

SOUTH AFRICA / JUDGMENT

Machika v Mthethwa (55842/2011) [2013] ZAGPPHC 308 (24 October 2013)

[2013] ZAGPPHC 308**COURT**

North Gauteng High Court, Pretoria

BEFORE

Nkosi

CASE / FILE NUMBER

55842/2011

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Policy**REPORTABLE****IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****GAUTENG HIGH COURT, PRETORIA****CASE****NO: 55842/2011****DATE:24/10/2013****In**

the matter between:

TB

MACHIKA.....PLAINTIFF

and

DM

MTHETHWA.....DEFENDANT

JUDGMENT

NKOSI AJ:

Introduction

[1] The applicant approached this court for an order in the following terms:

- (a) that she entered into a marriage with the defendant on the 3rd of May 2008;
- (b) the marriage as alleged by the plaintiff is one contemplated by the provisions of section 3(1) of the Recognition of Customary Marriage Act 120 of 1998.

[1] Plaintiff was therefore required to prove that: “the marriage was negotiated and entered into and celebrated in accordance with customary law”.

[2] The Recognition of Customary marriage Act 120 of 1998 prescribes the validity requirements for the conclusion of a customary marriage.

Fact in dispute

The existence or non-existence of the marriage.

The parties evidence

Plaintiff testified under oath that on or about May 2008 she and the defendant entered into a customary marriage in Bronkhorstspuit:

[3] The defendant initiated the Lobolo proceedings or talks with his family delegates who came to plaintiffs parental home to start the negotiations.

[4] She was not directly involved except her uncle Moses and Lucas Mahlangu.

[5] The Defendant was represented by his sisters Sasekant and Randzo.

[6] She was told by her mother that Lobolo was negotiated as follows:

- 6 Live Cattle
- 8 Cattle @ R1500,00 each
- Cash in the amount of R10 000,00 paid immediately
- R1000 for a calf was to be settled later

[8] Two weeks after the part payment of the Lobolo, plaintiff was told by her mother that she could go that they had to slaughter a goat and her grandmother conducted the ‘ukuyala’ to her how to behave. After the ‘ukuyala’ her mother gave her a dress and a blanket, after mother took her to the garage where defendants sisters were waiting.

- [9] Her mother handed her over to the defendant's sisters Sasekani and Randzo and they drove to Bushbuckridge to a place called Rolle. They arrived late at night. The Defendant was also travelling with them.
- [10] On arrival in Rolle there were people waiting for them. There were neighbours and church members to welcome them that night.
- [11] The following day she was dressed in new clothes specifically purchased for her with a head band to cover her head.
- [12] She was subjected to another 'ukulaya' coaching by her in-laws who told her to always support her husband, taking care of him. They further informed her that defendant was a child from a previous marriage and they gave her money, the amount of which was not disclosed as pocket money.
- [13] They had a good day, had drinks and food. They spent two days and thereafter drove back to Middelburg where the defendant had a house and they stayed together as husband and wife. She left Middelburg on 8 June 2011 while on maternity and later gave birth to their daughter. According to her tradition she had to go and stay with her mother after giving birth at least for 10 days.
- [14] On her return to their house in Middelburg she found defendant with another woman. Defendant introduced this woman as a girlfriend to him. She immediately called her mother and told her about this problem. She further called her uncle and told him about this. Uncle Lucas spoke to the defendant and she overheard him apologising to her uncle.
- [7] The woman found with the defendant refused to leave and started quarrelling with her. A month later she requested the defendant to register for a birth certificate and he refused. This made her to register the baby in her own surname as a result, as he constantly refused to accompany her to the Department of Home Affairs.
- [8] Defendant delayed to pay the balance of the Lobolo. He started asking as if he was not married to her after she found him with another woman. On the 8 of June 2009, the defendant signed an affidavit confirming his marriage to her.
- [9] It is her belief, as a Christian, that she will not be subjected to a polygamous marriage. She had not changed her surname to Mthetwa's as they had not yet signed. She remained Machika.
- [10] She confirmed that she did not know that she had to register the customary marriage at the Department of Home Affairs.
- On cross-examination
- [11] She confirmed to having a child prior to her relationship with the defendant.

The child is V M, a six years old boy. The name of the child's L M.

She was never married to Mahlangu but his child is given the correct surname.

[12] It was put to her that there was no valid customary marriage between the Defendant and herself as they did not follow the indispensable

'ukuyala' custom in Bushhuckridge and that she was not officially handed over to her in-laws. She was only requested to stay with Defendant pending final payment of Lobolo and the proper cultural ceremony to solemnize the marriage.

[13] It was further put to her that if she had been taken through the proper 'ukulaya/ukuyaia' customs she could not burn the defendant's clothes.

She said that she was provoked by another women, no name given, whom she received a call from Middelburg. She had to drive about 80km from Bronkhorstspuit to Middelburg to sort this woman out.

She admits burning defendant's clothes and stopped short from burning the whole house.

[14] It was put to her further that the date of final Lobolo payment and the date of the customary marriage or celebration to conclude the process was not yet announced. Therefore there had been no marriage.

On re-examination

[15] She said that defendant has been involved with other woman and she wants a divorce.

[16] 1st Wittness: Lucas Masango under oath confirmed that he is the plaintiffs uncle and that he was involved in the Lobolo negotiations

representing Plaintiff. It was his evidence that the defendant did approach the bride's family to initiate the Lobolo talks. That was done and portion of Lobolo was paid with the balance of R1000,00 for a calf and six life cattle's. He could not assist the court in confirming whether there was an official consummation of the marriage in terms of the Ndebele customs.

He was unfortunately not part of the crew who travelled with the plaintiff to Bushbuckridge. This is an indication that there was no official handing over of the bride to confirm consummation of the marriage in terms of the customary law.

He confirmed that they informally agreed that though the Lobolo was incomplete the defendant was entitled to stay with his wife as he had a house in Middelburg.

No date was set for the official wedding where every person, relatives, friends and neighbours would come and witness the marriage. He confirmed that both Ndebele and Shangaai cultures had to be combined to seal the relationship.

[25] The issue of plaintiff going to her parents place soon after giving birth was confirmed as the culture of the Ndebele people.

He confirmed that plaintiff called him at a time when she discovered that defendant had another woman in the house while she was on maternity. This was sorted out between himself and the defendant.

[26] This strengthens the argument that they were not married as yet. Should there be a problem between the two parties:

- (a) if caused by the husband the woman must report him to her in-laws and not to her own parents or uncle;
- (b) if caused by the woman the husband will have to report her to his in-laws or her parents.

There is no hybrid or short-circuit to this culture which is applicable to all Nguni cultures including Zulus, Swazis, Xhosas, Ndebele and Shangaan speaking people.

[27] If not yet married then the converse is true on cross-examination.

[28] He confirmed that he was not aware that plaintiff burnt defendant's clothes that she threatened to burn the whole house.

He was further confronted with the sms which was sent by plaintiff to the defendant that "we can stay without a marriage but you can take care of the kids".

He was not aware further that the child Unathi was not registered in the defendant's surname.

It was put to him that the reason for this is that plaintiff was of the view that they are not married. He further confirmed that there was no date set for the wedding ceremony to seal the requirements of the customary marriage.

He further confirmed that there was no beast slaughtering but only slaughtered a goat for plaintiff's mother.

Plaintiff was not given Mafumeza or Godchild to mark the completion of the marriage.

Mrs Lina Msiza testified that she is one of those who accompanied the plaintiff to Bushbuckridge and could not take the matter any further in confirming the existence of the marriage.

Plaintiff closed its case without calling further witnesses.

Mr Omar for the defendant brought an application for absolution from the instance which was found to be prematurely done.

[17] Dawson Mthetwa (the plaintiff) was called in to lead his evidence under oath. He denied that he was married to the plaintiff in terms of the customary marriage. He confirmed that the first phase of the Lobolo negotiations and the part payment thereof.

[18] He denied that the process was completed as required in terms of the Shangaan customs and culture which requires that full payment of the Lobolo had to be done, a date for the consummation of the marriage had to be arranged and agreed upon by the two families.

[19] He said that he had to pay the balance of the Lobolo and slaughter a beast and half of the carcass to be given to the bride's

parents; had to do a 'mshongola dance' at the bride's home indicating that he is being accepted as the son-in-law.

Traditional food is served to all present.

After this they all leave and go back home leaving the bride with her parents and wait for her to be delivered on a date agreed upon between the families.

On the date of her delivery the plaintiff and her delegates will find cattle tied to a tree waiting for them to slaughter it. Half of its carcass will be given to the bridegroom's family and they will take the other half for themselves.

After that they will undergo a process called 'ukulaya' (in Shangaan) and 'ukuyala' (in Ndebele). The couple will be seated outside side by side with the bride having her elders next to her.

[20] During that process the chief of the area, or his induna in case of his absence or any representative to witness. The bride will be dressed with the attire provided by the bridegroom.

The 'ukulaya' will begin in front of the community, induna, friends and relatives.

It is a requirement that the bride and the groom have to be together during that process.

[21] Plaintiff's evidence that she was "requested" by his sisters, at Bronkhorstspuit, to join him in Middelburg was not the official handing over. This was just a request for her to be allowed to join the defendant in Middelburg as he was staying alone after a divorce from his previous wife.

[22] Asked if he has a child with the plaintiff? His response was that he would like to believe so but the plaintiff created a doubt in his mind by skipping sleeping at home and coming back the next morning with the child without informing him. She refused to register the child in his surname.

[23] This was a subject of a meeting convened by plaintiff's uncle after the defendant lodged a complaint to them:

- (a) defendant had a name proposed for the child but the plaintiff refused to take it but went on to register the child in her own surname;
- (b) the reason she gave, in the presence of the uncles and defendant's sisters is that it is because they are not yet married.

[36] He further mentioned that they were not given a godchild as they had not yet finished with the traditional or customary marriage

requirements.

[37] Defendant further referred to two sms messages sent to him by the plaintiff.

- (a) 15 August 2010: “we can still be together without a wedding just want the Husband and kids” from Thembi (plaintiff);
- (b) 24 May 2010: “as soon as my demands are met and you set a date with your family and inform my family and stop pressuring me” from Thembi.

The two messages were not discovered but were shown to the parties in court and all agreed that they came from the plaintiff’s cell phone number:

[38] Defendant confirmed that he had the plaintiff and child in his medical aid to show that he wanted to take care of them.

[39] The affidavit discovered in the court papers was confirmed to have been signed by the defendant on request by plaintiff as she claimed to have had an intention to register her parents and his parents for funeral cover. The affidavit was meant for trial purpose only on insistence by the plaintiff.

[40] The plaintiff refused to go to the same church with the defendant until such time “we get married”.

[41] The plaintiff burnt his clothes and broke the windows, mirrors, televisions and took photographs of what she destroyed. The police were called but defendant decided to let it go.

[42] Defendant further mentioned some elements of dishonesty about the plaintiff citing that she was ashamed to be seen with him. She would often lie to him and attending Macufe festival with friends. She even went to the official opening of the World Cup in 2010 leaving him behind, and going to important events with friends. These taken together would not constitute a married woman.

[43] It emerged that defendant had previously married and divorced twice and that plaintiff has always been a friend to him until they started dating. He made it clear to her that he did not want a “vat en sit” arrangement and had to follow all procedures to get properly married but plaintiff’s behaviour made him not to finalize the marriage process and therefore there was no marriage.

Sasekani Nomyongo testified under oath that she is defendant’s elder sister. She was involved in the Lobolo arrangements and denied that the plaintiff was customarily married to the defendant.

She testified that the process to get married was not completed after the part-payment of the Lobolo.

She outlined what was outstanding to have the customary marriage to be completed in terms of the Shangaan culture and customs:

- (a) to settle the balance of 6 live cattle and the R1000,00 to the plaintiff’s parents;

- (b) having done that defendant had to do a slaughtering of a cow at the Machika family and take half of the cow for his family and the other half remaining at the plaintiffs (Machika home);
- (c) a ritual dance called 'mshongolo', where the defendant was expected to be dressed traditionally and do some dancing to drum beating, and to be accepted as a son in law;
- (d) the plaintiffs family had to prepare traditional food for the bridegroom's people; and
- (e) after this 'mshongolo' dance or ritual is part of the culture.

[44] It is only after this process that the plaintiffs family had to provide a date of handing of their daughter over to the Mthethwa

family:

- (a) on this date there will be eiders from plaintiff's family, the Machika's, and three girls in their company;
- (b) on their arrival they will find a cow tied to the three to be slaughtered by the Machika's and take half of it and the other half left for the defendant's family.

[45] This is a way of bringing together the two families ancestors to confirm a new family relationship:

- (a) then they all get into the house and it is where the bride will be clothed with Shangaan traditional attire;
- (b) the Mthethwa's will also cloth the plaintiff's uncle, grandmother, aunt or sister and in turn the Machika's will clothe the Mthethwa's as well.

[46] After this process they all go out to the court yard:

- (a) there will be neighbours, community, friends, induna. It is a customary that in such ceremonies a chief or his induna will be

invited. (This also happens when there is a funeral);

- (b) the ceremony will be witnessed by all present that defendant is now getting married and that plaintiff becomes a makoti, daughter in law.

[47] A grass-mat will be sprawled on the ground for the bride and the bridegroom:

- (a) the bride's family will sit on the left and the bridegroom on the right hand side;
- (b) this will be followed by the 'ukulaya' process by the defendant's grandmother, auntie and the elder sister:
- (i) starting with the plaintiff telling her of how they live in the Mthethwa family, how to behave like a married woman, to take care of the husband at all material times, to cook and wash for him and the general respect to all;

(ii) then the defendant is told, in her presence, how to take care of his wife and to provide for his family and to behave properly.

[48] After the 'ukulaya' process a child from the family will be given to the plaintiff as the godchild and to take her as her child and be responsible for all her needs:

- (a) the child will be let to sit down on the ground and jump over her twice. This signified that the plaintiff must bear children for the Mthethwa's, most expected of her to bear more children for the family. After the jumping she would take the child in her arms signifying that she accepts the child as hers;
- (b) the Machika's will in turn re-affirm their 'ukuyala' process to the plaintiff in the presence of the defendant as well.

[49] When this process is over the plaintiffs family will avail presents like pots and plates and this will be followed by general exchange of gifts and the ululation and singing takes place having witnessed the marriage ceremony in its final process in the full view of the induna and the community.

[50] The celebration starts and the people will have the prepared traditional meal: ground nuts, masonja, sorghum beer, mealie-meal or pap, meat and vegetables.

[51] After the celebration the three teenage girls who came with the bride and her elders will remain behind with her for a week after the delegates and the plaintiffs family have left. The girls are referred to as vakoroki in Shangaan culture.

[52] This concludes the customary marriage done in full view of the public. According to this witness, none of these happened, and

according to her the plaintiff was not yet married to the defendant, as required or dictated by their own custom or culture.

[53] She confirmed that she was part of the people who went to plaintiffs place, soon after the part payment of the Lobolo, to request that plaintiff be released to defendant,

as the defendant was staying alone and working in Middelburg: It was a special request and had to leave at night and they travelled with her to Bushbuckridge before she could join him in Middelburg. There was no date set for the marriage ceremony and she was taken to Bushbuckridge first for her to see where defendant came from called 'ekhaya'. The Lobolo was not paid in full and the date for that was not yet set. The bride was not delivered for the purpose of the marriage ceremony as it was still going to be done.

Defendant closed its case without calling further witnesses.

Weighing of argument and submissions

[54] Plaintiff submitted that she was married to the defendant by customary law as envisaged by section 3(1) of the Recognition of Customary Marriages Act 120 of 1988 which prescribes the validity requirements for the conclusion of a customary marriage.

Of importance in this matter is section 3(1)(b) which provides that: “the marriage must be negotiated into or celebrated in accordance with customary law” which I agree with. This requirement entails that:

- (a) capacity to enter into customary marriage;
- (b) consent of the bridegroom and the bride;
- (c) consent of the father (or guardian) of the bride;
- (d) payment of Lobolo; and
- (e) handing over of the bride.

[55] The first three requirements are not in real dispute except the bridegroom’s consent to the marriage as opposed to implied

consent to initiate the Lobolo proceedings which would lead to the consummation of the customary marriage if all steps are followed. The plaintiff cannot have it both ways: not married when it suits her and vice versa.

[56] Lobolo was partly paid and the plaintiffs view was that partly-paid Lobolo is not an impediment to the consummation of the marriage according to her culture. This view was disputed by the defendant whose stance was that the balance or the outstanding Lobolo of R1000,00 and the 6 (six) live cattle had to be paid by him to conclude the customary marriage which would precede by the handing-over of the bride formally in their culture and custom of the Shangaan.

This view was expressed in *Motsoatswa* and another 2011(2) SA 324 657: where it was confirmed that Lobolo forms an integral part of the customary marriage. The same view was expressed in *Southern v Moropane* case number 14295/10 SAGPJHC 146 about Lobolo or

part-payment thereof.

The two cases did not deal with the aspects of the delivery of the bride.

[57] The delivery process is an event witnessed by the community, neighbours, friends and relatives as against delivery in the commercial sense. Other cultures do invite the chief of the area or induna if they stay in the rural villages and the township residents

do the process without the chief or induna. This does not mean to overlook the ritual adherence which is more important. It has been widely accepted that the couple about to get married can waive other steps by agreement by the families. This view was accepted in *Mabuza v Mbatha* 2003 (4) SA 218 (c). This view might not be accepted as bringing a change to customary practices as known by different cultural groups.

This judgment cannot be read to mean easy deviation to acceptable cultural and customary practices.

- [58] In customary law the bride would not independently give consent to the marriage or customary marriage as a woman was a perpetual minor even if she had attained the age of majority. The father or her guardian would be the only person to accept the bridegroom to be on her behalf. This has been a generally accepted practice amongst the Nguni's (The Shangaans, Swazis, Ndebele, Xhosa and Zulus).
- [59] The delivery of the bride to the groom's place short of the full ceremony of slaughtering, traditional dance and rituals as outlined by the defendant's witness would render the process to the consummation of the customary marriage in complete.
- [60] The recently customary married couple can then proceed to the Department of Home Affairs to register their marriage in terms of the Recognition of the Customary Act of 1998. This Act does not seek to prescribe the customary practice to be followed before the marriage can be registered. It is there to recognise and legitimise the parties' chosen customary processes prior to the registration of the customary marriage.
- [61] This Act seeks to regulate, amongst other things, the matrimonial property rights of the newly wedded and to determine all their rights in case of further marriage by the husband.
- [62] This Act comes into operation to the parties once their marriage is registered as required by it and if not registered the matrimonial property rights will not be applicable.
- [63] The handing over of the bride is what distinguishes cohabitation from marriage. The fact that the woman is requested to stay with the groom after payment of Lobolo or part of it does not mean to short-circuit the true African customary marriage as practiced. This view was supported by the Mathapeng AJ judgment quoted above.

Facts found to be proven

- [64] Having heard the parties to this matter I am satisfied that on the facts and arguments placed before me, no customary marriage was shown to have existed between the plaintiff and defendant.

Court order

- [65] In the circumstance I make the following order:

- (a) The plaintiff's case is dismissed with costs.

VR SN NKOSI

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT: ADV. J JOOSTE

APPLICANT'S ATTORNEYS: SHAPIRO & SHAPIRO ATTORNEYS

COUNSEL FOR RESPONDENT: ADV. Z OMAR

RESPONDENTS' ATTORNEYS: C/O FRIEDLAND HART SOLOMON,
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