

SOUTH AFRICA / JUDGMENT

Monyepao v Ledwaba and Others

(1368/18) [2020] ZASCA 54 (27 May 2020)

[2020] ZASCA 54

COURT

Supreme Court of Appeal

BEFORE

Petse, Saldulker, Plasket, Nicholls, Koen

CASE / FILE NUMBER

1368/18

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1368/18

In the matter between:

MATSATSI DINAH TINY MONYEPAO APPELLANT

and

MOKGAETJI MARIA LEDWABA FIRST

RESPONDENT

MASTER OF THE HIGH COURT, POLOKWANE SECOND

RESPONDENT

ELMARIE BIERMAN THIRD

RESPONDENT

MATUBA MAPONYA FOURTH

RESPONDENT

Neutral citation: Monyepao v Ledwaba and Others (Case no 1368/18)

[2020] ZASCA 54 (27 May 2020)

Coram: PETSE DP and SALDULKER, PLASKET and NICHOLLS JJA and KOEN AJA

Heard: 20 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on Wednesday the 27th day of May 2020.

Summary: Customary marriage – later civil marriage to third party not invalidating earlier customary marriage – forfeiture of

benefits of marriage – order to that effect only competent as adjunct to decree of divorce.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Nair AJ, Makgoba JP and Phatudi J concurring, sitting as court of appeal):

1 The appellant is granted condonation for the late filing of the record. The appeal is re-instated.

2 The first respondent's application for condonation for the late filing of her notice of cross-appeal is dismissed.

3.1 It is provisionally ordered that no fee or disbursement may be levied, whether on a party and party basis or on an attorney and client basis, by the attorneys and correspondent attorneys of the parties in respect of any part of the record except for pages 1 to 125, the judgment of the court of first instance (eight pages) and the judgment of the full court (14 pages).

3.2 The parties are granted leave to make representations on affidavit, within ten days of the date of this order, as to why the order in paragraph 3.1 above should not be a final order. If no such representations are received within the time stipulated above, it shall thereafter become a final order.

4 The appeal is dismissed with costs.

5 The first respondent's costs of the appeal as well as the appellant's costs of the applications referred to in paragraphs 1 and 2 above shall be paid from the deceased estate of the late Tlou Coliphta Phago.

Plasket JA (Petse DP, Saldulker and Nicholls JJA and Koen AJA concurring)

[1] This appeal concerns the assets of the estate of the late Mr Tlou Coliphta Phago (Mr Phago) who died intestate on 22 December

2012. The appellant, Ms Matsatsi Dinah Tiny Monyepao (Ms Monyepao), and the first respondent, Ms Mokgaetji Maria Ledwaba (Ms Ledwaba) both claim to have been married to Mr Phago, in terms of customary marriages, at the time of his death. Both were appointed as executors of his deceased estate on his death. Both averred – in an application and counter-application – that the other's marriage to Mr Phago was either invalid or had terminated by the time of Mr Phago's death. The other parties, the Master and the respective attorneys of

the chief protagonists, play no role to speak of in these proceedings.

- [2] In the court of first instance, the Limpopo Division of the High Court, Polokwane, Mokgohloa DJP granted Ms Monyepao relief

alternative to the primary relief she had sought. She made an order directing that Ms Ledwaba's 'interest in the estate of the deceased is forfeited to the deceased's estate', and that the costs were to be borne by the deceased estate. She struck Ms Ledwaba's counter-application from the roll with costs. Ms Ledwaba, having obtained leave to appeal from this court on petition, succeeded before a full court of the Limpopo Division of the High Court, Polokwane. The full court (Nair AJ, with whom Makgoba JP and Phatudi J concurred) set aside the order of the court of first instance and replaced it with an order dismissing Ms Monyepao's application, with the costs to be borne by the deceased estate. This appeal is before us with the special leave of this court.

- [3] Before turning to the merits of the appeal, it is necessary first to deal with two applications for condonation, and then to say something of the record that was prepared in this appeal. For reasons that I shall spell out, it is necessary to make a special costs order in respect of the record.

The applications for condonation

- [4] Ms Monyepao has applied for condonation for the late filing of the record. The founding affidavit in the condonation application is entirely inadequate. It does not even say when the record was filed or when it should have been filed. The explanation is extremely vague and falls well short of providing an adequate explanation for the delay. From what I can gather, however, the record was collected (from the transcribers, I assume) on 4 April 2019 and ought to have been filed by not later than 5 April 2019. In all probability, it was filed a day or two late.
- [5] Although the explanation is far from satisfactory, the short delay and the absence of any possible prejudice to Ms Ledwaba –

despite her hollow and unspecific protestations to the contrary – persuade me somewhat reluctantly that condonation for the delay should be granted and an order should be made re-instating the appeal.

- [6] An application has also been brought by Ms Ledwaba for condonation for the late filing of a notice of cross-appeal. Given the state of the record, it is not clear to me if this relates to the counter-application. It was struck off the roll by the court of first instance and, although it was mentioned in the appeal, no order was made in respect of it. Whatever the subject-matter of the proposed cross-appeal, leave to cross-appeal is necessary because the rules relating to appeals apply *mutatis mutandis* to cross-appeals.[1] Leave has never been granted in respect of the counter-application. The application will therefore be dismissed.

The record

- [7] The record consists of four volumes and runs to 544 pages. Of that, only 147 pages is relevant for the determination of this appeal. The rest – more than three volumes – is made up of documents that have no place in an appeal record before this court: a transcript of the argument on leave to appeal before the court of first instance; the subsequent petition to this court for leave to appeal, including the order (of Leach and Petse JJA) granting leave to appeal to the full court; and an array of documents such as practice notes and heads of argument in the appeal to the full court.
- [8] It is incumbent on an attorney who has been instructed to bring a matter on appeal to this court to familiarise himself or herself with the rules of this court. It is not good enough for such an attorney to plead ignorance.[2]
- [9] As most of the record is obviously irrelevant, and ought to have been recognised as such by the legal representatives of both sides, I can see no reason why any legal representative on either side should be entitled to charge anyone, be it their clients or their opposition, in relation to the irrelevant portions of the record. At the end of this judgment, I shall make a provisional order to that effect, and give the parties an opportunity to make any representations they may wish to before the order may become final.

The merits of the appeal

The relief claimed

- [10] Before turning to the facts, it is necessary to set out the relief claimed by Ms Monyepao in her application before the court of first instance. I do so because the relief that she claimed is dependent on the proved facts. As Ms Ledwaba's counter-application is not before us and irrelevant, I shall say nothing more about it
- [11] In her notice of motion, Ms Monyepao applied for orders: (a) declaring that the customary marriage between Mr Phago and Ms Ledwaba had been 'dissolved in February 2008'; alternatively, that Ms Ledwaba's 'customary patrimonial benefits' of the marriage be forfeited to Mr Phago's deceased estate; (c) directing that immovable property occupied by Ms Ledwaba and her minor child be awarded to her minor child; (d) directing the Master to revoke the appointment of Ms Ledwaba as a co-executor of Mr Phago's deceased estate; and (e) directing the Master to appoint Ms Monyepao as the sole executor of that deceased estate. She also sought an order that the costs of her application would be costs in the deceased estate of Mr Phago.
- [12] It is not clear at all why Ms Bierman and Mr Maponya were cited as the third and fourth respondents. No relief was sought against them by Ms Monyepao. Their interest in the matter was not set out in the founding affidavit. I cannot understand why Ms Monyepao would consider it necessary to cite as a respondent her own attorney, who was assisting her in her capacity as co-executor of Mr Phago's estate. What possible legal interest Mr Maponya – Ms Ledwaba's attorney – may have in the application baffles me. Neither should have been cited as parties.

The

facts

- [13] Ms Monyepao alleged that Ms Ledwaba married Mr Phago in either June or July 2007 in terms of customary law. That is admitted by Ms Ledwaba. Ms Monyepao then stated that this marriage ‘lasted until February 2008’. This is denied by Ms Ledwaba. She said that her marriage relationship with Mr Phago continued, even after he had started ‘an extra-marital relationship’ with Ms Monyepao. Her marriage to Mr Phago, she said, ‘was never dissolved nor terminated until the death of the Deceased’. On the basis of the Plascon-Evans rule,[3] this must be accepted as one of the facts upon which the application was to be decided.
- [14] Ms Monyepao then alleged that between 17 July 2010 and 28 August 2010, she and Mr Phago entered into a customary marriage. Ms Ledwaba’s answer was that this marriage was a nullity ‘because it was concluded while the Deceased was married to me, without following the required procedure that would validate it’. This is, for the most part, a legal point, although if particular procedures applied in terms of the applicable custom, Ms Ledwaba has failed to prove the rule of customary law she relied on. As a result, it must be accepted as a fact that Ms Monyepao and Mr Phago entered into a customary marriage during the subsistence of the customary marriage of Ms Ledwaba and Mr Phago. The legal question to be answered is whether the fact of that marriage invalidates the later marriage.
- [15] Ms Monyepao alleged further, in support of her case that Ms Ledwaba was no longer married to Mr Phago at the time of his death, that on 26 November 2009, Ms Ledwaba married Mr Andrew Kwele in a civil marriage. Ms Ledwaba admitted this marriage but said that ‘it was null and void and did not have the effect of dissolving my customary marriage with the Deceased’.

The

issues

- [16] Arising from the relief that was claimed by Ms Monyepao and the facts I have outlined, the following principal issues require decision: (a) whether the customary marriage between Ms Ledwaba and Mr Phago was dissolved in February 2008; (b) if not, whether Ms Ledwaba’s civil marriage to Mr Kwele had the effect of invalidating her customary marriage to Mr Phago; and (c) in the alternative, whether Ms Ledwaba should be ordered to forfeit the benefits of her marriage to Mr Phago.

- [17] The secondary issues that require decision relate to paragraphs 3, 4 and 5 of the notice of motion. They are: (a) whether the immovable property in which Ms Ledwaba and her minor daughter reside should be 'awarded' to her minor daughter; (b) whether the Master should be ordered to remove Ms Ledwaba as a co-executor of the estate of Mr Phago; and (c) related to that, whether the Master should be ordered to appoint Ms Monyepao as the sole executor of that estate.
- [18] There is no factual basis for finding that Ms Ledwaba's customary marriage to Mr Phago was terminated – presumably by divorce – in February 2008. Ms Monyepao placed no admissible evidence before the court of first instance to establish this fact. In order for the marriage to have been brought to an end prior to the death of Mr Phago, it would have been necessary for a decree of divorce to have been issued in terms of s 8 of the Recognition of Customary Marriages Act 120 of 1998. Section 8(1) provides that a customary marriage 'may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage'. A divorce in terms of this section was not even alleged, let alone proved. That disposes of the declaratory order sought in paragraph 1 of the notice of motion.
- [19] In the papers, an argument was made that when Ms Ledwaba married Mr Kwele civilly, that had the effect of nullifying her existing

customary marriage to Mr Phago. That argument runs contrary to authority in this court. In *Netshituka v Netshituka and Others*[4] Petse JA held, on facts strikingly similar to those in this case, that a civil marriage between A and B that was entered into while A was married in terms of customary law to C was a nullity.[5] The same position pertains in this case: Ms Ledwaba's purported civil marriage to Mr Kwele was a nullity and it had no impact on the validity of her prior customary marriage to Mr Phago.

- [20] I turn now to the relief claimed in the alternative to paragraph 1, namely that Ms Ledwaba be ordered to forfeit the benefits of the marriage in favour of the estate of Mr Phago. That was the relief granted by the court of first instance. Section 8(4) of the Recognition of Customary Marriages Act provides that when a court grants a decree of divorce in respect of a customary marriage, it has the powers contemplated, inter alia, in s 9 of the Divorce Act 70 of

1979. Section 9(1) of the Divorce Act, in turn, provides:

'When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.'

- [21] It is clear from s 9(1) that the power of a court to order the forfeiture of benefits arises only as an adjunct to a decree of divorce. Moreover, a claim for the forfeiture of benefits can only be made by one party to a marriage against the other in divorce proceedings. It is not open to an outsider, such as Ms Monyepao, to claim that relief. As the proceedings in the court of first instance were not divorce proceedings, and Ms Monyepao had no standing, that court had no jurisdiction to order that Ms Ledwaba should forfeit the benefits of her marriage to Mr Phago in favour of his estate. Consequently, the full court correctly set aside the order of the court of first instance.
- [22] I turn now to the relief claimed in paragraph 3 of the notice of motion. There are two fundamental problems with seeking an order that the immovable property in which Ms Ledwaba and her daughter reside be 'awarded' to her daughter: first, not even an attempt was made in the founding affidavit to make out a case for this relief. Secondly, it is incompetent. Mr Phago's estate must, like every other intestate deceased estate, be liquidated and then distributed in accordance with the rules of intestate succession. Ms Monyepao has, together with Ms Ledwaba, been appointed as an executor for precisely this purpose. Consequently this relief could not have been granted.
- [23] I shall deal with the relief claimed in paragraphs 4 and 5 of the notice of motion together – for the Master to be ordered to remove Ms Ledwaba as an executor and to appoint Ms Monyepao as the sole executor of Mr Phago's estate. Presumably, this relief was sought in the belief that Ms Ledwaba's civil marriage to Mr Kwele had the effect of dissolving her earlier customary marriage to Mr Phago. As indicated above, this is not the case. Once again, however, not even an attempt was made in the papers to make out a case for this relief. This relief too could not have been granted.

Conclusion

- [24] From the above, it will be clear that the appeal must fail. In addition to making an order concerning the merits of the appeal, it is also necessary to make orders concerning the applications for condonation and the problems that I have outlined in relation to the record.
- [25] I consequently order:

C Plasket

Judge of Appeal

APPEARANCES

For the appellant: N L Skibi

Instructed by:

Legal Aid South Africa, Johannesburg

Legal Aid South Africa, Bloemfontein

For the first respondent: M Maponya

Matuba Maponya Attorneys, Polokwane

E G Cooper Majiedt Inc, Bloemfontein

[1] Rule 49(4) of the Uniform Rules. See too *Bank Windhoek Bpk v Rajie en 'n Ander* 1994 (1) SA 115 (A) at 151F-G.

[2] *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 684H-685A; *SA Express Ltd v Bagport (Pty) Ltd*

[2020] ZASCA 13 para 17.

[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1983 (4) SA 623 (A) at 634E-635D.

[4] *Netshituka v Netshituka and Others* 2011

(5) SA 453 (SCA) para 15.

[5] See too *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T) para 32 (confirmed as correct in *Netshituka* (note 4) para 15); *TM v NM and Others* 2014 (4) SA 575 (SCA) para 17.

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