

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO: 3930/2016

Date heard: **16 March 2017**

Date delivered: **28 March 2017**

Not reportable

In the matter between:

THEUNIS JOHANNES PIENAAR

First Applicant

ANDRIES DANIël FABER PIENAAR

Second Applicant

and

LAETITIA STRAUSS

First Respondent

**THE PROVINCIAL MANAGER OF THE
DEPARTMENT OF HOME AFFAIRS,
PORT ELIZABETH LOCAL OFFICE**

Second Respondent

JUDGMENT

PLASKET, J:

[1] The first applicant, Mr TJ Pienaar, and the second applicant, his son Mr ADF Pienaar, apply for orders: (a) declaring that the marriage registered by the first applicant on 4 August 2005 in the records of the second respondent, the Provincial

Manager, Department of Home Affairs, Port Elizabeth Local Office, is null and void; (b) declaring that the 'purported marriage' between the second applicant and the first respondent, cited as Ms Laetitia Strauss, is void *ab initio* and of no legal force or effect; (c) directing that the entry in the second respondent's records of the purported marriage be expunged; and (d) directing the respondent or respondents who oppose the application to pay the applicants' costs.

[2] The second respondent abides the decision of the court but the first respondent, who refers to herself as 'Laetitia Pienaar (born Strauss)', has brought a counter-application in which she seeks orders: (a) staying the main application pending the outcome of proceedings in the Family Court of Southampton, England in which she seeks a determination on whether that court has jurisdiction to consider the validity of a marriage ceremony between her and the second applicant and, if so, whether they were validly married; (b) alternatively, in the event of this order not being granted, postponing the matter to afford the first respondent an opportunity to file an answering affidavit in the main application; and (c) directing the applicants in the main application to pay her costs.

The facts

[3] The facts giving rise to the dispute between the parties are out of the ordinary, to say the least.

[4] The second applicant and the first respondent met at the University of Port Elizabeth, now known as the Nelson Mandela Metropolitan University, when they were both studying law. They met again in 1995 in England where the second applicant had gone to complete a Masters degree in Strategic Studies and the first respondent to work as an *au pair*.

[5] A romantic relationship developed and, in due course, they decided to marry. Their plan was to return to South Africa to marry. It was decided that prior to returning to South Africa, they would invite their English friends to a 'religious blessing service'. It was agreed that the first applicant, who was a pastor in the

Dutch Reformed Church in South Africa, would officiate at this service. The ceremony was held on 8 June 1996 in Hampshire, England.

[6] While the second applicant and the first respondent started living together after the ceremony, the planned marriage in South Africa never took place. Although, according to the second applicant, the relationship was a difficult one, they lived together for some time and have two children.

[7] The first applicant stated in his affidavit that, on 4 August 2005 at the request of the first respondent, 'I prepared a marriage certificate to be issued which I signed as a marriage officer, indicating that a marriage was solemnized at Port Elizabeth on 8 June 1996'. He submitted the certificate to the office of the second respondent and, as he said, 'a "marriage" was duly registered in the records of the Second Respondent'. He concluded that the certificate 'does not reflect the true position as the parties never got married in South Africa nor did I have the authority to marry the parties in England'.

[8] By the time the first applicant completed the certificate at the request of the first respondent, the relationship between her and the second applicant had broken down irretrievably.

[9] The first respondent has instituted divorce proceedings against the second applicant in the Southampton Family Court. In the document initiating the proceedings she claimed to have married the second applicant on 8 June 1996 in Port Elizabeth. In her affidavit attached to her counter-application, however, she stated that 'we were married to each other in England on 8 June 1996 in a formal wedding ceremony conducted by my father-in-law'. In submitting that only an English court has jurisdiction to determine the validity of the purported marriage, she stated that '[i]f a marriage is good by the laws of the country where it was effected, and it is common cause that a ceremony took place in England, it is good all over the world – *locus legit actum*'.

Developments in the litigation

[10] Once it became clear from the counter-application that it was common cause between the applicants and the first respondent that no marriage was alleged to have been solemnized in Port Elizabeth, the applicants proposed an order to settle the matter.

[11] The proposed order was to the effect that: (a) the entry in the second respondent's records of the marriage in Port Elizabeth on 8 June 1996 would be expunged; (b) the second respondent would be directed to expunge the record; (c) the relief claimed in paragraphs 2 and 3 of the Notice of Motion – declarators as to the validity of the purported marriage – would be stayed pending the outcome of the proceedings in England envisaged by paragraphs (a)(i) and (ii) of the counter-application; and (d) the first respondent would pay the applicants' costs.

[12] This proposal was rejected by the first respondent. The applicants now seek an order in the above terms.

The issues to be decided

[13] It is common cause that no marriage between the parties took place in Port Elizabeth. It follows that the certificate that purports to record such a marriage is false. Despite this, the first respondent sought a stay of the proceedings pending a determination in England of whether the English court has jurisdiction to determine the validity of the ceremony conducted by the first applicant on 8 June 1996 and, if it does, to decide whether the second applicant and the first respondent are validly married. In the alternative, she seeks a postponement of this matter to enable her to file an answering affidavit in the main application.

[14] I shall deal briefly with the last issue. The first respondent, for tactical reasons, it would appear, chose not to deal with the merits by answering the affidavits filed by the applicants. A party who chooses not to plead over, as it we, does so at risk of having the matter decided on his or her opponents papers. Such a party has no right to have the matter postponed to enable an answering affidavit to be filed.¹ Similarly,

¹ *Jordaan & another v Msweli* ELCLD 19 June 2007 (case no. EL 188/05; ECD 488/05) unreported, paras 25-28. This matter dealt with trial proceedings but the basic idea that the full defence of a party must be disclosed holds good for applications too.

if a party applies to strike out what is alleged to be inadmissible evidence but does not deal with the merits, he or she stands or falls on the basis of this choice.² No acceptable reason has been given by the first respondent as to why she did not answer to the merits of the main application. I accordingly find that there is no basis for the alternative, prayer (b) of the counter-application, in the event of me deciding not to stay the proceedings.

[15] I turn now to whether a case has been made out for the postponement of the matter pending a decision of the English court concerning whether the second applicant and the first respondent are validly married.

[16] This relief is predicated on both this court and the English court being asked to determine whether the second applicant and the first respondent were legally married in England on 8 June 1996. While that is what the English court will be required to decide, it is not the relief that was sought by the applicants at any stage. They sought, in paragraphs 2 and 3 of the notice of motion, declarators that the 'marriage registered by First Applicant on 4 August 2005' is null and void, and that this 'purported marriage' between the parties 'is void *ab initio* and of no legal force or effect'. In other words, the relief sought in paragraphs 2 and 3 of the notice of motion refers to a marriage entered into in Port Elizabeth, and not the purported marriage that the first respondent relies on.

[17] In any event, the applicants no longer seek this declaratory relief at this stage: in terms of paragraph 3 of the draft order that they have moved for, they propose the postponement of the relief claimed in paragraphs 2 and 3 of the notice of motion pending the determination by the English court of its jurisdiction to consider the validity of the second applicant's and the first respondent's 'marriage ceremony' on 8 June 1996 in England and, if it has jurisdiction, its decision whether the parties were validly married.

[18] There is, consequently, no proper case made out by the first respondent for the postponement of the application for the expungement of the record of the

² *Gore v Amalgamated Mining Holdings* 1985 (1) SA 294 (C) AT 295h-l; *Helen Suzman Foundation v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC) para 136.

purported Port Elizabeth marriage. That it never happened and that the record is false are two facts the applicants and the first respondent do agree on. Mr Rorke, who appeared for the first respondent, was unable to point to any concrete prejudice that the first respondent would or even could suffer if the false record of a non-existent marriage is expunged. It most certainly can have no effect one way or the other on the proceedings in the English court and nothing I say about it can bind in any way an English judge deciding different issues on different evidence.

[19] The certificate evidencing a marriage between the second applicant and the first respondent in Port Elizabeth on 8 June 1996 is false and fraudulent. In *Road Accident Fund v Mongalo; Nkabinde v Road Accident Fund*,³ a case involving fraudulent certificates being tendered as 'conclusive proof' of the existence of customary unions, Cameron JA held that '[d]eliberate deceit in the procurement of a document must taint its entire subsequent existence, and the law cannot permit propagation of the fruits of dishonesty'. In conformity with these sentiments, I can see no reason for leaving a false and fraudulent public record in existence, but only strong grounds of public interest for having it expunged forthwith.⁴

[20] In the result, the counter-application must fail and the application must succeed on the basis of the amended relief sought by the applicants.

The order

[21] I make the following order.

- (a) It is ordered that the entry in the records of the second respondent recording that a marriage between the second applicant and the first respondent took place in Port Elizabeth on 8 June 1996 be expunged.
- (b) The second respondent is directed to take all necessary steps to give effect to paragraph (a) of this order.
- (c) Subject to the first respondent filing, within 15 days of the date of this order, a claim for relief referred to in sub-paragraphs (i) and (ii) below, the determination of

³ *Road Accident Fund v Mongalo; Nkabinde v Road Accident Fund* 2003 (3) SA 119 (SCA) para 6.

⁴ As was ordered in *Snyman v Snyman* 1984 (4) SA 262 (W) at 263G-I; *S v S* 1975 (3) SA 440 (R) at 442A-B; *Morrison v Morrison* 1972 (3) SA 185 (C) at 185H-186A and 187A-B; *De Bono v De Bono* 1948 (2) SA 802 (C) at 807-808.

the relief claimed in paragraphs 2 and 3 of the notice of motion in the main application is stayed and postponed *sine die*, pending the outcome of the proceedings in the English court under case number SO15D00914 in which the first respondent seeks a determination on:

- (i) whether or not that court has jurisdiction to determine the validity or otherwise of a marriage ceremony between the second applicant and the first respondent in England on 8 June 1996; and
 - (ii) if so, whether or not the second applicant and the first respondent were validly married, the marriage is a nullity or there is a non-marriage.
- (d) The first respondent is directed to pay the costs of the applicants, such costs to include the costs of two counsel.

C PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicants: Ms TA Dicker SC and Mr G Gajjar, instructed by Karel Brink Attorney, Cape Town and Le Roux Inc, Port Elizabeth

For the first respondent: Mr S Rorke SC instructed by Lizelle Pretorious Inc, Port Elizabeth