

Marriage To A Foreigner: What it means in terms of Namibian laws

By: * TONI HANCOX - April 2006

THEY met, fell in love and got married. He is Namibian, she isn't. It should be one of the happiest times in a couple's life - the period of wedded bliss just after marriage.

From the queries received by the Legal Assistance Centre on a regular basis, it seems, however, that many couples are fraught with concern that their non-Namibian partners will be deported at any time should he or she not have a valid permit to reside in Namibia.

I cannot think of anything more nerve-wracking than a somber visit from an immigration official! One immediately feels guilty even if you haven't done anything wrong. A bit like being followed by a police car down the main road immediately makes you drive like you've only just passed your test! This short article is an attempt to clarify the position of "foreigners" who are married to Namibian citizens which will, hopefully, lower the stress levels in some marriages.

Our first port of call is the Immigration Control Act, Act no. 7 of 1993 ("the Immigration Act") which, among other things, regulates and controls the entry of persons into Namibia.

This Act provides how to and who should apply for the various permits, such as employment permits and study permits.

What is interesting, however, is that the relevant parts of the Act, those referring to necessary permits and prohibited immigrants, do NOT apply to Namibian citizens or to persons who are domiciled in Namibia (provided of course that the latter have not previously been officially removed from Namibia, have not been found guilty of specific serious offences or are not deemed to be an "undesirable" inhabitant or visitor).

The question follows then: Are those aliens (and I don't mean the green kind) who are married to Namibian citizens domiciled in this country or not? The answer also lies in the Immigration Act which, shortly, confirms that a person shall have domicile in Namibia if such person is ordinarily resident in Namibia by virtue of a marriage with a Namibian citizen.

This marriage must be a bona fide marriage, in good faith, as contemplated by the Namibian Constitution.

So, if one only looks to the Immigration Act it seems the situation is clear - honest marriage to a Namibian gives me domicile, means I don't need permits in terms of the Immigration Act.

It would seem that this was confirmed by the High Court of Namibia in the case of Sandra Miller and Michelle Paschke v The Law Society of Namibia (unreported), where it was stated that persons domiciled in Namibia do not need to obtain permanent residence permits.

From a proper reading of the Immigration Act, it appears that such persons are also exempted from obtaining employment and residence permits.

The Ministry of Home Affairs and Immigration can, in terms of Section 38 of the Immigration Act, issue a Certificate of Identity "to any person who is lawfully resident in Namibia and who desires to leave Namibia temporarily but is for any reason in doubt whether he or she will be able to lawfully enter Namibia on his or her return".

But we all know that laws can be changed.

So let's take the next step and look at our Namibian Constitution, the highest ranking of the laws in Namibia.

Article 4(3) of the Constitution deals with the acquisition of citizenship by marriage. It confirms that one can become a Namibian citizen by marrying a Namibian citizen, in good faith, and subsequently being ordinarily resident in Namibia as the spouse of such latter person for a period of at least ten years.

Then, lastly, one needs to actually apply to the Ministry of Home Affairs and Immigration; they don't just come and drop certificates off automatically.

The question is now whether being "ordinarily resident" means having a permit of some kind.

We have already seen that according to the Immigration Act, the very fact of a marriage to a Namibian citizen in good faith implies being ordinarily resident and affords such person domicile in Namibia.

It seems also as if the Immigration Act expressly distinguishes between persons acquiring domicile through marriage (i.e. "ordinarily resident" by virtue of marriage) whereas those acquiring domicile through a specified period of residence in Namibia have to be "lawfully resident" which would, in my view, imply some form of permit.

So in essence, the marriage to a Namibian citizen is the permit which allows the lucky suitor to remain in Namibia.

But this is not the only protection the foreign spouse has.

Chapter 3 of the Namibian Constitution deals with fundamental rights and freedoms and is entrenched.

This means that unlike laws passed by the legislature, Chapter 3 can NEVER be changed.

So the rights protected in this chapter were obviously held in high regard by the drafters of our Constitution.

The following articles referred to all fall within Chapter 3.

Article 14 deals with the family and basically affords all persons the right to marry and to found a family. It also states that: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

Flowing from this, in my opinion, would be the duty of mutual support that a husband and wife owe each other and, interestingly enough, this duty was confirmed in the South African Constitutional Court in *Dawood & Another v Minister of Home Affairs & Others* 2000 (8) BCLR 837 (CC).

One of the most trying times in any marriage is, arguably, the times when finances are a struggle. The duty of support not only relates to financial support, but certainly includes it.

Given the fact that an employment permit is granted at a fee of N\$500 and is usually only granted for a one-year period, one could be faced with the situation that the very person who needs to work more than others, cannot afford to apply for the necessary permit.

Surely then, the family as a unit under the Constitution should be protected from such potentially harmful situations.

The Dawood matter referred to above also confirmed that a legislative provision which impairs the ability of spouses to honour their obligations to one another in terms of a marriage relationship constitutes an infringement of the right to dignity.

We know, of course, that respect for human dignity is protected in terms of Article 8(1) of our Constitution, which reads: "The dignity of all persons shall be inviolable".

Lastly, in my submission, not granting a "foreign" spouse the right to live in Namibia without further ado, could potentially infringe upon the Namibian spouse's right to "leave and return to Namibia" (article 21(1)(i) of the Constitution) by choice, since he/she would have to leave Namibia in order to be united with the "foreign" spouse.

In conclusion, it appears that the law as a whole, from the Constitution to the Immigration Act, supports the contention that a person who marries a Namibian citizen

acquires domicile thereby and has the immediate right to live and work in Namibia without requiring any form of permit to do so.

I submit that this makes sense in a democratic society such as ours.

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