

SOUTH AFRICA / JUDGMENT

Mafuya v Lizwe (15290/12) [2013]

ZAWCHC 195 (10 September 2013)

[2013] ZAWCHC 195

COURT

Western Cape High Court, Cape Town

BEFORE

N P Boqwana

CASE / FILE NUMBER

15290/12

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE HIGH
COURT)

Case No: 15290/12

In the matter between:

PHUMELELA MAFUYA

.....Applicant

and

NOMVUYO MILLIE LIZWE

.....Respondent

JUDGMENT

DELIVERED ON 10 SEPTEMBER 2013

BOQWANA AJ

The applicant seeks an order declaring the marriage relationship entered into between the respondent and the applicant's deceased father Mtutuzeli Donald Lizwe on 13 February 2009 null and void.

The reason given by the applicant for this application is that her father suffered from dementia at the time he was getting married to the respondent and therefore lacked the mental capacity to appreciate the nature and the consequences of his actions.

According to the applicant dementia is an illness that results in mental disorientation, confusion and loss of memory to the sufferer and her father had been diagnosed with this sickness since March 2007. The applicant has attached the patient management referral letters dated 09 March 2007 and 30 August 2008 from Provincial Administration Western Cape, Department of Health respectively, a letter by Mrs C Tlhaleroe, a staff nurse from Ekuphumleni Frail and Aged Care Centre ('Aged Care Centre') dated 09 July 2010 and a medical report dated 18 March 2009 by Dr N Schruerder from GF Jooste Hospital.

The applicant alleges that the respondent removed her deceased father on 13 February 2009 from the Aged Care Centre to the Department of Home Affairs to have him marry her whilst he was in that state of confusion. She supports her allegation by attaching report cards from the Aged Care Centre and a letter by Mrs C Tlhaleroe.

The respondent avers in her answering affidavit that she had previously been married to the deceased. She and the deceased re-established contact after the death of his second wife and the two of them naturally reminisced about their past and felt it desirable that they be remarried once more.

She further alleges that whilst the deceased had in fact been diagnosed with and was suffering from dementia, at the time of the marriage he was in a state of *lucidum intervallum*. The marriage was solemnised by the marriage officer and before two competent witnesses. The applicant has not filed any replying affidavit to deal with the allegations raised by the respondent in her answering affidavit.

Evaluation

A person who, owing to a mental state or defect, is incapable of understanding the nature of a marriage contract cannot contract a valid marriage. The reason is the absence of the mind capable of consenting. In *Prinsloo's Curators v Crafford & Prinsloo* 1905 TS 669, it was found that a lunatic, whether certified or not, can validly marry during a lucid interval. In *Pienaar v Pienaar's Curator* 1930 OPD 171 at 176, it was found that a person who because of some mental defect has been declared incapable of managing his or her own affairs may marry if he or she is capable of understanding the nature of the marriage contract and responsibilities it creates.

There are a number of problems with the applicant's application as it stands. First, the applicant has brought her case by way of an application. Having done so she attaches no expert evidence to support her claim that the deceased suffered from dementia. Nevertheless, the respondent does not dispute that the deceased had been diagnosed with and suffered from dementia but she states that at the time of the marriage he was in a state of *lucidum intervalum*. The applicant was not at the marriage proceedings and has failed to reply to this allegation by the respondent. In that regard, the version that must be accepted is that of the respondent, having regard to the Plascon-

Evans rule. In this regard see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984

(3) SA 623 (AD) at 634 F.

The Court has also not been presented with any expert evidence to assist it in determining the state of mind of the deceased at the time he got married. The letter by Mrs Tlhaleroe is not sufficient for a number of reasons. One is that it is not clear whether or not Mrs Tlhaleroe is an expert who was qualified to give an opinion on the deceased's state of mind and had examined the deceased on the day of the marriage or before that date. Secondly no supporting affidavit was attached from Mrs Tlhaleroe regarding her observations of the deceased on that day as stated in the letter. Since these are motion proceedings, the respondent would not be in a position to test the correctness and reliability of the contents of the letter allegedly written by Mrs Tlhaleroe. Furthermore, Mrs Tlhaleroe was not at the marriage proceedings held between the respondent and the deceased, at least as it appears from the evidence before this Court. She therefore could not dispute whether or not the deceased was in a state of *lucidum intervalum* when he got married. Her letter was prepared a year later. It would therefore be inappropriate to attach a lot of evidentiary weight to it. Neither the marriage officer who solemnised the marriage nor the institution he or she worked for were joined as a party to these proceedings nor was there any affidavit procured from the marriage officer by the applicant regarding his or her observations of the deceased when he or she solemnised the marriage. In the circumstances the applicant's application cannot succeed.

The applicant's credibility is also questionable. The applicant brought an application before this Court under case number 8583/12 seeking the Court to declare the testament document executed on 12 November 2008 by her late father as his intended Will in terms of section 2(3) of the Wills Act No. 7 of 1953. In order for that to have been so, the applicant's deceased father would have had to have understood the nature and the consequences of the transaction he was executing. It is therefore nonsensical to insist that he was mentally unfit since 2007 to enter into a marriage contract whilst in another application the same applicant seeks the Court to find him mentally sound and validate a testament document as his Will. The applicant has also not filed any replying affidavit to deal with the allegations made by the respondent in this regard. Her application stands to be dismissed also on that ground.

There is no reason why costs should not follow the result. This Court was lenient by allowing the parties to proceed without heads of argument being filed. This behaviour of non-compliance with the Court rules should normally not be condoned. The Court in this instance however had regard to the fact that the respondent was a pensioner and that the issues before it were fairly straight forward and could be argued without written submissions. It is therefore appropriate that costs be awarded against the applicant in this regard.

I therefore make an order in the following terms:

The application is dismissed with costs.

N P BOQWANA

Acting Judge of the High Court

APPEARANCES:

For the Applicant: Advocate T. Twalo

Instructed by: Tsengiwe Mbeleni Attorneys

For the Respondent: Advocate A. Lawrence

Instructed by: Godla & Partners

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