Same-sex relationships concluded abroad in Namibia – Between (Limited) Judicial Recognition and Legislative Rejection

There is no doubt that the issue of same-sex marriage is highly controversial. This is true for both liberal and conservative societies, especially when the same-sex union to be formed involves parties from different countries. Liberal societies may be tempted to open up access to same-sex marriage to all, especially when their citizens are involved and regardless of whether the same-sex marriage is permitted under the personal law of the other foreign party. For conservative societies, the challenge is even greater, as local authorities may have to decide whether or not to recognise same-sex marriages contracted abroad (in particular when their nationals are involved). The issue becomes even more complicated in countries where domestic law is hostile to, or even criminalises, same-sex relationships.

It is in this broader context that the decision of the Supreme Court of Namibia in *Digashu v. GRN, Seiler-Lilles v. GRN* (SA 7/2022 and SA 6/2022) [2023] NASC (16 May 2023) decided that same-sex marriages concluded abroad should be recognised in Namibia and that the failure to do so infringes the right of the spouses to dignity and equality. Interestingly, the Supreme Court ruled as it did despite the fact that Namibian law does not recognise, and also criminalises same-sex relationships (see *infra*). Hence, the Supreme Court's decision provides valuable insights into the issue of recognition of same-sex unions contracted abroad in Africa and therefore deserves attention.

I. General Context

In his seminal book (*Private International Law in Commonwealth Africa* (Cambridge University Press, 2013) p. 182), Richard F. Oppong describes the issue of same-sex unions in Commonwealth Africa as follows: *'It still remains*

highly contentious in most of the countries under study whether the associations between persons of the same sex should be recognized as marriage. In Zambia, a marriage between persons of the same sex is void. It only in South Africa where civil unions solemnised either as marriage or a civil partnership are recognized' (footnotes omitted). As to whether other African countries would follow the South African example, Richard F. Oppong opined that '*[t]here is little prospect of this happening […]. Indeed, there have been legislative attempts […] in countries such as Nigeria, Uganda, Malawi and Zimbabwe – to criminalise same-sex marriage.*' (*op. cit.* p. 183). For a detailed study on the issue, see Richard F. Oppong and Solomon Amoateng, 'Foreign Same-Sex Marriages Before Commonwealth African Courts', *Yearbook of Private International Law*, Vol. 18 (2016/2017), pp. 39-60. On the prohibition of same-sex marriages and same-sex unions and other same-sex relationships in Nigeria under domestic law and its implication on the recognition of same-sex unions concluded abroad, see Chukwuma S. A. Okoli and Richard F. Oppong, *Private International Law in Nigeria* (Hart Publishing, 2020) pp. 271-274.

II. The Law in Namibia

A comprehensive study of LGBT laws in Namibia shows that same-sex couples cannot marry under either of the two types of marriage permitted in Namibia, namely civil or customary marriages (see Legal Assistance Center, *Namibian Laws on LGBT Issues* (2015) p. 129). In one of its landmark decisions decided in 2001 known as 'the *Frank* case' (*Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 (SC)*), the Supreme Court held that the term 'marriage' in the Constitution should be interpreted to mean only a '*formal relationship between a man and a woman*' and not a same-sex relationship. Accordingly, same-sex relationships, in the Court's view, are not protected by the Constitution, in particular by Article 14 of the Constitution, which deals with family and marriage. With regard to same-sex marriages contracted abroad, the above-mentioned study explains that according to the general principles of law applicable in Namibia, a marriage validly contracted abroad is recognised in Namibia, subject to exceptions based on fraud or public policy (p. 135). However, the same study (critically) expressed doubt as to whether Namibian courts would be willing to recognise a foreign same-sex marriage (*ibid*). The same study also referred to a draft bill discussed by the Ministry of Home Affairs and Immigration

which '*contained a provision specifically forbidding the recognition of foreign same-sex marriages*' (p. 136).

III. The Case

The case came before the Supreme Court of Namibia as a consolidated appeal of two cases involving foreign nationals married to Namibians in same-sex marriages contracted abroad.

In the first case, the marriage was contracted in South Africa in 2015 between a South African citizen and a Namibian citizen (both men) under South African law (Civil Union Act 17 of 2006). The couple in this case had been in a long-term relationship in South Africa since 2010. In 2017, the couple moved to Namibia.

In the second case, the marriage was contracted in Germany in 2017 under German law between a German citizen and a Namibian citizen (both women). The couple had been in a long-term relationship since 1988 and had entered into a formal life partnership in Germany under German law in 2004. The couple later moved to Namibia.

In both cases, the foreign partners (appellants) applied for residency permits under the applicable legislation (Immigration Control Act). The Ministry of Home Affairs and Immigration ('the Ministry'), however, refused to recognise the couples as spouses in same-sex marriages contracted abroad for immigration purposes. The Appellants then sought, *inter alia*, a declaration that the Ministry should recognise their respective marriages and treat them as spouses under the applicable legislation.

IV. Issue and Arguments of the Parties

'*The central issue*' for the Court was to determine whether '*the refusal of the [Ministry] to recognise lawful same-sex marriage of foreign jurisdictions […] between a Namibian and a non-citizen [was] compatible with the [Namibian] Constitution*' (para. 20). In order to make such a determination, the Court had to consider whether or not the applicable domestic legislation could be interpreted to treat same-sex partners as 'spouses'.

The Ministry argued that, in the light of the Supreme Court's earlier precedent (the abovementioned *Frank* case), spouses in a same-sex marriage were excluded from the scope of the applicable legislation, irrespective of whether the marriage had been validly contracted abroad in accordance with the applicable foreign law (para. 58). The Ministry considered that the Supreme Court's precedent was binding (para. 57); and the position of the Supreme Court in that case (see II above) (para. 36) reflected the correct position of Namibian law (para. 59].

The appellants argued that the *Frank* case relied on by the Ministry was not a precedent, and should not be considered as binding (para. 54). They also argued that the approach taken by the Court in that case should not be followed (paras. 52, 55). The appellants also contended that the case should be distinguished, *inter alia*, on the basis that, unlike the *Frank* case were the partners were not *legally married* (i.e. in a situation of long-term cohabitation), the couples *in casu* had entered into lawful same-sex marriages contracted in foreign jurisdictions and that their marriages were valid *on the basis of general principles of common law* – the *lex loci celebrationis* (para. 50). Finally, the appellants argued that the Ministry's refusal to recognise their marriage was inconsistent with the Namibian Constitution as it violated their rights (para. 51).

V. The Ruling

In dealing with the case, the Supreme Court focused mainly on the applicability of the doctrine of precedent in the Namibian context and the constitutional rights of the appellants. Interestingly, comparative law (with references to the law of some neighbouring African jurisdictions, English law, American law, Canadian law and even the case law of the European Court of Human Rights) was mobilised by the Court to reach its conclusion, i.e. that the Ministry's decision to interpret and apply the applicable legislation in a manner that excluded spouses in same-sex marriages validly entered into abroad violated the appellants' constitutional rights.

With regard to the validity of same-sex marriages contracted abroad, the Supreme Court ruled as follows:

[82] According to the well-established general principle of common law, if a marriage is duly concluded in accordance with the statutory requirements for a

valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia. […]

[83] […] The term marriage is likewise not defined in the [applicable legislation] and would contemplate valid marriages duly concluded and ordinarily recognised, including those validly contracted outside Namibia in accordance with the law applicable where the marriage is concluded in accordance with the general principle of common law already referred to. […].

[84] The Ministry has not raised any reason relating to public policy as to why the appellants' marriage should not be recognised in accordance with the general principle of common law. Nor did the Ministry question the validity of the appellants' respective marriages.

[85] On this basis alone, the appellants' respective marriages should have been recognised by the Ministry for the purpose of [the applicable legislation] and [the appellants] are to be regarded as spouse for the purpose of the [applicable legislation][…]

VI. The Dissent

The views of the majority in this case were challenged in a virulent dissent authored by one of the Supreme Court's Justices. With respect to the issue of the validity of same-sex marriages concluded abroad, the dissent considered that the majority judgment holding that *'in the present appeals, the parties concluded lawful marriages in jurisdictions recognising such marriages'* (145) failed to consider that *'the laws of Namibia (including the Constitution of the Republic) do not recognise same-sex relationships and marriages.'* (146). The dissent then listed many examples, including the criminalisation of sodomy and other legislation excluding same-sex relationships or providing that marriage shall be valid when two parties are of different sexes (para. 146).

More importantly, the dissent also criticised the recognition of the same-sex marriages based on their being valid under the law of the place where they were concluded by stating as follow:

[152] [the main finding of the majority judgment] has its basis on a well-established principle of common law, that if a marriage is duly concluded in

accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it fall to be recognised in Namibia and that, that principle find its application to these matters. […].

[170] […] The common law principle relied on by the majority is sound in law but there are exceptions to the rule and Namibia is under no obligation to recognise a marriage inconsistent with its policies and laws for the reason that the said marriage is warranted by the municipal law of the country in which it was contracted. The marriages of the appellants offend the policies and laws of Namibia […]. (Emphasis in the original).

VII. Comments

The case presented here is interesting in many regards.

First, it introduces the Namibian approach to the question of the validity of marriages in general, including same-sex marriages. According to the majority judgment and the dissenting judgment, the validity of marriages is to be determined in accordance with the 'well-established common law principle' that a marriage should be governed by the law of the place where it was contracted (i.e. *lex loci celebrationis*).

According to the Namibian Supreme Court judges, the rule arguably applies to marriages contracted within the jurisdiction as well as to marriages contracted abroad. The rule also appears to apply to both the formal and substantive (essential) validity of marriages. This is a particularly interesting point. In Richard F. Oppong's survey of approaches in Commonwealth Africa (but not including Namibia), the author concludes that '*most of the countries surveyed make a distinction between the substantive and formal validity of marriage*' (*op. cit.* 185). The former is generally determined by the *lex domicilii* (although there may be different approaches to this), while the latter is determined by the *lex loci celebrationis*. (*op. cit.*, pp. 183-186). The author goes on to affirm that '*the main exception appears to be South Africa, where it has been suggested that the sole test of validity [for both substantive and formal validity] is the law of the place of celebration*' (op. cit., p. 185). The case presented here shows that Namibia also follows the South African example. This is not surprising given that the majority opinion relied on South African jurisprudence for its findings and analysis (see

paras. 82, 90, 108 for the majority judgment and paras. 152, 155-162 of the dissenting opinion).

Secondly, the majority judgment and the dissenting opinion show the divergent views of the Supreme Court judges as to whether the *lex loci celebrationis* rule should be subject to any limitation (*cf.* II above). For the majority, the rule is straightforward and does not appear to be subject to any exception or limitation. Indeed, in the words of the majority, '*if a marriage is duly solemnised in accordance with the legal requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia*' (emphasis added). No exception is allowed, including public policy. It is indeed interesting that the majority simply brushed aside public policy concerns by considering that that the Ministry had not raised any public policy ground (para. 84) (as if the intervention of public policy depended on its being invoked by the parties).

This aspect of the majority decision was criticised by the dissenting opinion. According to the dissenting opinion (para. 170), the application of the *lex loci celebrationis* is subject to the intervention of public policy. In other words, public policy should be invoked to refuse recognition of marriages validly celebrated abroad (cf. Oppong, *op. cit*, p. 186) if the marriage is '*inconsistent with the policies and laws*' of Namibia.

Finally, and most importantly, it should be pointed out that although the majority generally reasoned about 'marriage' and 'spouses' in broad terms. Indeed, the majority repeatedly pointed out that the appellants 'had concluded valid marriages' that should be recognised in application of the *lex loci celebrationis*. Yet, when the the majority reached its final conclusions, it carefully indicated that the issue of the recognition of same-sex marriages was addressed *for immigration purposes only.* Indeed, the majority was eager to include the following paragraph at the end of its analyses:

[134] the legal consequences for marriages are manifold and multi-facetted and are addressed in a wide range of legislation. This judgment only addresses the recognition of spouses for the purpose of [the applicable legislation] and is to be confined to that issue. (Emphasis added).

The reason for the inclusion of this paragraph seems obvious: the Court cannot simply ignore the general legal framework in Namibia. Moreover, one can see in

the inclusion of the said paragraph an attempt by the majority to limit the impact of its judgment in a rather conservative society and the intense debate it would provoke (see VIII below). In doing so, however, the majority placed itself in a rather obvious and insurmountable contradiction. In other words, if the Court recognises the validity of the marriage under the *lex loci celebrationis*, and (in the words of the dissenting opinion) 'conveniently overlooks' (para. 162) the intervention of public policy, nothing prevents the admission of the validity of same-sex marriages in other situations, such as inheritance disputes, maintenance claims or divorce. Otherwise, the principles of legal certainty would be seriously undermined if couples were considered legally 'married' for immigration purposes only. For example, would couples be considered as married if they later wished to divorce? Would one of the spouses be allowed to enter into a new heterosexual marriage without divorcing? Can the parties claim certain rights by virtue of their status as 'spouses' (e.g. inheritance rights)?

This issue is particularly important even for the case at hand. Indeed, in one of the consolidate cases, the appellants obtained before moving to Namibia an adoption order in South Africa declaring them joint care givers of a minor and granting them joint guardianship (para. 5). In a document prepared by the Ministry of Gender Equality and Child Welfare (Guide to Namibia's Child Care and Protection act 3 of 2015 (2019)), it was clearly indicated that '*only "spouses in a marriage" can adopt a child jointly*' and that '*[i]f same-sex partner were legally married in another country, it depends on whether the marriage is recognised as a marriage under the laws of Namibia*' (p. 10). Therefore, in light of the decision at hand, it remains to be seen whether the South African adoption order will be or not recognised in Namibia. (On the adoption by same-sex couples in Namibia and the recognition of same-sex adoptions concluded in other countries, see the study undertaken the Legal Assistance Center on the *Namibian Laws on LGBT Issues* (2015) pp. 143-145).

VIII. The Aftermath of the Ruling: The Legislative Response

It is undeniable that Supreme Court decision could be considered as groundbreaking. It is no surprise that human rights and LGBT+ activists have welcomed the decision, despite the majority judgment's confined scope. On the other hand, legislative reaction was swift. In an official letter addressed to the

Parliament, the Prime Minister expressed the intention its Government to bring a bill that would reverse the Supreme Court decision by modifying '*the relevant common law principle in order that same sex marriage even where solemnized in Countries that permit such marriages cannot be recognised in Namibia*'. Later, two bills (among many others) were introduced in order to define ?the term 'marriage' as to exclude same-sex marriages; and ?to define the term 'spouse'. Both bills intend to prohibit the conclusion and the recognition of same-sex marriage in Namibia. Last July, the bills were discussed and approved by the Namibian's Parliament Upper House (The National Assembly). The bills need now to be approved by the Lower House (The National Council) and promulgated by the President to come into force.