

SOUTH AFRICA / JUDGMENT

M.M v R.A.N (A07/2022) [2023] ZALMPTHC 2 (3 March 2023)

[2023] ZALMPTHC 2

COURT

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi, MV Semenya

CASE / FILE NUMBER

A07/2022

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FLYNOTES:

CONSENT AND CUSTOMARY MARRIAGE

FAMILY

– Marriage – Customary – Consent of husband –

Long cohabitation raising presumption that customary
marriagesexisted – Husband consented to marriage when he allowed
wife to move in at his parental homestead and
both cohabited from

then – Valid customary marriage concluded –

Recognition of Customary Marriages Act 120 of 1998, s 3.

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

CASE

NUMBER: A07/2022

(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED.

DATE: 03/03/2023

SIGNATURE: In

the case between: M[...]
M[...]
Applicant (Defendant)
AND
N[...]
A[...] R[...]
Respondent (Plaintiff)
AML Phatudi J
Introduction
[1]
An intimate relationship between M[...] M[...] (the appellant) and
R[...] N[...] (the respondent) turned
into a consummate one when the
respondent became pregnant in 1983. The respondent, with the
blessings of the appellant, moved in
at the appellant's family
homestead at Gaba Pfenenii- Limpopo Province. Two children were born
out of the "marriage".
[2]
The appellant and respondent have since 1993 lived together as either
"boyfriend /girlfriend"[1]
or "husband and wife"[2].
Turbulences did not spare their "marital" life. They
separated bed and boarding from the year 2000 to 2007. Their
reconciliation paved way to consummate their "marriage"
until 13 January 2020, when the appellant escorted the respondent
to
her maiden homestead.
[3]
Shortly thereafter, the respondent instituted legal proceedings in
the Regional Court-Sibasa, Limpopo
Province, where she sought a
decree of divorce and the division of the joint estate.
[4]
The Regional Court (per MD Mabitsela) found and ordered that 'a
valid customary marriage was concluded
between the [respondent] and
the [appellant]'. He further granted a decree of divorce and
that 'the joint estate is
to be divided equally between the two
parties'.

[5]

The appellant, saddened by the trial court's order and the reasons for the judgement furnished later, is before this appeal court with leave of the trial court.

Factual background

[6]

On 22 December 1984, the respondent's father-L[...] R[...] N[...] (L[...] N[...]), her mother-R[...] N[...] (R[...]) and her aunt-K[...] C[...] N[...] (C[...])[3], welcomed and met with the respondent's family representative, N[...] L[...] M[...] (L[...] M[...]) in negotiation of the appellant's marriage to the respondent.

[7]

L[...] M[...] paid on amount of R180.00. In accounting to the money, she indicated that R80.00 was for Madodelangeno and R100.00 for lobola (lumalo). They, after accepting the money, joined by others for a meal in celebration of the unit in marriage between the respondent and appellant. Later C[...] accompanied L[...] M[...] when she (L[...] M[...]) was leaving with the respondent to her marital family, being a symbol of handover to M[...] family.

[8]

The appellant disputes the existence of a valid customary law. He avers that L[...] M[...] was commissioned neither by him nor by his family as a delegate or emissaries to negotiate for his marriage. He avers that L[...] M[...] cannot negotiate lobola for and on behalf of M[...] family because she is a member of the family by virtue of her marriage to M[...] family. She is married to the appellant's paternal uncle.[4](Younger brother to appellant's father)

Issue.

[9]

The crux of the matter is whether the trial court was correct to find that the parties concluded a valid customary marriage on 22 December 1984.

Law

[10] The

determination of the validity of a customary marriage is governed in terms of the Recognition of Customary Marriages Act, Act 120 of 1998 (RCMA). This is a law of Parliament that came into force on 15 November 2000 without any retrospective effect. Prior to the promulgation of RCMA, common law applied.

[11] JC

Bekker adumbrate in his book-Seymour's Customary Law in Southern Africa, the essential of the customary marriage, as: (i) The consent of the bride's guardian; (ii) The consent of the bride; (iii) The consent of the bridegroom; (iv) The payment of lobola, bogadi, lumalo or ikhazi; and (v) The handing over of the bride to the bridegroom.

Proceedings at the
Trial Court

[12] The appellant contested the existence of the marriage allegedly concluded on 22 December 1984. Put differently- The appellant alleged that all what the emissaries or the people who gathered at the respondent's homestead on 22 December 1984, believing they were concluding his customary marriage, was not in accordance with the law, more particularly, he did not give consent to such marriage.

[13] All pleadings and the evidence led by the parties at the trial court, including the presiding officer, applied the provisions of RCMA. Section 3 of RCMA prescribes the requirement for validity of customary marriages. It provides:

'3

(1) For customary marriage entered into after the commencement of this Act to be valid-(a) the prospective spouse (i) must both be above the age of 18 years ;(ii) must both consents to be married to each other under customary law: and, (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law."

[14]

The requirements as stipulated in section 3 of RCMA do not apply for validation of the parties' marriage. The application of the wrong law to the facts is a misdirection on the part of the trial court and warrants interference with the trial court's judgment and order. It must, however, be borne in mind that "the trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked." [5]

Evaluation

[15]

A

customary union (marriage), defined in the Black Administration Act 38 of 1927, is the association of a man and a woman in conjugal relationship according to Black law and custom, where neither the man nor the woman is a party to a subsisting marriage by civil rights.

Bekker states that ‘among the Venda, lobola is usually agreed upon and delivered from the family home of the bridegroom or his

father before the bride is handed over’[6].

[16]

Cohabitation naturally presumes the consent of the spouses. Proof of long cohabitation in itself raise a presumption

that customary

marriages exist. When existence of

customary marriage is in dispute, the circumstances must be such that

there no longer appears to be other evidence

available of the further

essential of the customary marriage or of the lack of such

essentials, before the court will presume the

existence of the

customary marriage from cohabitation alone.

[17] When

considering the evidence led and the appellant’s grounds for appeal in relation to the requirements

for a valid customary

marriage, I find consent of the bridegroom is the only requirement

contested by the appellant.

[18]

It is common cause that the appellant and the respondent have since 1983, been in an intimate relationship. The

respondent became

pregnant and decided to move in at the appellant’s homestead.

The appellant allowed the respondent to live

with him and both

started to afford each other their conjugal rights in their

consummate relationship. This is evident by the birth of a

child born in 1984 and another in 1989. Their

relationship endured for an uninterrupted period of 17 years. Their

separation between

the years 2000 to 2007 interrupted their

consummate relationship.

[19] As

Bekker states, “cohabitation naturally presumes the consent of the spouses”. The appellant and respondent’s

cohabitation

of 17 years, at least, is a long period of time which, “raise a presumption that a customary marriage exist.”

One can infer

from the appellant’s testimony at the trial court, that, a

customary marriage existed. For ease of reference,
this is how it

unfolded:

MR

MUNZHELELE: Now, tell the Court,
what is your relationship between you and the plaintiff?

MR

M[...] : We were staying
together, or before we were staying together.

MR

MUNZHELELE: Staying together as
what?

MR

M[...] : As boyfriend and
girlfriend.

MR

MUNZHELELE: How did it happen,
finding yourself staying with her?

INTERPRETER:

I beg yours?

MR

MUNZHELELE: How did it happen,
finding yourself staying with the plaintiff?

MR

M[...] : {Indistinct-09:06:42} the time
wherein she came, while she was pregnant and she said she is no
longer going back.

MR

MUNZHELELE: When was that, do you
remember?

MR

M[...] : It was during 1983.

MR

MUNZHELELE: Whose pregnancy was
it?

MR

M[...] : It was mine.

MR

MUNZHELELE: And then, what
happened after she had moved in in 1983, what happened afterwards?

MR

M[...] : So, she was staying there up
until 2000.

MR

MUNZHELELE: What happen in 2000?

COURT:

She stayed there? Where?

MR

M[...] : Or we were staying together at that family up until 2000.

MR

MUNZHELELE: Which family are you referring to?

MR

M[...] : There at my homestead.

MR

MUNZHELELE: Are you referring to

M[...] 's family?

MR

M[...] : Yes.

[20]

According to Vha-Venda custom, the moving in of a woman at her marital home and remain there is called Madodelangeno[7].

A message is sent to the woman family that their daughter or girl-child is already at the marital home and that they should not search for her anywhere for she is with the "bridegroom".

The consent of the bride's guardian or paterfamilias is

necessary to validate a customary marriage.

[21] Counsel

for the appellant was at pains to concede that the moving in of the respondent at the appellant's homestead constituted

Madodelangeno and that all the elements for validation of the customary marriage, existed as at 1983. He,

however, opines that the

trial court erred in concluding that the appellant consented to the conclusion of a valid customary marriage on 22 December 1984.

The issue to determine

is whether the appellant consented to a customary marriage

[22] The

evidence tendered demonstrates that the appellant allowed and welcomed the respondent to live with him at his parental homestead.

They cohabited and stayed together effective 1983 to, at the least, the year 2000. Firstly, there is no doubt, that this is a long time

that raises a presumption that a customary marriage exist.

[23]

Secondly, consent to marriage need not be on the day of negotiation of the marriage. Consent can be assumed, even before negotiations,

just like in this case. The appellant consented to the marriage the time he allowed the respondent to move in at his parental homestead

and both cohabited forthwith. The appellant concedes that the

respondent started cohabiting with him from 1983.

[24] The rendering of lobolo by the bridegroom, or, his family, or, guardian, was the major essential for the conclusion of the customary marriage. The amount of money, or, a number of cattle, and or, goats, was immaterial. Of importance is the delivery and acceptance of lobola or lumalo. L[...] M[...] represented the bridegroom's family when rendering lobola. L[...] M[...] is the appellant's parental aunt. She is married to his paternal uncle (K[...]). She was, as a result, representing the appellant's family. The appellant ought to have lead the evidence in contravention to the respondent's evidence. It is trite law that he, who alleges, must lead evidence to the proof thereof.

[25] The appellant's contention that the wife of a younger brother of the family head cannot represent the bridegroom's family when rendering lobola is without merit, let alone without any authority to that effect. In Vha-Venda culture and custom, "a woman may marry a woman"[8].

[26] The handing over of the bride to the bridegroom is one of the essentials for the conclusion of the customary marriage. There is no customary marriage until the bride is handed over to the bridegroom. Bekker states that the handing over need not be a formal ceremony, even the thwala (Madodelangeno in this case) of the girl consummates the customary marriage, if her guardian suffers her to remain with her suitor on the understanding that further lobola will be paid in due course.

[27] In the case, the respondent moved in at the appellant's homestead, with the appellant's personal consent that led to them to be engaged in a consummate relationship in the form of Madodelangeno. The respondents' 98-year-old father testified that he allowed her to be with her suitor, the appellant, with the understanding that Madodelangeno and or lobola, would be paid in due course. The unchallenged evidence demonstrates that the appellant's family, represented by L[...] M[...],

paid both Madodelangeno and lumalo in the amount of R80.00 and R100.00 respectively on 22 December 1984, to seal up the consummation of customary marriage between the appellant and respondent.

[28] It must be borne in mind that a day and date of payment of lumalo may not necessarily be the day and date of the conclusion of the customary marriage. The day of payment of lumalo may be the day of ratification of the consent of either party to seal up customary marriage. Put differently, a day or date of negotiation, or, entering into, or, celebrating the customary marriage in accordance with customary law, need not be on the same day to validate the said marriage.

Findings

[29] I, in this case, find that L[...], the bride's guardian, consented to the bride being married to her suitor, the appellant, when he suffered her to remain with her suitor from 1983 on the understanding that lumalo will be paid in due course. Lumalo was indeed paid on 22 December 1984.

[30] The evidence demonstrates that both the appellant (bridegroom) and the respondent (bride) consented to the customary marriage when the respondent moved in the appellant's homestead during 1983. I find it unnecessary to rub in the consent of the parties to their marriage that lasted at least, for 17 years. Their marriage is blessed with two children who have since attained majority in terms of our South African law.

[31] The payment of lobola or lumalo that occurred on 22 December 1984 was a ratification and to seal the customary marriage the parties concluded during 1983.

Conclusion

[32] The trial court's order in validating the marriage, more especially relating to the appellant's consent is concerned, is in my view, correct. I have no reason to fault the trial court's order.

Costs

[33] The trial court mulcted the appellant correctly with costs. The

appellant's appeal falls to fail and, as a matter of principle, he is liable to the respondent's cost including costs occasioned by employment of two counsel where applied.

[34] I, in

the result, would make the following order:

Order

34.1

The appellants appeal is dismissed with costs including costs occasioned by employment of two counsel where applied.

AML

PHATUDI

JUDGE

OF THE HIGH COURT

I agree

MV SEMENYA

JUDGE OF THE HIGH COURT

APPEARANCES

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INSTRUCTED BY

: Mphaphuli,

M[...]

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THOHOYANDOU

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:

Tshivhiahuvhi Attorneys

HEARD :04

November 2022

JUDGMENT :03

March 2023

JUDGEMENT

DATE:

Judgment

handed down electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date deemed handed down is 03 March 2023.

[1] The appellant's version.

[2] The respondent's version.

- [3] L[...]’ second wife
- [4] Khotshimunene in Tshi-Venda.
- [5] R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705
- [6] J.C. Bekker- Seymour’s Customary Law in Southern Africa-Fifth Edition-1989- at page 114
- [7] Most authorities, like Bekker, refers the practice as u gu-Thwala or, among the Pedis, Nyakelang-Keno.
- [8] Bekker -pg 125
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