

SOUTH AFRICA / JUDGMENT

Khambule v Mazibuko and Another (4631/2020) [2022] ZAFSHC 152 (9 June 2022) [2022] ZAFSHC 152

COURT

Free State High Court, Bloemfontein

BEFORE

N. M. Mbhele

CASE / FILE NUMBER

4631/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 4631/2020

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between: -

KEFILWE DORIS KHAMBULE

Plaintiff/Respondent

and

NTSKEISENG MARIA MAZIBUKO

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

CORAM: N. M. MBHELE, AJP

HEARD ON: 02 NOVEMEBR 2021 and 22, 23 and 25 FEBRUARY 2022

DELIVERED ON: 09 JUNE 2022

[1]

This is an application that was referred for oral evidence by my sister Opperman, J. The issue for determination is whether the applicant did enter into a valid marriage contract with Letjeba Samuel Mazibuko (the deceased). The respondents deny that a valid marriage existed between the applicant and the deceased. The second respondent filed a notice to abide the decision of this court.

- [2] The applicant testified in support of her case and called two witnesses. She testified to inter alia the following effect: She met the deceased in 2013 and started a relationship with him while his wife was still alive. In 2015 she fell pregnant with the deceased's child. His wife died in April 2015 while she was pregnant with the deceased's child. The deceased stayed with the applicant at a house they rented in Phuthaditjhaba. His kids were at that stage staying in Tshiame. During the period of mourning his wife he frequented his family home in Tshiame. In July he returned to stay permanently with the applicant. In October 2015 his family came to pay lobola for her in October 2015. The applicant's family demanded 8 cows at a cost of R2000.00 each as lobola price. There were times when the deceased doubted the paternity of the applicant's child. The DNA tests confirmed that the deceased was the father. After lobola negotiations the applicant was not handed over to the deceased's family neither was the marriage celebrated. The deceased died in a car accident in 2018 and was buried by his family at his house in Tshiame. The applicant went to the deceased's home like all other mourners on the date of the funeral to bury him. She attributes her failure to be part of the funeral arrangements to the fact that the deceased's daughter hated her and accused her of having killed her mother.
- [3] Matsela Lea Khambule is the applicant's sister who was representing the Khambule family during lobola negotiations between the Mazibuko and Khambule families. She confirmed that the deceased's family visited her home to negotiate lobola for the applicant. She confirmed the applicant's testimony on the amount set as the bride price and that there was no handing over of the bride nor was the marriage celebrated. According to her the Mazibuko family was represented by the deceased's aunt and uncle. After the parties agreed on the bride price the agreement was reduced into writing by, read to the delegates and signed by each of them.
- [4] Maria Pheko is the applicant's mother. She knew the deceased as her daughter's boyfriend and the father of her granddaughter. She confirmed that the Mazibuko family came to her family to ask the applicant's hand in marriage. The delegation reported to her that the Mazibuko's paid R6000.00 of the R16 000.00 agreed upon and promised to come back to settle the outstanding amount. According to her the marriage was not celebrated and her daughter was not handed over in terms of the customary law because the deceased died before matters could reach that stage. When it was put to her that the Mazibuko family had come to pay damages for the deceased's child with the applicant she responded that at the time of their visit the child was not yet born and damages are, in terms of the culture, paid after the child's birth. The applicant was not involved in arrangements of the deceased's funeral. The

applicant was accompanied by other family members to the funeral. She did not attend the funeral and she did not know the deceased's mother.

- [5] Paseka Masukela was one of the representatives for lobola negotiations between the Mazibuko's and the Khambule's. The parties agreed that the bride price would be 8 cows at R2000,00 each. The deceased's family paid R6000,00 which was an equivalent of 3 cows. All parties that were present at the

negotiations signed Exhibit 'A' which is a document confirming contents of their agreement. He denied that the deceased's

family had come to pay damages. He emphasized that the purpose of the meeting between two families was to negotiate lobola for the applicant and the deceased. He confirmed that the negotiations were sealed with a document that all delegates signed.

- [6] At the close of the applicant's case four witnesses testified in support of respondent's case. Ntsekiseng Maria Mazibuko is the- deceased's mother who testified to the following effect: she knows about the applicant and she knew that the applicant had a child with her son. In her evidence in chief when she was asked whether she knows of any marriage between her son and the applicant, she said that the process was never finalised. In her view

the applicant was not married to the deceased. The visit to the Khambule family was for payment of damages. She testified that she knows Itumeleng Khothatso as her daughter in law because she was the one staying with her son at Khalanyoni until his death. She later on in cross examination said that the deceased did send emissaries in the form of his aunt and negotiate lobola on his behalf. She said that the reason she did not want to take part in anything that had to do with lobola negotiations is because she did not want the deceased to marry the applicant because she feared that the applicant would be unkind to the grandchildren.

- [7] Lina Molise is the deceased's aunt who was part of one of the emissaries sent to the Khambule family. In her view the purpose of the visit was to pay damages for the deceased getting the applicant pregnant outside wedlock. The document that was signed at the end of the discussion was the confirmation of payment of damages not lobola negotiations. She said that she signed a document that was not read back to her. She, further, said that she cannot write and read

although she signed with her name in full on the document. Mr. Mvulane Mazibuko who was part of the Mazibuko delegation could write

and read he is the one who reduced the terms of the agreement into writing.

- [8] Mohau Qwelana is the deceased's daughter. She testified that she knows the applicant whom she met for the first time at Mandela Park around 2016 /2017 when she asked her to inform her uncle that her child required some ritual. According to her the deceased did not recognise the applicant's child as his own. The deceased introduced her to Puseletso Khothatso as his life partner in August

2015. She denied that the deceased ever stayed at Phuthaditjhaba with the applicant. According to her, the deceased was staying with Puseletso Khothatso whom the family acknowledged as the deceased's

wife. She denies that the applicant attended the deceased's funeral. Her father told her that he did not father the applicant's

child. In her view, the person recognised as the deceased's wife was supposed to wear mourning attire at the funeral which did not happen with the applicant who according to her did not even attend the funeral. Neither did it happen to Khothatso who according to her was recognised as the deceased's wife.

[9] Puseletso Khothatso testified that she was married to the deceased with whom she stayed at Khalanyoni (Tshiame C) since April 2015 until 2018 when he passed on. He stayed with the deceased daily until 2018. She did not participate in the funeral arrangements of the deceased nor was she clothed in the cultural mourning attire for widows. She did not know the applicant. She only heard that the applicant was present at the funeral after the burial. After the deceased died his mother instructed Khothatso to stay at the place they were renting until the family came to fetch her for the funeral.

They never came to fetch her. She went to Tshiame A on the day of the funeral to bury the deceased.

[10] Maki Khiba Mncedani testified that she is the daughter of the deceased. She explained the procedures and rituals involved during the conclusion of a customary marriage. She is not aware of any marriage existing between the deceased and the applicant nor any lobola paid for the applicant. She is aware that Khothatso was in an intimate relationship with her father until his death in 2018.

[11] I am faced with two diametrically opposed versions as to whether there was any lobola negotiations or not. When a court is faced with two mutually destructive versions the approach to follow is the one enunciated in *National Employers' General Insurance v Jagers*[1] where the following was said:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal cases, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being

probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster KO-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (Supra). I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitutes separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

See also *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others*.^[2]

[12] I have to consider the credibility of witnesses, their reliability and weigh the probabilities to determine which version is more probable. The evidence tendered on behalf of the applicant was straightforward. The applicant, her mother, her sister and Masukela delivered their evidence in a satisfactory manner. The contradictions in the applicant's testimony were immaterial when the evidence is viewed in its totality.

[13] Respondent's evidence was full of material contradictions and improbabilities. The first respondent acknowledged in her answering affidavit that the deceased did stay with the applicant at Phuthaditjhaba from April 2015 to November 2015 when he moved out to stay with his new girlfriend in Tshiame B (Khothatso). She denied any knowledge of the R6000.00 paid to the applicant's family in her answering affidavit. When giving oral evidence she admitted at first that the deceased did approach his aunt and sent her as one of the emissaries to Khambule family to negotiate lobola. She further testified that the reason she did not want the deceased to marry the applicant was her fear that the applicant would not be kind to her grandchildren. She later on somersaulted and said that the money paid to the Khambule family was for damages for the child born outside wedlock.

[14] Mamohau testified that the deceased denied paternity of the applicant's child but reiterated that the deceased, who confided in her, told her that he paid damages to the Khambule family. It makes no sense why the deceased would not acknowledge the applicant's child as his own but pay damages for impregnating the applicant outside wedlock. She was not frank with the court.

- [15] Lina Modise confirmed the first respondent's answering affidavit which denied that a delegation from the Mazibuko family paid R6000,00 to the Khambule family. She later on confirmed that she signed some paper which was not explained to her when confronted with the contents of exhibit "A". She further tried to distance herself from the exhibit "A" by denying that she is able to read and write although she signed the document with her names in full showing that she can write. She was evasive and did not make a good impression at all.
- [16] The evidence of the applicant's mother that the Mazibuko's could not have come to her family to pay damages because the child was not born yet and that damages are paid after a child is born was not disputed.
- [17] On analysis of the evidence and weighing up of all probabilities I find that the applicant's version is to be preferred over that of the first respondent on whether there were lobola negotiations concluded between the parties.
- [18] Having found that there were lobola negotiations held between the parties I turn to deal with whether the lobola negotiations marked the commencement of the marriage between the deceased and the applicant and signified the conclusion of a valid marriage between the applicant and the deceased.
- [19] In terms of section 3 of the Recognition of Customary Marriages Act 120 of 1998, a customary marriage entered into after the commencement of the Act will be valid if:
- “(i) the prospective spouses are both above the age of 18 years;
- (ii) both consent to be married to each other under customary law; and
- (iii) the marriage must be negotiated and entered into or celebrated in accordance with customary law.”
- [20] The Supreme Court of Appeal dealt with the essential requirements of a valid customary marriage in the matter of *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014) wherein Bosielo JA said the following:
- "[39] Except for minor and inconsequential differences on cultural rituals, both experts were agreed that the current customary requirements for a valid customary marriage among the Bapedi people include amongst others, negotiations between the families in respect of lobola; a token for opening the negotiations (go kokota or pula molomo); followed by asking for the bride (go kopa sego sa metsi); an agreement on the number of beast payable as lobola (in modern times this is replaced by money); payment of the agreed lobola; the exchange of gifts between the families; the slaughtering of beasts; a feast and counselling (go laiwa) of the makoti followed by the formal handing over of the makoti to her in-laws by her elders.

[40] Importantly, the two experts agreed that the handing over of the makoti to her in-laws is the most crucial part of a customary marriage. This is so as it is through this symbolic customary practice that the makoti is finally welcomed and integrated

into the groom's family which henceforth becomes her new family. See *Motsotsoa v Rora & Another and The Current Legal Status of Customary Marriages in South Africa*, IP Maithufi and GBM Moloi, *Journal of SA Law*, 2002, p 599 and Bennett (above) at p217."

[21] It is common cause that there was no handing over of the bride in terms of the traditions observed by both families. The applicant's mother admitted that ordinarily after lobola negotiations the marriage should have been celebrated which did not happen with the applicant and the deceased. She had no explanation why the marriage was not celebrated.

[22] Mr. Tsoeu, on behalf of the applicant, contended that customary law is a constantly evolving system and that failure to observe the rituals pertaining to the hand over of the bride should not stand in the way of a marriage that has been negotiated in accordance with customary law. Mr. Tsoeu finds support from *Tsambo v Sengadi*[3] where Molemela JA remarked as follows:

"[17] The appellant's contentions pertaining to the rituals observed during the handing over of the bride ceremony fail to take into account that customary law is by its nature, a constantly evolving system. That customary law has always evolved is evident from the following observation made by Professor Bennett almost three decades ago and approved in many judgments:

'In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters. Aside from this, the indigenous rituals might be supplanted by exotic ones: a wedding ring may now be used in place of the traditional gall bladder of a slaughtered beast and for many a church ceremony has become indispensable.'

[18] It is evident from the foregoing passage that strict compliance with rituals has, in the past, been waived. The authorities cited by the respondent, mentioned earlier in the judgment, also attest to that. Clearly, customs have never been static. They develop and change along with the society in which they are practised. Given the obligation imposed on the courts to give effect to the principle of living customary law, it follows ineluctably that the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law."

[23] In *Mbungela v Mkabi Mbungela and Another v Mkabi and Others*[4] Maya, P remarked as follows when dealing with the validity of a customary marriage where the ritual of the handing over of the bride was not performed:

“[30] To sum up: The purpose of the ceremony of the handing over of a bride is to mark the beginning of a couple's customary marriage and introduce the bride to the groom's family. It is not an important but not necessarily a key determinant of a valid customary marriage. Thus, it cannot be placed above the couple's clear volition and intent where, as happened in this case, their families, who come from different ethnic groups, were involved in, and acknowledged the formalisation of their marital partnership and did not specify that the marriage would be validated only upon bridal transfer.”

- [24] It is well accepted that culture adapts and evolves along with the society's needs, wants and opportunities. It is through culture that members of a particular group and society define themselves, conform to society's shared values and contribute meaningfully to society. The question to ask is to what extent does the culture evolve. In each and every case one would have to examine this question in line with facts at hand. When evolution is complete the final product must not be so removed

from the culture that you cannot recognise the culture in it. TW Bennet remarked as follows in Customary Law in South Africa page 217:

“Nevertheless, observance of traditional procedure and ceremonies is not unimportant, because it helps to define the cultural provenance of a union. 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 the 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.”

“.....Customary marriage is not completed by the performance of a single act nor does it need the approval of a public authority. Instead, it can best be described as a (potentially lengthy) process that affects only the spouses and their families.”

- [25] I must hasten to point out that the facts in Tsambo and Mbungela supra are distinguishable from the facts in casu. In Tsambo the court found that the marriage was celebrated in terms of the custom immediately after the lobola negotiations when the groom's aunts dressed the bride in the outfit matching that of the deceased, introduced her to all persons in attendance as their makoti and welcomed her into the family. In Mbungela the two families exchanged gifts immediately after the negotiations and the bride and groom celebrated their marriage at church and were accepted as husband and wife by both families and people in their circles. It is clear from the aforementioned authorities that after lobola negotiations it is necessary to have some form of a ritual marking the commencement of the customary marriage.

- [26] In the current matter none of the above occurred. The evidence shows that after the payment of R6000,00 deposit the deceased's family left and promised to come back again in the future. The deceased was not present at the applicant's home on the date of negotiations. The deceased's mother did not even know the applicant, she had never met her. The

applicant's mother did not even know the deceased's mother, she did not even accompany her daughter to the funeral of someone who is supposed to be considered her son in law. No ceremony of whatever nature was held to recognise her as the wife of the deceased. No evidence shows that the need to comply with other requirements for a valid customary law was waived by the parties. In view of the above I am unable to find that there was a valid customary marriage entered into between the deceased and the applicant. The application must fail.

[27] Costs are in the discretion of the court. I am of the view that the circumstances surrounding this case call for each party to pay her own costs.

[28] I, therefore make the following order:

1. The application is dismissed.
2. Each party to pay her own costs.

N.M. MBHELE, AJP

Appearances:

For the Applicant: Adv.

T. E. Tsoeu

Instructed by Moletsane Attorneys

Bloemfontein

For the 1st Respondent: Adv.

D. C. Hattingh

Instructed by Phatsoane Henney Inc.

[1] 1984

(4) SA 437 (ECO) at 440D - 441A.

[2] 2003

(1) SA 11 (SCA) at par [5].

[3] Tsambo v Sengadi [2020] JOL 47138 (SCA) and (244/19)

[2020] ZASCA (46) delivered on 30 April 2020 at paragraphs 17-18.

[4]

[2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA).

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