



NOT REPORTABLE

CASE NO: SA 9/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ANASTASIA SHAFETANGE AMUNYELA

Appellant

and

POMBILI NATANGWE AMUNYELA

First Respondent

PENDAPALA TANGENI AMUNYELA

Second Respondent

PHILLIP NAAPOPYE JUNIOR AMUNYELA

Third Respondent

DAVID FILLIPUS

Fourth Respondent

CAROLINE AMUNYELA

Fifth Respondent

FRIEDA FILLIPUS

Sixth Respondent

Coram: MAINGA JA, SMUTS JA and FRANK AJA

Heard: 15 April 2024

Delivered: 24 May 2024

Summary: This is an appeal against the judgment and orders of the High Court, wherein that court essentially dismissed the appellant's application to have her marriage with the deceased declared a putative marriage. On 8 August 1996 and in

England the late Phillip Amunyela (the deceased) and the appellant entered into a marriage in terms of the laws of England. The deceased passed away intestate on 29 November 2014.

The deceased was still married to his first wife at the time he married the appellant and only obtained a decree of divorce from his first wife on 16 April 1999. The divorce proceedings which resulted in the divorce decree lasted from 1998-1999. The deceased was then convicted of bigamy in the year 2000.

In 2006, the deceased's ex-wife opted to buy out the deceased from the property referred to as 16 Pullman Street by the respondents. In this regard, the appellant had to witness a power of attorney wherein the deceased appointed Mr Tobias Johannes Adrian Louw as conveyancer to effect the transfer of the said property to the ex-wife. Attached to the power of attorney was the deed of transfer. On both the power of attorney and the Deed of Transfer, the date of divorce was indicated as 16 April 1999. Though it was handwritten on the power of attorney and typed in on the deed of transfer.

The appellant asserted that she only became aware that the deceased though divorced from the ex-wife at the time of his death, was still married to her at the time he entered into marriage with the appellant. She thus *bona fide* believed that the deceased was divorced at the time he married her.

The respondents on their part denied that the appellant only became so aware after the death of the deceased. They averred that she must have become aware of the divorce date at the latest in 2006 when she witnessed the power of attorney and the Deed of Transfer.

The full birth certificate of the appellant and the deceased's son also reflected that the parents were unmarried. To this, the appellant merely stated that it was a mistake by the Ministry of Home Affairs.

The appellant further had no explanation for how she could not have become aware of the deceased's acrimonious divorce proceedings from his ex-wife during 1998 to

1999. She further had no explanation to how she could not have become aware of his conviction of bigamy in the year 2000. The respondents did not file heads of argument and have also not sought condonation in this regard.

The appellant on her part, filed the notice of appeal and the appeal record late. She sought condonation and re-instatement for the late noting of the appeal and the appeal record.

Held that, the appellant filed a condonation and re-instatement application for the late filing of the notice of appeal and the record, but nothing is said in both affidavits – why the record was filed late.

Held that, the explanation tendered for the delay in filing the notice of appeal late was insufficient.

Held that, the appellant offered no reasonable explanation for the entry on her son's full birth certificate – to the effect that she and the deceased were unmarried at the time of his birth.

Held that, it was highly unlikely that the deceased would have gone through an acrimonious divorce without it coming to the knowledge of the appellant.

Held that, it was equally highly unlikely that the appellant had no knowledge of the deceased's bigamy conviction.

Held further that, while appellant might not have known at the time of her marriage to the deceased that he was still married to his ex-wife, she learnt of the defect in her marriage long before he died.

Consequently, the application for condonation for the late filing of the notice of appeal and the appeal record is refused and the appeal is struck from the roll with no order as to costs.

APPEAL JUDGMENT

MAINGA JA (SMUTS JA and FRANK AJA concurring):

Introduction

[1] This appeal is against the judgment and order of the High Court, that court dismissing the appellant's application to have her marriage with the late Phillip Amunyela declared a putative marriage.

[2] The respondents did not file heads of argument as is required by rule 17(3) of the Rules of this Court. I accept that the appeal is unopposed.

Background facts

Appellant's case

[3] On 8 August 1996 and in England the late Phillip Amunyela (the deceased) and the appellant entered into a marriage in terms of the laws of England. The deceased passed away intestate on 29 November 2014. Appellant is the executrix in the estate of the deceased.

[4] Appellant met her late husband in March 1995, while she was studying in London. During one of their conversations the deceased had mentioned a 'previous wife', but informed her that they were separated. He further informed her that prior to his going to London he was living with a family member as the common home was occupied by his previous wife and their children (first and second respondents). As a result she held the *bona fide* belief that he was divorced from his previous wife. Moreover, he demonstrated love, care and commitment towards her, their

relationship and family. They did everything together as husband and wife and she therefore had no reason to doubt him or think of him as being dishonest.

[5] Appellant, was made aware after the death and burial of the deceased that although the deceased was divorced from his first wife at the time of his death, he was still married to the first wife at the time he married her.

[6] She experienced challenges with the administration of the estate, and appointed Ms Hans-Kaumbi to assist her in this process. She was advised that Erf 392, Academia, Windhoek, which was the major asset in the estate had to be sold to her and that the major heirs would need to consent thereto. First and second respondents are the major heirs and were reluctant to sign the consent. Appellant was advised to approach a legal practitioner to compel the first and second respondents to sign the consent forms and all necessary documents. She approached her legal representative of record, who addressed a letter to the two respondents requesting them to sign the consent forms failing which she would approach the appropriate forum for the necessary relief. The letter was served on the two respondents.

[7] In essence, the consent form provided that the respondents consent to the selling of 50 per cent of Erf 392, Academia, Windhoek to the appellant for the price of N\$ 3 100 000.

[8] The first and second respondents refused to sign the consent forms. Instead they approached Fisher, Quarmby & Pfeifer Attorneys who wrote to appellant's legal

representative stating that, in order to consider the validity and reasonableness of the sale and granting of consent, they wanted copies of letters of Executorship in the estate; valuation of Erf 392, Academia; draft deed of sale and statement reflecting the current balance due by the co-owners of the property. They further wanted to know whether appellant and the deceased remarried after the deceased's divorce to his first wife and his conviction of bigamy and whether they had a joint or separate estate(s). In that letter they labelled appellant and deceased's 1996 marriage as putative.

[9] The appellant was then advised by her legal representative that her marriage to the deceased was *void ab initio* as he was still married to his first wife at the time he married the appellant and because the deceased only divorced his first wife in 1999.

[10] Appellant alleges that she was not aware at the time of her marriage to the deceased that he was married to someone else. She was advised that her marriage to the deceased was a putative marriage. Further, she alleges that despite the existence of this first marriage, a marriage was duly solemnised between herself and the deceased and that at the time she had no knowledge that he had not divorced yet, as such the marriage should be regarded a putative marriage.

[11] She insisted that she and the deceased regarded their marriage to be in community of property and both regarded the marriage lawful, especially she who was the innocent party. She prayed that the marriage be declared putative and the

consequences be one of a marriage in community of property and a declaration that she was entitled to half share of the estate of late Phillip Amunyela.

The respondents' case

[12] The first and second respondents raised a preliminary point of the joinder of the four other biological children of the deceased. They then went on to deny that the marriage between the appellant and the deceased was a putative marriage. According to them, the appellant knew that their father was not divorced at the time she married the deceased. Further, that if indeed she was unaware of the marriage with their mother at the time of their marriage, the appellant at least became aware of this fact by 2006.

[13] They further state that the deceased divorced his ex-wife, after protracted divorce proceedings, on 16 April 1999. In that regard, the deceased and his ex-wife concluded a settlement agreement. In terms thereof, the ex-wife was entitled to reside in the immovable property at 16 Pullman street for three years from the date of divorce or until she remarried, whichever event occurred first. In 2006, the ex-wife purchased his half share in and to the immovable property at 16 Pullman Street, Windhoek from the deceased. On 3 November 2006, the deceased granted a power of attorney to transfer to Mr Tobias Johannes Adrian Louw and attached to such power of attorney was a Deed of Transfer.

[14] The first page of the power of attorney as well as the second page of the Deed of Transfer *inter alia* provide 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 . . .'

[15] Given the relevant portion of the power of attorney, the date of divorce indicated as 16 April 1999, they therefor aver that it is unlikely that she did not become aware of that date when she initialled each page and signed as witness. They further find it unlikely that, if as the appellant says she and the deceased were very close and shared everything with each other, the deceased would not have told the appellant of his protracted and antagonistic divorce with the first wife, their mother during 1998-1999. Furthermore, they find it unlikely that the appellant was not aware of the fact that the deceased was convicted and sentenced for bigamy in 2000.

[16] Respondents state that the property in question is the biggest asset in their late father's estate and its valuation at N\$ 3 100 000 by the appellant is 'not market related and is way too low' and they are not in agreement with the valuation of the property.

[17] Respondents further state that on the full birth certificate of Phillip junior (third respondent), the appellant and the deceased's son, which certificate the deceased had applied for Phillip junior, in his capacity as the father, it is indicated that the

deceased and the appellant were not married to each other. The respondents postulate that the appellant must have known of this entry on her son's full birth certificate and failed to correct this position because she knew this entry to be correct. She only acquired another birth certificate for her son after the death of his father when she realised that the initial birth certificate would count against her for purposes of her inheritance.

[18] Respondents state that should this Court declare the marriage between the deceased and the appellant a putative marriage, the six children of the deceased, including the son he begot with the appellant would be prejudiced.

Appellant in replication

[19] In her reply, the appellant took the view that there was no need to join the other children of the deceased as they have no interest in the outcome of her application and they would not be prejudiced if the relief sought was granted. After all the other four biological children gave their consent for the immovable property to be sold to her.

[20] The appellant insists that she only became aware that the deceased was married at the time he married her, after his burial. She further maintains that she merely signed the power of attorney and was advised that the date of divorce therein, was inserted by the conveyancer after she witnessed the document. Further, that she merely witnessed the power of attorney and did not scrutinize the contents thereof. She had no reason to scrutinize the deed of transfer which was attached to the power of attorney. She did not read or cannot recall reading the power of attorney particularly so because, the deceased informed her that his ex-wife decided

to 'buy him out' of the property and that the documents she witnessed in respect of that transaction were to give effect thereto.

[21] The appellant further asserted that not declaring the marriage putative would prejudice her. She explained that, she purchased the property concerned in 2001 after renting same for years from the Government. She was the exclusive owner of the property in terms of deed of transfer. In order to register a bond over the property, the 'property was endorsed' and that such 'endorsement is to the effect that we are married in community of property'. She states that, they were in fact married in terms of the laws of England and not in community and therefore the endorsement was incorrect. Further, since she is the exclusive owner of the property, if the marriage is not declared as putative, the respondents would not benefit therefrom.

[22] Regarding the endorsement on her son's birth certificate indicating that the parents were unmarried, she states that she had not used the birth certificate before, therefore did not notice the error. She corrected the error after she noticed it. They used the abridged birth certificate all the times. The indication on the birth certificate that they were not married was a mistake made by Home Affairs.

[23] The fourth, fifth and sixth respondents, once joined to the case, filed answering affidavits to the effect 'that they signed the consent forms, but that had they known that appellant was not married to their father they would not have signed'.

High Court proceedings

[24] The court *a quo* referring to *Moola & others v Aulsebrook NO & others*¹ set out the requirements for a putative marriage. That court reasoned that, the appellant signed at the bottom of each page of the power of attorney as it related to the deed of transfer of an immovable property at 16 Pullman Street to the deceased's first wife. That, it is not a requirement for witnesses to have knowledge of the contents of a document they witness, but that the appellant was not just an ordinary witness. The court further reasoned that she was witnessing a document that had a serious bearing on her husband and his marital status at the time. The court found that appellant's version that she did not know about the marriage status of her late husband and his first wife, when she signed the documents transferring the property at 16 Pullman Street to the first wife to ring hollow. The court accepted the version of the respondents that she must have known at that time.

[25] The court further noted that on the second page of the deed of transfer, it states that the deceased divorced his first wife in terms of a decree of divorce on 16 April 1999. The court further noted that the appellant initialled this page and found the appellant's version that she did not see the divorce date to be improbable.

[26] The court held the view that, on the appellant's own version, the deceased told her that he was separated from his first wife, and it was a matter of common sense that a separation is different from a divorce. The court further held the view that it was 'incumbent upon' the appellant to make further enquiries from the deceased regarding this separation before committing herself.

¹ *Moola & others v Aulsebrook NO & others* 1983 (1) SA 687 (N).

[27] That court relying on the authors Cronje *et J Heaton*² who states that as soon as both parties become aware of the defect, the relationship automatically ceases to be a putative marriage and the well-known *Plascon Evans* rule on factual dispute, it found that the conclusion that the appellant became aware of the divorce order in 2006 was more probable. For that reason the court declared the marriage between appellant and deceased husband to be *null and void ab initio* and refused to declare the marriage a putative marriage.

[28] The appellant appeals against the whole judgment and order of the court below.

The condonation application for the lapsing of the appeal

[29] The court below's judgment was delivered on 9 August 2021. The appellant however only filed her notice of appeal on 22 February 2022. The appeal record was then only filed on 14 April 2022. In terms of rule 7(1) of this Court's Rules an appellant is required to lodge notice of appeal within 21 days from the date of the judgment and in terms of rule 8(2)(b), the record is required to be filed three months from the date of the judgment appealed against. As the appellant's notice of appeal was filed after six months from the date of judgment and the record after eight months, the appeal had lapsed. The appellant filed a condonation and re-instatement application for the late filing of the notice of appeal and the record but nothing is said in both affidavits why the record was filed late. The appellant's legal representative tenders costs occasioned by such condonation application in the event that it is opposed.

² D S P Cronje and J Heaton *South African Family Law* 4 ed (2015).

[30] In *Petrus v Roman Catholic Archdiocese*³, this Court had this to say:

[9] It is trite that a litigant seeking condonation bears an onus to satisfy the court that there is sufficient cause to warrant the grant of condonation. Moreover, it is also clear that a litigant should launch a condonation application without delay. In a recent judgment of this court, *Beukes and Another v SWABOU and Others*, case No 14/2010, the principles governing condonation were once again set out. Langa AJA noted that “an application for condonation is not a mere formality” (at para 12) and that it must be launched as soon as a litigant becomes aware that there has been a failure to comply with the rules (at para 12). The affidavit accompanying the condonation application must set out a “full, detailed and accurate” (at para 13) explanation for the failure to comply with the rules.

[10] In determining whether to grant condonation, a court will consider whether the explanation is sufficient to warrant the grant of condonation, and will also consider the litigant's prospects of success on the merits, save in cases of “flagrant” non-compliance with the rules which demonstrate a “glaring and inexplicable disregard” for the processes of the court (*Beukes* at para 20).’

The explanation for the delay

[31] The appellant deposed to an affidavit in support for condonation and reinstatement of the appeal. She states that her erstwhile legal representative Ms Monika Angula (Ms M A) who was previously in the employ of AngulaCo Incorporated, appellant’s current legal representatives failed to inform her of the outcome of her matter after the judgment was delivered on 9 August 2021. The judgment came to her attention on 30 November 2021 and only received the judgment on 1 December 2021. The circumstances under which she came to receive the judgment, resulted from a call she received from the law firm to pay an account she received from Ms M A. She was informed that Ms M A was leaving the employment of the law firm and the invoice was forwarded to her on 30 November

³ *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) paras 9 -10.

2021 to settle. She called the firm to enquire about the status of the matter. She was informed that the matter was finalized and that judgment was delivered. When she requested the judgment, she was informed that same would be emailed to her, but that was not done. Perplexed and shocked from the failure to inform her of the outcome of the case she immediately called Ms M A who confirmed that judgment was delivered but that she was under the impression that appellant was informed of the status of her case. She further informed appellant that she discussed the matter with Ms Elise Angula (Ms E A) and she expected Ms E A to inform her. She immediately sought an appointment to see Ms E A, her current legal representative.

[32] She secured an appointment at the firm for 1 December 2021. According to her, it was while she was waiting to enter the consultation room with Ms E A that Ms M A handed her a copy of the judgment. During the consultation Ms E A invited Ms M A into the consultation room. Ms E A enquired from Ms M A why she had not shared the judgment with the appellant, Ms M A stated that because she had discussed the order and judgment with Ms E A she was of the impression that Ms E A would share the judgment with the appellant. Ms E A indicated that she had not seen the judgment and was in no position to discuss same with the appellant. After much deliberation, Ms M A eventually admitted that there was no agreement between herself and Ms E A that Ms E A would communicate the judgment with the appellant.

[33] Appellant then instructed Ms E A to study the judgment and provide her with an opinion. On 15 December 2021, the opinion was provided. The firm however closed for the festive season from 17 December 2021-12 January 2022. The notice of appeal was then filed on 22 February 2022.

[34] Appellant's current legal representative attested to a supporting affidavit. She explains that her office finalised the condonation application by 21 January 2022 and emailed same to the appellant. However, due to the appellant's inbox being full the message did not reach the appellant. The firm then telephoned the appellant on 24 January 2022 when they did not hear from the appellant. It would appear that that the appellant only received the condonation application on 27 January 2022.

[35] From the explanations advanced, it is not explained what happened between 12 January 2022 - 23 January 2022 as well as from 28 January 2022 - 21 February 2022. It is also not explained what steps were taken during these periods and why the condonation application as well as the notice of appeal could not be filed sooner. In fact both affidavits are mute on why the record was filed in April when the record is a one volume of 109 pages. For these reasons, the explanations proffered by the appellant and her legal representative are scant and fall short of full and detailed explanations.

[36] The explanation for the delay in 2021 was clearly attributed to the appellant's erstwhile legal representative's nonchalant and frankly unacceptable conduct. While it appears that the explanation for the delay is not satisfactory, I cannot find that this was a case where the appellant should not escape the results of her erstwhile legal representative's lack of diligence. Informing the appellant of the outcome of the case, was obligatory immediately after noting the judgment. Ms M A could not harbour the impression that Ms E A would speak to the appellant about the judgment when she did not even ask Ms E A to do so. The insufficiency of the explanation tendered

should be considered with the prospects of success and it is to that subject I now turn.

Prospects of success

[37] In this Court the appellant abandoned the prayer that the marriage be declared to be in community of property. There is only one issue for determination on the merits and that is, whether the marriage between the appellant and the deceased concluded in England is putative or not. The court below denied appellant the prayer for the reason that appellant must have become aware of the defect which rendered her marriage to the deceased void before (2006), deceased died in 2014. That court relied on the authority of the authors Cronje and Heaton where they state that, as soon as both parties become aware of the defect, the marriage automatically ceases to be a putative marriage.

[38] The requirements for a putative marriage are:

- (a) there must be bona fides in the sense that both or one of the parties must have been ignorant of the impediment to the marriage;
- (b) the marriage must be duly solemnised;
- (c) the marriage must have been considered lawful in the estimation of the parties, or of that party who alleges the bona fides.⁴

[39] Embodied in the issue for determination is the issue whether the appellant only became aware of the defect in her marriage to the deceased, after the death of the deceased, or she became aware by the latest in 2006 as the court below found.

⁴ *Moola & others v Aulsebrook NO & others* 1983 (1) SA 687 (N) at 690.

[40] From the appellant's founding affidavit, when she met the deceased in 1995, they were both students in London, England. They married on 8 August 1996. During one of their conversations, the deceased had mentioned a previous wife to her, and further that he and that wife had separated. The deceased further informed her that before he went to London, he lived with his relatives and that the common home was occupied by his previous wife and her children. With this information at hand she was therefore under a bona fide belief that the deceased was 'divorced from his previous wife'. Therefore she is adamant that, she only became aware after deceased's burial that the deceased though divorced from his first wife, was still married to the first wife when he married her.

[41] The first and second respondents say nay and contend that appellant knew that at the time she married the deceased, deceased's marriage to his first wife still subsisted. They further allege, that she at least during 2006 became aware of the defect of her marriage to the deceased when during 2006 the deceased's first wife purchased the property which was the common home of the deceased and his first wife. In order to effect the transfer, the appellant and the deceased signed a power of attorney and the attached deed of transfer which documents reflected the date of divorce of the deceased and his first wife. Appellant must have become aware of the date of divorce, so it is contended and could not have been innocent and *bona fide* as she alleged.

[42] Additional to the argument above, respondents aver that on appellant's own version of having been very close and shared everything with the deceased, it is highly unlikely that she was not aware of the 'protracted divorce proceedings' of the deceased with his first wife during 1998 and 1999, so is equally highly unlikely that

she was unaware of the deceased's conviction for the crime of bigamy in the year 2000. Respondents further attached a full birth certificate obtained by the deceased at the Ministry of Home Affairs, for their half-brother (third respondent) born between the appellant and the deceased on 17 September 1998. The birth certificate in paragraph 19 reflects that third respondent's parents were not married. The deceased was the informant or gave that information to Home Affairs. They contend that it is unlikely that appellant would not have been aware of this birth certificate and that entry therein.

[43] In reply to the allegations regarding the divorce proceedings in 1998-1999 and the bigamy conviction, the appellant maintains that she stands by her allegation that she only found out after the death of the deceased that he was still married to his first wife when he married her.

Submissions - appellant

[44] Appellant submits that her explanation is reasonable and objectively probable. That the only evidence the court below relied on for the awareness by the appellant of the defect in the marriage between her and the deceased, which rendered the marriage *void*, is her signature on the power of attorney to transfer by the deceased of Erf 3923, 16 Pullman Street, Windhoek to deceased's first or ex-wife. It is contended that appellant was aware of the reason for the transfer and the power of attorney related solely to the transfer and appellant had no reason to scrutinise it or doubt what her husband told her pertaining the transfer. It is further contended that the court below failed to take into account that the date of divorce on the power of attorney was written by hand with ink after appellant had signed the power of attorney and that, that court failed to take the possibility that she may not have seen

the date. It is further contended that even if she had read the power of attorney which is denied, she still would not have become aware of the date of divorce. The appellant therefore contends that the court below should have found that her marriage to the deceased was putative and insists with that prayer in this Court. She is further praying-surprisingly-in the heads of argument for a relief not contained in the notice of motion, that since the marriage is a nullity, the endorsements made on the deed of transfer number No. T 1604/2001 in terms of s 4(1)(b) of the Deeds Registries Act 7 of 1937 dated 8 March 2006 and 11 April 2017 be set aside and that the Registrar of Deeds be ordered to endorse the Deed of Transfer No. T 1604/2001 so as to reflect the sole owner of Erf 392, Academia as the appellant. Appellant further seeks a High Court order to be substituted for respondents paying appellant's costs.

[45] As already stated the respondents did not file heads of argument as is required by rule 17(3) of the Rules of this Court. I accept that to that extent the appeal is unopposed. But notwithstanding appellant still has to convince this Court that her appeal is meritorious.

Analysis of evidence

[46] The facts of this case, though not in all respects set out as clearly as could be desired, present no real difficulty at all. On the version of appellant, she was told by the deceased husband or he mentioned a previous wife to her but that they separated and that before he left for London he was living with relatives as the common home was occupied by the ex-wife and her children. It was on this information that she held a *bona fide* belief that the deceased was divorced from his ex-wife. In other words, she assumed that deceased was divorced, deceased himself did not utter the words divorced. The court below held the view and correctly so, the

words 'divorce' and 'separation' are not synonymous, they denote different meanings. Had she probed the deceased a little bit on the issue of the deceased's ex-wife, he would have confessed to her the exact status of that marriage. The respondents except for saying appellant knew at the time she married the deceased that he was not divorced to his ex-wife do not elaborate how she had acquired this knowledge. I would for the purposes of this judgment, reluctantly find that she probably did not know at that stage that deceased was still married to his ex-wife.

[47] The court below further found that the appellant at least in 2006 must have seen the date (16 April 1999) deceased had divorced his ex-wife when she signed and initialled the deed of transfer and power of attorney to transfer the deceased and his ex-wife's common home property into the name of the ex-wife. Appellant states that the court below could not have relied on her signature for the reason that she did not read the said documents, she blindly signed so to speak or the date of the divorce was entered after she had signed the documents. She has no recollection of her own on whether the date of divorce was not or was on the power of attorney at the time she signed the documents because she was advised that the date was entered by hand in ink after she had already signed. The view taken by the court below on this point cannot be said to be inconsistent with the circumstances of the issue in point given the education level of the appellant and the subject matter for which the power of attorney was granted, particularly page 2 of the deed of transfer where the date of the divorce is reflected as the court below found.

[48] Be it as it may, I will resolve the issue under discussion in favour of the appellant, but the matter does not rest there.

[49] There are three issues raised by the respondents on which the appellant offers no reasonable explanation or no explanation at all; ie, the full birth certificate of the third respondent (the son of the deceased and appellant); the acrimonious divorce of the deceased and his ex-wife and the conviction of bigamy.

[50] While appellant has some explanation on the birth certificate, she has none on the protracted and antagonistic divorce and the deceased's conviction of bigamy. In para 11 of respondents' answering affidavit, they make allegations of protracted, antagonistic divorce proceedings between their mother and the deceased during 1998 and 1999 and the prosecution for bigamy, conviction and sentence of the deceased during 2000. In reply appellant stated, 'I stand by my allegations in the founding affidavit. I was under a *bona fide* belief that the late Amunyela was divorced from his previous wife at the time of our marriage. I only became aware that he was still married to his first wife after his death . . . I was simply informed that they had separated prior to our marriage'.

[51] On the full birth certificate of her son which reveals that his parents were not married, she explains that, that error was not corrected earlier when the deceased was still alive, because she had never used the birth certificate before and as a result she did not notice the error and corrected the error (after the death of the deceased) immediately after she noticed it. She further states that she used the abridged birth certificate at all times which she attached. She attributes the error to the Ministry of Home Affairs. She in that regard attaches full birth certificates of the first and second respondents which were issued on the same date (14 May 2008)

and that the same error reflected on her son's birth certificate, the same error is recorded on the first respondent's full birth certificate. It is contended that both first and second respondents were born while the marriage between their biological parents subsisted and yet first respondent's birth certificate records that the parents were not married while that of the second respondent records that the parents were married.

[52] The information appellant purports to rely on does not assist her case in any way as she was not present at the Ministry of Home Affairs when the three birth certificates were procured. In the birth certificate of her son, it was the deceased who obtained the birth certificate and was him who furnished the information on the document. In the other two it was both parents who secured the birth certificates and provided the information thereon to Home Affairs. Only they can testify as to what happened at Home Affairs. There is no evidence, except for her say so that the error was caused by Home Affairs.

[53] The fact is, that birth certificate reveals that the parents are not married. Appellant is not saying she had not seen the birth certificate, but that she had not used it before, she used the abridged birth certificate at all times. Whether the mistakes in the birth certificates are attributable to the Ministry of Home Affairs, it is very unlikely that she had not seen or used her son's full birth certificate, until after the death of the deceased (it is unfortunate that the date stamp of when the full birth certificate was issued is illegible, we cannot see when it was issued).

[54] Even if I am wrong on the imprint of the full birth certificate, it is highly unlikely that the deceased would have gone through an acrimonious divorce without it coming to the knowledge of the appellant. It is also highly unlikely that the deceased would have been convicted of bigamy without it coming to the knowledge of the appellant. Appellant claims that the deceased 'demonstrated love, care and commitment towards me, our relationship and family. We did everything together as husband and wife and I had no reason to doubt him or think of him as being dishonest'. (The underlining is mine).

[55] Appellant failed to convince us that while she might not have known at the time of her marriage to the deceased that he was still married to his ex-wife, she learnt of the defect in her marriage long before deceased died. The court below was correct in rejecting the appellant's version and there are no prospects on the merits and the application for condonation should fail.

Costs

[56] Appellant failed in the court below and in this court as well. There should be no order as to costs.

Order

[57] The following order is made.

1. The application for condonation for the late filing of the notice of appeal and the appeal record is refused.
2. The appeal is struck from the roll.

3. No order as to costs.

MAINGA JA

SMUTS JA

FRANK AJA

APPEARANCES

APPELLANT:

N Kwenani
Instructed by AngulaCo Inc.

RESPONDENTS:

Unopposed
Tjombe-Elago Incorporated