal of conjugal rights cannot be available to the parties as a ground for divorce in

future as such rights would not have been previously enjoyed by the parties. You cannot refuse with something which you have not used before.

[37] It is doubtful that plaintiff loved defendant. His behaviour is not in accordance with that of a married man. He refused to consummate the marriage and to introduce her to his family for over 5 years and has not been financially supporting her. This type of conduct is contrary to a normal marriage relationship. I see, no reason why plaintiff should come to seek a divorce on that basis when defendant is also claiming the same right. If this was true, I see no reason why defendant should be clamoring for sexual intercourse if plaintiff is also eager to indulge.

[37] Taking into consideration the evidence of the parties, I find that plaintiff was not truthful that defendant is refusing him conjugal rights. Plaintiff orchestrated this marriage for reasons other than forming a family, but, for other reasons which are only known to himself. This was a sham marriage.

[39] In view of the fact that the marriage was valid, but, was not consummated, it is, therefore, voidable and qualifies for nullification. In the result the following is the order of court:

1. The marriage contracted by the parties on the 28 October 2011 at Outapi Magistrate Court is nullified.
2. All the benefits which accrued to the parties as a result of this marriage are cancelled as being of no force or effect.
3. Each party must pay its own costs.

APPEARANCES

PLAINTIFF: F. Kishi
Of Dr. Weder, Kauta & Hoveka Inc., Ongwediva

DEFENDANT: W. Horn
Of W Horn Attorneys, Oshakati