

SOUTH AFRICA / JUDGMENT

Modisane v Modikwe and Others (8166/2022) [2023] ZAGPJHC 1 (1 January 2023) [2023] ZAGPJHC 1

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala ML

CASE / FILE NUMBER

8166/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 8166/2022

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
04/01/23
In

the matter between:

MODISANE
KGOMOTSO GRANNIE
APPLICANT
And
MODIKWE
LESLEY
FIRST
RESPONDENT
THE
MINISTER OF HOME AFFAIRS
SECOND
RESPONENT
DIRECTOR
GENERAL OF HOME AFFAIRS
THIRD

RESPONDENT
KOMANE
PATRICIA
FOURTH
RESPONDENT

JUDGMENT

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 4th of January 2023.

TWALA J

[1] This application served before this Court in the unopposed motion Court roll wherein the applicant sought the declaratory relief and other ancillary orders in the following terms:

1.1 that the civil union marriage between the first and fourth respondent is deemed invalid and unlawful, and is therefore set aside,

1.2 that the second and third respondents register the applicant marriage and issue her with a marriage certificate,

1.3 Costs of suits if opposed

1.4 further and or alternative relief.

[2] As indicated above, the case was unopposed. The first, second and third respondents filed their notices to abide with the decision of this Court. However, the fourth respondents did not file any notice to oppose. On engaging with counsel for the applicant it was submitted that service of the documents was personal on both the first and fourth respondents. I therefore reserved judgment in order to reconsider the matter. I directed counsel to file heads of argument so that I could consider the matter properly which heads have since been filed.

[3] It is common cause that the applicant was granted a declaratory order by this Court per Nkosi AJ on the 30th of May 2019 under case number 15636/2018 that she was married in community of property according to customary law to the first respondent in terms of section 1, 2 and 3 of the Recognition of the Customary Marriages Act, 120 of 1998 ("The Act"). The Court ordered further that the marriage be registered by the relevant authorities in terms of the act. It is further undisputed that the first respondent was served with the application to declare and register the customary marriage on the 24th of July 2018 and he did not file any opposition. However, on the 2nd of October 2018 he proceeded to conclude a marriage by civil rights with the fourth respondent.

- [4] It has long been established that it is impermissible for a man who is a partner in a customary union to contract a civil marriage with another woman who is not his partner in a customary union during the subsistence of the customary union. Put differently, it is competent for a man who is a partner in a customary union to conclude a civil marriage only with the woman who is his partner in the customary union. Furthermore, it is trite that a civil marriage contracted while the man is a partner in an existing customary union with another woman is a nullity. (See *Thembisile v Thembisile* 2002 (2) SA 209 (T) which was followed in *Netshituka v Netshituka and Others* (462/10) [2011] ZASCA 120).
- [5] I have reconsidered the case and the ineluctable conclusion is that the applicant has made out an unassailable case and is therefore entitled to the relief that she seeks.
- [6] In the circumstances, I make the following order:
1. The civil marriage between the first and fourth respondent is declared unlawful and is set aside,
 2. The second and third respondents are directed to register the marriage entered into between the applicant and the first respondent within thirty (30) days of this order.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 8th November 2022

Date of Judgment: 4th January 2023

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