

SOUTH AFRICA / JUDGMENT

Molepo and Others v Mathobela and Others (3453/2018) [2019] ZALMPPHC 16 (30 April 2019)

[2019] ZALMPPHC 16

COURT

Limpopo High Court, Polokwane

BEFORE

MF Kganyago

CASE / FILE NUMBER

3453/2018

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REPUBLIC OF SOUTH
AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION,

POLOKWANE

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

CASE

NUMBER: 3453/2018

30/4/2019

In

the matter between:

KGOSHIGADI
PHILIA MATLOU MOLEPO
FIRST APPLICANT
MAKGAPE
STEPHEN MOLEPO
SECOND APPLICANT
MANAMEDI
CYNTHIA MOLEPO
THIRD APPLICANT
RHINA
PUTLA MOLEPO
FOURTH APPLICANT
AND
MAHUBE
GRACE MATHOBELA
FIRST RESPONDENT
ESATATE
LATE: MAISHA MOLEPO III
SECOND RESPONDENT
MASTER
OF THE HIGH COURT
THIRD RESPONDENT
MAISHA
FRANS MOLEPO
FOURTH RESPONDENT
LEKGEMA
FREDDY MOLEPO
FIFTH RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicants have brought an application seeking order that the first respondent be declared not to have been married to the late Kgoshi Maisha Molepo III; that the first respondent be ordered to disclose and furnish the assets belonging to the deceased and Ditlou tsa Ga-Molepo community; an order setting aside the letters of executorship issued in favour of the first respondent and that the second applicant be appointed as the executor; an order that the first applicant is the lawful beneficiary of the assets of the late Kgoshi Maisha Molepo III; an order that the fourth and fifth respondents have no powers to negotiate the marriage relationship on behalf of the first respondent and Ditlou tsa Ga-Molepo community; an order that the assets held by Kgoshi Maisha Molepo III devolve in terms of the tradition of Ditlou tsa Ga-Molepo and customary law; and an order that the first applicant is the kraalhead. The first respondent is opposing the applicants' application.

- [2] It came to light that there is a material dispute of facts in this matter. The parties agreed to refer the matter for oral evidence to determine whether there was a valid customary marriage between Kgoshi Maisha Molepo III (deceased) and Mahube Grace Mathobela (first respondent) and also to determine ownership of the deceased properties.
- [3] The first applicant testified and did not call any witnesses. She testified that her husband Kgoshi Setalane Molepo has long passed away, and she is the candle wife married by the tribe. The deceased is his son, and at the time of his death he was unmarried. She was not in good terms with the deceased. Even though they were not in good terms, if he wanted to marry he would have consulted her.
- [4] According to their custom, if a person who is supposed to be the chief intends to get married, they call a meeting of the elders and headsmen to inform them about the intended marriage. They will then send emissaries to the family of the bride to ask for a wife. In relation to the deceased this procedure never occurred.
- [5] She does not know about the alleged R4 800.00 which was paid for the first respondent as lobola. She does not know the person who accepted that money. She does not know the emissaries who were sent to the first respondent's family. She used to see the first respondent at her place but did not know what was happening. She just assumed that she was staying in the house with the deceased. She had never called the members of her inner circle to go and ask for a wife for the deceased.
- [6] After the deceased passed away, the first respondent took everything and left the royal house. She does not know all the cars that belonged to the deceased. She heard that the Government had given the deceased some cars. These cars were used for community work. She has no knowledge of the letters of executorship been issued to the first respondent. According to her she is the one who must be issued with the letters of executorship.
- [7] The witness was cross-examined and she conceded that that at the time of his death, the deceased was the reigning chief. She stated that she did not know who the deceased was in a love relationship with as he was bringing different women to their homestead. She further stated that in their custom and culture, the deceased was supposed to marry his cousin. She denied that the first respondent was married to the deceased. She stated that if there were to be emissaries who were supposed to go and negotiate lobola for the deceased, she is the one who was supposed choose them. She denied that when the deceased was

inaugurated as the chief during 2004, he had already introduced the first respondent as his wife. She conceded that before the deceased died she has seen the first respondent in the royal house on several occasions, but did not know that she was in a love relationship with the deceased. She stated that she knew that the deceased was having one child with the first respondent and was not aware that they had two children. That concluded the first applicant's evidence and she closed their case.

- [8] Mohube Grace Mathobela testified for her case. She testified that she knew the first applicant since 2001. She used to meet her at the royal house, and also when they came to her homestead to ask for her hand in marriage. She knows the deceased. She was staying with him as husband and wife in the royal house.
- [9] During 2003 the deceased family sent Godfrey Malatswa Molepo to pay R 800.00 for the knock (kokota). Her father is the one who accepted the R800.00. At that time she was still the deceased girlfriend. Her parents asked her whether she was agreeing to be married by the deceased as he might marry many wives and she agreed.
- [10] After a week the deceased came and took her to the royal house. Her parents gave her permission to leave with the deceased. When she arrived at the royal house she found the first applicant. On arrival she was treated as a visitor and as days passes the first applicant gave pots to do some cooking.
- [11] The deceased and the first applicant started having some problems to the extent that the first applicant obtained a protection order against the deceased. She and the deceased were staying together at the deceased grandmother's house. As the deceased was not in speaking terms with the first applicant, he arranged his uncles to go and hold lobola negotiations for him. That resulted in R4000.00 lobola being paid for her on the 27 February
2016. Before the uncles went to attend the lobola negotiations, they informed the first applicant and she told them she does not wish to get involved in that. The uncles called the elders and emissaries were elected and sent to her place to negotiate lobola.
- [12] When the lobola negotiations were finalised, both her parents have already passed away. Her intention was to stay together with the deceased and built a family. After lobola of R4000.00 was paid on the 26 February 2016, the following day the deceased came to her homestead and took her to the royal house. On arrival at the royal they found the first applicant and the deceased's sisters. The sisters welcomed her but the first respondent never uttered a single word. She did not have any problems with the deceased and she regarded him as her husband. They could not go to Home Affairs to conclude the civil marriage and change her surname and that of their children as the deceased fell sick and later passed away.
- [13] She was not involved in the funeral arrangement of the deceased. The funeral was arranged by the first applicant and deceased sisters. She only signed the documents that the deceased be released from the hospital to a private mortuary. During the memorial service, herself and the children were not mentioned. She sat on the matrass in the house in which she stayed with the deceased. She did not attend the funeral as she was not involved in the funeral arrangements and it was also announced on the loud speaker during the funeral service that she was unwanted. After the funeral the first applicant summoned her family and informed them that she was unwanted at the royal house and that if they did not leave with her something might happen to her and she will not be held accountable. She then packed her belongings and phoned the SAPS to escort her out of the royal house. When she

left she took everything including car keys, registration certificates of the cars and the deceased clothes. The deceased has told her what to take in case he dies as he knew that they were going to chase her out of the royal house.

- [14] The witness was cross examined and she stated that she stayed at the royal house for more than 10 years. She conceded that her family never handed her over to the deceased family. She conceded that she was never counselled by the deceased family. When it was pointed to her that the amount of R4000.00 on the alleged lobola letter does not specify that it was for lobola, she stated that it was a mistake done by the author of that letter.
- [15] The first respondent called Maisha Frans Molepo as her only witness. He testified that he knows the deceased and that he is the one who raised him. He knows the first respondent as she was staying with the deceased at the royal house as husband and wife.
- [16] On the 27 February 2016 he was part of the emissaries that went to the first respondent's family to pay lobola. They went to the first respondent's family to pay lobola on behalf of the deceased. They paid lobola for the first respondent in the amount of R4000.00 and the first respondent's family accepted that payment. After accepting the money there were no further talks. They then exchanged letters and were told that a huge celebration will be held at a later date. After that they left.
- [17] On arrival at home they held a meeting wherein the letter from the first respondent's family was read to all those who were present. All of them were satisfied with the report they got.
- [18] On arrival at the royal house they found the first applicant and one Samuel Molepo. They gave them the letter from the first respondent's family.
- [19] The witness was cross examined and he conceded that the intended huge celebration never took place as the deceased passed away before it was held. He conceded that when the first respondent allegedly got married, she already had two children. He conceded that when a person who gets married is already having children with the person who is marrying her, damages for those children should be paid first before lobola negotiations could take place. However, he could not tell whether in relation to the first respondent damages for two children were paid. That concluded the evidence of the first respondent and

she closed her case. Both parties submitted their oral closing address.

- [20] Section 3(1) of the Recognition of Customary Marriages Act no 120 of 1998 (Act) deals with the requirements of the validity of customary marriages. It read as follows:

“For any customary marriage entered into after the commencement of this act to be valid-

- (a) The prospective spouses-
- (i) must both be above the age of 18 years; and
- (ii) must both consent 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.”

[21] It is trite that customary marriage is not an event, but a process that comprises chain of events. In *Motsoatsoa v Roro and Others* 2010 ZAGPJHC 122 [2011] (1 November 2010); All SA 324 (GSJ) at para 17 the Court said:

“ ... *The basic formalities which lead to a customary marriage are:*

emissaries are sent by the man’s family to the woman’s family to indicate interest in the possible marriage (this of course presupposes the two parties man and a woman have agreed to marry each other); a meeting of the parties’ relatives will be convened were lobola is negotiated and the negotiated lobola or part thereof is handed over to the woman’s family and the two families will then agree on the formalities and date on which the woman will then be handed over to the man’s family which may include but not necessarily accompanied by celebration (wedding).”

[22] The most crucial part of customary marriage is the handing over of the makoti to the in-laws. The handing over symbolises the customary practice that the makoti is finally welcomed and integrated into the grooms family henceforth becomes her new family. (See *Moropane v Southon* [2014] ZASCA 76 (29 May 2014 at para 40).

[23] In the matter at hand, the first applicant dispute that the first respondent was married to the deceased. She dispute that there was any lobola negotiations which were carried out on behalf of the deceased. According to her, if the deceased intended to marry, he would have told her and she would have arranged a meeting of elders and also elect emissaries. However, at the same time she stated that she was not in good terms with the deceased. The first respondent has also confirmed that the deceased and the first applicant were not in good terms to the extent that the first applicant had obtained a protection order against the deceased. The first respondent was never challenged on this version.

[24] The question is if the first applicant had obtained a protection order against the deceased, was it possible for the deceased approach her? That now support the version of the first respondent’s witness who testified that the deceased had approached his uncles to go and negotiate lobola for him as he could not have approached the first applicant due to their differences. In African customs uncles play an important role for the purposes of lobola negotiations. Therefore in my view, the deceased had approached the relevant people to go and negotiate lobola for him. The uncles have also taken some initiatives to inform the first applicant, but she had no interest in the affairs of the deceased due to their stormy relationship. The Court is therefore satisfied that there were lobola negotiations regarding the deceased and the first respondent, and the letter attached to the first respondent’s answering affidavit is proof of the said lobola negotiations.

- [25] However, the mere fact that the lobola negotiations were held, is not sufficient to prove that a valid customary marriage has been concluded. As I have already pointed out in paragraph 21 above that customary marriage is a process that comprises a chain of events, the holding of lobola negotiations is one of those processes of chain of events.
- [26] In this case both the deceased and the first respondent were above the age of eighteen when the lobola negotiations were held. The first respondent has testified that her parents have asked her whether indeed she was willing to be married to the deceased as culturally the deceased was permitted to marry more than one wife. Despite the warning from her parents she agreed to be married to the deceased. That in my view shows that the parties have consented to be married to each other under customary law.
- [27] Now that the two families have agreed on the lobola amount to be paid for the first respondent, and that amount was paid, the final step and most crucial element of a customary marriage, was the handing over of the first respondent to the deceased family and celebration. Celebration does not in all instances takes place at the same time with the handing over of the bride to the groom's family. However, once handing over has been properly done, a valid customary marriage is concluded. Handing over can be done immediately after lobola negotiations or later at a date agreed by the two families.
- [28] In this case, the first respondent testified that after lobola negotiations were concluded, the emissaries from the deceased family were told that a huge celebration will take place at a later stage. However, that did not happen due to the passing away of the deceased. The first respondent has also conceded that she was never handed over to the deceased family and was also not counselled by the deceased family to show that she was formally part of the deceased family. According to the first respondent, the deceased came the following day after lobola negotiations and took her to the royal house and she thereafter stayed with the deceased until he passed away. What the deceased has done did not amount to handing over.
- [29] Even if the first applicant dispute knowing the first respondent, the evidence are overwhelming that the first respondent stayed in the royal house with the deceased over a long period of time. For that period of time which the first respondent and the deceased have stayed together, even if the deceased and the first applicant were not in good terms, it is impossible that the first applicant would not have known what was happening between the deceased and the first respondent. It is unfortunate the time period that the first respondent has spent in the royal house staying together with the deceased, does not determine the existence of a valid customary marriage.
- [30] I am therefore satisfied that the essential requirement for a valid customary marriage between the first respondent and the deceased have been met since she was never handed over to deceased family to seal their marriage.

[31] With regard to the issue of ownership of the assets, it is trite that the assets which are registered into the names of the deceased at the time of his death will automatically fall into his estate. If there is any person who alleges to have a claim against any of the deceased's assets, will lodge a claim against the estate.

[32] In the results the following order is made:

32.1 It is declared that there was no valid customary marriage that was concluded between the late Kgoshi Maisha Molepo III and the first respondent.

32.2 The assets registered into the names of late Kgoshi Maisha Molepo III at the time of his death automatically fell into his estate.

32.3 The first respondent to pay the applicants' costs.

MF KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

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INSTRUCTED BY

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