

SOUTH AFRICA / JUDGMENT

Cekiso and Others v Master of the High Court, Mthatha and Others (311/2017) [2017] ZAECMHC 45 (16 November 2017) [2017] ZAECMHC 45

COURT
Eastern Cape High Court, Mthatha

BEFORE
G N Z Mjali

CASE / FILE NUMBER
311/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

[EASTERN

CAPE HIGH COURT, MTHATHA]

CASE

NO: 311/2017

Date

heard: 24/08/2017

Date delivered: 16

/11/2017

In

the matter between:

MISOKUHLE
CEKISO
1ST
APPLICANT
(In
his capacity as an executor of the
Estate
Late Nkululeko Godwin Cekiso)
LUNGISWA
CEKISO
2ND
APPLICANT
BOMIKAZI
CEKISO
3RD
APPLICANT
And
THE
MASTER
OF THE HIGH COURT,
MTHATHA
1ST
RESPONDENT
JULIA
NOMAKHEPHU KONA
2ND
RESPONDENT
THE
SHERIFF OF THE HIGH COURT, QUMBU
3RD
RESPONDENT
THE
STATION COMMANDER,
KATKOP
POLICE STATION
4TH
RESPONDENT
HENRY
SIYILA
5TH
RESPONDENT
THE
MEC FOR TRANSPORT AND
SAFE
LIASON FOR THE EASTERN CAPE
6TH
RESPONDENT

JUDGMENT

MJALI J:

[1] In this application the applicants seeks an order couched in the following terms:

1.1 That the second respondent be interdicted and restrained from removing any assets belonging to the Estate Late Nkululeko Godwin Cekiso from the homestead of the applicants which is situated at Lalini Location, KwaMdakana, Katkop Administrative Area in the district of Qumbu, Eastern Cape or any other place in which they are lawfully possessed or kept with the knowledge or authority of the executor.

1.2 That the second respondent be ordered to return forthwith to the first applicant all assets belonging to the Estate Late Nkululeko Godwin Cekiso, as they will be identified in an inventory to be drawn by the executor which are presently in her possession or any other person

(s) which include but are not limited to:

1.2.1. A motor vehicle to wit, a 2010 Chevrolet Captiva 2.4 lt with registration letters and numbers [...] with chassis number KL1FC5EFXAB064278 as they may not have been tempered with by the second respondent.

1.2.2. That the sheriff, duly assisted by the members of the South African Police Services, be and are hereby authorised and directed to seize the said motor vehicle from the second respondent and hand it to the first applicant immediately for inclusion into the estate liquidation and distribution account.

1.3 That a declaration be issued that the second respondent was not legally married to the deceased, Nkululeko Godwin Cekiso and thus not entitled to inherit from the estate.

1.4 That any purported marriage between the second respondent and the deceased, Nkululeko Godwin Cekiso be declared null and void.

1.5 That any letters of executorship that might have been issued by the Master of the High Court in favour of the second respondent be set aside and cancelled with immediate effect.

1.6 That the second, fifth respondents or any other unauthorised persons who is/are presently occupying the common home of the applicants at Qumbu be ordered and directed to vacate the applicant's common home within 10 (ten) days from the date of the order.

1.7 That the respondents be ordered to pay costs of this application jointly and severally on an attorney and client scale should they oppose the application.

[2] The first applicant is the surviving son of the deceased and launched this application in his capacity as the beneficiary as well as the executor in the estate. In his founding affidavit he alleges that he was appointed as an executor by the Master of the High Court following a meeting of the family members and beneficiaries in which it his appointment as such was

unanimously agreed. The second and third applicants are daughters of the deceased and are suing in their capacity as the beneficiaries in the estate of their father who died intestate on 11 September 2016.

- [3] The application is only opposed by the second respondent, Julia Nomakhephu Kona, who also was appointed by the same Master of the

High Court as an executor in the same estate on the basis of being the spouse of the deceased. The applicants dispute that she was married to the deceased and further allege that the second respondent obtained her appointment as an executor of the estate of the deceased through misrepresentation and without the knowledge of the family members. Further that such letter was issued by the Master of the High Court after the first applicant had already been issued with one. It was issued on the strength of a document purportedly filed by the second respondent in support of her application for appointment as executor (Annexure B). The applicants contend that the decision of the master on the basis of the document which does not even conform to the requirements of an affidavit, could not be valid. For the aforesaid reasons the applicants also seek an order cancelling her letter of authority.

- [4] The issue for determination by this court as depicted in the parties heads of argument and in argument before me, is whether or not the second respondent was legally married to the deceased, Nkululeko Godwin Cekiso, thus being a surviving spouse of the deceased in terms of customary marriage. According to the applicants, the two had a love relationship and never married either by civil or customary law, thus she cannot be the beneficiary in the estate of the deceased. They allege further that the second respondent has unlawfully removed assets belonging to the estate from their home in Katkop. The assets so removed include vehicles belonging to the deceased. Further, the applicants allege that the second respondent has placed the fifth respondent in the common home in Katkop with instructions to chase the applicants from their home and is depleting the estate to the detriment of the beneficiaries.
- [5] The second respondent disputed all the allegations and contends that she is the surviving spouse of the deceased who was married to the deceased in community of property. Further that when the deceased got divorced from the mothers of the applicants, there was dissolution of property. As such the applicants have nothing to do with her joint estate with the deceased. In support of that contention she attached several annexures to her answering affidavit being annexures "JNK1", "JNK2", "JNK3", "JNK4" and "JNK5".
- [6] In limine the applicants objected to the admissibility of the aforesaid annexures on the grounds that such annexures purport to be copies of official documents issued by a Department of State yet they are not certified by the relevant issuing authorities further that no explanation is given about the whereabouts of the original documents. Another ground of objection is that annexures "JNK4" and "JNK5" purport to be affidavits in support of the existence of the marriage between the deceased and the second respondent yet they do not comply with the regulations governing the administration of oaths and affirmations in that

they are not commissioned by the commissioner of oath. As such they cannot be classified as affidavits or evidence for the purposes of the proceedings. Further that there is no application for condonation for the non compliance with the regulations governing the administering of oaths and affirmations. For the aforesaid reasons the applicants applied for the striking out of all the aforesaid annexures.

- [7] There are indeed numerous difficulties with the aforesaid documents. Apart from being copies (some even copies made from certified copies) without any explanation from the deponent, there is no authentication of the documents from the relevant sources. Further the copies themselves have not been certified as being true copies of the originals.
- [8] There is yet another problem with annexure “JNK4” apart from it being an uncertified copy. That document purports to be an affidavit of customary union. First it has four deponents who all have not attested under oath or it is not clear from the purported affidavit as to which of the four deponents swore to an affidavit if any at all. Secondly it is not clear from the document in what capacity the deponents attested to the purported affidavit. For these reason the applicants contend that the purported affidavit does not conform to the general requirements for affidavits as contained in the Regulations promulgated in terms of the Justices of the Peace and Commissioners of oaths Act No. 16 of 1963.
- [9] In order to be admissible, an affidavit must satisfy the general requirements for affidavits as contained in the Regulations promulgated in terms of the Justices of the Peace and Commissioners of oaths Act No. 16 of 1963. In terms of the aforesaid Regulations a commissioner of oaths is required to first ask the deponent whether he knows and understands the contents of the declaration; whether he has any objection to taking the prescribed oath and whether he considers the prescribed oath to be binding in his conscience. If the deponent answers these questions in the affirmative, the commissioner of oaths must then administer the oath. Then the deponent signs the affidavit or affixes his mark in the presence of the commissioner of oaths who then certifies that the deponent acknowledged that he or she knows and understands the contents of the declaration. In terms of Regulation 4(1) the commissioner is also required to state the manner, place and date of taking the declaration. Annexure “JNK4” simply does not conform to the aforesaid Regulations and as such cannot be classified as an affidavit and is consequently inadmissible. For the aforesaid reasons I am inclined to agree with Mr Notyesi who represented the applicants that all the annexures to the second respondent’s answering affidavit fall to be struck off for being inadmissible.
- [10] Even if I am wrong in striking the aforesaid annexures, the second defendant’s case that she was married to the deceased customarily, falls flat for the following reasons. First, the capacity of the deponents to annexure “JNK4” is not clear. Secondly none of them mentions being involved in the lobola negotiations and therefore their assertions in so far as lobola and the amount thereof can only be hearsay and as such inadmissible. Thirdly there is a discrepancy between the dates on which the purported customary union was entered into as

well as the venue thereof. According to annexure “JKN1” the customary union was entered into on 25 August 2015 at Ngqayi A/A, yet in annexure “JNK4” Nkosinathi Siza states that it was entered into on 14 May 2016. In the same annexure “JNK4” Nomakhephu J. Kona who must have been the person who supplied the information contained in “JNK1” states that the union took place at Ezibeleni, Queenstown. A fact which in my view lends credence to the applicants’ contention that the second respondent is fabricating the marriage for personal gain.

- [11] There is yet another hurdle. Bearing in mind that a party alleging the existence of a customary marriage bears the onus to prove such existence and in doing so there are essential requirements in terms of section 3(1) of the recognition of the Customary Marriages Act, to be alleged and proved. Such essential requirements are :

11.1 The consent of the bride,

11.2 Consent of the bride’s guardian, father or mother,

11.3 Payment of lobolo,

11.4 The handing over of the bride.

In casu, the applicants allege that there were never any lobola negotiations as well as celebrations to welcome the second respondent

into their family. Except for a half hearted attempt by the second respondent to prove the contrary, there is no evidence that has been placed before this court by means of affidavits from the people that were involved to prove that indeed lobola negotiations did take place and that there were celebrations held for the formal handing over of the second respondent to the deceased’s family. I have in this judgment already held that the second respondent has failed to prove that the deceased paid lobolo for her for the reasons stated above.

- [12] Even if it were to be accepted as alleged in annexure “JNK4” that the deceased paid R20 000.00 lobolo for the second respondent, regard being had to the above requirements for the validity of a customary marriage, payment of lobolo remains merely as one of the essential requirements. In other words, even if payment of lobolo is properly alleged and proved that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements (see *Fanti v Boto and others*

[2008] 2 All SA 533 (C).

- [13] The handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially handed over to the groom’s people there can be no valid customary marriage. TW Bennett Customary Law in South Africa 18ed states at 217 that:

“Hence, when the Recognition of Customary Marriages Act provides that, in order to qualify as customary, a marriage must be ‘negotiated

and entered into or celebrated in accordance with customary law', the form of negotiations, the handing over of a bride and the wedding are all relevant to giving the union the character of a customary marriage. It may then be distinguished, on the one hand, from an informal partnership and, on the other, from a marriage according to other cultural or religious traditions."

- [14] From the papers it is abundantly clear that there was no handing over of the bride to the deceased and the latter's family. The second respondent does not only fail to prove that there was a ceremony for her to be handed over but also fails to prove that her relatives handed her over to the deceased and his family. In terms of the practised customs pertaining in this area of jurisdiction the bride cannot hand herself over to the groom's family. She has to be accompanied by relatives. The customary marriage must take place in the presence of the bride and groom as well as of those representing the two families and who have been duly authorised to do so. It is totally inconceivable and in fact impossible for only one side of the two families to be involved in lobola negotiations as well as in the ceremonies that flow from such negotiations.
- [15] The mere fact that the deceased stayed with the second respondent is not sufficient and cannot elevate the relationship they had beyond cohabitation. "Customary marriage" is defined in section 1 as meaning "a marriage concluded in accordance with customary law." Cohabitation when all the essential requirements for a conclusion of a customary union have not been met, cannot be regarded as a customary marriage. As described by the authors Maithufi IP and Bekker JC, Recognition of Customary Marriages Act 1998 and its Impact on Family Law in South Africa CILSA 182 (2002) a customary marriage in true African tradition is not an event but a process that comprises a chain of events. Furthermore, it is not about the bride and the groom. It involves the two families. The basic formalities which lead to a customary marriage are: emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage (this of course presupposes that the two parties man and woman have agreed to marry each other); a meeting of the parties' relatives will be convened where lobolo is negotiated and the negotiated lobolo or part thereof is handed over to the woman's family and the two families will then agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration (wedding).
- [16] There is another issue to be dealt with. The second respondent sought to challenge the locus standi of the first applicant on the grounds that the Master of the High Court withdrew his appointment as the executor of the estate of the deceased. In argument Mr Mgxaji who represented the second respondent handed up a copy of a letter purportedly emanating from the office of the Master of the High Court, Mthatha and addressed to the first applicant via a postal address. Apart from the fact that that there is no confirmation from the office of the Master that indeed such a letter was written to the first applicant and that it was received by the recipient. The aforesaid letter did not form part of the second respondent's case. Even

if it can be said that the letter of authority was withdrawn, nothing stops the first applicant from launching the present application as the beneficiary of the deceased's estate with a substantial interest.

[17] As regards the prayer for eviction of the occupants of the common home of the applicants, there was no compliance with the requirements of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). For that reason such an order cannot be granted.

[18] I turn now to the issue of costs. The applicants have asked for an adverse cost order against the respondents should they oppose the application. It is trite that costs follow the results. Equally trite is that the award of costs is in the discretion of the court which must be exercised judiciously with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 SA 1045 (SCA) 1055F-G. Mala fides, unreasonableness and frivolousness have been found to be factors justifying the imposition of an adverse costs order.

[19] Only the second respondent opposed this application. From her papers it is clear that she had no bona fide defence against the application but was driven by malice and the desire to unjustifiably benefit from the estate of the deceased to the exclusion of the legitimate

beneficiaries. This is clearly demonstrated in her answering affidavit where she alleges a customary marriage that she fumbled to prove. Further in her assertions that the applicants have nothing to do in the estate of the deceased as their mothers were divorced. I find the conduct of the second respondent in defending an indefensible application unreasonable and frivolous. For the aforesaid reasons I am of the view that a case has been made for the granting of an adverse cost order against the second respondent. In the result therefore the following order will issue.

1. The second respondent was not legally married to the deceased, Nkululeko Godwin Cekiso.
2. The second respondent shall pay the costs of this application on an attorney and client scale.

G N Z MJALI

Judge of the high Court

APPEARANCES:

For the Applicants: Mr Notyesi

For the Respondents: Mr Mgxaji

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