IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 13326/2014

IN THE MATTER BETWEEN:

DONNE BOTHA **PLAINTIFF**

and

DOUW STEYN **DEFENDANT**

ORDER

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1. The action instituted by the plaintiff is dismissed and the court determines that no marriage was entered into between the plaintiff and the defendant.
2. The plaintiff is to pay the defendant the following costs:
   (a) The reserved costs of the second application to dismiss including the costs occasioned in relation to the meeting with Hadebe J in Chambers on 22 October 2020.
   (b) The qualifying fees of defendant's expert witness Ms Janet Kentridge.
3. Such costs are:
   (a) to be paid on the scale as between attorney and client;

(b) to include the costs occasioned by the engagement of two counsel.

JUDGMENT

Delivered on: 02 August 2021

Hadebe J:

[1] In this judgment, the parties will be referred to as cited in the pleadings. In her particulars of claim, the plaintiff sought the following orders.

1.1 a Decree of Divorce;
1.2 an order directing the defendant to pay:
    1.2.1 periodical payments to the plaintiff, in the sum of R50 000 (fifty thousand rands) per month, until the plaintiff's death or remarriage;
    1.2.2 an amount equal to one-half of the net value of the defendant's estate.

[2] The defendant, having denied the averments in plaintiff's particulars of claim, the plaintiff subsequently issued a notice in terms of Uniform rule 28 wherein she sought to amend her particulars of claim by:
2.1 the deletion of the existing particulars of claim, and a substitution therefore, of the particulars of claim annexed to the Rule 28 notice. The orders sought as per the substituted claim are as follows:
    2.1.1 the defendant pays to the plaintiff periodical payments, in the sum of R100 000.00 (one hundred thousand rands) per month, until the death or remarriage of the plaintiff;
    2.1.2 the defendant pays to the plaintiff an amount equal to one-half of the defendant's estate.

[3] In the alternative and in the event that the court finds that the plaintiff and the defendant were not married to each other, the plaintiff would, by reason of the defendant's representations that the marriage ceremony was a proper one, and the plaintiff having accepted that she enjoyed all the benefits and protections of a wife, she would thus be entitled to the orders that she seeks as per paragraph 2 herein.
[4] In a further alternative, the plaintiff places reliance on a document filed with her papers which she refers to as the written agreement (the agreement of 2 April

2007) purportedly concluded between the plaintiff and the defendant (the parties). Based on this document the plaintiff avers that she is entitled to an order directing the defendant to:

4.1 cause to be registered in the name of the plaintiff, a house to the value of R5 000 000.00 (five million rands);

4.2 pay a monthly income to the plaintiff of R100 000.00 (one hundred thousand rands) per month, calculated from 11 December 2007, being the date upon which the defendant advised the plaintiff that he was divorcing her, and that their relationship was over;

4.3 pay a cash sum of R20 000 000.00 (twenty million rands);

4.4 purchase a motor vehicle registered in her name to the value of R2 000 000.00 (two million rands); and

4.5 deliver two (2) engagement rings, one being an engagement ring with a four carat diamond, presented to her on Christmas day, 2005.

In addition to these orders, the plaintiff also seeks costs of suit, including the costs occasioned by the employment of two counsel. It is worth noting at this stage that even though the plaintiff sought an order directing the defendant to pay to her an amount equal to one-half of the defendant's estate, under cross-examination by Mr *Subel SC* defendants' counsel, she conceded that she had not spent a lifetime with the defendant. She effectively abandoned her claim in this regard.

[5] The defendant raised an objection to the plaintiff's Rule 28 notice. In the process, the defendant raised concerns that some of the averments in the plaintiff's particulars of claim were vague and embarrassing and that pleading to them would entail embarrassment for the defendant. I will revert to these in due course in this judgment.

Background facts (plaintiff's case)

[6] The parties met in September of 2005; according to the plaintiff, which fact is not disputed by the defendant the parties became engaged in 2005. In April 2007 an agreement was signed by the parties wherein proprietary issues were dealt with in the event the parties finally got married. (I will revert to the nature of this agreement between the parties in so far as the nature thereof is concerned). In the meantime, the parties resided together, travelling between London and South Africa.

[7] On 18 August 2007, the parties hosted a ceremony which was meant to be a wedding ceremony (the ceremony). This was at the Lanesborough Hotel, West Minister (the Lanesborough Hotel). Invitation cards were issued, family and friends of the plaintiff were flown from South Africa to London at the defendant's expense. A wedding planner was on standby in London. A wedding dress was made by top London designers. All the guests were housed in London at the expense of the defendant.

[8] In her evidence, the plaintiff produced a document which purported to be vows that were to be exchanged between the parties, which, however never happened. This will be elaborated on later in the judgment. A programme of how events would unfold was also in place. According to the plaintiff, the parties exchanged rings at this ceremony. After all these elaborate preparations, however, the wedding had not been registered. According to the plaintiff, the reason for this failure was that such registration could not have happened on short notice as in fact two weeks was required to get a licence.

[9] The plaintiff testified that the information she had received from the defendant was that this was a matter of simply the signing of the register when they got back to South Africa as they were both South African citizens. She further told the court after the ceremony in London, the parties had returned to stay together at the Saxon Hotel in Johannesburg. According to the plaintiff, she was then referred to as Mrs Steyn by the defendant's staff who ran the Hotel. The defendant took care of her every need. Although she did not perform any work at the insistence of the defendant, she was, however reflected as an employee of the defendant, first under her maiden name Botha, then after the ceremony under the surname of Steyn.

[10] The parties had continued cohabiting as husband and wife until 2 December 2007 when the defendant called the plaintiff's family and told them that he wanted "a divorce", according to the plaintiff. The relationship between the parties had then ended. It would seem after this separation; the relationship was rekindled in 2008. Though not permanently staying together, the parties resumed their travels together and again the plaintiff became dependent on the defendant for her financial needs.

At some stage, during a period not specifically stated in the plaintiff's evidence, she faced a criminal charge. She was again supported by the defendant on the issue of legal fees. At the finalisation of the criminal trial, in 2009 the relationship ended permanently. According to the plaintiff, this came about when she made a choice to walk away and never to take the defendant's calls.

The litigation

[11] In November 2014 the plaintiff started the litigation in this matter by issuing summons against the defendant. In a Rule 33(4)[1] application brought before Kruger J, by the defendant in the present matter on 15 May 2017, the learned Judge granted the following orders:

"A. **APPLICATION IN TERMS OF RULE 33(4)**

1. The questions of law/and or fact contained in paragraph 4 of the Plaintiff's particulars of claim (read with paragraph 4 of the Defendant's plea) and paragraphs 1 and 2 of the Defendant's special plea under Case No. 13336/2014 are to be determined separately by the trial court in terms of Rule 33(4) and prior to any other questions of law and/fact.
2. The remaining issues arising in the action are to be determined, if necessary, after the final determination of the issues referred to in 1 above.

B. **COUNTER-APPLICATION**

1. The Plaintiff's counter-application is dismissed.

C. **COSTS**

1. The plaintiff, Donne Botha is directed to pay the defendant's costs of the Rule 33(4) application as well as the counter-application. Such costs are:
   (a) to be paid on the scale as between attorney and client.
   (b) to include the costs of two counsel where the services of two counsel have been engaged".

[1] Rule 33(4) provides as follows:
'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and…'

[12] The matter was again before Kruger J on 25 August 2017 when the plaintiff brought an application to appeal Kruger J's judgment of 15 May 2017 and also an application to adduce further evidence. In that matter Kruger J made the following order:

"12.1 The application to adduce further evidence is dismissed with costs.

12.2 The application for leave to appeal is also refused with costs. Such costs are ordered to include the costs of both senior and junior counsel, and the costs are to be paid on the scale as between attorney and client".

Some of the pronouncements and observations made by Kruger J in both judgments are of relevance in the present judgment and will be referred to later on.

[13] On 24 January 2020, before Topping AJ and in an order taken by consent, the defendant was granted leave to withdraw his first application to dismiss the plaintiff's claim. The plaintiff was again ordered to pay the costs on the scale as between attorney and client. On 31 January 2020, in an order granted by Kruger J the matter was certified ready for hearing for a period of five days from 2 to 6 November 2020. Hence the matter served before me from 2 November to 4 November 2020.

The defendant's case considered in terms of the applicable (English) law at the time of the ceremony

[14] In amplification of his denial of the plaintiff's averments, the defendant presented both oral evidence as well as evidence on affidavit. Mr Adrian Christmas (Mr Christmas) testified that he is a Solicitor in England, Wales, that he still held a practising certificate though already retired. He had come to know the defendant in the late 1980s, early 1990s when the defendant came to set up a business in the United Kingdom. The defendant had been referred to him and he had acted for him. The witness was referred to a few documents by the defendant's counsel. One such document was referred to as a manuscript document and an agreement.

[15] Mr Christmas informed the court that shortly before what he called a *blessing ceremony* (my emphasis) he had received a call from the defendant saying that he was unable to get married. He further informed him that he had invited everybody to a wedding ceremony. The problem was, he was unable to comply with the requirements under the English law for giving notice or getting a special licence to

allow a wedding to take place. He was seeking advice as to what to do in the circumstances. Mr Christmas had then given advice to the defendant.

[16] What appeared from Mr Christmas's evidence is that the defendant was worried that he had invited so many people to a wedding that was unlikely to happen in the circumstances. Mr Christmas advised the defendant that he could have a ceremony of some sort so as not to disappoint his invitees from the Republic of South Africa. He told him that such ceremony *would not be a marriage* (my emphasis) and would be of no legal effect. According to Mr Christmas, it transpired that the defendant understood this type of ceremony even before he gave him this advice and that he had actually found out about it before he consulted with him.

[17] Mr Christmas explained that it was not unusual in the United Kingdom for people who are unable to get married in church to have what is called a religious blessing ceremony. This would result from instances where people are unable to get married because of technical difficulties, in instances where they may be married to someone else or where they may not be properly divorced. People would then seek solace in having a ceremony which is a blessing ceremony. He further testified that people can get married in a registry office but they would still require a religious ceremony to validate their relationship in the eyes of God and to have a blessing. Mr Christmas was invited to grace the ceremony with his presence. He could not attend, according to him, it was at short notice and he already had other engagements.

[18] Mr Christmas was again summoned to the defendant's house in London around the 27th/28th/29th December 2007. He was unable to be specific about the date. He met with the defendant as well as the plaintiff herein. Contrary to what he was fearing, that he might be tasked with telling the plaintiff that there had not been a marriage, he instead walked into a warm ambiance. One of the parties indicated to him that they wanted an agreement between the two of them to cover their cohabiting arrangements since *they were not married* (my emphasis). Both parties wanted something in writing and it had to be processed there and then. Mr Christmas undertook to do what he referred to in his evidence as a short agreement. He had then penned an agreement for the parties in his own handwriting. He was

told that that would be a temporary arrangement, pending the parties coming to a more formal arrangement.

[19] Despite Mr Christmas's enquiry as to why the parties would not wait for the consummation of a formal agreement, the parties insisted they wanted something there and then. The parties signed the document in the presence of Mr Christmas and he noted that they insisted on signing each page of the agreement. Mr Christmas's understanding was that the agreement was by way of regulating the financial arrangements between the parties pending the formalisation of those arrangements sometime in the future. The impression Mr Christmas got from the signing of this agreement was that the parties at that stage had not decided what they were going to do in the future by way of the agreement, it could have been a marriage or it could have been a formal cohabitation agreement or even a financial arrangement.

[20] The plaintiff had participated in the discussion and this was wholeheartedly according to Mr Christmas's observation. At no stage did the plaintiff ask for leave to call her attorney during the discussions leading to the conclusion of the agreement. The plaintiff did not appear to be under any form of duress, either physical or mental, she was not even distressed about not being married. The essence of the document was the payment of monies to wit R1 million, to the plaintiff in the eventuality that the parties failed to cohabit other than as a result of having mutually agreed to separate, based on family commitments or periods of holidays.

[21] Mr Christmas did confirm that other than this specified detail of the agreement, details around the rates and cohabitation for holidays were not part of the discussion. Arrangements relating as to what happened at death were part of the discussion. Mr Christmas candidly advised the court that he had felt he had to add value to the arrangement to have certain points that could occur in the future covered in the discussion. The defendant had indicated that he wanted the amount agreed to be in full and final settlement if the parties ceased to cohabit.

[22] He confirmed having deposed to a declaration on the 12th of December 2014. He had received a call from the defendant's lawyers asking him to check whether

any marriage ceremony, or a formal marriage ceremony had been registered with the registrar of births, marriages and deaths in London. Unless such registration is carried out, he advised that the marriage would not be a validly constituted marriage. The registrar is tasked with validating marriages. He undertook to search at the registry office as a result. This was in West Minister, England where the Lanesborough Hotel is situated. His search yielded negative results in that there was no entry of any marriage between the parties having been registered on the 18th of August, 2007.

[23] He had confirmed with a search in the form of a postal search. This search is done against names and it is conducted at the central registry. The results returned to him showed that there was no record of any marriage having taken place between the parties through the years 2006, 2007 and 2008. As a result of these failed searches, he concluded that there was no certificate of marriage between the plaintiff and the defendant. Mr Christmas gave a brief synopsis of what he understands are the requirements for a legally constituted marriage in terms of the laws of England.

[24] He told the court that his understanding was that in the United Kingdom a priest conducting a wedding ceremony has an obligation to complete the certification. Where a non-religious ceremony has been undertaken, at a registry office, one of the two registrars must be present and either of them has the duty to obtain the certification. The obligation to certify does not fall on the parties to the marriage. He insisted that both the plaintiff and the defendant understood that they were not married; hence the agreement that he had been called upon to draft to give the parties some structure moving forward. This would be in place until they were either married or some formal agreement governing their relationship came into place.

[25] The other witness called in the defendant's case is Janet Kentridge (Ms Kentridge). She is an expert in the Laws of England. Her credentials and experience were placed on record and were not disputed. Having made one or two typographical corrections on the report she had prepared as an expert, she then adopted and confirmed the contents of same. The gist of her evidence was about whether there was a ceremony that qualified as a marriage according to the laws of

England and Wales that had taken place between the parties. She advised the court that a marriage according to the laws of England had to be concluded, and could only be concluded within the parameters of the terms of the Marriage Act [2] (the Act). She emphasised that a person was either within the terms of the Act or would not be married. She said this referring to a judgment[3] incorporated in her report.

[26] In *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)*[4] the court found that there had been a valid marriage and that the court had the necessary jurisdiction to proceed with the divorce. The facts in that case are completely different from the matter before me. The parties had gone through two ceremonies. The first one was an Islamic service which was conducted in London. The husband was already married to someone else and both parties were aware. Four years later a second ceremony took place when, acting on legal advice, the husband sought to regularise the status of the wife in English law. The husband had been advised that to obtain English recognition of his marriage to the wife, he would have to obtain an Islamic divorce, followed by a genuine remarriage valid by local law in a country permitting polygamy. He obtained an Islamic divorce in Sharjah, an Islamic country which recognised polygamous marriage. The marriage, 3 days later, took the form of a revocation of the divorce. Some years later the couple separated, and the wife sought a divorce in England. The husband responded by obtaining a divorce in Sharjah. The husband argued that there was no valid marriage upon which the English court could found jurisdiction to grant a divorce. (This as per what appears in the headnote in *A-M v A-M*).

[27] In deciding whether a marriage existed in *A-M v A-M*, amongst other considerations, the court referred to what is said in Rayden and Jackson's *Law and Practice in Divorce and Family Matters* 17 ed (1997) para 34 that:

'Where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, though there may be no positive evidence of any marriage having taken place, particularly where the relevant facts have occurred outside the

[2] Marriage Act, 1949.
[3] *A-M v A-M* (*Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6 para 58.
[4] Ibid.

jurisdiction; and this presumption can be rebutted only by strong and weighty evidence to the contrary'.

At paragraph 35 of the judgment, the court went ahead and laid down the approach to be adopted when dealing with the said presumption. In *A-M v A-M* the parties had cohabited for 12 years and had had two children in the interim. That is not the position in the present case.

[28] For a marriage in the Church of England there has to have been the publication of banns of matrimony in advance or alternatively a special licence granted or another certificate to have been granted, according to Ms Kentridge. The marriage needs to take place in the church or chapel where the banns were published. Section 8 of the Act sets out stringent requirements about the publishing of banns and it provides as follows:

'No clergymen shall be obliged to publish banns of matrimony unless the persons to be married, at least seven days before the date on which they wish the banns to be published for the first time, deliver or cause to be delivered to him –

(a) a notice in writing, dated on the day on which it is so delivered, stating the christian name and surname and the place of residence of each of them, and the period during which each of them has resided at his or her place of residence, and

(b) …'

[29] Section 7 of the Act deals with the time and manner of the publication of banns. In terms of s 7(1) such publication has to happen three Sundays preceding the solemnization of the marriage. Section 9(1) provides that it is not lawful for the banns to be published by any person other than a clergyman. It is only in terms s 14 where an exception is allowed where the publication happens on board His Majesty's ships. No publication of banns in whatever form or manner of form happened in the matter before me. In paragraph 8.3.2 of his affidavit deposed to on 13 April 2015 Reverend Canon Simon Wilkinson (Reverend Wilkinson), the Anglican Clergyman who presided at the blessing ceremony, states in no uncertain terms that there was no publication of the parties' banns of matrimony as required by the Act. As a direct result of that no certification of publication of banns as required in terms of s 11 of the Act had taken place.

[30] Ms Kentridge proceeded and dealt with the other kinds of marriages where the parties are not married according to the rights of the Church of England. These would be marriages taking place in terms of Part 3 of the Act. She confirmed that the Lanesborough Hotel where the ceremony took place would have been an approved premises at the time. The question, however, does not end there, it also has to be established if it was approved under the relevant regulations. According to Ms Kentridge the issue of approval was not necessarily the issue but the question was whether the proceedings of 18 August 2007 qualified as a marriage in terms of the relevant section. Section 26 deals with marriages which may be solemnized on authority of the superintendent registrar's certificate. Section 46B dealing with the solemnization of marriages on approved premises provides as follows:

'(1) Any marriage on approved premises in pursuance of section 26 (1) (bb) of this Act shall be solemnized in the presence of –

(a) two witnesses, and

(b) the superintended registrar and a registrar of the registration district in which the premises are situated.'

[31] According to Ms Kentridge, the above subsections were not fulfilled in that there was no superintendent registrar at the ceremony. She in fact insisted, which is of course a fact that there wasn't a registrar at all for the district where the ceremony took place. The further non-compliance with the Act, was the failure by either party to say, in the hearing of the attendees, the words prescribed by the Act in terms of ss 43, 44(3) or (3A). In terms of s 43, if a marriage is to be solemnized in a registered building, without the presence of the registrar, a person authorised by the trustees or governing body of that particular building may be present at the solemnization of the said marriage. The name and address of such person has to be certified to the Registrar General and to the superintendent registrar of the registration district in which the building is situated. This has to be done within a prescribed time and in a prescribed manner.

[32] Section 44(3) makes provision for the words to be contained in a declaration to be made by each of the persons contracting the marriage in a registered building. The declaration must be made in some part of the ceremony and in the presence of

witnesses and the registrar or authorised person. The declaration is framed as follows in terms of the relevant subsection:

'I do solemnly declare that I know not of any lawful impediment why I, *AB*, may not be joined in matrimony to *CD*'.

Each of the contracting parties has to say to the other:

'I call upon these persons here present to witness that I, *AB*, do take thee, *CD*, to be my lawful wedded wife [or husband]'.

Section 44(3A) provides words in the alternative in which the declaration may be framed.

[33] Ms Kentridge testified that the essence that needs to be conveyed to every single person in the room, including the person conducting the ceremony, is that there is no legal obstacle to the two parties marrying each other and each individual getting married. The absence of those words is a conclusive indication that no marriage has taken place. She further referred to a prohibition contained in s 46(B)(4) of the Act which provides as follows:

'No religious service shall be used at a marriage on approved premises in pursuance of section 26(1)(bb) of this Act'.

A marriage in approved premises is strictly in terms of the Act, a registry wedding according to Ms Kentridge.

[34] Reverend Wilkinson confirmed this aspect, saying in his affidavit that there was deliberately no reference to any marriage, wedding, union, groom or bride during the ceremony as one would typically have in the case of a wedding ceremony. He deposed that he did not call upon the parties to exchange the peremptory minimum declaration that parties are required to exchange during the solemnization of a marriage at a registered building nor did the parties exchange such declaration.

[35] In her evidence, as an expert Ms Kentridge told the court that a wedding in a registry office is a civil wedding and that if anyone wanted a religious wedding, then they would have to go a whole different route and that a religious ceremony in a hotel is nothing more than a blessing ceremony. The issue of the blessing ceremony is succinctly dealt with by Reverend Wilkinson who says such ceremony is common and well understood in England. He deposed to the fact that many couples would

typically marry at the local registry office and subsequently have a faith-based ceremony as part of the celebrations.

[36] He insisted that the events planner and the defendant's personal assistant had requested him to do a blessing ceremony. He further said there was no question that a wedding ceremony should or could be conducted. There could have been no wedding ceremony taking place since the parties did not comply with any of the necessary preliminary and peremptory requirements for the solemnization of a marriage, according to Reverend Wilkinson. He was not even authorised to perform a civil wedding ceremony as a clergyman. This was confirmed by Ms Kentridge in her evidence. He then went ahead and dealt with the formalities for a properly constituted wedding as dealt with by Ms Kentridge.

[37] The court was referred to s 75 of the Act. This section deals with offences relating to solemnization of marriages. The relevant sections provide as follows:

'(1) Any person who knowingly and wilfully-

(a) ……

(b) solemnizes a marriage according to the rights of the Church of England without banns of matrimony having been duly published (not being a marriage solemnized on the authority of a special licence, a common licence [certificates] of a Superintendent Registrar);

(c) solemnizes a marriage according to the said rites (not being a marriage by special licence (or a marriage in pursuance of section 26(1)(*dd*) of this Act) in any place other than a church or other building in which banns may be published;

(d) ……

shall be guilty of felony and shall be liable to imprisonment for a term not exceeding fourteen years'.

[38] Ms Kentridge unpacked the provisions of this section of the Act as follows, that if someone were to say they are conducting a marriage in a hotel and there isn't the district registrar and another registrar (as indicated earlier in this judgment) then such person would be guilty of a felony. According to her this prohibition applied to Reverend Wilkinson. This notion is confirmed by Reverend Wilkinson right through his affidavit. In the circumstances, Ms Kentridge insisted that what happened at the

Lanesborough Hotel could not have been a marriage. According to her it would not matter that there were dresses that had been prepared, nor whether rings were exchanged, nor the profession of their love by either party, it was still not a marriage. The fact that the invitations referred to a wedding was completely irrelevant in view of the legal status of the ceremony that took place at the Hotel. This was so, she testified, because the legal prerequisites had not been fulfilled.

[39] In *Attorney-General v Akhter & Ors*[5] heard in the Royal Courts of Justice on 14 February 2020 it was said that agreements to marry do not give rise to legal rights, and that no action lies for their breach. It was further stated that a person could change their mind and break their promise to do so right up to the last minute before the proposed marriage ceremony or even during the ceremony. It was further considered that from a legal point that it does not matter how deeply hurtful such breach is to the person's intended spouse. Such agreements to marry do not give rise to legal rights and no action lies for their breach.

[40] It was further said in the same judgment that other than in the context of consent, mere intention (to marry) could not change the legal effect of a ceremony of marriage.[6] The question of whether a marriage is void had to depend on the facts as they were at the date of the alleged marriage, such determination could not be wholly dependent on future events, such as the intention to undertake another ceremony.[7]

[41] The evidence of Ms Kentridge also dealt with the failure to obtain a licence. This was so because the parties had not given notice of their marriage to the registrar. She gave a detailed account of how the notice of marriage has to be done in terms of s 27 of the Act. Chief amongst the requirements of s 27 is that each party has to go in person to give the said notice to the registrar. Ms Kentridge also dealt with the requirements of the Asylum and Immigration Act of 2004 dealing with the necessity for special permission for anyone coming to England to get married there.

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[5] *Attorney-General v Akhter & Ors* [2020] EWCA Civ 122.
[6] Ibid para 97.
[7] Para 103.

According to her a notice has to be given for a longer time for anyone intending to come into England to get married. This did not happen in the case of the plaintiff.

[42] The person who officiates at a wedding has a duty to register the said marriage according to English law and based on Ms Kentridge's evidence. In the case of a religious proper marriage, the clergyman conducting the marriage ceremony has to effect the registration there and then. In his affidavit at paragraph 8.6.3 Reverend Wilkinson says the following:

'I did not register in duplicate in two marriage register books the particulars relating to the alleged marriage. In addition, the register books were not signed by Steyn, Botha and two witnesses. This is for the simple reason that a marriage between Botha and Steyn was not solemnized.'

[43] Ms Kentridge concluded her expert evidence by saying that there was not and could not have been a marriage on 18 August 2007 at the Lanesborough Hotel. She emphasised that it could not have been a marriage and no marriage was registered. She reiterated that one fell within the Act or they are not married. Her evidence was not challenged on any front. The evidence of Ms Kentridge concluded the defendant's case.

[44] In his closing argument, Mr *Naidoo*, counsel for the plaintiff; conceded that a consideration of Ms Kentridge's evidence indicated, to a large extent that there are peremptory provisions in the Act that had not been complied with. That notwithstanding, Mr *Naidoo* submitted that, based on the *Akhter* judgment, the court in this case was called upon to go beyond determining whether there was a marriage or not. According to him, the court has to make a determination as to whether the marriage claimed by the plaintiff is what is referred to as a non-marriage and a marriage that is void for non-compliance with the strict requirements. He argued further that such determination is of immense importance in that that kind of distinction (between a non-marriage and a marriage that is void) would determine whether a second legged enquiry in respect of any claims against the defendant can be determined.

[45] Before going further with Mr *Naidoo's* submissions in this regard it is apt to consider what was said by Kruger J in his judgment of 15 May 2017. At paragraph 21 he says the following:

'As is evident from the excerpts of the agreement [of 11 December 2007], the parties acknowledged that they were not married to each other.

> …prescription in respect of all claims that the plaintiff may have had against the defendant, commenced to run, in my view, from the 11th December 2007 (The defendant has averred that it commenced earlier – 29th August 2007-'

And at paragraph 24:

'I am of the view that as the proposed alternate claims have prescribed, the application for leave to amend cannot be said to be *bona fide* and the application must fall on this ground alone'.

The agreement referred to in paragraph 6 of this judgment deals with what would be due to the plaintiff "*upon the conclusion of the marriage*" (my emphasis). Based on the decision that I am going to arrive at as well as the excerpts from Kruger J's judgment the contents of this document do not warrant any further attention in this judgment.

[46] Kruger J found merit in the argument on behalf of the defendant that no meaningful purpose would be served in allowing an amendment which would be met by a plea of prescription. He further had misgivings about the context of the application to amend itself in that he found that a perusal of the proposed amendment, together with the defendant's objection thereto revealed that the proposed particulars of claim (in that application) would be expiable. This he based on the fact that, in so far as he was concerned, there was a lack of particularity in a number of these particulars of claim which he went ahead and enumerated at paragraph 28 of his judgment. Referring to *Rousalis v Rousalis*[8] he concluded at paragraph 34 that the proposed alternate claims did not fall within the ambit of the decree of divorce nor could they be said to be ancillary to a divorce action. He stated that it was common cause that the defendant did not reside or carry on business within the area of this court's jurisdiction. As a result, he found, that this court did not

[8] *Rousalis v Rousalis* 1980 (3) SA 446 (C).

have jurisdiction in respect of the alternate claims as they were set out in the proposed amendment (before him).

[47] A consideration of the excerpts of Kruger J's findings makes it difficult to understand how the plaintiff would even commence considering "any claims against the defendant". The two marriages referred to by Mr *Naidoo* were distinguished in the *Akhter* judgment as follows:[9]

'The most significant practical difference is that a non-marriage creates no separate legal rights while a decree of nullity entitles a party to apply for financial remedy orders under the 1973 Act'.

The Justices in the *Akhter* judgment noted that the trial judge had adopted a more flexible approach as there had been a reference to human rights (relating to the rights of the children in the relationship of the respondents in that judgment).

[48] The Justices went further to say that it is the status of a valid marriage alone which creates rights and obligations and not any other form of relationship. At paragraph 46 of the *Akhter* judgment it was stated that a void marriage is "strictly speaking, a contradiction in terms". (This said with reference to *Bromley's Family Law* 11 ed, 2015 by Lowe and Douglass at 67). It was further said that, that was so because it had no legal effect on the status of the parties. On the other hand, a decree of nullity, it was said, could be said to be only declaratory because it does not make the marriage void. It was significant because it entitled the parties to apply for financial remedy orders under the Matrimonial Causes Act 1973 (the 1973 Act) .

[49] The *Akhter* judgment also dealt with the concept of a non-marriage. At paragraph 52 it was said that the Act and the 1973 Act set out when non-compliance with certain of the required formalities will make a marriage void. It was said in that judgment that those two Acts did not contain any provisions setting out when a ceremony would not be within the Act at all. The judgment further stated that "it had long been recognised, however, that there must be some ceremonies or acts which do not create even a void marriage and which, therefore, do not entitle a party to a

[9] *Attorney- General v Akhter & Ors* [2020] EWCA Civ 122 para 6.

decree of nullity".[10] The following statement referred to in paragraph 52 of the *Akhter* judgment is of relevance in this matter:

'We would also refer to, *The Formation and Annulment of Marriage*, 1st Ed 1951, in which Joseph Jackson said, at p. 65, that "the question whether a marriage is void, voidable or valid presupposes the existence of an act allegedly creative of the marriage status"'.

[50] A reference was made at paragraph 53 to *R v Mohamed (Ali)*[11] where it was said to be within the Act, the ceremony "must be at least one which will prima facie confer the status of husband and wife on the two persons. In no uncertain terms, the uncontradicted evidence in the case of the defendant shows that the ceremony at the Lanesborough Hotel did not and could not have achieved this result. The court expressed its reservations about the term "non-marriage" and indicated that it would propose that they should be called a "non-qualifying ceremony" to signify that they are outside the scope of both the 1949 and the 1973 Acts.[12] It was further stated that the focus should be on the ceremony.

[51] Mr *Naidoo* argued that the marriage in this case would fall into the category of a voidable marriage. He argued that this was so because the basic requirement of an intention of the parties to marry was common cause and that the parties had cohabited before the ceremony. He also cited the fact that there was an engagement and that there was no impediment in law that prevented the parties from marrying. Further in his address, Mr Naidoo inadvertently stated that "up to the stage at which the ceremony was conducted and **those vows were exchanged**". This is, with respect, not an entirely correct statement in that we know that Reverend Wilkinson stated categorically that no vows were exchanged between the parties.

[52] The authorities that I have referred to previously in this judgment clearly show that the intention and belief of the parties is immaterial if the ceremony is not within the four corners of the Act. I do not intend regurgitating those authorities save to say that the argument based on these aspects has no merit. The court was further requested to make a determination on what counsel referred to as a purported

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[10] Ibid para 52.
[11] *R v Mohamed (Ali)* [1964] 2 QB 350n.
[12] *Akhter* para 64.

marriage and to draw that distinction whether it is a void or a voidable marriage. This argument will not fly, firstly because the court will not have jurisdiction to make that determination. This court is called upon to determine if any marriage took place between the parties on 18 August 2007. That mandate does not extend to propping up some kind of ceremony that occurred outside the Act.

[53] Section 2(1) of the Divorce Act[13] confers jurisdiction to a court in instances if the parties or either of the parties is:

'(a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted or

(b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.'

[54] Divorce action is defined as:

'an action by which a decree of divorce or other relief in connection therewith is applied for, and includes

(a) an application *pendente lite* for an interdict or for the interim custody of, or access to a minor child of the marriage concerned or for the payment of maintenance; or

(b) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application;'.

The parameters of this section are clear and they do not incorporate what was submitted by counsel as a determination to be made by this court.

[55] In his response Mr Subel, counsel for the defendant correctly drew the court's attention to the fact that the only jurisdiction in this regard that the court possesses is only on one issue, and that is, is there a valid marriage? He was further correct in saying that one does not grant a decree of divorce in respect of void, so-called void marriages or voidable or putative marriages. Further as was correctly argued by defendant's counsel, the determination now sought to be made by this court, does

[13] 70 of 1979.

not fall within the ambit of the relief claimed by the plaintiff. Counsel further reiterated that the expert Ms Kentridge had clearly stated that what had happened between the parties in this case was a non-marriage and that her evidence had not been challenged nor had this aspect been further canvassed on behalf of the plaintiff.

[56] Counsel for the defendant gave quite a detailed submission of his observations of the type of a witness that the plaintiff was. He re-iterated the fact that all the litigation that the parties have had to go through has been unnecessary considering the fact that the plaintiff must have known way back in 2007 that no marriage had taken place between her and the defendant. The evidence in the transcript that was graciously provided to the court gives a clear indication of the lengths that the plaintiff was prepared to go to for her to be found to have been married to the defendant. She dismally failed to achieve this. The least said about her as a witness, the better. She was a poor witness, argumentative right through her testimony. She avoided answering questions directed at her. She insisted on making empty, unsubstantiated allegations. As was observed by counsel for the defendant, whenever she found herself trapped in the web of her inconsistencies, she pleaded duress or lack of capacity for which she has nothing to show.

[57] The plaintiff was the one alleging the existence of a marriage which she insisted had taken place in a foreign country. The sequence of events shows that she was represented at all the crucial stages of this litigation. It was incumbent upon her to present before this court the foreign legislation on which she relied to sustain her claim of there having been a marriage existing between her and the defendant. She failed to do this, despite the existence of Ms Kentridge's expert opinion in the file, years before this trial took place. The evidence of her sister, Ms Jacqueline Anne Burger and her friend Ms Paula Anne Xenopaulos did not take her case any further as it all amounted to the repetition of her evidence on the purported marriage.

[58] On the other hand, the defendant meticulously prepared for this trial. He placed the court in a proper position to understand what the requirements of the law were where the ceremony took place. The court has no reason to question the undisputed evidence of Mr Christmas and the expert evidence of Ms Kentridge. The cross- examination of Mr Christmas did not in any way affect the probative value of

his evidence, based on his personal involvement with the parties and his experience as a retired barrister of the London courts. The contents of the affidavit that was submitted by Reverend Wilkinson were not challenged in any way and the court was not given any reason not to accept the affidavit as deposed to by the Reverend.

[59] The evidence presented by the defendant leaves no shadow of doubt in my mind that there was never a marriage contracted between the plaintiff and the defendant. As a result, there can be no talk of a decree of divorce as correctly argued by counsel for the defendant. It is my considered view that the plaintiff has all along known that there is and there never was a marriage existing between her and the defendant. She may not have been schooled in English law as she argued in court, but the explanation given to her by the defendant in that the preparations were not up to scratch so as to lead to the celebration of a marriage, was sufficient for her to understand that the ceremony conducted by Reverend Wilkinson could not be turned into a marriage just by what she allowed herself to believe. She knew that the prerequisites for a marriage in English law had not been met.

[60] If all of this was not sufficient to convince her that no marriage had resulted from the ceremony that took place at the Lanesborough Hotel on 18 August 2007, then surely on either the 28th or 29th of August when the parties met with Mr Christmas at the hotel, where the document referred to in these proceedings was drafted, then, she clearly was aware that there was no marriage that had been concluded between her and the defendant. That knowledge notwithstanding, the plaintiff has continued litigating, knowing well that this was an exercise in futility. She decidedly ignored the subtle warnings given by Kruger J in his orders referred to earlier in this judgment.

[61] In the *Akhter* judgment the Justices made reference to the judgment of *Dukali v Lamrani (Attorney General intervening)*[14] where it was said that the marriage was "neither valid nor void but was not non-existent". It was further stated that the marriage was not valid "because there was manifold non-compliance with every requirement of the Marriage Acts as to notification, use of a registered or approved

[14] *Dukali v Lamrani (Attorney General intervening)* [2013] 2 FLR 1099.

venue, form, authorisation of the officiant and subsequent registration".[15] In *Akhter* it was further stated that it was also not a void marriage because "it did not even purport to be a marriage under the provisions of the Marriages Acts; the parties had not "purported to inter-marry under the provisions of [PART III] of the 1949 Act at all". It was therefore a "non-marriage".[16] The judgment stated further that agreements to marry did not give rise to legal rights, and that no action lies for their breach.[17]

[62] Like in the *Akhter* judgment, in this case the parties knew that the ceremony had no legal effect and that they would need to undertake another ceremony which complied with the requirements of the Act or in the case before me, a ceremony in terms of the marriage laws of South Africa if they were to be validly married. The indications emanating from the body of the evidence are that the plaintiff was content with the state of affairs. She does not seem to have even once raised the issue of the marriage that had failed to take place in England once the parties were back in South Africa.

[63] The judgment of *Akhter*[18] refers with approval to an article entitled 'The Legal Treatment of Islamic Marriage Ceremonies'[19] where it is stated that "it would be wrong in principle for those who know that they are flouting the law to have more rights than those who do not". The judgment[20] further stated that even if a wife's claim to a share of what would otherwise be matrimonial assets amounts to "property rights", the gateway to those property rights would be a right to a decree of either divorce or nullity. In the matter before me, I am satisfied that that right to a decree of divorce has not been established. I am further satisfied that no marriage was ever concluded between the plaintiff and the defendant. In the circumstances, this court has no legal mandate to issue any decree of divorce. That prayer by the plaintiff falls to be dismissed with costs.

Costs

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[15] Ibid para 36.
[16] *Akhter* para 57.
[17] Ibid para 88.
[18] *Akhter* para 45.
[19] Professor Probert and Shabana Saleem 'The Legal Treatment of Islamic Marriage Ceremonies' (2018) *Oxford Journal of Law and Religion*, 7, 376-400 at 390.
[20] *Akhter* para 72.

[64] Counsel for the defendant has submitted that costs on the scale as between attorney and client are justified in this case. His motivation for this scale is that not only is the claim frivolous and vexatious, but that the plaintiff has done everything possible to delay the matter being heard. He submitted further that the plaintiff had failed to comply with the directives of this court. Such failure had, according to counsel's submissions, resulted in the defendant having pro-actively taken steps that were required of the plaintiff as *dominus litis* to ensure that the matter was enrolled and trial ready. He submitted that on two separate occasions the defendant had been required to bring an application to strike out and dismiss the plaintiff's action. The first set of costs was granted against the plaintiff on 27 January 2020 and it was on an attorney and client scale.

[65] The costs of the second application to dismiss (issued on 3 June 2020) was reserved for determination by the trial court in an order of Vahed J dated 2 October 2020. Counsel has coupled this with the costs of the meeting held in Chambers with the presiding judge in this matter on 22 October 2020. Counsel argued that the same costs order had to be made as the order made in relation to the first application to dismiss. The basis for this argument was according to counsel, the fact that the plaintiff had persisted in her default in complying with the directives of this court and had failed to attend to the pagination of the court file and production of the trial bundle. In the circumstance counsel for the defendant indicated that the costs sought were to include the costs occasioned by the engagement of two counsel and to be taxed on the scale as between attorney and client. His submission in this regard was that the costs should include the qualifying fees of Ms Kentridge.

[66] Mr *Subel* justified the appointment of two counsel on the consideration that this was a very important matter. He further submitted that on the pleadings there was a claim for an amount equal to half of the estate of the defendant. The papers had grown enormously, and getting the matter trial ready had been a very difficult exercise. The court has been asked to declare Ms Kentridge as having been a necessary expert witness. I will hasten to say that if one considers the pronouncement of Van Heerden J in *Atlantic Harvesters of Namibia (Pty) Ltd v*

Unterweser Reederei GmbH of Bremen [21] (judgment referred to in defendant's heads of argument) that:

'In our Courts, foreign law is a matter of fact to be decided on evidence and the proper evidence is that of experts, that is to say, of lawyers practising in the courts of the country whose law our Courts want to ascertain',

then the calling of the expert evidence of Ms Kentridge became inevitable. This was a duty that fell in the domain of the plaintiff's doorstep. She failed to present this evidence, the defendant was thus left with no option.

[67] In response to the issue of costs sought, Mr *Naidoo* denied that the action was frivolous and that the plaintiff was entitled to bring the action and to see it to its logical conclusion. He thus argued that should the court grant the defendant costs, then such costs had to be on the party and party scale. I do not agree with counsel for plaintiff. Surely everyone is entitled to bring an action but entitlement is not a stand-alone consideration to the exclusion of everything else, especially the prospects of success in any given matter. In my mind that would be reckless and amount to taking a dangerous gamble. The courts would be inundated with unmeritorious applications to the detriment of deserving cases. Having said that, I am satisfied that that is exactly what the plaintiff has done in this case, to her detriment, I am afraid.

[68] Having said this I am satisfied that the defendant has made an overwhelming case for the dismissal of the plaintiff's action with costs. He has also succeeded to show the court why such costs should be granted at a punitive scale.

Order

[69] I accordingly make the following order:

1. The action instituted by the plaintiff is dismissed and the court determines that no marriage was entered into between the plaintiff and the defendant.

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[21] *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986 (4) SA 865 (C) at 874E-F.

2. The plaintiff is to pay the defendant the following costs:

   (a) The reserved costs of the second application to dismiss including the costs occasioned in relation to the meeting with Hadebe J in Chambers on 22 October 2020.

   (b) The qualifying fees of defendant's expert witness Ms Janet Kentridge.

3. Such costs are:

   (a) to be paid on the scale as between attorney and client;

   (b) to include the costs occasioned by the engagement of two counsel.

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Hadebe J

APPEARANCES:

Date of Hearing:	04 November 2020
Date of Judgment:	02 August 2021
Counsel for the Plaintiff:	Adv. Naidoo
Instructed by:	Amods Attorneys
Ref No:	MR AMOD/MS/N135
Counsel for the Defendant:	Adv. Subel S.C. with Adv. N. Beket
Instructed by:	Tegendhaft Wapnick Banchetti & Partners c/o Garlicke & Bousfield Inc.
Ref No:	VJM