

SOUTH AFRICA / JUDGMENT

Molefe NO v Director General Home Affairs and Others (46248/12) [2013]

ZAGPPHC 442 (8 November 2013)

[2013] ZAGPPHC 442

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi V.V

CASE / FILE NUMBER

46248/12

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

CASE

NUMBER: 46248/12

DATE:

8 NOVEMBER 2013

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

In

the matter between:

EVA

MANGETANE MOLEFE NOAPPLICANT

And

DIRECTOR

GENERAL HOME AFFAIRS.....FIRST

RESPONDENT

JOSEPHINA

N DIPEE.....SECOND

RESPONDENT

MASTER

OF THE HIGH COURT (POLOKWANE)).....THIRD

RESPONDENT

JUDGMENT

TLHAPI J

[1] This is an application which seeks the following orders:

“1. That the registration of the customary marriage between the deceased, namely LETLADI OPPIE PHAAHLE and the second respondent herein by the first respondent be declared ultra vires;

That the first respondent be ordered to de-register the registration of a customary marriage entered into between the late LETLADI OPPIE PHAAHLE and the second respondent;”

The application was opposed by the second respondent and, the first and third respondents were duly served on the 22 and 27 August 2012 respectively.

[2] At commencement of the proceedings I requested both counsel to address me on whether the application was a review application or not and why rule 53 of the Rules of Court had not been observed by the applicant. The view held by counsel for the applicant then was that Rule 53 was not applicable while counsel for the second respondent argued that the review had to be adjudicated in terms of the Promotion of Administrative Justice Act 3 of 2000. I had also asked counsel to comment on the document annexed to the papers as a Last Will and Testament in that although it bore the purported signatures of the testator it was not attested to in terms of the Wills Act neither was there any semblance of it having being registered and accepted by the third respondent. Realizing the unpreparedness of both counsel on the subject I requested supplementary heads of argument to be handed in, more so because we had to deal with the alleged ultra vires administrative conduct on the part of the first respondent.

BACKGROUND

[3] The applicant and the late Letladi Oppie Phaahle (‘deceased’) were brother and sister. In terms of the Last Will and Testament of the deceased, the applicant was declared sole heir. Although ABSA Trust Limited was the nominated Executor, the applicant was subsequently appointed Executrix. Mention of the following incidents is necessary:

1. A few months before his death, in September or November of 2007 the deceased commenced negotiations between his family and that of the second respondent to enter into a customary marriage. At the time the second respondent was pregnant with child.
2. There were disputes of fact on the papers whether the customary marriage was concluded before death or not. The applicant maintained that there was no official handing over therefore no marriage was concluded. The second respondent maintained that a customary marriage had been concluded before death.

3. The applicant and second respondent and their families participated in ‘marriage’ celebrations a few months after the burial of the deceased. It is the purpose, significance and consequences of such celebrations that may have relevance in determining the existence of a customary marriage.
4. Subsequent to these celebrations the second respondent caused the customary marriage to be registered. According to the applicant the second respondent caused an application for registration of the customary marriage to be lodged on 14 December 2009 outside of the cut off date of 1 November 2009 as determined in the Government Gazette No. 31735 published on 24 December 2008. The applicant averred that the purpose of this application was to set aside the marriage so registered in order to give effect to the deceased’s Last Will and Testament.
5. After exchange of correspondence between the attorneys for the applicant and the first respondent, the latter while acknowledging

that registration occurred outside of the cut-off date explained that in its investigations it had found no corruption in the registration

of the marriage.

6. The second respondent annexed to her papers copies of documents emanating from the office of the first respondent dated 12 February 2008, acknowledging receipt of an application for the registration of a Customary marriage. She averred that after receiving no response to her first application she was advised to lodge a second application and a second acknowledgement of receipt of an application dated 14 December 2009 was received by her.

THE LAW

- [4] Mr Komape for the applicant correctly submitted that Section 4(7) of the Recognition of Customary Marriages Act, Act 120 of 1998 (‘the Marriage Act’) entitled a court to order registration or cancellation or rectification ‘of any registration of the customary marriage effected by a registering officer.’ In my view the operative words in that section were that such order could only be granted ‘upon investigation instituted by that court’ (my emphasis).

Mr Komape while submitting that applications for review under the new constitutional dispensation had to be dealt with in terms of PAJA, argued that this was not an instance where it was applicable and neither was Rule 53 applicable.

I do not agree with this argument in that such administrative action had the potential to directly impact upon the right of the parties, that is the applicant and the second respondent and her children. In *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) Nugent JA defined administrative action (decision) as that which is:

“of an administrative nature” taken by a public body or functionary....it falls to be construed consistently, wherever possible, with the meaning that is attributed to administrative action as the term is used in s33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity”
paragraph 22

[5] Rule 53 (1) provides for the review, by way of notice of motion, by this court of decisions among others, of any officer performing

administrative function. It further provides that the notice of motion must be ‘directed and delivered by the party seeking to review such decision to...the officer....and all other parties affected:

(a) calling upon such person to show cause why such a decision should not be reviewed and corrected or set aside, and

(b) calling upon the officer—to dispatch ...to the registrar. the record of such proceedings sought to beset aside, together with such reasons as he is by law required or desires to give....and to notify the applicant that he has done so.(my emphasis)

(2)

(3)The registrar shall make available to the applicant the record dispatched the applicant shall cause copies of such portions of the records as may be necessary for the purpose of review to be made and shall furnish the registrar with two copies and each of the other parties one copy thereof (my emphasis)

[6] Mr Mphahlele for the second respondent submitted that neither Marriage Act or its Regulations provided for a procedure to be

engaged in the investigation envisaged by section 4(7) of the said Act. The Rules of Court dictated the procedure to be adopted. He correctly submitted that in circumstances where none of the affected parties and the court were in possession of the necessary information and reasons for registration by the official concerned, Rule 53 proceedings were appropriate and he referred to *Cunniff v Tshite and Others* (2000) 3 ALL SA 554 a 556 G-H and *Jockey Club of South African v Forbes* [1992] ZASCA 237; 1993 (1) SA 649 at 660D-G. He agreed with what was stated in the *Cunniff* matter supra that Rule 53 would not be engaged where the reasons for the decision were not necessary or where like in the *Jockey Club* matter supra the tribunal and Forbes were in possession of the record and reasons. In this matter he said the second respondent was not placed in such position.

[7] On 15 March 2010 through her attorneys, applicant addressed a letter to the first respondent requesting copies of the application forms submitted for registration of the marriage. This was an exercise of a right to information in the hands of the first respondent,

information that had the possibility to affect her right to inherit from her brothers estate. This right is protected by our Constitution. Except for acknowledging receipt of such request, such copies were never provided. The above letter alleged that application was only made on 14 December 2010 (2009) after the cut-off date.

[8] It further appears from documents annexed to the opposing affidavits that application for registration was made on two occasions.

Acknowledgement of the first application was given by the first respondent on 12 February 2008, more than a year before the cut-off

date and, the second on 14 December 2009. In these circumstances, the fact that such records were sought by the applicant could only mean that the applicant needed to be better apprised of the circumstances under which registration took place. This court does not have any information on what was placed before the first respondent on any one of these dates and the reasons for registration.

[9] The order that is sought is that of reviewing and setting aside the first respondent's alleged ultra vires administrative action and ordering the setting aside of the registration of the marriage. It is not only the applicant as heir

who may be adversely affected by the registration the customary marriage in that it would prevent her inheriting 100% in terms of the Last Will and Testament. The second respondent may be entitled to 50% of the estate and her children may be considered heirs or have a claim of maintenance against the estate of the deceased. The applicant and second respondent have a right to a proper ventilation of the request to set aside the registration of the marriage.

[10] In my view the applicant could also have approached the court by way of way of PAJA. In this instance she did not do so and this then did not preclude the court from obliging her to comply with Rule 53 of the Rules of Court because she was asking the court to review an administrative decision taken by the first respondent. It would be impossible to review objectively the action complained about in the absence of the record and reasons from the first respondent.

[11] in the circumstance the following order is granted:

1. The applicant is hereby ordered to obtain the record and reasons for registration of the customary marriage from the first respondent;
2. The applicant is granted leave to amend her notice of motion to comply with Rule 53;
3. The applicant and the second respondent are granted leave to supplement their Founding and Answering affidavits after receipt of reasons from the first respondent;
4. The applicant is ordered to pay the second respondents wasted costs of 03 October 2013

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

Matter heard on.....03 October 2013

Judgment

reserved on.....03 October 2013

Attorneys for the Applicants.....Molefe Attorneys

Attorneys for the Respondents.....Dikgale Attorneys

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