

SOUTH AFRICA / JUDGMENT

Bobani v Benge and Others (428/2018) [2022] ZAECHHC 8 (14 April 2022)

[2022] ZAECHHC 8

COURT

Eastern Cape High Court, Bhisho

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

428/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

[EASTERN

CAPE DIVISION: BHISHO]

CASE

NO. 428/2018

In

the matter between:

ZOLANI
BOBANI
Applicant
and
MS
NONTIBEKO SYLVIA BENGE
1st Respondent
MASTER
OF THE HIGH COURT, BHISHO
2nd Respondent
REGISTRAR
OF DEEDS, KING WILLIAM'S TOWN
3rd Respondent

JUDGMENT

JOLWANA J:

[1] In this matter the applicant approached the court seeking the following relief:

“(a) That the purported marriage entered into between the first respondent and the late Mhlophe Simon Bobani (the deceased) in August 1986 and at Mdantsane be and is hereby declared null and void ab initio on the grounds that it is a bigamous marriage.

- (b) That the appointment of the first respondent as the estate representative of the estate of the late Mhlophe Simon Bobani (the deceased estate) by the second respondent is declared unlawful and is hereby set aside.
- (c) That the second applicant be and is hereby authorized to appoint the applicant as the executor of the deceased estate as set out in paragraph “b” above forthwith.
- (d) An order that the first respondent is not entitled to claim any asset, more in particular house no.[...] N.U. [...], Mdantsane in the deceased estate.
- (e) That the first respondent or any other person(s) acting at her instance or on her instructions is/are hereby interdicted and restrained from harassing and/or intimidating the applicant and/or interfering with the applicant’s right to occupy his grandfather’s (referred to above as the deceased) house at no.[...] N.U. [...], Mdantsane.
- (f) That the first respondent be ordered to pay the costs of this application.”

[2] The applicant is the grandson of the late Mhlophe Simon Bobani (the deceased) and the late Ntombizakhe Maudlena Bobani (Mrs Ntombizakhe Bobani). He is the son of their only child Nomangesi Notshe. It appears from the abridged marriage certificate that the deceased and Mrs Ntombizakhe Bobani got married in community of property on 7 June 1980. The applicant is the only child/surviving child of Nomangesi who predeceased her parents and died in 2001. The deceased died in 2017 and his wife Mrs Ntombizakhe Bobani predeceased him in 2006.

[3] On the 9 March 1986 and during the subsistence of his marriage to Mrs Ntombizakhe Bobani, the deceased purportedly entered into another civil marriage with Sylvia Nontobeko Mbenge, the first respondent herein. In her answering affidavit the first respondent avers that she started a relationship with the deceased in December 1983 and that at that time the deceased was married to Mrs Ntombizakhe Bobani. She was however informed by the deceased that he was in the process of divorcing Mrs Ntombizakhe Bobani in 1984. She further says that in 1986 she was told by the deceased that he was divorced from Mrs Ntombizakhe Bobani and asked her to marry him. They got married on 9 March 1986 as she believed the deceased when he told her that he was divorced from Mrs Ntombizakhe Bobani.

- [4] The first respondent has filed another affidavit in which she indicates that certain information came to her knowledge after she had deposed to her answering affidavit. In what appears to have been intended to be a supplementary affidavit the first respondent has annexed court papers which were issued out of the then Supreme Court of Ciskei under case no.621/1984. It appears from those papers that the deceased had in fact instituted divorce proceedings against Mrs Ntombizakhe Bobani on 4 September 1984 in which he, inter alia, sought a decree of divorce. It also appears that Mrs Ntombizakhe Bobani was contesting the said divorce proceedings.

Those divorce proceedings were never concluded at the time of her death in 2006.

- [5] Most of these facts are common cause. Briefly it is common cause that the deceased and Mrs Ntombizakhe Bobani were married to each other, such marriage having been solemnized in Mdantsane on 7 June 1980. On the 9 March 1986 the deceased and the first respondent purportedly entered into a marriage in Mdantsane. On that date Mrs Ntombizakhe Bobani was still alive and legally married to the deceased and she died much later in 2006. Divorce proceedings which the deceased had instituted in 1984 were contested and were still pending when he purportedly entered into a marriage with the first respondent in 1986.
- [6] The deceased died on 28 April 2017. After his death the applicant proceeded to the Master's office in Mdantsane to report the death of his grandfather, the deceased. He alleges that he was told to come back to the Master's office after seven days as it was still too soon after the death of the deceased. When he went back the estate clerk who assisted him told him that the deceased was married to the first respondent and he was shown a marriage certificate. He was also told that the first respondent had been issued with Letters of Authority in terms of section 18 (3) of the Administration of Estates Act 66 of 1965.
- [7] The applicant seeks an order that the said appointment of the first respondent as the Master's representative in the estate of the late Mhlophe Simon Bobani, the deceased be declared unlawful and set aside. This order is sought on the basis that when the Master appointed the first respondent as the estate representative it was on the basis that the first respondent was legally married to the deceased and was therefore his surviving spouse. It also appears that the applicant was never even given a hearing as the close surviving relative of the deceased. This is despite the fact that the Master's office was aware of him and had told him to come back later when he went to report the deceased's demise.
- [8] There can be doubt that the deceased might have lured the first respondent into a marriage pretending to her that divorce proceedings

between himself and Mrs Ntombizakhe Bobani had been finalized when in fact that was not the case. The question therefore is whether during the subsistence of the marriage between the deceased and Mrs Ntombizakhe Bobani the first respondent could have entered into a valid marriage with the deceased. The first respondent's case is not that the deceased's marriage to Mrs Ntombizakhe Bobani had been terminated by divorce when she got married to the deceased. In fact she admits that she was acting on the mistaken belief that the divorce which the deceased

had told her about had been finalized and that the deceased and Mrs Ntombizakhe Bobani were divorced.

- [9] The problem of two people purportedly entering into a marriage is not a new phenomenon. It has in fact received the attention of our courts before. In *Snyman v Snyman* 1984 (4) SA 262 at 263 (WLD) at para D-F a matter similar to this one came before Goldstone J in which he wrote as follows:

“On 8 May 1982, the plaintiff and the defendant purported to enter into a contract of marriage. Thereafter they lived together as husband and wife and a child was born in consequence thereof. However, unbeknown to the plaintiff at the time of the “marriage”

the defendant was married. His prior marriage had been entered into on 6 January 1966. He had also entered into a previous

bigamous marriage on 12 November 1981. According to the evidence of the plaintiff, the defendant was convicted and sentenced

in the magistrate’s court on two counts of bigamy. In this Court the plaintiff sought an order declaring her purported

marriage to the defendant to be a nullity; an order for the payment of maintenance of the minor child; damages for injuria suffered by her and an order for costs.”

- [10] The learned Judge declared the said marriage null and void and also dealt with the other issues that were before court. It seems to me that a proper case has been made for some of the relief sought and that the purported marriage between the deceased and the first respondent is in fact invalid.
- [11] I however do not think that in declaring the purported marriage between the deceased and the first respondent null and void and declaring the first respondent’s appointment as the estate representative invalid this Court is entitled to enter into the realm of determining the correct estate representative or executor or even determine the inheritance in respect of the estate of the deceased as the applicant wants this Court to do. I am of the view that doing so would be to usurp the powers and functions of the second respondent to whom the power to appoint an estate representative, to issue Letters of Authority or Letters of Executorship, is by law, a power and function which the Legislative gave to the second respondent. For this reason I must respectfully defer to the Master of the High Court to exercise her or his statutory powers in accordance with the relevant legislative framework.
- [12] While the first respondent might very well have been misled by the deceased and lured into a marriage, that does not clothe the purported marriage with validity. In fact, had she taken the same steps that she took after the death of the deceased to obtain confirmation of the status of the divorce that the deceased had told her about before agreeing to the marriage she would have discovered that the divorce proceedings between the deceased and Mrs Ntombizakhe Bobani were still pending. At that time all it would have taken her would have

been for instance for her to ask the deceased to produce a decree of divorce or ask him to go to the relevant court with her to verify the status of the divorce proceedings. I also find it difficult to believe the first respondent's allegation that when she and the deceased went to the then Ciskei Department of Interior to get married the deceased told the officials there that she was divorced. Clearly those officials would have asked the deceased for a decree of divorce before proceeding to officiate the marriage. It is more likely that the first respondent and the deceased misled the officials at the Ciskei Department of Interior by telling them that they were both not married. In any event how the marriage between the deceased and the first respondent was officiated in circumstances in which the deceased was still married is neither here nor there. Therefore this Court need not concern itself with that. I therefore find that the purported marriage between Mhlophe Simon Bobani and the first respondent, Nontobeko Sylvia Bengu was invalid ab initio and is therefore liable to be set aside. The applicant's application must therefore succeed subject to the order that I intend to make herein.

[13] In the result the following order shall issue:

1. The purported marriage entered into between the first respondent and the late Mhlophe Simon Bobani (the deceased) on 9 March 1986 at Mdantsane be and is hereby declared null and void ab initio and is accordingly set aside.
2. The appointment of the first respondent as the estate representative of the estate of the late Mhlophe Simon Bobani (the deceased estate) by the second respondent is declared unlawful and is hereby set aside and the Letter of Authority issued to the first respondent is declared invalid and set aside.
3. The first respondent is directed to return the Letters of Authority issued to her by the second respondent to the second respondent.
4. The Master of the High Court – Bhisho is directed to cancel the Letters of Authority issued to the first respondent.
5. The second respondent is directed to start the process of appointing the estate representative/executor of the estate of the late Mhlophe Simon Bobani de novo and finalise the winding up of the estate of the deceased Mhlophe Simon Bobani.
6. The first respondent is ordered to pay costs of this application.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearance

Counsel for the Applicant: C.T.S. COSSIE

Instructed by:

NOMJANA ATTORNEYS

KING WILLIAMSTOWN

In person for the Respondent: NONTOTBEKO SYLVIA BENGE

Date heard:

14 April 2022

Delivered on:

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