

Short notes on:

AVOID COSTLY VOID, VOIDABLE AND PUTATIVE MARRIAGES

Introduction

A marriage which is void ab initio (as if it never existed) does not affect the status of the parties or confer any of the consequences of a civil marriage on the parties or their children or does it? Perhaps your spouse used a “ring” to share in your hard-earned riches and hid material information prior to marriage which would have made you turn in your tracks.

Matrimonial property system that applies in the event that the marriage is “annulled”

When a marriage is void - no matrimonial property system operates as between the parties, the reciprocal duty of support does not operate between them. They do not inherit intestate from one another and their children are born of unmarried parents. In order for a marriage to be confirmed void, the same would have to lodge an application with court for a declaratory order, as a result the court would merely confirm the existing position, which is a void marriage. A bona fide party ie who acted in good faith may institute a delictual action for satisfaction against the other party to the void civil marriage. The following grounds for declaring a marriage void has been accepted in our law:

1. Prenuptial stuprum (“Sexual relations with a third party before marriage”);
2. Impotence of a partner;
3. Sterility of a partner.

Exemption – A marriage may be declared void or voidable depending on peculiar circumstances

Prenuptial stuprum does not constitute the annulment of marriage; similarly, impotence and sterility does not constitute the annulment of a marriage. In *Stander v Stander*¹, it appears that sexual relations with a third party which results in the bride being pregnant at the time of the wedding constitutes annulment. This rule applies to the other grounds as well. The aggrieved party may file for divorce and ask the court to declare marriage annulled or void, the marital relationship will have never existed and the parties must return whatever was performed; this means rings, vehicles and the like. This will however not affect any transactions entered into by the parties as the parties will remain liable jointly and severally towards third parties. Interestingly had the party, instituting divorce known about the stuprum, impotence or sterility - the marriage would be voidable meaning; marriage

¹ 1929 AD 349

will dissolve by divorce but the matrimonial property system will still apply as per normal consequences.

Minors

A marriage entered by a minor without proper consent is not void but may by application be declared void by a court of law, provided that the application is brought by:

1. the parent or legal guardian of the minor before he reaches the age of majority within 6 weeks from the date on which the parent or the guardian becomes aware of the marriage; or
2. the minor before he reaches the age of majority or within 3 months thereafter.

Furthermore, if the marriage is not dissolved in terms within the above time periods then the matrimonial property system consequence will be as if the minor was of age at the time of entering the marriage.² This means that if the parties did not sign an antenuptial contract before entering such marriage, such marriage shall be deemed to be in community of property.

Putative Marriages

A marriage that is void, may be a putative marriage. A putative marriage has some of the consequences of a civil marriage. For a void marriage to be putative, one or both of the parties must have been unaware of the defect which renders their marriage void. This will not constitute a valid marriage, but merely constitute that the relationship was that of a putative marriage and it may have some of the consequences of a civil marriage.

The consequences include: the children born out of a putative marriage are children born out of civil marriage, this means; the children will inherit intestate, also that both parents have full parental responsibilities and rights in respect of their children. However, this may be amended by the court as the upper guardian according to the best interest of the child. The second consequence relates to the applicable matrimonial property system in the marriage, if both parties were bona fide (both parties were unaware of the defect within the marriage) when entering into the marriage and no antenuptial contract was concluded, the marriage will be in community of property. If only one party was bona fide the marriage will be one of in community of property if it is to the benefit of the bona fide party.

This position was confirmed in *DS and Another v GM*³ where the court found that:

² Section 42A of Act 1948 (As amended)

³ Para 7, (50056/11) [2013] ZAGPPHC23

“Where one or both parties are unaware that at the time they entered into a marriage with a defect which renders their marriage void and both bona fide believed that they are lawfully married, such marriage is a putative marriage. Although void ab initio, the law does attach some proprietary consequences to it when it is dissolved. If both parties to the putative marriage are bona fide they are deemed to be married in community of property”.

When is a marriage not a putative marriage

In terms of the Zulu v Zulu judgement⁴, the principles pertaining to putative marriages do not apply in the event of one of the parties having entered into a civil marriage that is in community of property and subsequently entering into another civil marriage rendering such marriage bigamous. In this instance the joint estate would render the principles of putative marriages impossible, as all the party's assets will fall into the joint estate of the first civil marriage.

Conclusion

As with any contract - one can apply the same principles when negotiating a marriage, failure at the negotiation stage to fully disclose information which may influence the other parties decision to enter such marriage can result in material misrepresentation. If a material breach, same could result in a costly dispute with regards to division of matrimonial property at divorce.

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⁴ Para 11, (17413/2005) [2008] ZAKZHC 10