

SOUTH AFRICA / JUDGMENT

K v P (09/41473) [2010]

ZAGPJHC 93 (15 October 2010)

[2010] ZAGPJHC 93

COURT

South Gauteng High Court, Johannesburg

BEFORE

D S S Moshidi

CASE / FILE NUMBER

09/41473

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REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/41473

DATE: 15/10/2010

In the matter between:

K, F.....Plaintiff

and

P, S TDefendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This matter came before me in the unopposed Motion Court.

[2] The plaintiff has instituted action against the defendant for general damages under the actio iniuriarum for the impairment of her dignity and reputation. The defendant failed to defend the action.

THE PARTICULARS OF CLAIM

[3] For proper context, paras 1 to 17.3 of the particulars of claim read as follows:

“1. The Plaintiff is F K, an unemployed female residing at 1082 Democracy Street, Hospitalview, Tembisa, 1632, who formerly practised

as a traditional healer (‘the Plaintiff’).

The Defendant is T S P, an adult male primary school teacher residing at 91 Mbele Street, Jiyani Section, Tembisa, 1632 (‘the

Defendant’).

On or about 12 November 2006, at 24 Enxiweni section in Tembisa, the Plaintiff and the Defendant represented by their respective

families entered into a customary marriage after negotiations were concluded between the two families, lobola was paid and the marriage was celebrated in accordance with customary law, after which the Plaintiff became the Defendant’s customary law wife. The contract concluding the customary marriage was recorded in writing, a copy of which is annexed hereto marked Annexure ‘A’.

The Plaintiff met the Defendant during September 2006 and the Defendant at all material times prior to the conclusion of the customary marriage professed to be a divorcee.

The parties lived together as husband and wife after entering into the customary law marriage till 19 January 2009 when the Defendant left the matrimonial home.

On 6 February 2009 the Plaintiff approached the Department of Home Affairs to register her customary marriage to the Defendant in

terms of the Recognition of Customary Marriages Act 120 of 1998.

At the Department of Home Affairs, the Plaintiff discovered that her customary marriage to the Defendant could not be registered due to the Defendant having entered into a civil union with Ms Sarah Mofokeng on 22 November 1991, which marriage still subsists as is evident from Annexure ‘B’ annexed hereto.

The Defendant by virtue of his civil marriage was prohibited by the provisions of section 8(2) of the Civil Union Act 17 of 2006 from entering into a customary marriage with the Plaintiff.

Whilst negotiating with the Plaintiff to enter into a customary marriage, the Defendant had a legal duty to disclose his marital

status but deliberately failed to do so with the intention of inducing the Plaintiff to marry him.

The Plaintiff was induced into marrying the Defendant and at all times held the bona fide belief that he was a divorcee and as such eligible for re-marriage.

The Defendant's failure to disclose his marital status was a material misrepresentation. Had the Plaintiff been aware that the Defendant was married and which marriage still subsisted, she would not have consented to entering into the customary marriage with him.

The Plaintiff acted to her prejudice by entering into the customary marriage with the Defendant.

In the premises, the Defendant's customary marriage to the Plaintiff is void ab initio.

The Defendant's misrepresentation in addition to constituting a breach of contract constitutes wrongful conduct with intent to injure the Plaintiff.

The Defendant's wrongful and intentional conduct caused the Plaintiff to suffer humiliation, hurt, loss of reputation, insult to her dignity, loss of social standing and embarrassment in the eyes of her family and friends when she discovered her marriage to be void ab initio.

As a result of the Defendant's wrongful conduct, the Plaintiff suffered general damages for the impairment of her dignity

and reputation in the sum of R150 000,00.

WHEREFORE the Plaintiff claims from the Defendant:-

General damages suffered in respect of the impairment of her dignity and reputation in the amount of R150 000,00;

interest on the aforesaid amount at the rate of 15.5% per annum;

costs of suit;"

THE EVIDENCE OF THE PLAINTIFF

[4] The plaintiff, a 46 years old former traditional healer, testified. She is currently unemployed. She was exceedingly emotional when she testified, so much so that her evidence had to be adjourned to the following day. Prior to agreeing to marry the defendant, and staying with him, he told her that he was divorced, a long time ago. After her visit to the Department of Home Affairs, and the discovery that the defendant was still married by civil law to Ms Sarah Mofokeng, she confronted the defendant. He said it was not her concern. She felt extremely hurt and humiliated. Both families were disappointed by the conduct of the defendant. As a churchgoer, she felt humiliated when her fellow-worshippers and friends heard of her failed marriage. She was also humiliated by the defendant's siblings by virtue of the void marriage. The medical reports in the Court bundle confirm that both the plaintiff and the defendant are HIV/AIDS positive. The plaintiff testified that when her HIV status became known, the defendant discriminated against her. He told her that he would never marry her by way of a civil marriage ceremony because of the stigma

attached to HIV/AIDS persons, in spite of him having initially promised to conclude a marriage with her. The defendant spread

rumours about her HIV status. As a consequence, she suffered from prolonged depression and ill-health. She said her good reputation

as a traditional healer has suffered, preventing her from practising her profession. From her evidence, the plaintiff could not tell who of the parties first contracted the HIV illness. At the time of her evidence, she was still residing in the defendant's immovable property whence he deserted her.

THE PROVISIONS OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998

[5] The evidence of the plaintiff established, on a balance of probabilities (see *Webster v Mitchell* 1948 (1) SA 1186 (W)), that all the requirements for a valid customary marriage were satisfied. The preamble to the Recognition of Customary Marriages Act 120 of 1998 ("the Recognition Act"), provides:

"To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith."

The Recognition Act defines "customary law" "means the custom and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". Sec 3 of the Recognition Act provides:

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

the prospective spouses –

must both be above the age of 18 years; and

must both consent to be married to each other under customary law; and

the marriage must be negotiated and entered into or celebrated in accordance with customary law.

(2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961), during the subsistence of such customary marriage."

In the event that these requirements are fulfilled, the customary marriage must be registered in accordance with the further requirements prescribed by sec 4 of the Recognition Act. As stated earlier in this judgment, the plaintiff has made out a cogent case for a customary marriage. She testified that "lobolo" as defined in sec 1 of the Recognition Act was successfully negotiated by the two families; that there was consent by both

spouses to enter into the marriage; that the traditional ceremonies whereat her prospective in-laws were accepted, and whereafter she was formally handed over to the defendant's family. In this regard, the bundle of the photographs was handed up to show the ceremony. The single outstanding issue was the registration of the customary marriage. In terms of the provisions of sec 3 of the Recognition Act either of the parties may attend to the registration of the marriage. This is in fact what the plaintiff attempted to when she visited the Department of Home Affairs, and discovered to her horror, that the defendant was still married civilly to Ms Sarah Mofokeng on 22 November 1991. The plaintiff's marriage to the defendant was therefore void ab initio in terms of the provisions of sec 10(4) of the Recognition Act which provides that:

"Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage,

competent to enter into any other marriage."

From this provision, it was therefore not possible or legally competent for the plaintiff to register her customary marriage. The provisions of the Recognition Act came into operation on 15 November 2000.

[6] By entering the institution of marriage, the plaintiff sought to enhance her social status, but however, ended up having her dignity violated, through the deceptive and malicious conduct of the defendant. Indeed, the defendant's conduct as described constituted a violation of the plaintiff's right to inherent dignity. In this regard sec 10 of the Constitution of the Republic South Africa Act, 108 of 1996 provides:

"Everyone has the inherent dignity and the right to have their dignity respected and protected."

This right to dignity is entrenched regardless of the other personal circumstances of the plaintiff as dealt with later herein. In addition, on the facts of this case, the conduct of the defendant also violated the plaintiff's rights to equality under sec 9 of the Constitution. Furthermore, the Promotion of Equality and Unfair Discrimination Act No 4 of 2000 expressly protects the plaintiff against discrimination on the grounds of HIV/AIDS status.

THE ASSESSMENT OF THE PLAINTIFF'S DAMAGES

[7] As will be shown later, the Recognition Act (No. 120 of 1998) does not per se address the question of bigamous marriages. The plaintiff's present claim based on the *actio iniuriarum*, is competently pleaded. In Amler's Precedents of Pleadings, 6th ed. by L T C Harms (2003) at p 190, the following is stated:

"The actio iniuriarum grants relief for an impairment of the person, entity or reputation of the plaintiff, which impairment is committed

wrongfully and animus iniuriandi (intentionally)."

Furthermore, in Hahlo, The South African Law of Husband and Wife 5th ed at 60 the learned authors say that:

“... An action for damages on the ground of breach of promise or fraud may lie against a person who has induced another by fraudulent

misrepresentations to enter into a void (eg bigamous) marriage with him.”

The plaintiff testified that the defendant told her that he was divorced. She said that she did not know that he was still married to Ms Sarah Mofokeng (cf *Claassen v Van der Watt* 1969 (3) SA 68 (T)) where it was held inter alia, that since the plaintiff knew that the defendant was a married man she was debarred from bringing an action for breach of promise). See also *Lloyd v Mitchell* [2004] 2 All SA 542 (C). More pertinently, in *Snyman v Snyman* 1984 (4) SA 262 (T), the plaintiff applied for an order declaring her marriage to be null and void on the grounds that her husband was unbeknown to her a party to an existing valid marriage. She sued for maintenance of the minor child of the parties, as well as damages of R5 000,00 under the *actio iniuriarum* for the contumelia she had suffered arising from the commission of bigamy. At 264D-E of the judgment, Goldstone J said:

“That a claim lies under that cause of action I have no doubt. In Viljoen v Viljoen 1944 CPD 137 SUTTON J awarded damages for the injuria suffered by a woman to whom a promise of marriage had been made by a man who, unbeknown to her, was married. ...In the present case, there was both injuria and contumelia attendant upon the unlawful conduct of the defendant.”

The defendant in that case was ordered to pay damages to the plaintiff in the sum of R5 000,00. In the instant matter, counsel for the plaintiff, quite correctly in my view, submitted that *Snyman*’s case was approved and applied in *Arendse v Roode* [1989] 2 All SA 106 (C). Furthermore, that more recently in *Zulu v Zulu and Others*

[2008] JOL 21484 (D), the Court confirmed the dictum laid down in *Snyman* and found that “the deceased had married the applicant in a civil marriage at the time when his marriage to the first respondent still existed. Marriage to the applicant was therefore bigamous and unlawful”. The Court held that the fact that the applicant was unaware of the prior marriage of the first respondent did not avail her, other than in respect of a claim for damages. In both *Snyman* and *Arendse* the Court took into account essentially, the following factors in order to determine appropriate damages:

The extent to which the plaintiff had suffered anguish and humiliation as a result of the defendant’s behaviour;

The plaintiff’s social standing;

The plaintiff’s financial circumstances;

The defendant’s financial circumstances;

The attitude of the defendant and whether he had shown any remorse or concern for the plaintiff.

In Arendse the plaintiff claimed R10 000,00 for impairment of her dignity, and was awarded the sum of R5 000,00 as damages under the *actio iniuriarum*.

[8] In the present matter, the plaintiff has placed on record her personal circumstances and the circumstances which led to her claim, as well the sequelae of the defendant's conduct, as sketched above. However, in determining her damages, each case must be considered on its own merits. This much is trite. Furthermore, her evidence that:

Her highest level of education was Std 6;

Although she knew that the defendant was married before, and she knew the wife, the defendant assured her that he had divorced his wife a long time ago;

Although she was never married before, the plaintiff has two children, born 1980 and 1990, respectively, sired by two different fathers. The first child was born immediately after the plaintiff left school. She separated from the father. The father of the second child passed on; this evidence should militate against any substantial award of damages in the particular circumstances of the case (cf *Snyman v Snyman* (supra) at 264F).

[9] I am also compelled to consider that the defendant is employed as a primary school teacher. His salary advice for the period 31 July 2008, contained in the Court bundle, shows that his gross salary was R11 222,00, with a nett of R6 066,76. It is however, reasonably conceivably that the defendant obtained salary increases since 2008. The Court bundle also reveals that the defendant took out a mortgage bond in favour of Nedperm Bank, in respect of the immovable property situated in Tembisa, in

1990. The bond amount was R86 385,00. Although the plaintiff currently occupies the immovable property, the defendant continues to pay the rates and taxes to the Ekurhuleni Metropolitan Municipality. The latest invoice from the latter municipality, dated 2 February 2010, shows the value of the immovable property to be about R408 000,00.

[10] Based on the above legal principles, the evidence, and all the information, the crisp issue is what should be a fair and just award for general damages for the impairment of the dignity and reputation of the plaintiff in the present matter. Counsel for the plaintiff has urged me, rather impassionately, to take into account the pattern of awards made in *Snyman v Snyman* (supra) and *Arendse v Roode* (supra), using the Consumer Price Index of 2010. This I shall attempt to do. I shall also take into account that this is the only claim the plaintiff has proved. In a motor vehicle accident related claim, in *Griffiths v Mutual and Federal Insurance Co*

[1993] ZASCA 121; 1994 (1) SA 535 (A), at 546F, the Court said:

“In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess. (See Southern Insurance Association Ltd v Bailey NO 1984

(1) SA 98 (A) at 113G-114E and the cases there cited.)”

Having taken into account all the circumstances of this matter, in my view the amount contained in the order below is fair and reasonable compensation for the plaintiff. The amount of R150 000,00 claimed by the plaintiff in the particulars of claim is on the excessive side in the circumstances.

CERTAIN SHORTCOMINGS IN THE RECOGNITION OF CUSTOMARY MARRIAGES ACT>

[11] Finally, I deal briefly with some of the shortcomings in the Recognition Act. Although the Legislature’s intention in enacting the Recognition Act was undoubtedly noble in recognising customary marriages previously ignored, and in order to put them on par with civil marriages, there are however, clearly still problem areas. As stated earlier in this judgment, the Recognition Act does not per se address the question of bigamous marriages or nullity. In T W Bennette Customary Law in South Africa

(2004) p 292, the problem is described succinctly as follows:

“The absence of a general nullity section, however, is an unfortunate lacuna in the Act. Although new statutory requirements for the creation of a valid customary marriage were specified, the effect of failing to observe them is uncertain. The terms of the Act itself give no clue as to an appropriate response nor does the Law Commission Report on Customary Marriages.”

See also Wille’s Principles of South African Law 9th ed, at p 305. In fact, sec 7(6) of the Recognition Act provides that a husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of the Act must make an application to the Court to approve a written contract which will regulate the future matrimonial property system of his marriages. The point made is that in spite of the intention to place customary marriages on the same level as civil marriages entered into in terms of the Civil Union Act 17 of 2006, more than one customary marriage remain permissible. In the context of the present matter, in the current South African law, the plaintiff, due to her marriage to the defendant being void ab initio, has no recourse in terms of the provisions of sec 8 of the Recognition Act. The latter section provides that a customary marriage may only be dissolved by a decree of divorce on the ground of irretrievable breakdown of the marriage. This indeed, accords with the provisions of sec 4 of the Divorce Act 70 of 1979. In this case, the plaintiff is denied the order usually accompanying a decree of divorce concerning the proprietary consequences and personal consequences. In the event of the plaintiff seeking to claim a division of property or maintenance by virtue of her void marriage, she would have to formulate a claim based on a breach of contract or based on the dissolution of a universal partnership. In such

event, the plaintiff is obliged to join Ms Mofokeng as an interested party considering that the joint estate between Mrs Mofokeng and the defendant still subsists. Ms Mofokeng still holds an undivided half-share in the joint estate. In this regard, sec 7(4)(b) of the Recognition Act provides that in the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings. The plight of spouses who end up with customary marriages which are later declared void, was well-illustrated in *Kwitsane v Magalela and Another* 1999 (4) SA 610 (Tk). In that case the applicant sought an order declaring that the customary marriage entered into by and between the deceased and the first respondent during 1996 was unlawful and of no force or effect. The applicant also sought an order that the first

respondent was not entitled to inherit from the deceased estate. The marriage was governed by the Transkei Marriage Act 21 of

1978. In declaring the customary marriage as unlawful and of no force or effect, Kruger AJ also ordered that the first respondent was not entitled to inherit from the deceased estate by virtue of the alleged marriage. In *Wormald NO and Others v Kambule*

[2005] 4 All SA 629 (SCA), the appellants sought the eviction of the respondent in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ("PIE"), and that the customary marriage that subsisted between the respondent and her deceased husband to be declared null and void. The Court held that although customary law recognises that a husband has a duty to maintain his wife and provide her with residential and agricultural land, she does not however, acquire any real rights in such land. The ownership vests in the husband's estate upon his death. Further, customary law does not make provision in instances where a widow is laying claim to property belonging to a third party, which is bonded. The Court pointed out that there was no indication on the papers that the second appellant was entitled for the purpose of providing support to the respondent. The Court held that in the absence of such evidence, the court a quo had erred in its finding that the respondent had accrued a right to occupy the property as a result of the alleged customary marriage. The respondent's occupation of the property was therefore unlawful. As a result of the shortcomings in the Recognition Act, particularly in not regulating the position around void customary marriages, the present damages claim brought by the plaintiff is clearly her only remedy to seek redress against defendant for the hurt, humiliation, and anguish caused to her person. This makes the award of equitable damages more difficult.

[12] There are indeed other shortcomings and lacunae in the provisions of the Recognition Act, such as the jurisdiction issue, and the registration of customary marriages issue, which are unnecessary to deal with in this judgment.

ORDER

[13] For all the above reasons, the following order is made:

The customary marriage between the parties be and is hereby declared null and void.

The defendant is ordered to pay damages to the plaintiff in the sum of R45 000,00.

The defendant is ordered to pay the costs of the action.

D S S MOSHIDI

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF MS A THAKOR

INSTRUCTED BY WEBBER WENTZEL

COUNSEL FOR THE DEFENDANT NO APPEARANCE

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