

SOUTH AFRICA / JUDGMENT

Mkhari v Minister of Department of Home Affairs (1129/2021) [2022] ZALMPPHC 32 (27 June 2022)

[2022] ZALMPPHC 32

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

1129/2021

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
CASE
NO: 1129/2021
REPORTABLE: YES/NO
OF INTEREST TO OTHER
JUDGES: YES/NO
REVISED.

In

the matter between:

MARIA
MOHLATLEGO MKHARI
PLAINTIFF
And
MINISTER
OF DEPARTMENT OF HOME AFFAIRS
DEFENDANT

JUDGEMENT

KGANYAGO J

[1] The plaintiff and the first defendant were allegedly married to Gideon Hlengani Mkhari (deceased) by civil rites. The plaintiff has instituted an action against the defendant seeking orders that (i) the purported civil marriage between the deceased and the first defendant entered into in Polokwane (Pietersburg) on the 22nd June 2000 be declared null and void; (ii) directing the second defendant to expunge the purported civil marriage between the deceased and first defendant from the register and/or system of the second defendant; (iii) directing second defendant to register and record the civil marriage between the deceased and plaintiff as per annexure M1; (Annexure M1 is the alleged marriage certificate between the plaintiff and the deceased); and costs of the suite.

[2] The first defendant (defendant) has defended the plaintiff's action, whilst the second defendant did not defend the plaintiff's action. The defendant in her plea to the plaintiff's particulars of claim has denied that the deceased and the plaintiff were lawfully married to each other. The defendant further pleaded that she started living with the deceased in a house purchased by the deceased in Polokwane during 1996 and denied that the said house was purchased by the deceased and the plaintiff. The defendant further pleaded that she and the deceased had entered into a valid civil marriage on 22nd June 2000.

[3] The plaintiff took the witness stand and testified under oath. She testified that she and the deceased met and fell in love during 1965 when she was employed as a professional nurse at Ethel Locus Memorial Hospital now known as Tintswalo Hospital. She started living together with the deceased as husband and wife during 1968. On 1st July 1968 she gave birth to their first child. During 1969 the deceased send emissaries to her family (Ngwatje) to pay for her

lobola. Lobola in the amount of R70.00 was paid for her. A letter of acknowledgment of lobola was issued and it remained with the Ngwatje family. All members of the Ngwatle family that had received the lobola from the deceased family have since passed away, and she does not know the whereabouts of the lobola letter.

[4] During 1971 and 1972 she gave birth to their second and third born children respectively. After the birth of their fourth child during 1977, the deceased suggested that they register their marriage. On 10th January 1978 she and the deceased went to Mhala Home Affairs where they registered their marriage. The witnesses to their marriage were her uncle Madireng Letswalo and Ephraim Chabangu representing the deceased family.

[5] Because of the demand of her work that entails her to work night shifts, she resigned at the request of the deceased in order to look after their children. After she had resigned from work, they had financial challenges, and she got employed as an educator. During 1978, she and the deceased bought a stand in Dwarsloop township where they erected a shack. The

deceased got employed as a traffic officer in Nelspruit. After the deceased was employed as a traffic officer, he got a government subsidy house in Dwarsloop township, and they moved into that house as a family.

- [6] The deceased was transferred to work in Mhala. From Mhala she was transferred to Nkowakowa, and later got a promotion to work in Giyani. From Giyani he was promoted to work in Polokwane. Whilst the deceased was working in Polokwane he bought a house at number 21 Riebok Street Fauna Park Polokwane. After the deceased had bought that house, he came to Dwarsloop to fetch her and their last born child to come and view the house. During that period their last born child was a student at Turloop University. Their last born child went to stay with the deceased in that house.
- [7] Whilst staying in Polokwane, the deceased health started to deteriorate, and he was in and out of hospital. During that period, they have started building a house in Dwarsloop, and the deceased was coming home after every two weeks even though his health was not good. When she saw that the deceased health was not improving, she took him to consult with the family doctor, but deceased told them that the doctor who knows his sickness well was in Polokwane, and he went back to Polokwane. During the year 2000, his health was fast deteriorating, and at the end of that year, she took an early retirement in order to look after the deceased. By that time the deceased was still staying in Polokwane with their last born child who was looking after him. From time to time she would come to Polokwane to visit, and she would not sleep in Polokwane but at her parental home in Bochum.
- [8] On 20th February 2001 she got a telephone call whilst in Bochum, telling her that the deceased had passed away. Her last born child took her to their Polokwane house. On arrival in Polokwane, she requested her sister-in-law to give her the keys of the vehicles and house, and also the identity document of the deceased so that they can lock the house, and go back Dwarsloop to make the funeral arrangements of the deceased. That is when her sister-in-law told her that there was someone in the house who was having a love relationship with the deceased, and was refusing to give them the keys of the house and vehicles, and also the identity document of the deceased. She was shocked as she was not aware of that relationship.
- [9] Later they were surprised when the police arrived, telling them to get out of the house. She did not know whether their last born child knew about the affair which the deceased had with that woman. The following day they went back to Dwarsloop, and whilst in Dwarsloop, they were served with a protection order from that woman who had a relationship with the deceased. The deceased was buried at Mkhari family cemetery in Casteel at Gamothakhathi village.

- [10] After the burial of the deceased, she got a message from Polokwane Local Municipality that the house in Riebok street Polokwane, was not yet fully paid. She paid for the outstanding balance and later got a title deed for that house from Pretoria. She at no stage got divorced from the deceased. She was registered as the deceased spouse on deceased Bonitas medical aid until the date of his death.
- [11] The plaintiff was cross examined and she stated that she slept once in the house in Polokwane as most of the time she visited Polokwane she was sleeping in Bochum. She denied that the defendant was living in the house in Polokwane permanently with the deceased. The plaintiff conceded that Frances Nomafrentshin appears as a dependant on deceased's Bonitas certificate of membership medical aid, and that Nomafrentsin was the deceased ex-wife whom he had divorced on 10th March 2000 as confirmed by the decree of divorce provided by the defendant's counsel. The plaintiff further stated that she was not aware of the marriage between the deceased and Nomafrentshin, and that to him shows that the deceased was a crook.
- [12] The plaintiff conceded that other than her oral evidence, she had no other proof of the customary marriage between her and the deceased as the people who had that proof are no longer alive, but she is having four children with the deceased and those children were legalised by her marriage with the deceased. The plaintiff stated that she became aware that the deceased and the defendant were married only after the deceased death. When it was put to the plaintiff that she was not lawfully married to the deceased by civil rites, she stated that she and the deceased were married to each other on 10th January 1978. The plaintiff conceded that for the past 20 years after the passing of the deceased, the defendant was living in the house at Riebok Street Fauna Park Polokwane. The plaintiff further conceded that she issued the summons against the defendant after 20 years, and that it was as a result of changing attorneys who were doing disservice to her.
- [13] Tony Gerald Mkhari was the plaintiff's second witness to testify under oath. He testified that he knows the plaintiff and defendant before court. The plaintiff is his biological mother, and the plaintiff was married to the deceased. He is the last born child of both the deceased and the plaintiff. He did not know that the defendant was married to the deceased, but was under the impression that the defendant was one of the deceased's girlfriends. That the deceased had many girlfriends and that he had stayed with all of the deceased's girlfriends as the deceased was taking care of him.
- [14] The witness further testified that during 1996 he enrolled to study at University of the North now known as University of Limpopo. He did not visit the deceased often in Polokwane as the deceased did not have a place to stay. During month ends the deceased will pick him up at the university, and they will travel together to Dwarsloop township. During 1997 the deceased called him and the plaintiff to come to Polokwane to view the house he was about to buy. Later during 1997 the deceased told him that he had bought a house in Polokwane. The witness stated that he did not stay in the house in Polokwane but, he would go to that house to visit. He only started staying in the house in Polokwane full time from December

1998 to January 1999.

- [15] According to the witness, in the Polokwane house, the deceased was living with the defendant and also the defendant's two sons. That the children of the defendant were not the biological children of the deceased. He did not tell the plaintiff about the defendant living with the deceased, as the deceased had told him not to tell the plaintiff, and the deceased had also given him a car to keep quite. He had never asked the deceased whether he and the defendant were married, as the deceased was just giving him instructions. The marriage certificate attached to the plaintiff's particulars of claim is the marriage certificate between the deceased and the plaintiff. That the marriage certificate was issued in his presence at Mhala Home Affairs, Thulamahashe on 11th July 2002. That the marriage certificate was issued on the basis of the marriage register of which the copy of that register was certified as true copy of the original on 15th March 2001. They issued the plaintiff with a duplicate marriage certificate as the plaintiff had lost her original marriage certificate.
- [16] The witness further testified that the deceased health started to deteriorate during 1999. When he visited the deceased at the end of 1999 he found that the deceased was sick, but could still move around. In the year 2000 the deceased was still sick, and was staying with the defendant and the defendant's five children. The defendant treated the witness like her own child. During the year 2000, the deceased was so sick to the extent that he was no longer able to travel to Dwarsloop. During January 2001, the plaintiff phoned the deceased to come back to Dwarsloop so that she can be able to take care of him, but the deceased refused. He then took the plaintiff to Polokwane.
- [17] On arrival at the house in Polokwane, the deceased told him not to come into the house with the plaintiff. After the witness had entered the house alone, the deceased asked him whether he wanted to kill him by bringing the plaintiff. The deceased told the witness to go to the plaintiff and tell her whatever he wanted to tell her. He went to the plaintiff and told her that the deceased was staying with another woman, and that the deceased health did not look good. The deceased was so thin to the extent that he was unable to cough. The plaintiff told the witness to take her to Bochum.
- [18] The witness took the plaintiff to Bochum, and he later went back to the house in Polokwane together with all of his siblings. They were all well received by the defendant. They all saw that the deceased was not looking good, and later he and his siblings went back to Dwarsloop. Because the plaintiff had taken early retirement, she remained in Bochum. During February 2001 they were phoned to be notified that the deceased had passed away. He and his siblings went to fetch the plaintiff in Bochum and drove to Polokwane. On arrival at the house in Polokwane they were refused entry by the defendant's children. They forced entry into the house, and police were called to evict them. The plaintiff is the one who had buried the deceased. They only became aware of the marriage between the deceased and the defendant when they were served with summons before the burial of the deceased.

- [19] The witness was cross examined and he conceded that the defendant had been staying together with the deceased in the house in Polokwane since the deceased had bought that house. The witness stated that the defendant's minor children were addressing the deceased as "father". The witness conceded that for the last four years of the deceased life, the deceased was living together with the defendant as husband and wife. The witness conceded that he did not have the original of the marriage register, and further that he was not the author of the copy that was attached to the plaintiff's particulars of claim. He conceded that he could not testify about the authenticity of marriage register because he did not see the plaintiff signing that register. The witness conceded that he could not testify about the records of Home Affairs. The witness stated that he knew Nomafrentshin as the deceased's girlfriend.
- [20] That concluded the evidence of the plaintiff and she closed her case. The defendant in turn applied for absolution from the instance. Defendant's counsel submitted that the plaintiff's case was that she was married to the deceased, and because of that marriage, any subsequent marriage should be regarded as null and void. Counsel for the defendant further submitted that from the pleadings, the defendant had disputed the marriage between the deceased and the plaintiff, but the plaintiff has failed to call any witness from the Department of Home Affairs to confirm that marriage. That the onus is on the plaintiff to proof the existence of such marriage. The plaintiff when she testified, did not testify about any of the documents that could proof the existence of her marriage and the deceased, and also did not even verify the alleged signature on the alleged register of marriage allegedly from the Department of Home Affairs as hers. That there is no evidence which the defendant can present to take this matter any further.
- [21] Counsel for the plaintiff submitted that the plaintiff had discharged the onus of proof that a civil marriage existed by presenting a register of marriage from Department of Home Affairs. That the deceased and the plaintiff opted for their marriage to be in community of property. That in 1978 when they entered into that marriage, there were no computers. That the defendant should come and take a stand since her marriage with the deceased is strange as it was entered into seven months prior to the death of the deceased. Further that during 1997 when the alleged lobola negotiations of the defendant took place, the deceased was still married to Nomafrentshin.
- [22] It is trite that the test in an absolution stage is whether at the close of the case for the plaintiff there is evidence upon which a reasonable man might find for the plaintiff, or if the defendant does not present any evidence, but close his/her case immediately, is there such evidence upon which the court may give judgment in favour of the plaintiff.
- [23] In *Gordon Lloyd Page & Associates v Rivera and Another*[1] Harms JA said:

"The test for absolution to be applied by a trial- court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

‘...(w)hen absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff..’

This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff.”

[24] The plaintiff has testified that she and the deceased were married to each other by civil rites on 10th January 1978. The plaintiff had testified that the deceased had allegedly paid lobola for the defendant on 27th September 1997. On 22nd June 2000 the deceased and the defendant allegedly got married by civil rites. Counsel for the defendant had further submitted copy of a decree of divorce during cross examination of the plaintiff, and this copy shows that the deceased had divorced one Nomafronthsin

Frances Mkhari on 10th March 2000. The plaintiff did not challenge the authenticity of the copy of the decree of divorce. In fact, the plaintiff’s second witness had testified that he knew Nomafronthsin as one of the deceased girlfriend. It is not known as to when did the deceased and Nomafronthsin got married. The deceased during his lifetime was married to three women without the knowledge of each other. He even divorced one of them without the knowledge of either of them.

[25] The plaintiff has therefore the onus to prove that her marriage to the deceased was a valid one. Credibility of the evidence of the plaintiff at this stage of the proceedings plays a lesser roll unless her evidence is so hopeless that we will just be delaying the inevitable. The plaintiff has testified that before she and the plaintiff were married to each other by civil rites, the deceased had sent emissaries to her homestead to negotiate lobola for her. That led to the deceased family paying lobola of R70.00 for her. However, the plaintiff did not call anyone to confirm that version and also no document to prove that was submitted.

[26] The plaintiff has testified that she had misplaced her original marriage certificate with the deceased and on 11th January 2002 she went Mhala Home Affairs in Thulamahashe where she was issued with a duplicate marriage certificate and also provided with a copy of the alleged register of the marriages. According to the copy of the alleged register, the alleged marriage between the deceased and plaintiff was allegedly entered into the register of marriages on 10th January 1978. The defendant in her plea had denied that the alleged civil marriage between the deceased and the plaintiff was lawfully solemnized and authorised. When the trial started, the defendant had denied the authenticity of the alleged marriage register from Mhala Home Affairs. However, when the plaintiff testified, she did not testify about the alleged marriage register, or to confirm that the signatures that appears on that document are hers and that of the deceased.

- [27] Despite the defendant having disputed the authenticity of the alleged marriage register, the plaintiff has failed to call anyone from Home Affairs to verify its authenticity. Plaintiff's counsel tried to rectify the error of failing to lead the plaintiff on the alleged marriage register by leading the plaintiff's second witness on that. However, that witness could only take it as far as testifying that the duplicate marriage certificate and copy of the marriage register were made in his presence. He could not testify about the contents of that alleged marriage register as on 10th January 1978 he was eight months old and could not have appreciated anything.
- [28] What complicates this matter further is the marriage of the deceased and Nomafrontshin which it has not been established as to when they got married. According to the Bonitas certificate of membership, the deceased was born 20th September 1944, the plaintiff born on 25th October 1944, and Nomafrontshin born on 29th September 1945. The three are in the same age bracket. The deceased and plaintiff's first child was born 1st July 1968. Rhulani whom the plaintiff's second witness has testified that he was Nomafrontshin child was born 30th December 1969. According to the Bonitas certificate of membership, the deceased had registered both the plaintiff and Nomafrontshin as beneficiaries of his medical aid on 1st November 1987.
- [29] Taking into consideration the date of birth of the plaintiff's first born child and Rhulani, Nomafrontshin child, and also that the deceased had registered both the plaintiff and Nomafrontshin as beneficiaries of his medical aid at the same time, it appears that the deceased was having a relationship with them at the same time. If this court was to accept that there was a marriage which was concluded between the deceased and plaintiff, the most crucial question is between the plaintiff and Nomafrontshin whom did the deceased marry first. If the deceased married Nomafrontshin first, it follows that the marriage concluded between the plaintiff and deceased was not valid. Had the plaintiff called a witness from Home Affairs, all these questions could have been clarified.
- [30] In *Monumental Art Co v Kenston Pharmacy (Pty) Ltd*[2] Rose Innes AJ said:
- "...it is not competent for Court to embark upon a conjecture in assessing damages where there is no factual basis in evidence or, an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made...If there is no or an insufficient evidential basis upon which the loss can be assessed on the probabilities, then no assessment of damages can be made for lack of proof of the quantum of those damages."*
- [31] The defendant had disputed the validity of the plaintiff's marriage with the deceased in her plea to the plaintiff's particulars of claim, and the defendant had further disputed the authenticity of the alleged register of marriages. Despite disputing that, the plaintiff has failed to call any official from Home Affairs to corroborate her version, and she also did not testify about the marriage register. Without that marriage register, there is nothing to support the plaintiff's version that she and the deceased got married on 10th January 1978 as

the alleged duplicate marriage certificate was issued on the basis of the alleged marriage register. It has also not been established as who between the plaintiff and Nomafrentshin got married to the deceased first. In my view, the plaintiff has failed to prove that she and the deceased had concluded a valid marriage on 10th January 1978. I agree with the defendant's counsel that the defendant's evidence will not take this matter any further. It will therefore serve no purpose to allow this matter to continue beyond the stage it had reached.

[32] In the result I make this order:

32.1 Absolution from the instance is granted with costs on party and party scale.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES: Counsel for the Plaintiff : Adv N Mkhari Instructed by : AA Milanzi Attorneys
Counsel for the defendant : T Grobler Instructed by : Thomas Grobler Attorneys Date heard : 1st June 2022 Electronically circulated on : 27th June 2022

[1] 2001 (1) SA 88 (SCA) at 92E-H

[2] 1976 (2) SA 111 (C) at 118D-F

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