



**REPORTABLE**

CASE NO: SA 21/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**HERMAN KONRAD**

**Appellant**

and

**SHANIKA NDAPANDA**

**Respondent**

**Coram:** SHIVUTE CJ, CHOMBA AJA, and MOKGORO AJA

**Heard:** 3 OCTOBER 2018

**Delivered:** 28 FEBRUARY 2019

**Summary:** The appellant, Mr. Herman Konrad, instituted motion proceedings in the High Court seeking for an order declaring his marriage to Ms. Shanika Ndapanda, the respondent, null and void. The appellant alleged that at the time he married the respondent, he was already in an existing marriage to his 'first wife'. The first wife also filed an affidavit supporting some of the allegations made by the appellant. The respondent filed an answering affidavit in which she disputed some material allegations made in the appellant's papers. Among other issues in dispute, the respondent

contended that at the time she married the appellant, she was not aware that he was already married.

After considering the averments made in the affidavits, the High Court found that the respondent's denials raised a genuine dispute of facts. The court further found that the appellant knew in advance that there would be a genuine and material dispute of fact. Nonetheless, the appellant approached the court by way of motion proceedings, thereby running the risk of having his case dismissed with costs. The application was accordingly dismissed with costs.

Aggrieved by the dismissal of his application, the appellant noted an appeal to the Supreme Court against that decision. On appeal, the issues for determination remained unchanged. The first ground laments the dismissal of the application with costs. The second issue concerned the validity of the purported second marriage.

The appellant submitted that by dismissing the application due to factual disputes, the court *a quo* failed to exercise its powers in terms of the rules of the High Court to facilitate the resolution of the issues justly, speedily, efficiently and cost effectively.

The appeal was unopposed since the respondent had withdrawn her notice to oppose the appeal on the eve of the hearing.

The averments made by the respondent make a case for a putative marriage. However, there was no formal application for a declaration of a putative marriage nor was there a cross appeal challenging the decision of the High Court not to have had decided the issue of a putative marriage. It was argued on behalf of the appellant that the issue could not therefore be decided by the Supreme Court.

The Supreme Court agreed with the findings of the High Court that there was a genuine and material dispute of fact and that the matter could not be heard on affidavit. However, the court was of the opinion that the court *a quo* erred in dismissing the case on procedural grounds instead of applying the overriding objective of judicial case management and the applicable rules of court to ensure the ventilation of the issues brought before it. For this reason, the appeal succeeded in part and the order of the High Court was set aside.

The Supreme Court also held that the prayer by the appellant to nullify the second marriage could not be decided in isolation. It held that the declaration of the invalidity of the marriage should be dealt with together with the claim for a putative marriage, especially in the circumstances where there is a dispute of fact as to the bona fides of the parties. This will also prevent any prejudicial effect on the proprietary interests of the respondent, if any, upon the determination of the existence of a putative marriage. The court agreed with the appellant that the issue of a 'putative marriage' was not properly placed before it. However, asking the court to make a declaration of the invalidity of the marriage will adversely affect the respondent's rights that may arise from the consequences of a putative marriage. This is not to say that the court has made any determination about the existence of a putative marriage. In cases such as this and on grounds of public policy, fairness and equity; the declaration on the validity of a marriage and that of a putative marriage should be determined together and not in the vacuum.

The court held further that rule 67 of the Rules of the High Court is couched in discretionary terms. It is thus not right for this court to direct the High Court on how it may exercise its discretion when a matter cannot be decided on affidavit. Accordingly, the court referred the matter back to the High Court to be placed under judicial case management for resolution.

As to the issue of costs, the court held that as the appeal had succeeded in part and considering the circumstances of the case, no order as to costs would be made.

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## APPEAL JUDGMENT

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SHIVUTE CJ (CHOMBA AJA and MOKGORO AJA concurring):

### Background

[1] The appellant brought an application in the High Court seeking an order declaring his marriage to the respondent null and void *ab initio*, due to the fact that he was already married at the time of the solemnization of the second marriage.

[2] The appellant married his first wife in 1981. Two now major children were born to the parties. On 7 September 1992, the appellant purported to enter into a marriage with the respondent before a magistrate. Subsequently, in 2009, the 'marriage' broke down when the appellant retired and moved back to his home village where, according to the respondent, he was 'cohabiting with his girlfriend.' In 2014, the respondent instituted divorce proceedings against the appellant. The divorce proceedings have since been withdrawn, in light of the present litigation. Broadly, this factual background is common cause or is not seriously disputed.

[3] The parties, who are now both pensioners, disagree on a number of factual elements, which I will now briefly outline. Amongst many contested issues in the parties' affidavits, I have identified the three which are of most consequence to the proceedings. Firstly, the parties disagree about whether the respondent knew about the appellant's

first marriage. The respondent claims that the appellant never informed her of his first marriage and, therefore, the first time that she became aware of his previous marriage was 'during 2012' when the appellant approached her with the request to sign certain papers with a view to selling the house, something that she refused to do. Conversely, the appellant claims that he had informed the respondent of his first marriage; that his first wife moved out when the appellant became romantically involved with the respondent, and that the appellant and the respondent knew each other long before they became romantically involved in 1991. As if to muddy the already dirty waters, the appellant's first wife entered the fray. She claims in an affidavit that the respondent attended the wedding reception (of the first marriage), as the respondent and the 'first' wife were co-workers and friends.

[4] Secondly, the appellant and respondent disagree as to whether the magistrate who solemnized their marriage enquired after their matrimonial status during their wedding ceremony. The appellant alleges that at no stage during the marriage process was he informed that entering into a marriage whilst already engaged in one is illegal. Accordingly, he claims he was unaware of the illegality of bigamy. The respondent alleges that they were asked by the magistrate whether either of them was married, and that they both responded in the negative. She further alleges that later at the religious ceremony where their marriage was blessed in church, they were jointly advised by the pastor of the illegality of marrying whilst already party to a legal marriage. Lastly, the parties disagree about the degree to which the respondent undertook upkeep and renovation of their matrimonial property. The respondent alleges that she assisted with the addition of two rooms to the house. The appellant claims that the addition of the two

rooms was completed before her arrival. He claims to have attached to his affidavit proof of purchasing building materials but no such annexure forms part of the record. The respondent further alleges that she contributed to the municipal accounts and purchased electricity. The appellant refutes this claim. The appellant provided documentary evidence which demonstrates that their municipal accounts were in arrears, but this, of course, is a far cry from proving that he had settled those arrears or that the respondent did not contribute towards payment of the municipal accounts and the purchase of electricity.

[5] After the appellant had allegedly deserted, the respondent attended to the upkeep and maintenance of the house with no assistance from the appellant. The appellant appears to have admitted this allegation when he said in reply that he tried to 'fix up' the house but was 'kicked out' by the respondent.

[6] The High Court found that the respondent's denials raised a genuine and material dispute of fact. It held further that the dispute was relevant in resolving the questions of whether the appellant and the respondent, or at least one of them, contracted the marriage in good faith and whether the respondent was an innocent party, having been ignorant of the impediment to their marriage, as she contends. With reference to a dictum in *Mineworkers Union of Namibia v Rossing Uranium Limited* 1991 NR 299 (HC) at 302D, the court held that the appellant knew in advance that there would be a genuine and material dispute of fact, but nevertheless chose to approach

the court by way of motion proceedings thereby running the risk of having his case dismissed with costs. The application was accordingly dismissed with costs.

#### Issues on appeal

[7] The appeal is premised on two grounds. Firstly, that the court erred in dismissing the application with costs on procedural technicalities and secondly, that once it had been established that there was a first marriage involving one of the parties, this court is obliged to declare the second marriage between the appellant and the respondent invalid or void *ab initio* without more.

#### Submissions of counsel

[8] Counsel for the appellant conceded during oral submissions that it was highly likely that the parties were questioned about their marital status before the solemnization of the second marriage despite assertions by the appellant to the contrary. She, however, argued that the issue of 'putative marriage' raised by the respondent in her answering affidavit was not properly before the court in the absence of a counter-application in the High Court to declare the second marriage a putative marriage.

[9] Counsel conceded that there was a dispute of fact that could not be decided on affidavit. She, nevertheless, submitted that the court *a quo* erred in dismissing the case instead of exercising its discretion to refer the matter to oral evidence so as to resolve

the disputed facts. Counsel referred to rule 1(3) of the Rules of the High Court that sets out the overriding objective of the rules, which includes facilitating the resolution of real issues in dispute justly, speedily, and efficiently as well as cost effectively. Counsel argued that the only issue the court *a quo* was called upon to decide was whether at the time he got married to the respondent, the appellant was already a party to an existing marriage. Once it has been established that the appellant was such a party, then this court is obliged to declare the second marriage a nullity. According to counsel, the bona fides of the parties at the time of the conclusion of the marriage contract was irrelevant in deciding the validity of the second marriage. Counsel argued that the question whether a party had contracted a marriage in good faith should only be considered when determining the issue of bigamy or the existence of a putative marriage. Counsel relied for this proposition on a passage in an unreported judgment of the High Court in *S J G v S G C*, Case no. A186/2009 delivered on 12 October 2009. Counsel urged the Court to set aside the order of the High Court; declare the marriage between the parties null and void and refer the matter back to the High Court for that court to hear oral evidence on disputed facts.

[10] I note that the sentence in para 7 of the unreported judgment in *S J G v S G C* relied upon by counsel, namely '[i]t is trite that a marriage solemnized whilst one of the parties thereto is still a party to an existing marriage is null and void,' is no authority for the proposition counsel contends for. If I understand counsel correctly, the proposition she contends for is this: Once it has been established that the second marriage was contracted whilst one of the parties thereto was a party to an existing marriage, the bona fides of the parties to the marriage is irrelevant even if one of the parties appears



to contend that the marriage should have the consequences of a putative marriage. In those circumstances, so the argument went, the marriage should be declared null and void without more.

[11] The proposition that the validity of the marriage should be decided separately from the claim for a putative marriage cannot be accepted as correct for the following reasons. It is trite that the concept of a putative marriage has been recognized at common law as a measure to provide some relief to an innocent party (who had entered into an invalid marriage without the knowledge of its invalidity).<sup>1</sup> 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.<sup>2</sup> Although the respondent did not make a formal application to have the 'marriage' declared a putative marriage, in substance she raised the issue in her answering affidavit. The allegations she made gave rise to the finding of a dispute of fact by the court *a quo*. It is therefore essential that the issue of the validity of the second marriage should be decided in context and not in a vacuum.

[12] A broader consideration of the circumstances surrounding the solemnization of the second marriage and the proprietary implications of the parties should be undertaken during the determination of the question whether or not the marriage was a nullity. The bona fides of the parties to the marriage is certainly a relevant consideration in this context. The issue that has arisen in the present case where a respondent's

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<sup>1</sup> *Mograbí v Mograbí* 1921 AD 275

<sup>2</sup> *Moola v Aulsebrook* 1983 (1) SA 687 (N)

rights under a putative marriage may be adversely affected should the matter be decided in a piece meal fashion is likely to arise in future cases as there may well be parties to marriages who find themselves in circumstances similar to those of the respondent. As a matter of public policy, equity and fairness to both parties to the union, it is imperative that the declaration of the invalidity of a marriage and that of a putative marriage, if properly raised, should be determined in tandem and not in isolation.

Whether the court *a quo* erred by dismissing the application instead of referring it to evidence

[13] By instituting motion proceedings in this matter, the appellant chose not to pursue his case by way of trial. Additionally, he did not ask for the matter to be referred to oral evidence in the court *a quo*. The court has a wide discretion in dealing with an application that cannot be decided on the basis of evidence on affidavit, but such discretion should be exercised in accordance with principle.<sup>3</sup> According to rule 67(1) of the Rules of the High Court, the court may:

(1) dismiss the application or make any order the court considers suitable or proper with the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may –

- (a) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear and be examined and cross-examined as a witness; or

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<sup>3</sup> *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 396D - E

(b) refer the matter to trial with appropriate directions as to pleadings, definition of issues or any other relevant matter.<sup>4</sup>

[14] While it is within the discretion of the court *a quo* to have dismissed the application since it could not be decided on affidavit, it does not follow that the application will always be dismissed with costs in such a case. There may be circumstances that will persuade a court not to dismiss the application but to order the parties to trial together with a suitable order as to costs.<sup>5</sup> Also, in a proper case and where the dispute between the parties can be determined speedily it might even be proper to invoke the provisions of the rules of court as to the hearing of oral evidence.<sup>6</sup>

[15] The court should have the opportunity of seeing and hearing the witnesses before coming to a conclusion based entirely on affidavits.<sup>7</sup>

[16] The exercise of the court's discretion in Rule 67 should be read with the overriding objective of the court rules to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable.<sup>8</sup> By dismissing the case the court *a quo* left the issue as to 'putative marriage' and the proprietary rights of the parties unresolved despite the disputes being alive in the court. In this instance the court *a quo* failed to resolve the real issues in dispute justly, efficiently and cost effectively as far as practicable.

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<sup>4</sup> Rule 67 of the Rules of the High Court of Namibia: High Court Act, 1990.

<sup>5</sup> *Van Aswegen and another v Drotskie and another* 1964 (2) SA 391 (O) at 395C - D

<sup>6</sup> *Ibid*, at 395D - E

<sup>7</sup> *South African Veterinary Council and another v Szymanski* 2003 (4) SA 42 (SCA) at para 23, referencing citing Innes CJ's remark in *Frank v Ohlsson's Cape Breweries Ltd* 1924 AD 289 at 294.

<sup>8</sup> Rule 17

[17] The appellant urges that the matter be remitted to the High Court with the direction for that court to refer the matter to oral evidence as contemplated under rule 67(1) (a) of the Rules of the High Court. I note, however, that rule 67 is couched in discretionary terms and avails wide discretion for the court to: dismiss an application,<sup>9</sup> or make any other order the court considers suitable,<sup>10</sup> or direct that oral evidence be heard on specified issues,<sup>11</sup> or refer the matter to trial with appropriate direction as to pleadings, definition of the issues or any other relevant matter.<sup>12</sup> Consequently, it would not be right or just in the circumstances for this court to direct the High Court as to how it may exercise its discretion in terms of rule 67. That court should be given latitude to exercise its discretion informed, amongst other things, by the need to resolve the matter justly, expeditiously, efficiently and cost effectively.

[18] The result is that the appeal must partially succeed. The matter is to be referred back to the High Court for that court to exercise its discretion as to how the matter should proceed.

### Costs

[19] In his notice of appeal, the appellant asked for the costs of the appeal if opposed. The respondent filed her notice of intention to oppose the appeal on 22 November 2017, but withdrew the opposition on the eve of the hearing. Moreover, counsel for the

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<sup>9</sup> Rule 67(1)

<sup>10</sup> Ibid

<sup>11</sup> Rule 67(1)(a)

<sup>12</sup> Rule 67(1)(b)

respondent was going to argue the appeal on instructions of the Director of Legal Aid. During the hearing counsel for the appellant did not press for a costs order. In the circumstances, no order as to costs should be made.

Order:

[20] In the result, the following order is made:

- (a) The appeal succeeds in part.
- (b) The order of the High Court dismissing the appellant's application with costs is set aside.
- (c) The matter is remitted to the High Court to be placed under judicial case management for resolution, taking into account the views expressed in this judgment.
- (d) No order as to costs is made.

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**SHIVUTE CJ**

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**CHOMBA AJA**

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**MOKGORO AJA**  
APPEARANCES

APPELLANT:

E.M. Angula

Instructed by AngulaCo. Inc.

Windhoek

RESPONDENT:

None Appearance