IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 2462/2019

Reportable: **YES** / ~~NO~~

Circulate to Judges: ~~YES~~ / **NO**

Circulate to Regional Magistrates: ~~YES~~ / **NO**

Circulate to Magistrates: ~~YES~~ / **NO**

In the matter between:

W[...], M[...] Plaintiff

and

W[...], C[...] Defendant

Neutral citation: *W[...] v W[...]* (Case no 2462/2019) (11 April 2025)

Coram: Nxumalo, J

Heard: 02 December 2021.

Date of order: 19 January 2022

Summary: Order granted in favour of the plaintiff without reasons pursuant to a stated case. Defendant sought reasons for the order in terms of Rule 49(1) (c) of the Uniform Rules - application for reasons made out of time without seeking condonation- Such an application must be made within ten days from the date of judgment- reasons provided nonetheless. The plaintiff instituted divorce proceedings. Defendant's special plea - the marriage between the parties null

and void *ab initio* as the plaintiff was already married to a third party at the time of their marriage. Whether the marriage entered into between the parties is null and void *ab initio* — Marriage concluded between the plaintiff and the other party declared null and void *ab initio*- and the marriage between the parties still extant.

ORDER

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1. The marriage concluded between the plaintiff and one K[...] E[...] D[...] V[...] on 24 January 2004, is hereby declared null and void ab initio;

2. The marriage concluded between the plaintiff and the defendant on 12 October 2013, still subsists;

3. The defendant is to pay the plaintiff's costs in respect of the stated case; and

4. The remaining dispute between the parties is postponed sine die.

REASONS

Per **Nxumalo J**

PRELIMINARY STATEMENT:

[1] On 02 December 2021, I heard a stated case pertaining to this matter. Thereafter, on 19 January 2022 after fully considering the matter, I granted an order in favour of the plaintiff without furnishing any reasons. Thereafter, none of the parties lodged any application for reasons to be

furnished within the period stipulated in rule 49(1)(c) of the Uniform Rules of Court. In my opinion, this rule is peremptory. It expressly and unambiguously provides as follows:

> *"(c) When in giving an order the Court declares that the reasons for the order will be furnished to any of the parties on application,* ***such application shall be delivered within 10 days after the date of the order."***[1]

[2] Whilst it is so that litigants are ordinarily entitled to reasons for judicial decisions following upon a hearing, and that when a judgment is sought to be appealed, written reasons are indispensable.[2] It is also so that unreasonable delays in most cases have been proven to cause prejudice to the other party. It is further so that in the interest of justice and good conscience, 'good cause' is a requirement for any extension or abridging of time and the condonation of non-compliance with the rules by a court, regard being had to rule 27(1) of the Uniform Rules.[3] The requirement of 'good cause' gives a court a wide discretion which must in principle be exercised with regard also to the merits of the matter seen as a whole.[4]

[3] It follows from the foregoing that it is peremptory for a party which is in breach of any provision of the rules, including rule 49(1)(c), to apply for condonation *vide* rule 27(3). Such an application, if successful, would obviously trigger rule 49(1)(b), which entitles such a party to deliver its application for leave to appeal within fifteen days after receipt of the reasons at such a later date. The defendant herein, however, did not

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[1] Emphasis supplied
[2] ***Strategic Liquor Services v Mvumbi NO and Others*** 2010 (2) SA 92 (CC), para 15
[3] See also ***Ex parte Oppel and Another in re: appointment of curator ad litem and curator bonis*** [2002] 2 All SA 8 (C) at 10
[4] ***Mimbiri v Road Accident Fund (Ex Tempore Judgment)*** [2022] JOL 60018 (GP), para 3. See also ***Gumede v Road Accident Fund*** 2007 (6) SA 304 (C), para 7

lodge such an application for condonation for non-compliance with rule 49(1)(c).

[4] It is against this backdrop that on **25 May 2023**, I declined the defendant's "*request for reasons*". That ruling, which still stands, was transmitted to the parties on or about **06 July 2023**. Queerly, on 21 July, the defendant lodged an "*application*" to the Registrar for reasons in terms of rule 49(1)(c). Equally queer is the fact that before the outcome of this "*application*" the defendant persisted in its request for reasons on **23 July 2023**. Given the chequered history of this matter it is imperative, for context, to give a brief overview thereof.

SYNOPSIS:

[5] The plaintiff, Ms W[...], instituted divorce proceedings against the defendant, Mr W[...], on or about **06 November 2019**. In paragraph 4 of her particulars of claim she averred that she and the defendant were married to each other on **12 October 2013** out of community of property subject to the accrual system, and that the marriage still subsists.[5] It is also averred in the said paragraph that the parties entered into an antenuptial contract, a true copy of which is annexed to the particulars of claim as Annexure X.[6]

[6] In paragraph 7 of the particulars of claim, the plaintiff further averred that having regard to the duration of the marriage between the parties, etcetera, it would be just and equitable that this Court grant an order for maintenance in her favour against the defendant in terms of the provisions of Section 7(2) of the **DIVORCE ACT** 70 of 1979, in the amount of R10 000.00 per month for a period of 5 years from the date of divorce, and

[5] p5, vol 1, Pleadings
[6] pp 9 to 11, *ibid*

the defendant be ordered to be liable for her medical and dental and ophthalmic costs, including her medical aid for a corresponding period, from the date of divorce.[7]

[7] The plaintiff furthermore sought an order that the defendant render to her an account supported by documented proof containing full particulars of the value of his estate in order to determine the difference in the accrual between the parties' respective estates; debating the aforesaid account and payment to her of any amount due and owing to her in terms of the provisions of Chapter 1 of the **MATRIMONIAL PROPERTY ACT** 88 of 1984 (hereinafter referred to as the "***MPA***").[8]

[8] The defendant, for his own part, ultimately delivered an amended plea together with a special plea. In terms of the latter, he pleaded that the said marriage was null and void *ab initio* as same was unlawful because the plaintiff was already married to a third party; to *wit*: one Mr K[...] E[...] D[...] V[...], at the time she purportedly married the defendant.[9] A certified true copy of the impugned marriage certificate is attached to the plea as Annexure CW1, to the pleadings.[10] In the premise, the defendant prayed that the marriage between the parties be declared void; alternatively, that the plaintiff's claim be dismissed with costs.[11]

[9] In his conditional counterclaim, the defendant in sum prayed that due to the plaintiff's conduct in enriching herself to his detriment, and her actions that led to the irretrievable breakdown of the marriage, the plaintiff would be improperly favoured if this Court did not in terms of Section 9 of the MPA, declare that her right to share in the accrual system of his estate be

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[7] Prayers 2-3, *ibid*
[8] See prayer 4, p8, *ibid*
[9] Para 1.1 to 1.2, p12, *ibid*
[10] P22, *ibid*
[11] p13, *ibid*

wholly forfeited.[12] In her replication, the plaintiff flatly denied that the marriage between the parties was null and void *ab initio* as alleged and pleaded that the purported marriage between her and D[...] V[...] was null and void *ab initio* as a result of the vitiating elements catalogued in paragraphs 2 to 7.[13] Significantly, the plaintiff specifically pleaded that the person who performed the purported marriage between her and D[...] V[...] on 24 January 2004, was not a marriage officer in terms of the **MARRIAGE ACT** 25 of 1961 and therefore the purported marriage was null and void *ab initio* for non-compliance with same.

[10] In the premise, the plaintiff persisted in her claim against the defendant as set out in the particulars of claim and requested this Court to dismiss the said special plea with costs. In her plea to the defendant's counterclaim, the plaintiff once more denied that their marriage is null and void *ab initio*.[14] That is how the pleadings closed and the matter set down for hearing before me on 19 and 20 October 2021. On the first day of hearing, having heard counsel for the parties and having read and considered the documents filed of record, I *inter alia*, ordered as follows, that: (a) the matter be postponed to 02 December 2021; (b) the issue whether the marriage entered into between the parties on 12 October 2013 is null and void *ab initio*, because the plaintiff at all material times hereto was married to a third party, one Mr K[…] D[...] V[...], shall be decided before any evidence is led or separately from any other question.[15]

[11] I also directed the parties to agree on a written statement of facts in the form of a special case for adjudication on or before 15 November 2021, containing: (a) the facts agreed upon; (b) the question of law in dispute

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[12] Para 9, p34, *ibid*
[13] p29 a-29c, *ibid*
[14] Para 4, p36b, *ibid*
[15] See Rule 33(1) to (3) of the Uniform Rules of Court

between the parties; and (c) the parties' contentions regarding those questions. The parties were further directed to annex to the said statement copies of documents necessary to enable me to decide upon such questions and to file their heads of argument on or before 24 November 2021. Costs of the postponement were to be reserved for adjudication with the stated case.[16] The parties, on or about 17 November 2021, delivered an agreed stated case for adjudication. It is common cause that Mr D[...] V[...] has since passed away on 19 April 2019. The following was also agreed between the parties to be common cause; to *wit*:[17]

a. the plaintiff was married to one D[...] V[...] on 24 January 2004, as set out in annexure D;[18]

b. the marriage officer who solemnised the marriage between the plaintiff and D[...] V[...] completed a marriage register in terms of Section 40 of **BIRTHS, MARRIAGES AND DEATHS ACT** 81 of 1963, as set out in annexure E;[19]

c. Act 81 of 1963 has been repealed by Section 33 of the **BIRTHS AND DEATHS REGISTRATION ACT** 51 of 1992;[20]

d. Regulation 5A of the **MARRIAGE ACT** 25 of 1961, reads as follows:

> *"5A.* ***Marriage register****- The marriage register referred to in Section 29A shall contain substantially the information prescribed on form DHA-30."*

[16] p141, Vol 2, Pleadings
[17] Para 7, pp122-124, Pleadings
[18] p136, *ibid*
[19] p137, *ibid*
[20] Act 51 of 1992

e. the relevant regulations applicable on the date of the impugned marriage was published in Government Gazette R883 on 21 May 1993;[21]

f. the marriage between the plaintiff and D[...] V[...] was not registered in the records of the Department of Home Affairs;[22]

g. according to the records of the Department (annexure G) the plaintiff was married on 09 January 1997, which marriage was subsequently dissolved, whereafter the plaintiff married the defendant on 12 October 2013;

h. according to the records of the Department (annexure H) D[...] V[...] was married on 16 November 1999, which marriage was subsequently dissolved by a decree of divorce and D[...] V[...] thereafter married one C[...] J[...] V[...] R[...], on 31 January 2013;

i. it is impossible to conduct an inquiry in terms of Section 6 of Act 25 of 1961, because both D[...] V[...] and D[...] B[...], passed away (the latter having solemnised the impugned marriage); and

j. the impugned marriage was never terminated by a decree of divorce.

[12] Accordingly, the issue joined between the parties was whether the marriage entered into between the parties on 12 October 2013,[23] is null and void *ab initio*, because at all material times hereto the plaintiff was

[21] Annexure J, pp143 to 152, Pleadings
[22] "*the impugned marriage*"
[23] "*the latter marriage*"

married to a third party.[24] The parties' contentions regarding this issue were contained in their respective heads of argument.[25] I thereafter heard oral argument on 02 December 2021 and reserved judgment. Subsequently, on 19 January 2022 I granted an order *inter alia*, declaring the impugned marriage null and void *ab initio* and conterminously; the current marriage extant. I also ordered the defendant to pay the plaintiff's costs in respect of the stated case. The remaining disputes between the parties were postponed *sine die*.[26]

[13] Thereafter, on 01 August 2022 (more than 6 months later) the remainder of the disputes between the parties was set down for hearing and having heard the parties' legal representatives and having read the documents filed of record and carefully considering the matter, I granted a decree of divorce incorporating the Deed of Settlement signed by the parties on the same day.[27] Significantly, in terms of paragraphs 3.2, 3.5 and 3.6 of the said Deed of Settlement, the parties *inter alia* agreed that one Mr A Heyns, a qualified auditor of the firm Enslins Auditors, Kimberley, be appointed as an independent auditor (Receiver) to determine the accrual in the parties' respective estates and that the final award of the said receiver may be made an order of court. The said receiver made his final award on 01 March 2023.

[14] It is against this backdrop that on 04 April 2023, the plaintiff *inter alia*, applied for the said award to be made an order of court and for the costs of the said application to be paid by the defendant. The motion was set down for 12 May 2023. On the said date, however, the matter was postponed to 19 May 2023, with costs to be paid by the defendant. On 28 April 2023, approximately 15 months after the date of the stated case

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[24] "*the impugned marriage*"
[25] pp168 to 182 and pp153-166, Vol 2
[26] p74, Notices
[27] p9, Index, Application dated 04 April 2023

order, the defendant personally requested for reasons for the said order by email, despite at all material times hereto being legally represented or a notice of withdrawal not having been delivered by his attorneys.

[15] On 16 May 2023, the defendant entered appearance to oppose the application to make the Receiver's award an order of court. Significantly, this appearance was delivered by one Dr VI Jameson Attorneys, *sans* any notice of withdrawal by his first attorneys or notice of substitution by the latter.[28] On 19 May 2023, the matter was once more postponed to 30 June 2023. The defendant was granted leave to file his answering affidavit on or before 09 June 2023. The plaintiff, in turn, was granted leave to deliver her replying affidavit on or before 23 June 2023. The foregoing notwithstanding, the defendant did not deliver any answering affidavit to resist the said application.

[16] Instead of lodging a substantive application for condonation for his non-compliance with rule 49(1)(c), the defendant elected to belatedly deliver an application for leave to appeal dated 27 June 2023 and condonation thereof. On 10 July 2023, the plaintiff delivered a notice in terms of rule 30A, to compel the applicant herein to comply with the rules of this Court; alternatively requesting this Court to dismiss the application for leave to appeal dated 27 June 2023. Meanwhile, the plaintiff set down the award application for hearing on 03 November 2023. On 03 November 2023, Stanton J granted the application unopposed and ordered the defendant to pay the costs of the application on an opposed basis. Whilst it is so that our courts are not made for the rules, but the rules for the courts, I am of the opinion that our courts have always had a wide discretion to discourage litigants from unduly protracting lawsuits and unduly increasing costs at the expense of limited judicial resources.

[28] pp23 to 24, *ibid*

[17] I am reminded of what the Constitutional Court remarked with regard to rules which require parties to take certain steps on pain of being prevented from proceeding with a claim or defence: [29]

"But for courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence… Many of the rules of court require compliance with fixed time limits, and a failure to observe those time limits may result, in the absence of good cause shown, in a plaintiff or defendant being prevented from pursuing their claim or defence. Of course, all these rules must be compliant with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of Section 36 of the Constitution. If the limitation caused by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint. The rules may well contemplate that at times the right of access to court will be limited. A challenge to the legitimacy of that effect, however, would require a challenge to the Rule itself. In the absence of such a challenge, a litigant's only complaint can be that the Rule was not properly applied by the court. Very often the interpretation and application of the Rule will require consideration of the provisions of the Constitution, as s 39(2) of the Constitution instructs. A court that fails to adequately consider the relevant constitutional provisions will not have properly applied the Rules at all." [30]

[18] I am of the opinion that, regard being had to the merits of the matter seen as a whole, the defendant egregiously failed to observe the relevant time limits or to show any good cause, substantiating why I should, in my discretion, condone same. It is now trite that condonation cannot be had

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[29] ***Giddey NO v JC Barnard and Partners*** 2007 (5) SA 525 (CC) para 16

[30] My emphasis

for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.[31] Besides, as alluded to above, my ruling still stands. That being as it may, these are the reasons for the order granted.

THE PARTIES' CONTENTIONS:

[19] The plaintiff, in sum, contended as follows, *vide* Ms Sieberhagen, that the marriage officer who solemnised the impugned marriage should have completed a marriage register in accordance with the marriage regulations applicable on the said date and as published in Government Gazette R883 on 21 May 1993. Regulation 5A expressly stipulates that a marriage register should contain substantially the information prescribed in form B1-30. That it is clear that the marriage officer who conducted the impugned marriage did not comply with the provisions of the said regulation. It was also not in dispute that the impugned marriage was never registered in the records of the Department of Home Affairs, as clearly set out in paragraphs 7.7 to 7.9 of the stated case.

[20] The plaintiff also contended that the impugned marriage did not comply with the formalities as set out in the **MARRIAGE ACT**. To this extent, the impugned marriage is null and void *ab initio*. No marriage therefore existed between the plaintiff and D[...] V[...] when the plaintiff married the defendant on 12 October 2013. The latter marriage is therefore valid. That no court order is required to declare the impugned marriage null and void *ab initio*, as same remains so without any declaratory order to that

[31] ***Grootboom v National Prosecuting Authority and Another*** 2014 (2) SA 68 (CC), para 23

effect.[32] The plaintiff in the main predicated its submissions against, *inter alia*, the *ratio decidendi* in the following authorities; to *wit*: ***Francescutti v Francescutti: In re Francescutti; Ex parte Francescutti***;[33] ***Singh v Ramparsad & Others***;[34] ***Minister of Home Affairs and Another v Fourie and Others***;[35] **and** ***Ex Parte Marais*** *(supra).* The plaintiff also referred this Court to certain provisions of the **MARRIAGE ACT** and the regulations made thereunder.

[21] It is against this backdrop that the plaintiff prayed this Court to declare the impugned marriage null and void *ab initio*; the latter marriage valid; the defendant to be ordered to pay the plaintiff's legal costs in respect of the stated case; and the remaining disputes between the parties to be postponed *sine die.*

[22] The defendant, *vide* Ms Labuschagné, contended as follows in sum. That D[...] B[...], who solemnised the impugned marriage, was a Magistrate who was an *ex officio* marriage officer.[36] That the plaintiff attempts to rebut the *prima facie* proof that the certified marriage certificate as well as a copy of the marriage register are valid documents even though both documents purport to be what they ought to be. The plaintiff also attempts to invalidate the fact that both documents were purportedly completed and signed by the said B[...], in the presence of two witnesses.

[23] That the **MARRIAGE ACT** and regulations contain no limitations and do not stipulate that, in the event that the incorrect forms were used to either register or confirm a marriage, that renders same void or invalid. Regulation 5C makes provision for supplementing and rectifying the

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[32] ***Ex Parte Marais and Another*** 1942 CPD 242
[33] 2005 JOL 13472 (W); ***Francescutti v Francescutti Ex Parte Francescutti*** 2005 (2) SA 442 (W) para 18
[34] 2007 JOL 19113 (D); 2007 (3) SA 445 (D) para 11; 32 to 34
[35] 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) para 63 to 64
[36] See Sections 2(1); 5(1) and 6(2) of the **MARRIAGE ACT**

particulars in the marriage register. That regulation, expressly stipulates as follows, that:

*"Where a marriage has allegedly been solemnised in terms of the **MARRIAGE ACT**, but the marriage register referred to in Section 29A, has for some reasons or the other not been completed or cannot be found, the Director-General may, after consideration of such proof and after such inquiry as he may deem necessary, direct that the marriage register referred to in regulation 5A, with regard to such marriage be completed."*[37]

[24] That a comparison of the available evidence reveals that all the particulars of the plaintiff and D[...] V[...], including their identity numbers as well as their full names and surnames, are correctly inscribed in the impugned marriage certificate and register. That the plaintiff never indicated or made known where the original marriage certificate is, but only belatedly sought to cast doubt on the authenticity of the impugned documents; and the copy of the impugned register and the authority of B[...] to solemnise the impugned marriage. That the mere fact that the impugned marriage was not registered does not render same void. That it is so because the omission is a mere administrative action that can be rectified. That the plaintiff has kept quiet about the two people who signed as witnesses and were present at the solemnisation of the impugned marriage, who could have assisted in the inquiry contemplated in Section 6 of the **MARRIAGE ACT**.

[25] That the marriage certificate was certified as a true copy of the original and no trace of any changes on the original by unauthorised persons have been found. Both impugned documents serve as *prima facie* evidence of the impugned marriage. That the plaintiff and D[...] V[...] lived together as husband and wife. That it can therefore be presumed that their intention

[37] Emphasis supplied

was to be married, especially regard being had to the plaintiff formally amending her details at Sanlam and attending *"a Yoga Court"* under the surname "*D[...] V[...]*." That on 19 June 2020, the plaintiff alleged that the defendant was well aware of the fact that she was informed during 2007, that her marriage to D[...] V[...] was not valid. That it was only when the plaintiff's heads of argument and replication was delivered that it became apparent that she disputed the validity of the impugned marriage on the basis that it was not registered, that the marriage officer used the wrong forms and lacked authority to solemnise the impugned marriage.

[26] The defendant also contended that it is still the approach of our courts that where a man and a woman are proved to have lived together as husband and wife, to presume, unless the contrary be clearly proved, that they were living together as a consequence of a valid marriage.[38] That a marriage certificate to which the parties are entitled to, after the marriage is solemnised, serves as *prima facie* evidence of the particulars set out in it and therefore shall in all courts of law and public office be *prima facie* evidence of the particulars set forth therein.[39] That this means that a judicial officer must accept the particulars as correct, until he is convinced that he cannot rely upon them. Whether such a conviction is justified must depend on the evidence which refutes or throws doubt upon the contents of the certificate.[40]

[27] That included in the presumption thus created would be all the essentials for the conclusion of a valid marriage including the capacity of the parties. A further common law presumption which is relevant in this regard is the presumption of the validity of a marriage flowing from the evidence of the ceremony and subsequent cohabitation.[41] The presumption referred to

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[38] Schwikkard, van der Merwe, *Principles of Evidence*, 2nd Ed, p473
[39] ***Gada v Gada*** (24141/2000) [2006] ZAGPHC 211 (29 May 2006)
[40] ***R v Chizah*** 1960 (1) SA 435 AD
[41] ***Ex parte L*** 1947 (3) SA 50 (C)

may, of course be rebutted.[42] The defendant also referred to *R v Chizah* (*supra*) where it was held that there is little merit in the argument that a pathologist's report, which constituted *prima facie* evidence of certain facts in terms of Section 212(4)(a) of the **CRIMINAL PROCEDURE ACT** 51 of 1977,[43] was once it was challenged, mere paper evidence. That the words "*prima facie* evidence" cannot be brushed aside or minimised. As used in this Section, they mean that the judicial officer will accept the evidence as *prima facie* proof of the issue and in the absence of other credible evidence, that *prima facie* proof will become conclusive proof.

[28] That the plaintiff cannot prove that she was not legally married to D[...] V[...]. That it is so simply because the plaintiff has failed to produce a court order evincing that the said marriage was dissolved by divorce. Consequently, the latter marriage allegedly entered into between the plaintiff and the defendant is *void ab initio* and that no consequences of any marriage came into effect between the parties. That a person may only be a spouse or partner in one marriage or civil partnership, as the case may be, at any given time.[44] That the defendant made out a proper case for the relief sought i.e. that the latter marriage is null and void *ab initio* as the plaintiff at all material times hereto was married to a third party; that none of the consequences of a marriage came into effect between the parties; and that the plaintiff be ordered to pay the costs in respect of the stated case; and the remaining disputes between the parties be postponed *sine die*.

DETERMINATION:

[29] It is trite law that whilst the registration of marriages under the **MARRIAGE ACT** is required in the public interest and for purposes of proof,

[42] ***W v W*** 1976 (2) SA 308 (W) at 315A-C
[43] "the *CPA*"
[44] Section 8(1) of the Civil Union Act 17 of 2006

registration *per se* is not essential to the validity of marriages. The use of the incorrect forms to either register or confirm the impugned marriage, therefore, cannot render same void or invalid. Nor can the absence of a marriage certificate, evincing same. It is so simply because in the absence of a certificate, the existence of the marriage can still be proved by means of other evidence.

[30] It is, however, also so that whilst the validity of a marriage may be presumed once evidence is adduced showing that the marriage ceremony was performed, such a presumption is rebuttable. The *onus* is on the person who challenges the validity of such a marriage to show that it is invalid. This rebuttable presumption of law creates a legal burden, in that the validity of the marriage must be disproved on a balance of probabilities. This onus of proof fell on the plaintiff in these proceedings. To this extent, the plaintiff evinced the invalidity of the impugned marriage on the basis of what is now common cause in terms of the stated case and attached documents.

[31] The **MARRIAGE ACT**, in relevant part, stipulates as follows:

> ***"29A. Registration of marriages-***
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> *(1) The marriage officer solemnising any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnised.*
>
> *(2) The marriage officer shall forthwith transmit the marriage register and records concerned, as the case may be, to a*

*regional or district representative designated as such under Section 21(1) of the **IDENTIFICATION ACT** 72 of 1986."*[45]

[32] Section 8(e) of the **IDENTIFICATION ACT** 68 of 1997[46], for its own part, expressly stipulates that citizens'; lawful and permanent residents' particulars of marriage contained in the relevant marriage register or other documents relating to the contracting of marriage and such other particulars concerning marital statuses as may be furnished to the Director General, to be included in the population register. In terms of Section 13(1) of the **IDENTIFICATION ACT**, the Director General shall, as soon as practicable after the receipt of an application, *inter alia*, issue a marriage certificate in the prescribed form, after the relevant particulars were included in the register in terms of Section 8 of the Act. Of significance is that a marriage certificate issued in terms of Section 13(1) is *prima facie* evidence of the particulars set forth therein.[47]

[33] It is so that in stated cases, the court may draw inferences from the agreed facts and attached documents and may base its decision on the questions of law in dispute on the facts and inferences.[48] The only *prima facie* evidence before this Court which cannot be brushed aside is the attached marriage certificate H0996493, issued to the parties on 12 October 2013, evincing their marriage to each other on the said date.[49]

[34] Whilst it is so that in the absence of a marriage certificate, the existence of the marriage can be proved by means of other evidence.[50] It is also so that any marriage certificate issued in terms of Section 13(1) of **THE**

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[45] Emphasis supplied
[46] Hereinafter referred to as the "***Identification Act***"
[47] Section 13(2) of the **Identification Act** 68 of 1997; see also ***Gabavana and Another v Mbete and Others*** [2000] 3 All SA 561 (Tk) at 568
[48] ***Seven Eleven Corporation SA (Pty) Limited v Georgiou and Another*** [2002] 4 All SA 612 (SE) at 619
[49] Annexure B, p131, Vol 2
[50] see ***Gada v Gada*** 2006 JDR 0445 (T) para 22 (and the authorities cited therein)

IDENTIFICATION ACT constitutes *prima facie* evidence of the particulars set forth therein and the existence of the marriage.[51] Whilst registration of a marriage is also not essential to the validity of the marriage, it is further so that where a marriage has been solemnised in terms of the **MARRIAGE ACT**, but the marriage register has for some or other reason not been completed, the Director-General may, only after submission of such proof and after such enquiry as he or she may deem necessary, direct that the prescribed registers with regard to the marriage be completed.

[35] It follows from the foregoing that the Director-General may direct that the prescribed registers with regard to the marriage be completed only after submission of such proof and after such enquiry as he or she may deem necessary. It seems to be an essential requirement for the Director-General to consider any proof and to conduct the necessary inquiry before issuing the relevant certificate. The fact that the impugned marriage was not registered, therefore, cannot be reduced to a mere "administrative action" that can be rectified. No consideration of any proof or inquiry has been conducted by the Director-General for the registration of the impugned marriage.

[36] There is no gainsaying that certainty is important for the broader community in light of the wide range of legal implications that marriages create. Marriages are thus taken seriously not only by the parties; their families and society, but by the State.[52] It is against this backdrop that the Constitutional Court enjoined that though freely entered into by the parties, marriages must not only be undertaken in public and in a formal way, but once concluded, must be registered.[53] This is because marriages are a

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[51] Section 13(2) of the **Identification Act**
[52] ***Minister of Home Affairs and Another v Fourie and Others*** 2006 (3) BLCR 355 (CC); 2006 (1) SA 524 (CC) para 64
[53] *Ibid*

sui generis juristic acts giving rise to relationships which confer on parties thereto certain rights, privileges, duties and status of a public character. Where rights and privileges, and immunities are sometimes conferred subject to compliance with certain prescribed formalities, full compliance with the formalities is taken to be peremptory.[54]

[37] The peremptory language of Sections 29A, 29(3), 30(3) and regulation 5C of the **MARRIAGE ACT** is indicative of the fact that a marriage will be null and void *ab initio* for failure to comply with the prescribed formalities. The actual intensity of the operational effect of the provisions of Section 29A of the **MARRIAGE ACT**, properly discerned, renders a marriage that does not comply with the prescribed conditions null and *void ab initio*. The provisions in Sections 29(3) and 30(3) are clearly indicative of a contrary intention on the part of the legislature.[55] It is therefore not a correct proposition that the **MARRIAGE ACT** and regulations contain no limitations and do not stipulate that in the event that the incorrect forms were used to either register or confirm a marriage, that renders same void or invalid.

[38] The corollary of the foregoing is twofold; to *wit*: (a) when a marriage is void, the status of the "*marriage*" is that no marriage exists, since the requirements met are insufficient to constitute a valid marriage;[56] and (b) such a "*marriage*" has no effect on the status of the parties to it, who retain the status of unmarried persons.[57]

CONCLUSION:

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[54] ***Springs Town Council v MacDonald; Springs Town Council v Badenhorst*** 1968 (2) SA 114 (T) at 116
[55] Cronje and Heaton, Family Law 38; Lee and Honore par 50; Sinclair and Heaton 356; *cf* ***Ex parte Dow****, supra* 831B-D.
[56] ***Ex parte Oxton*** 1948 (1) SA 1011 (C)
[57] ***Wells v Dean-Willcocks*** 1924 CPD 89; ***Docrat v Bhayat*** 1932 TPD 125; ***Ex parte Strachan*** 1946 NPD 592

[39] The nullity of a void marriage is absolute. It may be relied upon at any time by either of the parties, even after the death of the other or by any interested third person, even after the death of both parties. Although no declaration of nullity by a court is required, the marriage being null and *void ab initio,* even without such.[58] A declaratory order is usually applied for in the interest of legal certainty. As stated by Searle AJ, in ***Ex parte Oxton***:[59]

"The decree is merely declaratory of and does not alter the existing status of the parties. The object of the decree, however, is to place on record by means of a judgment in rem the fact that the marriage entered into by the parties was void ab initio and gave rise to no legal consequences."

[40] Ratification of a void marriage is, in principle, impossible, and the lapse of time makes no difference in this regard.[60] No discretionary powers are vested in the courts in terms of which they can declare a void marriage to be valid.[61] It is against this backdrop that this Court granted the foregoing order.

JUDGE APS NXUMALO
NORTHERN CAPE DIVISION
KIMBERLEY

APPEARANCES:

For Plaintiff: **ADV AS SIEBERHAGEN**
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[58] ***Ex parte Marais*** 1942 CPD 242
[59] 1948 (1) SA 1011 (C) at 1015
[60] ***Wells v Dean- Willcocks*** 1924 CPD 89 at 92
[61] ***Ex parte L*** *(also known as A)* 1947 (3) SA 50 (C) 58; see also ***Ex parte Soobiah*****: *In re Estate Pillay*** 1948 (1) SA 873 (N) at 881

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Trust Account Advocate

(In terms of Section 34(2)(b) of the LPA 28 of 2014)