

SOUTH AFRICA / JUDGMENT

Maloba v Dube and Others (08/3077)

[2008] ZAGPHC 434 (23 June 2008)

[2008] ZAGPHC 434**COURT**

High Courts - Gauteng

BEFORE

Mokgoatlheng

CASE / FILE NUMBER

08/3077

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**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)****Case Number: 08/3077****Reportable****In the matter between:**

MALoba, METJA AUDREY Applicant
and
DUBE, PHINDILE MARIA 1st
Respondent
KAREN KEEVY, N.O 2nd
Respondent
THE MINISTER OF HOME AFFAIRS
3rd
Respondent
THE MASTER OF THE HIGH
COURT JOHANNESBURG 4th
Respondent

JUDGMENT

MOKGOATLHENG, J:

INTRODUCTION

[1] The applicant seeks an order declaring that:

the first respondent and the late Collins Bafana Msimango were never married in accordance with Customary law or The Recognition of Customary law Marriages Act 120 of 1998;

the certificate of registration of the customary marriage issued by the Department

of Home Affairs pursuant to the Recognition of Customary law Marriages Act 120 of 1998 pertaining to the customary marriage is invalid.

FACTUAL BACKGROUND

- [2] On the 27th May 2006, the applicant and the late Collins Bafana Msimango concluded a customary marriage. A minor child was born of the marriage. Collins Bafana Msimango died on the 9th June 2006.
- [3] The applicant registered the customary marriage which subsisted between her and the late Collins Bafana Msimango on the 10th July 2006.
- [4] During August 2006, the applicant discovered that the first respondent claimed that she and the late Collins Bafana Msimango had concluded a customary marriage in December 2000, that two minor children were born of the marriage.
- [5] The applicant subsequently ascertained that the first respondent had on the 6th September 2006 posthumously registered the customary marriage between herself and the deceased late Collins Bafana Msimango.
- [6] In and during 2000 the late Collins Bafana Msimango and the first respondent agreed to marry each other.
- [7] Pursuant to such agreement, the late Collins Bafana Msimango and the first respondent's respective families agreed that the former's family would pay the amount of R6 000.00 as lobolo. In pursuance of the agreed lobolo, the late Collins Bafana Msimango's family paid the amount of R4 000.00.

- [8] The applicant states that the late Collins Bafana Msimango advised his mother that “he no longer wished to marry the first respondent, as a result the balance of the lobolo payment was not effected because the late Collins Bafana Msimango did not intend proceeding with the conclusion of the customary marriage with the first respondent”.
- [9] The applicant states that in December 2004, the late Collins Bafana Msimango’s family formally informed the first respondent’s family “that a marriage would not be concluded, that the latter’s family acknowledged this, as well as the fact that her relationship with the late Collins Bafana Msimango had ended, that they welcomed the first respondent back into their family”.
- [10] The first respondent states that she and the late Collins Bafana Msimango concluded a customary marriage at Balfour in 2000, that the latter’s family paid an amount of R4 000.00 as lobolo, after which a “traditional handing over ceremony occurred”.

THE APPLICABLE LAW

- [11] Section 3 of the Recognition of Customary Marriages Act 120 of 1998 provides:

“Requirements for validity of customary marriages: - (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”.

- [12] Section 4 of the Act provides:

“4(a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed”.

- [13] Section 5(b) provides:

“If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection(4)”.

- [14] Section 4(8) of the Act provides: “A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate”.

- [15] Section 8 of the Act provides: “Dissolution of customary marriage – (1) A customary marriage may only be dissolved by a Court by a decree of divorce on the ground of the irretrievable breakdown of the marriage”.

THE ANALYSIS AND EVALUATION OF EVIDENCE

- [16] The applicant in essence submits that the posthumous registration of the customary marriage between the first respondent the late Collins Bafana Msimango is not valid, as no customary marriage in accordance with Customary Law was ever concluded.
- [17] Both parties aver that they cohabited with the late Collins Bafana Msimango as man and wife, and have attached annexures of documents which they aver contain indiciae showing that their respective customary marriages are valid. The first respondent does not attack the validity of the applicant’s customary marriage to the late Collins Bafana Msimango.
- [18] In my view the respective parties documentary indiciae are relevant and may assist in the determination of the validity of their customary marriages.
- [19] The applicant argues that the first respondent’s claim that there was a handing over ceremony is unsubstantiated.
- [20] The applicant contends that the balance of the lobolo was not effected, because the late Collins Bafana Msimango did not intend proceeding with the conclusion of the customary marriage, that the first respondent’s family acknowledged that fact.
- [21] The evidence reveals that the late Collins Bafana Msimango did not personally advice the first respondent that he was withdrawing his consent to be married to her. Section 3(a) (11) provides that the prospective spouses must both consent to be married to each other under Customary Law. (my emphasis)
- [22] The applicant’s counsel’s submission that Collins Bafana Msimango withdrew his consent to be married has no merit. The first respondent’s parents or relatives cannot consent on her behalf, neither can they accept the late Collins Bafana Msimango’s parent’s or relative’s purported withdrawal of the late Collin Bafana Msimango’s consent on the first respondent’s behalf.
- [23] Correspondingly the late Collin Bafana Msimango’s parents or relatives cannot in law by proxy withdraw his consent to be married on his behalf. The late Collin Bafana Msimango must personally withdraw his consent by conveying the withdrawal of such consent personally to the first respondent.
- [24] It is trite in African Customary Law that there is no rigid custom governing the time stipulation within which lobolo has to be fully paid. What is sacrosanct is the undertaking to pay the agreed lobolo. Consequently, the nonpayment of the lobolo balance as alleged by the applicant is not decisive of the ultimate question, which is whether, was a valid customary

marriage negotiated or concluded and that in pursuance of such negotiations lobolo was fixed. In my view whether lobolo was fixed at R6 000.00 or R4 000.00 is not decisive, the fact of the matter is that lobolo was fixed and agreed upon.

- [25] The outstanding question is whether or not the marriage was entered into or celebrated in accordance with customary law. The first respondent states that there was a handing over ceremony. The applicant denies that there was a handover ceremony.
- [26] In terms of the Section 3(b) of the Act a customary marriage has to be negotiated and entered into or celebrated in accordance with customary law to be valid (my emphasis). The objective facts show that the marriage was negotiated and entered into in accordance with Customary Law. The agreement to marry in Customary Law is predicated upon lobolo in its various manifestations. The agreement to pay lobolo underpins the customary marriage.
- [27] The objective facts show that lobolo was paid. It is trite in Customary Law that the payment or part payment of lobolo is accompanied by a ceremony symbolically joining the respective spouses and their families together as one. This ceremony is conducted in accordance with Customary Law and is a manifestation of the celebration of a customary marriage.
- [28] “Customary Law is flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential” See *Mabuza v Mbatha* [2003] 7 BPLR (SCA) case NO 2839/01

See also TW Bennet A Sourcebook of African Customary Law for Southern Africa.

- [29] A customary marriage can only be dissolved by a competent Court. When the late Collins Bafana Msimango or his family purported to withdraw his consent to the customary marriage, after the payment of lobolo or part payment thereof, a valid customary marriage had already come into being. The marriage was, extant and was “solemnized” so to speak, in accordance with Customary Law. The purported withdrawal of consent even if it was personally conveyed to the first respondent by the late Collins Bafana Msimango would have been a nullity and would not have lawfully dissolved the customary marriage.

THE ORDER

- [30] The customary marriage between the first respondent and the late Collins Bafana Msimango is legally valid.
- [31] The applicant’s marriage to the late Collins Bafana Msimango is legally valid.
- [32] The application is dismissed with costs.

Signed at Johannesburg on the 23rd June 2008.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING:

DATE OF JUDGMENT:

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