

SOUTH AFRICA / JUDGMENT

Kgori v Nkoana and Others (6480/19)

[2020] ZAGPPHC 658 (11 November 2020)

[2020] ZAGPPHC 658**COURT**

North Gauteng High Court, Pretoria

BEFORE

Lukhaimane

CASE / FILE NUMBER

6480/19

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO****OTHER JUDGES: YES/NO****(3)****REVISED.****CASE NO: 6480/19****In****the matter between:**

MONICA
DIKELEDI KGORI
APPLICANT
and
ELIZABETH
MAMSI NKOANA
FIRST RESPONDENT
CLEODORA
PERTUNIA SCHALK
SECOND RESPONDENT
HALAMALANI
NELLY NKOANA
THIRD RESPONDENT
THE
MINISTER OF HOME AFFAIRS
FOURTH RESPONDENT
MASTER
OF HIGH COURT GAUTENG

FIFTH RESPONDENT
DIVISION,
PRETORIA

JUDGMENT

LUKHAIMANE AJ:

1. The Applicant lodged an application to have her customary marriage to one Tsakane Stanley Nkoana (the deceased) declared as valid, which declaration would result in the subsequent civil marriages that the deceased had entered into with the First and Second Respondents invalid.
2. The deceased passed away on 18 August 2018. It is the Applicant's contention that a valid customary marriage was entered into between herself and the deceased on 3 December 2005. Should this court find that such customary marriage is valid, the Fourth Respondent would be ordered to register it in terms of section 4(7) of the Recognition of Customary Marriages Act (Act 120 of 1998).
3. At the onset, I should mention that the nonregistration of a customary marriage does not make it invalid, what is at stake here is whether whatever transpired on 3 December 2005 rises to the status of a valid customary marriage having been concluded.
4. The First and Third Respondents oppose this application on the grounds that no valid marriage was concluded between the Applicant and the deceased as one of the essential requirements in terms of the Act had not been met. The First Respondent entered into a civil marriage with the deceased on 30 May 2013 and such marriage would be invalid should the Applicant's motion succeed. This marriage has since ended in divorce. The Third Respondent is the deceased's mother. Condonation is also granted for the late filing of the Third Respondent's affidavit.
5. The Applicant submitted three confirmatory affidavits by her relatives that were in attendance on 3 December 2005. There is also a belated confirmatory affidavit from one Mr LM Matlala who was part of the deceased's entourage on 3 December 2005.
6. The Applicant contends that she was unaware that the deceased had entered into subsequent marriages after their separation in July

2006. This is not only unlikely, but improbable as the deceased lived with the child that he had with the Applicant and such child participated in one of the marriages and it is impossible that the Applicant as the mother would have been unaware of the preparations and her child's role in such marriage.

7. The Applicant and the deceased separated for good during July 2006

and not only did the deceased enter into the subsequent civil marriages, the Applicant bore more children, not of the deceased.

Therefore, whether the customary marriage is valid or not, both the deceased and the Applicant after July 2006, conducted themselves as if they were not in a marriage relationship with each other.

8. In support of her application, Applicant filed several confirmatory affidavits from representatives of both families.

Facts

not in dispute

- The Applicant and the deceased have one child born on 27 May 2005.
- On 3 December 2005, lobolo negotiations took place between the two families, following the Sepedi culture. An amount of R6 000 was paid in that regard. A copy of the lobolo letter was presented.
- The deceased and Applicant lived together until July 2006 when Applicant moved out following a disagreement.
- Applicant's child with the deceased lived with the Third Respondent and later with the deceased and his subsequent wives.

Facts

in dispute

- Whether or not a valid customary marriage took place under Sepedi culture.

9. Whether or not a customary marriage is registered or not does not

affect its validity. Therefore should this court find that a valid customary marriage existed between the deceased and Applicant, the Fourth Respondent will be ordered to register such marriage.

10. At the onset, on the facts and given that Applicant and the deceased lived in the same area and that their minor child lived with the Third Respondent and later with the deceased and the First and Second Respondents when the deceased was married to them, it is improbable that the Applicant only became aware of the deceased's civil marriages after the deceased's passing.
11. The Third Respondent is clear and detailed in what transpired after the lobolo negotiations. The Applicant on the other hand only offers bare denials. The requirements of a valid customary marriage are as per section 3 of the Recognition of Customary Marriages Act 120 of 1998 titled: Requirements for validity of customary marriages. Section 3(1):

“For a customary marriage entered into after the commencement of this Act to be valid –

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

12. The parties were indeed both over 18 years old on 3 December 2005.
13. Both Applicant and the Third Respondent submit that it was indeed the intention of the deceased to marry the Applicant as at 3 December 2005. That is where their agreement ends. From the evidence, it is clear that some part of the negotiations took place as evidenced by the lobolo letter. However, this letter does not take the matter further as it merely states as follows:

“Ba ga Masanya ba amogetse Magadi a ga Ngkwana ka di 03 December 2005. A amogetse ke ntate Mabitsela le Mme Malete R6 000”

And then the various parties append their signatures.

14. Except for the Applicant's word that a marriage was entered into and celebrated in terms of customary law, there is no proof of that. Neither did Applicant seek any confirmatory affidavit from anyone who participated in such festivities or celebrations of Sepedi customs meant to consummate marriage. The Third Respondent on the other hand is adamant that a marriage in Sepedi culture never took place nor were there any celebrations to that effect. The reason the Third Respondent's version is the important one of all the Respondents is that she was there at the time and is able to account for what transpired.
15. The Third Respondent went into detail as to what is required in the Sepedi culture for a valid customary marriage to be said to have taken place. Apart from indicating that the Applicant never stayed with her (meaning she was never handed over), the Third Respondent indicated that no animal was slaughtered “go hlabisa” in consummation of the marriage – an act considered vital to the conclusion of a valid customary marriage. It is the Applicant's contention that the lobolo letter is sufficient evidence of a valid customary marriage having

taken place between her and the deceased. As previously stated, she adds that she left with the deceased's family on that day and there was a celebration of the marriage at the deceased's home. No other evidence is offered for this submission.

16. In *Fanti v Boto and others* 2008 (5) SA 405 (C) the court regarded certain requirements as customs traditionally observed by indigenous people in South Africa. The court *inter alia* stated as follows at 4131 – 414C:

“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: *Gidya v Yingwana* 1944 NAC (N&T) 4; *R v Mane* 1947 2 PH H 328 (GW); *Ziwande v Sibeko* 1948 NAC (C) 21; *Ngcongolo v Parkies* 1953 NAC (S) 103. These requirements have not vanished with the advent of the constitutional democracy in this country. On the contrary, the Constitution of the Republic of South Africa, 1996, enjoins the Courts to develop customary law and to marry it to the constitutional order of the day. The importance of these rituals and ceremonies is that they indeed indicate in a rather concretely visible way that a customary union is being contracted. I am in agreement with Van Tromp's views expressed in his work *Xhosa Law of Persons* at 78 that these ceremonies must be viewed as ceremonial and ritual process in which essential legal requirements have been incorporated.”

17. The full court of the Free State Division has also had an opportunity to pronounce itself on whether the handing over of a bride is an element of a customary marriage in *Rasello v Chali and others* (A69/2012) [2013] ZA FSHC 182 Molemela J, as she then was, stated as follows at paragraph [18]:

“....Although the Recognition of Customary Marriages Act does not include transfer of the bride in the requirements for a valid customary marriage, I accept that this, being an old Sesotho custom that is still widely recognised, it is a custom contemplated in section 3(6) of that Act and is thus an essential requirement for validity of a customary marriage. It was so accepted by the court in the case of Fanti v Boto (supra) on the basis of many authorities. Delivery of the bride entails that the bride will be accompanied to the groom's family by her own delegation, which will then formally hand her over to the groom's family. Olivier, Bekker et al in their work Indigenous Law describe delivery of the bride as “the transfer of the bride by her family group to the family of the man”.

18. These are indeed motion proceedings, and therefore, “It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted in those facts averred in the applicant's affidavits which have been admitted by the respondent, together with facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see *Plascon-Evans Paints (TVL) Ltd v Van*

Riebeck (Pty) Ltd (53/84)

[1984] ZASCA 51).”

19. In the result, it is declared that no valid customary marriage took place between the Applicant and the deceased.
20. The Application is dismissed with costs.

M A LUKHAIMANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicant : Adv J Modiba

Instructed by

: Mongwadi Mohale Attorneys

On behalf of the 2nd Respondent : Adv D Mtshwene

Instructed by

: Albert Hibbert Attorneys

On behalf of the 3rd Respondent : Adv S Mathiba

Instructed by

: VZLR Attorneys

Date of hearing

: 8 October 2020

Date of judgment

: 11 November 2020

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