

SOUTH AFRICA / JUDGMENT

Diba v Miselo and Another (5768/2021) [2021] ZAWCHC 234 (18 November 2021)

[2021] ZAWCHC 234

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

5768/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 5768/2021

In

the matter between

TANIA

DIBA

APPLICANT

AND

ELIZABETH

MISELO

FIRST

RESPONDENT

THE

MASTER OF THE HIGH

COURT

SECOND RESPONDENT

Heard:04 October 2021

JUDGMENT

delivered 18 November 2021

THULARE AJ

[1] The applicant sought an order declaring that the first respondent was never lawfully married to the late Nkosinathi Nelson Xakwe (the deceased) in terms of customary law. She further sought an order directing the second respondent (the Master) to suspend the first respondent's as the executor of the deceased estate and directing the first respondent to return the letters of authority;

and for the first respondent to account for any monies, assets or benefits payable to beneficiaries which she may have received,

claimed or withdrawn and that the Master issue letters of authority to a person appointed or recommended by the family of the deceased.

[2] The application was opposed on the basis that the first respondent was married in terms of customary law to the deceased. By agreement between the parties, which was made an order of court, the first respondent returned her letters of appointment to the Master, who then appointed a person as envisaged in section 18(1)(e) of the Administration of Estates Act, 1965 (Act No. 66 of 1965). The first respondent had to account to the Master for the period whilst she held the appointment.

[3] The only issue that remained was the validity of the marriage. In order to properly investigate the existence of the marriage, the issue was referred for oral evidence as well.

[4] The deceased's brothers, adult children not born of the respondent and uncle held the view that the deceased was a deeply

traditional and cultural man who performed amaXhosa rituals and practiced the isiXhosa way of life. This was amongst others because

he had left Cape Town, with its scientific medical resources and traditional initiation schools, in 1991 and went back to Cala, his home village for his initiation into manhood which included his traditional circumcision. The significance of his travels back home to Cala was the inclusion of his family and village kinsmen in his cultural milestones.

[5] In April 2001, he had taken the applicant, his daughter with another woman, to Cala for her imbeleko. The mother of the applicant had passed on. In their family, the mother of the child sat with the child on ukhuko to partake of the meat from the animal slaughtered for the event. The deceased had brought the applicant home so that his blood relative and niece, T[....] X[....], could sit on the grass mat with the child for the ritual. Similarly in 2012, the

deceased took Masilakhe, his first born child with the respondent to Cala for imbeleko. The first respondent did not attend. His sister, Nqabakazi Xakwe, sat with the child on ukhuko to partake of the meat. The family were made to believe that the first respondent was against the ritual being performed in Cala, as she argued that Masilakhe was born out of marriage and for that reason it was her family, the Miselo family that ought to perform the ritual for the child, and not the Xakwe family.

[6] Against this background, the deceased's brothers, adult children and uncle were of the view that the deceased would have informed his family about his intention to marry. The deceased would have informed the elders of the family and would have introduced the first respondent to his family and blood relations. It was inconceivable, according to the family, that it could be alleged that the deceased was married, and that complete strangers to the family would have conducted the lobola negotiations on his behalf. His marriage would be the only marriage which the Xakwe family did not attend when it was that of one of their own.

[7] There were other blood relations in Paarl, Kraaifontein and Somerset West who were available in the Western Cape around Cape Town for the deceased to engage and involve in his marriage. It was contrary to the family tradition that he would have strangers as ooNozakuzaku on the family's behalf, to be his delegation to arrange a customary marriage. The deceased had a good relationship with his

family. It was strange to the family that the deceased would not have shared and consulted with them about his marriage.

[8] After the ilobolo negotiations, the bride would be released to the groom's family. The Xakwe family, the district of Cala and the neighbouring towns, amaXhosa welcome and introduce the bride to the family through a ritual called utsiki. A sheep is slaughtered and young men of the family would feed the bride from its meat. She would then be dressed, as umtshakazi, in attire called amadakhi. She would be dressed with a scarf around her waist, a semi-blanket called ixakatho over her shoulders and a black doek on her head amongst others. She does not dress herself up. Her mother-in-law dressed her up. This was called ukunxibisa or ukubinxisa. The female senior members of the family would then advise her on how to conduct herself as a bride and as a married woman. The process is called ukuyalwa. The content is referred to as ukuhlonipha.

[9] All these processes were done for the deceased's four brothers when they married. It was not done for the deceased and first respondent. The conduct of the first respondent around the deceased's funeral was another area of concern for the family. A widowed wife sat on ukhukho from the time of death until after the funeral. After the funeral she would also be dressed in mourning regalia and would be so attired for six months and then a cleansing ritual would be performed. The widow's blood relations are invited to such ceremony. It is after the ceremony that she could revert to normal clothing. All these did not happen as the family did not know that first respondent was allegedly married to the deceased. She arrived

the day before the funeral of the deceased and left the day after the funeral. She came to the funeral accompanying her two children to the funeral of their father. She conducted herself as an unmarried woman before, during and after the funeral and regarded her children as born out of wedlock.

- [10] The first respondent's case was that she met the deceased in February 2001 and they got involved into a romantic relationship.

During that year, in the course of their relationship, the deceased suggested that he was ready to have children with her. He asked her to move in to live with him in his house. It was about six months after they had started their relationship. She moved in with the deceased although her mother did not approve of that move as her mother was of the view that her moving in without their families

having met was not in accordance with their custom.

- [11] She was not ready to have other children outside wedlock. The deceased was ready to start a family with her and started to arrange his ooNozakuzaku to visit her home. On 14 December 2001 ooNozakuzaku arrived at her homestead as arranged by the deceased and the marriage was negotiated. The two families agreed on eighteen thousand rands (R18 000-00) and ilobolo which was paid. There were symbols of successful marriage negotiations including exchange of alcohol bottles and a celebration.

- [12] Nongazi Eunice Nkukuma (uDabs) was a distant blood relation of the deceased. She knew the deceased's father including his two uncles, Jim Xakwe (Jim) and Nqabisile Dickson Xakwe (Dickson). She was a half-sister to the deceased's father. They shared isiduko as a clan and she used to visit her Cala blood relations in her youth. Jim and Dickson were direct paternal uncles to the deceased,

brothers to the deceased's father. Jim lived in Somerset West and worked in Wellington. The deceased, who lived in Paarl for many years knew her and regarded her as uDabawo (paternal aunt). The deceased called her uDabs, which was the shortened version of uDabawo. The deceased introduced the first respondent to her and they both treated her as and called her uDabs.

- [13] The deceased visited her home in 2001 and indicated his desire to get married to the first respondent. She discussed this with her husband, Witbooi Nkunkuma (Witbooi) and later with Jim. They agreed that her husband would form part of ooNozakuzaku and that she and Jim would be the elders that received the bride. On 14 December 2001 her husband was part of ooNozakuzaku who went to the first respondent's homestead to negotiate her marriage to the deceased. Witbooi was accompanied by Kleinboy Thandilizwe Ntsondwa (Kleinboy) and Ntuzi Tswana. ooNozakuzaku was three men only.

- [14] Kleinboy was the team leader and carried the R18 000-00 on him. He had been requested by the deceased to form part of ooNozakuzaku who visited the first respondent's family to negotiate the deceased's marriage. The Miselo family was also represented by three men

who were all the first respondent's three brothers. Her father passed on. ooNozakuzaku successfully negotiated the marriage with the Miselo family. Kleinboy amongst others paid the R18 000-00 and also handed over uswazi which included three bottles of brandy. The success of the negotiations was celebrated by a feast at the Miselo family. The first respondent's mother performed ukulaya. The marriage was recorded in writing in isiXhosa by Mntunzima John Miselo, one of the first respondent's brothers who was part of the negotiating team.

[15] In January 2002, as the families had agreed, the first respondent was delivered to the house of the deceased in Paarl. She was received by uDabs, her husband Witbooi and Jim as blood relations. There were other invited guests for the celebration. On the weekend when the first respondent was delivered, uDabs gave the first respondent a new name. The deceased had married when he was older, at thirty eight (38) years, which was more than the average age of marrying by his family members. He had discussed his challenge of finding and keeping a woman as a wife with uDabs and had confided in uDabs that the first respondent was someone he believed would build a family for him and they had both agreed on the name, Nokwakha, as an appropriate name to express the deceased's views about the first respondent and his wishes about their future. The deceased provided amadakhi and uDabs dressed the first respondent up. uDabs oversaw and led the process of ukunxibisa and ukulaya. The deceased had arranged food and drinks for the occasion to celebrate the delivery of the bride to his elders at his home. His friends and colleagues were present.

[16] From January 2002 the deceased and the first respondent lived as husband and wife at their home, [...], with their children

after their respective births in 2004 and 2007. The deceased's brothers, adult children and their uncle Dickson did not know the deceased or they deliberately exaggerated the benevolence in their relationship. As a point of departure, they did not know that the children of the deceased lived with their parents at his address. There is no countervailing evidence to that of Masilakhe that he and his sibling stayed with their parents at the deceased's house, which was their home, and that his father was abusive towards his mother. His mother struggled over many years, and eventually left the address just before the deceased passed on, and this was after his father had pointed her mother with a firearm. It was only then that they realized that instead of his mother being killed, they would rather move out of their suburban address back to the shanty town for her safety. Although they occasionally left the home because of his father's abuse, they usually returned home after their father would fetch them or their mother would ask them to return. They only permanently left their home in September 2020.

[17] Masilakhe's evidence is supported by objective evidential material. On 14 February 2004 the first respondent applied for a protection order at the Magistrates' Courts in Paarl. Her residential address in the application was provided as [...].

This was the home of their children, the house bought by the deceased. She listed their two children as persons affected by the

domestic violence. In the application she referred to the deceased as her husband. The allegations were that he was threatening and insulting her, and had thrown her out of their home. At the time they had been living together as husband and wife for nine years and she mentioned that they were married by custom. She complained about his excessive drinking and that when he was drunk he swore at them, beat her up and threw her out of the house. They used to sleep with their neighbours when he had thrown them out. In that application, she mentioned the discovery that he had an affair at the time and had fathered a child with the new girlfriend. He sometimes threatened her with his gun and she was afraid that one day he may kill her.

[18] The Magistrate granted an interim protection order on the same day. One of the terms was that the deceased was not to prevent the first respondent or any of the children from entering or staying at [...] or any part thereof. The interim protection order was made a final order on the return date. On 20 January 2009 there was an application for the setting aside of the protection order. It was removed from the roll because the deceased did not appear to pursue it and the order remained in force. The affidavits and the oral evidence of the deceased's brothers, children and uncle in this matter showed that they either downplayed his character and played ignorant, or they did not know what was going on in his life. The conduct of the first respondent, in 2004, to protect herself and her children against the threat to their health and well being by the respondent, and also to protect and advance her marriage, dispel the notion by the Xakwe family that the first respondent's allegation that she was married to the deceased was a recent fabrication opportunistically occasioned by the death of their family member in 2021.

[19] Both the first respondent and uDabs described the deceased as indoda erhwada, figuratively meaning raw and literally meaning a disrespectful, abusive and rude man. The first respondent had to approach the courts in 2008 for her own maintenance and that of the children. When the application was served on the deceased, he deposed to an affidavit and laid a criminal charge against her alleging that the first respondent had applied for a SASSA grant and in that application had identified other men as different fathers of her two children with him. This was in an effort to thwart her application for the maintenance of the children. He had abused his position as a warrant officer in the SAPS against the first respondent. This did not help as a maintenance order was made against him.

[20] From 2008 until just before his death, the first respondent had struggled to get the deceased to maintain his children. Their

maintenance court file is over 300 pages, which is around the size an arch-lever file. It reflects the first respondent's struggles to get the deceased to maintain his children. It also reflected the deceased's demeanour, including his suspensions from work by the SAPS and failure to attend disciplinary enquiries by his employer to address his conduct. There is no avenue provided by the Maintenance Act which the first respondent did not explore, from criminal prosecutions to emoluments attachments orders. The deceased was abusive and rude and did not have respect, including for authority.

- [21] In my view, the evidence of Ms Ntoboxolo Bambiso (Bambiso) guaranteed the truthfulness of the allegations made by the first respondent already in 2004, when there was no issue about the existence of a marriage. In that application the first respondent mentioned that part of the problems in her marriage was that her husband had an affair outside their marriage and had fathered a child with a girlfriend. Bambiso told this court that she had a child, E[....] B[....], with the deceased and the child was born in 2004. The abuse of the first respondent by the deceased occasioned that she now and then left the common home either because she was chased away or for her own safety or took “fed-up leave” from the common home. Not only did the deceased bring Bambiso home on those occasions of the first respondent’s temporary absence, he also brought another woman known to Bambiso as Blondie. It would not have been out of character for the deceased, on the day that Bambiso came to the house and found the first respondent that when Bambiso later asked the deceased about the first respondent, the deceased would have said the first respondent was just another mother of one of his children.
- [22] The applicant’s word that the deceased was unmarried, should be viewed in the light of the fact that she was unaware or deliberately undermined the lived reality of the deceased. The fact that the deceased and the first respondent lived at separate addresses as the time of his death, should also be contextualized as a factor to determine the probability of the existence of the marriage. It is clear that the applicant, the deceased brothers and his uncle, who were central in the funeral arrangements of the deceased, had no regard to the alleged marriage of the first respondent to the deceased and it is unfair of them to use their cold and aloof disposition towards her against her. The fact that they excluded the word ‘husband’ on the inscription of the deceased’s tombstone is their own creation and carry no value in the determination of the existence of the marriage.
- [23] The deceased’s brothers and the applicant can be pardoned for not knowing uDabs and their relationship to her. Dickson, however, should have assisted his nephews and grandchildren in navigating towards the truth and peace. I accept the version of uDabs and the first respondent that when Dickson met uDabs at the gate of the deceased’s home as part of the delegation from Cala who had come to fetch the body of the deceased from Cape Town, he recognized her immediately and the two reminisced about their youth and enjoyed their recollection of past events. If Dickson had been truthful about his remembrance of past events, the deceased’s brothers and children would have known that uDabs was unknown to them as young people but that she was known to the elders in the Xakwe family. It could therefore not be correct for them to say that there was simply communication with persons whose identities, origins and proximity were not known by anyone related to the Xakwe family to negotiate the deceased’s marriage to the first respondent..

- [24] The deceased's brothers displayed a superiority complex and an ill-disposed attitude towards the first respondent when they arrived to fetch his body. They were determined to remove his remains back to his ancestral land and were dismissive and exclusionary of her and did not accord her any recognition or her voice any worth of being heeded with a standing within the Xakwe family. They displayed no objectivity or at least a capacity to listen to anything that had to do with her.
- [25] It is difficult, because of the deceased's brother's inherent mind and character displayed by their inclination and tendencies, for one to rely on the version of the deceased's brothers, Phindile Edward Xakwe (Phindile) and Mzwamadoda Xakwe (Mzwamadoda), as regards the presence or otherwise of the first respondent and her children at the home of the deceased in 2002, 2006, 2007 and 2012 respectively when Phindile visited and around 2011-2013 when Mzwamadoda visited. Mzwamadoda was at pains to concede that the deceased came with the first respondent for the respective funerals of Jim and their grandmother. He later claimed that he only heard that she was there but never saw her.
- [26] The observation that a customary marriage is a familial matter is a correct one. A customary marriage extends the relationship to the respective families of its parties. The hallmarks of the conclusion of a customary marriage is a series of events and eventualities which evolve with time. The primary question in my view, which is raised by this matter, was whether it can be said that the involvement of the nucleus family, as understood in Western Thembuland in the Eastern Cape, was central to the recognition of the customary marriage. Put otherwise, was the absence of the "coming together" of the nucleus families of the parties who marry in accordance with the AbaThembu custom fatal to the marriage?
- [27] There is no evidence that suggest that the deceased's parents ever visited his home in Paarl since at least 2001. His father passed on in 2018 without having met his grandchild, the second child born to the deceased and the first respondent, Alizwa, since her birth in
2007. Dickson had never met the deceased's family before he came to fetch his body after the death. He had not seen the deceased nor communicated with him for over twenty (20) years. The Xakwe family in Cala had no relationship whatsoever with the family that the deceased established in Paarl since 2001. The family in Cala did not know about the domestic violence suffered by the first respondent and her children. They did not know about the deceased's Paarl family struggles of not being able to sleep at home, sometimes sleeping outside and sometimes with the neighbours.
- [28] They did not know about the first respondent's struggles with having food and clothing for the deceased's children whilst the deceased was a senior officer in the South African Police Service and whilst she was armed with a court order for their maintenance. Masilakhe cried when he informed the court about the absence of a relationship with his paternal family, which was initiated by the conduct of his father, and now pursued by his paternal relatives led by his father's brothers and their paternal uncle after the death of his father. Just like many young men, one could sense that he yearned for the security, identity and sense of

belonging that such relationship provided, which his blood relatives in Cala actively denied him.

- [29] The evidence also suggested that except for Phindile in 2002 and 2012 when his personal academic development occasioned him to come to Cape Town for further education, none of the deceased's other siblings, which is the other three brothers and a sister ever visited the deceased's home in Paarl. The applicant herself, on the evidence before me, visited the home between 2004 and 2008, amongst others when she was introduced to the first respondent by her father the deceased, and sometime thereafter when she was at tertiary education level. In my view, these facts do not support the impression sought to be created by the Xakwe family, which is that of a closely knit family with the deceased being one of the threads that held it together. The
- [30] On the contrary, the failure of the deceased's father, his three other brothers and sister to visit the home of their blood brother for twenty (20) years, against the background that the deceased was disrespectful, abusive and rude, suggests that the deceased's nucleus family, led by their father who was the head of that family, heeded the AbaThembu idiomatic expression:

"Inkomo enetshobo ayinqandwa"

In his article, "IsiXhosa Proverbs and Idioms as a Reflection of Indigenous Knowledge Systems and an Education Tool", Andiswa Mvanyashe (Southern Africa Journal for Folklore Studies, Volume 29, Number 2, 2019, #5615), in her analysis of Idioms and

Proverbs she wrote the following under the heading "Observations about Diseases" on this idiomatic expression at page 9:

"One of the idioms that reveal the people in the olden days faces similar issues to those faced today when dealing with stock and cattle is the following (Mesatywa and Jordan 1971, 182)."

The author cited the idiom and proceeded:

"("A cow with disease must be left in grassing fields.")"

Mesatywa and Jordan mention that the symptoms of itshobo in a cow are that it would run around mad and cause damages to its surroundings. The idiom means that a person who shuns other people's advice and continues to do what is wrong must be left alone because they might also put one's life in danger. According to Mesatywa and Jordan (1971,182) itshobo seemed to be a very dangerous disease."

- [31] Section 3(1) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) provides as follows:

"Requirements for validity of customary marriages. –

- (1) For a customary marriage entered into after the commencement of this Act to be valid-

- (a) the prospective spouses-
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.”

[32] In *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA) at para 17 and 18 it was said:

“[17] ... It is established that customary law is a dynamic, flexible system, which continuously evolves within context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned. As this court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society. Thus, the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experience.

[18] The Constitutional Court has cautioned courts to be cognizant of the fact that customary law regulates the lives of people and that the need for flexibility and the imperative to facilitate its development must therefore be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights. The courts must strive to recognize and give effect to the principle of living, actually observed customary law, as this constitutes a development in accordance with the ‘spirit, purport and object’ of the Constitution within the community, to the extent consistent with adequately upholding the protection of rights.”

[33] I am not aware that the Curriculum Developers for Education Districts like those responsible for the curriculum development within the AbaThembu region, gave any particular attention to lessons about the way of life of its inhabitants so that its young people learnt about their ways of life, in particular their practices, traditions, customs and culture. This was the position when the Indigenous peoples were still being decided for by the White minority as to what their children should learn and it seems to me that is still the position to date when the Black majority is able to determine its own content in basic education of its young. It seems to me that the education on indigenous knowledge of the young was and remain left to be instilled by parents, families, relatives, villages, communities and societies and in general by oral tradition. It follows that the parents and families are the primary sources of information for current and coming generations about AbaThembu culture, customs and history and that the blood relatives, villages, communities and societies are secondary sources.

[34] In my view, uDabs and Jim were the secondary sources consulted by the deceased in relation to the intended marriage in terms of AbaThembu custom. The deceased made a conscious and deliberate election not to include his own nucleus family, that is, his parents,

siblings and adult children in his marriage to the first respondent. For reasons better known to him, he deemed consultation with uDabs and Jim sufficient. Clearly according to him they were the Xakwe elders and carried his isiduko and were knowledgeable about the AbaThembu custom. I am unable to conclude that the absence of the deceased's nucleus family in any way led to loss of any valuable insight or knowledge of the deceased's custom. The evidence did not show that anything practical, physical or spiritual was missed in how uDabs and Jim guided the marriage to its conclusion. The two guided the conclusion of the marriage to reflect their historical and cultural experiences.

[35] In my view, it will amount to judicial overreach if I were to start to define who was one's family who would be necessarily

required, for a valid conclusion of a customary marriage, as the applicant and the deceased's brothers seem to think. What I think I should state, for purposes of this judgment, is that one's family remained an indigenous concept whose meaning should not be left to be pronounced, deduced and inferred from the knowledge of those who elevate their bargaining power to superior logic in a contested environment. Family as a concept within custom, has never been and should not be fixed.

[36] I find that uDabs, and Jim shared isiduko with the deceased and together with uDabs' husband, Witbooi, were part of Xakwe family and elders who were eligible to oversee the negotiation, entering into and celebration of the deceased's customary marriage to the first respondent in accordance with their custom. Both the deceased and the first respondent were above the age of eighteen (18) years. They consented to be married to each other under customary law. This was manifested when each of them reported their intention to marry to their respective elders and initiated as well as supported the preparations of the elders in the conclusion of the marriage. The marriage was negotiated, entered into and celebrated, from 14 December 2001 to January 2002, in accordance with customary law.

[37] For these reasons I find that the first respondent was married to the deceased, Nkosinathi Nelson Xakwe, in January 2002. I make the following order:

1. Prayer 1 of the notice of motion is dismissed with costs.

DM THULARE

ACTING JUDGE OF THE HIGH COURT

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