



**REPUBLIC OF NAMIBIA**

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**MINISTRY OF HOME AFFAIRS, IMMIGRATION, SAFETY AND SECURITY**

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**MOTIVATION SPEECH BY HON. DR. ALBERT  
KAWANA, MP, MINISTER OF HOME AFFAIRS,  
IMMIGRATION, SAFETY AND SECURITY, ON THE  
OCCASION OF MOTIVATING THE MARRIAGE  
BILL**

**Tuesday, 02 July 2024**

**National Assembly**

**Windhoek**

1. Honorable Speaker, I rise to motivate the Marriage Bill. There is no doubt that following the judgment of the Supreme Court which was handed down on 16 May last year, the issue of same sex marriage and sexual orientation have become topical in Namibia.
  
2. It may be recalled that two consolidated appeal cases involving foreign nationals “married” to Namibians in the same sex marriages in countries where same sex marriages are recognized took the Government to court challenging the decision of the Ministry of Home Affairs, Immigration, Safety and Security’s refusal to recognize the foreign nationals as “spouses” as contemplated in section 2 (1) (c ) of the Immigration Control Act, 1993 (Act No. 7 of 1993). The Section exempts foreign “spouses “of Namibian nationals from applying for entry and residence permits by virtue of marriage. The Ministry reasoned that the term “spouse “in that section refers to a spouse in a heterosexual marriage as recognised in terms of Namibian laws being a marriage between a man and a woman, not same sex marriages.
  
3. The two foreign nationals argued and contended that the decision of the Ministry was unlawful in that if one adopts the common law principle known as *lex loci celebrationis matrimonium* (i.e. the validity of a marriage is determined with reference to and in accordance with the legal requirements of a foreign country in which it was concluded). They argued that their marriages were valid because both South Africa and Germany recognise same sex marriage.

They, therefore, argued that their exclusion from the word “spouse” in the circumstances where their marriages were valid based on the common law principle, violated their right to dignity under Article 8 and equality under Article 10 of the Namibian Constitution.

4. Unfortunately, the Supreme Court largely and extensively, in its findings, relied on one main pillar, the common law legal principle cited above to find in favour of the foreign appellants and to decide that the two appellants must be recognised as “spouses” to their Namibian same-sex spouses for purposes of Section 2 (1) (c) of the Immigration Act referred to above.
5. There is no doubt that the judgement of the Supreme Court triggered a strong reaction from various sectors of the Namibian Society, ranging from political parties, religious organisations, traditional leaders, trade unions and youth organisations, among others. Given this state of affairs, one may ask a question, what steps need to be taken to address this development within the letter and spirit of the Namibian Constitution and other laws of our Republic?
6. Namibia is one of the shining examples of democracy on the African Continent. Respect for the rule of law is one of Namibia’s bedrock of democracy. The cardinal principle of the rule of law as one of the important elements of democracy is well respected in Namibia. The judiciary is completely independent. However, the Executive branch of the State has a duty to protect the values, cultural norms and traditions of the Namibian people.

These are the social values which today mirror the ideology of the Namibian society. Therefore, it is imperative that legislative reforms must be put in place in order to make it categorically clear and beyond any shadow of doubt that same sex marriages should not be recognised in Namibia because they are contrary to the cultural norms, tradition, ideology and religious beliefs of the Namibian people. A number of laws will have to be amended or repealed in order to clearly define the words marriage and spouse.

7. Honourable Members of this august House may recall that last year, Parliament passed two private members Bills with a view to addressing the subject of same sex marriage. The two Bills assisted to calm the nation following the judgement of the Supreme Court of 16 May 2023. Therefore, allow me to thank Honourable Jerry Ekandjo for tabling the two Bills. In the meantime, Cabinet directed that there is a need to comprehensively review the marriage legislation in Namibia and come up with a new Marriage legislation with a view to addressing many aspects which are related to marriage.
8. As a result, it has been decided to come up with a completely new law to regulate civil marriages in Namibia and to repeal the Marriage Act of 1961 (Act No. 25 of 1961) including all its subsequent amendments. Before I discuss the provisions of the Marriage Bill, allow me to briefly discuss the policy stance and the historical background underlying the policy stance.

9. The values, traditions and customs of the Namibian nation are enched in Christianity. As a result, Namibia today can be referred to as overwhelmingly christian nation. In terms of the bible as strictly interpreted, Christianity does not recognise nor support same sex marriages. In Namibia, this position is still held to this day. Indeed, a number of churches still solemnise marriages with a blessing of christian values.
  
10. It is my submission that the common law principle which the Supreme Court relied on has an exception which was established long time ago. As discussed hereunder, it is this exception which the Supreme Court failed to apply. I further submit that the common law principle which holds that the validity of a marriage is governed by the law of the country where it was contracted is not cast on stone. Both decided cases elsewhere as well as legislation, including Namibian laws provide an exception to the general common law principle relied upon by the Supreme Court.
  
11. As far back as 1917, in the case of *Seedat's Executors V The Master Natal* (1917 AD 302), the exception to the common law principle was clearly stated. In 1917, the late Chief Justice Innes of South Africa clearly stated the exception as follows:  
  
*"No doubt the general principle is that the validity of a marriage is governed by the law of the place where it was contracted..... But there are exceptions to the widely accepted rule by which foreign Courts recognise the validity of a marriage contracted in accordance with local law.*

*And one of them is based upon the principle that no country is under an obligation on grounds of international comity to recognize a legal relation which is repugnant to the moral principles of its people....”* (Emphasis added).

12. The Namibian Constitution clearly stipulates the hierarchy of Namibian laws under Article 66. First is the Namibian Constitution. Any law which is in conflict with the Namibian Constitution, the Constitution prevails. This is followed by an Act of Parliament, and at the bottom is the common law and the customary law which are at par with each other.

13. I will begin my analysis with the 1977 SWAPO Family Act. The Family Act was made part of the Namibian laws by virtue of Recognition of Certain Marriages Act, 1991 (Act No. 18 of 1991) which recognises marriages which were contracted under the SWAPO Family Act. Article 8 of the SWAPO Family Act of 1st December 1977 provides in part that:

*“the marriage shall be valid when two parties of different sex state their agreement to marry.....”* (Emphasis added).

14. It is not surprising that SWAPO adopted the policy stance reflected under Article 8 of the SWAPO Family Act of 1st December 1977. Given the big number of exiles under its care, SWAPO established camps or settlements where a large concentration of women and children were settled. In the camps or settlements, schools and other institutions such as health and agricultural centres were created by SWAPO in order to address the socio economic and cultural needs of exiles under its care. In these settlements, family values became the centre piece of life. Formal marriages took place and were solemnized by accredited officials appointed by SWAPO. The newly weds were issued with marriage certificates.
  
15. At home, family values and relations were propagated by religious and other faith-based organizations, as well as the tradition and customs of the Namibian people mainly through traditional authorities. At all material times, marriage was understood to be a union between a man and a woman of full age. Spouse was understood in the same manner. Therefore, a combination of these values found reflection in the laws of the Republic of Namibia after independence. At present, these laws regulate civil marriages as well as customary marriages.

Therefore, both prior and after independence of Namibia, at no time was same sex marriage recognised whether in exile or at home. The Government policy stance on same sex marriage must be understood in this context.

16. The stance of SWAPO on the issue of same sex marriage as reflected in the SWAPO Family Act of 1977 finds expression in a number of laws passed by our Parliament after Namibia's independence. A few examples will suffice. The Children Status Act, 2006 (Act No. 6 of 2006) defines "marriage" as follows:

"marriage means a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition or custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which marriage is recognized as a marriage by the law of Namibia;"  
(Empasis added).

The Child Care and Protection Act, 2015 (Act No. 3 of 2015) defines "marriage" as follows:



“marriage means a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition or custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, where such a marriage is recognized as a marriage under the laws of Namibia;”

17. Indeed, even Article 14(1) of the Namibian Constitution states that:

*“Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to find a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.”*

18. It is, therefore, very clear that the Supreme Court, with respect, failed to consider the fact that even the common law principle under discussion is subject to the requirement that the laws of foreign countries on marriage are subjected to the laws of Namibia. Those foreign marriages which are in conflict with the laws of Namibia cannot be recognised.

I further submit that even if the common law principle relied upon by the Supreme Court finds application in Namibia in its original form and totality, it is still subject to Article 66 (1) of the Namibian Constitution to the effect that both “the customary law and the common law of Namibia in force on the date of independence [remains] valid to the extent to which such customary or common law **does not conflict** with [the] Constitution or **any other statutory law**”. All these are clear provisions whose interpretation do not give rise to absurd results.

19. The above stated common law principle and the exception to the principle is similar to another international law principle which is known as comity. It mainly applies in extradition cases. The principle requires that even in the absence of extradition treaties between them, States must assist each other in extradition requests. The only exception is that States are not under an obligation to extradite suspects in criminal cases if the subject of extradition request does not constitute a criminal offence in the requested State. Indeed, the exception to the principle also applies in formal extradition treaties.

For example, section 3(1) of the Extradition Act, 1996 (Act No. 11 of 1996) of Namibia clearly states that: “for the purposes of this Act “extraditable offence” means an act, including an act or omission, committed within the jurisdiction of a country contemplated in section 4 (1) which constitutes under the laws of that country an offence punishable with imprisonment for a period of 12 months or more and which if it had occurred in Namibia, would have constituted under the laws of Namibia an offence punishable with imprisonment for a period of 12 months or more.” Emphasis added.

20. Hon. Speaker, Honourable Members, the Marriage Bill before you must be understood in the historical context I have outlined above. The Bill is attempting to modify the common law and it is within the letter and spirit of Article 66(2) of the Namibian Constitution. Under this approach, the common law will merely be modified as it was done in the past when the common law principle of the head of the family or household was modified by the Married Persons Equality Act, 1996 (Act No. 1 of 1996) which was passed by Parliament.

21. I now turn to discuss the salient clauses of the Bill before you. Namibia's current law on marriage is the Marriage Act, 1961 (Act No. 25 of 1961). Some of the aspects covered by this Bill have already been discussed in this august House during the discussion on the Civil Registration and Identification Bill last year. These are specifically the definitions of marriage and spouse. This Bill, once passed into law, will repeal the Marriage Act of 1961 and all its subsequent amendments. The amendments are: Marriage Amendment Act, 1964 (Act No. 11 of 1964); Marriage Amendment Act, 1968 (Act No. 19 of 1968); Marriage Amendment Act, 1970 (Act No. 51 of 1970); Marriage Amendment Act, 1972 (Act No. 26 of 1972); Marriage Amendment Act, 1973 (Act No. 12 of 1973); and Marriage Amendment A.G. Proclamation (A.G. Proclamation No. 8 of 1977). In addition, sections 23, 24 and 25 of Married Person Equality Act, 1996 (Act No. 1 of 1996); Marriage, Births and Deaths Amendment Act, 1987 (Act No. 5 of 1987); and section 10(10) and section 226 of the Child Care and Protection Act, 2015 (Act No. 3 of 2015) have been amended in order to bring them in line with new legislation.
22. This Marriage Bill only applies to civil marriages, just like the 1961 law which is being replaced also applied to civil marriages only.

The registration of customary marriages will be dealt with in a separate law. Likewise, this Bill will not repeal the Native Administration Proclamation of 1928; a separate bill called the Uniform Matrimonial Property Bill will be introduced for this purpose. The purpose of this bill is to regulate the solemnisation of marriages, provide for the validation and recognition of certain marriages and to provide for incidental matters. The Bill consists of seven parts. Part 1 covers introductory provisions; Part 2 covers pre-requisites to solemnisation of marriage; Part 3 covers Solemnisation of marriage; Part 4 covers validation and recognition of certain marriages; Part 5 covers marriages involving foreign nationals; Part 6 covers offences and penalties; Part 7 covers general provisions.

23. I want to start off by highlighting the provisions that I know all of us are eagerly awaiting, namely, the definitions of “marriage”, “foreign marriage”, “spouse” and “opposite sex”. The definitions that are contained in this Bill are a product of thorough consultations, including our Ministry, Office of the Attorney General and Legislative Drafters to find the best wording possible in order to express the policy principle.

24. I want to highlight those definitions:

*“marriage” means a legal union –*

- (a) entered into voluntarily between two persons of the opposite sex and of full age; and*
- (b) solemnised or validated in terms of this Act or the repealed law; or*
- (c) recognised in terms of the Recognition of Certain Marriages Act, 1991 (Act No. 18 of 1991);*

*“spouse” means a person, whether male or female, who is married to a person of the opposite sex and includes a person who is a party to a foreign marriage;*

*“opposite sex” means the –*

- (a) male sex in relation to the female sex*
- (b) female sex in relation to the male sex,*

*sex being as determinatively assigned for purposes of birth registration, and “opposite sexes” has a corresponding meaning;*

25. One other key definition is that of foreign marriage. A foreign marriage will only be considered to be valid in Namibia if it meets the requirements of clause 31.

One such requirement is that such marriage must be consistent with the laws of Namibia which apply to marriage. In other words, if such foreign marriage is not capable to be recognised in accordance with the laws of Namibia relating to marriage, such marriage will not be recognised in Namibia such as same sex marriage.

26. Part 1 of the Bill provides a procedure for the designation of marriage officers. These include magistrates as ex-officios, a certain category of staff members of the Ministry, and members of religious denominations or organisations. For the designation of marriage officers, the law will now make it possible for staff members of the Ministry at certain ranks to be marriage officers. This change seeks to reduce the current burden on the magistrates, thus ensuring improved accessibility to solemnisation of marriages. Ministers of religion will continue to be eligible for designation upon application being made by their religious institutions or denominations, while magistrates (excluding assistant magistrates) are automatically marriage officers by virtue of their office.

27. There will, however, be an additional requirement for ministers of religion to be in active service as ministers of religion and to hold a qualification at a level prescribed by the minister, from an accredited institution. At this point, I want to pause and highlight that it is not a right for a minister of religion to be a marriage officer in respect of civil marriages. It is a delegated function of the State and it must be understood as such. The bill, of course sets requirements that must be met before one is designated as a marriage officer. All current religious marriage officers must apply to renew their designations within 12 months of the Act coming into force, under the new requirements set in this Act. The Bill also provides for revocation of designation due to misconduct or failure to comply with the law. Article 4 and Article 14 of the Namibian Constitution have been taken into account during the drafting of the Bill.

28. Article 14, subarticle (1), (2) and (3) of the Namibian Constitution states that:

*“(1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family.*



*They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.*

- (2) *Marriage shall be entered into only with the free and full consent of the intending spouses.*
- (3) *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.*

In addition, Article 4 (3) of the Namibian Constitution states as follows:

*“(3) The following persons shall be citizens of Namibia by marriage:*

- (a) those who are not Namibian citizens under Sub-Article (1) or (2) hereof and who:*

- (aa) in good faith marry a Namibian citizen or, prior to the coming into force of this Constitution, in good faith married a person who would have qualified for Namibian citizenship if this Constitution had been in force; and*

*(bb) subsequent to such marriage have ordinarily resided in Namibia as the spouse of such person for a period of not less than ten (10) years; and*

*(cc) apply to become citizens of Namibia”;*

29. The Bill prohibits persons below the age of majority, i.e. eighteen (18) years to marry. Therefore, no parent or minister can grant permission for a child who is below 18 years to marry. Although the age of majority is now eighteen (18), the Bill proposes that a person below the age of 21 still requires consent of parents or legal guardian or any person authorised to do so, such as a children’s commissioner, who is a magistrate, in order to marry. This is because it is believed that marriage is a huge responsibility that requires parental involvement. We need to debate this as law-makers and come up with a sound decision. If the consent cannot be obtained or is refused unreasonably, then a children’s commissioner, who is a magistrate, can grant the consent.

### Marriages entered into not in good faith

30. The good faith requirement for marriages with foreigners remains a major problem.

We do know that some foreign nationals marry Namibian citizens just to acquire the right to live in Namibia through the marriage. The Constitution requires a marriage to be “**in good faith**” for it to be a route to Namibian citizenship for a foreign national. The Bill provides that a marriage between a Namibian citizen and a foreign national is not in good faith and not valid for purposes of acquiring Namibian domicile (which includes the right to live in Namibia) or citizenship, if it was entered into primarily for the purpose of the foreign national acquiring Namibian domicile or citizenship. I must admit that this is the most difficult criteria to achieve and yet it is a Constitutional requirement. According to our experience, there has been a number of cases where Namibian citizens have fallen victims to this practice, especially Namibian women.

31. If there is any suspicion that a marriage is not entered into in good faith, the Ministry has power to investigate such marriage. The Minister may set out rules and procedures for such investigations in the regulations. Investigations would have to be concluded within a reasonable time period. During an investigation, the marriage will be treated as one concluded in good faith, until the contrary is proven.

In other words, the couple would have to be given the benefit of the doubt until the Ministry has determined that the marriage was in bad faith (in the same way that people accused of crimes are innocent until proven guilty).

### Pre-solemnisation process

32. One of the key changes in our law will be the introduction of a pre solemnisation process. The lack of checks and validations before solemnisation causes problems afterwards. The Bill is introducing a process where a number of aspects can be checked prior to the solemnisation of the marriage such as:

- Are intending spouses not already married?
- Do the intending spouses have the necessary documents such as identification documents, divorce orders if divorced?
- If they are below the age of 21, are the necessary consents obtained?
- Is the intended marriage officer indeed a marriage officer?
- If a foreign national is involved, are there no impediments from another country?

- If a foreign national is involved, is such foreign national legally in the country?
- The intending spouses will be informed of matrimonial property regimes available for them to choose one, that is in community of property or out of community of property. Experience has shown that most victims of matrimonial property regimes are women. Therefore, they will need protection under this proposed law.

33. After a pre-solemnisation process is done, then a pre-solemnisation confirmation will be issued that no legal impediments exist. This will enable the intending spouses to proceed to a marriage officer and get married.

34. Foreign marriages will only be valid in Namibia if they meet the requirements set out in clause 31. This must be read together with the definition of a foreign marriage which means a marriage which –

“(a) is entered into outside Namibia **voluntarily between persons of the opposite sex** who are 18 years or older; and

(b) meets the requirements of section 31;”

We have already discussed some of the requirements of section 31. This means that most importantly, same sex marriage will not be valid under the laws of Namibia.

35. Honourable Speaker, Honourable Members, I want to conclude by saying that this Bill seeks to improve our current law and close loopholes. Let us, therefore, discuss it keeping in mind that loopholes in the marriage law can lead to unwanted elements in our country. I, therefore, invite Honourable Members to discuss the Bill with an open mind. I now present the Marriage Bill for consideration by this august House.

I thank you!

**-END-**